A.No.2723 of 2019
in A.No.1993 of 2014

PUSHPA SATHYANARAYANA, J.

A third party, which is an Asset Reconstruction Company Limited, has filed the above application for raising the order of attachment dated 30.03.2015.

2. The necessary facts required for consideration of the above application are:

(i) The first respondent, which is a Non-Banking Finance Company, extended the enterprise finance loan to the tune of Rs.25 lakhs to the respondents 2 and 3, who are the borrower and co-borrower. A loan agreement dated 28.04.2010 was entered into by the first respondent and the respondents 2 and 3. As there was a default and despite repeated demands of the first respondent, there was no re-payment of the arrears to settle the contract entered into by them. The loan agreement provided for arbitration of the dispute arising out of the said agreement between the parties. By invoking the same, the first respondent issued a letter dated 05.12.2013 initiating the arbitration proceedings. As the loan agreement dated 28.04.2010 was neither secured by pledge or hypothecation of movable

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nor by mortgage of any immovable property, it remained unsecured.

(ii) While so, there was an e-auction sale notice dated 17.12.2013 issued by the Debts Recovery Tribunal-II, Chennai for recovery, pursuant to D.R.C.No.177 of 2012 in favour of the State Bank of India, Chennai. Apprehending that the said sale may not fetch the actual price of the property and also further apprehending that the intending purchasers may form a cartel and they will try to purchase the property for the amount less than the market value, the first respondent filed an application in A.No.1993 of 2014 for furnishing the security to the tune of the amount due, failing which, for an attachment of the property. This Court also issued a notice in the said application, which could not be served on the respondents 2 and 3 and the service was effected through paper publication. Despite the same, there was no appearance for the respondents 2 and 3 either in person or through counsel. Hence, an order of attachment of the property was passed on 30.03.2015 ex-parte. The said attachment order is now sought to be raised by the applicant herein.

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3. The learned counsel for the first respondent, who appeared on behalf of the financial institution, opposed the application on the following grounds.

(i) An award has already been passed by the learned Arbitrator in favour of the first respondent and they had also initiated the execution proceedings in E.P.No.65 of 2015. Hence, they pleaded that the application under Section 9 of the Arbitration and Conciliation Act, is not maintainable.

(ii) Any claim in respect of the property, which is the subject matter of the execution petition, has to be raised and decided by the Executing Court and hence, the applicant has to file an application before the said Court and adjudicate the claim in respect of the property, which is attached.

(iii) The next objection was that the claim of assignment by the applicant from the original mortgagee is not valid.

(iv) The Recovery Certificate dated 29.08.2012 issued by the Debts Recovery Tribunal in D.R.C.No.177 of 2012 is unenforceable and the

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same is barred by limitation, as the Recovery Certificate issued by the Debts Recovery Tribunal is not a decree passed by the Civil Court.

4. The learned counsel for the applicant contended that on 20.06.2014, an Assignment Agreement dated 26.03.2014 was entered into with respect to the secured asset along with financial documents and securities were assigned in favour of the applicant herein and the Assignment Agreement was registered as Document No.3174 of 2014 on the file of the Sub Registrar of Assurances, Avadi. After the said assignment, the applicant had also filed a Memo for substitution of its name in the place of the State Bank of India and the same was allowed, by order dated 18.09.2018.

5. Admittedly, the property now sought to be attached in A.No.1993 of 2014 was already attached by the order of the Recovery Officer, DRT-II on 30.01.2013 and the same was duly communicated to the Sub Registrar concerned. As the mortgage in favour of the applicant herein was prior in time to that of the claim of the attachment by the first respondent herein, the applicant is entitled to bring the property to sale. However, in view of the order of attachment by this Court, the applicant is unable to bring the property to sale.

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The applicant has also undertaken to deposit the excess money if any, after realisation of their dues by sale of the schedule mentioned property and prayed for raising the order of attachment dated 30.03.2015.

6. The question that arise for consideration is as to whether the applicant, who is the assignee, is entitled to get the order of attachment raised and sell the property?

7. As per Section 2(la) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short, "RDB Act"), the term "secured creditor" shall have the meaning as assigned to it in Clause (zd) of Sub-section (1) of Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "SARFAESI Act"). Section 2(1)(zd) of the SARFAESI Act defines "secured creditor" as follows :

> "(zd) "secured creditor" means -
> (i) ....
> (ii) ....
> (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be ; or"

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8. The applicant/third party is JM Financial Asset Reconstruction Company Limited, which had got the Assignment Agreement dated 26.03.2014, as per which, the secured asset was secured along with securities in favour of the applicant herein for valuable consideration and the assignment agreement was also registered as Document No.3174/2014 before the Sub Registrar of Assurances, Avadi.

9. As stated earlier, original secured creditor, namely, the State Bank of India (SBI) had got the properties attached on 30.01.2013. When the attachment was already intimated to the Sub Registrar concerned, the respondent herein has once again got the same attached on 30.03.2015 in A.No.1993 of 2014. It is further stated that the second respondent is liable to pay a sum of Rs.11,36,76,772.87p. to the applicant. In realization of the said amount, the applicant is entitled to bring the property to sale. Further, in view of the order of attachment subsequently passed, the applicant is unable to bring the property to sale.

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10. In view of the definition of the "secured creditor", as has been extracted above, there is no difficulty in holding that the applicant company, who is an assignor, automatically becomes a secured creditor. On 18.09.2018, the DRT-II, Chennai, had allowed the name of the applicant to be substituted in the place of SBI.

11. Section 31-B of the RDB Act, which was introduced with effect from 01.09.2016, has removed all the doubts about the secured creditor having the first right over others and the same reads as follows:

> "**31-B. Priority to secured creditors** – Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority."

12. Section 31-B of the RDB Act provides that after registration of security interest, the debts due to any secured creditors shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority. Therefore, the RDB Act will prevail over the Arbitration and Conciliation Act.

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13. As Section 31-B clearly provides for a secured creditor to have the first charge over the property mortgaged, there is no difficulty in this case to hold that the subsequent attachment of the first respondent in an arbitral proceedings cannot have any validity. If the first respondent also has got the charge over the subject property, it is open to them to make a claim before the Assets Reconstruction Company/the applicant to pay from and out the excess amount in their hands after satisfying their claim in accordance with law.

14. In view of the above, the attachment order passed by this Court on 30.03.2015 is raised. This application is ordered accordingly.

22.11.2019

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