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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15-09-2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

WP No.10594 of 2023
And
WMP No.10543 of 2023

Indian Bank,
Chinniampalayam Branch,
1/202, Avinashi Road,
Chinniampalayam,
Coimbatore-641 062. ... Petitioner

Vs.

1.The Sub Registrar,
Singanallur Sub Registrar Office,
14/48, Vellalore,
Coimbatore-641 016.

2.Mr.P.Thirugnanam ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the first respondent and quash the Refusal Check Slip bearing

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No.RFL/Singanallur/5/2023 dated 25.02.2023 and consequently direct the first respondent to register the Certificate of Sale dated 23.02.2023.

For Petitioner	: Mr.Jayesh B.Dolia, Senior Counsel for M/s.Aiyar and Dolia.
For Respondent-1	: Mr.T.Arunkumar, Additional Government Pleader.
For Respondent-2	: Mr.K.Suresh

O R D E R

The Refusal Check Slip dated 25.02.2023 issued by the first respondent, is under challenge in the present writ petition.

PETITIONER'S CASE:

2. The petitioner is Indian Bank, questioned the validity of returning the Sale Certificate presented for registration under the Registration Act, 1908.

3. The principles already settled by the High Courts and the

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Supreme Court, are not in dispute between the parties to the writ petition on hand.

4. Admittedly, the first mortgage was created by the borrowers in the petitioner-Indian Bank on 13.05.2014. The second mortgage by way of Supplemental Deed was created on 20.11.2014 and the third mortgage was created on 05.10.2015. The order of attachment was passed by the Principal District Court, Karur in OS No.104 of 2016 on 20.07.2017 and on 19.01.2021.

5. The account of the borrower was declared as Non-Performing Assets. Consequently, the demand notice was issued under Section 13(2) on 20.01.2021. Publication was made on 26.01.2021 and possession notice was issued under Section 13(4) of the Act, on 13.07.2021. Auction sale notice was issued on 08.12.2022 and E-Auction was held on 26.12.2022. The conditional order was passed by the Debts Recovery Tribunal, Coimbatore in S.A.No.1163 of 2022 to pay a sum of Rs.1,40,00,000/- by an order dated 26.12.2022. After conducting public auction, the petitioner-Bank issued Sale Certificate to the Auction Purchaser

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on 23.02.2023. Sale Certificate issued was presented for registration under the provisions of the Registration Act, 1908. The Sub Registrar returned the Sale Certificate on the ground that the subject property was attached by the Principal District Court, Karur in OS No.104 of 2016 and therefore, the documents cannot be registered in view of the bar imposed under Section 22-B of the Registration Act, 1908.

6. The learned Senior Counsel appearing on behalf of the writ petitioner mainly contended that the petitioner-Bank is the secured creditor holding first charge over the subject property and empower to deal with the property to realise the debts. They acted in accordance with the SARFAESI Act, 2002 and the Rules and accordingly auctioned the property through public auction and consequently issued Sale Certificate in favour of the successful Auction Purchaser.

7. It is mainly contended that the attachment issued by the Principal District Court is not binding on the petitioner-Bank in view of Order XXXVIII, Rule 10 of the Code of Civil Procedure and Section 26-E of the SARFAESI Act. Order XXXVIII, Rule 10 of the Code of Civil

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Procedure speaks about “attachment before judgment not to affect the rights of strangers, nor bar decree-holder from applying for sale”. Section 26-E of the SARFAESI Act, provided “priority to secured creditors”. Accordingly, the petitioner-Bank holds first charge over the property and more-so the mortgage was created prior to the attachment of the property by the Principal District Court, Karur.

8. In support of the above contentions, the learned Senior Counsel for the petitioner relied on the judgment of the Hon'ble Division Bench of Madurai Bench dated 31.08.2023 passed in WP (MD) No.674 of 2023. The Hon'ble Division Bench considered the judgments of the Apex Court of India on the principles relating to secured creditors holding first charge over the mortgaged property under Section 26-E of SARFAESI Act. The Hon'ble Division Bench further considered that the subsequent attachments are not binding on the secured creditors in view of Order XXXVIII, Rule 10 of Code of Civil Procedure. Section 64 of Code of Civil Procedure bars 'private transfer'.

9. The transfer in the present case is an involuntary transfer. It

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is the secured creditor, who has exercised his right under the Special Act, is the SARFAESI Act, 2002. The Hon'ble Division Bench of Madurai Bench of this Court considered the scope of Section 26-E of the SARFAESI Act, 2002, which starts with a *non obstante* clause. However, neither the Government Pleader nor the counsel for the appellant, brought to the notice of the Hon'ble Division Bench about T.N.Amendment Act 41/22 dated 16.08.2022. Thus there was no discussion about Rule 9 of Security Interest (Enforcement) Rules 2022.

REPLY BY RESPONDENTS:

10. The learned Additional Government Pleader, appearing on behalf of the first respondent, raised an objection by stating that there is no discussion about the mandatory requirements contemplated under the provisions of Registration Act, 1908. Further, it is not placed before the Hon'ble Division Bench of Madurai Bench of this Court regarding the mandatory Rules to be followed by the secured creditors-Banks as contemplated under the Security Interest (Enforcement) Rules, 2002. The mandatory provisions of the Rules as well as the provisions of the Registration Act, 1908 and the Registration Rules, which is required in such

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cases, where the Sale Certificates are presented for registration have not been discussed nor be considered by the Hon'ble Division Bench of Madurai Bench of this Court and therefore, the said judgment is of no avail in support of the facts and circumstances of the present case on hand.

11. Pertinently neither the learned Government Pleader nor the learned counsel appearing on behalf of the appellant brought to the notice of the Hon'ble Division Bench about the Tamil Nadu Amendment Act 41/22 dated 16.08.2022.

12. The learned Additional Government Pleader, appearing on behalf of the first respondent, made a submission that twin options are available for the holders of the Sale Certificate issued by the secured creditors for registration under the Registration Act, 1908. The Auction Purchaser may present the Sale certificate for registration under Section 17 of the Registration Act, for registration. In such cases, the Registering Authority is empowered to register the same by following the procedures and by recovering the prescribed stamp duty. In cases, where the Authorised Officer of the Bank communicates the Sale Certificate to the Registering

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Authority/Sub Registrar under Section 89(4) of the Registration Act, 1908, then the Registering Authority is bound to follow the procedures as contemplated under Section 89(4) of the Registration Act, 1908, and make entries in Book No.I, which will have the effect of registration in view of the principles laid down by the Apex Court in the case of **The Inspector General of Registration vs. G.Madhurambal [2022 LiveLaw (SC) 969]**.

13. It is not in dispute that the principles are settled by the Apex Court regarding the rights of the secured creditors as first charge holder and to sell the mortgaged property through public auction. The secured creditors are holding first charge over the property in view of Section 26-E of the SARFAESI Act, 2002. They are empowered to auction the property, realise the amount due to them and if any balance amount remains, then they can discharge other encumbrances by following the procedures.

14. Question arises, when the issue relating to registration of Sale Certificate raised, then the Registering Authority, who is bound by the provisions of the Registration Act, has to ensure that the mandatory

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requirements under the Act, are complied with.

15. Section 22-A of the Registration Act, 1908 was inserted by Tamil Nadu Act 28 of 2012 with effect form 20.10.2016. Section 22-B was inserted by Tamil Nadu Act 41 of 2022 with effect from 16.08.2022.

16. In view of the Tamil Nadu Amendments and insertion of Sections 22-A, 22-B, the Registering Authority in the State of Tamil Nadu is empowered to refuse registration based on any one of the grounds stipulated under Sections 22-A (or) 22-B of Registration Act, 1908.

17. The learned Additional Government Pleader, appearing on behalf of the first respondent, brought to the notice of this Court that Sections 22-A and 22-B of the Registration Act, 1908 and Rule 55-A of the Registration Rules, are inserted in compliance of the judgment of the Hon'ble Division Bench of this Court in the case of **Ammasi Kutty relating to fraudulent registration (WA No.1989 of 2019 dated 30.04.2021)**. The Tamil Nadu Amendment has got a specific object, since large scale fraudulent registrations were made by suppressing material facts.

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18. It is not in dispute between the parties that there is an express bar under Section 22-B of the Registration Act, 1908, if the documents presented are relating to transfer of immovable property by way of sale, gift, lease or otherwise, which is attached permanently or provisionally by a Competent Authority under any Central Act or State Act, for the time being in force or any Court or Tribunal. Therefore, there is no ambiguity in respect of the action taken by the Registering Authority in refusing to register the Sale Certificate presented by the Auction Purchaser.

19. Irrespective of the procedures contemplated under Rule 55-A of the Registration Rules, the secured creditor-Bank has an option to lift the attachment or discharge the encumbrances and present the Sale Certificate for registration. Even in the absence of Rule-55A, the option is left open either to the secured creditor or to the Auction Purchaser to discharge the encumbrances and thereafter register the Sale Certificate free from all encumbrances.

20. The issue of public importance is that, whether the Sale

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Certificate issued with encumbrances cause prejudice to the public interest at large or not. Every Auction Purchaser must be made known about the factual details regarding the secured assets proposed to be auctioned by the secured creditor. Any suppression in this regard will vitiate the auction itself. Thus compliance of the mandatory procedures contemplated under the SARFAESI Act and the SARFAESI Rules become necessary in the interest of public and to protect the bona fide Auction Purchasers of the secured assets.

21. The Legislations consider these aspects loudly and framed procedures for issuance of notice and sale Certificates, etc.

PROCEDURES CONTEMPLATED:

22. **Section 26 E of the SARFAESI Act** stipulates that "*Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority*." Therefore the petitioner Bank holds first

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charge and they are entitled to auction the property of realise the loan dues by priority. Debts due to any secured creditor shall have precedence over all other debts.

23. The **Security Interest (Enforcement) Rules 2002**, contemplates procedures.

- **Rule 9 stipulates** “T*ime of sale, issue of sale certificate and delivery of possession, etc.”*
- **Sub Rule (6) to Rule 9** states that “ *On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.*”
- **Sub Rule (7) to Rule 9** states that “ *Where the immovable property sold is subject to any encumbrances, the authorised officer may, if the thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional*

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amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him."

- **Sub Rule (8) to Rule 9** states that "*On such deposit of money for discharge of the encumbrances, the authorised officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly."*
- **Sub Rule (9) to Rule 9** denotes that "*The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above."*
- **Sub Rule (10) to Rule 9** indicates that "The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

24. On compliance of Sub Rule (7) and (8) after issuing the

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sale certificate, the authorised officer shall deliver the property to the purchaser, free from encumbrances known to the secured creditor on deposit of money as specified under Sub Rule (7).

25. The procedures contemplated under Rule 9 of the Security Interest (Enforcement) Rules 2002, unambiguously stipulates that the secured creditors / Bank has got responsibility and accountability to consider the statutory creditors and other debts, while dealing with the secured assets. Unilateral actions, by neglecting other debts, are impermissible, since the procedures contemplated under the rules indicate about the protections provided to unsecured creditors, statutory creditors etc. The spirit of the Rules amplifies that the sale must be made free from all encumbrances to the third party Auction Purchaser, who is not expected to suffer unnecessarily on account of the procedural violations, if any committed by the secured creditors/ Banks.

26. On issuance of sale certificate under Sub Rule (6) to Rule 9, the purchaser may be allowed to deposit the money required to discharge the other encumbrances. On such deposit of money, the encumbrances may

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be cleared by the authorised officer. After clearing all the encumbrances, the authorised officer shall deliver the property to the purchaser free from any encumbrances. Sub Rule (10) to Rule 9 denotes that "***The certificate of sale issued under Sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not***."

27. Therefore, the secured creditors are empowered to make two kinds of auction sales. Firstly they can auction the secured assets and issue sale certificate under the form given in Appendix-V of the Rules by listing the other encumbrances. While indicating the other encumbrances, steps have to be taken by the secured creditors to clear the other encumbrances. Thereafter, under Sub Rule (9) to Rule 9, the authorised officer shall deliver the property to the Auction Purchaser, free from encumbrances. Sub Rules (7) to (10), to Rule 9, indicate the subsequent procedures to be followed by the authorised officer to protect the other encumbrances / non-secured statutory or other debts. It is not as if the secured creditors/ Banks can auction the secured assets, issue sale certificate and wash off their hands. They have duty towards the other non-secured

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statutory creditors under the provisions of the Security Interest (Enforcement) Rules 2002. In the event of non-compliance of the statutory rules issued under the SARFAESI Act, the Bank is not entitled for any relief from the hands of the Constitutional Courts. Unilateral actions of the secured creditors, at no circumstances be appreciated. They, being a public sector, is duty bound to protect the interest of the other statutory creditors including Crown's debt. The power conferred under the SARFAESI Act cannot be exercised, so as to deprive the other statutory creditors from realising their dues. This exactly is the reason why the legislature thought fit and contemplated the procedures so as to protect the interest of the Crown's debt and the interest of other non-secured creditors. Thus, mandatory procedures contemplated under the Rules, if violated or not complied with, then the secured creditor/ Bank is not entitled for the relief waiver of other debts.

28. If the above procedures are not complied with and the sale certificate has not been issued free from any encumbrances, then the sale certificate issued would fall under the second category, i.e., with encumbrance.

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29. The second category of sale certificate, in the form given in Appendix-V of the Rules, indicates that the list of encumbrances must be furnished in the sale certificate. In the present case, such list of encumbrances are not furnished by the authorised officer including the attachment, made by the District Court in respect of the secured assets. In the event of mentioning the list of encumbrances in the sale certificate, then it is to be construed that the sale certificate was not issued free from encumbrances. When the sale certificate was issued with encumbrances then such sale certificate cannot be registered under the Registration Act nor encumbrances made can be removed without lifting the attachments.

30. Once the Bank auctioned the property and issued a sale certificate under Sub Rule (6) to Rule 9 of Security Enforcement Rule 2002 by mentioning the list of other encumbrances, then such sale certificate cannot be registered by the registering authority. Thus, only on lifting the attachment, necessary entries can be made in the encumbrance certificate or to remove the encumbrances under the provisions of the Registration Act, 1908.

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31. The legislative intention of the SARFAESI Act and Security Interest (Enforcement) Rules, 2002, are not restricted by providing priority to the secured creditors / Banks, but extends its protection to the non-secured and statutory creditors. Therefore, the secured creditors / financial institutions, while invoking the provisions of the SARFAESI Act, and the Rules framed thereunder are mandated to follow the procedures scrupulously so as to ensure that other non-secured creditors are not deprived of their rights to realise their statutory or other dues.

32. Under the provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules 2002, the Auction Sale by the secured creditors, completes on delivery of the secured assets to the Auction Purchasers, free from all encumbrances. Violation of procedures, if any committed by the secured creditors, if resulted in denial of the rights of other non-secured creditors and statutory dues, then the secured creditors are not entitled for a direction from the High Court to remove the encumbrances notified. Thus, compliance of the procedures contemplated in the Rules are not only mandatory, but the non-compliance would result in

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denial of an opportunity to the non-secured creditors to recover their dues.

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33. The Auction Purchasers are to be made aware of the known encumbrances by the secured creditors. The secured creditors, to cover up their misdeeds, cannot file a writ petition and seek a direction against the Registering Authority to remove the encumbrances, which would deprive the other non-secured creditors from realising their dues. Importantly, such directions, if issued to remove the encumbrances, the public in general would be misled on account of such entries made in the public records and there is a possibility of fraud, misrepresentation or otherwise during further alienation of properties. That apart, the non-secured creditors and the statutory creditors would loose their opportunity to recover their dues permanently.

34. If the auction sale has been completed in all respects in compliance with the provisions of the SARFAESI Act and Rules, then alone the sale certificate issued by the authorised officer can be construed as free from all encumbrances as stipulated under Rule 9 of the Security Interest Enforcement Rules. In the event of notifying any other encumbrances in the

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sale certificate, then it is to be construed as sale certificate with encumbrances. In respect of the sale certificate issued with known encumbrances, then the Registering Authority under the Registration Act is not empowered to remove encumbrances. Such refusal is made in order to protect the interest of the non-secured statutory creditors and to protect the interest of the public at large, and therefore refusal by the Registering Authority is in consonance with law.

FINDINGS:

35. In the present case, the facts reveal that the petitioner is the secured creditor and by exercising their powers under the SARFAESI Act, issued Sale Notice, auctioned the subject mortgaged properties and issued Sale Certificates. Pertinently, the Sale Notice for sale of immovable properties issued by the petitioner-Bank reveals that in the Annexure-A, the petitioner has specifically stated that the subject property is free from encumbrances. Paragraph-1 of the Sale Notice in Annexure-A reads as "**Notice is hereby given to the public in general and in particular to the Borrower (s) and Guarantor (s) that the below described immovable property mortgaged/changed to the Secured Creditor, the physical /**

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constructive / Symbolic (whichever is applicable) possession of which has been taken by the Authorised Officer of Indian Bank, Chinniampalayam Branch, Coimbatore, Secured Creditor, will be sold on "As is where is", "As is what is", and "Whatever there is" on 26.12.2022, between 11.00 A.M. and 03.30 P.M., for recovery of Rs.2,81,59,276/- (Rupees Two Crores Eighty One Lakhs Fifty Nine Thousand Two Hundred and Seventy Six only) (as on 08.12.2022 due to the Indian Bank, Chinniampalayam Branch, Secured Creditor".

36. In the Annexure A to the Sale Notice, the following informations are provided to the public at large:-

"Encumbrances on property if any – Nil".

37. The sale Notice was not issued in compliance to Rule 9 of the Security Interest (Enforcement) Rules. Compliance of Rule 9 of the Secured Interest (Enforcement) Rules, is mandatory for the purpose of issuance of Sale Certificate in order to protect the "public interest" and the interest of the bona fide Auction Purchasers. Any violations of the procedures contemplated under Rule 9 of the Security Interest

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(Enforcement) Rules, would cause infringement of the right of bona fide Auction Purchasers of the secured assets auctioned by the secured creditors. True disclosure of the facts and the status of the secured assets are of paramount importance in order to protect the interest of the Auction Purchasers. Any violations in this regard would cause prejudice to the interest of Auction Purchasers.

38. This Court has witnessed in many cases that Financial Institutions/Secured Creditors/Banks are not following the procedures as contemplated under Rule 9 of the Security Interest (Enforcement) Rules, which is creating lot of dispute in the matter of registration of Sale Certificate for the benefit of the bona fide Auction Purchasers. Lapses and derelictions committed by the secured creditors in dealing with the secured assets is resulting in denial of right to the bona fide Auction Purchasers and in such circumstances, the Banks/Financial Institutions are attempting to step into the shoes of the purchasers and filing writ petitions before the High Court only to cover up their misdeeds and suppression of facts made by them. The secured creditors are taking undue advantage of Section 26-E of the SARFAESI Act and states that they hold first charge and therefore,

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they are not bound by other encumbrances and attachments made by the Courts. **No doubt, the other attachments are not binding on the secured creditors as they hold first charge under Section 26-E of the SARFAESI Act**. However, the secured creditors cannot wash off their hands in totality depriving the rights of other creditors as well as the attachments made by the Competent Court of Law or the Tribunals. The Legislatures thought fit and prescribed comprehensive procedures under the Security Interest (Enforcement) Rules in order to protect both i.e., interest of the secured creditors and to protect the interest of the non secured creditors and other creditors and the attachments.

39. The Auction Purchaser is at liberty to purchase the property through Public Auction either with encumbrances or free from encumbrances. Unless the facts are made clear by the secured creditors, the Auction Purchaser may not know about the other encumbrances created in respect of the properties proposed to be auctioned through Public Auction. Therefore, disclosure of true and necessary particulars in the Sale Notice is mandatory and even while issuing the Sale Certificate under Rule 9(6) of Security Interest (Enforcement) Rules, such Sale Certificate should contain

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the list of encumbrances, enabling the Authorities and the purchaser to know about other encumbrances. If the list is published, then the Auction Purchaser may come forward to discharge other encumbrances and convert the assets free from encumbrances or the purchaser may take the risk of purchasing the encumbered property. However, the Bank cannot suppress the facts by not publishing the list of encumbrances, which is in violation of the procedures contemplated under Rule 9 of the Security Interest (Enforcement) Rules, 2002.

40. The Registering Authority under the Registration Act, 1908, is bound by the provisions of the Act. On account of the lapses or derelictions on the part of the secured creditors, the Registering Authority cannot be compelled to register the Sale Certificate in violation of Section 22-A or Section 22-B of the Registration Act, 1908. The mandatory provisions under the Act, is to be scrupulously followed, while registering the documents and in the event of issuing directions by the High Court to register the document with encumbrances and Court attachments, the same will lead to an anomalous situation, where the general public is absolutely misled. The encumbrances published by the Registration Department is a

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public document and the same will be verified for purchase of property by any person. Therefore, any such misguidance at the instance of the secured creditors towards the encumbrance records maintained under the Registration Act, cannot be permitted and the public interest plays a pivotal role in such circumstances and any erroneous or false or untruthful statements are found in the encumbrance certificate, it will infringe the rights of the public at large. The purpose and object of the encumbrance records under the Registration Act will be defeated.

41. The entire object of the Registration Act, 1908, is to provide public notice that a particular property is transferred or stands in the name of the particular person. If such particulars are found to be false or erroneous, then the public in general will be misled and intending purchasers will get affected. Any compromise in this regard would lead to an anomalous situation, where the public in general will be misled.

42. Thus non adherence or violation of the procedures contemplated under SARFAESI Rules will dis-entitle the Bank from registering Sale Certificate under Section 17 or Section 89(4) of the

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Registration Act, 1908. The secured creditors have an option either to issue Sale Certificate with encumbrance or free from encumbrances, as the case may be and the bona fide Auction Purchaser has an option either to purchase the property free from encumbrances or with encumbrances and thereafter, they are at liberty to take a decision to discharge the encumbrances and register Sale Certificate under Registration Act or not to register the Sale Certificate, which is not compulsorily registrable. There is no concept of automatic waiver or discharge of encumbrances, Court attachments etc.

43. In the present writ petition, the Sale Notice did not disclose the attachment made by the Principal District Court, Karur. Even in the Sale Certificate issued by the Bank, there is no indication about the list of encumbrances. The fact regarding the attachment of property by the principal District Court, Karur has been suppressed by the Bank right from their initial stage of auction notice under the provisions of the SARFAESI Act.

44. Therefore, the petitioner is not entitled for the relief as such

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sought for in the present writ petition. However, the petitioner-Bank or the Auction Purchaser is at liberty to lift the attachment or discharge the encumbrances and present the Sale Certificate for registration and in such circumstances, the Registering Authority is bound to consider the Sale Certificate for registration by following the procedures as contemplated under the Registration Act.

45. With the above observations, the present writ petition stands dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is also dismissed.

15-09-2023

Index : Yes/No
Internet: Yes/No
Speaking order/Non-Speaking order
Neutral Citation : Yes/No
Svn

To

The Sub Registrar,
Singanallur Sub Registrar Office,
14/48, Vellalore,
Coimbatore-641 016.

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S.M.SUBRAMANIAM, J.

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