

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

WEDNESDAY, THE 17<sup>TH</sup> DAY OF NOVEMBER 2021 / 26TH KARTHIKA, 1943

WP(C) NO. 22744 OF 2020

**PETITIONER:**

PRADEEP KUMAR.P  
AGED 56 YEARS  
S/O. PARAMESWARAN PILLAI, BUSINESS, PUNNAMPARAMBIL  
BUILDINGS, COURT JUNCTION PONKUNNAM P.O. KOTTAYAM 686  
506.

BY ADVS.  
R.SURENDRAN  
KUM.S.MAYUKHA

**RESPONDENTS:**

- 1 THE STATE OF KERALA  
REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT  
SECRETARIAT, THIRUVANANTHAPURAM 695 001.
- 2 THE PRINCIPAL SECRETARY TO GOVERNMENT OF KERALA,  
TAXES DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM 695  
001.
- 3 THE PRINCIPAL SECRETARY TO GOVERNMENT OF KERALA,  
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAL,  
THIRUVANANTHAPURAM 695 001.
- 4 THE RURAL DEVELOPMENT COMMISSIONER,  
RURAL DEVELOPMENT DEPARTMENT, 4TH FLOOR, SWARRAJ  
BHAVAN, NANTHANCOD, KOWDIAR, THIRUVANANTHAPURAM ,  
KERALA 695003.
- 5 THE STATE LEVEL BANKER'S COMMITTEE,  
REPRESENTED BY ITS CONVENOR, SLBC CELL, CANARA BANK,  
CIRCLE OFFICE, CANARA BANK BUILDING, M.G. ROAD,  
THIRUVANANTHAPURAM 695 001.
- 6 THE SOUTH INDIAN BANK LTD.,  
REPRESENTED BY THE CHIEF MANGER, SOUTH INDIA BANK LTD,  
KANJIRAPPALLY BRANCH, KOTTAYAM DISTRICT, KERALA, STATE

686 507.

BY ADV SRI.S.EASWARAN S C

SMT.SURYA BINOY.SR.G.P

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON  
17.11.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.R.**

**JUDGMENT**

The quest of the petitioner, who is admittedly a borrower of certain loan facilities from the 6<sup>th</sup> respondent - South Indian Bank Limited (hereinafter referred to as 'the Bank' for short), to build a defense against the claims of the said Bank has led him to this Court posing a very inventive question: namely, whether Government of Kerala have unbridled powers under Section 58(f) of the Transfer of Property Act ('TP Act' for short), to declare every part of the State being brought within its ambit, for the purpose of creation of equitable mortgage by deposit of Title Deeds.

2. The petitioner concedes that he had taken a loan facility from the Bank and that he and his mother had 'delivered' their title documents to them as 'security' for a loan

facility availed of by a Firm called 'Sama Rubbers', of which, he is the Managing Partner. His contention, however, is that since the documents were delivered at Kanjirapilly, it cannot be construed to have created an equitable mortgage over the property in question because, as per the original provisions of Section 58(f) of the 'T.P Act', such deposit was permitted only in certain specified towns, though admitting that the statutory Scheme allows the State Government, by notification, to bring within its ambit 'any other town'.

3. The singular argument of the petitioner is that Ext.P2 notification issued by the Government of Kerala, invoking their power under Section 58(f) of the 'TP Act', has been done irregularly and without proper application of mind because, it extends every part of the territory of the State within the

purlieus of the said provision and that this is egregiously improper, because when 'any town' is brought within the umbra of the said provision, the Government requires to satisfy itself and to explain why it was so done.

4. The petitioner contends that, therefore, the Bank cannot enforce the security interest over the property in question, under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act ('the SARFAESI Act' for brevity), because 'delivery' of the title documents by him and his mother at Kanjirapilly cannot partake the character of an equitable mortgage over the property covered by it; and consequently, that they will have to attach it and bring to sale as per Civil Law.

5. I have heard Sri.R.Surendran, learned counsel for the petitioner; Sri.S.Easwaran,

learned Standing Counsel for the Bank and Smt.Surya Binoy, learned Senior Government Pleader appearing for the official respondents.

6. Sri.R.Surendran, learned counsel for the petitioner, supplemented the afore contentions of his client, relying on Article 243 B(1) of the Constitution of India saying that the word 'town' in the 'TP Act' cannot be construed to be the entire State; and therefore, that while the Government of Kerala issued Ext.P2, it ought to have explained and recorded the specific requirements of extending the ambit of Section 58(7) of the "T.P.Act" to the whole State, based on cogent and actionable cause and reasons. He asserted that, however, this has not been done by the Government and reiteratingly argued that Ext.P2 hence improper and incompetent.

7. Sri.S.Easwaran, learned Standing Counsel appearing for the Bank, made available

to this Court a very carefully curated compilation of documents and materials covering the field; and argued that, as per the original provisions of the "TP Act", as is stood in the year 1882, certain towns, including Calcutta, Madras, Bombay, Karachi, Rangoon, etc., were specified to be ones where the deposit of title documents would be construed as an equitable mortgage, in distinction to a registered instrument, which was the then mandatory norm. He submitted that, the towns specified in the original provision was obviously those wherein commercial activities were being carried on a large scale and that it is only such interest, which governed the intent behind the said provision.

8. Sri.S.Easwaran then showed me that the 'TP Act' was, thereafter, amended in the year 1929, stipulating that when a debtor delivers to the creditor or his agent, documents of

movable property, with the intent to create a security interest thereon, in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulamein, Bassein and Akyab, or any other town which the Governor General in Council may, by notification in the Gazette of India, specify, it shall be called a mortgage by deposit of title deeds. He submitted that, therefore, even going by the Scheme of the 'TP Act', as it stood in the year 1882 or in the year 1929, it was the Governor General in Council, who had the discretion to decide the towns to which the benefit under Section 58(f) of it would apply; and that subsequent to the Constitution of India being adopted, it is the Government concerned which would obtain this Authority, which is, in any case, unmistakable from the manner in which the said provision is presently worded.

9. Sri.S.Easwaran, thereafter, alleged

that the sole purpose of the petitioner behind this writ petition is to wriggle out of his obligations under the equitable mortgage created on the properties by himself and his mother, because he is aware that the only way he can do so is to impugn Ext.P2 notification of the Government and no other. He added that loan was given to the petitioner, concededly, in the year 2017 and he and his mother had delivered the title documents with the intent to create an equitable mortgage on the properties covered by it on 15.12.2017, followed by issuance of confirmatory letters, making their intention to do so irrefragable. He then explained that when the borrower defaulted payment, the Bank issued a notice under Section 13(2) of the SARFAESI Act on 23.06.2020, to which the petitioner caused a reply, but which, pertinently, did not contain any contention as against Ext.P2 notification,

but solely asserting that 'delivery of documents' made by him and his mother cannot be construed to be an equitable mortgage. He predicated that, it is thus perspicuous that the real intent of the petitioner is not to challenge Ext.P2, but to collaterally obtain force to his untenable assertion that delivery of the title deeds of his property would not lead to creation of an equitable mortgage over it; and thus, prayed that this writ petition be dismissed.

10. Smt.Surya Binoy, learned Senior Government Pleader appearing for the official respondents, submitted that the arguments of the petitioner, as regards the constitutionality and validity of Ext.P2, cannot garner any merit, going by the well established and recognized principles relating to statutory interpretation, because Section 58(f) of the 'TP Act' vests the State

Government with the unequivocal competence to notify any town, through a notification, to be brought within the ambit of the said provision.

11. She added that the words "any other town" in Section 58(f) of the "T.P Act" would take into account any territory of the State; and that, in any event of the matter, at least three States in India have already issued notifications akin to Ext.P2, bringing their entire territory within the umbra of these provisions.

12. As an adscititious argument, Smt.Surya Binoy submitted that the contentions of the petitioner edified on the definition of the words "any other towns" appearing in the constitutional provisions, are not tenable because going by Section 20 of the General Clauses Act, 1897, the expression used in "T.P.Act" can only have the same respective meaning therein. She thus contented that the

afore words in the "T.P.Act" cannot be confined to towns alone, but to every territory within the State of Kerala. She, consequently prayed that this writ petition be dismissed.

13. I have considered the afore submissions and have also evaluated the various materials produced on record by the rival parties, particularly the thoughtfully compiled set of papers made available by Sri.S.Easwaran.

14. There is no doubt - as is admitted - that the original provision relating to equitable mortgage in the "T.P.Act" was contained in Section 59 thereof, which created an exception to the Rule - that a mortgage can be effected only through a registered document - by mandating that when a debtor delivers title documents to a creditor in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, with the intent to create a security thereon, such transaction

shall not be held invalid.

15. The word 'equitable mortgage' was not used in the afore said provision, but, through the subsequent amendment to the Act in the year 1929, Section 58(7) was introduced, which reads as under:-

*"Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulamein, Bassein and Akyab, and in any other town which the Governor General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent, documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."*

16. It is, therefore, ineluctable that, for the first time, the word and concept of 'equitable mortgage' was expressly incorporated into the "T.P Act"; and even going by the afore extracted amendment, it was the Governor

General in Council, who was vested with the unfettered power to decide the other areas to be brought within its ambit.

17. That being so, I have also gone through the various judgments and precedents placed before me by the parties to this case, but I do not see anywhere it having been specifically declared as to the intent in the enumeration of certain specified towns in Section 58(f) of the "T.P. Act", in exclusion to others, as it stood in the years 1882 and 1929.

18. However, one certainly gets an insight into this from the judgments in **Jessie Moyle Stewart vs. Bank of Upper India Ltd.** [AIR 1916 Lah 1939]; **Imperial Bank of India vs. U.Rai Gyaw Thu and Co.Ltd.** [1923(25)BOMLR 1279] and **Himalaya Bank Ltd. vs. F W Quarry and others** [(1895) ILR 17 All 252], that the singular purpose and intent behind the original Section 58(f) of the "T.P Act" was to create an

opportunity for creditors and debtors to enter into financial transactions, without the burden of having to register the said arrangement. This is apodictic because, as I have already seen above, while the original provision did not contain the word 'equitable mortgage', but only sought to create a class of such transactions - which would be valid even without the rigor of registration, when the Statute was amended in the year 1929, the word and concept of 'equitable mortgage' was expressly brought in, making it unambiguous that the delivery by a debtor of his title document, in certain specified towns, with the intent to create mortgage over the property covered by it in favour of the creditor, would partake the character of an "equitable mortgage". The towns mentioned in the original provision, without doubt, were those which were the hubs of businesses and commercial

activities at that time.

19. Evidently, therefore, when the scope of businesses expanded in due time and when ease of doing commercial ventures required to be freed from the fetters of territorial limitations, Governments began to consider inclusion of more and more towns and areas into the fold of Section 58(f) of the "T.P.Act"; and it is, therefore, irrefutable that what governs their minds in doing so is only the financial and commercial importance of such areas, which have to be offered the flexibility under the said provision.

20. In the afore perspective, no one can argue against it that State of Kerala has evolved rapidly in the last many years, both in terms of size of businesses and of commercial and industrial activities; and the Government, therefore, in the year 2010, thought it fit to bring its entire territory within the purlieus

of Section 58(f) of the "TP Act", so as to enable creation of equitable mortgages through the deposit of title deeds at any place, without having to follow the constraints of registration.

21. That apart, I cannot find from Section 58(f) of the "T.P. Act" any fetter or bridle on the right of the State Government concerned to issue a notification bringing in its territories into the fold of Section 58(f); and therefore, the argument of Sri.R.Surendran, that Government must justify such inclusion through specific orders or proceedings, can certainly be only seen to be farfetched. The decision to bring in a particular territory or area within the umbra of Section 58(f) of the "T.P.Act" is essentially a policy and financial decision and if the Government was of the considered opinion that entire State of Kerala - as in the case of States like Hariyana,

Punjab and Orissa - require to be notified, so as to enable Banks and other Financial Institutions to enjoy the fiscal flexibility offered by Section 58(f) of the "T.P. Act", this Court cannot find fault with it or with such mentation, which led to Ext.P2.

22. In the absence of the petitioner showing me any fetter on the power of the Government in exercising its authority under Section 58(f) of the "TP Act" with respect to any territory of the State, I fail to fathom how an argument, as has been now impelled by Sri.R.Surendran, can never find imprimatur of any Court.

23. In the afore scenario, the contentions of the petitioner edified on Article 243 B(1) of the Constitution of India would also plummet into complete insignificance because what Section 58(f) of the "T.P.Act" effectively does is to empower the Government to bring in any

area within its scope, based on its assessment of the requirements of the times and the necessities of the business community. Therefore, the distinction between "towns", "cities" and "panchayats", as has now been tried to be brought in by Sri.R.Surendran would be of no relevance to the issues at hand, because, as I have already seen above, the words "any other town" does not indicate the territorial limits, as if it is under the delimitation processes, but only the areas to which Section 58(f) of the "T.P.Act" would apply.

24. The above is unmistakable because, it is certainly within competence of the Government to even take out portions of a town or a city or a panchayat and notify it specifically under Section 58(f) of the "T.P. Act", so as to cover only that area, and this would obtain favour in law as long as it is

hypostasised on an assessment of the financial requirements and ease of business requisites.

25. That being so said, as rightly stated by Sri.S.Easwaran, the only reason why the petitioner has sought to challenge Ext.P2 - which was issued as early as in the year 2010 - is because action has now been taken by the Bank against him under the SARFAESI Act. The method which he has devised to wriggle out of his obligations under the loan facility is to contend that his property is not covered by an equitable mortgage because its title documents were not delivered by him in a "town" notified under Section 58(f) of the "T.P. Act", prior to Ext.P2 notification. It is unnecessary to say it again that this argument can obtain no legs to stand on for the reasons above and additionally because, as is admitted, when certain towns were originally included in Section 58(f) of the "T.P.Act", no orders or

proceedings were issued to justify it and hence if the submissions of Sri.R.Surendran are to be accepted, then such inclusion would also have to be seen as incompetent. However, pertinently, the petitioner accepts it.

26. Indubitably, the petitioner is engaging in brinkmanship when faced with recovery action. Of course, the Bank contends that the petitioner and his mother had given specific confirmatory letters to the effect that they have executed the "equitable mortgages", but I do not think that this Court will be justified in taking cognizance of the same and speaking upon it in this judgment, since, concededly, a Securitisation Application numbered as S.A.No.233/2020-has been filed by the petitioner before the jurisdictional Debts Recovery Tribunal, assailing the alleged mortgage even on other grounds.

27. I, therefore, leave all these

contentions to be pursued by the parties before the Debts Recovery Tribunal or such other Authority as they may be advised.

28. As far as this writ petition is concerned, it is luculent from the conspectus of my afore observations that challenge of the petitioner against the notification of the Government, bringing the entire State of Kerala within the beneficial embrace of Section 58(f) of the "T.P.Act", cannot be sustained. I am certain that Government has acted correctly and that they were not obligated or enjoined by its provisions to explain why a particular territory has been either brought in, or excluded, from the provisions of Section 58(f) of the "T.P.Act"; and that these decisions are within the policy decision making realm, into which this Court seldom and rarely enters.

In the afore circumstances, leaving open all other contentions of the rival parties, I

dismiss this writ petition, confirming Ext.P2  
notification of the Government.

Sd/-

**DEVAN RAMACHANDRAN**

**JUDGE**

SAS/17/11/2021

