

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.323 of 2012

1. S.Kumar
2. K.Rajeswari
3. K.Aanandha Saravanan
4. K.Aanandha Subramaniam

... Plaintiffs

Versus

1. B.P.Suresh
2. Mrs.S.Surya Prabha
3. Mrs. Jesarammali
4. Padaga Lingam
5. Kannan
6. Santhakumar
7. Loganathan
8. Mani
9. Munniya

10. Kannan
11. Subramaniam
12. Aravind Kumar
13. Srinivasan
14. Mrs. Sivaranjani

15. Raja
16. C.M.Kumar
17. Na.Ka.Sekar
18. Jothy Kumar
19. Vijayakumar
20. Ravanaiya
21. Murugesan
22. Janakiraman
23. Balasundarem

24. Shivaji
Proprietor of Silver Ornaments
25. Aasai
carrying on business of Screen Printing
26. Raja
carrying on business of Book Binding
27. The Corporation of Madras
Rep. By its Commissioner,
Rippon Buildings, Chennai 600 003. ... Defendants

Plaint filed under Order IV Rule of the Original Side Rules of the High Court of Madras read with Order VII Rule 1 of the Code of Civil Procedure 1908 and praying to pass a judgment and decree:

- a) directing the defendants to deliver vacant possession of the scheduled property to the plaintiffs;
- b) directing the defendants 1 to 26 jointly and severally pay to the plaintiffs a sum of Rs.34,52,600/- as mesne profit at Rs.24 lakh per annum from the date of sale till the date of the plaint;
- c) directing the defendants 1 to 26 jointly and severally pay to the plaintiffs future mesne profit at the above rate of Rs.24 lakh per annum from the date of the plaint till delivery of possession.
- d) directing the defendant 27 to take appropriate action against the first defendant for indulging such unauthorized and wrongful construction without due sanction and plan and permission of the defendant 27.
- e) for costs.

For Plaintiffs : Mr.T.Srikanth

For Defendants : No appearance

J U D G M E N T

The suit has been filed for recovery of possession by the plaintiffs.

2. The case of the plaintiffs in brief is as follows:

The defendants 1 and 2 have borrowed monies on the security of the suit property from M/s.Hindu Janopakara Saswatha Nidhi Ltd., and there was a sum of Rs.8,55,130/- outstanding and payable by the defendants 1 and 2 to the said Nidhi. While so, the defendants 1 and 2 had approached the mortgagee, viz. M/s.Shaymala Devi wife of Mr. J.Gopilal, for financial assistance to enable them to discharge the said loan. The defendants 1 and 2 have executed a registered simple mortgage deed on 28.01.2008 for a sum of Rs.15,00,000/- and after paying the Nidhi, a sum of Rs.8,55,130/-, the balance of Rs.6,44,870/- was paid to the mortgagor, viz. defendants 1 and 2 at the time of execution of deed of mortgage on 28.01.2008. The said simple mortgage conferred the power of sale without intervention of the Court, under Section 69 of the Transfer of Property Act, on the mortgagee, viz. M/s. Shyamala Devi. Since, the defendants defaulted the payment of

mortgage amount, despite repeated demands made by the mortgagee, the mortgagee had exercised the power of sale conferred on her under the mortgage and brought the property to public auction through the auctioneer, viz. M/s. Sri Raj & Co. Originally the property was brought to auction on 27.04.2009, 02.07.2009 and 03.10.2009. But the said auctions were deferred on all the above three occasions on the undertaking given by defendants 1 and 2 to clear the entire loan.

3. Defendants 1 and 2 did not keep up their promise and hence the mortgagee requested the auctioneer M/s. Sri Raj & Co., to put up the property to public auction. Pursuant to the said request, the auction sale letter was sent on 01.04.2010 by the auctioneer M/s. Sri Raj & Co., informing the defendants 1 and 2, that the property will be put up for public auction on 17.04.2010. Though they received the notice, defendants 1 and 2 did not come forward to pay the mortgage amount.

Finally, the property was put up for auction sale on 17.04.2010 and the plaintiffs were declared as successful highest bidders at Rs.86,00,000/-. The plaintiffs also paid 25% of the auction amount, viz. Rs.21,50,000/- on the same day, the balance amount was paid subsequently and the sale deed came to be executed in favour of the plaintiffs on 24.05.2010 by the mortgagee. It is also claimed that the plaintiffs, after the

execution of sale deed, approached defendants 1 and 2 and defendants 3 to 26, who were in possession of the property requiring them to deliver possession, the defendants did not comply with the said request for delivery possession. Hence, the plaintiffs have come forward to file the present suit.

4. A written statement was filed by defendants 1 and 2 and defendants 3 to 26 did not appear, they were set *ex-parte*. The defendants 1 and 2 in their written statement contended that there was an agreement between the 1st plaintiff and the defendants, wherein the 1st plaintiff had agreed to pay a sum of Rs.1,76,00,000/- as sale consideration to the said property. Therefore, according to the defendants, the purchase made by the plaintiffs for a total consideration of Rs.86,00,000/- is not a valid transaction. It is also claimed that the 1st plaintiff and her husband promised to help the defendants to clear the mortgage, created in favour of M/s.Hindu Janopakara Saswatha Nidhi Ltd., and obtained these documents under the pretext of clearing the said loan. The main contention of defendants 1 and 2 is that they deny the very execution of the mortgage. They would also refer to the original suit in CS.No.1034 of 2008, filed by the husband of Shymala Devi seeking specific performance and vacant possession with reference to

the portion of the suit property. Defendants 1 and 2 would also deny the fact that the property was sold in public auction on 17.04.2010. Their claim is that the auction itself was conducted, it is claimed that the defendants 1 and 2 have filed the suit in CS No.722 of 2012 seeking accounting and redemption. On the above contentions the defendants sought for dismissal of the suit.

5. On the above pleadings, this court framed the following issues on 08.07.2014.

1. *Whether the auction sale of the plaint schedule property held on 17.04.2010 under Section 69 and 69-A of the Transfer of Property Act by the auctioneer M/s.Sri Raj and Co. to realise the mortgage money due under the registered mortgage executed by defendants 1 and 2 on 28.11.2008 is vitiated by any illegality or procedural illegality?*
2. *Whether the plaintiffs are entitled to seek delivery of vacant possession of the suit schedule property?*
3. *Whether the defendants are jointly and severally liable to the amount claimed by the plaintiffs as mesne profits?*
4. *What are the other reliefs for which the plaintiffs are entitled to?*

6. At trial, P.W.1 filed the proof affidavit and he was examined in chief on 21.11.2014 and 27.02.2015 and he was also cross-examined by the learned counsel for the defendants 1 and 2 on three occasions, viz., on 30.03.2015, 01.04.2015 and 24.04.2015.

7. Upon an application filed by the plaintiff, subpoena was directed to be issued by this Court to the auctioneer requiring the auctioneer to produce the documents relating to the auction. The clerk of the auctioneer was examined as C.W.1 and the documents relating to the auction that were produced by him were marked as Exhibits C1 to C11. However, the learned counsel for the defendants 1 and 2 did not appear, thereafter and C.W.1 was not cross-examined. Despite the suit having been posted before the learned Additional Master, for several hearings, there is no progress in suit and the learned Additional Master referred the suit back to the Court.

8. When the matter was listed before this Court on 17.01.2018, there was no representation for the counsel for the defendants in CS No.323 of 2012 and the plaintiffs in CS No.722 of 2012, hence their evidence was closed and the matter was posted for arguments on

23.01.2018. Despite, the matter being posted for several occasions before this Court, i.e., on 23.01.2018, 19.02.2018, 23.02.2018, 27.02.2018, 28.02.2018 07.03.2018 and 08.03.2018, there is no representation for the counsel for the defendants in CS No.323 of 2012.

9. In the absence of any evidence on the side of the defendants in CS No.323 of 2012, this Court is forced to proceed against the defendants *ex-parte*. From the evidence of P.W.1 and documents marked as Exhibits P1 to P5 as well as Exhibits C1 to C11 marked by C.W.1. It is seen that the defendants have executed a simple mortgage on 20.01.2008 and the said simple mortgage confers the power of sale without intervention of the Court on the mortgagee. From Exhibits C3 to C11, it is seen that the auctioneer had issued the notices to the defendants requiring them to pay the amount and those notices have been acknowledged by defendants 1 and 2. Copy of the pamphlet circulated in the area, declaring that the property was to be sold in auction on 17.04.2010 at 5.00 p.m. has also been marked as Ex.C4. The said pamphlet was also sent by registered post to the defendants and the receipt of the same has been acknowledged by them. A publication has been effected by auctioneer in Malaimalar dated 14.04.2010 regarding the auction. A copy of the publication has been

produced as Ex.C6. Ex.C7 is the record of the auction held on 17.04.2010, it is seen from that at least three bidders have taken part in the auction and the plaintiffs are the highest bidders at Rs.86,00,000/-. On the same day, i.e., 17.04.2010, viz. the date of auction, the plaintiffs have paid a sum of Rs.21,50,000/- representing 25% of the bid amount to the auctioneer, which is evidenced by a receipt issued by the auctioneer, marked as Ex.C8. The proceedings of the auctioneer has also been informed to the defendants 1 and 2 by the auctioneer under Ex.C9 dated 19.04.2010, the receipt of the same also acknowledged by the defendants. From Ex.C10, it is seen that the plaintiffs have paid the balance amount of Rs.64,50,000/- and the sale deed has been executed in favour of the plaintiffs on 24.05.2010, the said sale deed is marked as Ex.P2. Thereafter, the plaintiffs have issued Ex.P3 series, notices to the defendants, who are in possession of the property. Though, P.W.1 has been cross examined by the defendants, nothing worthwhile has been brought about to discredit the testimony of P.W.1. There is no material to controvert the documentary evidence, which had been placed before the Court to show that in fact the property was sold in auction on 17.04.2010 and the sale deed has been executed in favour of the plaintiffs by the mortgagee on 24.05.2010 on payment of the entire sale consideration.

10. In view of the above, I am of the considered opinion that the plaintiffs are bound to succeed. There will be a decree as prayed for in favour of the plaintiffs. The defendants 1 and 2 to pay cost of the suit to the plaintiffs.

09.03.2018

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Index:Yes/No
Internet: Yes/No
Speaking Order/Non speaking order

List of the witnesses examined on the side of the plaintiff:

P.W.1 Rajkumar Chordia

List of Exhibits marked on the side of the plaintiff:

Sl. No.	Exhibits	Description of Documents	Date
1	Ex.P1	Certified copy of the second simple mortgage	20.01.2008
2	Ex.P2	Certified copy of the Sale Deed	24.05.2010
3	Ex.P3 (series)	Copy of notice with 8 acknowledgment card and 23 along with postal receipts	23.07.2011
4	Ex.P4	Xerox copies of the Chennai Metropolitan Water Supply and Sewerage Board receipts	18.09.2010
5	Ex.P5	Xerox copy of extract of permanent Land Register	24.02.2011

List of the witnesses examined on the side of the Court Witness:

C.W.1 M.P.Baskar

List of Exhibits marked on the side of the Court Witness:

Sl. No.	Exhibits	Description of Documents	Date
1	Ex.C1	Subpoena notice received by Sri Raj & Co.	----
2	Ex.C2	Authorisation letter	100216
3	Ex.C3 series	Two Acknowledgment cards	---
4	Ex.C4 series	The copies of the auction catalogue	---
5	Ex.C5 series	Two Acknowledgment cards	---
6	Ex.C6	Copy of the Paper publication	---
7	Ex.C7	Bidders list in respect of the said auction (two sheets)	---
8	Ex.C8	Copy of the receipt issued to the plaintiffs	---
9	Ex.C9 series	Copy of the letter and two Acknowledgement cards	19.04.2010
10	Ex.C10	Copy of the receipt	030510
11	Ex.C11	Copy of the letter and two Acknowledgment cards	030510

List of the witnesses examined on the side of the defendants: Nil

List of Exhibits marked on the side of the defendants: Nil

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

R.SUBRAMANIAN, J.

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C.S.No.323 of 2012

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