IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :04.07.2017

Coram

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

W.P.Nos. 2711 & 2792 of 2017
and
W.M.P.Nos. 2653, 2654, 2727, 2728 of 2017

Asset Reconstruction Company (India) Limited,
Represented by its Chief Manager - Legal
S. Saravanan,
The Ruby, 10th Floor,
Senapathi Bapat Marg,
Dadar (West), Mumbai - 400028.
...Petitioner in both the WPs

Versus

1. The Commercial Tax Officer,
   Alandur Assesment Circle,
   O/o the Commercial Tax Officer,
   Chennai - 600 016.

2. The Sub Registrar,
   Sub Registration Office,
   Saidapet,
   Chennai. ...1st & 2nd Respondents in both W.Ps.,

3. Maxwell Exim Foods Ltd.
   Represented by its Director,
   G. Balakrishnan,
   Rayala Towers, 780, Anna Salai,
   Chennai - 600 020.
...3rd Respondent in W.P.No.2711/2017

3. M/s Enkay Foods Limited,
   Represented by its Director,
   Srinivasa Raghavan,
   Rayala Towers,
   781, Anna Salai,
   Chennai - 600 002.
...3rd Respondent in W.P.No. 2792 of 2017

Prayer in W.P.No. 2711 of 2017:

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus calling for the records of the first respondent in Form No. 5 in R.C. 2619/2001/A3 dated 07.04.2004 attaching schedule mentioned properties mortgaged to the petitioner situate at Manapakkam Village, Sriperumpudur Taluk, Kancheepuram District to the Sub-Registrar, South Joint I Saidapet, Chennai and quash the same and further direct the second respondent to raise the attachment over the schedule mentioned properties mortgaged to the Petitioner found in Form No. 5 in R.C.2619/2001/A3.

Prayer in W.P.No. 2792 of 2017:

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus calling for the records of the first respondent in R.C. 3617/2001/A3 dated 26.02.2010 attaching the schedule mentioned properties mortagaged to the Petitioner situate at Manapakkam Village, Sriperumpudur Taluk, Kancheepuram District to the Sub-Registrar, South Joint I Saidapet, Chennai and quash the same and further direct the second respondent to raise the attachment over the schedule mentioned properties mortgaged to the Petitioner found in R.C. 3617/2001/A3 dated 26.02.2010.

For Petitioner : Mr. Vijay Narayanan,
Senior Counsel,
assisted by K.M.Aasim Shehgad
for
M/s. BFS Legal Associates

For Respondents : Mr. K. Venkatesh,
Government Advocate

COMMON ORDER

Heard Mr. Vijay Narayanan, Senior Counsel assisted by Mr.K.M.Aasim Shehzad learned counsel appearing for the petitioner and Mr.K.Venkatesh, learned Government Advocate appearing for the respondent.

2.The petitioner is an Asset Reconstruction Company and they have challenged an order passed by the first respondent, the Commercial Tax Officer, Alandur Assessment Circle, dated 26.02.2010, attaching the schedule mentioned property owned by the assessee in default namely, the third respondent. The petitioner has come forward with this writ petition contending that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, by insertion of section 26E and by virtue of such amendment, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over the security interest is created, shall have priority and shall be paid in priority over all other debts and the Government dues including revenue, taxes, cesses and rates due to the Central Government, State Government or local authority.

3. Prior to the amendment, as there was a divergent views, the matter was referred to a Full Bench in W.P.No.6267 of 2006 and W.P.No.253 of 2011, 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.''

4. The Full Bench to which I was also a party, took note of the amendment and answered the reference in favour of the secured creditor and against the Commercial Taxes Department. For better appreciation, the entire order passed by the Full Bench is quoted herein below:-

> 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.

5. Thus, the above legal issue having been decided in favour of the Secured creditor, it has to be necessity held that they would have priority over all other debts and Government dues, including taxes, cesses etc., due to the State Government, Central Government or Local Authority. Therefore the impugned order of attachment is liable to be set aside. However, this will not prejudice the interest of the respondent department from initiating steps for recovery of the arrears of sales tax, additional sales tax, additional surcharge, penalty etc, by resorting to other procedures available to them under the provisions of the Tamil Nadu General Sales Tax Act.

With the above, these Writ Petitions are allowed. Connected W.M.Ps are closed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

mrr/pbn

To

1. The Commercial Tax Officer,
Alandur Assesment Circle,
O/o the Commercial Tax Officer,
Chennai - 600 016.

2. The Sub Registrar,
Sub Registration Office,
Saidapet,
Chennai.

+2cc to m/s.Bfslegal, Advocate Sr. No.46537,46496
+1cc to Special Government Pleader Sr. No.46496

SAI(CO)
GN(25/07/2017)