IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 5/3/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE T.RAVINDRAN

Writ Petition Nos.469 of 2006 and 253 of 2011

W.P.No.469 of 2006

Indian Overseas Bank
rep. By its Senior Manager
Constituted Attorney
Perungulathur Branch
Chennai 600 063. ... Petitioner

Vs

1. The Commercial Tax Officer
Chengelpet Assessment Circle
Chengelpet.

2. The Commissioner
Commercial Tax Department
Ezhilagam
Chepauk
Chennai 5.

3. A.N.Padmaraj ... Respondents

Petitioner in W.P.No.469 of 2006:- Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of mandamus to forbear the first respondent herein from proceeding further under the proposed auction sale notice issued vide Na.Ka.No.95302/2005 Aa/26.9.05, published in Kancheepuram District Gazette dated 1/11/2005 for the sale of the factory land and building belonging to the third respondent measuring 43 cents situated in Sy.N2/1A1 (21A2 & 2/1A1A1) in Perumattunallur Village, Chengalpet District.

W.P.No.253 of 2011

K. Mahendran ... Petitioner

Vs

1. The Commercial Tax Officer
Aroor
Dharmapuri District.

2. The Tamil Nadu Industrial Investment
Corporation Ltd
MHU Complex
692 Anna Salai
Nandanam
Chennai 600 035. ... Respondents

Petitioner in W.P.No.253 of 2011:- Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorari to call for the records of the first respondent in his proceedings in N.K.2062/97/A3 and quash the recovery notice dated 1/11/2010 issued therein as illegal and without authority of law in view of the law laid down by two Division Bench judgments of this Hon'ble Court reported in 25 VST 175 and 25 VST 187.

For Petitioners ... Mr.A.P.Srinivas

For respondents ... Mr.V.Hari Babu
Additional Government Pleader
(Taxes)
for R.R.1 and 2 in
W.P.No.469 of 2006
and for R.1 in W.P.No.253 of 2011

Mr.KV.Sundarrajan
for R.2. In W.P.No.253/2011

C O M M O N O R D E R

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

In W.P.No.469 of 2006, Indian Overseas Bank, Perungalathur Branch, Chennai, has sought for a writ of mandamus, forbearing the first respondent, from proceeding further under the auction sale notice issued, vide Na.Ka.No.95302/2005 Aa/26.9.05, published in Kancheepuram District Gazette, dated 1/11/2005, for the sale of factory land and building, belonging to the third respondent, measuring 43 cents, situated in Sy.N2/1A1 (21A2 & 2/1A1A1), in Perumattunallur Village, Chengalpet District.

2. Writ Petition No.253 of 2011 has been filed, to quash the recovery notice, dated 1/11/2010, in view of the law laid down by two Division Bench judgments of this Hon'ble Court, reported in 25 VST 175 and 25 VST 187.

3. Contention in both the writ petitions is that sales tax Department has no jurisdiction, to issue recovery notice or bring the property for sale.

4. Having regard to the divergent views expressed by two Hon'ble Benches, as to whether crown debt or debt due to the secured creditor, has first charge over the property, already mortgaged with the Bank, reference has been made to the Hon'ble Full Bench, in respect of the following issues:-

> "i. 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.
>
> (ii). As to the status and the rights of a third party purchaser of the mortgaged property in question."

5. After hearing the parties, the Hon'ble Full Bench in W.P.No.2675 of 2008, etc., batch, dated 10/11/2016, held as follows:-

> 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.”

6. In the light of the above Full Bench decision, Sales Tax Department has no authority to proceed against the properties, already mortgaged with the Bank, for realisation of arrears of tax. Consequently, recovery notice/public sale notice challenged in the writ petitions deserve to be set aside.

7. However, Mr.V.Hari Babu, learned Additional Government Pleader (Taxes) submitted that as against the Hon'ble Full Bench decision, State has filed SLP and it is in Diary stage.

8. As on today, there is no stay of the judgment of the Hon'ble Full Bench and that the same is binding on us. Following the Full Bench decision, both the notices dated 1/11/2010 (in W.P.No.253 of 2011and publication of sale notice, dated 1/11/2005 (in W.P.No.469 of 2006) are set aside. Writ Petitions are allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

mvs.
To
1. The Commercial Tax Officer
Chengelpet Assessment Circle
Chengelpet.
2. The Commissioner
Commercial Tax Department
Ezhilagam
Chepauk
Chennai 5.
3. The Commercial Tax Officer
Aroor
Dharmapuri District.
4. The Tamil Nadu Industrial Investment Corporation Ltd
MHU Complex
692 Anna Salai
Nandanam
Chennai 600 035.
+2cc to Special Government Pleader, (Taxes0,sr.17484,17485

Writ Petition Nos.
469 of 2006 and 253 of 2011

NRI(CO)
RMP(26/03/2018)