



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.03.2021

CORAM

**THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MRS.JUSTICE S.ANANTHI**

W.P. (MD)No.1970 of 2021

and

W.M.P. (MD)No.1677 of 2021

Tamilnad Mercantile Bank Limited,
Pandanthalumoodu Branch,
Door No.17/92, Thiruvananthapuram Main Road,
(Via) Kaliyakkavilai,
Padanthalumoodu - 629 164,
Kanyakumari District,
represented by the Chief Manager/Authorised Officer,
Mr.G.Uthayakumar ... Petitioner

Vs.

1.The Sub-Registrar,
Office of the Sub-Registrar Thiruvattar,
Thiruvattar, Kanyakumari District.
2.M/s.A.K.Traders,
Rep. by its proprietor Mr.K.Ajayakumar,
2-106, Near Convent Junction,
Kulasekaram,
Kanyakumari District - 626 161.

3.Mr.K.Ajayakumar
4.Mrs.D.S.Rabeena
5.Mr.Oommen Babu
6.Mr.C.Ramadhas ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, seeking for issuance of a Writ of Mandamus, directing the 1st respondent, Sub-Registrar, Thiruvattar, Kanyakumari District to register the Sale Certificate dated 18.01.2021 issued in respect of the schedule mentioned property by the Petitioner Bank in favour of the 6th respondent and for a consequential direction to efface/delete the encumbrance attachment entry dated 02.11.2016 in Doc.No.30/2016 and to efface/delete the encumbrance attachment entry dated 11.12.2017 in Doc.No.25/2017 on the file of the 1st Respondent, Sub-Registrar, Thiruvattar, Kanyakumari District as against the schedule mentioned property.



For Petitioner : Mr.N.Dilip Kumar
For Respondent No.1 : Mr.K.Sathiyasingh
Additional Government Pleader
For Respondent No.5 : Mr.G.Cenil

ORDER

(Order of the Court was made by M.M.SUNDRESH, J.)

The present Writ Petition has been filed by the petitioner, who is a secured creditor, seeking a Writ of Mandamus, directing respondent No.1 to register the Sale Certificate dated 18.10.2020. There is a consequent prayer to delete the encumbrance entries dated 02.11.2016 and 11.12.2017.

2.In pursuant to the loan obtained, respondents 2 to 4 made a registered memorandum of deposit of title deeds dated 17.11.2005, in favour of the petitioner Bank. It is followed by another registered memorandum of deposit of title deed dated 26.03.2015. As there was a default in payment, notice was issued on 10.02.2021 followed by possession notice on 27.06.2017. In the meanwhile, suits were filed by respondent No.5 in O.S.Nos.90 of 2016 and 140 of 2017 for recovery of money against respondent Nos.3 and 4 herein and orders of attachment were passed by the learned Subordinate Judge, Padmanabhapuram in I.A.No.190 of 2016 in O.S.No.90 of 2016 on 20.09.2016 and in I.A.No.278 of 2017 in O.S.No.140 of 2017 during October, 2017. When the petitioner went to register the sale certificates, the respondent No.1, declined to do so, in view of the entry of the aforesaid attachments made. Thereafter, the petitioner filed the present Writ Petition after making a representation to the respondent No.1.

3.Mr.N.Dilipkumar, learned counsel appearing for the petitioner submitted that the issue is no longer *res-integra* and the transaction between the petitioner and respondent Nos.2 and 3, followed by deposit of title deeds are prior in nature. The petitioner is a secured creditor. Respondent No.5 filed suits only for recovery of money, in which, orders of attachments have been obtained. In the first suit an order of attachment was passed only on 20.09.2016 and in the other suit such order was passed during October, 2017. Therefore, the rights of the petitioner will have to be upheld, so also, the proceedings initiated. A reliance has been made by the Division Bench of this Court in ***W.P. (MD) Nos.6976 of 2020 and 1101 of 2021, dated 29.10.2021.***

4.Learned counsel appearing for respondent No.5 submitted that in the first suit in O.S.No.90 of 2016, attachment was made on 20.09.2016, though in the second case attachment was made during



October, 2017, after initiation of the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. As orders were passed by the Civil Court, which were accordingly entertained, the subsequent registration cannot be entertained.

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5. Considering the very same issue earlier, we have passed the following order in W.P.(MD) Nos.6976 of 2020 and 1101 of 2021, dated 29.10.2021:-

"8. Considering the similar issue, a Division Bench of this Court, in which one of us [Hon-ble Mr. Justice M.M.SUNDRESH] is a party, in a batch of writ petitions in **W.P. (MD) Nos. 8546 of 2020**, etc., batch, by order dated 09.09.2020, was pleased to hold that the proceedings under the SARFAESI Act would have primacy, especially in a case where the mortgage in favour of the Bank was earlier. The aforesaid decision was rendered after taking note of the judgment rendered by the Division Bench of the Gujarat High Court in **Bank of India v. State of Gujarat [Manu/GJ/0130/2020]** and a Full Bench judgment of this Court in **Assistant Commissioner (CT), Annasalai III Assessment Circle v. Indian Overseas Bank [(2016) 6 CTC 769]**.

9. Reliance has been made on the order passed by the learned Single Judge in **Govindhji Jewat & Co., v. Rukmani Mills Ltd., reported in 2020 (6) CTC 313**, wherein, the aforesaid principle has been reiterated. In the said case, the learned Single Judge has held that the mortgage being earlier, it creates a right in favour of the mortgagee and therefore, even the order of attachment passed by the Civil Court will have to yield. In the said judgment also, the learned Single Judge made reliance upon the judgment of the Division Bench in **S.Senthamarai Kannan v. Chief Manager, Canara Bank, Palani Branch, Dindigul District [CDJ 2020 MHC 2555]**.

10. In the case on hand also, the registered mortgage was admittedly prior. The 9th respondent in W.P.(MD)No.6976 of 2020 / 8th respondent in W.P.(MD)No.1101 of 2021 sought for an attachment in an arbitration proceedings, in which, the petitioners Bank was obviously not a party, as the transaction has got nothing to do with it. The said order was also subsequent to the mortgage created in favour of the petitioner. Now, a third party right has also been created through the sale certificate issued in favour of the auction purchasers, viz., respondents 7 & 8 in W.P.(MD)No.6976 of 2020 and the 7th respondent in W.P.(MD)No.1101 of 2021. If the 1st respondent raise a contention that in view of the recording of the attachment order by it already, the subsequent sale deed cannot be registered, then the very act of recording the said interim order of attachment passed by the Tribunal itself ought not to have been done, as there was



a subsisting mortgage on that date.

11. The learned Counsel appearing for the 9th respondent in W.P.(MD)No.6976 of 2020 / 8th respondent in W.P.(MD)No.1101 of 2021 submitted that there is a procedure violation. We are not concerned with the said issue. The question for consideration is as to whether the earlier mortgage would prevail as against the subsequent interim attachment. The question of procedural violation can only be raised by the borrower, who did not do so. Therefore, the said contention has got no relevance to the case on hand.

12. The submission made on the maintainability of the writ petitions is also rejected. We are not on the merits of the order passed by the Arbitration Tribunal, which is by way of an interim measure. The question is with regard to the upholding of one's own existing right, which is prior to the loan given by the 9th respondent in W.P.(MD)No.6976 of 2020 / 8th respondent in W.P.(MD)No.1101 of 2021, in favour of the borrowers. Certainly, a mortgage deed creates right over the properties mentioned thereunder in favour of the mortgagee.

13. Therefore, looking from any perspective, we are of the view that the petitioner Bank cannot be denied the relief as sought for. In such view of the matter, both the writ petitions stand allowed. The first respondent in both the writ petitions are directed to register the sale certificates issued by the petitioner Bank in favour of the respondents 7 & 8 in W.P.(MD)No.6976 of 2020 and the 7th respondent in W.P.(MD)No.1101 of 2021. Consequently, the encumbrance / attachment entry made on the file of the first respondent with respect to the properties, which are subject matter of the two mortgage deeds and the subject matter of these writ petitions, are directed to be deleted by the first respondent. The aforesaid exercise shall be carried out within a period of four weeks from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed."

6.The issue involved is rather settled. The loans were obtained in the years 2000, 2005 and 2015. Only in pursuant to the loan transactions, documents have been executed by way of memorandum of deposit of title deeds duly registered. In fact the first mortgage on 06.03.2000 was not registered as there was no mandatory for registration. Therefore, the petitioner has got a better right over the properties than the respondent No.5, who obtained order of attachment before judgment to recover the money due. In such view of the matter, we have no hesitation in allowing the Writ Petition.

7.Accordingly, the Writ Petition is allowed and the respondent No.1 is directed to register the sale certificate to be presented by the petitioner within four weeks from the date of receipt of a copy of this order, if is otherwise in order, while



deleting the encumbrance entries dated 02.11.2016 in Document No.30 of 2016 and dated 11.12.2017 in Document No.25 of 2017 made at the instance of respondent No.6. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(T & P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

sj

Note: (i) In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

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

+1 CC to M/s.SPL GP (SR-13600[F] dated 25/03/2021)

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-13663[F] dated 25/03/2021)

W.P. (MD)No.1970 of 2021

24.03.2021

MJ(CO)

TR(29.03.2021) 5P 4C