IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.03.2019

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THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.46581 of 2006 &
M.P.No.2 of 2006

Indian Bank
represented by its
Assistant General Manager,
Asset Recovery Management Branch II
Circle Office Buildings
Ground Floor,
No.55, Ethiraj Salai,
Chennai-600 008. ... Petitioner

Vs

1.Tax Recovery Officer, Central II
Room No.322, III Floor,
No.46, Nungambakkam High Road,
Chennai-600 034.

2.S.Nageswara Rao ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the 1st respondent in his proceedings dated 30.04.2003 in T.R.No.1/CR.II/02-03 and the consequential Notice dated 06.10.2006 in T.R.1/24/97/CR-II/05-06 issued by the 1st respondent, quash the said proceedings and the Notice issued therein.

For Petitioner : Mr.Jayesh B.Dolia for M/s.Aiyar & Dolia

For Respondents : Mr.A.N.R.Jayaprathap for R1

O R D E R

The writ petition has been filed seeking for a Writ of Certiorari to call for the records of the first respondent in proceedings dated 30.04.2003 in T.R.No.2/CR.II/02-03 and the consequential notice dated 06.10.2006 in T.R.1/24/97/CR-II/05-06 issued by the 1st respondent and to quash the same.

2.It is the admitted position that the petitioner had extended financial facilities to the second respondent and that as security for the said financial facilities, the second respondent had created an equitable mortgage dated 01.09.1989 over the property of the second respondent ad measuring 5320 sq.mtrs. situated in Gandhi Nagar, Sub Registration District of Vijayawada. It appears that the second respondent did not discharge his dues to the Income Tax Department to the extent of Rs.2,51,89,428, excluding interest, and, therefore, the Tax Recovery Officer, Vijayawada issued a notice of demand dated 28.01.1994 and an order of attachment dated 23.03.1994. The petitioner, mean while, filed a Debt Recovery Application No.63 of 1995 before the Debt Recovery Tribunal, Bangalore and also filed a claim petition before the Tax Recovery Officer, Vijayawada and claimed that the equitable mortgage of the petitioner had priority over the attachment of the first respondent. Accordingly, the Debt Recovery Tribunal by order dated 14.09.1995 allowed O.A.No.63 of 1995 and declared that the petitioner was entitled to claim a sum of Rs.2,63,24,578/- from the second respondent and recover the same by the sale of the mortgaged property at Vijayawada. This order was challenged by the first respondent before the High Court of Karnataka in W.P.No.35143 of 1996. By order dated 02.08.1999, the writ petition was disposed of stating that the Tax Recovery Officer should determine as to whether the bank had prior mortgage or whether the Income Tax Department had the prior charge. Based on the aforesaid order, the first respondent passed the order dated 30.04.2003 whereby it was held that the equitable mortgage of the petitioner would be the first charge over the immovable property from 01.09.1999 until the attachment by the Income Tax Department on 28.01.1994 and that, thereafter, the first respondent would have the priority.

3.Thereafter, it appears that the second respondent made an offer to the petitioner for one time settlement of his dues and the petitioner/Bank by a reply dated 05.01.2006 agreed to receive a sum of Rs.240 lakhs in full and final settlement subject to the terms and conditions of the said communication. Subsequent thereto, it appears that the second respondent settled the dues of the petitioner in multiple instalments as per details set out by the petitioner in its letter dated 02.11.2006. In toto, it appears that the petitioner has received a sum of Rs.290.23 lakhs in full and final settlement.

4.After the one time settlement, it appears that the first respondent issued a letter dated 06.10.2006 to the petitioner calling upon the petitioner to pay a sum of Rs.1,01,89,320/-, which is said to be due and payable by the second respondent to the first respondent in terms of Section 226(3) of the Income-Tax Act, 1961. In this communication, the first respondent has stated that if the petitioner discharges any liability to the assessee after receipt of this notice, the petitioner would be personally liable to the first respondent to the extent of the liability of the assessee. The petitioner was further put on notice that if the petitioner fails to make payment in pursuance of this notice, it shall be deemed to be an assessee and further proceedings would be taken for realisation of the amount as if it were an arrears of tax due from the petitioner in the manner provided in Sections 222 to 225 of the Income-Tax Act, 1961. The communication dated 30.04.2003 and consequential communication dated 06.10.2006 are the impugned orders in this writ petition.

5.At the hearing today, the learned counsel for the petitioner submitted that undoubtedly the petitioner is the mortgagee under the equitable mortgage that was created by the second respondent on 01.09.1989, which is much prior to the Income-tax Department's attachment order dated 28.01.1994. Accordingly, the learned counsel for the petitioner submitted that this mortgage has priority over the attachment of the first respondent as per the judgment of the Hon'ble Supreme Court and this Court. He also pointed out the communication pertaining to one time settlement and the payments made by the second respondent in instalments thereafter.

6.In response, the learned counsel for the first respondent submitted that it is not in dispute that the petitioner has a prior charge because the equitable mortgage is prior in time. However, he submitted that the property had not been brought to sale by the petitioner and that the petitioner had received its payment under a one time settlement. Accordingly, he submitted that the first respondent has the first charge over the property. He further submitted that the order dated 30.04.2003 of the Tax Recovery Officer was not challenged by the petitioner until the filing of this writ petition. He also invited the attention of this Court to the communication dated 05.10.2006 from the first respondent to the petitioner wherein it was stated that the property in question had been alienated by the second respondent vide sale deed registered on 27.07.2006 for Rs.3 crores.

7.This Court has carefully considered the affidavit, counter affidavit of the first respondent and documents on record and oral submissions of the learned counsel for both sides.

8.It is not in dispute that the equitable mortgage of the

Bank is much prior in point of time to the attachment of the Income-tax Department. Moreover, the Income-tax Act, 1961, does not provide for a statutory charge in favour of the Income-Tax Department. Accordingly, the bank was entitled to bring the property for sale. However, the second respondent offered a one time settlement which was accepted by the petitioner and consequently, the equitable mortgage in favour of the petitioner was redeemed by the second respondent on making payments as per the one time settlement. Therefore, the first respondent, Tax Recovery Officer, is entitled to proceed against the second respondent and its immovable property as per applicable law. In this regard, the documents on record do not disclose whether the first Respondent put the Sub-Registrar concerned on notice about the attachment of the immovable property.

9.Notwithstanding the current fact situation, as set out in the preceding paragraph, the validity of the proceedings of the first respondent dated 30.04.2003 and the consequential communication dated 06.10.2003 should be examined. It was held in a catena of decisions of the Hon'ble Supreme Court such as State of Karnakata vs. Shreyas Papers (2006) 1 SCC 615 and Rana Girders Ltd., vs. Union of India (2013) 10 SCC 746 that the prior mortgage of a secured creditor would prevail over crown debts. In fact, the Full Bench of this Court in UTI Bank vs. Deputy Commissioner of Central Excise (2006) 5 CTC 801, held that the only exception to the priority of prior charges of secured creditors over crown debts is if the relevant tax statute expressly stipulates that it is a first charge over the property. In the instant case, the Income Tax Act, 1961, does not contain such a stipulation.

10.Therefore, the order of the first respondent dated 30.04.2003 and the consequential communication dated 06.10.2006 are clearly without jurisdiction and untenable in law. The first respondent does not have the statutory right to decide that the equitable mortgage would be valid only until the date of attachment by the first respondent. Such an order would be non est in the eye of law. Accordingly, the impugned proceedings/communications dated 30.04.2003 and 06.10.2006 are liable to be quashed.

11.Therefore, the writ petition is allowed by quashing the impugned proceedings/communications of the first respondent dated 30.04.2003 and 06.10.2006. However, this order shall not preclude the first Respondent from initiating appropriate proceedings against the second respondent and the immovable property in terms of applicable provisions of the Income-tax

Act, including Section 222(1)(b) and 281, so as to recover its dues. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

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To
The Tax Recovery Officer, Central II
Room No.322, III Floor,
No.46, Nungambakkam High Road,
Chennai-600 034.

+1cc to Mr.AP.Srinivas, Advocate SR.No.30736

+1cc to M/s.Aiyar & Dolia, Advocate SR.No.30976

W.P.No.46581 of 2006 &
M.P.No.2 of 2006

MG(CO)
GMY(07/05/2019)