



**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**Reserved on: 23.09.2020**

**Pronounced on: 09.12.2020**

**CORAM**

**THE HONOURABLE Mr.JUSTICE N.SESHASAYEE**

**WEB COPY**

**S.A(MD)No.287 of 2018**

1.P.Subbhulakshmi

2.P.Mariyammal

3.P.Ravichandran

: Appellant/Respondents/Plaintiffs

Vs.

Mr. K.P.Ramasamy

: Respondent/Appellant/Defendant

**PRAYER:** Second Appeal is filed under Section 100 of C.P.C, against the Decree and Judgment in A.S.No.1 of 2015 on the file of 2nd Additional District and Sessions Court, Tuticorin, dated 29.4.2016, reversing the Decree and Judgment, dated 8.9.2014, passed in O.S.No.61 of 2007 on the file of the Sub Court, Tuticorin.

For Appellants : Mr.B.Rajesh Saravanan

For Respondent : Mr.KA.Ramakrishnan

**JUDGMENT**

The plaintiffs who were successful before the trial Court in their suit for declaration of plaintiffs' title over the suit property and with an alternate relief of mandatory injunction to remove the construction in the suit property, have approached this court in this appeal. Parties would be referred to by their respective ranks before the trial court.

**Pleadings:**

2. The facts which provided a cause for the action to the plaintiffs are now stated:

- The property around which the litigation revolves is a block of dry land measuring 3.71 acre in Sy.No.203/3 of Kilavallanadu village This property and other originally belonged to a certain Alagarammal. Alagarammal had a daughter and a son. They were Alvarammal, and Perumal Naicker. Of them Perumal Naicker died as a bachelor. (Beyond this reference here, Perumal Naicker does not have any further role in the litigation)
- On the demise of Alagarammal, the entire suit property and others devolved on her daughter Alvarammal. Later when Alvarammal died, the properties that she had, were succeeded to by her sons Perumal Naicker and Ganga Naicker.

<https://hcservices.courts.gov.in/hcservices/> In a petition between the (second mentioned) Perumal Naicker



and his brother Ganga Naicker, the suit property came to be allotted to the share of Perumal Naicker. The plaintiffs are the heirs of the Perumal Naicker.

While so, when they faced obstruction from the defendant to their title, they laid the suit.

3. The defendant has pleaded: While Perumal Naicker was alive, on 20.03.1992 under Ext.B.1 sale deed, the suit property was sold by him to one Janakaraj, and he in turn had sold the same to one Sonai on 01.07.2005 under Ext.B.3, sale deed. The Revenue Records too were mutated in the name of these purchasers. The defendant is only a Power of Attorney of the said Sonai, and that his principal (the purchaser under Ext.B.3) had put up a compound wall around the property.

**The trial & the first appeal:**

4.1 The dispute went to trial. For the plaintiffs, the third plaintiff was examined as P.W.1. The documents they produced were marked as Exts.A-1 to A-4, of which Ext.A.3 is the death certificate of Perumal Naicker. It showed that Perumal Naicker had died on 21.07.1977. To substantiate the correctness of Ext.A.3, the plaintiffs have taken steps to summon the medical records of the Government Medical College Hospital, Thoothukudi. In response to that, P.W.2, a staff of the hospital had appeared before the Court and produced Ext.A.4, communication to the effect that the records would be preserved only for 7 years, and that the records sought to be produced were destroyed. With no credible rebuttal evidence forthcoming to dislodge the evidentiary value of Ext.A.3, the trial Court accepted it and acted upon it.

4.2 Turning to the defendant's evidence, he has produced five documents which came to be marked as ExtsB-1 to B-5. Of them Ext.B-1 is critical in the context of the case, since Ext.B.1 sale deed in favour of the predecessor-in-title of the principal of the defendant was executed the same Periasamy in 1992. To prove his possession the defendant has produced Ext.B.5 dated 01.02.2012, which is a few years after the institution of the suit, and the trial court took note of it. Ultimately it proceeded to decree the suit.

4.3 When the matter was taken up in the first appeal by the defendant, the first appellate Court accepted the genuineness of Ext.A-3 death certificate, but has acted on the oral testimony of P.W.1, wherein he has deposed that the property was in the possession of the defendant, and that he had put up a compound wall along the property. Achammal, a cousin of the plaintiffs, was examined as P.W.4, and she has deposed that she had not gone to the suit property. It would then proceeded to overturn the decree of the trial court, and broadly its line of reasoning is:



- Firstly, that the suit was laid only against the power of attorney of Sonai, and that Sonai (who is not arrayed as a defendant) is a necessary party to the suit.
- Secondly, based on the evidence of P.W.1 to P.W.4, the plaintiffs are not shown to be in possession of the suit-property prior to the institution of the suit, and hence they are not entitled to mandatory injunction for recovery of property.

**The second appeal:**

5. This appeal is admitted to consider the following substantial questions of law:

- 1. Was not the first appellate court in error in holding that the principal of the defendant is a necessary party and that the suit is bad for non-joinder of necessary party, when no objection was taken at the earliest point of time as provided in Order I Rule 13 CPC?*
- 2. Has not the first appellate court has overlooked the fact that an act of the agent binds the principal?*
- 3. Was not the first appellate court in error in denying mandatory injunction, and contrary to the presumption that in case of vacant land possession follows title?*

**The Arguments:**

6. Alleging that Ext.B-1 sale deed in favour of Janakaraj, executed in 1992, is a rank forgery and a fabricated document, since the executant thereof (father of the plaintiffs') had died some sixteen years prior to the said sale, in 1977, the learned counsel for the appellants/plaintiffs submitted:

- In the written statement, the defendant had stopped with a statement that he is the power of attorney of Sonai (the purchaser under Ext.B-3 sale deed), but he had not objected to the maintainability of the suit on the ground of non-joinder of necessary party. Since the act of an agent binds the principal, and since the defendant, as the power of attorney, has been the visible face of the principal, and was seen obstructing and challenging the title of the plaintiffs, the suit was laid properly. And, at any rate, the first appellate court should not have taken up this issue, without raising a specific point on the same under Order XLI Rule 31 CPC. And, the dismissal of the suit on the ground of non-impleadment of a necessary party at the appellate stage, without any objection at the earliest point of time is contrary to Order 1 Rule 13 CPC.
- Secondly, the act of the agent binds his principal. Indeed, he not only has contested the suit, but has also preferred an appeal.
- Thirdly, turning to the aspect on possession of the property, the defendant is a rank encroacher of the suit property, and



that he is not in settled possession of the suit property. Hence there is no need to file a suit for recovery of property and a suit for mandatory injunction would be adequate. And, so far as proof of possession of a vacant land goes, possession must be presumed to follow title. Now, the burden is only on the defendant to rebut this presumption. And, the only document produced by him to prove the possession is Ext.B-5, land tax receipt/*kist* receipt, and it is dated 01.02.2012, very obviously after the suit. This apart, the first appellate court appeared to have picked up a stray sentence of P.W.1 about defendant's possession out of the context, and used it.

7. Per contra, the learned counsel for the respondent would argue that even the finding of the courts below believing in the genuineness of Ext. A-3 (death certificate of Perumal Naicker) is not proper, as the document is incomplete in details. Secondly, in the plaint the date of death of Perumal Naicker is not given, and in the context of this case it is a material omission. This apart, the principal of the defendant is a necessary part to the suit, and his non-impleadment is not a mere procedure irregularity.

### **Discussion**

8. It is an admitted fact on either side that Perumal Naicker was the owner of the suit property. According to Ext.A-3, Perumal Naicker had died even in 1977. If this were true, then Ext.B-1, executed on 20-03-1992, some sixteen years after the alleged date of death of Perumal Naicker, will be a false document. Consequently, Janakaraj, the purchaser under Ext.B-1, would not derive any title for him to pass it on to Sonai (principal of the defendant) under Ext.B-3 dated 01.07.2005. Since there is no dispute that the plaintiffs are the heirs of Perumal Naicker, they will be in a better position to establish their title to the suit property. It is an uncomplicated equation. Indeed, both the trial court as well as the first appellate court have accepted the genuineness of Ext.A-3 death certificate of Perumal Naicker.

9. Let the necessary facts be restated. The plaintiffs have laid the suit when they saw the defendant interfering with their right of ownership over the suit-property. The defendant, however, informs the court that he is the power of attorney of a certain Sonai. The plaintiffs did not implead Sonai, though they could have. Now, since the power of attorney of Sonai is already before the Court as the defendant, will Sonai continue to be a necessary party that his non-impleadment should cost the plaintiffs their suit?

### **Principal as a Necessary Party Vs Sec.99 CPC**

<https://hcservices.courts.gov.in/hcservices/> party is one in who the right of action, or the

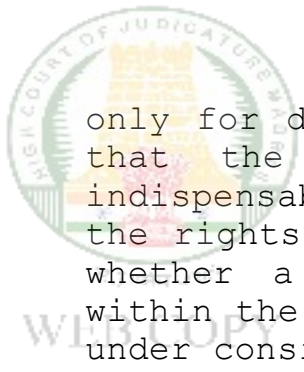


right to defend an action inheres, and hence his/her presence is mandatory for the conclusive adjudication of the litigation. The court needs to know whose rights are litigated before it, and who it ought to hear for deciding the same. Hearing the person, be it natural or juristic, in who the right to defend an action is vested, is an expression of procedural fairness, and no Court can depart from it. However, under Order III Rule 2 CPC, a party in who the right to sue or defend is vested, can either appear in person, or, *inter alia*, through his power of attorney, though with the leave of the court. The Procedural law permits the power of attorney of a party to be the face and conscience of his principal (the party to an action) before the Court. It is a procedural option or a facility available to a litigant. But an agent or a power of attorney gets his authority to act for the principal/litigant and to bind the latter, not under the procedural law but under the substantive law on agency. The law of agency provides that the acts of the agent done within the scope of his authority binds the principal. Thus, an agency is created outside the procedural law, and once so created, the procedural law recognises and accommodates it for litigation-purposes.

11. Is there a difference between a named defendant appointing a power of attorney to defend the suit with the leave of the Court under Order III Rule 2 CPC, and the suit defended by a power of attorney competent to defend the suit for his principal without naming the latter in the cause title of the plaint? Will the two situations bring about a qualitative difference in the outcome of the suit? It is least likely, for the maxim *qui facit per alium facit per se* dictates that an agent with the authority to defend the rights of the principal can bind the latter with his acts done in pursuance of such authority. And, it binds him wholly and not selectively.

12. If tested on the touch stone of who a necessary party is, and why his impleadment is mandatory, and the role of an agent in law, it is logical to deduce that in the presence of an authorised power of attorney in the party array to contest the suit, the principal, for all it matters will have his existence only in the cause title of the suit, under the shadow of his agent. Should the principal, who in the context of the case is Sonai, then be considered as a necessary party to the suit, that his non-impleadment ought to non-suit the plaintiffs? To state it differently, will it then be a case that falls within the net of Sec. 99 CPC, or within its proviso?

13. The Court primarily decides the rights of the parties that are litigated based upon on the substantive law. Its focus is on the rights involved in the litigation. It hears those it ought to hear



only for deciding the rights involved in the suit. And it knows that the procedure which regulates the right of hearing, indispensable though it is, only aids it in its pursuit to decide the rights contested in a litigation. Therefore, how to measure whether a procedure non-compliance is an irregularity falling within the net of Sec.99 CPC? This will also answer the point now under consideration.

14. Sec.99 CPC reads:

***No decree to be reversed or modified for error or irregularity not affecting the merit of jurisdiction. -***

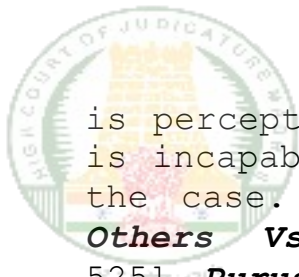
*No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:*

*Provided that nothing in this section shall apply to non-joinder of a necessary party.*

One of the earliest authority that set the tone for several later decisions is the judgement of the Hon'ble Supreme Court in ***Kiran Singh And Others vs Chaman Paswan And Others*** [AIR 1954 SC 340]. In this judgement, the Hon'ble Supreme Court explained the criterion for understanding Sec.99 and 21 of the Code of Civil Procedure, in conjunction with Sec.11 of the Court Fees Act. It says:

*"...The policy underlying sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the Legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits..."*  
(emphasis supplied)

15. Based on the principle laid down, a broad statement may be made: where a compliance or a non-compliance of a procedure produces different results vis à vis, the rights involved in the suit or action, leading to a failure of justice, the procedural irregularity will fall outside the domain of Sec.99 CPC. If however, it does not produce different results as concerning the rights involved in the case, and no failure of justice occasions, then it falls within Sec.99 CPC. This is the bottom-line. In all the cases where the Courts have held that the irregularity complained of will fall under Sec.99 CPC, one underlying principle



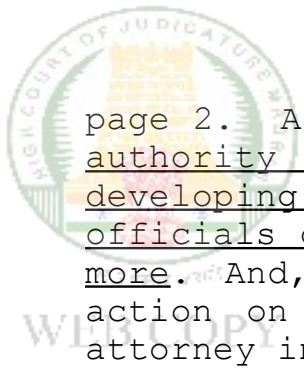
is perceptible: the irregularity involved in each of those cases, is incapable of affecting the decision on the rights involved in the case. For few such instances, See: **Kuldeep Kumar Dubey & Others Vs Ramesh Chandra Goyal (dead) through Lrs.** [(2015)3 SCC 525] **Purushottam Umedbhai Vs Manilal** [AIR 1961 SC325], **Subbiah Pillai Vs Sankarapandian Pillai** [(1948)61 LW220(DB)], **MCS Rajan & Co Vs National Nail Industries** [(1976)88 LW 673], **Radakishen Vs Wali Mohammed** [AIR 1956 Hyderabad 133], **Ali Muhammad Khan Vs Ishaq Khan** [ILR 1931 Allahabad 57 (FB)], **P.J.Joseph Vs Suhara Beevi** [AIR 2000 Kerala 60].

16.1 Now in the backdrop of the facts in this case, given the fact that the defendant's principal is a necessary party, there will always be a tempting possibility to bring the situation under the proviso to Sec.99 CPC. But, if it is considered thus, then that would make the principles of agency as governed by the substantive law on agency redundant. If there should be a space for the principles of agency to co-exist alongside the procedural requirement of impleading a necessary party, then it is necessary to hold that in the presence of his authorised agent, a principal may not be considered as a necessary party within the meaning of proviso to Sec.99. The procedural law, with its inherent flexibility to address multi-various situations, has always been pragmatic in its application. And, it should be so.

16.2 The defendant herein, has claimed the authority as the power of attorney of Sonai, contested the suit, produced all the original documents to sustain the contest, adduced oral evidence, even filed the first appeal, and possibly has done everything which his principal would have done if he were a defendant. Could there be any prejudice, or failure of justice be complained of by the principal? Therefore, in the absence of any fraud on court, an agent, with the authority to defend an action, if he has defended it the way the present defendant has defended, the court may not have a reason to arrive at a different conclusion even if the principal is impleaded. This implies, the situation will fall under Sec.99 CPC, notwithstanding its proviso.

**The anti-climax:**

17. All the statements hitherto made are premised on the existence of the authority in the defendant to defend the rights of his principal in the suit. However, when this Court probed Ext.B-4 Power of Attorney document to understand the extent of authority the defendant has to defend the suit for his principal, it did not realise that it was in for a shock. Ext.B-4 was executed on 06-07-2005, barely five days after Ext.B-3 sale deed was obtained by Sonai. It is a three page document, and the nature of authority granted under it is detailed in a few lines in



page 2. A careful reading of this document revealed that the only authority granted under Ext.B-4 to the defendant was for developing the land into a layout, and for engaging with the officials on behalf of his principal for this purpose, and nothing more. And, definitely not any authority to defend any suit or action on behalf of the principal. It is a special power of attorney intended for a specific purpose.

18.1 In **Bank of Bengal Vs Ramanathan Chetty** [AIR 1915 PC 121 : (1916)XXX MLJ 232], the Court was confronted with the construction of a power of attorney. The Privy Council held:

*"17. Applying to the power in the present case the canon of construction laid down in Bryant, Powis and Bryand Ld. V. La Banque du Peuple (1893) A.C. 170, 177 viz - " that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."*

In **Syed Abdul khader Vs Rami Reddy & others** [AIR 1979 SC 553], the Hon'ble supreme court has held:

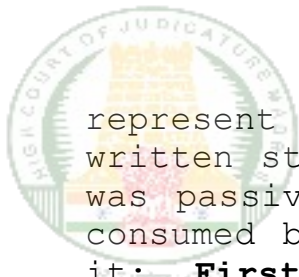
*"A power of attorney has to be strictly construed and what it authorises depends on its terms and the purpose for which it is executed".*

18.2 If Ext.B-4 power of attorney is tested on the principles stated, it fails to convince this Court, that under it the defendant could have obtained any authority to defend any suit or action pertaining to the suit property on behalf of his principal Sonai. There is neither any express term; nor are there any terms from which it could be gathered by implication. Unfortunately, neither of the judgements delivered by the trial Court and the first appellate court make a pointed reference to this aspect. With the defendant proving to be incompetent to defend Sonai, the latter retains his status as a necessary party to the suit, and hence the case instantly falls within the proviso to Sec.99 CPC. Surely, it is an anticlimax. When an act of the agent is beyond the authority granted to him by the principal, then such acts cannot bind the principal. Ex consequenti, the decrees passed by both the courts are vitiated and have become non est.

### **Should the plaintiffs take the blame?**

19. Should the plaintiffs be then non-suited for not impleading a necessary party? Have the plaintiffs invited this situation upon themselves? In the opinion of this court, they have not. This court spots that the defendant appeared to have created a

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represent his principal with his misleading assertion in the written statement that he is the power of attorney of Sonai. He was passively witnessing when the plaintiffs and the Courts are consumed by his statement. This is how the defendant has managed it: **First**, he, in his written statement, did not disclose that he has only a limited authority under the power of attorney, and more particularly that he did not have any authority to represent his principal in any suit. He projected himself in his written statement as if he had absolute authority to act for his principal, which included an authority to defend a suit. **Secondly**, he did not produce Ext.B-4 Power of Attorney along with his written statement, but only during trial. This apparently has denied an opportunity to the trial Court to look into the power of attorney when it framed the issues. **Thirdly**, even in his affidavit of chief examination, he, as D.W.1, did not disclose his limited authority. **Fourthly**, during trial he produced all the original documents, including the parent title documents of his principal, something he could not have accessed without an authority granted to him by his principal. And, **fifthly**, in his appeal memorandum (against filed without any authority) before the first appellate court, he did not disclose his limited authority under Ext.B4. Any reasonable man would therefore, believe that this defendant has the authority to defend the suit on behalf of his principal.

20. Has not the defendant masqueraded with an element of pretended innocence to maneuver through the judicial process? Does not he intend to hoodwink the Court? This Court consciously refrain from making a statement here, since the defendant has produced the power of attorney (Ext.B-4), though belatedly. Still he has been unfair to the court. It cannot be ignored that his pleadings have been plainly misleading, and till the suit reached this court his conduct has been unsuspecting (and for a reader of this judgement, till paragraph 16 above). Ultimately, the entire judicial exercise since 2007 has gone wasted, and has benefited none.

### **What Next?**

21. Now, Sonai is a necessary party to the suit, though not in the context in which the first appellate court has considered it thus. And, the suit cannot proceed without Sonai in the party array.

22. Sonai, necessarily has to be impleaded even at this distant point of time. It is unavoidable. The core issue is, if Ext.B-1 is a false document, then Sonai cannot derive a valid title to the suit-property. And, if Ext.B-1 is a forged sale deed, then the plaintiffs, as lawful title holders would be forced to hold it out to a fraudulent title holder. It is a possibility. But fraud is an



process, and the Courts do not exist to aid anything that even approximates fraud.

23. This Court, therefore, *suo motu* impleads Sonai as an additional defendant, and it invokes Sec.21 of the Limitation Act for the said purpose. The provision reads:

**Sec. 21: Effect of substituting or adding new plaintiff or defendant.—**

(1) *Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:*

*Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.*

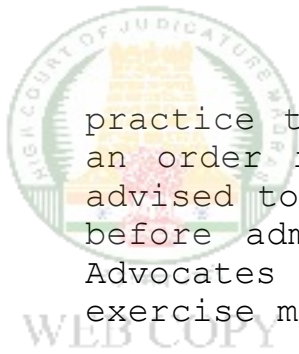
(2) *Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.*

Sonai is impleaded now, and he is deemed to be in the party array right from the inception of the suit within the meaning of Proviso to Sec.21 of the Limitation Act. The reasons therefor are already explained in earlier paragraphs. After all Sonai, may have to now explain to the court how the defendant managed to produce all the original documents, which only he would have an occasion to produce, if he were a defendant. Is he an imprudent principal, or a party to the near-fraud-situation created by the defendant? Or, did the defendant play the *Sikandi*, a la Mahabharata? This will be unravelled, now in the presence of Sonai.

24. When Ext.B-4 was produced during trial, the trial Court had the first opportunity to peruse the document, and it had an opportunity to step in to direct the plaintiffs to implead the defendant's principal *suo motu*. For the collective failure of the defendant at the first instance, and the Courts at the second instance, the plaintiffs' right to remedy should not go banished. After all, the plaintiffs have proceeded against the person who has visibly interfered with their right. More so, where the genuineness of Ext.B-1 sale is suspect. The suit has to be now remanded.

**Suggestion to the Bar and the Bench:**

25. This case highlights how careful the Courts should be, and demonstrates the consequence which (an inadvertent?) omission to send the power of attorney document may produce. It is common



practice that rarely a power of attorney document is read before an order is passed under Order III Rule 2 CPC. The courts are advised to make sure that they read the power of attorney document before admitting its holder to represent the party. Sometimes Advocates too may trip, or be tricked by their clients, and this exercise may be useful to them as well.

**Conclusion:**

26. In the end, this Court allows the appeal and sets aside the decree of the first appellate court passed in A.S.No.1 of 2015 and remands the case to the trial court. The trial court is now required to summon Sonai, and/or anyone who may claim right under him, as the case may be, receive his and/or their written statements, and proceed to dispose of the case. Parties would be at liberty to adduce evidence. Since the suit has commenced in 2007, some thirteen years ago, this court requires the learned trial judge to bestow his best attention to the case and strive for its disposal at the earliest. It is a case where cost should be imposed on the defendant. But, since the courts below have partially contributed to this situation, no cost is imposed.

Sd/-

Assistant Registrar (AD II)

// True Copy //

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Sub Assistant Registrar(CS)

Tsg-2

To

1.The Second Additional District and Sessions Judge,  
Tuticorin.

2.The Subordinate Judge, Tuticorin.

3.The Section Officer-2 copies

V.R.Section, Madurai Bench of Madras High Court, Madurai.

Copy to

1.The Additional Registrar General,  
Madurai Bench of Madras High Court, Madurai.

2.The Registrar(Judicial)

Madurai Bench of Madras High Court, Madurai.

**S.A(MD)No.287 of 2018**

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