IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2019

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

WP.No.25185 of 2018

M/s.Annam Steels Pvt Limited
Rep. By its Director,
Mr.c.VijayKumar. .... Petitioner

Vs.

1. Assistant Commissioner of Customs (Bonds),
Office of the Commissioner of Customs (Port),
Chennai -V, 60, Rajaji Salai, Custom House,
Chennai - 600 001.

2. Indian Overseas Bank,
Rep by its authorized Officer,
Central office Annexure Building,
1st floor, No.763, Chennai - 600 002. ... Respondents

IMPLEADED AS PER ORDER DATED 01/10/2018
IN WMP.NO.29804/2018 IN WP.NO.25185/2018

PRAYER: PETITION filed under Article 226 of the Constitution of India praying for the issuance of writ of Certiorarito call for the records relating to the proceedings of the respondent in F.No.S.Misc/391/2017-Bonds (Sea), dated 20.07.2018, quash the same.

For Petitioner : Mr.R.N.Amarnath
For Respondent : Mr.T.L.Thirumalaisamy SPC for R1
Mr.F.B.Benjamin George for R2

O R D E R

Heard the submissions of Mr.R.N.Amarnath, learned counsel for the petitioner, and Mr.T.L.Thirumalaisamy, SPC for the 1st respondent and Ms.J.Shilpa for Mr.F.B.Benjamin George learned counsel for the 2nd respondent.

2. The prayer in this Writ Petition is for issuance of Writ of Certiorari to quash the proceedings of the respondent in F.No.S.Misc/391/2017-Bonds (Sea), dated 20.07.2018.

3. Property admeasuring 2.12.1/2 acres situated at Panchetty Village, Ponneri Taluk, Chengelpet District, Red hills

(property in question) was originally owned and possessed by one Mr.Pramod Kumar Saraf. The property was mortgaged to Indian Overseas Bank for financial accommodation for an entity by the name and style of DDS Steel Rolling Mills Pvt. Ltd, in the year 2008.

4.It appears that there was a default committed in repayment of the loan and as such, the Bank took possession of the property on 09.07.2010 in terms of Section 13(4) of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (in short 'SARFAESI Act') and the same was published on 14.07.2010 and thereafter the property was brought to sale.

5.There was an attachment by the customs authorities in 2010 on the mortgaged property arising out of orders of assessment passed by the customs authorities upon SDS Private Limited (in short 'SDS') and Jai Bhavani Steels Enterprises Limited (in short 'Jai Bhavani') wherein Mr.Pramod Kumar Saraf was a Director. A letter dated 14.12.2010 is also stated to have been issued to the District Collector, Thiruvallur District and Inspector General of Registration with a copy marked to the Sub-Registrar, Red Hills within which Ponneri Taluk fell, that they may not entertain any transaction or transfer of properties set out in the annexure to the letter, including the property in question. Evidently no encumbrance wa registered or charge created.

6. Meanwhile, the petitioner was a successful bidder in the auction conducted by the Indian Overseas Bank and the property was sold to him on 22.12.2011. The sale was confirmed and Sale Certificate dated 23.01.2012 issued to the petitioner who was also put in possession and enjoyment of the property then and there. The sale certificate initially contained errors insofar as the pathway in the property, was omitted to be included as the part of property in question. Upon the petitioner pointing the same out, the sale certificate was corrected and a corrigendum issued on 29.06.2017.

7. The petitioner thereafter approached the office of the Sub-Registrar, Red hills, seeking registration of the property when it was informed that there was a subsisting attachment of the property and as such the sale could not be registered. It is only thereafter that the petitioner came to be aware that on 14.12.2010, the Commissioner of Customs had ordered the attachment of the properties owned by Jai Bhavani and SDS that included the properties of its Director, more specifically the property in question.

8. The Assistant Commissioner of Customs/R1 has filed a counter touching upon the merits of the assessment made in the

cases of Jai Bhavani and SDS as well as various irregularities stated to have been committed by the aforesaid two assessees, as revealed by the intelligence received and investigation conducted by the authorities. Since I am not concerned with the assessments per se, I refrain from adverting further to the same.

9. The petitioner approached the first respondent several times and vide several communications seeking lifting of the attachment. In fact, since the representations were not dealt with or disposed of, the petitioner was constrained to file a Writ Petition in WP. No.10457 of 2018 and final orders were passed by this Court directing the respondent to consider the petitioner's representation by affording an opportunity of personal hearing. It is pursuant thereto that the impugned order dated 20.07.2018 has been passed.

10. The sole question that arises for resolution is as to whether the charge created by the Customs Department would prevail over the charge created by the Bank in discharge of which the property in question was auctioned and purchased for valuable consideration by the petitioner.

11. The respondent has rejected the claim of the petitioner for lifting of attachment on the ground that the non payment of customs duty has resulted in attachment and as such it is the customs department that holds first charge over the property as a secured creditor.

12. The question of priority of charge was considered by the Full Bench of this Court in the case of UTI Bank Limited vs. Deputy Commissioner Central Excise [2006 (5) CTC 801] setting out the scheme of priority in respect of collection of dues at paragraph No.26 extracted below:

> '26. In the light of the above discussion, we conclude,
>
> (i) Generally, the dues to Government, i.e., tax, duties, etc. (crown's debts) get priority over ordinary debts.
>
> (ii) Only when there is a specific provision in the statue claiming "first charge" over the property, the Crown's debt is entitled to have priority over the claim of others.
>
> (iii) Since there is no specific provision claiming "first charge"in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner-Bank.

(iv) In the absence of such specific provision in the Central Excise Act as well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown's debts.

In view of the above conclusion, the petitioner UTI Bank, being a secured creditor is entitled to have preference over the claim of the Deputy Commissioner of Central Excise, first respondent herein'

13. That apart, Section 26E to the SARFAESI Act reads as follows:

'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.'

14. The Section is unambiguous and provides that a charge created over a property to a secured creditor, being a financial institution, would prevail over all other charges created over the asset in question and is absolute in its obligation. In the present case, the charge created by the Bank is prior in time to the demand raised by the customs authorities. Moreover, the customs authorities have not even registered an encumbrance or created a charge but only written a letter to the Registrar not to entertain any transfer of the property in question. This cannot, in any way stand in the way of the Bank, as secured creditor, taking recourse under SARFAESI.

15. In the light of the reasoning above, the Writ Petition is allowed and the respondent is directed to lift the attachment over the property in question within a period of two (2) weeks from date of receipt of a copy of this order. No costs.

Sd/-
Asst. Registrar

//True Copy//

Sub Asst. Registrar

To
1. Assistant Commissioner of Customs (Bonds),
Office of the Commissioner of Customs (Port),
Chennai -V, 60, Rajaji Salai, Custom House,
Chennai - 600 001.

2. Indian Overseas Bank,
Rep by its authorized Officer,
Central office Annexure Building,
1st floor, No.763, Chennai – 600 002.

+1 CC to Mr.Mr.T.L.Thirumalaisamy Advocate SR.NO.12401
+1 CC to Mr.Mr.F.B.Benjamin George Advocate SR.NO.1279

+1cc to Mr.R.N.Amarnath, Advocate in sr.no.13612 (17.07.19)

WP. No.25185 of 2018

CO(GP)
VC(03/06/2019)