



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :17.02.2022

Pronounced on : 28.02.2022

Coram::

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit No.1065 of 2009

N.Pannerselvam ... Appellant/3rd Defendant

/versus/

1.P.Anandan ... Respondents 1 & 2/Plaintiffs

2.A.Sundarapandian

3.R.Ramasamy

4.R.Chandra ... Respondents 3 to 4/1st and 2nd Defendants

Prayer: Appeal Suit has been filed under Section 96 and Order 41 Rule 1 of C.P.C., praying to set aside the decree and judgment dated 31.12.2007 passed in O.S.No.4674 of 2005 on the file of Additional District and Sessions Judge, Fast Track Court-III, Chennai and consequently, dismiss the suit as against the appellant.

For Appellant :Mr.Naresh Vasudevan

For Respondents :Mr.V.Balaji for R1 and R2
Not ready notice for R3 and R4

J U D G M E N T

The appeal is directed against the preliminary decree passed by the trial Court in the suit for recovery of money lend on mortgage.

2. The facts of the litigation leading to the first appeal is that, the defendants, who are husband and wife, borrowed a sum of Rs.4,28,000/- from the plaintiff on 12/04/2001 to meet their family expenses and agreed to pay interest at the rate of 24% p.a. As security, they executed a registered mortgage deed in respect of land and building allotted to the first defendant by the Tamil Nadu Housing Board (TNHB) on payment entire costs.



No due certificate issued by Housing Board was handed over to the plaintiffs. Ever since the date of mortgage, the defendants did not pay any interest or principal or part thereof. Hence, notice was issued to the defendants on 21/08/2001. After receiving the notice, the defendants met the plaintiffs personally and promised to clear the debt within one year. Contrary to their oral assurance, they failed to clear the debt within the time granted. Again, the plaintiffs issued notice on 08/03/2005 for which the defendants came out with reply denying the liability. Hence, the suit.

3. The defendants contesting the suit stated that the suit is not maintainable before the Court at Chennai, since the transactions took place at Dindigul. They are permanent resident of Uthamapalyam, Theni District. They were introduced to the plaintiffs by a broker, when they wanted finance to meet their school building construction. The said broker, who arranged loan for 9 teachers working in the defendants school with one Navasuriya Finance, K.K.Patti, on condition the loan to be paid from the monthly salary of those teachers, has so far collected Rs.3,83,429/- from the defendants. The plaintiffs are partners of the said Navasuriya Finance. The blank cheques given as security for the loan were misused by the plaintiffs and criminal complaints under Section 138 of the Negotiable Instruments Act instituted at Judicial Magistrate Court, Uthamapalayam. In the said circumstances, the mortgage deed was obtained from them by coercion without passing of any consideration. The issuance of notice dated 21/08/2001 was denied. The defendants disown the reply notice dated 22/04/2005 issued on their behalf. If the mortgage deed is valid and true, the plaintiffs ought to have resorted to sale under Section 69 of the Transfer of Property Act, 1882 and not a suit for recovery of money. The suit property was sold to one Panneerselvam on 22/11/2004.

4. The said Panneerselvam was impleaded as the 3rd defendant and he in his written statement contended that, he is a bonafide purchaser for valuable consideration. He purchased the property, after due diligence of verifying the encumbrance certificate and title document issued by the Tamil Nadu Housing Board. The alleged mortgage deed relied by the plaintiffs is not valid, since it was created even before defendants 1 and 2 derived title over the property.

5. The trial Court framed the following issues for consideration:-

(1).Whether this Court has jurisdiction to try this suit?



WEB COPY

(2).Whether the plaintiffs' are entitled to a preliminary decree for recovery of Rs.8,64,560/- with interest at the rate of 24% p.a, from the defendants on the basis of alleged mortgage deed executed by the defendants and for consequential reliefs as prayed for in the plaint?

(3).Whether the plaintiff's has obtained the alleged mortgage deed dated 12.04.2001 by means of threat, undue influence and coercion and hence, invalid in law?

(4).Whether the 3rd defendant is liable to pay the mortgage debt?

(5).To what relief the plaintiffs are entitled?

6. On behalf of the plaintiffs, one witness was examined and 11 documents were marked. On behalf of the defendants, the contesting 3rd defendant was examined and 4 exhibits were marked and relied.

7. The Trial Court, on appreciation of the evidence available had allowed the suit granting preliminary decree directing the defendants 1 to 3 jointly and several for a sum of Rs.8,64,560/- with interest at the rate of 24% p.a on the principal amount of Rs.4,28,000/- from the date of the plaint till the date of realisation within 4 months. It was further ordered, in default of payment of the suit claim by the defendants, the plaintiff is entitled to apply to the Court for a final decree for sale of mortgaged property and the defendants are hereby debarred from all rights to redeeming the mortgaged property and in case, the sale proceeds of the mortgaged immovable property are not sufficient to discharge the whole decree amount then that the defendants 1 & 2 are directed to pay such shortfall amount with interest at the rate of 24% p.a till the date of realisation with costs of the suit. The 3rd defendant is not personally liable to pay the suit claim.

8. The appeal filed against above said decree on the ground that the lower court erred in holding that defendants 1 & 2 had created mortgage transferring interest in favour of the plaintiff though no interest was crystallised upon the defendants when the alleged mortgage was created. On the date of the suit mortgage (Ex.A.1), the Tamil Nadu Housing Board was the owner of the property and 1st defendant was only an allottee. He and his wife cannot create mortgage of a property which he had no title or interest.



9. The Learned Counsel for the appellant would extract the dates and events and submit that, on the day he purchased the property, his vendor had clear title executed in his favour by Tamil Nadu Housing Board. On verification of encumbrance in the Registrar Office, and being satisfied there is no encumbrance reflected, on payment of consideration, he has purchased the property and his right is absolute and cannot be deprived.

10. The Learned Counsel for the appellant would further state that the allotment letter (Ex.A.8) dated 08.03.1994 in favour of R.Ramaswamy (1st defendant) and no due certificate issued by Tamil Nadu Housing Board (TNHB) in favour of Ramasamy dated 01.04.1987 are not title documents to create any mortgage. While so, the property purchased from 1st defendant, after due diligence cannot be charged for the money due to the plaintiff from defendants 1 & 2.

11. Contrarily, the Learned counsel for the respondent would submit that the allotment letter of the Tamil Nadu Housing Board is good as the title deed. The sale deed executed by the Tamil Nadu Housing Board subsequently is only a formal transfer of title. To create mortgage, the title deed is not required. Any interest in the property also be subjected to mortgage. The 1st and 2nd defendants have executed the mortgage deed and got it registered before the Sub Registrar Office. The said mortgage is not challenged by the mortgagor. However, only on filing the suit, through written statement defendants 1 & 2 had pleaded that the said mortgage deed was obtained on the premise of security deed for a difference transaction. But no evidence adduced by the 1st and 2nd defendant to substantiate the said defence since the said defence is only to protract the proceedings and delayed the payment of the loan amount same to be ignored.

12. The Learned Counsel for the respondent would further submit that while the defendants 1 & 2, plead that the suit is not maintainable and remedy is to proceed under Section 69 of Transfer of Property Act, 1882, the 3rd defendant, who alleged to have purchase the property for value would contend that the mortgage deed itself is not valid in law. Neither of the contention is sustainable, since the mortgage of the interest in the property is valid and the subsequent sale deed by the Tamil Nadu Housing Board only feed the grant. The appellant, who claims to have been purchased the property for value after perusing the encumbrance has to proceed against his vendor for suppression of facts and selling the charged property



fraudulently without disclosing the charge. The respondents herein who holds a valid charge over the property cannot be deprived of their right for fraud committed by the respondents 1 & 2 on the 3rd defendant/appellant.

WEB COPY

Point for consideration:-

Whether the decree of the Trial Court against the defendants including the appellant herein suffers any legal or factual infirmity?

13. The Learned Counsel for the appellant comparing the encumbrance (Ex.B.2) which reflects the mortgage of the suit property in favour of the plaintiff and Ex.A.3 which does not reflect the said encumbrance would submit that he is a bonafide purchaser for value. On perusal of these two documents which are certificates issued by same authority, this Court finds that due to some variations in the sub-division of the survey numbers, two different result on encumbrances are shown for the suit property. However, as it is observed by the Court below, the suppression of the factum of mortgage by the vendor will not take away the right of the mortgagee.

14. As far as the mortgage property is concerned, the 1st defendant had paid the entire sale consideration and the Tamil Nadu Housing Board has issued no due certificate (Ex.A.11). Section 54 of Transfer of Property Act, 1882, say "Sale" completes on payment of sale consideration. It has to be presumed that the sale is completed. Registration of title is only a legal formality. More so, when the interest in the property has been mortgaged, formal transfer of title is only a superfluous document and will not take away the right of the mortgagee to act on the said duly registered document.

15. In the instant case, the defendants 1 & 2 though filed written statement have not adduced any evidence. The subsequent purchaser, who was impleaded as 3rd defendant, had mounted the witness box and marked four documents. The status of the purchaser of mortgaged property is not questioned by the plaintiffs. However, the appellants right in the property what he has purchased is always subject to be charge created by his vendor. The appellant/3rd defendant herein cannot deprive the charge in the property which has been created by a mortgage deed executed by his vendor prior to the sale in his favour. From the written statement of the appellant, it appears that he was under the impression that the mortgage itself is void since on



the date of creating the mortgagee, the title to the property was not transferred to the 1st defendant by Tamil Nadu Housing Board. Such erroneous impression about the transfer of property probably had caused the inconvenience to the appellant/3rd defendant. The settled principle of law is the charge over the property by mortgage will continue even if the ownership changes.

16. In Jeswanthraj Mody -v- Selvanayaki Ammal and others reported in 1996 (II) CTC 643, this Court on a similar circumstances has held that in Section 55 of the Transfer of Property Act, 1882, it is the duty of the seller to disclose the encumbrance created by him before the sale. If any fraud has been committed by the seller by stating that suppressing the encumbrance through mortgage, the remedy to the purchaser is only against the vendor and none else. Merely because the appellant has purchased the property without knowing the mortgage in favour of the plaintiff, it does not follow that the charge is effaced from the property. When there is a valid document under valid debt, any sale will be only subject to the security created in favour of the appellant. Merely because the appellant claims to be a bonafide purchaser, it will not confer on him a better title than what the defendants 1 & 2 conveyed to the appellant the title, which is always subject to the charge created under the mortgage.

17. Hence, this Court finds no legal or factual error in the judgment of the Trial Court. Therefore, the judgment of the trial Court passed in O.S.No.4674 of 2005 is confirmed. In the result, the Appeal is dismissed with costs.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

bsm

To:-

The Additional District and Sessions Judge,
Fast Track Court-III,
Chennai.



Copy to

The Section Officer,
V.R.Section,
High Court,
Madras.

+1cc to M/s.K.G.Vasudevan, Advocate Sr.13425
+1cc to M/s.V.Balaji, Advocate Sr.12968

A.S.No.1065 of 2009

kj[col]
srg 07/06/2022