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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2019

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

WRIT PETITION NO.5010 OF 2010
AND M.P.NO.2 OF 2010

1. Foods, Fats and Fertilizers Limited
represented by its Authorised
Signatory T.K.Ravindran
No.222, Fountain Plaza, I Floor,
Pantheon Road, Egmore,
Chennai - 600 008.
2. Goenka Infrastructures Private Limited,
represented by its Authorised
Signatory T.K.Ravindran
No.222, Fountain Plaza, I Floor,
Pantheon Road, Egmore,
Chennai - 600 008.

...Petitioner

Vs

1. The Deputy Commissioner,
Commercial Taxes, Kancheepuram.
2. The Assistant Commissioner,
Commercial Taxes,
Chengalpattu Assessment Circle,
25/35, Alagesan Street,
Vedachalam Nagar, Chengalpattu.
3. Karnataka Bank Limited,
Basaveshwarnagar Branch,
No.105, Mohan Mansion,
III Floor, Kasturba Road,
Bangalore - 560 001.
4. Muthu Flour Mills Private Limited,
No.44, Ramanujam Godown Street,
Poonthamalli, Chennai - 600 056.

... Respondents



Prayer:

PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus calling for the records relating to the impugned notice of attachment of the first respondent dated 19.01.2010 bearing Ref.Na.Ka.No.5132/2009/A2 and published in the Kancheepuram District Gazette No.2 dated 01.02.2010 and the impugned sale notice of the second respondent bearing Rc.1701/06/A3 dated 09.02.2010 and quash the same and consequently forbear the respondents from in any manner proceeding further against the petitioners or their property purchased in auction by sale certificate dated 22.10.2009 in respect of all or any of the arrears of the fourth respondent herein.

For Petitioner : Mr.D.Bharatha Chakravarthi
for M/s.Sai Bahrath and Ilan

For Respondent : Mr.V.Haribabu, AGP - R1 & R2
Mr.S.R.Raghunathan - R3
No appearance - R4

O R D E R

The petitioners are the purchasers of properties bearing Survey Nos.5/1D1, 5/1D3A, 6, 1/3A, 1/3B, 5/1D2, 1/3C, 5/1D3 and 6, situated at Pukkathurai Village, Maduranthakam Taluk, Chengalpattu District ('property in question'). The property in question had been purchased by the petitioners under an auction sale conducted by the third respondent, Karnataka Bank Limited ('Bank'). Pursuant to the purchase thereof, the Commercial Tax Officers/ the first and second respondents, (R1 and R2), appear to have issued an order of attachment dated 19.01.2010 followed by a sale notice dated 15.04.2010, impugned in this Writ Petition.

2. The brief sequence of dates and events is that the fourth respondent, (R4), an assessee in terms of the provisions of the Tamil Nadu General Sales Tax Act, 1959 ('TNGST Act'), was admittedly in arrears of commercial tax as well as in default of repayments of financial accommodation received from the Bank. The property in question had been offered as security by R4 to the Bank that had registered a charge on 10.05.2006 before the appropriate Sub-Registrar. This is not disputed.

3. In respect of the commercial tax arrears, admittedly no charge was initially created and the stand of R1 and R2 is that an automatic charge was created by operation of Section 24 (2) of the Act that continued in force till such time the charge was actually created and registered on 23.07.2007. The charge



created by the Commercial Taxes Department is subsequent to the registration of charge by the Bank. The petitioners, upon noting the auction sale notice participated in the sale, purchasing the property in question on 25.03.2008. A sale certificate has been issued by the Bank. The petitioners are two companies of the same group entites. The terms of auction provided that the confirmation of auction could be either in favour of the purchaser or its nominee and upon nomination of the second petitioner by the first, the sale certificate was issued in the name of the former.

4. The case of the petitioners is that upon noting the notification of auction sale by the Bank, a verification was undertaken with the concerned Sub-Registrar when it was noted that a registered mortgage stood in favour of the Bank. Being satisfied of the title held by the bank, they had participated in the auction and had purchased the property on payment of sale consideration. The sale certificate has been issued on 22.10.2009. Thus, according to them, they are bonafide purchasers of the property in question and have received good and valid title in respect of the same from the Bank.

5. The petitioners rely on the decision of a Division Bench of this Court in the case of Gupta & Company Vs. The Commercial Tax Officer and others (W.P. No.6267 of 2006 dated 09.03.2018), as per which the priority of charge would have to be determined in the light of the provisions of Section 26E of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI Act') and bearing in mind the dates on which the charge had been created by secured financial creditors.

6. The case of the Bank is that a term loan/overdraft facility for a sum of Rs.5,00,00,000/- had been disbursed in 2006 to R4, who had defaulted in repayments. Notice under Section 13(2) of the SARFAESI Act had been issued on 30.03.2007 and the property had been taken possession of in terms of Section 13 (4) of the SARFAESI, and brought to auction sale. The mortgage was created and registered on 10.05.2006, simultaneous with the disbursal of financial accommodation.

7. The Bank relies on the provisions of Section 26E of the SARFAESI Act, which according to it, accord it primary charge in respect of properties mortgaged to it for the satisfaction of debts created by the security interest. Reliance is placed on the decisions of this Court in the cases of (i) UTI Bank Ltd., Vs. The Deputy Commissioner of Central Excise, Chennai II Division [(2007) 208 ELT 3], (ii) The Assistant Commissioner (CT) Vs. The Indian Overseas Bank in W.P. Nos.2675 and batch dated 10.11.2016 (iii) Indian Overseas Bank Vs. Sub Registrar, Tuticorin and others [(2018) SCC Online Mad 5016] and (iv) State



Bank of India vs. The Assistant Commissioner, Commercial Tax and others [(2016) SCC Online Mad 33329].

8. The bank contends that the provisions of Section 26E are categoric to the effect that it is a secured creditor who holds priority of charge in respect of assets that have been mortgaged to it in satisfaction of security interest. In the present case, quite apart from the provisions of Section 26E itself, the sequence of dates reveal that the registered charge has been created by the Bank as early as in May 2006, at which time, there admittedly, was no registered charge by any other entity including the Commercial Taxes Department.

9. The Commercial Taxes Department has created a charge only in July 2007 and even after creation of such charge, the order of attachment of property has been passed on 19.01.2010 and the property put up for sale on 15.04.2010, both events having transpired only after the sale certificate was issued by the Bank to the petitioner on 22.10.2009. Thus according to the Bank, the impugned action of the Commercial Taxes Department, having taken place two years after the sale by the Bank to the petitioner, is belated and wholly contrary to law.

10. Heard the learned counsel for both sides and perused the relevant documents as well as the case law relied upon.

11. The Commercial Taxes Department, (R1 and R2) argue that the provisions of Sections 24 (1) and (2) would result in creation of charge automatically over the property of a defaulting assessee in respect of its arrears, similar to the claim of the Government in respect of land revenue and the claim of the Land Development Bank in regard to the property mortgaged to it under section 28(2) of the Tamil Nadu Cooperative Land Development Banks Act, 1934. Thus there is no necessity, according to them, to have registered a charge at all. The provision reads as follows:

Section 24. Payment and recovery of tax: (1) Save as otherwise provided for in sub-section(2) of section 13, the tax assessed or has become payable under this Act from a dealer or person and any other amount due from him under this Act shall be paid in such manner and in such installments, if any and within such time as may be specified in the notice of assessment, not being less than twenty-one days from the date of service of the notice. The tax under sub-section (2) of section 13 shall be paid without any notice of demand. In default of such payments the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax or interest under this Act.



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Section 24-(2) Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall, subject to the claim of the government in respect of land revenue and the claim of the Land Development Bank in regard to the property mortgaged to it under section 28(2) of the Tamil Nadu Co-operative Land Development Banks Act, 1934(Tamil Nadu Act X of 1934), have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered:- (a) as land revenue, or

(b) on application to any Magistrate by such Magistrate as if it were a fine imposed by him:

12. The provisions of Section 24(1) no doubt create a charge upon the properties of a defaulting person in favour of the Commercial Tax Department. However, such charge shall translate into a priority of claim only if the Department had proceeded to comply with the specific procedure set out under the Tamil Nadu Revenue Recovery Act, 1864 (in short 'RR Act') in that regard. In the present case, it is admitted by the respondents that the procedure set out under the RR Act has not been complied with as the counter states that after demands of TNGST and CST were raised on 23.07.2007, the Sub-Registrar, Madurantagam was addressed for creation of encumbrance over the property, created on 17.07.2009 only.

13. Meanwhile, the Bank, at the time of acceptance of the property in question as security interest, has verified the existance of encumbrance, if any, reflected in respect of the property in question. There was none. Thus charge created on 10.05.2006 over the property in question is proper and constitutes the primary charge, overriding any other subsequent charge, that would only be a second charge to be satisfied with the surplus, if any, after satisfaction of the first charge. The argument of the Commercial Taxes Department revolving around the provisions of section 24(2) of the Act is thus rejected.

14. Moreover, the provisions of Section 26E, inserted in the SARFAESI Act with effect from 01.09.2016, commence with a non obstante clause that protects the rights of the secured creditor in priority over all other debts of land revenue. The First Bench of this Court, while considering the provisions of Section 31-B of the Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 in the case of The Assistant Commissioner (CT) Vs. The Indian Overseas Bank (supra) has categorically stated that this provision, which is in pari materia with Section 26E of the SARFAESI would protect the rights of the secured creditor over all other debts and Government dues. The



provisions of section 26 E of the SARFAESI Act override the provisions of Section 24(2) of the Tamil Nadu General Sales Tax Act.

15. Learned counsel for the Revenue places reliance on a decision of the learned single Judge of this Court sitting in Madurai, in the case of Mrs.Meenakshi J. Ganesh Kumar V. Deputy Commercial Tax Officer, Srivilliputhur and another ((2011 41 VST 150). This case is distinguishable for the reason that the sale in question was a private sale and the only ground raised by the petitioner in that case was that he was a bona fide purchaser, who could not be held liable for default of sales tax by a third party assessee. Upon consideration of these facts and following the decision of the Division Bench of this Court in the case of R.Balasubramanian V. Additional Deputy Commercial Tax Officer III, Tuticorin (W.A.(MD) No.130 of 2005 dated 22.08.2005), the learned single Judge dismissed the Writ Petition stating that the mere fact that the purchaser was a bonafide purchaser would not come to his aid. No other argument, specifically on the legal provisions involved, appear to have been advanced for consideration.

16. In the present case, admittedly, the Bank has registered its charge more than one year prior to registration of charge by the Commercial Taxes Department. The sale by auction has been on 25.03.2008, confirmed by certificate dated 22.10.2009. The attachment of the property and the auction notice by the Commercial Taxes Department are subsequent events. Thus, in my considered view, the bank has acquired a lawful and legitimate title to the property in question and has passed on such title, unencumbered and unblemished by virtue of any other charge, to the petitioners herein. The fact that the petitioners are bona fide purchasers is only incidental and the Revenue, in its counter, has not disputed this averment.

17. In the light of the discussion above, I am of the categorical view that the rights of the bonafide auction purchaser cannot be set at naught by the impugned action of the Commercial Taxes Department. The impugned order is set aside and the Writ Petition allowed. No costs. Consequently connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The Deputy Commissioner,
Commercial Taxes, Kancheepuram.

2. The Assistant Commissioner,
Commercial Taxes,
Chengalpattu Assessment Circle,
25/35, Alagesan Street,
Vedachalam Nagar, Chengalpattu.

+1cc to Mr.S.R.Raghunathan, Advocate, S.R.No.82458

+1cc to M/s.Sai Bahrath and Ilan, Advocate, S.R.No.82584

+1cc to the Special Government Pleader(T), S.R.No.82684

Writ Petition No.5010 of 2010
and M.P.No.2 of 2010

SSD(CO)
CS/20/01/2020