

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.10.2021

Pronounced on : 21.10.2021

CORAM:

THE HON'BLE MR. JUSTICE V.PARTHIBAN

Application No. 1828 of 2020

in

Application No. 4423 of 2019

in

C.S.No. 428 of 2019

1. Headway Projects
No.23, 7th Cross Street,
West Shenoy Nagar,
Chennai -600030.

2. A.Vanipriya

..Applicants

Vs

Meena Jawahar Palaniappan
W/o. Late M.Sokkalingam

..Respondent

Prayer: Application is to revoke the leave granted in Application No. 4423 of 2019 dated 01.07.2019 on the file of this Court and pass such further or other orders.

For Applicants : Mr.P.C.Harikumar

For Respondent : Mr.B.S.Jothiraman

ORDER

The application has been filed seeking to revoke the leave granted by this Court in Application No.4423 of 2019 dated 01.07.2019. This Court has granted leave to sue the 4th defendant, who is not residing within the jurisdiction of this Court.

2. The suit has been filed for the following prayer;

(a). directing the defendants 1 to 4 jointly and severally to pay a sum of Rs.3,90,00,000/- (Rupees three crores ninety lakhs only) being the principal and interest sum of Rs.2,39,21,260/- (Rupees two crores thirty nine lakhs and twenty one thousand and two hundred and sixty only) till the date of the plaint totalling in all a sum of Rs.6,29,21,260/- (Rupees six crores twenty nine lakhs and twenty one thousand and two hundred and sixty only);

(b). directing the defendants jointly and severally to pay interest on Rs.3,90,00,000/- at 24% p.a from the date of the plaint till the date of realization;

(c). in default, directing sale or foreclosure of mortgaged 'A', 'B', 'C' Schedule properties more fully described in the schedule, under Order 34 CPC';

(d). in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for an order for the balance;

3. The applicants herein are the defendants 1 & 2 in the suit. The objections against granting leave by this Court by the applicants herein principally premised on the fact that the respondent/plaintiff had executed a mortgage deed on 25.03.2015 in respect of Schedule 'C' property at the office of the Sub Registrar, Madhuranthagam, which is situated outside the jurisdiction of this Court. According to the applicants herein, the plaintiff herself has admitted that the defendants have undertaken to execute a registered mortgage deed by deposit of title in respect of Schedule 'A' mentioned properties, therefore there is no mortgage has been created in respect of Schedule 'A'

mentioned property. While so, in the entire plaint, the plaintiff has pleaded that as if the Schedule 'A' property of the plaint has been mortgaged by deposit of title deeds and seeking relief against the said property under Order 34 Rule 1 of CPC.

4. When the suit of this nature has been filed and when the entire lease is with regard to mortgage being created in respect of Schedule 'C' property and even other Schedule properties 'B' & 'D' being situated outside the jurisdiction of this Court, the leave granted by this Court is to be recalled. As far as Schedule 'A' property is concerned, that is not the subject matter of *lis* as far as redemption of mortgage is concerned, admittedly.

5. At the outset, the learned counsel appearing for the applicants referred to Order 37 Rule 1 of the Original side Rules, which reads as under;

“Plaint to be filed with certificate of encumbrances.

1. Every plaint shall contain an allegation that the plaintiff has caused a search to be made in the office of the Registrar of Assurances of the district, or sub-district, in which, the immovable property comprised in the mortgage or subject to the charge sued on, is situate for a period of not

less than twelve years prior to the date of presentation of the plaint, or for the period subsequent to the mortgage sued on, whichever may be shorter, and that he is not aware that any person other than the persons mentioned in the plaint, has any interest in the said property. The certificate of the Registrar of Assurances, stating the result of search, shall be filed with the plaint.

The cost of making the search, and filing the certificate shall be costs in the cause. Provided that a plaint which does not comply with the above provisions shall be returned for rectification of defects within a time to be fixed, and shall be rejected if it be not complied with within the time fixed.”

According to the above rules, the land must be situated within the jurisdiction of this Court in order to maintain the suit. In this regard, Rule 1 of Order 37 has not been complied with as could be demonstrated by very averments as contained in the plaint itself.

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6. The learned counsel further contended that in terms of Order 34 of CPC, there should have been a prayer for preliminary decree seeking foreclosure in the suit relating to mortgage. Such a prayer is not there in the plaint, therefore, on this ground also the leave granted by this Court is liable to

be revoked. With regard to factum that Schedule 'A' property which alone is situated within the jurisdiction of this Court, he would draw the attention of this Court to paragraph 5 of the plaint. In the said paragraph, the plaintiff herself has stated that the 2nd defendant/applicant offered in Clause 9 of the MOU dated 25.03.2015 has mortgaged by handing over the copies of documents of title and undertook to execute a mortgage deed. Therefore, there was factually no mortgage at all in respect of the schedule 'A' property. As stated above, the other properties prescribed in Schedule 'B', 'C' & 'D' are all admittedly situated outside the jurisdiction of this Court. In a suit for mortgage relating to the immovable property, this Court cannot have any jurisdiction if the landed property lying outside the jurisdiction of this Court. The learned counsel appearing for the applicants also referred to the prayer in this regard as contained in the plaint for revocation of the leave granted by this Court.

7. Per contra, the learned counsel appearing for the respondent/plaintiff would submit that the main prayer in the suit is only for a direction to the defendants 1 to 4 to jointly and severally pay a sum of Rs.3,19,00,000/- with interest. Only in default, the prayer has been included for foreclosure of mortgage of Schedule 'A', 'B' & 'C' properties under Order 34 of CPC. It is not

the case relating to immovable properties and recovery of land and the principal prayer is only for a direction towards recovery of money. Therefore, the suit prayer is very much maintainable before this Court.

8. This Court has considered the rival submission made by Mr. P.C.Harikumar, learned counsel appearing for the applicants and Mr. B.S.Jothiraman, learned counsel appearing for the respondents.

9. As rightly pointed out by the learned counsel appearing for the respondent/plaintiff, the principal prayer in the suit is for a direction to the defendants to pay jointly and severally a sum of Rs.3,19,00,000/- with interest and only, in default, there is a prayer for foreclosure of mortgage. This Court while considering the objections raised on behalf of the applicant herein is constrained to refer the decision of this Court reported in **CDJ 2003 MHC 807 in the case of A.S.Baskaran Vs. Indian Finance & Factors Limited**. The learned Judge as he then was has held that when the preliminary decree will be one for recovery of money and only when there is default, a final decree may ensue permitting recourse to the land . There is no adjudication of title to the land or immovable property. The learned Judge as he then was has held that

the suit is not for want of land and refused to revoke the leave on the basis of identical objections raised by the learned counsel.

10. It is useful to refer to the various observations and also the Apex Court decision being adverted to by the learned Judge from paragraphs 5 to 10 of the judgment, which read as under;

5. The learned counsel for the applicant relies on the decision of Federal Court in Moolji Jaitha and Co. v. K.S. and W. Mills Co. AIR 1950 (37) F C 83 and contends that the expression 'suit for land' covers three clauses, of suit, namely, suit for determination of title to the land, suit for possession of land and other suits in which the reliefs claimed if granted would directly affect title to or possession of land and in the present case, the relief claimed by the plaintiff would directly affect the title to the land and hence it is a suit for land.

6. The attention of this Court is drawn in this regard to the latest decision of the Apex Court in Adcon Electronics Pvt. Ltd. v. Daulate and Anr. 2001 (4) CTC 39, in which the question as to what is meant by 'suit for land' within Clause 12 of Letters Patent of the High Court of Judicature at Bombay was considered and their Lordships referred to and extracted in the judgment, the divergence of opinion among the learned Judges of Five-Judge Bench of Federal Court in Moolji Jaitha and Co. v. The Khandesh

Spinning and Weaving Mills Co. Ltd. AIR (37) 1950 F.C. 83, with regard to the import of expression 'suit for land' and held that they are in respectful agreement with the view expressed by Mahajan, J. in that case and that view is as follows:

"Justice Mahajan observed, "If an attempt is made to find a comprehensive definition of the phrase, it will eventually be discovered that it has created further complications. I therefore content myself by saying that where the nature of the suit is such that in substance it involves a controversy about land or immovable property and the Court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immovable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in the real sense of the term, then such a suit cannot fall within the four corners of this expression." He added, "In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a "suit for land"; but if the suit is simpliciter for specific performance, i.e., for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that

the decree in it would operate on the land."

By agreeing with the above view, their Lordships of the Apex Court laid down that where the relief relates to adjudication of title to land or immovable property or delivery of possession of the land or immovable property, it will be a suit for land and the suit simpliciter for specific performance of contract for sale of land is a suit for enforcement of terms of contract and the title to the land as such is not the subject matter of the suit and hence it is not a suit for land.

7. In fact, the above referred Five-Judge Bench decision of the Federal Court was earlier considered by a Division Bench of this Court, while considering the expression of "suits for land or other immovable property" occurring in Clause 12 of the Letters Patent of this Court with regard to the suits for recovery of money by enforcement of equitable mortgages, in the decision in Southern Petrochemical Industries Corporation Ltd. v. Durga Iron Works and three Ors., 1995(2)CTC602 and the Division Bench held as follows:

"6. As we could see from the views of the learned Judges of the Federal Court, the relevant tests to be remembered and applied to find out as to whether the suit is one for land are: (1) Whether the suit involves determination of right, title or interest in land; or (2)

whether the suit involves recovery of possession or, control of land. In a suit to recover money due under a mortgage, when we apply the above tests, it is not possible to say that the suit will come within the mischief of any of the above tests. There may not be a determination of title to the land as such. Equally so, there may not be straightway a decree for recovery of possession of land. Primarily the decree will be one for recovery of money. Only when there is a default, a final decree may ensue permitting recourse to the land in satisfaction of the money claim. Even then, there is no determination of title to the land and there is no decree for recovery of possession."

8. In the present suit, the relief sought for is a money decree for a sum of Rs. 14,54,443 with interest against the defendants and in default, the properties in the schedule be sold. The maintainability of the suit on the Original Side of this Court is being challenged by the applicant/defendant on the ground that it is a suit for land within the meaning of Clause 12 of the Letters Patent. This is resisted by the respondent/plaintiff on the ground that the suit is only for recovery of money and only when in default, recourse to the land in satisfaction of claim would be made and hence it is not a suit for land. The import of expression 'suit for land' is now well settled by the Apex Court in the decision referred to supra.

9. In the present case, primarily the decree will be one for recovery of money and only when there is default, a final decree may ensue permitting recourse to the land in satisfaction of the money claim. There is no adjudication of title to the land or immovable property and there is no delivery of possession of the land or immovable property. The title to the land is not the subject matter of the suit. Hence, the present suit is not one for land. The contention of the applicant is devoid of merit and liable to be rejected. There is no need to revoke the leave granted to the respondent/plaintiff and the applicant is not entitled to the reliefs sought for in both the applications.

10. The applications are dismissed. No costs.”

11. From the above, it could be seen that the present prayer and the objections are almost identical and in which case this Court has to necessarily follow the principles laid down by the learned judge as he then was in the above decision of this Court. Even otherwise this Court is of the view that the case on hand principally laid for the recovery of money from the defendants and only as alternate relief, foreclosure of mortgage is prayed. Therefore the suit cannot strictly attract the provisions as cited by the learned counsel appearing for the applicant/defendants in terms of the Original Side Rules and

provisions of CPC. On the other hand, the decision referred to above would be squarely applicable.

12. This Court in the facts and circumstances of the case has to come to an inexorable conclusion that the prayer primarily one for recovery of money, the suit, therefore cannot be construed as being one of mortgage suit. In the said circumstances this Court does not find any infirmity in the leave granted earlier and the same is not liable to be revoked.

13. Accordingly, this Court finds no merit and substance in the application filed by the applicants/defendants and therefore the same stands dismissed.

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V.PARTHIBAN,J.

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