BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.03.2020

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.(MD).No.5916 of 2020
and W.M.P.(MD).Nos.5117 & 5119 of 2020

S.Senthamarai Kannan .. Petitioner

/Vs./

1.The Chief Manager,
Canara Bank,
Palani Branch,
Dindigul District.

2.V.Kulanthaivel .. Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India for issuance of writ of Certiorarified Mandamus to call for the records relating to the impugned E-auction notice issued by the 1st respondent in Dinamalar Tamil Daily Newspaper, dated 26.02.2020 and to quash the same as illegal and consequently direct the 1st respondent to issue fresh E-auction notice by complying Rule 8 (6) of the Security Interest (Enforcement) Rules 2002.

For Petitioner : Mr.R.M.Anbunidhi

For Respondents : Mr.Pala Ramasamy for R1

O R D E R

(Order of this court was made by **S.S.SUNDAR, J.**)

This writ petition is filed for issuing a writ of Certiorarified Mandamus to call for the records relating to the impugned E-auction notice issued by the 1st respondent in Dinamalar Tamil Daily Newspaper, dated 26.02.2020 and to quash the same as illegal and consequently direct the 1st respondent to issue fresh E-auction notice by complying Rule 8 (6) of the Security Interest (Enforcement) Rules 2002.

2.The brief facts that are necessary for the disposal of this writ petition are as follows:

The second respondent borrowed loan from the first respondent by creating an equitable mortgage in respect of the property of the second respondent. It is admitted that the second respondent failed to discharge the loan and the first respondent declared the account as NPA and initiated proceedings under SARFASI Act. Since the second respondent has not settled the amount despite notice under Section 13(2), it is admitted that the property is brought to sale. The impugned notification is the E-auction notice issued and published in Dinamalar, dated 26.02.2020 in respect of the secured properties.

3.The petitioner states in his affidavit that the second respondent borrowed a sum of Rs.50 lakhs from the petitioner for his business and the petitioner also got post dated cheques for the discharge of entire loan. Stating that the second respondent failed to repay the loan, the petitioner appears to have issued a legal notice. Since the second respondent has not repaid the amount, it is stated that the petitioner has filed a suit in O.S.No.181 of 2017 on the file of the Principal District Court, Dindigul, to recover the amount borrowed by the second respondent along with interest. By order, dated 28.12.2017, the trial Court has granted an order of attachment of properties of second respondent before judgment in favour of the petitioner. The properties attached are properties mortgaged and brought to sale. Stating that the said order was communicated to the Sub Registrar, Palani and the same was registered as required in law, the petitioner has approached the first respondent to cancel the sale through E-auction, as advertised.

4.The grievance expressed by the petitioner is that the E-auction notice does not contain the encumbrance pursuant to the order of trial Court in the suit filed by petitioner, attaching the properties before judgment. Since the Bank has given a specific reply that they have prior charge and that the petitioner's claim would be considered if there is any excess amount is realised after discharging the entire dues of bank, the petitioner has approached this court stating that the E-auction notice should contain the encumbrance and that the petitioner's right will be in jeopardy, if the encumbrance is not disclosed in the E-auction notice by the respondent bank.

5.This court is unable to accept the contention of the petitioner that he is aggrieved by not referring to the order of attachment in the E-auction notice. First of all the petitioner is not a secured creditor and the order of attachment is much later to the proceedings initiated by the Bank under Securitization Act.

6.The learned counsel relied upon Rule 8 (7)(a) of Rules. Rule 8 reads as follows:

"8.Sale of immovable secured assets

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2)[The possession notice as referred to in sub-rule (1) shall be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers,] one in vernacular language having sufficient circulation in that locality, by the authorised officer.

[(2A)All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule(2) of rule8.]

(3)In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

(4)The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5)Before effecting sale of the immovable property referred to in sub-rule(1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property an may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b)by inviting tenders from the public;

[(c)by holding public auction including through E-auction mode; or]
(d)by private treaty;
[Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.]
(6)The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5);
[Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix IV-A to be published in two leading newspapers including one in Vernacular language having wide circulation in the locality;]
*[(7)Every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the web-site of the secured creditor, which shall include_*
(a)the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
(b)the secured debt for recovery of which the property is to be sold;
(c)reserve price of the immovable secured assets below which the property may not be sold;
(d)time and place of public auction or the time after which sale by any other mode shall be completed;
(e)deposit of earnest money as may be stipulated by the secured creditor;
(f)any other terms and conditions, which the authorised officer considers it necessary for a purchaser to know the nature and value of the property.]
(8)Sale by any method other than public auction or public tender, shall be on such terms as may be settled [between the secured creditor and the proposed purchaser in writing]."

The question is whether the Bank is required to accept the order of attachment before Judgment as an Encumbrance so as to disclose the same in the sale notice.

7.The effect of an order of attachment before Judgment is stated in Section 64 C.P.C. Section 64 of Civil Procedure Code reads as follows:

> ***"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 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.*
> *(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 purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."*

8.Section 64(1) renders only the private sale void as against all claims enforceable under the attachment if such transfer is after attachment. The right of a mortgagee who secured the property prior to attachment has an indefeasible right to proceed against the property. Further Order 38 Rule 10 C.P.C, protects the rights of prior mortgagee by saying that such attachment shall not affect the rights, existing prior to the attachment of persons not parties to suit. As per Section 64(2) of Civil Procedure Code, an order of attachment has no legal implication to affect the right of secured creditor to proceed against the property or to recover the money which is due to him based on the mortgage created by the borrower in favour of the first respondent bank. In this case, it is admitted that the bank has got the first charge in view of the mortgage and it is not in dispute that the proceedings for recovery of money had already been initiated by resorting to the provisions of Security Interest (Enforcement) Rules 2002. In such circumstances by virtue of Section 64 of Civil Procedure Code and Order 38 Rule 10 of C.P.C., the order of attachment is not binding on the bank to proceed against the property in the manner known to law as a secured creditor. The order of attachment before Judgment in a suit in which the Bank is not a party is not an encumbrance so as to affect the rights of Bank or the title of purchaser of property in the auction at the instance of Bank.

9.Learned counsel appearing for the respondent, relied upon a judgment of *Division Bench of Delhi High Court* in ***S.S.Dahiya and***

others Vs. Union of India and others, dated 14.02.2020, wherein it has been held as follows:

> *"14."Encumbrance" actually means the burden caused by an act or omission of man and not that created by nature. It means a burden or charge upon property or a claim or lien on the land. It means a legal liability on property. Thus, it constitutes a burden on the title which diminishes the value of the land. It may be a mortgage or a deed of trust or a lien of an easement. An encumbrance, thus, must be a charge on the property. It must run with the property."*

As far as the Bank whose right as Secured Creditor is protected and the order of attachment in this case is not an encumbrance.

10.Having regard to the discussion above made, this Court find that the petitioner has no *locus standi* to challenge the sale proceedings initiated by the bank against the borrower on the ground that the order of attachment is not disclosed in the sale notice. Therefore, this writ petition is neither maintainable nor having merits.

11.Accordingly, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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+1 CC to M/s.N.SATHEESH KUMAR, Advocate (SR-12901[F] dated 23/03/2020)

+1 CC to M/s.PALA.RAMASAMY, Advocate (SR-12911[F] dated 23/03/2020)

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