(2012) 07 KL CK 0089

In the High Court Of Kerala

Case No : WP (C) .No. 2349 of 2012 (P)

State Bank Of India APPELLANT

Vs

M/s. Vijaya Constructions and Others RESPONDENT

Date of Decision : 09-07-2012

Acts Referred:

Citation : (2012) 07 KL CK 0089

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : George Thomas Mevada, Sri N. Raynold Fernandez, Sri. Manu George Kuruvilla, Smt. Rinu Jose and Sri. Amal George, for the Appellant; L. Rajesh Narayan, for R1 and R2, Sri. T.V. George, SC, KFC, Sri. A.A. Abul Hassan, SC, KFC for R4 and Linny Stephen Chamaparambil, Government Pleader for R5, R6 and R7, for the Respondent

Final Decision : Allowed

Judgement

Justice P.R. Ramachandra Menon

1. State Bank of India is the petitioner. The grievance is mainly with regard to Exhibit P3 order of attachment dated 11.08.2010 issued by the 5th respondent. The first respondent had availed a loan from the petitioner Bank creating equitable mortgage over different extents of properties belonging to the 2nd and 3rd respondents. In spite of the agreement to satisfy the loan installments, the repayment was not at all prompt or proper. In the said circumstance, the Bank declared the account as NPA and proceeded with steps under the SARFAESI Act. Being aggrieved of the steps taken by the Bank, the second respondent herein, who happens to be the sole proprietor of the first respondent, approached this Court by filing WP(C) NO. 19093/2011 which was disposed of as per Exhibit. P5 judgment dated 26.07.2011. The grievance exposed by the second respondent in the said writ petition was that the said petitioner/borrower was not in a position to satisfy the due amount, despite which the Bank was not finalising the proceedings under the SARFAESI Act by causing the property to be sold which

virtually enhanced the liability of the petitioner day by day and hence wanted a direction to have the proceedings completed expeditiously. It was accordingly, that the writ petition was disposed of with a direction to the respondent Bank to complete the proceedings under the SARFAESI Act at the earliest, at any rate, within three months from the date of receipt of a copy of the judgment.

2. In tune with the direction, the Bank proceeded with further steps, when it came to the notice of the Bank that the property involved herein was caused to be attached by the 5th respondent, by issuing Exhibit P3 notice dated 11.08.2010, in respect of some liability which was to be cleared by the owner of the property towards the 4th respondent KFC. It is in the said circumstance that the petitioner Bank has approached this Court seeking for a declaration that the respondents 4 and 5 are not justified in proceeding against the property, pursuant to Exhibit P3 attachment, since the petitioner Bank has priority rights. It is also stated that, in the course of further proceedings pursuant to Exhibit P5 judgment, the property was put in public auction and the successful bidder has quoted a sum of Rs. 40 lakhs, as against the outstanding liability of more than 4 crores as on date.

3. During the pendency of writ petition, it was sought to be amended by filing I.A. No.8709/2012, which was allowed as per order dated on 27.06.2012 incorporating appropriate prayers to set aside Exhibit P3 as well. Pursuant to the notice received, the 4th respondent has appeared and filed a counter affidavit, as to the extent of liability to be satisfied by the first/second respondent in respect of the loan transaction availed from the said respondent. It is stated that, a sum of Rs. 1 crore was borrowed in the year 2007 for execution of a civil contract awarded by the Cochin University of Science and Technology and various properties were offered as security, which however does not include the property involved herein. Particulars of the properties against which steps are being taken to realise the due amount including the properties mortgaged are given in Para 7 of the counter affidavit. It is also pointed out that the second respondent herein had filed another writ petition as WP(C). No. 19084/2011, alleging that the ''State Bank of India'' (to be corrected as State Bank of Travancore, as submitted by the learned counsel across the Bar, Vadakkancherry branch) has the first charge over the properties in question. The said writ petition was disposed of as per judgment dated 03.01.2012, ordering to lift the attachment made by the 5th respondent over the aforesaid 4 items of properties, over which mortgage rights in favour of the Bank was created much earlier. The present writ petition is filed by the ''SBI'' seeking for an order to lift the attachment in respect of the other four items, where the petitioner SBI has got prior charge, by virtue of earlier mortgage right created as early as in the year 2005. The petitioner has filed reply affidavit as well, referring to the vital particulars as to the date of creation of mortgage, date of attachment of property and such other relevant aspects.

4. In response to the submission made by Sri. George Thomas Mevada - learned senior counsel for the petitioner Bank, the learned counsel appearing for the 4th

respondent Corporation submits that, though the factual position as to the prior right of the Bank over the attached properties has been sought to be disputed in the counter affidavit, on verification of the actual facts and figures, the said respondent is now convinced as to the factual position that the mortgage in favour of the ''SBI'' was created as early as in the year 2005 i.e., much before the subsequent loan given by the 4th respondent - KFC in the year 2007

5. After hearing both the sides, this Court finds that there is virtually no dispute as to the security interest created in favour of the ''SBI'' in the year 2005 and that the loan availed by the parties concerned from the KFC was only much later in 2007. Exhibit P3 attachment order is of 11.08.10. As such, this Court finds that the petitioner is entitled to succeed. In the above facts and circumstances, it is declared that the respondent corporation (KFC) is not justified in proceeding against the property over which security interest was created in the favour of the petitioner Bank. Accordingly, the Exhibit P3 order is set aside and the petitioner Bank is set at liberty to proceed with further steps for issuing the ''sale certificate'' to the successful bidder, in accordance with the relevant provisions of law, thus giving effect to Exhibit P5 judgment, taking the proceedings to a logical conclusion, at the earliest.

The writ petition is allowed. No cost.