IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**17.11.2023**
Pronounced on	**16.02.2024**

CORAM

THE HON'BLE MRS. JUSTICE K.GOVINDARAJAN THILAKAVADI

A.S.No.243 of 2013

R.Vijayalakshmi ... Appellant/ 6th defendant

Versus

1.Sasikala Statin
2.K.Chandrakala
3.M.A.Kannan
4.R.Mani
5.S.K.Natesan
6.M.Palaniammal ... Respondent 2 to 6/Defendants

Prayer : The Appeal Suit is filed under Section 96 read with Order XII Rule 1 of Code of Civil Procedure, praying to set aside the judgment and decree dated 05.04.2013 made in O.S.No.49 of 2009 on the file of the learned II Additional District Court, Erode.

For Appellants : Mr.S.Mukunth, Senior Counsel
for Mr.N.Krishna Kumar
For R1 : Mr.T.R.Rajagopalan, Senior Counsel

for K.S.Jeyaganesan

For R2, 3,5 & 6 : Mr.P.Tamilavel

JUDGMENT

This Appeal Suit is preferred as against the judgment and decree dated 05.04.2013 made in O.S.No.49 of 2009 on the file of the learned II Additional District Court, Erode.

2. The case of the plaintiff is that the plaintiff purchased the suit property as a vacant site under two registered sale deeds dated 30.04.1996 and 12.06.1996. Ever since purchase, the plaintiff is in continuous possession and enjoyment of the suit property as it's absolute owner. After purchase, the plaintiff started constructing RCC terraced building in the above vacant site stage by stage. When it was nearing completion, the plaintiff was in need of money to finish the said construction work. Hence, she approached the 2nd defendant for a loan of Rs.5,00,000/-. The 2nd defendant agreed to lend the money but he insisted the plaintiff to execute a mortgage deed in respect of the suit property in the name of the 1st defendant who is the wife of the 2nd defendant. The 2nd defendant prepared

the mortgage deed in the name of the 1st defendant and asked the plaintiff to execute the mortgage deed on 30.12.2002. The same was registered on 06.01.2003 in the District Registrar Office, Erode. However, the defendants did not allow the plaintiff to read the said document. Since the plaintiff was in urgent need of money to complete the construction, she was dominated by the 2nd defendant in executing the said document. Thereafter, the plaintiff received Rs.5,00,000/- from the 2nd defendant. The plaintiff agreed to repay the principle amount with interest at the rate of Rs.150/- per hundred per month within a period of 3 years. The plaintiff also handed over the original sale deed of the 2nd defendant as insisted by him. At the time of execution and registration of mortgage deed, the defendants 1 & 2 cleverly, fraudulently and without the plaintiff's knowledge and consent obtained her signature and thumb impression in few other stamp papers and green sheets. When the plaintiff questioned the same, the defendants informed that they were all necessary for preparation and registration of the mortgage deed. Except the mortgage deed, the plaintiff did not execute any other document in favour of the defendants 1 and 2 on 30.12.2002 or on any other date. The description of the house property was specifically mentioned in the mortgage deed. The plaintiff agreed to pay interest for the mortgage amount for three years to the 2nd defendant. In January 2008 some unknown persons started enquiring about the suit property. The plaintiff came to Erode and met the defendants. At that time, the defendants informed the plaintiff that the suit property belongs to them. The plaintiff came to understand that the defendants have fabricated a Power of Attorney in their favour as if it was executed by the plaintiff, by using the blank documents in which the plaintiff has signed. Hence, the plaintiff issued a legal notice on 24.01.2008 to receive the principle amount of Rs.5,00,000./- with interest and asked the 1st defendant to cancel the mortgage deed. The 1st defendant issued a reply notice with false allegations stating that the plaintiff has borrowed more than Rs.10,00,000/- from the 1st defendant and executed a mortgage deed and agreed to repay the amount with interest at the rate of Rs.150/- per hundred per month. However, in the same reply notice the 1st defendant also stated that she is ready to receive the amount of Rs.5,00,000/- with interest and also to cancel the mortgage. Thereafter, the plaintiff applied for encumbrance certificate from which she found that a Power of Attorney deed has been fabricated as if it was executed by the plaintiff on

30.02.2002 in favour of the 2nd defendant. The same was registered 06.01.2003 under document No.5/2003 before the District Registrar Office, Erode. On the strength of the above forged Power of Attorney, the 2nd defendant executed a sale agreement in favour of the 4th defendant. The plaintiff also learnt that the defendants 2 and 4 jointly executed a sale deed on 16.07.2007 in favour of the 5th defendant who executed a sale deed in favour of the 6th defendant on 10.03.2008. The plaintiff caused a rejoinder notice on 11.03.2008 stating about the fraudulent act of the defendants 1 and 2 in fabricating the document. The defendants 2 to 5 after receipt of the rejoinder notice replied on 20.03.2008 with an evasive answer. Due to the fraudulent act of the defendants 1 to 2, the plaintiff did not pay the mortgage amount of Rs.5,00,000/- to the 1st defendant. The plaintiff never executed any Power of Attorney in favour of the 2nd defendant. The said document is a forged document and therefore, the subsequent documents created by the 2nd defendant in favour of the 4th defendant and the documents created by defendants 2 and 4 in favour of the 5th defendant are not only non est in law but they are also invalid, void and will not bind upon the plaintiff and even the document executed by the 5th defendant in favour of the 6th defendant is also not valid. Except the plaintiff, no one else has any right or title over the suit property. The 3rd defendant, who is the father of the 2nd defendant, actively assisted in fabricating all the documents and therefore, he was impleaded in the above suit. Hence, the plaintiff was constrained to file the above suit for the following reliefs:

a)declaring that the power of attorney deed dated 30.12.2002 allegedly executed by the plaintiff infavour of the 2nd defendant and registered on 06.01.2003 as document No. 5/2003 District Registrar's Office, Erode is void, in-operative and not binding the plaintiff.

b) restraining the 2nd defendant from carrying out any deeds set out in the said fraudulent, fabricated forged power of attorney deed document No. 5/2003, District Registrar's Office, Erode by means of a permanent injunction.

c) Setting aside the sale deed Document No. 3864/2007 District Registrar's Office, Erode dated 16.07.2007 executed by defendants 2 and 4 ? .?. Kannan and S.K. Natesan infavour of the 5th defendant Palaniammal as void and unenforceable and not binding on the plaintiff.

d) For a consequential permanent injunction restraining the 5th defendant from acting upon the document setout in Clause C above.

e) declaring that the plaintiff is the absolute owner of the suit property.

f) directing the defendants 1 to 6 to vacate and deliver vacant possession of the suit property to the plaintiff with in a period stipulated by this Honourable Court failing which this Honourable Court put the plaintiff in possession of the suit property.

g) directing the defendants to pay to the plaintiff jointly and severally past mesne profits of Rs. 8,000.00 from 16.01.2009 till the date of suit.

h) directing the defendants to pay to the plaintiff jointly and severally Rs. 10,000/- per mensum or Rs. 1,20,000/- per annum as future mesne profits from date of suit till the date of delivery of possession.

i)directing the defendants to pay the cost of the suit

and

j) granting such other and further reliefs as may deem fit and necessary in the circumstances of the case and render justice.

3.The case of the 2nd defendant is that the plaintiff has executed a Power of Attorney deed on 30.12.2002 registered as document No. 5 / 2003 dated 06.01.2003 on the file of the District Registrar's Office, Erode, in favour of the 2nd defendant empowering him to deal with the suit property. The said Power of Attorney is true, valid and binding on the plaintiff and she is estopped from challenging the same. The plaintiff is not entitled to agitate the execution of the power of attorney deed after lapse of 7 years. The plaintiff ought to have filed the suit within 3 years from the date of execution of Power of Attorney and not from the date of receipt of encumbrance certificate dated 09.05.2002 as alleged by her. Hence, the suit is barred by law of limitation and the same is liable to be dismissed in limine. It is further submitted that in pursuant to the Power deed, the 2nd defendant entered into a sale agreement with the 4th respondent for the sale of suit property and subsequently, the defendants 2 and 4 jointly sold the suit property to the 5th defendant under a registered sale dated 16.07.2007 for a valid consideration. The possession of the property was also handed over to the 5th defendant. Thereafter, the 5th defendant sold the suit property to the 6th defendant for a valid consideration and pursuant to the sale, the 6th defendant took possession of the suit property and she is in possession and enjoyment of the same as absolute owner by paying necessary taxes and charges to the Government. Having known about the factum of sale in favour of the 6th defendant the plaintiff, has not whispered about the same in the plaint for the reason best known to her. The loan amount borrowed by the plaintiff from the 1st defendant under mortgage deed dated 30.12.2002 was discharged by her on 10.03.2008 and it is a separate loan transaction between the plaintiff and the 1st defendant. Hence, the 1st defendant is unnecessarily dragged on to the Court. Like wise the 3rd defendant has no role in any of the transactions between the plaintiff and the other defendants. Hence, the defendants 1 and 3 are not necessary parties. Therefore, the present suit is bad for mis-joinder of parties. Hence, the suit is liable to be dismissed.

4.The contention of the 6th defendant is that she purchased the suit property from the 5th defendant for a valid consideration. Subsequent to her purchase on 10.03.2008 the 6th defendant obtained permission for construction of ground and 1st floor by spending Rs.30,00,000/-. The defendant also obtained Electricity Service Connection, Water connection and also paid property tax to the house constructed in the suit property. The 6th defendant had obtained a loan of Rs.21,00,000/- from the Tamil Nadu Mercantile Bank, Erode for constructing the house. The house tax was also assessed in the name of the 6th defendant and 6th defendant is in physical possession and enjoyment of the suit property ever since its purchase. Hence, the suit is liable to be dismissed.

5.In the additional written statement filed by the 2nd defendant it is stated that the plaintiff has already filed a suit for bare injunction in O.S.No.441 of 2008 before the Principal District Munsif, Erode, and the same was dismissed. In the above suit, the plaintiff admitted about the sale deeds dated 16.7.2007 and 10.03.2008 executed in favour of the defendants 5 and 6. Hence, it would show that the plaintiff had knowledge about the about sale transaction even in the year 2008. Even then, the plaintiff did not file any application under Order 2 Rule II CPC in the said suit in O.S.No. 441 of 2008. Hence, the plaintiff is precluded from filing the present suit in respect of the suit property which was already sold in favour of the defendants 5 and 6 respectively. Moreover, the plaintiff has not pressed the earlier suit in O.S.No. 441 of 2008 and the same was dismissed on 12.01.2009 as not pressed. However, without getting any liberty to file a fresh suit for the same cause of action as required under Order 23 Rule III of CPC, the present suit is not maintainable. In view of the above, the plaintiff is not entitled to file the present suit and the same is barred under the provisions of Order 23 Rule 4 of CPC and the suit is liable to be dismissed

6.Based upon the above pleadings, the trial Court framed the following issues:

1. வாதியானவர் தாவாவில் கோரியுள்ளபடி விளம்புகை, உறுத்துக்கட்டளை, சுவாதீனம் ஒப்படைப்பு மற்றும் இடைக்கால வருமானம் பெற அருகதையுடையவரா?

2. இந்த வழக்கானது தேவையற்ற தரப்பினர்களைச் சேர்க்கப்பட்டதாலும், தேவையான தரப்பினர்களைச் சேர்க்காததாலும் பாதிக்கப்பட்டுள்ளதா?

3. இந்த வழக்கானது காலவரையறை சட்டத்தால் பாதிக்கப்பட்டுள்ளதா?

4. பிரதிவாதிகள் தாவாச் சொத்தை தகுந்த பிரதிபிரயோஜனத்தின் பேரில் நல்லெண்ணத்தின் பேரில் கிரயம் பெற்றுள்ளார்களா?

5. வாதி வேறு பரிகாரம் பெற அருகதையுடையவரா?

Additional issues:

1. இந்த வழக்கானது உ.வி.மு.ச. வகுமுறை 2 விதி 2ன்படி பாதிக்கப்பட்டுள்ளதா?

2. இந்த வழக்கானது உ.வி.மு.ச. வகுமுறை 23 விதி 4ன்படி பாதிக்கப்பட்டுள்ளதா?

7.Upon considering the above averments and the materials placed on record and arguments advanced on both sides the trial court decreed the suit partly by stating that the Power of Attorney deed executed on 30.12.2002 and registered on 06.01.2003 before the Sub Registrar Office, Erode, as Document No. 5 of 2003 as null and void and not binding on the plaintiff and also granted permanent injunction restraining the 2nd defendant from interfering, restraining the defendant from acting in furtherence to the said Power of Attorney deed and also cancelled the sale deed executed by the 2nd and 4th defendant in favour of the 5th defendant and also restrained the 5th defendant from dealing with the property in pursuant to the sale deed executed in her favour and also granted declaration decree, declaring that the plaintiff is the absolute owner of the suit property and also granted the relief of recovery of possession directing the defendants 1 to 6 to hand over the suit property to the plaintiff within a period of three months. With respect to the past and future profits the trial Court held that the same shall be adjusted for the mortgage loan obtained by the plaintiff from the 1st defendant and therefore, declined to grant any relief with regard to the past and future profits.

8.Aggrieved by this, the present appeal is preferred by the 6th defendant.

9.The learned counsel appearing for the 6th defendant would contend that the 4th respondent had obtained Ex.A6 encumbrance certificate on 09.05.2008 and the suit in O.S.No. 441 of 2008 was filed on 21.7.2008. Therefore, even on the date of the earlier suit the first respondent / plaintiff was aware about the sale in favour of the 5th and 6th defendants. Even on the date of filing O.S.No. 441 of 2008 the appellant/6th defendant had commenced the construction in the suit property. Moreover, when the 1st respondent/plaintiff was examined as P.W.1, she categorically admitted in her evidence that even on the date of filing O.S.No. 441 of 2008 the appellant/6th defendant was in possession of the suit property. The trial

Court failed to appreciate that the 1st respondent/plaintiff filed the suit in O.S.No. 441 of 2008 for permanent injunction and had not pressed the said suit within a period of six months from the date of its filing. While so, the trial Court ought to have noticed that under Order 23 rule 4 (b) of CPC if the plaintiff had withdrawn the suit without seeking permission to file a fresh suit on the same cause of action, as contemplated under Sub Rule 3 of Order 23 CPC. Hence, the plaintiff is precluded from instituting a fresh suit. The trial Court also erred in holding that the present suit is not barred by the provision under Order 2 Rule 2 of CPC. The trial Court ought to have dismissed the suit on the ground that the suit is barred by provisions of Order 2 Rule 2 and Order 23 Rule 14 (b) of CPC. The trial court failed to take note of the fact that exhibit A3 mortgage deed and Ex.B.1 Power of Attorney executed by the plaintiff in favour of the first defendant and 2nd defendant had been executed on the very same day, that is, on 30.12.2002 and registered on the very same day i.e., on 06.01.2003 and also failed to take note of the fact that the stamp papers were purchased from the very stamp vendors and having running numbers and the attesting witnesses and the identifying witnesses on both the documents are one and the same.

Since the plaintiff in her cross examination admitted her signature in the Power of Attorney deed, the onus is upon the plaintiff to prove that she had not executed Ex.B.1 Power of Attorney. The trial Court erred in casting the onus of proof upon the defendant overlooking the principal of law. The plaintiff executed Ex.B.1 Power of Attorney as early as in the year 2003, but failed to take any steps to cancel the power and only in the year 2009 she has come forward seeking a declaration that Ex.B.1 is void and not binding on her. The relief sought by the plaintiff for injunction restraining the 2nd defendant from acting as power agent become infructuous on the event of execution of Ex. A.4 sale deed and subsequent sale deed Ex. A.36 in favour of the 6th defendant/ appellant herein.

10.The learned counsel would further contend that even at the time of filing the suit in O.S.No.441 of 2008 for injunction, the plaintiff was aware about the sale in favour of the 6th defendant/appellant herein, which is admitted by her during the course of cross examination. The plaintiff has admitted that the 6th defendant/appellant herein was in possession of the suit property, even at the time of filing the suit in O.S.No. 441 of 2008. While so, the learned trial judge totally overlooked Ex.B.12 to B.16 which would establish that appellant/6th defendant alone constructed the house on the suit property and not the plaintiff. Except producing Ex.A.27 planning permission, the plaintiff has not let in any evidence to show that she has commenced and completed the construction. The plaintiff failed to come forward to repay the loan amount especially when she denies Ex.B-10 receipt issued by the first defendant. The plaintiff failed to plead that she is ready and willing to refund the money especially when she denies Ex.B.10 discharge receipt. Therefore, in view of the above, the judgement and decree of the learned II Additional District Judge, Erode dated 05.04.2013 made in O.S. No.49/2009 is liable to be set aside.

11.On the side of the respondent, it is contented that suit property is the absolute property of the plaintiff by virtue of sale deeds dated 30.04.1996 and 12.06.1996. The suit property was a vacant site at the time of her purchase. Thereafter the plaintiff had started construction in RCC terraced building and since the plaintiff was in need of money to complete the building, she borrowed a sum of Rs.5 lakhs as loan from the 1st defendant who insisted in executing the mortgage deed in favour of his wife/ 2nd defendant. The plaintiff accordingly executed a mortgage deed on

30.12.2002 which was registered on 06.01.2003. At the time of execution of mortgage Deed, the defendants one and two fraudulently obtained the signatures of the plaintiff in the stamp papers and green sheets. When the same was questioned by the plaintiff, it was informed by the defendants 1 and 2 that the above papers are necessary for preparation and registration of mortgage deed. Except the mortgage deed, the plaintiff did not execute any other document in favour of the defendants 1 and 2. Thereafter, the plaintiff came to know about the fraudulent act to the defendants 1 and 2 by fabricating the documents entered into the several transactions without the knowledge of the plaintiff. Hence, she was constrained to file the above suit, for declaring the fabricated power of attorney deed dated 30.12.2002 in favour of the 2nd defendant, which was registered on 6.01.2003, as null and void and not binding on the plaintiff and to restrain the second defendant from encumbering the suit properties by virtue of the fabricated power of attorney deed and also to set aside the sale deeds in favour of the 5th defendant executed by the defendants 2 and 4 as null and void and not binding on the plaintiff. The plaintiff also sought the relief of Permanent injunction restraining the 5th defendant from acting upon the sale deed in her favour and declaring the plaintiff as a absolute owner of the suit property and also to direct the defendants 1 to 6 to vacate and deliver vacant possession of the suit property to the plaintiff within the period fixed by this Court. The plaintiff also claimed mesne profits for past and future mesne profits.

12.It is not in dispute that the plaintiff has purchased the suit property under two registered sale deeds dated 30.04.1996 and 12.06.1996 marked as Exs. A1 and A2 respectively. It is also not in dispute that the plaintiff borrowed loan from the 1st defendant and executed the mortgage deed in favour of the 2nd defendant who is the wife of the first defendant and the said mortgage deed was executed on 30.13.2002 and registered on 06.01.2003 at the District Registrar's Office, Erode. However, the specific allegation of the plaintiff is that on the date of execution of mortgage deed i.e., on 30.12.2002 the defendants 1 and 2 obtained the signature of the plaintiff and her thumb impressions in few stamp papers and green sheets. According to her, except the mortgage deed, she had not executed any other document in favour of the defendants 1 and 2 on 30.12.2002.

13.Therefore, according to the plaintiff, in this case, the power of attorney was obtained by the act of undue influence by the defendants 1 and 2. The plaintiff has instituted the present suit to declare the said power of attorney deed dated 30.12.2002, allegedly executed by the plaintiff, in favour of the 2nd defendant which was registered on 06.01.2003 as Document No.5/2003 at the District Registrar's Office as null and void along with other releifs. Therefore, the plaintiff who pleads the undue influence must prove those allegations positively. The general allegation is that the document obtained by undue influence are insufficient to satisfy the requirements of undue influence. Admittedly, on the date of execution of power deed, the plaintiff also executed a mortgage deed in favour of the first defendant. However, the plaintiff is not in agreement with the execution to the power deed.

14.From the above submissions, the following points for consideration arises:

1.Whether, the present suit in O.S.No.49/2009 is barred by the provision of Order 2 Rule 2 of CPC?

2.Whether the suit is barred under Order 23 Rule (4) (b) of CPC?

3.Whether Ex.B.1 power deed is a fabricated document ?

4.Whether the plaintiff has discharged the mortgage loan borrowed from the 2nd defendant?

5.Whether the sale deeds in favour of the defendants 5 & 6 are valid?

6.Whether the 6th defendant alone has put up the construction in the suit property?

7.Whether this appeal can be allowed or not?

Point for consideration Nos.1 & 2

15.In the present case, the plaintiffs contention is that on the date of execution of the mortgage deed, the defendants obtained her signatures in blank papers and green sheets. Making use of the same, the defendants have fabricated the alleged power deed. The plaintiff came to know about the power deed only when she applied for encumbrance certificate on 09.05.2008.The further contention of the plaintiff is that, on 15.07.2008, the defendants their henthcmen disturbed the plaintiff's construction work in the suit property. Though the plaintiff managed to send them away with the help of her relatives and neighbours, the defendants challenged that they would take possession of the suit property from the plaintiff. Hence, plaintiff was constrained to file a suit in O.S.No.441/2008 before the Principal District Musnif Court, Erode for a bare injunction against the defendants and also preferred a Police complaint against them. While so, on 16.01.2009, the defendants took forcible possession of the suit property from her and therefore, she had not pressed the suit in O.S.No.441 of 2008 on 22.01.2009 and filed the present suit. Therefore, the cause of action in the suit in O.S.No.441 of 2008 and the present suit in O.S.No.49 of 2009 are different. Hence, the learned counsel appearing for the respondent/plaintiff would submit that the present suit in O.S.No.49 of 2009 is not barred under Order 2 Rule 2 CPC.

Order 2 Rule 2 CPC reads as follows:

> *" Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."*

16.The principle underlying Order 2 Rule 2 CPC is that no man can be vexed twice over the same cause of action. The *sine quo non* for invoking Order 2 Rule 2 CPC against the plaintiff by the defendant is that the relief which the plaintiff has claimed in the second suit was not available to the plaintiff for being claimed in the previous suit as the cause of action in the previous suit against the defendant and yet not claimed by the plaintiff. The bar of Order 2 Rule 2 comes to operation when the cause of action on which the suit was filed, forms the foundation for the subsequent suit and when the plaintiff could have claimed the relief sought in the subsequent suit in the earlier suit, and both the suits are between the same parties.

17.In the present case, the contention of the plaintiff is that, at the time of filing the suit in O.S.No.441 of 2008, the plaintiff was in possession of the suit property. Since the defendants interfered the plaintiff's possession in the suit property, she was constrained to file the above suit for permanent injunction. She had also preferred a Police complaint marked as Ex.34. Only on 16.01.2009 she was dispossessed from the suit property which made her to not press the earlier suit and to file the present suit for declaration of title and recovery of possession and for declaring the power deed and sale deeds as null and void. Therefore, it cannot be said that the suit is barred under Order 2 Rule 2 CPC.

18.The next contention of the appellant/6th defendant is that without seeking liberty to file a fresh suit in the earlier suit, the plaintiff is precluded from filing the present suit. Hence, the suit is barred under Order 23 Rule 1 (4) CPC.

Order 23 Rule 1 (4) CPC reads as follows:

"Where the plaintiff-

a. abundance any suit or part of claim under sub rule (1), or

b. withdraws from a suit or part of a claim without the permission referred to in sub rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim."

19.The subject matter in Order 23 Rule 1 CPC means the services of acts or transaction alleged to exists gives rise to the relief claimed and it is not merely the property. Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit. **[Ref: (1970) 1 SCC 761]**

20.As discussed above, the cause of action in the earlier suit in O.S.No.441 of 2008 is not the same cause of action for the present suit. Hence, the suit is not barred under Order 23 Rule 1(4) CPC.

Point Nos.3 to 7:

21.The learned counsel appearing for the appellant/6th defendant would argue that when the plaintiff pleads that the power of attorney was obtained by an act of fraud and undue influence, the same has to be proved positively. Mere usage of words "Fraud ", "Undue Influence" in pleadings will not be helpful in any way to prove the case of the plaintiff. In the absence of such proof, the suit filed by the plaintiff ought to have been dismissed by the trial Court. Whereas, the trial Court erroneously decreed the suit in favour of the plaintiff.

22.Now, it has to be seen whether the alleged power deed marked as Ex.B.1 was executed by the plaintiff or it was fabricated by the defendants. The specific case of the plaintiff is that on 30.12.2002 she had executed only Ex.A.3-mortgage deed and the same was registered on 06.01.2003. At the time of executing the said mortgage deed she had not executed any other documents. However, her signatures were obtained by the 2nd defendant in blank papers and green sheets. When the same was questioned by her, the 2nd defendant informed her that her signatures are needed for obtaining the mortgage loan. Only after obtaining the encumbrance certificate, she came to know about the alleged Power of Attorney deed. Therefore, the contention of the plaintiff is that the alleged power deed is a fabricated document created by the defendants under undue influence.

23.On the other hand, the contention of the defendants is that, the power of attorney deed is a genuine document executed by the plaintiff and the contention of the plaintiff that the said document is a fabricated one is false.

24.As per Section 111 of Indian Evidence Act, where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. In the present case, when the defendants claims that the 2nd defendant is the power agent of the plaintiff, the 2nd defendant stands in the position of active confidence. While so, the burden of proving good faith of the transaction is upon the 2nd defendant to show that transaction was in good faith. The 2nd defendant must prove that plaintiff was fully aware of nature of the document, though the alleged power deed is a registered document and contra evidence cannot be let in against the recitals of the document as per Section 92 of the Indian Evidence Act.

25.The plaintiff has filed the above suit to declare the power deed dated 30.12.2002 registered on 06.01.2003 as null and void. The said power deed is marked as Ex.D1 on the side of the defendants. It is not in dispute that on 30.12.2002 the plaintiff borrowed a sum of Rs.5,00,000/- from the 1st defendant and executed Ex.A.3-mortgage deed and the same was registered on 06.01.2009. According to the defendants, 2 to 5 and the appellant/6th defendant the said mortgage loan was discharged by the plaintiff and the discharge receipt was marked as Ex.B.10. The power deed was executed by the plaintiff in favour of the 2nd defendant with intention to give power to the 2nd defendant for selling the suit property. While so, the defendants must first prove that the said mortgage loan was discharged by the plaintiff. On perusal of Ex.B.10 it is seen that the signature of the plaintiff is not found in the above receipt and only the signature of the 1st defendant is alone found to be in the said receipt. While so, the defendants have to prove that the mortgage loan was discharged by the plaintiff. When the plaintiffs specifically denies the discharge of the mortgage loan and the receipt was fabricated, the defendants ought to have examined the witness in the above receipt. As such, the defendants failed to establish the genuinety of Ex.B.10 receipt.

26.Now, it has to be seen that whether the alleged power deed is a genuine document executed by the plaintiff in favour of the 2nd defendant with intention to give power to the 2nd defendant for selling the suit property. In Ex.A3 mortgage deed it is mentioned as follows:

> ‘‘சொத்துக்கள் யாவும் என் சொந்த சுவாதீன அனுபவத்தில் இருந்து வருகிறது. தற்சமயம் நான் வீடு கட்டுவதற்கு பணம் தேவைப்படுகிறது.’’ எனக் குறிப்படப்பட்டுள்ளதாக தெரிகிறது. இதே பத்திரத்தில் சொத்து விபரத்தில் ‘‘3090 சதுரடி காலி நிலத்தில் புதியதாக கட்டிக்கொண்டு இருக்கும் ஆர்.சி.சி. தார்சு கட்டிடமும் அதற்கு சேர்ந்த கதவு, நிலவு, மின் இணைப்புகள், லைட் பாயின்ட்கள் சகிதமும் குதவுக்கு சேர்ந்தது.’’ எனக் குறிப்பிடப்பட்டுள்ளது.‘‘

27. If the plaintiff had executed the mortgage deed for loan purpose for constructing the house in the suit property, it is not necessary for the plaintiff to execute a power deed in favour of the 2nd defendant on the same day for selling the property. The defendants failed to examine the witness in the power deed to prove that the power deed was executed by the plaintiff in favour of the 2nd defendant and the plaintiff was aware of the transaction. The contention of the defendants that the mortgage loan was obtained by the

plaintiff for administrating her school cannot be accepted, since the same is against the recitals found in the mortgage deed. Moreover, the 1st defendant in her reply notice Ex.A.9, dated 01.01.2008, she has stated that in the event of the plaintiff discharging the mortgage loan, she is ready to cancel the mortgage deed executed in her favour. The same is extracted as hereunder:

> *"As per your notice your client is ready to pay Rs.5,00,000/- with subsequent interest as per terms mentioned in the mortgaged deed, if your client ready to pay as per the terms of mortgage deed my client is ready to get the amount from your client and ready to cancel the mortgage as your client wishes. Please kindly inform the date and time."*

28.In the said reply notice the 1st defendant accepted about the borrowal of mortgage loan for the purpose of completing the construction in the suit property. However, the 1st defendant failed to appear and adduce evidence in respect of the mortgage loan and under what circumstances the alleged power deed was executed. Moreover, when the mortgage loan was obtained for constructing the house in the suit property, it is not necessary for the plaintiff to execute a power deed in favour of the 2nd defendant for selling the suit property on the same day. Moreover, in the reply notice nothing is whispered about the alleged sale agreement dated 24.10.2004 executed by the 2nd defendant in favour of the 4th defendant under Ex.B.8 in respect of the suit property, which is a registered document. Admittedly, the 4th defendant is the brother of the 1st defendant and brother-in-law of the 2nd defendant. While so, the 1st defendant would certainly been aware of the above transaction between her husband, the 2nd defendant and her brother, the 4th defendant.

29.Moreover, in Ex.A.3- mortgage deed and in Ex.B.8-Sale agreement, the incomplete construction of the building is mentioned. Whereas, in the sale deed under Ex.B.9 executed by the 2nd and 4th defendants in favour of the 5th defendant who is none other, the mother of the 2nd defendant, it is mentioned only as vacant site. No explanation was given on the side of the defendants in this regard. According to the defendants, on 16.07.2007, the mortgage loan was cancelled under Ex.A.10. On the same day Ex.A.9 sale deed was executed by the defendants 2 and 4 and registered in favour of the 5th defendant. In fact, in the reply notice dated

01.02.2008 issued by the 1st defendant, nothing is whispered about Ex.B.8 sale agreement and Ex.B.9 sale deed. This would goes to show that the alleged power deed is a fabricated document. If really the plaintiff had executed the alleged power deed, the 1st defendant would have mentioned the same in her reply notice. However, she had only stated that on receipt of the mortgage amount, she was ready to cancel the mortgage deed. Moreover, the defendants 1 to 6 though received the notice issued by the plaintiff under Ex.A.10, the 1st defendant alone replied under Ex.A.9 reply notice. The service of notices to other respondents is established by the plaintiff by marking Ex.A.11 to A.16 Acknowledgements. Even in ExA.17 reply notice dated 20.03.2008, the 1st defendant failed to mention about the alleged power deed dated 30.12.2002 and about the sale agreement dated 24.10.2004 and about the sale deed in favour of the 5th defendant dated 06.07.2007. From the above facts, it is clearly proved that the defendants 1 & 2 with the help of the signed blank papers obtained from the plaintiff, fabricated the above power of attorney deed.

30.The further contention of the appellant/6th defendant is that, the plaintiff failed to produce any document to show that she had constructed the house in the suit property. Whereas, the 6th defendants has produced Exs.B.13 to B.19 to prove that she had obtained loan from the Tamil Nadu Mercantile Bank, for constructing the house in the suit property by obtaining planning permission from the Veerppan Chathiram Municipality and that she had constructed the building in the suit property. The building was assessed to tax in the name of the 6th defendant. The 6th defendant had also obtained service connection and water connection to the said house. The house tax receipts, Electricity and Water Tax receipts are issued in the name of the 6th defendant. Hence, the 6th defendant is alone the absolute owner of the suit property. Whereas, the plaintiff has produced Ex.A25 letter requesting the Veerappan Chathiram Municipality, to grant permission for constructing a residential house in the suit property situated in S.No.110/35, 110/36 respectively. She had also forwarded a letter on 30.03.2004 and 30.03.2006 under Exs.A.27 and A.28 for extending the construction work in the suit property. This would show that the plaintiff was in possession of the suit property during the above said period. The plan approval is marked as Ex.A.29. While so, it cannot be accepted that the 6th defendant has applied on 04.06.2008 for constructing the house in the suit property and the permission was subsequently extended from 2008 to 2011 under Exs.B.13, B.31& B.32 by the Municipality of Veerappan Chathiram. Moreover, on 17.06.2008 the 6th defendant has applied for constructing the ground and first floor in the suit property under A.31, but the permission was granted by the Municipality for constructing the house for the period from 17.06.2008 to 16.06.2011 as mentioned in Ex.A.31, and under Exs.A.30 and A.32, the 6th defendant has applied for Tax assessment for the suit property. From the above facts, it appears that the 6th defendant has constructed a terraced house within a period of one month, which is not possible. Moreover, the contention of the 6th defendant that under Ex.B.19 she had borrowed a sum of Rs.21,00,000/- from the Tamil Nadu Mercantile Bank, for putting up construction in the suit property. On perusal of Ex.B.19 it is seen that only on 31.07.2008, the loan was granted by the bank. While so, the 6th defendant under Ex.B.30 dated 28.07.2008 has applied for Tax assessment. Therefore, It would show that the documents, marked on the side of the 6th defendant as Exs.B.30 to B.36 are created for the purpose of grabbing the property of the plaintiff. On the other hand, the plaintiff has clearly established through oral and documentary evidence that the alleged power deed is a fabricated documents and therefore, the sale deed in favour of the 6th defendant is not binding on her. Moreover, the husband of the 6th defendant has examined as D.W.1 clearly admitted that he had not tendered any amount to the plaintiff as advance the defendants failed to establish that the plaintiff has received the sale consideration by virtue of the sale deeds executed in favour of the defendants 5 & 6. The receipt marked as Ex.B.6 is also not proved by the defendants. Therefore, the trial Court has rightly held that the alleged power deed and the documents in favour of the 4th, 5th and 6th defendants marked as Exs.B.8, B.9, B.36 and the alleged discharge receipt marked as Ex.B.10 are forged documents and fabricated for the purpose of grabbing the property of the plaintiff and not binding on the plaintiff. Since the plaintiff herself admitted that she had not discharged the mortgage loan, the trial Court has rightly held that the mortgage amount has to be adjusted and therefore, the plaintiff is not entitled for any amount as damages for use and occupation by the 6th defendant. Therefore, no interference is required in the judgment and decree passed by the trial Court.

31.In the result, the appeal suit is dismissed. The judgement and order passed by the trial Court is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

16.02.2024

Index:Yes/No
Speaking Order : Yes/No

To
II Additional District Judge, Erode.

K.GOVINDARAJAN THILAKAVADI,J.

vsn

PRE- DELIVERY JUDGEMENT MADE IN

A.S.No.243 of 2013

16.02.2024