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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **16.12.2021**

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.426 of 2021
and
C.M.P(MD)No.5608 of 2021

Kalaimani (died)

1.Palanisamy
2.Tamilselvan
3.Dhanalakshmi ... Appellants/Appellants/Plaintiffs

Vs.

1.K.T.Suriyaprakash

2.The Branch Manager,
Punjab National Bank,
East Car Street,
Dindigul. ... Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 19.12.2018 passed in A.S.No.3 of 2017, on the file of the Additional District Court, Dindigul, confirming the judgment and decree dated 29.04.2016 passed in O.S.No.66 of 2014 on the file of the Additional Subordinate Court, Dindigul.

For Appellants : Mr.A.Saravanan

JUDGMENT

The concurrent Judgments and decrees passed in O.S.No.66 of 2014 by the Additional Subordinate Court, Dindigul and in A.S.No.3 of 2017, on the file of the Additional District Court, Dindigul, are being challenged in the present Second Appeal.

2. Originally, one Kalaimani as plaintiff has instituted a suit in O.S.No.66 of 2013 on the file of the trial Court for the relief of declaration, permanent injunction and also to declare the sale deed, dated 16.04.2009 of the first respondent herein in respect of the suit property as null and void, wherein, the present respondents have been shown as defendants.

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3. For the sake of convenience, the parties are referred to as, as described before the trial Court.

4. The case of the plaintiff is that originally the suit property belonged to one Rajamaniammal, wife of late.S.P.Renganatha Mudaliar. One Sukumaran, who is the son of the said Rajamaniammal, had obtained loan in the second respondent/the Punjab National Bank by depositing the title deed of the suit property as security for the loan. The said fact was not known to the plaintiff. However, without disclosing the said depositing of title on the suit property as a security for the loan obtained from the second respondent, the said Sukumaran executed a power of attorney in favour of the husband of the plaintiff viz., Palanisamy in respect of the suit property on 29.06.2005. Further, an affidavit was also sworn in by the said Sukumaran, which was attested by the Notary Public, dated 01.10.2005, to the effect that the original title of the suit property had been stolen. Subsequently, on 29.03.2006, the said Palanisamy had sold the suit property to his wife, namely, Kalaimani, the plaintiff. While the plaintiff was in possession and enjoyment of the suit property, the first defendant came to the suit property on 20.09.2013 with his henchmen and informed that he has purchased the suit property and handed over the copy of the sale certificate and ex-parte preliminary decree passed in O.S.No.445 of 2003, on the file of the Subordinate Court, Dindigul. Subsequently, on 24.01.2014, a legal notice was issued by the plaintiff and on 10.02.2014, the first respondent issued a reply notice in contrary to the real facts. Hence, the plaintiff has filed the suit for the above stated relief.

5. The first defendant had filed a written statement and stated that the suit property originally owned by Rajamani Ammal. Her son, Sukumaran, who is running M/s.Abirami Textiles, had obtained loan from the second defendant by depositing the title deeds of the suit property. Later, the said Sukumaran executed a power of attorney in favour of the husband of the plaintiff viz., Palanisamy, who in turn had sold the same to his wife, the plaintiff. The plaintiff is not a bonafide purchaser and the sale deed executed by the second defendant in favour of the first defendant, dated 16.04.2009 is valid under law. On 14.09.2000, the said Sukumaran had obtained a loan from the second defendant Bank for a sum of Rs.2,50,000/- by depositing the title deed of the suit property. Due to the non-payment of the loan amount, the second defendant filed a suit in O.S.No.445 of 2003, on the file of the Subordinate Court, Dindigul, wherein, a preliminary decree was passed on 01.07.2003 in favour of the second defendant Bank for a sum of Rs.6,41,348.42/- with interest as on 22.09.2006. In the said suit, Sukumaran and Rajamaniammal were shown as parties. The second defendant Bank conducted a public auction of the suit property and the first respondent was issued with sale certificate, dated 16.04.2009 and possession was handed over and prayed for dismissal of the suit.

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6. Before the trial Court, on the side of the plaintiff, P.W.1 to P.W.3 were examined and Exs.A1 to A8 were marked. On the side of the defendants, the first defendant himself was examined as D.W.1 and Ex.B.1 was marked.

7. On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit.

8. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff, as appellant, had filed an Appeal Suit in A.S.No.3 of 2017. Pending the Appeal suit, the plaintiff died and her legal heirs were brought on record as appellants 2 to 4/plaintiffs. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court.

9. Challenging the said concurrent Judgments and decrees passed by the Courts below, the present Second Appeal has been preferred at the instance of the plaintiffs, as appellants.

10. Heard the learned counsel for the appellants and also perused the records carefully.

11. The learned counsel appearing for the appellants/plaintiffs would submit that the Courts below ought to have appreciated the documentary evidence marked under Ex.A.4-title deed of the plaintiff, dated 29.03.2006 and claimed title to the suit property and unless the same is set aside in the manner known to law, the title of the plaintiff and thereafter the entitlement of other appellants, as legal heirs of the deceased plaintiff cannot be doubted or denied in any circumstances. The Courts below ought to have seen that though a preliminary for a sum of Rs.6,41,348.42/- obtained by the second defendant Bank as on 22.09.2006 without the subsequent interest till the repayment, but has sold the property for a sum of Rs.1,45,530/- to the first defendant, is nothing but collusive, especially, the second defendant Bank being a Public Sector Bank and not even contested the present suit. The Courts below ought to have appreciated the fact that Ex.B.1 of the first respondent sale certificate, dated 16.04.2009 itself averred that the sale of the schedule property was made without freeing encumbrance and not freed from the sale deed, dated 29.03.2006, which was marked as Ex.A.4, executed by Palanisamy as a power agent in favour of the plaintiff. The first defendant also has never taken any steps to cancel the said encumbrance as on today and prayed for allowing the Second Appeal.

12. It is the admitted case of the plaintiff that originally the suit property belonged to one Rajamaniammal, wife of late.S.R.Renganatha Mudaliar and her Sukumaran had obtained loan in

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the second respondent/the Punjab National Bank by depositing the title deed of the suit property as security for the loan. However, without disclosing the said depositing of title deed on the suit property as a security for the loan obtained from the second respondent, the said Sukumaran executed a power of attorney in favour of the husband of the plaintiff viz., Palanisamy in respect of the suit property on 29.06.2005. Further, an affidavit was also sworn in by the said Sukumaran, which was attested by the Notary Public, dated 01.10.2005, to the effect that the original title of the suit property had been stolen. Subsequently, on 29.03.2006, the said Palanisamy had sold the suit property to his wife, namely, Kalaimani, the plaintiff. While the plaintiff was in possession and enjoyment of the suit property, the first defendant came to the suit property on 20.09.2013 with his henchmen and informed that he has purchased the suit property and handed over the copy of the sale certificate and an ex-parte preliminary decree was passed in O.S.No.445 of 2003, on the file of the Subordinate Court, Dindigul. Subsequently, on 24.01.2014, a legal notice was issued and on 10.02.2014, the first respondent sent a reply notice, in contrary to the real facts.

13. It is the admitted case of the defendant that the suit property originally owned by Rajamani Ammal and her son, Sukumaran, who is running M/s.Abirami Textiles, had obtained loan from the second defendant by depositing the title deed of the suit property. Later, the said Sukumaran executed a power of attorney in favour of the husband of the plaintiff viz., Palanisamy, who in turn had sold the same to his wife, the plaintiff. The plaintiff is not a bonafide purchaser and the sale deed executed by the second defendant in favour of the first defendant, dated 16.04.2009 is valid under law. On 14.09.2000, the said Sukumaran had obtained a loan from the second defendant Bank for a sum of Rs.2,50,000/- by depositing the title deed of the suit property. Due to the non-payment of the loan amount, the second defendant filed a suit in O.S.No.445 of 2003, on the file of the Subordinate Court, Dindigul, wherein, a preliminary decree was passed on 01.07.2003 in favour of the second defendant/Bank for a sum of Rs.6,41,348.42 with interest as on 22.09.2006. In the said suit, Sukumaran and Rajamaniammal were shown as parties. The second defendant Bank conducted a public auction of the suit property and the first defendant was issued with sale certificate, dated 16.04.2009 and the possession was handed over to him.

14. On a perusal of the materials available on record, it is seen that the plaintiff claimed that she was not aware about the said mortgage and the pendency of the suit proceedings by the second defendant Bank against Sukumaran, wherein, he appeared and defended his case and executed a document fraudulently in favour of the plaintiff's husband ie., before the preliminary decree, dated 22.09.2006. The plaintiff's husband, being a power of attorney agent, at the time of *lis* pendency, has executed a sale deed in

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favour of the plaintiff. As the principal Sukumaran is aware about the said mortgage, he cannot execute a power of attorney when the same has been held as a security by the Bank for the loan obtained. The plaintiff or her husband could not give any proper evidence to show that they had no knowledge about the pendency of the suit when they allegedly state that the original document was not in the hands of the principal Sukumaran and he gives a certificate for the same by an affidavit vouched by the Notary Public on 01.10.2005, but in the affidavit it is seen that the said document alleged to have been lost on 27.09.2005. The date before loosing of the said document, he had executed the power of attorney on 26.09.2005. The plaintiff's husband has not seen the original document and only on the oral submission made that the same has been lost as the stand taken by the plaintiff. This would show that at the time of executing the document, the original document was with the Bank. The plaintiff's husband also has believed the words of Sukumaran that the said document is lost and executed a power of attorney and based on the same, the plaintiff has also purchased it, but purchased it without any consideration, which has been admitted by the plaintiff.

15. The plaintiff's submission that the said Sukumaran had taken loan from her husband and only for the said amount, he has executed a power of attorney and the same has been sold to the plaintiff, was also not proved by letting any evidence. It is also seen that the plaintiff's husband getting a power of attorney and selling it to the wife without any consideration, would prove that there was no valid sale taken place based on the said document. After purchase, from the year 2006, the plaintiff has not mutated the revenue records and has not produced any document to prove the same. The second defendant had installed a Board, wherein, it has been clearly stated that the property has been mortgaged and it has been sold, was not even admitted by the plaintiff when she is residing in the same place which would show that it is only to deny the rights of the Bank. If at all the plaintiff has taken this property as a security for the loan given to her, she can only claim it through Sukumaran and not before the first defendant in the suit. The plaintiff has not proved her title to the property and she claimed that the first defendant has not proved his title and the same is null and void, cannot be granted on the ground that the second defendant has brought the property for sale by following the SARFAESI Act and accordingly, the sale certificate was issued to the first defendant is a valid one. The possession was not also proved by producing any document by the plaintiff and not made out appropriate case for proving her possession. The plaintiff cannot claim any right through the sale deed executed as a power of attorney holder and the original principal has not paid the amount and as per the sale of property has been conducted by open auction and the said sale binds on the principal and accordingly, the Bank in order to recover the loan, has taken action under the SARFAESI Act. That being the case, the sale certificate issued in favour of the first defendant is valid and the plaintiff cannot seek for

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declaration of the sale and the trial Court as well as the first Appellate Court have rightly dismissed the same.

16. The plaintiff states that the Bank has to wait for a final decree being passed by the Courts below for proceeding against the said mortgagor and without waiting, they proceeded against him in the other mode without giving an opportunity to the Judgment debtor to clear the decreetal amount within the limitation period, cannot be accepted, because the preliminary decree came to be passed on 22.09.2006 for a sum of Rs.6,41,348.42/- with subsequent date till the date of realisation. According to the plaintiff, the ground taken that when the auction sale certificate has been executed on 16.04.2009, till the year 2013, the first defendant has not made any claim over the suit schedule property, is without any valid reason, as it is clear that the first defendant had approached the plaintiff for doing some construction work. The sale of the property was made without being encumbrance and not freed from the sale deed, dated 29.03.2006, which was executed by Palanisamy in favour of Kalaimani, the said encumbrance has not been cancelled till date and the first defendant being a resident of Madurai, he did not made any attempt to get the transfer of revenue records, except the sale certificate dated 16.04.2009 and possession has not been handed over by the second defendant and prayed that the same has not been within the limitation period.

17.Section 26(C) of the SARFAESI Act reads as follows:-

> *"26-C.Effect of the registration of transactions, etc.-*
>
> *(1) .....*
>
> *(2) Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration under the provisions of Chapter IV and this Chapter, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or licence of such property or attachment order subsequent to such registration, shall be subject to such claim."*

Based on the above said Act, secured creditor have the priority right over the other creditors.

18. The claim of the plaintiff that Sukumaran had obtained loan from them and in lieu of the said payment, he has executed the power of attorney in favour of the plaintiff's husband, who in turn has executed a sale deed is not accepted.

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19. The sale certificate has been registered and the revenue records mutated has not been produced either of the parties. If the plaintiff is a genuine purchaser, she would have immediately mutated the revenue records, but she has not mutated and now she cannot turn around and ask the first defendant to mutate the records. Further, the evidence of P.W.1 to P.W.3 are rejected and these are all factual aspects and also the denial of knowledge of mortgage and based on a encumbrance certificate and an affidavit executed was relied on by the plaintiff is not accepted and it has been well considered by both the Courts below and the case been appropriately rejected and valid reasons have been given. In the year 2003, they have numbered the suit and proceeded based on the preliminary decree and the SARFAESI Act came into effect in the year 2002. That being the case, the authorities are at liberty to chose their course of auction by an Act, which is convenient to them.

20. For the reasons aforesaid, this Court is of the considered view that no substantial questions of law has been made out by the appellants/plaintiffs to interfere with the well considered judgment and decree rendered by the Courts below and accordingly, the Second Appeal stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

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/ /2022

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Additional District Court,
Dindigul.

2.The Additional Subordinate Court,
Dindigul.

3.The Record Keeper,(2C)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

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+1 CC to M/s.A.SARAVANAN, Advocate
(SR-38979[F] dated 16/12/2021)

S.A(MD)No.426 of 2021
16.12.2021

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