



IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 28 / 04 / 2022
CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

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SA NO.48 OF 2016

Kamalakannan

Rep. by his Power Agent Ayyadurai

...Appellant/Appellant/Defendant
Vs.

Manickasundaram

...Respondent/Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 18.08.2015 made in A.S.No.99 of 2013 on the file of the learned Principal District Court, Erode, confirming the judgment and decree dated 27.08.2013 made in O.S.No.386 of 2009 on the file of the learned Sub Court, Perundurai.

For Appellant : Mr.N.Manokaran
For Respondent : Mr.M.Guruprasad

J U D G M E N T

Aggrieved over the concurrent findings of the Courts below, the unsuccessful defendant has preferred the above Second Appeal.

2.For the sake of convenience, the parties are called as per their ranking in the Suit.

3.The plaintiff filed a Suit for declaration, delivery of vacant possession, mesne profits and damages. According to him, the Suit property originally belonged to one Chokalingam Asariar and the defendant derived title by virtue of a registered WILL dated 23.03.1983. On 30.10.2003, the defendant entered into an agreement for sale, with one C.Mohanambal, for a sale consideration of Rs.5,00,000/- and received a sum of Rs.4,50,000/- as advance. The agreement of sale dated 30.10.2003 was registered on 12.11.2003. Thereafter, on 20.11.2003, the defendant had executed a registered Power of Attorney in favour of one C.Krishnamoorthy empowering him to sell the Suit property and other properties to do all the necessary activities regarding the sale agreement.



4. On 28.10.2005, the Power Agent has extended the time stipulated in the previous agreement dated 30.10.2003 for a period of ten months by way of a registered deed of extension of agreement. On 25.08.2006, the Power Agent sold the Suit properties and other properties and handed over possession of the property in D.Nos.468, 469, 470 and 471 except the Suit property to the plaintiff after receiving the balance sale price of Rs.50,000/-.

5. Pursuant to the sale, the revenue records were transferred in the name of the plaintiff and he is paying the house tax. After the sale, the defendant sought permission to reside in the Suit property for six months till he shift his residence to some other place. After a lapse of six months, the defendant did not vacate the premises. After repeated demands by the plaintiff, he promised to vacate at the end of the month of "Thai" of Sarvathari Tamil Year in the presence of Panchayatars namely Selvaraj of Perundurai and Chinnasamy of Veppampalayam Village, Erode Taluk.

6. On 03.03.2009, the plaintiff revoked the permission granted to the defendant and cause a legal notice demanding delivery of possession. The defendant received the notice on 05.03.2009 and issued a reply notice on 09.03.2009 containing all sorts of false allegations, which was suitably replied by way of a rejoinder notice dated 02.04.2009. The defendant alleged it as a loan transaction and the documents were executed for the purpose of security for the loan transaction and that he never had an intention to sell the property. The averment that the transaction is a loan transaction as claimed by the defendant is false. The defendant is only a Licensee with regard to the Suit property and therefore, the plaintiff filed a Suit for declaration of title and delivery of vacant possession along with mesne profits and damages.

7. The defendant denied the averments made in the plaint in its entirety and would contend that he was in need of a sum of Rs.4,50,000/- for which he approached the plaintiff. The plaintiff in turn insisted that the defendant should execute some documents and also hand over the original documents for security for repayment of loan of Rs.4,50,000/- with interest at the rate of Rs.1.50 per hundred per month till repayment. As such the deed is styled as "Agreement of Sale" in the name of his wife and it was executed on 30.10.2003 and another document styled as "Power of Attorney" in the name of C.Krishnamoorthy, who is none other than the paternal uncle of the plaintiff. All



the original documents were kept as security for repayment. This sort of loan transaction are very much prevalent in the rural and semi-urban side by the money lending persons. The defendant paid the interest. But the plaintiff was not in the habit of issuing any receipt for payment of money, which is their custom. The defendant paid interest upto July 2007, which were not accounted by the plaintiff nor acknowledged by any receipt.

8. At that juncture, the defendant informed the plaintiff that he is going to Dubai for work and on return, he will repay the principal amount and to cancel the documents executed by the defendant as security in the name of his wife and his paternal uncle and to return the original documents. The defendant left for work in August 2007 and returned back in the month of January 2009 with the money he saved from his earnings at Dubai. When he approached the plaintiff with amount of Rs.4,50,000/- with accrued interest, the plaintiff demanded exorbitant interest for the purpose of cancelling the document executed as security. The documents were sham and nominal documents and there is no intention to execute the agreement of sale and Power of Attorney. The plaintiff created the Sale Deed in his favour behind his back suppressing the real intention of creating the documents namely, loan transaction. The defendant is willing to pay the principal amount of Rs.4,50,000/- with interest @ Rs.1.50 per month per hundred. The defendant also issued a telegram and set out the real happenings in the reply notice. As such, there was no cause of action for the Suit and therefore, the Suit is liable to be dismissed.

9. The Trial Court framed appropriate issues and found that the execution of documents in favour of the paternal uncle of the plaintiff and the sale agreement were admitted by D.W.1. Though it is stated that the interest towards the loan transaction were paid upto 2007, no receipts were marked. It is further admitted that the documents were witnessed by D.W.1, who is the father of the defendant and that the defendant has not let in evidence to deny the transaction. The claim of the plaintiff stood proved and thus, the Trial Court decreed the Suit as prayed for.

10. On appeal, the First Appellate Court confirmed the findings of the Trial Court. The First Appellate Court has also held that since the valuation of the property was not challenged before the Trial Court, that issue cannot be raised in the First Appeal stage and accordingly, dismissed the appeal. Aggrieved over the same, the present Second Appeal has been preferred.



document for extension of time to execute the sale deed. When there was no time limit specified in the sale agreement and that time is not the essence of the contract, it is not known as to why the deed of extension of time was executed, that too, after a period of two years. In the deed of extension of time, one Selvaraj stood as a witness.

15. Another question which is brought to the consideration of this Court is that when the defendant's father is residing in the Suit property from the date of sale agreement, it is not explained as to why the Power of Attorney was executed in favour of the paternal uncle of the plaintiff, that too, within ten days after executing the agreement for sale. Another important point is that the sale agreement is said to have been made for a total sale consideration of Rs.5,00,000/- and a sum of Rs.4,50,000/- was paid as advance. There is no averment with regard to payment of this meager amount of Rs.50,000/- took three years period even though it is stated that the agreement holder was working as a Teacher in a Middle School and the plaintiff, who is the purchaser has independent income of his own.

16. As contended by the learned counsel for the plaintiff/appellant, the prevailing practice of getting the sale agreement and Power of Attorney by the money lenders, in that area is common. A reading of the evidence on the plaintiff side, even though it is stated that the balance sale consideration of Rs.50,000/- was paid to the Power of Attorney, no receipt or endorsement was obtained from him as well as from the defendant.

17. Another question arises for consideration is that when the defendant and his Power of Attorney namely his father vide Ex.B1 was very much available in Town, as to why, no ratification or confirmation deed was obtained from them and no receipt for payment of the balance sale consideration of Rs.50,000/- was not obtained from them. There is no explanation for the same. Further, the sale deed was executed in the year 2006, after a period of three years from the date of agreement of sale. But there is no material to show that the defendant was informed of the execution of the sale deed till the legal notice issued by the plaintiff vide Ex.A19 dated 03.03.2009. The next infirmity noted by this Court is the valuation of the property. If the agreement of sale vide Ex.A1 is true, the property was valued at Rs.5,00,000/- during the year 2003. The appreciation of price over a period of six years even at the rate of 10% per annum would result in valuation of the property more than Rs.5,00,000/-. But the Suit property was valued at



Rs.1,50,000/-. The First Appellate Court, to a specific question raised on the valuation, rejected the same on the ground that it was not raised by way of a written statement nor before the Trial Court. When an issue is borne out by records and it is a question of law, the First Appellate Court should have dealt with the same and given an answer. But, without giving a finding on that issue and also all the other issues raised above, the First Appellate Court simply confirmed the findings of the Trial Court.

18.The case of the defendant is that he went to Dubai for work in August 2007 and returned back in the month of January 2009 and approached the plaintiff for discharge of loan. It is only at that point of time, the plaintiff for the first time issued a legal notice vide Ex.A19 dated 03.03.2009. The long gap between the execution of the agreement of sale, execution of the sale deed and demand for possession corroborates the case of the defendant that it might be a loan transaction.

19.The Hon'ble Supreme Court in KRISHNA MOHAN KUL ALIAS NANI CHARAN KUL AND ANOTHER VS. PRATIMA MAITY AND OTHERS [2004 (9) SCC 468] has observed as under:

"12.As has been pointed out by the High Court, the first Appellate Court totally ignored the relevant materials and recorded a completely erroneous finding that there was no material regarding age of the executant when the document in question itself indicated the age. The Court was dealing with a case where an old, ailing illiterate person was stated to be the executant and no witness was examined to prove the execution of the deed or putting of the thumb impression. It has been rightly noticed by the High Court that the courts below have wrongly placed onus to prove execution of the deed by Dasu Charan Kul on the plaintiffs. There was challenge by the plaintiffs to validity of the deed. The onus to prove the validity of the deed of settlement was on defendant No. 1. When fraud, mis-representation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the



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burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. 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 ingrained 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. The Section requires that the party on whom the burden of proof is laid should have been in a position of active confidence. Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity



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be necessary nor be registered for cancellation of the power of attorney and a mere notice of information to the power of attorney agent regarding cancellation is sufficient, and therefore, regarding the genuineness of Ex.B.7 cancellation notice dated 24.8.1989, there is absolutely no ambiguity or doubt entertained and since being a general power of attorney given in favour of Venkataraman under Ex.A.2, the owner of the property, who appointed the agent under the power, is at liberty to cancel the same at any moment. It should never be forgotten that the agent is acting only for and on behalf of the owner of the property and for his convenience and benefits and with no vested interests entrusted with the agent and as against the interest of the owner, the power of attorney agent cannot act. It is always relevant to seek from the agent whether he has acted in the manner expected by law or the purpose that is sought to be achieved by giving such power of attorney has been really achieved and these two aspects need paramount consideration in the cases in hand while discussing and deciding the facts of the case.

21.....

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



23. The surrounding circumstances under which Ex.A.1 has come into existence is sufficient to prove the totality of circumstances, and therefore, Ex.A.1 cannot at all be treated to have come into being to the legal expectations, and therefore, just for the simple reason that technically, the power of attorney was in favour of the said Venkatraman, it does not mean that he could do anything much less acting quite against the agreed norms and the letter and spirit of law. Absolutely no valid or tangible reason has been assigned either on the part of the purchaser or by the said Venkataraman, the power of attorney agent, to have created the sale deed in favour of the plaintiff in the first suit, particularly when it is vehemently opposed by the owner of the property for whose benefits and to make things easy for him, the very purpose of executing the power of attorney has been done, and therefore, this court is of the view that it is a open case in which it is not even relevant as to who is in possession or enjoyment of the suit property, on the date of the execution of the sale deed and this question should have been considered uppermost for answer by the lower courts which they have miserably failed.

23.As per the above judgments, in a Suit for declaration, if the plaintiff is to succeed, he must do so on the strength of his own title. The onus to prove the title of the property is on the plaintiff, by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendant has proved his case or not. Therefore, the contention raised by the plaintiff that the defendant has not entered the witness box and proved his case is immaterial and it is for the plaintiff to prove the title.

24. The learned counsel for the respondent relied on a judgment of the Hon'ble Supreme Court in MAN KAUR (DEAD) BY LRS. VS. HARTAR SINGH SANGHA [2010 (10) SCC 512] wherein it is held thus:-



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"15.We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of attorney holders. This Court in Janki Vashdeo Bhojwani vs. Indusind Bank Ltd. - 2005 (2) SCC 217, held as follows:

"13.Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

17.....In the case of Shambhu Dutt Shastri v. State of Rajasthan, 1986 2 WLN 713 (Raj) it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18.The aforesaid judgment was quoted with the approval in the case of Ram Prasad v. Hari Narain - AIR 1998 Raj 185. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity



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and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ramprasad is the correct view."

12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons



11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the defendants/respondents to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

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hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

15. We do not propose to discuss other judgments, though there is plethora of settled case law on this issue. Suffice to say that the approach made by the High Court has been wholly wrong, if not, perverse. It should not have interfered with concurrent findings of the trial court and first appellate court on a pure question of fact. Their inference on facts is certainly reasonable. The strained effort made by the High Court in second appeal to arrive at a different finding is wholly unwarranted apart from being impermissible under law. Therefore, we have no hesitation to allow the appeal and set aside the impugned judgment of the High Court and restore that of the trial court as confirmed by the appellate court."

26. On the other hand, in the judgment of the Hon'ble Supreme Court in NINGAWWA VS. BYRAPPA AND OTHERS [AIR 1968 SC 956] relied on by the learned counsel for the appellant, it is observed as under:

"5. The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document out as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable."



27. In the judgment of the Hon'ble Supreme Court relied on by the learned counsel for the appellant in PREM SINGH AND OTHERS VS. BIRBAL AND OTHERS [2006 (5) SCC 353] it is observed as under:

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"15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable document. It provides for a discretionary relief.

16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-existent in the eye of law, as it would be a nullity.

17. Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary Article would be.

18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid. [See Unni & Anr. vs. Kunchi Amma & Ors. (1891) ILR XIV Mad. 26) and Sheo Shankar Gir vs. Ram Shewak Chowdhri & Ors. [(1897) ILR XXIV Cal. 77].

19. It is not in dispute that by reason of Article 59 of the Limitation Act, the scope has been enlarged from old Article 91 of 1908 Act. By reason of Article 59, the provisions contained in Articles 91 and 114 of 1908 Act had been combined."

28. In view of the above, if a document is found to be void, the defendant need not take steps to set aside the same. As held in Damodar Lal's case (cited supra) if it is found that the conclusion on facts in evidence made by the Courts below, stem out of a complete misreading of evidence or without considering the material evidence and it is based on conjectures and surmises, it can be considered as a substantial question of law and the concurrent findings can be interfered with exercising power under Section 103 of Civil Procedure Code, 1908.



29. In the present Second Appeal, the Courts below have not considered the material evidence available before it and also failed to give a finding on the issues, particularly, the First Appellate Court failed to consider the issues and discuss the same. For illustration, the valuation of the Suit is based on material / documentary evidence produced before it. In view of the failure by the First Appellate Court to frame appropriate points for consideration and failure to give a finding on the material issues, this Court is inclined to set aside the judgment and decree of the First Appellate Court.

30. Accordingly, the judgment and decree dated 18.08.2015 passed in A.S.No.99 of 2013 by the learned Principal District Judge, Erode, is set aside and the matter is remitted back to the First Appellate Court for fresh consideration. However, liberty is granted to the parties to adduce additional evidence, if they choose to do so. The First Appellate Court shall pass orders within a period of six months from the date of receipt of a copy of this order, without being influenced by the observation made in the above Second Appeal.

31. In fine, the Second Appeal is allowed. No costs.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

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1. The Principal District Judge
Principal District Court
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2. The Subordinate Judge
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