Proclamation No 3 of 2003
A.No.1821 of 2012
in
C.S. No.538 of 1996

Reserved on: 11.12.2023

Delivered on: 28.03.2024

**A.A. NAKKIRAN, J,**

The Proclamation No.3/2003 has been filed by the Plaintiff/Decree holder seeking settlement of Proclamation of sale, to serve notice of sale and to fix a date for sale of the property at O.S No.111/2 Part, now 111/5 part in Egmore-Nungambakkam Taluk bearing Door No 3, New no 48/3, Arcot Road,Saligramam, Chennai-93

2.The Application in 1821/2012 has been filed by the Defendant No 2/Judgment Debtor seeking to declare that the preliminary and Final decree to be treated as fraudulent, collusive and inexecutable in law.

3.Before delving into the present proclamation and the Application under consideration, it is necessary to advent into the facts of the case briefly.

4.The Plaintiff, M/s Gemini Pictures & Circuits P Ltd filed the suit in C.S. No. 538 of 1996 before this Hon'ble Court praying for a preliminary mortgage decree on the basis of an equitable mortgage dated 19.03.1996 by deposit of title deeds executed by the 2nd Defendant Mr.M.Ramasamy, furnished as a security, in respect of the dues of the 1st respondent, Mr. P.L.S. Kannan payable to the plaintiff. As per the plaint, the mortgaged property is located at O.S No.111/2 Part, now 111/5 part in Egmore-Nungambakkam Taluk bearing Door No 3, New No.48/3, Arcot Road, Saligramam, Chennai-93, admeasuring about 19 grounds.

5.A compromise was entered into between the plaintiff and the defendants whereby the defendants submitted to the preliminary decree and the preliminary decree dated 18/10/1996 was passed holding the plaintiff to be entitled to Rs.1,42,79,241.87 and the defendants were directed to pay the sum within one year i.e on or before 18/10/1997. Since the amount was not paid, an application in A.No.4212/1998 was filed seeking final decree and vide final decree dated 30.06.1998, the property which was allegedly mortgaged by the Applicant as stated above on 19.03.1996 was ordered to be sold to realise the amount secured by mortgage.

6.The 2nd defendant, claiming inter alia that he was not a party to the compromise and had not appeared before the court on 18.10.1996, that there was no valid mortgage, that the claim of mortgage is false as the properties were already sold, that the title deeds have not been produced, filed an application in A.No.4212 of 1998 to set aside the compromise decree dated 18.10.1996 and the same was allowed by the Learned single judge vide order dated 27.10.2000.

7.However, the same was challenged vide appeal in O.S.A. No. 90/2001 by the 1st Respondent. The 2nd defendant had also preferred an appeal in O.S.A. No. 37/2002 against the final decree dated 30.06.1998. The appeal preferred by the plaintiff was allowed and the appeal preferred by the 2nddefendant was rejected by this Hon'ble Court vide order dated 12.12.2002 holding that the factum of appearance for recording the compromise has been recorded by a Learned Judge of this Court and the same cannot be interfered. The decisions in the above appeals have also confirmed by the Hon'ble Supreme Court in C.A.Nos.337/2004 & 340/2004 on 30.08.2011.

8.In the meantime, the plaintiff/Decree holder preferred an execution petition in Proclamation No.3/2003 on 05.02.2003 seeking to sell the allged mortgaged property to realise the dues of Rs.2,23,29,605.77/- as on 05.02.2003. During the pendency of the proclamation, the 2nd defendant, Mr.M.Ramasamy filed the application in A.No.1821/2012 inter alia claiming that a fraud has been played on the court, that the Company was non-existent as on the date of cause of action i.e. on 19.03.1996 as the name of the Company had changed to Gemini Industries & Imaging Limited as on 08.03.1996 itself, that the compromise was presented even before the suit summons was served, that the 1st defendant had colluded with the plaintiff in the filing of the suit as he was an employee of the plaintiff and the suit had been filed only to snatch the Applicant's property, by misusing his signature, 2nd respondent/1st defendant, created a fabricated compromise and that he never appeared before this court, that the compromise was filed even before the suit summons was served on him and that when no vakalat was filed, it could not be possible for any advocate to appear for him and sign the compromise, that the Hon'ble Division Bench and the Hon'ble Apex Court did not interfere with the findings of the Learned Judge regarding the validity of the mortgage and only the validity of the compromise was discussed and decided, that the 2nd defendant is not a borrower and had only furnished the property as security and hence, he cannot be personally held liable, that a fake encumbrance certificate has been produced before this Hon'ble Court suppressing that most of the property that was alleged to be mortgaged was conveyed between 1988 to 1995, i.e.even prior to the alleged date of mortgage and hence there could not have been any valid mortgage, that the original title documents, have not been produced before the court at the time of filing the suit or at the time of seeking proclamation, without which the relief of proclamation cannot be granted, that the 2nd respondent/1st defendant is an employee of the 1st respondent/plaintiff and the fact that the same counsel has appeared for both of them in another proceedings and has hence the suit is collusive, the plaintiff has not proceeded against the 2nd respondent/1st defendant and hence sought the preliminary and Final decree to be treated as fraudulent, collusive and inexecutable in law by taking recourse to Section 47 of the Civil Procedure Code. The 2nd Defendant also filed his objections to the proclamation as counter on similar lines. The 1st respondent has not filed any counter and was set exparte on 08.07.2015. Earlier, this Court by an order dated 30.06.1999 in A.No 1945/1998 had directed the plaintiff to produce the original mortgage deed and other original documents as they had claimed that the mortgage was created by deposit of title deeds. Thereafter by an order dated 24.07.2012, this court permitted the plaintiff to file their counter in A.No 1821 of 2012 before evidence was let in. However, no counter was filed and the documents were also not produced by the plaintiff. Evidence on the side of the 2nd defendant was recorded in A.No.1821/2012 and Proclamation 3/2003 which were clubbed together. Exhibits A1 to 14 were marked on the side of the Applicant/2nd defendant.Evidence was closed on 11.04.2016 and thereafter matter was posted for arguments. The case was posted for final hearing on many occasions and in January 2023, it was informed to this Court that the plaintiff had gone into liquidation.

9.The 2nd defendant took out an application in A.No 1225/2023 and after notice, the Official Liquidator was impleaded as 3rd respondent on 13.06.2023 and by order dated 21.06.2023, the court cleared the air by modifying the order to the effect that the amendment was to be carried out in A.No 1821/2012. By an order dated 26.09.2023 directing the official liquidator to produce the original mortgage deed, original title documents, encumbrance certificate and other relevant documents in relation to the suit.

The Official Liquidator had filed an affidavit and counter affidavit explicitly admitting that they are not in possession of the original title documents and has also contended that the original directors can be impleaded to know about the original documents as they have come into the picture only in 2016. The Official Liquidator had also filed the copy of the certificate issued by the Registrar of Companies dated 08.03.1996, by which the name of the company had been changed from M/s.Gemini Pictures and Circuits P.Ltd., to Gemini Industries and Imaging Ltd. During the course of hearing, a technical plea was raised by the official liquidator that without the leave of the Company Court under Section 446 of the Companies Act, 1956, the hearing in the A.No.1821/2012 and Proclamation 3/2003 cannot be continued. Thereafter, the 2nd defendant has approached the Company Jurisdiction of this Court in C.A No 542/2023 in C.P. No. 178/2015 and the Company Court by an order dated 24/11/2023 granted leave for the continuation of the cases in the original side jurisdiction of this court. Thereafter, the Applicant/2nd defendant has filed a reply affidavit in A. No. 1821/2012 stating that there is no necessity to implead the former directors as sufficient opportunity has already been givenand that for the last 27 years, they had been representing the plaintiff and they have not produced the documents, that without the title documents the suit and the proclamation could not even have been numbered, that they are unable to produce the same as the documents are not with them and that in the absence of the documents, the final decree cannot be executed and has sought the application to be allowed.

10.The Learned Counsel for the Applicant/2nd defendant fiercely contended that the mortgage suit in the first place ought not to have been numbered without the original mortgage deed and the title documents. The counsel further contended that the suit summons was served in the suit only on 21.10.1996 before which date, the Applicant/2nd defendant could not have entered into any compromise and also contended that the Applicant /2nd defendant did not appear before this Court to record the compromise. The counsel also relying upon exhibit A11 contended that the 1st defendant is the employee of the plaintiff and that suit is a collusive suit to make unlawful gain by sale of the Applicant's property.

11. It is the further contention of the learned counsel for the applicant that as per the provisions of Order 34, Order 37 Rules (1), (5), (11), (13) and Order 38 Rule (2) to (4)of the Original Side Rules, it is

incumbent on the part of the plaintiff to not only file the original mortgage deed and all other title to documents, but also to file an encumbrance certificate to seek the sale of the property. Drawing the attention of this court to the averments in the plaint, the learned counsel contended that the case of the plaintiff is that the 2nd defendant had executed an equitable mortgage by relying upon a letter dated 19.03.1996 by deposit of title deeds, neither the original mortgage deed nor the title documents have been produced along with the plaint and rather only a xerox copy of another mortgage deed with contents altogether contrary to the claim of the plaintiff is found in the xerox, which is also admitted by them in the plaint by specifically stating the contents therein are not true and the 2nd defendant is not liable to pay any amount. The plaintiff also admits that the said document was returned by the Sub-Registrar. Hence, the said document, the contents of which are false and which has not been markedwill not have any evidentiary value. The plaintiff has also not taken any steps to ensure the production of the document before this Court. A letter allegedly executed by the applicant/2nd defendant cannot be treated as the mortgage deed. It is further contention that the entire suit property did not vest with the applicant on the date of mortgage as most of the extent was settled and conveyed during the period 1988 to 1995 and relied upon the encumbrance certificate marked as Exhibit A 14 in support of his contention. In view of the fact that most of the property stood alienated prior to the alleged date of mortgage, it is the contention of the Learned Counsel for the applicant that the encumbrance certificate produced before this court is a fabricated document and hence the plaintiff has committed a fraud.

12. The counsel further contended that the plaintiff company had changed its name on 08.03.1996 even prior to the alleged date of mortgage and the plaintiff has hence supressed the material facts before this court and committed a fraud. The counsel further contended that no benefit could accrue to the plaintiff if any order has been obtained by fraud. It is further contended that unless the requirements under law are satisfied, the decree, though confirmed by the Hon'ble Division Bench and the Hon'ble Apex Court, cannot be executed. On the above lines, it is contended that the plaintiff has not only failed to produce the documents as contemplated under Order 38 of the Original Side rules despite the directions of this Court in in its order dated 30/06/1999, ***marked as Ex. A6*** but also failed to file any counter and lead evidence as because, the plaintiff cannot be in

possession of those documents as the mortgage deed was never executed and that the original documents are with the purchasers from the Applicant/2nd defendant. It is further contended on behalf of the Applicant/2nd defendant that the transferees of the property had filed a suit in C.S No 489 of 1998 for declaration andpermanent injunction restraining the plaintiff herein from seeking to proceed against the property in the B Schedule to the plaint in execution of mortgage decree obtained in C.S No 538 of 1996 and interim injunction was granted. As against the interim orders, O.S.A 78/1999 was filed and the appeal was decided in favour of the transferees. The said order has been annexed by the 1st respondent/plaintiff along with the proclamation no 3/2003. Subsequently, the suit was transferred to the file of the City Civil Court and numbered as O.S. No. 13439/2010 and has been decreed on 03.03.2014 by the I Additional Judge, Chennai. It was further contended that no extent of the property can be brought to sale unless the title deeds are deposited in the court. Further, it was contented by the Learned Counsel that there is no personal guarantee and that only the property has been alleged to be given as security. Hence, the Applicant/2nd defendant cannot be held to be personally liable and that only a final decree is enforceable. The Learned Counsel also submitted that the findings of the Learned Single Judge in A.No 4212 of 1998 has not been interfered in appeal and has hence become final. In support of his contentions, the learned counsel relied upon the judgments in ***Lakshmi Vilas Bank Ltd. Vs. M/s Shreechakra Enterprises and others, AIR 2003 Madras 1*** and (2006) 1 SCC 697, That being the case, the Learned Counsel sought the dismissal of the Proclamation No 3/2003 and sought the A.No 1821 of 2012 to be allowed.

13. The 1st respondent/plaintiff has not filed any counter. Nor have they cross examined the Applicant witness (PW1). The 1st respondent/plaintiff has not filed the original title documents which he claims to have been deposited by way of mortgage despite the specific orders of this court. The learned counsel for the 1st respondent/ plaintiff has not made any submissions on the contentions of the Applicant/2nd defendantregarding the mortgage and mandate for production of title documents. However, he has filed the orders of the Hon'ble Division Bench and the order of the Hon'ble Apex Court.After the official liquidator was impleaded, the Counsel for the liquidator who has argued the case.The 2nd respondent/defendant has been set-exparte on 04.07.2015. The Learned

Counsel for the official liquidator has submitted that the liquidator was appointed in 2016 and the files were handed over thereafter. It was further contended that the original documents as demanded by this Court are not available in the records of the Plaintiff company and the office of the Official Liquidator cannot be held responsible for it. The Learned Counsel did not dispute the mandatory requirement of filing of the original title documents in the mortgage suit and for bringing the property to sale as per Order 37 and 38 of the Original Side Rules. Rather the Learned Counsel contended that the directors be impleaded in their personal capacity to answer the demand of the original documents said to be deposited.

14. This court has heard the elaborate arguments of the parties and perused the oral as well as documentary evidence.

15. The first contention of the Applicant/2nd defendant is that a fraud has been played on him and this court and a preliminary decree has been obtained by playing fraud by submitting fabricated compromise deed and that the Applicant never appeared before this Court to record the same on 18.10.1996. The contention cannot be accepted at this stage in view of the

fact that the Hon'ble Division Bench had rejected that claim and the Hon'ble Apex Court has upheld the order of the Hon'ble Division Bench. However, it is settled law that the defendant is entitled to raise his objections on the executability of the decree under Section 47 of the Code of Civil Procedure. The main contention of the Applicant/defendant is that unless the original title deeds are deposited, the final decree cannot be executed and all other contentions revolve around above contention. Hence, this court is confining itself only to the executability of the decree as per law.

16. To sell the mortgaged property, there mustbe a valid mortgage. Therefore, it is necessary to look into the validity of the mortgage. The validity of mortgage is dependent not only upon the creation of mortgage, but also deposit of title deeds and intention to offer the property as security. In addition, such mortgage must be made by the owner of the property. The undisputed position in law that when a suit for recovery of mortgage money is filed claimed that an equitable mortgage by deposit of title deeds has been made, it is incumbent on the plaintiff to file the original mortgage deed and the original title deeds. In the present case, the plaintiff

claims that the mortgage is an equitable mortgage by deposit of title deeds of the property by way of security to the amounts payable by the 2nd respondent/1st defendant to the plaintiff. The plaintiff has filed only a copy of a letter dated 19.03.1996 in support of their claim. The said letter was also not marked by the plaintiff. That apart the xerox copy of the mortgage deed alleged to be executed by the Applicant/2nd defendant, contains terms and conditions contrary to the letter dated 19.03.1996 and the averments in the plaint. As rightly contended by the Learned Counsel for the Applicant, a valid equitable mortgage cannot be created unless the title deeds are deposited. It will be useful to refer to Section 58 (f) of the Transfer of Property Act, 1882:

> "Section 58 (f) Mortgage by deposit of title-deeds.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

17. In the present case, the suit was filed in 1996. The plaintiff though has pleaded and contended that the title deeds were deposited with them, has failed to produce the same to substantiate the claim of mortgage despite the orders of this court on 30.06.1999. Further, the plaintiff who has secured

a decree for sale of the suit property to realize his dues ought to produce an encumbrance certificate for the last twelve years. The necessity to produce the encumbrance certificate is to ensure that notice of sale is given to all interested parties.

18. In the present case, along with the proclamation, the 1st respondent/plaintiff has produced an encumbrance certificate with "nil" encumbrances.However, along with the same application for proclamation, the 1st respondent/ plaintiff had also filed an order of the Hon'ble Division Bench in O.S.A 78/99, through which it is evident that suit property has been alienated in parts between 1988 and 1995.The encumbrance certificate marked as Exhibit A14 by the Applicant for the relevant period also stand to prove the same point. The suit in C.S No 489/1998which was subsequently transferred to City Civil Court has also been decreed.It is clear from the records that the encumbrance certificate produced by the plaintiff is a false document and does not reflect the correct picture. Whileso, it is not known as to how there could be a valid mortgage when the mortgagor himself had no rights over the entire extent on the date of alleged mortgage. As rightly contended by the Learned Counsel for the Applicant, a mere Letter is insufficient to constitute a valid equitable mortgage in the absence of deposit of title deeds. Therefore, it is clear that the 1st respondent/plaintiff who has all along engaged his own counselfor nearly 27 years failed to produce the title documents to prove the mortgage. Therefore, this court has no option but to conclude that suit itself is based on a wrong premise and that there is no valid mortgage. It goes without saying that in the absence of

a valid mortgage, the property cannot be sold.

19. Now coming to the provisions of the Original Side Rules of this court, as per Rule 37 (5), the sale of the mortgaged property is to be conducted in the manner prescribed under Order 38 of the Rules. As per Order 38(1), the sale of the property is by way of public auction in accordance with Order 39. Order 38 (2) mandates a search to be conducted by the applicant and for the production of encumbrance certificate for not less than 12 years cumulatively prior to the order of sale. Order 38 Rule 3 directs that the sale papers including the title deeds. In the present case, the applicant has not only failed to deposit the title deeds but also produced an encumbrance certificate, which does not give the correct picture. The affidavit filed by the plaintiff in support of the proclamation and the proclamation formare not reflective of the true facts. The fact that the proclamation has been sought only in respect of a portion of the property alleged to be mortgaged will not be of any assistance to the plaintiff as the mortgage in the first place is found to be invalid and that in case of failure to deposit the original title deeds along with the proclamation and sale

papers, even a small extent cannot be brought to sale. In view of the fact that the mandatory requirement of production of original title deeds has not been complied, the sale papers and the proclamation 3/2003 are unsustainable and hence rejected. In view of the fact that the original title deeds have not been filed and the mandate under law has not been complied, the decree is held to be inexecutable.

20.In so far as enforcing the decree as a personal claim against the Applicant/2nd defendant, this court finds from the averments in the plaint itself that the suit property was furnished as only security and the plaintiff has stated that the 2nd defendant is not liable to pay any amount. The 2nd defendant had not issued any personal guarantee. Hence, no personal claim can be made against the Applicant/2nd defendant or against any of his other property.

21.In so far as the contention of the Learned Counsel for the Official Liquidator that the directors of the company be impleaded to seek the title deeds, this court is not in consonance with the same as the company had been represented by the Directors right from the initiation of the suit in1996. However,despite several opportunity and the mandatory requirement under Order 38 of the Original Side Rules, the title documents have not been produced. As seen from the exhibits marked on behalf of the Applicant/2nd defendant, a major portion has been conveyed to various persons even before the alleged date of mortgage. The official liquidator in the form of affidavit has also stated that the original title deeds are not available in the records.Therefore, it can be safely concluded that the original title deeds were never deposited with the plaintiff.It is also evident from the rules that without depositing the title documents, the proclamation could not have been sought. The Final Decree was passed on 30.06.1998 and 25 years have passed thereafter. As rightly contended by the Learned Counsel for the Applicant/2nd defendant, no useful purpose would be achieved by impleading them and hence the request is rejected.

22. In view of the above findings, the Proclamation No 3 /2003 is rejected and the Application No 1821/2012 is partly allowed. There will be no order to costs.

28.03.2024

**A.A. NAKKIRAN, J,**

Lbm

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A.No.1821 of 2012
in
**C.S. No.538 of 1996**

**28.03.2024**