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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **01.10.2018**

CORAM:

THE HONOURABLE MR. JUSTICE **T.RAJA**

and

THE HONOURABLE MR. JUSTICE **KRISHNAN RAMASAMY**

W.P.(MD) No.12176 of 2018

Manimuth Humanitarian Service Trust,
Rep. by its Managing Trustee C.M.Harirajan,
51/59, Siva Guru Street,
Palani. ... Petitioner

Vs.

1.The Inspector General of Registration,
Santhome,
Chennai.

2.The Superintendent of Central Excise,
Pollachi.

3.The Sub Registrar,
Kinathukadavu,
Coimbatore District.

4.The Chief Manager & Authorised Officer,
Canara Bank,
Assets Recovery Management Branch,
166, TV Samy Road West,
R.S.Puram, Coimbatore. ... Respondents

PRAYER: The writ petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, to direct the third respondent to remove the charge created in respect of Survey No.80/2, Nallatipalayam Village, Kinathukadavu Taluk, in favour of the second respondent by document No.27/2014, dated 29.12.2014, as per the dictum laid in UTI Bank-Vs-Deputy Commissioner of Central Excise, 2007 (1) LW 500 (FB).

For Petitioner : Mr.K.P.S.Palanivelrajan
For Respondents 1 and 3 : Mr.C.Ramar
Additional Government Pleader

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For Respondent 2 : Mr.R.Aravindan
For Respondent 4 : Mr.Pala Ramasamy

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ORDER

(Order of the Court was made by T.RAJA, J.)

This Writ Petition is filed by M/s.Manimuth Humanitarian Service Trust represented by its Managing Trustee C.M.Harirajan seeking Writ of Mandamus directing the Sub Registrar, Kinathukadavu, Coimbatore District, to remove the charge created in respect of Survey No.80/2, Nallatipalayam Village, Kinathukadavu Taluk, in favour of the second respondent by document No.27/2014, dated 29.12.2014, as per the dictum laid in UTI Bank vs. Deputy Commissioner of Central Excise reported in 2007 (1) LW 500 (FB).

2.The learned Counsel appearing for the petitioner would plead that M/s.BAPL Industries Ltd., have acquired property from one Smt.Gita Buradia, Smt.Asha Buradia and Smt.Nirmala Buradia, situated within the jurisdiction of the registration District of Tirupur and Sub Registration District of Kinathukadavu in Pollachi Taluk in the village of Nallatipalayam in Patta No.39, bearing S.F.No.80/2 having an extent of 7 acres 41 cents along with building thereon and registered as Document No.1154/1997. As M/s.BAPL Industries Ltd. have borrowed loan from the Canara Bank, fourth respondent herein, by mortgaging the said properties situated in S.F.No.80/2 at Nallatipalayam Village measuring to an extent of 7 acres 41 cents in favour of the Canara Bank, the fourth respondent herein, due to default committed by the borrower, the said account was classified as Non-Performing Asset by the fourth respondent. Finally, the Canara Bank, the fourth respondent herein, has filed O.A.No.92 of 2005 on the file of the learned Debt Recovery Tribunal, Coimbatore wherein an award was also passed on 16.05.2008 and that became final, since no appeal was preferred as against the order passed by the Debts Recovery Tribunal, Coimbatore. Thereafter, the said property was also attached on 22.07.2008. Subsequently, the same has also been registered with the third respondent.

3.The learned Counsel appearing for the petitioner would submit that during the pendency of the proceedings before the Debts Recovery Tribunal, Coimbatore, the Superintendent of Central Excise, the second respondent herein, also created a charge over the same property and the entry in the book of Sub Registrar, Kinathukadavu, the third respondent has been made for a sum of Rs.3,08,62,435/- on 29.12.2014 vide document No.27/2014. Since the said charge was created after six years and five months from the date of award passed by the Debts Recovery Tribunal, Coimbatore, i.e., on 16.05.2008, the rights of the secured creditor to realise the security debts due and payable by sale of assets over which security interest is created, shall have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority, as per the ratio laid down by the Full Bench of this Court reported in ***2007(1) LW 500 (UTI Bank vs. Commercial Tax)***. The learned Counsel for the petitioner would further submit that when the petitioner has purchased the property in a public

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auction on 02.05.2017 brought by the Canara Bank, the fourth respondent herein, for realising the loan amount against the borrower, who has committed default and subsequently, their account was classified as Non-Performing Asset, the further charge created by the Superintendent of Central Excise, Pollachi, on 29.12.2014 is without any jurisdiction. Referring to Section 31-B of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, the learned Counsel for the petitioner would further contend that Section 31-B of the Act clearly makes the issue raised between the petitioner and the second respondent clear that the rights of the secured creditors to realise secured debts due and payable to them by sale of assets over which the 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. This legal position also has been further clarified by a Full Bench of our High Court in the order dated 10.11.2016 passed in W.P.Nos.2675, 253 and 9750 of 2011 and batch (Assistant Commissioner (CT), Anna Salai-III Assessment Circle v. Indian Overseas Bank, rep. by its Manager, Recovery Administrative Branch, and another) while answering to the question with regard to the status and right of the third party purchaser of the mortgaged property in question. Therefore, when Section 31-B of the Act is answered to the doubt raised by the second respondent, Superintendent of Central Excise, Pollachi, the Writ Petition deserves to be allowed as prayed for by directing the Sub Registrar, Kinathukadavu, Coimbatore District, to remove the charge created in respect of S.F.No.80/2 situated at Nallatipalayam Village, Kinathukadavu Taluk, that stand in the name of the Superintendent of Central Excise, Pollachi. Concluding his arguments the learned Counsel for the petitioner would also refer to the judgment of the Apex Court in the case of ***Rana Girders Limited v. Union of India and others*** reported in ***(2013) 10 SCC 746*** to say that even if the second respondent is right in justifying the charge created on the property purchased by the petitioner in a public auction on 02.05.2017, after attachment made by the fourth respondent on 22.07.2008 which is about six years and five months prior to the charge created by the second respondent on 29.12.2014, the excise duties are being not statutory liabilities which do not arise out of land and building or the plant and machinery, the Central Excise Department can enforce their right only with regard to the finished products but not on the plant and machinery.

4.Opposing the above, a detailed counter affidavit was filed by the Superintendent of Central Excise, the second respondent herein.

5.The learned Counsel appearing for the second respondent would submit that once a charge is created in terms of the Central Act and also in terms of Section 142 of the Customs Act, that charge will always travel along with the property the reason being once the charge created in favour of the Central Excise Department on account of the tax due and payable by the original assessee that will always travel

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along with the property in terms of Section 100 of Transfer of Property Act and the same will be in force until the purchaser of the property clear the tax arrears. This Court while deciding the priority of charge between a secured creditor and the Government Department concerned, it is held that the right of a secured creditor will have priority over the Government Department. In this context, it is relevant to refer to Section 31B of the Act, which is given 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."

6.The Full Bench of our High Court while framing the following two questions, has also answered the question (b) against the second respondent which are given as under:

> "a) As to whether the Finan*cial 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."*
>
> 5.The afore said would, thus answered (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.
>
> 6.Insofar 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.Moreover, a cursory reading of Section 31B makes it clear that the controversy raised by the second respondent in the counter affidavit filed. That shows that notwithstanding anything contained in any other law for the time being in force, the rights of secured

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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. In the present case, as we highlighted above, the petitioner being a *bona fide* purchaser has purchased the property brought by the bank in public auction held on 02.05.2017. Moreover, the crucial aspect to be borne by us is the date of attachment of the property in question by the bank on 22.07.2008. When the property in question was already attached by the fourth respondent bank after classifying the account of the original borrower as Non-Performing Asset and subsequently the property was also attached on 22.07.2008, almost six years ago, the property in question has disappeared from the scope of attachment to be made by the second respondent, the reason being that the charge was created only on 22.12.2014. It may be further noted herein that the fourth respondent bank has not sold the property without subjecting the property in public auction.

8.In view of the above, the Writ Petition stands allowed. The Sub Registrar, Kinathukadavu, Coimbatore District, third respondent herein, is directed to remove all the entries made in respect of Survey No.80/2, Nallatipalayam Village, Kinathukadavu Taluk, in favour of the second respondent by document No.27/2014, dated 29.12.2014. No costs.

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ASSISTANT REGISTRAR (CS I)

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SUB ASSISTANT REGISTRAR (CS I)

SRM

To

1.The Inspector General of Registration,
Santhome, Chennai.
2.The Superintendent of Central Excise, Pollachi.
3.The Sub Registrar,
Kinathukadavu, Coimbatore District.
4.The Chief Manager & Authorised Officer,
Canara Bank, Assets Recovery Management Branch,
166, TV Samy Road West, R.S.Puram, Coimbatore.

1CC TO MR. K.P.S.PALANIVELRAJAN, ADVOCATE SR 87943
1CC TO MR. R. ARAVINDAN, ADVOCATE SR 88626
1CC TO MR. PALA. RAMASAMY, ADVOCATE SR 88134

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