

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.07.2017

CORAM

THE HON'BLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.Nos.40656 of 2015,34703 of 2016 and
3572 of 2017

and

W.M.P.Nos.1 of 2015, 29890,29891 of 2016 and
3607,3608 of 2017

M/s.Well Stores (Madras)
Private Limited,
Rep by its Director,
Mr.R.James.

..Petitioner in W.P.No.40656/2015

Asset Reconstruction Company
(India) Limited,
Rep by its Chief Manager,
Mr.Harshwardhan Kadam.

..Petitioner in W.P.No.34703/2016

Asset Reconstruction Company
(India) Limited,
Rep by its Chief Manager-Legal
S.Saravanan.

..Petitioner in W.P.No.3572/2017

Vs.

1.The Tax Recovery Officer-IV,
O/o the Principal Commissioner of
Income Tax -4,
Room No.327, Wanaparthi Building,
"Aayakar Bhavan" No.121, Mahatma
Gandhi Road,
Nugambakkam,
Chennai 600 034.

2.The Tax Recovery Officer-VII,
O/o The Additional City Company
Range-IV,
Room.No.327, Wanaparthi Building,
"Aayakar Bhavan" No.121, Mahatma
Gandhi Road,
Nugambakkam,
Chennai 600 034

..Respondents in W.P.No.40656/2015

1.The Tax Recovery Officer-IV,
O/o the Principal Commissioner of
Income Tax,
Room.No.327, Wanaparthi Building,
"Ayyakar Bhavan" No.121 Mahatma
Gandhi Road,
Nungambakkam,
Chennai-600 034.

2.The Tax Recovery Officer-VII,
O/o The Additional City Company
Range-IV,
Room.No.327, Wanaparthi Building,
"Aayakar Bhavan" No.121, Mahatma
Gandhi Road,
Nugambakkam,
Chennai 600 034.

3.The Sub-Registrar,
Sub Registration Office,
Saidapet, Chennai. ..Respondents in W.P.No.34703/2016

1.The Tax Recovery Officer-VII,
O/o The Additional City Company
Range-IV,
Room No.327, Wanaparthi Building,
"Aayakar Bhavan" No.121, Mahatma
Gandhi Road,
Nungambakkam,
Chennai- 600 034.

2.The Sub-Registrar,
Chennai South-Joint-I,
Sub Registration Office,
9, Jeenis Road, Saidapet,
Chennai 600 015.

3.M/s.M.V.R.Exports Private Limited,
Rep by its Management,
24, GST Road,
Guindy, Chennai 600 032. ..Respondents in W.P.No.3572/2017

Prayer in W.P.No.40656 of 2015 : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus, to call for the records in T.R.No.M-64/TRO-4/2015-16 dated 06.11.2015, on the file of the first respondent herein and quash the same and further direct the first respondent to communicate the raising of attachment over the 6 items of immovable properties owned by the petitioner listed as Item Nos.22 to 27 in the Form No.ITCP 16 in T.R.No.M-81/2004-05 dated 21.02.2005, issued by the second respondent, situate at Manapakkam Village, Sriperumpudur Taluk, Kancheepuram District to the Sub-Registrar, South Joint-1, Saidapet, Chennai.

Prayer in W.P.No.34703 of 2016 : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus, to call for the records of the second respondent attaching 27 items of immovable properties mortgaged to the petitioner listed as Item Nos.1 to 27 in the Form No.ITCP 16 in T.R.No.M-81/2004-05 dated 21.02.2005, attaching immovable 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 third respondent to raise the attachment over the immovable properties mortgaged to the petitioner found in Form No.ITCP 16 in T.R.No.M-81/2004-05 dated 21.02.2005.

Prayer in W.P.No.3572 of 2017 : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus, to call for the records of the first respondent in Form No.I.T.C.P 16 in T.R.No.M-63/04-05 dated 21.02.2005 attaching the schedule mentioned properties mortgaged to the petitioner situate at Manapakkam Village, Sriperumpudur Taluk, Kancheepuram District and situated within the registration district of Chennai-South and within the Sub-Registration District of Chennai South Joint I 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.I.T.C.P.16 in T.R.No.M-63/04-05 dated 21.02.2005.

In W.P.No.40656 of 2015,

For Petitioner : Mr.N.Ramakrishnan for
M/s.Waraon And Sairams
For Respondents : Mr.A.P.Srinivas
and Mr.A.N.Jayaprathap

In W.P.No.34703 of 2016,

For Petitioner : Mr.Vijay Narayan, Senior
Counsel for M/s.BFS Legal
For Respondents : Mr.A.P.Srinivas for R1 & R2
Mrs.A.Srijayanthi,
Spl. Govt. Pleader for R3

In W.P.No.3572 of 2017,

For Petitioner : Mr.Vijay Narayan,
Senior Counsel
for M/s.M.Aasim Shehzad
For Respondents : Mr.A.P.Srinivas and

Mr.A.N.Jayaprathap for R1

: Mrs.A.Srijayanthi,
Spl. Govt. Pleader for R2

C O M M O N O R D E R

Heard Mr.N.Ramakrishnan, learned counsel on behalf of M/s.Waraon And Sairams, learned counsel for the petitioner in W.P.No.40656 of 2015; Mr.Vijay Narayan, learned Senior Counsel assisted by M/s.BFS Legal and Mr.M.Aasim Shehzad, learned counsel for the petitioners in W.P.Nos.34703 of 2016 and 3572 of 2017; Mr.P.Srinivas, Mr.A.N.Jayaprathap, learned Standing Counsels and Mrs.A.Srijayanthi, learned Special Government Pleader appearing for the respondents.

2. There are three writ petitions, relating to the orders of attachment passed by the Income Tax Department on the properties, which were initially mortgaged with the Indian Bank by the borrower. In W.P.Nos.34703 of 2016 and 3572 of 2017, the petitioner is Asset Reconstruction Company (India) Limited and they have challenged two orders of attachment of the subject properties and also seeking for a direction to raise the attachment. The short ground, on which the impugned order have been challenged, is by placing reliance on the decision of the Hon'ble Full Bench in the case of Assistant Commissioner (CT), Anna Salai-III Assesment Circle Vs. The Indian Overseas Bank in W.P.No.2675 of 2011 etc. dated 10.11.2016. The issue, which was referred to Hon'ble Full Bench, for decision is as follows:

"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 leads 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."

4. The respondent in their counter affidavit contended that any transfer of property during the pendency of the proceedings under the Income Tax Act or after the completion thereof and before the notice under Rule 2 of Second Schedule as per Section 281 of the Act is void. Therefore, the mortgage of creation of charge in favour of the Bank, during the

pendency of the proceedings, is void and the Income Tax Department has attached the properties, after issuing notice under Rule 2 of the second schedule. One more submission made by the Revenue is by contending that the document executed between the petitioner and the Indian Bank is a sale document and admittedly, purchase made by the petitioner was on 07.12.2007, much after the attachment of the property by the Income Tax Department.

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 valid by 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.

7. In the counter affidavit, the Income Tax Department has made an alternate submission that in any case as far as the petitioner, in whose custody, the subject properties now rest, is concerned, the Income Tax Department has nothing to add except to aver that excess realization from sale of the subject properties over and above the dues to the Indian Bank from the date of pendency of the proceedings against the defaulter or at least from the date of attachment dated 27.02.2004, be surrendered to the Income Tax Department for adjustment against the outstanding dues of the defaulter-company, since the subject properties were also mortgaged, rather pledged as security to the Indian Bank for obtaining various financial facilities by the defaulter-company as well as M/s.Well Stores, the petitioner in W.P.No.40656 of 2016.

8. The learned counsel appearing for the petitioner viz., Asset Reconstruction Company (India) Limited, on instructions, would submit that in case there is any excess realization after adjustment of the dues payable to the petitioner, then

obviously the reminder would be shared among the other creditors in accordance with relevant statutory provisions.

9. Thus, for the above reasons, it is held that the petitioner would have priority over all other debts and Government dues including taxes, cesses, etc., due to the Income Tax Department, Central Government, State Government or Local Authority. Therefore, the impugned orders of attachment are liable to be set aside.

10. In the result, the writ petitions in W.P.No.34703 of 2016 and 3572 of 2017 are allowed and the impugned orders are set aside and the attachment stands raised. In the light of the orders passed in these writ petitions, no further orders are required in W.P.No.40656 of 2015, as the said properties is covered in the list of the properties, which are the subject matter of the other two writ petitions. Hence, W.P.No.40656 of 2015 is dismissed. As this Court has allowed the writ petitions filed by Assets Reconstruction Company India Limited, The Sub-Registrar, Saidapet, Chennai is directed to remove the entries in the encumbrance certificate of the subject properties. No costs. Consequently, the connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsm

To

1.The Tax Recovery Officer-IV,
O/o the Principal Commissioner of
Income Tax,
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3.The Sub-Registrar,
Chennai South-Joint-I,
Sub Registration Office,
9, Jeenis Road, Saidapet,
Chennai 600 015.

+ 1 cc to Mr. BFS Legal, Advocate Sr.50433
+ 1 cc to Mrs. Hema Murlaikrishnan, Advocate Sr.50360
+ 1 cc to Mr. Waraon and Sairams, Advocate SR.50240

W.P.Nos.40656 of 2015,34703 of 2016
and 3572 of 2017

EV(CO)
Eu 11.08.17



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