



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.09.2024

Pronounced on : 19.10.2024

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CORAM:

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

and

THE HON'BLE MR.JUSTICE P.B.BALAJI**W.P.No. 15451 of 2024**

M/s. Tamilnadu Mercantile Bank Ltd.,
represented by Branch Manager,
Madipakkam Branch,
No.01, Dharsan Complex, Vigneshwara Nagar,
Medavakkam Main Road, Madipakkam,
Chennai – 600 091.

...Petitioner

Vs.

1.The Sub Registrar,
SH 49, Sabai Colony,
Sembakkam, Rajakilpakkam,
Chennai – 600 073.

2.The Assistant Commissioner (ST),
Tambaram Assessment Circle,
Integrated Commercial Taxes and
Registration Department Buildings,
Room No.342, III Floor,
Nandanam, Chennai – 600 035.

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India,
for issuance of a Writ of Mandamus, directing the 1st respondent to delete
the property mentioned in the schedule of the writ petition from the



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Certificate of Encumbrance and direct the 1st respondent to register the Sale Certificate dated 04.10.2023 issued by the petitioner bank.

For Petitioner : Mr.V.Chandrasekaran
For Respondents
For R1 : Mr.M.Habeeb Rahman
Government Advocate

For R2 : Mr.Haja Naziruddin
Additional Advocate General
Assisted by Mr.G.Nanmaran
Special Government Pleader

ORDER

(Order of the Court was made by MR.JUSTICE P.B.BALAJI, J.)

The Petitioner Bank has sought issuance of a Writ of Mandamus, directing the Sub-Registrar, Sembakkam, to delete the property mentioned in the schedule to the Writ Petition from the Certificate of Encumbrance and to direct the 1st respondent to register the Sale Certificate dated 04.10.2023 issued by the petitioner Bank.

2.We have heard Mr. V. Chandrasekaran, learned counsel for



the writ Petitioner and Mr. Haja Naziruddin, learned Additional Advocate General, assisted by Mr.G.Nanmaran, learned Special Government Pleader for the 2nd respondent and Mr.M.Habeeb Rahman, learned Government Advocate for the 1st Respondent.

3.According to the learned counsel for the Petitioner Bank, the property which is set out by way of a separate schedule to the Writ Petition was mortgaged by one A.Seyathu, partner of M/s. Friends Telecom in favor of the Petitioner Bank on 12.11.2015, by an agreement of deposit of title deeds. This mortgage was created in respect of credit facilities availed by the partnership firm, M/s. Friends Telecom. The memorandum of deposit of title deeds was duly registered as Document No.12332 of 2015 on the file of Sub Registrar Office, Selayur as well. The property was also registered under Section 26D of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002, on 21.11.2015.

4.It is the case of the Petitioner Bank that the said loan availed by M/s. Friends Telecom became a non-performing asset on 31.03.2021 and



consequently the Petitioner Bank invoked the provisions of the SARFAESI Act, 2002, and issued notice under Section 13(2) on 16.09.2021, calling upon the borrower to pay a sum of Rs.17,51,657.85, together with future interest at 11% with monthly rests and also penal interest at the rate of 2% per annum.

5.The specific case of the writ Petitioner Bank is that the subject property of the said mortgage was sold in public auction on 31.08.2023 in favor of Mrs. Kala Ramu, resident of Tambaram for a sum of Rs. 28,60,000/- and that the said auction purchaser had fully complied with the terms and conditions of the auction sale by remitting the entire consideration on 27.09.2023. On receipt of the said amount, the loan account was closed on the very same day i.e., 27.09.2023 and subsequently, a Sale Certificate was issued to the auction purchaser, Mrs. Kala Ramu on 04.10.2023.

6.It is also the case of the Petitioner Bank that after adjusting the sale proceeds towards the loan account, there was a surplus of Rs.



1,66,093.31/- and by way of a demand draft bearing No.776296, the same was issued in favour of the 2nd respondent, the Assistant Commissioner, Commercial Taxes Department, Tambaram Assessment Circle.

7.The grievance of the Petitioner Bank is that the 1st respondent Sub Registrar has refused to register the sale certificate citing the priority of charge in favour of the 2nd respondent, the Assistant Commissioner, Commercial Taxes Department, Tambaram Assessment Circle.

8.According to Mr.V.Chandrasekaran, the SARFAESI Act, 2002, gives priority to banks in respect of its dues over all other debts including revenue, taxes, cesses or other rates which may be due and payable to either the State Government, Local Authority or the Central Government.

9.The learned counsel would invite our attention to Section 26E of the SARFAESI Act, 2002, the same is extracted hereunder:

“Section 26E : Priority to secured creditors.

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.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.]”

10.The learned counsel for the Petitioner would also place reliance on the decision of the Hon'ble Supreme Court in ***Kotak Mahindra Bank Ltd. v. Girnar Corrugators Pvt Ltd., and others*** reported in **2023 3 SCC 2010**, where the Hon'ble Supreme Court held that the secured creditor under the SARFAESI Act, 2002, would have a priority over the amount secured by an award under the Micro, Small and Medium Enterprises Development Act, 2006. The learned counsel would therefore state that the refusal of the 1st Respondent, Registrar to register the Sale Certificate was not justified. He would further submit that the bank having duly forwarded the surplus amount, no further claim could be made over the subject property originally mortgaged in favour of the Petitioner Bank and consequently, the Sub Registrar was also duty bound to delete the relevant



entry from the Certificate of Encumbrance made on 05.01.2022, reflecting the attachment in favour of the 2nd Respondent. He would also bring to our notice that the deposit of title deeds was made on 12.11.2015 and was duly registered on 12.11.2015, whereas the attachment in favour of the 2nd Respondent was much later on 06.01.2022. He would therefore pray for the writ petition being allowed.

11.Per Contra, the Learned Additional Advocate General would submit that the 1st Respondent has no difficulty in registering the sale certificate, however, the attachment in favour of the 2nd Respondent cannot be deleted. According to the Learned Additional Advocate General, the attachment would run with the property and therefore, there can be no direction as prayed for by the writ Petitioner.

12.The Learned Additional Advocate General would also placed relevance on the following decisions.

1. ***Punjab Urban Planning and Development Authority and others, vs Raghu Nath Gupta and others***, reported in (2012) 8 SCC 197, where the Honourable Supreme Court held that when property was purchased in an “as is where is basis”, they were estopped from contending



later that certain amenities were not provided by the Development Authority at the time of allotment of the plots.

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2. *Rekha Sahu v. UCO bank and others*, reported in 2013

SCC Online Allahabad 13203, where Division Bench of the Allahabad High Court, again referring to, “as is where is” held that any fraud perpetuated by the borrower or multiple mortgages created by the borrower with different banks / financial institutions may not be within the knowledge of the banks / financial institution issuing the loan and therefore there is an element of uncertainty over the secured creditor being aware of any other such encumbrances. The Honourable Division Bench also further held that the immunity claimed by the banks/financial institutions under the pretext of “as is where is or as is what is basis” was dying a slow death and banks /financial institutions being a secured creditor were bound to make due diligence and thorough search before proposing for sale and further held that the bank/financial institution has to tread very carefully before holding public auction and take all necessary steps to ascertain and furnish the information relating to any encumbrance /attachment of the property to the intending purchaser.



13.Placing reliance on the above decisions, the learned Additional Advocate General would draw our attention to the auction notice issued by the Petitioner Bank in the present case and submitting that here also the Bank has clearly mentioned that the sale is only on an “as is where is” condition and therefore the petitioner bank cannot now claim any priority as their own auction notice clearly sets out the fact that the sale is only on an “as is where is” condition. According to the learned Additional Advocate General, the charge in favour of the 2nd respondent would therefore subsist and cannot stand extinguish and the sale in favour of the auction purchaser would be subject to the charge of the 2nd respondent. He would therefore pray for dismissal of the writ petition.

14.We have carefully considered the submissions advanced by the learned counsel on either side.

15.Here, it is an admitted case where the mortgage, that is, right created in favour of the secured creditor namely the writ petitioner was prior



in point of time and their mortgage being of the year 2015, whereas the attachment in favour of the 2nd respondent, Assistant Commissioner (ST), Tambaram Assessment Circle, was only in the year 2022. We have already extracted Section 26E of the SARFAESI Act, 2002. The statute thus makes it very clear that the debts due to the secured creditor under the SARFAESI Act, 2002, shall have a priority over all other debts including the debts due to the State Government, Local Authority or the Central Government. This statutory provision has also come up for examination before the courts and as already discussed in *Kotak Mahindra's case*, (referred herein supra) the Hon'ble Supreme Court held that, in view of the mandate of Section 26E of the SARFAESI Act, 2002, the asset secured in favour of the Bank would have a priority and would prevail over any other recovery proceedings. Further, in the instant case, it is admitted that after adjusting the entire loan account, there was a surplus amount which was also duly sent to the 2nd respondent since they had a charge by way of attachment over the very same subject property.

16.As regards sale in “as is where is” condition, we have no quarrel over the ratio laid down by the Hon'ble Supreme Court as well as the



Hon'ble Division Bench. The sale in “as is where is” clause is only to give immunity to the secured creditor who may not be aware of any other encumbrance clandestinely entered into or made by the borrower in question. Therefore, in the present case, merely because the auction sale was held in “as is where is” condition, it would not clothe any special right in the 2nd respondent for continuance of the attachment for the following reasons:-

(i) In terms of section 26E, the secured creditor, namely the Petitioner Bank in the present case, has a priority and this claim is preferred to the claim of any other person including the sovereign.

(ii) In exercise of the priority charge, the property has been brought to sale in public auction and the auction purchaser has also paid the entire sale consideration and necessary sale certificate has been issued in favour of the auction purchaser. Thus, the right, title and interest in respect of the subject property has lawfully vested with the auction purchaser.

(iii) Considering the fact that there is an attachment over the property in favour of the 2nd respondent and the same is subservient to the priority charge holder, namely the Petitioner Bank, the 2nd respondent now cannot claim that the attachment in favour of the 2nd respondent would continue to subsist and prevail and it would run with the property and bind the auction purchaser also, when nothing



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remains or survives for the said attachment to continue.

17. In fact, the Bank has sold the property for an amount in excess of the loan amount due to the bank and the surplus sale consideration has also been duly sent to the 2nd respondent. Thus, the entire charge over the property stands discharged and the 2nd respondent can no longer claim to have any charge over the property which can only be subject to the priority of charge in favour of the Petitioner Bank.

18. We are unable to countenance the submissions of the learned Additional Advocate General that since the attachment runs with the property, it would also bind the auction purchaser.

19. In this case, admittedly the property has been duly conveyed in favour of the auction purchaser for valid sale consideration and in view of Section 26E, the attachment in favour of the 2nd respondent cannot continue to subsist, especially when nothing is remaining for the 2nd respondent to claim in and over the subject property.

20. With regard to registration of the Sale Certificate, we see no



justification on the part of the 1st respondent, Sub Registrar to refuse registration of the Sale Certificate. In fact, even in cases where an attachment order is subsisting, the Sub Registrar cannot refuse registration, as even according to the learned Additional Advocate General, the attachment would run with the property and therefore, the Sub-Registrar cannot refuse registration on the ground that there is an earlier attachment which is subsisting over the subject property. Therefore, insofar as this part of the prayer in the writ petition, there can be no second opinion that the petitioner is entitled to registration of the Sale Certificate in favour of the auction purchaser Mrs. Kala Ramu.

21. With regard to deletion of the entry, namely, the attachment in favour of the 2nd respondent, we do not find any provisions in the Registration Act which permit the registering authorities to delete an entry which is already finding place in the Encumbrance Register/Certificate. However, in terms of the customary practice and well settled procedure, the Registrar is duty bound to cause a contra entry stating that the said attachment in favour of the 2nd respondent stands raised in view of the exercise of the priority right by the Petitioner Bank by bringing the property



for sale in public auction and consequently, conveying the said property in favour of the auction purchaser, Mrs.Kala Ramu. Insofar as this limb of the prayer, we therefore direct the 1st respondent to make an entry in the Encumbrance Records to reflect in the Encumbrance Certificate, notifying that the attachment in favour of the 2nd respondent in entry, Document No.04 of 2022 dated 05.01.2022, stands cancelled in view of the auction sale conducted by the Petitioner Bank in favour of Mrs.Kala Ramu on 31.08.2023 and consequent registration of the sale certificate which is also being ordered in this writ petition.

22.In fine, the writ petition is disposed of in the manner following:

(i) The 1st respondent shall register the Sale Certificate dated 04.10.2023, issued by the petitioner Bank, within a period of two weeks from the date of receipt of a copy of this order.

(ii) The 1st respondent shall cause an entry in the Encumbrance Certificate cancelling the attachment order in favour of the 2nd respondent in Document No.04 of 2022 dated 05.01.2022, simultaneous to the registration



of the Sale Certificate in favour of the auction purchaser as directed in
Clause (i) herein above.

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(iii) There shall be no order as to costs.

(D.K.K.J.,) (P.B.B.J.,)

19.10.2024

Index : Yes/No
Speaking Order/Non Speaking Order
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To

1.The Sub Registrar,
SH 49, Sabai Colony,
Sembakkam, Rajakilpakkam,
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D.KRISHNAKUMAR,J.

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Pre-delivery Order in
W.P. No.15451 of 2024

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