IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
15.11.2024	18.12.2024

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

C.M.A. NO.913 OF 2012

Dr.Shahjahan .. Appellant

- Vs –

1. R.Sowbagyarajan (Died)
Rep. By Power of Attorney
R.Soundarapandian

2. G.Velusamy

3. Indian Bank
Rep. By its Branch Manager
Udumalpet Branch
Udumalpet, Coimbatore Dt.

4. The Recovery Officer
Debts Recovery Tribunal
Cauvery Complex
Trichy Road, Ramanathapuram
Coimbatore.

5. Jayalakshmi
6. Saranya

7. Swathi .. Respondents
(RR-5 to 7 brought on record as LRs
Of Deceased R-1 vide order of court
Dated 20.10.2023 made in MP Nos.1
to 3/2015 in CMA No.913/2012)

Civil Miscellaneous Appeal filed against the judgment and decree dated 24.08.2011 made in A.S. No.15 of 2010 on the file of the Court of Subordinate Judge, Udumalpet, remanding the matter to the trial court by reversing the judgment and decree made in C.F.R. No.3462 (unnumbered plaint) dated 18.9.2010 on the file of the District Munsif, Udumalpet.

For Appellant : Mr. A.Jenasenan

For Respondents : Mr. S.Kalyanaraman for
M/s.Aiyar & Dolia for R-3
Mr. N.Thiyagarajan for RR-5 to 7
No Appearance for RR-2 & 4

JUDGMENT

The judgment and decree dated 24.08.2011 of the Subordinate Judge, Udumalpet, in and by which the judgment and decree dated 18.09.2010 of the District Munsif, Udumalpet, was reversed and the matter was remanded to the file of the trial court is put in issue by filing the present appeal.

2. The case, as transpires from the materials available on record are that the mortgage of the subject property by the 2nd respondent was made in the year 1990 in favour of the 3rd respondent by of agreement of sale dated 14.12.1988. In the year 1996, the 3rd respondent filed O.S. No.31/1996 for recovery and the saud suit was transferred and renumbered as T.A. No.921/1997 and T.A. No.514/2002 upon constitution of the Debts Recovery Tribunal. The Tribunal, upon adjudication, decreed the case in favour of the 3rd respondent herein in the year 1999 and recovery certificate was issued for recovery of a sum of Rs.1,36,45,461/- along with interest. On the basis of the recovery certificate, proceedings were initiated by the Recovery Officer to recover the amount in R.P. No.30 of 2002 and on 17.10.2006, public auction was conducted in which the appellant succeeded in purchasing the property as the successful auction purchaser leading to the issuance of sale certificate, which was also registered.

3. It further transpires from the materials that in the year 2007, the 1st respondent filed I.A. No.630/2007 in T.A. No.514/2002 under Schedule II Rule 11 (1) of the Procedure for Recovery of Tax claiming *inter alia* that an agreement of

sale was entered into between the 2nd respondent and 1st respondent on 14.12.1998 and that as a consequence thereof, suit in O.S. No.408/1994 was filed by the 1st respondent against the 2nd respondent claiming the relief of specific performance and the suit was decreed ex parte on 12.01.1995 pursuant to which the 2nd respondent executed a sale deed in favour of the 1st respondent and, therefore, the 1st respondent, as the owner of the subject property claimed absolute ownership and claimed that the sale certificate issued in favour of the appellant is invalid and void.

4. I.A. No.630 of 2007, filed by the 1st respondent, was dismissed by the Recovery Officer on the ground that the alleged sale, which culminated into the registered sale deed took place subsequent to the mortgage and, therefore, the decree in the suit will not bind the bank as also the auction purchaser. As against the said order, no appeal was filed by the 1st respondent u/s 30 of the Recovery of Debts Due to Banks & Financial Institutions Act.

5. It is the further averment of the appellant that an unnumbered suit was filed by the 1st respondent seeking the relief of declaration that he is the absolute

owner of the subject property. As against the same, an application was filed to reject the plaint and the trial court, vide order dated 18.9.2010, rejected the claim of the 1st respondent herein and challenging the same, the 1st respondent herein, who is the plaintiff in the unnumbered suit, filed A.S. No.15 of 2010 and the appellate court allowed the same on the ground that it is open to the plaintiff to approach the Civil Court challenging the said judgment. Aggrieved by the same, the auction purchaser, viz., the appellant herein, has filed the present appeal.

6. Learned counsel appearing for the appellant submitted that when there is an express bar under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act with regard to filing of appeal, the trial court rightly considered the provisions of the Act and rejected the claim of the 1st respondent herein, which is sound and reasonable. It is the further submission of the learned counsel that the finding of the appellate court that the plaintiff is entitled to establish the title to the property as against the sale certificate was issued is wholly erroneous. It is the further submission of the learned counsel that the suit property is the subject matter of mortgage as well as recovery proceedings

before the Debts Recovery Tribunal, which is not disputed that that the Debts Recovery Tribunal had decreed the suit property in favour of Indian Bank in T.A. No.921 of 1997 and T.A. No.514 of 2002, which led to the issuance of recovery certificate No.78 of 1999. It is the further submission of the learned counsel that all the above were done before the Debts Recovery Tribunal in the presence of the 2nd respondent and, thereafter, the public auction was conducted in the year 2002. The 2nd respondent having been a party to the above proceedings with open eyes cannot file the suit for declaration of title, which cannot be entertained on account of the express bar contained u/s 17 and 18 of the Act. Learned counsel for the petitioner drawing the attention of this Court to Section 18 of the Act submitted that no suit could be entertained in respect of properties, which are the subject matter of debt recovery proceedings under the Act and in view of the above bar, the trial court was right in rejecting the plaint under Order 7 Rule XI of the Code of Civil Procedure.

7. It is the further submission of the learned counsel that the appellant is a bona fide auction purchaser and a decree holder and the rifghts of the appellant cannot be extinguished except in cases where the purchase is attacked on the

grounds of fraud or collusion. It is the further submission of the learned counsel that the appeal remedy u/s 30 of the Act was not resorted to by the 1st and 2nd respondents and that being the case, the order of the Debts Recovery Tribunal having become final the finding recorded by the appellate court that Rule 11 (6) permits the plaintiff to agitate his rights before the civil court is grossly misconceived as an appeal against an order of the Recovery Officer is only before the Tribunal.

8. It is the further submission of the learned counsel that the alleged sale agreement between the 1st and 2nd respondents is a collusive and sham document for the reasons that the unregistered sale agreement is alleged to be of the year 1988, yet the property was mortgaged in the year 1990 and the suit was filed only in the year 1994, in which an ex parte decree was obtained by the 1st respondent and the 2nd respondent, viz., the mortgagor had conveniently complied with the decree by executing the sale deed without demur notwithstanding the fact that the said property was under mortgage with the bank. It is the further submission of the learned counsel that even in the present suit, the 1st respondent herein had not prayed for setting aside the sale certificate

issued in favour of the appellant, which clearly shows the collusive nature of the transaction. In the above circumstances, without considering all the aforesaid facts, the interference caused with the said order by the appellate court is grossly erroneous and against the intent and purport of Section 18 and, therefore, the same requires to be set aside.

9. In support of the aforesaid submission, learned counsel placed reliance on the decision of the Apex Court in ***Sadashiv Prasad Singh – Vs – Harendar Singh (2015 (5) SCC 574)***.

10. Per contra, learned counsel appearing for the 1st respondent, since deceased, submitted that the appellate court had rightly considered the appeal and allowed the same holding that the suit filed by the 1st respondent/plaintiff is maintainable in view of Rule 11 (6) of the Second Schedule of the Act. It is the further submission of the learned counsel that the suit has been filed to establish the right of the 1st respondent over the property and is not questioning the authority or challenge to the order passed by the Tribunal. Rightly appreciating the above, the appellate court has dismissed the appeal.

11. It is the further submission of the learned counsel that the 1st respondent had sought for a declaration that he is the absolute owner of the property and consequently sought for a permanent injunction restraining the 3rd respondent from interfering with his peaceful possession and enjoyment of the property. It is further submitted that the sale agreement was entered into between the 1st and 2nd respondent as early as on 14.12.1988 to sell the property for a sum of Rs.80,000/- towards which a sum of Rs.60,000/- was paid as advance towards the sale consideration. The decree passed by the civil court in O.S. No.408 of 1994 seeking specific performance has been passed as early as on 7.10.1996 and only in the year 2007, the 1st respondent had come to know about the purchase of the suit property by the appellant in the auction held by the Recovery Officer. In such a backdrop, the non-impleadment of the 3rd respondent herein as also the appellant herein in the suit filed for specific performance cannot be found fault with.

12. It is the further submission of the learned counsel that the title to the suit property passed to the plaintiff as early as on 7.10.1996, when the sale deed

was executed and, therefore, the subsequent alleged purchase by the appellant on 17.10.2006, will not bind the 1st respondent. Rightly appreciating Rule 11 (6), the appellate court has passed the order. The 1st respondent after obtaining a copy of the certificate issued by the Tribunal has filed a claim before the Recovery Officer as per Rule 11 (1) of the II Schedule, which was dismissed by the Recovery Officer against which the suit has been laid before the District Munsif Court, Udumalpet u/r 11 (6), which was erroneously rejected, which was rightly set aside by the appellate court after following the procedure contemplated under the Act, more particularly Section 31-A.

13. Referring to Section 31-A, it is submitted by the learned counsel that the 1st respondent had only wanted his claim before the Recovery Officer to be investigated and had not approached the Tribunal against the decree and, therefore, rightly appreciating the same, the appellate court has set aside the order of the trial court by relying upon Rule 11 (1) and 11 (6) of II Schedule to the Act, in and by which there is a clear indication that a civil suit is maintainable. However, without considering the same, the trial court has dismissed the plaint, which has been rightly set aside and the matter remanded to the trial court for

fresh consideration, which does not warrant any interference at the hands of this Court.

14. In support of the aforesaid submission, learned counsel placed reliance on the decision of a single Judge of this Court in ***SRajaganapathy Ganesan – Vs – Union of India & Ors. (2011 (4) LW 76)***.

15. This Court gave its anxious consideration to the submission advanced by the learned counsel appearing on either side and perused the materials available on record.

16. There could be no quarrel with the fact that the 2nd respondent had mortgaged the property in favour of the 3rd respondent bank during the year 1990 and that during the year 1996, O.S. No.31 of 1996 was filed by the 3rd respondent for recovery and the Tribunal, upon transfer of the proceedings, had passed the order issuing Debt Recovery Certificate No.78 of 1999.

17. It is to be pointed out that the 2nd respondent was a party to the proceedings before the Tribunal and he had all along kept silent and there was no whisper from the 2nd respondent with regard to the alleged sale of the property to the 1st respondent on 7.10.1996 consequent to the decree issued on 12.01.1995. Even in the suit filed by the 1st respondent in O.S. No.408/1994, there is no whisper by the 2nd respondent with regard to the mortgage made with the 3rd respondent as early as in the year 1990, though it is the specific stand of respondents 1 and 2 that an agreement for sale was entered into between the 1st and 2nd respondent on 14.12.1988 and a sum of Rs.60,000/- out of the total sale consideration of Rs.80,000/- had changed hands. However, when the mortgage was entered into with the 3rd respondent by the 2nd respondent, there was no whisper about the sale agreement.

18. Only after the auction sale and issuance of sale certificate on 17.10.2006 by the Recovery Officer in favour of the successful auction purchaser, viz., the appellant herein, I.A. No.630/2007 in T.A. No.514/2002 came to be filed by the 1st respondent. There is no whisper from the 1st respondent as to how he

came to know about the issuance of sale certificate and how he filed the application before the Recovery Officer.

19. Be that as it may. It is to be pointed out that in I.A. No.630/2007 filed by the 1st respondent herein before the Recovery Officer, the same stood dismissed on 23.11.2009 by holding that the alleged sale took place after the mortgage and, therefore, the decree in the suit will not bind the parties. Curiously, against the said order of the Recovery Officer, no appeal was filed by the 1st respondent, inspite of an appeal remedy available u/s 30 of the Act, which for better appreciation, is quoted hereunder :-

*"**30. Appeal against the order of Recovery Officer :-***

(1) Notwithstanding anything contained under section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order

made by the Recovery Officer in exercise of powers under Sections 25 to 28 (both inclusive).”

20. From the above, it is evident that as against the order passed by the Recovery Officer, remedy of appeal is available before the Tribunal. However, the 1st respondent, after the rejection of I.A. No.630/2007, has not filed any appeal before the Tribunal u/s 30 of the Act. The 1st respondent, instead of filing the appeal u/s 30 of the Act had filed the suit before the civil court.

21. The 1st respondent tries to draw inspiration from Rule 11 (6) of Schedule II of the Act to submit that a suit is very well maintainable. However, it is to be pointed out that Section 18 of the Act explicitly bars the filing of any suit in respect of proceedings, which are the subject matters of the recovery proceedings before the Tribunal.

22. In this regard, a careful perusal of Section 9 of the Code of Civil Procedure reveals that where there exists an implied bar, a suit cannot be entertained. In the present case, Section 18 of the Act clearly bars the filing of any suit against any proceedings, which is the subject matter of recovery

proceeding. That being the case, Section 9 of the Civil Procedure Code directly stands attracted and in view of the said bar, the proceedings, which is the subject matter of the suit property cannot be agitated before the civil court and it could be entertained only by way of appeal against the orders of the Recovery Officer before the Tribunal.

23. When there is an implied bar under Section 9 of the Code of Civil Procedure and when the Act provides for an appeal remedy before the Tribunal u/s 18 against the order passed by the Recovery Officer, without resorting to the said remedy, the act of the 1st respondent in laying the suit before the civil court, that too by invoking Rule 11 (6) of Schedule II of the Act really baffles the Court. When the faster remedy is available before the Tribunal u/s 18, this Court is at a loss to understand the reason for the 1st respondent knocking the doors of the civil court by filing the suit and claiming the relief of declaration of title in his favour.

24. Further, it is the specific case of the 1st respondent that the sale deed was executed on 7.10.1996, though the mortgage was in the year 1990. The

recovery certificate was issued in the year 2002 and, thereafter, auction was conducted and sale certificate was issued in the year 2006. The interim application was filed in the year 2007. However, what is intriguing is the fact as to how the 1st respondent came to know about the sale certificate being issued in favour of the appellant. The only lead through which the 1st respondent could have come to know about the auction sale is through the 2nd respondent, the seller, who is alleged to have sold the subject property to the 1st respondent. The only reason that could be attributed is that the 1st and 2nd respondents, in collusion, want to scuttle the sale made in favour of the auction purchaser.

25. The rights of the auction purchaser, so long as it is bona fide, stands protected and the sale certificate issued in favour of the auction purchaser cannot be set at naught merely because a sale deed was executed behind the back of the bank between the 1st and 2nd respondents. In this regard, useful reference can be had to the decision of the Apex Court in *Sadashiv Prasad case (supra)*, wherein the Apex Court held thus :-

> *"17. Learned Counsel for the auction purchaser Sadashiv Prasad Singh, in the first instance vehemently contended, that in terms of the law declared by this Court, property purchased by a third party*

auction purchaser, in compliance of a court order, cannot be interfered with on the basis of the success or failure of parties to a proceeding, if auction purchaser had bonafidely purchased the property. In order to substantiate his aforesaid contention, learned Counsel representing Sadashiv Prasad Singh placed emphatic reliance, firstly, on a judgment rendered by this Court in Ashwin S. Mehta and Anr. v. Custodian and Ors. MANU/SC/0102/2006 : (2006) 2 SCC 385). Our attention was drawn to the following observations recorded therein:

> *"70. In that view of the matter, evidently, creation of any third-party interest is no longer in dispute nor the same is subject to any order of this Court. In any event, ordinarily, a bona fide purchaser for value in an auction-sale is treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the bona fide purchaser in an auction-sale is saved. (See Nawab Zain-ul-Abdin Khan v. Mohd. Asghar Ali Khan (1887) 15 IA 12) The said decision has been affirmed by this Court in Gurjoginder Singh v. Jaswant Kaur MANU/SC/0634/1994 : (1994) 2 SCC 368).*
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> *(Emphasis Supplied)*

18. On the same subject, and to the same end, learned Counsel placed reliance on another judgment rendered by this Court in Janatha Textiles and Ors. v. Tax Recovery Officer and Anr. MANU/SC/2670/2008 : (2008) 12 SCC 582, wherein the conclusions drawn in Ashwin S. Mehta's case (supra) came to be reiterated. In the above judgment, this Court relied upon the decisions of the Privy

Council and of this Court in Nawab Zain-Ul-Abdin Khan v. Mohd. Asghar Ali Khan MANU/PR/0002/1887 : (1887-88) 15 IA 12; Janak Raj v. Gurdial Singh MANU/SC/0033/1966 : AIR 1967 SC 608; Gurjoginder Singh v. Jaswant Kaur MANU/SC/0634/1994 : (1994) 2 SCC 368; Padanathil Ruqmini Amma v. P.K. Abdulla MANU/SC/0321/1996 : (1996) 7 SCC 668, as also, on Ashwin S. Mehta (supra) in order to conclude, that :

> *"18. It is an established principle of law, that a third party auction purchaser's interest, in the auctioned property continues to be protected, notwithstanding that the underlying decree is subsequently set aside or otherwise."*

It is, therefore, that this Court in its ultimate analysis observed as under:

> *"20. Law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction-sale and a decree-holder purchaser at a court auction. The strangers to the decree are afforded protection by the court because they are not connected with the decree. Unless the protection is extended to them the court sales would not fetch market value or fair price of the property."*
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> *(Emphasis supplied)*

On the issue as has been dealt with in the foregoing paragraph, this Court has carved out one exception. The aforesaid exception came to be recorded in Velji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Ors. MANU/SC/3408/2008 : (2008) 9 SCC 299, wherein it was held as under:

"30. In the first case mentioned above i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud."

31. In the present case, the auction having been confirmed on 30.7.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by anyone in this case.

(Emphasis Supplied)

19. It is, therefore, apparent that the rights of an auction-purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion."

26. From the above, it could very well safely be concluded that the rights of an auction purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase is engineered on the grounds of collusion or fraud. However, in the present case, such plea of collusion or fraud is

not canvassed. The only ground on which suit has been laid is that it has sought a declaratory relief of title.

27. Though a decision of a single Judge of this Court has been relied on by the 1st respondent, however, it is relevant to point out that the decision relied on behalf of the 1st respondent is not applicable to the case on hand as the facts in the said case are totally different and, therefore, this Court is not relying upon the same.

28. To canvass the declaratory relief of title, it is incumbent on the 1st respondent to approach the correct forum. However, without a cavil of doubt, this Court could very well hold that the act of the 1st respondent in not approaching the Tribunal would clearly reveal that the 1st and 2nd respondents were only inclined to drag on the proceedings to the detriment of the auction purchaser and if really the act of respondents 1 and 2 was bona fide, the proper forum for them to have approached would have been the Tribunal and not the civil court. When there is an explicit bar u/s 18 of the Act, the act of the 1st respondent in approaching the civil court, that too, after the issuance of the sale

certificate would clearly show that the act is not bona fide and is against the interest of the bona fide auction purchaser.

29. When the subject property, which is entangled in a mortgage, which had already been recovered by the Tribunal from the 2nd respondent, and which is very well known to the 2nd respondent, the 1st respondent ought to have approached the Tribunal u/s 18 against the order passed by the Recovery Officer, which alone would have been the bona fide approach. However, to defeat the rights of the auction purchaser/appellant, the approach of the 1st respondent by means of a suit before the civil court u/r 11 (6) of the Act is wholly misconceived and impermissible moreso, when there is an implicit bar u/s 9 of the Code of Civil Procedure. Therefore, rightly appreciating the same, the trial court had rejected the unnumbered plaint and the act of the appellate court in setting aside the same and remanding the matter to the trial court clearly reveals error in application of the provisions of the Act and the said order is perverse and the same deserves to be interfered with as the said suit is not maintainable.

30. Accordingly, for the reasons aforesaid, the impugned order passed by the learned Subordinate Judge, Udumalpet, in A.S. No.15/2010 is set aside and the judgment and decree passed by the learned District Munsif, Udumalpet, in C.F.R. No.3462/2010 dated 18.9.2010 stands confirmed and this civil miscellaneous appeal is allowed. However, there shall be no order as to costs in this appeal.

18.12.2024

Index : Yes / No

GLN

To

1. The Subordinate Judge
Udumalpet.

2. The District Munsif
Udumalpet.

M.DHANDAPANI, J.

GLN

PRE-DELIVERY ORDER IN
C.M.A. NO. 913 OF 2012

Pronounced on

18.12.2024