IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :25.01.2018

CORAM

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

W.P.No.25867 of 2017

Canara Bank
Teppakulam Branch
26 Nandhikoil Street
Teppakulam, Trichy 620 002.
Represented by its Chief Manager & authorized Officer
... Petitioner

Vs.

1.The Recovery Officer,
Office of the Tax Recovery Officer I
Income-Tax Department – Range II
44 Williams Road,
Cantonment, Trichy 620 001.

2.S.Ravi Shankar ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, directing the 1st respondent to lift the order of attachment TR No.966/TRO-1/2015-16 dated 20.11.2015 and attachment TR No.965/2015-16 & 973-2016-17 dated 02.12.2016 pursuant to the representation of the petitioner dated 06.02.2017.

For Petitioner : Mr.P.Raghunathan
for T.S.Gopalan & Co.

For 1st Respondents : Mr.A.N.Jeya Pradhap
Standing Counsel

O R D E R

The petitioner is Canara Bank a Nationalised Bank represented by its Chief Manager and Authorised Officer, Teppakulam Branch, Trichy, and in this writ petition they seek for a direction upon the first respondent, the Recovery Officer, Income-Tax Department-Range-II, Trichy, to lift the order of attachment dated 20.11.2015 and the attachment order dated 02.12.2016.

2. The facts which are necessary for the disposal of the writ petition are as hereunder:

The petitioner had advanced certain credit facilities to M/s.Rathna Stores Private Limited upto an aggregate limit of Rs.21,50,00,000/- which credit was secured by way of a guarantee by the second respondent. The second respondent created a mortgage by deposit of title deeds over his property at No.19, Madley Road, & Door No.8, New No.19, Thukkaram 3rd Street, T. Nagar, Chennai 600 017, in favour of the petitioner bank. The mortgage by deposit of title deeds was recorded by a memorandum and registered as Document No.2015 of 2010 dated 21.09.2010 in the office of the Sub-Registrar, T.Nagar. It is stated that subsequently the credit facility was enhanced to Rs.30,50,00,000/- and further mortgage by way of deposit of title deeds was recorded by way of a memorandum dated 06.01.2014 registered as Document No.27 of 2014.

3. The borrower M/s.Rathna Stores Private Limited defaulted in repayment of the loan and the account of the Company was classified as non-performing on 05.11.2014. On 25.02.2015, the Authorized Officer of the petitioner bank issued a demand notice to the Company and two others including the second respondent/guarantor calling upon them to pay a total amount of Rs.28,96,34,614.30/- due as on 25.02.2015 together with interest within a period of ninety days. The Company as well as the second respondent were informed that if they committed default in payment, the property which has been mortgaged would be brought for sale in accordance with the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act). The borrower as well as the second respondent guarantor defaulted to comply with the notice and therefore, the Authorized Officer of the petitioner's bank took symbolic possession of the property and also caused publication of the possession notice in English and Tamil News Papers having wide circulation in the area. Even thereafter, the borrower nor the guarantor complied with the directions and did not effect any payment. The property was brought for sale on various dates, but, there were no bidders and the petitioner bank came to know that there were no bidders because M/s. Pothys Private Limited were in possession of the property and they secured an interim order in W.P.No.15785 of 2016. According to the said order, the bank was directed to hand over physical possession of the property to the said Company and further directed the Company to redeliver physical possession to the bank upon sale of the property. Subsequently it appears that the petitioner bank came to know that there were attachments made by the Income Tax Department over the said property. On verification, it was found that by order dated 20.11.2015, the first respondent attached the property and also registered the same on the file of the Sub-Registrar, T.Nagar, as document No.42 of 2015. Similarly on

02.12.2016, the first respondent attached the property and attachment was registered as document No.18 of 2016. The petitioner would submit that they being secured creditors and the mortgage having been created in their favour by registered instrument was of the year 2014 and the attachment of the Income Tax Department all being subsequent to their mortgage, they have the first charge of the property and they are entitled to bring the property for sale. With these facts, the petitioners prays for the aforementioned relief.

4. The revenue on the other hand would contend that the notice under Section 148 of the Income Tax Act was issued before the date of mortgage and during the pendency of the assessment proceedings, the lending bank could have taken possession only after the approval from the Income Tax Department as per proviso 2 of Section 281 (1) of the Income-Tax Act. Therefore the first respondent would term the mortgage as illegitimate and the action of the first respondent to proceed to collect the statutory dues through attachment and sale of the property is in order.

5. On the above facts, two questions arise for consideration, namely, (i) whether the petitioner who is a secured creditor would have priority over the dues payable to the Income Tax Department and (ii) whether on account of the notice issued under Section 148 of the Income-Tax Act, whether the mortgage created in favour of the petitioner's Bank could have been done only after obtaining approval from the Income Tax Department in terms of Section 281 (1) of Income Tax Act.

6. So far as the first question is concerned, the issue is no longer res integra and has been considered by the full bench of this court in WP.Nos.6267 of 2006 and 253 of 2011 dated 10.11.2016. Before the full bench, the question which arose for consideration was whether the financial institution, which is a secured creditor or the Department of the Government concerned, would have priority of charge over the mortgaged property in question with regard to the tax and other dues and as to the status and rights of a third party purchaser of the mortgaged property in question.

7. The questions were answered by the full bench in the following manner:-

> "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 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 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 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."

8. Thus, question No.(i) was answered in favour of the financial institution which is a secured creditor having the benefit of the mortgaged property. Accordingly the question framed above has to be answered in favour of the petitioner Bank and against the 1st respondent and accordingly it is held that the petitioner Bank is entitled to priority of charge over the mortgaged property in question.

9. With regard to the question No.(ii) regarding the applicability of Section 281 (1) of the Income Tax Act admittedly the counter affidavit does not state that notice was given by the Income Tax Department to the 1st respondent relating to pendency of income tax proceedings or liability of any tax payable by the 2nd respondent to the Income Tax Department. In such circumstances, would the proviso to Sub-section (1) of Section 281 (1) of the Income Tax Act stand attracted. This question was considered by the Division Bench of the High Court of Gujarat in the case of Tax Recovery Officer Vs. Industrial Finance Corporation of India reported in (2012) 346 ITR Page 11. The question involved in the said writ petition was whether, in view of sub-section (2) of Section (1) Section 281 (1) of the Income-Tax Act, the charge created against the property in question by mortgaging the property by the borrower in favour of the financial institution during pendency of any proceedings under the Income Tax Act is void as against any claim in respect of the tax and other sum payable by the assessee in favour of

the revenue. This question was answered in the following terms:-

> " 25.The petitioner-revenue, the Tax Recovery Officer, has not disputed the fact that no notice of pendency of any income-tax proceeding was served on the 1st respondent-financial institution on or before the equitable mortgage made by the 2nd respondent-borrower Company in favour of the 1st respondent-financial institution. It is not the case of the petitioner-revenue that no adequate consideration was made before creating the charge by equitable mortgage by the 2nd respondent in favour of the 1st respondent-financial institution.
>
> 26....It was contended on behalf of the petitioner-revenue that the 1st respondent-financial institution before allowing the loan in favour of the 2nd respondent-borrower Company must have noticed the Annual Reports of the Company to find out the liability of repayment and thereby it is to be accepted that they have knowledge of liability of payment of tax dues by the 2nd respondent in favourt of the petitioner-revenue. However, such submission cannot be accepted as a fact cannot be presumed that the 1st respondent had the knowledge of income-tax liability of the 2nd respondent-borrower Company and/or pendency of any income-tax proceeding against the 2nd respondent-borrower Company, particularly while executing the agreement, the Director on behalf of the 2nd respondent had specifically mentioned in the agreement that there was no income-tax dues and no such proceeding was pending. As the fact cannot be presumed, the aforesaid submission made on behalf of the petitioner-revenue cannot be accepted.
>
> 27. Under the proviso to sub-section (1) of Section 281, the charge or transfer shall not be void if made-(i) for adequate consideration and without notice of the pendency of such proceedings, or (ii) without notice of tax or other sum payable by the assessee. Thereis nothing on record to

suggest that any notice was given by the revenue to the 1st respondent relating to pendency of such income-tax proceeding or liability of any tax payable by the 2nd respondent assessee in favour of the petitioner –revenue cannot take the plea that the 1st respondent had knowledge of the pendency of the proceeding and thereby it is open to the 1st respondent to derive advantage of clause (i) of the proviso to sub-section (1) of Section 281 of the Income-tax Act, 1961, so far as it relates to charge created by the 2nd respondent in favour of the 1st respondent-financial institution equitable mortgage of the immovable property in question, as against any claim in respect of any tax or any other sum payable by the assessee as a result of completion of any proceeding or otherwise by the petitioner-revenue."

10. The Division Bench of the High Court of Gujarat also referred to two other decisions of the High Court of Madhya Pradesh arising under the General Sales Tax Act of Madhya Pradesh in the case of State of Madhyapradesh Vs. Abhaykumar, reported in (1992) 86 STC 88 and Pooranchand Ved Prakash Vs. The State of Maddhyapradesh, reported in (1973) 31 STC 170, wherein, it was held that transfer of property which was for a valuable consideration and which was without notice of the pendency of the proceedings under the Sales-tax Act and therefore, the transfer falls under the exception created by the proviso to Section 33-A of the Madhyapradesh General Sales Tax Act, 1958. Thus, by applying the law laid down in the above mentioned documents question No.(ii) has to be answered in favour of the petitioner bank and against the respondents.

11. Thus for all the above reasons, the Writ Petition is allowed and the attachment shall stand lifted and the 1st respondent shall intimate the Sub-Registrar, T. Nagar to delete the entries in the books maintained by him within a period of three weeks from the date of receipt of a copy of this order. No costs.

Sd/-

Assistant Registrar(CS III)

//True copy//

Sub Assistant Registrar

sji/cse

To

The Recovery Officer,
Office of the Tax Recovery Officer I
Income-Tax Department - Range II
44 Williams Road,
Cantonment, Trichy 620 001.

+1cc to Mr.A.P.Srinivas, Advocate SR.No.6392
+1cc to Mr.T.S.Gopalan @ Co, Advocate SR.No.6041

W.P.No.25867 of 2017

GP(CO)
GN(21/02/2018)