IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

WP(C).No. 34178 of 2008 (R)

PETITIONER:

THE MANJOOR SERVICE CO-OPERATIVE
BANK LTD., NO. K-73, MANJOOR.P.O
VAIKOM, REPRESENTED BY ITS SECRETARY.

BY ADVS.SRI.V.G.ARUN
SRI.T.R.HARIKUMAR

RESPONDENT:

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1. THE TAHSILDAR, VAIKOM.

2. THE DISTRICT COLLECTOR, KOTTAYAM.

3. THE MANAGER,
I.N.G VYSYA BANK, RAVIPURAM BRANCH, ERNAKULAM.

4. THOMAS ULAHANNAN, THENGUMPILLIL
HOUSE, MANJOOR.P.O, VAIKOM
KOTTAYAM DISTRICT.

5. XAVIER THOMAS, THENGUMPILLIL HOUSE,
MANJOOR.P.O, VAIKOM, KOTTAYAM DISTRICT.

R3 BY ADVS. SRI.R.S.KALKURA
SRI.M.S.KALESH
SRI.HARISH GOPINATH
SRI.V.VINAY MENON
R1 & R2 BY GOVERNMENT PLEADER SRI. REJI JOSEPH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09-11-2015, THE COURT ON 19.11.2015 DELIVERED THE FOLLOWING:

WP(C).No. 34178 of 2008

APPENDIX

PETITIONER'S EXHIBITS:

P1 : TRUE COPY OF THE MORTGAGE DEED DATED 9.7.1999.

P2 : TRUE COPY OF THE TITLE DEED DATED 29.12.1994.

P3 : TRUE COPY OF THE GEHAN DATED 4.6.2008.

P4 : TRUE COPY OF THE GEHAN DATED 4.6.2008.

P5 : TRUE COPY OF THE GEHAN DATED 4.6.2008.

P6 : TRUE COPY OF THE POSSESSION CERTIFICATE DATED 15.5.2008.

P7 : TRUE COPY OF THE NOTICE ISSUED BY THE 1ST RESPONDENT DATED 1.9.2008.

P8 : TRUE COPY OF THE APPLICATION ALONG WITH AFFIDAVIT DATED 31.10.2008.

P9 : TRUE COPY OF THE SALE NOTICE ISSUED BY THE 1ST RESPONDENT DATED NIL.

P10 : TRUE COPY OF ORDER NO.B7-15965/06 OF THE 2ND RESPONDENT DATED 26.7.2008.

RESPONDENTS' EXHIBITS:

R3(a) : TRUE COPY OF THE APPLICATION SUBMITTED BY XAVIER THOMAS AND THOMAS ULAHANNAN JOINTLY DATED 22.1.2004.

R3(b) : TRUE COPY OF THE LETTER OF SANCTION DATED 28.1.2004 ISSUED BY THE BANK.

R3(c) : TRUE COPY OF THE PROMISSORY NOTE JOINTLY EXECUTED BY DEFENDANTS 4 AND 5 DATED 28.1.2004 IN FAVOUR OF THE BANK FOR RS.10 LAKHS.

R3(d) : TRUE COPY OF THE TAKE DELIVERY LETTER EXECUTED BY 4 AND 5 IN FAVOUR OF THE BANK DATED 28.1.2004.

R3(e) : TRUE COPY OF THE AGREEMENT DATED 28.1.2004 EXECUTED BY RESPONDENTS 4 AND 5 IN FAVOUR OF THE BANK.

R3(f) : TRUE COPY OF THE LETTER OF REQUISITION ISSUED BY THE BANK TO THE DISTRICT COLLECTOR KOTTAYAM DATED 25.3.2006.

//TRUE COPY//

P.A. TO JUDGE

smv

CR

SHAJI P. CHALY, J.

W.P.(C). No.34178 of 2008

Dated this the 19th day of November, 2015

JUDGMENT

This Writ Petition is filed by the petitioner Service Co-operative Bank seeking to quash Exts.P7 and P9 recovery proceedings initiated by the first respondent for and on behalf of the 3rd respondent Bank and further to declare that the properties of the 4th respondent mortgaged with the petitioner bank is not liable to be proceeded against for the amounts allegedly due from the 5th respondent to the 3rd respondent bank.

2. Brief facts for the disposal of the Writ Petition are as follows:

3. Petitioner is a Co-operative Society, a Primary Credit Society having its area of operation spread over Manjoor Village in Vaikom Thaluk. The wife of the 4th respondent, a member of the petitioner bank had availed a loan on the strength of a mortgage deed executed in respect of the property of the 4th respondent, having an extent of 8.09 Acres lying in suvey No.625/1 in Block No.33 of Manjoor Village and the

improvements thereon, evident from Ext.P1 mortgage deed. The true copy of the title deed deposited by the 4th respondent is produced as Ext.P2. The loan, amount of Rs.50,000/- is repayable within a period of 12 years. The 4th respondent availed enhanced loan of Rs.12 lakhs without closing the existing loan by executing Exts.P3, P4 and P5 gahans in favour of the petitioner bank each for an amount of Rs. 4 lakhs.

4. During 2008, petitioner came to know that against the dues of the 5th respondent, who is the brother of the 4th respondent towards the 3rd respondent bank, notice had been issued by the 1st respondent under Section 34 of the Kerala Revenue Recovery Act attaching the very same property which is mortgaged with the petitioner bank by the 4th respondent. Thereupon, petitioner made enquiries and found that the RR proceeding is initiated to recover an amount of Rs.12,73,688/- together with interest and cost due from the 5th respondent to the 3rd respondent against the personal loan availed by the 5th respondent. It was also understood by the petitioner that, 4th respondent had stood guarantee for the said loan and that only a personal guarantee had been given by the 4th respondent and his

property was not provided as security. Ext.P6 possession certificate was issued by the Village Officer, Manjoor stating that as on 15.5.2008 the 4th respondent has mortgaged the property with the petitioner bank. Thereafter, petitioner has secured Ext.P7 copy of the sale notice and found that the very same property mortgaged with the petitioner bank is under attachment at the instance of the 3rd respondent bank. Thereupon, petitioner preferred Ext.P8 before the 2nd respondent as provided under Section 46 of the Revenue Recovery Act requesting for release of attachment as the property stood mortgaged in the name of the petitioner bank. It is also stated that though the order of attachment is dated 01.09.2008, a copy of the same could be obtained only on 20.10.2008 and the claim petition was filed on 31.10.2008 within a period of 14 days prescribed by Section 36 of the Kerala Revenue Recovery Act. But in spite of the earnest efforts of the petitioner, 2nd respondent has not initiated any action. It is under such circumstances, petitioner has filed this Writ Petition.

5. First respondent has filed a counter affidavit contending that it has proceeded against the mortgaged property as per a

Revenue Recovery Certificate issued by the 2nd respondent for an amount of Rs.12,73,698/- with interest at the rate of 24% per annum w.e.f. 24.3.2006, from the 5th respondent. That it is as per the authorisation that notices were issued under Sections 7 and 34 of the Kerala Revenue Recovery Act. It is also contended that in the meanwhile Kaduthuruthy Urban Co-operative Bank filed W.P.(C) No.9999/2008 before this Court against the revenue recovery proceedings and this Court has disposed of the said Writ Petition on 27.3.2008 directing the Deputy Tahasildar, Vaikom to forward Ext.P6 therein to the 2nd respondent District Collector, Kottayam within one month and the 2nd respondent was directed to take a decision thereon within a period of three months. Accordingly, District Collector has passed Ext.P10 order dated 26.7.2008 holding that the first charge on the above attached property goes to Kaduthuruthy Urban Co-operative Bank and so revenue recovery proceeding cannot be initiated against the said property.

6. It is also contended that the petitioner bank has informed that, the 4th respondent has pledged the above attached property in the bank, and in view of Ext.P8 application filed by the

petitioner before the 2nd respondent, the auction was postponed till the disposal of the this Writ Petition. Thus 1st respondent contends that the actions initiated by the 1st respondent was in accordance with law.

7. Third respondent has filed counter affidavit contending that the 5th and 4th respondents applied for commercial loan for the purchase of a Tata vehicle evident from Ext.R3(a). Pursuant to the aforesaid application 3rd respondent had vide letter dated 28.01.2004 granted a vehicle loan of Rs.10,00,000/- to the 5th and 4th respondents respectively evident from R3(b). It is also contended that respondents 4 and 5 have executed promissory notes and take delivery letter in favour of the bank, and bank is entitled to proceed since the respondents 4 and 5 have failed to repay the loan amount. Therefore, the bank justified its action by seeking recovery proceedings through respondents 1 and 2 in view of appropriate notification issued under Section 71 of the Kerala Revenue Recovery Act. Therefore, it is contended by the 3rd respondent bank that the petitioner is entitled to proceed against the mortgaged property covered under Ext.P1.

8. Heard learned counsel for the petitioner, Sri. T.R.

Harikumar, learned Government Pleader and learned counsel for the 3rd respondent, Sri.R.S. Kalkura.

9. Even though notice was served on respondents 4 and 5 there is no appearance for the said respondents. Learned counsel for the petitioner has invited my attention to Section 35, 36 and 36A of the Kerala Co-operative Societies Act and contended that the petitioner bank is entitled to have first charge on the assets of the mortgagor. Since the property is mortgaged as per Ext.P1, and Exts.P3, P4 and P5 gahans are executed, as per Section 35, 36 and 36A of the Act, the petitioner is entitled to have charge over the properties covered by Ext.P1 mortgage. Therefore, learned counsel contended that the proceedings initiated by the 1st and 2nd respondents for and on behalf of the 3rd respondent is bad in law. Moreover, it is contended that to secure personal loan respondents 4 and 5 have not mortgaged any properties much less the property covered under Ext.P1 mortgage in favour of the 3rd respondent. It is contended further that, the loan was provided by the 3rd respondent bank on personal guarantee of R4 and R5 and against the vehicle for which the loan was secured. In such

circumstances, petitioner contended that the proceedings initiated by respondents 1 and 2 under the R.R. Act by issuing Ext.P7 demand cannot be sustained under law. On the other hand learned counsel for the 3rd respondent contended that they are entitled to seek revenue recovery proceedings under the Kerala Revenue Recovery Act by virtue of the notification issued by the State Government to recover priority loans and other specified loans as per the notification issued under Section 71 of the R.R. Act. Learned Government Pleader submits that the 1st respondent proceeded on the basis of the certificate issued by the 2nd respondent pursuant to the requisition made by the 3rd respondent bank. Therefore, the proceedings are in accordance with law.

10. Having considered the rival submissions, I am of the considered opinion that the question that is to be considered is whether the petitioner bank is entitled to get charge over the properties covered by Ext.P1 as provided under the Co-operative Societies Act interdicting the 3rd respondent bank to proceed against the same under the Revenue Recovery Act. Section 71 of the Kerala Revenue Recovery Act only enables the authorities

under the Act to proceed in terms of the Recovery Certificate issued by the District Collector subject to the provisions of other statutes in vogue. Viewed in that circumstance, in view of the charge created under Sections 35, 36 and 36 A of the Kerala Co-operative Societies Act, the certificate issued by the District Collector in favour of the 3rd respondent can only be treated as, subject to the said provisions of the Kerala Co-operative Societies Act. Merely because a notification is issued under Section 71 of the Kerala Revenue Recovery Act, the same is not an absolute right created in favour of the 3rd respondent. Section 71 of the Act only stipulates that, in public interest by notification in the Gazette declare the provisions of the Kerala Revenue Recovery Act applicable to the recovery of amounts due from any person or class of persons to any specified institution or any class or classes of institutions. The exercise of the power conferred under Section 71 is circumscribed by the provisions of other statutes by which certain powers and rights are conferred on other persons. Taking into account the said aspect, it can be seen that the petitioner Co-operative Society as of right is entitled to have the benefit of Sections 35, 35A and 36 of the Co-operative Societies Act, in supersession to the rights of 3rd person under Section 71 of the RR Act.

11. The mortgage made by the 4th respondent with the petitioner bank is not disputed by any of the respondents but the contention of the 3rd respondent bank is that since they are entitled to proceed under the Revenue Recovery Act by virtue of the notification contained under Section 71, they can proceed so and recover the amounts due from respondents 4 and 5. I have gone through Section 36A of the Kerala Co-operative Societies Act and found that the petitioner has got charge on movable or immovable property of the borrower if a gahan is created. So also as per Section 35(2) a person who has created a mortgage is precluded from transferring the charged property under sub-section 1 except with the previous permission in writing of the Society which holds charge. So also sub-section 3 of the said Section makes it clear that if any transfer is made, the same will be void. But the said charge created is subject to the prior claim of the State Government if any. So also it is found that 2nd respondent has passed Ext.P10 order in similar circumstances holding that when a prior charge is created against the property

under the Co-operative Societies Act, no recovery proceedings can be initiated by resorting to the Kerala Revenue Recovery Act. Taking into account all these aspects, I am of the considered opinion that the action of respondents 1 and 2 by issuing Ext.P7 demand is arbitrary and illegal and therefore, cannot stand the test of law.

12. Thus taking into account the cumulative circumstances, facts and law involved in the subject matter, I have no hesitation to hold that Ext.P7 demand notice issued by the 1st respondent pursuant to the recovery certificate issued by the 2nd respondent cannot be sustained under law. Under normal circumstances, the parties should have been relegated to pursue Ext.P8 application pending before the 2nd respondent, but since 7 years have elapsed since the filing of the said application, I do not think it is proper and reasonable to relegate the parties to the statutory authority. Therefore, I set aside Ext.P7, leaving open the liberty of the petitioner bank to proceed to recover the loan on the basis of the mortgage and gahans executed by the 4th respondent as per Ext.P1, P3, P4 and P5 respectively. It is also made clear that when sale of the mortgaged property is

held, the petitioner shall issue a notice to the 3rd respondent bank enabling it to participate in the auction or to otherwise proceed in accordance with law.

Therefore, the Writ Petition is allowed setting aside Ext.P7, and direct the petitioner to issue notice to the 3rd respondent, when the petitioner bank proceeds for sale of the mortgaged property in order to realise the amount due as per the mortgage created by the 4th respondent.

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.A. To Judge

smv
09.11.2015