BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA

AND

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.P(MD)No.18045 of 2018

and

W.M.P(MD)No.15931 of 2018

Tamilnad Mercantile Bank Ltd.,
Having one of its branches at
Therekalputhur,
K-1, Block - 11 & 12,
APPTA Complex,
APPTA Nagar,
Tirunelveli Road,
Nagercoil - 629 002.
Kanniyakumari District,
represented by
The Authorized Officer. ... Petitioner

Vs.

1.The Sub-Registrar,
Kanyakumari Joint-I Sub Registrar's Office,
Near PWD Office,
Nagercoil - 629 001.

2.The Commercial Tax Officer,
Nagercoil (Rural),
C.T.Buildings,
Mead Street,
Nagercoil - 629 001.

3.G.Selwyn Rajakumar ... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of Certiorarified Mandamus to call for the records relating to the attachment entry made by the second respondent towards tax arrears and registered on the file of the first respondent on 11.04.2018 as Doc.No.7/2018 in Vol.No./P.No.2685/75 and efface/delete the said adverse encumbrance entry and consequently, direct the first respondent to register the sale certificate dated 11.07.2018 executed by the petitioner bank in favour of the third respondent in respect of the subject properties within the time schedule to be fixed by this Court.

For Petitioner : Mr.N.Dilip Kumar

For Respondents : Mr.VR.Shanmuganathan
Special Government Pleader for R.1 & R.2

Mr.T.A.Ebenezer for R.3

* * * * *

ORDER

[Order of the Court was made by T.RAJA,J.]

Tamilnad Mercantile Bank Ltd., Therekalputhur, Nagercoil - 629 002, Kanniyakumari District, represented by the Authorized Officer, has come to this Court challenging the impugned attachment entry made by the second respondent towards tax arrears and registered on the file of the first respondent on 11.04.2018 as Doc.No.7/2018 in Vol.No./P.No.2685/75 and efface/delete the said adverse encumbrance entry and consequently, direct the first respondent to register the sale certificate dated 11.07.2018 executed by the petitioner bank in favour of the third respondent in respect of the subject properties within the time schedule to be fixed by this Court.

2. By consent, the writ petition is taken up for final disposal.

3. Learned Counsel for the petitioner assailing the impugned entry made by the first respondent would submit that M/s.Vaibav Steels, Ozhuginasery, Nagercoil, having borrowed a cash credit loan of Rs.4,00,00,000/- (Rupees Four Crores only) on 30.05.2013, mortgaging two properties, one in the name of S.Balamurugan and the other in the name of G.Vanaja as collateral security to the loan, committed default in repaying the loan amount and as a result, the loan amount was classified as a Non-Performing Asset (in short 'NPA') on 30.06.2015. Thereafter, the petitioner bank initiated proceedings under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [in short 'SARFAESI Act']. However, finding no response either from the borrower or from the guarantor to clear the dues, the petitioner bank, again issued a possession notice dated 27.01.2016 and it is also published in the newspapers. Again, finding no response from the borrower and guarantor, an application was moved before the District Collector - cum - District Magistrate, Kanyakumari District, under Section 14 of the SARFAESI Act on

21.12.2017, requesting the District Collector – cum – District Magistrate, Kanyakumari District, to assist the petitioner bank to take peaceful possession of the property under Section 14 of the SARFAESI Act. Considering the fact that the borrower has committed default along with the guarantor and accepting the request made by the petitioner bank, the District Collector-cum-District Magistrate, Kanyakumari District, by exercising the powers under Section 14 of the SARFAESI Act, passed the proceedings dated 11.01.2018 granting assistance to the petitioner to take over the possession of the secured assets and as a result, the peaceful possession of the assets was also taken and handed over to the petitioner bank on 15.02.2018 by the Special Tahsildar (Stamps) – I, Nagercoil. Subsequently, in order to recover the dues, the petitioner bank held a public auction issuing sale notices on 12.02.2016, 30.03.2016, 13.05.2016, 05.09.2016, 05.08.2017, 17.11.2017 and 27.02.2018 and the last of such sale notices on 06.04.2018 under the SARFAESI Act against two properties mortgaged to the petitioner bank. Notices were also published in the newspapers as per the provisions of the SARFAESI Act. Finally, the properties were sold to the third respondent as he was the successful bidder having quoted Rs.3,44,25,000/- (Rupees Three Crores Forty Four Lakhs and Twenty Five Thousand only).

4. Narrating the above events, it is submitted that finally when the sale certificate was also issued in favour of the auction purchaser, the sale certificate was submitted through on-line to the first respondent for registration on 11.07.2018 and a hard copy of the same was also submitted and Temporary Registration No.TP/27767569/2018 was also assigned by the Registration Department for having submitted for registration. However, the first respondent orally refused to register the sale certificate stating that there was an encumbrance entry vide proceedings dated 10.04.2018.

5. The learned Counsel for the petitioner would submit that when the petitioner bank is the secured creditor by virtue of Section 26-E of the SARFAESI Act, which came into force with effect from 01.09.2016, the rights of the secured creditor to realise the security 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. In support of his submissions, he has also referred to various decisions laid down by this Court.

6. Taking further support from the latest judgment passed by this Court in State Bank of India v. Assistant Commissioner, Commercial Tax, Chennai – 10 and others reported in 2016 SCC Online Mad 33329, it is submitted that the learned Judge having considered the similar and identical issue under Section 26-E of the SARFAESI Act and Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and following the Full Bench judgment of this Court in UTI Bank Ltd., v. The Deputy Commissioner

of Central Excise, Chennai II and another reported in 2007-1-L.W.50, has reiterated the ratio laid down by this Court that 'the rights of the secured creditor to realise the security 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'.

7. Heard the learned Counsel for the parties.

8. It is pertinent to extract hereunder paragraphs 9.1 and 9.2 in the judgment of this Court in State Bank of India v. Assistant Commissioner, Commercial Tax, Chennai – 10 and others reported in 2016 SCC Online Mad 33329:

> "9.1. Vide judgement dated 10.11.2016 passed in W.P.No.2675 of 2011, titled: The Assistant Commissioner (CT), Anna Salai-III Assessment Circle Vs. the Indian Overseas Bank rep. by its Manager, Recovery Administrative Branch, Central Office, and another, answered the reference, as follows:
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> ".... 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 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 (1) 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."

(emphasis is mine)

9.2. As correctly argued by the learned counsel for the petitioner Bank, on a parity of reasoning, Section 26-E of the 2002 Act construed likewise. In other words, not only should the amendment apply to pending lis, but the declaration that the right of a secured creditor to realize the secured debts, would have priority over all debts, which would include, Government dues including revenues, taxes, etc.,. should hold good qua 2002 Act as well."

9. Mr.VR.Shanmuganathan, learned Special Government Pleader appearing for the respondents 1 and 2 having referred to the judgment reported in 2016 SCC Online Mad 33329 (cited supra) passed by the learned Single Judge of this Court, who has followed the judgment of the Full Bench of this Court reported in 2007-1-L.W.50 (cited supra), is unable to support the impugned order.

10. For the sake of convenience, Section 26-E of the SARFAESI Act, is extracted hereunder:

"26E. Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or 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."

11. In the light of the judgment of this Court reported in 2016 SCC Online Mad 33329 (cited supra) and on a conjoint reading of Section 26-E of the SARFAESI Act and Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, there cannot be any doubt that the rights of a secured creditor to realise the 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, inasmuch as Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, was introduced with a "notwithstanding" clause and it has also come into force from 01.09.2016.

12. Before applying Section 26-E of the SARFAESI Act and Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, it is necessary to mention two vital dates. The property in question was already mortgaged to the petitioner bank by the borrower, viz., the husband and wife on 14.06.2013, whereas the attachment order has been passed by the second respondent only on 11.04.2018. Therefore, the attachment made on 11.04.2018 on the mortgaged property that took place long time ago, namely, 14.06.2013, cannot stand to the legal scrutiny, more particularly, in the light of the provisions of Section 26-E of the SARFAESI Act and Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Therefore, we find that the impugned entry made by the first respondent is liable to be deleted.

13. In the result, this writ petition is allowed and the first respondent is directed to delete the attachment entry made by the second respondent towards tax arrears and registered on the file of the first respondent on 11.04.2018 as Doc.No.7/2018 in Vol.No./P.No.2685/75 and consequently, register the sale certificate dated 11.07.2018 executed by the petitioner bank in favour of the third respondent in respect of the property in question. No costs. Consequently, the connected writ miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar(CS-IV)

rsb
To
1.The Sub-Registrar,
Kanyakumari Joint-I Sub Registrar's Office,
Near PWD Office,
Nagercoil - 629 001.

2.The Commercial Tax Officer,
Nagercoil (Rural),
C.T.Buildings,
Mead Street,
Nagercoil - 629 001.

+1cc to Mr.N.DilipKumar, Advocate in SR No.80755
+1cc to Mr.T.A.Ebenezer, Advocate in SR No.80822
+1cc to Spl Government Pleader SR No.81288

W.P(MD)No.18045 of 2018
and
W.M.P(MD)No.15931 of 2018

NM/RP/SAR 4/27.09.2018/7P/6C