

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE C.SARAVANAN

O.S.A. No. 80 of 2017

Umedraj Jain

..Appellant

Vs.

1. Dr.V.Sudarsanan

...Respondent

(RR2 to 6 are deleted from the array of Parties vide court order dated 08.08.2017)

Prayer: Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the order and decretal order dated 03.03.2017 passed in A.No.5398 of 2016 in Proc.No.5 of 2012 in C.S.No.1102 of 2017.

Prayer in A.No.5398 of 2016:

Pleaded to set aside the orders of the Learned Master dated 12.08.2016 in proclamation No.5/2012 in C.S.No.1102/2007.

Proc.No.5 of 2012:

Proclamation praying that this Hon'ble' Court be pleased to sell the immovable property.

C.S.No.1102 of 2007:

Directing the Defendants to pay to the Plaintiff the sum of Rs.79,69,544/- (Rupees seventy nine lakhs sixty nine thousand and five hundred and fourty four only) with further interest at the rate of 9% per annum on Rs. 58,50,000/- from the date of plaint to date of payment that may be fixed by this Hon'ble Court.

For Appellant : Mr.S.Silambanan, Senior Counsel
for Mr.R.Ramesh

For Respondents : Mr.P.B.Sampath Kumar for R1

JUDGMENT
(Delivered by M.M.SUNDRESH, J.)

This appeal is preferred by the appellant as against the order passed in Application No. 5398 of 2016 in C.S.No.1102 of 2007, by which the order passed by the learned Master was set aside by holding that the same is not in tune with the decree granted as against the original defendants.

2. The facts in brief are as under: A mortgage of deposit of title deeds was executed by the defendants in the suit in favour of the first respondent/plaintiff while receiving the loan. The suit was filed in C.S.No.1102 of 2007 as early as 10.12.2007 for recovery of money on the said mortgage by deposit of title deeds. Pending the suit, the defendants sold the property to the appellant, who had knowledge about the litigation. He filed an application seeking to implead himself which was dismissed. The said order has become final. Thereafter, a preliminary decree was passed in C.S.No.1102 of 2017 on 05.10.2010. The operative portion of the same is reproduced hereunder:-

"4.That the defendant shall be at liberty on or before the said 5th day of January 2011, to pay into Court the said sum of Rs.95,83,673.18 (Rupees Ninety Five lakhs eighty three thousand six hundred and seventy three and paise eighteen only) and the said taxed costs of the plaintiff of this suit as taxed by the Taxing Officer and noted in the margin hereof as aforesaid.

5.That, on payment as aforesaid, the plaintiff shall bring into Court all documents in his possession of power relating to the mortgaged property set out in the Schedule hereto and all such documents shall be delivered over to the defendant or such person as he appoints, and the plaintiff shall if so required reconvey or retransfer the said property free from the said mortgage, and clear of and from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and thereupon the plaintiff shall be at liberty to apply for payment out to this Court of the said sums.

6.That, in default of payment in as aforesaid, the plaintiff may apply to the Court or a final decree for the sale of the mortgaged property

morefully set out in the schedule hereunder and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold and the sale-proceeds shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the said sums due to the plaintiff as aforesaid together with subsequent interest at the rate of 9% per cent per annum and such further costs as may be allowed to the plaintiff by the Court, and the balance, if any, shall be paid to the defendant or other person entitled to receive the same.

7. That in case the said net sale-proceeds shall not be sufficient for payment in full of the amounts payable to the plaintiff as aforesaid, the plaintiff shall be at liberty to apply for a persona decree against the defendants for the amount of the balance due to the plaintiff with 9% p.a. Till the date of realization."

3. In addition to the preliminary decree, a final decree was passed on 29.08.2011 while taking note of payment made in the interregnum. It is apposite to place on record the aforesaid decree:-

"that the defendants had paid a total amount of Rs.15,00,000/- (Rupees fifteen lakhs only) by way of three cheques issued by them i.e., two cheques on 09.08.2010, each for a sum of Rs.5,00,000/- (Rupees five lakhs only) totalling a sum of Rs.10,00,000/- (Rupees ten lakhs only) and another cheque for a sum of Rs.5,00,000/- (Rupees five lakhs only) on 26.08.2010;

that the said payment have been omitted to be mentioned and deducted from the decree amount while the preliminary decree has been passed by this Court on 05.10.2010;

that the said payments made by the defendants ought to have been appropriated towards the suit claim and thereafter only the preliminary decree should have been passed, and it is ordered and decreed as follows:-

That the mortgaged properties mentioned in the preliminary decree made on 5th day of October 2010 and more particularly described in the schedule hereunder be sold;

2. That the sale proceeds of the sale as mentioned in clause (1) supra shall be appropriated towards the decree amount and the interest of 9% per annum thereon less the

payments already made on three occasions to the tune of Rs.15,00,000/- (Rupees fifteen lakhs only) along with its proportionate interest for such payments;

3.That the plaintiff herein, do on or before the 29th day of September, 2011 bring into court two copies of a proclamation of sale, the affidavits and certificates prescribed by Rule 3 Order XXXVIII of the Original Side Rules, 1956.

4.That the defendants herein do pay to the plaintiff herein, a sum of Rs.105/- (Rupees one hundred and five only) as and for the costs."

4. Thus, a final decree was passed granting three months time to make the payment. On failure to make the payment, 9% interest was directed to be paid as per the agreed terms under the mortgage. Suffice it to state that the defendants did not dispute the preliminary decree as well as the final decree, as it was passed by consent. However, C.S.No. 757 of 2011, has been filed by the appellant wherein the final decree passed has been challenged and the same is stated to be pending. In the meanwhile, the first respondent/decree holder filed objections to the memo filed by the appellant. The relevant portion of the objections filed by the first respondent/decree holder reads as under:-

"Objections filed by the Decree Holder
The D.H./Plaintiff was served with a copy of the Memo filed by the Third party/proposed party, enclosing the following six Pay Orders for a total sum of Rs.30,00,000/- and four cheques for a total sum of Rs.65,84,670/-, alleging that the said sums would clear the entire Decree Amount payable in C.S.No. 1102 of 2007

Pay Orders:-

- 1.Rs.5,00,000/- dated 12.06.2014 D.D.No. 002266
Axis Bank, Anna Nagar
2. Rs.5,00,000/- dated 12.06.2014 D.D.No. 002265
Axis Bank, Anna Nagar
3. Rs.5,00,000/- dated 16.06.2014 D.D.No. 002270
Axis Bank, Anna Nagar
4. Rs.5,00,000/- dated 16.06.2014 D.D.No. 002271
Axis Bank, Anna Nagar
5. Rs.5,00,000/- dated 13.06.2014 D.D.No. 002267
Axis Bank, Anna Nagar
6. Rs.5,00,000/- dated 13.06.2014 D.D.No. 002268
Axis Bank, Anna Nagar

Cheques:-

- 1.Rs.10,00,000/- Cheque Dt. 27.07.2014 No.11861
- 2.Rs.10,00,000/- Cheque Dt. 27.08.2014 No.11862
- 3.Rs.10,00,000/- Cheque Dt. 27.09.2014 No.11863
- 4.Rs.35,84,670/- Cheque Dt. 27.08.2014 No.11862

The total sum covered by the above said Pay Orders and Cheques comes to Rs.95,84,670/-. I humbly submit that this is not the entire Decree Amount as alleged by the Third Party/Proposed Party. The total Decree Amount payable in C.S.No.1102 of 2007 comes to Rs.1,00,32,920.43/- as on 20.06.2014. if the difference amount and subsequent interest up to date of actual payment is paid I am ready to receive the Pay Orders as well as Cheques tendered by the Third Party/Proposed Party, subject to usual default clause. For time being, i am returning the above said Pay Order as well as the Cheques enclosed with the Memo filed by the Third Party/Proposed Party.

Under these circumstances, the D.H./Plaintiff prays this Hon'ble Court to direct the Third Party/Proposed Party to pay the entire Decree Amount along with interest till the actual payment of the entire Decree Amount and thereby render justice."

5. Learned Master agreeing with the appellant dismissed the application filed by the first respondent/decreed holder. Aggrieved over the same, an application was filed before the learned Single Judge by the decreed holder in App.No. 5398 of 2015. This application was allowed by the learned Single Judge, inter alia, holding that the amount will have to be paid as per the decree. While doing so, the learned Single Judge has allowed deduction of the amounts paid along with the proportionate interest. Thus, deduction was permitted to be made only towards the interest alone. Aggrieved over the same, the present appeal has been filed.

6. Learned Senior Counsel appearing for the appellant has made two submissions. The first is with respect to Section 34 of the Civil Procedure Code which speaks about the interest. It is submitted that there cannot be any interest more than 6% after the decree. Secondly, it is submitted that as per Order 21 Rule 1(5) CPC, if the amount is paid and refused to be received, no interest is liable to be paid. To buttress his submission, learned Senior Counsel relied on the following decisions (i) a judgment of the Division Bench of Delhi High Court in M/s. Ircon International Ltd v. M/s. M.Moolji, reported in 2012 188

DLT 51; and (ii) a three-Judge Bench judgment of the Apex Court in V.Kala Bharathi & Ors v. The Oriental Insurance Company Ltd., Branch Chitoor, (2014) 5 SCC 577.

7. Learned counsel for the first respondent/decreed holder submitted that here is a case where the application filed by the appellant was dismissed pending suit to implead himself as a party defendant. The property was purchased with the knowledge of the litigation and the mortgage deed. Even after the preliminary decree, no payment was made till the year 2015. The decree is for payment of specified amount within three months, failure to pay would result in payment of 9% interest till the date of realization. Therefore, there is no application of Section 34 of the Code of Civil Procedure as the decree itself says about the entitlement as per the agreed terms under the mortgage deed. In any case, the aforesaid amount was directed to be paid by the original defendants which has not been appealed against. Such a decree cannot be put to challenge indirectly in collateral proceedings. Order 21 Rule 1 (5) CPC has got no application when a person has stepped into the shoes of the judgment debtor and disputes the extent of liability. Further, only a limited portion of amount was sought to be paid by way of Postal Order and the remaining amount was unilaterally sought to be paid by way of post dated cheques. The postal order was rejected immediately and, therefore, in view of the above said dispute raised, Order 21 Rule 1(5) CPC may not be pressed into service especially when no deposit has been made nor any payment was received. Thus, the order passed by the learned Single Judge requires no interference.

8. As submitted by the learned counsel appearing for the respondent, the decree inter se parties has become final. Such a decree cannot be put to challenge indirectly in collateral proceedings and that too through an order passed in the execution proceedings. It is a settled law that an execution Court cannot go beyond the decree. The decree is also very specific that the amount will have to be paid within three months, failing which 9% interest would follow. At best, the appellant can step into the shoes of the judgment debtors. Admittedly, he purchased the property during the pendency of the proceedings with full knowledge. Therefore, it is not open to him to contend that the decree is not correct by placing reliance upon Section 34 of the Code of Civil Procedure. Furthermore, he has also filed an independent suit challenging the decree.

9. On the question of applicability of Order 21 Rule 1 (5) CPC also, we do not find any merit. The payment made after the preliminary decree was given due credit. Even the judgment of V.Kala Bharathi (supra) relied upon by the learned Senior counsel for the appellant which, in turn, took into

consideration of the decision of the Constitution Bench judgment in Gurpreet Singh v. Union of India reported in (2006) 8 SCC 457 would clearly show that what is to be deducted for payment to be made is the interest component alone.

10. In the case on hand, due deduction was already made and thereafter only the learned Single Judge passed an order. Moreover, no deposit has been made by the appellant but only Postal Orders were made that too for part of the amount when the decree amount itself is disputed. Such an approach is not open to be adopted by the appellant contrary to the decree. We have to see the offer made by him as a whole. When it is not acceptable to the decree holder then such a benefit cannot be allowed to be given to a third party who stepped into the shoes of the judgment debtor by invoking Order 21 Rule 1(5) of Code of Civil Procedure. Moreover what has been offered by way of Postal Order is only an initial amount as against the larger extent which was sought to be paid on different dates by way of post dated cheques contrary to the decree. Thus, looking from any perspective, we do not find any fault with the reasoning in the impugned order of the learned Single Judge. Hence it warrants no interference.

Accordingly, the appeal stands dismissed. However, we make it clear that inasmuch as the appellant has filed the suit challenging the decree itself, our observations will not stand in his way in contending the matter on merits. No costs. Consequently, connected C.M.P. No.10727 of 2018 is closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

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+1 CC to Mr.P.B.Sampath Kumar, Advocate sr 30543.
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O.S.A. No. 80 of 2017

NMI (CO)
SP(03/04/2019)