

**IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 08.11.2016**

PRONOUNCED ON : 10.11.2016

Coram:

The Hon'ble Mr. **Justice M.SUNDAR**

C.S.No.128 of 2007

1.Vastimal Jawanjee

2.Mrs. Uchhab Kanwar

W/o Mr.Vasitmal Jawanjee

(amended as per order dt: 15.03.2011

in Appl. No.4451 of 2010)

... Plaintiffs

-Vs-

1.Dharam Chand Nahar (deceased)

2.D.Jaishree Bai (deceased)

3.Shreya Nas Nahar

4.Chandraprakash

5.Mrs.Snehaiatha

6.Mr.Surendra Nahar

7.Mr.Rajesh Nahar

(Cause title amended as per order

dt:10.10.2014 in Appl.No.5412 of 2013)

... Defendants

Suit filed under Order II Rule 3 & 5 and Order IV Rule 1 of O.S.Rules directing the defendants to vacate and deliver vacant possession of the house ad ground bearing Door No.39, Audiappa Naicken Street, Sowcarpet, Chennai 600 079, morefully described in the schedule hereunder; for permanent injunction restraining the defendants from inducting any third party to occupy the property; directing the defendants to pay jointly and severally damages for wrongful use and occupation at Rs.50,000/- per month from

the date of filing the suit till delivery of vacant possession and (deleted as per order dated 30.01.2014 in A.No.583 of 2004); to pass such further or other orders as may deem fit and necessary in the circumstances of the case and thus render justice.

For plaintiffs :: Mr.P.K.Sivasubramaniam

For defendants :: Mr.S.Venkatesh

J U D G M E N T

1. The brief facts of the plaintiff's case is as follows :

(a) The plaintiffs 1 and 2 are husband and wife. The first plaintiff filed the suit for possession of the suit property on the basis of the Sale Deed dated 08.08.2016, executed by Muthialpet Benefit Fund Ltd., as the mortgagee of the suit pursuant to the auction conducted under Section 69 of Transfer of Property Act on 24.07.2006. Initially, on 19.08.2006, the first plaintiff issued notice to defendants 1 to 3 and there was no reply from defendants 1 and 2 for the same. However, the third defendant had sent a reply on 30.11.2006 stating that she has filed a suit in C.S.No.595 of 2006 challenging the auction sale. Pending suit for possession, the first plaintiff settled undivided half share of the suit property

to his wife/second plaintiff vide Settlement Deed dated 28.06.2007 and thus, the plaintiffs 1 and 2 are joint owners of the suit property. It is the further case of the plaintiff that the suit property was originally owned by one Mrs.Pattas Kavar, who bequeathed the suit property to her daughter-in-law Mrs.Jaishree Bai through her last Will and Testament dated 30.04.1984 which was the subject matter in O.P.No295 of 1990 filed by one Dharam Chand Nahar, who was the executor appointed under the aforesaid Will. Subsequently, probate was granted and the same was ordered on 27.07.1992. However, the said order came to be set aside and the O.P. was also dismissed without any order as a result of which intestacy occurred and the first defendant was the only adopted son of the said late Mrs.Pattas Kavar.

(b) It is the further case of the plaintiffs that the defendants 1 and 2 jointly borrowed a sum of Rs.40 Lakhs from Muthialpet Benefit Fund Ltd., and had executed a Mortgage deed on 20.09.1993. The same had also been registered duly as Document No.846/1993 before the Sub Registrar at Sowcarpet, Chennai. Since the mortgage dues had not been paid duly by the defendants, the Mortgagee initiated proceedings against them. Against which, the

defendants filed a suit for permanent injunction in O.S.No.657 of 1999 on the file of the City Civil Court, Chennai and the suit was also dismissed on 28.04.1999 granting time of nine months to settle the dues. The defendants failed to comply with the said condition also, the suit property was brought for sale. Further, the defendants choose to file another suit in O.S.No.1728 of 2000, which was also dismissed. After the dismissal of the aforesaid suits also the defendants, without making any payment had continued to file suits and writ petitions seeking validity of the Mortgage. However, all the efforts taken by the defendants, went in vain. The Mortgagee, Muthilapet Benefit Fund Ltd., once again brought the suit property for sale through auction and the plaintiffs herein were the successful bidders of the same. The plaintiffs also paid the entire sale consideration and hence, a Sale Deed dated 08.08.2006 had been executed between the parties. After execution of Sale Deed, the same was communicated to the defendants and the plaintiff issued a notice on 19.08.2006 requesting them to vacate and hand over vacant possession of the property. Since there had been no reply, they caused another notice dated 23.11.2006 to be issued. After receiving the said notice, the third defendant had sent a reply on 30.11.2006, stating that she

had initiated proceedings in C.S.No.595 of 2006 challenging the auction sale.

(c) It is also the case of the plaintiffs that the first defendant is the only legal heir of Mrs.Pattas Kaver and he had executed the Mortgage Deed along with second defendant and the defendants 3 and 4 have no right over the suit property and the defendants 1 to 4 are bound to vacate and hand over the vacant possession of the suit property. Since the plaintiffs paid a sum of Rs.46,00,000/- for discharging the Mortgage taken by the defendants 1 and 2, the defendants are bound to pay damages for the use and their occupation from the date of plaint, till the date of delivery of vacant possession.

(d) With the above pleadings the plaintiffs sought for relief of direction against the defendants to vacate and deliver vacant possession of the house and ground bearing Door No.39, Audiappa Naicken Street, Sowcarpet, Chennai 600 079 and for permanent injunction restraining the defendants 1 to 4 from inducting any third party to occupy the property and directing the defendants 1 to 7 to pay jointly and severally damages for wrongful use and occupation at Rs.50,000/- per month from the date of filing the suit till

delivery of vacant possession and also for costs.

2. The defence raised by the defendants in the written statement :

(a) Pending proceedings, defendants 1 and 2 died and their legal heirs were impleaded as defendants 3 to 7. It is the case of the defendants that the Mortgage loan was borrowed by their mother and father and that they had no right to mortgage the property of these defendants. They had also filed a suit in C.S.No.596 of 2006 challenging the auction and the said suit came to be dismissed on an application filed by one Basanthamal Jawaji against which, the defendants have also preferred O.S.A. and the same is pending. It is further averred that the mortgagee has no legal right over the suit property since the same is an ancestral property. The defendants have initiated proceedings before the City Civil Court in O.S.No.2921 of 2000, the same was dismissed, however, no finding had been rendered with regard to ownership of the property in the said suit. The Plaintiffs having colluded with the mortgagee Benefit Fund had conducted the auction sale and hence, the said auction itself is challenged by the defendants herein. It is also averred that a very meager amount of Rs.46,00,000/- had been fixed for the property

though the same is situated in Sowcarpet and hence, the concocted sale is illegal. However, the sale said to have taken place is not binding on these defendants and hence, the question of handing over possession does not arise. The plaintiff have no right or claim over the true owner of the property and therefore, the plaintiff is not entitled to any mandatory injunction as prayed for and pleaded for the dismissal of the suit.

3. Based on the rival pleadings extracted supra after hearing both sides, the following issues were framed on 16.06.2009:

"1. Whether the suit is bad for non-joinder of necessary parties ?

2. Whether the defendants are estopped from challenging the auction sale in view of the rejection of the plaint in C.S.No.595 of 2005 filed by D3 ?

3. Whether the plaintiff is the auction purchaser in the private sale held under Section 69 of T.P.Act and if so, whether the plaintiff is entitled to obtain vacant possession of the suit property?

4. Whether the plaintiff is entitled to recover damages for use and occupation from the defendants, and if so, what should

be the quantum ?

5. Whether the Plaintiff is entitled to the permanent injunction as prayer for ?

6. To what relief is the plaintiff entitled ?"

Issue No.2 : Whether the defendants are estopped from challenging the auction sale in view of the rejection of the plaint in C.S.No.595 of 2005 filed by D3 ?

4. This issue is pivotal to deciding the matter. Answer to this issue will necessarily be the fulcrum of the case and answer to other issues will follow.

5. Having purchased the suit property by way of sale under Section 69 of the Transfer of Property Act ('T & P Act' for brevity) on 24.07.2006, the plaintiffs have laid the instant suit with prayers for recovery of possession of the suit property, for permanent injunction, damages and incidental/residual reliefs. Defendants 1 and 2 herein are father and mother of defendants 3 to 7. Defendant 3 herein namely, Shreya Nas Nahar filed a suit in C.S.No.595 of 2006 on the file of this Court with a prayer for declaration that the auction held on 30.05.2006 in respect of the suit schedule property is null and void and for consequential permanent injunction and possession of the

property. In this suit an application for rejection of plaint was taken and vide order/Judgment dated 07.12.2007 the plaint was rejected. This Order/Judgment has been marked as Ex.P24. Paragraphs 21, 22 and 23 of the said Order/Judgment reads as follows:

"21.The terms of Section 69(3) is clear and obvious and it protects the interest of the purchaser and confine the remedy of the Mortgagor or any aggrieved person to a Suit for damages. No irregularity or impropriety in the exercise of the power of sale would affect the title of an innocent purchaser and the purchaser gets a good title.

22. The only plea raised by the Plaintiff is inadequacy of price. According to the Plaintiff his valuable property has been sold for a very low price of Rs.46,00,000/- which would vitiate the sale. In the absence of fraud, irregularity alleged to have been committed in the exercise of power of sale, the Mortgagors only remedy is for damages. The Plaintiff, who claims the share in the property cannot challenge the validity of the sale under Section 69 of T.P.Act. The Plaintiff and Mortgagors appear to have filed number of Suits to thwart the sale and the subsequent proceedings. Once it is found tha the

intention of the parties is only to re-agitate the same issue. Court has to view such conduct seriously and such action must be immediately stopped. The process of Court must be used bonafidely and properly and must not be abused. In a proper case the Court will prevent the improper use of machinery and summarily prevent its machinery from being used as means of vexation and delaying tactics in the process of litigation.

23. In the result,

(1) A.No.1816 of 2007 is allowed and the Plaint in C.S.No.595 of 2006 is rejected;

(ii) Consequently, O.A.No.632 of 2006 is closed."

6. The above order dated 07.12.2007 of this Court which was also a judgment as it is rejection of plaint has been marked as Ex.P24 in the instant proceedings as set out above. One other paragraph in the said order/judgment is of enormous significance, the same is in paragraph 16 and it reads as follows:

"Even going by the Plaint averments in my considered view the Plaintiff has no semblance of right over the Suit property. The case is a clear case of

the re-litigation on the same issue. As discussed earlier, the Plaintiff, his Brother and Parents have filed Suits after Suits with a view to thwart the sale under Section 69 of T.P.Act and other proceedings."

7. It is not in dispute that the above judgment has become final and there is no Intra Court Appeal or Review against the same. In short, the above judgment has been given complete legal quietus. Under such circumstances, the defendant's cannot be heard to contend in this suit that the auction sale held on 24.07.2006 is not valid. A further reading of Ex.P.24 would reveal that the defendants cannot now assailed the auction sale under Section 69 of the T & P Act. A perusal of the factual matrix would also show that a barrage of legal proceedings have been initiated by the defendants to avoid recovery of proceedings by one proceedings or the other. The complete legal quietus given to Ex.P24 read in the light of these proceedings clearly answer this issue in favour of the plaintiffs. The defendants are clearly estopped from challenging the auction sale.

Issue No.3 :

Whether the plaintiff is the auction purchaser in the private sale held under Section 49 of T.P.Act and if so, whether the plaintiff is entitled to obtain vacant possession of the suit property?

Issues 2 and 3 are dovetailed. Answer to the above issue flows from the answer to issue No.2 supra and therefore, issue number 3 has also necessarily be answered in favour of the plaintiff. Plaintiff are entitled to recovery of vacant possession of the suit property.

Issue No 4:

Whether the plaintiff is entitled to recover damages for use and occupation from the defendants, and if so, what should be the quantum ?

Answer to issue Nos.2 and 3 would clearly reveal and take us to the indisputable position that the defendants are in wrongful possession of the suit schedule property and therefore they are liable to pay damages. Damages have been claimed at the rate of Rs.50,000/- per month. It is fair that evidence is let in evidence and establish this quantum. It is left open to the plaintiff to move the Court for such a course. Issue no.4 is answered accordingly.

Issue No.5 :

Whether the Plaintiff is entitled to the permanent injunction as prayer for ?

In the light of answer to issue Nos.2 and 3 and 4 supra, it is obvious that the plaintiffs are entitled for injunction restraining the defendants from inducting third parties. Seeing the barrage of proceedings, unlashd by the defendants if such a course is adopted by the defendants it will lead to obstruction in recovery possession of the suit schedule property which in turn will lead to another round of litigation which from any perception of the matter is completely undesirable.

Issue No.1 :

Whether the suit is bad for non-joinder of necessary parties ?

With regard to this issue, it cannot be disputed that a necessary party is one without whose presence a workable order or decree cannot be passed by the court. A perusal of the rival submissions and the factual matrix as narrated supra, make it clear that all parties who are necessary for passing a workable decree or present before this Court. In this view of the matter, this issue is also answered against the defendants and in favour of the plaintiffs.

Issue No.6 :

To what relief is the plaintiff entitled ?

Separate issue regarding costs has not been framed. Under such circumstances, considering the tenacious manner in which the defendants have been delaying the recovery of possession by filing a barrage of proceedings, it is just and reasonable to award costs to the plaintiff and the same is being done under this residuary issue. The suit is decreed with costs.

sd/.M.S.J
10.11.2016

//Certified to be a true copy//

Dated this the day of 2016

R.s/22.12.2016

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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