

(2009) 06 MAD CK 0260

Madras High Court (Madurai Bench)

Case No: S.A. No. 2119 of 2003

M. Abdul Muthalip

APPELLANT

Vs

M. Samsudeen

RESPONDENT

Date of Decision: June 18, 2009**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Tamil Nadu Court Fees and Suits Valuation Act, 1955 - Section 25, 25(a), 26, 40

Hon'ble Judges: R. Mala, J**Bench:** Single Bench**Advocate:** G. Ghouse Kathiri, for the Appellant; D. Muruganantham, for the Respondent

Judgement

R. Mala, J.

The averments in the plaint is as follows:

The plaintiff had purchased the suit property under a registered sale deed dated 07.03.1985 and from then onwards the plaintiff was in possession and enjoyment of the suit property as an absolute owner. In the year 1989, the plaintiff made arrangements to settle at Delhi on account of his business. Hence he appointed the defendant as the general power of attorney to manage the suit properties, by a registered Power of Attorney, dated 15.05.1989. The plaintiff was under the bonafides impression that the defendant is managing the properties with due care and caution as his power agent. Hence, he did not visit the suit properties for a long time.

The plaintiff returned to his native place in the month of January 2002 and sought the defendant to handover the possession of the suit property and also the power deed. But the defendant gave a evasive reply. Then he came to know that the defendant himself had purchased the suit properties. Immediately, the plaintiff applied for certified copy of the power deed. The plaintiff never authorised the defendant to execute a sale deed. The plaintiff never received any consideration

from the defendant herein towards the sale of the suit property. The sale deed in favour of the defendant is vitiated by fraud. So, the sale deed cannot confer any title in favour of the defendant. The sale deeds were executed without any proper authority and the same is invalid and is a "Non est factum" and cannot create any title in favour of the defendant. Hence the plaintiff can ignore the same and need not seek to set aside. Hence the plaintiff is constrained to file a suit for declaration that the sale deed dated 06.11.2000 created by the defendant on the strength of general power of attorney is invalid and cannot create any title to the defendant and further for declaration that the plaintiff is the absolute owner of the suit property and for recovery of possession. Hence he prayed for a decree.

2. The gist and essence of the written statement filed by the defendant is as follows:

The suit is not maintainable both in law and in facts. The plaintiff did not purchase the property mentioned in the plaint out of his own fund. It was purchased out of the defendant's funds in the year 1985, out of the sincere gratitude towards his brother Samsudeen. The plaintiff was settled in New Delhi thirty years back and he is not aware of the sale deed. The defendant had also purchased and got a sale deed to his name to some property on the same date as the sale deed executed in the name of the plaintiff and vendor was the same to both the sale deeds. The entire sale consideration and other incidental expenses for the execution of sale deeds was spent by the defendant only. The plaintiff did not know about the said execution and at no point of time, the plaintiff was in possession and enjoyment of the suit property. The defendant is in possession of the same on the promise of the plaintiff to execute the sale deed to the defendant at later point of time, since the sale consideration was given by the defendant. The original sale deeds have been with the defendant from the date of execution.

3. The plaintiff had planned to sell the property to third party and due to the sudden impact, the defendant had convened a Panchayat in this regard and then the plaintiff had executed a general power of attorney in favour of the defendant as the defendant could not be able to purchase stamp papers on the same day and the plaintiff wanted to go back to Delhi due to his urgent business work. The plaintiff had also promised to the defendant that whenever he would be prepared for the sale deed, he would come and sign in the sale deed. The plaintiff has also given ample power to the defendant in the power deed to do anything. The plaintiff is also doing banian business and visited the suit village then and there. The defendant gave a video camera, tape recorder and other dress materials to the plaintiff whenever the defendant came from Saudi Arabia to the suit village. The defendant is also doing cultivation and planted coconut samplings ever since the date of purchase in the year 1985 in first item of suit property and used the second item of the suit property as a paddy nursery. Both the suit items were vacant at the time of purchase. The defendant had constructed a new house in the other survey number purchased in his name adjacent to the first item of the suit property. Hence the

defendant is in possession and enjoyment of the suit property from the date of the sale deeds dated 07.03.1985 to till date and his possession is open, actual exclusive, hostile and continued and he perfected his title by adverse possession and his animus is to the knowledge of the plaintiff. The plaintiff returned to his native place in the month of January 2002 and met the defendant in the third week of January 2002 and asked the defendant to handover the possession of the suit property and power deed is absolutely false. The defendant went to Jeddah on 01.12.2000 from Tamil Nadu and he did not return to India till date.

4. No cause of action arose for the suit and the plaintiff has not come to the court with clean hands. The defendant wanted the sale deed in his favour from the plaintiff in the year 1989 itself and the plaintiff had also agreed to execute the same whenever both of them came to the suit village. The defendant had been sending amounts to the plaintiff on various dates to the tune of Rs. 1,39,500/- through cheque. The defendant had also given Rs. 60,000/- for the plaintiff's daughter marriage along with 10 sovereigns of gold. This fact was known to one Sambandam, son of Paramasivam. The plaintiff had written a letter to the defendant dated 18.11.2000, stating that he was willing to sign the sale deed and demanded the sale deed to be brought to Delhi for his signature. Since the defendant is not having any leave, he departed to Saudi Arabia on 01.12.2000. The plaintiff has also written several letters to the defendant demanding money and assurance to the execution of the sale deed to the defendant. The plaintiff's aim was only to grab money from the defendant and the plaintiff has received money from the defendant then and there from 29.11.1989 to 01.03.1994 through cheques and cash directly from the defendant. There is no fraud on the part of the defendant. The plaintiff has lost his title and the defendant is in possession and enjoyment of the same for more than 15 years. The plaintiff's notice to cancel the power deed has not been properly addressed to the defendant's address. The suit was not properly valued. Hence he prayed for the dismissal of the suit.

5. The trial court after considering the averments both in plaint as well as written statement, framed four issues and considering the oral evidence of P.W.1, D.W.1 and D.W.2 and also considering the documents marked under Ex.A1 to A3 and Ex. B1 to Ex.B39, decreed the suit as prayed for and two months time is granted to handover the possession. Against that the defendant had preferred an appeal and that has been confirmed by the first appellate court. Aggrieved by the same, the present Second appeal has been filed before this Court.

6. This Court on perusal of the entire material records, admitted the Second Appeal and framed the following Substantial questions of law:

a. On the facts and circumstances, was it correct for the Courts below to hold that the sale deed in favour of the appellant under Exs.A2 and A3 are invalid in law when the power given by the respondent to the appellant empowers him to sell the properties comprised in the sale deeds?

- b. Whether the suit, as framed by the respondent for declaration that the sale deeds executed in favour of the appellant on 6.11.2000 are invalid without seeking to set aside the sale deed is sustainable in law?
- c. When the appellant had executed sale deeds on the basis of the power given to him by the respondent, was not the respondent estopped from contending that the sale deeds executed were unsustainable?

7. Substantial question(a) to (c):-

The learned counsel for the appellant would contend that the respondent herein has executed the power of attorney deed Ex.B4 in favour of the defendant on 15.05.1989 and in pursuance of that the appellant herein has executed sale deeds as per Ex.A2 and Ex.A3 in his favour and the respondent issued notice under Ex.A1, dated 09.03.2002, for terminating the power and filed the suit for declaration that the sale deeds dated 06.11.2000 created by the defendant on the strength of the general power of attorney deed dated 15.05.1989 is invalid and cannot confer title to the defendant and also for declaration that the plaintiff is the absolute owner of the suit property and consequentially for recovery of possession directing the defendant to handover the possession of the suit property and on his failure to hand over the possession order delivery through process of court. The learned counsel for the appellant /petitioner submit that the respondent has not filed a suit seeking to set aside the sale deed and value the suit u/s 40 of the Tamil Nadu Court Fees and suits Valuation Act (hereinafter called as the "Act") and the suit is not maintainable.

8. While considering the facts of the present case, both the appellant and respondent are own brothers. The appellant executed Ex.B4 in favour of his brother giving power to deal with the property including to execute a sale deed. But the appellant herein has executed the sale deed dated 06.11.2000 as per Ex.A2 and Ex.A3. At this juncture, the respondent herein has filed the suit for declaration that the sale deed dated 06.11.2000, created by the defendant on the strength of the general power of attorney is invalid and cannot create any title to the defendant. But the suit has been valued u/s 25(a) of the "Act".

Section 25(a) of the Act reads as follows:

(25. Suits for declaration- In a suit for a declaratory decree or order, whether with or without consequential relief not falling u/s 26-

(a) Where the prayer is for a declaration and for possession of the property to which the declaration relates, fee shall be computed on the market value of the property or on(rupees one thousand and five hundred), whichever is higher;

Section 40 of the "Act", reads as follows:

40. Suits for cancellation of decrees, etc-(1) In a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject-matter of the suit, and such value shall be deemed to be -

If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed:

If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property.

(2) If the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular item of the property belonging to the plaintiff or to the plaintiff's share in any such property, fee shall be computed on the value of such property or share or on the amount of the decree, whichever is less.

Explanation. A suit to set aside an award shall be deemed to be a suit to set aside a decree within the meaning of this section.

Sub-section (2) and Explanations are new.

9. Per contra, the learned counsel for the respondent would contend that the respondent herein is not a party to the sale deed, and the suit is filed for declaration that the sale deed as void, so the suit is maintainable, court fees paid is correct and he also relied upon decisions in Siddha Construction Private Limited, represented by its Power Agent Anjay Sharma, [Siddha Construction \(P\) Ltd. Vs. M. Shanmugam and Others, Alamelu alias Chinnakannammal and Others Vs. Manickkammal](#), J. Shanker .vs. P. Jayabal reported in 2007 (2)TNCJ 516 Madras and further submitted that the prayer could be amended in the form of seeking declaration that the document is not valid and not binding and the relief is sufficient with seeking cancellation. While considering the citation along with the facts of the present case, the respondent herein has filed a suit for declaration" that the sale deed, dated 06.11.2000 created by the defendant on the strength of general power of attorney is invalid and cannot confer any title to the defendant. In such circumstances, the document to be alleged to be cancelled. Even though there is no specific prayer for the cancellation of the sale deed, but as per the citation, he ought to have valued the suit and paid the court fees u/s 40 of the "Act". But he valued the suit only u/s 25(a) of the "Act". He also relied upon another decision and urged that the plaintiff is not the party to the impugned sale deed and he need not pay the court fee u/s 40 of the "Act" and payment of court fee u/s 25(a) of the "Act" is proper. The case on hand, the respondent has executed a power of attorney deed as per Ex.B4. In pursuance of that power of attorney, i.e., the appellant executed Ex.A2 and Ex.A3 sale deeds in his

favour. So the respondent is a party to the sale deeds Ex.A2 and Ex.A3. In such circumstances, he ought to have filed a suit for cancellation of the sale deeds and for declaration that the impugned sale deeds are null and void and he ought to have paid the court fee u/s 40 of the "Act". Hence the above citation is not applicable to the facts of the present case.

10. He also relied upon a decision reported in [Alamelu alias Chinnakannammal and Others Vs. Manickkammal](#), and urged that since the power of attorney has executed the sale deed on his own to his brother, he is not a party to the sale deed. So there is no need to pay the court fee u/s 40 of the Act and he relied upon the following portion:

Held, that having regard to the way in which the suit had come to be filed in the present case, it was clear that the plaintiff did not admit at any time that the documents was executed by her or that she was a party to the document. Her case was that it was a forged one. Forged documents would not confer title on any person and it would be unnecessary to get such a document set aside in order to succeed in the prayer for declaration. The payment of court fee is to be adjudged on the plaint allegations. Whether the allegation of forgery is correct or not will have to be gone into in the suit. The suit was properly valued.

In a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject-matter of the suit, and such value shall be deemed to be if the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed;

While considering the above citation along with the facts of the present case, as already discussed, in pursuance of this power of attorney executed by this respondent herein in favour of the appellant herein and during the subsistence of the power deed, the appellant herein has executed sale deeds as per Ex.A2 and Ex.A3. In such circumstances, any act done by a agent is binding the principle. Hence the respondent herein is a party to the sale deed and hence the decision reported by the learned counsel for the appellant in [Alamelu alias Chinnakannammal and Others Vs. Manickkammal](#), is not applicable to the facts of the present case.

11. As already discussed, since the respondent is party to the sale deeds Ex.A2 and Ex.A3, the respondent/plaintiff ought to have filed a suit for cancellation of the sale deeds Ex.A2 and Ex.A3 and valued the suit as per Section 40 of the "Act".

12. The learned counsel for the appellant would contend that the suit is not maintainable and he ought to have set aside the sale deed before the relief of possession and other relief's and he relied upon a decision in [Smt. Bismillah Vs. Janeshwar Prasad and Others](#), and it reads as follows:

Party prima facie proceeding on premise that she cannot ignore sale deeds but they need to be set aside before relief of possession and other relief's can be availed of.

But here in pursuance Ex.B4, the appellant herein had executed Ex.A2 and Ex.A3, if the respondent feels that document is a voidable document, then he has to set aside the same and he ought to have valued the suit u/s 40 of the Act.

13. The learned counsel for the appellant also relied upon a decision K. Tirupathi Mudali vs. T. Lakshmana Mudali and another reported in AIR 1953 Madras 545. But the above citation is not applicable to the facts of the present case.

14. The learned counsel for the respondent would rely upon a decision and urged that in mofussil, pleading are to be construed liberally and pleading must be construed as a whole and relied upon a decision in [Des Raj and Others Vs. Bhagat Ram \(Dead\) By LRs. and Others](#), It is true that the plaintiff has preferred the plaint before the District Munsif court, Thiruvaiyaru. There is no quarrel over the fact it is a mofussil. But the suit to be properly valued and court fees to be paid properly. But herein even then the prayer is for declaration that the sale deeds dated 06.11.2000 created by the defendant on the strength of the general power of attorney deed dated 15.05.1989 is invalid and cannot confer title to the defendant and also for declaration that the plaintiff is the absolute owner of the suit property and consequentially for recovery of possession directing the defendant to handover the possession of the suit property and on his failure to hand over the possession order delivery through process of court, but the suit ought to have valued u/s 40 of the "Act". But the suit has been valued only u/s 25(a) of the "Act" on the basis of 30 times of kist paid to the property. So the above citation is not applicable to the facts of the present case.

15. The learned counsel for the respondent would also relied upon a decision in Parayya Allayya Hittalamani vs. Sri Parayya Gurulingayya Poojari and others reported in (2008) 2 MLJ 504 : 2008-1-L.W.186 and submitting that the above document is a weak one and the same must be construed having regard to the fact that the surrounding and attending circumstances and in such cases, the evidence of the parties would be appreciable. But here, Ex.B4 is a power of attorney and in that Ex.B4 there is a specific recital that he is given a general power to execute sale deed to anybody. In that it is stated as follows:

So the recital has clearly proved the fact that full power has been given to the appellant to execute the sale deed in favour of anybody and fixed the sale price as he desires. So there is no restricted or specific power has been given. Even though, the respondent herein has submitted that the power has been executed only for maintenance of the suit properties. But this argument does not hold good. So the citation is irrelevant to the facts of the present case.

16. The learned counsel for the respondent would contend that the appellant herein is the power of attorney and he cannot execute the sale deeds Ex.A2 and Ex.A3 in his

favour, so the sale deeds itself is void, but the above argument is an unacceptable one because of the decision in [Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.](#), which reads as follows:

Even an agent can become a purchaser when an agent pays the price to the principal on his own responsibility.

As a power of attorney, appellant executed the sale deed in favour of the appellant herein and the appellant herein has every right to purchase the properties under Ex.A2 and Ex.A3 per the decision in [Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.](#), The defendant/appellant can purchase the property provided he must pay the entire sale consideration to prove that he paid the entire sale consideration. He had also filed the document under Ex.B8 to Ex.B20.

17. At this juncture, the learned counsel for the respondent would rely upon a decision in 2006 2 MLJ 192 and arguing that the concurrent finding of the courts below and interference by the High court not correct, which reads as follows:

It is well settled by diverse decisions of this Court that High Court in Second Appeal is entitled to interfere with the concurrent findings of the fact if the said concurrent findings of the fact are based on non-consideration of an important piece of evidence in the nature of admission of one of party to the suit, which is overlooked by the two courts below. It is equally well settled that u/s 100 of C.P.C High Court cannot interfere with concurrent findings of facts of the courts below without insufficient and just reasons. High Court is also not entitled to set aside the concurrent findings of fact by giving its own findings contrary to the evidence on record.

It is equally settled that High Court in Second appeal is not entitled to interfere with the concurrent findings of fact arrived at by the Courts below until and unless it is found that the concurrent findings of fact were perverse and not based on sound reasoning.

Because, here, the question of law has been raised. So, on the basis of it only, the second Appeal can be dealt with by this Court. In such circumstances, if there is a substantial question of law, the Second Appeal is maintainable. So the above citation is irrelevant for the purpose of the case.

18. The learned counsel for the respondent would rely upon a decision in Adivekka and others vs. Hanamavva Kumvenkatesh "D" by L.Rs and Another reported in (2007) 6 MLJ 355 : 2008-I-L.W.264 and urged that the defendant/appellant was not examined before the trial court and non-examination of the party to the lis would lead to drawal of an adverse inference against the party. It is pertinent to note that the respondent that the respondent/plaintiff has filed the suit. It is the bounden duty of the respondent/plaintiff to prove his own case. He cannot get his relief on the lacunae and flaws in the case of the appellant/defendant. So the above citation

is not relevant to the facts of the present case.

19. The learned counsel for the appellant would contend that as an agent, he is acted according to the terms of Ex.B4 power deed since the appellant herein has purchased the property under Ex.A2 and Ex.A3 and he cannot repudiate Ex.B2 sale deed merely because of the fact that Ex.A2 and Ex. A3 are executed by the agent/appellant herein. For that reason, a decision in Kumar Narendra Nath Mitter .vs. Sm. Bimala Sundari Debi and others reported in AIR 1938 Calcutta 573 was relied and it is stated as follows:

Principal cannot repudiate it merely because it is for agent's benefit.

The above said citation is squarely applicable to the facts of the present case.

20. As already discussed, the respondent herein filed a suit for declaration that the sale deed is not valid even though this Court come to the conclusion that in mofussil pleadings are to be construed liberally but the suit to be properly valued and court fees to be paid accordingly. Since Ex.A2 and Ex.A3 has been executed on the basis of Ex.B4 Power of attorney and execution of the power of attorney deed is admitted by the respondent/plaintiff so Ex.A2 and Ex.A3 are valid in law, if the respondent consider that it is a voidable one, he ought to have set aside the same or cancel the same by valuing the suit u/s 40 of the "Act". But here he valued the suit only u/s 25(a) of the "Act", which is not sustainable under law.

21. As already discussed, since the respondent herein has executed Ex.B4 power deed, While the same is in existence, an agent can execute a sale deed under Ex.A2 and Ex.A3 are in favour of the appellant himself as per the reported decision in [Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.,](#) that even an agent can purchase the property and as per the decision in 1938 Calcutta 573, principal cannot repudiate it merely because it is for agents benefit. Hence the respondent is estopped from contending that the sale deeds executed were unsustainable.

As already narrated above, since the respondent herein has empowered the appellant under Ex.B4, Power Deed to execute the sale deed according to his wish and in pursuance of that the appellant herein has executed the sale deed under Ex.A2 and A3. So it is valid in law. So the Courts below are incorrect to hold that the sale deed executed in favour of the appellant under Ex.A2 and A3 are invalid in law.

22.(a) In view of the discussion made above, all the three substantial questions of law are answered in favour of the appellant. The respondent/appellant herein has admitted the validity of Ex.B4 power deed till it was cancelled the sale deed under Ex.A1 was executed on 09.03.2002, during the subsistence of power deed, the defendant/appellant has executed the sale deed Ex.A2 and Ex.A3 and it is valid in law.

(b) So the respondent/appellant is estopped from contending that the sale deed executed were invalid.

(c) The respondent/plaintiff admitted that he executed Ex.B4. He cancelled the same under Ex.A1 on 09.03.2002. During the period as a Power Agent, the appellant herein has executed Ex.A2 and Ex.A3. After Ex.A1, the respondent herein has filed the suit. The respondent herein has to file a suit for cancellation of Ex.A2 and Ex.A3 and valued the suit u/s 40 of the "Act". Since he valued the suit u/s 25(a) of the "Act" and without seeking to set aside the sale deeds Ex.A2 and Ex.A3, the suit itself is not maintainable. So the decree and judgment of the trial court as well as the first appellate court is not correct. It warrants interference by this Court. In the result, the second Appeal is allowed. The decree and judgment passed by the trial court and the first appellate court is set aside and the Suit in O.S. No. 44 of 2002, on the file of the District Munsif Court, Thiruvaiyyaru is dismissed. No costs.