

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.3.2021	Delivered on : 29/3/2021
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CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Original Side Appeal No.131 of 2021 & CMP.No.5926 of 2021

R.Ravinderkumar, rep.by his
power of attorney R.NihhaalAppellant

Vs

1.M/s.Indostar Capital Finance
Ltd., having regd. Office at
One Indiabulls Centre, 20th
Floor, Tower 2A, Jupiter Mills Compound,
Senapati Bapat Marg,
Mumbai-13 and

Branch office
at Nos.22 & 23, 2nd Floor,
Sakithyan Annex Building,
Venkatnarayana Road,
T.Nagar, Chennai-17 rep.by
its Authorized Officer

2.Mrs.K.Ponnammal

3.Mr.A.P.Ravi

4.Mrs.R.Manju

...Respondents

Prayer: APPEAL under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent and under Section 13 of the Commercial Courts Act, 2015 against the order dated 08.3.2021 made in Appln.No.653 of 2021 in C.S.(Comm.Div.) No.733 of 2019.

Prayer in Appln.No.653/2021 in C.S.733 of 2019:

Application filed under Order XIV Rule 8 read with Order XXXVIII Rule 6(2) of CPC praying to raising attachment order dated 19.02.2020 in A.No.9876 of 2019 in C.S.733/2019 pending before this Court.

For Appellant: Mr.Mukund Rao for
M/s.Eswar Kumar & Rao

JUDGMENT

T.S.SIVAGNANAM, J

This appeal filed by the plaintiff in C.S.(Comm.Div.)No.733 of 2019 is directed the order dated 08.3.2021 in A.No.653 of 2021 in C.S.(Comm.Div.) No.733 of 2019.

2. We have elaborately heard Mr.Mukund Rao, learned counsel appearing for M/s.Eswar, Kumar and Rao, learned counsel on record for the appellant.

3. The appellant filed the said suit in December 2019 against respondents 2 to 4 herein seeking judgment and decree

(i) directing the defendants to jointly and severally pay the plaintiff a sum of Rs.1,28,84,072/- along with further interest at the rate of 2.70% per month on Rs.80,00,000/- from the date of filing the suit until the actual date of realization;

(ii) directing the defendants to jointly and severally pay the plaintiff a sum of Rs.90,80,880/- along with further Interest at 2.70% per month on Rs.50,00,000/- from the date of filing the suit until the actual date of realization;

(iii) directing the defendants to jointly and severally pay the plaintiff a sum of Rs.1,39,09,077/- along with further interest at the rate of 2.90% per month on Rs.1,05,00,000/- from the date of filing the suit until the actual date of realization;

(iv) directing the defendants to jointly and severally pay damages to the plaintiff a sum of Rs.25,00,000/- along with further interest at the rate of 2.70% per month from the date of filing the suit until the actual date of realization; and

(v) directing the defendant to pay costs of the suit.

4. In the said suit, the appellant/plaintiff filed two applications namely (i) O.A.No.1171 of 2019 to grant an order of interim injunction to restrain respondents 2 to 4 herein/defendants or their agents from alienating or encumbering in any manner their properties mentioned in the schedule to the Judges summons pending disposal of the suit; and (ii) A.No.9876 of 2019 to direct respondents 2 to 4 herein/defendants to jointly and severally furnish security for a sum of Rs.3,83,74,028/-, failing which, for an order of attachment before judgment of immovable properties belong to respondents 2 to 4 herein/defendants more fully described in the schedule to the Judges summons.

5. The learned Single Judge, by two separate orders, both dated 30.12.2019, (i) in A.No.9876 of 2019, directed the second respondent herein/first defendant to furnish security to the tune of the suit claim for a sum of Rs.3,83,74,028/- on or before 13.1.2020 and directed the application to be listed on

13.1.2020; and (ii) in O.A.No.1171 of 2019, granted an order of interim injunction restraining respondents 2 to 4 herein/defendants from alienating the schedule mentioned properties till 13.1.2020 and ordered notice to the respondents returnable by 13.1.2020. Subsequently, both the applications came up for hearing on 13.1.2020 and the order of injunction granted on 30.12.2019 was extended till 22.1.2020 and both the applications were directed to be listed on 22.1.2020. Further on 22.1.2020, the order of interim injunction granted in O.A.No.1171 of 2019 was extended until further orders of this Court and both the applications were directed to be listed on 19.2.2020.

6. By order dated 19.2.2020 in A.No.9876 of 2019, the learned Single Judge granted an order of attachment before judgment of A schedule property belonging to the first defendant/second respondent herein, who was stated to be the principal borrower.

7. In the meantime, the first respondent herein filed an application in A.No.2756 of 2020 seeking to implead themselves as a party to the said suit. Subsequently, they also filed A.No.653 of 2021 seeking to raise the order of attachment dated 19.2.2020 in A.No.9876 of 2019. The learned Single Judge, by the impugned order dated 08.3.2021, allowed A.No.653 of 2021 filed by the first respondent herein and raised the attachment in respect of A schedule property. Aggrieved by that, the plaintiff is before us by way of this appeal.

8. We have carefully perused the material papers placed before this Court. We are of the firm view that the learned Single Judge was right in raising the order of attachment. We support our conclusion with the following reasons :

As mentioned earlier, the appellant/plaintiff laid the said suit before the Commercial Division of this Court sometime during December 2019 stating that the defendants/respondents 2 to 4 herein are due and liable to pay him various amounts. The first defendant/ second respondent herein is stated to be the principal borrower and defendants 2 and 3/respondents 3 and 4 herein are stated to be the guarantors. The appellant/plaintiff pleads that there were financial transactions between the plaintiff and the first defendant/second respondent for several years and several mortgages were done in respect of different properties. The loans were settled, the mortgage deeds were canceled and the financial dealings were going on for a considerable period of time and in the last of such borrowals, the first defendant/second respondent herein defaulted in repayment, which necessitated the appellant to approach this Court and file a suit.

9. It is the further case of the appellant/plaintiff that if the attachment is raised, then he would be put to great prejudice and he would be unable to realize the fruits of the decree in the event of success in the suit. The first respondent herein, which had filed the application to raise the attachment, is taking effective steps to bring the property in question to sale and consequent to the impugned order, the entry in the office of the Sub-Registrar concerned would be canceled and the appellant/plaintiff would be put to irreparable hardship. He ultimately prayed for restoring the order of attachment.

10. We have carefully considered the submissions of the learned counsel for the appellant/plaintiff and perused the stand taken by the first respondent herein before the learned Single Judge.

11. The first respondent herein is a financial organization with registered office at Mumbai. They would state that respondents 2 to 4 herein namely the defendants approached the first respondent on 23.8.2017 for a loan against properties situated in Tiruvanmiyur village described in the schedule for a sum of Rs.2.60 crores. The third respondent herein agreed to stand as a guarantor as he is the owner of the schedule mentioned property. Thereafter, the first respondent herein sanctioned the loan vide letter dated 23.8.2017 and as per the terms and conditions of the said sanction letter, documents were executed in favour of the first respondent to secure the loan transaction. In terms of the sanction, they were required to repay the loan along with interest as per the guidelines of the Reserve Bank of India and the third respondent herein executed an agreement for deposit of title deeds, which were duly registered before the Sub-Registrar, Neelankarai as doc.No.6521 of 2017 creating equitable mortgage pertaining to the schedule property and all other documents were executed by the borrower and the guarantors including indemnity bond, demand promissory note, etc in favour of the first respondent herein.

12. Thus, the first respondent herein stated that the title deeds of the property are with them and by virtue of the equitable mortgage executed in their favour, a security interest has been created over the property in question in favour of the first respondent in the year 2017 itself. It has been further stated that after availing the loan, the second respondent herein namely the borrower was irregular in repayment of instalments and failed to fulfill the repayment schedule.

13. Consequently, their loan account became a Non Performing Asset (NPA) and the first respondent herein issued a notice dated 09.10.2019 under Section 13(2) of the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, the SARFAESI Act) calling upon the borrowers to pay a sum of Rs.2,69,45,232/-. The said notice was also published in two leading English and vernacular newspapers on 22.10.2019. After issuance of the said notice and following due procedure, symbolic possession of the schedule property was taken. Further the possession notice dated 30.12.2019 under Section 13(4) of the SARFAESI Act was issued and the same was affixed in the schedule property. Further, the said possession notice was published in two leading English and Vernacular newspapers on 05.1.2020. As on 14.9.2020, respondents 2 to 4 herein namely the defendants are liable to pay a sum of Rs.2,82,87,830/-.

14. It has been further stated by the first respondent herein that at the time of execution of the loan agreement, it was confirmed that there was no encumbrance or charge, lien mortgage on the schedule property and that after verification of all related documents, the loan amount was disbursed. Furthermore, respondents 2 to 4 herein indemnified the first respondent herein that they would not encumber or create any litigation over the schedule property with any third parties. They also undertook to safeguard the interest of the first respondent.

15. It was the case of the first respondent herein that all these facts were suppressed, the said suit had been laid and an order of attachment was ordered, which caused great prejudice to the first respondent herein. The civil court has no jurisdiction to entertain the suit in the light of the bar under Section 34 of the SARFAESI Act. The first respondent relied upon the decision of the Hon'ble Supreme Court in the case of State Bank of Patiala Vs. Mukesh Jain [reported in 2016 (6) CTC 330].

16. The learned Single Judge, after taking into consideration of all these facts, noted that the said suit had not been filed on the basis of any agreement of sale, but only with respect to advancing the loan to the first defendant, that the said suit was also not based on execution of mortgage deed, but on the strength of promissory notes and that the said suit was not based on land. Considering these facts and balancing the right of the existing mortgagee and also the fact that what is required to be examined is as to whether the transaction between the plaintiff and the defendants was bona fide or whether there was any suppression, the learned Single Judge raised the order of attachment by the impugned order.

17. Mr.Mukund Rao, learned counsel appearing for the appellant referred to the mortgage deed dated 18.7.2017, which, according to the plaintiff, was the first mortgage deed and the second mortgage deed was dated 11.9.2017. The third mortgage deed was dated 11.1.2019.

18. They are all registered documents in respect of other properties. However, the schedule property in the present application is without any encumbrance and the first respondent herein verified the same from the concerned Sub-Registrar Office and having been satisfied that there was no encumbrance of the property in question, the first respondent herein advanced the loan amount. What is to be noted is that the said suit has been laid for recovery of money. It is not a suit based on money nor it is a suit based on land.

19. In paragraph 21 of the plaint, the cause of action was stated to be certain promissory notes executed by the defendants. Curiously enough, the second respondent herein, who is the first defendant in the said suit and who is the borrower, though entered appearance through a counsel, did not contest the application for interim injunction namely O.A.No.1171 of 2019 nor the application for attachment before judgment namely A.No.9876 of 2019. We were informed by the learned counsel for the appellant that a notice was served and the second respondent herein/first defendant entered appearance through counsel, yet she did not object. Therefore, the conduct of the second respondent/first defendant needs to be examined.

20. To be noted, the original title deeds of the property in dispute have been mortgaged in favour of the first respondent herein by way of deposit of title deeds and other documents were also executed. The defendants failed to repay the loan and proceedings have already been initiated under the SARFAESI Act and possession was taken under Section 13(4) of the SARFAESI Act. As could be seen from the affidavit filed by the first respondent in the present application, notices issued under the SARFAESI Act were duly published in the newspapers and admittedly, the deposit of title deeds was in the year 2017. Hence, we are of the considered view that the learned Single rightly raised the order of attachment. We find no grounds to interfere with the impugned order.

21. For the foregoing reasons, the above original side appeal is dismissed. Consequently, the connected CMP is also dismissed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

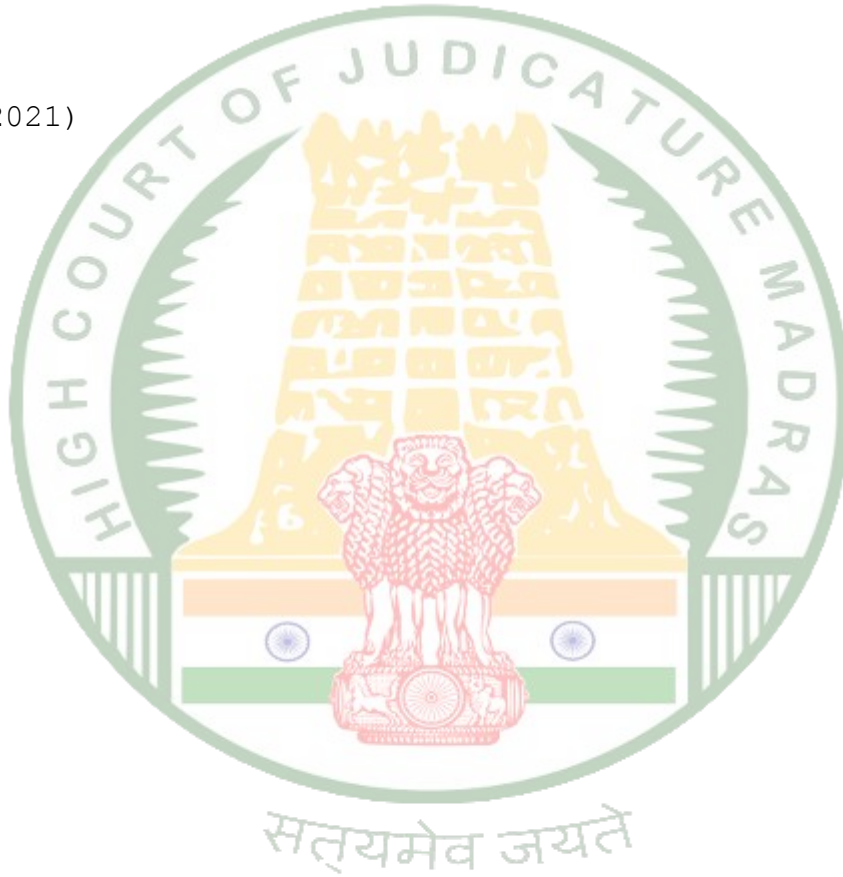
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To
The Sub Assistant Registrar(O.S.I),
High Court, Madras-104.

+1cc to Mr.Eswar Kumar and Rao, Advocate, S.R.No.20080

OSA.No.131 of 2021 &
CMP.No.5926 of 2021

SSV(CO)
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