



A.S.No.281 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 31.10.2022

Judgment Pronounced on : **09.11.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.281 of 2012
and M.P.No.1 of 2012

C.R.N.Balakrishnan

.. Appellant

Versus

1. C.R.N.Palanisamy (Died)
2. P.Rajakumar
3. S.Deva Jothi

.. Respondents

(Respondents 2 and 3 brought on record as
LRs of deceased sole respondent vide order of
this Court dated 28.06.2013 made in M.P.No.1 of 2013)

Prayer : Appeal Suit filed under Section 96 of Civil Procedure Code to set aside the judgment and decree, dated 27.04.2010 passed in O.S.No.679 of 2007 on the file of the Additional District Court-cum-Fast Track Court No.IV, Coimbatore, Tiruppur.

For Appellant : Mr.P.Subramanian

For Respondents : Mr.V.Raghavachari, for RR-2 and 3
R1- Died (steps taken)



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JUDGMENT

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A. The Appeal Suit :

This Appeal Suit is filed aggrieved by the judgment and decree, dated 27.04.2010 in O.S.No.679 of 2007, on the file of the Additional District Court-cum-Fast Track Court - IV, Coimbatore, Tiruppur, in and by which, the suit filed for partition and separate possession of the 1/3rd share in the suit property was dismissed by the Trial Court. For the sake of convenience, the parties are referred to as per their array in the Original Suit itself.

B. The Complaint :

2. The case of the plaintiff is that the defendant is the brother of the plaintiff. In the year 1963, the plaintiff, the defendant, another brother namely, *Subbiah Naidu* and their mother, *Rangammal*, partitioned the property belonging to them vide Doct.No.856/1963 on the file of the Sub-Registrar, Sulur. Thereafter, the said *Subbiah Naidu* relinquished all his rights in favour of the defendant. Suit properties belonged to the mother of the plaintiff and the defendant *Rangammal*. She died intestate in the year 1970. After her death, the suit properties were enjoyed in common. While so, the plaintiff and the defendant decided to form a lay out of the suit



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property and sell the same and accordingly, the plaintiff executed a General Power of Attorney to promote and sell the suit property as sites and the said Power of Attorney, dated 27.03.1965 was registered as Doct.No.4/1965 on the file of the Sub-Registrar, Sulur. However, since there was no progress, the plaintiff gave proper intimation to the defendant and with his knowledge, the registered power was cancelled on 19.04.1975 which was registered as Doct.No.76/1975 on the file of the Sub-Registrar, Sulur. The defendant, after cancellation of the Power of Attorney, has attempted to alienate the suit property. Hence, the plaintiff issued a public notice and thereafter, the present suit is filed.

C. The Written Statement & The Reply :

3. The suit is resisted by the defendant by filing written statement. It is the contention of the defendant that as far as the suit property is concerned, except for the properties ad-measuring 1.28 cents in G.S.No.367/2 and 36.5 cents in G.S.No.363, all the other properties are sold to third parties as house sites pursuant to Power of Attorney, voluntarily executed by the plaintiff in favour of the defendant. The plaintiff had received his share of the sale consideration directly from the purchasers. The plaintiff discharged all his debts only out of the said sale consideration.



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At present, there are several buildings and more than 100 persons are in occupation of the suit property. As far as the above said 2 extents mentioned in G.S.No.367/2 and G.S.No.363 are concerned, the plaintiff and the defendant have got 1/2 undivided share along with one *C.R.Venkatsalu Naidu*, brother of the plaintiff and the defendant's father. Therefore, unless the said co-owners are also impleaded as parties, no partition in respect of the said lands is also possible. As a matter of fact, the plaintiff is not co-operating for partition of the said property.

4. Additional written statement was also filed to the amended plaint. To the written statement filed by the defendant, the plaintiff filed a reply, in which, it was contended that the plaintiff cancelled the Power of Attorney on 19.04.1975 well before the properties are sold and the plaintiff also handed over a copy of cancellation deed to the defendant for his information. Having received the information, the defendant sold the property with a malafide intention to cause wrongful loss to the plaintiff.

D. The Issues :

5. On the strength of the above pleadings, the Trial Court framed six issues which are as follows:-



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(i) *Whether the properties in G.S.No.367/2 and G.S.No.363 alone are available for partition?*

(ii) *Whether, except the above property, the other suit properties have already been sold and whether the plaintiff has received his share of the sale consideration from the defendant?*

(iii) *Whether the plaintiff is entitled to 1/3rd share in the suit properties?*

(iv) *Whether the plaintiff is entitled for the relief of permanent injunction?*

(v) *Whether the plaintiff is entitled for mean profits?*

(vi) *To what relief, the plaintiff is entitled to?*

E. The Evidence :

6. On the above issues, the plaintiff examined himself as P.W.1 and on behalf of the plaintiff, **Exs.A-1 to A-10** were marked. The defendant examined himself as D.W.1 and on behalf of the defendant, **Exs.B-1 to B-4** were marked.

F. The Findings of the Trial Court :



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7. The Trial Court, thereafter, proceeded to consider the evidence on record and the contention of the parties and by a judgment, dated 27.04.2010, found that P.W.1 did not specifically deny the suggestion that whether all the suit properties were sold even before the the cancellation of Power of Attorney under the name and style Dharani and Company. P.W.1 has further admitted that in the suit property, 100 houses, industries and totally, the land has been sold in respect of 202 persons. Inspite thereof, even though prior to the suit, the suit properties are in the name of these 202 persons, none of them have been added as parties to the suit. Therefore, once the suit property having been sold, they are not available for partition. The Trial Court further found that even though it is the case of the plaintiff that he has cancelled the Power of Attorney ten years before the sales in the year 1975 and has duly intimated the same, no such intimation has been brought on record. In such view of the matter, unless the purchasers are made as parties, the validity of their sale cannot be decided. Since the plaintiff has come forward for suit for partition, it is the duty of the plaintiff to implead all the necessary parties and let in evidence as to their sale and in the absence of the same, the plaintiff has failed to prove the necessary facts and therefore, decided all the issues in favour of the defendant and



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dismissed the suit. Aggrieved by the same, the present Appeal Suit is laid before this Court.

G. The Submissions :

8. Heard *Mr.P.Subramanian*, learned Counsel appearing on behalf of the appellant and *Mr.V.Raghavachari*, learned Counsel appearing on behalf of the respondents.

9. *Mr.P.Subramanian*, learned Counsel appearing on behalf of the appellant, taking this Court to the pleadings and evidence, would submit that the plaintiff has categorically pleaded that all the sales were after the cancellation of the Power of Attorney. If so, such sales are not binding on him. The plaintiff has produced **Ex.A-2** in support of his contention. The learned Counsel would also submit that it is the case of the defendant that the suit property was sold and the Power of Attorney was in force and the plaintiff has obtained the sale consideration directly from the purchasers. The defendant ought to have proved the same. In the absence of any proof from the defendant, when the parties have admitted that the properties



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originally belong to the mother, the plaintiff is entitled for a decree in the suit.

10. Per contra, *Mr.V.Raghavachari*, learned Counsel appearing on behalf of the respondents, would submit that it is the plaintiff's case that he has cancelled the Power of Attorney with due intimation. Firstly, such fact has not been proved before this Court. No registered letter or notice was sent at the time of cancellation. Secondly, no proof has been laid before this Court that the sales were after the cancellation of the document. Thirdly, even if the sales were after the cancellation of the document, so long as the plaintiff did not intimate about the cancellation deed, the Power of Attorney Agent cannot be found fault with selling the properties. As a matter of fact, all the sales have happened more than a decade prior to the filing of the suit and when the plaintiff, in the witness box, has admitted that the entire area is developed with hundreds of houses, industries, commercial shops, very belatedly, the suit was filed in the year 2007 and the same is abuse of process of law. The defendant has also marked **Ex.B-3** series, various pattas, which were granted in respect of the purchasers and the photographs in **Ex.B-4** series showing the kind of development which cannot be



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happened overnight and the plaintiff, having kept all along for decades together, has belatedly filed the vexatious suit.

H. The Discussion & Points for consideration :

11. I have considered the rival submissions made on either side and perused the material records of the case. The following points for consideration arise for determination in the instant case:-

(i) Whether the suit properties in G.S.No.367/2 and G.S.No.363 are liable to be partitioned?

(ii) Whether the sale in respect of the rest of the suit properties is valid and binding on the plaintiff?

(iii) To what relief the plaintiff is entitled to?

I. Question No.1 :

12. Firstly, in respect of the first point for consideration, the defendant has specifically pleaded that in respect of 1.28 cents in G.S.No.367/2 and 36.5 cents in G.S.No.363, the same was the ancestral property of the father of the plaintiff and the defendant namely, *C.R.Narayanasamy Naidu* and therefore, his brother *C.R.Venkatsalu Naidu* also has half share in the same. Therefore, unless the said *C.R.Venkatsalu*



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Naidu and the other coparceners are parties to the present suit, the said properties cannot be partitioned in the present suit. Further, the plaintiff has filed the suit for partitioning of the suit properties, belonging to his mother. While so, as far as the above said survey numbers is concerned, the plaintiff has not denied about the averments of the defendant even in the reply statement filed by him. Unless all the co-owners are parties to the suit, there cannot be a partition of undivided half share and therefore, the said extent cannot be partitioned in the present suit and the point is answered accordingly.

J. Question No.2 :

13. As far as the second point for consideration is concerned, it is the specific case of the plaintiff that the plaintiff has cancelled the Power of Attorney executed in favour of the defendant and that the same has been duly intimated to the defendant and that the sale has been effected after such cancellation and intimation. It is the bounden duty of the plaintiff to prove the same. Even though the cancellation of Power of Attorney is produced as *Ex.A-4*, no proof has been produced either in the form of any registered letter. It is the case of the plaintiff that he has handed over a copy of the



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cancellation deed, in which case also, no acknowledgment of receipt of the copy of the cancellation deed is produced or no oral evidence of any witness therefor has been brought-forth. Therefore, the plaintiff failed to prove the intimation of cancellation of Power of Attorney.

14. The plaintiff, except producing **Ex.A-2**, Encumbrance Certificate, has not let in any evidence that the properties were sold after the cancellation of the Power of Attorney. **Ex.A-2**, Encumbrance Certificate is relating to the period of the execution of **Ex.A-1**, partition deed and except the partition deed, no other entries are found in the said Encumbrance Certificate. It is the bounden duty of the plaintiff to discharge the primary onus of establishing the foundational facts of his case, which is not done by him. Therefore, in the absence of the proof of such facts, the plaintiff's suit is bound to fail.

15. This apart, if the case of the plaintiff is that even after intimation, the Power Agent went on to sell the property, considering the sales having been taken place, more than a decade before the filing of the suit, as rightly held by the Trial Court, the validity of the sale has to be gone into and that



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cannot be gone into without the presence of the purchasers especially when the purchase has been made long prior to the filing of the suit.

16. Per contra, the defendant has produced **Ex.B-3** series of pattas, showing the properties are in the hands of third parties. The plaintiff also admitted in the witness box that more than 100 houses, industries are there in the suit property and the property has been sold to more than 202 persons. He had not specifically denied the suggestion in the cross-examination that these sales happened when the Power of Attorney was in force. Therefore, in the light of all the above evidence on record, since the property has been sold and dealt with by the parties long prior to the suit, the same is not available for partition and the Trial Court rightly dismissed the suit. The point is answered accordingly.

K. Question No.3 :

17. In view thereof, I find that the findings of the Trial Court, in respect of all the issues, as correct and accordingly, the third point for consideration is answered that the plaintiff is not entitled to any relief in the Suit.



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L. The Result:

18. In the result, the Appeal Suit in A.S.No.281 of 2012 is dismissed as without any merits. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

09.11.2022

Index : yes
Speaking order
grs

To

1. The Section Officer,
V.R.Section,
High Court of Madras.
2. The Additional District Court-cum-
Fast Track Court No.IV, Coimbatore,
Tiruppur.



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D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery Judgment in

A.S.No.281 of 2012
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