IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.12.2016

Coram

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

W.P.No.27504 of 2015
and M.P.Nos.1 and 2 of 2015

State Bank of India,
Stressed Assets Management Branch,
Rep. by its Assistant General Manager,
Red Cross Buildings, II Floor,
No.32, Montieth Road,
Egmore, Chennai-8. .. Petitioner

Vs

1. The Assistant Commissioner,
   Commercial Tax,
   Office of the Commercial Tax,
   Puraswalkam Assistant Circle,
   Chennai - 10.

2. S.K.C Retail Ltd.,
   Rep. by its Directors
   Presently having office at
   No.218, Purasawalkam High Road,
   Purasawalkam, Chennai - 600 007.

3. The Sub-Registrar,
   Purasawalkam,
   Chennai - 07. .. Respondents

* * *

Prayer : Writ Petitioner filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus or other suitable writ or order/direction to call for the records and quash the attachment entry registered as Document No.1/2015, S.R.O. Purasawalkam, effected by the first respondent with the office of third respondent and consequently direct the third respondent to remove the attachment entry so as to enable the petitioner bank or its successors to register the sale certificate/sale deed in favour of third party(s) in accordance with law prayer amended as per order dated 21/10/16 made in WMP.31631/16 in WP.27504/2015 in the light of the recent amendment effected in RDDB & FI Act as well as SARFAESI Act.

* * *

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For Petitioner : Mr.M.L.Ganesh

For Respondents: Mr.S.Kanmani Annamalai,
Special Government Pleader for R1

Mr.Saurabh Mishra,
for M/s.Vasudha Thiagarajan for R2

Mr.Akhil Akbar Ali,
Government Advocate for R3

ORDER

1. This is a writ petition challenging the attachment entry effected by respondent No.3 at the say so of respondent No.1.

2. The record shows that in view of respondent No.2, being in arrears of sales tax, respondent No.1 vide communication dated 19.01.2015, called upon respondent No.3, to create a lien on the subject properties, which were otherwise mortgaged to the petitioner Bank, i.e., State Bank of India (SBI).

2.1. Pursuant to the communication dated 19.01.2015, an attachment entry was made by respondent No.3 on 13.08.2015.

3. In effect, the tussle is between the petitioner Bank and respondent No.1 with regard to the proceeds of the subject immovable properties, some of which, during the pendency of the captioned writ petition have been put to sale.

4. It is the case of the petitioner Bank that it has taken auction route for selling the subject properties by taking recourse to the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (in short the 2002 Act).

4.1. The record would show that the some of the properties, during the pendency of the writ petition, have been sold and the proceeds received thereupon are held in trust by the petitioner Bank. These facts emerge upon perusal of the order dated 05.10.2015 and 28.04.2016, passed by my predecessors.

4.2. Pursuant to order dated 16.12.2016, the petitioner bank has filed an affidavit of even date 16.12.2016, which gives details of the properties, which have been sold and those which are yet to be sold. The details of properties, which have been sold are given in paragraph 3 of the said affidavit, while those which are yet to be sold are given in paragraph 6 of the said affidavit.

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4.3. Pertinently, moneys received from the properties sold are given in paragraph 4 of the affidavit. For the sake of convenience, the said portion of the affidavit is extracted hereafter :

> ".... 4. I further state that the petitioner bank for and on behalf of the consortium member banks received the following sale consideration from and out of sale of aforesaid properties under SARFAESI proceedings initiated by the bank.

Item No.1	Rs.5,65,00,000/- sold on 26.10.2016
Item No.2	Rs.3,10,00,000/- sold on 17.08.2016
Item No.3 (a) & (b)	Rs.4,66,00,000/- sold on 23.03.2016

4.4. A perusal of paragraph 5 of the same affidavit would show that insofar as the properties, which are reflected in item No.3(a) and (b) above, sales certificates have been registered in favour of the concerned auction purchasers. However, insofar as the properties shown as items No.1 and 2 are concerned, it is averred in the very same affidavit by the petitioner Bank, that sales certificates have not, yet, been, registered in favour of the concerned auction purchasers, i.e., Mr.E.Saravanan, Mrs.S.Jayanthi and Mr.Arvind Kumar.

5. Respondent No.1, in opposition to the reliefs claimed for in the writ petition, has filed a counter-affidavit.

6. In sum, respondent No.1 claims priority over moneys, which have been received by the petitioner Bank upon sale of the subject properties. The stand of respondent No.1 is that a prior statutory charge is created in its favour by virtue of the provisions Section 42(1) and Section 43 of the Tamil Nadu Value Added Tax, 2006, (in short the 2006 Act).

7. On the other hand, the petitioner Bank claims that respondent No.1 cannot have a prior charge on the subject properties, which stand mortgaged to it.

8. Concededly, the mortgage in favour of the petitioner Bank was created on 26.05.2005, which was prior to the date of attachment. The date of attachment, as indicated above, was 19.01.2015. To be noted, attachment entry was made by respondent No.3, on 13.08.2015. This apart, the matter is now put beyond the pale of doubt, as during the pendency of the writ petition, an amendment has been made to the 2002 Act with the insertion of Section 26E. For the sake of convenience, the said Section is extracted hereafter :

> " 26E. Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts

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due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation.— For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

8.1. This amendment was brought about with effect from 01.09.2016.

9. Likewise, a pari materia provision was introduced in the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (in short 1993 Act), with the insertion of Section 31B.

9.1. A challenge was laid to the amendment made in the 1993 Act in a batch of writ petitions. Since, two Division Benches of this court differed on the construction of Section 31B of the 1993 Act, the matter was referred to a Full Bench of this Court, in pursuance to the order passed in W.P.No.6267 of 2006 and W.P.No.253 of 2011. The Full Bench was, accordingly, called upon to answer the following issues :

"a) As to whether the Financial Institution, which is a secured creditor, or the department of the government concerned, would have the "Priority of Charge" over the mortgaged property in question, with regard to the tax and other dues.

b) As to the status and the rights of a third party purchaser of the mortgaged property in question."

9.1. Vide judgement dated 10.11.2016 passed in W.P.No.2675 of 2011, titled: The Assistant Commissioner (CT), Anna Salai-III Assessment Circle Vs. the Indian Overseas Bank rep. by its Manager, Recovery Administrative Branch, Central Office, and another, answered the reference, as follows :

"…. 2. We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31B in the Principal Act, which reads as under:-

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"31B. Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation - For the purpose of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

3. There is, thus, no doubt that the rights of a secured creditor to realise debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

4. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

5. The aforesaid would, thus, answer question (1) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

6. In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of Section 31B, as it includes "secured debts due and payable to them by sale of assets over which security interest is created".

7. We, thus, answer the aforesaid reference accordingly."

(emphasis is mine)

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9.2. As correctly argued by the learned counsel for the petitioner Bank, on a parity of reasoning, Section 26-E of the 2002 Act construed likewise. In other words, not only should the amendment apply to pending lis, but the declaration that the right of a secured creditor to realize the secured debts, would have priority over all debts, which would include, Government dues including revenues, taxes, etc.,. should hold good qua 2002 Act as well.

10. I tend to agree with the submission advanced before me by the learned counsel for the petitioner Bank.

11. Accordingly, as prayed, in view of the judgement of the Full Bench of this Court, the impugned attachment entry would have to be lifted. It is ordered accordingly.

12. At this stage, Mr.S.Kanmani Annamalai, learned Special Government Pleader, says that respondent No.1 has filed a Special Leave Petition (SLP), against the aforementioned judgement of the Full Bench of this Court, which is likely to come up for hearing in another four to six weeks.

13. Therefore, the writ petition is disposed of, based on an undertaking given by Mr.M.L.Ganesh, who appears for the petitioner Bank, that in case, the Revenue were to succeed in the SLP, the money realised from the sale of the subject properties would be disbursed to respondent No.1, in accordance with law.

14. Hence, no further orders are called for in the writ petition. Resultantly, the connected miscellaneous petitions shall also stand closed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1. The Assistant Commissioner,
Commercial Tax,
Office of the Commercial Tax,
Puraswalkam Assistant Circle,
Chennai - 10.

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2.The Sub-Registrar,
Purasawalkam,
Chennai - 07.

+1cc to Mr.M.L.Ganesh, Advocate, S.R.No.74938

W.P.No.27504 of 2015

TM(CO)
CS(23/12/2016)

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