IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.08.2019

CORAM :

THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

C.R.P(PD) No.4541 of 2017

Girija ... Petitioner/5th Respondent

Vs.

Karthik Kumar @ Karthikeyan ... Respondent/Plaintiff

**PRAYER:** Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order dated 19.09.2017 passed in I.A.No.1917 of 2016 in O.S.No.2554 of 2015, on the file of the I Additional District Munsif Court, Coimbatore, as unsustainable, irrational, against law, facts and equity and allow the said I.A.No.1971 of 2016 by allowing the above Civil Revision Petition.

For Petitioner : Mr.E.Om Prakash, Senior Counsel
For M/s.Ramalingam Associates

For Respondent : Mr.S.B.Viswanathan
S.Mohan Kumar

**ORDER**

The present revision is preferred against the order dismissing the petition filed to reject the plaint u/o. VII R.11 and Sec.151 of C.P.C.

2. The fifth defendant in the suit, who is the auction purchaser of the suit properties is the revision petitioner. The respondent herein is the plaintiff.

3. Plaintiff filed the above suit for declaring power of Attorney dated 17.10.2005; Cancellation of Power of Attorney dated 24.10.2005; sale certificate dated 29.07.2015 issued in favour of the revision petitioner by the bank in SARFAESI proceedings as null and void and for injunction restraining the auction purchaser from alienating, altering physical features and disturbing their possession of the properties.

4. The revision petitioner filed a petition to reject the plaint on the ground that the Civil Court has no jurisdiction over matters pertaining to debt recovery seized of by the Debt Recovery Tribunal as per Sec.34 of SARFAESI Act(hereinafter referred to as the 'Act'), barred by limitation and the valuation made is incorrect.

5. The case of the plaintiff is that originally certain ancestral properties belonged to one Nallasamy Konar and his brothers. After partition between them on 14.07.1975, Nallasamy Konar derived title to the suit properties. Nallasamy Konar had two sons and two daughters viz., D.Arunachalam 2) Ponnusamy @ Jagannathan 3) Subbulakshmi and 4) Kaleeswari. The said Nallasamy Konar entered into partition of the ancestral properties with his sons and daughters through a registered partition deed bearing document No.1823/1989 dated 20.04.1989 (Plaint Document No.1). After division, the said Nallasamy Konar and his children were enjoying their respective shares independently. Other than the ancestral properties, Nallasamy Konar owned certain other properties, he and his sons Arunachalam first defendant in the suit and Ponnusamy @ Jagannathan father of the plaintiff were commonly enjoying as Hindu Undivided Family. They have sold certain items of properties and in respect of the remaining properties of Nallasamy Konar, and his two sons entered into partition vide registered document No.765/19997 dated 12.03.1997.



6. In so far as the ancestral properties, according to the respondent/plaintiff, he and his sister are coparceners and on the death of their father in the year 2007 their mother is entitled to 1/3 share in the

property. Even after the death of Ponnusamy @ Jagannathan, they are continuing physical possession with valid title to the same. Allegedly, a Power of Attorney was executed in favour of the 2nd defendant in the suit on 17.10.2005 vide registered document No.1973 of 2005. The 2nd defendant had pledged the property in favour of third defendant, which was brought to sale by the 4th defendant and sold to 5th defendant and a sale certificate dated 29.07.2015 registered as Document No.439/2015. When the plaintiff made enquiries, he was informed of the above transactions. The power of Attorney, mortgage deed and cancellation of power of Attorney are false and were fabricated collusively by the first defendant Arunachalam and second defendant impersonating themselves as owner of the property. Plaintiffs father never executed any Power of Attorney nor mortgaged the properties and there was no necessity to do the same. Since the documents were created by fraud, he filed the above suit to set aside the Power of Attorney, sale certificate issued by the bank and for injunction.

7. The learned Senior counsel appearing for the revision petitioner would contend that Sec.34 of the Act clearly ousts the jurisdiction of Civil Court to entertain any suit or proceeding in respect of any matter which falls within the power of the Tribunal to determine. In so far as the present suit is

concerned, pursuant to a mortgage executed by the title holder through his Power of Attorney, the bank has taken measures to recover the debt. The auction sale was conducted in as legal a manner as per the Act. Any person aggrieved over the measures taken shall approach the Tribunal for redressal of his relief. Even if the property belongs to HUF, the jurisdiction lies only to Tribunal and Civil Court has no jurisdiction. Even assuming that the suit is maintainable the cause of action to file the suit arose in 2005, when the mortgage was created in favour of the bank, during the life time of the plaintiff's father, much less proceedings as contemplated under Sec.13(4) for enforcement of the security interest, including sale of secured asset was taken by way of taking possession. Accordingly, the possession was taken in the year 2010, but the plaintiff had failed to action to file an application u/s. 17 of the Act. Filing of the suit after a period of ten years is barred by limitation. Further suit is filed to set aside the sale. In that event, it has to be valued corresponding to the value of the property. But the plaintiff has not valued the suit property and paid the Court fee by undervaluing the same.



8. The learned counsel appearing for the respondent/plaintiff would contend that the entire transaction was tainted with fraud, fabrication of documents and collusion between the bank and the borrower. Without the

knowledge of the plaintiffs father the disputed documents were created. The date on which came to his knowledge he has filed the suit. The matters of fraud and forgery cannot be agitated before Debt Recovery Tribunal and in view of the same the jurisdiction of the Civil Court is not ousted. Further fraud knows no limitation and hence the plea of limitation cannot be raised at this stage. It being a mixed question of fact and law, it can be decided only after trial. To support his contention he would rely of the following judgments in A.V.Papayya Sastry and Other v Govt.of A.P.and others, (2007) 4 SCC 221 and The State of Andhra Pradesh & anr v. T.Suryachandra Rao, 2006-1 L.W 547.

9. Heard the submissions of both sides.

10. Admittedly plaintiff's father was title holder of the suit property having inherited the same by way of partition. It is stated that he had executed a Power of Attorney on 17.10.2005 for the purpose of promoting and selling the property. For that purpose, the power to mortgage to raise funds was also given. Accordingly a mortgage is created in favour of the third respondent bank in the year 2005. It is stated that the Power of Attorney was cancelled on 24.10.2005 after creation of mortgage deed. The father of the plaintiff died in the year 2007. At the time of his death the plaintiff was a

major. In that event he had every right to challenge the mortgage created by his father affecting his rights. He should have filed a suit. It appears that 3rd respondent pursuant to the default committed by the plaintiff's father had initiated the measures under the Act as contemplated u/s.13(2). It is presumed that notice was issued as per the above provision of the Act and following that on 20.01.2010 a possession notice was issued u/s. 13(4) of the Act. It is stated that the plaintiff's father died in the year 2007 and then it should have been issued to the plaintiff himself. If the bank is not entitled to enforce the recovery of debts against a dead person or against the interest held by the other coparceners, the issue should have been raised as per ec.17 of the ACt before the Debt Recovery Tribunal. Sec.34 of the Act ousts the jurisdiction of the Civil Courts in the matter of recovery of debt against a secured asset. No Civil Court has jurisdiction to entertain any suit in respect of any matter ceased of by the Debt Recovery Tribunal and no injunction shall be granted in respect of any action taken under the Act. The remedy of any person aggrieved is filing an appeal u/s. 17 of the said Act against the measures taken under Sec.13(4) of the Act.



11. In the instant case, the petitioner has chosen to file a suit in the year 2015 for the action initiated prior to 2010. In a similar circumstance, the

Hon'ble Supreme Court in the case of ***Jagadish Singh vs. Heeralal and others, (2014) 1 SCC 479,*** has held as under:

*"...*

*19. The expression 'any person' used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the Judgment of this Court in Satyavati Tondon's case.*

*20. Therefore, the expression 'any person' referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.*

*21. Section 34 of the Securitisation Act ousts the civil court jurisdiction. For easy reference, we may extract Section 34 of the Securitisation Act, which is as follow:*

*"34. Civil Court not to have jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered*

*by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).*

*23. Section 13, as already indicated, deals with the enforcement of the security interest without the intervention of the court or tribunal but in accordance with the provisions of the Securitisation Act.*

*24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression 'in* *respect of any matter' referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.*

*25. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a secured creditor under sub- section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal. to determine as to whether there has been any illegality in the "measures" taken.*



Therefore, the Civil Court has no jurisdiction to entertain the dispute to set aside the sale certificate. The only remedy available to the petitioner is to approach the Debt Recovery Tribunal by filing an appeal to set aside the sale certificate issued by Recovery Officer of the Tribunal.

12. In the instant case, the mortgage was created during 2005 through the Power of Attorney of Plaintiff's father. The Power of Attorney was cancelled by him in the same year after creation of mortgage. Even after the cancellation of Power of Attorney plaintiff's father did not take any action against the mortgage created with the bank. In respect of the bank transactions, particular in matters of grant of loan, it goes without saying that lot of verification of the title would have been done. Therefore, without the knowledge of the title holder mortgage would not have been created. Possession notice was published on 20.01.2010 in a newspaper and it would have also been served on the petitioner. In that event fraud cannot be alleged against the bank which had taken legal recourse as per the law. The judgments in the case of ***A.V.Papayya Sastry and Others vs. Govt of A.P and Others, (2007) 4 SCC 221 and The State of Andhra Pradesh and another vs. T.Suryachandra Rao, 2006-1-L.W.547*** relied on by the learned counsel for the respondent will not apply to the present case.



I do not want to go into the issue of limitation and valuation as *prima facie* it is decided that Civil court has no jurisdiction to try this issue. In the light of the above discussion, this Civil Revision petition is allowed and the order passed by the Trial Court in I.A. No.1917/2016 in O.S.No.2554/2015 dated 19.09.2017 is set aside. No costs.

**14.08.2019**

Index: Yes/No
Internet: Yes/No
Speaking Order/ Non-Speaking Order
Note:Issue today (17.02.2020)

**M.GOVINDARAJ,J.**

Ssi/kpr

To:

1. The I Additional District Munsif Court, Coimbatore

2. The Section Officer, VR Section, Madras High Court.

C.R.P(PD) No.4541 of 2017



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