BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE R.THARANI

W.P.[MD]Nos.23896, 23914 & 23916 of 2019
and
W.M.P.[MD]Nos.20517, 20525, 20527 &
20529 to 20531 of 2019

Tamil Nadu Mercantile Bank Ltd,
Verkizhambi Branch,
Having one of its branches at
Door No.3-130/47B, Main Road,
Chanivilai, Mekkamandapam (Post) – 629 166,
Kanyakumari District,
represented by the Chief Manager / Authorised Officer,
Mr.G.Uthayakumar. : Petitioner in all WP's

Vs.

1.The Sub-Registrar,
Office of the Sub-Registrar,
Thuckalay,
Kanyakumari District.

2.G.T.Robinson
3.A.Victoria

4.M/s. Cholamandalam Investment
and Finance Company Limited,
'Dare House', No.2, N.S.C. Bose Road,
Parrys, Chennai – 600 001.
Represented by its Authorised Signatory.
: Respondents in all Writ Petitions

5.M.Bhagyanathan : 5^{th} Respondent in W.P.[MD]No.23896/19
6.R.Nancy Flora : 5^{th} Respondent in W.P.[MD]No.23914/19
7.S.Nirmala Devi : 5^{th} Respondent in W.P.[MD]No.23916/19

COMMON PRAYER: These writ petitions filed under Article 226 of the Constitution of India, to issue Writs of Certiorarified Mandamus, calling for the records relating to the attachment entries dated 24.06.2019 on the file of the Sub-Registrar, Thuckalay Kanyakumari District registered as against Survey Nos.161/9, 159/3, 166/1, 479/6 & 479/8 more fully described in the schedule and quash the same and for a consequential direction to efface / delete the said adverse encumbrance entries and direct the first respondent to register the Sale Certificate executed by petitioner Bank on 03.10.2019 in favour of the fifth respondent / Auction Purchaser within a reasonable time period to be fixed by this Court.

For Petitioner : Mr.N.Dilip Kumar
in all WP's
For Respondents : Mr.M.Murugan
in all WP's Government Advocate
[In all Writ Petitions]

COMMON ORDER

[Common order of this Court was made by **T.S.SIVAGNANAM, J]**

Heard Mr.N.Dilip Kumar, learned counsel appearing for the petitioner and Mr.M.Murugan, learned Government Advocate appearing for the respondents.

2.By consent on either side, these writ petitions are taken up for disposal.

3.In the light of the orders we propose to pass in this writ petition, taking note of the law laid down by the Full Bench in the case of ***Assistant Commissioner (CT)*** *Vs.* ***The Indian Overseas Bank*** *reported in* ***2016 (6) CTC 769,*** notice to the respondents 2 to 5 is dispensed with. Therefore, we propose to consider the prayer sought for by the petitioner as against the first respondent alone.

4.The petitioner is a Bank who had granted certain advance / loans to the respondents 2 and 3. In order to secure the loan transaction, the borrowers had executed a memorandum of deposit of title deeds dated 10.12.2015 and 03.01.2018, which documents were registered before the Sub-Registrar's office. The properties which are subject matter of these writ petitions are covered under the memorandum of deposit of title deeds dated 10.12.2015 and 03.01.2018. The borrowers had defaulted in repayment of the loan. As a result, the petitioner bank initiated action under the provisions of the SARFAESI Act and demand notices were issued to not only the borrowers but to the guarantors under Section 13(2) of the Act dated 16.11.2018. This was followed by possession notices dated 06.02.2019.

5.It appears that the second respondent Mr.G.T.Robinson, had availed a vehicle loan from the fourth respondent the fourth respondent and he is a defaulter and did not repay the loan. Consequently, the fourth respondent had filed an application under the provisions of the Arbitration Act in Application No.5358 of 2018 before the Principal Bench, praying for a direction upon the second respondent herein to furnish security to the tune of Rs.5,42,381.13 within a time frame, failing which to pass an order of attachment. The Court by order dated 28.03.2019, had granted an order of attachment, for a sum of Rs.2,70,845/- as the remaining amount has been recovered by sale of the vehicle for which finance was availed.

6.The contention of the petitioner bank is that the property which is subject matter of mortgage with the Bank is worth more than 2 ½ crores and it has been attached for a sum of Rs.2,70,845/- that too for a loan availed from the fourth respondent which is not a secured creditor as that of the petitioner bank. Further more, it is submitted that the mortgage created in favour of the petitioner bank is in the year 2015 and in terms of the provisions of the recent amendment to the SARFAESI Act, the petitioner being the secured creditor has a precedent over all other dues including the statutory dues. Further, it is submitted that the second respondent filed an appeal before the Debt Recovery Tribunal, Madurai in S.A.No.297 of 2019, challenging the sale notice dated 08.04.2019 in which an interim order was granted in I.A.No.1009 of 2019 dated 21.05.2019, directing the second respondent to pay a total sum of Rs.17,76,000/- to the petitioner bank on or before 20.06.2019 as first instalment and Rs.17,76,000/- as second instalment on or before 20.07.2019 and a further sum of Rs.17,76,000/- on or before 19.08.2019.

7.It is submitted by the learned Counsel for the petitioner that the second respondent has not complied with the conditional order granted by the Debt Recovery Tribunal. The Bank proceeded to bring the properties for re-auction by notification dated 11.07.2019. As there are no bidders another e-auction notice was issued on 22.08.2019. In the said auction, the fifth respondent in all these writ petitions were declared as successful bidders and sale certificates have been issued in their favour on 03.10.2019. When they approached the first respondent for registration of the sale certificate, it appears that the first respondent refused to register the same because of an order of attachment passed by the Principal Bench of this Court in Application No.5358 of 2019 dated 28.03.2019.

8.In our considered view, the dues payable to the respondent bank will be a precedent over the dues recovered by the fourth respondent. This view is supported by the Full Bench in the case of ***Assistant Commissioner (CT)*** *Vs.* ***The Indian Overseas Bank,*** referred supra. The judgment is as follows:

> "1.The Writ Petitions have been listed before the Full Bench in pursuance to the Reference Order in W.P.No.6267 of 2006 amd W.P.No.253 of 2011, in respect of the following issues:

(a)As to whether the Financial Institution, which is a Secured Creditor or the Department of the Government concerned, would have the 'Priority of Charge' over the Mortgaged property in question, with regard to the tax and other dues.

(b)As to the status and the rights of a Third party Purchaser of the Mortgaged property in question.

2.We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31-B in the Principal Act, which reads as under:

"31-B.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.

Explanation: For the purposes of this Section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where Insolvency or Bankruptcy proceedings are pending in respect of Secured Assets of the borrower, priority to Secured Creditors in payment of debt shall be subject to the provisions of that Code."

3.There is, thus, no doubt that the rights of a Secured Creditor to realise secured debts due and payable by sale of assets over which security Interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This Section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

4.The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

5.The aforesaid would, thus, answer Question (a) in favour of the Financial Institution, which is a Secured Creditor having the benefit of the Mortgaged property.

6.In so far as Question (b) is concerned, the same is stated to relate only to Auction Sales, which may be carried out in pursuance to the rights exercised by the Secured Creditor having Mortgage of the property. This aspect is also covered by the introduction of Section 31-B, as it includes "Secured Debts due and payable to them by sale of assets over which Security Interest is created".

7.We, thus, answer the aforesaid Reference accordingly.

8.The matters be placed before the roster Division Bench for dealing with the individual cases."

9.In terms of the law laid down in the aforementioned case, the petitioner bank being a secured creditor is entitled to bring the property into auction for recovery of the dues and issue sale certificate. Therefore, in our considered view, there can be no impediment for the first respondent to register the sale certificate. Of course, we cannot at this stage direct the deletion of the order of attachment registered by the first respondent pursuant to the order dated 28.03.2019 for which the petitioner bank should get themselves impleaded in Application No.5358 of 2019 and seek for raising the order of attachment or modify the order of attachment. It is well open to the petitioner bank to place this order before the Hon'ble Court in Application.No.5358 of 2019 as and when they move an application for impleadment and for raising the attachment. One more option which is available to the petitioner bank is to settle the dues to the fourth respondent which is around Rs.2,00,000/- and if such an offer is made, the fourth respondent will agree even for scaling down the interest. However, we make it clear that this is only optional. As and when the petitioner obtains appropriate orders in Application No.5358 of 2019, it can approach the first respondent for necessary relief. The first respondent is permitted to register the sale certificate within a period of three [3] days from the date on which the petitioner / auction purchaser presents the same along with a copy of this order.

10.With the above directions, these Writ Petitions stand disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

/ /2020

Sub Assistant Registrar

To
The Sub-Registrar,
Office of the Sub-Registrar,
Thuckalay,
Kanyakumari District.

+2 CC to M/s.N.DILIPKUMAR, Advocate SR NOS-98012 & 98513

+1 CC to M/s.GP (SR-98435[F] dated 14/11/2019)

COMMON ORDER MADE IN
W.P.[MD]Nos.23896, 23914 & 23916 of 2019
13.11.2019

MR
MS/07.01.2020/6P.5C