IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.08.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.25394 of 2019

and W.M.P.No.24934 of 2019

Indian Overseas Bank

Kallakurichi Branch
Represented by its Manager
T.No.52, Katcheri Road
Kallakurichi
Villupugam District – 606 202 .. Petitioner

.Vs.

1.The State Tax Officer
Kallakurichi
Villupuram District

2. Mr.R.Kannan
Proprietor
M/s.Mahalakshmi Traders
No.42, Agrahara Street
Madhavacherry Village
Chinnasalem
Villupuram District .. Respondents

(R2 given up on 27.08.2019 by way of
writ petitioner's endorsement in case file)

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorar calling for the records of the 1st Respondent in Na.Ka.A3/1362/2015 dated 30.07.2019 and quash the same as being illegal and against the provisions of law as per the judgment dated 10.11.2016 in W.P.No.2675 of 2011 passed by the full bench of this Court.

For Petitioner : Ms.Ananda Gomathy Murugesan

For Respondents: Ms.G.Dhanamadhri
Government Advocate

ORDER

Ms.Ananda Gomathy Murugesan, learned counsel on record for writ petitioner and Ms.G.Dhanamadhri, learned Government Advocate, who has accepted notice on behalf of sole respondent (now) in the instant writ petition, are before this Court.

2.To be noted, in the writ petition as filed, there were two respondents, but at the hearing, learned counsel for writ petitioner gave up the second respondent and has made an endorsement in the case file to that effect, which reads as follows:

'The 2nd respondent is given up.'

3.In the light of the aforesaid endorsement and reiteration of the same by learned counsel on record for writ petitioner Bank, there is only one writ petitioner and a sole respondent in the instant writ petition now.

4.In the aforesaid backdrop, with consent of learned counsel on both sides, main writ petition is taken up, heard out and is being disposed of.

5. An 'auction notice dated 30.07.3019 bearing reference Na.Ka.A3/1362/2015' (hereinafter 'impugned auction notice' for brevity) has been issued by the sole respondent and in the instant writ petition challenge to impugned auction notice is with regard to one of the five items of properties which are sought to be brought to auction. Though the prayer in the writ petition places a challenge to the impugned auction notice in its entirety, at the hearing, learned counsel on record for writ petitioner abridges the prayer and submits that vide the impugned auction notice five items of immovable properties are sought to be brought to auction and the writ petitioner's challenge to the impugned auction notice is restricted to one of the 5 items of immovable properties, namely *ej;jk; kid (gl;lh vz; 417). g[y vz; 152-18. tp!;jpuzk; 0.00.82 Vh;!* (hereinafter 'said property' for clarity and convenience). Therefore, to state with clarity and specificity, challenge to impugned auction notice is a limited challenge qua said property alone.

6. Before this Court proceeds to set out the lone ground on which challenge is predicated, it may be necessary to mention that this Court has noticed that the auction has been fixed tomorrow i.e., 28.08.2019 (Wednesday at 11.00 am) in the forenoon. The case file placed before this Court reveals that instant writ petition has been presented and filed in this Court on 26.08.2019. The affidavit filed in support of the instant writ petition is completely silent about how and when the writ petitioner Bank gained knowledge about the impugned auction notice.

7. At the hearing, it is submitted that the impugned auction notice was dropped off in the writ petitioners Bank's branch in Kallakurichi, Villupuram District apparently by the borrower on

22.08.2019.

8. In the normal circumstances, this Court would not have been inclined to interfere in a matter of this nature as this is clearly, not merely an eleventh hour attempt, but it is '59th minute of eleventh hour' attempt.

9. This takes us to the ground on which the challenge to impugned auction notice is predicated.

10. Notwithstanding several averments in the affidavit filed in support of the writ petition, grounds urged, contentions canvassed and raised, learned counsel for writ petitioner, at the hearing, focused on one pivotal submission and that one pivotal submission is predicated on an order of a Hon'ble Full Bench of this Court dated 10.11.2016 made in W.P.Nos.2675 of 2011 etc., wherein and whereby Hon'ble Full Bench answered a reference. The reference reads as follows:

> "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.'

11. After adverting to the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 and Section 41 thereto, which seeks to introduce Section 31B in the parent/principal Act, the aforesaid reference was answered by Hon'ble Full Bench in the following manner:

> '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.'
>
> '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.'

12. Learned counsel for writ petitioner adverting to a memorandum of deposit of title deeds, submitted that writ petitioner bank is a mortgagee qua said property and that the mortgage, which is an equitable mortgage i.e., mortgage by deposit of title deeds is in 2012. Furthering submissions in this direction, it was submitted that said property has been securitised by the writ petitioner Bank under 'The Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002' (hereinafter 'SARFAESI Act' for brevity) and therefore, writ petitioner Bank clearly has priority, over what according to first respondent, is dues under fiscal law.

13. Responding to the aforesaid lone pivotal submission on which the writ petition was focused in the hearing, learned Revenue counsel, who had accepted notice on behalf of sole respondent (now) brought to the notice of this Court that the aforesaid order of Hon'ble Full Bench has been carried in appeal to the Hon'ble Supreme Court by the Commercial Tax Department vide Special Leave Petitions (Civil) Diary No(s).20471 of 2017 etc., and on 16.03.2018, Hon'ble Supreme Court issued notice after condoning delay and directed status-quo to be maintained by the parties.

14. Learned Revenue Counsel submitted that the aforesaid order of Hon'ble Supreme Court is now operating, there were listings after notice was issued and that further listing of the aforesaid Special Leave Petitions is in the anvil.

15. Learned counsel for writ petitioner Bank, points out that the order of Hon'ble Full Bench has not been stayed and parties in that case have been directed to maintain status-quo.

16. This Court is of the considered view that it may not be necessary to delve into those aspects of the matter as it emerges clearly from the narrative thus far that the principle laid down by Hon'ble Full Bench of this Court is clearly under challenge and the Hon'ble Supreme Court is in seizin of the matter. In other words, the principle laid down by the Hon'ble Full Bench of this Court has to be tested by the Hon'ble Supreme Court which is in seizin of the matter.

17. Therefore, considering the narrow compass on which the instant writ petition turns, this Court is left with the considered view that it would be appropriate to direct the auction qua said property under the impugned auction notice shall go on tomorrow, but the confirmation with regard to said property alone i.e., one of the five items of properties which are being auctioned shall be subject to outcome of aforesaid Special Leave Petitions in the Supreme Court. In other words, it is subject to whether Hon'ble Supreme Court sustains the

Hon'ble Full Bench principle or decides otherwise. Though obvious, it is made clear that with regard to the other four items of properties which form subject matter of impugned auction notice, auction of the same will not be subject to any rider and there shall be no impediment for further proceedings including confirmation of sale. This order shall not be quoted as a precedent in the days to come as this order has been passed keeping in mind the peculiar factual matrix and unique circumstances in this case.

This writ petition is disposed of with the above directions. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The State Tax Officer
Kallakurichi
Villupuram District

W.P.No.25394 of 2019 and
W.M.P.No.24934 of 2019

Kak(27/08/2019)