



CrI.O.P(MD)No.21417 of 2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED On: 23.07.2021

PRNOUNCED On : 12.01.2023

CORAM

THE HONOURABLE MR. JUSTICE B. PUGALENDHI

CrI.O.P(MD)No.21417 of 2016 and
CrIOP(MD)No.10979 of 2016

Sivakumar : Petitioner / Accused

Vs.

1.The Inspector of Police,
City Crime Branch,
Tirunelveli,
Tirunelveli District.
[Crime No.21 of 2014]

: Respondent / Complainant

2.Rajammal

: Respondent /

De facto complainant

Prayer: Petition filed under Section 482 of the Criminal Procedure Code, to call for the records pertaining to the case in CC.No.308 of 2016 on the file of the Judicial Magistrate No.1, Tirunelveli and quash the charge sheet and consequential all further proceedings as against the petitioner.

For Petitioner : Mr.D.Shanmugaraja Sethupathi

For Respondent : Mr.T.Senthil Kumar
No.1 Additional Public Prosecutor

For Respondent : Mr.V.Sasi Kumar
No.2



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ORDER

The petitioner / accused No.2 in CC.No.308 of 2016, on the file of the learned Judicial Magistrate No.1, Tirunelveli has filed this criminal original petition under Section 482 of CrPC to quash the proceedings pending against him in CC.No.308 of 2016.

2.At the instance of the 2nd respondent / *defacto* complainant, the respondent Police registered a case in Crime No.21 of 2014 and after completion of the investigation, filed a final report as against this petitioner and another for the offence punishable under Sections 197, 417, 418, 467, 468 and 420 IPC. The learned Judicial Magistrate No.I, Tirunelveli has also taken cognizance of the final report in CC.No.308 of 2016. Challenging the same, the petitioner / accused No.2, has filed this application to quash the proceedings pending against him.

3.The case of the prosecution is that the 1st accused was working as a Branch Manager in HDFC Bank at



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Palayamkottai Branch and the petitioner Sivakumar/
2nd accused was working as a Manager in the Head Office at Thiruvananthapuram. In the year 2004, one Kannan availed a mortgage loan from HDFC Bank by mortgaging his immovable property in Survey No.145/1, (Plot No.96), situated in Keela Natham Village, Palayamkottai Taluk, Tirunelveli District. Since the borrower defaulted in repayment of the loan, HDFC Bank authorities initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [in Short SARFAESI Act] in the year 2009 and auction notice was also issued on 22.05.2012 by the Head Office in the dailies. Subsequently, the *defacto* complainant participated in the public auction and she purchased the property for a sum of Rs.7,25,000/-. She had paid an advance amount of Rs.73,000/- on 29.05.2012. After completion of the auction process, she paid the remaining sale consideration of Rs.6,57,000/- on 20.06.2012 and Sale certificate was also issued on 10.07.2012. While so, when she approached the Sub Registrar, Palayamkottai to register the property in question, she learnt that the said property was already acquired by the Tamil Nadu Housing Board in the year 2003.



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The accused by suppressing the acquisition of the property by the Tamil Nadu Housing Board, had sold the property to the *defacto* complainant in the public auction and thereby cheated her.

4.The petitioner is an Assistant Manager of HDFC Bank, Thiruvananthapuram Branch. One Kannan had availed housing loan of Rs.3,80,000/- from HDFC Bank in the year 2004 and mortgaged the title deeds of the property. Since the borrower failed to repay the loan amount, HDFC Bank initiated proceedings under the SARFAESI Act and took possession of the property in the year 2010. Thereafter the HDFC Bank published a auction notice in the newspapers on 23.05.2012 and pursuant to the auction notice, the 2nd respondent had participated in the public auction, and offered to purchase the property for a sum of Rs.7,30,000/-, the sale was confirmed on 23.06.2012 and possession was handed over to her on 10.07.2012. Thereafter on 14.11.2012 the 2nd respondent issued legal notice alleging that the property was sold in the public auction suppressing the encumbrance that the property was already acquired by the Tamil Nadu Housing Board in the year 2003.



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She has also filed a petition before the District Consumer Redressal Forum, Tirunelveli in Con.OP.No.58 of 2013 against the Chairman, the Managing Director and the Senior Manager of the HDFC Bank. She has also filed the present complaint before the learned Judicial Magistrate No.I, Tirunelveli under Section 156(3) CrPC on 06.02.2014, which was referred for investigation to the 1st respondent Police. Accordingly the 1st respondent Police has registered a case in Crime No.21 of 2014 for the offence punishable under Sections 197, 417, 418, 467, 468 and 420 IPC on 15.07.2014 and has filed a final report for the offence punishable under Sections 197, 417, 418, 467, 468 and 420 IPC, as against this petitioner and another on 05.08.2016. Subsequently the petitioner has filed this quash petition.

5.The learned Counsel for the petitioner has made his submissions as follows:

a.The petitioner is charged for the offence under Sections 197, 417, 418, 467, 468 and 420 IPC. The ingredients of the offence under Sections 197, 417, 418, 467, 468 and 420 of IPC are not attracted in this case towards the petitioner. In order to attract Sections 467



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and 468 IPC, forgery of document is a *sine-quo-non*.

The definition of forgery of document as per Section 463 IPC is that making any false document with intent to cause damage or injury to any person or to support any claim or title or cause any person to part with property or to enter into express or implied contract would amount to forgery. As per Section 464 IPC, a person is said to have made a false document means (i) if a person made or executed a document claiming to be someone else or authorised by someone else; (ii) he altered or tampered a document; (iii) he obtained a document by practicing deception or from a person not in control of his senses.

b.The certificate issued by HDFC bank does not fall under categorie Nos. ii and iii. It is not sufficient that a document has been made or executed dishonestly or fraudulently and even assuming execution of such document, purporting to convey some property of which he is not the owner, is not exeuction of a false document as defined under Section 464 CrPC and since the document executed is not a false document, the offence of forgery cannot be established. Therefore, the ingredients of Section 467 and 468 IPC are not attracted.



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c. Insofar as the other offences under Sections 417, 418 and 420 IPC are concerned, the element of cheating has to be proved. Cheating is defined under Section 415 IPC that (i) to make a false statement so as to deceive any person and (ii) fraudulently and dishonestly inducing a person to deliver any property or to do or to omit to do something. As per Section 420 IPC, dishonest intention is the *sine-qua-non* for attracting such offence and mere breach of contract is not enough. Further the essential ingredients required for attracting the penal provisions are deception and dishonest intention from the very beginning of the transaction. Mere using the word cheating in the complaint does not constitute an offence of cheating. In the complaint lodged by the defacto complainant, there is no averment of cheating or fraudulent intention. The factual details given in the complaint do not establish any element of such dishonest intention by the petitioner and therefore, the element of cheating is not available and hence the ingredients for invoking Sections 417, 418 and 420 cannot be attracted.



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d.Insofar as the offence under Section 197 is concerned, a certificate as per Section 197 IPC is a certificate which is required to be given or signed in the course of administration of justice and it refers to some statutory requirements and therefore, the sale certificate issued by the HDFC Bank is not a false certificate within the meaning of Section 197 IPC and therefore, this Section also cannot be attracted.

e.During the relevant point of time, the petitioner was working only as an Assistant Manager and the Manager alone is the authorised officer in HDFC Bank to initiate the proceedings under SARFEASI Act. Therefore, the petitioner is in no way connected with the said sale transaction at any point of time.

f.Section 32 of the SARFAESI Act gives protection to any secured creditors or any of his officers or Manager for any act done or omitted to be done in goodfaith. The complaint forwarded by the learned Judicial Magistrate under Section 156(3) CrPC is improper, since the complaint does not disclose commission of any offence and the



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transaction is only civil in nature. Since the civil law remedies are time consuming one, the defacto complainant initiated criminal prosecution.

g. In support of his contention the learned Counsel for the petitioner has relied on the following judgments:

i. Indian Oil Corporation Vs NEPC India Limited,
reported in **2006 (6) SCC 736:**

ii. Suresh Yadav Vs Sharifa Be reported in
AIR 2008 SC 210:

iii. P. Ashokumar Vs Inspector of Police,
reported in **2009 (1) MLJ (CRL) 352.**

6. The learned Additional Public Prosecutor appearing for the State submits that the petitioner and the other Bank officials knowing that the property, which was brought under auction was already acquired by the Tamil Nadu Housing Board in the year 2003 and suppressing this fact HDFC Bank sold the property in public auction and in order to safeguard their liability, they have committed this offence. The ingredients for the offence under Sections 197, 417, 418, 467, 468 and 420 IPC are clearly attracted against this petitioner and other accused, since the



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dishonest intention and mens rea have been in existence ever since the commencement of the transaction. The respondent Police after collecting all the relevant materials, which are connecting the accused to the offence, have filed the final report in the year 2016. The trial Court after satisfying with the materials placed by the investigation agency, has taken the final report on file. There is a prima facie case as against the accused and therefore, this is not a case for quashment of the final report without trial. By filing this quash petition, the trial has been stalled by the petitioner. All the grounds raised by the petitioner can be tested only after conducting trial and therefore, the learned Additional Public Prosecutor prays that this criminal original petition be dismissed.

7.The learned Counsel appearing for the 2nd respondent / defacto complainant submits that all the grounds raised by the petitioner can only be tested during the trial and therefore, prayed for dismissing this petition.



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8.This Court considered the rival submissions and perused the materials placed on record.

9.This petitioner is accused No.2 in CC.No.308 of 2016. The 1st respondent Police has filed the final report as against this petitioner and other accused for the offence punishable under Sections 197, 417, 418, 467, 468 and 420 IPC. The learned Judicial Magistrate concerned has also taken cognizance of the final report and now the case is pending for trial. The petitioner / A-2 has approached this Court that the ingredients of the offences charged as against this petitioner are not attracted as against the petitioner. The property was sold in auction on the basis of as is where is and as is what is. Only after accepting this condition mentioned in the auction notice dated 29.05.2012, the 2nd respondent had participated in the auction and obtained the property. Therefore she cannot maintain the complaint as against the bank officials having accepted the condition of as is where is and as is what is.

10.The scope of Section 482 of CrPC in quashing the complaint and final report has already been settled by the



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Hon'ble Supreme Court in a catena of judgments. It is relevant to refer to the guidelines issued by the Hon'ble Supreme Court in **State of Haryana and Ors. Vs. Ch. Bhajan Lal and Ors**, reported in **AIR 1992 SC 604**, in entertaining the application for quashing the charge sheet and the said guidelines are extracted hereunder:

"1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do



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not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. In yet another decision in **Indian Oil Corporation Vs. NEPC India Ltd and Ors**, reported in **AIR 2006 SC 2780**,



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the Hon'ble Apex Court further elaborated the exercise of jurisdiction under Section 482 CrPC in quashing complaints and the criminal proceedings and the relevant portion is extracted hereunder:

"12.

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with maladies/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate



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prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."



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12. Bearing in mind the above guidelines of the Hon'ble Apex Court this Court proceeds with the case on hand:

13. The petitioner stands charged for the offence punishable under Sections 197, 417, 418, 467, 468 and 420 IPC.

i. Charge under Sections 417, 418 and 420:

a. The essential ingredient to be attracted for the charges under Sections 417, 418 and 420 is 'cheating'. The offence of cheating has been defined by the Hon'ble Supreme Court.

1. In **Hridaya Ranjan Pd. Verma and Ors. Vs. State of Bihar and Ors**, reported in **AIR 2000 SC 2341**, the Hon'ble Supreme Court has defined cheating as follows:

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in



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the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15..... Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise."

2. In **Ram Jas Vs State of U.P.**, reported in **AIR 1974 SC 1811**, the Hon'ble Supreme Court has defined Cheating as follows:

"3....The ingredients required to constitute the offence of cheating are :-

(i) There should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) The person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and



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(iii) In cases covered by (ii) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

b. Thus to constitute cheating the concept of deception must exist from the very start of the transaction. In order to hold a person guilty of cheating, the intention of a person must be dishonest and there must be mens rea. It has to be shown that the intention was not dishonest at time of making a promise. In the case on hand, the petitioner with a dishonest intention suppressed the very fact of the encumbrance by the Tamil Nadu Housing Board in the subject property and made false promise that the property was free from encumbrance and made the defacto complainant to participate in the auction sale and induced her to purchase the property. Because of the act of the intentional omission in disclosing the encumbrance from the very inception, damage was caused to the defacto complainant. Thus the offence of cheating is prima facie made out against the petitioner. Therefore, the contention of the petitioner is not acceptable and the same is rejected.



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ii. Charge under Sections 467 and 468 IPC:

a. The essential ingredient to be attracted for the offence under Sections 467 and 468 IPC is forgery. Forgery is defined in Section 463 IPC that whoever makes any false document is said to be committed forgery. Making a false document as per Section 464 IPC is that whoever dishonestly or fraudulently makes, signs, seals or executes a document or a part of a document is said to be a false document. The expression 'dishonestly' has been defined in Section 24 IPC that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person. The expressions 'wrongful gain' and 'wrongful loss' have been defined under Section 23 IPC that a gain by unlawful means of property to which the person gaining is not legally entitled and loss by unlawful means of property to which the person losing it is legally entitled.

b. In this case the petitioner has sold the property to the 2nd respondent suppressing certain material facts for wrongful gain in order to safeguard their liability towards



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the property and therefore, prima facie case of forgery is made out and hence the contention of the petitioner is unacceptable and therefore it stands rejected.

iii. Section 197 IPC:

The main ingredient for invoking Section 197 IPC is issuing or signing of a certificate (i) required by law to be given or signed (ii) relating to a fact of which such certificate is by law admissible in evidence, is a false one. Therefore, in order to charge a person under Section 197 IPC , the certificate in question must be a required one, by some provision of law, admissible in evidence, as such, certificate without further proof. As per Rule 9(6) of the Security Interest (Enforcement) Rules, 2002, on confirmation of the sale by the secured creditor, on the terms of payment have been complied with, the authorized 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. Therefore the law mandates that the sale certificate should be issued after the completion of auction. The form



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given in Appedix V of the Rules itself mandates that any encumbrance with respect to the property has to be disclosed. However there is no such list of encumbrance mentioned in the sale certificate issued to the 2nd respondent by the HDFC Bank authorities as mandated in the said Rules, but instead of listing out the encumbrances, they have simply introduced a clause of as is where is and as is what is, which is not prescribed in the Form V of the said Rules. This itself shows that the authorities have not acted as per the mandated provisions of the Security Interest (Enforcement) Rules, 2002. Hence, the ground raised by this petitioner that Section 197 IPC cannot be sustained stands rejected.

14.The HDFC Bank has given a housing loan to one Kannan on 15.09.2004. But he had defaulted in repayment of the loan and therefore the Bank has initiated proceedings under the SARFAESI Act in the year 2009, wherein, the possession of the property was ordered to be handedover to the HDFC Bank. Accordingly, the property was handedover to the HDFC Bank, which in turn, sold the property under the public auction to the 2nd respondent. The petitioner was the



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Assistant Manager of the HDFC Bank. The petitioner claims that the notification was made with specific condition as is where is; as is what is basis. The possession receipt was also issued on 10.07.2012 with the following statement:

"Recived on 'as is where is and as is what is' condition.

We have purchased the property knowingly that the aforesaid property is in the process of Housing Board Acquisition and we have no claim of any nature whatsoever against Housing Development Finance Corporation Limited in respect of aforesaid property."

15. Therefore according to the petitioner, the 2nd respondent knowing that the property has already been acquired by the Tamil Nadu Housing Board in the year 2003, has purchased the property. The loan was of the year 2004, the proceedings under the SARFEASI Act were initiated by the Bank in the year 2009 and notice for auction was published by the HDFC Bank Limited in the daily newspapers on 23.05.2012 and 24.05.2012. The auction was conducted on 23.06.2012, sale was confirmed on the same day and thereafter, the sale certificate and possession receipt



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were issued on 10.07.2012. Only in the sale certificate dated 10.07.2012, the HDFC Bank Limited has stated that the property is in the process of Housing Board acquisition. But this is not referred in the auction notice published in the daily newspaper on 23.05.2012 and on 24.05.2012 and it is also not mentioned in the sale proceedings dated 23.06.2012. The subject property was already acquired by the Special Tahsildar (Land Acquisition) on 16.06.1992 and the award was also passed on 30.06.2003. The HDFC Bank authorities either knowing or without knowing the same, has lent loan to one Kannan in the year 2004. Thereafter they issued a auction notice, in conclusion of the proceedings initiated under the SARFEASI Act in the year 2012 on the basis of 'as is where is ; as is what is.' The possession receipt dated 10.07.2012 discloses that the bank was aware of the acquisition proceedings. However it is mentioned as if there is a process of Housing Board acquisition. The acquisition proceedings were completed even in the year 2003, however, the Bank has lent the loan in the year 2004 and is now taking advantage of the clause of 'as is where is and as is what is, which was mentioned in the auction notice dated 29.05.2012.



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16. It is relevant to refer to a decision of the Hon'ble Division Bench of the Andhra Pradesh High Court in Re **Mandava Krishna Chaitanya Vs UCO Bank, Asset Management Branch** reported in **(2018) 3 ALD Page 266**, wherein it has been held as follows:

"8. In this regard, it may be noted that Section 13(6) of the SARFAESI Act states that any transfer of a secured asset after taking possession thereof or taking over of management under Section 13(4) by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred, as if the transfer has been made by the owner of such secured asset. Therefore, the sale by the secured creditor is practically on par with a sale by the owner of the secured asset himself. Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002') deal with sale of immovable secured assets, time of such sale, issuance of the sale certificate and delivery of possession, etc. Rule 8(1) requires the secured creditor to take or cause to be taken possession of the secured asset which is an immovable property by delivery of a possession notice. Rule 8(2) requires such possession notice to be published in two newspapers not later than seven days.



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Rule 8(3) states that in the event possession of the immovable property is actually taken by the authorized officer of the secured creditor, he shall keep it in his own custody or in the custody of any person authorized or appointed by him who shall take as much care of the property in his custody as an owner of ordinary prudence would, under similar circumstances, take of such property. Rule 8(4) states that the authorized officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of. Rule 8(5) requires the authorized officer, before he effects sale of the immovable property, to obtain valuation thereof from an approved valuer so as to fix the reserve price therefor in consultation with the secured creditor and prescribes the modes in which he may sell the said property. Rule 8(6) deals with issuance of notice of 30 days to the borrower intimating him of the intention to sell the immovable secured assets. The proviso to this rule details the terms of the sale which need to be mentioned in the public notice that would be published in newspapers under Rule 9(1). Clauses (a) and (f) in this proviso are relevant and read as under:



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'(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

.....

(f) any other thing which the authorized officer considers it material for a purchaser to know in order to judge the nature and value of the property.

10. The secured creditor cannot therefore blindly accept any property as security and go on to sell the same without even enquiring as to what encumbrances attach to it. Be it noted that a secured creditor and more particularly, a bank, offers loan facilities on the strength of such secured assets and, in most cases, such loan facilities are sourced from public funds garnered from the exchequer/common man and therefore, a high level of responsibility attaches to the secured creditors, especially banks, to ensure that the secured assets, on the strength of which they offer tax payers' monies or customer deposits to borrowers, are worthy of being mortgaged as security for such loans. It is not open to a bank, such as the UCO Bank, to baldly state that it obtained the subject property as security for the loan sanctioned by it to a borrower and that once it proposed to



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sell it on an 'as is where is' and 'as is what is' basis it is freed from all responsibility."

17.As per Section 54 of the Transfer of the Property Act, the definition for sale is that the transfer of ownership in exchange for the price paid or promised or part paid and part promised. The delivery of tangible immovable property takes place with similarly placed buyer or such a person as he directs in possession of the property. Similarly certain rights and liabilities of buyer and seller are provided under Section 55 of the Transfer of the Property Act. It would be useful to refer to Section 55(1) (a) (b) (c) of the Transfer of Property Act and the same is extracted hereunder :

"55. (1) The seller is bound—

(a) to disclose to the buyer any material defect in the property 1[or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;



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(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;"

18.The petitioner has also raised a ground of goodfaith and claims that there is a protection given under Section 32 of the SARFAESI Act for such an action taken in goodfaith and Section 32 of SARFEASI Act is extracted hereunder:

*"32.Protection of action taken in good faith.—
No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act."*

19.The term goodfaith defined in the Black's Law Dictionary is that, A state of mind consisting in

- 1)Honesty in belief of purpose,
- 2)Faithfulness to one's duty or obligation,
- 3)Observance of reasonable commercial standards of fair dealing in Given trade or business, or
- 4)Absence of intent to defraud or to seek unconscionable advantage.

20.The petitioner being well aware of the fact that the subject property was already acuquired by the



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Tamil Nadu Housing Board in the year 2003, suppressing the same, has made false promise to the defacto complainant that the property was free from encumbrance with an intention to defraud her and thus it cannot be stated that such action of the petitioner in selling the property to the defacto complainant was in goodfaith. Therefore, this ground of the petitioner is rejected.

21.With regard to the ground of selling the property on 'as is where is; as is what is, basis is concerned, it would be apposite to refer to the following decision:

i. Leelamma Mathew Vs India Overseas Bank and Others,
[Civil Appeal No.7128 of 2022], the Hon'ble Apex Court has held as follows:

"27... As per Section 54 of the Transfer of Property Act the seller was bound to disclose any buyer any material defect in the property of which the buyer is not aware and which the buyer could not ordinarily discover. Under the circumstances also the submission on behalf of the Bank that the property was put to auction on "as is where is" and "as is what is" condition, thereafter the plaintiff shall not be entitled



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to compensation of the less area cannot be accepted."

ii. In **Re Rekha Sahu Vs UCO Bank** reported in (2014) BC 221 (DB) (ALL), it has been held as follows:

"Any asset sold under the SARFAESI Act is sold on an 'as is where is' and 'as is what is' basis, unless specified otherwise, but Section 55(1) of the Transfer of Property Act, 1882, dealing with the rights and liabilities of the buyer and seller, mandates that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto. The Allahabad High Court therefore observed that a duty is cast upon the authorized officer of the bank to disclose to the auction purchaser any material defect in the title, failing which it could be construed that the purchaser was misled".

22. From the above decisions it is clear that it is the duty of the seller to disclose any material defect in the property or in the seller's title and if it is not done, it would be construed that the purchaser was misled. In this case since the petitioner has not disclosed the encumbrance by the Tamil Nadu Housing Board in the



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auction notice issued in the dailies, he cannot escape from his liability by stating that the property was sold on 'as is where is and as is what is basis'. Therefore this ground of the petitioner is also rejected.

23.The other ground raised by the petitioner is that the issue is civil in nature and therefore, a complaint under Section 156(3) cannot be maintained. The Hon'ble Supreme Court in Indian Oil Corporation cited supra has held that as the nature and scope of a civil proceedings are different from a criminal proceeding, mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

24.As already discussed there is a prima facie criminal offence made out in the complaint and in the final report as against the petitioner and hence the ground of the issue



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civil in nature and availability of civil remedy, cannot be sustained and this ground is also rejected.

25.The Bank officials knowing that the property brought for auction was already acquired by the Tamil Nadu Housing Board, have sold it in the public auction without disclosing the encumbrance in the auction notice issued in the daily newspapers. Even in the possession receipt they simply incorporated that there is a process of acquisition proceedings, but it has already been culminated with an award in the year 2003. The fact remains that bank lent loan in the year 2004. They lent loan without ascertaining this fact and in order to safeguard their liability, they have sold the property to the 2nd respondent intentionally.

26.In the light of the above discussion, this Court is of the view that a prima facie case is made out as against this petitioner and it is not a fit case for the quashment of the final report at the threshold. In the result, the Criminal Original Petition stands dismissed. Consequently connected miscellaneous petition also stands dismissed.



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27.Further, though the complaint was lodged on 06.02.2014, FIR was registered on 15.07.2014, final report was filed on 05.08.2016, the trial cannot be proceeded, in view of the pendency of this criminal original petition. Considering that the final report was filed in the year 2016 and trial is not concluded even after six years, the trial Court is directed to proceed with the case in CC.No.308 of 2016, on a day to day basis and dispose of the case within a period of six months from the date of the receipt of a copy of this order.

12.01.2023

Internet: Yes / No.

Index : Yes/ No

To

- 1.The Judicial Magistrate No.1,
Tirunelveli.
- 2.The Inspector of Police,
City Crime Branch,
Tirunelveli.
Tirunelveli District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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B . PUGALENDHI , J . ,

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