BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

A.S.(MD)No.51 of 2013

The Branch Manager,
Tamil Nadu Industrial Investment
Corporation Limited,
Special Recovery Branch,
United Shopping Complex 1st Floor,
No.74, Dr.Najappa Road,
Coimbatore-641 018. ... Appellant / 3rd Defendant

-Vs-

1.Lakshmi Vilas Bank Limited,
Palani Branch through its Manager,
Palani rep. By its Branch Manager,
Having Branch Office at
No.40, New Dharapuram Road,
Palani, Dindigul District. ... 1st Respondent / Plaintiff

2.M/s.M.S.Traders,
Shanmughapuram,
Palani,
Through Proprietor Mr.Moula,
Mosque West Street,
Balasamudram Village,
Palani Taluk,
Palani. ... 2nd Respondent / 1st Defendant

3.Sajitha Banu ... 3rd Respondent / 2nd Defendant

PRAYER: Appeal filed under Order 41 Rule 1 & 2 of the Civil Procedure Code, against the judgment and decree dated 21.04.2010 made in O.S.No.92 of 2008 on the file of the Additional District Judge, FTC, Dindigul.

For Appellant	:	Mr.S.Saravanan
For R1	:	Mr.Alaguram Jothi
For R2 & R3	:	No appearance

JUDGMENT

The third defendant in O.S.No.92 of 2008 on the file of the Additional District Judge/Fast Track Court, Dindigul, is the appellant herein.

2. The first respondent herein namely Lakshmi Vilas Bank Limited, Palani Branch, represented by its Branch Manager, filed the said suit for recovering a sum of Rs.7,81,117/- with interest from the respondents 2 and 3 herein. According to the plaintiff, the suit property comprised in Natham Survey No.53/1A in Mosque West Street, Balasamudram Village in Palani Taluk was purchased by the respondents 2 and 3 herein vide sale deed dated 21.12.1994 from one K.Mohamed Ali. The respondents 2 and 3 herein availed a loan of Rs.4,50,000/- from the first respondent herein/plaintiff and mortgaged the suit property to secure the said loan on 16.03.2004. Since they committed default, the bank filed the said suit for recovering the said sum from R2 and R3 herein. The Bank came to know that the appellant Corporation had raised a claim that the suit property had been earlier mortgaged in their favour. Therefore, the appellant Corporation was impleaded as third defendant in the suit vide order dated 14.03.2008 in I.A.No.141 of 2008. The appellant Corporation filed written statement controverting the plaint averments. The appellant Corporation contended that the suit property admittedly belonged to one Mohamed Ali and the said Mohammed Ali had offered the suit property as collateral security in favour of the appellant Corporation by depositing the original title deed on 02.06.1986 to secure the loan availed by one Abdul Kalam Azad. Since the borrower committed default, the appellant Corporation took recovery action under State Financial Corporation Act. The borrower filed O.S.No.94 of 1990 on the file of the District Munsif Court, Coimbatore, challenging the recovery action taken by the Corporation and also obtained an interim order. Therefore, the appellant initiated action against Mohamed Ali under Section 29 of the State Financial Corporation Act and also took constructive possession of the mortgage property on 22.08.2005. They also conducted public auction sale on 29.11.2005 and again on 30.01.2006. But there were no bidders.

3. The specific stand of the appellant Corporation is that the Bank ought not to have advanced any loan to R2 and R3 herein, when the prior mortgage created in respect of the suit property in favour of the appellant Corporation was very much subsisting. Based on the divergent pleadings, the trial Court framed the necessary issues. On behalf of the plaintiff Bank, its official was examined. Ex.A1 to Ex.A13 were marked. On behalf of the appellant Corporation, one official by name Ponnusamy was examined as D.W.1 and Ex.B1 to Ex.B9 were marked. After a consideration of the evidence on record, the trial Court decreed the suit as prayed for. Aggrieved by the same, the appellant Corporation has filed this appeal.

4. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to set aside the impugned judgment and decree passed by the trial Court.

5. Per contra, the learned counsel appearing for the plaintiff bank submitted that the impugned judgment is well founded and does not call for any interference. The respondents 2 and 3 did not choose to contest this appeal. Nor they have filed any independent appeal questioning the impugned judgment and decree.

6. I carefully considered the rival contentions and went through the evidence on record. The point for consideration is whether the appellant Corporation is the prior mortgagee in respect of the suit property and if so, whether its right will have to be postponed to that of the plaintiff bank under Section 78 of the Transfer of the Property Act, 1882.

7. One of the issues framed by the Court below was whether the mortgage created by Mohamed Ali would bind his purchasers also. The other issue framed by the Court below was whether the appellant Corporation will have priority over the plaintiff bank. There cannot be any doubt that the equitable mortgage was created in respect of the suit property by K.Mohamed Ali in favour of the appellant Corporation as early as on 02.06.1986. A perusal of the document enclosed in Ex.B1 would categorically establish this fact. Vide letter dated 03.06.1986 addressed to the appellant Corporation, K.Mohamed Ali had stated that to secure the facilities availed by Thiru.Abdul Kalam Azad, he had deposited the title documents relating to his properties comprised in Natham Survey No.53/1A measuring 855 square feet having door No.3A, Balasamudram Village, Palani Taluk with intent to create equitable mortgage. The property originally belonged to his father Kadersha Rawther. Mohammed Ali had stated that the original title deed had been lost long back and could not be traced out. The property devolved on all the legal heirs of Kadersha Rawther that included Mrs.Mymoon Beebi, sisters Mrs.Ummul Asanath, Mrs.Mahmootha Beebi, elder brother late.Mr.Abdul Azees Sons Mr.A.Shaih Mohammed and Mr.A.Abdul Majeeth. Vide release deed dated 04.04.1985 registered as Document No.379/1985, the other legal heirs relinquished their interest in favour of Mohamed Ali. The original release deed dated 04.04.1985 was deposited with the appellant Corporation by Mohamed Ali on 02.06.1986. After creating such equitable mortgage in favour of the appellant Corporation, the said Mohamed Ali had fraudulently sold the suit property in favour of the respondents 2 and 3 herein on 21.12.1994 vide sale deed registered as document No.1644/94. In order to give an impression as if it had a parent title document, the said Mohamed Ali had created a sale deed dated 21.02.1991 in his favour executed by his nephew Shaih Mohammed and Abdul Majeeth.

8. I have already noted that the said Shaik Mohammed and Abdul Majeeth are very much parties to the release deed dated 04.04.1985. After purchasing the suit property from Mohamed Ali, the respondents 2 and 3 herein have approached the plaintiff Bank on 10.03.2004 for availing a loan of Rs.4,50,000/-. The sale deed

dated 21.12.1994 executed in their favour by Mohamed Ali was deposited as title document on 13.03.2004.

9. A mere look at the encumbrance certificate would reveal that the real title deed for the suit property would only be the release deed dated 04.04.1985 registered as document No.379/85. But what was submitted was only a certified copy of the document No.379/85. The Manager, Lakshmi Vilas Bank, Palani, ought to have insisted that the original document dated 04.04.1985 should be deposited. Instead, he chose to advance the loan on the strength of a certified copy. The Court below has not taken note of this aspect. Therefore, I have no hesitation to come to the conclusion that the appellant Corporation is the prior mortgagee in respect of the suit property. The suit mortgage created by Mohamed Ali in favour of the appellant Corporation would obviously bind the purchasers namely R2 and R3 herein. The finding given by the Court below in this regard is clearly erroneous and it deserves to be interfered with.

10. Having held that the appellant Corporation is the prior mortgagee, the question is whether it would stand postponed to the subsequent mortgage. Section 78 of the Transfer of Property Act, 1882 is as under:-

> ***78.Postponement of prior mortgage:-*** Where, through the fraud, misrepresentation or gross neglect of prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Obviously, the appellant Corporation cannot be accused of any fraud or misrepresentation. However, the counsel for the plaintiff Bank would contend that there has been gross neglect on the part of the appellant Corporation. The first mortgage was created way back in the year 1986. When the appellant Corporation took action against the original borrower namely Abdul Kalam Azad, he filed the suit and also obtained injunction against the appellant Corporation. In that event, the appellant Corporation ought to have taken action against the surety under Section 31 of the State Financial Corporation Act. The appellant Corporation did not do so. Instead, they chose to invoke only Section 29 of the State Financial Corporation Act, 1951. As held in the decision of the Hon'ble Supreme Court reported in ***(2008) 5 SCC 176 (Karnataka State Financial Corporation Vs. N.Narasimahaiah),*** the State Financial Corporation cannot proceed against the surety under Section 29 of the Act. Till filing of the suit, the appellant Corporation had not taken any action under Section 31 of the State Financial Corporation Act, 1951. But failure to initiate proper recovery measures would not constitute gross neglect within the meaning of Section 78 of the Transfer of Property Act. The subsequent mortgagee must also show as to how failure on the part of the prior mortgagee induced them to advance money on the strength of the mortgaged property. The court below has failed to properly construe Section 78 of the Transfer of Property Act. More than anything else, there cannot be any excuse for the bank in not insisting on the deposit of the original document.

11. If I hold that Section 78 of the Transfer of Property Act, 1882 cannot be invoked by the plaintiff bank, then, the impugned judgment and decree will have to be set aside. But what will be the consequence? As per the decision reported in ***2013 (6) CTC 647 (The Tamil Nadu Industrial Investment Corporation Ltd., Vs. Decolyte Engineering Industries and others***), the State Financial Corporation could have taken action against the surety within twelve years. The mortgage was created in the year 1986. The right of the mortgagee to enforce the mortgage expired in the year 1998 itself. Therefore, even if the rights of the plaintiff are subordinated to that of the appellant, the appellant cannot still take action against the surety in view of the bar of limitation. Courts are here to uphold justice. Mohammed Ali had cheated the appellant Corporation by selling the mortgaged property. The borrowers obviously knew that Mohamed Ali had already mortgaged the property in favour of the bank because the release deed executed in favour of Mohamed Ali is duly entered in the register of encumbrance. They had purchased the property from Mohamed Ali without the parent document. The borrowers herein namely R2 and R3 cannot be said to be bonafide purchasers. A technical approach will result in depriving the plaintiff bank as well as the appellant Corporation. The borrowers will go scot free. In this view of the matter, the impugned judgment and decree is modified. The rights of the appellant Corporation is placed on par with the plaintiff bank. The plaintiff bank is permitted to bring the suit property to auction sale. The proceeds of the auction sale will be so appropriated as to satisfy the claims of the plaintiff bank as per the decree and also the claims of the appellant Corporation on an equal basis. If any balance amount is left, the same can be handed over to the respondents 2 and 3 herein.

13. This appeal is partly allowed on these terms. No costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Additional District Judge, FTC, Dindigul.

2. The Section Officer,
   Vernacular Records,
   Madurai Bench of Madras High Court,
   Madurai.

+1 CC to M/s.R.SARAVANAN, Advocate (SR-26604[F] dated 18/08/2021)

+1 CC to M/s.J.ALAGURAAM JOTHI, Advocate (SR-26571[F] dated 17/08/2021)

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