(2002) 06 MAD CK 0087

In the Madras High Court

Case No : S.A. No. 1930 of 1986

Janaki Ammal, Johnsi Rani, Tharani, Giritharan, Leelavathi, Perumalsamy, Rohini and Sudhakar, Rohini, rep. by mother and guardian 5th appellant-Leelavathi	APPELLANT
Vs	
S.S. Subramanian, K. kandasamy, Rama Ammal and Rajagopal	RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:
Provincial Insolvency Act, 1920 — Section 28(2), 28(7), 37, 43, 51(3)

Citation : (2002) 3 MLJ 4

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : K. Srinivasan, for the Appellant; R. Nandakumar, for the Respondent

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—Tmt. Janaki Ammal and others, the appellants herein, are the defendants 4 to 11 in the suit. Having lost before

both the Courts below, they have filed the second appeal.

2.S.S. Subramanian, the first respondent herein filed the suit in the year 1981 for redemption of Othi and for mesne profits against one Kandasamy

and the appellants. It is the case of the plaintiff that the suit properties originally belonged to one Ramasamy who usufructuary mortgaged the

properties in favour of one Chellappa Mavali in 1962 and the said mortgagee assigned the said mortgage in favour of Kandasamy Chettiar, the first

defendant. These properties were brought for sale in a suit filed against Ramasamy through the execution proceedings in the year 1966 and the

same was purchased by one Thirumalai Chettiar in Court auction. After the death of Thirumalai Chettiar, the defendants 2 and 3, the heirs of

Thirumalai Chettiar sold the suit properties in favour of the plaintiff. The plaintiff, the vendee filed the above suit claiming redemption of the

mortgage.

3.It is the case of the defendants that the Court auction sale in favour of Thirumalai Chettiar was not valid, since the same was made during the

pendency of the insolvency proceedings. As the properties vested with the Official Receiver pursuant to the insolvency proceedings, the sale in

favour of Thirumalai Chettiar is not valid and binding pursuant to the provisions of the Provincial Insolvency Act. It is further contended by the

defendants that the Court auction purchaser was aware of the insolvency proceedings, and as such, the Court auction purchaser is not a bona-fide

purchaser. The vendee is not entitled for redemption of mortgage and hence, the suit is liable to be dismissed.

4.On the basis of the above pleadings, the trial Court framed necessary issues and passed a decree in favour of the first respondent/plaintiff.

Aggrieved by the same, the first defendant and the appellants have filed two separate appeals and the same were dismissed by the appellate Court

by a common judgement. Hence, the first defendant and the appellants filed second appeals in S.A.No.813 of 1986 and the present appeal

respectively.

5.It is noticed that the appeal filed by the first defendant/Kandasamy Chettiar in S.A.No.813 of 1986 was dismissed as abated on 7-10-1998,

since he was reported to be dead. Therefore, S.A. No.1930 of 1986 filed by the defendants 4 to 11 alone are taken up for final disposal.

6.Heard learned counsel for parties and also gone through the records including the judgements impugned.

7.When the second appeal was admitted on 28-11-1986, this Court framed the following substantial question of law:-

Whether, on the facts and circumstances of the case, the Court auction sale in favour of Thirumalai Chettiar is not valid?

8.In elaboration of the above substantial question of law, Mr. Srinivasan, learned counsel appearing for the appellants/defendants would contend

that both the Courts below missed an important point with reference to the interpretation of Sections 28(2) and 51(3) of the Provincial Insolvency

Act (hereinafter referred to as ""the Act""). According to him, when the insolvency petition was pending and when the properties belonging to the insolvent vested with the Official Receiver, the sale of the properties in Court auction cannot be a valid one, since the same was effected without the leave of the Court. When admittedly the insolvency proceedings were pending when the Court auction sale was effected, the subsequent order of adjudication, by which the said Ramasamy was adjudged as an insolvent, as per Section 28(7) of the Act, would relate back and date effect from the date of presentation of the insolvency petition on which it was made, and as such, the Court auction sale is invalid. Even though the said adjudication was subsequently annulled u/s 43 of the Act, the Court by the very same order, directed the properties to be vested with the Official Receiver u/s 37 of the Act. Learned counsel for the appellant further submitted that the plaintiff cannot invoke Section 51(3) of the Act, as the good faith on the part of the Court auction purchaser has not been established.

9.The above submissions of learned counsel appearing for the appellants are resisted by learned counsel for the first respondent/plaintiff contending that the reasonings given by both the Courts below for decree of the suit are perfectly justified, and there is no substantial question of law which warrants interference in the second appeal. He would further submit that when it is the case of the defendants that the plaintiff would not be protected u/s 51(3) of the Act, it is for the defendants to establish that the Court auction purchaser was not a bona-fide purchaser as he was aware of the insolvency proceedings, and as such, the contentions urged by learned counsel for the appellants/defendants should be rejected.

10.On going through the relevant documents and the judgements impugned, and on hearing the submissions made by learned counsel for both parties, I am of the considered view that there is no valid reason to hold that the conclusion arrived at by the Courts below are wrong.

11.The main point urged by learned counsel for the appellants/defendants 4 to 11 is that the Court auction sale is not valid in view of the pendency of the insolvency proceedings. Both the Courts below, while referring to the relevant Sections of the Act, would conclude that the materials available in this case do not show that the Thirumalai Chettiar was aware of the pendency of insolvency proceedings and as such, Thirumalai Chettiar has to be held as the bona-fide purchaser of properties. This factual finding, in my view, cannot be said to be without any basis, as the

perusal of the deposition of P.W.1 examined on the side of the plaintiff and D.Ws.1 to 3 examined on the side of the defendants, would make it

clear that the finding is correct.

12.There is no dispute in the fact that the suit properties originally belonged to Ramasamy. The said Ramasamy usufructuary mortgaged the

properties in favour of one Chellappa Mavali under the original of Ex.A-1 on 4-10-1962. The said Chellappa Mavali assigned the mortgage in

favour of the first defendant/Kandasamy Chettiar on 13-12-1970. In the meantime, the suit properties were brought by sale by one Muthusamy

Chettiar in a separate suit filed by him against Ramaswamy in O.S. No.15 of 1965. These properties were purchased by one Thirumalai Chettiar

on 11-4-1967 under Ex.A-3. Even before the execution, during the pendency of the suit in O.S. No.15 of 1965, the said Ramasamy, the owner of

the property filed insolvency petition in I.P. No.9 of 1966 before the Insolvency Court. The Court auction sale was on 8-3-1967 and the same

was confirmed on 11-4-1967. Admittedly, the insolvency petition was disposed of only on 12-3-1968, long after the Court auction sale. Though it

is prescribed u/s 28(7) of the Act that the order of adjudication passed on 12-3-1968 would take effect from the date of presentation, namely, on

16-4-1966, the Court auction sale which was made on 8-3-1967 and confirmed on 11-4-1977, cannot straightaway be held to be invalid, unless

there are materials to show that the Court auction purchaser was aware of the insolvency proceedings. It cannot be disputed that the title of the

auction purchaser who purchased the property in good faith, is protected by Section 51(3) of the Act. Under those circumstances, the only

question to be considered in the present case is as to whether the auction purchaser had purchased the property in good faith as a bona-fide

purchaser.

13.It is the plaintiff''s case that after the death of Thirumalai Chettiar, the legal representatives of Thirumalai Chettiar, namely, the defendants 2 and

3 sold the properties to the plaintiff. The plaintiff as P.W.1 either in the plaint or in the deposition, do not say anything about the pendency of the

insolvency proceedings. As a matter of fact, while he was cross-examined, he emphatically denied having any knowledge of the pendency of the insolvency proceedings or the subsequent order of adjudication. It is the case of the defendants in the two separate written statements through the

first defendant and the appellants/defendant 4 to 11, the sale is not valid because of the pendency of the insolvency proceedings and the

subsequent order of adjudication.

14.It has been held in OFFICIAL RECEIVER, MADURAI VS. DINDIGUL CO-OPERATIVE LAND MORTGAGE BANK LTD.,

THROUGH ITS SECRETARY 1974 (II) M.L.J--NOTES OF RECENT CASES - page 9) as follows:-

Once an adjudication is made and that dates back to the date of presentation of the insolvency petition it naturally follows that the vesting of the

property in the Official Receiver or the Court, as the case may be, also dates back to the date of presentation of the petition.

Once the property is deemed to have vested in the Official Receiver, a sale without notice to him would be one without jurisdiction as far as he is

concerned. The Official Receiver steps into the shoes of the judgment-debtor, once the property vests in him. When the Official Receiver is in the

position of the judgment-debtor a sale without notice to him is certainly invalid as far as he is concerned.

15.It is the evidence of the defendants through D.Ws.1,2 and 3 that Thirumalai Chettiar was relative of Muthuswamy Chettiar who was the plaintiff

in O.S. No.15 of 1965, brought the properties for sale in auction. When a suggestion was put to P.W.1, the plaintiff, that Thirumalai Chettiar is the

relative of Muthuswamy Chettiar, it was emphatically denied. Unfortunately, the defendants did not adduce any evidence to show that the said

Thirumalai Chettiar was aware of the insolvency proceedings while he purchased the property in Court auction. Under those circumstances, it

cannot be held that the sale is not protected by virtue of Section 51(3) of the Act. u/s 51(3) of the Act, it is specifically provided that a person

who, in good faith, purchases the property of a debtor under a sale in execution, shall, in all cases, acquire a good title to it against the receiver.

This Section would relate to the effect of insolvency of antecedent transaction. Though an attempt was made to show that Thirumalai Chettiar was

the relative of Muthuswamy Chettiar, as noted above, nothing was produced by the defendants or anything could be elicited from P.W.1 in the course of cross-examination to indicate that the auction purchaser was aware of the insolvency proceedings. The defendants 2 and 3 who are the

legal representatives of the said Thirumalai Chettiar who sold the property to the plaintiff, did not contest the matter and they were set ex-parte.

Under those circumstances, it can be safely held, as pointed out by the Courts below that there is absolutely nothing to show that Thirumalai

Chettiar who purchased the property in Court auction sale was aware of the insolvency proceedings and as such, was not a bona-fide purchaser.

16.The above aspect could be viewed from yet another angle. The defendants 2 and 3, the vendors of the plaintiff, who were set ex-parte, raised

the very same question in another suit filed by them in O.S. No.1284 of 1974. After trial, it has been specifically held that Thirumalai Chettiar was

not benami of Muthuswamy Chettiar and the auction sale in favour of Thirumalai Chettiar brought in suit in O.S. No.15 of 1965, is valid, and

necessary properties would belong to the said Thirumalai Chettiar, even though the insolvency proceedings were pending during the relevant time.

When this aspect was dealt with by the trial Court, it has been specifically held that this point would be res-judicata as far as the defendants 4 to

11, the appellants are concerned, as they are the legal representatives of the said Ramaswamy Chettiar, who was the party to the suit i.e., he is the

second defendant in O.S. No.1284 of 1974. Though the validity of the Court auction proceedings were considered by the trial Court in detail, it

was not on the basis of the objection raised by the defendants 4 to 11, to whom res-judicata would apply, but on the basis of the contention urged

by the first defendant to whom the res-judicata would not apply. On this point also, the contention raised by learned counsel for the appellants

would fail.

17.There is yet another aspect as well. The suit was filed by the plaintiff for redemption of the suit properties directing the first defendant to

handover the properties to the plaintiff. The other defendants 4 to 11, the appellants herein were added as parties as the legal representatives of the

said Ramasamy who mortgaged the properties. There is no relief sought for as against the appellants with reference to the handing over of the

property. As noted above, the appeal filed by the first defendant/Kandasamy, against whom the relief was sought for, was dismissed as abated in

S.A. No.813 of 1986 on 7-10-1998, as he died on 21-10-1990 itself. That apart, it is seen from the records that the appellants, the defendants 4

to 11, at the time of admission of the appeal, obtained a status-quo order with reference to the handing over of the possession of the properties to

the plaintiff, by order dated 28-11-1986. But it was brought to the notice of this Court that the possession has already been taken on 14-11-1984

itself and therefore, this Court, by order dated 22-12-1986, vacated the status-quo order.

18.From the above facts, it is clear that nothing survives in the second appeal. For the reasons mentioned above, the second appeal is dismissed

with costs.

