BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATE: 08.02.2018
CORAM:
THE HONOURABLE MR.JUSTICE S.S.SUNDAR

S.A. (MD)No.238 of 2017
and
C.M.P.(MD)Nos.4862 and 10117 of 2017

Chellappan : Appellant/ Appellant/ Plaintiff

Vs.

Munchirai Agricultural Co-operative
Bank Limited, DRL (E) 13,
Represented by its Special Officer,
Marthandam, Marthandam Post,
Nalloor Village,
Vilavancode Taluk,
Kanyakumari District. : Respondent/Respondent/Defendant

Prayer: Second Appeal is filed under section 100 of the Code of Civil Procedure,1908, against the judgment and decree of the lower Appellate Court dated 09.01.2017 passed in A.S.No.11 of 2014 on the file of the Subordinate Judge, Kuzhithurai, confirming the judgment and decree of the Trial Court dated 01.10.2013 passed in O.S.No.56 of 2006 on the file of the II Additional District Munsif Court, Kuzhithurai.

For Appellant : Mr.M.R.Sreenivasan
For Respondent : Mr.C.Godwin
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JUDGMENT

This Second Appeal has been filed against the judgment and decree of the lower Appellate Court dated 09.01.2017 passed in A.S.No.11 of 2014 on the file of the Subordinate Judge, Kuzhithurai, confirming the judgment and decree of the Trial Court dated 01.10.2013 passed in O.S.No.56 of 2006 on the file of the II Additional District Munsif Court, Kuzhithurai.

2.The plaintiff in the suit in O.S.No.56 of 2006 on the file of the II Additional District Munsif Court, Kuzhithurai is the appellant in this second appeal. The plaintiff filed a suit in O.S.No.56 of 2006 for declaration that the debt in Loan No.NFS249 is void, invalid, and permanent injunction restraining the defendant from proceeding into the suit property.

3.The case of the plaintiff is that he is the absolute owner in possession and enjoyment of the property comprised in Old Survey No.3396 of Killiyoor Village which is resurveyed as R.S.No.231/8 of Pallor Village. The suit property is a land measuring an extent of 9 cents 75.7 sq.links, and a building bearing Door No.5-158 of Mullankinavillai Village. It is admitted by the plaintiff that the suit property belonged to one Rayappan and that after his death, the suit property was partitioned in a partition deed dated 13.03.1982 among the three sons of Rayappan and the property described as 'A' schedule including the suit property was allotted to one of the sons, Yesumarian. It is the further case of plaintiff that by virtue of the sale deed dated 16.06.1986, Yesumarian, son of Rayappan purchased the suit property from his brother and brother's wife who had obtained a sale from Yesumarian earlier. It is also admitted that the suit property was pledged by the said Yesumarian in favour of Colachel housing society for getting a loan. It is stated in the plaint that the document of title in respect of suit property was deposited with the said housing society. It is stated that this housing loan was closed. It is stated that the then Secretary of the defendant society fraudulently created a loan agreement and and issued a loan to the said Yesumarian. It is stated further that the said Yesumarian settled the loan by paying the money to the then Secretary of defendant and that the Secretary had released all the original title deeds to the said Yesumarian. It is the specific case of the plaintiff that though no amount is due to the defendant, the defendant is claiming some right over the suit property. The plaintiff's further case is that he had entered into an agreement of sale with the original owner by name Yesumarian and filed a suit in O.S.No.49 of 2004 on the file of Subordinate Court for specific performance of the agreement. After getting a decree in the suit on 28.09.2004 he got a sale deed in execution of the decree for specific performance in E.P.No.8 of 2005 before the Subordinate Court, Kuzhithurai. Stating that the defendant has no right after settlement of accounts and releasing the original documents of title deeds, it is contented by the plaintiff that the defendant has no right to collect any amount from the plaintiff and to proceed against the suit property. Since the plaintiff was orally threatened by the defendant, it is stated that the plaintiff was constrained to file the suit.

4.The suit was contested by the defendant namely the Special Officer representing the Munchirai Agricultural and Rural Development Co-operative Bank Limited, on the following grounds:

4.1.The suit as laid is not maintainable and the plaintiff is not entitled to any relief in the suit. Since the original owner mortgaged the property for a loan obtained from the defendant, it is contended by the defendant that the plaintiff has no right to seek any relief to declare the debt as void. Since the mortgage created by the erstwhile owner is binding on the plaintiff, it is further contended by the defendant that the suit is liable to be dismissed. As the plaintiff is only purchaser of the property during the subsistence of the mortgage it is contended that the plaintiff is not entitled to claim any right as against the mortgagee who has every right in law to recover the money by proceeding against the suit property which is the subject matter of mortgage. The defendant stated that Yesumarian had availed a loan of Rs.2,09,600/- for the purpose of establishing a off-set printing press and executed a registered hypothecation deed in respect of the suit property and that he had pledged the original partition deed. The defendant specifically denied the discharge of loan and stated further that a sum of Rs.4,23,000/- is outstanding in the loan account as on 31.05.2006.

4.2.The trial Court dismissed the suit on merits though it held that the suit is maintainable. After finding that the plaintiff has not produced any material to show that the loan which was availed by the erstwhile owner has been discharged in the manner known to law the trial Court found that the suit filed by plaintiff for specific performance is a fraudulent and collusive one. Though the plaintiff has pleaded fraud and fabrication of records so as to resist the claim of defendant under the mortgage loan, no document is produced by the plaintiff to prove that the mortgage created in favour of the defendant was discharged. In view of the fact that the mortgage / hypothecation is a registered one, the trial Court also found that the plaintiff is not a *bona fide* agreement-holder. It is also admitted by the plaintiff that he has not enquired about the encumbrance over the suit property before the plaintiff entered into the agreement of sale. Thus the trial Court dismissed the suit. As against the dismissal of the suit by the trial Court, the plaintiff preferred an appeal in A.S.No.11 of 2014 on the file of the Subordinate Court, Kuzhithurai and the Appellate Court also confirmed the findings of the trial Court after holding that the plaintiff has not substantiated his case on merits. As against the concurrent judgment and decree of the Courts below, the second appeal has been filed by the plaintiff.

5.The learned counsel for the appellant reiterated the same arguments which his counterpart had advanced before the Courts below with regard to the validity of mortgage. The learned counsel for the appellant further contended that the original title deeds were handed over to the plaintiff after the plaintiff purchased the property through Court in execution of the decree for specific performance in the suit filed by him. Since the document of title deeds were retained by the plaintiff's vendor, it was suggested by the learned counsel for the appellant that the mortgage set up by the defendant is neither true nor valid. Further, it was contended by the learned counsel for the appellant that the appellant is a *bona fide* purchaser for value without notice of the mortgage. In this regard, he also submitted that the encumbrance certificate produced by him would show that the mortgage that was created in favour of the defendant was not shown. It is his further contention that the plaintiff who is in possession and enjoyment of the property, is entitled to exercise his right of ownership particularly in the absence of any materials produced by the defendant to prove that the mortgage is real and acted upon. This Court is unable to find any merits in any of the contentions. The fact that a mortgage was created by the vendor of plaintiff in favour of the defendant on 28.03.2000 is not in dispute, nearly three years later, the plaintiff had entered into an agreement of sale on 25.01.2003. The agreement that was entered into between the plaintiff and the erstwhile owner is much after the creation of mortgage in favour of the defendant bank. Though the plaintiff has obtained a decree for specific performance on 28.09.2004, it cannot be assumed that he has an independent right. The erstwhile owner / mortgagor after executing the mortgage cannot sell anything more than the right which he had in the suit property. When the suit property is mortgaged, the mortgage created by the plaintiff's predecessor-in-interest is binding on him. It is not in dispute that the mortgage dated 28.03.2000 is a registered mortgage and hence, the plaintiff cannot deny that he had knowledge about the mortgage. Merely because the plaintiff has obtained an encumbrance certificate without showing the existence of mortgage, it is not binding on the defendant when the records of the defendant clearly show that the mortgage loan granted to the plaintiff's predecessor-in-interest was never discharged or redeemed. Even assuming that the plaintiff is a *bona fide* purchaser without notice of the mortgage, that will not help him to advance an argument that the loan agreement and mortgage is null and void. Hence, this Court has no reason to interfere with the findings of the Courts below. One more peculiar fact in this case is that the suit was filed for a declaration that the loan No.NFS249 is void and invalid. The plaintiff being the purchaser of the property from the mortgagor is bound by the mortgage deed dated 28.03.2000 for the loan that was advanced to the plaintiff's vendor long back. When the plaintiff has not questioned either the mortgage dated 28.03.2000, it is not open to him to seek a declaration declaring the loan transaction as void or invalid.

6.Having regard to the specific findings rendered by the Courts below with regard to the genuineness of the mortgage transaction entered into between the plaintiff's vendor and the defendant which is supported by evidence, this Court is unable to find any substantial question of law in the above second appeal.

7.As a result, the Second Appeal is dismissed. However, there is no order as to costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(C.O)

/True Copy/

Sub-Assistant Registrar

To

1.The Subordinate Judge, Kuzhithurai.

2.The II Additional District Munsif Court,
Kuzhithurai.

Copy to:-

The Record Keeper, (2 copies)
Vernacular Records,
Madurai Bench of Madras High Court,
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+One cc to Mr.R.Nandakumar, Advocate, SR.No.47562

+One cc to M/s.Godwin, Advocate, SR.No.47406

gsp/srm

RL/7C/5P/KK/SAR2/16/3/2018

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