

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.11.2017
Coram

The Hon'ble Mr. Justice T.S. Sivagnanam

Writ Petition No. 14421 of 2017
and
W.M.P.No.15631 of 2017

State Bank of India,
Stressed Assets Management Branch,
rep. by its Assistant General Manager,
Ret Cross Building, II Floor,
No.32, Montieth Road, Egmore, Chennai-8.

...Petitioner

Vs.

1. The Assistant Commissioner of Income Tax,
Central Circle 2 (3),
No.46, New Building, 1st Floor,
Mahatma Gandhi Road,
Nungambakkam, Chennai - 34.

2. M/s. Surana Corporation Ltd.,
30, GNT Road,
Madhavaram, Chennai- 600 110.

...Respondents

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records and to quash the impugned demand notice, dated 22.03.2017, issued by the first respondent as null and void.

For Petitioner : Mr. M. L. Ganesh

For Respondent-1 : Mr.A.P.Srinivas
Senior Standing Counsel

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O R D E R

Heard Mr. M. L. Ganesh, the learned counsel appearing for the petitioner and Mr.A.P.Srinivas, the learned Senior Standing Counsel for the first respondent. Since the petitioner challenges a notice issued by the first respondent, notice to the second respondent is dispensed with.

2. The petitioner, is the State Bank of India, and they are aggrieved by the impugned notice, dated 22.03.2017, issued by the first respondent, for recovery of income tax, payable by the second respondent, for the assessment years 2005-06 to 2013-14. The impugned notice states that, the second respondent is due and payable of the income tax of Rs.69.81 Crores, for the above referred assessment years, and since certain monies of the second respondent were lying with the hands of the petitioner/Bank, the first respondent has issued the impugned notice under Section 226 (3) of the Income Tax Act, 1961, to the petitioner. The validity of this notice is challenged by the petitioner before this Court, in this Writ Petition.

3. The primary ground, on which, the demand notice is challenged, is by contending that, on account of the recent amendment to Securitisation And Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI Act) viz., Section 20 E, and Section 31 B of the Recovery of Debts and Bankruptcy and Financial Interest Act (RD & BFI Act), the secured creditor shall have precedence over all dues, over the Central and the State Government. It is further contended that, the petitioner, being a secured creditor, is entitled to exercise their rights under Section 35 of the SARFAESI Act, and the question of issuing notice under Section 226 (3) of the Income Tax Act does not arise. In support of the said contention, the learned counsel for the petitioner/Bank referred to the following decisions:-

- i) UTI Bank Ltd., Vs. Deputy Commissioner of Central Excise, reported in Manu/TN/0188/2007.
- ii) Stock Exchange Vs. V. S. Kandalgaonkar, reported in Manu/SC/0876/2014.
- iii) Dena Bank Vs. Bhikabhai Prabhudas Parekh & Co. reported in Manu/SC/0317/2000.
- iv) ICICI Bank Ltd., Vs. Official Liquidator, High Court, Madras, reported in Manu/TN/0013/2005.

4. The learned Senior Standing Counsel for the first respondent referred to the counter affidavit filed by the first respondent, wherein, it is stated that, the impugned notice is only a garnishee notice, and not a notice of attachment, and it is always open to the petitioner/Bank to set forth the facts, which will be considered by the first respondent. Further, it is contended that, the Department has proceeded on the basis of decision of the Constitution Bench of the Hon'ble Supreme Court, in the case of Builders Supply Corporation Vs. Union of India, reported in 56 ITR 91. It is reiterated that the impugned

notice, is not a demand notice and has been issued in tune with the provisions of the Income Tax Act, 1961.

5. After hearing the learned counsel appearing for the petitioner and the learned Senior Standing Counsel for the first respondent, and perusing the materials placed on record, I am inclined to accept the arguments advanced by the learned counsel appearing for the petitioner, in the light of the decision of the Hon'ble Full Bench of this Court, (in which, I was a party) in the case of Assistant Commissioner (CT) Anna Salai-III Assessment Circle Vs. The Indian Overseas Bank, in W.P.No.2675 of 2011 etc., dated 10.11.2016. This decision was rendered by the Full Bench, after taking into consideration the amendment to SARFAESI Act and RD & BFI Act, as stated supra. At this juncture, it would be useful to refer to the relevant portion of the decision of the Hon'ble Full Bench, which is extracted as hereunder:-

""'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.'"

3. The Full Bench after taking note of the Enforcement of Security interest and Recovery of Debts and Laws and Miscellaneous Provisions (Amendment) Act, 2016, held that there is no doubt that the rights of the 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. The operative portion of the judgment of the Full Bench is 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:-

''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. ""

6. There is no dispute to the fact that the petitioner is a secured creditor, and in such circumstances, they have precedence over all the dues, payable to the Central Government and the State Government.

7. This Court, in the case of M/s.Well Stores (Madras) Private Limited, Rep by its Director, Mr.R.James, the Tax Recovery Officer-IV, O/o the Principal Commissioner of Income Tax -4, Nugambakkam, in W.P.Nos.40656 of 2015,34703 of 2016 and 3572 of 2017, dated 18.07.2017, considered the validity of the orders of attachment passed by the Income Tax Department, in respect of the properties, for which, loans have been advanced by the secured creditor, which debt, was taken over by the Asset Reconstruction Company of India, and, after following the decision of the Hon'ble Full Bench of this Court, in the case of Assistant Commissioner (CT) Anna Salai-III Assessment Circle (supra), it is held as follows:-

"5. The answer to the two submissions raised by the revenue lies in the decision of the Full Bench referred supra. That apart the interpretation given by the Income Tax Department to the Assignment Agreement dated 07.12.2017, stating that it should be treated as a sale transaction is not tenable. This is so because, the terms and

conditions of the agreement clearly shows it is an assignment of security interest created in favour of the Indian Bank and by that the Indian Bank had transferred in favour of the petitioner, the loans disbursed under the financing documents together with all its rights, title and interest in the financing documents and any underlying Security Interests, Pledges and/or guarantees in respect of such loans.

6. Therefore the petitioner being the successor would step into the shoes of the financing Bank, which admittedly, is a secured creditor. Further more, the document has been validly stamped for the purpose of stamp duty as assignment deed as could be seen from the endorsement in the reverse of page No.1 of the Assignment agreement dated 07.02.2017. Thus, in the light of the decision of the Full Bench, taking note of the Amendment Act, 2016, the order of attachment made by the Income Tax Department should yield to rights of the petitioner, secured creditor. Therefore, they are required to be set aside."

8. In the light of the above discussions, the impugned notice cannot be enforced against the petitioner/Bank, and it is held to be not sustainable in law. Accordingly, this Writ Petition is allowed, the impugned notice is set aside. No costs. Consequently, connected Writ Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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To

1. The Assistant Commissioner of Income Tax,
Central Circle 2 (3),
No.46, New Building, 1st Floor,
Mahatma Gandhi Road,
Nungambakkam, Chennai - 34.

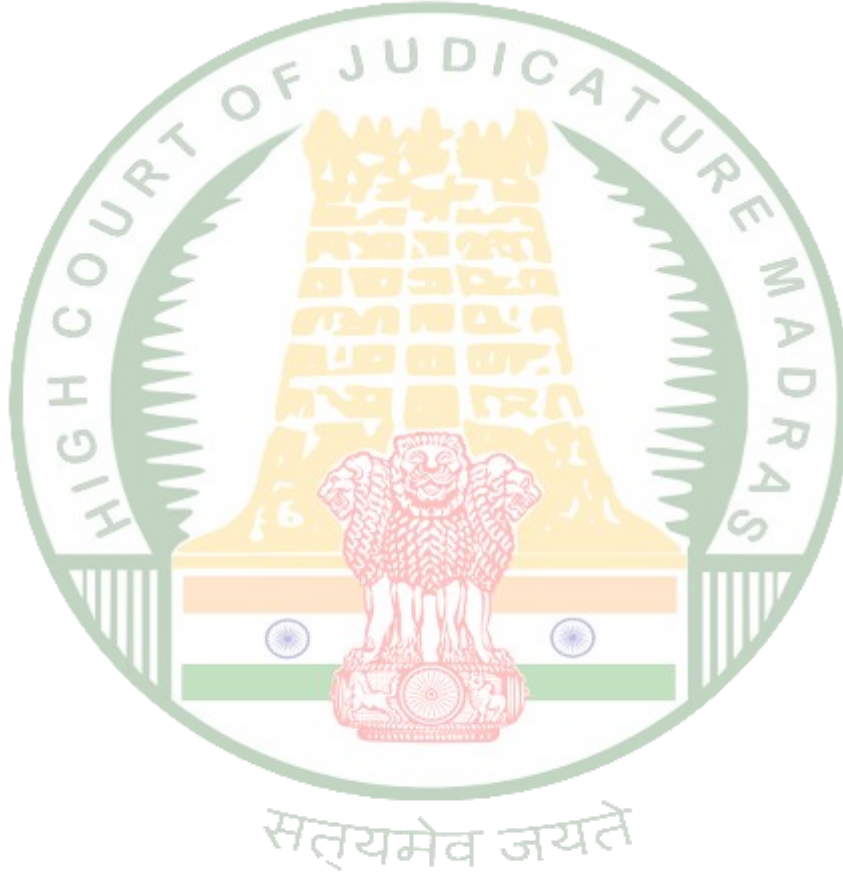
2. M/s. Surana Corporation Ltd.,
30, GNT Road,
Madhavaram, Chennai- 600 110.

+1cc to Mr.A.P.Srinivas, Advocate SR.No.85623

+1cc to Mr.M.L.Ganesh, Advocate SR.No.85263

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GN(18/12/2017)



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