

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.04.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.4051 of 2016
and CMP No.20475 of 2016

S.Chita ... Petitioner/Defendant

Vs.

G.Oubli	...	Respondent/Plaintiff
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Civil Revision Petition filed under Article 227 of the Constitution of India, against the judgment and decree of the learned 1st Additional District Judge, Salem in CMA No.15 of 2016 dated 11.11.2016 reversing the fair and decreetal order of the learned 2nd Additional Subordinate Judge, Salem in I.A.No.80 of 2016 in O.S.No.100 of 2016 dated 08.06.2016.

For Petitioner : Mr.J.Franklin

For Respondent : Mr.A.Karthikeyan
for caveator

ORDER

This Civil Revision Petition has been filed against the judgment and decree of the learned 1st Additional District Judge, Salem in CMA No.15 of 2016 dated 11.11.2016 reversing the fair and decreetal

order of the learned 2nd Additional Subordinate Judge, Salem in I.A.No.80 of 2016 in O.S.No.100 of 2016 dated 08.06.2016.

2. The petitioner herein is the defendant and the respondent herein is the plaintiff in O.S.No.100 of 2016 filed by the respondent before the Principal Sub Court, Salem, for recovery of a sum of Rs.9,16,400/- alongwith 24% interest per annum from the petitioner.

3. According to the respondent, on 21.12.2013, the petitioner borrowed a sum of Rs.6,00,000/- for her urgent family and business expenses, by executing a promissory note in favour of the respondent on the same day, agreeing to repay the said amount on demand, alongwith interest @ 24% per annum. However, the petitioner failed to pay the said amount inspite of repeated reminders which made the respondent to file the suit.

4. The respondent also filed I.A.No.80 of 2016 for attachment of the property mentioned therein alleging that the petitioner is trying to alienate the petition mentioned property to some third parties with an intention to defeat the interest of the respondent.

5. The petitioner filed counter denying the averments made in the affidavit as well as borrowal and execution of promissory note. According to the petitioner, she does not know the respondent and the suit promissory note is a fabricated one created with an intention to grab the property of the petitioner. Further, it is stated that the petitioner has only obtained home loan from ICICI Bank and created a charge over the said suit property and the document of title are in the custody of the ICICI Bank and in the said circumstances, the question of alienation of the property to the third party does not arise.

6. On 26.04.2016, the plaintiff filed written statement in O.S.No.100 of 2016 denying the averments made in the plaint.

7. The learned Judge, considering the averments made in the affidavit and counter affidavit in the plaint, dismissed the application holding that the petitioner has furnished particulars about the home loan taken by him from ICICI Bank and also furnished the loan account whereas the respondent has not filed any encumbrance certificate to show that the property is free from encumbrance. Against the said order of dismissal dated 08.06.2016, the

respondent filed CMA No.15 of 2016 on the file of the 1st Additional District Court, Salem.

8. The learned 1st Additional District Court, Salem, on considering all the materials available on record, allowed the appeal by setting aside the order dated 08.06.2016 of the II Additional Subordinate Judge, Salem made in I.A.No.80 of 2016 in O.S.No.100 of 2016. The learned Judge had took note of the fact that the respondent has filed encumbrance certificate which does not reveal any encumbrance much less charge of the ICICI Bank. The respondent has also filed third party affidavit to substantiate his case that the petitioner is trying to alienate the property to third party. Even though the property is mortgaged with ICICI Bank, order of attachment before judgment can be ordered subject to mortgage in favour of the said Bank. Against the order dated 11.11.2016 of the learned 1st Additional District Court, Salem, the petitioner has preferred the Civil Revision Petition.

9. Heard the learned counsel appearing for the petitioner and respondents and perused the materials available on record.

10. The learned counsel for the petitioner made submissions on merits of the case. He would contend that the petitioner had neither borrowed any amount from the respondent nor executed promissory note in favour of the respondent. Whether the petitioner had borrowed the money from the respondent by executing promissory note for same or the promissory note is a fabricated one is the matter to be decided only after conclusion of trial by letting in oral and documentary evidence by both the parties. The learned Judge had dismissed the application in I.A.No.80 of 2016 in O.S.No.100 of 2016 on the ground that the respondent had not filed any encumbrance certificate to show that the property sought to be attached is free from encumbrance.

11. On the other hand, the respondent has filed encumbrance certificate and in the said encumbrance certificate only, the purchase of property by the petitioner is mentioned and there is no other encumbrance in the said property. The learned Trial Judge has failed to take note of the encumbrance certificate filed by the respondent as well as the affidavit filed by third parties wherein it has been stated that the petitioner is trying to alienate the suit property and sell the same to third parties. Further, even if the

property is mortgaged in favour of the ICICI Bank, attachment can be ordered subject to said mortgage. The learned 1st Additional District Judge, Salem has considered these observations in correct perspective and by exercising powers conferred by him.

11. In the above said facts and circumstances of the case, I do not find any illegality or irregularity in the order passed in the impugned order warranting interference by this Court.

12. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed. The learned Principal Subordinate Judge, Salem is directed to dispose of the suit in O.S.No.100 of 2016, on merits and in accordance with law, as expeditiously as possible, in any event, not later than 30th September 2017.

17.04.2017

Speaking/Non-Speaking order
Index :Yes/No
rgr

V.M.VELUMANI,J.

rgr

To

1. The 1st Additional District Judge,
Salem
2. The 2nd Additional Subordinate Judge,
Salem.

C.R.P.(PD)No.4051 of 2016

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