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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.10.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.836 of 2014

Anand Kumar ... Appellant/Plaintiff

Vs.

1.B.Varadhan

2.The Bank of India, rep. by its
Branch Manager, Erode Branch
Having Office at No.68-70,
Gandhi Road Erode

3.Authorized Officer,
Bank of India, Coimbatore Zone
Star House,
No.324, Oppanakara Street
Coimbatore

4.T.Devakumar
Son of Thangamuthu
Proprietor TDK Enterprises
S.R.Petrol Bunk Solar Town
Erode

5.T.S.Chelladhurai

6. Ezhilarasi ... Respondents/Defendants

PRAYER: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 06.09.2014 in O.S.No.48 of 2009 on the file of the learned II Additional District Judge, Puducherry.

For Appellant :Mr.V.V.Sairam

For Respondent :Mr.S.Nagarajan for R.1

Mr.Benjamin George for R.2 & R.3

Mr.V.G.Suresh Kumar for R.6

R.4 & R.5 not ready in notice.



JUDGMENT

The unsuccessful appellant before the Court below has approached this Court by way of this appeal. The plaintiff had filed a mortgage suit O.S.No.48 of 2009 on the file of the II Additional District Judge, Puducherry for recovery of a sum of Rs.9,43,500/- from the 1st defendant and to pass a preliminary decree regarding the same and in default to pass a final decree for sale of the mortgaged property and in case the sale proceeds so ordered is insufficient, then to pass a personal decree against the plaintiff.

2. The brief facts which has culminated in the filing of the above 1st appeal are herein below set out:-

Plaintiff's Case:

3. It is the case of the plaintiff that the 1st defendant who was known to him had requested him to extend a loan of a sum of Rs.5,00,000/- for discharging his debts to the Union Bank of India, Puducherry Branch. The 1st defendant had agreed to pay interest and had also offered to mortgage his property which has been described in the suit schedule. On this assurance the plaintiff had paid a sum of Rs.5,00,000/- to the 1st defendant who executed a simple mortgage deed dated 03.08.2004 in favour of the plaintiff. The defendant had agreed to redeem the mortgage within the period of 3 years from the date of execution and registration of the mortgage deed. He had also agreed to pay interest at 18% per annum on the sum of Rs.5,00,000/-.

4. The plaintiff would further submit that the defendant had undertaken to hand over the original title deeds relating to the suit schedule property as soon as he received it from the bank. However, contrary to the assurance, the 1st defendant had offered it as security to the Bank of India, towards the loan availed by the 4th defendant. It appears that, the bank had initiated proceedings against the 4th defendant, the 1st defendant and one Daisey Rani demanding repayment of the loan and had taken possession of the schedule mentioned property.

5. On coming to know about the same the plaintiff had issued a legal notice to the 1st defendant and the 3rd defendant on 07.06.2007 to which there was no reply from the 1st defendant. The 3rd defendant had sent a reply dated 14.06.2007 stating that the mortgage would not bind the 2nd defendant Bank and that they had obtained an encumbrance certificate where this encumbrance was not reflected. The plaintiff therefore issued a re-joinder dated 20.06.2007.



6. Meanwhile, the 5th defendant had filed a suit for recovery of money against the 1st defendant on the file of the learned Additional Subordinate Judge, Puducherry. Since the 1st defendant remained ex-parte in the said proceedings, an ex-parte Decree came to be passed and the 5th defendant had filed an execution proceedings to execute the decree. The 1st defendant did not mention about the mortgage created in favour of the plaintiff and had also not taken any steps to raise the attachment in respect of the property. Though the value of the property was over a sum of Rs.35,00,000/- the 5th defendant had mentioned its value as Rs.5,00,000/- and in an auction sale conducted on 31.01.2008, pursuant to the execution proceedings the property was sold and a sale certificate issued to the auction purchaser. The plaintiff would submit that the sale had to be cancelled as the plaintiff had a first charge over the suit property. Therefore, the plaintiff has come forward with the instant suit.

Written Statement of the 1st defendant:

7. The 1st defendant had admitted the borrowal and the rate of interest and also the execution of the simple mortgage deed dated 03.08.2004. He also admitted the fact that he had agreed to hand over the original sale deed on receiving it from the bank and had undertaken to redeem the mortgage within a period of 3 years. However, he would contend that since the property had been given as a security to the Bank of India, Coimbatore Zone, for the loan availed by the 4th defendant, the bank had brought the property to sale in exercise of their rights under the SARFASI Act. Since the 4th defendant had defaulted in the payment of the money, the property was brought to sale. The 1st defendant conceded that he had not taken any steps to raise the attachment and would also concur with the statement of the plaintiff that the property has been under-valued. He would further submit that the Civil Court had no jurisdiction in the light of the SARFASI Act. He therefore, sought for the dismissal of the suit.

Written Statement of the D.2 and D.3:

8. The 2nd and 3rd defendants who are the bank had stated that the Civil Court has no jurisdiction to entertain a suit in respect of the matters in which the Debt Recovery Tribunal was empowered to decide. The provisions of Section 34 spelt out the bar of jurisdiction of the Civil Court, therefore they sought to have the suit dismissed.

Written Statement of D.4:

9. The written statement of the 4th defendant was that



the 1st defendant had stood guarantee for the loan borrowed by him and the schedule mentioned property having been offered as a security by the 1st defendant, the plaintiff could not seek to enforce a right on the property. He therefore, sought for the dismissal of this suit.

Written Statement of the 5th defendant:

10. The 5th defendant would at the outset, submit that he is an unnecessary party. He had filed O.S.No.264 of 2005 on the file of the learned Additional Subordinate Judge, Puducherry, against the 1st defendant for recovery of money. In the said proceeding he had taken out an application for attachment of the suit property and the property was also ordered to be attached. Thereafter the suit was decreed on 20.03.2006. After obtaining the decree, the 5th defendant had initiated execution proceeding in E.P.No.109 of 2008 for bringing the property to sale and sale was ordered. The property was sold to the 6th defendant who has deposited the sale amount. Therefore, the suit is infructuous and nothing remains to be considered. The 6th defendant had also more or less adopted the defence of the 5th defendant.

11. Originally the learned Additional District Judge, Puducherry had framed the following issues:

- i) Whether the plaintiff is entitled to the suit amount as prayed for?
- ii) To what other relief the plaintiff is entitled?

Thereafter, the Additional District Judge had deemed it fit to frame an additional issue which reads as follows: Whether this Court has jurisdiction to try the suit?

12. During trial, the plaintiff had examined 6 witnesses on his side and marked Ex.A.1 to Ex.37. On the side of the defendant, 4 witnesses were examined and Ex.B.1 and Ex.B.2 were marked.

13. The Court below on considering the evidence on record held that the plaintiff was entitled to a decree for recovery of money. Since the bank had already taken steps and had brought the property to sale, the suit was decreed granting a personal decree against the 1st defendant for the recovery of the suit amount with interest at the rate of 6% per annum. The 1st defendant was directed to pay the plaintiff a sum of Rs.9,43,500/- with subsequent interest at the rate of 6% per annum on the principal amount of 5,00,000/-.



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14. Challenging this Judgment and Decree the plaintiff is before this Court. The only point for consideration which arises in the above appeal is:

i) Whether the plaintiff is entitled to a mortgage decree?

15. From the perusal of the records, evidence and documents it is seen that the plaintiff had executed a simple mortgage deed in favour of the petitioner on 03.08.2004, registered as Document No.2549 of 2004 in the office of the Sub Registrar, Villianour, Puducherry. However the 1st defendant even on the date of availing the loan from the plaintiff had mortgaged the property with the defendant bank by depositing the title deeds of the property with them. That apart, he had mortgaged the property with the bank as security for the loan borrowed by the 4th defendant. In addition to that, the 1st defendant also owed money to the 5th defendant who has initiated proceedings for recovering the money in which he had obtained an order of attachment of the suit property in the suit O.S.No.264 of 2005, on the file of the Hon'ble Additional Subordinate Judge, Puducherry. The records which show that the 1st defendant had remained an ex-parte and the 5th defendant had obtained an ex-parte decree in the said suit. Thereafter, an execution proceedings had been initiated in the E.P.No.109 of 2006 for the sale of the suit property which had been already attached. On 31.01.2008 a public auction pursuant to the orders of Courts were held and the property was sold to the highest bidder namely, the 6th defendant herein.

16. Therefore, the property was not available even on the date of the filing of the suit. The learned Trial Judge has rightly rejected the plaintiff's request for granting a mortgage decree, and I do not find any reason to interfere with the said Judgment and Decree. The point for consideration is answered against the plaintiff and the appeal stands dismissed and therefore, the Judgment and Decree of the Trial Court is confirmed however, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS-VII)

// True Copy //

Sub Assistant Registrar

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To

II Additional District Judge,
Puducherry.

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Copy to: The Section Officer,
V.R.Section, High Court,
Madras-104.

+1cc to Mr.V.G.Suresh Kumar, Advocate SR.No.53105

A.S.No.836 of 2014

RSV(CO)
CB(25/11/2021)