Ritu Gupta and anr Vs. Usha Dhand and ors

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SooperKanoon Citation : sooperkanoon.com/1171476

Court : Delhi

Decided On : Oct-30-2014

Judge : G. S. Sistani

Appellant : Ritu Gupta and anr

Respondent : Usha Dhand and ors

Advocate for Def. : Mr. Nabi

Advocate for Pet/Ap. : Mr. Mitra

Judgement :

$~12. * IN THE HIGH COURT OF DELHI AT NEW DELHI + CS(OS) 188/2011 % Judgment dated 30.10.2014 RITU GUPTA & ANR ..... Plaintiffs Through: Mr.Gaurav Mitra, Mr. Vijayender Kumar and Ms. Rhea Mitra, Advs. versus USHA DHAND & ORS ..... Defendants Through: Mr.Hashmat Nabi, Adv. for D-4 Mr.Suresh Arora, Adv. for D-5 Mr. Sanjeev Gupta, Adv. for D-7 Mr.Sarfaraz Khan, Adv. for D-8. CORAM: HON'BLE MR. JUSTICE G.S.SISTANI G.S. SISTANI, J (ORAL) I.A.10405/2011 (under Section 151 CPC), I.A.12761/2011 (under Order 39 Rules 1 & 2 CPC filed by plaintiffs against defendant No.8), I.A.12763/2011 (under Order 39 Rules 1 & 2 CPC filed by plaintiffs against defendants No.4 &

5) 1. Plaintiff has filed the present suit for declaration, permanent injunction and mandatory injunction. Plaintiffs claim themselves to be the owners and are in absolute possession of property bearing No.J-2/9, Krishna Nagar, New Delhi-

110059, measuring 114 sq. yds., comprising of ground floor, first floor and terrace. The plaintiffs are stated to have purchased this property from defendant No.1 vide a registered sale deed dated 28.04.2010 registered on 30.04.2010 as document No.7421 in Additional Book I, Volume No.4596 on pages 15-27 registered with Sub-Registrar VIII, Delhi for total sale consideration of Rs.27,40,000/-. The sale consideration was paid by means of a cheque. Possession of this property is stated to be with the plaintiffs alongwith the entire chain of original title deeds of the property.

2. It is the case of the plaintiffs that when the property was purchased, the plaintiffs were assured that the property is free from all encumbrances, mortgages etc. The chain of sale transactions with regard to the said property is detailed in the plaint. A notice under Section 13 of SARFAESI Act, 2002 was issued and information was received that symbolic possession of the property would be taken over on 26.08.2010 for the sale of the property on 25.09.2010 by defendant No.4 i.e. PNB Housing Finance Ltd., which led to the filing of the present suit.

3. During the pendency of the suit, the plaintiffs also learnt that the ground floor of the property stood mortgaged to three banks and first floor to two banks on different dates. The plaintiffs in these circumstances filed the present suit.

4. During the pendency of the suit IA No.6546/2011 and 6547/2011 were filed by defendants No.4 and 5 under Order 7 Rule 11 CPC for rejection of the plaint on the ground that the present suit was barred under the provisions of Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). By a detailed order dated 19.11.2013, both the applications were dismissed. An appeal filed by defendant No.4 before the Division Bench was dismissed as withdrawn. However, leave was granted to the appellant (defendant No.4 herein) to take up the pleas as available in law at the time of hearing of the applications filed by the plaintiffs under Order 39 Rules 1 & 2 CPC.

5. The learned counsel for the plaintiffs submits that after the judgment of the learned Single Judge dated 19.11.2013 has attained finality, the logical consequences would be that the interim order should be confirmed as in case any

of the banks are permitted to sell the property, the subject matter of the present suit would vanish which would result in serious prejudice being caused to the rights of the plaintiff. Mr. Mitra, counsel for the plaintiffs also submits that the findings of the learned Single Judge are clear and explicit that prima facie it appears that a fraud has been played by the sons of defendant No.1 and the sale deeds sought to be relied upon by the parties (defendants) are in fact a nullity and the only genuine sale deed is the one executed by defendant No.1 in favour of the plaintiffs as sale consideration has actually passed to her and in the other sale deeds, which are the basis of mortgage being created the sale consideration has merely been shown and returned back to the sons who have played the fraud.

6. Mr.Mitra, counsel for the plaintiffs also contends that the learned Single Judge has recognised the fact that the matter would require trial and the present case falls within the exception as carved out by various judgments of this Court as also the Apex Court as detailed in paragraph 13 of the order of the Single Judge.

7. Learned counsel appearing for all the banks have submitted that since the sale deeds sought to be relied upon by them pertain to a date prior to the sale deed executed by the mother in favour of the defendants, thus fraud, if any, has been played upon the plaintiffs and even otherwise counsel appearing for PNB Housing Finance Ltd. and also for Bank of Baroda submit that their respective sale deeds are of earlier point of time and once the sale deed pertaining to ground floor and first floor had been executed, the mother had no right to execute the subsequent sale deeds in favour of the plaintiffs and the plaintiffs would only have the right to seek damages but would have no right, title or interest over the property in question.

8. I have heard learned counsel for the parties. By a detailed order dated 19.11.2013 the applications filed by two banks under Order 7 Rule 11 CPC have been dismissed. The order of the learned Single Judge has also attained finality as an appeal filed against the aforesaid order stands dismissed as withdrawn. Before the rival contentions of the parties can be considered, it would be worthwhile to reproduce the following paragraphs of the order of the learned Single Judge dated 19.11.2013:

13. The above submissions have been considered. At the outset, it must be noted that Section 34 of the SARFAESI Act has been interpreted in several decisions. In Mardia Chemicals v. Union of India (supra), it was clarified in para 51 that to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.

This principle was reiterated in Nahar Industrial Enterprises Limited v. Hongkong Shanghai Banking Corporation (supra). Therefore, it is not entirely accurate to state that, after the proceedings under the SARFAESI Act have commenced, in no circumstance can the jurisdiction of the civil Court be invoked. The decision in Jagdish Singh v. Heeralal (supra) did not involve any allegation of fraud by any of the parties and, therefore, the decision is distinguishable on facts. Further, there can be no doubt that a mortgage by deposit of title deeds is recognised in law, and if validly made, would bind the subsequent bonafide purchaser as well. The position, however, would be different when the title deeds forming the basis of such mortgage are themselves questioned as being fraudulent. This has been recognised in Ram Prakash Mehra v. Union of India (supra) and Sadanand Properties Pvt. Ltd. v. Punjab National Bank (supra). In V. Thulasi v. Indian Overseas Bank III (supra), the Court found on facts that the Plaintiff had not made out a case of fraud.

14. In the present case, not only has fraud been pleaded, but even the Defendant Banks do not dispute the fact that the Sale Deeds executed by Defendant No.1 in favour of her sons in respect of the same property are prima facie bad in law.

15. Learned counsel appearing for PNBHFL submitted that the Sale Deed dated 23rd August 2006, which was deposited with it by way of mortgage, was only in respect of the ground floor and was for a sale consideration of Rs. 30,00,000. On the other hand, the Plaintiffs purchased the entire building by the Registered Sale Deed dated 28th April 2010, nearly four years later, for just Rs. 27.40 lacs. He accordingly submitted that if, at all, it was the Sale Deed by which the Plaintiffs

purchased the suit property, the said sale deed to be fraudulent, and, in any event, the validity of the Sale Deed dated 23rd August 2006 was not vitiated.

16. The specific case of the Plaintiffs is that the bank officials have colluded with Defendants 1, 2 and 3 and that is why there have been as many as five Sale Deeds within a short span of time between 23rd August 2006 and 26th February 2007 in respect of the same property. Learned counsel for the Plaintiffs has pointed out various features of the Sale Deeds, which, according to him, throw serious doubts on their validity. He also pointed out that a criminal complaint has been filed which is under investigation.

17. Without expressing any final view on the above contentions of the parties, the Court, prima facie, is satisfied that the pleas urged by the parties raises triable issues. Prima facie, it also does appear that the Sale Deeds executed by Defendant No.1 in quick succession in respect of the same property are of doubtful validity and that the plea that they are vitiated on account of fraud would require evidence to be led by the parties before a final view can be taken in the matter. The Court is of the view that the case falls within the exceptional category pointed out by the Supreme Court in Mardia Chemicals v. Union of India (supra), with the caveat that it is premature for the Court to express any view as to which of the parties has been party to the fraud that prima facie appears to have been committed.

18. Consequently, the plaint cannot be rejected at this stage on the basis of Section 34 of the SARFAESI Act. The applications are accordingly dismissed.

9. Learned Single Judge has firstly reached a conclusion that the case of the plaintiffs falls in the exception to the general rule that the jurisdiction of the Civil Court is barred under Section 34 of the SARFAESI Act. Reliance has been placed on the judgment of Mardia Chemicals v. Union of India and Nahar Industrial Enterprises Limited v. Hongkong Shanghai Banking Corporation. Once the learned Single Judge reached the conclusion that the Civil Court has the jurisdiction to entertain the matter, a prima facie case in favour of the plaintiffs would stand established. In para 14 of the order, the Single Judge has observed that the banks do not dispute the fact that the sale deed executed by defendant No.1 (mother) in

favour of her sons in respect of the same property is prima facie bad in law whereas Mr. Nabi, counsel for defendant No.4 points out that this paragraph stands clarified in the order of the Division Bench wherein the counsel has clarified that he has not conceded that any fraud has been played or committed as far as the appellant is concerned.

10. The mere fact that there are different sale deeds executed by the mother in favour of her sons being five in number prima facie would show there is some irregularity if not an element of fraud in executing any such sale deeds.

11. At this stage, the arguments of counsel for the banks cannot be accepted that the sale deed in favour of the plaintiff is later in point of time and thus cannot be relied upon for the reason that it is unclear as to whether the sale deeds in favour of the sons are genuine or the sale deed in favour of the plaintiff is genuine. Moreover Mr.Mitra, has submitted that in the case of the plaintiff sale consideration has been paid by a cheque, which stands encashed and money deposited in the account of the mother (seller) whereas in the sale deeds in favour of the son the money stands withdrawn by the son. This is yet another issue which would require trial.

12. The plaintiff has also made an allegation that such fraud would not have been committed into without the connivance of the officer of the bank. This fact has also been noticed by the learned Single Judge.

13. In my view, at this stage, in case any of the banks is permitted to sell the property, the subject matter of the present suit would vanish and serious prejudice would be caused to the rights of the plaintiff and the bank(s), whereas if the property is preserved till the decision of the suit, none of the parties will suffer irreparable loss. The plaintiff has been able to make out a strong prima facie case and balance of convenience is also in favour of the plaintiff. Thus to balance the equities, the interim order is confirmed with the following directions: (i) The trial of this case will be expedited. (ii) All parties agree that the evidence would be recorded by a Local Commissioner. (iii) All parties would maintain status quo with regard to title and possession of the suit property. The plaintiff shall not change the character of the property. All the applications are disposed of. CS(OS) 188/2011

14. As time is required by the parties to place documents on record, which have been filed in different proceedings before Debt Recovery Tribunal, list the matter before Joint Registrar on 09.12.2014 for admission/denial of documents.

15. List the matter before Court on 22.01.2015 for framing of issues and for passing directions with regard to fixing the dates of trial and appointment of Local Commissioner. All written statements be taken on record. G.S.SISTANI, J OCTOBER30 2014 ns /pdf