IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.Nos.22055 & 22056 of 2012

and M.P.Nos.2 and 2 of 2012

T.K.Purushothaman ... Petitioner in both W.Ps.

vs.

1. Oriental Bank of Commerce
Kotturpuram Banch, No.1, I Main Road,
Chennai, rep. by its Chief Manager.

2. K.Ramesh
Proprietor-M/s.Rammag Foundations.

3. The Recovery Officer,
Chennai Debts Recovery Tribunal No.2,
4th Floor, Spencer Towers,
770-A, Anna Salai,
Chennai - 600 002.

4. The Registrar,
Chennai Debts Recovery Tribunal No.2,
4th Floor, Spencer Towers,
770-A, Anna Salai,
Chennai - 600 002. ... Respondents in both W.Ps.

Prayer in W.P.No.22055 of 2012: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, to call for the records pertaining to the proclamation of Sale issued by the 3rd respondent dt 3.7.2012 in DRC.No.21/2011 in O.a.No.23/2009, quash the same.



Prayer in W.P.No.22056 of 2012: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorarified mandamus, to call for the records pertaining to the order dt.23.7.2012 passed in Memo Sr.No.3764 in O.A.No.23/2009 on the file of the 4th respondent, quash the same and consequently, direct the 4th respondent to grant permission to the petitioner for perusal of the records in O.A.No.23/2009 and DRC No.21/2011 vide Memo Sr.No.3764.

For Petitioner in both W.Ps. : Mr.R.Nagasundaram

Respondent in both W.Ps. : Mr.M.A.Abdul Wahab-R1

COMMON ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Contending that his property Flat No.F-7, at Old No.8, New No.14, Vivekananda Street, Zamin Pallavaram, Radha Nagar, Chromepet, Chennai - 600 004, has been attached in DRC No.21 of 2011 and that affixture was made, Mr.T.K.Purushothaman, as third party, has filed an application under Rule 17 of the Debts Recovery Tribunal (Procedure) Rules, 1993, in O.A.No.23 of 2009 on the file of Debts Recovery Tribunal-II, Chennai. Registry of the tribunal has raised doubts over the maintainability of the said application.

2. Proclamation of sale deed has been issued by the Recovery Officer, Debts Recovery Tribunal-II, Chennai. Petitioner has filed W.P.No.22055 of 2012 for a writ of certiorari, to quash the proclamation of sale issued by the Recovery Officer, Debts Recovery Tribunal-II, Chennai in DRC No.21 of 2011 in O.A.No.23 of 2009, on the file of the said tribunal.

3. Subsequently, after considering the affidavit, filed in Sr.No.3765 dated 01.06.2012, along with the application Sr.No.3764, the Debts Recovery Tribunal-II, Chennai, has passed an order on 23.07.2012, stating that the description of the properties vary, and if at all the property of the petitioner had been attached by the Recovery Officer, the remedy available to the petitioner is to prefer a claim, under Rule 11 of II Schedule to Income Tax Act, 1961, before the Recovery Officer, who had attached the schedule property, and brought the same to sale, for execution of the order in DRC No.21 of 2011, stated supra. Proceedings of the Debts Recovery Tribunal-II, dated 23.07.2012, rejecting the application filed for perusal of records in O.A.No.23 of 2009, is challenged in W.P.No.22056 of 2012. Sale Proclamation dated 03.07.2012, has been challenged in W.P.No.22055 of 2012.

4. As averments and submissions in both the writ petitions are similar, they are taken up together, and disposed of by a common order.

5. Record of proceedings of this Court shows that on 14.08.2012, while ordering notice of motion, returnable by two weeks, in respect of Item No.3 of the proclamation of sale dated 03.07.2012 in DRC No.21 of 2011 in O.A.No.23 of 2009, the Recovery Officer has been permitted to receive bids, but shall not open, without specific orders from this Court.

6. When the matter came up on the earlier occasion, we directed Mr.MA.Abdul Wahab, learned counsel for Oriental Bank of Commerce, Kotturpuram Branch, Chennai to ascertain as to whether there was any bid for the items notified. Reverting, learned counsel for the bank submitted that auction did not take place as scheduled, including Item No.3 of Proclamation of sale dated 03.07.2012.

7. Placing on record the above submission, Proceedings dated 23.07.2012, impugned in W.P.No.22056 of 2012, is reproduced.

> "1. The affidavit vide Sr.No.3795 dated 01.03.2012 along with application vide Sr.No.3764 has been filed by one Mr.T.K.Purushothaman S/o. Mr.T.K.Krishnamurthy, who is a 3rd party to the proceedings in OA 23/2009 praying to permit him to carry out perusal of records in OA 23/2009.
>
> 2. After scrutiny of the affidavit filed by Mr.T.K.Purushothaman and the application for perusal of records, Registry of this Tribunal raised queries stating that the applicant has not filed any proof to prove that he is the absolute owner of the property in respect of which he is claiming right, title and possession. As the reply given by the Ld.Counsel for the 3rd party was not satisfactory, the matter was placed before the Tribunal.
>
> 3. Heard the Ld. Counsel for applicant / 3rd party and perused the affidavit filed by Mr.T.K.Purushothaman and the application for perusal of records. The applicant / 3rd part ha snot given the details of the property in respect of which he is claiming right, title and possession in his affidavit. Therefore, the Ld. Counsel was directed by the Tribunal to file documentary evidence to prove prima facie that the applicant / 3rd party is the absolute owner of the property in respect of which he claims right, title and interest. Accordingly, the Ld. Counsel filed:
>
> (i) The Sale Deed dated 01.12.2006 registered as Document No.6443/2006 at Sub-Registrar Office, Pallavaram executed by Mr.S.Ganesan S/o.Mr.Subramaniam represented by his Power of Attorney Mr.K.Magesh S/o. late A.Krishnan in favour of Mr.T.K.Purushothaman, the applicant herein.

(ii) Land sale Agreement dated 01.12.2006 and
(iii) The Construction Agreement dated 01.12.2006.

4. I have also perused the relevant documents pertaining to the property attached by the Ld. Recovery Officer in execution of the Recovery Certificate. The Ld. Counsel submitted that the Ld. Recovery Officer has attached the property belonging to the applicant herein in DRC No.21/2011 in OA 23/2009 and therefore prayed for perusal of records in OA 23/2009.

5. In the light of the submissions made by the Ld. Counsel for the applicant 3rd party, I carefully perused the description of the property attached by the Ld. Recovery Officer and the description of the property in the Sale Deed in favour of the applicant herein / 3rd party. The description of the property which has been attached by the Ld. Recovery Officer is as under:

"Schedule of Property-1

(Property in the name of K.Ramessh vide Sale deed dt. 3.1.2006 registered as document No.21 on the file of SRO, Pallavaram and Construction Agreement dt. 17.11.2005)

A Flat bearing Door No.7 in the first floor measuring about 750 sq.ft. along with 260 sq.ft., undivided share in all that land bearing Old Door No.8, New Door No.14, Vivekanandar Street, in Zamin Pallavaram Village, Cromepet, Chennai 600 044 comprised in Old Survey No.242/1, New Survey No.242/12 and as per Patta in Survey No.242/12 (patta No.1084 of about 16 Cents (Measuring 6976 sq.ft.) or thereabouts and bounded on the north by Vivekanandar Street, east by New Door No.2; south by Palaniandavar Street; and west by New Door NO.2 and situated within the registration district of South Chennai and sub-registration of Pallavaram."

6. The description of the property purchased by the applicant herein/3rd party as per the sale deed dated 01.12.2006 is as under:

Schedule of Property

"A" Schedule

All that piece and parcel of vacant land bearing Old Door No.8, New Door NO.14, Vivekanandar Street, Chrompet, Chennai 600 044, Radha Nagar, Situated in Zamin Pallavaram Village, comprised in Old Survey No.242/1, and New Survey No.242/12 and as per patta Survey No.242/12 (patta No.1084) of about 16 cents (measuring 6976 sq.ft) or thereabout bounded on the

North by: Vivekanandar Street,
East by : Plot No.29
South by : Plot No.19
West by : Palaniandavar Street,
And situated within the Registration District of South Chennai and Sub Registration District of Pallavaram.

"B" Schedule
(hereby conveyed)
254 Sq.ft. Undivided share out of the "A" Schedule vacant land."

7. On the face of it, the property claimed by the applicant herein/ 3rd party appears to be entirely different from the property attached by the Ld. Recovery Officer, i.e., the property described as Flat bearing Door NO.7 in the First Floor. As per the Construction Agreement filed by the applicant / 3rd party, the Flat number is shown as Flat No.7, first Floor. A perusal of the Sale deed pertaining to the property attached by the Ld. Recovery Officer shows that the extent of undivided share sold to the purchaser therein is 260 sq.ft.whereas the extent of undivided share purchased by the applicant herein / 3rd party is 254 sq.ft. Similarly, the are of the flat asper the Order of Attachment is about 750 sq.ft. whereas the area of the flat claimed by the applicant/3rd party as per the Construction Agreement dt. 1.12.2006 filed by the 3rd party is 634 sq.ft. The Market value of undivided share of schedule property, which is attached by the Ld. Recovery Officer, is shown as Rs.1,14,400/- whereas the value of 254 sq.ft. of undivided share purchased by the applicant/3rd party is shown as Rs.1,44,780/- in the Sale Deed.

8. Further, the boundary of the property scheduled to the Order of Attachment is entirely different from the property purchased by the applicant herein / 3rd party. In such circumstances, this Tribunal is of the opinion that the applicant / 3rd party has not made out a prima facie case to prove that the property in respect of which he claims right, title and interest is the same property which is described in the schedule to the Order of Attachment and mortgaged to the applicant bank. Thus, the applicant / 3rd party has nothing to do with the proceedings in OA 23/2009 and therefore, he is not entitled to the perusal of records in OA 23/2009.

9. The applicant herein claims right, title and interest over the property described in the Sale Deed filed by him. As already pointed out, he has also filed the Sale Agreement dated 01.12.2006 and Construction Agreement dated 01.12.2006 to prove that he purchased the property described in the schedule thereunder

pursuant to the Land Sale Agreement dated 01.12.2006 and constructed the flat after entering into construction agreement dated 01.12.2006. If at all the applicant/3rd party claims the property described in the sale deed filed by him has been attached by the Ld. Recovery Officer, the remedy available to the applicant is to prefer a claim under rule 11 of II-Schedule to the income-tax Act before the Recovery Officer who has attached the schedule property and brought the same to sale in execution of DRC NO.21/2011.

10. In the light of the foregoing discussion, the request of the applicant/3rd party to peruse the records in OA 23/2009 is rejected."

8. Though, Mr.R.Nagasundaram, learned counsel for the petitioner, assailed the correctness of the proceedings dated 23.07.2012, on the grounds inter alia that the rejection by the tribunal, to peruse the records, is contrary to Rules 17 and 23 (vii) of the Debts Recovery Tribunal (Procedure) Rules, 1993, and prayed for, perusal of records, this Court is not inclined to accede to the said request, for the reason that the Debts Recovery Tribunal, upon consideration of the documents and comparison of the description of the properties attached by the Recovery Officer, and sale deed executed, in favour of the writ petitioner/ 3rd party, had arrived at a categorical conclusion, as follows:

"8. Further, the boundary of the property scheduled to the Order of Attachment is entirely different from the property purchased by the applicant herein / 3rd party. In such circumstances, this Tribunal is of the opinion that the applicant / 3rd party has not made out a prima facie case to prove that the property in respect of which he claims right, title and interest is the same property which is described in the schedule to the Order of Attachment and mortgaged to the applicant bank. Thus, the applicant / 3rd party has nothing to do with the proceedings in OA 23/2009 and therefore, he is not entitled to the perusal of records in OA 23/2009."

9. Thus, observing that the property attached by the Recovery Officer was different, the tribunal has held that the remedy available to the petitioner is to prefer a claim under Rule 11 of II Schedule to Income Tax Act, 1961, before the Recovery Officer. Whatever be the details, the petitioner wanted to peruse O.A.No.23/2009 and DRC No.21/2011 vide Memo Sr.No.3764, with reference to the description of the property, has been done by the tribunal.

10. Rule 11 of II Schedule to Income Tax Act, 1961, is extracted hereunder.

Investigation by Tax Recovery Officer.

11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that—

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not

on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

11. Going through the impugned proceedings, and the material on record, we are of the view that as rightly observed by the tribunal, if at all the petitioner is aggrieved by the order of attachment, the appropriate remedy available to the petitioner is to challenge the order of attachment by preferring a claim under Rule 11 of II Schedule to Income Tax Act, 1961.

12. Sale proclamation dated 03.07.2012, did not fructify as there were no bidders. Therefore, the impugned sale proclamation has lapsed.

13. In the light of the above discussion, we are of the view that there is no manifest illegality in the proceedings dated 23.07.2012. While sustaining the same, W.P.No.22055 of 2012 is disposed of granting liberty to the petitioner, to prefer a claim under Rule 11 of II Schedule to Income Tax Act, 1961, before the Recovery Officer, if he so desires.

14. Mr.R.Nagasundaram, learned counsel for the petitioner submitted that a claim under Rule 11 of II Schedule to Income Tax Act, 1961, would be filed before the Recovery Officer, within a period of two weeks from the date of receipt of a copy of this order. Submission is placed on record.

15. If any such application / claim is filed under Rule 11 of II Schedule to Income Tax Act, 1961, before the Recovery Officer, time spent in this writ petition be excluded.

16. Further, for the reasons stated supra, W.P.No.22056 of 2012, is dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Deputy Registrar

/true copy/

Sub Asst. Registrar

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To

1. The Chief Manager,
Oriental Bank of Commerce
Kotturpuram Banch
No.1, I Main Road,
Chennai.

2. The Recovery Officer,
Chennai Debts Recovery Tribunal No.2,
4th Floor, Spencer Towers,
770-A, Anna Salai,
Chennai - 600 002.

3. The Registrar,
Chennai Debts Recovery Tribunal No.2,
4th Floor, Spencer Towers,
770-A, Anna Salai,
Chennai - 600 002.

+ 1 cc to Mr.R.Nagasundaram Advocate,SR.10114

+ 1 cc to M/s.K.V.Subramanian, Advocate,SR.11268

W.P.Nos.22055 & 22056 of 2012
and M.P.Nos.2 and 2 of 2012

nr 27/02/2018