IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **08.09.2023**

CORAM

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.No.4774 of 2011

State Bank of India
Cuddalore.
Represented by its Branch Manager. ... Petitioner
The appellant name is changed in the cause title vide Court order dated 02.01.2020 made in C.R.P.No.4774 of 2011 as per Memo dated 03.12.2019 (02.01.2020) on USR No.233 of 2020 are recorded.

Vs

1.S.Nithiyanandam
2.G.Lakshmi
3.Ramamurthy
4.Vimala Ramamurthy ... Respondents

PRAYER:-Civil Revision Petition filed under Section 115 of the Code of Civil Procedure to under Article 227 of the Constitution of India against fair and decreetal order dated 29.07.2011 passed in E.A.No.264 of 2009 in E.P.No.15 of 2009 in O.S.No.158 of 2001 by the learned Additional Subordinate Judge-I, Cuddalore.

For Petitioner : Mr.O.Padmaprakash

For Respondents : Mr.R.Gururaj

ORDER

The Civil Revision Petitioner before me is a Nationalised Bank. The said bank granted a mortgage loan to the respondents 2 and 3 on 29.07.1993. To enforce the said Mortgage, O.S.No.158 of 2001 was presented. The suit ended in a decree in favour of the mortgagee on 18.04.2002. The said preliminary decree has become final. In order to enforce the preliminary decree, a final decree proceeding was presented and the final decree was passed on 23.02.2005. To execute the final decree, E.P.No.15 of 2009 was presented.

2. Pending this Execution proceeding, the respondents 2 and 3 had incurred loans from a third party. The said third party filed a suit in O.S.No.169 of 2000 and a decree came to be passed. In order to execute

the said decree in O.S.No.169 of 2000, E.P.No.74 of 2002 was presented. In the said Execution Proceedings, the schedule mentioned property in O.S.No.158 of 2001 was brought for auction. The property was purchased by the third party viz., Paul Anand. The said Paul Anand executed a Power of Attorney in favour of one Parthasarathy. The said Parthasarathy alienated the property in favour of respondents 1 and 2 on 27.08.2008 for a consideration of a sum of Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand only).

3. In the Execution Proceeding filed in O.S.No.158 of 2001, an application was filed under Section 47 of Code of Civil Procedure by the purchasers from Parthasarathy. This application was allowed by the learned Additional Subordinate Judge-I, Cuddalore in E.A.No.264 of 2009 on 29.07.2011. Aggrieved over the same, the present Civil Revision Petition has been filed.

4. Heard Mr.O.Padmaprakash, learned counsel for the petitioner and Mr.R.Guru Raj, learned counsel appearing for respondents 1 and 2.

5. Mr.Padma Prakash, learned counsel would submit that the purchase having taken place pending the litigation, the right of the Bank cannot be put in jeopardy. He would also urge that the Bank had given a mortgage loan in favour of the respondents 3 and 4, the original judgment debtors and therefore, it is entitled to continue to enforce the mortgage as against any person who comes to the property through them.

6. Rejecting these arguments, Mr.R.Guru Raj would submit as follows:-

(i) His clients are bonafide purchasers for value without notice of the mortgage dated 29.07.1993 or of the decree passed by the Court on 15.06.2001 or of the final decree dated 23.02.2005. He would state that being bonafide purchasers, the decree cannot be executed against them.

(ii) He would continue the arguments and submit that the mortgage was not registered and therefore it was not reflected in the encumbrance certificate. He would urge that if the mortgage had been reflected in the encumbrance certificate his clients could not have proceeded to purchase the property.

(iii) The sheet anchor of his argument is that, consequent to allowing of E.A.No264 of 2009, E.P.No.15 of 2009 was dismissed. The Bank, not having preferred a Civil Revision Petition against the dismissal of E.P.No.15 of 2009, this Court is barred from entertaining the Revision against Section 47 application as it is hit by principles of res judicata.

(iv) He would lastly submit that the decree is barred by time, since 12 years have lapsed pending the Civil Revision Petition. The allowing of the Revision by this Court would tantamount to the extension of time and therefore, taking cognizance of Section 3 of Limitation Act and dismiss this Revision.

(v) He would finally submit that Section 52 of the Transfer of Property Act is inapplicable to Court auction. He would refer to ***Rajendra Singh and Others Vs Santa Singh and Others*** reported in ***AIR 1973 SC 2537*** for the said proposition. He would rely upon several authorities in order to sate that Section 52 applies only in a situation if the execution petition had been presented within 12 years.

7. I have carefully considered the arguments of Mr.Padma Prakash and Mr.Guru Raj. I have gone through the records.

8. The facts of the present case shows that O.S.No.158 of 2001 was presented to enforce the some mortgage deed dated 29.07.1993. It is too well settled proposition of law that a person who purchases from a

mortgagor privately or through Court, purchases and only equity of redemption. Therefore, what Mr.Guru Raj's clients have purchased pursuant to the decree in O.S.No.169 of 2000 is only the right that the judgment debtors possessed on the date of presentation of the plaint in O.S.No.169 0f 2000.

9. On that day, the defendants in O.S.No.169 of 2000 only had the right vis-a-vis the bank, the sale of their equity of redemption. Consequently, whether the sale is voluntarily in nature or involuntarily, the purchaser from a mortgagor obtains only that right. By the mere fact that the sale happens to be through Court auction does not mean the previous mortgage that had been executed by the defendants, in favour of the bank, is extinguished.

10. If I were to take an example (if not for the Court auction decree) had the purchase been made by the respondents 1 and 2 directly

from the mortgagors, they would still be bound to discharge the mortgage. The fact that they purchased through an auction does not give them a higher right. They cannot take a plea of bonafide purchasers in such an auction. The fact that a Court auction sale had intervened does not give them the right to nullify the mortgage.

11. The issue whether *lis pendens* applies to a Court auction sale is no longer res intergra. This position of law has been settled in ***Kedar Nath Lal & Another Vs Ganesh Ram & Others*** reported in ***AIR 1970 SC 1717.***

12. In paragraph 16 of the said judgment, the Supreme Court was pleased to hold that if a property is acquired *pendente lite*, the acquirer is bound by the decree, ultimately granted in a proceeding pending prior to it. This result is not avoided by the reason that there was

an earlier attachment. On the other hand, Section 52 of the Transfer of Property Act places a complete embargo on the transfer of an immovable property, right to which is directly and substantially in question in a pending litigation. Apart from this judgment, it has also been held by the Supreme Court that Section 52 will apply to involuntary sale in ***Samarendra Nath Sinha & Another Vs Krishan Kumar Nag*** reported in ***AIR 1967 SC 1540***, the Court was pleased to hold in the following terms:

> *"It is true that Section 52 to of the Transfer of Property Act strictly does not apply to involuntary alienations, such as Court auction sale. But is is well established that the said principles of lis pendens applies to such alienations also."*

13. Applying these two judgments to the facts of the present case, I have to necessarily come to a conclusion that the sale by respondents 1 and 2 was hit by *lis pendens*. I should also necessarily reiterate that *lis pendens* commences with the presentation of the plaint and ends, only with the discharge/satisfaction of the decree. It is no one's

case that the mortgage which had been executed on 29.07.1993 was discharged by the respondents 2 and 3. Therefore, the purchase by the respondents 1 and 2 herein, as I have already held is only equity of redemption and it is also hit by the principle of *lis pendens*. Therefore, the purchase made by them gives them a right to redeem the property from the Bank. It cannot be argued by them that by virtue of having purchased the property by Court auction, the bank looses its right over its security. I also have to take note of the position of law that there is no warranty of title in a Court auction sale.

14. In so far as the plea of non-registration of the mortgage and consequently it not being reflected in the encumbrance certificate is concerned, I have to take note of the law on the date on which the mortgage was created. The law that prevailed with respect to the creation of mortgage by deposit of title deeds during the relevant time did not require such registration. The law was amended only in 2012 making it mandatory for registration of mortgages created by deposit of title deed.

Therefore, during the relevant period, the bank had not committed an infraction of law by not registering the mortgage.

15. In so far as the plea of bonafide purchasers for value without notice of litigation is concerned, I do not have to labour much on this point since *lis pendens* does not know of a bonafide purchase. The submission of Mr.Guru Raj is that the judgment of ***Ahmedabad Municpal Corporation of the city of Ahmedabad Vs Haji Abdulgafur Haji Hussenbhai*** reported in (1971) 1 SCC 757 is in his favour and therefore, he has to be recognised as a bonafide purchaser of value.

16. The judgment of the Supreme Court arise under the following circumstances.

17. The property originally belonged to one Haji Nur-Mohammed Haji Abdulmain. He had gone into serious financial troubles and therefore he was adjudicated as an insolvent. In the insolvency

proceedings, his property was sold and it was purchased by the respondent Haji Abdulgafur Haji Hussenbhai. There were arrears in favour of the Ahmedabad Municipal Corporation. It sought to enforce its charge over the property. At that stage, it was argued by the purchaser that he is entitled to the benefits of Section 100 of Transfer of Property Act, because a charge created by non-payment of taxes cannot be enforced in the hands of a person to whom the property had been transferred for consideration and without notice of the charge. The Supreme Court agreed with the purchaser and held that since the purchase had been made without notice of the charge, it cannot be enforced as against him.

18. A comparison of Section 52 of Transfer of Property Act with Section 100 of the Transfer of Property Act shows, while section 100 excludes a bonafide purchaser for value without notice of the charge through a proviso, such an exclusion for Mr.Guru Raj's clients is

unfortunately not found under Section 52. Therefore, the judgment in ***(1971) 1 SCC 757*** does not rescue the respondents 1 and 2.

19. Now we turn to the main argument of Mr.Guru Raj that since no revision has been preferred against the dismissal of the execution Petition in E.P.No.15 of 2009, the present revision which has been preferred only against the order of Section 47 application is barred by the principle of *res judicata*.

20. It is too well settled for me to extract all the judgments cited by Mr.Guru Raj that where two suits are tried together and common issues are framed and joint trial takes place, if one suit is dismissed and it is not appealed against, it will operate as *res judicata* in an appeal filed against the other suit. This proposition has been in force in this Country for quite a long time and does not require any reiteration by the weight of authorities cited by Mr.Guru Raj. In fact, this proposition has been

diluted by virtue of amendment to Order XLI Rule 33 of the Code introduced by the amendment 104 of 1976. As per this amendment under Order XLI Rule 33, even if a decree is not appealed against, the Appellate Court has the power to interfere with a decree which has not been appealed against. This view of mine is only on the side because it does not directly arise for consideration in the present case.

21. It cannot be disputed that the Execution Petition in E.P.No.15 of 2009 was dismissed on account of the fact E.A.No.264 of 2009 was allowed. If the order passed in E.A.No.264 of 2009 is set aside, the revival of E.P.No.15 of 2009 is only dependent or a consequential one. Dependent order means that on dismissal or allowing of one order, it has direct consequences on the other. In the present case, since E.A.No.264 of 2009 was allowed, E.P.No.15 of 2009 was dismissed. Therefore, to expect a revision to be filed even against the dependent order, in order to get rid of the plea of res judicata is to read too much

into the proposition that has already been set out above.

22. The judgment that was relied upon by Mr.Guru Raj in ***Sheodan Singh Vs Smt.Daryao Kunwar*** reported in ***AIR 1966 SC 1332*** arose under the circumstances where four suits were tried together and appeals have been presented as against the decrees in all the four suits. Two appeals had been dismissed for default due to non-payment of printing charges. The question before the Supreme Court was whether other two appeals can be tried independently of the dismissal. The Supreme Court came to a conclusion that such an argument cannot hold water because even if the appeals have been dismissed on a technical point, by virtue of the dismissal, the decree of the Courts below stood confirmed. The decree of the Courts below having being confirmed by dismissal of the two appeals and the Court not being empowered to pass inconsistent decrees, it was barred from hearing other two appeals.

23. As pointed out above, it is not as if the E.P. and Section 47 application were tried together. The allowing of Section 47 application had an effect of dismissal of the E.P. We can look at it in other way. If Section 47 application had been dismissed, it will be a fantastic proposition to expect the petitioner in Section 47 application to file a Revision not only against the dismissal but also as against the pendency of the Execution Petition. One being the dependent on the other, if a Revision is filed against the main order, it is not necessary to file a Revision against an order which is passed consequential to the order passed in the first case. Therefore, the judgment in ***Sheodan Singh Vs Smt.Daryao Kunwar*** reported in ***AIR 1966 SC 1332*** does not apply to the facts of the present case.

24. Mr.Guru Raj would finally cite a judgment of a Constitutional Bench in ***Pandurang Dhondi Chougule and others Vs Maruti Hari Jadhav and others*** reported in ***(1966) 1 SCR 102.*** He would state that I do not have the jurisdiction under Section 115 of the Code of

Civil Procedure to correct gross errors of law unless the errors relate to jurisdiction of the Court to try the dispute itself.

25. It is here we have to see the provision as it stood prior to 1976 and thereafter. Prior to 1976, an order under Section 47 was to operate as a decree and therefore, the appeal was held maintainable. Finding the never ending cycle of litigation, the Parliament in its wisdom deleted the provision treating an order under Section 47 as a decree and had directed the same to be treated as an "order". If it is treated as a decree, more certainly a Revision under Section 115 is not maintainable. That not being the situation now and this judgment having been rendered prior to Amendment 104 of 1976, I would say that the remedy has to be given to a decree holder who has suffered an order under Section 47.

26. The jurisdiction under Section 115 is exercisable where the

lower Court has exercised its powers within its jurisdiction illegally or with material irregularity. This is found in the very body of the Section itself. Therefore, this position of law remains unaltered as it would be clear from a reading of paragraph 10 of the judgment of the Supreme Court reported in ***(1966) 1 SCR 102***.

27. The order under Section 47 not being appealable but being revisable, all I have to see if there is a material irregularity in the impugned order.

28. In this particular case, the material irregularity is that the Court has not applied the principle that *lis pendens* applies even to an involuntary sale like a Court auction. The Court auction sale made by respondents 1 and 2 was subject to the mortgage decree in O.S.No.158 of 2001. Consequently, I reject the argument that the Revision is not maintainable under Section 115.

29. In the light of the above discussion, the order and decreetal order in E.A.No.264 of 2009 in E.P.No.15 of 2009 in O.S.No.158 of 2001 dated 29.07.2011 is set aside. Consequently, E.P.No.15 of 2009 shall stand restored on the file of I-Additional Subordinate Judge, Cuddalore to be proceeded in accordance with the law.

30. The learned Subordinate Judge is requested to give priority to the execution as the proceedings have been pending for more than twenty two (22) years. With the above direction, this Civil Revision Petition stands allowed. No costs.

08.09.2023

gba

Index: Yes/ No
Speaking order: Yes/ No
Neutral Citations: Yes/ No

To

The Additional Subordinate Judge-I,
Cuddalore

V. LAKSHMINARAYANAN,J.

Gba

C.R.P.No.4774 of 2011

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