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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:05.12.2018
Delivered on:05.04.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.114 of 2018
&
C.M.P.No.3824 of 2018

V.Sivaperuman .. Appellant / 2nd Defendant
Vs
1.R.Saraswathi .. 1st Respondent / Plaintiff
2.V.Neethirajan .. 2nd Respondent / 1st Defendant

PRAYER: First Appeal is filed under Section 96 R/W Order 41 Rule 1 of Civil Procedure Code against the Judgment and Decree dated 30.06.2017 made in O.S.No.52 of 2014 on the file of the XV Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.A.S.Narasimhan
For Respondent 1 : Mr.L.Rajasekar
For Respondent 2 : Given Up

JUDGMENT

The 2nd defendant in a mortgage suit is the appellant before this Court. The suit O.S.No.52 of 2014 has been instituted by the plaintiff on the file of the XV Additional City Civil Court, Chennai for a direction to the defendants to pay the plaintiff a sum of Rs.11,87,000/- towards principal and interest and to award interest at the rate of 18% per annum for Rs.2,25,000/- from the date of the suit till date of realisation and in default of the payment, to direct the sale of the suit schedule property in public auction.

2.Plaintiff's case:

2.1.The plaintiff has come forward with the suit on the following basis:



It is the case of the plaintiff that she is running a vegetable shop at No.85, Thiruvalluvarpuram, 1st street, Choolaimedu, Chennai - 600 094. On 24.10.2001, the 1st defendant had borrowed a sum of Rs.2,25,000/-, as a security he had executed equitable mortgage in respect of the suit schedule property. It is the case of the plaintiff that, though the 1st defendant had undertaken to pay interest, no payments had been made and as on 22.10.2013 a total amount of Rs.11,87,000/- was due from the 1st defendant.

2.2.It was the further case of the plaintiff that after the execution of the equitable mortgage the defendant had authorised the plaintiff's husband to collect the rent from the tenants occupying the portions in the schedule mentioned property. It is the further case of the plaintiff that the 2nd defendant who is the 1st defendant's brother and a co-owner of the remaining undivided half share in the suit schedule property had sent a reply dated 23.11.2001 to the plaintiff's husband's letter dated 24.02.2001 disputing the ownership of the 1st defendant to the suit schedule property. This constrained the plaintiff to lodge a Police complaint against the defendants before Central Crime Branch, Egmore and the plaintiff would submit that thereafter the 1st defendant had met the plaintiff and requested her not to precipitate the Police station but volunteered to repay a sum of Rs.2,25,000/- as a full and final settlement.

2.3.An undertaking letter to that effect was also given on 17.09.2002 before the Police Authorities and on the date of the execution of the letter of undertaking the 1st defendant had issued a sum of Rs.10,000/- and had issued post dated cheques (3 in number) totalling a sum of Rs.2,65,000/-. The plaintiff would contend that when the 1st cheque had become payable the 1st defendant had issued a legal notice to the plaintiff, her husband, the Sub-Inspector of Police and the Bank Manager alleging that the cheques had been obtained by undue influence.

2.4.The 1st defendant had also issued a letter to stop payment of the cheque to the Bank and therefore when the cheques were submitted the same had been rejected/dishonoured. The plaintiff has also initiated the proceedings under Section 138 of the Negotiable Instruments Act, before the IX Metropolitan Magistrate, Saidapet, Chennai in C.C.Nos.8268 of 2002, 8409 of 2002 and 1101 of 2003 in respect of three cheques. Though the 1st defendant had initially participated in the proceedings he later abstained from the Court and Non-Bailable warrant was also issued against the 1st defendant.

2.5.The plaintiff submits that the defendant has not repaid the amount borrowed by him and therefore the plaintiff is constrained to file the suit after issuing a pre suit notice



dated 13.08.2011, addressed to both the defendants as well as the other brother of the defendant's one V.Selvaraj.

3. Defendant's Case:

3.1. The 1st defendant had remained ex parte in the proceedings and it was only the 2nd defendant who had contested the suit. The 2nd defendant would contend that the 1st defendant is not the absolute owner of the suit property. The execution of the mortgage deed was denied and the 2nd defendant would submit that the same is not binding on him. He would also contend that there is a suit for partition filed much before the mortgage deed in O.S.No.2119 of 1999 wherein the reliefs sought for was a partition of the properties.

3.2. The 2nd defendant would further contend that the suit property has been allotted to his share even before the mortgage and immediately on receiving the legal notice the 2nd defendant had issued a letter dated 23.11.2001 objecting the creation of the mortgage. The 2nd defendant has also raised a defense of limitation.

4. Trial Court:

4.1. The learned XV Additional City Civil Judge, Chennai had originally framed five issues which was later recast on 20.06.2017 and the following are the recast issues:

"1) Whether the equitable mortgage dated 24.10.2011 executed by the defendant in favour of plaintiff is true value and enforceable in law?

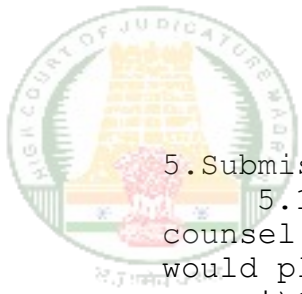
2) Whether the plaintiff is entitled to recover a sum of Rs.11,87,000/- together with interest from the defendant as claimed in the plaint?

3) Whether the plaintiff is entitled to claim 36% interest from the defendant for the outstanding due by him?

4) Whether the 2nd defendant is a necessary party to the suit?

5) To what other relief the plaintiff is entitled?"

4.2. The parties had gone to trial and the plaintiff had examined herself as P.W.1 and marked Ex.A.1 to Ex.A.21. The defendants on their side had examined the 2nd defendant as D.W.1 and Ex.B.1 was marked during the cross examination of P.W.1 and the rest of the documents namely Ex.B.2 to Ex.B.4 were marked through the 1st defendant. The learned XV Additional Judge by his Judgement and Decree dated 30.06.2017, was pleased to decree the suit as prayed for. Challenging the said Judgement and Decree the appellant is before this Court.



5.Submissions:

5.1.Heard the arguments of Mr.A.S.Narasimhan, learned counsel for the 2nd defendant. The counsel for the appellant would place the following dates for consideration of the Court:

i)On 07.03.1999, the defendant had filed a suit for partition in O.S.No.2119 of 1999.

ii)On 22.08.1999, the parties had entered into a compromise in and by which it was agreed that the property subject matter of this suit would be allotted to the 2nd defendant by the 1st defendant and other brother V.Selvaraj in whose name the property stood.

5.2.It was agreed that the two of them would execute the settlement deed in favour of the 2nd defendant. Therefore, on 22.08.1999 it was agreed that the property in question is the exclusive property property of the 2nd defendant. On 24.10.2001 the mortgage deed was executed by the 1st defendant in favour of the plaintiff. This deed has come into existence only after the family arrangement/agreement and nowhere in the mortgage deed is there any mention about the compromise that had been entered into between the parties therefore the mortgage deed is not enforceable.

5.3.On 05.04.2002, the suit O.S.No.2119 of 1999 was decreed and partition granted with a direction that during the final decree proceedings the properties should be allotted in the same manner as per compromise agreement Ex.A.11. Therefore the counsel for the appellant would argue that even prior to the execution of the mortgage deed the property in question was agreed to be allotted to the 2nd defendant by the other two brothers. Therefore he would submit that the property has not changed hands even after mortgage and continues to be in the possession of the 2nd defendant. He further contended that the plaintiff was very much aware about the arrangement between the brothers and being fully aware of the same has entered into the mortgage deed with an intention to usurp the properties.

5.4.The counsel further argued that, though the plaintiff was aware that the owner of the other undivided half share was the 2nd defendant, she has not taken any steps whatsoever to implead the 2nd defendant. Thereafter the 2nd defendant has suo motu impleaded himself as a party to the said proceedings. The counsel would draw my attention to the proof affidavit of P.W.1 where the plaintiff has admitted that they were aware that the 1st defendant's brother V.Selvaraj is the co-owner of the schedule mentioned property.

5.5.He would also point out the admission of P.W.1 that it was only the 2nd defendant who had impleaded himself as the



defendant and not the plaintiff. To the question, as to whether she was ready to submit her expense statement to show the passing of consideration the plaintiff had said that she was ready. She also admitted that in the notice sent by the 2nd defendant it has been averred that the property does not belong to the 1st defendant and that it belongs to the 2nd defendant by virtue of the compromise dated 22.08.1999.

5.6.The plaintiff would further submit that the defendant had borrowed money even prior to 1996 and the title deeds were also deposited even in the year 1996 itself. The plaintiff would further submit that the final decree in the suit for partition has not been passed and the compromise arrangement given effect to. Therefore, in these circumstances the suit filed for partition of the 1st defendant's undivided half share in the suit schedule property cannot be countenanced and the property has to be sold. The 2nd defendant would therefore submit that since the mortgage deed itself is not maintainable no relief can be granted to the plaintiff over the suit property.

5.7.Per contra, Mr.L.Rajasekar appearing for the respondent would contend that the deed is not disputed by the parties. He would argue that the partition suit had not attained finality and it is only a contingent interest that has been created in favour of the 2nd defendant and therefore the plaintiff would question the right of the 2nd defendant to object to the bringing of the undivided half share in the suit property for sale to recover the amounts due from the 1st defendant. The plaintiff's counsel would further argue that the very suit has been restricted only to the share of the 1st defendant and not to the entire property.

6.Points for consideration:

The points for consideration that emerge on perusing the records and hearing the arguments are as follows:

a)Whether the mortgage deed dated 24.10.2001 would supersede the agreement entered into between the defendants and other brother V.Selvaraj as the compromise has been signed as early as on 02.08.1999?

b)Whether the plaintiff can claim any right over the suit property considering the fact that in the Judgement and Decree in O.S.No.2119 of 1999 the learned Judge has held that the suit property has been purchased from out of joint family funds and each of the brothers were entitled to 1/3rd share in the suit properties and that in the final decree proceedings the suit property should be allotted to the 2nd defendant?



7. Discussion:

7.1. The plaintiff has come forward with a case that she had given a loan to the 1st defendant for which the 1st defendant had executed a security in her favour and the said security was the undivided half share of the 1st defendant in the suit schedule property. The records would show that even prior to the execution of the mortgage deed the suit for partition had been filed and in the said suit it has been clearly stated that the suit schedule property though purchased in the name of the 1st defendant and the brother V. Selvaraj was not their exclusive property but was the property of the family since it was purchased from out of the joint family funds.

7.2. It is seen that after the institution of the suit for partition the brothers had entered into a compromise wherein the 1st defendant and V. Selvaraj in whose name the said property stood had agreed to allot the suit property exclusively to the 2nd defendant.

7.3. After the execution of the agreement the 1st defendant, deliberately suppressed the suit for partition as well as the compromise signed by the parties and had mortgaged the suit property in favour of the plaintiff and executed the mortgage deed in favour of the plaintiff. In the suit O.S.No.2119 of 1999 the Additional Judge (Fast Track Court No.5), Chennai has held that the suit property was not the exclusive property of the 1st defendant and his brothers but was the joint family property of the defendants herein, Sivaperumal and their sister each being entitled to 1/4th share in the suit property.

7.4. Since the compromise agreement had not culminated in a decree prior to the execution of the mortgage deed in favour of the plaintiff and the interest of the 2nd defendant remained a contingent interest the mortgage deed is valid. However considering the fact that in the suit O.S.No.2119 of 1999 the Court below has held the compromise arrangement was valid and further that the suit property is the common property of all the four legal heirs. The plaintiff in the present suit can only claim his outstanding from out of 1/4th share that falls due to the 1st defendant.



In the result the appeal is partly allowed. In default of the payment of a sum of Rs.11,87,000/- together with interest at 6% per annum for Rs.2,25,000/- by the 1st defendant, the plaintiff shall bring the 1st defendant's 1/4th share in the suit property for a sale in public auction to realise the decree amount. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

The XV Additional Judge,
City Civil Court,
Chennai.

+1 cc to Mr.A.S.Narasimhan, Advocate, S.R.No.33099

+2 ccs to M/s.L.Rajasekar, Advocate, S.R.No.33149

A.S.No.114 of 2018 &
C.M.P.No.3824 of 2018

KS(CO)
SSM(04/10/2019) .