

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 15.11.2019	Delivered on 05.12.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.22 of 2015
and MP No.1 of 2015

V.Valarmathi

..Appellant/Plaintiff

vs.

1. The Branch Manager,
Tamilnadu Industrial Investment Corporation Ltd.,
Special Recovery Branch,
D.No.3-6, Vaalmeeki Street,
Subramanya Nagar,
Salem 636 004.

2. K. Murugesan

3. Parvathi

4. Arivuselvam

5. V.Manoharan

6. Mangairkarasi

7. V.Jayaraman

... Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 08.09.2014 made in A.S.No.17 of 2012 on the file of the learned Additional District Court, Dharmapuri confirming the judgment and decree dated 21.02.2012 made in O.S.No.30 of 2008 on the file of the learned Sub Court, Harur, (O.S.No.79 of 2004) on the file of the learned Sub Court, Dharmapuri.

For Appellant

: Mr.N.Manokaran

For Respondents

: Mr.K.Magesh for R1

Mr. P.Valliappan for RR3 to 7

R2 No Appearance

J U D G E M E N T

The plaintiff in OS No.30 of 2008 on the file of Sub Court, Harur, (OS No.79 of 2004 Sub Court, Dharmapuri) whose suit for declaration that the mortgage of schedule 'A' properties by Vediappan in favour of the defendants is illegal void ab initio and unenforceable, declaration that the proposed auction sale of the Schedule 'A' and 'B' properties is arbitrary and illegal, permanent injunction restraining the defendants from proceeding any further against the Schedule 'A' and 'B' properties of the plaintiff and for costs of the suit, was dismissed by the Trial Court, upon its affirmation by the Lower Appellate Court has come up with this Second Appeal.

2. The suit was laid by the appellant/plaintiff contending that the plaintiff and one D.Sundararajan were originally partners of the Partnership Firm and they were carrying on business in the name and style of "Sri Vaitheswaran Pipes". The said Partnership Firm had obtained a loan from the first defendant viz., The Tamilnadu Industrial Investment Corporation Ltd., which is a State Financial undertaking. As a security for the said loan, the Partnership had mortgaged its properties described in Schedule 'B'. The properties described in Schedule 'A' which originally belonged to one Vediappan were given as collateral security and the said Vediappan had guaranteed the repayment of the loan by the Firm. The business was carried on for some time and the same could not be continued due to the untimely death of the other partner, viz. Sundarrajan on 13.06.1999. The business was also closed down immediately. The guarantor Vediappan also died intestate on 21.07.2001. The plaintiff is one of the daughters of the said Vediappan.

3. The plaintiff would contend that the mortgage executed by Vediappan of the entirety of the 'A' Schedule properties is void ab initio and illegal, since he is not the exclusive owner of the said property. It was claimed by the plaintiff that the 'A' Schedule property was ancestral property of Vediappan in which his sons and daughters were entitled to a right by birth. It was contended that the mortgage created by Vediappan, has no legal force and it is not binding on the shares of the plaintiff as well as the other children of Vediappan. Since the first defendant in exercise of its purported rights under Section 29 and 31 of the State Financial Corporation Act, attempted to bring the property to sale, the plaintiff had come up with the above suit seeking the aforesaid reliefs.

4. During the pendency of the suit, the suit 'B' Schedule properties were sold and the Second defendant was the successful bidder. The second defendant was thus impleaded as a party to the suit. The other legal heirs of Vediappan were also impleaded as defendants 3 to 7.

5. The suit was resisted by the first defendant contending that the claim of the plaintiff that the suit properties are ancestral properties of Vediappan is incorrect. The suit A schedule properties, according to the first defendant, are the separate properties of Vediappan, he having purchased the same under the Sale Deed dated 12.07.1972 from Smt.Vishnupriya Ammal. The first defendant would further contend that it has every right to take proceedings under Sections 29 and 31 of the State Financial Corporation Act, to recover its dues. A suit for injunction will not lie and the Civil Court cannot injunct the Corporation from exercising its statutory rights under the relevant law. It was also contended that the suit 'B' Schedule properties were sold on 21.06.2005 to the second defendant for a total consideration of Rs.7,70,000/- .

6. The second defendant though filed a written statement contending that he is a bona fide purchaser for value at auction conducted by the Financial Corporation remained ex-parte. An additional written statement was filed by the first defendant contending that the sister of the plaintiff had filed the suit in OS No.3 of 2009 on the file of Sub Court, Harur, seeking partition of the 'A' Schedule properties and the same was dismissed on 10.11.2010 as not maintainable. Defendants 4, 5, 7 and one Rajendran, filed another suit in OS No.649 of 2004 on the file of District Munsif Court, Harur, against the first defendant seeking a prayer for injunction which was also dismissed.

7. An Appeal filed against the said suit, viz. OS No.649 of 2004 in AS No.16 of 2009 was also dismissed by the Sub Court on 07.09.2009. Therefore, according to the first defendant, the present suit is an abuse of process of law. Though the suit was originally filed for a permanent injunction restraining the auction sale of the suit 'A' and 'B' schedule properties, the fact that the 'B' Schedule properties were subsequently auctioned during the pendency of the suit was taken into account and an amendment of the plaint was also carried out, impleading the second defendant, the purchaser in the Court auction.

8. At trial, the plaintiff was examined as P.W.1 and Exhibits A1 to A45 are marked. On the side of the defendants, one Mr. Murugesan, Branch Manager of the first defendant was examined as D.W.1 and the seventh defendant was examined as D.W.2. Second defendant, the auction purchaser remained ex parte.

9. The learned Subordinate Judge, who tried the suit, concluded that the 'A' Schedule properties are the self-acquired properties of Vediappan and therefore, he had every right to mortgage the suit properties in his capacity as a guarantor of the debts of the erstwhile Partnership Firm viz. "Sri Vaitheswaran Pipes". The claim of the plaintiff that the properties were ancestral properties and therefore, Vediappan did not have absolute right to mortgage the entirety of the property was rejected by the Trial Court. On the powers of the State Financial Corporation, viz. the first defendant to bring the property to sale, the learned Trial Judge concluded that as per Sections 29 and 31 of the Act, they have all the powers to sell the properties that were mortgaged and such a sale cannot be questioned before the Civil Court.

10. The Trial Court also concluded that since the other similar suits filed by the other legal representatives of Vediappan have been dismissed, the present suit is not maintainable. The Trial Court, however, proceeded on the footing that both the suit A & B schedule properties had been auctioned. The Trial Court also came to the conclusion that the suit itself is not maintainable. On the above conclusion, the Trial Court dismissed the suit. Aggrieved the plaintiff preferred an Appeal in AS No.17 of 2012.

11. Along with Appeal the plaintiff also filed an Application in I.A. No.23 of 2013 seeking to produce documents which were obtained by applying under the Right to Information Act. The learned Appellate Judge found that the document that is sought to be produced dated 27.12.2010 has already been filed as Ex.A39, before the Trial Court and hence the production of Additional evidence in the Appeal is not necessary.

12. On the main Appeal, the learned Appellate Judge concluded that the actions of the State Financial Corporation can be called in question only under Article 226 of the Constitution of India, in support of his conclusion, the learned Additional District Judge, relied upon the judgment of the

Hon'ble Supreme Court in Gajarat Jain v. State of Bihar & Others, reported in (1995) 12 SCC 595. On the said conclusion, the learned Appellate Judge without going into the merits of the Appeal dismissed the Appeal on the conclusion that the suit itself is not maintainable. Aggrieved the plaintiff has come up with this Second Appeal.

13. The following questions of law were framed by this Court at the time of admission.

1. Whether the Courts below were right in dismissing the suit by holding that the remedy for the appellant is only to file a writ petition and not a suit?
2. Whether the right of the appellant to file a writ petition would amount to an implied bar for a suit in terms of Section 9 C.P.C.?
3. Whether the Courts below were right in holding that the first defendant has got right to proceed against the guarantor's property under Section 31 of the State Finance Corporation Act?

14. I have heard Mr.N.Manokaran, learned counsel appearing for the appellant, Mr.K.Magesh, learned counsel appearing for the first respondent and Mr.P.Valliappan, learned counsel appearing for the respondents 3 to 7. The second respondent though served, he is not appearing either in person or through counsel.

15. Mr.N.Manokaran, learned counsel appearing for the appellant elaborating on the questions of law would contend that while Section 29 of the State Financial Corporation Act, empowers the Corporation to sell the properties of the debtor mortgaged, Section 31 prescribes a slightly different procedure for sale of properties belonging to guarantors. Therefore, according to him, the sale of property belonging to guarantors cannot be directly resorted to by the Corporation without following the procedure prescribed under Section 31, viz. by approaching the Principal District Court. It is also his further contention that the Lower Appellate Court was not right in concluding that even if there had been irregularities in the conduct of the sale by the Corporation the remedy of the debtor is only by way of a Writ Petition.

16. He would submit that the learned Appellate Judge had misquoted the judgment in Gajarat Jain v. State of Bihar & Others, 's case and assumed that the suit will not lie. It is

the further submission of Mr.N.Manokaran, that the suit is a general remedy and Section 9 of the Code of Civil Procedure, enables the Civil Courts to entertain suits of civil nature. Unless the suit is expressly barred by any special enactments the jurisdiction of a Civil Court cannot be said to be taken away. He would also invite my attention to various judgments of the Hon'ble Supreme Court, which laid down the procedure for conduct of sales by the State Financial Corporations and contend that in the case on hand, the Corporation has not followed any of the essential procedures prescribed by the Hon'ble Supreme Court.

17. Mr.N.Manokaran, would also point out that the Lower Appellate Court was not right in dismissing the Application filed under Order XVI Rule 27 of the Code of Civil Procedure, to let in additional evidence. He would further submit that the documents that are sought to be produced are all information obtained under the Right to Information Act, relating to the events that happened prior to the institution of the suit. Therefore, according to him, the Lower Appellate Court was not right in dismissing the Application, on the ground that the documents are after the suit.

18. Contending contra, Mr.K.Magesh, learned counsel appearing for the first respondent/Corporation would submit that the sale has been done properly and 'B' Schedule property which is the property of the Firm has the loan be sold in exercise of the powers under Section 29 of the Act, the property of the guarantor, viz. the 'A' Schedule property has not been sold so far. He would also further submit that the appellant being a defaulter cannot be heard to contend that the mortgage itself is invalid. Mr.K.Makesh, would also submit that the sale having taken place, the appellant without seeking to set aside the sale cannot seek other reliefs.

19. I have considered the rival submissions.

20. A perusal of the proceedings before the Courts below would show that neither the Trial Court nor the Appellate Court had understood the prayer of the plaintiff and the real issues involved in the suit. The Trial Court had concluded that the property, viz. the 'A' Schedule property being separate property of Vediappan, mortgage created by him is valid and binding. But the Trial Court did not go in to the question of the conduct of the sale or the validity of the sale that said to have taken place on 21.06.2005. Though it is claimed by the first

respondent Corporation that the Sale was done following the procedure prescribed, the evidence of D.W.1, the Manager would demonstrate that none of the requisites or conditions laid down by the Hon'ble Supreme Court for conduct of a sale by Financial Corporation had been followed in the case on hand.

21. Proceeding dated 10.09.2013 obtained under the Right to Information Act, was sought to be placed before the Lower Appellate Court by way of additional evidence and the Lower Appellate Court on a mistaken impression that it is a document that emanated after the suit, had dismissed the application. This document dated 10.09.2013 is a reply given by the respondent Corporation to the queries raised under the Right to Information Act, and the information provided under the document are all details of transactions which had taken place prior to the suit. A perusal of the same would show that the sale had taken place on 21.06.2005, but the advertisement for the sale was issued in Newspapers on 08.06.2005. The Hon'ble Supreme Court had in various cases relating to sales by the State Financial Corporations had held that there should be a minimum of 30 days gap between the public notice and the actual sale, so one of the essential pre-conditions prescribed by the Hon'ble Supreme Court had been violated.

22. Evidence of D.W.1 would also show that the sale was held without fixing any upset price. The sale price is less than the guideline value of the property on the date of the auction. It is also conceded that VEDIAPPAN, the mortgagor/guarantor had died. Though his death was informed to the first defendant only on 05.02.2004, the notice dated 17.05.2004 for the auction sale was issued to him. This is also in violation of the guidelines prescribed by the Hon'ble Supreme Court in various cases, the latest being in Kerala Financial Corporation v. Vincent Paul and Another, reported in 2011 (4) SCC 171. It is also seen from the judgment of the Hon'ble Supreme Court in Subhransu Sekhar Padhi v. Gunamani Swain and others, reported in (2014) 12 SCC 368, the Hon'ble Supreme Court had held that the scope of Sections 29 and 31 are different and the property of the guarantor, mortgaged with a State Financial Corporation, can only be dealt with by the following procedure under Section 31 of the Financial Corporation Ltd. Admittedly, in the case on hand the procedure prescribed under Section 31 of the State Financial Corporation Act, has not been adopted. No Application has been filed before the District Court seeking sale of the property.

23. The Hon'ble Supreme Court in Karnataka State Industrial Investment and Corporation Ltd. v. Cavalet India Ltd. and

others, reported in 2005 (4) SCC 456, had held that the State Financial Corporation while acting under the exercise of powers under Section 29 or 31 must act reasonably and such reasonableness has to be tested against the dominant consideration, viz. to secure the best price. The Hon'ble Supreme Court in Kerala Financial Corporation v. Vincent Paul, reported in 2011 (6) CTC 554, had issued the following directions to be followed by the State Financial Corporation, while conducting sales of the mortgaged properties under Section 29 or 31 of the State Financial Corporation Act,

"20. We also observed in the earlier part of our judgment that though the KFC has initiated proceedings under Section 29 of the Act, admittedly, the State has not framed Rules or guidelines in the form of executive instructions for sale of properties owned by them. Till such formation of Rules or guidelines or orders as mentioned above, we direct KFC to adhere the following directions for sale of properties owned by it:

(i) The decision/intention to bring the property for sale shall be published by way of advertisement in two leading newspapers, one in vernacular language having sufficient circulation in that locality.

(ii) Before conducting sale of immovable property, the authority concerned shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; or

(b) by inviting tenders from the public; or

(c) by holding public auction; or

(d) by private treaty.

Among the above modes, inviting tenders from the public or holding public auction is the best method for disposal of the properties belonging to the State.

(iii) The authority concerned shall serve to the borrower a notice of 30 days for sale of immovable secured assets.

(iv) A highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price.

(vi) The essential ingredients of sale are correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them.

(vii) Reserve price means the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e., the minimum bid at auction.

(viii) The debtor should be given a reasonable opportunity in regard to the valuation of the property sought to be sold, in absence thereof the sale would suffer from material irregularity where the debtor suffer substantial injury by the sale."

24. A perusal of the evidence of D.W.1 would show that none of the above guidelines issued by the Hon'ble Supreme Court have been followed by the first respondent. However, the Courts below have not considered the entire suit in the right perspective. Though the information obtained from the State Financial Corporation, viz. the first respondent regarding the conduct of the auction sale and breach of the guidelines issued by the Hon'ble Supreme Court were attempted to be produced, the Lower Appellate Court, on erroneous grounds, rejected the said Application. The conclusion of the Lower Appellate Court that a suit is not maintainable, in my considered opinion, is erroneous. A Suit is a general remedy and a Writ Petition under Article 226 is for special remedy. A Writ Petition could be

maintained only if an alternative remedy is not efficacious. That does not however mean that if a Writ Petition would lie, a suit would not lie. The general law is that if the suit would lie, a Writ Petition would not lie, since there is an alternative remedy available but the converse is not correct. The Lower Appellate Court has applied the converse and held that the suit is not maintainable and therefore, I am convinced that the first and second substantial questions of law will have to be answered in favour of the appellant and the suit as framed is maintainable. I also find that the Lower Appellate Court was not right in dismissing the Application filed under Order XVI Rule 27 of the Code of Civil Procedure.

25. In view of the answers given to questions of law 1 and 2 above, the judgment and decree of the Lower Appellate Court are set aside. The Second Appeal is allowed and the regular Appeal in AS No.17 of 2012 remitted to the Lower Appellate Court for fresh consideration. The order of the Lower Appellate Court dismissing I.A. No.23 of 2013 is also set aside. The Lower Appellate Court is directed to restore I.A.No.21 of 2013 also, and dispose of the same along with the Appeal in accordance with law. The Lower Appellate Court is required to complete the exercise within a period of three months from the date of receipt of copy of this judgment. The parties are directed to appear before the Lower Appellate Court on 02.01.2020.

27. In view of the fact that the Second Appeal is allowed and the matter is remitted back to the lower Court, the Court fee paid in the Second Appeal is directed to be refunded to the appellant. Consequently, the connected miscellaneous petition is closed.

s/d-

Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

jv

To

1. The Additional District Judge,
Dharmapuri.
2. The Subordinate Judge
Harur.

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3. The Subordinate Judge
Dharmapuri.

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

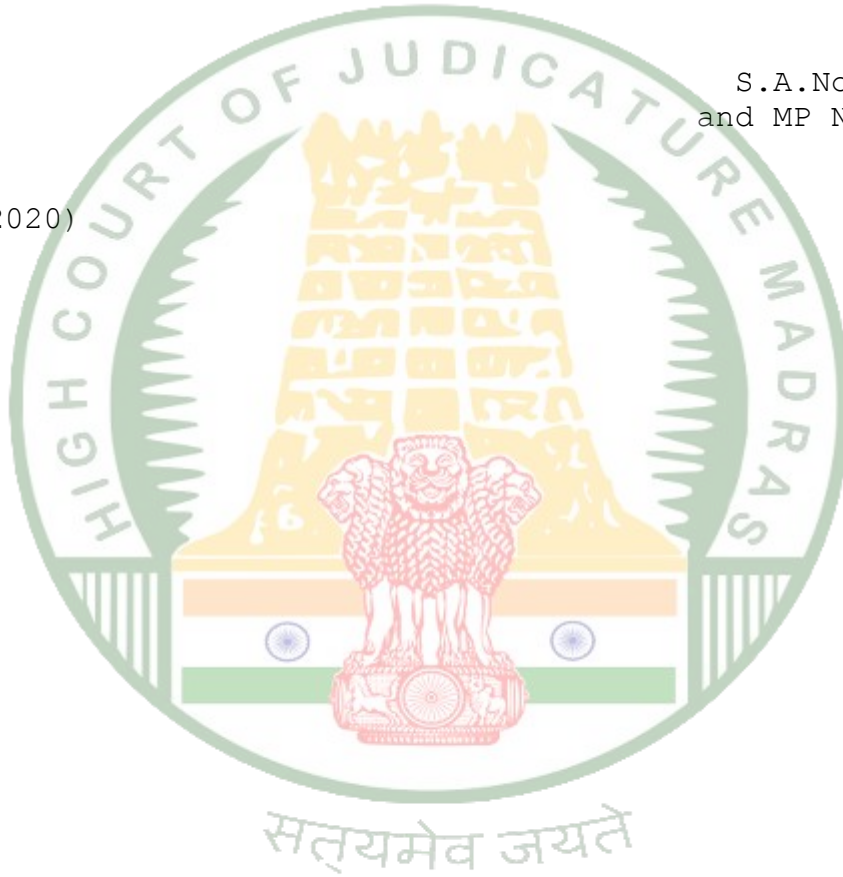
+1 CC to Mr.N.Manokaran, Advocate sr 101840.

+1 CC to Mr.K.Magesh, Advocate sr 101439.

+1 CC to Mr.P.Valliappan, Advocate sr 101590.

S.A.No.22 of 2015
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