IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 06.08.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.Nos.12272 , 12281, 12283 and 12284 of 2019
&
W.M.P.Nos.12559, 12568, 12570 and 12571 of 2019

JSR Infra Developers Pvt. Ltd.,
Rep. By Authorised Signatory S.Karthikeyan
4th Floor, New No.17, Old No.8
Vijayaraghava Road, T.Nagar
Chennai - 600 017 .. Petitioner in all W.Ps

Vs.

1. The Assistant Commissioner of Income Tax
Central Circle-2(4)
Investigation Wing, Room No.111, 1st Floor
New No.46, M.G.Road, Chennai - 600 034
.. 1st Respondent in All WPs.

2. The Sub-Registrar
Katpadi, 127, Chithoor
Vellore Road
Dharapadavedu, Katpadi- 632 007
.. 2nd Respondent in WP.12272 of 2019

The Sub Registrar,
3,156 Salt Road, Near State Highway 115,
Cheyyur-603 302.
.. 2nd Respondent in WP.12281 of 2019

The Sub Registrar,
Chennai, Joint II,
No.82, Bharati Salai Pycrafts Road,
Royapettah, Chennai-600 014.
.. 2nd Respondent in WP.12283 of 2019

The Sub Registrar,
T.Nagar, 9 Jeenis Road,
Saidapet, Chennai-600 015.

.. 2nd Respondent in WP.12284 of 2019

3. Indian Overseas Bank
Represented by its Manager
IV Main Road, V Block
No.83, Plot No.4035
4th Main Road, Anna Nagar
Chennai - 600 040 .. 3rd Respondent in all W.Ps

Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Mandamus directing the 1st respondent to lift the order of attachment of immovable property (Schedule mentioned) in ACIT-CC-2(4)/BCDPS4688G/281B/2017-18 under Section 281 B of the Income Tax Act, 1961 dated 05.04.2018, 05.04.2018, 15.11.2017 and 04.04.2018 respectively and consequently direct the 2nd Respondent to remove the appropriate encumbrances in the concerned encumbrance certificate reflecting the said attachment orders.

For Petitioner : Mr.Nithyaesh Natraj
for M/s.Nithyaesh and Vaibhav

For Respondent : Mr.A.P.Srinivas for R1
Mr.T.M.Pappaiah
Special Government Pleader for R2
(No appearance)

O R D E R

Mr.Nitheyesh Nataraj, learned counsel of M/s.Nithyaesh and Vaibhav, on behalf of writ petitioner in all the four writ petitions and Mr.A.P.Srinivas, learned senior Standing Counsel for Income Tax on behalf of the first respondent are before this Court.

2. With regard to second respondent, Mr.T.M.Pappaiah, learned 'Special Government Pleader' (hereinafter 'State Counsel' for brevity) has accepted notice and learned State counsel's name is shown in the cause list today, but none appears today. With regard to third respondent i.e., Indian Overseas Bank, it has been duly served, name of the third respondent bank with its full/complete address as in the cause title of the writ petitions is shown in the cause list. This Court is informed that no counsel has entered appearance on behalf of third respondent Bank. Name of the third respondent Bank called out aloud thrice in the Court and adjoining corridors, but there is no response.

3. Be that as it may, contest in the instant writ petition is primarily between the writ petitioner and the first respondent Assistant Commissioner of Income Tax Department who

has passed four orders of provisional attachment, two dated 05.04.2018, the other two dated 15.11.2017 and 04.04.2018, all bearing reference ACIT-CC-2(4)/BCDPS4688G/281B/2017-18 (hereinafter 'impugned orders' in plural and 'impugned order' in singular for the sake of brevity). With regard to the second respondent, it comes to light that the second respondent, who is the jurisdictional Sub-Registrar, is only a formal party and has no real say in the instant matter.

4. In the aforesaid backdrop, main writ petitions are taken up, heard out and are being disposed of with consent of learned counsel for writ petitioner and Revenue Counsel for first respondent.

5. Impugned orders have been made under Section 281B of the 'Income Tax Act, 1961' ('IT Act' for brevity). The impugned orders are orders of provisional attachment of immovable properties.

6. A perusal of the impugned orders reveal that immovable properties belonging to an individual one J.Sekhar have been made subject matter of provisional attachment.

7. However, writ petitioner before this Court in these four writ petitions is not that natural person i.e., individual J.Sekhar, but it is a juristic person. In other words, it is a private limited company, which goes by the name J.S.R Infra Developers Pvt. Limited. Therefore, in the previous hearing, a question arose as to the locus based on which the writ petitioner is assailing the impugned orders. Besides this, the sole and pivotal question that falls for consideration in these writ petitions was also projected. Capturing these two aspects of the matter, this Court made proceedings dated 20.06.2019, which reads as follows:

> 'Subject matter of instant writ petition is an order of attachment qua immovable properties.
>
> Legal issue is whether Income Tax Department can attach properties which have already been securitised.
>
> Be that as it may, on facts, Revenue Counsel points out that the interest of writ petitioner in the immovable property, which is subject matter of attachment, has not been articulated in the affidavit filed in support of this writ petition.
>
> Faced with the above situation, learned counsel for writ petitioner seeks time to file additional affidavit.
>
> List on 3.7.2019.

8. Today, notwithstanding various averments made in the

affidavits filed in support of these writ petitions, notwithstanding the grounds raised, contentions urged in the affidavits filed in support of the writ petitions and common counter affidavit of the first respondent, learned counsel on both sides, submitted that the aforesaid lone issue captured in 20.06.2019 proceedings of this Court is the lone and pivotal issue which falls for consideration in the instant writ petitions.

9. With regard to the natural person i.e., individual J.Sekhar whose properties are subject matter of impugned orders and the writ petitioner which is a juristic person viz., Private Limited Company, basis on which the writ petitioner, which is a juristic person i.e., Private Limited Company, is questioning the impugned orders is concerned, after the aforesaid 20.06.2019 proceedings, writ petitioner has filed a common additional affidavit dated 25.04.2019 in all the four writ petitions and an attempt has been made to explain this aspect of the matter i.e., a natural person's immovable properties being attached vide impugned orders and another juristic person questioning the same as writ petitioners in the instant writ petitions. This is in Paragraphs 3 and 4 of the additional affidavit, which read as follows:

> '3.I State that the petitioner - JSR Infra Developers Pvt. Ltd., was previously known as Vaibhav Infrastructure, before its incorporation as a registered company under the aegis of the Companies Act.
>
> 4. I State that the petitioner is a borrower having taken credit facilities from the 3rd respondent- Indian Overseas bank, wherein certain properties have been given as security to the 3rd respondent bank. The properties mortgaged with a 3rd respondent bank for the purpose of the loan availed by the petitioner primarily include properties that belongs to JSR infra developers private limited (previously) known as Vaibhav infrastructures), the petitioner herein and those properties that stand in the name of the directors (including Mr.J.Sekar) of the petitioner company,(Personal properties belonging to the directors of the petitioner's company have been mortgaged with the 3rd respondent bank). It is further stated, that the attachment of some of these properties by the 1st respondent/income tax officials, more clearly mentioned in the scheduled provided in the earlier filed affidavits, are the subject matter of challenge in the present writ petitions, as these properties have already been mortgaged with the third respondent bank and security interest has been created as per law.'

10. The crux and gravamen of the first respondent's stand is articulated in Paragraphs 6 of the counter affidavit, which

reads as follows:

> '6. I submit that the details of amount of loan sanctioned, value of the property, the payments made so far and the present outstanding amount and any SARFEASI proceedings are initiated are not stated by the writ petitioner. The first charge in favour of the Bank is not admitted this respondent. Any number of attachments can be made on the properties and the relevance of first charge and subsequent charge comes only at the time of sale. The petitioner cannot substitute itself in the place of the Bank and maintain this writ petition. The question of first charge or second charge holder cannot be decided in the writ petition and mortgagee Bank can prove the same before the appropriate Court by letting in evidence. The petitioner has no locustandi to maintain the writ petition. There is no law prohibiting the subsequent charge holders from attaching the properties and the first charge is relevant only when the property is put for sale and further the after the discharge of the first charge holder, the remaining can be taken by the other charge holder and therefore, attachment can be made. The attachment is necessary to prevent the further mortgages and increase in loan amount and any other borrowals. Further the properties stands in the names of the individuals and while so the company cannot maintain the writ petition. '

11. Therefore, it comes out clearly that properties belonging to an individual i.e., a natural person, who is one of the Directors in the writ petitioner company, are subject matter of provisional attachments qua impugned orders. Ideally this Court is of the considered view that the natural person i.e., individual J.Sekhar whose immovable properties have been subjected to provisional attachment by impugned orders, should have come before this Court and assailed the impugned orders. The natural person i.e., individual J.Sekhar, being a Director in the writ petitioner company may not be a sufficient reason for the writ petitioner company to assail the impugned orders. The reason is fair, simple and straight. No elucidation and elaboration is required for the principle that a company is a juristic person and this juristic person is independent of the natural persons/individuals, who are Directors on the Board of the said company. It is also to be noted that even according to the writ petitions, the company has been represented by an Authorised Signatory one Mr.S.Karthikeyan and who is the deponent of the affidavits filed in support of these writ petitions. Therefore, in the considered view of this Court, this itself will put an end to the case of the writ petitioner in the instant writ petitions qua their campaign against the

impugned orders.

12. However, in the light of the legal question that has been raised, which has been captured in the aforesaid proceedings dated 20.06.2019, this Court considers it appropriate to embark upon the exercise of examining that legal point also as this is a generic legal principle.

13. As would be evident from 20.06.2019 proceedings, which has been extracted and reproduced supra, the legal issue is whether immovable property which has already been securitised can be made subject matter of attachment by the Income Tax Department. To be noted, this is captured with specificity in Paragraph 2 of the aforesaid proceedings dated 20.06.2019. With regard to the aforesaid legal submission, learned counsel for writ petitioner pressed into service a judgment made by a Hon'ble Full Bench judgment of this Court reported in AIR 2017 Mad 67 (FB) [The Assistant Commissioner (CT) Vs. The Indian Overseas Bank and another]. This Court deems it appropriate to extract Paragraphs 1 to 7 of the said order, which read 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. '

14. Learned Revenue counsel points out that order of Hon'ble Full Bench would only mean that attachment by Income Tax Department will be subject to securitisation if properties which have already been securitised are attached and it does not mean that the Income Tax Department does not have the right to order attachment of properties which are already securitised.

15. This Court, considering the order of the Hon'ble Full Bench of this Court, has no difficulty in accepting the submission made by learned Revenue Counsel that it is clear that order of Hon'ble Full Bench does not place any fetters on the rights of the Income Tax Department to attach a property which has already been securitised if the Income Tax Department chooses to attach a property which is already securitised. Post attachment, anything that is realized from the attachment by Income Tax Department is subject to such securitisation and the creditor thereunder. However, in the instant case, the third

respondent, which according to the writ petitioner company is the creditor, who has secruitised the immovable properties, has not even chosen to come before this Court to assert its rights and say that it has securitised immovable properties which are subject matter of provisional attachment. Therefore, the question as to whether the immovable properties, which are subject matter of provisional attachment qua impugned orders have already been securitised with third respondent Bank as the creditor, itself is not clear and even if that be so, the question of apportioning the monies realized from the attached properties, if such a scenario unfurls need to be gone into only at that stage. In other words, the issue as to the date of securitisation and as to whether it is appropriate to pass impugned orders are the determinants which may govern this apportionment aspect. However, it is not necessary to go into these aspects in this order. Suffice to say that it is clear that there are no fetters on the powers of the Income Tax Department with regard to original attachment. As this is the last point that has been canvassed, this Court finds no infirmity, more so at the instance of a writ petitioner company qua the impugned orders. Therefore, this Court considers that this is not a fit case for interfering with impugned orders.

16. Be that as it may, as the individual J.Sekhar, whose immovable properties are subject matter of provisional attachment qua impugned orders is not before this Court and as the challenge to the same has been laid by a juristic person and as that juristic person has also been represented by a natural person (Authorised Signatory), who is other than the individual J.Sekhar, it would be appropriate to make it clear that all the rights and contentions of the individual i.e., J.Sekhar qua the impugned orders will stand preserved and this order will not impede or affect those rights.

17. In the light of the narrative thus far, all the writ petitions are held to be bereft of merits, they fail and the same are dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

gpa

To

1. The Assistant Commissioner of Income Tax
   Central Circle-2(4)
   Investigation Wing, Room No.111, 1st Floor
   New No.46, M.G.Road, Chennai – 600 034

2. The Sub-Registrar
   Katpadi, 127, Chithoor
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6. The Sub Registrar,
   T.Nagar, 9 Jeenis Road,
   Saidapet, Chennai-600 015.

+2cc to M/s.Nithyaesh and Vaibhav, Advocate, S.R.No.68013
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.67400
+1cc to the Government Pleader, S.R.No.68087 & 68088

W.P.No.12272 , 12281, 12283 and 12284 of 2019

RJI(CO)
CS/30/09/2019