IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2024

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THE HONOURABLE MR. JUSTICE V.LAKSHMINARAYANAN

C.R.P. No. 2598 of 2024
and
C.M.P. No. 13648 of 2024

1. Kanniammal

2. Varadaraj ... Petitioners / Appellants / Petitioners

Vs.

ICICI Bank, Edapadi Branch
ICICI Bank
Branch Manager
Salem Main Road
Edappadi Taluk
Salem District.

... Respondent/ Respondent/ Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order dated 10.06.2024 made in C.M.A. No. 1 of 2024 on the file of the learned Subordinate Judge, Sankagiri confirming the order dated 18.12.2023 made in I.A. No. 5 of 2023 in O.S. No. 97 of 2021 on the file of the learned District Munsif cum Judicial Magistrate, Edappadi by allowing this civil revision petition.

For Petitioners : Ms. S.Vaiduriya

For Respondent : Ms. M.Deeptha Devi

O R D E R

This civil revision petition arises against the order of the learned Subordinate Judge at Sankagiri in C.M.A. No. 1 of 2024 dated 10.06.2024 in confirming the fair and decreetal order of the learned District Munsif cum Judicial Magistrate, Edappadi in I.A. No. 5 of 2023 in O.S. No. 97 of 2021 dated 18.12.2023.

2. O.S. No. 97 of 2021 seeks for the relief of partition and separate possession. The civil revision petitioners are the plaintiffs in the suit. According to the plaintiffs, the suit scheduled mentioned property originally belonged to one Sithha Gounder. The property is a natham property. He was given a natham patta and was enjoying the same. He passed away and on his death, the properties were succeeded to by his wife, Kulanthaiammal and children, Sithhammal, Palanisamy and Chellamuthu. Chellamuthu passed away on 04.10.1989. Therefore, on the death of Sithha Gounder and Kulandhaiammal, the properties devolved on the aforesaid persons.

3. The civil revision petitioners are the wife and son of the deceased Chellamuthu Gounder. They would plead that the defendants 1 to 4 had alienated the property in favour of the sixth defendant. According to the plaintiffs, they are entitled to one-third share of the suit schedule property. The 6th defendant, in turn, mortgaged the property in favour of the respondent ICICI bank and secured a loan. The 6th defendant defaulted in payment of amounts to the bank and therefore the 7th defendant bank brought the property for auction. On coming to know about the same, they presented the suit for partition. Pending the suit, they took out an application in I.A. No. 5 of 2023 seeking for an injunction restraining the ICICI bank from proceeding further with alienation or auction sale of the suit property including the one-third share of the plaintiffs.

4. ICICI bank entered appearance and pointed out that they had advanced the loan to the 6th defendant on the basis of the registered sale deed dated 06.05.2015 and had advanced a loan of Rs. 32,70,000/- in favour of the 6th defendant. As the 6th defendant had committed a default, they had no other option than to invoke the SARFASEI Act. The bank pleaded Section 34 of the SARFASEI Act is a bar to the suit.

5. Taking into consideration the respective pleadings, the learned Trial Judge dismissed the injunction application holding that SARFASEI Act is a bar to the suit. The said finding has been confirmed by the lower Appellate Court. Hence, the revision.

6. Heard Ms. S.Vaiduriya for the civil revision petitioner and Ms. M.Deeptha Devi for the respondent.

7. Ms. S.Vaiduriya would submit that the civil revision petitioners are not the debtors of the bank. She would state that they had not executed a sale deed in favour of the sixth defendant but the sale made by the defendants 1 to 4 can only be with respect to their $1/3^{rd}$ share, which they obtained on the death of Sithha Gounder. She argued that the sale deed executed by the defendants 1 to 4 cannot bind the $1/3^{rd}$ share of the civil revision petitioners. She argued that the Debt Recovery Tribunal cannot deal with the said issue and therefore, the courts below erred in holding that the suit is barred.

8. Ms. M.Deeptha Devi would refer to her counter affidavit and also to the judgment of the Supreme Court in ***Punjab and Sind Bank vs. Frontline***

Corporation Limited, 2023 SCC Online SC 470 and would argue that the order of the courts below requires confirmation.

9. A perusal of the counter affidavit would show that the mortgagor is the sixth defendant and the mortgagee is the seventh defendant. Nowhere in the counter affidavit or in the written statement, the respondent has pleaded that the plaintiffs had joined in execution of the sale deed in favour of the sixth defendant. The simple plea of the plaintiff is that on the death of Chellamuthu, they succeeded to his estate. Chellamuthu died as early as on 1989. Sithha Gounder died subsequently. In terms of the Hindu Succession Act, the legal heirs of the predeceased son are entitled to a share. Therefore, the plea that the plaintiffs cannot file a suit for partition to enforce their right over the property to which they succeeded on the death of Sithha Gounder is untenable.

10. Turning to the judgment cited by Ms. M.Deeptha Devi shows that the respondent before the Supreme Court was a "borrower". In terms of SARFAESI Act, when he is a borrower, his remedy is only before the Tribunal created under the SARFAESI Act. This judgment cannot be applied to the case of a third party to a proceeding. A right of the third party, claiming

a share in the property by virtue of succession, certainly cannot agitated by a Tribunal created for the limited purpose to determine the rights between a secured creditor and a borrower.

11. The narration of the aforesaid facts would go to show that the Courts could have come to a conclusion that a suit for partition is barred by virtue of Section 34 of the SARFASEI Act. A reading of Section 34 of the SARFASEI Act would show that a suit is barred, if and only if, the remedies sought for in the suit can be granted by the Tribunal or the Appellate Tribunal constituted under the Act. Neither the DRT nor the DRAT, which are the authorities constituted under the Act, are empowered to grant a decree for partition. Therefore, the findings of the Court below that the suit is not maintainable cannot be held to be the correct position of law.

12. Though the suit is maintainable, the plaintiff still has to prove the triple test in order to get the benefit of injunction. The fact that the plaintiffs are not parties to the sale deed in favour of the defendant shows that they have a prima facie case. However, the bank having advanced a sum of Rs. 32,72,000/- cannot be left high and dry on account of the fact it has a valid mortgage in its favour executed by the 6th defendant. In case the property is

sold in the SARFASEI Act, the interest of the civil revision petitioners will be jeopardised. Apart from that, the purchaser in such a sale would not get full title to the property. The interest of both sides would have to be balanced. Therefore, the civil revision petitioners will be entitled to an order of injunction, in case they deposit a sum of rupees Rs. 36,60,548/- within a period of 12 weeks from today. In case the said amount is not deposited, M/s. ICICI Bank is at liberty to proceed further with the same. At the time of such sale, the bank shall clearly state about the pendency of this suit.

13. In the result, the civil revision petition is disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

26.09.2024

Index : Yes / No
Speaking order : Yes / No
NCC : Yes / No
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To

1. The Subordinate Judge, Sankagiri.

2. The District Munsif cum Judicial Magistrate, Edappadi.

V.LAKSHMINARAYANAN, J.,

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