



S.A(MD)No.88 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 18.10.2024

Pronounced on : 06.01.2025

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

**S.A(MD)No.88 of 2019
and
C.M.P(MD)No.2372 of 2019**

Kalyani Sundari

... Appellant/Respondent/
Plaintiff

Vs.

Sudhagar

...Respondent/Appellant/
Defendant

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree, dated 08.02.2018 passed in A.S.No.20 of 2016 on the file of the Principal Sub Court at Nagercoil, Kanyakumari District, reversing the judgment and decree, dated 29.02.2019 passed in O.S.No.249 of 2012 (O.S.No.542 of 2010, Old Number) on the file of the District Munsif-cum-Judicial Magistrate Court, Bhoothapandi by allowing this Second Appeal.

For Appellant : Mr.V.Meenakshi Sundaram
For Respondent : Mr.M.P.Senthil



S.A(MD)No.88 of 2019

JUDGMENT

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This Second Appeal is preferred against the judgment and decree, dated 08.02.2018 passed in A.S.No.20 of 2016 on the file of the Principal Subordinate Court at Nagercoil, Kanyakumari District, reversing the judgment and decree, dated 29.02.2016 made in O.S.No.249 of 2012 on the file of the District Munsif-cum-Judicial Magistrate Court, Boothapandi.

2. The appellant is the plaintiff and the respondent is the defendant in O.S.No.249 of 2012 on the file of the District Munsif-cum-Judicial Magistrate Court, Boothapandi.

3. For the sake of convenience, the parties are referred as plaintiff and defendant as arrayed in O.S.No.249 of 2012 on the file of the District Munsif-cum-Judicial Magistrate Court, Boothapandi.

4. It is the case of the plaintiff that the suit property is measuring 5.58 cents comprised in new R.S.No.747/4A 45, Teachers Colony, Shenbagaramanpudur Village, Thovalai Taluk, Kanyakumari District. The plaintiff's husband Sudalaikannu purchased the suit property from its



S.A(MD)No.88 of 2019

original owner Sankarji through registered sale deed, dated 24.05.1996.

The plaintiff and the said Sudalaikannu have no issue out of wedlock.

Sudalaikannu died intestate on 29.10.2006, leaving the plaintiff and her mother-in-law Chellathai as legal heirs. Chellathai died on 29.12.2007.

Thereafter, the plaintiff is in exclusive possession and enjoyment of the suit property. So, the plaintiff planned to sell the suit property. On obtaining encumbrance, she learnt that one Sivalingam purchased the suit property from one Udayar as the power of attorney of the plaintiff and her mother-in-law on the basis of the alleged power deed. The plaintiff and her mother-in-law never executed any power of attorney in favour of Udayar at any point of time. He might have forged it. The plaintiff is in possession of suit property which stood in her husband's name. Hence, the plaintiff lodged a police complaint against Udayar, Sivalingam and others. Knowing these facts, the defendant purchased the suit property from Sivalingam under sale deed, dated 11.02.2009. Hence, the plaintiff has filed the suit for declaration and permanent injunction.

5. It is the case of the defendant that the suit property originally belonged to Sudalaikannu. After his death, the plaintiff and the mother of



S.A(MD)No.88 of 2019

Sudalaikannu namely Chellathai executed a registered power of attorney in favour of Udayar under document No.488/2007. Prior to her death, the said Udayar sold the suit property to one Sivalaingam through registered sale deed under document No.1731/2007. From the said Sivalingam, the defendant purchased the suit property through registered sale deed, dated 11.02.2009 under document No.2519/2009. So, the defendant is *bonafide* purchaser. The suit is bad for non-joinder of Udayar and Sivalingam as parties for arriving fair decision. The plaintiff is well aware of execution of power of attorney. The defendant is the lawful owner of the suit property. The plaintiff has no title or right over the suit property and hence, she is not entitled to any decree as sought in the suit.

6. The trial Court has framed the following issues:

(1) Whether it is correct that the suit property is in exclusive possession and enjoyment of the plaintiff?

(2) Whether the plaintiff is entitled to the relief of declaration?

(3) Whether the plaintiff is entitled to the relief of permanent injunction?

(4) Whether the defendant is bonafide purchaser of the suit property?



WEB COPY



S.A(MD)No.88 of 2019

(5) Whether it is correct that the suit is bad for non-joinder of necessary parties as stated by the defendant?

(6) To what other relief with costs the plaintiff is entitled to?

7. During trial, the plaintiff was examined as P.W.1 and marked Ex.A.1 to Ex.A.15. On the defendant's side, D.W.1 and D.W.2 were examined and marked Ex.B.1 to Ex.B.6.

8. After hearing both, the learned District Munsif-cum-Judicial Magistrate, Boothapandi decreed the suit in O.S.No.249 of 2012 by passing judgment and decree dated 29.02.2016. Aggrieved by the judgment and decree, the defendant has preferred Civil Appeal in A.S.No.20 of 2016 before the Principal Sub Court, Nagercoil. The first Appellate Court after hearing both, passed the judgment, dated 08.02.2018 allowed the appeal by reversing the judgment and decree of the Trial Court, dated 29.02.2016 and dismissed the suit in O.S.No.249 of 2012.

9. Challenging the same, the plaintiff has preferred this Second Appeal and the same has been admitted on 19.03.2019 by framing the



S.A(MD)No.88 of 2019

following substantial questions of law:-

"i) Whether the first appellate Court is correct in dismissing the suit for declaration and consequential permanent injunction on the ground of non-joinder of necessary parties (Udaiyar and Sivalingam)?

ii) Whether the appellant/plaintiff is entitled for declaration of title and consequential permanent injunction decree without seeking for further reliefs such as to declare the power deed dated 13.11.2007 as null and void, more particularly in view of proviso clause of Section 34 of the Specific Relief Act?

iii) Whether the appellant/plaintiff discharged his burden of proof as provided in Section 101 & 103 of the Indian Evidence Act, to get the decree of declaration and consequential permanent injunction?"

10. The learned counsel for the appellant/plaintiff has argued that the suit property originally belonged to Shankarji, the plaintiff's husband Sudalaikannu purchased the same by virtue of Ex.A.2 registered sale deed, dated 24.05.1996. The plaintiff has no issue through Sudalaikannu, who died on 29.10.2006 leaving behind him the plaintiff and his mother Chellathai as



S.A(MD)No.88 of 2019

legal heirs. His mother Chellathai died on 29.12.2007. The plaintiff tried to sell the suit property and on enquiry she learnt that as if the mother Chellathai and plaintiff executed a power of attorney, dated 13.11.2007 in favour of Chellaithai's another son Udayar. The plaintiff had never executed any power of attorney. But, the said Udayar forged the power of attorney and by using the same he sold the suit property in favour of the defendant on 10.12.2007. The defendant has produced only the photocopy of the power of attorney and he has not produced the original of the same. Moreover, the plaintiff's photo is not seen as like the photo of Chellathai affixed. The attesting witnesses to the power of attorney are different persons and the identifying witnesses are also two different persons. In Ex.B.5 power deed, it is seen that the plaintiff and her mother-in-law put their thumb impressions in all pages. But, the plaintiff used to sign her name. So, the plaintiff lodged a police complaint against Udayar and others. The trial Court has correctly appreciated the evidence of the plaintiff and correctly decreed the suit. Whereas the first Appellate Court wrongly reversed the judgment of the trial Court without proper appreciation of evidence. Therefore, this Second Appeal may be allowed.



S.A(MD)No.88 of 2019

WEB COPY

11. Per contra, the learned counsel for the defendant has mainly argued in respect of Ex.B.5 - Power of Attorney as the entire case based on it. There is no dispute between the original title holder Shankarji, then Sudalaikannu, who was the husband of the plaintiff. After death of Sudalaikannu, the plaintiff and her mother-in-law executed Ex.B.5 - Power of Attorney on 13.11.2007 in favour of Udayar, who is none other than the brother of Sudalaikannu as they wanted to sell the property. The said power of attorney is a registered one. Accordingly, the said Udayar sold the property to one Sivalingam for valuable consideration. The defendant purchased the property from Sivalingam. After multiple transaction and after the death of Chellathai, now the plaintiff claimed that the power of attorney was a forged one which is unacceptable. The learned counsel further argued that without seeking annulment of power of attorney the plaintiff cannot maintain the suit, and when the plaintiff alleged forgery and lodged a police complaint against Udayar and Sivalingam, they are necessary parties to the suit. Without them, the suit is bad for non joinder of necessary parties. When the plaintiff alleged forgery, she has to take steps to send the document for expert opinion, but the plaintiff has not taken such steps. Moreover, the photo of Chellathai is seen affixed in the Ex.B.5 power deed. The plaintiff



S.A(MD)No.88 of 2019

has not disputed it, while so without knowledge of the plaintiff, Ex.B.5 could not be executed by them. The said Udayar sold the property to Sivalingam prior to the death of Chellathai. From Sivalingam, the defendant purchased the property. So, the defendant is a bonafide purchaser. The first Appellate Court has properly appreciated the evidences and correctly held that the plaintiff failed to substantiate her case and correctly reversed the finding of the trial Court and rightly dismissed the suit. Therefore, he prayed to dismiss this Second Appeal. In support of his argument, the learned counsel for the defendant relied on the following rulings:

"(a) (2008) 4 Supreme Court Cases 594 (Anathula Sudhakar /v/ P.Buchi Reddy (Dead) By Lrs & Ors.)

(b) 2005 (4) CTC 197 (Chellakannu /v/Kolanji)

(c) (1996) 7 Supreme Court Cases 767 (Noorul Hoda /v/ Bibi Raifunnisa and Ors.)

(d) (2006) 5 Supreme Court Cases 353 (Prem Singh and Ors. /v/ Birbal and Ors.)

(e) 2007-2 Law Weekly 810 (S.Krishnan /v/ Rathinavel Naicker & Ors.)

(f) (2014) 2 Supreme Court Cases 269 (Union of India and Others /v/ Vasavi Co-op. Housing Society Ltd., and Others)"



S.A(MD)No.88 of 2019

WEB COPY

12. Heard the arguments of both sides and perused the material records of the case. The suit property measuring 5.58 cents comprised in new R.S.No.747/4A 45, Teachers Colony, Shenbagaramanpudur Village, Thovalai Taluk, Kanyakumari District was originally belonged to Shankarji, from whom the plaintiff's husband Sudalaikannu purchased the same. There is no dispute in it. The rival contention urged by both sides is in respect of Ex.B.5 - Power of Attorney.

13. It is the case of the plaintiff that after the demise of her husband, the plaintiff and her mother-in-law lived together, and then her mother-in-law died. Whiles, she wanted to sell the suit property and obtained encumbrance certificate in respect of the suit property and from the encumbrance certificate she came to know that her brother-in-law Udayar sold the property to one Sivalingam on the basis of power of attorney and that the defendant purchased the property from one Sivalingam. It is her definite case that the plaintiff and her mother-in-law never executed any power of attorney in favour of Udayar, and it is forged one. It is also her case that she used to sign but in Ex.B.5 - Power of Attorney, her signature was not found and some thumb impression alone found. On the other hand



S.A(MD)No.88 of 2019

the defendant stated that admittedly, the plaintiff and her mother-in-law were living together, Ex.B.5 is a registered document and in it, the photo of her mother-in-law was affixed. So, without the knowledge of the plaintiff, the document could not be executed. It is also the main case that while the plaintiff alleged forgery, the said Udayar and Sivalingam are also necessary parties as the plaintiff stated that she lodged a complaint before the police station against them.

14. Perused the evidence adduced on both sides and also perused the judgment of the Courts below. Ex.B.5 - Power of Attorney is a registered one, which was registered in favour of Udayar, who is none other than the plaintiff's husband's brother as well as another son of her mother-in-law. When a document is registered, *prima facie* it is a valid document to prove execution of the document by the parties concerned. To substantiate forgery regarding Ex.B.5, the said Udayar is the proper party to adjudicate the issue. The defendant contends that he is a *bona fide* purchaser from Sivalingam for valuable consideration. There is no dispute that Sivalingam purchased the property from Udayar. Of course, it is well settled that the plaintiff is the *dominus litus* in a suit and she is at liberty to implead any person as



S.A(MD)No.88 of 2019

defendant in a suit instituted by her. However, 'proper party' is one whose presence is necessary for complete and effective adjudication of dispute, though no relief is sought against him. Hence, the said Udayar and Sivalingam are proper and necessary parties to the suit, as the plaintiff challenging the very power of attorney deed on the ground of forgery. They are the right persons to contact and prove the execution of power of attorney. In the absence of Udayar and Sivalingam the issue could not be properly adjudicated as rightly decided by the first Appellate Court. Therefore, this Court confirmed the findings of the first Appellate Court that the suit is bad for non-joinder of necessary parties.

15. On perusal of the evidence of the plaintiff as P.W.1, the plaintiff admitted that the defendant is in possession of the suit property and revenue records were mutated in his name. Hence, the plaintiff is out of possession of the suit property. The plaintiff laid the suit for declaration of her title and injunction against the defendant. The defendant traced the title through Ex.B.5 registered power of attorney. Though the plaintiff raised a plea that it is forged one, she has not proved the same, even she has not taken steps to obtain an expert opinion. Simply on the plaintiff's side, it is argued



S.A(MD)No.88 of 2019

that she is used to sign her name and she is not used to put a thumb impression. But, the plaintiff admitted that her mother-in-law's photo is affixed in Ex.B.5. Moreover, it is not the case that after the death of her mother-in-law, the said Udayar conveyed the property on the basis of Ex.B.5 - Power of Attorney. As already stated supra, if a document is registered one, on its face it is a *prima facie* valid document. In the above facts and circumstances, the plaintiff ought to have sought relief of cancellation of Ex.B.5 or declaration that Ex.B.5 is null and void in view of the proviso of Section 34 of the Specific Relief Act. Unfortunately, no relief was sought by the plaintiff. In the absence of such relief, the plaintiff cannot maintain a suit against the defendant, who is a *bona fide* purchaser as rightly observed by the first Appellate Court.

16. The plaintiff alleged that Ex.B.5 is a forged document. If so, whether the plaintiff has proved her case as per Sections 101 and 103 of the Indian Evidence Act is to be decided for which the Sections are reproduced hereunder:

Section 101: Burden of proof.—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts



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S.A(MD)No.88 of 2019

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.

Section 103: Burden of proof as to particular fact.—*The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

17. It is a settled position of law that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it and that the burden of proving a fact always lying upon the person who asserts the facts. Until such burden is discharged, the other party is not required to be called upon to prove his case. Section 103 of the Evidence Act provides that the burden of proof of any particular fact lies on the person who wishes the court to believe in its existence.

18. Under Section 101 of the Indian Evidence Act, the initial burden to prove the case is on the plaintiff and only after she discharges her initial burden, the onus shifts to the defendant. In the case on hand, the plaintiff



S.A(MD)No.88 of 2019

has not substantiated that she has not executed Ex.B.5 - Power of Attorney.

She admitted that she was living along with her mother-in-law after the death of her husband. Ex.B.5 is a registered document and also the plaintiff admitted that the photo of her mother-in-law is seen affixed in it. The plaintiff's contention is that Ex.B.5 is only a certified copy and not original. For this, the defendant put forth a case that Ex.B.5 power of deed consists of some other property also and hence, at the time of purchase only a copy of the power deed was handed over to him by his predecessor in title. On perusal of Ex.B.5 in addition to suit property some other properties are also mentioned and this fact was not disputed by the plaintiff. Whiles, the plaintiff ought to have impleaded the said Udayar and Sivalingam. They are also not parties to the suit filed by the plaintiff. In the normal course, they would have joined with the plaintiff and filed the suit jointly against the defendants. They were also not examined as witnesses on the side of the plaintiff.

19. As rightly held by the first Appellate Court the plaintiff has not discharged her initial burden of proving her case by getting an expert opinion with regard to the genuineness of Ex.B.5 under Section 45 of the Indian



S.A(MD)No.88 of 2019

Evidence Act. The plaintiff states that she lodged a police complaint regarding forgery, but no document is filed to substantiate the same and the result of the criminal complaint. The plaintiff has not discharged her burden as per the Evidence Act. As a party to the document and a cloud was cast upon her title, it is her duty to sought for cancellation of the power of attorney and the defendant's predecessor sale deed. Without getting such reliefs, she is not entitled to the declaration of her title.

20. The trial Court has not considered all these aspects. The first Appellate Court has correctly appreciated the evidence and correctly held that the plaintiff has not established her case and hence, the first Appellate Court rightly reversed the decree of the trial Court. Therefore, this Court holds that the plaintiff is not entitled to reliefs of declaration and injunction over the suit property. The questions of laws in this Second Appeal are answered against the appellant/plaintiff. Thus, this Second Appeal fails.

21. In the result, this Second Appeal is dismissed. The judgment and decree, dated 08.02.2018 passed in A.S.No.20 of 2016 on the file of the Principal Subordinate Court at Nagercoil, Kanyakumari District, reversing



S.A(MD)No.88 of 2019

the judgment and decree, dated 29.02.2016 made in O.S.No.249 of 2012 on the file of the District Munsif-cum-Judicial Magistrate Court, Boothapandi is confirmed. The suit in O.S.No.249 of 2012 is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

06.01.2025

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD

To

- 1.The Principal Sub Court at Nagercoil,
Kanyakumari District.
- 2.The District Munsif-cum-Judicial Magistrate Court,
Bhoothapandi.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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S.A(MD)No.88 of 2019

P.VADAMALAI, J.

VSD

Pre-Delivery Judgment made in
S.A(MD)No.88 of 2019
and
C.M.P(MD)No.2372 of 2019

06.01.2025