

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Reserved on : 18.04.2018]

[Pronounced on : 23.08.2018]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.R.C.No.1573 of 2017

and

Crl.M.P.No.15868 of 2017

1. Velammal (Deceased)
2. TNU. Thirupathy
3. TNU. Yuvarajan
4. S. Indira

... Petitioners

.. Vs ..

1. Indiabulls Housing Finance Limited,
Rep. by its Power of Attorney,
Mr.R.Inbasekaran,
No.20, Apex Chamber, 1st Street,
Sir Thyagaraya Road,
T.Nagar, Chennai - 600 017.

2. N. Srinivasan
3. Vijaya
4. Shanthi (Shanthi Sridharan)
5. Anandhi (Anandhijaichand)

... Respondents

PRAYER: Criminal Revision Case filed under Sections 397 and 401 of Cr.P.C., praying to call for the records pertaining to the Crl.M.P.No.1955 of 2014 pending on the file of the learned Chief Metropolitan Magistrate (FAC), Chennai and to set aside / recall the impugned order dated 24.11.2017.

For Petitioners : Mr. R.Ganesan

For R-1 : M/s. Ridhima Sharma

For RR-2 to 5 : No Appearance

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ORDER

This Criminal Revision Case is filed by the petitioners seeking to set aside the impugned order dated 24.11.2017 passed by the learned Chief Metropolitan Magistrate (FAC), Chennai, in CrI.M.P.No.1955 of 2014.

2. The petitioner Nos.2 to 4 herein are the legal representatives/legal heirs of the 5th respondent in the above Criminal miscellaneous petition filed before the learned Chief Metropolitan Magistrate (FAC), Chennai.

3. The learned counsel appearing for the petitioners submitted that the first respondent herein viz., Indiabulls Housing Finance Limited has preferred a petition before the trial Court in CrI.M.P.No.1955/2014 for taking possession of the petition mentioned property situated in Sivaji Street, T.Nagar, Chennai and the said petition was ordered on 24.11.2017.

4. The 5th respondent in the above said criminal miscellaneous petition namely, M.Velammal W/o. Late Ulaganathan died on 25.06.2014, prior to the filing of the petition and as such, the petition filed and ordered against the dead person is nullity in law. The Death Certificate and the Legal heirship certificate of the said M.Velammal have been filed before this Court.

5. Learned counsel appearing for the first respondent/Indiabulls Housing Finance Limited has fairly conceded that the petition has been filed against the dead person due to inadvertence and originally, the petition in CrI.M.P.1955 of 2014 was filed before the learned Chief Metropolitan Magistrate (FAC), Chennai, immediately after the disposal of the Second Appeal in S.A.No.34 of 2014, by the Debts Recovery Tribunal-II (hereinafter referred to as "DRT-II") at Chennai and after the disposal of RA(SA)No.32/2015 by the Debts Recovery Appellate Tribunal (hereinafter referred to as "DRAT"). But on the date of filing of the petition, R.5 in the above CrI.M.P.No.1955 of 2014 had died.

6. In view of the admitted position that the petition itself has been filed against the dead person and the order has been passed against dead person and also taking note of the fact that the death of the said Velammal and her legal heirs viz., the petitioners 2 to 4 herein are not disputed, I am of the considered view that the order passed by the learned Chief Metropolitan Magistrate (FAC), Chennai, in CrI.M.P.No.1955 of 2014, dated 24.11.2017 is liable to be set aside.

7. The learned counsel appearing for the petitioners would further contend that as against the issuance of possession notice dated 14.12.2013 by the first respondent herein, the first petitioner herein (deceased) and the second petitioner herein have moved S.A.No.34 of 2014 before the Debts Recovery Tribunal-II at Chennai, under Section 17 of the SARFEASI Act on the ground that the deceased Velammal is not a mortgagor and she has not signed in the alleged Partition Deed and as such, the 1/10th share of the deceased Velammal in the schedule mentioned property cannot be taken possession by the first respondent.

8. It appears that after following the principles and after hearing both the parties, the said Second Appeal has been allowed by the DRT-II at Chennai, by an order dated 15.05.2015 and as against the said order, the first respondent herein has moved an appeal in RA (SA) No.32/2015 before the DRAT and by an order dated 10.10.2017, the DRAT has allowed the said RA (SA) No.32/2015 in favour of the first respondent herein by observing as follows:-

"To safeguard the interest of the deceased mother, 1/10th share of sale proceed can be kept reserved in the name of the deceased R1. PO of DRT has erred in setting aside the notice of the appellant financial institute in the name of 1/10th share of R1."

9. Learned Counsel appearing for the petitioners would further contend that when both DRT-II and DRAT have come to a conclusion that the 1/10th share of the deceased Velammal do not form part of the mortgage deed and she is not signatory to the Partition Deed and though the DRT-II held in favour of the deceased Velammal, the DRAT, without looking into the legal position in respect of the right of the co-sharer to remain in possession to the extent of his undivided 1/10th share, has failed to observe the same and erred in ordering taking possession of the entire property including the unmortgaged portion property of the deceased Velammal asking her to take money of the sale proceeds, when the first respondent herein/Indiabulls Housing Finance Limited does not have any mortgage of the entire property and have no right to sell the property which was not mortgaged to the first respondent herein by the deceased Velammal.

10. Learned counsel appearing for the first respondent submitted that the writ petition in W.P.No.28640/2017 filed by

the petitioners 2 to 4 herein before this Court is pending and hence, I am not expressing any view on the order passed by the DRAT, which is extracted above, except to say that the deceased Velammal being the mother of the deceased Nagarajan, who died intestate, is entitled to 1/10th share in the petition mentioned property.

11. Admittedly, the deceased Velammal is not a signatory to the alleged Partition Deed nor the mortgage deed in favour of R.1-Indiabulls Housing Finance Limited, and hence, in respect of the undivided share of the deceased Velammal viz., 1/10th share devolved upon her on the death of Nagarajan and hence, the undivided 1/10 share of Velammal, possession cannot be handed over to the first respondent/Indiabulls Housing Finance Limited, if at all they have to work out remedy under the Partition Act. Since the matter is under consideration before the learned Chief Metropolitan Magistrate, Chennai, except enlightening the legal position, I am not passing any order as to the right and entitlement of the first respondent herein with regard to the relief sought for by the first respondent, as per the mortgage deed in their favour, except to enlighten on the above said factual and legal position and it is for the learned chief Metropolitan Magistrate to consider the factual and legal position of the case, in the light of the legal provisions applicable to the facts and circumstances of the case and to pass an order.

12. In the result, the order dated 24.11.2017 passed by the learned Chief Metropolitan Magistrate (FAC), Chennai, in CrI.M.P.No.1955 of 2014, is hereby set aside and the Criminal revision Case is allowed and the matter is remitted back to the learned Chief Metropolitan Magistrate (FAC), Chennai, for fresh consideration and the first respondent herein, who is the petitioner before the learned Chief Metropolitan Magistrate, is required to implead all the Legal heirs of the deceased Velammal, the fifth respondent in the above CrI.M.P.No.1955 of 2014 as per the Legal heirship Certificate produced before this Court. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS VII)

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Sub Assistant Registrar

KSA-2/Jr1

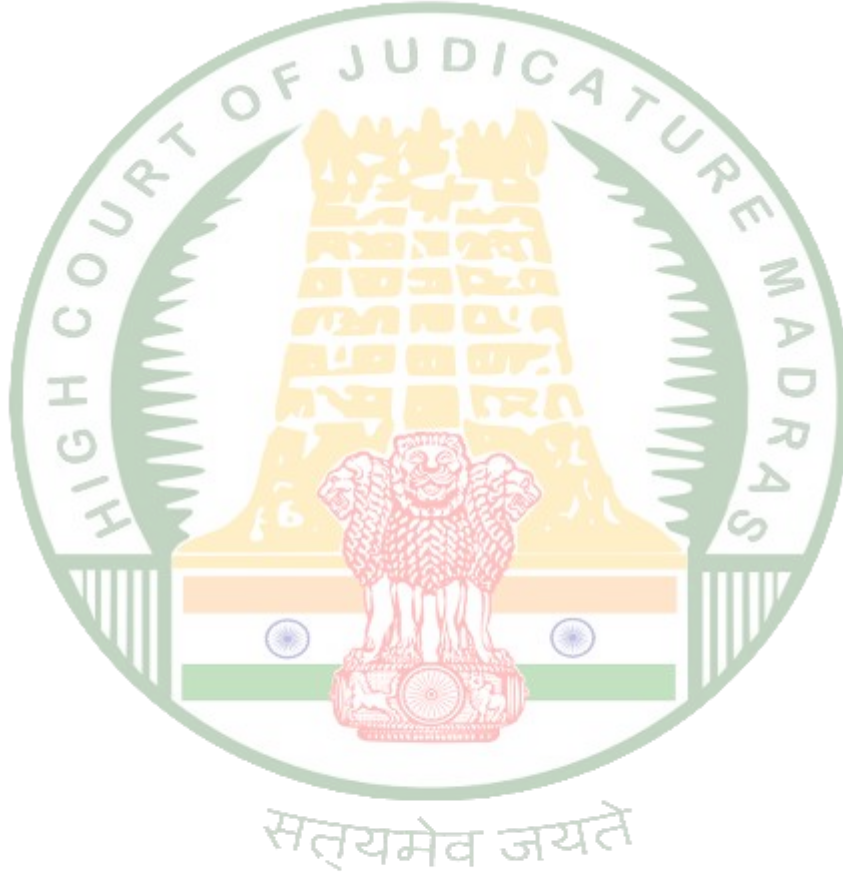
To

The Chief Metropolitan Magistrate (FAC),
Chennai.

+1cc to M/s. Ridhima Sharma, Advocate, S.R.No.57753

Cr1.R.C.No.1573 of 2017

NRL (CO)
CS/11/09/18



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