



A.S(MD) No.7 of 2023

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Dated: 31.01.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD) No.7 of 2023

and

C.M.P(MD) Nos.234,5763 and 16520 of 2023

Arul Kavimani

... Appellant/1st defendant/
Counter claim petitioner

Vs.

1. Amalirani

... 1st Respondent/2nd defendant
Counter claim Respondent

2. K.P.Selvam

... 2nd Respondent/Plaintiff

Prayer : This Appeal Suit has been filed under Section 96 r/w.Order XLI Rule 1 of C.P.C, to against the judgment and decree dated 05.07.2022 in O.S. No.43 of 2016 and in the counter claim of the original suit on the file of the Additional District Judge, Ramanathapuram

For Appellant : Mr.Arulkavimani

(Party in person)

For Respondent :Mr.Vinayagamoothy

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree passed in O.S. No.43 of 2016 and in the counter claim of the original suit on the file of the Additional District Judge,



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Ramanathapuram, wherein the second respondent has filed the suit for declaration that the sale deed dated 23.07.1997 and document No.581 of 1997 as null and void and for permanent injunction. The first defendant i.e, the appellant herein also filed counter claim as against the second defendant for the relief of partition. The trial Court has dismissed the suit and the counter claim. As against the decree and judgment passed in the suit, the present appeal has been filed by the first defendant/counter claim petitioner.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Trial Court.

3. The averments of the plaint are as follows:

The defendants 1 and 2 are the brothers and sisters of the plaintiff. The plaintiff executed a general power of attorney dated 08.08.1997 in favour of the first defendant. Subsequently, the plaintiff revoked his power of attorney and the same was intimated to the first defendant on 02.06.1997 and the cancellation deed was registered on 02.07.1997. The first defendant has fraudulently created the sale deed dated 23.07.1997 in favour of the second defendant without any sale consideration after execution of



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cancellation of power deed by the plaintiff. The said deed dated 23.07.1997, was completely suppressed by the defendants and the same came to the knowledge of the plaintiff only on 28.06.2013. The plaintiff has executed Will dated 04.06.1997 in favour of his minor daughter. The first defendant after knowing fully well that the power deed had been cancelled, conspired with the second defendant and executed sale deed and the same is illegal. The first defendant has no power to execute the sale deed in favour of the second defendant and no consideration was paid, thereby, the sale deed dated 23.07.1997 is voidable. Hence, the plaintiff filed a suit for the relief of declaration that the sale deed dated 23.07 1997, is null and void and for permanent injunction.

4. The brief averments of the written statement filed by the first defendant are as follows:

The plaintiff had appointed the first defendant as his power agent through registered General Power of attorney dated 08.08.1994, to sell the suit property. The first defendant had never received the information in respect of termination of the power of attorney deed, cancellation of power of attorney deed. On the date of sale deed, there was no restriction upon the first defendant that he should not sell the property. Infact, the plaintiff was part of the



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family discussions about the sale, date and other co-ordinations for the registration process. There is no cause of action for the suit and the cause of action averred is not correct. In order to get unlawful gain the present suit is filed and hence, the suit is liable to be dismissed.

5. The brief averments of the written statement filed by the second defendant are as follows:

The plaintiff appointed the first defendant as power agent through power deed dated 08.08.1994. It is false to state that the plaintiff cancelled power deed on 02.06.1997. Infact the second defendant had purchased the suit property from the power agent of the plaintiff, namely, the first defendant for good and valid consideration. On and from the date of the sale deed, the second defendant is in absolute possession and enjoyment of the property and she had also transferred patta in her name and paid revenue taxes to the Government . It is false to stated that the plaintiff had given a letter dated 02.06.1997, to the first defendant and the same was fraudulently created for the purpose of suit. The power of attorney deed executed by the plaintiff in favour of the first defendant was not cancelled on 02.07.1997 and there was no entry in the concerned Registrar's office. In the sale deed dated



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23.07.1997 itself there was a mention about the sale consideration that the first defendant had already obtained amount from the second defendant to discharge his loan amount and the first defendant has totally received Rs.1,00,000/- from the second defendant and executed sale deed. The second defendant did not commit any fraud in getting the sale deed from the first defendant. After the sale deed dated 23.07.1997, the plaintiff had no right, title, interest over the suit property and the suit property absolutely belongs to the second defendant. The Court fee paid by the plaintiff is not correct. Hence the suit is liable to be dismissed.

6. The brief averments of the counter claim filed by the first defendant are as follows:

The family dispute with regard to the suit property is not settled amicably among the family members and in the first week of August 1994 it was decided by the parents that the suit property would be transferred by the plaintiff to the first defendant after collecting Rs.1,00,000/- from the first defendant. The decision of the parents was followed by the first defendant and she has paid Rs.1,00,000/- by way cash to the plaintiff. The power of attorney deed dated 08.08.1994 was executed to the first defendant only after receiving one lakh as the value of the suit property. In the first week



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of July 1997, it was decided by the parents that the suit property needs to be transferred to the second defendant and other daughter Idhaya rani. However, as his daughter was not in good condition with this defendant she did not show any interest in the registration dated 23.07.1997. The parents instructed the second defendant to function as custodian of the property until the family comes into good terms with each other. Therefore, the second defendant has to transfer $\frac{1}{2}$ share to Idhayarani. The first defendant had requested the second defendant to honour her commitment and transfer $\frac{1}{2}$ of the suit property to other daughter Idhayarani. However, the second defendant is evading from transferring the said $\frac{1}{2}$ share to Idhayarani. Therefore, the property has to be partitioned into two equal shares for the two daughters of the family.

7. The reply statement filed by the second defendant are as follows:

The first defendant cannot file counter claim as against the second defendant and the same is not maintainable. The first defendant prayed the relief of partition of the share belonging to his sister Idhayarani, who is not a party to the suit. No counter claim is maintainable, seeking the relief against the person who was not added as a party in the suit. The first defendant acting as power



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agent of the plaintiff has executed sale deed in favour of the second defendant for valid consideration and delivered the possession of the suit property to the second defendant. The first defendant received the sale consideration of Rs.1,00,000/- and then only executed the sale deed. Therefore, Idhayarani has no right over the properties and she also did not have any share over the property and hence, the counter claim is liable to be dismissed.

8. Based on the above said pleadings and hearing both sides, the trial Court has framed the following issues and additional issues:

Issues:

- 1) Whether the plaintiff is entitled to get the relief of declaration that the sale deed dated 23.07.1997 vide document No. 581/1997 is null and void?
- 2) Whether the plaintiff is entitled to get the relief of permanent injunction as prayed for?
- 3) Whether this Court has no pecuniary jurisdiction to try this suit?
- 4) To that other relief and cost the plaintiff is entitled?

Additional Issue:

- 1) Whether the counter claim by the first defendant is maintainable?



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9. In order to prove the case before the trial Court, on the side of the plaintiff P.W.1 was examined and Exs.A1 to A9 were marked and on the side of the defendants D.W.1 and D.W.2 were examined and documents Exs.B.1 to B.16 were marked and on the side of the Court, Ex.C.1 was also marked.

10. After analysing the evidence adduced on both sides, the trial Court has dismissed the suit as well as the counter claim. As against the decree and judgment of the suit and counter claim the present appeal has been filed on various grounds.

Grounds of appeal

1) the decree and judgment of the trial Court dated 05.07.2022 upon the counter claim of the appellant/first defendant are against law, weight of evidence and probabilities of the case.

2) the trial Court erred in allowing the suit in favour of the second defendant as its findings are based on unsubstantial pleading of second defendant and plaintiff as far as the counter claim of this appellant is concerned. The decree and judgment of the trial Court are not based on any sound principles of law.



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3) the trial Court erred by concluding that issue no.1 and additional issue no.1 are inter connected.

4) the parties to the suit are co-brothers and the sisters of the same parents. The counter claim by the brother to establish right of another sister who is not a party to the suit in the counter claim.

5) the trial Court erred in concluding that to allot half share to his sister, who is not a party to the suit, is not maintainable in law.

6) The trial Court failed to appreciate the exhibits of evidence in the trial.

7) the trial Court erred by not applying the principles of equity in the suit?

8) the depositions of witnesses were not interpreted soundly in combination with the exhibits.

11. The learned counsel appearing for the appellant would contend that the appellant has filed the suit for declaration of the sale deed dated 23.07.1997 as null and void. The plaintiff had executed the power of attorney of deed dated 02.06.1997 in favour of the first defendant and thereafter, the power deed was cancelled



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on 02.07.1997, but the first defendant has executed the sale deed after the cancellation of the power deed i.e. on 23.07.1997. The defendants colluded with each other and created fraudulent documents by suppressing the power of attorney deed. In order to prove his case, he has examined P.W.1 and marked documents Ex.A.1 to A9. Ex.A.3 is the general power deed revocation letter. Ex.A.4 is the general power deed cancellation document. The trial Court without considering that the sale deed was executed after the cancellation of the power deed dismissed the suit. Further the first defendant has filed counter claim for partition of the properties stating that the properties belong to the second defendant and her sister Idhayarani but the trial Court without considering the evidences adduced by the parties erroneously dismissed the counter claim and therefore the decree and judgment passed by the trial Court, dismissing the suit and counter claim are liable to be set aside.

12. The learned counsel appearing for the first respondent would contend that the appellant and the second respondent herein are brothers and sisters and the second respondent herein executed the power deed in favour of the appellant, dated 08.08.1994, and based on the power deed, the appellant herein had



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executed the sale deed in favour of the first respondent on 23.07.1997 and on and from the date of sale deed itself the first respondent is in possession and enjoyment of the property and on the date of sale deed, the power deed has not been cancelled. Inorder to prove the case of the plaintiff, he has examined himself as P.W.1 and no other witnesses were examined. On the side of the defendants D.W.1 and D.W.2 were examined and documents Exs.B.1 to B.16 were marked. The trial Court after analysing the evidence adduced on both sides dismissed the suit as well as counter claim by holding that the plaintiff has no right over the property after the sale deed dated 23.07.1997. The cancellation of power deed was registered only on 30.07.1997 i.e., after the sale deed. Therefore, the present appeal is liable to be dismissed.

13. This Court heard both sides and perused the records and upon hearing both sides and perusing the records including the judgment of the trial Court, the points for determination in this appeal are as follows:

1) Whether the sale deed was executed in favour of the second defendant by the first defendant after cancellation of the power deed?

2) Whether the suit is barred by limitation?



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3) Whether the plaintiff is entitled for a decree of declaration that the sale deed dated 23.07.1997 vide document No.581 of 1997 is null and void?

4) Whether the plaintiff is in possession of the suit property?

5) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

6) Whether the judgement and decree of the trial Court are sustainable in law and on facts ?

7) Whether the appeal is liable to be allowed or not ?

8) Whether the Court fee paid by the plaintiff is correct?

14. During pendency of appeal the appellant has filed an application under Order 41 Rule 27 to receive some documents as additional evidence in CMP(MD)No.16520 of 2023. According to the petitioner/appeallat he filed the petition to receive the documents of unregistered sale deed which was produced before the trial Court in I.A. NO.113 of 2007 in O.S. No.43 of 2016 and not marked by the trial Court. The said document is unregistered sale deed. The plaintiff/appellant has only produced the xerox copy of the unregistered sale deed and the same is not in accordance with law. Further the said document is not properly stamped, thereby it cannot be marked and the trial court itself has not marked the said



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documents. Therefore the petition filed by the petitioner/appellant is liable to be dismissed.

Point No.1

15. In this case, there is no dispute in respect of relationship of the parties and the plaintiff and the defendants are brothers and sisters. The plaintiff is none other than one of the brother of the defendant. According to the plaintiff, he is the owner of the suit property and he has executed the power of attorney deed in favour of the second defendant dated 08.08.1994. Thereafter, he instructed the cancellation of power deed through letter dated 02.06.1997 and thereafter, he prepared the document for cancellation of power deed dated 02.07.1997 and then the same was registered on 30.07.1997. The above said cancellation of power deed was informed to the first defendant, despite that, the first defendant colluded with the second defendant and executed the sale deed and the same came to the knowledge of the appellant only on 28.06.2013. Thereafter, he filed the suit for declaration that the sale deed executed by the first defendant in favour of the second defendant as null and void. According to the first defendant, he admitted the execution of power deed in his favour and also the sale deed executed in favour of the second defendant and the first defendant also denied the passing of consideration. According to the second defendant she purchased the



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property from the first defendant based on the power of attorney deed executed by the plaintiff by paying consideration of Rs.1,00,000/-. Therefore, the plaintiff has to prove that he had cancelled power of attorney deed prior to the execution of the sale deed by the first defendant in favour of the second defendant.

16. In this context the plaintiff was examined as P.W.1 and he deposed about the execution of power of attorney deed and cancellation of power deed and also produced documents Ex.A1 to A9. A1 is the original sale deed, A2 is the original sale deed, A3 is the revocation letter dated 02.06.1997, A4 is the general power deed cancellation document dated 02.07.1997. On a perusal of those documents, they reveal that though general power of attorney revocation letter was dated 02.07.1997, there is no proof that the same was served to the first defendant. The Ex.A4 is cancellation document but the plaintiff has produced the document of cancellation of power deed but the same was registered only on 30.07.1997. Therefore, the plaintiff has failed to prove that the cancellation of power deed was prior to the date of sale deed in favour of the second defendant. The plaintiff also admitted the sale deed executed by the first defendant in favour of the second defendant, but his only contention is that prior to that power of



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attorney deed was cancelled. The plaintiff has miserably failed to produce any documents to prove the same. Per contra the available documents show that the cancellation of power of attorney deed was registered only on 30.07.1997 i.e., after the sale deed in favour of the second defendant executed by the first defendant. Therefore, this Court is of the opinion that the plaintiff has miserably failed to prove his case and the available records show that the sale deed was executed prior to the date of cancellation of power deed. Thus point no.1 is answered.

Point No.2:

17. In this case, the defendants have not specifically pleaded about the limitation, however, in the pleadings they have stated that the averments in the plaint that the plaintiff came to the knowledge of the sale deed only on 28.06.2013 is false and on the date of the sale itself, the plaintiff has knowledge about the sale deed. Whiles, it is the duty of the plaintiff to establish that when he came to know about the knowledge of the sale deed. According to the plaintiff, it came to his knowledge only on 28.06.2013 but the plaintiff cancelled the power deed on 30.07.1997. The plaintiff after knowing the sale deed registered the power of attorney cancellation deed was registered and thereby, he has knowledge about the sale deed dated 23.07.1997. Therefore the contention of the plaintiff is not



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acceptable one and the suit is barred by limitation. Thus, point No.2 is answered.

Point No.3

18. The contention of the plaintiff is that he cancelled the power of attorney deed dated 08.08.1994 through document dated 02.07.1997 and the sale deed was executed on 23.07.1997 and therefore, the first defendant has no right to execute the sale deed in favour of the second defendant. But, already this Court had discussed and decided in previous points that the plaintiff has proved the cancellation of power deed, but the sale deed was executed before registration of powerdeed, therefore, the plaintiff is not entitled to the relief of declaration in respect of the sale deed. This Court also in the previous point decided that the suit is barred by limiation, thereby the plaintiff is not entitled to the decree of declaration in respect of sale deed. Thus point no.3 is answered.

Points Nos. 4 and 5

19. The plaintiff has sought for the relief of permanent injunction in respect of the suit properties, alleging that he is in possession and enjoyment of the property. In order to prove the same, the plaintiff has not produced any documents. Per contra the defendants side evidence shows that after the sale deed patta was transferred in their name and property tax was also mutated in the



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name of the second defendant and to that effect she has produced Exs.B.7 to 11 and thereby the second defendant proved that she has been in possession and enjoyment of the property, but the plaintiff failed to prove his possession by filing sufficient documents. Moreover, the plaintiff himself admitted that he filed suit for declaration in respect of the sale deed. Already this Court also declined to grant the relief to set aside the sale deed and the plaintiff miserably failed to prove his possession over the property. The main requirement to grant permanent injunction is exclusive possession. But in this case, the plaintiff has not proved exclusive possession of the suit property, thereby, the plaintiff is not entitled to the relief of permanent injunction in respect of suit property. Thus point Nos. 4 and 5 are answered.

Point No.6

20. The trial Court in the judgment elaborately discussed about the evidence adduced on both side and fairly came to conclusion that the plaintiff failed to prove that the cancellation of power of attorney deed is not genuine and the sale deed was registered only after registration of sale deed and also discussed that the plaintiff has not proved his case through sufficient evidences and fairly came to the conclusion that the suit is liable to be dismissed and dismissed the suit. Therefore there is no infirmity



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or perversity found in the decree and judgment of the trial Court and thereby this Court finds no necessity, warranting interference in the decree and judgment of the trial Court. Thus point No.6 is answered.

Point No.7

21. The plaintiff has sought for declaration in respect of the document dated 23.07.1997. The plaintiff is the party to the document and the document was executed through his power agent of the plaintiff and thereby he has to pay court fee under Section 40 of the Court fee for the value of the document in which he sought for declaration, but the plaintiff has paid the court fee only under Section 25(d) of the Tamil Nadu Court fee and suit valuation Act, therefore payment of court fee also not correct. Thus, point No.7 is answered.

Point No.8.

22. In this case the plaintiff has filed the suit for declaration in respect of sale deed as null and void. The first defendant has filed counter claim for suit for partition that too as against the second defendant and her sister one Idhayarani who is not a party to the suit. Therefore, the maintainability of the counter claim itself is a question and the trial Court ought not to have entertained the counter claim and it is to be dismissed in limine. Apart from that, counter claim between the co-defendants for partition is



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maintainable, in a suit for declaration the counter claim between the defendants is not all maintainable. The trial Court in the judgment has relied the judgment of this Court but failed to consider that in that judgment the suit is filed for partition and thereby the counter claim between the defendants is maintainable. In the present case the declaration is in respect of sale deed, thereby the counter claim for partition between co-defendants itself is not maintainable. Further, in the present case the appellant has not filed separate appeal as against the counter claim and only filed single appeal as against the decree and counter claim. The Division Bench of this Court in the case of M/s.DMY Creation SDN,BHD vs. M/s. Lyca Production Private Limited in OSA(MD) No.114 of 2022 has held follows:

12. In the light of the aforesaid decisions, it can be easily concluded that counter claim is in the nature of a cross-suit for all purposes, having a cause of action that can be independently enforced and necessary court-fee has to be paid on the relief sought for, both in the suit stage as well as in the appellate stage separately. When the suit and counter claim are disposed of by a common judgment, separate appeals have to be filed by the parties and failure to file appeal on the common judgment passed either as against the suit or the counter claim would result in attaining finality and the doctrine of res judicata would apply. Therefore, all the aforesaid Points (iv) to (vi) are answered accordingly and the preliminary objection raised by the respondent / defendant holds good and the appellant/plaintiff has to file separate appeals as against rejection of the suit claim filed by him as well



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as partly allowing of the counter claim filed by the respondent/defendant by paying separate Court Fees. The appellant / plaintiff has filed the present appeal only as against the main suit for the relief of recovery of money for the sum of Rs.23,70,05,222/-. Therefore, this Court has passed Judgment in the appeal filed by the appellant / plaintiff for the main suit only.

23.In view of the above discussios the single appeal as against the decree and judgment passed in the suit as well as counter claim are not maintainable and the parties have to file separate appeal for the suit and the counter claim. But in this case the appellant has not filed any separate appeal for the counter claim and thereby also the appeal is not maintainable and thereby inrespect of counter claim this Court need not discuss. In respect of counter claim, the court need not go further. Thus, point No. 8 is answered.

24.Further, In this case the suit is filed by the plaintiff for the relief of declaration as against the first and second defendants. The second defendant is the owner of the property and aggrieved party is the plaintiff but the first defendant is no way aggrieved by the judgment of the trial Court in O.S. No. 43 of 2016, but he has filed only appeal as against the suit. Therefore the appellant has no *locus standi* to file this appeal and he is not an aggrieved party to prefer the appeal



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25. In view of the above said discussions this Court is of the opinion that present appeal has no merits and deserves to be dismissed with costs.

26. In the result, the appeal suit is dismissed with costs. Consequently connected miscellaneous petitions in CMP(MD) Nos. 234,5763 of 2023 are closed and CMP(MD) No.16520 of 2023 stands dismissed.

31.01.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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To:

1. The Additional District Judge, Ramanathapuram
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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