IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 12.01.2024	Pronounced on: 31.01.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.814 of 2017
and
C.M.P.No.20372 of 2017

1.M.Kathirvel
2.K.Vaishnavi

...Appellants

Vs.

1.D.Arumugasamy
2.A.Mohankumar

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree of the learned II Additional District Judge, Salem dated 22.09.2017 in A.S. No.5 of 2017 confirming the Judgment and Decree of the learned I Additional Subordinate Judge, Salem dated 23.12.2016 in O.S. No.306 of 2007.

For Appellants : Mr.S.Sathiaseelan

For Respondents : Mr.B.Ravi, for Mr.R.Subramanian

JUDGMENT

The unsuccessful defendants who suffered a decree for declaration that the sale deed executed by the Power Agent, first defendant in favour of the second defendant as null and void are the appellants before me.

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

3. The brief and material facts that are required to adjudicate the Second Appeal are as follows:

The plaintiffs claimed to have purchased 2359 sq.ft of land under registered sale deeds. According to the plaintiffs, the first defendant created an unregistered power of attorney, as if the plaintiffs had authorised him to sell the suit property and based on the said power of attorney, the first defendant had executed a registered sale deed in favour of the second defendant, who was none else than the wife of the first defendant. According to the plaintiffs, the said sale deed was a result of forged documents and consequently, null and void.

4. The said suit was resisted by the first defendant by filing a written statement and an additional written statement. According to the first defendant, the power of attorney, as per the then existing laws, did not require registration and the allegation that the power of attorney was forged was stoutly denied. The sale deed executed in favour of the second defendant by the first defendant as Power Agent was valid and binding of the plaintiffs and on these grounds, the suit was sought to be dismissed.

5. Before the trial Court, the first plaintiff examined himself as P.W.1 and one Madheswaran was examined as P.W.2. Exhibits A1 to A7 were marked on the side of the plaintiffs. On the side of the

defendants, the first defendant examined himself as D.W.1 and Anbazhagan, Gunasekaran and Thangadurai were examined as D.W.2 to D.W.4 respectively. Exhibits B1 to B29 were filed. Exhibits C1 to C3 were marked as Court Exhibits, being the report of finger print from the Forensic Department.

6. The trial Court framed the following issues:

> *(i) Whether the general power of attorney dated 02.03.1998 is a forged one?*
>
> *(ii) Whether the plaintiff is entitled to claim declaration that the sale deed dated 11.10.2007 as null and void?*
>
> *(iii) to what relief?*

7. Answering the said issues, the trial Court held that the power of attorney was not a genuine document and the defendants did not prove passing of sale consideration and therefore, proceeded to decree the suit as prayed for. The trial Court also found that correct Court fee was paid by the plaintiffs and merely because Court fees was paid

under Section 25 and not under Section 40 of Court Fees Act, it could not be a ground to non-suit the plaintiffs.

8. The defendants preferred an Appeal in A.S. No.5 of 2017. The First Appellate Court, on independently assessing the oral and documentary evidence, alongside the pleadings of the parties, confirmed the findings of the trial Court and dismissed the Appeal.

9. Aggrieved by the said concurrent findings of the Courts below, the defendants have preferred the present Second Appeal.

10. On 24.11.2017, while admitting the above Second Appeal, this Court has framed the following substantial questions of law;

> *(a) The only case put up by the plaintiff that the power was forged having been found against still is the Lower Appellate court right in confirming the Decree of the Trial Court?*
>
> *(b) When the defendants have produced original parent documents coupled with a finding that the power is genuine is the Lower Appellate Court right in holding the sale is void?*

(c) Is the suit has framed is maintainable without the reliefs of declaration of titles and declaration that the power is void and unenforceable respectively?

11. Heard Mr.S.Sathyaseelan, learned counsel for the appellants and Mr.B.Ravi, learned counsel for the respondents.

12. I have gone through the pleadings, oral and documentary evidence adduced by the parties and also the judgments on which the reliance is placed by the learned counsel on either side.

13. The learned counsel for the appellants would attack the concurrent findings of the Courts below mainly, on the ground that the Courts below failed to see that in the absence of a prayer challenging the power of attorney executed by the plaintiffs, the suit was not maintainable as framed and consequently, the Courts below have committed a grave error in decreeing the suit. The learned counsel would also state that the Courts below have wrongly shifted the

burden on the defendants and instead, ought to have placed the burden of proof on the plaintiffs who approached the Court seeking the relief of declaration. In this regard, he also placed reliance on judgments of the Hon'ble Supreme Court viz., ***Anil Rishi vs. Gurbaksh Singh*** reported in ***(2006) 5 SCC 558, Rangammal vs. Kuppuswami and another*** reported in ***(2011) 12 SCC 220 and Sebastiao Luis Fernandes (Dead) vs. K.V.P.Shastri*** reported in ***(2013) 15 SCC 161.***

14. Further, the learned counsel for the appellants would state that at the time of the execution of the power of attorney, the law did not require registration of the same. Further, he would also place reliance on the letter dated 30.01.2019, which a clarificatory letter in nature, issued by the Inspector General of Registration regarding effect of non registration of power of attorney.

15. The learned counsel would also attack the concurrent

findings on the ground that insofar as sale consideration, there was no plea by the defendants in the written statement and in the absence of any such plea, no amount of evidence could be adduced by the parties. He would also place reliance on the decisions of the Hon'ble Supreme Court to drive home his submissions.

16. Finally, the learned counsel for the appellant would state that when the plaintiffs had alleged fraud, it was incumbent on them to plead and also proved and the plaint was totally lacking in any pleadings pointing out to any act of fraud as alleged by the plaintiffs. In this regard, he would place reliance of the decision of the Hon'ble Supreme Court in the case of ***Canara Bank Vs. P.Selathal and Others*** reported in ***(2020) 13 SCC 143***.

17. Further, the learned counsel for the appellants would also drawn any attention to Section 85 of the Indian Evidence Act, 1872 regarding presumptions of powers of attorney. In this regard, he

would place reliance on decision of this Court in the case of ***PSA Ennore Pte. Limited, Rep. by Kenny Low, its Authorised Signatory V. Union of India, Rep. by its Secretary and another*** reported in ***(2010) SCC online Madras 198.***

18. Per contra, Mr.B.Ravi, learned counsel for the respondents would submit that the plaintiffs had purchased the suit property under various sale deeds and suit property consisted of four items. The plaintiffs were not aware of the fraud committed by the first defendant, until when they applied for encumbrance certificate at the time of deciding to sell the suit property to one, Gajalakshmi.

19. The learned counsel for the respondents would submit that there was no necessity to challenge the power of attorney as the power of attorney was a void document according to the plaintiffs. He would further contend that the power of attorney was not produced before the Court and the consideration was also not proved to be passed on to the

principal. Being a Power Agent, the Agent was accountable to the principal for the sale consideration received from the purchaser and the sale deed itself is a nominal and sham document, executed without consideration by the husband, Power Agent in favour of his wife and therefore, a challenge to the sale deed alone would suffice, according to the learned counsel for the respondents.

20. The learned counsel would further state that the appellants/ purchasers never got into the box and adverse inference ought to be drawn against the purchasers. He would also invite my attention to the evidence adduced by the parties in order to contend that the parties are aware of the facts in issue, the findings of the trial Court and First Appellate Court cannot be challenged on the ground that the issues were framed without a pleading. He would further invite my attention to the evidence adduced by the parties with regard to issues framed by the Court and therefore, he would state that no prejudice was caused to the appellant by the trial Court framing the issues with regard to the

validity of the power of attorney, though not specifically challenged in the plaint.

21. Finally, the learned counsel for the respondents submits that being concurrent findings of fact, based on pleadings, proper appreciation of oral and documentary evidence, the same that does not require interference under Section 100 of Civil Procedure Code. The learned counsel for the respondents placed reliance on two decisions of the Hon'ble Supreme Court in the cases of ***Ramathal and others V. K.Rajamani (Dead) through Lrs and another*** reported in ***AIR 2023 SC 3978*** and ***Kewal Krishan vs. Rajesh Kumar and Others*** reported in ***2021 SCC Online SC 1097***, in support of his contentions.

22. Adverting my focus and attention to the substantial questions of law framed at the time of admission of the above Second Appeal and in order to answer the same, I briefly proceeds to discuss the material and relevant pleadings and evidence of the parties. In the

plaint, the plaintiffs have stated that the first defendant has created an unregistered power of attorney, as if the plaintiffs gave the same to him to sell the suit properties.

23. The further case of the plaintiffs is that based on the said power of attorney, the sale deed has been executed by the Power Agent in favour of his wife, the second defendant. Therefore, the sum and substance of the case projected by the plaintiffs was that they did not execute any power of attorney in favour of the first defendant and consequently, the sale deed executed by the first defendant as if, she was a power of attorney of the plaintiffs was null and void.

24. It is the submissions of the learned counsel for the appellants that the pleading lack material particulars with regard to fraud committed by the defendants and plaintiffs have miserably failed to discharge the burden of proof on them. The learned counsel for the appellants also placed reliance on the findings of the finger print expert and report which confirmed the fact that the signatures in the

power of attorney were that of the plaintiffs only. With regard to the framing of the suit without a prayer for declaring the power of attorney to be null and void, the learned counsel for the appellants would place strong reliance of the decision of the Hon'ble Supreme Court, in the case of ***G.Rama Vs. T.G.Seshagiri Rao (Dead) by LRs.*** reported in ***(2008) 12 SCC 392,*** where the Hon'ble Supreme Court dealing with the suit for partition held that when there is no challenge to the release deed in the suit for partition and the appellants had taken a stand that it was a joint family property and no specific issue regarding nature of property was framed, not only evidence was also not let in in that regard, proceeded to dismiss the Appeal. However, in the facts of the present case, though, there were no specific challenge to the power of attorney, by way of a separate prayer, the trial Court had framed a specific issue with regard to the genuineness of the power of attorney and the parties also let in evidence in support of this respective contentions, addressing the said issue. In the light of the same, the ratio laid down by the Hon'ble Supreme Court in

G.Ramas's case (cited supra) where there was neither an issue nor evidence, cannot be made applicable to the facts of the present case.

25. The learned counsel for the appellant placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Bachhaj Nahar Vs. Nilima Mandal and another***, reported in ***(2008) 17 SCC 491,*** where the Hon'ble Supreme Court found fault with the High Court, ignoring the principle relating to object and necessity of pleadings in a suit based on easementary rights. The Hon'ble Supreme Court has held that when facts necessary to make out a particular claim or to seek a particular relief are not found in the claim, the Court cannot focus the attention of the parties or its own attention on such claim or relief by framing an appropriate issues. Again the ratio laid by the Hon'ble Supreme Court in this case cannot be applicable to the facts of the present case.

26. The specific case of the plaintiffs is that they have not

executed any power of attorney in favour of the first defendant. In such view of the matter, the plaintiffs cannot be called upon to provide any further particulars or materials with regard to such a document, which according to them is not within their knowledge. However, based on the defence set up by the first defendant, the trial Court has proceeded to frame an issue regarding the validity of the power of attorney and the parties thereupon have consciously chosen to lead evidence regarding the said issue as well. Only thereafter, the trial Court has decided the issue regarding the validity of the power of attorney, that too, after discussing the relevancy of the opinion of expert into account. Thus, in the facts of the present case, I am unable to see any irregularity committed by the trial Court in framing an issue with regard to validity of the power of attorney.

27. The learned counsel for the appellant would place reliance decision of ***M.Meenakshi and others vs. Metadin Agarwal (Dead) by LRs and others*** reported in ***(2006) 7 SCC 470*** where the Hon'ble

Supreme Court held that even a void order is required to be set aside by a competent Court of law as a void order may not be necessarily non-est. However, the Hon'ble Supreme Court was dealing with an order passed by the competent authority under the Urban Land Ceiling Act and in that context had held that even a void order was required to be set aside. The said ratio cannot be extended to a case where there is absence of challenge to a power of attorney.

28. The learned counsel for the Appellant would place reliance on the decision of the Hon'ble Supreme Court in the case of ***Rangammal Vs. Kuppuswami and another reported in (2011) 12 SCC 220***, regarding burden of proof. The learned counsel for the appellant would strongly contend that the burden of proof was only on the plaintiffs to establish that the power of attorney was forged as claimed by them and the Courts below had erroneously shifted the burden on the defendants and proceeded to decree the suit as prayed for by the plaintiffs. He would also place reliance on the judgment of

the Hon'ble Supreme Court in the case of ***Sebastriao Luis Fernandes (Dead) through LRs and Others Vs.K.V.P.Shastri (Dead) through LRs and others*** reported in ***(2013) 15 SCC 161*** and in the case of ***Anil Rishi Vs. Gurbaksh Singh*** reported in ***(2006) 5 SCC 558*** for the very same proposition regarding the burden of proof.

29. Section 101 of the Indian Evidence Act, reads thus:

> *"101. Burden of proof - Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"*

30. From a reading of Section 101 and also in view of settled legal position, the burden of proof of a particular fact always lies on a person who asserts the said facts. Unless and until, the initial burden stands discharged, the other party is not called upon to prove his case. Here, admittedly it is the first defendant who claims that the plaintiffs

have executed an unregistered power of attorney in his favour. Thus the burden of proof insofar as proving the said power of attorney is only on the first defendant and not the plaintiffs. On the facts of the case before the Hon'ble Supreme Court, it had held that the burden of proof was on the plaintiff to establish that the sale deed had been executed only for legal necessity and for the benefit of the minor and the facts of the said case stand on an entirely different footing altogether.

31. In fact, the Hon'ble Supreme Court in the said case referred earlier decision of the Apex Court, the case of ***Subhra Mukherjee V. Bharat Coking Coal Ltd,*** reported in ***(2000) 3 SCC 312.*** The Hon'ble Supreme Court discussed the law on the question of burden of proof with regard to sham and bogus transaction and the Hon'ble Supreme Court held that when the issue of documents being genuine or sham or bogus was at large, the party who alleged that the documents are bogus had to prove nothing, until the party relying upon

the document establishing it to be genuine. Thus, it can be seen that the Hon'ble Supreme Court has consistently interpreted Section 101 of the Evidence Act and held that when the plaintiff alleges fraud, validity or genuineness of the documents assailed or that the said document is bogus, the burden of proof is only based on the persons who rely upon the said document. It is first and foremost, the requirement of such party claiming under the document to prove its genuineness, before the burden stands shifted to the other party. Therefore, I do not find any merit in the submission of the learned counsel for the appellant that the Courts below had erroneously placed the burden of proof on the first defendant, instead of the plaintiffs.

32. The learned counsel would also rely on the decision of the Hon'ble Supreme Court in the case of ***Canara Bank Vs. P.Selathal and others*** reported in ***(2002) 13 SCC 143,*** arising under the debt recovery laws where, the Hon'ble Supreme Court held that when there are allegations of fraud in the plaint, specific instances and acts of

fraud with evidence have to be pleaded in the plaint. The said decision was rendered on an entirely different context altogether, where there were allegations with regard to fraud in respect of a partnership deed and in such circumstances, the Hon'ble Supreme Court found that the allegation of fraud was illusory and not specifically pleaded and proved by the plaintiff. However, in the instant case, the execution of the very power of attorney itself is denied by the plaintiffs and I do not find anything more required to be pleaded in such circumstances. The first defendant is claiming benefit under the said power of attorney and therefore, it is incumbent on the first defendant to prove the genuineness of the said power of attorney, including its due execution.

33. The next question that falls for consideration is with regard to the opinion of the finger print expert and the reports that have been marked as Exs.C1 to C3. It is now well settled law that even though the Court has the benefit of expert evidence, it should cautious in

evaluating the same. The Hon'ble Supreme Court has in ***Chennadi Jalapathi Reddy Vs. Baddam Pratapa Reddy (dead) through Lrs & anr***, reported in ***2019 (14) SCC 220***, held that the expert evidence is a weak type of evidence and not substantive in nature and it may not be safe to solely rely upon such evidence and the Court may seek independent and reliable corroboration in the facts of the given case.

34. The Courts below have rightly focussed their attention to this aspect and held that the report of the expert is not to be accepted, having regard to the facts and circumstances of the case.

35. I do not find any infirmity in the said procedure followed down by the Courts below, disregarding the expert opinion's report and findings.

36. The learned counsel for the respondents would place reliance on the decision of the Hon'ble Supreme Court in the case of

Ramathal and others V. K.Rajamani (Dead) through LRs and another, reported in ***AIR 2023 SCC 3978***, where the Hon'ble Supreme Court held that when a document of sale was void, then there was no necessity to seek cancellation of the same. Before the Hon'ble Supreme Court, it was a case where the power of attorney was executed for development of lands and additional clauses authorising the agent to sell, gift and settle. The same were found to be never intended. The Hon'ble Supreme Court held that the issue regarding ownership and possession of the plaintiff would cover the issue of *nonest* fact and the plaintiff cannot be non suited on the ground that there was no prayer seeking to declare the sale as void. The learned counsel for the respondents would further place reliance on the decision of the Hon'ble Supreme Court in the case of ***Kewal Krishan Vs.Rajesh Kumar and others*** reported in ***2021 SCC Online 1097***, where the Hon'ble Supreme Court dealing with Section 54 of Transfer of Property Act , 1882 relating to sale, held that sale of immovable property has to be for a price and the price may be payable in future also. However, the sale deed consideration having been paid and the plaintiff having specifically stated that the sale deeds were without consideration and sham and nominal and when there was a specific pleading that the sale deed was void, the Hon'ble Supreme Court held that it was not necessary for the plaintiff to seek a relief of declaration. The Hon'ble Supreme Court held that it is for the party producing the document to prove the same and applying the ratio to the facts of the present case, the first defendant had claimed right under the power of attorney executed, alleged to have been executed by the plaintiffs, which has been stoutly denied by the plaintiffs. Thus, it is for the first defendant to prove that the plaintiffs had executed the power of attorney and the plaintiffs cannot be called upon to prove the negative.

37. Even with regard to consideration, the plaintiffs have set out in the plaint that they have not executed any power of attorney in favour of the first defendant to sell the suit property. Thus, this is the

best possible pleading and the plaintiffs cannot give any further particulars, since it was not within the plaintiffs' knowledge. Therefore, it was only for the defendants to establish that the plaintiffs had in fact executed the power of attorney and based on the said power of attorney, the sale deed had been executed by the first defendant in favour of the second defendant. Admittedly, the second defendant is the wife of the first defendant. The sale deed clearly mentions that the purchaser namely, the second defendant has paid a valid consideration to the first defendant. The first defendant claims only to be the power of attorney of the plaintiffs. Therefore, he is accountable to the plaintiff, for the sale consideration received from the second defendant. However, the defendants have failed to prove that the sale consideration was in fact paid under the said sale deed. Applying the ratio of the Hon'ble Supreme Court as referred herein supra, in ***Kewal Krishan*** case, (referred supra) if passing of consideration is not established, then the document would only have to be declared a sham or void document and the Hon'ble Supreme Court even went to the extent of holding that the plaintiff in such a case, need not seek declaration that the sale deed is a void document and he could prove it even in the absence of such a prayer in the suit. Here, on the facts of the present case, the plaintiffs have challenged the sale deed based on the alleged execution of the power of attorney by the plaintiffs in favour of the first defendant. The second defendant who seeks entire benefit by way of purchase under the sale deed has not chosen to enter the witness box to defend her title. It is only her husband, the alleged Power Agent of the plaintiffs who have chosen to give evidence. The passing of considerations is a vital and necessary component of any sale transaction in terms of Section 54 of the Transfer of Property Act and when plaintiffs have challenged the sale deed as being a result of fraud and that the sale was not a valid document in the eye of law. Here, admittedly, the sale deed has been executed by the husband claiming to be a power of attorney of the plaintiffs, in favour of his own wife. Though there is a mention about passing of sale consideration, the defendants have not been able to establish that there has been actual passing of sale consideration under the said sale deed. In any event, the first defendant claims to be a power of attorney of the plaintiff, was accountable to the owner for the sale consideration received from the second defendant. Unfortunately, the first defendant has miserably failed to establish the materials particulars, especially when the burden was very much on him to establish the genuineness of the sale deed as well as the power of attorney based on which, the sale deed came to be executed.

38. With regard to non registration of the power of attorney, though I am in agreement with the arguments of the learned counsel for the appellant that at the relevant point of time when the sale deed was executed in favour of the second defendant, the law prevailing was different and it was not necessary for registration of the power of attorney. Moreover, it was much later that the registration of power of attorney became mandatory in the State of Tamil Nadu. However, from the above discussions, it is not only the question of non-

registration of power of attorney which has resulted in the decree being suffered by the appellants. Even otherwise, the courts have concurrently found that the appellants have not discharged the burden of proof on them.

39. I do not see any perversity in the approach of the Courts below to exercise jurisdiction and interference under Section 100 of CPC. When the High Court finds that there is no perversity or illegality in the findings arrived at by the Courts below and there is no substantial questions of law arising for consideration, the High Court would not interfere with the finding. Unless the findings are a result of mis-application of either law or mis-appreciation of evidence or omission to rely on material evident etc, the High Court, exercising jurisdiction under Section 100 of CPC is not required to interfere with concurrent findings arrived at by the Courts below. I do not find any merit in the Second Appeal and all the Substantial questions of law are answered against the appellants. The Second Appeal is dismissed.

No costs. Consequently, connected Miscellaneous Petition is also dismissed.

31.01.2024

Index : Yes/No
Internet : Yes/No
rkp

To

1. The II Additional District Judge, Salem
2. The I Additional Subordinate Judge, Salem

P.B.BALAJI, J,

rkp

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