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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.07.2021
Date of Judgment : 04.08.2021

THE HON'BLE MR. JUSTICE G.K.ILANTHIRAIYAN

A.S.No.663 of 2019
and
C.M.P.No.19834 of 2019

1. K.Gopinathan
2. R.Seshadri
3. K.Jayasri
4. S.Mahalakshmi

[defendants 3 to 6 are impleaded as per the order in
I.A.No.5527 of 2016 dated 13.04.2016]

...Appellants/Defendants 3 to 6
Vs.

1. S.Savarimuthu Sebastian
Rep.by his Power of Attorney,
S.Edward Enoch Thompson.

...1st Respondent/Plaintiff

2. Selvarani
3. Sakkubai

...2 & 3 Respondent/Defendants 1 & 2

PRAYER: This Appeal Suit filed under Section 96 of the Civil Procedure Code r/w Order XLI Rule 1 of the Civil Procedure Code to set aside the judgment and decree in O.S.No.10817 of 2010 on the file of learned VI Additional Judge, City Civil Court, Chennai, dated 08.03.2019 allow this Appeal with cost throughout the suit proceeding.

For Appellants : Mr.V.Balaji

For Respondents : Mr.Venkatesh Madhavan (for R-1)
: Given up (for R-2 & R-3)

J U D G M E N T

This Appeal Suit is directed against the judgment and decree passed in O.S.No.10817 of 2010 dated 08.03.2019 on the file of the learned VI Additional Judge, City Civil Court, Chennai.

2. For the sake of convenience, the parties are referred to hereunder according to their litigative status before the Trial Court.



3. The suit was filed for declaration, recovery of possession and permanent injunction. The case of the plaintiff is that he is the owner of the suit property. According to the plaintiff, he purchased the suit property from Rosy George by the registered sale deed dated 04.11.1981 registered vide documents No.5079 of 1981. The said Rosy George purchased the said plot by the registered sale deed dated 22.09.1967 registered vide document No.3061 of 1967 from one Chinnasamy Naidu. Actually the said Chinnasamy Naidu was the owner of large extent of land admeasuring 2 acres 31 cents, comprised in Survey No.98/1 situated at Peravallur, Chennai - 11. He layout the said property and the suit property purchased by the plaintiff is one among the property in the said layout. After demise of the said Chinnasamy Naidu, his manager one Sundaramoorthy, who had taken over the entire lands in the layout and prepared another layout for the very same property and resold the plots which were already sold by the said Chinnasamy Naidu but left unoccupied by the respective purchasers of the properties in various dimensions giving numbers such A21A etc. In the original layout approved by the Tahsildar, there was no such numbering and the row of plots on Loganathan Street, where the schedule property is situated consisted of 60 by 40 plots beginning from plot Nos.A.11 to A.20 and beyond A.20 one plot was left free for developing road and subsequently the same was changed and sold out. In fact, the plot No.A.18 purchased by the first defendant failed to protect the same and half of her plot which was sold out by the neighbour in plot No.A.17 owned to one K.Subramanian and renumbered as A.17A under the new layout. Therefore, the first defendant tried to occupy one half of the suit property and tried to put up the thatched hut. Therefore, the plaintiff lodged a complaint and the first defendant was warned by the Police to stop from putting up any construction. The first defendant had vexatiously filed a suit for permanent injunction as against the plaintiff in O.S.No.5070 of 1992 on the file of the learned IV Assistant Judge, City Civil Court, Chennai and the plaintiff had also sought to implead him and the other illegal occupants in the said suit. In the said suit, an Advocate Commissioner was appointed and as per his report, the plot No.A.18 claimed to be in occupation by the first defendant bounded on West by plot No.18-A, instead of by plot No.A-17, as per the original layout. Hence, the suit was filed by his Power of Attorney of the plaintiff.,

4. On receipt of the summons, the defendants 1 and 2 failed to appear and as such, they were set ex-parte.



5. Resisting the plaint, the defendants 3 to 6 filed their written statement stating that third defendant purchased a plot No.A.18 from the first defendant by the registered sale deed dated 03.11.2008 and registered vide Document No.8419 of 2008 at the office of the Sub Registrar, Sembium. The vendor of the third defendant purchased the plot No.A.18 by the registered sale deed dated 28.10.1966 registered vide document No.4237 of 1966 from one Chinnasamy Naidu. In the said sale deed, the boundaries and the layout annexed does not have plot No.A.19A. The plaintiff purchased the plot No.A.19 from Rosy George by the sale deed dated 04.11.1981 from the said Chinnasamy Naidu. The western boundary of the plot No.A.19 has been shown as A.19-A. Therefore, the vendor of the third defendant as well as the plaintiff have no identity of the property. When the plaintiff admitted to encroach the plot No.A.18, the vendor of the third defendant filed the suit in O.S.No.5070 of 1992 and the same was decreed in favour of the vendor of the third defendant. Therefore, neither the defendant nor his vendor encroached the suit property and it is for the plaintiff to identify his property. Thereafter, the third defendant had put up construction of apartment and sold the same by means of undivided share in favour of the defendants 4 to 6 herein. Therefore, the third defendant is the absolute owner of the plot No.A.18 and prayed for dismissal of the suit.

6. On completion of pleadings of the both sides, the Trial Court framed the following issues:-

"1. Whether the plaintiff is entitled for the decree to declare that the plaintiff is the owner in title of the property mentioned in the suit schedule of property?

2. Whether the plaintiff is entitled for the recovery of possession from the defendants 1 to 6?

3. Whether the plaintiff is entitled for the permanent injunction as prayed for?

4. To what relief the plaintiff is entitled for?"

7. On the side of the plaintiff, the power agent of the plaintiff was examined as P.W.1 and documents were marked as Ex.A.1 to Ex.A.7. On the side of the defendants, the third defendant was examined as D.W.1 and the documents were marked as Ex.B.1 to B.6.

8. On a perusal of the oral and documentary evidence, the Court below decreed the suit in favour of the plaintiff. Aggrieved by the same, the appellants/defendants 3 to 6 preferred this Appeal Suit.



9. The learned counsel for the first appellant/third defendant submitted that admittedly the plaintiff purchased the plot No.A.19 and the first defendant purchased the plot No.A.18 from the same vendor. After purchase of the plot No.A.18, the third defendant put up construction by apartment and sold out to the defendants 4 to 6. The plaintiff filed the suit through his Power of Attorney by stating that he is residing at Plot No.A.18. The said Power of Attorney was marked as Ex.A.6. Admittedly, it was not adjudicated before the registering authority as required under Section 35 of the Stamp Act. Therefore, the Power of Attorney cannot maintain the suit and it is liable to be dismissed, since the Power of Attorney holder has no locus to sustain the suit. In fact, P.W.1 admitted the fact that Ex.A.6 should be registered with the registering authority. The Trial Court framed additional issues on 08.03.2019 viz., on the date of judgment and without answering those issues mechanically decreed the suit which is against Order 15 Rule 5 of CPC. However, no opportunity was given to the appellants/3 to 6 defendants before framing the additional issues. Those issues were framed on the date of judgment and while decreeing the suit. Even assuming that, it is valid there is no specific clause to file the suit by the Power of Attorney holder. Therefore, the Power of Attorney cannot maintain the suit and he has no right to depose on behalf of the Principal. The defendants 3 to 6 never encroached any portion of the suit property. As per the sale deed, the third defendant purchased the plot No.A.18 and put up construction and obtained approval to construct apartments in respect of the plot No.A.18 and completed the construction. Thereafter all the apartments were also sold out in favour of the defendants 4 to 6. The Court below, though decreed the suit in respect of the plot No.A.19 in favour of the plaintiff, there is no whisper about the recovery of possession from the defendants 3 to 6.

10. Considering the above, while pending this Appeal Suit, this Court appointed an Advocate Commissioner to inspect the suit property and survey the suit property with the help of approval plan by the Surveyor. On several occasions, the Advocate Commissioner was issued notice to the plaintiff as well as the revenue officials to inspect and survey the suit property, but they did not present and finally, the Advocate Commissioner gave notice to inspect and measure the suit property. When the counsel for the defendants 3 to 6 and along with surveyor, the Advocate Commissioner were present in the suit property, the plaintiff or his counsel did not present. After, verifying the plan and after making some measurements,



the Surveyor informed to the Advocate Commissioner that the measurements in one part of the said map is not clear and only if a map with clear measurements is given, it would be convenient for him to identify the property. Therefore, there is dispute in respect of identity of the property. Hence, the Advocate Commissioner filed a memo before this Court for passing appropriate orders and directions. He further submitted that the issue in respect of recovery of possession, the Court below framed an additional issue No.2 dated 08.03.2019. But the Court below failed to answer to the said issue and mechanically decreed the suit as prayed for. Therefore, he prayed for dismissal of the suit. In support of his contentions, he relied upon the unreported judgments are as follows:-

- (i) O.S.A.No.141 of 2012 (Himayam Engineers & Builders v. S.Ravichandran & others)
- (ii) S.A.No.2033 of 2004 (Lakshmanan v. Veerakathi Chettia (died))
- (iii) W.P MD) No.3598 of 2016 (S.Saravanan v. District Collector, Pudukkottai)
- (iv) C.R.P (PD) Nos.1793 to 1798 of 2011 (Hamshaveniammal v. Stanley Paul)

11. Per contra, the learned counsel for the plaintiff/first respondent contended that the plaintiff filed the suit before this Court and thereafter, on pecuniary jurisdiction, it was transferred to the file of V Additional City Civil Court, Chennai. The third defendant was examined as D.W.1. In his deposition, he categorically admitted that the plot No.A.19 belong to the plaintiff. The third defendant purchased the plot No.A.18 from the first defendant. The suit has been filed in respect of the plot No.A.19 and the plaintiff is entitled to decree in respect of all prayers with regards to the plot No.A.19. Further, he deposed that he has no objection with regards to the prayer sought for in respect of plot No.A.19. When the appellant/third defendant categorically admitted that the plaintiff is entitled for decree with regards to the plot No.A.19, the Court below need not answer the issue of recovery of possession. The non adjudication of the Power of Attorney, which was marked as Ex.A.6 is not fatal to the suit. It is settled law that the substantive justice and technicalities are fitted against each other with the technicalities go and substantive justice shall revive. Further, the plaintiff never disputed the Power of Attorney, which was executed in favour of P.W.1. The plaintiff proved his title through Ex.A.1 to Ex.A.3. He further submitted that in fact, the defendants categorically admitted in their written statement itself that the plaintiff purchased the suit property from his



vendor Rosy George by the registered sale deed dated 04.11.1981. The said Rosy George purchased the suit property from Chinnasamy Naidu by the registered sale deed dated 22.09.1967. While pending the suit, the plaintiff filed a petition seeking amendment with regards to the boundary of the suit property on Eastern side. As per the amendment, the suit property is situated at Eastern side by plot No.A.20. Aggrieved by the same, the appellants/defendants 3 to 6 did not prefer any revision and as such, it cannot be questioned in the Appeal Suit. Therefore, he prayed for dismissal of the Appeal Suit.

12. Heard the learned counsel for the first appellant/third defendant as well as the learned counsel for the first respondent/plaintiff.

13. The plaintiff filed the suit for declaration and recovery of possession and he also prayed for permanent injunction restraining the defendants from in any manner, alienating, encumbering, or dealing with or altering the physical features of the schedule mentioned property. Admittedly, the plaintiff purchased land bearing plot No.A.19 from his vendor Rosy George by the registered sale deed dated 04.11.1981 registered vide document No.5079 of 1981. The plaintiff's vendor Rosy George had purchased the suit property under a layout plan from one Chinnasamy Naidu under the registered sale deed dated 22.09.1967 registered vide document No.3061 of 1967. Both the sale deeds were marked as Ex.A.2 and A.3 respectively. The copy of the proposed layout was marked as Ex.A.1. Likewise, the first defendant purchased the plot No.A.18 from the very same vendor of the plaintiff's vendor's vendor viz., Chinnasamy Naidu by the registered sale deed dated 28.10.1966 registered vide document No.4237 of 1966. Thereafter, the third defendant purchased the plot No.A.18 from the first defendant by the registered sale deed dated 03.11.2008 for the valid sale consideration vide document No.8419 of 2008 at the office of the Sub Registrar, Sembium. Thereafter, the third defendant obtained planning permission and constructed apartments. The said apartments were sold out to the defendants 4 to 6 and they are in possession and enjoyment of their respective flats.

14. According to the plaintiff, the very same layout was modified after demise of the said Chinnasamy Naidu by his Manager one Sundaramoorthy and he sold out the plots by re-numbering the same. As per the revised layout, the part of the portion of the plot No.A.18, which was purchased by the third defendant and the portion of another plot sold out to the third



persons which resulted in wrongly identifying plot No.A.19 as A.18 and put up the construction. Admittedly, the plaintiff purchased the suit property on 04.11.1981 itself, whereas, the third defendant purchased the plot No.A.18 on 03.11.2008. Thereafter, he obtained patta and planning permission to put up the construction. He completed entire construction of apartments and also sold out the flats in favour of the defendants 4 to 6. If at all any dispute in respect of identifying the suit property, the plaintiff ought to have first identify the suit property and filed the suit. Admittedly, the plaintiff is not clear about the identity of the property and in fact after filing the suit, the plaintiff filed a petition for amendment in respect of boundary and amended as East by plot No.A.20. Though the plaintiff prayed in respect of plot No.A.18, filed the suit as against the defendant with regards to the plot No.A.19. Admittedly, both had purchased both the plot Nos. A.18 and A.19 respectively. Therefore, without identifying the correct plot, the plaintiff cannot sustain the suit for recovery of possession.

15. The third defendant categorically admitted that the plaintiff purchased the suit property by the registered sale deed and as such, he is entitled for any prayer with regards to the plot No.A.19. Whereas, the plaintiff claimed recovery of possession as against the defendants 3 to 6, as if they encroached the suit property and put up construction. In fact while pending the Appeal Suit, this Court appointed the Advocate Commissioner to inspect the suit property with the help of Surveyor to measure the same. When the Advocate Commissioner and the Surveyor visited the suit property and measured the suit property that he finds difficulty in identifying the suit property. The Surveyor asked for a map with clear measurements so that, it would be convenient to identify the property.

16. The relevant portion of the memo dated 16.02.2021 filed by the Advocate Commissioner as extracted hereunder:-

"8. After verifying the plaint and after making sum measurements, the Surveyor informed me that since the measurements in one part of the said map was not clear, only if a map with clear measurements was given, it would be convenient for him to identify the property. He gave a written report to that effect and the copy of the same is annexed herewith."

Therefore, the plaintiff himself is not clear about his property with regards to it's identity.



17. The learned counsel for the first appellant/third defendant vehemently contended that the additional issues were framed by the Court below on the date of judgment viz., on 08.03.2019 and without giving any opportunity and decided the issues.

18. The additional issues framed by the Court below on 08.03.2019 as follows:-

"1. Whether the Court has got power to order amendment of schedule before the defendants 3 to 6 are properly impleaded?

2. Whether the amended schedule of suit property belongs to plaintiff or not?"

19. Though the Court below answered the first additional issue, it failed to answer with regards to the second additional issue. In this regard, the learned counsel for the appellant/third defendant relied upon the un reported judgment of the Hon'ble Division Bench of this Court in O.S.A.No.141 of 2012 (Himayam Engineers & Builders v. S.Ravichandran & others), in which it has been held as follows:-

"5.5 In the case on hand, admittedly, the parties have not been heard before the framing of the additional issue. The additional issue framed goes to the root of the matter. It has got the effect of making the appellant disentitled to get a relief on merits. Such an issue cannot be framed and decided by the Court without hearing the parties. Therefore, we are of the view that the procedure adopted by the learned single Judge cannot be sustained in the eye of law. Our view is also fortified by a decision of the Karnataka High Court in Perikal Malappa v.T.Venkatesh Gupta, (AIR 2007 (NOC) 12 (KAR)) wherein the facts involved are identical."

20. The learned counsel for the first appellant/third defendant also relied upon the un-reported judgment of this Court in S.A.No.2033 of 2004 (Lakshmanan v. Veerakathi Chettia (died), in which it has been held as follows:-

"13. The learned counsel for the appellant would submit that the parties have identified the suit property and there is no dispute regarding the same. But, I find it very difficult to accept the same. Any decree that may be passed by a civil court shall be executable and the same shall not be the source for



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another litigation or confusion. In my considered view, unless the suit property has been properly described, a workable decree cannot be granted by the civil court. In the instant case, the learned counsel for the appellant would himself admit that the western boundary of the suit property has not been properly described in the plaint schedule. In such an event, I am of the view that with the wrong four boundaries and with the wrong description of survey number, a decree cannot be passed in favour of the plaintiff."

21. The Hon'ble Division Bench of this Court held that the additional issues framed goes to the root of the matter, such an issue cannot be framed and decided by the Court without hearing the parties.

22. In the case on hand, the additional issues were framed by the Court below on the date of judgment viz., on 08.03.2019. No opportunities were given to the parties to the suit. That apart, on the very same day, the Court below passed the impugned judgment and decreed the suit. The Court below also failed to answer the second additional issue with regards to recovery of possession.

23. Insofar as the Power of Attorney, which was marked as Ex.A.6 is concerned, which was executed by the plaintiff in favour of S.Edward Enoch Thompson on 07.07.2008. Admittedly, it was not adjudicated before the concerned registering authority. In this regard, the learned counsel for the appellant/third defendant relied upon the un-reported judgment of this Court in W.P MD) No.3598 of 2016 (S.Saravanan v. District Collector, Pudukkottai), in which it has been held as follows:-

"3. This writ petition is dismissed on the main ground that the petitioner has filed the Writ Petition on the basis of the power of attorney executed by his son, who is residing in foreign country, though it has been executed before the consulate General as per the Registration Act, it has to be adjudicated within four months before the Registrar herein and only then, it becomes a valid power of attorney. Therefore, the office has also made an endorsement at that time of filing. In the said endorsement it is stated that this has to be clarified before the admission stage. He has clearly stated it has not been adjudicated before the Registration Office in India. Therefore, the Power of Attorney itself becomes invalid. The filing of Writ



Petition on the basis of Power of Attorney itself is invalid."

24. The learned counsel for the first appellant/third defendant further relied upon the un-reported judgment of this Court in C.R.P (PD) Nos.1793 to 1798 of 2011 (Hamshaveniammal v. Stanley Paul) in which it has been held as follows:-

"14. According to the power agent of the petitioner, the respondent in both the civil revision petitions are working in abroad and they have executed power of attorney before the consulate officer by respondent in C.R.P (PD) No.1795/second defendant and before Notary Public by respondent in C.R.P (PD) No.1796/third defendant. The power of attorney is not registered as per Section 18 of Indian Stamp Act and said power of attorney is not a valid one. The learned Judge, allowed the applications on the ground that the power of attorneys are executed before the consulate officer and Notary Public and they need not be registered. The learned Judge has committed an irregularity in allowing both the applications. The learned Judge failed to see that any power of attorney executed outside India it is to be adjudicated in India as per the provisions of Section 18 of the Indian Stamp Act. The power of attorney having failed to get adjudicated by a competent Sub-Registrar, is not entitled to represent the respondent, as power of attorney are not valid."

25. Accordingly, the Power of Attorney executed outside India has to be adjudicated in India as per the provisions of Section 18 of the Indian Stamp Act. The Power of Attorney having been failed to get adjudicated by a competent authority is not entitled to represent the plaintiff as Power holder and it is not valid. Whereas, the Court below failed to frame any issue in this regard, whether the Power of Attorney, which was marked as Ex.A.6 is valid or not. However, as rightly pointed out by the learned counsel for the first appellant/third defendant this issue can be raised before this Court and it can be answered by this Court. The Court below brushed aside the issue that if substantive justice and technicalities are fitted against each other with the technicalities go and substantive justice shall revive. The said settled law is not applicable to the case on hand. Since the Power of Attorney itself was not adjudicated before the authority concerned and as such, the Power holder has no authority to depose on behalf of the plaintiff. Section 18 of the Indian Stamp Act, mandates the adjudication before the



registering authority when the Power of Attorney is executed outside India. Therefore, the Power holder cannot maintain the suit, unless the Power of Attorney is adjudicated before the registering authority.

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26. D.W.1 deposed that the plaintiff purchased the suit property by the registered sale deed and as such, he can claim any prayer with regards to his property. He also deposed that the plaintiff cannot ask for any prayer as against the defendants by showing the property situated at plot No.A.18. Therefore, it does not mean that D.W.1 admitted the case of the plaintiff as if he encroached the suit property and put up construction in plot No.A.19.

27. As per the memo filed by the Advocate Commissioner appointed by this Court, it reveals that the plot No.A.19 is not identified and asked for clear map with measurements by the Surveyor. While that being so, the plaintiff is not entitled for any relief as prayed for.

28. In view of the above discussion, the suit is liable to dismissed. Accordingly, this Appeal Suit is allowed and the Judgment and Decree passed in O.S.No.10817 of 2010 dated 08.03.2019 is hereby set aside. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kv

To

1. The VI Additional Judge, City Civil Court, Chennai.

2. The Section Officer,
V.R.Section, High Court of Madras.

+1 CC to Mr. Venkatesh Mahadevan, Advocate sr 37963

+2 Ccs to Mr.V.Balaji, Advocate sr 37906.

A.S.No.663 of 2019

CA(CO)

SP(06/01/2022)