IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.02.2024	Pronounced on: 01.03.2024

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.597 of 2017
and
CMP. No.14910 of 2017

1.N.Velusamy
2.V.Saradhamani

...Appellants

Vs.

1.C.Meenakshi Pavalayammal
2.Samiathal
3.Deivanai
4.Damayanthi
5.Sri Devi
6.A.Menaka Sri
7.R.Srinivasan
8.Giri Muthusami
9.Velliangiri
10.Balavelayutham
11.Erode Cauvery Junior Chamber Charitable Trust by its Chairman J.Gopalakrishnan
12.T.C.T.Balasankar
13.S.Sudhakar
14.M.Sethusankar

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the decree and judgment dated 24.04.2017 rendered in A.S. No.75 of 2016 on the file of the Second Additional District Judge, Erode, reversing the decree and the judgment dated 24.06.2016 rendered in O.S. No.138 of 2011 on the file of the Second Additional Subordinate Judge, Erode by allowing this Second appeal.

For Appellant : Mr.S.Subbiah,
Senior Counsel
for Ms.Elizbeth Ravi

For Respondents : Mr.N.Manokaran for R1
Mr.A.Madhumathi for R2 to R5
Mr.M.Gurupraad for R6 to R11
Mr.K.S.Jayaganesan for R12 to R14

JUDGMENT

The 1st and 13th Defendants, husband and wife are the Appellants herein.

2. The parties are described as per their litigative status before the Trial Court.

3. The material facts that are necessary for deciding the present

Second Appeal are as hereunder:

3.1.The Plaintiff, sister of the 1st Defendant filed the suit seeking declaration of her ½ share in the suit properties and also for reliefs of permanent injunction, restraining the Defendants 1 and 13 from encumbering Items 1 to 6 of the suit properties and Defendants 7 to 16 from alienating or putting up construction in the suit properties.

3.2. The case of the Plaintiff is that the properties are the ancestral properties of the father of the Plaintiff and 1st Defendant and as a daughter the Plaintiff was entitled to 1/3rd share and subsequently when the 1st Defendant obtained a Power of Attorney on the pretext of straightening boundaries with the neighbour, Pavalayammal and misused it to create a Sale Deed in favour of Defendants 7 to 11 and also executed a Sale Deed in favour of his wife, the 13th Defendant and subsequently when the mother of the Plaintiff and 1st Defendant also died, the Plaintiff became entitled to ½ share in the suit properties. It is her further case that she issued a notice for partition on 10.10.2010 and also thereafter she cancelled the Power of Attorney executed by her on 0 1.12.2010 and even thereafter, the

Defendants 1 and 13 effected sale of properties to third parties, viz., Defendants 14, 15 and 16. It is also alleged that the mother was critical and just prior to her demise, the 1st Defendant had used the Power of Attrney executed by the mother along with the Plaintiff to create a Sale Deed in favour of his wife, the 13th Defendant.

4. The 1st Defendant filed a written statement denying the share of the Plaintiff in toto and claiming that the suit properties were not ancestral in nature but separate and self acquired properties of the father of the Plaintiff and 1st Defendant. There was a partition of ancestral properties on 01.02.1984 and 06.02.1984 and the father became entitled to ½ share and the 1st Defendant became entitled to ½ share and therefore, the Plaintiff would only be entitled to 1/4th share after the demise of the parents and the remaining 3/4th share would be the 1st Defendant's share. In any event, the 1st item according to the 1st Defendant was purchased out of the own funds of the 1st Defendant and it belonged to him absolutely. The Plaintiff executed the power voluntarily as she wanted to sell her share to meet family

needs and discharge debts of her husband. The 13^{th} Defendant, wife of the 1^{st} Defendant and her parents provided money and jewels which were used for the business being run by the 1^{st} Defendant. After sale of the lands, the Plaintiff was given her due share and it is denied that the 1^{st} Defendant used the sale proceeds to clear his personal debts. It is also denied that the mother was in hospital from on 03.08.2010 and during that period the Sale Deed was executed by the 1^{st} Defendant in favour of the 13^{th} Defendant. The suit filed without seeking cancellation of the sale deeds was not maintainable and the sale deeds were all valid and binding on the Plaintiff and therefore the 1^{st} Defendant prayed for dismissal of the suit.

5. The 1^{st} Defendant also filed an additional written statement stating that the 1^{st} defendant has no objection for a partition of the 6^{th} item alone and allotting $1/4^{th}$ share therein to the Plaintiff and that the Plaintiff was not entitled to any share in items 2 to 5.

6. The purchasers who were impleaded have filed written statements contending that they have perused the original power of attorney deed and

they are all bona fide purchasers and their sale deeds are valid and cannot be disturbed.

7. The trial court dismissed the suit in entirety. On appeal, however, the First Appellate Court reversed the judgment and decree and granted a decree for partition and protecting the third party purchasers, held that the share of the purchasers would stand adjusted against the 1st Defendant's share.

8. Aggrieved by the reversal findings rendered by the First Appellate Court, the 1st and 13th Defendants have preferred the above Second Appeal. On 23.10.2017, the above Second Appeal was admitted on the following substantial questions of law:

> *" a.When once the relationship of Principal and agent is created under a registered power of Attorney document, is not the Princpal bound by the act of the Agent under Section 226 of the Contract Act?*
>
> *b. When a power of Attorney Agent acts within his powers, specifically granted to him, in terms of the power of Attorney document, is it open to the Principal to challenge his acts, in a collateral suit for declaration of title, without filing any suit to have the acts by him set aside or cancelled?*
>
> *c.When there is a relationship of Principal and agent,*

between a sister and brother and when the agent had performed his acts, still whether the sister being the Principal can ignore the sale deeds executed on her behalf and seek for declaration of title and for partition?

d.When one of the suit properties stood in the name of the junior member of Joint Hindu Family, if there any presumption in law to hold that the said property also formed part of Joint Hindu Family properties?

e.When the onus of proof is upon the plaintiff to prove a property as one belinging to Joint Hindu Family, whether the judgment of the lower Appellate Court straight away considering the defence of the defendant and holding it as against him that he had not proved that it was his separate property is legal?"

9. I have heard Mr.S.Subbiah, learned Senior Counsel for Mrs.Elizabeth Ravi, learned counsel for the Appellants and Mr.N.Manoharan, learned counsel for the contesting 1st Respondent, Mrs.A.Madhumathi, learned counsel for Respondents 2 to 5, Mr.M.Guruprasad, learned counsel for Respondents 6 to 11 and Mr.K.S.Jeyaganesan, learned counsel for Respondents 12 to 14.

10. Mr.S.Subbiah, learned Senior Counsel would contend that the 1st Appellant has proved that he had separate business income and only from and out of the same, he has purchased the 1st Item of the suit property and

in so far as the rest of the items, they were all covered by the General Power of Attorney admittedly, executed by the Plaintiff and the mother of the Plaintiff and 1st Defendant and when only based on the said Power of attorney, that too duly registered, sales have been effected, it would certainly bind the Plaintiff and she cannot seek for a relief of partition, without having declared the sale deeds as null and void. The learned Senior Counsel would also state that the 1st Appellant has produced account books to prove that the 1st item was purchased in his name, that too only out of his own income and not from and out of any joint family nucleus.

11. The learned Senior Counsel would also state that the Trial Court had appreciated the oral and documentary evidence in a right perspective, whereas the First Appellate Court has erroneously over turned the well considered findings of the Trial Court, on incorrect application of law and also wrong appreciation of facts. He would therefore pray for the Second Appeal being allowed.

12. The learned Senior Counsel would place reliance on the following

decisions, in support of his arguments:

(i) R.V.E.Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Another reported in *(2003) 8 SCC 752*

(ii) K.Kalidass (deceased) and others Vs. P.Munusami and another reported in *2019-4-LW-166*

(iii) R.Selvaraj V. R.Radhakrishna Pillai and another reported in *AIR 1976 Mad 156*

(iv) G.Narayana Raju (dead) by his legal representative Vs. G.Chamaraju and others reported in AIR 1968 SC 1276

(v) Chattanatha Karayalar Vs. Ramachandra Iyer and another reported in *AIR 1955 SC 799*

(vi) Kiran Devi Vs. Bihar State Sunni Wakf Board and others reported in *2021 (5) CTC 575*

(vii) Rajendran and another Vs. Radhakrishnan and others reported in *2023-5-LW-1*

(viii) R.Raju (Died) Represented by LRs and others Vs. R.Ganesan and others in *A.S. (MD) No.16 of 2007 dated 24.03.2023.*

13. Per contra, the learned Counsel for the 1st Respondent, the Plaintiff in the suit Mr.N.Manoharan, would state that the brother of the 1st Plaintiff, had taken the Power of Attorney under the guise of straightening boundaries with a neighbouring land owner, had taken a power for sale of the properties from the Plaintiff and the mother and therefore, the Power of Attorney was not valid and therefore, the transaction were void and it was therefore not necessary for the Plaintiff to seek for declaring the sale deeds

as null and void or *void ab initio*. In so far as the 1st item, he would also state that the account books were not proved by examining the accountant and even the books were not certified by statutory authority and therefore, there was no sanctity for relying on the same.

14. Mr.N.Manoharan, learned counsel would also invite my attention to the oral evidence and contend that when the mother was critical in hospital, no son would go to register a property, that too in his wife's name and this would expose the attitude of the son and his evil design to grab all the properties of the mother as well as the Plaintiff. He would also refer to the account books and point out the entries being in different ink and would only probablise that they have been fabricated.

15. Mr.N.Manoharan, learned counsel for the first respondent would rely on the following decisions:

1) *Umadevi Nambiar Vs. Thamarasseri Roman Catholic Diocese represented by its Procurator Devssia's Son Rev. Father Joseph Kappil* reported in *(2022) 7 SCC 90*

2) *Kewal Krishan Vs. Rajesh Kumar and others* reported in *Manu/SC/1112/2021*

3) *Krishna Mohan Kul Alias Nani Charan Kul and Another Vs.*

Pratima Maity and others reported in *(2004) 9 SCC 468*

4) *Malla Naicker @ Singari and others Vs. Jeeva (minor) and others* reported in *2012 (1) CTC 128*

5) R/First Appeal No.5228 of 2019 – Division Bench judgment of the Gujarat High Court in *Jay Ambe Industries v. Garnet Specialty Paper Ltd.*

6) Chandradhar Goswami and others v. The Gauhati Bank Ltd. reported in *MANU/SC/0031/1966.*

7) Madras Cements Ltd. v. T.M.T. Kannammal Educational Trust reported in *MANU/TN/2754/2014*

16. The learned Counsel appearing for the purchasers would submit that they have all purchased respective items of the suit property, for valuable sale consideration and they have also been put in possession. Further, the General Power of Attorney executed by the Plaintiff and the mother of the Plaintiff was also a registered instrument, authorising the 1st Defendant to sell and therefore, the said sale deeds in favour all the third party purchasers should be held to be saved and suitable orders be passed.

17. I have carefully considered the rival submissions advanced by the learned Senior Counsel, Mr.S.Subbiah, appearing for the Appellants and Mr.N.Manoharan, learned counsel for the contesting Respondent, the Plaintiff and also all the learned counsel for the purchasers. That apart, I

have also gone through the pleading, oral and documentary evidence in original. I have also gone through the judgments of the Trial Court and the Appellate Court.

18. The case of the Plaintiff in short is that she is entitled to a ½ share in the suit properties, being Item Nos.1 to 6 and even though Item No.1 stands in the name of her brother, the 1st Appellant was purchased only out of joint family business income and in so far as other items, being ancestral properties, she had a share, being the daughter and therefore after the demise of the father and mother, both intestate, she is entitled to a share and that the brother knocked off her entire share by getting a Power of Attorney, on misrepresentation and having sold all the properties to various third party purchasers.

19. The Plaintiff admits the execution of the power of attorney, A4 = B1. The Power of Attorney is also a registered document, empowering the First Defendant to deal with the properties set out in the Schedule thereunder, viz., Item Nos.2 to 6. The 6th item has been sold by the First

Defendant to his wife, the 13th Defendant and the rest of the items are sold to third parties, for consideration. The 13th Defendant has thereafter sold the 6th item to the 14th to 16th Defendants.

20. I shall first take up the 1st item of suit property, which admittedly stands in the name of the 1st Defendant. The Plaintiff alleges that the said Item is also available for partition and it was acquired in the name of the 1st Defendant, from and out of joint family business funds. It is trite law that in such cases, the burden is only on the person who asserts the property to be joint family property, i.e. in this case, the Plaintiff. The Apex Court has also laid down the ratio on these lines in *Chattanatha Karayalar*'s case, *G.Narayana Raju*'s case as well as *R.Selvaraj*'s case, all referred herein supra. Eve recently, a larger bench of the Apex Court in *Kiran Devi*'s case, referred herein supra, has also reiterated the very same principles and held that there can be no presumption of joint family or business. Our Division Bench also, in *Rajendran*'s case, referred herein supra, has held that burden is on the Plaintiff to first show that there was sufficient nucleus which yielded large income and that out of surplus the property was purchased in the name of a member of the family. A similar view has also been taken by

another Division bench of our Court in *R.Raju's* case.

21. The Plaintiff has not filed any documents to establish that the said item of property was purchased in 1985 from and out of surplus business income that had accrued from and out of the business that was carried on by the father and the 1st Defendant.

22. Mr.N.Manoharan, learned counsel would also place reliance on the decision of this Court in *Malla Naicker*'s case, referred herein supra, where it has been held that a Kartha who claims the properties are his separate properties, it is his burden to establish the same.

23. In the present case, the 1st Defendant has been doing business right from 1981 and has also filed Ex.B9 to B16 account books and corresponding day books to show that he was doing business at the relevant point of time and that he had sufficient income to purchase the property. Mr.N.Manoharan, learned counsel for the first respondent has vehemently contended that the account books were fabricated and he would take me through the said ledgers and day books and state that the entries which have been stated by the 1st Defendant are of a different ink and handwriting

altogether and that the First Appellate Court had also refused to rely on the same as the accountant had not been examined and the accounts had also not been certified by the statutory authorities.

24. I have carefully perused the ledgers as well as day books. The account ledger tallies with the day book register. There are several business transactions that have taken place and it at least shows that the 1st Defendant was doing profitable business under the name and style of Mathankumar Traders. Though Mr.N.Manoharan, learned counsel would harp on some corrections in the ledgers and the day book, pertaining to one amount of Rs.70,000/- on 12.06.1985, I do not think that this one entry will tilt anything in favour of the Plaintiff. In fact, I have perused the cross examination of D.W.1 and there is not even a suggestion to D.W.1 that the accounts have been fudged.

25. Though Mr.N.Manoharan would rely on the ratio laid down by the Supreme Court *Chandradhar Goswami*'s case and our Court in *Madras Cements Limited*'s case and also the judgment of the Division bench of the Gujarat High Court, in *Jay Ambe Industries*' case, referred herein supra,

regarding admissibility of accounts, even the entry or the ledgers and day books that have been maintained in the ordinary course of business, which can be looked into in line with ratio laid down in *R.Ve.Venkatachala Gounder*'s case referred supra, when the burden is only on the Plaintiff to prove that the property was purchased in the name of the 1st defendant, out of joint family business income and the Plaintiff has not endeavoured to file any evidence whatsoever, in support of her claims, the Plaintiff cannot request the Court to take into account the weakness of the Defendant's claim and try to draw advantage out of the same, in her favour. Moreover, in cross, P.W.1, the Plaintiff has started that after her marriage in 1976, she left Erode and was living in Kulithalai and other places and therefore, her claims that the item 1 of the suit property was purchased out of the joint family business income remains only on paper and a self serving statement. The Trial Court had rightly held that the Plaintiff was not able to establish her claims of purchase of the said item only from and out of joint business income. However, the First Appellate Court shifted the burden on the 1st Defendant and pointing to lacuna in his evidence regarding the income of his business and non-certification of the accounts by a statutory authority, erroneously proceeded to hold that the said item of property was purchased only from and out of joint family business income, without any iota of evidence being adduced by the Plaintiff. Thus, the said finding of the First Appellate Court is unsustainable and liable to be set aside.

26. Coming to the remaining items of suit property, admittedly the Plaintiff, the 1st Defendant and their mother had a share in the said items and in order to dispose of the properties, the Plaintiff and the mother have executed a registered Power of Attorney in favour of the 1st Defendant, their brother/son respectively.

27. The Plaintiff admits execution of the Power of Attorney and also factum of registration. Her claim in the suit is however that she executed the said Power only for purposes of straightening the boundaries with the neighbour. If so, there was no necessity for the said Power to include all the items of suit properties, excepting Item No.1, which stood in the name of the 1st Defendant already. There was no requirement to add clauses empowering the Power Agent to deal with the property, including sale. As P.W.1, the Plaintiff has also stated that she executed it voluntarily. In fact even

according to P.W.1, she has also stated that the boundary issue was settled soon after she executed the Power of Attorney. However, the Plaintiff has not chosen to revoke the same immediately thereafter.

28. The Plaintiff has also not examined any person in connection with her claim that the said Power of Attorney was executed only for the purposes of straightening the boundaries. Interestingly, even when the Plaintiff chose to cancel the said Power of Attorney after the demise of the mother, in the cancellation deed which is marked as Ex.A.10, the Plaintiff only states that she has made alternate arrangements in respect of the properties and her mother had also passed away on 10.08.2010 and therefore, she was cancelling the power of attorney. She has also stated that her husband only prepared for execution and registration of the said cancellation deed. The said cancellation deed is dated 01.12.2010. According to the Plaintiff, she applied for encumbrance certificate on 11.12.2010 and came to know of the sales effected by the First Defendant. Strangely, the suit came to be filed 4 months thereafter on 12.04.2011. A person of prudence or reasonable mind, whose valuable right in immovable properties has been sold behind her back, based on a Power of Attorney

executed for a different purpose, would have rushed to Court or at least issued a notice or lodged a police complaint without any delay. The lethargy shown on the part of the Plaintiff raises a string doubt in the mind of the Court as to her bona fides.

29. The learned counsel for the 1st respondent, Mr.N.Manoharan would rely on the decision of the Hon'ble Supreme Court in *Umadevi Nambiar*'s case, where it was held that cancellation of alienations need not be challenged when the Power Agent had sold the properties. However, on facts, the Apex Court found that the Power Deed did not authorise the agent to sell and therefore in such circumstances, held that the alienations need not be challenged.

30. In *Krishna Mohan Kul's* case, the Hon'ble Supreme Court held that when transaction are executed in fiduciary relationships, the onus of proof will be on the person on whom the document is conferring benefit. Here, the document is only a power of attorney and the 1st defendant act only as an agent of the Plaintiff and therefore, the ratio laid down by the Apex Court cannot be applied to the facts of the present case, more so, when

the claim of the Plaintiff is that the power was necessary only for straightening boundaries with the neighbouring owner, but admittedly the Power of Attorney has been executed for several other properties and the Plaintiff also admits execution and registration of the deed, along with her mother.

31. In view of the foregoing, the 1st Defendant being the lawfully constituted General Power of Attorney Agent, empowered to sell the suit properties, especially Items 2 to 5, the Plaintiff is bound by the acts of the Power Agent and cannot repudiate the sale deeds in respect of Item Nos.2 to 5 of the suit properties. In fact, when the Plaintiff admits to execution of the General Power of Attorney and also the factum of its registration, the Plaintiff cannot seek a mere relief of partition, without first seeking to set aside the sale deeds executed by the 1st defendant, as duly constituted Power of Attorney Agent of the Plaintiff and the mother of the Plaintiff and 1st Defendant. Even from this angle, the suit, in so far as Item Nos.2 to 5 is not maintainable.

32. Coming to the 6th item of the suit properties, regarding the contention of the Plaintiff that her mother was in a critical condition and at that time the 1st defendant has chosen to execute a Sale Deed in favour of his own wife, the same cannot be brushed aside lightly. However, though the mother was admitted in the hospital on 03.12.2010 and died on 10.08.2010, on 09.08.2010, the sale in favour of the 13th Defendant was executed and registered in respect of the 6th item alone and the Plaintiff has also alleged that the said sale deed was without consideration. Though the 1st Defendant has denied that the mother was critical on 08.08.2010 and has stated that she was conscious and only on 10.08.2010 she was brought home and put on ventilator as she had only breathing problems. According to the 1st Defendant, he was not aware that his mother would die on the next day. In the light of such emphatical denial, the Plaintiff could have filed medical records or examined the doctor to prove her claims that on 08.08.2010, the mother was in coma or critical.

33. However, one circumstance that goes against the 1st Defendant is that when the Plaintiff has specifically denied that the sale deed in favour of

the wife of the 1st defendant was not supported by consideration, the 1st and 13th Defendants ought to have proved that the sale deed was for valid consideration. However, they have failed to produce any proof in this regard and therefore, the said sale in favour of the 13th Defendant is not valid in terms of Section 54 of the Transfer of Property Act, 1882. In, *Kewal Krishan*'s case, referred herein supra, the Hon'ble Supreme Court has held that a sale of immovable property has to be for a price and it is an essential part of the sale and when consideration is not proved, it would be a void document. Thus applying the ratio laid down by the Apex Court, to the facts of the present case, Item 6 of the suit property has to be treated as available for partition as there is also no requirement for the Plaintiff to challenge the said sale deed which is a void instrument.

34. It is however seen that the 13th Defendant has subsequently alienated the 6th item of property purchased by her, to Defendants 14 to 16. In the additional written statement, the 1st Defendant has in fact conceded for a share to be allotted to the Plaintiff in the said 6th item. Therefore, in view of the above discussions, the Plaintiff is entitled to a 1/4th share in Item

6 of the suit property alone.

35. The First Appellate Court has misdirected itself and failed to take note of available oral and documentary evidence on record and by erroneously placing the burden on the 1st Defendant, has proceeded to grant a decree for partition and in the process also committed a grave error in holding that the suit for partition simpliciter was not maintainable without a prayer for declaring the sale deeds in respect of Item Nos 2 to 5, which were only voidable and not void documents. The Plaintiff has not established her claims that the 1st defendant obtained the General Power of Attorney by misrepresentation and fraud.

36. I answer the substantial questions of law in favour of the Appellants and set aside the judgement and decree of the First Appellate Court, in part, confirming the decree for partition in respect of Item No.6 alone. No equity can be shown in favour of the Defendants 14 to 16 who are purchasers of the 6th item, when their vendor had no title and her sale deed was a void document. It is for the 1st and 13th Defendants to protect the purchasers of the 6th item, in a manner known to law, atleast by amicably

settling the 1/4th share of the Plaintiff in the said property by payment of a fair and reasonable consideration in lieu of the said 1/4th share of the Plaintiff, or alternatively refund the sale consideration received from defendants 14 to 16, together with reasonable interest, depending on factors like market value, possession etc.,

37. The Second Appeal is allowed in part, confirming the decree for partition in so far as Item 6 of the suit properties alone and setting aside the judgment and decree of the First Appellate Court in so far as the remaining Items viz., Item Nos.1 to 5. There shall be no order as to costs. Connected Miscellaneous Petition is closed.

01.03.2024

Index :Yes/No
Internet : Yes/No
Neutral Citation :Yes/No.
Speaking order/Non-speaking order
rkp

To
1.The Second Additional District Judge, Erode.

2.The Second Additional Subordinate Judge, Erode.

P.B.BALAJI, J.

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