IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.11.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.27240 of 2016

M/s.Edhayam Frozen Foods Pvt. Ltd.,
Represented by its Managing Director,
3/52-B, Krishnarajapuram,
Tuticorin-628 002. .. Petitioner

Versus

1.The Tax Recovery Officer-2,
Corporate Range-2,
Income Tax Department,
Room No.426, New Block, IV Floor,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

2.The Commissioner of Income Tax,
Corporate Range-2,
15th Floor, Wana Party Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

3.The Additional Commissioner of Income Tax-II,
Corporate Range-2,
15th Floor, Wana Party Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

4.The Assistant Commissioner of Income Tax,
Central Circle-III (2),
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

5.The Recovery Officer-I,
Income Tax Office,
No.2, V.P.Rathnasmy Nadar Road,
Bibikulam, Madurai-625 002.

6.The Sub-Registrar,
Keelur Sub-Registration Office,
Keelur, Ottapidaram Taluk,
Tuticorin District. .. Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records of the first respondent in his proceedings in T.R.No.98, 101 & 103/TRO-2/2016-17, quash the order/letter, dated 28.06.2016 and direct the first respondent to lift the attachment made over the properties, viz., land measuring 1.96 acres and 6.09 acres comprised in S.No.61/4 and 59/2 respectively situated in Mela Arasaradi Village in Ottapidaram Taluk, Tuticorin District.

For Petitioner : Mr.B.Kumar, Senior Counsel
For Mr.R.Asokan

For Respondents : Mr.T.Pramodkumar Chopda
Standing Counsel for R1 to R4

Mr.M.Swaminathan for R5

Mr.S.Diwakar
Special Government Pleader for R6

O R D E R

Heard Mr.B.Kumar, learned Senior Counsel assisted by Mr.R.Asokan, learned counsel appearing for the petitioner; Mr.T.Pramodkumar Chopda, learned Standing Counsel appearing for the respondents 1 to 4; Mr.M.Swaminathan, learned counsel appearing for the fifth respondent and Mr.S.Diwakar, learned Special Government Pleader appearing for the sixth respondent.

2. In this Writ Petition, the petitioner seeks for issuance of a Writ of Certiorarified Mandamus to quash the order passed by the first respondent, vide proceedings dated 28.06.2016 and to direct the first respondent to lift the attachment made out in the property in question. The impugned order states that the property in question was attached towards the demand of income tax in the case of M/s.Feena Petro Products Ltd., represented by its directors Mr.A.S.T.Winston, Mr.A.S.T.Newton, Mr.A.S.T.Milton and Mr.A.S.T.Silverster. The property in question was the individual property owned by Mr.A.S.T.Winston, who had purchased the same, vide sale deed, dated 06.07.1995. The said A.S.T.Winston was one of the Directors of M/s.Feena Petro

Products Ltd., which availed financial assistance from Dena Bank. It appears that the property in question, the individual property of A.S.T.Winston was offered as collateral to secure a loan transaction of M/s.Feena Petro Products Ltd., with the Bank. The borrower defaulted in payment and the Dena Bank initiated recovery proceedings in O.A.No.136 of 2000 on the file of the Debt Recovery Tribunal, Chennai. The Bank secured a decree against the Company as well as Mr.A.S.T.Winston in the year 2000. The property including the subject property was brought for sale by the Recovery Officer of the Debt Recovery Tribunal, Chennai. The petitioner participated in the public auction and was declared as a successful bidder and the sale was confirmed in favour of the petitioner on 07.10.2011. On 13.10.2011, Sale Certificate was issued, which was registered on the file of Sub Registrar, Keelur, Tuticorin.

3. The petitioner's case is that the Tax Recovery Officer, Tuticorin, attached the property on 28.01.2013 for arrears of income tax payable by Mr.A.S.T.Winston and this notice of attachment was registered by the Sub Registrar, Keelur, Tuticorin, in his books and when the petitioner applied for encumbrance on 07.04.2015, this attachment effected by the Tax Recovery Officer, Tuticorin was reflected. Therefore, the petitioner submitted a representation stating that they have purchased the property through a public auction conducted by the Recovery Officer, DRT, Chennai and as on date of sale, there was no attachment over the property and to support contention, they have produced the copies of the encumbrance certificate for the relevant period. The petitioner prayed for lifting the order of attachment. This request appears to have not been considered, which prompted the petitioner to approach the Commissioner of Income Tax, by representation dated 29.02.2016. Thereafter, the petitioner approached the first respondent, Tax Recovery Officer, Chennai to lift the attachment by representation dated 14.04.2016 followed by another representation to the Commissioner on 12.05.2016. The first respondent enquired into the matter and passed the impugned order stating that the properties are attached as far back as on 29.02.2000.

4. For the purpose of examining the correctness of the stand taken in the impugned order, it may not be necessary for this Court to traverse into the factual allegations set out in the counter affidavit, as the Court is going to test the correctness of the impugned order purely on legal grounds.

5. Admittedly, the property was brought for public auction by the Dena Bank, which was a secured creditor. The question would be as to whether crown debts would have precedence over the debts payable to a secured creditor? This issue is no longer resintegra and has been answered by the Full Bench of

this Court, to which, I was also a party in the case of The Assistant Commissioner (CT) Vs. The Indian Overseas Bank and another in W.P.No.2675 of 2011, dated 10.11.2016. For better appreciation, the order passed is quoted in its entirety:-

"The writ petitions have been listed before the Full Bench in pursuance to the reference order in W.P.No.6267 of 2006 and W.P.No.253 of 2011, in respect of 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.''

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:-

''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 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.''

3.There is, thus, no doubt that the rights of a secured creditor to realise secured 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 (a) 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.

8.The matters be placed before the roster Division Bench for dealing with the individual cases."

Thus, by applying the decision of the Full Bench referred above, the law having come into force, governs the parties even in respect of litigations which are pending. Therefore, the Income Tax Department cannot claim any precedence over the secured creditor in proceeding against the subject property for the recovery of the income tax arrears in the light of the law laid down by the Full Bench, which was rendered taking note of the recent enactment viz., the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016.

6. In the light of the above, the Writ Petition is allowed and the impugned order is quashed. The sixth respondent, viz., the Sub Registrar, Keelur, Tuticorin District is directed to delete the encumbrance which has been entered based upon the request made by the Tax Recovery Officer and the said direction be complied with, within a period of three weeks from the date of receipt of a copy of this order. Needless to state that this order will not stand in the way of the Income Tax Department from proceeding against the defaulter. There is no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
1.The Tax Recovery Officer-2,
Corporate Range-2,
Income Tax Department,
Room No.426, New Block, IV Floor,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

2.The Commissioner of Income Tax,
Corporate Range-2,
15th Floor, Wana Party Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

3.The Additional Commissioner of Income Tax-II,
Corporate Range-2,
15th Floor, Wana Party Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

4.The Assistant Commissioner of Income Tax,
Central Circle-III (2),
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

5.The Recovery Officer-I,
Income Tax Office,
No.2, V.P.Rathnasmy Nadar Road,
Bibikulam, Madurai-625 002.

6.The Sub-Registrar,
Keelur Sub-Registration Office,
Keelur, Ottapidaram Taluk,
Tuticorin District.

+1cc to Mr.T. Pramod Kumar Chopda, Advocate, S.R.No.69868
+2cc to Mr.Ashokan, Advocate, S.R.No.69445

nmi(CO)
md(08/12/2016)

W.P.No.27240 of 2016