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C.R.P.(MD)No.68 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.08.2021

CORAM:

THE HONOURABLE MRS.JUSTICE R.THARANI

C.R.P. (MD)No.68 of 2017

and

C.M.P. (MD)No.257 of 2017 and 687 of 2021

Tamilnad Mercantile Bank Ltd.,
Having Registered Office
at Thoothukudi,
One of its Branch at Theni
Functioning at Periyakulam Road,
Theni, Rep. by Branch Manager

... Petitioner / Petitioner /
Claimant / 3rd Party

Vs.

1.Mani,

... Respondent / 1st Respondent
Petitioner / Plaintiff

2.Janarthanan

... Respondent / 2nd Respondent
Respondent / Defendant

Prayer: This Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure, to set aside the order passed by the Subordinate Judge, Theni, in E.A.No.59 of 2015 in E.P.No.62 of 2014 in O.S.No.211 of 2013, dated 27.09.2016.

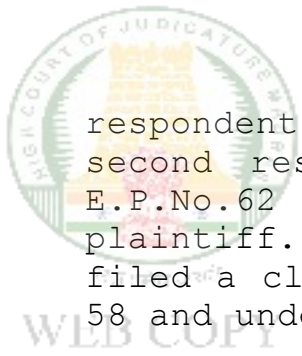
For Petitioner	: Mr.N.Dilip Kumar
For R1	: No appearance
For R2	: No appearance

ORDER

This Civil Revision Petition is filed against the order, dated 27.09.2016 passed in E.A.No.59 of 2015, in E.P.No.62 of 2014 in O.S.No. 211 of 2013, on the file of the Subordinate Judge, Theni.

2.The revision petitioner is a third party, the first respondent herein is the plaintiff and the second respondent herein is the defendant in O.S.No.211 of 2013. The first

<https://hcservices.ecourts.gov.in/hcservices/>



respondent herein / plaintiff has filed a money suit against the second respondent herein / defendant. The suit was decreed. E.P.No.62 of 2014 was filed by the first respondent herein / plaintiff. In the Execution Proceedings the revision petitioner filed a claim petition in E.A.No.59 of 2015, under Order -21 Rule 58 and under Section 151 C.P.C.

3.Brief substance of the petition in E.A.No.59 of 2015 is as follows:-

3.1.The petitioner is the claimant. The respondents are brothers. The first respondent / plaintiff filed a money suit against the second respondent and obtained a decree. To execute the decree, the first respondent / plaintiff filed a E.P. Petition and he has filed a petition in E.A.No.326 of 2013 for attaching the suit property. The second respondent / defendant endorsed 'no objection' in the petition and the suit properties were attached by the Court and immediately, that attachment order was registered before the Sub Registrar Office, Theni.

3.2.The second respondent mortgaged all the suit properties in the petitioner's Bank and obtained a loan of Rs.18,00,000/-. The mortgage was registered before the Sub Registrar Office, Theni. The mortgage deed was executed before the attachment order was passed by the Court. The petitioner took steps for recovery of the loan amount under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. All the suit properties were brought for auction on 13.02.2015 and the property was sold for a sum of Rs.16,00,000/-. A person, by name, Navaneethan, S/o. Vengadasamy Naidu, Kovilpatti, has purchased the property and he has deposited Rs.4,00,000/- towards auction amount. When the auction purchaser enquired the Sub Registrar Office, he came to know that there is an attachment made in the suit properties and the auction purchaser did not pay the balance amount and he got back the advance amount paid by him. For the above reason, the petitioner filed the claim petition.

4.Brief substance of the counter filed by the first respondent in E.A.No.59 of 2015 is as follows:-

The petitioner is not entitled for a prayer of declaration. The auction was not proper. There is no provision to return the advance amount paid by an auction purchaser. The first respondent is having every right to execute the decree of the Court. The petition is to be dismissed.

5.On the side of the petitioner, one witness was examined and six documents were marked. On the side of the respondents,



no witness was examined and no document was marked. The trial Court after considering both sides, allowed the petition by confirming the right of the petitioner over the first item of the suit property. Against that order, the revision petitioner has preferred this Civil Revision Petition.

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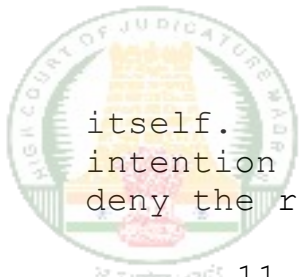
6.On the side of the revision petitioner, it is stated that the second respondent has borrowed a sum of Rs.18,00,000/- from the petitioner / Bank and mortgaged all the schedule mentioned properties. He has executed three registered deeds in favour of the petitioner / Bank on 07.11.2008, on 05.05.2011 and 05.10.2012 respectively. The first item of the schedule of property is covered in all the three mortgage deeds and the second item of the schedule of property is covered in the third mortgage deed, dated 05.10.2012. The petitioner / Bank already initiated auction proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act.

7.The first and second respondents filed a collusive suit as if the second respondent borrowed a hand loan from the first respondent. The second respondent submitted himself to the decree and the suit was decreed on 13.03.2014. On the strength of the collusive decree, the first respondent filed an E.P petition and on 13.03.2014, an order of attachment before judgment was passed in respect of the schedule mentioned properties. Only to defeat the secured interest created in favour of the petitioner, the respondents filed a false case and obtained an order.

8.The Subordinate Judge by the order dated 27.09.2016 had allowed the application in part and declared the right of the petitioner / Bank in respect of first schedule property and held that the petitioner Bank has got first mortgage rights over the first schedule property and that the petitioner is at liberty to bring the first schedule of property for auction.

9.The Subordinate Judge failed to render any finding in respect of the second schedule property and has failed to permit the petitioner / Bank to auction the second schedule property.

10.On the side of the revision petitioner, it is further stated that the order passed by the Subordinate Judge, without mentioning the right of the petitioner Bank in respect of the second item of the schedule of property is not maintainable. The reason stated by the Subordinate Judge to allow the petition with regard to the first item of the property mentioned in the execution petition is equally applicable to the second item of the schedule properties. An order of attachment before judgment was passed only on 13.03.2014, whereas, the properties in the second schedule were mortgaged with the petitioner / Bank on 05.10.2012



itself. The respondents filed a collusive suit only with an intention to defeat the rights of the petitioner / Bank and to deny the recovery and prayed the order to be set aside.

11. The petitioner side argument was heard on 27.04.2021. The case was adjourned to 30.04.2021, 01.06.2021, 14.06.2021, 21.06.2021, 24.06.2021 and on 07.07.2021. There was no representation on the side of the respondents. Even today i.e., on 06.08.2021, there was no representation on the side of the respondents. Even after sufficient opportunity was given, there was no representation for the respondents. This matter is pending for the past four years. There is no use in keeping the matter pending any further. Hence, the order is passed on merits.

12. A perusal of the records reveals that the second respondent had executed three registered mortgaged deeds in favour of the revision petitioner / Bank. The first respondent / plaintiff filed a suit against the second respondent / defendant and the first respondent obtained a decree in his favour. To execute the decree, the first respondent filed an execution petition in E.P.No.62 of 2014 and on 13.03.2014, he obtained an order of attachment before judgment.

13. On the claim petition filed by the Bank in E.A.No.59 of 2015, the trial Court, after considering both sides, the Execution Court has passed an order in favour of the revision petitioner with regard to the first schedule of property alone. Though E.A.No.59 of 2015 was filed for both the properties mentioned in the execution petition, the Subordinate Judge passed an order only with regard to the first schedule of property. Even in the paragraph brief substance of the petition, it was mentioned that the petition was filed only with regard to the first schedule of property. In the above circumstances, the order passed with regard to the first schedule property alone is not fair.

14. Hence, it is decided that the order of the trial Court has to be modified that the revision petitioner / Bank is having the first right over both the properties mentioned in the execution petition and the petitioner is at liberty to bring both the properties mentioned in the Execution Petition for auction sale. The first respondent is having only a secondary right over the properties.

15. With the above direction, the order passed by the Subordinate Judge, Theni, in E.A.No.59 of 2015 in E.P.No.62 of 2014 is hereby modified.

<https://hcservices.ecourts.gov.in/cse/ViewCase.do?caseId=211> of 2013, dated 27.09.2016 is hereby modified



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and the Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

Ls

Note :

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 Subordinate Judge,
Theni.

2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-25826[F] dated 10/08/2021)

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KS (CO)

SB(13.09.2021) 5P 5C