Application Nos.7 and 8 of 2020
and Application Nos.33 and 34 of 2021
in I.P.No.20 of 2019

SENTHILKUMAR RAMAMOORTHY J.,

Four applications are before this Court. Application Nos.7 and 8 of 2020 have been filed by Axis Bank Limited (Axis Bank), which claims to be a secured creditor of the insolvent. In Application No.7 of 2020, Axis Bank seeks a declaration that the Simple Mortgage Deed dated 12.06.2018 in favour of Mr.Yelamarthi Ashwin pertaining to the property described in the schedule thereto, which was registered as Doc.No.8141 of 2018 through Power of Attorney bearing Doc.No.8142 of 2018 on 20.06.2018 at the SRO, Kundrathur, is null and void. Purportedly in enforcement of the above mortgage and by using the power of attorney, it appears that the mortgaged property was conveyed to M.M.Sankar (Sankar). In Application No.8 of 2020, Axis Bank seeks an order to direct the Official Assignee to take custody of the original title deeds pertaining to the scheduled property.

2.Pursuant to earlier orders of this Court, Axis Bank handed over the original title deeds to the Official Assignee on 03.01.2022. Consequently, the relief claimed in Application No.8 of 2020 has been granted. As indicated above, Application No.7 of 2020 impugns the Mortgage Deed dated 12.06.2018. However, in view of the subsequent execution of the sale deed dated 31.10.2020, no purpose would be served by adjudicating the validity of the Mortgage Deed in isolation, without adjudicating the validity of the above mentioned sale deed, which is not impugned in Application No.7 of 2020. On this issue, it should be noted that the evidence indicates that the sale deed was executed in favour of Sankar after the insolvency commenced and, therefore, this disposition is *prima facie* of doubtful validity. However, this should be tested in an appropriate application which assails all the three documents or, at a minimum, the sale deed.

3. The other two applications are filed by Sankar, who claims to be the present owner of the relevant property. Application No.33 of 2021 is to take appropriate action against the insolvent and Axis Bank for suppression of facts in I.P.No.20 of 2019. Application No.34 of 2021 is to set aside the order of adjudication dated 31.10.2019 in I.P.No.20 of 2019.

4. In support of Application Nos.33 and 34 of 2021, submissions were made by the learned counsel, Mr.N.S.Thanu Madhan. The first contention was that the encumbrance certificate reflects the Mortgage Deed dated 12.06.2018

in favour of Mr.Yelamarthi Ashwin. On the same date, he submits that a power of attorney was executed in favour of Sankar's wife by the insolvent. Pursuant thereto, a Sale Deed was executed on 31.10.2020 in favour of Sankar. Such Sale Deed was executed after this Court passed an order dated 09.09.2020 in W.P.No.12289 of 2020 directing the Registration Department to consider the request for registration, if otherwise in order, subject to payment of stamp duty and registration fees.

5. By drawing reference to the encumbrance certificate, it was pointed out that the encumbrance certificate reflects the encumbrance in favour of previous lenders such as PNB Housing Finance Limited and ICICI Bank. By contrast, the alleged mortgage in favour of Axis Bank is not reflected in the encumbrance certificate. According to the alleged purchaser, the mortgage in favour of Mr.Yelamarthi Ashwin was executed in view of the fact that the encumbrance certificate did not disclose a subsisting mortgage in favour of Axis Bank. It is further submitted that the alleged purchaser paid valuable consideration and purchased the immovable asset in the above facts and circumstances. Therefore, it is submitted that the insolvent suppressed material facts and that the order of adjudication is liable to be annulled on such basis.

6. Axis Bank made submissions to the contrary. Axis Bank submitted that the insolvent approached it for a home loan. By referring to the sanction letter in this regard, it was pointed out that the insolvent availed of a home loan from Axis Bank. Since the insolvent had previously availed of a loan from ICICI Bank, the insolvent was required to obtain the title documents from ICICI Bank and hand over the same to Axis Bank within thirty days. Learned counsel for Axis Bank also pointed out that the security interest in favour of Axis Bank was duly registered on 23.01.2018 with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI). Learned counsel contended that upon registration with CERSAI, the security interest in favour of Axis Bank shall have priority over any subsequent security interest over the relevant property. On this issue, reliance was placed on Section 26 C of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act) as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016. Therefore, it was contended that the mortgage in favour of Axis Bank is valid and enforceable.

7. The next contention on behalf of Axis Bank was that the power of attorney executed by the insolvent was used on the basis of a false life

certificate. On this issue, the counter of the insolvent was relied upon. In conclusion, learned counsel for Axis Bank adverted to the terms and conditions of the sanction of the loan to the insolvent and pointed out that the insolvent was under an obligation to obtain the original title deeds from ICICI Bank and hand over the same to Axis Bank. The bank cannot be put to loss on account of the failure of the insolvent to comply with his obligation under the loan agreements.

8. The insolvent admitted that he availed of a loan from Axis Bank after previously having availed of a loan from ICICI Bank. However, it was contended that the loan was availed of from Axis Bank in view of the assurance by Axis Bank to sanction and disburse the full market value of the property as loan.

9. By referring to the encumbrance certificate, learned counsel for the insolvent submitted that the loan availed of from ICICI Bank was discharged on 27.03.2018. The subsequent mortgage in favour of Mr.Yelamarthi Ashwin was created on 12.06.2018. During the three intervening months, it was submitted that Axis Bank did not call for the original documents. Such documents were called for only upon default by the insolvent in payment of EMI. In conclusion,

learned counsel for the insolvent submits that the insolvent will be put to great prejudice if the adjudication is annulled.

10. On behalf of the Official Assignee, it was submitted that the order of adjudication was passed on 31.10.2019. Pursuant thereto, the schedule of affairs was filed by the insolvent on 07.11.2019. The insolvent disclosed both ordinary and secured creditors. The list of creditors included both Axis Bank and Mr.Yelamarthi Ashwin/M.M.Sankar. The Official Assignee also pointed out that a creditors' meeting was held on 05.12.2019 and that such meeting was attended by Sankar and the officials of Axis Bank. Therefore, the Official Assignee contended that Sankar was fully aware of the insolvency proceedings and the order of adjudication. Consequently, the Official Assignee should have been joined as a party to the two writ petitions filed by the mortgagee and the power of attorney. In these facts and circumstances, the Official Assignee submitted that the Sale Deed executed on 31.10.2019 in favour of Sankar is void because it is subsequent to the order of adjudication.

11. By way of rejoinder, learned counsel for Sankar submitted that the admitted fact is that there is no registered mortgage or even a registered memorandum of deposit of title deeds (MoDT) in favour of Axis Bank. By

adverting to the power of attorney in favour of Axis Bank dated 22.02.2018, it was contended that Axis Bank failed to take any action for a considerable period of time in spite of being entitled to collect the original title deeds. As regards the contention that Sankar was informed about the insolvency, it was submitted that Sankar was not the owner at the time of the creditors' meeting and that the mortgagee was not called for the meeting. It was further contended that the officials of Axis Bank colluded with the insolvent. Hence, as a *bona fide* purchaser for valuable consideration, it was contended in conclusion that Sankar should not be prejudiced on account of such collusion and the filing of an insolvency petition by suppressing material facts.

12. The applications filed by Sankar should be examined in light of the rival contentions. The documents on record reflect that Axis Bank did not register the MoDT. Nonetheless, the documents on record also indicate that the security interest in favour of Axis Bank was registered with CERSAI. Section 26C of the SARFAESI Act, as amended, appears to provide for priority of the claim of a secured creditor, whose security interest is registered with CERSAI. *Prima facie*, this is not a provision that deals with the creation of a security. However, at this juncture, it is not necessary to adjudicate on the validity of the mortgage in favour of Axis Bank. Such adjudication should await an

appropriate application either by Axis Bank or by the Official Assignee under Section 7 of the Presidency Towns Insolvency Act, 1909.

13. At this juncture, as indicated above, it is sufficient to adjudicate the applications of Sankar. Sankar alleges suppression of material facts by the insolvent and seeks an annulment of the adjudication. This contention is denied by the insolvent. The insolvent points out that he disclosed the loan transactions with Axis Bank and Mr.Yelamarthi Ashwin. He also states that he filed the schedule of affairs within a reasonable time of his adjudication as an insolvent. The Official Assignee confirms that the list of creditors include Axis Bank and Mr.Yelamarthi Ashwin. On the basis of these facts, it cannot be concluded that the insolvent has failed to disclose material facts in these proceedings. Application No.34 of 2021 appears to be designed to indirectly sustain the disposition in favour of Sankar, which is *prima facie* void. It is a separate matter that the facts on record disclose that the insolvent was in the practice of approaching one bank or financial institution after another. By this process, the loan availed of from the previous bank or financial institution was discharged by using the amount disbursed under the new loan obtained from the next bank or financial institution. It also appears that Axis Bank has not adopted appropriate risk management or mitigation practices by failing to

collect the original title deeds either from the insolvent or directly from ICICI Bank. Without doubt, the methodology adopted by Axis Bank has contributed to the present imbroglio. At the same time, it should be noticed that Axis Bank deals with public money and the insolvent admits that he availed of a loan from Axis Bank to discharge the loan to ICICI Bank. As indicated earlier, at this juncture, I refrain from adjudicating on the validity of the alleged mortgage in favour of Axis Bank.

14. Reverting to the applications of Sankar, for the reasons set out earlier, the application to set aside the order of adjudication is without merit, especially at the instance of Sankar. Accordingly, the said application is rejected. Similarly, the application to take action against the insolvent and Axis Bank for alleged suppression of facts lacks merit. Consequently, the estate shall continue to be administered by the Official Assignee and the claims made by creditors of the insolvent, including Mr.Yelamarthi Ashwin / M.M.Sankar, would be subject to adjudication by the Official Assignee. The Official Assignee has indicated that Axis Bank has also filed a claim. Needless to say, such claim should also be adjudicated by the Official Assignee. It is open to Axis Bank to relinquish the security and make the claim as an ordinary creditor. Instead, if Axis Bank opts to enforce its alleged security, either Axis

Bank or the Official Assignee may file an appropriate application to adjudicate the validity of the charge / mortgage / security interest of Axis Bank.

15. For reasons set out above, Application Nos. 33 and 34 of 2021 are dismissed. Application No.7 of 2020 is disposed of by granting leave to Axis Bank to challenge all three documents, including the sale deed, collectively. Such application may also be filed by the Official Assignee. Application No.8 of 2020 is closed for reasons set out at the outset. There shall be no order as to costs.

31.01.2022

Internet : Yes / No
Index : Yes / No

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