(2015) 02 KAR CK 0048

In the Karnataka High Court

Case No : Regular Second Appeal No. 465 of 2011(MON)

Canara Bank APPELLANT

Vs

J.R. Subramanya and Others RESPONDENT

Date of Decision : 04-02-2015

Acts Referred:
Transfer of Property Act, 1882 — Section 59

Citation : (2015) 02 KAR CK 0048

Hon'ble Judges : Ravi V. Malimath, J.

Bench : Single Bench

Advocate : V. Haridas Bhat, Advocate, for the Appellant

Final Decision : Allowed

Judgement

Ravi V. Malimath, J.—The case of the plaintiff is that on 24.02.2003, the first defendant borrowed a loan in a sum of Rs. 1,00,000/- for the purpose of business, while agreeing to pay interest @ 11.25% per annum, compounding quarterly rests and failing which, he agreed to pay further additional interest at 2% per annum. The second defendant is the guarantor for repayment of the said loan.

2. The first defendant had also executed an on-demand pronote for a sum of Rs. 1,00,000/- and he agreed to renew the facilities granted for each year. Once again, the defendant approached the plaintiff-bank for enhancement of OCC limits. On 15.04.2003, the OCC limits to him was to the tune of Rs. 5,00,000/- and in connection with the same, the first defendant also executed on demand pronote and other relevant documents agreeing to pay the interest therein. The first defendant executed the cash credit agreement in favour of the plaintiff bank and towards the security for OCC limits of Rs. 5,00,000/-, the first defendant deposited the title deeds in respect of the suit schedule property with the plaintiff bank, thereby created an equitable mortgage by depositing the title deeds described in ''B'' schedule of the plaint together with all buildings and structures, etc.

3. The first defendant also executed a letter, evidencing depositing of title deeds along with ''A'' and ''B'' suit schedule properties respectively, giving details of the title deeds. That inspite of repeated requests and issuance of a legal notice dated 18.08.2004, the defendant did not bother to regularize the OCC limits. On the other hand, the plaintiff came to know that the first defendant in order to avoid payment of liability and in collusion with the third defendant, executed a sale deed in respect of the suit schedule property. Hence, a notice was issued to the defendants to clear the liability. The same was not done. That after adjusting the surrender value of the L.I.C. policies, as well as the amount available in F.D., the loan amount of Rs. 4,32,865/-, which was outstanding as on 14.03.2006 including interest upto 31.08.2004 and interest from 01.09.2004 onwards till the date of filing of the suit amounting to Rs. 1,12,290/-. That the defendants are liable to pay interest at 15.25% per annum compounded quarterly rests. Hence, the instant suit was initiated for recovery of Rs. 5,44,155/- along with interest at 15.25% per annum.

4. On service of summons, the defendants entered appearance. Defendant No. 1 has not filed any written statement. Defendant Nos. 2 and 3 filed separate written statements. That the plaintiff has no cause of action to file the suit against the defendants. That the second defendant has not affixed his signature to any of the loan documents and he is not liable to pay the suit claim. That he does not know the purchase of ''A'' suit schedule property by the third defendant. That the second defendant is not a guarantor to the first defendant.

5. The third defendant contends that he is not aware of the loan transaction between the plaintiff and the first defendant. The averments in the plaint were partly denied. He denied that there is any charge created in respect of ''A'' suit schedule property. He denied that it is a collusive suit. He pleaded that he is bonafide purchaser having purchased the same for a sale consideration of Rs. 50,000/- vide a registered sale deed dated 29.07.2004, from the first defendant. He has constructed a house and is living there. The same has been done after verification from the Sub-Registrar.

6. On the basis of the pleadings, the trial court framed the following issues:

"i. Whether the plaintiff proves that the defendant No. 1 borrowed Rs. 1,00,000/- on 24.02.2003 under OCC facility agreeing to repay along with interest at 11.25% per annum compounded quarterly by executing pronote and other documents?

ii. Whether the plaintiff proves that defendant No. 2 stood as guarantor for the said loan amount by executing necessary documents?

iii. Whether the plaintiff proves that the defendant No. 1 borrowed Rs. 5,00,000/- on 15.04.2003 under OCC facility agreeing to repay along with interest at 13.75% per annum compounded quarterly by executing pronote and other documents?

iv. Whether the plaintiff proves that the defendant No. 2 stood as guarantor for the said enhanced loan amount by executing necessary documents?

v. Whether the plaintiff proves that the defendant No. 1 has created equitable mortgage about suit properties towards the loan raised?

vi. Whether the plaintiff is entitled for suit claim from the defendants?

vii. Whether the defendant No. 3 proves that, he is a bonafide purchaser for value of ''A'' suit schedule property?

viii. What order or decree?"

7. The plaintiff examined three witnesses as PW-1 to PW-3 and got marked 30 documents. The second defendant was examined as DW-1 and another witness as DW-2 and the second defendant was examined as DW-3 and 21 documents were marked. Issue Nos. 1 to 5 were held in the affirmative. Issue No. 7 was held in the negative. Issue No. 6 was held that the plaintiff was entitled to recover the suit claim from defendant Nos. 1 and 2. The suit was partly decreed for a sum of Rs. 5,44,155/-, against defendant Nos. 1 and 2. The suit against defendant No. 3 was dismissed. Defendant Nos. 1 and 2 were jointly and severally held liable to pay the decreetal amount along with current and future interest at 15.25% and to satisfy the decree within six weeks. Aggrieved by the same, the plaintiff filed an appeal. The appeal was dismissed affirming the judgment and decree of the trial court. Hence, the present second appeal by the plaintiff.

8. By the order dated 16.09.2014, the appeal was admitted to consider the following substantial question of law:

"When both the courts held that the property purchased by the third defendant was under an equitable mortgage in favour of the appellant-bank, whether the Courts below were justified in dismissing the suit against the third defendant solely on the ground that he is the bonafide purchaser despite the fact that the property was mortgaged for the amount due and it was to be auctioned for realization of the dues?"

9. The learned counsel for the appellant/plaintiff contends that the impugned orders of both the Courts below are erroneous. That the Courts below committed an error in dismissing the suit against the third defendant only on the ground that he is a bonafide purchaser. The records would show that the property was mortgaged for the amount due by defendants 1 & 2 by deposit of title deeds. Therefore the property being mortgaged by deposit of title deeds, no sale could have taken place. That the 3rd defendant having purchased the property cannot be considered as a bonafide purchaser. Therefore, the decreetal of the suit against defendants 1 & 2 without a right to sell the mortgaged property and the dismissal of the suit against defendant No. 3 is erroneous. In view of the substantial material evidence on record, the suit should have been decreed against all the defendants and by further granting liberty to the plaintiff to sell

the plaint TV schedule property to satisfy the decree.

10. Notice to respondent No. 1 was held sufficient by the order dated 8-9-2014. Respondent No. 2 is served and unrepresented. Respondent No. 3 is represented by counsel. At the request of the learned counsel for respondent No. 3, the matter was adjourned by the order dated 7-10-2014 and thereafter the matter was listed for consideration on various dates. On 27-1-2015 the respondent No. 3 was absent. Hence the matter was directed to be listed on 29-1-2015 and thereafter on 30.1.2015. It was adjourned to 02.02.2015. The 3rd respondents'' counsel was absent. The matter was adjourned to 4th February, 2015 finally. Today when the matter is taken up for consideration there is no representation by the respondent No. 3. The order sheet would show that the counsel for Respondent No. 3 was always absent inspite of adjournments being granted due to his absence.

11. Heard the learned counsel for the appellant and examined the records.

12. The trial court while considering the issues held that based on the evidence of the plaintiff bank which has remained unchallenged, there is sufficient material to show that the 1st defendant has mortgaged the property by way of depositing the title deeds in respect of the suit schedule property in favour of the plaintiff bank towards the amount raised by the 1st defendant. The other issues with regard to borrowing of the amount, the guarantor as defendant No. 2, etc., were held in the affirmative. Issue No. 7 was with regard to whether defendant No. 3 is the bonafide purchaser of TV schedule property. The trial court was of the view that the contention of defendant No. 3 requires to be accepted. That he is a bonafide purchaser for a valuable consideration. D.W.1 namely defendant No. 3 has stated in his evidence that he is a bonafide purchaser for value and after verifying the records before the Sub-Registrar as well as the Grama Panchayat, he purchased the schedule property from defendant No. 1 and therefore he cannot be blamed. His interest requires to be protected.

13. The contention of the defendants that the mortgage by deposit of title deeds requires to be registered in terms of Section-59 of the Transfer of Property Act was rightly rejected by the trial court. Hence, it is not necessary to dwell further on this issue. Therefore, what requires to be considered is what care and caution was taken by the third defendant while purchasing the property, whether he is truly a bona-fide purchaser.

14. It is the specific case of defendant that since the property was free from any encumbrance, he purchased the property. He relies on the evidence of DW-2 namely, the Second Division Assistant at the Sub-Registrar Office at Chennarayapatna who has stated that his office issued the encumbrance certificate for the period of 01.04.1975 to 16.09.2004 and that the property was free from encumbrances. That the property was purchased in terms of Ex. D-12 on 27-4-2004. Therefore, since there was no encumbrance as on the date of the purchase, the case of defendant No. 3 was accepted. The trial court was of the

view that the plaintiff should have informed the concerned Sub-Registrar that the 1st defendant has mortgaged the schedule property. Since that was not done, it has to be held that the 3rd defendant is a bonafide purchaser for a value. Therefore the suit was dismissed against the defendant No. 3.

15. I''am of the considered view that the reasonings assigned by the trial court are wholly unacceptable. To show that he is a bona-fide purchaser for value, he has to show that he had taken necessary care and caution. Merely verifying the encumbrance of the said property would not be sufficient to substantiate the defence that he is a bonafide purchaser. Admittedly the deposit of title deeds have been made with the bank. When the defendant No. 3 intended to purchase the property in question it was but necessary that the title deeds are verified. In the absence of the title deeds it cannot be said that defendant No. 3 was a bonafide purchaser for value. Therefore a reasonable enquiry would have to be made before it could be contended that he is a bonafide purchaser for value. In order to show that he is a bonafide purchaser, the bonafides with regard to the transaction requires to be established. Such reasonable enquiry would necessarily include title deeds to the property. When the title deeds are not in possession of his vendor, it cannot be said that a reasonable enquiry has been made before the purchase of the property. No sale can take place without delivery of the title deeds. Therefore the plea of the 3rd defendant that he is a bonafide purchaser cannot be accepted.

16. Infact, the material on record would show that he was aware of all the transactions that took place. He was even aware that there was deposit of title deeds. The 1st defendant received the property by way of a gift deed dated 15.04.2003, wherein the value of the property was mentioned at Rs. 2,00,000/-. The sale executed in favour of the 3rd defendant on 29.7.2004 was for a sum of Rs. 50,000/-. The value of the property assessed at Rs. 2,00,000/- cannot fall to Rs. 50,000/- in a year. Hence, it is for this reason alone that the property valued at Rs. 2,00,000/- was sought to be purchased by him for Rs. 50,000/-. By the low sale amount it could be inferred that the 3rd defendant was aware of the deposit of title deeds. He has knowingly purchased litigation. Therefore, by no stretch of imagination can it be said that the defendant No. 3 could be a bonafide purchaser for value. The findings recorded by the trial court are based on flimsy reasons. They cannot be sustained. It is apparent that all the defendants have colluded to cheat the Bank. Under these circumstances, the finding that the 3rd defendant is the bonafide purchaser for value is set aside.

17. Both the Courts came to the conclusion that the plaintiff is entitled to realize the said amount against defendant No. 1 and 2 and dismissed the suit against defendant No. 3. In view of reversing the findings of the trial court against defendant No. 3, the suit requires to be decreed against all the 3 defendants. However, since defendants 1 & 2 have since sold the property and they are bound by the deposit of title deeds to the plaintiff, it is only just and necessary that the consequential relief of permitting the bank to sell the property on the

failure of the defendants to satisfy the decreetal amount requires be granted.

18. Consequently, the substantial question of law is answered by holding that the Courts below were not justified in dismissing the suit against the 3rd defendant solely on the ground that he is the bonafide purchaser, notwithstanding the fact that the property was mortgaged and it was to be auctioned for realization of the dues.

19. It was further pleaded by the defendants that the certain LIC policies as well as Fixed Deposits were deposited with the plaintiff bank as security against the amount advanced, there has been no adjustment towards the said amount. On the contrary it is the specific case of the plaintiff as narrated in the plaint itself that the LIC policies as well as the Fixed Deposits have since been liquidated and the amounts have been adjusted towards the outstanding amounts. Therefore the said contention of the defendants cannot be accepted. The amounts falling to the share of the defendants in terms of the LIC policies and Fixed Deposits have since been adjusted and the balance amount alone is sought to be claimed along with interest.

20. Consequently, the judgment & decree of the trial court in O.S. No. 27/2996, dated 27.02.2009, passed by the Civil Judge, Senior Division, Arasikere and the judgment and decree in R.A. No. 61/2009, dated 28.08.2010, passed by the Court of Principal District Judge, Hassan, are modified. The suit of the plaintiff is decreed for a sum of Rs. 5,44,155/-, against all the defendants. The defendants are jointly and severally directed to pay the decreetal amount with current and future interest at 15.25% per annum. The defendants 1 to 3 shall satisfy the decree within 6 months from the date of receipt of a copy of this order with a single default clause failing which the plaintiff would be entitled to sell the plaint ''A'' schedule immoveable property by auction or otherwise to realize the decreetal amount. The appeal is allowed with costs.