

THE HON'BLE SRI JUSTICE A. VENKATESHWARA REDDY

C.C.C.A. No.346 of 2007

JUDGMENT:

The appellant/first respondent/decreed holder has filed this appeal suit assailing the order dated 09.05.2007 in E.A.No.19 of 2006 in E.P.No.36 of 2000 in O.S.No.378 of 1998 on the file of the learned Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge-cum-XXII Additional Chief Judge, City Civil Court at Hyderabad.

2. This application in E.A.No.19 of 2006 was filed by the claim petitioner/auction purchaser/third party under Order-XXI Rule-58 of the Civil Procedure Code, 1908 (for short 'CPC') to set aside the order of attachment made in I.A.No.878 of 1998 in O.S.No.378 of 1998 and to pass orders in favour of the claim petitioner.

3. The learned judge of the trial Court has allowed the claim petition and attachment in respect of the suit schedule property made in O.S.No.378 of 1998 was set aside declaring the claim petitioner as absolute owner of

the suit schedule property - Flat bearing No.103, 1st floor, Block-B of the building known as Panchavati Apartments bearing Municipal No.6-1-132/10 on Plot No.10, Survey No.15 (old No.30/2) having plinth area 830 square feet together with the undivided share of land admeasuring 44.44 square yards situated at Zamistanpur, Skandagiri, Padmaraonagar, Secunderabad (hereinafter referred to as “suit schedule property” for the sake of convenience). Feeling aggrieved by the impugned order, the first respondent/deed holder-M/s.TCI Finance Limited, Secunderabad has preferred this appeal.

Pleadings in E.A.No.19 of 2006 in E.P.No.36 of 2000 in O.S.No.378 of 1998:

4 (a). The claim petitioner has filed an application under Order-XXI Rule-58 of C.P.C. against the respondent Nos.1 to 6 alleging that she is the absolute owner of the suit schedule property having purchased the same under an auction-sale conducted by the sixth respondent-State Bank of Hyderabad, Kushaiguda branch, Hyderabad, being the highest bidder. The then Chief Manager of sixth respondent-bank, being the Authorized Officer under the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “SARFAESI Act”) and in exercise of the powers conferred under Section 13 read with Rule 12 of the Security Interest (Enforcement) Rules, 2002 (for short “the Rules”) sold the suit property in the public auction conducted on 05.12.2005. Thereafter on behalf of the bank, executed a sale certificate under Rule 9 (6) of the Rules in favour of the claim petitioner, who was the highest bidder and she was put in possession of the property. The said sale certificate was also registered on 20.01.2006, vide document No.174 of 2006.

4 (b). Since the time of purchase the claim petitioner is in peaceful, interrupted and continuous possession and enjoyment of the suit flat, she was further informed by the bank officials that the second respondent-Jalaram Plastics Private Limited, Cherlapally, Hyderabad, has approached their bank for financial assistance and the bank has sanctioned Cash Credit Hypothecation Facility creating charge over the assets and also creating equitable

mortgage of suit flat belonging to the third respondent-M. Vishwanath and another property of other directors. Accordingly, a Memorandum of Deposit of Title Deeds enclosing the sale deed dated 22.06.1988 was made as such the attachment, if any in favour of the decree holder only creates a second charge in view of the earlier equitable mortgage in favour of the sixth respondent-bank.

4 (c). The petitioner further stated that some persons have visited the suit flat and one of the persons visited has also shown a paper publication which was published in local Telugu newspaper daily "Praja Shakthi" dated 18.08.2006 intimating that towards the realization of decretal amount, the suit property is brought to sale, and auction which would be conducted on 18.09.2006 by the Court in E.P.No.36 of 2000. Accordingly, the claim petitioner has filed the claim petition claiming to be the absolute owner of the suit schedule property.

5. The first respondent-TCI Finance Limited, who is the decree holder in O.S.No.378 of 1998 has filed a detailed counter. Whereas, respondent Nos.2 to 5 who are

the judgment debtors and defendants in O.S.No.378 of 1998 were absent and they were set *ex parte* before the trial Court. The sixth respondent-bank has filed a counter in support of the claim petition.

6 (a). The main averments of the counter filed by the first respondent/decreed holder are that they have filed the original suit in O.S.No.378 of 1998 against the respondent Nos.2 to 5 for a sum of Rs.15,23,908/- and the suit was settled in compromise, and a compromise decree was passed on 22.09.1998. The decreed holder has also filed I.A.No.879 of 1998 under Order-38 Rule 5 of CPC and the trial Court was pleased to grant conditional attachment of suit schedule property on 08.09.1998. The judgment debtors have committed default in payment of amount. Therefore, the decreed holder has filed E.P.No.7 of 1999 for realization of the decretal amount. Again, a compromise was recorded on 08.11.1999 in E.P.No.7 of 1999 and in view of the compromise, the said E.P.No.7 of 1999 was closed/terminated. But, the judgment debtor Nos.2 to 5 have committed default in compliance of the terms of

compromise, as such the decree holder has filed E.P.No.36 of 2000 towards realization of the decretal amount and the property was brought to sale, but in view of the various tactics adopted by the judgment debtors, sale could not be concluded.

6 (b). Meanwhile, sixth respondent-bank has filed an application under Order-XXI Rule 58 of CPC to raise attachment claiming that the bank has got first charge over the suit schedule property as it was mortgaged to them. However, the application in E.A.No.9 of 2006 filed by the bank was dismissed for default on 14.07.2006. But, the bank in connivance with the claim petitioner created a sale certificate dated 28.01.2006. Since the suit schedule property has been attached on 08.09.1998 itself, any sale without permission of the Court is void under Section 64 of CPC, more so since the bank is aware of the attachment as well as pendency of the execution proceedings and the claim petition filed by the bank was dismissed by the Court, the present claim petition is not maintainable as the claim petitioner is only claiming the property through the

sixth respondent-bank and the said bank cannot sell the property when the claim petition is pending before the Court, accordingly, prayed for dismissal of the claim petition filed by the claim petitioner.

7. After impleadment of the sixth respondent-bank, the first respondent-decree holder has filed a detailed additional counter reiterating their plea canvassed in the earlier counter. Further stated that the alleged sale in favour of the claim petitioner is bogus, sham, only done to defeat the claim of the decree holder and liable to be dismissed.

8. The sixth respondent-bank has filed counter *inter alia* contending that they have no objection for allowing the claim petition as prayed for. The bank has further submitted that the judgment debtors have availed credit facility from their bank on furnishing the security of mortgaged property by depositing the title deed on 28.04.1993. Since the judgment debtors have committed default in repayment of credit facility availed, the bank has filed a suit in O.S.No.30 of 1995 on the file of the learned

III Senior Civil Judge, Secunderabad and obtained a preliminary decree on 08.09.2003, thereafter the defendants/judgment debtors have failed to pay the amount to the bank. Therefore, the bank has exercised of its right to recover the amount due by sale of mortgaged property by invoking the provisions of SARFAESI Act. The claimant has participated in the auction conducted by the Authorized Officer of the bank and on deposit of the sale price, the sale certificate was given to her and physical possession of the property was also delivered. The bank was having first charge over the suit schedule property and it had a right to enforce the security by sale of property as per law for realization of the amount due, accordingly, submitted that the claim petition be allowed as prayed.

Issues:

9. On the basis of the pleadings, material available on record, the following points were framed for consideration by the trial Court:

1. Whether the claim petitioner is absolute owner of the suit schedule property;

2. If so, whether the attachment of suit schedule property made in O.S.No.378 of 1998 is liable to be set aside?
3. To what relief?

Evidence and findings of the trial Court:

10. During enquiry, on behalf of the claim petitioner, she herself got examined as PW.1 and in her evidence Exs.A.1 to A.9 documents are marked. Whereas, on behalf of the contesting respondent/decreed holder and judgment debtors, no oral or documentary evidence is adduced.

11. Thus, the trial Court upon hearing of both sides and upon consideration of the entire material available on record, allowed the claim petition filed by the claimant declaring her as absolute owner of the suit schedule property. Consequently, attachment in respect of the schedule property made in O.S.No.378 of 1998 was set aside. Feeling aggrieved by the said order, the decreed holder in O.S.No.378 of 1998 has filed this appeal suit.

12. Heard the learned counsel for the appellant/decree holder, first respondent/claim petitioner and sixth respondent-bank. The other respondent Nos.2 to 5 who are the judgment debtors in E.P.No.36 of 2000 and defendants in O.S.No.378 of 1998 remained *ex parte*.

13. In the light of the rival contentions raised and material available on record, the following points would arise for consideration:

- i) Whether the claim petitioner is entitled for declaration of her title as absolute owner in respect of the suit schedule flat as prayed for?
- ii) Whether the order impugned is sustainable?

Point Nos.(i) and (ii):

14. Since the point Nos.(i) and (ii) are inter-related, for the sake of convenience and brevity, both the points are answered together as under:

15. The admitted or undisputed facts of the case are that the second respondent-judgment debtor No.1 has

availed credit facility from the sixth respondent-bank and it was secured by movable and immovable properties including equitable mortgage of the suit flat belonging to the third respondent, who deposited the title deed of the suit flat on 28.04.1993 and created equitable mortgage. Thereafter, the second respondent-Jalram Plastics Private Limited have committed default in repayment of the credit facility and the bank has filed the suit in O.S.No.35 of 2015 on the file of the learned III Senior Civil Judge, Secunderabad for recovery of outstanding amount and for a preliminary decree in respect of the suit schedule property. The said suit was decreed in favour of the bank on 08.09.2003, as no appeal was preferred, the said judgment has attained finality.

16. Meanwhile, the respondent Nos.2 to 4 have also availed loan from the first respondent on 02.03.1994 to a tune of Rs.5,50,000/-. They have also entered into a lease agreement for purchase of machinery under the lease finance, vide letters dated 03.03.1994 and 09.03.1994, the lease period was for three years commencing from March,

1994, the total value of lease was Rs.8,15,148/- and the respondents have agreed to pay the said monthly rents @ Rs.22,643/- per month in 36 monthly instalments commencing from March, 1994 and also executed a promissory note to that effect, but failed to repay the said amount, as such the first respondent/deGREE holder/TCI Finance Limited has filed the suit in O.S.No.378 of 1998. In that suit, a compromise was effected and in terms of the compromise, by referring to the schedule of payments, suit was decreed on 22.09.1998.

17. During pendency of the said suit itself, conditional attachment of suit schedule property herein was ordered, vide I.A.No.879 of 1998 under Order-37 Rule-5 of CPC on 08.09.1998. Again, since the terms of compromise were not implemented by the defendants in O.S.No.378 of 1998, the plaintiff therein/TCI Finance Limited has filed E.P.No.7 of 1999 for realization of the decretal amount. Pursuant to the terms of compromise dated 08.11.1999, the E.P. was terminated, however, the amount was not paid.

18. Subsequently, the present E.P. No.36 of 2000 was filed for realization of the decretal amount and notices were ordered in the said E.P. to all the judgment debtors. In this E.P.No.36 of 2000, the sixth respondent-bank has also filed a claim petition vide E.A.No.9 of 2006 stating that the suit property is mortgaged in their favour and it cannot be subjected to auction. However, the said E.A.No.9 of 2006 was dismissed for default on 14.07.2006.

19. This being the factual situation, now let us examine the claim made by the claimant-Smt. S. Janaki in respect of the suit schedule property is sustainable. Be it stated that throughout the proceedings in O.S.No.378 of 1998, defendant Nos.1 to 3 therein did not contest the matter. In the original suit, the matter was settled in terms of compromise, by fixing the schedule for repayment of the amount and the suit was decreed as per the terms of compromise on 22.09.1998. Again, when the terms of compromise were not implemented by the defendants, the decree holder has filed E.P.No.7 of 1999 against the judgment debtors. In this E.P. also, there was no contest

and pursuant to the terms of compromise, the E.P. was terminated. But again the judgment debtors/defendants in O.S.No.378 of 1998 failed to adhere to the terms of compromise, thereby the decree holder/TCI Finance Limited has filed the present E.P.No.36 of 2000.

20. Thus, throughout the proceedings in O.S.No.378 of 1998 or in E.P.No.7 of 1999 there was no contest and the parties have entered into compromise, a decree was passed, earlier execution petition was terminated, finally E.P.No.36 of 2000 was filed. Whereas, in O.S.No.30 of 1995 as per the pleadings in the plaint and contesting written statement and the judgment as in Exs.A.3 to A.7, it was a suit decreed on contest and a preliminary decree was passed on 08.09.2003 by the learned III Senior Civil Judge, Secunderabad. But by suppressing this fact, the defendants have again offered the very same property as security to M/s.TCI Finance Limited and availed lease finance facility from M/s. TCI Finance Limited.

21. As per the pleadings in O.S.No.30 of 1995 equitable mortgage was created by the third respondent-M. Vishwanath in respect of the suit schedule property. Whereas, as per the order of attachment before judgment in I.A.No.879 of 1998 in O.S.No.378 of 1998, a conditional attachment was ordered on 08.09.1998. Consequently, the suit property was attached. Therefore, undisputedly viewed from angle, the suit flat was initially mortgaged with the sixth respondent-bank and a preliminary decree was passed, vide O.S.No.30 of 1995 on 08.09.2003 for sale of mortgaged property towards realization of suit claim. Whereas, subsequently after five years conditional attachment was ordered on 08.09.1998 in favour of M/s.TCI Finance Limited in O.S.No.378 of 1998.

22. The contention of the appellant/decreed holder is that during pendency of the proceedings in E.P.No.36 of 2000, the sixth respondent-bank has filed a claim petition vide E.A.No.9 of 2006, but failed to pursue the matter, consequently the said E.A. was dismissed for default on 14.07.2006 itself, as such the sixth respondent-bank is not

entitled to conduct the auction of suit flat and the claim made by the claim petitioner pursuant to the auction proceedings being the highest bidder is not tenable.

23. Be it noted that the sixth respondent-bank has sanctioned cash credit facility with a limit of Rs.3,60,000/- in favour of the second respondent-Jalaram Plastics Private Limited on hypothecation of the stocks by personal guarantee of the directors and on deposit of title deeds of third respondent in respect of suit schedule flat on 28.04.1993. Thereafter, the respondents /defendants failed to repay the said amount, as such the sixth respondent-bank has filed the original suit in O.S.No.30 of 1995. The said suit was decreed on 08.09.2003. Ex.A.6 is certified copy of judgment in O.S.No.30 of 1995. Ex.A.7 is the certified copy of the preliminary decree wherein three months time was granted for redemption. But, the defendants therein failed to pay the decretal amount within the redemption period, as such, the bank has invoked the provisions of SARFAESI Act and brought to the suit flat for sale. Thus, the bank has first charge over the mortgaged

property and by invoking the provisions of the Section 13 of SARFAESI Act, sold the suit property. The claim petitioner has participated in the auction and she was declared as successful bidder. The sale certificate was also issued and it was registered. Therefore, viewed from any angle, the attachment and the sale of suit schedule property conducted by the bank is beyond the scope of Section 64 of CPC and I find no force in the contentions raised by the appellant/deGREE holder in O.S.No.378 of 1998.

24. The learned judge of the trial Court while relying on the principles laid by the Apex Court in ***M/s. Transcore Vs. Union of India and another***¹ held that even though an application is pending before the Debt Recovery Tribunal (DRT), still secured creditor i.e., bank can invoke the SARFAESI Act and in view of the principles laid in the decision, the bank need not obtain any permission from the Court even though they have filed claim petition in

¹ AIR 2007 SC 712 = (2008) 1 SCC 125

E.A.No.19 of 2006 and the bank is at liberty to invoke the provisions of SARFAESI Act.

25. The learned counsel for the appellant/decreed holder strenuously contends that the bank is not entitled to take recourse of the provisions of SARFAESI Act simultaneously when a claim petition is filed before the Court, and the principles of Doctrine of Election will apply. He would further contend that when two remedies are available, the aggrieved party has the option to elect either of them and cannot invoke both the remedies and relied on the principles laid in the following decisions:

- i) ***Sri Bhavanarayana Swami vari Temple Vs. Vadapalli Venkata Bhavanarayana Charyulu²***;
- ii) ***National Insurance Company Limited Vs. Mastan and another³***.

26. *Per contra*, the learned counsel for the respondent/claimant contends that a mortgage created by the second respondent-Jalaram Plastics Private Limited in

² 1970 (1) SCC 673

³ (2006) 2 SCC 641

favour of the sixth respondent-bank was much prior to the attachment order dated 08.09.1998 passed by the Court and the bank has got first charge over the suit flat and the bank has filed the suit, obtained a preliminary decree, and thereafter put the property for sale by invoking the provisions of Section 13 of SARFAESI Act and the bank is entitled to invoke the said provisions. There is no irregularity or infirmity in the procedure adopted. He relied on the principles laid in ***State Bank of India Vs. Union of India and others***⁴.

27. Perused the principles laid in the above decisions. There cannot be any dispute about the Doctrine of Election, but the same is not applicable to the facts of the case on hand. The Apex Court in ***Transcore***'s case (1st supra) while reviewing the available case law and overruling the decision of a Division Bench of High Court of Punjab and Haryana in ***Kalyani Sales Company Vs. Union of India***⁵ held that withdrawal of the O.A. pending before

⁴ 2021 (6) ALD 739 (TS)(DB)

⁵ AIR 2006 P & H 107 DB

DRT under the DRT Act is not a pre-condition for taking recourse to Section 13 (4) of the SARFAESI Act. It is for the bank/financial institution to exercise its discretion as to in which cases it may apply for leave and in cases it may not apply for leave to withdraw holding that the first proviso to Section 19 (1) of DRT Act is an enabling one and may deal with myriad circumstances.

28. The Apex Court has further held that there are three elements of election, viz., existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the Doctrine of Election will not apply. The doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. Accordingly, the Apex Court has held that conceptually, there is no inherent or implied inconsistency between the two remedies under both the Acts. These two enactments provide for cumulative remedies to the secured creditors. By removing all fetters on the rights of the

secured creditor, he is given a right to choose one or more of the cumulative remedies. Thus, the remedy under the Act is additional, which cannot be curtailed by the Doctrine of Election and there is no repugnancy or inconsistency between the two remedies available in the Civil Procedure Code and in the SARFAESI Act and therefore, the Doctrine of Election has no application in the matter.

29. Thus, in view of the principles laid by the Apex Court in ***Transcore's*** case (1st supra), it is clear that whether to apply for leave or not, the provisions of Section 19 (1) of DRT Act is the discretion of secured creditor depending on the circumstances of each case. Though the borrower is at liberty to raise such plea before the DRT or before the authorities concerned, it is for them to decide on merits strictly in accordance with the provisions of the Act, as such the bank or financial institution can take action simultaneously under SARFAESI Act, DRT Act and also as per the provisions of CPC as there is no conflict of interest involved in applying the said provisions for realization of the amount due and payable to the financial institution

under the Act. As such, the sixth respondent-bank has rightly initiated the proceedings under Section 13 (4) of SARFAESI Act in respect of mortgaged properties covered by the judgment and decree under Exs.A.6 and A.7 in O.S.No.30 of 1995 and auction was conducted, claim petitioner being the highest bidder sale certificate was issued in her favour, it was registered. Therefore, viewed from any angle, there is no irregularity or infirmity in the procedure adopted by the sixth respondent-bank for realization of the decretal amount in O.S.No.30 of 1995 by invoking the provisions of Section 13 of SARFAESI Act.

30. That apart, the appellant/decreed holder having pleaded that they have obtained attachment before judgment in respect of EP schedule property on 08.09.1998 itself and that there is irregularity in the procedure adopted by the sixth respondent-bank and in view of the dismissal of E.A.No.9 of 2006, the bank is not entitled to invoke the provisions of SARFAESI Act and that the claimant, who participated in the auction conducted by the Authorized Officer of the sixth respondent-bank and

purchased the suit flat, cannot get good title in respect of the same, failed to enter into the witness box to speak the contents of written statement/counter filed by them on oath, thereby avoided cross-examination by other side, this by itself is sufficient to draw an adverse inference against the appellant/decreed holder under Section 114 (g) of the Indian Evidence Act to hold that the defence set up by him is not correct (***Vidhyadhar Vs. Manikrao and another***⁶).

31. Therefore, for all the reasons stated above, the principle of Doctrine of Election does not apply for invoking the provisions of SARFAESI Act in respect of the financial institutions and banks. Accordingly, the sixth respondent-bank having obtained preliminary decree in O.S.No.30 of 1995 in respect of the suit flat sold the same in public auction by invoking the provisions of SARFAESI Act and there is no infirmity or irregularity in the procedure adopted. The 6th respondent-bank was having first charge over the suit flat in view of equitable mortgage created on 28.04.1993 in their favour. Thereafter, decree was obtained

⁶ AIR 1999 SC 1441

on 08.09.2003 in O.S.No.30 of 1995, auction was held on 05.12.2005, sale certificate was registered on 20.01.2006 and as such, the order impugned does not warrant any interference by this Court. The trial Court while relying on the principles laid by the Apex Court in **Transcore's** case (1st supra) has rightly allowed the claim petition and the same is sustained. Accordingly, both the points are answered against the appellant/decreed holder in favour of respondent/claim petitioner.

32. In the result, the appeal suit is dismissed confirming the judgment and decree dated 09.05.2007 in E.A.No.19 of 2006 in E.P.No.36 of 2000 in O.S.No.378 of 1998 on the file of the learned XXII Additional Chief Judge, City Civil Court, Hyderabad, in its entirety. However, in the circumstances of the case, both the parties shall bear their own respective costs.

As a sequel, miscellaneous applications, if any pending in this appeal, shall stand closed.

A. VENKATESHWARA REDDY, J.

Date: 05.01.2023
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***THE HON'BLE SRI JUSTICE A. VENKATESHWARA REDDY**

+ CCCA No.346 of 2007

% 05-01-2023

M/s. TCI Finance Limited,
situated at M.G. Road, Secunderabad,
rep.by its authorized signatory
Dinesh Goud, s/o. M. Rajalinga Goud.

.. Appellant

v.

\$ Smt. S. Janaki,
w/o. Sri N.S. Raghunathan,
r/o.5-2-288, Hyderbasthi,
Secunderabad,
and 5 others.

.. Respondents

! Counsel for the appellant: Sri N. Naveen Kumar

Counsel for the Respondents: Sri Ch. Siva Reddy

< Gist:

> Head Note:

? Cases referred:

¹ AIR 2007 SC 712 = (2008) 1 SCC 125

¹ 1970 (1) SCC 673

¹ (2006) 2 SCC 641

¹ 2021 (6) ALD 739 (TS)(DB)

¹ AIR 2006 P & H 107 DB

¹ AIR 1999 SC 1441