IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 27.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.2879 of 2018

Arumugam .. Petitioner

Vs.

The Authorised Officer,
The Chief Manager,
Punjab National Bank,
Asset Recovery Management Branch,
Punjab National Bank Tower,
46-49, R.H.Road,
Chennai - 600 014. .. Respondent

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Mandamus, directing the respondent to refund the sum of Rs.67 lakhs deposited by the petitioner on 17.10.2013 with interest at the rate of 24 % from 17.10.2013 till the date of repayment.

For Petitioner : Mr.R.R.Pradheep

For Respondent : Mr.M.L.Ganesh

ORDER
(Order of this Court was made by S.MANIKUMAR, J.)

Auction purchaser who had paid Rs.67 lakhs, has filed the instant writ petition for a Mandamus, directing the respondent, to refund a sum of Rs.67 lakhs, deposited by the petitioner on 17.10.2013, with interest at the rate of 24 % per annum, from 17.10.2013, till the date of repayment.

2. According to the petitioner, one Mr.K.Suresh has availed credit facilities from Punjab National Bank, Chennai, respondent herein, during February 2006, for his business purpose. To secure the above said loan, Mr.Suresh had mortgaged the property being the land and building situated at Kodambakkam Village Division No.131, Mambalam - Guindy Taluk, Chennai District comprised in S.No.367/3 Part, block 126,

T.S.No.37, bearing Plot No.A-68, Door No.6, Gnanamani Street, Jafferkhanpet, Chennai - 600 083, ad measuring East to West on both sides 40 Feet and on the North to South side on both sides 60 feet in total measuring an extent of approximately 2400 Sq.Ft., along with super structure building in the land measuring approximately 1760 Sq.Ft.

3. Declaring the said loan account of K.Suresh, as Non Performing Asset, Punjab National Bank, Asset Recovery Management Branch, Chennai, respondent herein, has brought the aforesaid property for auction on 17.10.2013, under SARFAESI Act 2002. Petitioner being a successful bidder in the auction and deposited a sum of Rs.67 lakhs with the bank.

4. According to the petitioner, after auction, he came to know that, even in the year 2009, Mr.K.Suresh, owner of the property had entered into an agreement through his Power Agent, M/s.Anuja Bajaj with one Mr.Rajesh, for sale of the property. Power Agent is the wife of Mr.Rajesh. The said agreement dated 23.02.2009, has been registered as Document No.383 of 2009. Petitioner also come to know that on 16.06.2009, similar sale agreement has been registered for the same property, vide Document No.1313 of 2009 with one Dr.V.Kalanithi.

5. Petitioner has contended that upon enquiry, he found that both the abovesaid agreements are reflected in the Encumbrance Certificate, but the bank, without disclosing the same, published an advertisement in the newspapers for sale of the secured asset, owned by Mr.K.Suresh and offered as security for the credit facility availed from Punjab National Bank, Chennai, respondent herein, during February 2006.

6. It is the further case of the petitioner that, believing the publication as bona fide, he has participated in the auction, purchased the property and bank has been dragging the matter for the past 4 years, without clearing the encumbrance. Petitioner has also contended that the bank has not taken any steps for taking possession or registration of sale certificate. Petitioner also came to know that, Dr.V.Kalanithi, who had entered into an agreement dated 16.06.2009 has filed a suit in C.S.No.1 of 2013 for recovery of money and obtained an order of attachment from this Court, dated 22.11.2017 for execution of decree dated 21.12.2016.

7. Petitioner has further contended that the bank had sold the property without disclosing the encumbrance to the petitioner. According to the petitioner, failure to disclose the above, would vitiate the entire proceedings and therefore, in his letter dated 02.01.2018, petitioner has requested the bank to refund the amount deposited by him or in the alternate, take steps to delete the encumbrance and execute the sale deed, but till date, the bank has not taken any steps to the same. Petitioner does not have any other alternate or

efficacious remedy, and has filed the instant writ petition and prayed for the relief, as stated supra.

8. Bank, in its counter affidavit, has submitted that although the petitioner remitted the sale amount in the year 2013, but not opted to receive the sale certificate and registered the same in the office of the Sub Registrar, within whose jurisdiction the property is situated, due to ill health as evident from the affidavit executed on 05.07.2017 by the writ petitioner.

9. Bank has further contended that the petitioner cannot seek for refund of the auction amount on the ground that there is an order of attachment and encumbrances reflected in the proceedings of the Sub-Registrar. Bank has further contended that the borrower, M/s.K.K.S.Exports represented by its proprietor, Mr.K.K.Shanmugam, had availed packing credit and FOBNLC facilities aggregating to the tune of Rs.30 lakhs as early as on 27.02.2003 and to secure the repayment of loan amount, his son Mr.K.S.Ramesh, as guarantor offered the property, namely 1/3rd undivided share of land together with building in the ground floor situate at Door No.6, Gnanamani Street, Jaffarkhanpet, Chennai-83 and in confirmation of the same, the guarantor executed a letter of intent on 28.03.2003 in terms of Section 58(f) of the Transfer of Property Act.

10. Bank has further contended that the above said credit facility was extended to the tune of Rs.80 lakhs to the borrower, M/s.K.K.S.Exports in the year 2006 and to secure the additional loan amount, Mr.K.S.Suresh, another son had offered his property, namely 1/3 rd undivided share of land together with building in the first floor situated at Door No.6, Gnanamani Street, Jaffarkhanpet, Chennai-83. In confirmation of the same, Mr.K.S.Suresh has executed a memorandum of deposit title deed on 28.02.2006, registered as Doc.No.595/2006 on the file of the Sub Registrar, Ashoknagar, to secure the repayment of loan amount.

11. Bank has further contended that the borrower M/s.K.K.S.Exports represented by its proprietor, Mr.K.K.Shanmugam, committed default in repayment of the loan amount. Bank has issued a demand notice dated 22.12.2010, under Section 13(2) of the SARFAESI Act, 2002 and the same was acknowledged by the borrower/Mr.K.K.Shanmugam and his two sons/guarantors. The borrower has failed to repay the loan amount within 60 days, and therefore, bank has issued a possession notice dated 27.06.2011 under Section 13(4) of the SARFAESI Act, 2002. Even after the issuance of the above said notice, neither the borrower nor the guarantor repaid the amount. Therefore, bank was constrained to issue a sale notice dated 03.09.2013 to bring the property, belonging to the guarantor, Mr.K.S.Ramesh, for E-auction on 17.10.2013. In the E-auction, the petitioner was declared as successful bidder in

respect of property belonging to the guarantor, Mr.K.S.Suresh.

12. At paragraph No.10 of the counter affidavit, bank has stated as follows:-

> "I further state that the respondent bank is given to understand that the petitioner had taken physical possession of the aforesaid property after entering into understanding with the borrower and hence not insisted for filing of application under Section 14 of the Act."

13. Bank has further submitted that though sale confirmation letter was issued in favour of the petitioner, he has not chosen to receive sale certificate from the bank due to ill health and that he was out of station. Only during July, 2017, the petitioner has requested the bank to issue sale certificate. Petitioner has also given an affidavit of declaration dated 05.07.2017 to the respondent bank. Responding to the petitioner, bank has issued a sale certificate on 05.07.2017.

14. Bank has further submitted that when the sale certificate was sought to be registered probably, the petitioner would have been informed about the two sale agreements in favour of third parties, viz. Mr.Rajesh and Dr.V.Kalanidhi respectively, in the year 2009. Bank has contended that the sale agreements are not binding on the secured creditor, since the mortgage was executed by the owner of the property in the year 2006 itself, which is prior to the execution of sale agreements and that therefore per se void in nature.

15. Bank has further contended that it has advised the writ petitioner that necessary legal action can be taken to register the sale certificate by obtaining a direction to the Sub-Registrar concerned, but the petitioner has not chosen to do so. It is also the contention of the bank that it is not known as to whether Dr.V.Kalanidhi, has disclosed about the deposit the title deeds with the bank for the loan availed by M/s.K.K.S.Exports, represented by its proprietor, Mr.K.K.Shanmugam, in the suit filed by him.

16. Bank has further submitted that the third party/Dr.V.Kalanidhi, has not filed any suit for specific performance of the alleged sale agreement dated 16.06.2009, but has chosen to file money suit in C.S.No.1/2013 before this Court and it goes without saying that the right of the third party is only subject to the mortgage rights vested with the respondent bank. Third party cannot bring the property for auction, for his money dues, since the mortgage rights, is anterior due to the said sale agreement, said to have been executed by Mr.K.Ramesh to Dr.V.Kalanidhi.

17. Inviting attention of this Court, to an order made in W.P.No.28968 of 2015, dated 02.06.2016, in the case of Punjab National Bank, represented by its Chief Manager, Chennai Vs. The Sub-Registrar, Anna Nagar, Chennai and two others, learned counsel for the bank submitted that, bank has filed a writ petition, seeking for a direction to the Sub Registrar to register the sale certificate and after hearing the parties, mandamus has also been issued. He therefore submitted that for any reason, the Sub-Registrar, within whose jurisdiction subject property is situated has not registered the sale certificate. It is always open to the petitioner to seek for a mandamus against the concerned Sub-Registrar.

18. Attention of this Court was invited to the affidavit of Mr.Arumugam/writ petitioner herein, wherein, he has stated as follows:-

> "I submit that I have met The Chief Manager, ARMB, PNB Towers, Royapettah, Chennai - 600 014 regarding issuance of Sale Certificate for the property situated at No.6, Gnanamani Street, Jafferkhanpet, Chennai.
>
> 2. I further submit that I have been a successful bidder in E-auction for the sale of the above said property. I further state that I have paid the entire amount of Rs.67 lakhs (Rupees Sixty seven lakhs) through my Axis Bank Account on 27.02.2014.
>
> 3. I further submit that due to ill health I was unable to contact the Bank to obtain Sales Certificate.
>
> 4. I further submit that now I am satisfied with the property and documents and I have decided to obtain the Sale Certificate and also ready to go for execution of Sale Certificate for the above mentioned property in my own cost."

19. On this day, when the matter came up for further hearing, the Chief Manager, Punjab National Bank, Chennai, has filed additional affidavit dated 27.03.2018, wherein, he has stated that, subsequent to the last hearing of the case, he has inspected the secured property to find out the ground reality, and found that painting works were going on, in the said property and one Mr.Sridhar, claiming to be a mediator, informed him that the entire property is put for sale.

20. According to the Chief Manager, Punjab National Bank, Chennai, the said Mr.Sridhar also informed him, that he is in consultation with the writ petitioner/Arumugam, for sale of the secured property. Chief Manager, Punjab National Bank, Chennai, in the additional affidavit dated 27.03.2018, has further submitted that bank has also filed an application to lift the attachment obtained by the third party/Dr.V.Kalanidhi, as against the secured property, by which right of the secured creditor over the property is reiterated.

21. Responding to the averments, made in the counter affidavit and documents, enclosed in the typed set of papers, including the affidavit dated 05.07.2017, executed by the writ petitioner, before an Advocate/Notary, Chennai, writ petitioner has filed another affidavit in the month of March 2018, wherein, he has denied taking physical possession of the secured asset, after entering into an understanding with the borrower, and the contention of the bank that, in the above said circumstances, there was no need to file an application under Section 14 of the SARFAESI Act, 2002.

22. According to the writ petitioner, at no point of time, he had informed the bank that he would take possession of the secured assets. It is impossible to take possession even with the assistance of the order of the learned Chief Metropolitan Magistrate, Chennai and therefore, the deponent of the counter affidavit of the bank has made false statement.

23. Writ petitioner has further contended that he was neither in possession of the property nor issued sale certificate, though he has paid the entire sale consideration in the year 2013 itself. According to him, he has functional literate, and can only sign in English and cannot understand the contents of any document without being explained. Bank has obtained his signature in the affidavit, as if the petitioner had delayed to get receipt of sale certificate, due to ill health. For better understanding and brevity, paragraph Nos.4, 5 and 6 of the affidavit un dated March 2018 are extracted hereunder:-

> "4. I submit that I am neither in possession nor do I have the Sale Certificate registered in my favour although I have paid the entire Sale Consideration. In fact the bank had issued the sale certificate in the year 2017 after making me to sign an affidavit to safe guard their position. I also unwittingly without knowing the evil design signed the affidavit and received the sale certificate. It is needless to point out that without any document conferring any right, it is impossible to take possession of an immovable property. When the trend in this country is that even with perfect title possession cannot be so easily obtained. I do not know who the Borrower is and it is specifically denied that I have an understanding with the Borrower. It is not clear from where and how the deponent of the Affidavit came to such an understanding. In fact the deponent has to be examined by this Honourable Court for making such false statement.
>
> 5. I further submit the Affidavit dated 05.07.2017 was prepared by the Bank and I was asked to sign, as I am a functional literate and

I can only sign English and cannot really understand very clearly the contents of any document without being explained. In the anxiety of obtaining the Sale Certificate and having waited for four years. I signed the Affidavit with the hope of getting the Sale Certificate. In fact the Bank was unable to get the Sale Certificate registered for the past one year.

6. I submit I am an innocent person who had been taken for a ride by the bank taking advantage of my lack of knowledge about the nuances auction sale."

24. For the above said reasons, the petitioner has sought for the relief as prayed for.

25. Indisputedly, loan has been availed by M/s.K.K.S.Exports, represented by its proprietor, Mr.K.K.Shanmugam, for business purpose and his two sons, namely Mr.K.S.Ramesh and Mr.K.S.Suresh, have offered their respective properties. Mr.K.S.Ramesh has executed a letter of intent on 28.03.2003 in terms of Section 58(f) of the Transfer of Property Act. The said letter dated 28.03.2003, addressed to the Manager, Punjab National Bank, Chennai, is extracted hereunder:-

"Dear Sir,

Please acknowledge receipt of the undernoted title deeds deposited by me/us with you on 27.3.2003 by way of equitable mortgage to secure the undernoted limit/s sanctioned and the moneys ad-name of the borrower) as per loaning documents executed on 27.03.2003 agreed to be executed in respect of the following:

1.Packing Credit for Rs.1000000/-

2.FOBNLC for Rs.2000000/-

As already agreed, I/we undertake to insure the mortgaged property for its full market value and keep the same insured till the adjustment of the account.

I/we also agree to execute in your favour simple mortgage or English Mortgage at my/our cost as decided by you, whenever called upon to do so."

26. Insofar as, 1/3rd share and undivided share, belonging to Mr.K.S.Suresh, he has executed a memorandum of deposit of title deeds of the said building on 28.02.2006, registered as Document No.595/2006 on the file of the SRO, Ashoknagar, Chennai-83. Memorandum of deposit of title deeds registered as Document No.595/2006 is reproduced.

"MEMORANDUM OF DEPOSIT OF TITLE DEEDS

Memorandum of Deposit of Title Deed that on this 28th day of February 2006 at Chennai Mr.K.S.Suresh S/o.Mr.K.K.Shanmugam, Hindu, aged about 40 years, now residing at plot no.A-68, Door No.6, Gnanamani Street, Jafferkhanpet, Chennai-83, (which terms unless repugnant to the context shall mean and include his legal heir, representative, attorneys, successors and assigns) hereinafter referred to as "The Guarantor" has deposited with PUNJAB NATIONAL BANK, Purasavalkam, Chennai-600 084, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 with its Head Office at Bhikaiji Camaplace, New Delhi, (hereinafter referred to as the Bank) the original title deeds mentioned in the Schedule 'A' hereunder written relating to the property belonging to the 'Guarantor' free from encumbrances with Equitable Mortgage by way of Deposit of Title Deeds in respect of property morefully described in the Schedule 'B' hereunder written infavour of the Bank for the repayment severally of advances of already made which may hereafter made by the Bank to M/s.K.K.S.Exports having its office at New No.11, Old No.2, Gnanamani Street, S.M.Block, Ashok Nagar, Chennai, under working capital upto limit of Rs.80,00,000/- (Rupees eighty lakhs only).

The Guarantor further declares that the documents deposited with the bank are the only documents that are in his possession and custody:-

SCHEDULE 'A' LIST OF DOCUMENTS OF TITLE

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1. Xerox copy of deed of sale dated 28.06.1989 executed by Sathyamuthu Co-Op Housing sites Society infavour of Mrs.Saralakshmi Doc.No.2682 of 1989.

2. Original Deed of sale dated 26.4.1999 executed by Mrs.Saralakshmi and 3 others to and infavour of Mr.K.S.Suresh Document No.1199/1999.

3. Original Deed of General Power of Attorney dated 5.5.2000 executed by Mr.K.S.Suresh infavour of Mr.K.K.Shanmugam.

4. Agreement of sale dt. 5.3.2002 between Mansi Mercantiles and Mr.K.K.Shanmugam document No.470/2002.

5. Cancellation of Sale agreement dt.25.11.2005 between K.K.Shanmugam and M/s.Mansi Mercantiles document No.2946/2005.

6. Deed of Cancellation of Sale agreement dt.23.12.2005 executed by M/s.Mansi Mercantiles company infavour of K.S.Suresh Document No.3242/05.

7. Approved plan vide PPA No.D9/5192/99 and building permission No.D9/4254/99 dated 22.9.1999.

8. Property tax receipt infavour of K.Suresh dated 12.12.2002 for the period of 1/2002-2003 and 3-2002-2003.

9. Metro Water supply and Sewerage tax receipt No.284020 dated 27.9.2005 for the period 2/2004-05 and 1/2005-2006 issued in the name of K.Suresh.

10. Encumbrance Certificate:

i. E.C.No.3815 dated 08.10.2002 period 1.1.2000 to 7.10.2002.

ii. E.C.No.5/34 dated 28.11.2005 for the period 1.1.2002 to 27.11.2005.

iii. E.C.No.5343 dated 26.12.2005 for the period 1.1.2003 to 25.12.2005.

Schedule B. (Description of Property)

1/3 UDS of all the piece and parcel of land measuring 2400 sq.ft. of Kodambakkam village, Division No.131, Mambalam Guindy Taluk, Chennai, comprised in S.No.367/3 Part, Block No.126, T.S.No.37, bearing Plot No.A.68, Door No.6, Gnanamani Street, Jafferkhanpet, Chennai-600 083, together with entire building in the first floor and land bounded on:-

North by: 20 feet Road
South by: Plot No.A76, A-77 and A-78
West by: Plot No.A-67
East by: Plot No A-69

lying withinthe Registration District of Chennai Central and Sub Registration District of Ashok Nagar.

IN WITNESS WHEREOF I have set my hands to this Deed of Title at Chennai the day, month and year mentioned above."

27. Borrower has committed default in repayment of loan amount. Bank has issued a demand notice dated 22.12.2010, under Section 13(2) of the SARFAESI Act, 2002, thereafter, bank issued a possession notice dated 27.06.2011 under Section 13(4) of the SARFAESI Act, 2002. Bank has issued sale notice dated 03.09.2013, fixing the sale on 17.10.2013, to bring the property of the guarantor Mr.K.S.Ramesh. Petitioner has been declared as the successful bidder and deposited a sum of Rs.67 lakhs. Sale has been confirmed on 17.10.2013.

28. What remains to be considered is that whether the bank had delayed issuance of sale certificate or the petitioner has not chosen to receive the sale certificate from the bank. As per the Sub Rule 6 of Rule 9 of the Security Interest (Enforcement) Rules, 2002, on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale, shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

29. Sub Rule 7 of the Rule 9 of the Security Interest (Enforcement) Rules, is extracted hereunder:-

"(7) Where the immovable property sold is subject to any encumbrances the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

[Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale.]"

30. As per Rule 9 (9) of the Security Interest (Enforcement) Rules, 2002, the authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

31. In the case on hand, according to the bank, there was no resistance from the guarantor, and therefore, possession was taken over by the writ petitioner way back in the year 2013 and that he continued to be in the possession of the property. Bank has also contended that as per his own affidavit dated 05.07.2017, petitioner did not contact the bank to obtain sale certificate and further added that he was satisfied with the property and documents, and he had decided to obtain the sale certificate and was also ready to go for execution of the same, on his own costs. Whereas, petitioner in his additional affidavit un dated March 2018, has stated that bank has obtained his signature in the affidavit dated 05.07.2017 and that he was a functional literate. Auction had taken place on 17.10.2013, sale was confirmed on the same day and Rs.67 lakhs has been paid by the petitioner with the bank for purchase of the property.

32. Though, writ petitioner has contended that he has contacted the bank to get the sale certificate issued, and the bank did not respond, there is absolutely no documentary evidence to support the averments.

33. At this juncture, this Court deems it fit to consider, the difference between the pleadings and proof, required in a writ petition filed under Article 226 of the Constitution of India and the pleadings in the Civil Court. The Hon'ble Supreme Court at paragraph No.13, in Bharat Singh and Others Vs. State of Haryana and Others, reported in 1988 (4) SCC 534, held as follows:

".... In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evident which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

34. At the risk of repetition, contents of paragraph Nos.3 and 4 of the affidavit dated 05.07.2017, executed by the petitioner in the presence of the Advocate/Notary, are extracted hereunder:-

"3.I further submit that due to ill health I was unable to contact the bank to obtain Sales Certificate.

4. I further submit that now I am satisfied with the property and documents and I have decided to obtain the Sale Certificate and also ready to go for execution of Sale Certificate for the above mentioned property in my own cost."

35. In the abovesaid affidavit, petitioner has categorically stated that due to the ill health , he was unable to contact the bank obtain the sale certificate. He is satisfied with the sale documents and sale certificate. Contention of the bank, that the writ petitioner did not take necessary legal action to register the sale certificate, is not refuted.

36. Though as per Rule 9 (6), of the Security Interest (Enforcement) Rules, 2002, the authorised officer, on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale, shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to the said rules, even taking it for granted that there was a failure to discharge the duty by the Authorised Officer, the writ petitioner ought to have made a request to the bank for issuance of the sale certificate, as he has already paid entire amount and if there was any refusal, could have always approached this Court seeking for a mandamus directing the authorised officer to issue the sale certificate. The fact that the petitioner has not chosen to approach this Court for necessary orders and but has submitted as affidavit dated 05.07.2017, to the bank clearly shows that

the writ petitioner for some reasons or other, did not obtain the sale certificate. Contention of the petitioner that he is a functional literate and did not understand the contents is unacceptable. After parting with a huge sum of Rs.67 lakhs, no one will keep quiet. However, it could be seen that on receipt of the affidavit dated 05.07.2017, bank has issued the sale certificate.

37. Material on record discloses that after the issuance of sale certificate dated 05.07.2017, petitioner has come to know about an order of attachment dated 22.11.2017 in E.P.No.70 of 2017 in C.S.No.1 of 2013. Perusal of the Form-IV, attachment in execution issued by the High Court, shows that one Dr.V.Kalanidhi, has filed a suit against Mr.K.S.Ramesh and Mr.K.S.Suresh, sons of the K.K.Shanmugam, and that in the money suit, this Court has granted a decree dated 21.12.2016, for a sum of Rs.1,25,73,014/- with interest thereon, at the rate of 6% per annum from 21.12.2016 till the date of realization.

38. Dr.V.Kalanidhi, has filed E.P.No.70 of 2017 in C.S.No.1 of 2013. This Court, Vide order dated 22.11.2017, held that such order of attachment has to be proclaimed by issuance of Form-24. Though the petitioner has contended that it was the bank, which ought to have disclosed the encumbrance, in the auction notice dated 03.09.2013 and therefore, the proceedings is vitiated, we are not inclined to accept the said contention, for the reason that though bank has an obligation to mention the encumbrances in the auction notice, but having deposited a sum of Rs.67 laksh with the bank, there is absolutely no material indicating that the petitioner either approached the bank for issuance of the sale certificate to get the same registered or made an attempt to verify the encumbrance after the sale which was effected in the year 2013.

39. For four years, there was no action on the part of the writ petitioner, which probablises the case of the bank, that the petitioner was in possession, after auction. Otherwise, after having paid a huge amount to the bank, no prudent person will keep quiet.

40. As rightly contended by the bank, mortgage is of the year 2006, whereas, the sale agreement is dated 16.06.2009. Ordinarily, right of the mortgagor/secured creditor, would prevail over the unsecured creditor. However, there is a decree in C.S.No.1 of 2013. Contention of the bank that the said Dr.V.Kalanidhi/decree holder, would not have brought to the notice of this Court about the existence of the mortgage with the bank, it is a matter to be considered by the concerned Court, dealing with execution.

41. From the material on record, it is also to be deduced that sale had not been challenged on any of the grounds

raised, regarding non-disclosure of encumbrance. On the other hand, petitioner has obtained sale certificate. There is no merit in the writ petition, directing the bank/respondent herein, to refund of the sale amount. It is open to the petitioner, to raise all tenable grounds for raising of the attachment, if so advised.

42. For the above reasons, the Writ Petition is dismissed. No costs.

Sd/-
Assistant Registrar(CS--III)

//True Copy//

Sub Assistant Registrar

dm

To
The Authorised Officer,
The Chief Manager,
Punjab National Bank,
Asset Recovery Management Branch,
Punjab National Bank Tower,
46-49, R.H.Road,
Chennai - 600 014.

+ 1 cc to Mr.M.L.Ganesh, Advocate Sr.23671
+ 1 cc to Mr. R.R. Pradheep, Advocate Sr.23480

W.P.No.2879 of 2018

BR(CO)
EU(25/04/2018)