*** THE HON'BLE SRI JUSTICE SANJAY KUMAR**

AND

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

\+ WRIT PETITION Nos.1084 AND 2585 OF 2017

% 06—08—2018

City Union Bank Limited,
Karimnagar Branch, Rep. by its
Chief Manager and Authorised Officer

...Petitioner

vs.

$ The Sub Registrar, Peddapalli,
Karimnagar District & Others

... Respondents

!Counsel for the Petitioner : Sri Ambadipudi Satyanarayana

^Counsel for the Respondents 1 & 2: The G.P for Registration & Stamps (A.P)

^Counsel for the Respondents 3 to 5: None appeared

^Counsel for the Respondent No.6: The G.P for Revenue (T.S)

<Gist :

>Head Note :

? Cases referred

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* * * *

WRIT PETITION Nos.1084 AND 2585 OF 2017

Between:

City Union Bank Limited,
Karimnagar Branch,
Karimnagar

....Petitioner

And

The Sub Registrar, Peddapalli,
Karimnagar District & Others

....Respondents

JUDGMENT PRONOUNCED ON: 06.08.2018

THE HON'BLE SRI JUSTICE SANJAY KUMAR

AND

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? :

2. Whether the copies of judgment may be Marked to Law Reporters/Journals? :

3. Whether His Lordship wishes to see the fair copy of the Judgment? :

SANJAY KUMAR, J

T.AMARNATH GOUD, J

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION Nos.1084 AND 2585 OF 2017

COMMON ORDER:(Per Hon'ble Justice T.Amarnath Goud)

Since both the writ petitions raise common question of law, they are being disposed of by this common order.

W.P.No.1084 of 2017:

2. M/s.Sri Maha Lakshmi Mobile Agencies, Karimnagar, the fourth respondent herein, availed a loan of Rs.7 lakhs on 10.07.2014 from the City Union Bank Limited, Karimnagar Branch, the petitioner herein. The Managing Partner of the fourth respondent firm created an equitable mortgage in favour of the secured creditor/Bank by depositing title deeds of his immovable property i.e., open plot admeasuring 90 square yards situated beside H.No.2-1-225, 2-1-226 & 2-1-227, Pragathinagar Sub Road, Peddapalli Village and Nagara Panchayat, Karimnagar District. As the fourth respondent failed to pay the scheduled loan instalments, the secured creditor/Bank invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the SARFAESI Act) after the loan account was treated as a Non-Performing Asset (NPA) and accordingly, the Bank issued demand notice dated 11.08.2015 and also possession notice dated 22.12.2015 under the provisions of the SARFAESI Act. Later, sale notice dated 13.01.2016 was issued and thereafter the secured asset was auctioned on 25.02.2016. The fifth respondent stood as

the highest bidder in the auction by offering sale consideration of Rs.9,51,000/- and thereafter, the Bank issued sale certificate dated 19.08.2016 in favour of the fifth respondent. The petitioner Bank and the fifth respondent both approached the first respondent for registration of the property and also the fifth respondent paid the requisite amount through challan, but the first respondent refused to do so on the ground that the property is subjudice before the Court of the Senior Civil Judge, Karimnagar in I.A.No.290 of 2015 in O.S.No.901 of 2015 and by order dated 26.05.2015, attachment before judgment under Order XXXVIII Rule 5 of the Civil Procedure Code has been passed. The Bank filed the present writ petition challenging the action of the first respondent in not registering the sale certificate.

W.P.No.2585 of 2017:

3. M/s.Lakshmi Telecom, Nellore, the third respondent herein, availed a total loan of Rs.45 lakhs from 07.01.2006 to 21.02.2014 from the City Union Bank Limited, Nellore Branch, the petitioner herein. The husband of the proprietrix of the third respondent created an equitable mortgage over his plot, along with superstructures and building thereon, admeasuring Ac.0-28 ¾ ankanams in Sy.No.1034, Old D.No.8-29-1A and new D.No.8-29-1, Kondurivari Street, Kavali, SPSR Nellore District, in favour of the secured creditor/Bank by depositing title deeds of the aforesaid property. As the borrower failed to pay the loan instalments as per the payment schedule, the secured creditor invoked the provisions of the SARFAESI Act after the loan account was treated as a

Non-Performing Asset (NPA) and accordingly, the Bank issued demand notice dated 23.09.2015 and also possession notice dated 19.03.2016 under the provisions of the SARFAESI Act. Later, sale notice dated 23.06.2016 was issued and thereafter, the secured asset was auctioned on 10.08.2016. In the auction, respondent Nos.4 and 5 stood as the highest bidders with sale consideration of Rs.35,20,000/- and thereafter, the Bank issued sale certificate dated 09.09.2016 in favour of respondent Nos.4 and 5. The petitioner Bank and respondent Nos.4 and 5 both approached the first respondent for registration of the property and also respondent Nos.4 and 5 paid the requisite amount through challan, but the first respondent refused to dos so on the ground that the property is subjudice before the Court of the Additional Senior Civil Judge, Nellore in I.A.No.331 of 2015 in O.S.No.236 of 2015 and by order dated 01.06.2015, attachment before judgment under Order XXXVIII Rule 5 of the CPC has been passed. The Bank filed the present writ petition challenging the action of the first respondent in not registering the sale certificate.

4. The common point for consideration in these writ petitions is whether the sale certificates executed by the bank in favour of the auction purchasers can be refused registration by the Registrar under the Registration Act, 1908 on the pretext of an order of attachment before judgment by a civil Court?

5. It is necessary to refer to Rules 5 and 10 of Order XXXVIII and Section 64 of CPC, which deal with attachment before judgment, Sections 53 and 54 of the Transfer of Property Act, 1882

and Sections 22-A, 47 and 49 of the Registration Act, 1908, and they read as under:

" The Civil Procedure Code, 1908:

Rule 5. Where defendant may be called upon to furnish security for production of property:- (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy, the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.

Rule 10. Attachment before judgment not to affect rights of strangers, nor bar decree -holder from applying for sale:- Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Section 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 there in 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.

(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."

The Transfer of Property Act, 1881:

53. Fraudulent transfer.—
(1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force relating to insolvency. A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

53A. Part performance.— Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

54. "Sale" defined.— "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Sale how made.— Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. Contract for sale.— A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

The Registration Act, 1908:

22A. Registration of documents which is against the public policy.— (1) The State Government may, by notification in the Official Gazette, declare that the registration of any document or class of documents is against the public policy.

(2) Notwithstanding anything contained in the Act, the registering officer shall refuse to register any document to which the notification issued under sub-section (1) is applicable"

47. Time from which registered document operates.— A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

49. Effect of non-registration of documents required to be registered.— No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(a) affect any immovable property comprised therein, or
(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.

6. The expression and word 'attachment' has been well considered by the Supreme Court in **Kerala State Financial Enterprises Ltd. V/s Official Liquidator, High Court of Kerala**[1] in para 11 thereof and it reads as follows:

[1] (2006) 10 SCC 709

"11. The word "attachment" would only mean "taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it". It is used for two purposes: (i) to compel the appearance of a defendant; and (ii) to seize and hold his property for the payment of the debt. It may also mean prohibition of transfer, conversion, disposition or movement of property by an order issued by the court.

7. In the said judgment, the Supreme Court referred to its earlier judgment in para 12 and it reads as under:

"12. In Sardar Govindrao Mahadik v. Devi Sahai, this Court held: (SCC p.268 para 58)

58. What is the effect of attachment before judgment? Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in Section 64 of the Code of Civil Procedure provides that 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 monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is claimed enforceable is the claim for which the decree is made."

8. In view of the above, the equitable mortgage which was duly created and registered in favour of the secured creditor is much prior to the order of attachment before judgment and the sale certificate issued under the provisions of the SARFAESI Act stands altogether on a different footing under law and the order of attachment before judgment will not have any bearing on the SARFAESI proceedings.

9. It is needless to observe that the civil Court has no jurisdiction to deal with the subject matters pertaining to the SARFAESI Act. In the present scenario, the secured creditor was

not a party to the civil suits before the Courts below and thus the orders of attachment before judgment are not binding on the secured creditor/Bank. More so, the cause of action before the Courts below is not within the ambit of SARFAESI Act.

10. Insofar as the action of the first respondent in not registering the sale certificates is concerned, the Government Pleader for Revenue (Andhra Pradesh) relied upon Section 22-A of the Registration Act, 1908. He also relied upon Standing Order 219 issued by the Revenue Department pertaining to the registration and it reads as follows:

> "**S.O.219:-** An order restraining a person from alienating certain property does not operate as a prohibition to the registering officer against the registration of a document executed by such person affecting such property.
>
> (b) If the A.P. High Court or any other Civil Court restrains a person from alienating a property and if such orders are brought to the notice of the Registering Officer or served on the Registering Officer, the Registering Officer is estopped from going ahead with the registration."

11. Upon fair reading of S.O.219 in the light of Section 64 of CPC, this Court is of the view that it only pertains to a civil dispute between the private parties and it does not include an institutional sale under a statute. Though Section 64 comes into play only after the alienation of the property under attachment amongst the private persons, the said legal position does not create an embargo upon the Registrar to proceed with the registration of sale certificates under the SARFAESI Act as the bank is not a party to the suit and the sale is not being effected by a party to the attachment order.

12. The Supreme Court in **Hamda Ammal V/s Avadiappa Pathar[2],** dealt with an identical issue in the light of Order XXXVIII Rules 5, 10 and Section 64 of the CPC, Sections 47 and 49 of the Registration Act, 1908 and also Sections 53 and 54 of the Transfer of Property Act, 1882 and held as follows:

> "2. In order to decide the above controversy we would advert to some relevant provisions. Order XXXVIII Rule 5 CPC which provides the conditions for attachment before judgment reads as under.
>
> '5(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-
>
> (a) is about to dispose of the whole or any part of his property, or
>
> (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,
>
> the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy, the decree, or to appear and show cause why he should not furnish security.
>
> (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.
>
> (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
>
> (4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.'
>
> The above provision itself makes it clear that the attachment before judgment would be made where the court is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property form the local limits of the jurisdiction of court with the intention to obstruct or delay the execution of any decree that may be passed against him. Thus this provision would not apply where the sale deed has already been executed by the defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. It would be a different case altogether if a creditor wants to assail such transfer by sale under Section 53 of the Transfer of Property Act, 1882 on the ground of a fraudulent transfer.

[2] (1991) 1 SCC 715

Such suit would be decided on totally different considerations in accordance with the provisions of Section 53 of the Transfer of Property Act. Order XXXVIII Rule 10 CPC reads as under:

> ‘10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.’

This provision also makes it clear that attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit.

3. Section 64 CPC prohibits private alienation of property after attachment and reads as under:

> ‘64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest there in 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.
>
> *Explanation:-* For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.’

The above provision bans or prohibits a private transfer or delivery of the property attached or of any interest therein contrary to such attachment as void as against all claims enforceable under the attachment. The order of attachment is issued on a prescribed Form No.24 in Appendix E to CPC which prohibits and restrains defendant from transferring or charging the property by sale, gift or otherwise. Thus neither in Section 64 CPC nor in the form prescribed for attachment there is any prohibition for submitting the document of sale for registration. The act of submitting the sale deed for registration which has already been executed prior to an attachment is not an act of transfer which is prohibited under the above provisions.

4. Section 54 of the Act defines sale as “a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised”. Thus after the execution of the sale deed with consideration all the ingredients of sale are fulfilled except that in case of tangible immovable property of the value of Rs.100 and upwards it can be made only by registered instrument. Now, if we read Section 47 of the Registration Act, it clearly provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. This provision makes it clear that after the registration it will relate back to the date of execution of the sale deed. The act of registration is to be performed by the registering authority. According to Section 23 of the Registration Act a document of the nature of sale deed shall be accepted for registration within four months from the date of its execution. Thus a statutory period of four months has been provided for presenting the sale deed for registration from the date of its execution. In case of dispute regarding the execution

of the document an enquiry is permitted under Section 74(a) of the Registration Act and that may also take some time. The legislature being alive to such situations has already provided in Section 47 of the Registration Act that it shall operate from the time from which it would commence to operate if no registration thereof had been required or made and not from the time of its registration. Thus in our view the vendee gets rights which will be related back on registration from the date of the execution of the sale deed and such rights are protected under Order XXXVIII Rule 10 CPC read together with Section 47 of the Registration Act."

13. In similar circumstances, the Kerala High Court in **The South Indian Bank Ltd. V/s The Sub Registrar[3],** considered the question whether a sale certificate is liable to be registered or not in view of the order of attachment before judgment passed by the civil Court and held that the secured creditor is entitled to proceed with the registration and the Registration Authority cannot stall the process of registration under the garb of an order of attachment passed by the civil Court.

14. The preponderance of judicial opinion leads to the irresistible conclusion that the sale of the mortgaged property in favour of the auction purchaser and the sale certificate under the SARFAESI Act in such circumstances is free of all encumbrances. The attachments effected subsequent to the mortgage created in favour of the bank do not affect the rights of the secured creditor over the subject property. Such attachments have no impact on the sale conducted under the Act and the same ceases to have any effect or fall to the ground the moment the same is confirmed in favour of the secured creditor Bank and auction purchaser. Otherwise, those attachments would remain as a permanent taboo prejudicially affecting the marketability and title to the property

[3] WP(C) No.3875 of 2017 dated 24.11.2016

even though they ceased to have any legal efficacy and thereby it becomes necessary to register the sale certificate.

15. Taking into account all these aspects and reckoning the law in the subject as discussed above, this Court has no hesitation to hold that the secured creditor is entitled to succeed in these writ petitions. The writ petitions are accordingly allowed directing the first respondent in both the writ petitions to register the sale certificates in accordance with the Registration Act. Miscellaneous Petitions pending if any shall stand closed. No order as to costs.

SANJAY KUMAR, J

T.AMARNATH GOUD, J

Date: 06.08.2018
TJMR