IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE VIJU ABRAHAM

FRIDAY, THE 12TH DAY OF JANUARY 2024 / 22ND POUSHA, 1945

WP(C) NO. 31933 OF 2023

PETITIONER:

UNION BANK OF INDIA
KOTHAMANGALAM BRANCH, THEKKEKUNNEL COMPLEX
NEAR TO KSRTC BUS STAND, KOTHAMANGALAM
ERNAKULAM-686691, REPRESENTED BY ITS BRANCH MANAGER
MATHEW VARGHESE THARAKAN, AGED 37 YEARS,
S/O.VARGHESE MATHAI THARAKAN.

BY ADVS.
ASP.KURUP
SADCHITH.P.KURUP
C.P.ANIL RAJ
SIVA SURESH
RESHMA RAJ

RESPONDENTS:

1 THE SUB REGISTRAR
OFFICE OF SUB REGISTRAR, KOTHAMANGALAM,
ERNAKULAM, PIN - 686666

2 THE TAHSILDAR, TALUK OFFICE
KOTHAMANGALAM, ERNAKULAM - 686666

3 THE VILLAGE OFFICER
THRIKKARIYOOR VILLAGE OFFICE
THRIKKARIYOOR P.O., ERNAKULAM, PIN - 686692

4 ASWATHY KANIYAMKUDI
PULLUVAZHI, ERNAKULAM, PIN - 683541

5 CHITRA V.K.
KARUKAPPILLIKUDY, PINDIMANA PO,
KOTHAMANGALAM ERNAKULAM, PIN - 686692

BY ADV.DEEPA V., GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 12th day of January, 2024

The petitioner has approached this Court seeking a direction to the first respondent to efface the attachment effected over the property covered by Ext.P5 and register the same on presentation of the same on payment of requisite stamp duty and for a consequential direction to respondents 2 and 3 to effect transfer of registry of property in the name of the fifth respondent as and when Ext.P5 is registered with the first respondent.

2. Petitioner is a nationalised Bank. As per the averments in the Writ Petition, one Mohandas P.T. and his wife, the fourth respondent, jointly availed a housing loan of Rs.7,00,000/- from the Bank by mortgaging the property having an extent of 2.83 Ares in survey No.89/9 of Thrikkariyoor Village obtained as per Ext.P1 sale deed. Later, on account of the default committed by the parties in repaying the loan amount, the Bank enforced the mortgage and brought the property for sale by initiating proceedings under the 'Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002. (hereinafter referred to as the 'SARFAESI Act') and the same was sold in favour of the fifth respondent and Ext.P5 sale certificate dated 11.08.2023 was issued. However, the sale certificate when presented for registration, it was found that there is an entry of attachment at the instance of the fourth respondent dated 06.04.2018 by the Family Court, Muvattupuzha in I.A.No.383 of 2018 in O.S.No.215 of 2018 as is evident from Ext.P6 encumbrance certificate. Petitioner submits that on account of the mortgage created prior to the attachment of the property and on account of the subsequent sale of the mortgaged property as per Ext.P5, the attachment reflected in Ext.P6 falls to ground and to be effaced. However, the first respondent is refusing to register the sale certificate, consequent mutation of the property and acceptance of tax and it is in the said circumstance, the petitioner has approached this Court.

3. Petitioner submits that since the mortgage was prior to the date of attachment, necessarily the respondents have to register the sale certificate and to efface the order of attachment in Ext.P6 encumbrance certificate.

4. The attachment effected by the Family Court, Muvattupuzha, in I.A.No.383 of 2018 in O.S.No.215 of 2018 is on 06.04.2018 and the equitable mortgage in favour of the petitioner is created on 01.12.2015.

5. Heard the learned counsel for the petitioner and the learned Government Pleader.

6. The learned counsel for the petitioner relied on the decision of this Court in **Madhan S. v. Sub Registrar, Kollam and Others** [2014 (1) KHC 249] and the decision of a Division Bench of this Court in **Secretary, Keechery Service Co-operative Bank Ltd. v. Sajitha Nizar alias Sajitha P.M. and others**, [2020 (5) KHC 231] and contends that the attachment effected subsequent to the creation of equitable mortgage will not affect the right of the Bank to sell the mortgaged property and the attachment has to be effaced from the encumbrance register.

7. In **Madhan**'s case (supra), this Court held in paragraph 9 as follows:-

> *"9. 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."*

8. A Division Bench of this Court in **Ali Asharaf M.M. and Another v. Sub Registrar, Thrissur** (Judgment dated 24.7.2015 in W.A. No.612/2015) has affirmed the law laid down in **Madhan**'s case. In **Keechery Service Co-operative Bank** case (supra), another Division Bench of this Court also affirmed the law laid down in **Madhan**'s case (supra) and held in paragraph 7 as under:-

> *"7. In the light of the aforesaid declaration of law by this Court the order of dismissal of the petition filed for lifting the attachment ordered under Ext R7 (a) viz., Ext.R7(b) by the Federal Bank*

> *would pale into insignificance. We do not find any reason to disagree with the declaration of law in Madhan's case (supra) which was virtually affirmed by the Division Bench in Ali Asharaf's case (supra). In the said circumstances and taking note of the fact that the orders of attachment of the property in question were after the creation of equitable mortgage of the same with Federal Bank we do not find any reason to interfere with the impugned judgment passed by the learned Single Judge following the dictum in Madhan's case (supra), carrying the directions to effect mutation of the property as also to efface all encumbrance over the property effected after 27/06/2014, the date on which the property in question was mortgaged with Federal Bank".*

Thus it is trite law that attachment effected subsequent to the creation of equitable mortgage does not have any effect on the sale conducted by the Bank under the SARFAESI Act and has to be effaced from the encumbrance register. It is evident from the documents produced in the Writ Petition that the attachment obtained by the fourth respondent is subsequent to the creation of equitable mortgage by the borrowers in favour of the petitioner.

9. This Court in **Phoenic ARC Pvt. Ltd. v. Sub Registrar, Feroke** [2023 KHC Online 9452] while considering an identical issue referring to Section 89(5) of the Registration Act, 1908 has held that since the

attachment subsequent to creation of equitable mortgage has lost its efficacy and has to be obliterated from the records, the same can be done by the Sub Registrar by filing the certified copy of the order/judgment of this Court in Book No.1 maintained by the Sub Registrar.

10. Accordingly, there will be a direction to the first respondent to efface the attachment effected over the property covered by Ext.P5 sale certificate and register Ext.P5 on presentation, if the same is otherwise in order. There will also be a direction to the third respondent to effect mutation of the property on such registration, if there is no other impediment.

Writ Petition is disposed of with the above directions.

Sd/-

VIJU ABRAHAM
JUDGE

csl

APPENDIX OF WP(C) 31933/2023

PETITIONER'S EXHIBITS

Exhibit P1	A TRUE COPY OF THE SALE DEED NO. 7535/2007 IN THE NAME OF THE BORROWER
Exhibit P2	A TRUE COPY OF DEMAND PROMISSORY NOTE DATED 02/12/2015
Exhibit P3	A TRUE COPY OF HOUSING LOAN AGREEMENT DATED 2.12.2015 IN FAVOUR OF THE PETITIONER
Exhibit P4	A TRUE COPY OF THE MEMORANDUM OF DEPOSIT OF TITLE DEED DATED 2.12.2015 DRAWN BY THE APPLICANT
Exhibit P5	A TRUE COPY OF THE SALE CERTIFICATE DATED 11.8.2023 IN FAVOUR OF THE 5TH RESPONDENT
Exhibit P6	A TRUE COPY OF THE ENCUMBRANCE CERTIFICATE DATED 7.7.2023 ISSUED BY THE 1ST RESPONDENT