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W.P.No.36312 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.02.2024

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.No.36312 of 2023

M/s.Prathees Engineering Enterprises,
RS No.223/26, EC Road,
Pachayankuppam,
Cuddaloure-5.

.. Petitioner

Vs

1.Stressed Assets Stabilization Fund,
3rd Floor, IDBI Tower,
World Trade Centre Complex,
Cuffe Parade, Mumbai-400 005
rep. by its Manager.

2.M/s.Colix Beverages Ltd.,
Door No.183, Old No.76,
T.T.K. Road, 5th Floor,
Alwarpet, Chennai-600 018.

.. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India seeking issuance of a writ of certiorarified mandamus to quash the public auction notice dated 12.12.2023 issued by the first respondent in respect of the property situate at C-18, SIPCOT Industrial Complex, Village Kudikadu, Cuddalore Taluka, Cuddalore District, Tamil Nadu ("Cuddalore property") and to consequently forbear the first respondent, their men, assigns, servants or agents from alienating the



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above mentioned property in any manner whatsoever, including by way of public auction.

For the Petitioner : Mr.R.Parthasarathy
Senior Counsel
for M/s.Rekha S

For the Respondents : Mr.R.Srinivasan
for M/s.R&P Partners
for respondent No.1

: R2 – Not Ready in Notice

ORDER

(Order of the court was made by the Hon'ble Chief Justice)

We have heard Mr.R.Parthasarathy, learned Senior Counsel for Ms.Rekha.S, learned counsel for the petitioner; and Mr.R.Srinivasan, learned counsel for M/s.R & P Partners, learned counsel for the first respondent.

2. The writ petition is filed seeking issuance of a writ of certiorarified mandamus to quash the public auction notice dated 12.12.2023 issued by the first respondent in respect of the property situated at C-18, SIPCOT Industrial Complex, Village Kudikadu, Cuddalore Taluka, Cuddalore District, Tamil Nadu ("Cuddalore



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property”) and to consequently forbear the first respondent, their men, assigns, servants or agents from alienating the above mentioned property in any manner whatsoever, including by way of public auction.

3. Shorn of unnecessary details, the undisputed facts relevant for the determination of the *lis* are:

(i) The petitioner is an MSME. The petitioner is armed with an award against the second respondent under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006. The award is passed on 9.5.2003. The petitioner filed an execution petition, bearing E.P.No.2 of 2018, against the second respondent for recovery of the amount.

(ii) The first respondent is a secured creditor of the second respondent. The second respondent has executed a mortgage in favour of the first respondent in respect of the subject property. The security interest is registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India



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[CERSAI] as required under Section 26-A of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for brevity, "*the SARFAESI Act, 2002*"].

(iii) Under Section 26-E of the SARFAESI Act, 2002, the first respondent has a priority charge. Reference can be made to the judgment of the Apex Court in the case of *Kotak Mahindra Bank Limited v. Girnar Corrugators Private Limited*, (2023) 3 SCC 210.

(iv) The first respondent filed a petition under Section 47 of the Civil Procedure Code, 1908 [for brevity, "*the CPC*"] bearing E.A.No.24 of 2019. The said E.A. filed by the first respondent raising objection to the execution and seeking a direction to enquire as to who has a better charge is dismissed for default on 21.9.2021.

4. Learned Senior Counsel for the petitioner submits that the first respondent, having raised an objection under Section 47 of the CPC to the execution petition and abandoned it by allowing that objection to be dismissed for default, has waived the right to claim



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priority charge. Even a statutory right can be waived. Learned Senior Counsel for the petitioner relies upon the judgment of the Apex Court in the case of *Krishna Bahadur v. Purna Theatre and others*, (2004) 8 SCC 229.

5. Learned counsel for the first respondent submits that the first respondent has a priority charge.

6. There is no dispute with the proposition that the first respondent has a priority charge in view of Section 26-E of the SARFAESI Act, 2002. The security interest is also registered with CERSAI. The document is placed on record.

7. The claim of the first respondent that it has a priority charge cannot be disputed by learned Senior Counsel for the petitioner in view of the judgment of the Apex Court in the case of *Kotak Mahindra Bank Limited*, supra.

8. The only contention, however, raised by learned Senior



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Counsel for the petitioner is about the waiver of the right by the first respondent, inasmuch as the first respondent has not prosecuted the objection under Section 47 of the CPC and the petition filed by the first respondent was dismissed for default.

9. The first respondent has a priority charge pursuant to a statutory provision. It cannot be said that a statutory right is waived only because the objection under Section 47 of the CPC is dismissed for default. There is no agreement – either express or implied – between the petitioner and the first respondent to the effect that the first respondent is waiving its right.

10. The dismissal of the petition under Section 47 of the CPC for default would not amount to *res judicata*, nor it can tantamount to acquiescence.

11. At the first instance, it was not necessary for the first respondent to file an objection under Section 47 of the CPC in view of the statutory provision under the SARFAESI Act, 2002, viz.,



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Section 26-E.

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12. In the light of the above, we cannot comprehend the contention of learned Senior Counsel for the petitioner that the first respondent has waived its priority charge only on the ground that the objection filed by the first respondent under Section 47 of the CPC in the execution petition has been dismissed for default.

The writ petition, as such, is dismissed. There shall be no order as to costs. Consequently, W.M.P.Nos.36292 and 36294 of 2023 are closed.

(S.V.G., CJ.)

(D.B.C., J.)

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Index : Yes/No
Neutral Citation : Yes/No
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THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY,J.

(sasi)

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