

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2021

PRONOUNCED ON : 22.04.2021

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(PD)No.4097 of 2017

C.M.P.No.19196 of 2017

Subbulakshmi
Rep by Power Agent
Dr.R.Jagan

... Petitioner

Vs.

1. Suseela
2. T.Mahendran
3. Chitra Latha
4. Shanmugavalli
5. Jeeva
6. Manickam
7. Kala
8. R.Sreenivasan
9. Thiagarajan
10. Seethalakshmi
11. Vinayagamoorthy
12. S.Jalindar
13. B.Chandrakanth
14. B.Vittal
15. M.Sreedharan
16. P.Manojkumar
17. M.Santhosh Kumar
18. Kiran Vilas Jadav

19. V.Manikka Rao

... Respondents

Prayer :- The Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order dated 22.06.2017 in I.A.No.536 of 2016 in O.S.No.497 of 2005 on the file of the learned V Additional District Judge, Coimbatore.

For Petitioner : Mr.C.R.Prasanan

For Respondents

For R11 : Mr.N.Manokaran

R1 to R10 & R19 : Not ready in notice

R12 to R18 : Notice served

ORDER

This Civil Revision Petition is directed as against the fair and decreetal order dated 22.06.2017 passed by the learned V Additional District Judge, Coimbatore in I.A.No.536 of 2016 in O.S.No.497 of 2005, thereby dismissing the petition to implead the respondents 8 to 19 herein.

2. The petitioner is the plaintiff and the respondents 1 to 4 are the defendants. The petitioner filed suit on mortgage for recovery a sum of Rs.16,92,000/-. Originally one Thangavel borrowed the loan and created the mortgage by deposit of title deed in respect of the suit property. Thereafter he did not pay any amount to the petitioner either towards

interest or principal. He died left behind the respondents 1 to 4 as his legal heirs. While pending the suit, the petitioner filed petition to implead the respondents 5 to 7 as defendants in the suit, since they are also legal representatives of the said deceased Thangavel. The same was allowed and they were impleaded as defendants 5 to 7 in the suit.

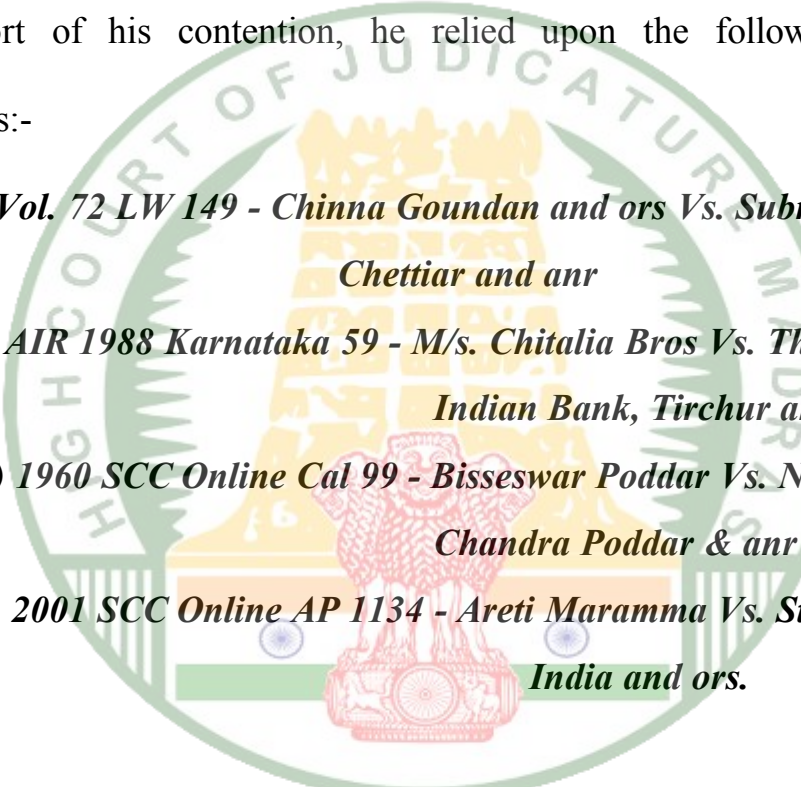
3. While P.W.1 was in the box and after marking documents, the petitioner filed petition in I.A.No.536 of 2016 to implead the respondents 8 to 19 herein in the suit as defendants 8 to 19. In that petition, though notices served to all the respondents 8 to 19, the 11th respondent alone had entered appearance and filed his counter. The said petition was dismissed for the reason that the petitioner failed to produce evidence to support of her contention that the proposed parties are the alienees and as the suit is on mortgage, the proposed parties are not necessary parties for proper and effective adjudication. Aggrieved by the same, the present Civil Revision Petition.

4. The learned counsel appearing for the petitioner would submit

that when there is categorical admission by the 11th respondent herein about the purchase of suit property and no other respondents filed their counter to deny the allegations made by the petitioner to implead them as parties to the suit, the Court below ought not to have dismissed the petition to implead them. The power agent of mortgagor have executed the sale deed dated 08.04.2004 in favour of one Thiagarajan in respect of 84 cents comprised in S.F.No.542/3 vide document No.948 of 2004. In turn, he executed an agreement for sale dated 22.04.2004 vide document No.1020 of 2004 in favour of one Seethalakshmi. The power agent also executed a sale deed dated 08.04.2004 in respect of the property ad measuring one acre comprised in survey No.542/3 in favour of one Sreenivasan. The said Sreenivasan and Thiagarajan also executed sale deed in favour of other respondents herein as such they are necessary parties to the suit proceedings.

4.1. He further submitted that the 5th respondent, who claims to be the wife of the deceased mortgagor Thangavel and her children have executed a sale deed in favour of the 11th respondent herein viz.,

Vinayagamoorthy. They claimed right over the suit property, on the strength of the Will dated 07.04.2004 registered vide document No.175 of 2004 alleged to have been executed by the deceased mortgagor. Therefore, they are necessary parties to the suit filed by the petitioner as defendants 8 to 19. In support of his contention, he relied upon the following reported judgments:-

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- i) Vol. 72 LW 149 - Chinna Goundan and ors Vs. Subramania Chettiar and anr*
 - ii) AIR 1988 Karnataka 59 - M/s. Chitalia Bros Vs. The South Indian Bank, Tirchur and ors*
 - iii) 1960 SCC Online Cal 99 - Bisseswar Poddar Vs. Nabadwip Chandra Poddar & anr*
 - iv) 2001 SCC Online AP 1134 - Areti Maramma Vs. State Bank of India and ors.*

5. Per contra the learned counsel appearing for the 11th respondent submitted that the petitioner and one Mahendran and others colluded themselves in hand and glove and filed this present application to nullify the sale deed executed in favour of the 11th respondent. This respondent is a bonafide transferee in good faith for valid sale consideration. In fact, the said

Mahendran filed suit for partition and separate possession claiming 1/4th share in the suit properties and for permanent injunction in O.S.No.347 of 2004 and the same was dismissed by the judgment and decree dated 14.11.2006. Aggrieved by the same, the said Mahendran filed appeal suit in A.S.No.18 of 2008 and the same was partly decreed and declared that said Mahendran and others are the legal representatives of the deceased Thangavel and they were entitled to have equal share in the suit properties. Aggrieved by the same, the 11th respondent herein viz., the 9th defendant in the suit filed by the said Mahendran filed second appeals in S.A.No.1080 & 1081 of 2009 and both appeals were allowed by this Court, the same was also confirmed by the Hon'ble Supreme Court of India. Therefore, the sale deed executed in favour of the 11th defendant is declared as valid and title in favour of the 11th respondent herein.

5.1. He further submitted that the 11th respondent is a bonafide purchaser of the suit property and when the suit on mortgage for recovery of money and in transfer during the pendency of the suit is directly hit under Section 50 of the Transfer of Property Act. He further submitted that, the

petitioner filed petition without any particulars in respect of the sale deed executed in favour of the 11th respondent and the entire affidavit is concocted of facts. The petitioner did not state any reason to implead the respondents as defendants in the suit. Therefore, he prayed for dismissal of this present Civil Revision Petition.

6. Heard Mr.C.R.Prasanan, learned counsel appearing for the petitioner and Mr.N.Manokaran, learned counsel appearing for the 11th respondent. Though notices served to all the respondents, except the 11th respondent no one is appeared through pleader or person.

7. The petitioner is the plaintiff and the respondents 1- 4 are the defendants. The petitioner filed suit for recovery of money on mortgage by depositing of title deed by one Thangavel. After borrowal of the amount, the said Thangavel died and the respondents 1 to 4 were impleaded as defendants 1 to 4 as his legal heir. Thereafter the petitioner also filed petition to impleade the respondents 5 to 9 herein and the same was allowed and impleaded as the defendants 5 to 9 in the suit. It is curious to note that

the suit was dismissed for default on 27.11.2007 and thereafter it was restored on 04.01.2013. Only thereafter the petitioner filed petition to implead the respondents 5 to 9 as the defendants 5 to 9 in the suit and the petition was also allowed.

8. On perusal of records revealed that the 11th respondent viz., Vinayakamoorthy purchased part of the suit property ad measuring 4 acres by the registered sale deed dated 30.12.2004 from the fifth respondent herein, in pursuant to the Will executed by the mortgagor deceased Thangavel, in favour of the fifth respondent herein. On the death of the said Thangavel, the fifth respondent herein become absolute owner of the property comprised in S.R.No.542/3 ad measuring 4 acres out of 5.84 acres. One of the legal representatives of the said Thangavel viz., Mahendran filed partition suit in O.S.No.347 of 2004 in respect of the very same property and the same was dismissed. Aggrieved by the same, the said Mahendran filed appeal suit in A.S.No.18 of 2008 and the same was partly decreed, in which the present 11th respondent viz., Vinayakamoorthy is also one of the party. Aggrieved by the same the 11th respondent herein filed second appeal

before this Court in S.A.Nos.1080 & 1081 of 2009 and the same was allowed declaring that the sale deed dated 30.12.2004 executed in favour of the 11th respondent herein is valid and declared him as bonafide purchaser for valid sale consideration.

9. It is also curious to note that after purchase of the said property dated 30.12.2004 by the 11th respondent, the present suit has come to be filed without even verifying the encumbrance certificate, the petitioner filed the suit on mortgage. That apart, on perusal of the affidavit filed in support of the petition to implead the respondents 8 to 19 is bereft of facts and no particulars have been given and without even mentioning in respect of the purchase of the property by them. The suit is on mortgage and in respect of the suit property, any such transfer during the pendency of the suit which is not collusive and in which any right to immovable property is directly hit under Section 50 of the Transfer of Property Act.

10. The learned counsel appearing for the petitioner relied upon the

judgment reported in **1960 SCC Online Cal 99** in the case of **Bisseswar Poddar Vs. Nabadwip Chandra Poddar & anr.**, which reads as follows :-

"14..... Our attention was drawn to the case of *Lloyds Bank Ltd. v. P.E. Guzdar and Co.* and the learned counsel for the appellant contended on the strength of this authority that the plaintiff is entitled to priority in respect of his mortgage as against the defendant No. 2 who claims to be the purchaser of the property. But the principle of this case cannot strictly apply to the case before us which is not a case of competition between two mortgagees, and Section 78 of the Transfer of Property Act is not attracted to this case. In the case before us the competition is between a mortgagee by deposit of title deeds and a subsequent purchaser. It appears to us that the principle embodied in Section 48 of the Transfer of Property Act is applicable to this case. Section 48 may be set out hereunder: "Where a person purports to create by transfer at different times rights in or over the same immovable property and such rights cannot all exist or be exercised to

their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created".

11. He also relied upon the judgment reported in **2001 SCC Online AP 1134** in the case of **Areti Maramma Vs. State Bank of India and ors**, which reads as follows :-

"16. The mortgage debt became due in 1909. The 1st defendant purchased part of the mortgage property in a Court auction in another suit in July, 1918. The possession was delivered to him through Court in February, 1919. In July, 1919, mortgage suit was brought against the original mortgagor. 1st defendant who was purchaser of part of the mortgage property was not impleaded. The mortgage suit was decreed in November, 1919. The decree-holder in that suit himself purchased the property in April, 1996 in Court auction. His possession was resisted by the 1st defendant on the basis of his purchase of the very property in another suit. In November, 1929,

the mortgagee filed the suit for delivery' of possession. Dealing with the consequences of non- impleading of a transferee subsequent to the mortgagee, the Division Bench of the Madras High Court held as under: "A mortgagee who takes a mortgage of property naturally expects that he will be able to work out his mortgage according to the circumstances existing at the time of the mortgage. It is reasonable on his part to suppose that he would not be adversely affected by transactions behind his back effected after his mortgage. That a sale of the equity of redemption made by the mortgagor after his mortgage and behind his back should throw obstacles in the way of his working out his security is an inequitable to him as that the purchaser of the equity of redemption should be affected by proceedings taken behind his back. In this case both the circumstances have happened. We have to see that each party is not adversely affected by the transaction or the proceeding of the other. In these circumstances a new situation arises which is not perhaps the fault of either

party. The mortgagee had to bring a suit impleading the purchaser of the equity of redemption. Such a suit has two purposes. From his own point of view he wishes to cure the defect of his former proceedings which have turned out to be imperfect. From this point of view of the purchaser of the equity of redemption the mortgagee is in fairness bound to give him an opportunity to redeem the mortgage. From this double point of view such a suit has to be brought. That such a suit lies is now established by the authorities already referred to. The question that now arises is when does the cause of action for such a suit arise? The best way of discussing such a question would be by dissociating the mortgagee and the purchaser in execution sale.

17. In *Bipra Charan v. Rupeswari Dasi*, AIR 1953 Cal. 683, a Division Bench of the Calcutta High Court framed the question which arose in that case as under:

"4. The sole question which has been canvassed in this appeal is a question of law viz.,

where in the case of a simple mortgage the mortgagee brings a suit on his mortgage but omits to implead a subsequent transferee in possession of a part of the mortgaged property and obtains a decree and in execution of the decree purchases the mortgaged property but fails to get possession of the part transferred, is he entitled to recover by suit possession of the said part from the transferee."

.....

21. Where H attempted to take possession, he was obstructed one Mr. T claiming title under a sale in 1932 by Mr. J claiming through F referred to above. The suit filed by H was decreed in 1940. 'T' filed an appeal in the High Court and the matter was compromised in favour of H. When H started construction, a new challenge was made to the title by one K claiming to be the L.R. of the purchaser of the property through one of the brothers on 30-1-1920. Thereupon H filed the suit against K. The defence before the trial Court was that inasmuch as H claimed the title on the basis of a decree in

mortgage and inasmuch as the predecessors-in-title of K were not parties as required under Order 34, Rule 1, the rights of K were not affected. The trial Court took the view that inasmuch as the sale by the three brothers in the year 1920 in favour of the predecessors-in-title of K was barred by lis pendence in view of the maintenance suit filed by E and her daughters, the sale by the three brothers was hit by Section 52 of the Transfer of Property Act and it did not convey title of K. and decreed the suit. The High Court reversed the decree of the trial Court. In appeal, the Supreme Court framed the issue as under:

"NOTWITHSTANDING the tangle of legal proceedings extending over 30 years, which forms the background of the present litigation, the single and sole question that arises for decision in this suit is whether the sale deed dated 30-1-1920 under which the appellants claim is subject to the result of the sale dated 2-8-1928 in execution of the decree in OS No. 100 of 1919-20 by reason of the rule of lis pendence

enacted in Section 52 of the Transfer of Property Act. If it is, it is not in dispute that it becomes avoided by the purchase by Devamma on 2-8-1928. If it is not, it is equally indisputable that the appellants as purchasers of the equity of redemption from Keshavananda have a right to redeem the mortgage dated 1-9-1918, and not having been impleaded in OS No. 8 of 1933-34 are not bound either by the decree passed therein or by the sale in execution thereof."

.....

23. A glance at the authorities referred to above would indicate that the decree in a mortgage suit is not binding on a person who has interest in the mortgage property either by way of a sale subsequent to the mortgage or otherwise but not made party to the suit. Failure to implead the interested person may not by itself defeat the right of the mortgagee but the decree cannot be enforced against a person who has interest in that property but not impleaded in the suit. The remedy was also indicated in the decided cases. It is to the effect that it is open to the mortgagee

to institute fresh suit against the person having interest in the equity of redemption."

The above judgment held after the suit, in the execution proceedings and not in the appeal suit. In the case on hand, the suit is very much pending and the legal heirs of the deceased Thangavel i.e., the mortgagor are very much available as respondents 1 to 7 herein. Therefore, the above judgments cited by the learned counsel appearing for the petitioner are not helpful to the case on hand.

12. In view of the above discussions, the Court below rightly dismissed the petition and this Court finds no infirmity or illegality in the order passed by the Court below. Accordingly, this Civil Revision Petition stands dismissed. There shall be no order as to costs. Consequently connected miscellaneous petition is closed.

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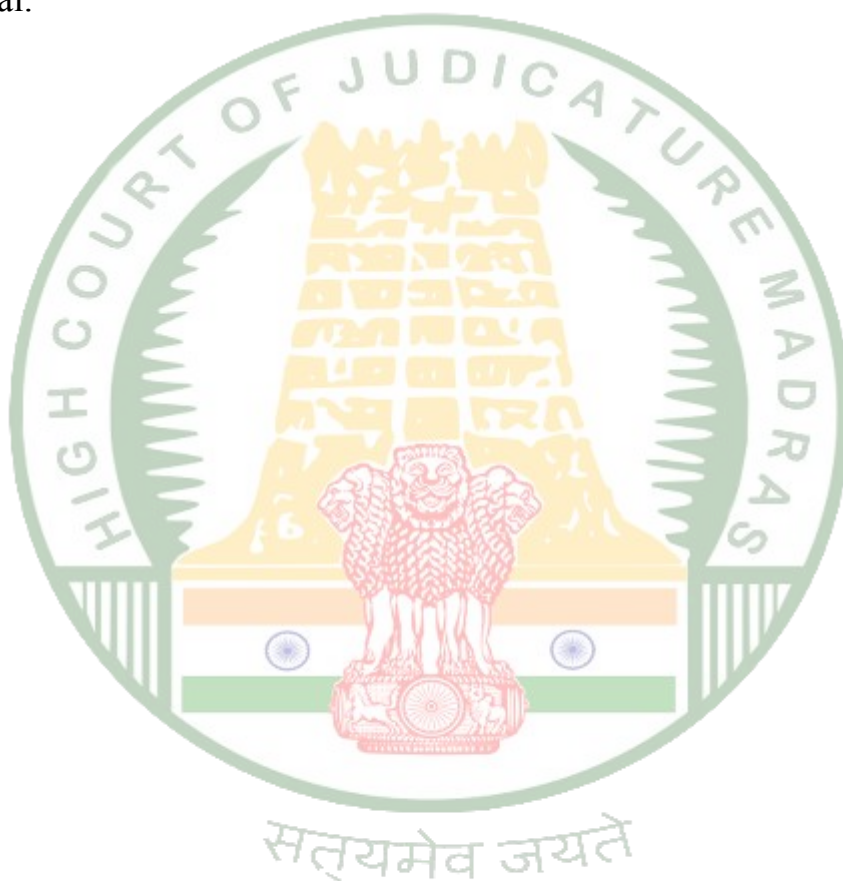
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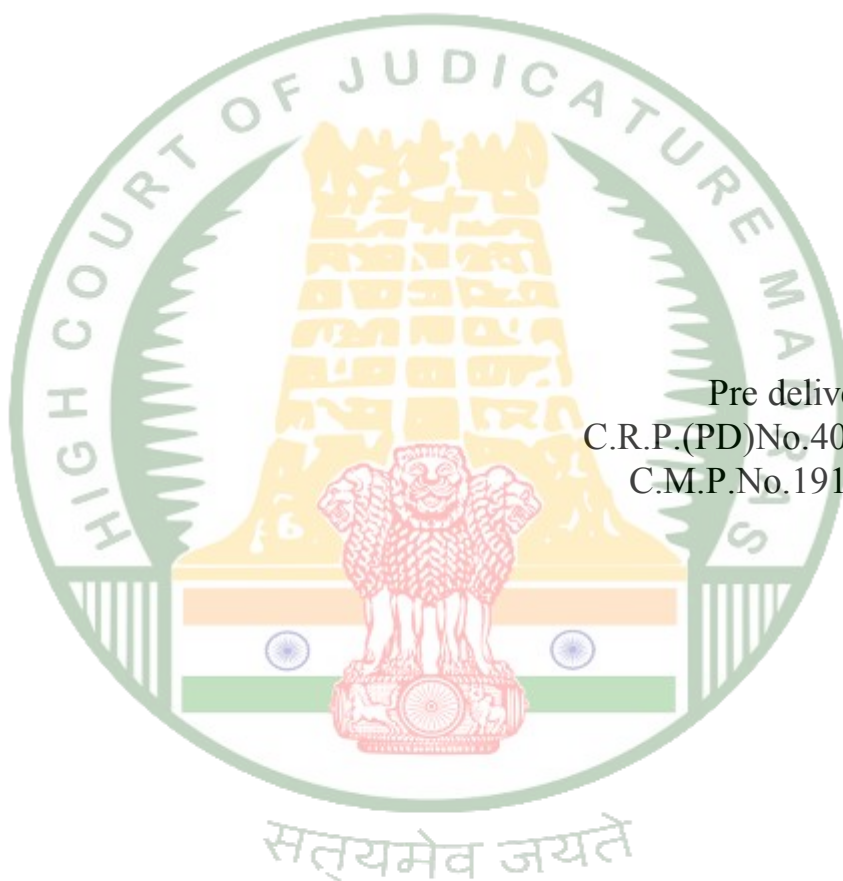
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V.R. Section,
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