

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.06.2016

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.No.28968 of 2015

and

W.P.No.1 of 2015

Punjab National Bank,
represented by its Chief Manager,
ARMB, Khivraj Buildings, Anna Salai,
Chennai-600 006.

... Petitioner

Vs.

1.The Sub-Registrar,
Anna Nagar, Chennai.

2.M/s.Amarlal Tanoomal (HUF),
represented by Mr.Amarlar Tanoomal,
S/o.Tanoomal,
No.75, Elephant Gate Street,
Chennai-79.

3.Mr.R.Srinivasan,
S/o.Mr.V.C.Raghavan,
No.20, Pedariyar Koil Lane, Chennai-1.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Mandamus, directing the 1st respondent to permit the petitioner-Bank to register the sale certificate executed as and when by the petitioner-Bank in favour of the auction purchaser by invoking SARFAESI Proceedings pertaining to the property owned by the third respondent namely undivided share of the land measuring an extent of 424 sq.ft out of 1692 sq.ft together with flat bearing No.E (Ground Floor), having a plinth area of 703 sq.ft which includes commons area situated at Old Door No.46, New Door No.58, Chetty St., Ayanavaram, Chennai-23, forming part of Ayanavaram Village, comprised in T.S.No.148/1, Block No.15, Puraswakkam-Perambur Taluk, Chennai District, in accordance with law.

For Petitioner : Mr.M.L.Ganesh

For respondents : Mr.M.Digvijaypandian, AGP (For R1)
Mr.T.S.Kandha Kumar (For R2)
R3 - No appearance

ORDER

This writ petition has been filed by the petitioner, praying for issuance of a Writ of Mandamus, directing the 1st respondent to permit the petitioner-Bank to register the sale certificate to be executed by the petitioner-Bank in favour of the auction purchaser by invoking the provisions under SARFAESI Act, pertaining to the property owned by the 3rd respondent namely undivided share of the land measuring an extent of 424 sq.ft out of 1692 sq.ft together with Flat bearing No.E (Ground Floor), having a plinth area of 703 sq.ft which includes common area situated at Old Door No.46, New Door No.58, Chetty Street, Ayanavaram, Chennai-23, forming part of Ayanavaram Village, comprised in T.S.No.148/1, Block No.15, Puraswakkam-Perambur Taluk, Chennai District.

2.In the affidavit filed in support of the writ petition, it has been averred by the petitioner, inter alia, as follows:-

2-1.The 3rd respondent herein had availed various credit facilities viz., cash credit, term loan and housing loans from the petitioner-Bank and for the due repayment of the loan liability, the 3rd respondent had offered his immovable property as collateral security as evident from Memorandum of Deposit of Title Deeds (MOD), registered as Doc.No.3701/2008 on the file of the Sub-Registrar, Anna Nagar. Since the 3rd respondent had failed and neglected to repay the loan amount, his account had become NPA in the books of the petitioner-Bank. The 3rd respondent and guarantors are jointly and severally due and liable to pay the total outstanding loan amount of Rs.2,07,20,658/- to the petitioner-Bank.

2-2.The petitioner-Bank had filed an application in O.A.No.10/2012 before the Debt Recovery Tribunal-II, Chennai and the Tribunal ordered for attachment of the mortgaged property of the 3rd respondent on 17.01.2013. Despite knowing the fact that the property of the 3rd respondent was mortgaged with the petitioner-Bank as early as in the year 2008, the 2nd respondent has deliberately suppressed the said fact and obtained an order of attachment in I.A.No.12213 of 2011 in

O.S.No.5918 of 2011 on the file of the XVI Assistant Judge, City Civil Court, Chennai.

2-3.The petitioner-bank has initiated SARFAESI proceedings as against the mortgaged property and due to an entry about the attachment order passed by the City Civil Court, Chennai in the said suit, the 1st respondent is refusing to register the sale certificate in favour of auction purchaser. Consequently, the intending auction purchaser is not willing to purchase the mortgaged property, due to attachment and refusal by the 1st respondent/Sub-Registrar to register the document, even though the said attachment is subsequent to the first charge created in favour of the petitioner-Bank by the 3rd respondent as evident from MOD. The petitioner-Bank is a secured creditor holding first charge on the mortgaged property and the 2nd respondent has no legal right or title to attach the same, thereby causing great prejudice to the bank to recover the public money. Hence, the petitioner-Bank has come forward with the present writ petition seeking a direction the 1st respondent to register the sale certificate to be executed by the petitioner-Bank in respect of the subject property.

3.When the matter was taken up for consideration, the learned counsel for the petitioner-Bank submitted that the petitioner-Bank is a secured creditor and the Bank is holding the security on the mortgaged property and the 2nd respondent has no legal right over the subject property, which was mortgaged by the 3rd respondent. In fact, the petitioner-Bank had filed O.A.No.10 of 2012 before the Debt Recovery Tribunal, Chennai and obtained an order of attachment on 17.01.2013 in respect of the subject property. Further, the petitioner-Bank had filed an application before the XVI Assistant Judge, City Civil Court, Chennai to lift the attachment order passed in I.A.No.12213 of 2011 in O.S.No.5918 of 2011; but the said application was dismissed by the Court below stating that the petitioner-Bank is not a party to the suit. The said suit filed by the 2nd respondent was decreed on 16.02.2012. The learned counsel for the petitioner would further submit that the 2nd respondent had filed only money suit and they chosen to attach the mortgaged property, despite knowing the fact that the MOD entry is reflecting in the encumbrance certificate, prior to the attachment order passed in O.S.No.5981 of 2011. In this regard, the learned counsel for the petitioner has also relied upon the judgment delivered by this Court in W.P.(MD).No.2635 of 2012, dated 13.03.2013, [M/s.D.P.Properties Pvt. Ltd., Vs. Sub-Registrar, Arasaradi and others] and submitted that the order of attachment obtained by the 2nd respondent from the City Civil Court, Chennai in O.S.No.5918 of 2011, is not a bar for registering the sale certificate executed by the petitioner-Bank

in respect of the subject property. Thus, the learned counsel for the petitioner sought for a suitable direction to the 1st respondent.

4. Per contra, the learned counsel appearing for the 2nd respondent, by filing a counter affidavit, submitted that before filing the present writ petition, the petitioner-Bank had filed an application to lift the attachment order passed by the City Civil Court, Chennai; but, the said application of the petitioner-Bank was dismissed by the City Civil Court, Chennai, on merits. Only thereafter, the petitioner-Bank has filed the present writ petition. Moreover, the 1st respondent has not passed any order refusing to register the document of the petitioner-Bank; under such circumstances, the present writ petition is not maintainable. Thus, the learned counsel for the 2nd respondent sought for dismissal of the writ petition.

5. Heard the submissions made on either side and perused the materials available on record.

6. In my considered opinion, it is a well settled legal principal that the order of attachment passed by the Court is not a bar for registering the document. The sale of the subject property, pending the order of attachment, is void only as against the claims enforceable under the order of such attachment and not in respect of other claims. In this regard, a useful reference could be made in the judgment delivered by this Court in W.P.(MD).No.2635 of 2012, dated 13.03.2013, [M/s.D.P.Properties Pvt. Ltd., Vs. Sub-Registrar, Arasaradi and others], wherein it has been held as follows:-

"16. With regard to the next question, it is the submission of the learned counsel for the 2nd respondent bank that as per Section 64 C.P.C., the sale deed executed by the vendor of the petitioner is void since order of attachment passed by the DRT is in force. Section 64 of C.P.C. reads as follows:

"64. Private alienation of property after attachment to be void:- (1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

Explanation: For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets".

17. A close reading of the said provision would show that the transfer or delivery of the property attached in favour of third person is void only as against all claims enforceable under the said attachment; otherwise, it is not void generally. In this regard, an useful reference could be placed in the judgments relied on by the petitioner. In 1971 (3) SCC 878 (supra), the Hon'ble Supreme Court has held as follows:

"6. But Mr.Chagla appearing on behalf of Pillai raised an alternative contention. He said that at the time of sale there was another outstanding attachment and the sale in favour of Padmavathi being contrary to such attachment was, in any event, void. It appears that on January 17, 1956, Pillai had in execution of a decree obtained in Suit No.55 of 1953, attached the property, but that attachment was removed on March 23, 1957, on satisfaction of the decree. By Section 64, Code of Civi Procedure, the attachment is only void as against all claims enforceable under the attachment, and it is not void generally. Since the attachment effected on January 17, 1956 was removed, any private alienation contrary to such attachment cannot be regarded as void for there are no claims enforceable under the attachment, dated January 17, 1956".

18. In (1985) 2 SCC 167 (supra), the Hon'ble Supreme Court has held as under:

"30. The consequence of attachment of certain shares of a company held by a shareholder for purposes of sale in a proceeding under section 149 of the Land Revenue Act is more or less the same. The effect of an order of attachment is what Section 149 of the Land Revenue Act itself says. Such attachment is made according to the law in force for the time being for the attachment and sale of movable property under the decree of a civil court. Section 60 of the Code of Civil Procedure, 1908 says that except those items of property mentioned in its proviso, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities of money, debts, shares in a corporation and all other saleable property, moveable or immovable, belonging to a judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf, is liable for attachment and sale in execution of a decree against him. Section 64 of the Code of Civil Procedure, 1908 states that where an attachment of a property is made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is forbidden under Section 64 of the Code of Civil Procedure is a private transfer by the judgment-debtor of the property

attached contrary to the attachment, that is, contrary to the claims of the decree holder under the decree for realisation of which the attachment is effected. A private transfer under section 64 of the Code of Civil Procedure is not absolutely void, that is, not void as against all the world but void only as against the claims enforceable under the attachment. Until the property is actually sold the judgment debtor retains title in the property attached. Under Rule 76 of Order 21 of the Code of Civil Procedure, 1908, the shares in a corporation which are attached may be sold through a broker. In the alternative such shares may be sold in public auction under Rule 77 thereof. On such sale either under Rule 76 or under Rule 77, the purchaser acquires title. Until such sale is effected, all other rights of the judgment debtor remain unaffected even if the shares may have been seized by the officer of the court under Rule 43 of Order 21 of the Code of Civil Procedure, 1908 for the purpose of effecting the attachment, or through a Receiver or through an order in terms of Rule 46 of Order 21 of the Code of Civil Procedure may have been served on the judgment debtor or on the company concerned".

19. The dictum laid down in the above judgment (1985) 2 SCC 167 (supra), gives a fitting answer to the issue raised in this writ petition. So far as the order of attachment passed by the DRT is concerned, the transfer is not void generally but it is void only as against the claims enforceable under the said attachment. Therefore, I am of the opinion that the sale of the property attached cannot be construed as illegal sale. However, if the 2nd respondent bank exercises its right as against the property, the petitioner cannot raise any objection because the sale of the vendor in favour of the petitioner is void in respect of the order of attachment obtained by the 2nd respondent bank. So, even if

the property is sold in favour of the petitioner, the 2nd respondent bank can always exercise its right as against the said property.

20. In view of the above finding, I am of the opinion that the sale of the subject property pending the order of attachment is void only as against the claims enforceable under the order of said attachment and not in respect of other claims. Therefore, the sale of the property, which is under attachment, cannot be said as illegal."

The dictum laid down in the above judgment is squarely applicable to the present facts of the case. From the dictum laid down in the said judgment, it is clear that even if the property which is under attachment is sold, the person who got attachment order can always exercise his rights as against such property; therefore, the attachment order is not a bar for registering the sale deed. In the present case, the petitioner-Bank is standing in a better position because the petitioner-Bank is the secured creditor. Under such circumstances, I am of the opinion that the 1st respondent shall register the sale certificate issued by the petitioner-Bank in respect of the subject property.

7. For the foregoing reasons, the writ petition is allowed and a direction is issued to the 1st respondent to register the document/sale certificate of the petitioner-Bank in respect of the subject property.

Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssv

To

1. The Sub-Registrar,
Anna Nagar, Chennai.

+1cc to Mr.M.L.Ganesh, Advocate Sr.29353

W.P.No.28968 of 2015
and
W.P.No.1 of 2015

gj[co]
srg 28/07/2016