

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on :26.08.2019
Pronounced on :06.09.2019
CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.Nos.296 & 299 of 2015
and
M.P.Nos.1 & 1 of 2015

1.Alice Manoranjitham
2.J.Ebenezer
3.Miller Joshua

... Appellants / Appellants / Defendants
in Second Appeal 2960/2015
...Appellants/Appellant/Plaintiffs in
SA.No.299 of 2015

Vs.

1.G.Natarajan

... Respondent/Respondent/Plaintiff
in S.A.No.296 of 2015

1.Sri Kandasamy Permanent Fund Ltd.,

2.M/s.Vamana Auctioneers

3.G.Natarajan

... Respondents / Respondents / Defendants
in S.A.No.299 of 2015

PRAYER in S.A.No.296 of 2015: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the IV Additional City Civil Court, Chennai, in A.S.No.444 of 2011 dated 10.10.2013 confirming the judgment and decree of the II Assistant City Civil Court, Chennai, in O.S.No.187 of 2009 dated 08.07.2011.

PRAYER in S.A.No.299 of 2015: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the IV Additional City Civil Court, Chennai, in A.S.No.445 of 2011 dated 10.10.2013 confirming the judgment and decree of the II Assistant City Civil Court, Chennai, in O.S.No.4730 of 2002 dated 08.07.2011.

For Appellants : Mr.P.Prakash Paul,
in both the Second Appeals

For Respondents : Mr.M.Senthil Kumar
in both the Second Appeals

COMMON JUDGMENT

Second Appeal No.296 of 2015 emanated from O.S.No.187 of 2009 on the file of the II Assistant City Civil Court, Chennai, which suit had been filed by the Plaintiff, G.Natarajan against three Defendants, J.Alice Manoranjitham, J.Ebenezer and E.Miller Joshua seeking delivery of vacant possession of the suit property and past damages of Rs.36,000/- and also future damages every month from the date of the plaint till the date of delivery of vacant possession.

2. Second Appeal No.299 of 2015, has emanated from O.S.No.4730 of 2002, on the file of the II Assistant City Civil Court, Chennai, which suit had been filed by the Plaintiffs namely, J.Alice Manoranjitham, J.Ebenezer and E.Miller Joshua against Sri Kandasamy Permanent Fund Ltd., M/s.Vamana Auctioneers and G.Natarajan, for a declaration that the auction notice dated 16.08.2002 was null and void and also for redemption of the mortgage deed dated 07.09.1999 and for injunction against the Defendants from proceeding with the auction and for a declaration that the sale deed in Doc.No.3806/2005 on the file of the Sub-Registrar Office, Royapuram, executed by 1st and 2nd Defendants in favour of the 3rd Defendant is null and void.

3. Both the suits were taken up for consideration by the II Assistant City Civil Court, Chennai. By a common judgment, dated 08.07.2011, the Trial Court held that the Plaintiffs in O.S.No.4730 of 2002 were not entitled for any relief and that the Plaintiff in O.S.No.187 of 2007 was entitled for delivery of possession. Damages were not granted.

4. Challenging the said common judgment, the Plaintiffs in O.S.No.4730 of 2002 had filed A.S.No.445 of 2011. The said Plaintiffs who were the Defendants in O.S.No.187 of 2009 filed A.S.No.444 of 2011. Both the First Appeals were taken up for consideration by the IV Additional City Civil Court, Chennai and by common judgment dated 10.10.2013, both the First Appeals were dismissed and the common judgment and decree of the Trial Court in both the suits were confirmed.

5. Aggrieved by the said common judgment, the Plaintiffs in O.S.No.4730 of 2002 who were also the defendants in O.S.No.187 of 2009 have filed the present Second Appeals. The Second Appeals have been admitted on 09.08.2019 on the following one substantial question of law:

"Whether prior notice under Section 69 of the Transfer of Property Act, had been issued or not?"

Facts in brief:-

6. The Plaintiffs in O.S.No.4730 of 2002, J.Alice Manoranjitham, J.Ebenezer and E.Miller Joshua, had executed a simple mortgage deed, dated 07.09.1999, registered as Doc.No.2328 of 1998 in the office of the Sub-Registrar, Royapuram, in favour of the 1st Defendant, Sri Kandasamy Permanent Fund Ltd., towards grant of loan of Rs.3.20 lakhs. It was stated that the 2nd Defendant, M/s.Vamana Auctioneers had given a notice for public auction without issuing a prior notice of demand for repayment. Consequently, it was stated that the said notice for public auction was null and void. The Plaintiffs claimed that there was no default in repayment of the loan and further claimed that Statement of Accounts were not submitted by the 1st Defendant. Consequently, they had filed the suit to declare the auction held on 16.08.2002 as null and void and that the auction was in violation of the stipulations of Section 69 (2) (a) of the Transfer of Property Act.

7. It is the case of the mortgagor, Sri Kandasamy Permanent Fund Ltd., that the Plaintiffs had borrowed a sum of Rs.3,25,000/- and had executed a simple mortgage deed on 07.09.1998, agreeing to repay the same on demand by the mortgagee. The rate of interest had also been determined in the mortgage deed. It was stated that at the time of filing the suit a sum of Rs.6,93,207.60/- was due and payable by the plaintiffs. It was also stated that the property had been sold by public auction and the sale deed in favour of the highest bidder G.Natarajan had also been registered on 07.12.2005, which document had been registered as Doc.No.3806/2005 in the Office of the Sub-Registrar, Royapuram.

8. It is the case of the 3rd Defendant, G.Natarajan, purchaser that he had purchased the property in public auction held on 16.08.2002 and the sale deed had also been registered as Doc.No.3806/2005 in the Office of the Sub-Registrar, Royapuram. It was stated that after the property had been sold on public auction, the mortgagor had informed the plaintiffs, but they did

not come forward to execute the sale deed. Consequently, the mortgagor himself had executed the sale deed. It was specifically stated that steps, as stipulated under Section 69 (3) of the Transfer of Property Act, had been complied with. It was therefore stated that the suit should be dismissed.

9. G.Natarajan, the auction purchaser, had also filed O.S.No.187 of 2009 seeking delivery of vacant possession and claiming past mesne profits of Rs.36,000/- together with the interest and future mesne profits at the rate of 3,000/- per month.

10. Both the suits were taken up for consideration by the learned II Assistant City Civil Court, Chennai and by judgment dated 08.07.2011, O.S.No.4730 of 2002 had been dismissed and O.S.No.187 of 2009 was decreed with respect to recovery of possession but dismissed with respect to grant of mesne profits.

11. Thereafter, the aggrieved plaintiffs in O.S.No.4730 of 2002 who were also defendants in O.S.No.187 of 2009 filed A.S.Nos.445 of 2011 and 444 of 2011. Both the First Appeals were dismissed by judgment dated 10.10.2013. The common judgment and decree of the Trial Court was confirmed.

S.A.Nos.296 & 299 of 2015:

12. The Second Appeals have been admitted on 09.08.2019 on the following one substantial question of law:

"Whether prior notice under Section 69 of the Transfer of Property Act, had been issued or not?"

13. Heard arguments advanced by Mr.P.Prakash Paul, learned counsel for the appellants and Mr.M.Senthilkumar, learned counsel for the respondents.

14. Mr.P.Prakash Paul, learned counsel stated that, there has been a violation of the provisions under Section 69 of Transfer of Property Act. According to him, Section 69(2)(a) of the Transfer of Property Act, stipulated that a notice in writing requiring payment of the principle money should be served on the mortgagor if default had been made in payment of principle money for three months. It is his contention that, in the instant case, no such notice was issued. The learned counsel stated that consequently, the entire sale by auction stands

vitiated. The learned counsel also raised further points that an Interlocutory Application had been filed on 07.10.2005, prior to the execution of the sale deed on 07.12.2005 and inspite of the pendency of the said Interlocutory Application seeking redemption of mortgage, the sale deed had been executed. The learned counsel stated that the documents were marked only through the 3rd Defendant, G.Natarajan, and that the sale was also hit by fraud and collusion and also inadequate consideration.

15. In this connection, the learned counsel had relied on 1982 1 MLJ 425, Mohamed Ali & Anr. Vs. M.K.Abdul Salam Saheb & Ors, wherein, it had been held that the sale of the property mortgaged is completed by the execution of sale deed and the mortgage was extinguished with the completion of the sale.

16. The learned counsel also relied on a judgment of learned Single Judge of this Court in C.S.No.160 of 2005 dated 05.01.2018, B.Narasimah Sastry & Ors. Vs. The Purasawalkam Permanent Fund Limited and Ors., wherein, the issue, whether a sale deed would be vitiated by fraud was examined with respect to inadequacy of sale consideration.

17. The learned counsel also relied on AIR 1993 Bom 203, Satyapal Uttamchand Chowdhary Vs. Rukayyabai Huseinbhai, wherein, it had been observed that Section 69 of Transfer of Property Act is a drastic provision and places "bonafide" mortgagors who have a real defence to any action on the mortgage, in a very disadvantageous and helpless position.

18. The learned counsel finally relied on a judgment of the Honourable Supreme Court reported in 1997 1 CTC 767, Dhanna Singh & Ors Vs. Baljinder Kaur & Ors., wherein, it had been held that the doctrine of lis Pendency would apply even in a suit for permanent injunction and that a subsequent purchaser would not get any right to lead evidence since he only stepped into the shoes of the Defendants who had given up the right to lead evidence.

19. The learned counsel therefore stated that the auction sale in the present case deserves to be set aside and the judgments and decree of the Trial Court and First Appellate Court have to be interfered with.

20. Per contra, Mr.M.Senthilkumar, learned counsel for the respondents stated that Section 69(3) of the Transfer of Property Act, had specifically provided that the title of a purchaser cannot be impeached on the ground that due notice had not been given and the only relief which a person aggrieved by improper exercise of such power can seek his remedy in damages against the person exercising such power. In this case, the learned counsel relied on a judgment of a learned Single Judge of this Court reported in 2019 (4) LW 11, G.Kalki Rajan Vs. V.Sreenivasan (Deceased) & Others, wherein, it had been held that failure to issue notice under Section 69(2) does not render the auction invalid and is an inadequate ground to set aside the sale. The learned counsel stated that though the auction purchaser had purchased the property in the year 2002, he had not yet obtained vacant possession. The learned counsel urged that the judgment of the First Appellate Court and Trial Court does not require any interference and that the Second Appeal must be dismissed.

21. I have carefully considered the arguments advanced.

22. For the sake of convenience, the mortgagors / plaintiffs in O.S.No.4730 of 2002, who are also the Appellants in both the Second Appeals would be termed as the Appellants and the 1st Defendant in O.S.No.4730 of 2002, who is the mortgagee would be termed as the 1st Respondent and the auction purchaser who was the 3rd Defendant in the said suit would be termed as the 3rd Respondent.

23. The Appellants had borrowed a sum of Rs.3,25,000/- as loan from the 1st Respondent and had executed a Mortgage Deed dated 07.09.1988, registered as Document No.2328/98 in the Office of the Sub-Registrar Office, Royapuram, with respect to the property bearing Plot No.11/3, Gengan Street, Old Washermenpet, Chennai - 600 021, together with undivided 1/3rd share of land, to a total extent of 988 sq.ft and also the entire 2nd floor portion in R.S.No.1611, Block No.28, Tondiarpet Division, Patta C.A.No.567/82-83. The Mortgage Deed had been marked as Ex.A4. The Mortgage Deed also provided for bringing the property for public auction under the provisions of the Transfer of Property Act. The property was actually brought up for public auction consequent to non-payment of the mortgage amount in the manner provided in the Mortgage Deed. An auction notice was issued on 16.08.2002 which had been produced as

Ex.A2. The 3rd Respondent was the successful bidder in the auction. A notice dated 20.08.2002 was issued to the appellants calling upon them to pay a sale consideration of Rs.5,00,000/-. They did not make any payment. Finally, on 07.12.2005, the sale deed was registered in favour of the 3rd respondent in Doc.No.3806/2005 in the Office of the Sub-Registrar, Royapuram.

24. The substantial question of law framed for determination is whether there has been prior notice under Section 69 (2) (a) of the Transfer of Property Act. For better appreciation, Section 69 of the Transfer of Property Act is extracted hereunder in entirety,

"69. Power of sale when valid

A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist [or a member of any other race, sect, tribe or class from time to time specified in this behalf by [the State Government], in the Official Gazette];

(b) where [a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgagee is the Government.

(c) where [a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgaged property or any part thereof [was, on the date of the execution of the mortgage-deed], situate within the towns of Calcutta Madras, Bombay, [or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf].

[(2)] No such power shall be exercised unless and until -

[(a)] notice in writing requiring payment of the principal money has been served on the mortgagor,

or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or [(b)] some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

[(3)] When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

[(4)] The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

[(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.]”

25. Reliance has been placed by the learned counsel for the Appellants on Section 69(2)(a) of the Transfer of Property Act, which required that a notice in writing must be served on the mortgagor and if default had still been made of the principle money or any part for a continuous period of three months after such service, then the mortgagee can bring the property for sale. Section 69(3) provides that any sale made cannot be impeached on the ground that due notice was not given. However,

it provided for an alternate remedy to the mortgagor who complains that notice had not actually been given namely to seek damages against the person who exercised the power of sale under the Mortgage Deed.

26. In the instant case, the 1st Respondent had brought the property for auction. There is no evidence on record to show that they had issued notice calling upon the appellants to pay the arrears amount with respect to the principle and that in spite of such notice the appellants have not come forward to make the payment. The issuance of such notice is not mandatory. Once a Mortgage Deed had been entered into between the parties a contractual relationship arises if there is consensus and ad idem. If the contract is vitiated by undue influence, misrepresentation or fraud, then both the parties to the contract are bound by the terms thereof.

27. The Mortgage Deed, in the instant case provides that the mortgagor shall pay a sum of Rs.3,25,000/- on demand together with interest and if default is made, provision has been given for payment of interest on the arrears. It had also been provided that if there is failure to make any payment for a period of six months continuously, the mortgagee will call upon the mortgagor by notice in writing to pay up all the arrears together with interest and if there is failure to do so, the mortgagors will be at liberty to close the account, treat the amount as arrears, charge interest on the same and also bring the property for sale. Having executed this Mortgage Deed, the Mortgagors are bound by the terms of the Mortgage Deed. Issuance of notice would be a precautionary step pre-informing the mortgagors that they are already in arrears and any further default would only bring the property to sale. Since the deed in itself expressly provides for payment in accordance with the contract executed between the parties, even though, Section 69 (2)(a) provides for issue of notice, the bonafide purchaser in an auction cannot be inflicted with liability and his title impeached if the mortgagee fails to issue such notice. A purchaser gets title if the vendor has title to convey and confers title in accordance with the law, in this case, on the strength of the Mortgage Deed.

28. Moreover, the 3rd Respondent / Purchaser had not violated any provision of any law and non issuance of notice under Section 69(2)(a) of the Transfer of Property Act, by the mortgagee would only give rise to cause of action by the mortgagor against the mortgagee in their personal capacity and that is why under Section 69(3), it had been provided that an effective remedy of damages can be sought by the mortgagors

against the mortgagee.

29. The contention of the learned counsel for the Appellants that the entire sale should be vitiated, cannot be countenanced by this Court. The title of the third respondent cannot be impeached on this particular ground. Moreover, a perusal of the records reveal that notice has been issued in Ex.A3 on 20.08.2002 informing about the auction sale. At any rate, the sale deed had also been registered in favour of the 3rd Respondent. That the Appellant was in default had not been denied by the learned counsel for the Appellants. Consequently, in answer to the substantial question of law framed, I hold that the sale in favour of the 3rd Respondent is not vitiated and the 3rd Respondent had obtained unimpeachable title on his purchase of the suit property under Ex.B6 dated 07.12.2005.

30. The other issues raised by the learned counsel for the Appellants namely, that the sale is hit by lis pendens or that the sale is also to be impeached in view of inadequate consideration are rejected by me. Both the Courts below have given concurrent findings on issue of facts and it may not be appropriate of this Court to re-examine those facts.

31. In view of the reasons stated above, I hold that the Second Appeals have no merits and accordingly, they are dismissed, with costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

- 1.The IV Additional Judge,City Civil Court, Chennai.
- 2.The II Assistant Judge,City Civil Court, Chennai.
- 3.The Section officer
VR Section, Madras High Court

+2 ccs to Mr.P.Prakash Paul Advocate sr77541

+1 cc to Mr.R.Murugabharathi Advocate sr77231

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