

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.11.2020
Pronounced on : 07.12.2020

Coram:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

CRP.Nos.651 &652 of 2011
and MP.No.1 of 2011
in CRP.No.652 of 2011

KannammalPetitioner/6th Respondent
in both the CRPs

Vs.

1. M.Mahalingam
2. Ramesh
3. Sakayam
4. Jeevarathinam

...Respondents
in both the CRPs

PRAYER in CRP.No.651 of 2011: Civil Revision Petition is filed under Section 115 of Civil Revision Petition to set aside the fair and decretal order dated 13.04.2010 made in E.A.No.30 of 2010 in E.P.No.34 of 2009 in O.S.No.592 of 1995 (Second Additional Sub Court), Erode on the file of the Sub- Court, Perundurai.

PRAYER in CRP.No.652 of 2011: Civil Revision Petition is filed under Section 115 of Civil Revision Petition to set aside the fair and decretal order dated 13.04.2010 made in E.P.No.34 of 2009 in O.S.No.592 of 1995 (Second Additional Sub-Court), Erode, on the file of the Sub- Court, Perundurai.

For Petitioners : M/s.N.Manoharan
(in both the CRPs)

For Respondent : M/s.T.Murugamanickam
(in both the CRPs) Senior Counsel
for M/s.C.S.Saravanan

For R2 to R4 : Dispensed with

COMMON ORDER

CRP.No.651 of 2011 has been filed by the 6th respondent against the order passed by the Sub-Judge, Perundurai in E.A.No.30 of 2010 in E.P.No.34 of 2009 in O.S.No.592 of 2006 dated 13.04.2010.

CRP.No.652 of 2011 has been filed by the 6th respondent against the order passed by the Sub-Judge, Perundurai in E.P.No.34 of 2009 in O.S.No.592 of 2006 dated 13.04.2010.

2. The first respondent herein had filed an execution petition in E.P.No.311 of 2006 on the file of the I Additional Sub-Judge, Erode, for executing the decree passed in O.S.No.592 of 2005 dated 12.03.2001. He also filed an application in E.A.No.438 of 2006 in E.P.No.311 of 2006 on the file of the I Additional Sub-Judge, Erode, to recognize him as transferee of the decree and permit him to execute the decree which was obtained by the decree holder namely V.A.Duraisamy. Subsequently, the aforesaid E.P and E.A were transferred to the Sub-Court, Perundurai and re-numbered as E.P.No.34 of 2009 and E.A.No.30 of 2010 respectively.

3. The learned Sub-Judge, Perundurai, by the order dated 13.04.2010 had allowed the application in E.A.No.30 of 2010 and consequently, passed an order in E.P.No.34 of 2009 holding that the petitioner therein is entitled to get the sale deed and directed him to file a draft sale deed. Feeling aggrieved, the sixth respondent in EA and EP has filed the present Civil Revision Petitions.

4. Heard Mr.N.Manokaran, the learned counsel for the petitioner in both the CRPs and Mr.T.Murugamanickam, learned Senior Counsel assisted by Mr.C.S.Saravanan, learned counsel for the first respondent in both the CRPs.

5. The learned counsel for the petitioner has submitted that one V.A.Duraisamy had filed a suit in O.S.No.592 of 1995 on the file of the II Additional Sub-Judge, Erode, against one Navaneetham and obtained a decree dated 12.03.2001 for specific performance of a sale agreement in respect of the suit property. He further submitted that in the said decree, the trial court had directed the decree holder viz, V.A.Duraisamy to deposit the balance sale consideration of Rs.48,750/- and after receiving the said amount, the defendant has to execute the sale deed within a period of two months. He further submitted that in pursuance of the said direction, the decree holder had deposited the balance sale consideration before the trial court and thereafter since he was in jail in connection with a criminal case, he executed a registered power of attorney dated 26.11.2002 in favour of one K.Velusamy to deal with the suit property. He further submitted that in the said power deed, no power has been given to K.Velusamy to made over the decree. but, the said K.Velusamy had made over the said decree on 07.03.2003 in favour of the first respondent herein, who is none other than his own son-in-law. Based on the said made over, the

first respondent herein had filed an execution petition against the original decree holder and legal representatives of the judgment debtor viz., Navaneetham and also an execution application to recognize him as transferee of the decree and permit him to execute the said decree. He further submitted that in the affidavit filed in support of the aforesaid petitions, and also in the deed of made over of the decree, it is not stated that the first respondent herein had paid any amount for getting made over of the decree, but, when the first respondent examined himself as PW1, by filing proof affidavit, had produced one receipt said to have been issued by the said K.Velusamy dated 07.03.2003 acknowledging the receipt of Rs.1,00,000/- and also produced another receipt dated 13.03.2003 said to have been issued by the decree holder acknowledging the receipt of Rs.1,00,000/- and marked the said receipts as Exs.P4 and P6 respectively. He further submitted that since there is no pleading with regard to Exs.P4 and P6, the said documents should not have been received in evidence. He further submitted that the said documents would have been created falsely subsequent to the filing of the aforesaid petitions and that must be the reason for not mentioning the said documents in the affidavits filed by the first respondent herein and also for not producing the said documents along with the said petitions. He further submitted that the executing court without considering the aforesaid facts, had erroneously allowed the said petitions and therefore, he prayed to allow these CRPs and set aside the orders passed by the executing court in the aforesaid Execution petition and Execution Application.

6. The learned counsel for the petitioner in support of the aforesaid contentions has relied upon the following decisions:

1. Syed Abdul Khadar Vs. Rami Reddy and others, (1979) 2 SCC 601;
2. Samba Sivam and others Vs. Gunasekaran and others, (2003) 2 MLJ 676;
3. Krishna Mohan Kul @ Nani Charan Kul and another vs Pratima Maity and Others, 2004 (9) SCC 468;
4. Thiruvengadam Pillai Vs. Navaneethammal and another, (2008) 4 SCC 530.

7. Per contra, the learned senior counsel for the first respondent has submitted that the original decree holder viz., V.A.Duraisamy, in his counter statement has not denied the execution of the registered power deed (Ex.P2) in favour of one K.Velusamy dated 26.11.2002. He further submitted that in the said power deed, it is stated that the power agent can do all things which are necessary for disposing of the suit property and hence, it has to be presumed that a power has been given to made over the decree also. He further submitted that in the Income Tax return (Ex.P5) the payment of amount to the power

agent has been shown and hence the contention of the petitioner that Exs.P4 and P6 receipts were subsequently created, cannot be accepted. He further submitted that the original decree holder, though has been arrayed as first respondent in the aforesaid petitions, he has not taken any steps to disprove that the signatures found in Ex.P6 are not his signatures. He further submitted that since neither the decree holder nor the sixth respondent therein (petitioner herein) did not take steps for getting handwriting expert's opinion, the executing court itself had compared the disputed signature of the decree holder found in Ex.P6 with his admitted signature found in Ex.P2 (General Power of Attorney and came to the conclusion that both the signatures are tallied and hence Ex.P6 was issued only by the decree holder. He further relying on the Division Bench decision of this court in Central Bank of India Vs. Antony Hardware Mart, 2006 (3) CTC 39 contended that the court is competent to compare the disputed signature with the admitted signature in view of Section 73 of the Indian Evidence Act. He further submitted that in pursuance of the orders passed in the aforesaid petitions, the first respondent herein had submitted a draft sale deed and executing court had accepted the said draft sale deed and executed a sale deed on 08.06.2010 in favour of the first respondent herein and the same was duly registered on 12.03.2011 and hence, these Civil Revision Petitions have become infructuous and therefore, he prayed to dismiss these Civil Revision Petitions.

8. A perusal of the typed set of papers filed by both the parties would show that one V.A.Duraisamy had filed a suit in O.S.No.592 of 1995 on the file of the II Additional Sub-Judge, Erode, against one Navaneetham for the relief of specific performance of a sale agreement dated 25.09.1992 in respect of the suit property. In the said suit, an exparte decree was passed on 12.03.2001 directing the defendant therein to execute a sale deed in favour of the said V.A.Duraisamy after receiving the balance sale consideration of Rs.48,750/- within a period of two months. In pursuance of the said decree, the said V.A.Duraisamy had deposited the balance sale consideration of Rs.48750/- before the trial court. Thereafter, the said V.A.Duraisamy had executed a registered power deed dated 26.11.2002 (Ex.P2) in favour of one K.Velusamy authorizing him to sell the suit property by doing all necessary acts. Thereafter, on 07.03.2003, the said K.Velusamy had made over the said decree in favour of the first respondent herein and the said made over document (Ex.P3) has been registered before the Sub-Registrar, Perundurai. Thereafter, it appears that on 26.10.2005, the said V.A.Duraisamy had executed a registered deed cancelling the Ex.P2 power deed. However, in the meanwhile, based on the made over dated 07.03.2003, the first respondent herein had filed an execution petition and also filed an

execution application to recognise him as transferee of the decree and seeking permission of the court to execute the said decree.

9. During pendency of the proceedings before the executing court, the original decree holder V.A.Duraisamy died and hence his legal representative has been impleaded as respondent No. 6.

10. According to the original decree holder viz., V.A.Duraisamy, he did not give power under Ex.P2 to the power agent K.Velusamy to made over the decree. Therefore, it would be relevant to extract the following recitals:-

“ ... ஈரோடு இரண்டாவது கூடுதல் சார்பு, நீதிமன்றத்தின் அசல் வழக்கு எண்.592/95 ஆக வழங்கப்பட்டுள்ள தீர்ப்பின் அடிப்படையிலும் தனித்து பாத்தியப்பட்டும் எனது சுவாதின அனுபோகத்திலிருந்து வருகிற இதனடியில் கண்ட எவ்வித வில்லங்க விவகாரங்களும் இல்லை. சொத்தை பராமரித்து வரவும், விற்பனை செய்யவும், கிரையத்தில் காணும் சொத்துக்களைக்குறித்து நேரில் இருந்து நிர்வகித்து வரவும், சொத்தை விற்பனை செய்வது சம்பந்தமாக கிரையத்துக்கு பேசவும், கிரைய ஒப்பந்தம் செய்து கொடுக்கவும், கிரைய பத்திரம் எழுதிக் கொடுக்கவும் ”

11. A bare reading of the aforesaid recitals show that the Original decree holder namely V.A.Duraisamy had executed the said power deed as if he became an absolute owner of the property mentioned in the said deed by virtue of the decree passed in OS.No.592 of 1995, forgetting the fact that only a decree was passed in his favour in a suit for Specific Performance and he will become an owner only after getting a sale deed in his favour. Before getting proper sale deed in his favour, the decree holder cannot execute a power deed (Ex.P2) to sell the property. Even assuming that the said decree holder can execute such a power deed, the aforesaid recitals would show that he gave power to K.Velusamy to maintain, enter into a sale agreement in respect of the said property and also to sell the same. But, in the said power deed, nowhere it is stated that the said K.Velusamy can made over the decree to anyone.

12. In Syed Abdul Khader Vs. Rami Reddy and Others (cited supra), the Hon'ble Supreme Court in paragraph No.12 held as follows:-

“12. It was urged that the Court should bear in mind the first principle that a Power of Attorney has to be strictly construed. Undoubtedly, where someone other than the person who has a right to act in respect of certain things has, under a contract of agency, the right to ac. On be-half of principal, the authority conferred by the written instrument has to be strictly construed. Ordinarily a Power of Attorney is construed strictly by Courts (vide

Bryant, Powis and Bryant Ltd. v. La Banque du Peuple) (1)."

13. In this case as already pointed out that the decree holder had executed the said power deed (Ex.P2) believing that he became absolute owner of the property by virtue of the decree passed in O.S.No.592 of 1995. He never thought that the said decree has to be executed and that being so, by adopting the principle of strict construction of a Power of Attorney, it cannot be presumed that the decree holder had executed the power deed (Ex.P2) with an intention to authorize the agent to execute a decree made over document also.

14. It is also to be pointed out that during enquiry in the said petitions, the first respondent herein examined himself as PW1 and marked one receipt dated 07.03.2003 as Ex.P4 said to have been issued by power agent viz., K.Velusamy acknowledging the receipt of Rs.1,00,000/- towards consideration for the made over of the decree. He also filed another receipt dated 13.03.2003 said to have been issued by the original decree holder viz., V.A.Duraisamy acknowledging that he has received a sum of Rs.1,00,000/- towards the made over of the decree in favour of the first respondent herein. But the said receipts were not referred to either in the decree made over (Ex.P3) or in the affidavits filed by the first respondent in support of the E.A.No.30 of 2010 and E.P.No.34 of 2009.

15. At this juncture, it would be relevant to refer to the decision in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs and others (2008) 4 SCC 594 wherein, the Hon'ble Supreme Court in paragraph No.29 has held as follows:-

"29.....No amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled".

16. In this case, without pleadings, the first respondent herein had marked Exs.P4 and P6. The executing court relying upon the said documents had passed orders and hence, the procedure adopted by the executing court is against the settled principles of law.

17. It is also to be pointed out that the decree made over document (Ex.P3) was executed on 07.03.2003 and Ex.P4 receipt was said to have been issued by the first respondent herein to the power agent K.Velusamy on the very same date i.e., on 07.03.2003 itself, but, there is no reference in Ex.P3 with regard to alleged payment of consideration. If really any payment was made towards consideration of the made over of the decree, the said fact would have been mentioned in Ex.P3 made

over document itself, but there is no explanation forth coming from the first respondent for getting separate receipt on 07.03.2003 itself. Further, not at all whispered anything about Exs.P4 and P6 in the affidavits also. The aforesaid facts would lead to an inference that Exs.P4 and P6 might have been created much later and that must be the reason for not mentioning about the alleged payments in the affidavits.

18. It is also to be pointed out that the executing court has held that the burden is upon the decree holder viz., V.A.Duraisamy to disprove that he has not issued Ex.P6 receipt.

19. In Thiruvengadam Pillai Vs. Navaneethammal and another, (cited supra), the Hon'ble Supreme Court in paragraph No.19 has held as follows:-

"19. The trial court had analyzed the evidence properly and had dismissed the suit by giving cogent reasons. The first appellate court reversed it by wrongly placing onus on the defendants. Its observation that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, it was for the defendants to establish that the document was forged or concocted, is not sound proposition. The first appellate court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate court lost sight of the fact that the party who propounds the document will have to prove it. In this case plaintiffs came to court alleging that the first defendant had executed an agreement of sale in his favour. The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative."सत्यमेव जयते

20. From the aforesaid decision, it is clear that the party who propounds the document will have to prove it. In this case, in Ex.P6, it is stated that the said receipt has been issued by the decree holder V.A.Duraisamy in favour the power agent K.Velusamy but the said K.Velusamy has not been examined before the court. Two witnesses also said to have been signed in the said document. But the said persons also not examined before the court. Further, since the said document has been produced by the first respondent, the burden is upon him to prove that the said document was executed by the said V.A.Duraisamy but he has not taken any steps for getting handwriting expert's opinion. The executing court, contrary to the settled principles, had held

that the said V.A.Duraisamy has not taken any steps to disprove the signature found in the said document does not belong to him. The said V.A.Duraisamy while examining himself as RW1 had categorically denied the execution of Ex.P6 receipt. Under the said circumstances, it is for the first respondent to take steps to get hand writing expert's opinion but he has not taken any steps for getting hand writing expert's opinion. Further, he has not examined the person in whose favour the said receipt was issued and also has not examined the persons who were said to have signed as witnesses in the said document.

21. It is also to be pointed out that the executing court itself has taken the task of comparing the disputed signature of the said V.A.Duraisamy found in Ex.P6 with the admitted signature and came to the conclusion that both the signatures are similar and hence Ex.P6 might have been issued by the said V.A.Duraisamy.

22. The learned senior counsel for the first respondent also relying upon the Division Bench decision of this court in Central Bank of India

Vs. Antony Hardware Mart (cited supra) contended that the court is competent to compare the disputed signature with the admitted signature in view of Section 73 of the Indian Evidence Act. In that case DW1 in his cross-examination had admitted his signature in Ex.A5 and the contents thereon, but in the later part of his deposition he has stated that the signature found in Ex.A5 is not his signature. Under the said circumstances, a Division Bench of this court has compared the disputed signature with the admitted signature and recorded a finding as it did not find any dissimilarity between the signatures.

23. In Thiruvengadam Pillai Vs. Navaneethammal and another, (cited supra), the Hon'ble Supreme Court while dealing with the powers of the court under Section 73 of the Indian Evidence Act, in paragraph No.16 has held as follows:-

"16. While there is no doubt that court can compare the disputed handwriting/signature/finger impression with the admitted handwriting/signature/finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression. The

comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the the disputed signature is of the person who has put the admitted thumb impression. Where the court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in a position to identify the characteristics of fingerprints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal."

24. In view of the aforesaid decision of the Hon'ble Supreme Court, though the court can compare the disputed handwriting/signature/finger impression with the admitted handwriting/signature/finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. Further, such comparison cannot be casual or by a mere glance. If the court ventured to compare the disputed signature with admitted signature it should record its opinion only after an analysis of the characteristics of the said signatures. In this case, the executing court without assistance of an expert, had recorded a finding as the disputed signature of RW1 found in Ex.P6 and his admitted signature in Ex.P2 are similar. Further, the executing court did not mention about the characteristics of the said signatures. Hence, the said findings cannot be accepted.

25. The first proviso to Rule 16 of Order 21 of CPC says that where the decree is transferred by assignment, notice shall be given to the transferor and judgment debtors in the execution application filed by the transferee. The object of sending notice is to enable the transferor and the judgment debtor to raise such objections as regards the assignment as may be available to them, for example that the consideration money was fully paid or partly paid, etc.,

26. In this case, the original decree holder has not made over the decree to the first respondent herein. Only the Power Agent namely K. Velusamy has made over the decree vide Ex.P3 in favour of the first respondent herein. The said K.Velusamy has not been added as a party. Original decree holder namely V.A.Duraisamy alone has been added as first respondent in EA and also in EP. The said V.A.Duraisamy opposed the said EA and EP by filing counter. In his counter, he has stated that he

did not give power to the said K. Velusamy to execute deed of made over the decree. He also stated that the said K. Velusamy misused his power and made over the decree in favour of his own son-in-law and filed Execution Petition. As already pointed out that in Ex.P3 (Deed of decree made over) nothing has been stated about payment of consideration. All the aforesaid facts would lead to an inference that the said K. Velusamy had acted against the interest of the Principal viz., V.A.Duraisamy.

27. In Samba Sivam and others Vs. Gunasekaran and others (cited supra) this court, in paragraph No.22 held as follows:-

"22. It further comes to be seen that the owner, who has given the power of attorney has not been benefited even to the extent of a pie from out of the said sale, and therefore, no doubt need be entertained that the power of attorney agent has acted against the interest of the owner and not in safeguarding the owner's interest. The legal necessity, the compelling circumstance and the terms and conditions under which the power agent acted in creating Ex.A.1 sale deed in favour of the purchaser are quite essential to be proved, which are all absolutely lacking in the case particularly when the original owner has come forward to allege that it was a nominal sale created by the power of attorney agent in favour of his own brother-in-law, the plaintiff in the first suit and that too without any consideration being passed on to the owner of the property, and therefore, the transaction held under Ex.A.1 by the power of attorney agent in favour of the plaintiff in the first suit cannot be treated as either genuine or away from blames or has been done within the expectations and parameters of law. "

28. In Krishna Mohan Kul @ Nani Charan Kul and another vs Pratima Maity and Others, (cited supra), the Hon'ble Supreme Court in paragraph No.12, held as follows:-

"12..... A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with zealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been

engrained in Section 111 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule."

29. In this case, as already pointed out the power agent namely K. Velusamy executed Ex.P3 (Decree made over document) in favour of his son-in-law without receiving any consideration with a view to grab the property. Subsequently, the 1st respondent herein had produced Exs.P4 and P6 receipts to show as if consideration was passed. The said documents cannot be relied upon as they were produced in evidence without pleadings and no one was examined pertaining Ex.P6. In view of the aforesaid decision of the Hon'ble Supreme Court, Agents also standing in confidential relations with the principals. A person standing in a fiduciary relation to another has a duty to protect the interest to his case. Further, the original decree holder namely V.A.Duraisamy while examining himself as RW1 has categorically denied that he received any amount either from the first respondent herein or from the said K. Velusamy. He also deposed that he did not issue any receipt.

30. Under the said circumstances, the burden is upon the first respondent herein to prove the fact that for the said made over, consideration was passed. But the first respondent herein miserably failed to prove that consideration was passed. Therefore, the transaction held under Ex.P3 by the power agent in favour of the first respondent herein cannot be treated as genuine.

31. The executing court failed to consider that the first respondent has not come to the court with clean hands and as such, it should not have granted reliefs in his favour. Therefore, the impugned orders are liable to be set aside. It is open to the parties concerned to approach the Executing Court for restitution by invoking Section 144 of CPC.

32. In the result, these Civil Revision Petitions are allowed. The orders passed by the Sub-Judge, Perundurai, in E.A.No.30 of 2010 and E.P.No.34 of 2009 in O.S.No.592 of 1995 dated 13.04.2010, are set aside. Consequently, E.A.No.30 of 2010 and E.P.No.34 of 2009 on the file of the Sub-Judge, Perundurai, are dismissed. Consequently, connected miscellaneous petition is closed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

gv
To

1. The Second Additional Sub-Court,
Erode

2. The Sub- Court,
Perundurai.

+1 CC to Mr.C.S. Saravanan, Advocate sr 39473.

+1 CC to Mr.N. Manokaran, advocate sr 39358.

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