
(2016) 09 MAD CK 0095
In the Madras High Court
Case No : C.S. No. 590 of 2002

Vasundhara

APPELLANT

Vs

M. Dhanalakshmi

RESPONDENT

Date of Decision : 22-09-2016

Acts Referred:

Specific Relief Act, 1963 — Section 37, Section 39

Citation : (2017) 171 AIC 788 : (2016) 8 MLJ 715

Hon'ble Judges : Mrs. Pushpa Sathyanarayana, J.

Bench : Single Bench

Advocate : Mr. S.R. Raghunathan, Advocate, for the Plaintiff; Mr. R. Thiagarajan, Advocate, for the Defendant

Final Decision : Dismissed

Judgement

Mrs. Pushpa Sathyanarayana, J. - C.S. No. 590 of 2002

The suit is for a direction to the defendant to vacate and deliver vacant possession of the Schedule "B" property to the plaintiff; for permanent injunction restraining the defendant or her men or servants or agents or any one acting on her behalf from in any way interfering with the plaintiff's peaceful possession and enjoyment of the Schedule "A" property; for a direction to the defendant to pay a sum of Rs. 75,000/- towards damages for wrongful use and occupation of the suit Schedule "B" property; for a direction to the defendant to pay the future damages for wrongful use and occupation of Schedule "B" property at Rs. 25,000/- p.m., from this date till the date of handing over of possession of same to the plaintiff and for costs of the suit.

2. One Kalyani Iyer was the sole and absolute owner of the suit property, which is a land and building in T. Nagar, Chennai. She had mortgaged the same with M/s. Park Town Benefit Fund Limited. As there was a default in payment of the mortgage debt, the property was brought in public auction through M/s. Vamana Auctioneers on 28.03.2002. The plaintiff was declared as the highest bidder in

the auction which was for Rs. 45 Lakhs. Accordingly, the said amount was deposited by the plaintiff and got a sale deed executed in her favour which was registered on 16.05.2002, thereby becoming the sole and absolute owner of the suit property. Even prior to the purchase of the said property, the plaintiff has been in possession of a portion of the suit property, by running a business therein, as she was the daughter-in-law of the owner Kalyani Iyer.

3. It is stated that on 16.05.2002, the defendant entered into a portion of the suit property, which is described in Schedule "B". Therefore, a notice was issued to her on 20.07.2002 asking her to vacate the premises. The occupation of the defendant in the B Schedule property is without any right or title as she is not paying any rent. Hence, she is only a rank trespasser. Hence, the suit has been filed for eviction of the defendant from "B" Schedule property and deliver vacant possession of the same to the plaintiff and for permanent injunction and for damages for use and occupation.

4. The suit was contested by the sole defendant contending that the plaintiff is not the owner of the suit property as the alleged sale executed in favour of the plaintiff by M/s. Park Town Benefit Fund Limited, is illegal, non-est in the eye of law and the entire auction is vitiated. It is stated by the defendant that the original mortgagor, namely Kalyani Iyer passed away on 06.04.2000. However, the property was brought to sale in auction on 28.03.2002. It is her further case that she had offered Rs. 47 Lakhs as purchase price, which is the highest amount. It is also stated that she had made a deposit of Rs. 5000/- on 28.02.2002 as earnest money deposit and obtained a receipt from the auctioneers. Hence, the sale in favour of the plaintiff is illegal. After the demise of the original owner Kalyani Iyer, the property devolved upon her heirs. One of the heirs, namely C. Srinivasan, who is the son of Kalyani Iyer, who was in the production of Teleserial and films entered into with an arrangement with the defendant on 10.12.2001, borrowed a sum of Rs. 9 Lakhs and put the defendant in possession of the "B" Schedule property and agreed to repay the said sum in equal instalments at the rate of Rs. 75,000/- per month. Pursuant to the said arrangement, the defendant was put in possession of the ground floor of the suit property.

5. It is the further case of the defendant that the Chairman of M/s.Park Town Benefit Fund Limited colluded with the plaintiff and brought about the auction in a surreptitious fraudulent manner, ignoring the highest offer of the defendant. In fact, the defendant had filed a suit in Tr.C.S. No. 933 of 2002 originally on the file of the City Civil Court, Chennai, which was subsequently transferred here for declaration that the auction sale held on 28.03.2002 is null and void and for permanent injunction restraining the plaintiff herein, in interfering with her peaceful possession. The defendant also has been remitting a sum of Rs. 75,000/- per month in separate account in Indian Bank, High Court Branch. As the sale deed is non-est in the eye of law, the defendant prayed for dismissal of the suit.

Tr.C.S. No. 933 of 2002.

6. The suit is for a declaration that the auction sale held on 28.03.2002 by the third defendant in respect of the property bearing door no.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai - 600 017 confirmed by the first defendant in favour of the second defendant in respect of the said property which is morefully described in the schedule hereunder is null and void; for permanent injunction restraining the first defendant or their men, agents, servants, subordinates or anyone under or through them from executing sale deed in respect of property bearing door no.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai - 17 morefully described in the schedule hereunder; and for a direction to the defendants to pay the costs of the suit.

7. The defendant in C.S.No.590 of 2002 is the plaintiff in this suit, who has sought for a declaration that the auction held on 28.03.2002 by the third defendant is null and void in respect of the suit property and the sale in favour of the second defendant is also illegal. The contention of the plaintiff is that she was the highest bidder and the second defendant was the wife of one of the co-owners and her bid was only for Rs. 45 Lakhs. According to the plaintiff Dhanalakshmi, there were other bidders who had taken part in the auction by depositing Rs. 5000/-. Hence, the above relief is sought for.

8. As the plaintiff had shown M/s.Park Town Benefit Fund Limited as well as M/s. Vamana Auctioneers as defendants, each of the defendant has filed their written statement separately. In the written statement filed by the first defendant, who is M/s. Park Town Benefit Fund Limited, it is admitted that the suit property was auctioned on 28.03.2002. But it is contended that though another person by name K.V. Kandaswamy had deposited Rs. 5000/- for the purpose along with the second defendant, they did not raise their voice nor did they participated in the auction and M/s.Park Town Benefit Fund Limited, who is the mortgagee, further denied that the plaintiff offered a sum of Rs. 47 Lakhs as her bid. Though admittedly the initial upset price was fixed at Rs. 75 Lakhs, as there were no other bidders, it was gradually brought down and fixed at Rs. 40 Lakhs. The highest bid was that of the second defendant. Though the plaintiff had alleged that there was a huge due to the mortgagee, it was not mentioned what was the sum. If the dues were huge, the first defendant would not have fixed lesser price, when there was a highest price in the offer. The allegation of collusion was denied by the first defendant and there were only three bidders and one K.V. Kandaswamy, who had paid the sum of Rs. 5000/- has not participated in the auction. As the auction was conducted in the manner known to law, the plaintiff is not entitled to the suit relief.

9. The second defendant who is the highest bidder, in whose favour, the sale was executed, specifically denied in the written statement that the plaintiff bid the property for Rs. 47 Lakhs in the auction. The suit for declaration that the auction held on 28.03.2002 is null and void, is not maintainable, even immediately after the auction and the same should have been challenged at the earliest and not

after the sale deed executed and registered in her favour. Hence, contended that the suit had become infructuous, as no relief to set aside the sale has been sought for.

10. The written statement of the third defendant, who is the auctioneer, while denying all the allegations, submitted that the suit had become infructuous, as the suit property had already been sold and the sale deed had been executed in favour of the highest bidder. The auctioneers have contended that the property was sold in auction, in the manner known to law, after giving wide publicity and notice etc. There was also a paper publication effected in "Dhina Thanthi". The participants, other than the plaintiff were the second defendant, one R. Subramania Iyer, J. Kannan and K.V. Kandaswamy. The said K.V. Kandaswamy did not participate in the public auction and they were not participated in the auction and the upset price was fixed at Rs. 40 Lakhs. After hot contest, the second defendant was declared as the highest bidder, which was witnessed by others. The unsuccessful bidders were returned the earnest money deposit. The alleged collusion, fraud or irregularity pleaded in the plaint were all denied by the third defendant. The third defendant auctioneers specifically stated that on 28.03.2002, viz., the date of public auction, the plaintiff Dhanalakshmi had not participated in the same and hence, she has got no locus standi to contest the above suit. As the auction was conducted following the conditions of sale, the provisions of the Transfer of Property Act and according to the normal business practise, the plaintiff has no right to challenge the same and the suit has to be dismissed as vexatious.

11. On 22.09.2011, this Court framed the following issues in C.S.No.590 of 2002:

"1. Whether the plaintiff has acquired a valid title under sale deed dated 16.05.2002 bearing document No.1117/2002 on the file of the Sub-Registrar, T. Nagar pursuant to the acceptance of the highest bid made by him in the auction held on 28.03.2002 at the instance of the mortgagee M/s. Park Town Benefit Fund Limited?

2. Whether the defendant has trespassed into the suit "B" schedule property as alleged in the plaint?

3. Whether the plaintiff is entitled to a decree against the defendant to vacate and deliver vacant possession of the plaint "B" Schedule property?

4. Whether the plaintiff is entitled to the relief of permanent injunction from in any way interfering with the plaintiff's peaceful possession and enjoyment of the plaint "A" schedule property?

5. Whether the plaintiff is entitled to recover a sum of Rs. 75,000/- towards damages for use and occupation till the date of filing of the suit?

6. Whether the plaintiff is entitled to future damages for use and occupation at the rate of Rs. 25,000/- per month? And

7. To what other relief, the plaintiff is entitled? "

12. On 22.09.2011, this Court framed the following issues in Tr.C.S. No.933 of 2002:

"1. Whether the plaintiff was the highest bidder in the auction held on 28.03.2002 ?

2. Whether the auctioneer has improperly rejected the highest bid of the plaintiff and accepted a lower bid made by the 2nd defendant and whether the auction sale is liable to set aside?

3. Whether the plaintiff is entitled to a declaration that the auction sale held on 28.03.2002 by the 3rd defendant in respect of the suit property, which was confirmed by the first defendant in favour of the second defendant, is null and void?

4. Whether the plaintiff is entitled to a permanent injunction against the first defendant not to execute a sale deed in respect of the suit property? And

5. To what other relief, the plaintiff is entitled? "

13. Ms. M. Dhanalakshmi was examined as P.W.1 and Ms. V. Vasundhara was examined as D.W.1 and 12 documents were marked as Exs.P1 to P12 and 4 documents were marked as Exs.D1 to D4.

14. Heard the submissions made by Mr. S.R. Raghunathan, learned counsel appeared for the plaintiff in C.S. No.590 of 2002 and second defendant in Tr. C.S. No.933 of 2002 and Mr. R. Thiagarajan, learned counsel appeared for the sole defendant in C.S. No. 590 of 2002 and plaintiff in Tr.C.S. No.933 of 2002 and perused the materials available on record. There was no appearance for the defendants 1 and 3 in Tr. C.S. No. 933 of 2002. For the sake of convenience, the parties will be referred to by their status in C.S. No.590 of 2002.

15. One Smt. Kalyani Iyer was the original owner of the suit property, who had mortgaged the same with M/s. Park Town Benefit Fund Limited. The suit property was brought to auction due to the default committed by her and the plaintiff is the purchaser of the same, in the auction conducted on 28.03.2002. The said auction is now called in question, by the defendant, who claims to have participated in the auction and gave the highest bid. The defendant claims to be highest bidder in the auction for a sum of Rs. 47 Lakhs and she also relies on the receipt issued for Rs. 5000/- which is the earnest money deposit. However, the same is not mentioned in evidence and the same is also not marked as document. With respect to production of the receipt for Rs. 5000/-, the defendant Dhanalakshmi has admitted that the original was taken by Vasundhara and she also says that the auction was cancelled and hence, the money was returned, whereas in the written statement filed by her in C.S.No.590 of 2002, it is stated that she had offered Rs. 47 Lakhs, which is the highest bid, but it is subject to the condition that Rs. 9 Lakhs has to be set-off, which is payable to her.

16. In para 9 of the written statement filed by the defendant, it is stated as follows:

"9. M/s.Park Town Benefit Fund Limited colluded with the plaintiff, brought about the auction proceedings in a surreptitious and fraudulent manner and ignoring the highest offer made by the defendant for purchase of the property, subject to her rights to seek for set-off of Rs. 9 Lakhs payable to her by the heirs of Late Smt. Kalyani Iyer pursuant to the usufructuary mortgage created in her favour"

17. So far as the auction sale is concerned, the defendant has stated that there was a hot contest in the auction between the plaintiff and the defendant and the defendant was the highest bidder and the bid of the plaintiff was only for Rs. 45 Lakhs. Once again in the written statement filed in C.S.No.590 of 2002, the defendant has stated that in the auction proceedings held on 28.03.2002, after acceptance of the defendant's offer for the purchase of the property, the subsequent execution of the sale deed in favour of the plaintiff on 16.05.2002 is illegal and invalid. Whereas, in the plaint filed in Tr. C.S. No.933 of 2002, there is no whisper about the offer by the defendant or the acceptance by the auctioneer.

18. Even in the common proof affidavit filed by the defendant Dhanalakshmi, in para 6, she has stated that on questioning the fraudulent manner in which the auction was conducted and on challenge by the defendant and one K.V. Kandaswamy, the entire auction process was abruptly stopped. She has further stated since the entire auction process is vitiated by fraud and the rejection of the offer made by her and accepting the offer of the plaintiff Vasundhara is a fraud on her and an undue favour for Vasundhara for certain undisclosed reasons by the auctioneer and the mortgagee. In para 9 of the proof affidavit, it is admitted that the highest offer made by the defendant for the purchase of the property was subject to her right to seek for set-off of Rs. 9 Lakhs payable to her by the legal heirs of Late Kalyani Iyer to the usufructuary mortgage created in her favour.

19. While so, in the cross examination, the defendant had stated as follows:

"I took return of Rs. 5,000/- that I had paid to participate in the auction. I was informed that the auction was cancelled and hence the money was returned and the original receipt was taken back by the auctioneer...."

When the defendant had categorically stated that Rs. 5000/- was refunded to her not because she was the unsuccessful bidder in the auction, but because the auction was cancelled on the said date. She is estopped from contending that the auction was vitiated.

20. From the conjoint reading of the pleadings and the evidence of the defendant-Dhanalakshmi, she has been blowing hot and cold by saying that she was the successful bidder on one hand and on the other hand, the auction itself was cancelled. In the light of the foregoing discussions, the plaintiff has acquired a

valid title under the sale deed dated 16.05.2002 and the auction held on 28.03.2002 is valid. Hence, issue no.1 in C.S. No.590 of 2002 and issue nos.1,2,3 in Tr.C.S. No.933 of 2002 are held in favour of the plaintiff Vasundhara.

Issue Nos. 4, 5 and 6

21. The learned counsel for the defendant-Dhanalakshmi strenuously contended that the auction was not valid. Even presuming that there was a valid sale, pursuant to the auction, the right of redemption of the defendant is destroyed, in view of the auction. Though the said contention at the first blush appears to be very attractive, on a close scrutiny reveals the cracks within, because to make such a plea that the right of redemption is destroyed by the auction, the defendant ought to have established that there was a valid usufructuary mortgage. Excepting her own interested testimony, there is no valid and substantial evidence to prove that there was an usufructuary mortgage by one of the co-owners of the property pursuant to which she was put in possession of a portion of the suit property. The best person to speak about the same would be one of the sons namely, C. Srinivasan S/o. Kalyani Iyer to whom she had lent money and who had put her in possession.

22. However, the defendant Dhanalakshmi had not made the usufructuary mortgagor as a party, nor she has chosen to examine him. Even with respect to possession, there had been inconsistent plea by the defendant with reference to the date of her possession. Though there is no pleading in the plaint with respect to possession, in the written statement filed in C.S. No. 590 of 2002, she has stated that her possession was from 10.12.2001 and she was in occupation of the ground and the first floor. However, in the cross examination, she pleads that she came in possession even prior to 10.12.2001.

23. In the written statement in para 8 she has admitted that she was put in possession of the property consisting of ground and first floor of the portion, pursuant to the agreement dated 10.12.2001, she has produced the photocopies of Exs.P4 and P5 dated 01.06.2001 and 25.06.2001, viz., the registration slip cum receipt and the letter addressed to the Chennai Telephones by the defendant Dhanalakshmi and both the exhibits are much prior to the said date. There is no valid reason given for non production of the originals. When the possession of the defendant is only pursuant to the agreement called usufructuary mortgage, the production of Exs.P4 and P5 dated at least six months prior to the date of occupation are mysterious and the same cannot be accepted and have to be rejected. Since Exs.P4 and P5 were only photocopies, it was objected to at the time of marking. The defendant also had not produced any shred of evidence to prove the fact that she was possessed of any resources, to lend money to C.Srinivasan or to bid in the auction. In the cross examination, she has specifically admitted that she was not an income tax assessee and she did not possess any resources to participate in the bid.

24. As stated earlier, there is no proof for the alleged usufructuary mortgage

also. As the said mortgage was not registered, no scrap of paper could be produced before this Court. The defendant Dhanalakshmi though claims to be the highest bidder trying to thwart the sale in favour of the plaintiff alleging fraud committed in the auction sale, the same has not been pleaded and proved. So far as the recovery of money by the defendant from C. Srinivasan is concerned, she seems to have already acquired promissory notes and cheques allegedly executed by him, which are marked as Exs.P6 series and P8 series. Since the said C. Srinivasan is not a party to any of the suits, they are irrelevant to the case. The claim of the defendant that she had already filed a suit to recover money from C. Srinivasan is also not substantiated by any evidence by marking the plaint etc.

25. The plaintiff in Tr. C.S. No. 933 of 2002 who is challenging the auction has to first of all establish her locus standi to file the suit. In view of the finding in issue no.1 that the auction was valid, the claim of the defendant has to be rejected.

26. When the defendant has got no locus standi to challenge the sale, the question of benefits, price offered, whether it is fair and equitable and whether the original mortgagor or her legal heirs were put on notice become otiose. When there is a valid auction and the defendant had got no right to challenge the same, whether the sale is vitiated or not and the other aspects with respect to the sale, need not be gone into.

27. The learned counsel for the defendant was pleading that the plaintiff, who is the daughter-in-law of the original mortgagor, instead of protecting the interest of her mother-in-law, took part in the auction, would amount to breach of trust. Secondly, the tender conditions were not valid. The mode of payment was not stated and also, the burden of proof was on the plaintiff. In the absence of specific pleadings to the above effect, it is unnecessary to go into the such question.

28. The learned counsel for the defendant relied on a judgment of the Bombay High Court in *Satyapal Uttamchand Chowdhary v. Rukayyabai Huseinbhai Bandukwala And Another* [AIR 1993 Bombay 203] wherein the mortgagor of the property filed a suit challenging the defendant- mortgagee's right to auction the mortgaged property, which was filed even prior to the auction took place. It was held on facts that the mortgagee and purchaser were acting in tandem and committed fraud in conducting the sale. Hence, the auction was declared as void and not binding on them. But in the case on hand, the challenge is by the third party claiming to be one of the participants in the auction and the highest bidder. In the absence of any evidence, the above citation is not applicable to the facts and circumstances of the case.

29. The plaintiff has made her claim for recovery of possession from the defendant, based on the valid title under Ex.P9 dated 16.05.2002. When the sale is held to be valid and the possession of the defendant is not legal, the plaintiff is entitled to a decree, as prayed for.

30. In the light of the above discussions and the findings, the suit in C.S.No.590 of 2002 is decreed as prayed for and Tr. C.S.No. 933 of 2002 is dismissed. No costs. Consequently, connected applications are closed.

C.S. No. 590 of 2002

Ms. Pushpa Sathyanarayana, J.

31. After pronouncement of the judgment today, learned counsel for the defendant in C.S. No. 590 of 2002 seeks time to vacate and hand over the possession of the suit property. With the consent of the learned counsel for the plaintiffs, three months time is granted.