

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.10.2019
PRONOUNCED ON: 15.11.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN
A.S.No.1041 of 2012

L.Pandurangan ... Appellant/3rd Defendant

Vs.

1. S.Jaganathan

2. The Authorised Officer,
Tamil nadu Merchantile Bank,
539-540, D.B.Road, R.S.Puram,
Coimbatore.

3. The Manager,
Tamil nadu Merchantile Bank Ltd.,
Pavitharampudur Branch,
No.2/170, Raja Veethi, Pavitharam,
Namakkal Taluk & District.

... Respondents/Plaintiff and Defendant1&2

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code as against the judgment and decree made in O.S. No.104 of 2009 dated 28.10.2011 on the file of the Principal District Judge, Namakkal.

For Appellant : Mr.M.S.Palanisamy
for M/s. R.Ashraf khan

For R1 : Mr.R.Venkatasubban
for M/s.Sarvabhauman Associates

For R2 & R3 : Mr.L.Rajasekar
for M/s. N.K.S.Rukmangathan

JUDGMENT

Aggrieved over the judgment and decree dated 28.10.2011, passed in O.S. No.104 of 2009, on the file of the Principal District Court, Namakkal, the third defendant has preferred the first appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. Suit for directing the defendants 1 and 2 to take the actual possession of the suit properties and deliver the same to the plaintiff or in the alternative pass a decree directing the defendants 1 and 2 to repay the suit amount with interest on the sale amount at 18% per annum from the date of the suit till realisation and costs.

4. The case of the plaintiff, in brief, is that the properties described in the plaint schedule belonged to one Dr.Kannagi and others and they had taken a loan on the security of the suit properties from the second defendant and for the non payment of the loan, the defendant 1 and 2 had taken the symbolical possession of the secured properties under the SARFAESI Act and the plaintiff was the successful bidder and he has purchased the suit properties for a sum of Rs.18,10,000/- on 28.03.2006 and the sale certificate has been issued to the plaintiff as the successful bidder by the second defendant after receiving and acknowledging the entire sale consideration as abovestated. Though the sale certificate states that the defendants 1 and 2 had handed over the delivery of the possession of the suit properties, however, it is only symbolical and not actual. It is learnt that the defendants 1 and 2 have not taken the actual possession of the suit properties but only symbolical possession of the suit properties and the plaintiff was assured of the actual delivery within a short time. The sale notice also is silent about the possession. The defendants 1 and 2 are bound to deliver the possession of the suit properties sold to the plaintiff. However, as the defendants 1 and 2 had not taken steps with reference to the same and thereby, the plaintiff was constrained to issue a legal notice to the defendants 1 and 2 and the defendant on 01.12.2008 demanding immediate steps to deliver the actual possession of the suit properties to the plaintiff or in the alternative refund the sale amount with interest. The defendants 1 and 2, despite the receipt of the notice, had not taken steps to comply with the demand made by the plaintiff and on the other hand, the first defendant alone sent a reply containing false allegations and it is understood that the third defendant was the original owner of the suit properties and he appears to be in the physical possession of the suit properties and to avoid complications, he has also been made as a party to the suit. Hence, according to the plaintiff, he has been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The defendants 1 and 2 resisted the plaintiff's suit contending that after admitting the averments contained in the plaint as regards the suit properties belonging to Dr.Kannagi and others and the factum of their obtainment of loan from the second defendant and the factum of the suit properties being brought to sale under the SARFAESI Act, the defendants 1 and 2 further admitted that the plaintiff is the successful bidder in

the Court auction and admitted that the sale certificate had been issued to the plaintiff on 28.03.2006 after acknowledging the sale consideration paid by him amounting to Rs.18,10,000/-. However, denied the case of the plaintiff that he had not been handed over the actual possession of the suit properties and he had been only given the symbolical possession and further admitted the receipt of the legal notice issued by the plaintiff and put forth the case that the same had been repudiated by way of a reply notice. According to the defendant 1 and 2, the possession of the suit properties had been given to the plaintiff on the date of the execution of the sale certificate and the sale certificate does not mention that only symbolical possession was given and the defendants did not assure to give actual possession in future. The plaintiff was fully aware of the happenings before the sale and after the sale and according to the defendants, there are proceedings before the Court between the third defendant and the mortgagors of the second defendant bank in respect of the title to the suit properties and therefore, contended that the suit laid by the plaintiff is premature and the plaintiff having put forth the case that the third defendant is in the actual possession of the suit properties ought to have laid the suit against him and not against the defendants 1 and 2. Hence, according to the defendants 1 and 2 the plaintiff is not entitled to secure the reliefs prayed for and sought for the dismissal of the plaintiff's suit.

6. The third defendant resisted the plaintiff's suit and after disputing the case of the plaintiff that he had purchased the suit properties in Court auction following the SARFAESI Act proceedings initiated by the defendants 1 and 2 against Dr.Kannagi and others, according to the third defendant, it is he who had purchased the suit properties on 08.10.1996 as a vacant site and later put up the construction on the same and enjoying the suit properties and further according to him, Dr.Rajkumar and his wife Dr.Kannagi were running Medi Finance and the third defendant, during the year 1996, borrowed a sum of Rs.15,00,000/- from the abovesaid finance and at that point of time, he had given empty pronotes, stamp papers and green papers with revenue stamps by affixing signature and thumb impressions etc., and later, it is put forth that Dr.Rajkumar compelled him to execute the sale agreement and the sale agreement dated 04.11.1996 had been taken from the third defendant by using force and further, Dr.Rajkumar compelled him to execute a mortgage deed and following the same, the third defendant executed the mortgage deed and hence, Dr.Rajkumar and his henchmen made attempts to evict the third defendant from the suit properties and according to him, he has filed a suit in O.S.No.308/99, on the file of the District Munsif Court, Tiruchengode and obtained the relief of permanent injunction and the appeal preferred against the same in A.S.No.121/2008 had been dismissed and the third defendant had come to understand that under the guise of the mortgage deed, Dr.Rajkumar had

obtained the power of attorney on 20.09.1999 which is a fraudulent document and on the basis of the same, he had created four sale deeds dated 12.10.1999, 13.10.1999, 14.10.1999 and 15.10.1999 in the name of Dr.Kannagi, Savithiri, Mahalakshmi and Nalliappan and the abovesaid documents are also fraudulent documents and Dr.Rajkumar, in collusion with the defendants 1 and 2, created the documents as if he had borrowed loan and by way of the same endeavoured to bring the suit properties to sale and the sale certificate had come to be issued in the name of the plaintiff. However, as the third defendant is in the possession and enjoyment of the suit properties, according to the third defendant, the plaintiff is not entitled to seek and obtain any relief from him and prayed for the dismissal of the plaintiff's suit.

7. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1. Whether the 3rd defendant is in actual physical possession of the property?
2. Whether the General Power of Attorney in favour of Baskaran, is fraudulent and fabricated?
3. Whether the four sales in favour of Kamatchi and 3 others are not true?
4. Whether the sale by defendants 1 and 2 is collusive?
5. Whether the plaintiff is not entitled to the reliefs claimed?
6. Whether the suit is barred by limitation?

Additional issues:

1. Whether the defendants 1 and 2 had taken symbolical possession of the suit property?
2. To what relief if any the plaintiff is entitled to?

8. In support of the plaintiff's case, PW1 was examined, Exs.A1 to A6 were marked. On the side of the defendants, DWs 1 to 3 were examined, Exs.B1 to B21 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit in favour of the plaintiff with costs by directing the defendants 1 and 2 to take steps to deliver the possession of the suit properties to the plaintiff within two months and in spite of the same, further held that if the defendants 1 and 2 failed to take steps to deliver the possession of the suit properties within two months, held that the plaintiff is alternatively entitled to the decree for the recovery of the amount and passed the alternative relief by directing the defendants 1 and 2 to pay the suit amount with

subsequent interest on the sale amount of Rs.18,10,000/- at the rate of 18% per annum from the date of the suit till the date of realisation. Aggrieved over the same, the third defendant alone has preferred the first appeal.

10. The following points arise for determination in this first appeal:

1. Whether the judgment and decree dated 28.10.2011, passed in O.S. No.104 of 2009, on the file of the Principal District Court, Namakkal are liable to be set aside?

2. To what relief the third defendant/appellant is entitled to?

3. To what relief the plaintiff is entitled to?

Point No.1:

11. As could be seen from the materials available on record, both oral and documentary, it is found that the suit properties belonged to Dr.Kannagi and others and they had taken loan from the second defendant's bank and inasmuch as the loan amount had not been repaid, it is found that the second defendant bank had taken the proceedings under the SARFAESI Act for securing the loan amount and accordingly, initiated action against the secured properties provided for the loan, namely, the suit properties and even thereafter, as the borrowers had failed to pay the loan amount, it is found that the suit properties had been brought for auction and in the auction, it is found that the plaintiff, being the successful bidder, accordingly, the sale certificate had come to be issued in favour of the plaintiff on 28.03.2006 and however, according to the plaintiff, though the sale certificate had been issued in his favour, he had not been actually given the physical possession of the suit properties by the defendants 1 and 2 and only been handed over the symbolical possession and as the defendants 1 and 2 are bound to deliver the physical possession of the suit properties to the plaintiff and as they had failed to take the steps with reference to the same despite the repeated demands and the issuance of the legal notice, according to the plaintiff, he has been necessitated to institute the suit against the defendants 1 and 2 for appropriate reliefs.

12. The plaintiff has also pleaded that inasmuch as the third defendant is found to be in the actual physical possession of the suit properties, he being the original owner, according to the plaintiff, to avoid complications, the third defendant has also been made as a party to the suit proceedings. On a reading of the plaint, it is found that though the third defendant had been impleaded as a party to the proceedings, the plaintiff has not claimed any relief against the third defendant.

13. The defendants 1 and 2 have admitted the claim of the plaintiff of having purchased the suit properties in the Court auction on 28.03.2006 and the issuance of the sale certificate

in his favour. But, according to the defendants 1 and 2, the actual possession of the suit properties had been entrusted to the plaintiff and therefore, denied the case of the plaintiff that he had been provided with only symbolical possession. Further, according to the defendants 1 and 2, as the lis is pending between the third defendant and the mortgagors of the second defendant bank qua the title of the suit properties and the plaintiff had also admitted that it is only the third defendant who is in the actual possession of the suit properties, it is put forth that the plaintiff's suit is premature and the plaintiff should seek his remedies only against the third defendant and not against the defendants 1 and 2.

14. The third defendant would put forth the case that Dr.Rajkumar and Dr.Kannagi were running a finance and he had secured a loan for a sum of Rs.15,00,000/- from the said finance and at that point of time, he had entrusted the empty pronotes, stamp papers and green papers with revenue stamps by affixing signature and thumb impressions etc., and also put forth that he had been compelled to execute the sale agreement in favour of Dr.Rajkumar and also compelled to execute a mortgage deed and according to the third defendant, Dr.Rajkumar, based on the abovesaid deeds, also created a power of attorney deed and based on the power of attorney deed, executed four sale deeds in favour of Dr.Kannagi, Savithiri, Mahalakshmi and Nalliappan and according to the third defendant, all the abovesaid documents are created and fraudulent documents and further put forth the case that Dr.Rajkumar, in collusion with the defendants 1 and 2, had created the documents as if the suit properties had been mortgaged by Dr.Kannagi and others for the purpose of the loan and thereby endeavoured to bring the suit properties for sale and a sale certificate had come to be issued in the name of the plaintiff and therefore, according to the third defendant, inasmuch as it is only he who is in the possession and enjoyment of the suit properties, the plaintiff is not entitled to secure the reliefs prayed for and sought for the dismissal of the plaintiff's case.

15. As above pointed out, the plaintiff has not sought any remedy against the third defendant. From the materials placed on record and as rightly determined by the trial Court, based on the creation of the mortgage deed in favour of the second defendant bank on the part of Dr.Kannagi and others by offering the suit properties as security and on their failure to discharge the loan amount, it is found that the suit properties had been brought for sale under the SARFAESI Act. The plaintiff is found to be the successful bidder and the sale certificate had come to be issued in favour of the plaintiff which has been marked as Ex.A4. As could be seen from the possession notice and the auction proceedings marked in the suit, the second defendant bank had taken the possession of the suit properties by virtue of Section 13 (4) of the SARFAESI Act read with rule 9 of the Security Interest (Enforcement rules 2002). As rightly

held by the trial Court, the defendants 1 and 2 had not secured the physical possession of the suit properties and had only taken the symbolical possession and in such view of the matter, when pursuant to the SARFAESI Act, the defendants 1 and 2 had proceeded with the auction of the suit properties and the plaintiff being the highest bidder in the auction and following the same, a sale certificate has come to be issued in the name of the plaintiff, marked as Ex.A4, it is found that as held and determined by the trial Court, the defendant cannot be held to have delivered the actual physical possession of the suit properties in favour of the plaintiff by way of the sale certificate but had only given the symbolical possession of the same and accordingly, when the defendants 1 and 2 are liable and bound to deliver the possession of the suit properties to the plaintiff, he being the successful bidder and when the defendants 1 and 2 had been unable to deliver the physical possession of the suit properties in favour of the plaintiff on the date of the sale certificate, at least should have endeavoured to hand over the physical possession of the suit properties to the plaintiff immediately thereafter. However, as the defendants have failed to act in that directions, despite the several demands on the part of the plaintiff and the issuance of the legal notice and on the other hand, repudiated the legal notice issued by the plaintiff only with false allegations contending that the physical possession had been handed over, but when with reference to the same, no acceptable and reliable material is forth coming and the available materials only point out that symbolical possession alone has been given to the plaintiff qua the suit properties, in such view of the matter, as rightly held and determined by the trial Court, the defendants are bound to act further under the SARFAESI Act by virtue of the power conferred under Section 14 of the Act and take necessary possession of the suit properties and hand over the same to the plaintiff, the successful bidder. In such view of the matter, the judgment and decree of the trial Court directing the defendants to take steps to hand over the suit properties in favour of the plaintiff within two months and on the failure of the same, alternatively directing the defendants to pay the suit amount with interest at the rate of 18% per annum on the sale amount of Rs.18,10,000/- from the date of the suit till realisation, in my considered opinion, do not warrant any interference.

16. As above noted, as against the judgment and decree passed by the trial Court, neither the plaintiff nor the defendants 1 and 2 had thrown any challenge. It is only the third defendant who had preferred the appeal.

17. The grievance of the third defendant is that inasmuch as he has been admitted to be in the possession of the suit properties, the trial Court, while disposing of the suit, should have explained and determined his case with reference to his occupation of the suit properties one way or the other and

therefore, according to him, the disposal of the plaintiff's suit by the trial Court without determining the contentions put forth by the third defendant is not in accordance with law and accordingly, sought for appropriate reliefs. In this connection, it is mainly put forth by the third defendant that the trial Court had failed to consider the judgment passed in O.S. No.308 of 1999 and the judgment passed in A.S.No.121 of 2008 which had been marked as Exs.A5 and A6.

18. It is found that O.S.No.308 of 1999 had been laid by the third defendant against Baskaran, Mahalakshmi, Savithiri, Kannagi, Nalliappan and Rajkumar for the relief of permanent injunction. Though in the abovesaid suit various rival contentions has been put forth by the respective parties, however, finally, the abovesaid suit had been ended in favour of the third defendant and the trial Court is found to have granted the relief of permanent injunction in favour of the third defendant by holding that the defendants and their men are not entitled to trespass into the suit properties and evict the plaintiff i.e. the third defendant unlawfully except in accordance with the proceedings contemplated under law and on that line, granted the relief of permanent injunction in favour of the third defendant. The appeal preferred against the abovesaid judgment and decree by the defendants in the said suit in A.S.No.121 of 2008 had also ended in dismissal. However, considering the relief granted in favour of the third defendant in the abovesaid proceedings, it is found that the defendants in the abovesaid suit are only restrained by way of permanent injunction not to evict the third defendant from the suit properties unlawfully except in accordance with the procedures contemplated under law. Therefore, the relief of permanent injunction obtained by the third defendant is only a qualified relief and not an absolute relief.

19. Keeping the abovesaid facts in mind, when it is found that even according to the third defendant, he had secured loan from the finance run by Dr.Rajkumar and Dr.Kannagi and by way of the same, further admitted that he had entrusted empty pronotes, signed blank stamp papers etc., containing his signature and thumb impressions and also would put forth the case that Dr.Rajkumar had forcibly obtained the sale deed, mortgage deed and the power of attorney deed etc., and based on the same had created the sale deeds and on that basis, the loan documents had been created in collusion with the defendants 1 and 2 and consequently, the suit properties had been brought for sale under the SARFAESI Act, resultantly, as held by the trial Court, when to the knowledge of the third defendant, the abovesaid acts had been committed by Dr.Rajkumar and others and when a cloud on the title of the third defendant qua the suit properties had emanated, in such view of the matter, the third defendant, as a prudent person, should have endeavoured to take appropriate steps to set aside the sale agreement, mortgage deed and the power of attorney deed said to have been obtained from him forcibly and compulsorily and also endeavoured to secure the empty pronotes and the signed blank stamp papers etc., said to

have been entrusted by him at the time of the obtainment of the loan and also should have further proceeded to obtain the relief of declaration of title in respect of the suit properties against Dr.Rajkumar and others and when it is found that the third defendant had not taken any endeavour pointing to the same and on the other hand, appears to remain content only with the filing of the suit claiming the relief of permanent injunction and not sought for any reliefs for setting aside the documents said to have been secured from him forcibly by Dr.Rajkumar and not sought for setting aside the sale deeds alleged to have been created subsequent thereto and also declaration of the title to the suit properties despite the creation of the abovesaid documents and on the other hand, had only chosen to seek the bare relief of permanent injunction in O.S.No.308 of 1999, eventually, it is found that based on the possession of the suit properties on the part of the third defendant, only the qualified relief has been granted in his favour by way of permanent injunction against the defendants in the abovesaid suit that they should not evict the third defendant from the suit properties except in accordance with law. In such view of the matter, when despite to the knowledge of the third defendant, the various documents had been forcibly obtained from him by Dr.Rajkumar and others as put forth by him and if there had been any semblance of truth with the abovesaid case of the third defendant, as a prudent person, he would have endeavoured to take steps to set aside the same in the manner known to law and on the other hand, the third defendant is not found to have initiated any appropriate action against the persons who are alleged to have unlawfully taken the various documents from him, the abovesaid conduct of the third defendant would only belie his case and in such view of the matter and furthermore, when the third defendant had also not endeavoured to produced any material in support of his case that the various documents had been secured from him on the part of Dr.Rajkumar and others forcibly as put forth by him, in all, it is found that accordingly, the trial Court had also not proceeded to determine the said issue, particularly, in the absence of any material put forth on the part of the third defendant pointing to the same. Moreso, when the plaintiff has not sought for the relief against the third defendant as such, it is seen that the third defendant has also not evinced interest to place any material in support of his defence version. In the light of the abovesaid factors, when the third defendant is found to have been granted only the qualified relief against Dr.Rajkumar and others in O.S.No.308/99 and when it is found that only the symbolical possession of the suit properties had been taken by the defendants 1 and 2 as per the SARFAESI Act and as per the procedures contemplated under law and resultantly, the plaintiff being the successful bidder, in all, it is found that accordingly the plaintiff had chosen to institute the suit against the defendants 1 and 2 for appropriate reliefs by impleading the third defendant also in the suit proceedings, however, without claiming any relief as against the third defendant.

20. In the light of the abovesaid factors and considering the materials available on record, it is seen that the trial Court is justified in upholding the plaintiff's suit by granting the reliefs in his favour as against the defendants 1 and 2 and accordingly, found right in disposing of the suit in favour of the plaintiff. In such view of the matter, by way of the abovesaid directions given by the trial Court in favour of the plaintiff, the defendants 1 and 2 are only directed to take steps to deliver the possession of the suit properties as per law and the same being not contra to or against the judgment and decree passed in O.S. No.308/99, on the file of the District Munsif Court, Tiruchengode, in such view of the matter, the appeal preferred by the third defendant, impugning the judgment and decree of the trial Court, does not merit acceptance in any manner and resultantly, the appeal should fail.

21. In the light of the abovesaid discussions, the judgment and decree dated 28.10.2011, passed in O.S. No.104 of 2009, on the file of the Principal District Court, Namakkal do not warrant interference. Accordingly, the point No.1 is answered. Point Nos.2 and 3:

22. For the reasons aforesaid, the judgment and decree dated 28.10.2011, passed in O.S. No.104 of 2009, on the file of the Principal District Court, Namakkal are confirmed and resultantly, the first appeal is dismissed. Considering the facts and circumstances of the case, there is no order as to costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

sli

To:

1.The Principal District Judge, Namakkal.

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.K.S.Rukmangathan , Advocate SR.No. 95056

+lcc to Mr.Sarvabhuman , Advocate SR.No. 94920

A.S.No.1041 of 2012

A.SK(11/09/2020)