



A.S.No.105 of 2014

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WEB **D.BHARATHA CHAKRAVARTHY, J.**

Today, the matter is listed under the caption "for being mentioned". The learned Counsel for the respondents brought to the notice of this Court that earlier, the Memorandum of Deposit, dated 24.01.2006, executed in favour of the fourth respondent/Bank, has been produced by way of an additional typed set of papers. In that view of the matter, the sentence "(i) the Memorandum of Deposit of title deeds" in paragraph No.18 and "or in the Memorandum of Deposit of title deeds" and "But, however, was not produced before this Court" in paragraph No.19, are factually erroneous.

2. The learned Counsel for the appellants is also present. This Court has verified the said submission of the learned Counsel for the respondents and it is found that actually they have filed an additional typed set of papers on 30.09.2022 containing the Memorandum of Deposit of title deeds. Accordingly, the judgment needs correction.

3. Therefore, the following corrections have to be made in paragraph No.18:-



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After the words "the Bank failed to produce", "(i) the Memorandum of Deposit of title deeds" may be removed and (ii) and (iii) may be corrected as (i) and (ii) respectively.

4. The following corrections have to be made in paragraph No.19:-

After the words "their investigation as to the title", "or in the Memorandum of Deposit of title deeds" and in the last sentence "But, however, was not produced before this Court" may be removed.

5. Registry is directed to carry out the corrections and issue fresh judgment copy.

01.11.2022

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D.BHARATHA CHAKRAVARTHY, J.

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01.11.2022



Appeal Suit No.105 of 2014

IN THE HIGH Court OF JUDICATURE AT MADRAS

Judgment Reserved on : 14.10.2022

Judgment Delivered on : 20.10.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Appeal Suit No.105 of 2014

1.A.Porkodi

2.A.Manimegalai

... Appellants

Versus

1.Mrs.Leelavathi

2.Miss.T.Ponmozhi (Minor)

3.Master. T.Tamilmozhiyan (Minor)

4.State Bank of India,

Rep.by its Manager,

Siruthozhil Chetpet Branch,

Chennai – 600 031.

... Respondents

Appeal Suit is filed under Section 96 of the Code of Civil Procedure, 1908, against the Judgment and Decree dated 19.07.2013 in O.S.No.13362 of 2010 passed by the Learned VII-Additional City Civil Judge, Chennai.

For Appellants : Mr.V.Selvaraj

For Respondents : Mr.M.L.Ganesh (for R4)
: No Appearance (for R1 to R3)



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JUDGMENT

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A. The Appeal Suit :

If the properties belong to three siblings and one of them mortgages the entire property to the Bank, by producing a forged Legal Heirship Certificate, what is the remedy open to the other sisters is the question which arises in this Appeal Suit.

2.This Appeal Suit is filed by the unsuccessful plaintiffs, against the Judgment and Decree dated 19.07.2013, on the file of the VII- Additional City Civil Court, Chennai, in and by which, the suit filed by the appellants/plaintiffs for a permanent injunction restraining the 4th respondent/Bank, from bringing the entire property to auction and for partition of the suit property and to allot 1/3rd share each in the suit property, was dismissed by the Trial Court.

B. Facts of the Case :

3.The facts of this case are not in controversy and by and large admitted by both sides. The suit property is a piece of plot measuring 1947 square feet in Old No.7 and New No.13, First Street, Plot No.24,

Thiruppur Kumaran Colony, Saidapet, Chennai 15, comprised in



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T.S.No.22, Block No.3 of Mambalam Village, Chennai. The property was purchased by the plaintiffs' mother, namely, *T.Roopavathi*, by a registered sale deed dated 07.05.1987 registered as Document No.637 of 1987 with the Sub-Registrar, T.Nagar. She died on 13.07.1997, leaving behind her husband *K.A.Annamalai*, *Porkodi*, her daughter/first plaintiff, *Manimegalai*, her daughter/second plaintiff, and a son *Tholkappiayan*. The said *Tholkappiayan* died on 29.01.2006, leaving behind his wife, *T.Leelavathi*/the first defendant, his daughter *Ponmozhi*, the second defendant, and his son, *T.Tamilmozhiyan*/the third defendant. The plaintiffs' father *K.A.Annamalai*, died on 29.07.1998, leaving behind the plaintiffs and the said *Tholkappiayan* as his legal heir.

4.The plaintiffs' brother *A.Tholkappiayan*, was involved in a partnership business in the name and style M/s. Shabbika Garments with one *Shabir Ahmed*, who was sent to jail for serious economic offenses, etc. The said *Tholkappiyan* and the said *Shabir Ahmed* had obtained loans for their business with M/s.State Bank of India, Siruthozhil Branch, Chennai, which is the 4th defendant in the suit.



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5.They availed a term loan of a sum of Rs.17.78 Lakhs as on 29.01.2006. As on February 2006, they have also availed the working capital limit of Rs.30 Lakhs. The said *Tholkappiayan*, the brother of the plaintiffs, is said to have executed a Memorandum of Deposit of title deeds by depositing the original title deeds of the suit property with the 4th respondent/Bank and created a mortgage in respect of the suit property.

6.Since there was default, the Bank had filed O.A.No.20 of 2009, before the Debts Recovery Tribunal – I (DRT), at Chennai, and the said original application was decreed and a Recovery Certificate was issued in D.R.C.No.117 of 2009. Thereafter, it seems that by further proceedings, the suit property was attached by an order dated 26.10.2010, and intimation with regard thereto was sought to be affixed in the suit property. Thereupon, the present suit was filed on 10.11.2010. After filing of the suit, the plaintiffs also filed Claim petitions Nos.1 & 2 of 2010 before the Recovery Officer, on 13.11.2010.

7.The defendants Nos.1 to 3 in this suit namely, the legal heirs of said *Tholkappiayan*, remained *ex-parte* in the suit. The 4th defendant/Bank alone contested the suit by filing a written statement. In the said written



statement, in paragraph No.4, the allegations made in the plaint were denied. The case of the 4th defendant/Bank is stated in paragraphs Nos.5 and 6, and it is essential to reproduce the entire paragraphs 5 & 6, which reads as hereunder:-

“5. This defendant states that the plaintiffs have all along been in the knowledge of the financial transactions of Mr.A.Tholkappiyan with the Fourth Respondent herein and of the mortgage created by Mr.A.Tholkappiyan as the owner of the suit property. This defendant states that after death of Mrs.Roopavathy, who was the original owner of the property and after the death of her husband Mr.Annamalai, the said Mr.A.Tholkappiyan was allotted the suit property and was in exclusive possession of the property as its sole owner and he and his wife Mrs.T.Leelavathi, the First Defendant herein, repaid the house mortgage loan of Rs.3,00,000/- to the Thivagarayanagar Cooperative Bank Ltd and redeemed the mortgage over the property earlier created by the Late.Mrs.Roopavathy. Mr.A.Tholkappiyan was also granted Patta and property tax assessment for the property in his name by the concerned authorities.



6. *Without prejudice to the above contentions this defendant states that the Plaintiffs herein were neither in possession of the property nor they had filed any valid document to show that they were jointly in possession of the same after the death of the said Mrs.Roopvathy. Hence the Plaintiffs ought to have paid court full court fee on the value of the suit property.*”

C. The Issues & Trial :

8.On the said pleadings, the Trial Court framed the following issues:-

“i) Whether the plaintiffs are entitled for a decree of partition as prayed for in the plaint?

ii) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed by them?

iii) What other reliefs the plaintiffs are entitled to?”

9.The first plaintiff was examined as P.W.1 and on behalf of the plaintiffs, the certified copy of the sale deed in the name of the plaintiff's mother *T.Roopavathi*, dated 07.05.1997, was marked as **Ex.A-1**. The Death Certificate of the said *Roopavathi*, is marked as **Ex.A-2**. The Death



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Certificate of *K.A.Annamalai*, the father of the plaintiffs, is marked as

Ex.A-3. The legal heirship certificate is marked as **Ex.A-4**. The death certificate of *Tholkappiayan*, was marked as **Ex.A-5**. A demand letter dated 02.01.2007, issued by the 4th defendant/Bank to the said *Shabir Ahmed*, first defendant and others, was marked as **Ex.A-6**. The decree of the Debts Recovery Tribunal-I dated 23.06.2009, decreeing a claim of Rs.61,49,605/- and for sale of the mortgaged property, was marked as **Ex.A-7**. The White Meter Card in respect of the electricity connection of the suit property, from 16.07.2008, standing in the name of the first plaintiff, is marked as **Ex.A-8**. No separate oral evidence was let in by the 4th defendant/Bank. However the claim petitions filed by the plaintiffs before the Debts Recovery Tribunal-I in Claim Petition No.1 of 2010 and Claim Petition No.2 of 2010, were marked as **Ex.B-1**. The self-same copy of the demand letter dated 02.01.2007, which is marked as **Ex.A-6**, a building contract between One *Murugan* and the first plaintiff, and a copy of the settlement deed executed by the second plaintiff in favour of her minor daughter, namely, *Thangamalar*, and the very plaint in the present suit were all bunched up and marked as **Ex.B-2** series.

D. Findings & Decision of the Trial Court :



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10. Thereafter, the Trial Court proceeded to consider the case of the parties and by Judgment and decree dated 19.07.2013, found that since the said *Tholkappiayan* had mortgaged the property, notices have been issued under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred as SARFAESI Act), and thereafter, the original application in O.A.No.20 of 2009 was filed and after the property was sought to be brought for sale, the present suit in O.S No.13362 of 2010 has been filed. The Trial Court further found that, even though the plaintiffs denied the oral partition between themselves and the said *Tholkappiayan*, they have not particularly stated as to, in which part of the suit property they are residing. They have not filed any documents to establish their possession. The said findings are contained in paragraph No.11 of the Judgment. In paragraph No.12, the Trial Court strangely finds that as if the plaintiffs have accepted the oral partition between the plaintiffs and their brother *Tholkappiayan*, and the plaintiffs have taken steps to redeem the property, as the said *Tholkappiayan* had mortgaged the property. The Trial Court found that, (i) since the Bank had taken steps by issuing notice under Section 13(2) of the SARFAESI Act, and the orders have been passed under the Act, and (ii) since the plaintiffs had not specifically mentioned as to which portion was



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allotted to them in the partition, and the plaintiffs having taken steps by filing a claim petition before the DRT, have failed to prove their case before the Trial Court. Therefore, the Trial Court dismissed the suit filed by the plaintiffs.

E. The Submissions :

11. *Mr. V. Selvaraj*, the learned counsel, taking this Court through *Ex.A-8*/White meter card, would submit that the same would be *prima facie* proof that the plaintiffs had put up construction and are residing in the suit property. The learned counsel, taking this Court through *Ex.A-7*/Legal notice, would point out that it is the specific case of the 4th defendant/Bank, in the said notice that the said *Tholkappiayan* mortgaged the property by producing a forged Legal Heirship Certificate. But, however, the stand taken before the Trial Court by them was oral partition. Absolutely, there is no proof for any oral partition between the parties and that the property was allotted to the said *Tholkappiayan*. Therefore, if the Bank had advanced the loan to the said *Tholkappiayan*, who had only 1/3rd of the share in the suit property, the mortgage if any created, cannot bind the plaintiffs. Therefore, the plaintiffs' prayer for partition and permanent injunction is bound to succeed.



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12.The learned Counsel for the appellants relied upon the Judgment of the Hon'ble Supreme Court of India, in ***Jagdish Singh Vs. Heeralal and Ors.¹***, to contend that the Bank can proceed against the assets of its borrowers alone and the parties have to approach the DRT, if only the measures are taken under the SARFAESI Act and if the property does not belong to the borrower, then to that extent, the suit before the Civil Court is maintainable.

13.Per contra, *Mr. M.L. Ganesh*, the learned Counsel appearing on behalf of the 4th respondent/Bank submitted that, in this case, firstly, the suit itself is an abuse of process of law, as the plaintiffs knew about the mortgage created by their brother, and after the decree was passed, after the death of their brother, these steps were being taken only at the stage of attachment and sale of the mortgaged property. Their knowledge can be ascertained by the averments in the plaint itself.

14.He would submit that once proceedings are initiated under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as “RDDBFI Act”), and the DRT has allowed the



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original application including sale of the mortgaged property (the suit scheduled property), the recovery certificate is drawn up as per the said Judgment of the Tribunal. Based on the recovery certificate, the Recovery Officer is entitled to bring the mortgaged property for sale. The Rules framed under the Second Schedule to the Income Tax Act are applicable. Under the said rules, if any third party has any rival claim, has to only file a claim petition. Accordingly, these plaintiffs have also filed a claim petition, which came to be rejected. Therefore, there is no question of re-agitating the very same issue before the Civil Court. The Civil Court completely lacks jurisdiction to adjudicate the issue on hand.

15. In support of his contentions, the learned counsel relied upon the following Judgments:-

(i) *The Authorised Officer, State Bank of India Vs. Allwyn Alloys Pvt. Ltd., and Ors*², (ii) *Sree Anandhakumar Mills Ltd., Vs. IOB and Ors*³, (iii) *R.Subramanian Vs. The Honkong and Shanghai Banking Corporation Ltd., and Ors*⁴, (iv) *V.Thulasi Vs. IOB*⁵, (v) *Sri Chandra and S.Chitra Vs. K.Nagarajan and Ors*⁶, (vi) *Ranganath Raju Vs. BOI*⁷, (vii)

2 (2018) 5 CTC 225 at Page No.225 : MANU/SC/0581/2018

3 MANU/SC/0638/2018

4 MANU/TN/0959/2018

5 MANU/TN/1939/2011

6 MANU/TN/1517/2012

7 MANU/OR/0361/2006



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CBI Vs. Gomathiammal⁸, (viii) Jagadish Singh Vs. Heeralal⁹, (ix) SBI

Vadavalli Branch Vs. Krithaanyaa¹⁰, (x) Minor Krithaanyaa Vs. State Bank of India (SBI)¹¹, and (xi) Electrosteel Castings Limited Vs. UV Asset Reconstruction Company Limited and Ors¹².

F. Proceedings before this Court & The adverse inference :

16. Before proceeding to consider the rival submissions made, it is necessary to record the events which transpired during the hearing of this case. This case was heard in part on 07.09.2022. After hearing the learned counsel for the parties, this Court strangely found that before the Civil Court, neither the Memorandum of Deposit of title deeds, nor the other relevant documents were produced. The demand letter in ***Ex.A-6***, and ***Ex.B-1***, clearly mentioned as, though the said *Tholkappiayan* furnished a forged Legal Heirship Certificate and obtained the loan. It is useful to extract the relevant averments in ***Ex.A-6***, which reads as follows:-

“...The Bank has received notices of claim for the same property from his wife as well as from the two women, who are said to be his sisters. Now, it was found that the legal heirship certificate

⁸ MANU/TN/3858/2016

⁹ MANU/SC/1126/2013

¹⁰ MANU/TN/3290/2011

¹¹ MANU/SCOR/27005/2012

¹² MANU/SC/1150/2021 : 2022 (1) CTC 533



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issued in favour of K.A.Annamalai and A.Tholkappiayan, on the death of Smt. Roopavathi, was not issued by the Tahsildar, Mylapore....”

However, in the written statement extracted above, the 4th defendant /Public Sector Bank has taken a stand, which is extracted supra to the effect, that the said *Tholkappiayan* was 'allotted' the suit property by way of oral partition.

17.It is in this context, this Court had specifically raised the query to the learned counsel appearing on behalf of the 4th respondent/Bank as to, on what basis the mortgage was accepted on behalf of the Bank in respect of the suit property. The learned counsel was unable to give a specific answer. Upon a query from this Court, he sought time to produce a copy of the MOD, or pleadings before the Debts Recovery Tribunal. The said order of this Court which is dated 07.09.2022, reads as follows:-

“Part heard.

The learned Counsel for the appellant also seeks further time to file written arguments. The learned Counsel for the R4/Bank has filed written arguments. He also seeks time to produce the copy of MOD or pleadings before the DRT, for the satisfaction of the Court.

Post on 14.09.2022.”



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“Heard Mr.V.Selvaraj, the learned Counsel for the appellant. He has completed the arguments.

For the completion of the arguments of the learned Counsel for the Bank by producing the MOD and other relevant documents before DRT and for further arguments, post the matter on 23.09.2022.”

Again on 30.09.2022, the following orders were passed:-

“Heard the matter in part, and for continuation of the further arguments, post the matter on 12.10.2022.

2.In the meanwhile, Registry is directed to call for the records from the Lower Court. The learned Counsel appearing on behalf of the Bank/fourth respondent is also required to produce the photo copy of the legal heirship certificate of Tmt.Roopavathy, dated 19.09.1997, relied upon in the MOD.”

18.However, inspite of repeated hearings, the said documents were not forthcoming, and therefore, this Court proceeded to hear the learned Counsel in detail again on 14.10.2022 and finally, the Judgment was reserved. Thus, the Bank failed to produce (i) the Memorandum of Deposit of title deeds, (ii) the copy of the application filed by it before the Tribunal, and (iii) the Legal Heirship Certificate said to have been

<https://www.mhc.tn.gov.in/> produced by the said *Tholkappiayan* before it. An Appellate Court dealing



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with the first appeal against the decree is to find the facts and for this purpose, it can also seek to know the truth from either of the parties to the suit by directing them to produce any documents which may be relevant to the issues and if the party doesn't produce, adverse inference has to be drawn.

19. In this case, it is clear from the demand notice issued that the Bank had accepted the mortgage by the said *Tholkappiayan*, based on the said forged Legal Heirship Certificate. However, inspite of being a Public Sector Bank, they took a contrary stand in the written statement that the said *Tholkappiayan*, become entitled to the suit property by virtue of an oral partition. It is for them to produce the documents of title, which were scrutinized by them that the said *Tholkappiayan* claimed oral partition or the concerned recitals in their investigation as to the title, or in the Memorandum of Deposit of title deeds or their pleadings before the Debts Recovery Tribunal. It is also pertinent to state that the said Memorandum of Deposit is referred to for the first time, specifically in the written arguments filed before this Court. But, however, was not produced before this Court.



G. The Discussion & Findings :

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20.Repeated arguments were made before this Court only relating to the legal question, as to the jurisdiction of the Civil Court. Facts precede the law and in this case, it stares on the 4th defendant/Bank. The finding of the Trial Court in paragraph No.11 that the plaintiffs denied the oral partition, and in paragraph No.12 as if the plaintiffs have admitted the oral partition, would adumbrate the perversity of the findings of the Trial Court.

21.On the other hand, by Ex.A-1 to A-8, the plaintiffs have proved that the property originally belonged to *Roopavathi*, and that she died intestate and that the first plaintiff, the second plaintiff and the said *Tholkappiayan* and through him, the defendants Nos.1 to 3, are entitled to 1/3rd share each, in respect of the suit schedule property. Therefore, the plaintiffs are entitled to the relief of partition.

22.Now, the question to be decided is that, whether the Civil Court is entitled to grant the relief of permanent injunction restraining the Bank from selling or enforcing its rights under the alleged mortgage/deed, arising out of the mortgage, in respect of the 2/3rd share belonging to the



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plaintiffs also. In this regard, there is a specific difference between the SARFAESI Act and the RDDBFI Act. If any proceedings are initiated under the SARFAESI Act, even third parties can question by filing an Appeal under Section 17 the RDDBFI Act before the Tribunal and therefore if any person wants to challenge the measures taken under the said act, they have to approach only the Tribunal. This position has been clearly laid down by the Hon'ble Supreme Court of India, in the Judgment of **Jagadish Singh**, cited supra. The Trial Court found as if the proceedings are taken under the SARFAESI Act. The same is again perverse. In this case, no proceedings were initiated under the SARFAESI Act. As matter of fact almost all the Judgments relied upon by the learned Counsel for the respondents cited supra, which is in relation to the SARFAESI Act, are *per se* not applicable to the present suit.

23.As far as the present case is concerned, the proceedings were initiated under the RDBFI Act. In this regard, the law has been specifically laid down by the Hon'ble Supreme Court of India, in **Nahar Industrial Enterprises Limited and others, Vs. Hong Kong and Shanghai Banking Corporation and Others**¹³, and reference needs to be made, in respect of paragraphs Nos.85, 86, 95, and 96 of the said Judgment, which reads as



follows:-

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“85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counterclaim.

86. The Debts Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act.] The power of the Tribunal to grant interim order is attenuated with circumspection. [See Dataware Design Labs (P) Ltd. v. SBI [(2005) 127 Comp Cas 176 (Ker)] , Comp Cas at p. 184.] Concededly in the proceeding before the Debts Recovery Tribunal detailed examination, cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debts Recovery



Tribunal centres round the legally recoverable dues of the bank.

96. The Tribunal was constituted with a specific purpose as is evident from its Statement of Objects. The Preamble of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, it did not even have any power to entertain a claim of setoff or counterclaim. No independent proceedings can be initiated before it by a debtor.

*97. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. **Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The civil court, therefore, will continue to have jurisdiction.***”

(emphasis supplied)

Thus, it may be seen that it was not open for the plaintiffs, who are the third parties to have contested the suit filed by the Bank, or even to make a counter claim, before the Tribunal that 2/3rd of the suit property belonged to them and the Bank's claim should be restricted only to the 1/3rd share



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belonging to the said *Tholkappiayan*. In this regard, the jurisdiction of the

Civil Court is ousted only in respect of the questions which strictly fall under Section 17 of the RDDBFI Act and to that extent, it doesn't fall to the jurisdiction of the Tribunal, and the inherent remedies under the common law and the jurisdiction of the Civil Court, are not barred.

24. In this connection, the second limb of argument made on behalf of the learned counsel for the appellants is that the Rules framed under Second Schedule to the Income Tax Act, for recovery is to be applicable. Since there is a provision to make claim statement under the said rules, therefore, the jurisdiction of the Civil Court is barred. In this regard, the relevant rule which is Rule 11 under the Second Schedule to the Income Tax Act, reads as follows :-

“11. Investigation by Tax Recovery Officer.-

(1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.



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(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that—

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him,



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or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.”

25.The phrase 'Tax recovery Officer' has to be read as 'Recovery Officer' under the RDDBFI Act. It can be seen that the said Rule 11, is an investigation by the Recovery Officer as to the claim and if he is satisfied with the claim of the third party, the Recovery Officer himself can release the property from attachment or sale. And if the Recovery Officer is not satisfied, then the claiming party can institute a Civil Suit to establish his right. In this case, firstly the Civil Suit was already filed and thereafter the claim was made with the Recovery Officer subsequently. It is submitted that the petitioners Claim Petition has been rejected, though the orders are not produced before this Court.

26.Further, as per Chapter -V of the RDDBFI Act, Section 25 prescribes the mode of recovery, which includes the attachment and sale of the immovable properties of the defendants. Section 26 deals with the validity and amendment of the Recovery Certificate. Section 27 provides



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for stay of the proceedings under the Certificate or Amendment or withdrawal thereof. Section 28 enables the recovery officer to resort to the other modes of recovery, which are prescribed thereunder. Section 29 makes the provisions of Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, applicable to the proceedings with the necessary modifications which is relevant to the instant case, and as such, which is extracted hereunder:-

“29. Application of certain provisions of Income-tax Act.—The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax: Provided that any reference under the said provisions and the rules to the “assessee” shall be construed as a reference to the defendant under this Act. ”

Section 30 also provides an appeal to the Tribunal against the order of the recovery officer.

27. Therefore, a careful consideration of these provisions, it would be



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clear that in order to effect recovery, the Recovery Officer himself can attach and sell the properties belonging to the defendants. Power of Investigation under Rule 11, of the Second Schedule to the Income Tax Act, enabling the third party to prefer a claim petition, has to be read in respect of the properties which are sought to be attached by the Recovery Officer himself. But, when the Tribunal has ordered the sale of mortgage property, I am afraid that any claim petition is maintainable before the Recovery Officer and the Recovery Officer could consider the said claim petition and modify the mortgage or alter the Recovery Certificate which is granted by the Tribunal. Therefore, on this score also, the alternative remedy as projected by the learned Counsel for the respondents is unsustainable. Thus the jurisdiction of the Civil Court is in-tact, in the facts and circumstances of the instant case.

28.The very basis of the case is that the 4th defendant is the mortgagee. It cannot have more rights than the mortgagor himself. If the mortgagor does not have the right in respect of the entire property and was entitled to only 1/3rd of the share in the property mortgaged then by whatever means, it may not be lawful for the 4th defendant/Bank to sell more than 1/3rd of the share belonging to the Judgment Debtor/Borrower.



This is the core and basic issue involved in this case and by procedural ramblings or otherwise, such a right which is not available to the 4th defendant/Bank, cannot be created.

29.The 4th defendant/Bank was cheated by the said *Tholkappiayan* by the production of forged Legal Heirship Certificate. If so, it is only the 4th defendant/Bank, which had to suffer the consequences and not the other lawful owners of the property, in this case, the sisters, who have to suffer the consequences. Therefore, I hold that the suit in respect of the permanent injunction was maintainable. Once the suit is maintainable, the plaintiffs have proved their case, that they are also the legal heirs of the said Roopavathi, who is the owner of the property and are entitled to 2/3rd of the share in the suit property.

30.It is the case of the 4th defendant/Bank that there was an oral partition and the entire property was allotted to the said *Tholkappiayan*. Neither the defendants Nos.1 to 3, who are the legal heirs of the said *Tholkappiayan* adduced any evidence nor the Bank did anything to prove the said case. On the other hand, from their own demand letter/*Ex.A-6*, and adverse inferences drawn on account of non production of relevant documents, stare at their face and they failed to prove their case. On the



contrary, the plaintiffs have by the production of the copy of the sale deed standing in the name of *Roopavathi*, the Death Certificate and the Legal Heirship Certificate have proved their case, therefore, they are entitled to the relief.

H. The Moulding of Relief :

31. But, however, the 4th defendant/Bank, had also advanced money. It is entitled to realise its dues. The legal heirs of the said *Tholkappiayan*, the defaulter of the loan, have remained *ex-parte*, throughout before the Trial Court as well as before this Court. They have 1/3rd of the share in the suit property.

32. In a suit for partition, especially in a suit of this nature, it is not necessary always to pass a preliminary decree and thereafter relegate the matter to the Trial Court to pass the final decree. In appropriate cases, this Court is entitled to pass a composite decree. In view of the fact that the 4th respondent/Bank is entitled to realise the share of Borrower/Judgment Debtor, and has not realised the amount so far, in lieu of the entire property being only of 1947 sq.ft and it would diminish in value if it is divided into three shares by metes and bounds. For all the above reasons, instead of effecting partition by dividing the shares metes and bounds, this



Appeal Suit No.105 of 2014

Court finds that in this case, would be expedient and necessary to sell the suit property and divide the sale proceeds into three shares and 1/3rd share amount shall be paid out to the 4th defendant/ Bank.

33.This Court as the First Appellate Court, can appropriately mould the relief with reference to the special facts and circumstances of the instant case. A useful reference in this regard can be made to paragraph 67 of the Judgment of the Hon'able Supreme Court of India, in **J.P. Builders v. A. Ramadas Rao**¹⁴. The plaintiffs claim that they are under occupation of a portion of the suit property. They have to vacate and handover possession to the auction purchaser.

I. The Decree:

34.In the result,

- i) The Appeal Suit in A.S.No.105 of 2014 is allowed;
- ii) The Judgment and Decree in O.S.No.13362 of 2010 dated 19.07.2013 of the Learned VII-Additional District Judge, City Civil Court, Chennai, is set aside;
- iii) The suit in O.S.No.13362 of 2010, dated 19.07.2013, on the file of the VII-Additional, City Civil Court, Chennai, is decreed on the following terms:-



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- a) The first plaintiff and the second plaintiff and the defendants 1 to 3 jointly are entitled to 1/3rd share each in the suit scheduled property;
- b) The 4th defendant /Bank is therefore entitled for its rights as the mortgagee, only in respect of the 1/3rd share belonging to the defendants Nos.1 to 3;
- c) The suit scheduled property is incapable of being divided into metes and bounds into three equal shares and therefore it is ordered to be sold by public auction;
- d) The parties shall appear before the Trial Court on 21.11.2022. There will be no further notice to the parties;
- e) As per the Judgment of the Hon'ble Supreme Court of India in ***Kattukandi Edathil Krishnan v. Kattukandi Edathil Valsan***¹⁵, the Trial Court shall continue the proceedings without insisting upon any application for final decree;



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f) The Trial Court shall appoint an Advocate Commissioner to arrive at a minimum upset price, advertise the property for sale by public auction and to conduct an auction and confirm the highest bidder by directing to deposit the entire sale consideration before the Trial Court, within the time schedule as may be fixed by the Advocate Commissioner in the sale notice;

g) Before the confirmation of the sale, any party to the suit will also be entitled to match the highest bid, by depositing the total sale consideration after deducting their share, by way of demand draft for the entire bid amount, within ten days from the declaration of the highest bid.

h) And upon such deposit, the parties claim can be given preference. And if more than one parties match the bid, then the highest bid among the parties to the suit shall be given preference.



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- i) If the plaintiffs do not make any bid, the plaintiffs or any person claiming through them shall vacate and hand over possession to the Advocate Commissioner and the Trial Court shall upon receipt of the entire sale consideration, immediately put the Purchaser into possession;
- j) Upon realization of the sale proceeds, the first plaintiff is entitled to 1/3rd of the sale proceeds and the second plaintiff is entitled to 1/3rd of the sale proceeds and the 4th respondent/Bank is entitled to 1/3rd of the sale proceeds;
- k) The Trial Court shall credit the respective amounts, by directing the parties to submit their Bank account and identity details without insisting for any formal application of payment out.
- iv) However, there shall be no order as to costs.



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Index : yes/no

Speaking/Non-speaking order

klt

To

- 1.The VII-Additional Judge, City Civil Court, Chennai.
- 2.The Section Officer, V.R. Section, High Court of Madras.



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D.BHARATHA CHAKRAVARTHY, J.

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20.10.2022