

## Housing Development Finance Corporation Ltd. Vs State of Kerala

**Court:** High Court Of Kerala

**Date of Decision:** June 3, 2015

**Acts Referred:** Transfer of Property Act, 1882 - Section 48

**Citation:** (2015) 3 KLT 638

**Hon'ble Judges:** A. Muhamed Mustaque, J

**Bench:** Single Bench

**Advocate:** Lal K. Joseph, A.A. Ziyad Rahman and V.S. Shiraz Bava, for the Appellant; M.T. Sheeba, Government Pleader, Lal George, Johnson T. John, K. Mohanakannan and A.R. Pravitha, Advocates for the Respondent

**Final Decision:** Allowed

### Judgement

A. Muhamed Mustaque, J

Petitioner is a Banking Company engaged in housing finance in Kerala. They have approached this Court

aggrieved by attachment on secured assets, created by way of mortgage in favour of the petitioner by the 8th and 9th respondents, to recover the

defaulted chitty amount from them due to the seventh respondent-Kerala State Financial Enterprises Ltd. (for short, "KSFE"). The mortgage was

created in favour of the petitioner as per the loan agreement dated 22.07.2004. Ext. P1 is the loan agreement. On account of default in repayment

of the loan amount by respondents 8 and 9, the petitioner initiated SARFAESI proceedings.

2. The borrowers-respondents 8 and 9 had subscribed a chitty with K.S.F.E. The agreement with K.S.F.E. was on 03.03.2008. Ext. R(7)(a) is

the copy of the said agreement. The borrowers also defaulted payment to K.S.F.E. K.S.F.E. initiated revenue recovery proceedings.

3. The only issue in this Writ Petition is whether the initiation of revenue recovery proceedings for arrears of public revenue on land have got

precedence over the mortgage right of the petitioner. Admittedly, the mortgage right was created by a contract in the year 2004. The loan

agreement with K.S.F.E. was subsequent.

4. Section 48 of the Transfer Property Act, 1882 embodies principle of priority which reads as follows:

48. Priority of rights created by transfer.--Where a person purports to create by transfer at different times rights in or over the same immovable

property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special

contract or reservation binding the earlier transferees, be subject to the rights previously created.

5. In the light of Section 48 of the T.P. Act, if rights are created in favour of different persons at different times, one who has advantage in time has

the advantage in law. The question is whether public revenue would have any overriding impact upon contractual right created prior to the arrear

that has become due as a "public revenue due" on a land.

6. This Court in *Nedungadi Bank Ltd. v. Tahsildar Ottapalam* (1977 KLT 826) held as follows:

With much more force it could be said that a mortgagee of immovable properties cannot be defeated by the State seeking to attach and sell the

mortgaged properties to the detriment of the mortgagee. The property proceeded against by the State must be its debtor's property. In law the

mortgagor and the mortgagee have distinct and separate interests in the specific immovable property or properties which constitute the security for

the mortgage debt. The State cannot therefore seek to recover the debt owed by one of them by proceeding against the interests of the other in the

property or properties under mortgage unless the debt due to the State is a first charge thereon.

7. Learned counsel for K.S.F.E. Shri Lal George would argue with reference to Section 3 of the Revenue Recovery Act, 1968 (for short, the "RR

Act") that a public revenue due on any land is a first charge on that land and therefore it would prevail upon mortgage right. He would further argue

that the expression given for "engagement" under Section 2(a) of the R.R. Act takes in the agreement executed by the debtor agreeing for revenue

recovery action. Therefore, dues to the K.S.F.E. is also public revenue due on land.

8. The question in this is not whether the dues to the K.S.F.E. are public revenue due on land or not. I do not find in the facts and circumstances of

the case, a probe is necessary to answer the same. The sole issue in this Writ Petition is whether a mortgagee is having a right of precedence to

proceed against secured asset. It is settled principles of law as embodied under Section 48 of the T.P. Act that those who are in advantage in time

have advantage in law. The creation of the charge by the R.R. Act therefore, has to be understood based on the right of priority in terms of time.

Thus, it has to be concluded that the petitioner having the advantage of mortgage, prior to the creation of charge, has an advantage in law to

proceed against the property. However, it is made clear that the K.S.F.E. has a second charge and would be entitled to claim for the excess

amount recovered from the sale of the land by the petitioner. Accordingly, the Writ Petition is allowed and the following directions are issued:

i. All attachments effected in the secured asset shall be lifted.

ii. The Registering Authority shall register the sale certificate issued under the SARFAESI Act.

iii. Any excess amount received from the sale proceeds by the petitioner shall be released to the K.S.F.E. No costs.