

Case No. 10

2004 -3-L.W. 46

IN THE HIGH COURT OF JUDICATURE AT MADRAS

31.03.2004/Civil Revision Petition Nos.1649 and 1640 of 2003

K. Gnanaprakasam. J.

Nedungadi Bank Ltd, Main Branch rep. by its Assistant General Manager,
Coimbatore. (Now taken over of by Punjab National Bank)...Petitioners in both
C.R.Ps.

Vs

1. M/s. Pondy Metal Rolling Mills Pvt. Ltd, rep by its Director.
- 2..M/s.Krishna Steels, rep. by its Proprietor Thiru Gopalakrishnan.
3. Thiru Gopalakrishnan.....Respondents in both C.R.Ps.

Hypothecation agreement - third party creditor filed suit for recovery of money against hypothecator - hypothecated goods attached - whether hypothecate bank has first charge over the goods - since hypothecatee did not file suit, no such first charge - C T Senthilnathan (1977 (2) M L J 499 followed

COMMENTS: The judgement is clearly wrong. Observations of Division bench in C T Senthilnathan are mere obiter. Issue to be decided solely based on the terms of the agreement. When an attachment of property cannot prevail over the right of an agreement holder under a sale agreement, the same principle should apply in the case of a hypothecation agreement also. The Correct view, it is humbly submitted that hypothecation will prevail over attachment proceedings.

Petitions filed under Section 115 C.P.C. against the fair and decretal order dated 6.6.2002 made in I.A.No.665/2002 in I.A.No.564/2000 in O.S. No. 1053/2000 and in I.A.No.666/2002 in I.A.No.564/2000 in O.S. No. 1053/2000 respectively on the file of II Additional Subordinate Judge, Coimbatore.

Held: In our case, hypothecatee, namely, petitioner-Bank has not chosen to file any suit to obtain any money decree but, I am given to understand that hypothecatee

has taken out necessary proceedings before Debt Relief Tribunal after the filing of the suit by the first respondent in which he got an order of attachment before judgment and only in the said circumstances. I am unable to accept the contention of the learned advocate for the revision petitioner that they are entitled to have the first charge over the hypothecated property. As the Division Bench of our High Court has held (in 1997-2-MLJ 499) that the right of the hypothecatee is only to file a suit and to seek for the sale of the hypothecated goods after obtaining a money decree and therefore, the petitioner cannot at all have the first charge over the hypothecated goods. Though the first respondent had attached the property and the same has got to be brought to sale and at that stage how much it would fetch is not known either to the revision petitioner or the first respondent. In the said context and also meet the ends of justice. I feel that the first respondent has got to be permitted to bring the attached property for sale by public auction and after adjusting towards the amount due to the first respondent anything remains, would certainly should go to the petitioner-bank.

For the above said purpose. I do feel that the petitioner-Bank as hypothecatee, is a necessary and proper party, though not for proper adjudication of the proceedings, at least for follow up action, everything must be done and should be done in his presence to avoid unnecessary controversy over the matter.

Union of India VS C.T. Shentilanathan and another(1972)2 M.L.J.499 (D.B.); and

M/s. Sundaram Finance Ltd. VS M/s. Balurghat Transport Co. Ltd. and another (2001-3-L.W.359); - Referred to.

C.R.P. 1650 of 2003 allowed.

C.R.P. 1649 OF 2002 dismissed

For Petitioner in both C. R. Ps: Mr. M. Sathyanarayanan.

For Respondents in both C. R. Ps: Mr. M.S. Krishnan.

ORDER

These Civil Revision Petitions are directed against the order dated 6.6.2002 passed in

I.A. Nos. 665/2000 and 666/2000 in I.A. No. 564/2000 in O.S. No. 1053/2000 on the file of II Additional Subordinate Judge, Coimbatore.

2. The revision petitioners are Nedungadi Bank Limited (Now taken over by Punjab National Bank) and they have filed an application in I.A.No.666/2000 to implead them as party to the suit and also filed another application in I.A.No.665/2000 to erase the order of attachment before Judgment. Which has been passed in I.A.No.564/2000. Both the petitions come to be dismissed. Aggrieved by the same, they have filed these two Civil Revision Petitions.

3. Heard the learned advocate for the petitioners and the respondents.

4. The revision Petitioner would contend that respondents 2 and 3 have hypothecated their goods to the Bank and in respect of the same property, the first respondent, namely, M/s. Pondy Metal Rolling Mills Private Limited has filed a suit for recovery of the amount due to them and also taken out an application for attachment before judgment of properties of the respondents 2 and 3, which are already hypothecated to the petitioner-Bank. It is therefore, argued that as the goods have already been hypothecated, they have a charge over it and that the attachment application taken out by the first respondents is subsequent to the same and therefore, the said attachment is not maintainable and even if it is maintainable, the same is subject to the hypothecation made in favour of the Bank.

5. On the contrary learned advocate for the first respondent would contend that even on their own admission of the petitioner-Bank, the goods are said to have been hypothecated and they have not enforced their right and taken custody of the goods. Therefore, the right of the bank over the goods hypothecated is only limited right as long as the Bank has not taken any action pursuant to the hypothecation of the properties made to them, now, they cannot claim first charge of the hypothecated goods. It is the further contention of the learned advocate for the first respondent that even before the petitioner-Bank had taken action, they have filed the suit and also obtained an order of attachment before judgment and as such, their right to the goods which were said to have been hypothecated to the, will have the first charge over the hypothecated goods and therefore, their rights cannot sub-serve the right of the petitioner-Bank as claimed by them.

6. The fact that the first respondent has filed the suit and also got an order of attachment before judgment of the goods, which were said to have been hypoth-

ecated to the petitioner Bank, is not in dispute. As it has been rightly pointed out by the learned advocate for the first respondent, the petitioner-Bank is not in a position to place any material before this Court that it has taken any action pursuant to the goods said to have been hypothecated to them and before the order of attachment before Judgment obtained by the first respondent. As such it is submitted that the order of attachment which has been passed in favour of the first respondent would prevail over the hypothecation, said to have been made in favour of the petitioner.

7. In support of the said contention, learned advocate for the respondent would rely upon the case of Union of India VS C.T. Shentilanathan and another (1977)2 M.L.J.499 (D.B) wherein the Division Bench of our High Court has held.

“ Though the learned counsel for the plaintiff referred to this decision, he was not able to satisfy us that under Exhibit A-1, there was any transfer of such interest or title of the hypothecator in the goods in favour of the hypothecatee. Excepting for the bare assertion that the plaintiff as hypothecatee could seek for possession of the goods in case of default of the hypothecator, no further right is thought of or claimed in and the recitals in Ex.A.1. It is therefore clear that there was no transfer of interest in movable property under Ex.A.1 so as to sustain the contention of the learned counsel for the plaintiff that the case under consideration involves a mortgage of movable property. As we said, the best that can be claimed by the plaintiff in this action is an equitable charge. He could work out the equitable charge only after obtaining a decree on the private debt. After obtaining the decree he could seek execution as against the goods secured under the hypothecation deed, if available with the hypothecator at or about the time when he seeks execution. Under these circumstances, we are unable to accept the contention that this is a case of mortgage of movable property. This is a pure and simple case of hypothecation of goods under which no delivery of possession of the hypothecator was contemplated and the only right which the hypothecatee got under it was a right to seek for the sale of the hypothecated goods after obtaining a money decree on the debt “,

In the above said judgment, it is made clear that in case of hypothecation, there is no delivery of possession of the goods hypothecated and therefore, the right of the hypothecatee is only to seek for the sale of hypothecated goods after obtaining a money decree on their debt. The very same view was taken by the learned Judge of this Court (A. Kulasekaran.J.) in the case of M/s. Sundaram Finance Ltd. VS M/s. Balurghat Transport Co. Ltd., and another.(2001-3-L.W.359).

8. In our case, hypothecatee, namely, petitioner-Bank has not chosen to file any suit to obtain any money decree but, I am given to understand that hypothecatee has taken out necessary proceedings before Debt Relief Tribunal after the filing of the suit by the first respondent in which he got an order of attachment before judgment and only in the said circumstances, I am unable to accept the contention of the learned advocate for the revision petitioner that they are entitled to have the first charge over the hypothecated property. As the Division Bench of our High Court has held that the right of the hypothecatee is only to file a suit and to seek for the sale of the hypothecated goods after obtaining a money decree and therefore, the petitioner cannot at all have the first charge over the hypothecated goods.

9. In the above said circumstances, it would appear as though the petitioner-Bank who got hypothecation of goods, have to go with empty hands. But I do not wish such a situation and the right of the petitioner-Bank has got to be safeguarded, if it could be done in a manner known to law. Though the first respondent had attached the property and the same has got to be brought to sale and at that stage how much it would fetch is not known either to the revision petitioner or the first respondent. In the said context and also to meet the ends of justice. I feel that the first respondent has got to be permitted to bring the attached property for sale by public auction and after adjusting towards the amount due to the first respondent, anything remains, would certainly should go to the petitioner-Bank.

10. For the above said purpose, I do feel that the petitioner-Bank as hypothecatee, is a necessary and proper party, through not for proper adjudication of the proceedings, at least for follow up action, everything must be done and should be done in his presence to avoid unnecessary controversy over the matter.

11. That only in ;the said circumstances, Civil Revision Petition 1650/2003 is allowed. But Civil Revision Petition NO.1649/03 to erase the order of attachment before judgment is dismissed. No costs.

12. The first respondent is at liberty to bring the attached property to sale in public auction as early as possible in accordance with law.