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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 01.08.2018
CORAM
THE HONOURABLE MR.JUSTICE S.S.SUNDAR
C.R.P.(PD)(MD)No.402 of 2014
and
M.P(MD)No.1 of 2014

N.Ramachandran ...Revision Petitioner/
Petitioner/3rd Defendant

Vs.

1.M/s.Ellora Outfits (Dissolved Partnership Firm)
represented by S.Senthilkumar,
No.17, Nageswaran east street,
Kumbakonam town and munsif,
Thanjavur District.

2.Ellora Readymades,
represented by its proprietor V.Senthilkumar,
No.1098, Maruthamuthu nagar,
Chennai Salai,
Kumbakonam town and munsif,
Thanjavur District. ...1&2 Respondents/1&2 Respondents/
Defendants 1&2

3.K.Ramadas ...3rd Respondent/3rd Respondent/
Plaintiff

PRAYER: This petition is filed under Article 227 of Constitution of India, to set aside the fair and decreetal order dated 19.11.2013 passed in I.A.No.166 of 2013 in O.S.No.326 of 2011 by the Principal Subordinate Judge, Thanjavur and allow the Application with cost.

For Petitioner : Mr.R.Rajaraman
For R3 : Mr.Sesubalanraja

ORDER

This Civil Revision Petition is filed by the 3rd defendant in the Suit in O.S.No.326 of 2011 as against the order passed by the learned Principal Subordinate Judge, Thanjavur in I.A.No.166 of 2013 in O.S.No.326 of 2011. The 3rd respondent herein has filed the suit in O.S.No.326 of 2011 for declaration to declare the memorandum of deposit of title deeds executed by the plaintiff on 06.02.2009 as discharged and for a consequential mandatory injunction, directing the third defendant to return the list of documents mentioned in the suit scheduled within a time to be fixed by that Court.

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2. It is not in dispute that the first defendant borrowed some amount from the third defendant. The plaintiff also executed a memorandum of deposit of title deeds in respect of the suit property in favour of the third defendant on 06.02.2009 as security for the loan. It is the specific case of the plaintiff that the plaintiff did not borrow any money from the third defendant to create a mortgage by depositing title deed and only obliged to the request of the first defendant to offer the title deeds as a security for the loan facility offered to the first defendant. The main contention of the plaintiff in the suit is that the second defendant, a proprietary concern, owned by one V.Senthilkumar, has taken over the business of the first defendant and that he has no knowledge about the transaction between the second defendant and the third defendant. Since, the third defendant is presumed to have discharged the loan and the security by permitting the first defendant in the suit being take over by a new proprietary concern, it is stated that the plaintiff is entitled to a decree as prayed for.

3. An application in I.A.No.166 of 2013 in O.S.No.326 of 2011 under order 14 Rule 2 of CPC was filed by 3rd defendant, to try the issue whether the Civil Court has jurisdiction to try the suit in view of the bar imposed by the SARFAESI Act. The lower Court dismissed the petition on the ground that the plaintiff is not a debtor and that he has independent right contract Act and hence he is not precluded from filing the suit before the Civil Court.

4. The learned counsel for the revision petitioner submitted that the lower Court ought to have decided the preliminary issue with regard to the maintainability of the suit. He submitted further that as per Section 34 of the SARFAESI Act, jurisdiction of Civil Court is ousted. It is further contended that the execution of memorandum of deposit of title deeds as security for the loan, is specifically admitted by the plaintiff and that therefore the petition filed by the revision petitioner cannot be dismissed.

5. The learned counsel for the 3rd respondent referred to the facts that are narrated in the plaint and submitted that the liability of the plaintiff in the suit by virtue of the mortgage created in favour of the bank stands discharged by virtue of Section 133 of Indian Contract Act. The case of plaintiff in the suit is that the first defendant in the suit was a partnership firm and that the plaintiff executed a memo of deposit of title deeds in favour of the third defendant on 06.02.2009 for the loan advanced to the first defendant which is a partnership Firm. It is further stated that plaintiff is not a debtor, however, he executed the memorandum of deposit of title deeds as security for the loan facility offered to the first defendant.

6. It is further stated that the partnership firm namely the first defendant was dissolved with the knowledge of the third defendant bank and that the business of the petitioner was taken

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over by the proprietary concern owned by Mr.V.Senthil Kumar. It is also the case of the plaintiff that the bank has not taken any action against the first defendant or the partners of the first defendant.

7. It is further stated that the first defendant's account was closed and that a new account has been opened in the name of second defendant which is neither a partnership firm nor a concern involved in the partnership of the first defendant. It is in these circumstances, stated that the plaintiff is absolved from his liability and hence, this suit is maintainable before the Civil Court.

8. The learned counsel also relied upon the judgment of Delhi High Court reported in 1980 SCC OnLine Del 318 in the case of State Bank of India Vs Machine Well Industries and others. Having regard to the facts narrated in the plaint, this Court is of the view that the issue regarding the maintainability of the suit, need not be tried as a preliminary issue. However, the trial Court may decide the issue at the time of trial after considering the evidence that have been let in, in view of position that the issue raised by the defendant cannot be decided on the admitted facts. As a result, this Civil Revision Petition is dismissed. However, liberty is given to the bank to raise the issue with regard to maintainability and the same will be decided along with other issues in view of the observations made by the lower Court in the order in I.A.No.166 of 2013.

9. The learned counsel appearing for the petitioner stated that the partnership firm was dissolved with the knowledge of the bank. So it is open to the bank, to take appropriate action against the individual or against the firm. The order passed by the lower Court shall not stand in the way.

10. Accordingly, this Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar(CS-III)

To

1.Principal Subordinate Court,
Thanjavur.

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2.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.(**2 copies)**

+1CC to Mr.R.Rajaraman, Advocate, SR.No.76354
+1CC to Mr.Sesubalanraja, Advocate, SR.No.76516

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and
M.P(MD)No.1 of 2014
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