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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.17064 & 17065 of 2023

Indian Bank,
Perianaickenpalayam Branch,
30, 30/1, LMW Road,
Periyanaickenpalayam,
SRKV Post, Coimbatore – 641 020
Rep by its Chief Manager/Authorised Officer,
Mr.Chetan Khanna ... Petitioner in both W.Ps.

Vs.

1.The Secretary to State Government of Tamil Nadu,
Registration Department,
Fort St. George, Chennai.

2.The Inspector General of Registration,
No.100, Santhome High Road,
Chennai – 600 028. … Respondents 1 & 2 in both W.Ps.

3.The Sub Registrar,
SRO Kinathukkadadavu,
15/117 Coimbatore Pollachi Road,
Kinathukadavu – 642 109,
Coimbatore District. ... 3rd Respondent in W.P.No.17064 of 2023

4.The Sub Registrar,
SRO Perinaickenpalayam,
Perianaickenpalayam,
Coimbatore 641 020. ... 3rd Respondent in W.P.No.17065 of 2023

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Prayer in W.P.No.17064 of 2023: 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 third respondent in Refusal Check Slip dated 08.03.2023 No.RFL/Kinathukkadavu/13/2023, quash the same and to consequently, direct the third respondent to register the sale certificate issued by the petitioner in favour of the Auction Purchaser in respect of the mortgaged property measuring 2540 sq. ft in site No.32, VGP Balaji Nagar in S.F.No.47/1, Solavampalayam Village, Patta No.234, within the Kinathukadavu Sub Registration District and Coimbatore Registration District.

Prayer in W.P.No.17065 of 2023: 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 third respondent in Refusal Check Slip dated 07.03.2023 No.RFL/Periyanaicken Palayam/16/2023, quash the same and to consequently, direct the third respondent to register the sale certificate issued by the petitioner in favour of the Auction Purchaser in respect of the mortgaged property measuring 1500 sq. ft at site No.C-13 in C Block in S.F.No.510/4 of Narasimmanaickenpalayam Village within the Coimbatore Registration District, Periyanaickenpalayam Sub Registration District.

For Petitioner
in both W.Ps. : Mr.T.Sundar Rajan

For Respondents
in both W.Ps. : Mr.R.Ramanlaal,
Additional Advocate General – IV,

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Assisted by
Mr.T.Arun kumar,
Additional Government Pleader

COMMON ORDER

The refusal check slips issued by the respective Sub Registrars/third respondent is under challenge in these writ petitions.

2. The writ petitioner is Indian Bank, Periyanayakanpalayam Branch, Coimbatore. One Mr.G.Lokesh, the proprietor of M/s.Selvam Enterprises and Selvam Agency availed various loan facilities from the petitioner bank and created two equitable mortgages of the respective schedule mentioned properties in favour of the writ petitioner bank as security. In respect of W.P.No.17064 of 2023, the original title deeds of the property was deposited on 01.03.2019 and executed a memorandum of deposit of title deeds dated 06.03.2019 registered as document No.1326/2019 on the file of the third respondent therein. In respect of W.P.No.17065 of 2023, a memorandum of deposit of title deeds dated 19.02.2016 was executed and registered as document No.2433 of 2016 on the file of the third respondent therein. The borrower committed default in repayment of the loan facilities, which had slipped to NPA.

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3. The petitioner bank being the secured creditor initiated auction under the SARFAESI Act and the sale notice was issued on 13.12.2022. In so far as the schedule mentioned property in W.P.No.17064 of 2023 is concerned, one Mr.S.Prakash was declared as the highest bidder in the auction for a sum of Rs.14,43,000/- and the sale confirmation letter dated 24.01.2023 was issued to him and the auction purchaser paid the sale price. In so far as the schedule mentioned property in W.P.No.17065 of 2023 is concerned, one Mr.V.Muthukrishnapandi was declared as the highest bidder in the auction for a sum of Rs.4,78,000/- and the sale confirmation letter dated 24.01.2023 was issued to him and the auction purchaser paid the sale price.

4. The petitioner presented the sale certificates for registration before the respective third respondent. The respective third respondent issued the impugned orders of refusal slip on the ground that there is an attachment under the provisions of the Chit Funds Act (State Act) by the Chit Fund company. The order of attachment was passed by the Tribunal constituted

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under the Chit Funds Act.

5. In the context of the refusal orders issued by the third respondent under section 22B of the Registration Act, the learned counsel for the petitioner mainly contended that the bank enjoys precedence over all debts including attachments. Under section 26 (E) of the SARFAESI Act, the bank is the first charge holder and therefore, they are entitled to auction the secured assets by following the procedures. The petitioner conducted an E-Auction by following the procedures and the successful bidders paid the sale price. The sale certificates were issued and the said certificates were presented for registration. Since the petitioner bank enjoys precedence over all other debts, the sale certificates which were issued are to be registered under the provisions of the Registration Act. Learned counsel for the petitioner relied on the judgments of this Court with reference to the registration of the sale certificate under the provisions of the Registration Act. However, all those judgments relied on were delivered, prior to the Tamil Nadu Amendment Act, 41 of 2022 dated 16.08.2022. Prior to the insertion of section 22B in the Registration Act, there was no such bar to

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refuse registration. Therefore, the said judgments are of no avail to the petitioner for the purpose of considering the relief as such sought for in these writ petitions.

6. Learned Additional Advocate General appearing on behalf of the respondents 1 to 3 mainly contended that even in case, the sale certificates were communicated by the authorised officer under section 89(4) of the Registration Act, the same cannot be entered in Book 1, in view of the expressed bar under section 22B of the Registration Act. In the present case, the petitioner has not stated anything about the attachments made under the provisions of the Chit Fund Act and therefore, they are not entitled for the relief. In the present case, the mandatory requirement contemplated under the provisions of the Security Interest (Enforcement) Rules, 2002 has not been followed by the petitioner bank. Recently, the Hon'ble Division Bench of Madurai Bench of Madras High Court passed an order in W.P.(MD).No.674 of 2023 dated 31.08.2023. 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 properties under section

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26(E) of the SARFAESI Act. It was further considered about the subsequent attachments and it was held that those subsequent attachments are not binding on the secured creditors in view of Order 38 Rule 10 of CPC.

7. Section 64 of CPC bars any "Private Transfers". The transfer in the present case is an involuntary transfer. It is the secured creditor who has exercised the right under the SARFAESI Act, 2002. The Hon'ble Division Bench considered the scope of section 26-E of the SARFAESI Act, 2002 which starts with a non- obstante clause.

8. Pertinently, neither the learned Government Pleader appeared before the Division Bench nor the learned counsel appeared for the petitioner brought to the notice of the Hon'ble Division Bench about the Tamil Nadu Amendment Act 41/2022 dated 16.08.2022. There was no further adjudication about the mandatory procedures to be followed under Rule 9 of the Security Interest (Enforcement) Rules, 2002. In the absence of considering these two important provisions, the judgment relied on by the

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petitioner is no avail, since the petitioner bank in the present case has not listed out the encumbrances as required under Rule 9 of the Security Interest (Enforcement) Rules, 2002.

9. In respect of the procedures contemplated under section 89(4) of the Registration Act, the registering authority is bound to follow the procedures contemplated by making necessary entries in book 1. The said entries will also 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].*** Therefore, the sale certificates are presented for registration under section 17 of the Act, else the authorised officer communicated the sale certificates to the registering authority under section 89(4) of the Registration Act. Both will have the effect of registration and therefore, section 22B is to be applied commonly in both circumstances.

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10. It is needless to state that the registering authority is bound by the provisions of the Registration Act to ensure that the requirements as contemplated under the Registration Act are complied with.

11. Section 22A of the Registration Act, 1908 was inserted by TN Act, 28/2012 with effect from 20.12.2016 and Section 22B was inserted by TN Act, 41 of 2022 with effect from 16.08.2022. In view of the TN Amendments and insertion of 22A and 22B, the registering authority in the State of Tamil Nadu is empowered to refuse registration, based on any one of grounds stipulated under section 22A or 22B of the Registration Act.

12. Learned Additional Advocate General appearing on behalf of the respondents, brought to the notice of this Court that Sections 22A and 22B of the Registration Act, 1908 and Rule 55A 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 which created an anomalous situation in the matter

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of transfer of properties in the State of Tamil Nadu.

13. 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. There is no impediment for the Registering authority to register the sale certificates presented for registration by the auction purchasers.

14. 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 certificates for registration. Even in the absence of Rule-55A, the option is left open either to the secured creditor or to the auction purchasers to discharge the encumbrances and thereafter register the sale certificates free from all encumbrances.

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15. The issue of public importance is that, whether the sale 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.

16. The Legislations considered these aspects loudly and framed procedures for issuance of notice and sale certificates, etc.

PROCEDURES CONTEMPLATED:

17. 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.

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

> * Rule 9 stipulates "Time 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 amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him."

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* 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."

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

20. The procedures contemplated under Rule 9 of the Security Interest (Enforcement) Rules, 2002 unambiguously stipulates that the secured creditor / Bank has got responsibility and accountability to consider the

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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 creditor/ Bank.

21. 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 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."

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22. 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 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

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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 of waiver of other debts.

23. 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.

24. 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

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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.

25. Once the Bank auctioned the property and issued a sale certificate under Sub Rule (6) to Rule 9 of Security Interest (Enforcement) Rules, 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.

26. 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

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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.

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

28. In the present case, the facts placed before this court reveals that the petitioner is the secured creditor and by exercising their powers under the SARFAESI Act issued sale notice, auctioned the subject mortgaged

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properties and issued sale certificates. The mortgages were created on 19.02.2016 & 06.03.2019. Auction sale notice was issued on 13.12.2022. Admittedly, the attachments under the Chit Fund Act by the Tribunal was made in the year 2021. Therefore, after the attachments made by the Tribunal, auction sale notice was issued. However, the petitioner bank has not listed the known encumbrances in the auction sale notice. They have not even disclosed the encumbrances in the sale certificates issued under Sub-Rule 6 to Rule 9 of SARFAESI Rules. The sale notice issued by the petitioner dated 13.12.2022 in the present case states that the sale is made on "As is where is and as is what is" basis and no representations and warranties are given by the Bank relating to encumbrances, Statutory liabilities etc.,.

29. In the sale notice, there is a specific column provided relating to "prior encumbrance". The petitioner bank has stated as “the property is encumbered in favour of the Indian Bank”. Therefore, the petitioner bank has not complied with the requirements as contemplated under Rule 9 of the Security Interest (Enforcement) Rules, 2002. 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

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interest of the bona fide Auction Purchasers. Any violations of the procedures contemplated under Rule 9 of the Security Interest (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.

30. 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 26E of the SARFAESI Act

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and states that they hold first charge and therefore, 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 26E 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.

31. 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.

32. 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 public

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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.

33. 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.

34. In the present case, the sale notice did not disclose the attachments made by the petitioner under the Chit Fund Act. Even in the sale certificates issued by the petitioner/Bank, there is no indication about the attachments.

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Thus, the petitioner bank has suppressed the fact regarding the attachments made by the Tribunal, under the Chit Fund Act. The suppression was made right from the initial stage of issuance of auction sale notice under the provisions of the SARFAESI Act. Therefore, the petitioner is not entitled for the relief as such sought for in the present writ petition. However ,the petitioner bank or the auction purchaser is at liberty to lift the attachments or discharge the encumbrances and present the sale certificates for registration and in such circumstances, the registering authority is bound to consider the sale certificates for registration by following the procedures as contemplated under the Registration Act.

35. With the above observations, the writ petition stands dismissed. No costs.

19.09.2023

nl / krk
Index : Yes/No
Speaking order/Non speaking order
Neutral Citation: Yes/No

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To

1.The Secretary to State Government of Tamil Nadu,
Registration Department,
Fort St. George, Chennai.

2.The Inspector General of Registration,
No.100, Santhome High Road,
Chennai – 600 028.

3.The Sub Registrar,
SRO Kinathukkadadavu,
15/117 Coimbatore Pollachi Road,
Kinathukadavu – 642 109,
Coimbatore District.

4.The Sub Registrar,
SRO Perinaickenpalayam,
Perianaickenpalayam,
Coimbatore 641 020.

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S.M.SUBRAMANIAM, J.

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