BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 25.02.2020
CORAM
THE HON'BLE MR.JUSTICE R.SUBRAMANIAN
C.R.P.(PD)(MD) No.895 of 2013
and
M.P(MD)No.1 of 2013
and
M.P(MD)No.1 of 2014

Thirumaran ... Petitioner/3rd Party Claim Petitioner

-Vs-

1.Union Bank of India,
Thiruthangal Branch,
Rep. by its Branch Manager,
D.No.217, Virudhunagar Road,
Thiruthangal. ...1st Respondent / Respondent/Petitioner / Plaintiff
2.Sakkammal
3.Mythili ...Respondents 2 & 3 / 2nd & 3rd Respondents
4.Chilikkur Narayanasamy Naidu
5.Arumugasamy
6.Thiruganam ...Respondents 4 to 6/4th,5th &6h Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to set aside the fair and decreetal order passed by the Subordinate Judge, Sivakasi, Virudhunagar District in E.A.No.163 of 2008 in E.P.No.60 of 2001 in O.S.No.66 of 1990 dated 15.03.2013 by allowing the revision petition with costs.

For Petitioner	:	Mr.J.Barathan for Mr.S.Selvakumar
For R1	:	Mr.R.Pandivel
For R2 & R3	:	Mr.P.Mahendran
For R4	:	Mr.C.Sundaravadivel
For R6	:	Mr.A.V.Arun
For R5	:	Dismissed vide Court order dated 14.12.2017

O R D E R

This Civil Revision Petition is at the instance of the third party claimant, whose petition under Order 21 Rule 97 to 100 of the Civil Procedure Code was closed on the basis of compromise entered into between the Bank/Decree holder, Judgment debtor and the Court Auction Purchaser.

2. The facts leading to the filing of the above petition under Order 21 Rule 97 in E.A.No.163 of 2008 are as follows:-

(i) One Velgurusamy created an equitable mortgage in favour of Union Bank of India in respect of three items of properties on 15.02.1984. The said mortage was an unregistered mortgage by deposit of title deeds. Probably, suppressing the mortgage, Velgurusamy sold a portion of one of the items of property on 12.02.1987 to one Chilikkur Narayanasamy Naidu and on the same day, Velgurusamy sold the western portion of the property, which is the subject matter of the proceedings, to one Arumugasamy. The petitioner purchased the eastern portion of the property from Chilikkur Narayanasamy Naidu on 22.01.1990 and the petitioner's father Rethinasamy purchased the western portion of the property from Arumugasamy on 20.01.1990. In the meantime, it appears that a suit was filed by the first respondent/Bank in O.S.No.66 of 1990. Though the suit was presented on 28.04.1989, it came to be numbered on 15.03.1990. The Bank however had impleaded the Chilikkur Narayanasamy Naidu, the purchaser of the eastern portion of the property as a party to the suit, while Arumugasamy the purchaser of the western portion of the property was not impleaded. Though an Encumbrance Certificate was shown as a document in the plaint that was evidently not marked to cover up the misdeed of the Bank in not impleading both the purchasers. In the suit, substituted service was effected through paper publication to both the defendants and an ex-parte preliminary decree came to be passed on 21.03.1991. On 04.02.1994, an application for passing a final decree was filed in I.A.No.278 of 1995. Again substituted service was ordered and publication was effected on 22.01.1996. It is seen from the publication, dated 22.01.1996 that it was another attempt to effect fraudulent service on the parties to the suit by the Bank. The name of the Sub-Court was shown as Sub-Court, Palani, whereas, the proceedings were actually pending on the file of the Sub-Court, Srivilliputhur as on the said date. Therefore, the service in the final decree application itself cannot be held to be sufficient service. Despite that, overlooking the same, an ex-parte final decree came to be passed for sale of three items of property shown as A,B & C schedules. An Execution Petition in E.P.No.60 of 2001 came to be presented on 17.07.2001 and the amount due as on the date of the Execution Petition was shown as Rs.16,57,268.50/-. Since the borrower Velgurusamy had died, by then, his legal representatives were impleaded in the Execution Petition.

(ii) A perusal of the Execution Petition would show that notice was ordered only to the legal representatives of the judgment debtor and not to the purchaser Chilikkur Narayanasamy Naidu, who was also impleaded as respondent therein. According to the Amin's value, the suit 'A' schedule was valued at Rs.10,00,000/- and 'B' and 'C' schedules were valued at Rs.18,00,000/-. However, the Court valued the 'A' schedule at Rs.17,00,000/- and ordered the sale of said property alone. But, after four years, the suit 'A' schedule property, which was valued at Rs.17,00,000/- on 21.10.2003, was sold for a pittance of Rs.3,25,000/- on 14.07.2007 to the sixth respondent herein. The sale was also confirmed and the sale certificate was issued. It should be pointed out that all these proceedings went ex-parte. Upon knowing about the sale and issuance of sale certificate, the petitioner herein filed a petition under Order 21 Rule 97 on 24.01.2008. A suit was also instituted by the petitioner for declaration that the preliminary decree and the other proceedings in O.S.No.66 of 1990 are null and void. The suit is said to be pending. While so, on 28.07.2008 the legal representatives of the Velgurusamy, the mortgagor, filed a Civil Revision Petition before this Court in C.R.P.(MD)No.1350 of 2008 questioning the power of Civil Court to execute the decree in view of Section 31A of Recovery of Debts Due to Banks and Financial Institutions Act 1993. This Court, by an order, dated 11.08.2010 concluded that the Execution Proceedings ought not to have been taken by the Civil Court in view of the provisions of 31A of Recovery of Debts Due to Banks and Financial Institutions Act 1993. Upon such findings, this Court allowed the Civil Revision Petition setting aside the sale. As against the said order of this Court, the Bank as well as the Auction Purchaser filed Special Leave Petitions before the Hon'ble Supreme Court of India. The claim petition filed by the petitioner was adjourned awaiting the result of the Special Leave Petition. Though the Bank as well as the Auction Purchaser entered appearance in the suit filed by the petitioner in O.S.No.126 of 2008 before the Principal District Court, Virudhunagar District at Srivilliputhur as well as in the obstruction petition filed by the petitioner neither of them chose to implead the petitioner atleast in the Special Leave Petition that was pending before the Hon'ble Supreme Court of India or in the Civil Revision Petition that was pending before this Court at that time.

(iii) Ultimately, on 02.01.2013 the Bank and the legal representatives of the original mortgagor entered into a compromise providing for payment of a sum of Rs.20,96,383/- to the Bank and for confirmation of sale of the 'A' schedule property in favour of the auction purchaser. Strangely, the Bank also relinquished its mortgage rights over B and C schedule properties in favour of the mortgagor, who had already played fraud on the petitioner's vendor by selling the mortgaged property suppressing the mortgage. On 15.03.2013, when the order passed by the Hon'ble Supreme Court of India in Special Leave Petition was brought to the notice of the Executing Court, the Executing Court without realising that a huge fraud has been played on the Supreme Court itself by the Bank, auction purchaser and the legal representatives of the mortgagor, by suppressing the sale made by the mortgagor himself and releasing the un-encumbered properties from the mortgage, closed the claim petition filed by the petitioner.

3. I am not surprised by the action of the Bank as well as the auction purchaser and the mortgagor. The narration above shows as to how, the machinery of the Court has been misused by unscrupulous Bank officials, the auction purchaser as well as the legal representatives of the mortgagor to defeat the rights of the

persons, who had already purchased the property well before the institution of the suit. It was incumbent on the Bank to implead Arumugasamy when it filed the suit in the year 1989 since the sale in favour of the vendors of the petitioner were prior to the suit, namely, on 12.02.1987. After all, the mortgagor is not prevented from alienating the mortgaged property. However, the alienation will be subject to the mortgage. If only the vendor of the petitioner, namely, Arumugasamy, had been impleaded in the suit, he had an option to redeem the mortgage also. That right was foreclosed to him by not impleading the said Arumugasamy in the suit by the Bank. Even the publication of notice in the final decree proceedings suffered from various defects. The Court machinery has been fully utilised by the Bank and the mortgagor to achieve their ends in releasing B and C schedule property in favour of the mortgagor free of encumbrance.

4. It is also seen from the Execution Petition that no notice was issued to the purchaser Chilikkur Narayanasamy Naidu, though he was made as a party in the execution petition. Unfortunately, these irregularities were camouflaged under the compromise before the Hon'ble Supreme Court of India. The Executing Court, in my considered opinion, ought not to have closed E.A.No.163 of 2008 because there was a compromise between the mortgagor, Bank and the auction purchaser before the Hon'ble Supreme Court of India. The rights of the petitioner would remain un-effected by the said compromise since he was not made as a party to the execution petition.

5. I am convinced that this is a case where even the Hon'ble Supreme Court has not been spared of the fraud and the parties, particularly, the Bank, Mortgagor and the auction purchaser had colluded among themselves to deceive the purchaser from the original mortgagor, who had purchased the property even prior to the institution of the suit. This practice of deception impels me to set aside the order of the Executing Court and restore the E.A.No.163 of 2008 on the file of the Sub-Court, Sivakasi. The Sub-Court, Sivakasi is directed to dispose of E.A.No.163 of 2008 on merits and in accordance with due reference to the observations made above in this order.

6. Accordingly, the Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

am   25.02.2020
To

The Subordinate Judge,
Sivakasi.

Copy to:
The Record Keeper, V.R.Section, (2 copies)
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.R.PANDIVEL, Advocate (SR-8157[F] dated 25/02/2020)
+2 CC to M/s.A.V.ARUN, Advocate (SR-8821[F] dated 27/02/2020)
+1 CC to M/s.S.SELVAKUMAR, Advocate (SR-8904[F] dated 27/02/2020)

C.R.P.(PD)(MD) No.895 of 2013
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SMA/13/03/2020/5P/7C