(2014) 01 KL CK 0036

In the High Court Of Kerala

Case No : Writ Petition (C) No. 28728 of 2013

Madhan S. APPELLANT

Vs

Sub Registrar, Kollam and Others RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 10 64
Income Tax Act, 1961 — Section 29
Transfer of Property Act, 1882 — Section 52

Citation : AIR 2014 Ker 54 : (2014) 2 BC 1 : (2014) 1 ILR 586 : (2014) 1 KHC 249 : (2014) 1 KLJ 483 : (2014) 1 KLT 406

Hon'ble Judges : V. Chitambaresh, J

Bench : Single Bench

Advocate : A.V. Thomas, M.M. Jasmin and Nidhi Sam Johns, for the Appellant; P. Parameswaran Nair, Assistant Solicitor General of India, Rafeek V.K., Government Pleader, R.S. Kalkura, Standing Counsel, SBT, N. Nagaresh, Shaji Thomas, Binu Paul and T.V. Vinu, for the Respondent

Final Decision : Allowed

Judgement

V. Chitambaresh, J.—Can the attachments effected subsequent to the creation of equitable mortgage be effaced after the property is purchased by another in sale conducted by the Recovery Officer of the Debts Recovery Tribunal? The fifth respondent had mortgaged his property (3.44 ares in RS No. 38/2 and 0.9443 are in R.S. No. 393/3) situated in Kollam west village to the fourth respondent bank (''the bank'' for short) as security for the loan availed. The bank filed OA No. 437/2002 in the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (''the Act'' for short) for recovery of dues. The Debts Recovery Tribunal passed Ext. P1 final order allowing the bank to recover a sum of Rs. 22,18,958.28 with interest thereon till realisation by sale of the property. A recovery certificate was accordingly issued to the Recovery Officer who proceeded to recover the debt in accordance with the provisions of the second schedule to the Income Tax Act, 1961. The provisions of the second schedule to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 have been made applicable by virtue of Section 29 of the Act.

2. The Recovery Officer proclaimed the mortgaged property for sale under Rule 52 of the second schedule to the Income Tax Act, 1961 on failure of the certificate debtors to pay the amount even after receipt of demand notice. Ext. P2 sale notice published in the ''Malayala Manorama'' Daily fixed the date of sale as 16/07/2009 wherein the petitioner was the highest bidder for a sum of Rs. 27,30,000/-. No application was filed by anyone to set aside the sale and the same was accordingly confirmed by Ext. P3 order under Rule 63(1) of the Income Tax (Certificate Proceedings) Rules, 1962. Ext. P4 sale certificate issued to the petitioner was registered as document No. 2415/2009, Sub-Registry Office, Kollam on the basis of which Ext. P5 order of delivery was issued by the Recovery Officer. Mutation was effected in favour of the petitioner and land tax was also paid for the property evidenced by Ext. P6 receipt which however contained an endorsement by the village officer as to the existence of certain attachments from Court.

3. Ext. P7 encumbrance certificate obtained by the petitioner reflected that several attachments were made at the instance of respondents 6 to 11 subsequent to the creation of equitable mortgage in favour of the bank on 25/03/2000. The first of such attachments was on 21/10/2000 and the others were on 04/11/2000, 03/11/2001, 15/03/2003 and 22/06/2004 in addition to an attachment made in OS No. 193/2001. The Writ Petition has been filed for a declaration that the sale of the property under the Act is free of all encumbrances and that attachments aforesaid does not affect the title of the petitioner. A writ of mandamus is also sought for a direction to the first respondent Sub-Registrar and the second respondent Village Officer to remove the entries relating to the encumbrances over the subject property subsequent to the mortgage. Neither the fifth respondent nor respondents 6 to 12 filed any counter-affidavit to the writ petition traversing the allegations even though notice was served on them by special messenger.

4. I heard Mr. A.V. Thomas, Senior Advocate on behalf of the petitioner as well as Mr. R.S. Kalkura, Advocate on behalf of the bank in extenso. I also heard Mr. Rafeek V.K., Government Pleader on behalf of the Sub-Registrar and Village Officer as well as Mr. P. Parameswaran Nair, Assistant Solicitor General on behalf of the Recovery Officer of the Debts Recovery Tribunal.

5. A brief look at the relevant statutory provisions and the various judicial decisions would throw an insight to the points canvassed by the petitioner and the reliefs sought for in the writ petition. Section 64 of the Code of Civil Procedure, 1908 (''the CPC'' for short) reads as under:

64. Private alienation of property after attachment to be void.--(1) Where an attachment has been made, any private transfer or delivery of the property

attached or of any interest therein and any payment to he judgment-debtor of any deb, dividend or other moneys contrary to the such attachment, shall be void as against all claims enforceable under the attachment.

[(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.]

Explanation.-- For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

(emphasis supplied)

Similarly Order XXXVIII Rule 10 CPC reads thus:

10. Attachment before judgment not to affect rights or strangers, nor bar decree-holder from applying for sale.-- Attachment before judgment shall not affect the rights, existing prior to the attachment of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

(emphasis supplied)

6. It was observed in Housing Development Finance Corporation Vs. Sub Registry Officer, arising under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as follows:

This Court finds that the rights and liberties conferred on the creditor/bank by virtue of mortgage created in the year 2001 and the right to proceed under the relevant provisions of the SARFAESI Act cannot be defeated because of the subsequent attachments ordered by the Civil Courts in 2007-2009. As such, the sale conducted on 24/11/2010, leading to issuance of Ext. P4 sale certificate, is complete in all respects and the title stands conveyed to the second petitioner.

A Division Bench of this Court after adverting to the provisions of the Kerala Revenue Recovery Act, 1968 and the CPC observed in Rajalekshmi Amma Vs. Basheer and Others, as follows:

When a mortgage is created in terms of the provisions of the TP Act, it amounts to an encumbrance. An order of attachment before judgment creates no charge, x x x x The quality of the mortgage as an encumbrance does not get watered down to be subservient to by an order of attachment by the Civil Court under Code of Civil Procedure. That order of attachment does not override or deserves to be preferred over the rights of a mortgagee or the effect of the mortgage as an encumbrance.

7. I shall quote from a few other decisions also to give completeness to the judgment taking note of the elaborate arguments of the petitioner and the absence of any case law on the point under the Act.

(i) V.S. Thiru Venkita Reddiar Vs. S. Noordeen and Another, The consequence is on the happening of a judicial sale all previous attachment effected upon the property sold fall to the ground.

(ii) Leelavathy Bai v. Gangadharan 1987 (2) KLT SN Case No. 38:

Attachment will not confer any title in favour of the person who attaches. Injunction granted or attachment ordered or effected in relation to immovable properties will not make the suit one in which any right to immovable property is directly and specifically in issue so as to attract the bar of lis pendens provided in Section 52 of the Transfer of Property Act.

(iii) Kolappa Pillai v. Sukumaran Nair 1987 (2) KLT SN Case No. 54:

Section 64 hits only a private transfer or delivery of the property attached or of any interest therein. The passing of a decree by a Court of law declaring a charge on such property or the Court sale and delivery of the property in execution of such a decree can in no sense be said to be a private transfer or delivery of the property or of any interest therein.

(iv) Francis Vs. Navodaya Kuries and Loans (P.) Ltd. and Others,

Hence the attachment before judgment though made prior on point of time in OS No. 94/1989 ceased to have effect with the Court sale in favour of respondent No. 1 (in OS No. 1156 of 1991) on 21/12/1995

(v) Kabidi Venku Sah Vs. Syed Abdul Hai and Another,

The attaching creditor can bring the property to sale only subject to the mortgage so long as it is subsisting. That is to say he could bring only the mortgagers equity of redemption to sale if it had not already been extinguished by its sale in execution of any decree obtained on that mortgage.

The preponderance of judicial opinion leads to the irresistible conclusion that the sale of the mortgaged property in favour of the petitioner under Ext. P5 sale certificate under the Act is free of all encumbrances. The attachments effected subsequent to the mortgage created in favour of the bank do not affect the title and ownership of the petitioner over the subject property. Such attachments have no impact on the sale conducted under the Act and the same ceases to have any effect or fall to the ground the moment the sale is confirmed in favour of the petitioner. The declaration so sought by the petitioner is therefore granted and I further direct the Sub-Registrar and the Village Officer to efface the attachments effected subsequent to the mortgage from the relevant records. Otherwise those attachments would remain as a permanent taboo prejudicially affecting the marketability and title to the property even though they ceased to have any legal efficacy. The needful in relation to the property bought by the petitioner shall be done within a period of two months from the date of receipt of a copy of this judgment.

The Writ Petition is allowed. No costs.

