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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 23.01.2019

Judgment Pronounced on : 01.02.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.701 of 2008
and MP.No.1 of 2008
and MP.No.1 of 2015

1.Palanichamy Appellant/ Appellant /
1st defendant
2.M.Arumugam Appellant
[2nd appellant originally impleaded as 4th
respondent Vide order of the Court dated
19.9.2014 in MP.No.1 of 2014 in SA.No.701/2008
and transposed as 2nd appellant Vide order of the
Court dated 25.2.2015 in MP.No.1 of 2015 in
S.A.No.701 of 2008]

Vs

1.Subramani

2.M/s.Rajkumar Chit Funds Pvt. Limited
Rep by its Addl. Managing Director V.Rajkumar
34, Venkatramani Road
R.S.Puram
Coimbatore City & District.

3.M.A.K.Ali @ M.A.K.Liyakath Ali ..Respondents/Respondents/
Plaintiff/Defendants 2 &3

Prayer :- Second Appeal find under Section 100 of CPC, against
the judgment and decree dated 24.10.2007 made in A.S.No.28 of
2006 passed by the Subordinate Judge, Tiruppur, confirming the
judgment and decree dated 22.6.2006 made in O.S.No.491/2005 on
the file of District Munsif, Tiruppur.



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For 1st Appellant : Mr.Sharath Chandran
for Mr.Govind Chandrasekhar

For 2nd Appellant : Mr.C.Prakasam

For Respondents : Mr.M.S.Krishnan, Senior Counsel
for M/s. Sarvabhauman Associates [R1]

JUDGMENT

The first defendant in O.S.491/2005 on the file of District Munsiff Court (originally O.S.324/1991 before the Sub court, Tiruppur) is the appellant herein. The suit is laid inter alia for declaration that the plaintiff is a bonafide purchaser of the suit property. The suit came to be decreed by the trial Court, and the appeal which first defendant(present appellant) had filed in A.S.28/2006, also came to be dismissed. Parties would be referred to as per their rank before the trial court.

Pleadings:

2. Substantial facts are admitted on either side:

- The suit property is a vacant plot measuring 3,825 feet and is denoted as plot No.21 in a lay out. This plot is part of a larger extent, and the entire property including the suit property originally belonged to a certain Kandasamy. It is he who developed his property into a layout. Thereafter, sometime in October, 1967, Kandasamy obtained a loan from M/s Rajkumar Chitfunds, the 2nd defendant, and to secure the said debt, he executed an equitable mortgage in its favour of his entire property as it was prior to the formation of the lay out.
- Be that as it may, on 19.01.1968, he had sold the suit property (plot No.21 of the layout) to one Jambulingam Chettiar under Ext.A3 sale deed. Obviously, the sale was made after the mortgage referred to above. After the execution of Ext.A-3, on 16-11-1968, the mortgagee/2nd defendant filed a suit for recovery of mortgage-money. Jambulingam Chettiar, the purchaser under Ext.A-3 was not a party to the suit. On 12.03.1969, a preliminary decree was passed in the mortgage suit followed by the final decree for sale of the suit property on 17.11.1969. Subsequently, the decree holder filed E.P.No.93 of 1975 and brought the mortgage-security (the entire property as was mortgaged) for sale. In the Court auction that took place on 09.02.1977, the mortgagee himself has purchased the suit



property. On 23.02.1977, it was confirmed. On 31.08.1977, the possession of the property was delivered to the auction purchaser/mortgagee/the 2nd defendant herein. The related documents are under Exts.B2 and B3.

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- Till the Court auction sale, Jambulingam Chettiar was in dark about the suit in O.S.639 of 1968 and all that have taken place since its institution. After the Court auction sale, or to be specific the delivery of property to the auction purchaser, on 18.08.1988, Jambulingam Chettiar had sold the plot to one Liaqat Ali, the 3rd defendant. Within a month, on 14.09.1988, Liaqat Ali sold the suit property to the present plaintiff under Ext.A-2.
- Facing an obstruction to his title, the plaintiff laid the suit for declaration that he is the bonafide purchaser of the suit property and for other ancillary reliefs. During the pendency of the suit, the first defendant was alleged to have interfered with the possession of the plaintiff and said to have put some construction, and hence the plaint was amended to include a mandatory injunction to pull down the said construction. Significantly, the prayer included an alternate relief by which the plaintiff has sought a decree for refund of the sale consideration that he had paid to his Vendor Liaquat Ali, the 3rd defendant in the suit.

3. The third defendant remained exparte. In the written statement filed by the first defendant and adopted by the 2nd defendant, the thrust was on his source of title and denied the title of the plaintiff.

4.1 Before the trial Court , the sale deeds that Kandasamy had executed in favour of Jambulingam on 19-01-1968, the one Jambulingam had executed in favour of the 3rd defendant (Liaquat Ali) on 18-08-1988, and then by him to the plaintiff on 14-09-1988 were marked respectively as Exts.A-3, A-2 and A-1. His suit notice is Ext.A-6 and the reply notice dated 07-11-1990 is marked Ext.A-7. The defendants have produced their documents as Exts. B-1 to B-20. While the plaintiff has examined himself as P.W.1, the first defendant was examined as D.W.1. Both sides examined independent witnesses as well.

4.2 The trial Court decreed the suit, and in doing so, the trial court has reasoned that inasmuch as the mortgagor Kandasamy had no subsisting title in the suit property as on the date when O.S.639 of 1968 was laid by the mortgagee, the decree obtained therein would not bind him and consequently it would not bind his successors in title, namely the 3rd defendant and



the plaintiff. Ultimately, the trial Court has held that the plaintiff is a bonafide purchaser of the suit property. This was confirmed by the first appellate Court, and its line reasoning is not vastly different from that of the trial Court.

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5. This appeal is not admitted yet. However, notices were served on the first respondent/plaintiff and he has appeared. Heard the counsel for the appellant briefly, and this Court felt that the case does involve the following substantial questions of law that requires this Court's consideration:

1. What is the effect of court auction sale in O.S.639 of 1968 on the title of the plaintiff?

2. Has the plaintiff a right to redeem the mortgage involved in O.S.639 of 1968?

6. The learned counsel for the appellants submitted that:

- The Courts below have broadly taken a view that Jambulingam Chettiar who had purchased the property before the institution of the suit in O.S.No.639 of 1968, was not made a party to the suit and hence the decree is not binding on him. Arguing further, the learned counsel would further submit that on the strength of an authority reported in *Allokam Peddabbayya and another vs. Allahabad Bank and others* [(2017) 8 SCC 272] if at all Jambulingam, or Liaqat Ali, or the plaintiff had any right in the suit property, it is a limited right to redeem the mortgage and it co-terminates with the sale of mortgaged property.
- If at all the plaintiff was interested in challenging the court auction sale, he should have filed a suit for avoiding the decree passed in O.S.639 of 1968 but it was not resorted to. His suit is primarily one for declaring him as a bonafide purchaser, which is not equivalent to seeking a declaration that the decree passed in that suit as not binding on him. Nor can it be equated to one for redemption of the mortgage. The plaintiff herein had earlier issued a pre-suit notice dated 20.10.1990. This is Ext.A-6. It was replied to by the first appellant Vide Ext.A-7 reply notice dated 07.11.1990, through which, plaintiff was adequately informed about the entire facts leading up to the court auction sale, delivery of the suit property etc., yet the plaintiff had chosen to seek a declaration that he is a bonafide purchaser.

7.1 Per contra, the learned senior counsel appearing for the plaintiff/first respondent would argue, that admittedly, as on the date of institution of O.S.639 of 1968, the mortgagor Kandasamy had already sold the suit property to Jambulingam.



And, Order 34 Rule 1 mandates that all the persons interested in a mortgage security and right of redemption shall be in the party array. It is an indisputable fact that Jambulingam was interested in the mortgage-security and a holder of right of redemption, when the suit was laid. It is not difficult for the mortgagee, when he laid O.S.639 of 1968 to make ordinary enquiries that common sense may guide to ascertain those who are interested in the right of redemption. In the final analysis mortgagee had laid the suit against one who had already parted with the right of redemption, and the one in who it was vested, not made a party. Is it not a fraud on the statute? Is not Rule 1 of Order 34 CPC intend to avoid it? A fraud vitiates all that comes under its sweep and necessarily the court auction sale held pursuant to the final decree passed in O.S.639/2001 will stand vitiated.

7.2 At any rate the right of redemption still survives in the plaintiff/ first respondent, and he must be granted the liberty to redeem. Reliance was placed on the authorities in Jayasingh Dnyanu Mhoprekar and another Vs. Krishna Babaji Patil and another [(1985) 4 SCC 162]; Mangru Mahto and others Vs. Shri Thakur Taraknathji Tarakeshwar Math & others [(1967) 3 SCR 125 : AIR 1967 SC 1390]; Nagubai Ammal & Others Vs. B.Shama Rao & others [1956 SCR 451 : AIR 1956 SC 593]; Ganapa Rama Hegde and Others Vs. Timmaya Narayan Hegde [AIR 1942 Bom 146]; Mahammad Mehar Talukdar and others Vs. Rash Behari Majumdar and others [AIR 1932 Cal 561]; Sheikh Kalu Sharip & Ors. Vs. Abhoy Charan Karmokar [AIR 1921 Cal 157].

Of discussion & Decision:

8. The suit property was mortgaged in 1967, and the mortgagor had sold it to Jambulingam on 19-01-1968. Few months later, on 16-11-1968, mortgagee had laid O.S.639 of 1968, for recovery of mortgage money merely. The right of redemption on the date of the suit was vested in Jambulingam. He was not arrayed as a defendant. And, the preliminary decree was passed against the one who had already lost his interest in the mortgage-security and had parted with his right of redemption in favour of Jambulingam. The man who ought to have been heard in law, was not heard. Order 34 Rule 1 stood violated. Is it a fraud on Court, or fraud on statute, or a procedural violation?

9. Non impleadment of a person either interested in the mortgage-security or in right of redemption is serious enough to impact the right of redemption, adversely. Therefore, failure to implead the mortgagor, or his successors in interest is fatal to the sustainability of the mortgage-suit. Till this point the plaintiff has walked the right lane in his ongoing litigious pursuit. However, where he appeared to have lost the plot, is in seeking the right prayer.



10. While it is true, that complying with the requirements of Order 34 Rule 1 CPC is mandatory, a decree passed without complying with it is not ab initio void. It is therefore, necessary that the suit must be laid for avoiding the decree passed. Here the principal prayer in the suit is to declare that the plaintiff is a bonafide purchaser of the suit property. So be it. How does it matter, when the sale in favour of Jambulingam itself is subject to the mortgage which the original owner Kandasamy had created in favour the plaintiff in O.S.639 of 1968? Plaintiff might be a bonafide purchaser, and it need not even be doubted. That however, does not dispense him of the need to redeem the mortgage to free the suit property of the encumbrance on it.

11. As indicated earlier, a decree passed in violation of Order 34 Rule 1 CPC is not void. Therefore, till it is avoided, it valid and all that were done pursuant to the decree would be valid. Here, Ext.A-7 reply notice is critical. It is dated 07.11.1990. This implies that even prior to the institution of the suit, the plaintiff had the minimum information about O.S.639 of 1968 and all that had happened in that suit. The plaint however, does not make a statement on it. Would it be difficult for the plaintiff to gather information on the same and institute a suit for avoiding the decree in O.S.639 of 1968? He had an opportunity to wreck damage on the defendant's strategy, but missed it dearly. And, today it is well beyond limitation for him to seek.

12. Placing reliance on Sheikh Kalu Sharip and Ors. Vs. Abhoy Charan Karmokar, [AIR 1921 Calcutta 157 : 25 CWN 253], the learned counsel for the plaintiff, argued that this Court may permit the plaintiff to redeem the mortgage now? The point is, is it still available for him? In Allokam Peddabbayya and another vs. Allahabad Bank and others [(2017) 8 SCC 272], the Hon'ble Supreme Court has held that the on confirmation of sale of the mortgaged property, right of redemption gets extinguished. It says:

"9. The right to enforce a claim for enquiry of redemption is a statutory right under the Act. It necessarily presupposes the existence of a mortgage. The right to redeem can stand extinguished either by the act of the parties or by operation of the law in the form of a decree of the court under the proviso to Section 60 of the Act. The appellants being purchasers of the equity of redemption can have or claim no better rights under Section 91, than what their predecessor-in-interest had under Section 60 of the Act.



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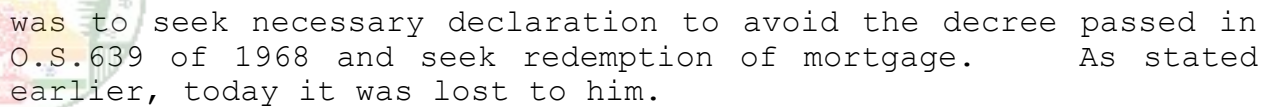
10.
.....
11.
The plaintiffs, despite the aforesaid, did not take any steps to either amend the relief sought in the suit, much less seek redemption of the mortgaged property by offering to deposit the mortgage dues or even to set aside the auction-sale under Order 34 Rule 1 CPC. The appeal, AS.No.67 of 1997 arising from the same was also dismissed. The behaviour of the plaintiffs thereafter necessarily raises issues of waiver by conduct with regard to their right to redemption as claimed notwithstanding the subsistence of the period of limitation to seek redemption. In Mademsetty Satyanarayana Vs.G.Yelloji Rao [(1965) 2 SCR 221 : AIR 1965 SC 1405}, on the issue of waiver it was observed as follows : (AIR p.1410, para 11)

"11..... But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

12.
.....
13.
.....

14. The reliance upon Order 34 Rule 1 CPC is completely misconceived as under Rule 8 the right to redemption survived only till confirmation of the sale and not thereafter. The suit was instituted only after issuance of the sale certificate and the question for redemption had become irrelevant."

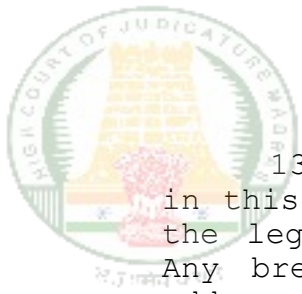
Order 34 Rule 8 relates to a final decree in a suit for redemption. Rule 8(1) provides that a right to obtain a final decree for redemption is available to a mortgagor till the mortgagor is barred "from all right to redeem the mortgaged property has been passed or before the confirmation of a sale ..." In context of the facts of this case, Ext.B-2 is the sale certificate dated 15-03-1977, issued by the Execution court followed by delivery of possession under Ext.B-3. Necessarily other things remaining a constant, the right of redemption has expired in 1978 itself. The only opening that the plaintiff had had to secure his title to the suit property



13.1 As this Court takes a pause and contemplates on the sequence of events that have led to the situation (de hors the inadvertence in seeking the right prayer), it spots one fact that could have even averted the present suit. Impleadment of the alienee of the mortgagor in due compliance of Order 34 Rule 1 CPC. Order 34 nowhere provides a procedural mechanism within its scheme to monitor and cross verify if Order 34 Rule 1 is actually complied at the point of institution of suit. This has only managed to encourage the production of reams of printed pages of reported judgements on how to deal with a situation where Order 34 Rule 1 is not complied with. Prevention is better than cure is not a proverb merely to be taught in schools, but is a maxim, nay, shall be a beacon light, in justice administration. Insistence on filing an encumbrance certificate along with the plaint could have been adequate to address the situation, at least to a limited extent, as it would have enabled the Court to ascertain if those who have obtained any interest in the mortgage-security or in the right of redemption through a registered deed of conveyance at least are impleaded as per Order 34 Rule 1. There may be other instances where the Court may not still know it, such as in cases of devolution of mortgagor or mortgagee's right by succession, including testamentary succession through unregistered Will. However, the fact that there is no absolute cover against non compliance of Order 34 Rule 1 need not have halted the procedure from insisting in filing an encumbrance certificate at the point of institution of the mortgage-suit.

13.2 Else where, under Order XXI Rule 66(2) CPC read with Rule 190(4) and Rule 191 of the Civil Rules of Practice, encumbrance certificate is insisted at the point of proclamation of sale of immovable property. Here, the interest of the would be auction-purchaser is taken care of. But if the same provision is insisted when a suit on mortgage is laid, it could have prevented at least one class of litigations challenging the decree passed in suits for non compliance of Order 34 Rule 1 CPC.

13.3 The mortgage-suit referred to frequently in this judgement is instituted in 1968. Since then, at least two major Parliamentary Amendments have come in 1976, and in 2002, but this issue was not addressed. Has not this vacant space in the procedure law served more to breed litigations - that which it could have prevented?



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13.4 Mortgage is becoming a dying branch of law, at least in this State, more due to the arrival of special enactments in the legislative scene. Still, the issue cannot be left open. Any breeder of future litigations, once spotted, and if not addressed, will be a dis-service to the legal system. The general motion of the statutory law to change is essentially static, and is a mismatch to the dynamics of the societal changes. The legislative process to bring a change in law is too tedious to the point of being slow. It is therefore necessary if not obligatory on the part of the Courts to identify vacant spaces and provide fillers without offending the scheme of the statute. This Court therefore directs that henceforth in every suit instituted under Order 34 Rule 1 CPC, an encumbrance certificate should be filed in order the Court is informed that all those who might have obtained some interest in the mortgage-security or right of redemption to the extent they are disclosed in the encumbrance certificate are brought before the court. After all prevention is better than cure.

14. There are moments when impressive arguments that appeals to conscience as just, still stands without vitality to satisfy law. Here is a plaintiff-in-tactical error (in failing to seek the right prayer) presents an opportunity to this court to tell him, all your litigious journey is wasted as you fail to satisfied law.

15. However, the plaintiff is not without any remedy. He has sought an alternative relief against his immediate vendor Liaquat Ali, the 3rd defendant, for return of the sale consideration. This can be granted. If the right to redeem the mortgage is extinguished even in 1978, then the 3rd defendant did not have a title to transfer the suit property to the plaintiff on 14-09-1988. Necessarily, the plaintiff will be entitled to have the sale consideration paid by him refunded by the 3rd defendant.

16. In conclusion, the appeal is allowed, and the decree of the trial court granting a decree that the plaintiff is a bonafide purchaser and other ancilliary reliefs are hereby set aside, but a decree directing the 3rd defendant to pay the plaintiff a sum of Rs.55,760/- with interest at 6% p.a. from the date of the suit till its realisation is hereby passed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Asst.Registrar (CS IV)

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Sub Asst. Registrar

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To:

1. The Subordinate Judge, Tiruppur.
2. The District Munsif, Tiruppur.

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