BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.08.2020

CORAM

THE HON'BLE MR.JUSTICE **S.S.SUNDAR**

C.R.P.(MD)Nos.881 to 884 of 2015

C.R.P.(MD)No.881 of 2015

M/s.Govindhji Jewat & Co.,
Represented by its Partner
Rajendra Kone, Son of Govindji,
15, Girivihar 2nd Floor,
K.S.Subramanian Road,
King's Circle,
Mumbai - 400 019. : Petitioner/Petitioner/Plaintiff
[Carrying on business at Jai Bhuvan,
17-19, Razi Syed Street, Bombay]

.. Vs ..

M/s.Rukmani Mills Ltd.,
a Limited Company incorporated under
Indian Companies Act,
Represented by its Board of Directors,
Silaiman, Madurai. : Respondent/Respondent/Defendant

PRAYER: Civil Revision Petition is filed under Section 115 of Civil Procedure Code, praying to set aside the fair order and executable order dated 24.07.2014 in E.P.No.121 of 1986 in O.S.No.85 of 1979 on the file of the learned Principal Subordinate Judge, Madurai, and order to proceed the execution petition.

For Petitioner : Mr.M.Rajaraman
For Respondent : Mr.S.Srinivasaraghavan

C.R.P.(MD)No.882 of 2015

M/s.Govindhji Jewat & Co.,
Represented by its Partner
Rajendra Kone,Son of Govindji,
15, Girivihar 2nd Floor,
K.S.Subramanian Road,King's Circle,
Mumbai - 400 019. : Petitioner/Petitioner/Plaintiff

.. Vs ..

M/s.Rukmani Mills Ltd.,
a Limited Company incorporated under
Indian Companies Act,
Represented by its Board of Directors,
Silaiman, Madurai. : Respondent/Respondent/Defendant

PRAYER: Civil Revision Petition is filed under Section 115 of Civil Procedure Code, praying to set aside the fair order and executable order dated 24.07.2014 in E.A.No.504 of 2006 in E.P.No.121 of 1986 in O.S.No.85 of 1979 on the file of the learned Principal Subordinate Judge, Madurai.

For Petitioner : Mr.M.Rajaraman
For Respondent : Mr.S.Srinivasaraghavan

C.R.P.(MD)No.883 of 2015

M/s.Govindhji Jewat & Co.,
Represented by its Partner
Rajendra Kone,
Son of Govindji,
15, Girivihar 2nd Floor,
K.S.Subramanian Road,
King's Circle,
Mumbai - 400 019. : Petitioner/Petitioner/Plaintiff

.. Vs ..

M/s.Rukmani Mills Ltd.,
a Limited Company incorporated under
Indian Companies Act,
Represented by its Board of Directors,
Silaiman, Madurai. : Respondent/Respondent/Defendant

PRAYER: Civil Revision Petition is filed under Section 115 of Civil Procedure Code, praying to set aside the fair order and executable order dated 24.07.2014 in E.A.No.505 of 2006 in E.P.No.121 of 1986 in O.S.No.85 of 1979 on the file of the learned Principal Subordinate Judge, Madurai.

For Petitioner : Mr.M.Rajaraman
For Respondent : Mr.S.Srinivasaraghavan

C.R.P.(MD)No.884 of 2015

M/s.Govindhji Jewat & Co.,
Represented by its Partner
Rajendra Kone,
Son of Govindji,
15, Girivihar 2nd Floor,
K.S.Subramanian Road,
King's Circle,
Mumbai - 400 019. : Petitioner/1st Respondent/ Petitioner/Plaintiff

.. Vs ..

1.State Bank of India,
Stressed Assets Management Branch,
represented by its Assistant General Manager,
having office at 32, Red Cross Building,
Montieth Road, Egmore,
Chennai - 600 008. : 1st Respondent/Petitioner/Claimant/ Third party

2.M/s.Rukmani Mills Ltd.,
a Limited Company incorporated under
Indian Companies Act,
Represented by its Board of Directors,
Silaiman, Madurai. : 2nd Respondent/Respondent/Respondent/ Defendant

PRAYER: Civil Revision Petition is filed under Section 115 of Civil Procedure Code, praying to set aside the fair order and executable order dated 24.07.2014 in E.A.No.372 of 2012 in E.P.No.121 of 1986 in O.S.No.85 of 1979 on the file of the learned Principal Subordinate Judge, Madurai.

For Petitioner : Mr.M.Rajaraman
For Respondent 1 : Mr.V.Meenakshisundaram
For Respondent 2 : Mr.S.Srinivasaraghavan

- - - -

COMMON ORDER

All the above Civil Revision Petitions have been filed by the plaintiff in the suit in O.S.No.85 of 1979 on the file of the Principal Sub Court, Madurai.

2.The revision petitioner filed a suit in O.S.No.85 of 1979 before the Principal Sub Court, Madurai and obtained a decree for recovery of a sum of Rs.1,75,806/- with interest at 20% from the date of plaint. The said suit was decreed as prayed for by a judgment and decree dated 10.01.1986. The revision petitioner thereafter filed an execution petition in E.P.No.121 of 1986 to execute the decree by attachment and sale of the property namely land and building and premises with all fixtures and fittings, machineries, electrical installations, etc., belongs to the judgment debtor, M/s.Rukmani Mills. It appears that the property of the respondent namely the entire mill premises were also attached and the Court also drew sale proclamation by fixing the upset price at Rs.1,00,00,000/-. During the pendency of the execution proceedings, the revision petitioner filed E.A.No.504 of 2006 in E.P.No.121 of 1986 in O.S.No.85 of 1979 to reduce the upset price from One crore to Forty lakhs.

3.The revision petitioner filed another application in the execution petition in E.A.No.505 of 2006 in E.P.No.121 of 1986 to grant permission to the revision petitioner/plaintiff to bid in the auction and adjust the decree amount. The first respondent in C.R.P.(MD)No.884 of 2015 is a third party to the suit and execution proceedings. In C.R.P.(MD)No.884 of 2015, M/s.Rukmini Mills is the second respondent. In all other Civil Revision Petitions, M/s.Rukmini Mills is the sole respondent. The first respondent in C.R.P.(MD)No.884 of 2015 filed E.A.No.372 of 2012 in E.P.No.121 of 1986 in O.S.No.85 of 1979 for the following reliefs:

a) to adjudicate that the petitioner bank alone, as a secured creditor, is entitled to bring the schedule mentioned property for sale and to appropriate the sale proceeds towards the loan account of the second respondent;

b) To adjudicate that the first respondent being a money decree holder is entitled to proceed only against the remaining sale proceeds which are available after adjusting towards the loan account of the second respondent;

c) To release the schedule mentioned property from the attachment effected by this Hon'ble Court in the above execution petition;

d) to grant an order of interim injunction restraining the first respondent from bringing the schedule mentioned property for sale through Court auction till the disposal of the claim petition;

e) To pass an order staying all the proceedings of the above execution petition in E.P.No.121 of 1986 till the disposal of the claim petition;

f) directing the contesting respondents to pay the cost of this petition.

4.The first respondent in C.R.P.(MD) No.884 of 2015 is a nationalised bank which granted credit facilities to M/s.Rukmani Mills in the year 1980. It is admitted by the second respondent in C.R.P. (MD)No.884 of 2015, namely, M/s.Rukmini Mills, that they created equitable mortgage on 18.08.1980 over the petition mentioned property by way of deposit of title deeds with the bank. The equitable mortgage appears to have been extended for additional credit facilities granted to M/s.Rukmani Mills from time to time. Since the mill has committed default in repaying the loan amount, it is stated by the bank that they initiated legal proceedings under SARFAESI Act against M/s.Rukmani Mills and took possession of the entire mill which is the subject matter of execution proceedings in E.P.No.121 of 1986 on 15.10.2008. The bank has also filed original application in O.A.No.11 of 2008 before the Debt Recovery Tribunal and it is pending. The movable properties like machineries and other hypothecated goods were sold on 23.12.2010 for a sum of Rs.1.05 Crores. It is stated that M/s.Rukmani Mills has to pay still a sum of Rs.45.43 Crores as on 31.03.2012. It is further stated that the bank was constrained to bring the properties of the Mill i.e., the mill premises which is also described in the schedule to the execution petition filed by the revision petitioner, for auction. Since the property which was mortgaged to the bank had been attached by the revision petitioner on 27.03.1986, it is stated that the bank being a secured creditor by getting equitable mortgage on 18.08.1980, will have preference to proceed against the properties to recover the dues.

5.The learned Principal Sub Court, Madurai, dismissed the execution petition in E.A.No.121 of 1986 in O.S.No.85 of 1979 and the applications in E.A.No.504 of 2006 and E.A.No.505 of 2006 in E.P.No.121 of 1986. The Principal Sub Court allowed E.A.No.372 of 2012 in E.P.No.121 of 1986 filed by the first respondent bank in C.R.P.(MD)No.884 of 2015. Aggrieved by the common order passed by the learned Principal Subordinate Judge, Madurai, the revision petitioner/plaintiff in O.S.No.85 of 1979 has preferred all the above Civil Revision Petitions.

6.C.R.P.(MD)No.881 of 2015 is preferred as against the order in E.P.No.121 of 1986; C.R.P.(MD)No.882 of 2015 is preferred as against the order in E.A.No.504 of 2006; C.R.P.(MD)No.883 of 2015 is filed as against the order in E.A.No.505 of 2006 and C.R.P.(MD) No.884 of 2015 is filed as against the order in E.A.No.372 of 2012 in E.P.No.121 of 1986, by the Principal Sub Court, Madurai.

7.In all the above Civil Revision Petitions, the positive and consistent case of the bank and the judgment debtor is that the properties which are sought to be proceeded against in E.P.No.121 of 1986 is the property that was mortgaged to the first respondent bank by deposit of title deeds. Though a vague attempt was made by the revision petitioner disputing the mortgage by deposit of title deeds, the lower Court and this Court is convinced that a mortgage was created by deposit of title deeds on 18.08.1980. It is based on the mortgage and hypothecation agreement, all the movables within the mill premises had already been sold by the bank.

8.It is seen that the property was attached in the execution proceedings long after the creation of mortgage. Hence, the bank as a secured creditor has got indefeasible right to proceed against the mortgaged properties and the attachment will be subject to the mortgage in favour of the bank.

9.The learned Counsel appearing for the revision petitioner submitted that SARFAESI proceedings initiated by the bank are subsequent to the attachment made by the Court in the execution proceedings and that therefore, the attachment will prevail over the mortgage. The learned Counsel appearing for the petitioner in the alternative submitted that the provisions of Order 21, Rule 58 (3)(c) of Code of Civil Procedure protects the rights of the decree-holder to continue the attachment subject to the mortgage, charge or interest in favour of any third party who has secured the property by way of a prior mortgage. The learned Counsel appearing for the petitioner submitted that the bank has given certain particulars about the credit facilities in an earlier application in E.A.No. 833 of 2006 and that it is seen that the credit facilities were availed only on 26.03.1992. It was therefore submitted by the learned Counsel appearing for the petitioner that the mortgage was not created in the year 1980 as alleged in the execution application in E.A.No.372 of 2012. It was also submitted by the learned Counsel appearing for the petitioner that the Executing Court failed to consider that no document was produced by the bank to show that equitable mortgage was on 1980 as alleged in the petition. Since the petitioner cannot avail any remedy by approaching the Debt Recovery Tribunal as a decree holder in an independent suit, the petitioner states that the lower Court has failed to protect the interest of the revision petitioner who has obtained money decree as against M/s.Rukmani Mills.

10.The Execution Petition was filed by the revision petitioner to execute the money decree which was for a sum of Rs.7,71,888/- as on 1986. The bank has got enough records to show that the property was taken possession under SARFAESI Act. The mortgage by deposit of title deeds is evident from the letter of confirmation which was in the prescribed format detailing the documents of title handed over to the bank at the time of creating the mortgage in the year 1980. M/s.Rukmani Mills has admitted the mortgage by deposit of title deeds in their counter affidavit filed before the lower Court. Even before this Court, the learned Counsel appearing for M/s.Rukmani Mills fairly conceded that an equitable mortgage was created by deposit of title deeds with effect from 08.09.1980. The learned Counsel appearing for the petitioner submitted that the confirmation letter dated 08.09.1980 does not disclose the property details. The confirmation letter refers to all the title deeds relating to the property of M/s.Rukmani Mills situate in various places. It is admitted that the documents of title are pertaining to the mill premises. From the list of documents produced, the learned Counsel appearing for the petitioner is unable to point out that the title document pertaining to the property which are mentioned in the execution petition is not included in the list of documents so as to contend that the petition mentioned property in the execution petition is not secured by an equitable mortgage by deposit of title deeds. Though lengthy argument was advanced by the learned Counsel appearing for the petitioner, it is well settled that a decree holder who has attached some properties which were earlier mortgaged to another person cannot defeat the rights of mortgagee who has secured the properties prior to attachment. It is unnecessary for this Court to elaborate several precedents except referring to a judgment of a Division Bench of this Court in **W.P.(MD)No.5916 of 2020 [S.Senthamarai Kannan v. The Chief Manager, Canara Bank, Palani Branch, Dindigul District and another]** reported in **CDJ 2020 MHC 2555** wherein it has been held as follows:

> "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."

11.On the admitted facts, this Court is of the view that the bank's right to proceed against the property is protected against any one who has no prior right. In this case, the order of attachment was much after the mortgage and therefore, is not binding and the bank can proceed against the property as held by the Hon'ble Division Bench of this Court. Order 38 Rule 10 of C.P.C. protects the rights of the prior mortgagee and therefore, any attachment after the mortgage cannot affect the rights of the bank which existed prior to the attachment. The bank is not a party when the order of attachment was passed by the executing Court in 2008. It is true that the order of attachment will be subject to the bank's right to proceed against the property based on the mortgage. The claim petition was filed by the bank in E.A.No.372 of 2012 to hold that the petitioner bank alone as a secured creditor is entitled to bring the schedule mentioned property for sale and appropriate the sale proceeds towards the loan account of the bank and to adjudicate that the revision petitioner herein being a decree-holder is entitled to proceed only against the remaining properties which are available after adjusting towards loan amount of the second respondent.

12.The order passed by the learned Principal Subordinate Judge in raising the attachment to enable the bank to proceed against the property is perfectly in order. However, the order of attachment will hold good as it is valid otherwise and it is enforceable subject to the mortgage rights of the bank to proceed against the property for recovery of its dues. The order of attachment made in E.P.No.121 of 1986 will be subject to the mortgage by deposit of title deeds in favour of the first respondent in C.R.P.(MD)No.884 of 2015. The order of attachment cannot affect the bank or the auction purchaser to get absolute title after the sale at the instance of the bank is confirmed.

13.As a result, C.R.P.(MD)No.882, 883 and 884 of 2015 are dismissed. C.R.P.(MD)Nos.881 of 2015 is partly allowed. It is declared that the order of attachment in E.P.No.121 of 1986 is subject to the equitable mortgage in favour of the first respondent bank. It is further clarified that the revision petitioner being a money decree-holder is entitled to proceed only against the remaining asset or balance of sale proceeds which are available after adjusting the dues towards the loan account of the first respondent bank in C.R.P.(MD)No.884 of 2015. However, the lower Court dismissed the execution petition in E.P.No.121 of 1986. Since the revision petitioner's right against the remaining sale proceeds is preserved in this proceedings, the lower Court ought to have stayed the proceedings in E.P. No.121 of 1986 instead of dismissing E.P.No.121 of 1986. C.R.P.(MD)No.881 of 2015 is therefore partly allowed and the order dismissing E.P.No.121 of 1986 is set aside. The execution petition in E.P.No.121 of 1986 stands stayed till the first respondent in C.R.P.(MD) No.884 of 2015 realises its dues out of the properties mortgaged with the bank. It is open to the revision petitioner to proceed against the remaining sale proceeds after adjustment of dues to the bank. No costs.

Sd/-

Assistant Registrar(CO)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

SRM

To

The Principal Subordinate Judge,
Madurai.

+1 CC to M/s.M. RAJARAMAN, Advocate (SR-14827[F] dated 25/08/2020

+1 CC to M/s.S. SRINIVASA RAGHAVAN, Advocate (SR-14937[F] dated 26/08/2020)

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-14928[F] dated 25/08/2020

C.R.P.(MD)Nos.881 to 884 of 2015
24.08.2020

avs(CO)
TR(16.09.2020) 9P 5C