

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **23.10.2018**

C O R A M

THE HON'BLE MR.JUSTICE M.S.RAMESH

Civil Revision Petition (PD) No.2760 of 2017
and C.M.P.No.13108 of 2017

G.Ramesh .. Petitioner

Vs

1.A.Ramani Bai
2.Sureshwar .. Respondents

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, praying to set aside the Fair Order and Decreetal Order passed in I.A.No.11646 of 2016 in O.S.No.2654 of 2015 dated 10.02.2017 passed by the Learned XVI Assistant Judge, City Civil Court at Chennai.

For Petitioner : Mr.R.Raman Laal

For Respondents : Mr.P.Chandrasekar

ORDER

The challenge in the present Civil Revision Petition is against the rejection of an application filed under Order VII Rule 11 of the Code of Civil Procedure.

2.The learned counsel for the petitioner raised three grounds, before this Court, for the purpose of establishing that the plaint is liable to be rejected:

(a)The prayer sought for in the suit has become infructuous, in view of the subsequent developments that the suit property came to be sold through a public auction;

(b)In view of the earlier suits filed by the respondents/plaintiffs, the present suit is barred by the principles of *res judicata* and

(c)In view of Sections 60 and 83 of the Transfer of Property Act, 1882, the suit is barred.

3.The learned counsel for the respondents on the other hand submitted that the earlier suits filed by the respondents were only for the relief of permanent injunction and that the 'cause of auction' for the present suit arose when the petitioner herein had issued an auction notice. The learned counsel further submitted that Sections 60 and 83 of Transfer of Property Act, are not mandatory in nature and hence, it cannot be said that the suit is barred in view of such

provisions.

4.I have given careful considerations to the submissions made by the respective counsel.

5.In so far as the first ground raised by the learned counsel for the petitioner herein is concerned, merely because the suit property came to be sold through public auction pending the suit, the plaint need not necessarily be rejected. Order VII Rule 11 (a) of C.P.C., speaks of the 'cause of auction', that stood as on the date when the plaint was presented. In other words, what is required to invoke Order VII Rule 11 C.P.C., is that, the plaintiff should not have a cause of action on the date when the plaint was presented. It goes without saying that whenever a subsequent event arises pending the suit, it cannot be said that the plaint is devoid of any cause of auction, since the subsequent event is subject to the final outcome of the suit.

6.The averments in the plaint indicates that the plaintiffs were willing to redeem the mortgage and that they were unable to do so in view of exorbitant interest charged by the defendant, the non furnishing of actual amount dues and various threats from the petitioner/defendant. When the plaint averments goes to say that there was a valid mortgage and that the plaintiffs were willing to

redeem the mortgage, it has to be necessarily held that the plaintiff did have a cause of action on the date of filing of the suit. The subsequent sale had taken place during the pendency of the suit, which would obviously be subject to the result of the suit.

7. In so far as the second ground raised by the petitioner is concerned, the respondents herein had earlier filed two suits in O.S.No.8888 of 2008 and O.S.No.9984 of 2009 seeking for permanent injunction before the City Civil Court at Chennai. The present suit for rejection of mortgage has been filed after the auction notice was issued to the petitioner. The auction notice has also been produced as one of the documents along with the plaint. Earlier suits were filed prior to the auction notice. As such, it can be *prima facie* held that the cause of action for the present suit arose when the petitioner herein had issued the auction notice. As such, the instant suit will not be get hit by the principles of *res judicata*.

8. In so far as the provisions under Sections 60 and 83 of the Transfer of Property Act, is concerned, as pointed out by the learned counsel for the respondents, Section 83 of the Transfer of Property Act, is not a mandatory provision which imposes certain conditions of pre-deposit of the mortgage amount. The language of Section 83 of the Transfer of Property Act, is discretionary in nature and as

such, there cannot be a bar to file a suit for mortgage.

9. Likewise, Section 60 of the Transfer of Property Act, gives the mortgagor a right to redeem, on payment or tender of the mortgage amount to the mortgagee. The plaint averments in the instant suit goes to show that the plaintiffs were willing to tender the amount and that owing to the reasons of non-furnishing of the mortgage amount, the threat caused by the petitioner herein and the subsequent trespass into the property had prevented them from seeking for payment of the mortgage amount.

10. Nevertheless, whether or not, such a tender was made, requires to be determined during the course of the trial. For the purpose of invoking Order VII Rule 11 of C.P.C., it would suffice if an averment is made to that effect that the mortgagor intended to redeem the mortgage, which is found from the averments in the present plaint. As such, this ground raised by the petitioner herein also does not require consideration.

11. It is hereby made clear that all the above observations have been made for the purpose of answering the various grounds raised by the learned counsel for the petitioner in the Civil Revision Petition and that the Trial Court shall not quote or adopt such

observations as a precedent for the purpose of finally determining the suit. The parties are at liberty to raise all the grounds raised in the present Civil Revision Petition before the Trial Court during the course of trial and in the final arguments.

12. In the light of the above observations, I do not find any infirmity in the order of the Trial Court in rejecting the application filed under Order VII Rule 11 of CPC. As a result, this Civil Revision Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

23.10.2018

jbm

Index : Yes/No

Speaking order/non speaking order

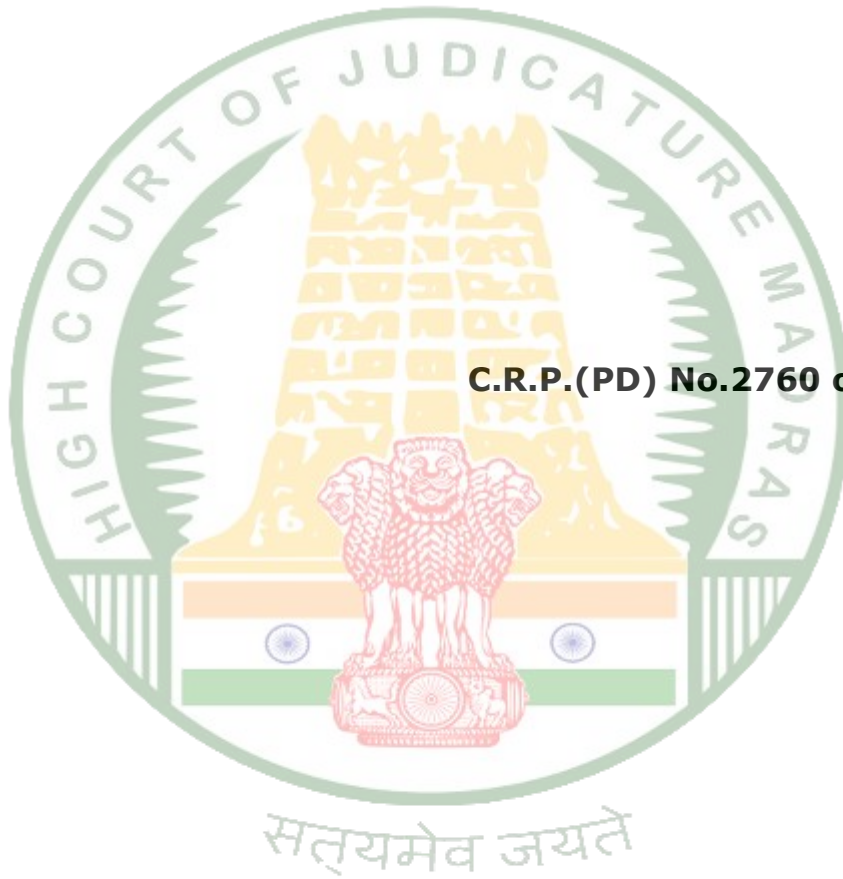
To

The XVI Assistant Judge,
City Civil Court,
Chennai.

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M.S.RAMESH, J.

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