IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.02.2021

Pronounced on : 08.03.2021

CORAM

THE HONOURABLE MR. JUSTICE **C.V.KARTHIKEYAN**

A.No.653 of 2021
in
C.S.(Comm.Div.)No.733 of 2019

M/s.Indostar Capital Finance Limited
having its registered office address at:
One Indiabulls Centre, 20th Floor,
Tower 2A, Jupiter Mills Compound,
Senapati Bapat Marg, Mumbai – 400 013.

Branch Office at:
No.22 & 23, 2nd floor,
Sakithyan annex building,
Venkatnarayana Road, T Nagar,
Chennai – 600 017.
Represented by its Authorized Officer

... Applicant / Proposed Respondent

-Vs-



1.R.Ravinder Kumar
S/o.Late Mr.Rishab Chand,
Represented by his power of attorney
R.Nihhaal, S/o.R.Ravinder Kumar
No.30, Govindu Street,
T.Nagar, Chennai – 600 017.

... Plaintiff / Respondent

2.K.Ponnammal

3.A.P.Ravi

4.R.Manju

... Defendants / Respondents

**Prayer:-** This application filed under Order XIV Rule 8 read with Order XXXVIII Rule 6(2) of CPC praying to raising attachment order dated 19.02.2020 in A.No.9876 of 2019 in C.S.No.733 of 2019 pending before this Court.

For Applicant : Mr.M.Ajmal Azzath

For Respondents : Mr.M.Nandhakumar
For Mr.Eswar.

**ORDER**

This Application has been filed by a third party to the suit under Order XXXVIII Rule 6(2) of the Code of Civil Procedure, 1908 seeking to raise the order of attachment, in A.No.9876 of 2019 in C.S.No.799 of 2019 dated 19.02.2020.

2.In the affidavit filed in support of the said application, the applicant, M/s.Indostar Captial Finance Limited had stated that the defendants had approached them seeking loan on 23.08.2017 and offered as security properties situated at Thiruvanmiyur. They sought a loan for a sum of Rs.2,60,00,000/-. The 1st defendant stood as guarantor for the loan. The 1st defendant was also the owner of the property. The loan was sanctioned by letter dated 23.08.2017. The sanction was also accepted by the defendants. The defendants agreed to repay the amount with interest. They also agreed to deposit the Title Deeds and an Equitable Mortgage was created and registered under Document No.6521 of 2017 on the file of the Sub-Registrar office, Neelankarai. The Title Deeds were also deposited. The mortgage was executed in the year 2017 much prior to the institution of the present suit.



3.The defendants did not repay the loan. The account had been classified as a Non-performing asset. The applicant had invoked the powers under Section 13(2) of the SARFEASI Act, 2002 by issuing notice dated 09.10.2019. The notice was also published in the newspapers. Possession notice was also issued on 30.12.2019 under Section 13(4) of the SARFEASI Act. This was also published in the newspapers on 05.01.2020. At the time of execution of the Loan Agreement it was confirmed that there was no encumbrance or charge, lien, mortgage over the suit property. It was only after verification that the applicant disbursed the loan.

4.Thereafter, the applicant came to know that the very same property had been attached by an order of court dated 19.02.2020 in A.No.9786 of 2019. It had been stated that the plaintiff had not revealed the fact that the property was already mortgaged with the applicant. It had also been stated that under Section 34 of the SARFAESI Act, the civil court had no jurisdiction to examine the issues. It had been stated that the applicant has every right to bring the property on auction and if it is so, then the general public would hesitate to buy the property. It is under these circumstances that the application has been filed.



5.Heard arguments advance by the learned counsel for the applicant and also the learned counsel for the plaintiff.

6.The facts stated in the application cannot be denied or disputed. As a matter of fact it is not denied or disputed. It is evident that the 1st defendant and the other defendants had approached the applicant seeking loan and had deposited the Title Deeds of the property situated at Enjambakkam village in Old S.No.165/15B in New S.No.165/15B2 measuring 0.14.75 cents in Thiruvanmiyur.

7.It is a fact that by this deposit of Title Deeds, an Equitable Mortgage had been registered as Document No.6521 of 2017 on the file of the Sub-Registrar office, Neelankarai. This fact should have been disclosed by the plaintiff. The plaintiff should have informed the Court that the property was already mortgaged. Further it is also seen that public notices had been issued not only with respect to recalling the loan amount but with respect to possession. This had been published in the newspapers on 05.01.2020. The order of attachment was passed by a learned Single Judge of this Court on 19.02.2020. On that date, the applicant herein had already taken possession of the property.



8.The learned counsel for the plaintiff placed reliance on the judgment of the learned Single Judge of this Court in ***ICICI Bank Ltd. Rep. by its Authorized Officer -Vs- P.Rajaram and Others*** reported in

***2020 SCC OnLine Mad 5260***. That was a case were an unregistered Sale Agreement had been entered into between the plaintiff and the defendant with respect to a property which was already subject to mortgage. The learned Single Judge had opined that any attachment order passed by this Court is always subject to the prior right already created in favour of the secured creditor.

9.The facts in the instant case are different. The suit had not been filed on the basis of any agreement of sale, but with respect to advancing loan to the 1st defendant for a sum of Rs.80,00,000/-. But the suit had not been based on the strength of such execution of a mortgage deed but on the strength of Promissory notes. Therefore, even the plaintiff would not be aggrieved if the mortgage is raised since the plaintiff will certainly have to find out an alternate efficious way of recovering the amount, in case the plaintiff obtains a decree in the Court. To reiterate, this suit is not based on land.

10.It is also seen in A.No.9876 of 2019 quite apart from the present property which is schedule A to the said application there were several other properties in schedule B, C, D, E items 1 and 2 and F items 1 and 2 properties have been mentioned.

11.The Court will have to balance the rights of an existing mortgagee and will also have to examine whether the transaction between the plaintiff and the defendants was bonafide or not Suppression of an existing mortgage is also very significant. The reason that the suit is not based on the mortgage but based on promissory note has to be examined.

12.In view of these facts, the order of attachment dated 19.02.2020 in A.No.9876 of 2019 is raised with respect to schedule A of the scheduled properties given in the Judges Summons to that particular application. This application is allowed. No costs.

08.03.2021

smv/vsg
Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No



**Note:**

Registry is directed to communicate this order to Sub Registrar Office, Neelangari, indicating that attachment ordered in A.No. 9876 of 2019 dated 19.02.2020 has been raised.

**C.V.KARTHIKEYAN, J.,**

smv/vsg



Pre-delivery order made in

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