

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :29.03.2021

Pronounced on :15.04.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

A.S.No.470 of 2019

and

C.M.P.Nos.13265 of 2019 and 4655 of 2021

M/s ARC Investments Castings LLP
Rep.by its Partner MD.Punit Rasesh Shah,
433, 8th Main, 4th Block,
Koramangala, Bangalore
and Registered Office at
No.1C, Prince Apartments,
No.59, Ormes Road,
Kilpauk, Chennai. .. Appellant/Petitioner

/versus/

1.M/s Interpump Hydraulics India Pvt.Ltd.,
Rep.by its Finance Manager,
P.A.Arunachalam,
129, SIPCOT Industrial Complex,
Zuzuvadi, Hosur. ..1st Respondent/Petitioner

2.M/s UT Limited
Rep.by its G.P.A.Holder, S.Karthikeyan,
No.14, Princep Street,
Kolkatta 700 072. ..2nd Respondent/Judgment Debtor

3.P.Pragasam .. 3rd Respondent/Auction Purchaser

Prayer:- Appeal Suit has been filed under Section 96 of the Civil Procedure Code, 1908 praying to set aside the order and decree and order dated 09.03.2018 in E.P.No.57 of 2016 in E.P.No.183 of 2014 on the file of the Principal District Judge, Krishnagiri.

For Appellant :Mr.A.R.L.Sundaresan,
Senior Counsel for
Mrs.A.L.Ganthimathi

For Respondents :Mr.S.Ravi for R1
Mr.R.Thiagarajan for R2
Mr.A.Venkatesh Kumar for R3

J U D G M E N T

(The case has been heard through Video Conferencing)

The property, which is the subject matter of the appeal, is 3.00 acres land bearing plot No.26, SIPCOT Industrial Complex, Zuzuvadi Village, Hosur Taluk, Krishnagiri District, Tamil Nadu.

2.The parties are litigating their respective right and title over the said property. Based on the sale deed Ex.P-11 dated 25/07/2016 executed in favour of the appellant, pursuant to a private treaty under Rule 8 (5)(d) of the Securities Interest Rules and based on the sale certificate Ex.R-5 dated 05/08/2016, issued to it by the Execution Court pursuant to the Court auction sale in favour of the third respondent in a suit for recovery of money.

3.The point for determination in this appeal is, in the peculiar facts and circumstances of the instant case, whether the sale in favour of the appellant under the SARFAESI Act in respect of the immovable property mortgaged to the Allahabad Bank as security for the loan will prevail over the Court auction sale in favour of the 3rd respondent for recovery of money decree?

4.Facts leading to the appeal:-

The first respondent herein filed a suit in O.S.No.13/2011 for recovery of Rs.32,07,760.80, being the costs with interest for the goods sold and delivered to the second respondent herein. The Court passed ex parte decree against the second respondent on 20/07/2012. For realisation of the decree amount, R.E.P.No.183/2014 filed by the first respondent/decreed holder for attachment and sale of the subject property. The Execution Court ordered attachment on 16/06/2015. The attachment was made absolute on 07/07/2015. After paper publication, auction was conducted on 06/06/2016. The third respondent herein was the successful bidder in the said auction for a sale price of Rs.1,51,00,000/-. Towards the sale price, the third respondent deposited Rs.36,61,720/- on the day of auction and balance Rs.1,13,25,000/- on 15/06/2016. The sale was confirmed on 03/08/2016 and sale certificate was issued on the same day. The Court on behalf of the judgment debtor/first respondent herein, registered the sale certificate in favour of the auction purchaser/third respondent on 13/08/2016.

5.The appellant herein as a third party claimant filed an application E.A.No.57/2016 on 06/09/2016 under Order XXI, Rule 58 of the Civil Procedure Code, to recall the sale certificate issued by the Court in favour of the 3rd defendant/auction purchaser and consequentially to raise the order of attachment effected in E.P.No.183/2014 as against the subject property in execution of the decree dated 20/07/2012 passed in O.S.No.13/2011.

6.The said application was filed by the appellant premising that the subject property owned by M/s UT Limited (second respondent herein) was under mortgage with Allahabad Bank for the financial assistance availed. For failure to discharge the loan, Allahabad Bank declared the assets as Non-Performing Assets (NPA) and caused notice dated 01/08/2011 under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter to be shortly referred as "SARFAESI Act") to the borrower/the second respondent to clear the debts within 60 days from the date of the notice. The second respondent did not clear the debt within the given time. Consequentially, the possession of the property was taken on 17/11/2011 in exercise of the power conferred under Section 13(4) of the SARFAESI Act r/w Rule 8(1) of Security Interest (Enforcement) Rules, 2002. Later, Allahabad Bank assigned the debt in favour of M/s Pegasus Assets Reconstruction Pvt. Ltd., who in turn sold the property to the appellants herein on 28/04/2016 and issued the sale certificate. The sale deed was executed in favour of the appellant on 25/07/2016. The sale deed was subsequently registered on 17/11/2016.

7.The trial Court dismissed the application for the following reasons.

(a)The appellant herein got incorporated as LLP only on 25/05/2016. Whereas Ex.P-2-sale certificate issued in its name is dated 28/04/2016. This clearly proves that Ex.P-2 is a document created with anti-date to defeat the right of the Court auction purchaser. The sale certificate issued in favour of the claimant even before the incorporation of the claimant as LLP is contrary to Sections 12 and 14 of the Limited Liability Partnership Act.

(b)In order to create a pre-existing right in favour of the claimant both the claimant and second respondent had created Ex.P2 (sale certificate) and Ex.P-11 (sale deed) in collusion with M/s Pegasus Limited. The stamp papers purchased by third parties are used for preparing Ex.P-11 to anti-date the document so as to maintain the application under Order 21, Rule 58 of the Civil Procedure Code.

(c)The pendency of proceedings before BIFR is of no consequence, since the said Act itself got repealed from

01.12.2014 and any proceeding pending got abated. Even otherwise, the suit for recovery of money was filed in the year 2011 and decree passed on 20/07/2012, whereas the reference under Section 15 of the SIC (Special Provisions Act) 1985 was received by BIFR only on 28/05/2013 and before BIFR could proceed with the reference, the Bank has invoked the provisions of SARFAESI.

(d) The property alleged to have sold under SARFAESI Act in favour of the third party claimant was not in accordance with the procedure laid under Rules 8 and 9 of the Security Interest Rules. The private sale was not effected within the time stipulated or in terms of the said rules, hence, the said sale is invalid.

(e) The claimant had not produced any proof for the payment of the sale consideration of Rs.701 lakhs. Out of total consideration of Rs.701 lakhs, only Rs.1,75,00,000/- paid to the Reconstruction Company namely M/s Pegasus and the remaining amount Rs.5,26,00,000/- alleged to have paid to the defaulted borrower. This is contrary to the covenant found in the assignment deed (Ex.P-12).

(f) The application under Order 21, Rule 58 of the Civil Procedure Code is not maintainable, since on the date of filing the application, the subject property already sold to the auction purchaser. The private sale effected in favour of the applicant is only after the auction sale in favour of the 3rd respondent.

8. Gist of the appeal:-

Assailing the trial Court judgement and the findings, the appeal is filed stating that the trial Court erred in appreciating the evidence properly. The trial Court failed to consider that the suit property was mortgaged with M/s Allahabad Bank as security for the loan amount borrowed by the second respondent. Later, proceedings were taken under SARFAESI Act and was sold for value of Rs.7,01,00,000/- to the appellant. As such the purchase of the 3rd respondent is totally invalid. On the date of judgment in O.S.No.13/2011 (20/07/2012), the 2nd respondent had no alienable right or title over the property, since proceedings under Section 13(2) of the SARFAESI Act (01/08/2011) already initiated by the lending bank. The trial Court ought to have seen that the secured creditors have a paramount charge over the mortgaged property and have a secured right over the unsecured creditors. Any order or judgment of the Court shall only be subject to the rights of the secured creditors. The Court below erred in holding that the appellant LLP does not have any right to purchase property, since the LLP has not been incorporated on the date of purchase by overlooking the fact that the sale deed was executed only after the incorporation.

9. Petition to receive additional documents and counter:-

The appellant had filed a miscellaneous petition in C.M.P.No.4655/2021 under Order XLI, Rule 27 of the Civil Procedure Code to receive additional documents, primarily to show how the sale consideration of Rs.701 lakhs paid to the first and second respondents.

10. In the counter filed by the third respondent, the application is opposed on the ground that the affidavit filed along with this petition does not disclose any ground mentioned in Order 41, Rule 27 of the Civil Procedure Code to admit the 17 documents listed. It is not a case, where the trial Court refused to admit these documents. It is not the case of the appellant that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him before the trial Court. These documents, which are sought to be produced in the appeal, are created fraudulently.

11. The case of the appellant as seen from the evidence is that, during the year 2004, the M/s UT Limited (second respondent) availed term loan and credit facility from M/s Allahabad Bank, Industrial Finance Branch at Kolkata. As security for the loan, M/s UT Limited deposited the title deed of the subject property creating equitable mortgage. First charge over the property was created in favour of Allahabad Bank. By the middle of the year 2011, the outstanding due payable by M/s UT Limited was Rs.36.03 crores and interest thereon. The Allahabad Bank, for violation of terms of sanction and for making the account irregular notified M/s UT Limited a Non-Performing Asset. Notice under Section 13(2) of the SARFAESI Act was issued to M/s UT Limited on 01/08/2011 (Ex.P-5) calling upon M/s UT Limited to pay the dues within 60 days. M/s UT Limited failed to repay the loan amount within the given time. Therefore, the Allahabad Bank took possession of the properties of M/s UT Limited and caused paper publication (Ex.P-6) for sale the subject property and other properties of M/s UT Limited. 07/08/2012 was fixed as date of opening the tender. The attempt of the Allahabad Bank to sell the property through tender not fructified and went in vein. Therefore, on 27/09/2013, the Bank assigned the financial assistance granted to M/s UT Limited together with all underlying security interest to M/s Pegasus Assets Reconstruction Private Limited. The same was intimated to M/s UT Limited vide, letter dated 18/02/2014 (Ex.P-7). On the date of assignment i.e 27/09/2013, the outstanding dues was Rs.4763.54 lacs, plus interest and other charges. The assignee M/s Pegasus proposed an one time settlement to M/s UT Limited vide, its letter dated 04/08/2015 (Ex.P-8). It offered full settlement, if M/s UT Limited make down payment of Rs.10 crores within 30 days from the date of receipt of the sanction letter and the balance amount of Rs.3.5 crores and Rs.1.5 crores to be paid out of sale proceeds of land at Hosur (subject property) and machinery at Budge Budge Trunk Road, Kolkata respectively.

The M/s UT Limited had not responded to this settlement offer.

12. Meanwhile, M/s Interpump Hydraulics India Pvt. Ltd. (the first respondent herein) which supplied materials like, gear pumps, breaking kit, thrust plate, drive gear and other accessories to the M/s UT Limited (second respondent) filed suit O.S.No.13/2011 on 23/01/2011 for a sum of Rs.32,07,760.80/- with interest. The second respondent herein, who is the defendant in the said suit, entered appearance and filed written statement but remained ex parte, after the case was taken up for trial on framing issues. Hence, ex parte decree was passed on 20/07/2012. Thereafter, the second respondent filed a petition to set aside the ex parte decree. That petition was returned for defective filing. The second respondent herein did not represent the petition in time. After 281 days delay, the petition to set aside the ex parte decree was represented on receipt of the notice in R.E.P.No.24/2013 filed to attach and sell the machineries found in the subject premises. The said condone delay petition was numbered as I.A.No.138/2013 and transferred to the Additional District Court, Hosur, due to change in territorial jurisdiction. The petition was re-numbered as I.A.No.10/2014. The delay was condoned on terms to pay cost of Rs.2,000/-, on or before 24/07/2014. The second respondent did not pay the cost, hence, the condone delay petition was dismissed on 30/07/2014. Thereafter, in R.E.P.No.24/2013 filed for attachment of machineries and sale, the second respondent engaged Counsel but did not file counter. The petition was ordered, machineries were attached, but the Amin could not execute the attachment since the machineries were fixed to the wall and could not be removed. Hence, the said REP closed.

13. Under these circumstances, the first respondent/decreed holder in O.S.No.13/2011, filed R.E.P.No.183/2014 for attachment of the subject immovable property. The second respondent evaded notices, hence, substituted service through paper publication was effected and thereafter the property was brought to auction on 15/06/2016. The REP was adjourned to 02/08/2016 for confirmation of sale. On that day, the sale was confirmed and the sale certificate was issued to the auction purchaser, the third defendant herein.

14. The appellant case is that the third respondent had purchased the property from a person, who has no alienable right, whereas the appellant had purchased the property from the vendor, who is the secured creditor. To show their purchase from the person, who have alienable right, they rely upon Ex.P-2, Ex.P-10 and Ex.P-11. Ex.P-10 is the letter dated 05/02/2016, to show that M/s Pegasus Asset Reconstruction company as sole secured creditor intimated the second respondent that they are intended to sell the property for Rs.701 lacs through private treaty as per the provisions contained in SARFAESI Act and

offered the second respondent company, Mr.Harish Khaitan (Director-cum-guarantor) and Smt.Vandana Khaitan (guarantor) to repay the total amount of Rs.4763.53 lacs together with interest within 30 days, if they are interested in releasing the mortgage property. Very strangely, in this letter the borrower Mr.Harish Khaitan and guarantor Vandana Khaitan are also signatories and the name of the proposed buyer is not disclosed.

15.After this letter, the sale certificate Ex.P-2 has emanated from M/s Pegasus. This document is dated 28/04/2016. The sale certificate is issued in favour of M/s ARC Investment Casting LLP acknowledging receipt of Rs.1.75 crores, out of total sale consideration of Rs.7.01 crores. In this sale certificate, it is stated that the balance amount Rs.5.26 crores is being paid to M/s UT Limited. The handing over of the possession is also recorded in the said sale certificate. The Director of M/s ARC Investment has signed on behalf of the purchaser. The name of the Director not found anywhere in this document. The M/s ARC Investment registered office address not provided. In fact, on 28/04/2016, there was no LLP in the name M/s ARC Investment Casting in existence.

16.The learned Senior Counsel for the appellant, referring document No.2, the letter dated 02/06/2015, Document No.3 the letter of intent dated 04/06/2015, the document No.09 LLP agreement dated 27/04/2016 and document No.12, the certificate of incorporation of the M/s ARC Investment Casting LLP dated 25/05/2016 submitted that, these documents, which are sought to adduce as additional evidence, will explain the sale certificate Ex.P-2 is genuine and valid.

17.Why these documents not produced during the trial is not explained. The appellant had not satisfied the statutory requirement to accept additional documents at appeal stage. Nonetheless, these documents does not help the case of the appellant. In fact, it worsen their case and exposed the fraud, they try to play on the Court in collusion with the second respondent. Document No.2 is the letter offered by one M/s Amsteel Castings Pvt. Ltd. dated 02/06/2015 offering to buy the property of M/s UT Limited located at plot No.26, SIPCOT Industrial Complex, Hosur for Rs.701 lacs. On 04/06/2015, the letter of intent is executed between M/s Amsteel Casting Pvt limited, Hosur (purchaser), M/s UT Limited Hosur (seller), M/s Pagasus Asset Reconstruction Pvt Ltd, (assignee) and Mr.Harish Khaitan (in his individual capacity as facilitator). The said Harish Khaitan is the Director of the second respondent company the borrower/debtor. He had set his hand in this letter of intent (LOI) both as representative of the seller as well as the facilitator. In this letter of intent, there is a specific Clause (8), which says that it is a condition precedents for the execution of purchase deeds with regard to the premises, the

seller shall obtain all necessary clearance/NOC's from the jurisdictional Courts. Mr.Harish Khaitan, who was fully aware of the decree in O.S.No.13/2011 passed by the jurisdictional Court, had not obtained any NOC from the Court before executing the purchase deed Ex.P-11.

18.Mr.HarishKhaitan, the Director of the second respondent company having indebted to the first respondent and had full knowledge of the decree passed in O.S.No.13/2011 and subsequent progress in it had participated in the settlement agreement and claim to have received Rs.5.26 crores as per the sale certificate Ex.P-2 and Ex.P-11. He had been examined as RW-2 in the present petition. In the cross examination, he had deposed, "I am aware that Pegasus Assets Reconstruction Pvt Ltd sold the Hosur property in favour of the claimant. I came to know that it was sold in the year 2016. I cannot recollect the date and month of sale. I cannot recollect the fact that I have received a sum of Rs.5crores 26 lacs for the sale of Hosur property. I have neither received cash on hand but only through bank. I admit that am not produced the bank account to prove that I have received the amount as I have not required to produce the same. I admit when an application is pending before BIFR I am not entitled to receive money by way of sale transaction. The witness now stating that he is entitled to receive money with the permission of the bank. I admit that I have not obtained any permission from BIFR to receive the money. I admit that a petition has been filed through our power agent M.Karthikeyan to set aside the sale made in favour of the 3rd respondent."

19.Now, coming back to the execution proceedings, the second respondent filed applications in E.A.Nos.41, 42 and 43/2016 in R.E.P.No.183/2014, under Order 21, Rule 106 of the Civil Procedure Code alleging that no personal notice was served on him in the Executive Petition. Further, it was also averred that, arbitration proceeding regarding the second respondent company is pending before the Board for Industrial and Financial Reconstruction (in short "BIFR"), Delhi Bench II in Case No.60/2013 under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and in such case, no civil suit will lie for the recovery of money or for the enforcement of any security against the second respondent, in view of Section 22 of the said Act.

20.Permission to be represented by Power Agent, to set aside the exparte attachment order dated 28/09/2015 and to stay the execution proceedings till the disposal of the petition to set aside attachment were the relief sought in these three applications (E.A.Nos.41 to 43 of 2016). After hearing both sides, these petitions were dismissed on 28/02/2017 vide common order by the Execution Court. Against the dismissal of the application E.A.No.42/2016, (petition to set aside the exparte

attachment) the second respondent had filed an appeal in C.M.A.No.1642/2017 before High Court of Judicature at Madras and the same was dismissed for non prosecution on 18/07/2018.

21.In respect of the proceedings before the BIFR, we find, it is the consequence of the resolution passed by the Board of Directors of the second respondent company on 30/03/2013. The BIFR had received the request for reference and Form-A from the company on 28/05/2013. The second respondent company after sought for BIFR intervention under SIC (Special Provision) Act, 1985, voluntarily had not co-operated for adjudication by furnishing copies of Form-A to the parties concern. In its proceedings dated 15/07/2016, the Bench of BIFR recording its displeasure over the negative attitude of the second respondent company and had adjourned the matter to 15/09/2016. The proceedings of the BIFR Bench II, dated 15/07/2016 is marked as Ex.P-9. From this document, it is evident that after referring the matter to BIFR in the year 2013, which is after the institution of the suit in O.S.No.13 of 2011 and after the decree, the second respondent had never shown any interest to pursue the matter, but, indulging in private negotiation to dispose the company assets.

22.To summarise the facts, the suit in O.S.No.13/2011 for recovery of money filed by the first respondent on 23/01/2011, which was prior to the SARFAESI proceedings, which purported to have commence on 01/08/2011 on issuance of notice under Section 13 (2). Likewise, the proceeding initiated under Section 15 of SIC (Spl Provision) Act, was on 28/05/2013 much after, the decree passed in O.S.No.13/2011 hence, Section 22 of that Act have no application.

23.The proceedings under SARFAESI Act, initiated on 01/08/2011 dropped by the Bank and assigned the financial liabilities to Pegasus under the assignment deed dated 27/09/2013. The said assignment deed though deal with immovable property at Hosur, not duly registered in Tamil Nadu, which is a mandatory requirement under law. The sale certificate, based on the said assignment deed, is with a non-existing company on the date of agreement. Before the Court below no proof filed to support the payment of sale consideration of Rs.701 lacs.

24.By filing the application under Order 41, Rule 27 of the Civil Procedure Code to receive additional documents, an attempt is made by the appellant to improve its case and show consideration really passed to the second respondent and M/s Pagasus. This Court takes note of the fact that, M/s Amsteel, M/s Electrialloy and M/s UT Limited are all involved in allied trade and the payments alleged to have made to M/s UT Limited by them prior to incorporation of the appellant company M/s ARC Investments Casting LLP cannot be taken as payment towards the sale consideration on behalf of M/s ARC Investments Castings

LLP. The contradiction in the affidavit filed in support of the application to receive the additional documents exposes the falsehood in the case of the appellant. Particularly, at para 6 of the affidavit it is stated that, "I submit that a sum of Rs.21 lacs had been given as advance to M/s UT Limited through M/s Electralloy Special Steel Castings Pvt. Ltd. Chennai at the time of entering into letter of intent. Thereafter, on 11/04/2016 a cheque bearing No.232952 dated 11/04/2016 was issued to M/s.Union Bank of India by M/s.Amsteel Castings Pvt Ltd to purchase demand draft and the Bank issued a DD bearing No.052240, dated 11/04/2016 in favour of M/s Pegasus Asset Reconstruction Pvt Ltd for Rs.45,00,000/- on the same day, cheque No.23722957 was issued in favour of M/s Union Bank of India for a sum of Rs.1.75 crores and a demand draft for Rs.1.75 crores was obtained from the Union Bank of India in favour of M/s Pegasus group III Trust bearing No.052441 dated 11/04/2016. As such a sum of Rs.2.20 crores was paid to the Asset Reconstruction Company and a sum of Rs.21 lacs already been paid to M/s UT Limited"

25.At para 11 of the same affidavit it is stated that, "As such out of the sum of Rs.701 lakhs payable under the sale transaction, a sum of Rs.1.75 crores was paid to M/s Pegasus Asset Reconstruction Pvt Ltd, Rs.45.00 lakhs were paid to the Asset Reconstruction Pvt.Ltd on behalf of M/s UT Limited and as such a sum of Rs.561 lakhs was paid to M/s UT Ltd and for the balance of Rs.1,40,00,000/- M/s Amsteel Castings Pvt Ltd had already given a cheque dated 01/01/2016 bearing No. 009832 drawn on ICICI Bank, Karamangala Branch in favour of M/s UT Ltd but the same has not yet been encashed by it due to the pending litigation." (Emphasis added)

26.Thus, it is very obvious that, no money paid by the appellant LLP in respect of the sale deed Ex.P-11 after its incorporation. Even according to the affidavit filed by the appellant in support of the C.M.P.No.4655/2021, which is dated 3rd March 2021, still Rs.140 lacs - out of Rs.701 lacs is payable. This add force to the finding of the Court below that, the evidence are fabricated with anti-dates to show as if the sale of the subject property was effected prior to the Court auction sale.

27.It is also pertinent to point at this juncture that through the additional documents new facts are sought to be introduced. To claim primacy over the Court auction sale, in the grounds of appeal, the appellant had stated that proceedings were taken under SARFAESI and the property was sold under public auction for a value of Rs.7,00,00,000/- (Rupees Seven Crores only) on 28/04/2016 and as such the purchase of the 3rd respondent is invalid. In fact, the alleged purchase by the appellant is not through public auction. It is through private

treaty which has purported to have emanated from the letter of M/s Amsteel Casting Pvt. Ltd, dated 02/06/2015 followed by the letter of intent (LOI) dated 04/06/2015 and payments starting from 04/06/2015. These new facts and documents sought to be relied is destructive the case of the appellant. The LLP of the appellant come into existence only on 27/04/2016, when the agreement was entered between its partners and it become functional only on its incorporation as LLP on 25/05/2016. Whiles, the appellant claim that the sale consideration for the subject property paid starting from 04.06.2015.

28. In addition to the cloud and suspicion over the truth and genuineness of Ex.P-2 and Ex.P-11 and the murkiness explaining the passing of the sale consideration, this Court also holds that on law the appellant is not entitled for the relief prayed in the application in E.A.No.57/2016 filed under Order 21 Rule 58 of the Civil Procedure Code for the following reasons:-

(a) The claim petition in E.A.No.57/2016 is filed by the appellant for the following relief:

(i) to adjudicate the claim of the petitioner/third party claimant.

(ii) recall the sale certificate issued by this Hon'ble Court in favour of the 3rd respondent.

(iii) consequently raise the order of attachment effected in E.P.No.183/2014 as against the property described in the schedule hereunder in execution of the decree passed in O.S.No.13/2011 dated 20/07/2011 and communicate the same to the Sub-Registrar, Hosur.

(iv) such further or other reliefs

(v) costs of the petition.

(b) This claim petition was filed on 06/09/2016 under Order XXI, Rule 58 of the Civil Procedure Code. On the date of filing this claim petition, the property already sold to the 3rd defendant pursuant to the attachment. Thereafter, the sale was confirmed and certificate was issued on dated 05/08/2016. The said sale certificate was registered at the Sub Registrar Office, Hosur on 13/08/2016. While so, the petition filed under Order XXI, Rule 58 of the Civil Procedure Code on 06.09.2016 for adjudication of claims/objections to attachment of property undoubtedly after the attached property sold.

29. On examination of Order XXI of Civil Procedure Code, which is the lengthiest order in CPC, one could see that, the procedure for execution of decree is laid stage after stage. The rights of the decree holder, the judgment debtor, any third party, who claims interest in the property sought to be attached are well defined and protected. After the amendment to the Civil Procedure Code by Act 104/1976, the Execution Court itself is empowered to determine the questions arising between the parties

to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree and there is an embargo to file separate suit.

30. While Order XXI, Rule 58 (1) enables to file claim or objection to the attachment of property in execution of decree on the ground that the said property is not liable to such attachment, the proviso to this Sub-Rule prohibits entertaining claim preferred or objection made, if before such claim or objection, the property attached has already been sold. Now, the question may arise, if there is bar to file claim or objection, after the attached property sold, what is the remedy for the person aggrieved. The answer lies in Order XXI, Rule 90 of CPC.

31. Order XXI, Rule 58 (1) and (2) of the Civil Procedure Code is extracted as below:-

"58. Adjudication of claims to, or objections to attachment of, property---

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-----

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this Rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit."

Order XXI, Rule 90 of the Civil Procedure Code is extracted as below:

"90. Application to set aside sale on ground of irregularity or fraud----- (1) Where any immovable property has been sold in

execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up."

32. The legislators intent, without any ambiguity clear from the language employed in Order XXI, Rule 58 and Order XXI, Rule 90 of the Civil Procedure Code. These two Rules are to operate at two different stage of executing the decree. The prior rule is applicable before sale of the attached property and the later rule is applicable after the sale of the attached property. The Courts have explained the word 'after been sold' as the stage after execution of sale certificate.

33. If a property is attached for the debt of a person in which, he has no alienable right or limited right, then any person interested in the property attached can resort to Order XXI, Rule 58 of the Civil Procedure Code, and claim or object the attachment. If the said attached property is already sold, then proviso to Order XXI, Rule 58(1) of CPC restricts entertaining the claim or objection, however the person having share or interest can resort to Order XXI, Rule 90 of CPC and challenge the sale on the ground of material irregularity or fraud.

34. The Hon'ble Supreme Court in Kacherla Lakshminarayana -vs- Mattaparthi Syamala reported in [2008 (14) SCC 258], after considering the conflicting opinion rendered by the Andhra Pradesh High Court in Magunta Mining Co -vs- M.Kondaramireddy : AIR 1983 AP 335 and by the Patna High Court in Kewal Singh -vs- Umesh Mishra : AIR 1983 Pat 303 regarding the interpretation of the word 'sold' employed in Order XXI Rule 58 (1) (a) CPC, held that, " The word "sold" in clause (a) of the proviso to Rule 58 has to be read meaning thereby a complete sale including the confirmation of the auction."

35. In the instant case, the sale completed and become absolute under Order XXI, Rule 92 of Civil Procedure Code. After the confirmation of sale, the sale certificate registered much before filing of petition under Order XXI, Rule 58 of Civil Procedure Code. In the Kacherla Lakshminarayana judgment cited supra, Hon'ble Supreme Court has referred the time factor, stage factor and locus factor to ascertain whether petition under Order XXI, Rule 58 of CPC is maintainable.

36. The appellant had chosen to file the claim petition under Order XXI, Rule 58 of CPC, despite knowing that the property attached already sold, because sale under Order XXI, Rule 90 of CPC can be challenged only on the ground of material irregularity or fraud. While the time factor and stage factor are not in support of the appellant, the claim petition is filed based on the locus factor. Therefore, to test the 'locus factor', whether the vendor of the appellant had pre-existing right in the property attached and whether the judgment debtor i.e. the second respondent herein had alienable right over the property on the date of attachment and sale has to be determined.

37. The appellant claims right and title over the property from its vendor M/s Pegasus Asset Reconstruction Pvt.Ltd. which is the assignee of financial securities of M/s UT Limited. The deed of assignment is Ex.P-12. It is dated 27/09/2013. On perusal of this assignment deed, we find assets of about 62 Non Performing borrowers of M/s Allahabad Bank been assigned to M/s Pegasus. The name of M/s UT Limited is found in serial No.35. The schedule to the deed provide details about the borrower, outstanding amount, nature of credit facility and documents related to secured assets and other documents. The list of pending litigations also mentioned. Conspicuously the decree passed in O.S.No.13/2011 is not mentioned. It is also pertinent to recall that RW-2 during the cross examination had deposed that he did not mention about this suit and decree passed in O.S.No.13/2011 in his reference to BIFR. Also, to be noted, the Encumbrance Certificate of this property does not indicate anything about the deposit of title deed or equitable mortgage of the subject property alleged to have created in favour of Allahabad Bank. Above all, the assignment deed executed at Mumbai, is in respect of immovable property at Hosur and that said assignment deed is not registered at Tamil Nadu.

38. The non-registration of the assignment deed perse at Tamil Nadu renders it invalid, as per the judgment of the Division Bench judgment of this Court rendered in Veena Textiles -vs- The Authorised Officer, IFCI Ltd reported in 2014(5) CTC 209. The relevant passage in this judgment is extracted below:-

"13. It is not in dispute that the

above properties, thus, assigned under the Deed of Agreement dated 25.5.2011, are admittedly situated in Tamil nadu and not within the jurisdiction of the Registering Authority at Calcutta. Therefore, it is a very clear that the said Assignment Deed made at Calcutta in respect of property situated in Tamil nadu and got registered before the Registering Authority, Calcutta was against Section 28 of the Registration Act as amended by the Tamil Nadu Act 19 of 1997 with effect from 29.03.1997, which reads as follows:

"28.Place for registering documents relating to land:- Save as in this part otherwise provided---(a)Every document mentioned in Clauses (a), (b), (c), (d) & (e) of sub-section (1) and sub-section (2) of Section 17, in so far as such document affects immovable property and in Clauses (a), (b), (c) & (cc) of Section 18, shall be presented for registered in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate in the State of Tamil Nadu; and (b)Any document regitered outside the State of Tamil Nadu in contravention of the provisions of Clause(a) shall be deemed to be null and void".

14.A perusal of the above said provision of law would show that the document registered outside the State of Tamil Nadu in contravention of the provisions of Clause (a) of Section 28 of the Registration Act shall be deemed to be null and void. Therefore, there cannot be any doubt that the Deed of Assignment dated 25.5.2011 is deemed to be null and void, since the same was made in voilation of Section 28(b) of the Registration Act. Consequently the First Respondent, having not empowered to act legally against the petitioners in pursuant to the said Deed of Assignment dated 25.5.2011, was not

entitled to initiate the proceedings before the Second Respondent under the SARFAESI Act, which has resulted in passing the impugned Order by the Second Respondent under Section 14(3) of the SARFAESI Act."

39. Therefore, the sale certificate Ex.P-2 and the sale deed Ex.P-11 executed by M/s Pegasus in favour of the appellant is based on a void document and therefore, the vendor of the appellant had no valid alienable right. This finding is for the purpose to decide whether the vendor of the appellant had any right to execute Ex.P-2 and Ex.P-12.

40. The vendor's right to alienate is one limb of locus factor. The other limb of 'locus factor' depends on the veracity of Ex.P2 and Ex.P11 and the purchasers eligibility to buy property. To test the veracity of these two documents Ex.P-2 and Ex.P11, it is necessary to refer Sections 11, 12 and 14 of the Limited Liability Partnership Act, 2008.

"11: Incorporation document:-

(1) for a limited liability partnership to be incorporated:-

(a) two or more persons associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document;

(b) the incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the registered office of the limited liability partnership is to be situated; and

(c) there shall be filed along with the incorporation document, a statement in the prescribed form, made by either an advocate, or a company secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the limited liability partnership and by any one who subscribed his name to the incorporation document, that all the requirements of this Act and the rules made thereunder have been complied with in respect of incorporation and matters precedent and incidental thereto.

(2) The incorporation document shall-----

- (a) be in a form as may be prescribed;
- (b) state the name of the limited liability partnership;
- (c) state the proposed business of the limited liability partnership;
- (d) state the address of the registered office of the limited liability partnership;
- (e) state the name and address of each of the persons who are to be partners of the limited liability partnership on incorporation;
- (f) state the name and address of the person who are to be designated partners of the limited liability partnership on incorporation;
- (g) contain such other information concerning the proposed limited liability partnership as may be prescribed.

(3) If a person makes a statement under clause © of sub-section (1) which he—
(a) knows to be false; or
(b) does not believe to be true, shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees.”

“12. Incorporation by registration--

(1) when the requirements imposed by clauses (b) and (c) of sub-section 11 have been complied with, the Registrar shall retain the incorporation document and, unless the requirement imposed by clause (a) of that sub-section has not been complied with, he shall, within a period of fourteen days—

(a) register the incorporation document; and

(b) give a certificate that the limited liability partnership is incorporated by the name specified therein.

(2) The Registrar may accept the statement delivered under clause (c) of sub-section (1) of

section 11 as sufficient evidence that the requirement imposed by clause (a) of that sub-section has been complied with.

(3)The certificate issued under clause (b) of sub-section (1) shall be signed by the Registrar and authenticated by his official seal.

(4)The certificate shall be conclusive evidence that the limited liability partnership is incorporated by the name specified therein."

"14.Effect of registration--- On registration, a limited liability partnership shall, by its name, be capable of-----

(a)suing and being sued;

(b)acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;

(c)having a common seal, if it decides to have one; and

(d)doing and suffering such other acts and things as bodies corporate may lawfully do and suffer."

41.The appellant case it that it is a registered Limited Liability Partnership and as purchaser of the secured asset from M/s Pegasus under Ex.P-2 and Ex.P-11, the sale in its favour have priority over the Court auction sale[Ex.A-6]. It is the case of the appellant that the 2nd respondent on the date of attachment 16/06/2015 and thereafter, had no alienable right. When the judgment debtor had no alienable right in the property attached, the third party purchaser have no better right in the property.

42.From the evidence, it is seen that there is no record to show that, at the time of attachment (or) at the time of Court auction sale, the judgment debtor had lost its alienable right in the property. Contrarily, when the sale certificate[Ex.P-2] tested in the light of Sections 11, 12 and 14 of Limited Liability Partnership Act, 2008, we find that it was executed by the assignee, who claims right under an unregistered document to and in favour of a non-existing entity signed by its Director of the said Limited Liability Partnership, inspite of the bar under law to enter into any contract before incorporation. From the deposition of RW-4[stamp vendor], RW-5[Head Clerk] at the Sub Registrar Office, Hosur and RW-6[Junior Assistant], District

Registrar Office, the cloud over Ex.P-11 regarding the actual date of its execution is highlighted. Therefore, the appellant right to sustain the claim petition proves to lack locus and bonafide.

43. There is sufficient evidence to prove that the appellant and second respondent are parties to the negotiation in the private treaty. They had enough notice about the decree obtained by the first respondent against the second respondent and the Court auction purchase of the property by the 3rd respondent. With full knowledge and notice of these facts, they had entered into private treaty to buy the property and to defeat the interest of the Court auction purchaser. Documents are created in favour of the appellant along with the second respondent. They have conveniently suppressed several facts which they had knowledge and had initiated the claim petition with ulterior design. Having failed before the Execution Court, the petition is filed for introduction of documents and new facts which never pleaded. A prima facie scrutiny of those documents only add proof of embellishment of facts and records. Therefore, this Court holds that the application to receive additional document fail the test laid under Order 41 Rule 27 of the Civil Procedure Code. Hence, the application is dismissed.

44. For the reasons stated above, this Appeal Suit is dismissed. The Order and decretal order passed by the Principal District Judge, Krishnagiri dated 09.03.2018 made in E.A.No.57/2016 in E.P.No.183 of 2014 is confirmed. No order as to costs. Consequently, connected Miscellaneous Petitions are dismissed.

Sd/-

Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

ari

To:

The Principal District Judge,
Krishnagiri.

+1cc to Mrs.A.L.Ganthimathi, Advocate SR.No.22949

+1cc to Mr.A.Venkatesh Kumar, Advocate SR.No.22899

+2cc to Mr.R.Thiagarajan, Advocate SR.No.22730

A.S.No.470 of 2019

and

C.M.P.Nos.13265 of 2019

and 4655 of 2021

RSI (CO)
GMY (04/06/2021)



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