IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 07.01.2019
CORAM
THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU
W.P.No.26144 of 2018
and
W.M.P.No.30415 of 2018

State Bank of India
Stressed Assets Management Branch
No.1112, 1st Floor, Raja Plaza
Avinashi Road, Coimbatore - 641 037
Represented by its Assistant General Manager. ...Petitioner

vs.

1.The Tax Recovery Officer (TDS)
Coimbatore
No.1510, 1st Floor
May Flower Midcity
Trichy Road, Coimbatore.

2.The Joint-I Sub Registrar
Tiruppur
Registration District of Tiruppur.

3.M/s.P.G.C.Corporation Ltd.,
No.5, Prem Gardens
Rajaji Nagar, P.N.Road,
Tirupur - 641 601.

4.M/s.P.G.C.Industries Pvt. Ltd.,
No.5, Prem Gardens
Rajaji Nagar, P.N.Road,
Tiruppur - 641 601. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the first respondent to remove the attachment effected on 08.07.2016 with the office of the second respondent so as to enable the petitioner bank to register sale certificate in favour of auction purchaser/third party in accordance with law.

For Petitioner : Mr.M.L.Ganesh

For Respondents: Mrs.Hema Muralikrishnan
standing counsel for R1
Mr.P.P.Purushotham
Government Advocate for R2
Mr.P.Sripriya
For R3 & R4

O R D E R

The petitioner seeks for mandamus directing the first respondent to remove the attachment effected on 08.07.2016 with the office of the second respondent so as to enable the petitioner-Bank to register the sale certificate in favour of the auction purchaser/third party.

2. The case of the petitioner in short is as follows:

The third respondent had availed various credit facilities from the State Bank of Patiala, which is now merged with the State Bank of India, the petitioner herein. In order to secure the repayment of the loan liability of Rs.1,11,93,78,688.30 as on 31.08.2018, the corporate guarantor/4th respondent had mortgaged its immovable property situated at Thottipalayam Village in S.F.Nos.596, 598, 592 and 595, Tiruppur Town, 15th Ward, B.S.Sundaram Road, Old T.S.No.1289, 1290, 1291, 1292/1 and 2, 1293/1, New T.S.No.4, 5 and 7, Ward J, an extent of 3.27 acres together with right of way covered under MOD registered as Doc.No.5805/2010, SRO. Tiruppur. Since the third respondent had committed default in repayment of the loan amount, the loan accounts were classified as NPA on 30.06.2014. The petitioner-Bank had initiated SARFAESI action to recover the outstanding loan amount of Rs.91,14,17,029 as on 31.10.2014 from the third respondent and its guarantors. Consequently, the petitioner-Bank had taken possession of the secured property on 10.02.2015 under Section 13(4) of the SARFAESI Act. Even after issuance of demand and possession notices, the third respondent and its guarantors have not acted upon. Consequently, the sale notice was issued on 13.10.2016 to auction the secured property. In the E-auction sale conducted on 18.11.2016, one N.Palanisamy, was declared as successful bidder for the sale amount of Rs.12,15,72,000/- and the said amount was duly appropriated towards the loan amount after deducting TDS of 1%. The petitioner-Bank issued a sale certified on 24.04.2017 in favour of the successful bidder. But, the sale certificate was unable to be registered before the second respondent, since the first respondent had attached the above said properties for the dues of the third respondent herein. The petitioner-Bank had sent a letter on 02.08.2018 to the first respondent to lift the attachment effected on 08.07.2016 on the secured properties. However, the first respondent did not raise the attachment. Hence, the present writ petition is filed before this Court.

3. A counter affidavit filed by the first respondent, wherein, it is stated as follows:

The Income Tax Department sought to recover the tax deducted at source by the third respondent from the payments made to its employees/3rd parties. The Income Tax Department is seeking to recover the amount payable to the employees, but not paid to them by the third respondent by labeling it as tax deducted at source and not paid over the same to the Income Tax Department. Hence, the petitioner cannot claim precedence in the present case. The first respondent has created encumbrance over the attached property on 08.07.2016, which is known to the auction purchaser as well.

4. The learned counsel for the petitioner submitted that the petitioner-Bank, being the secured creditor, is having priority over the other dues, as contemplated under Section 26E of the SARFAESI Act and therefore, the first respondent is not justified in not raising the attachment. He further contended that in any event, the properties attached by the first respondent are the properties of the fourth respondent, who is not the defaulter at the hands of the first respondent and on the other hand, only the third respondent/assessee, is the defaulter. Therefore, he contended that for realizing the tax dues from the third respondent, the first respondent is not entitled to attach the properties belonging to the fourth respondent. In support of his contention, the learned counsel relied on the following decisions viz., (i) a Division Bench decision reported in 2005 (1) CTC 758 in the case of ICICI Bank Ltd., .Vs. The Official Liquidator (ii) a Division Bench decision reported in (2015) 2 SCC 1 in the case of Bombay Stock Exchange .Vs. Kandalgaonkar & Others (iii) unreported decision of this Court made in WP.Nos.40656 of 2015 etc., dated 18.07.2017 and (iv) unreported decision of the Apex Court made in Special Leave to Appeal No.6483 of 2018 dated 10.08.2018.

5. The learned standing counsel for the first respondent, based on instructions, submitted that the attachment made by the first respondent on 08.07.2016 is the properties belonging to the fourth respondent and not that of the third respondent.

6. Heard both sides.

7. It is seen that the third respondent had availed some credit facilities from the State Bank of Patiala, which got merged with the petitioner-Bank. It is not in dispute that the fourth respondent herein is the corporate guarantor, who had mortgaged the subject matter properties to secure the loan/credit facilities advanced by the petitioner to the third respondent. Thus, it is not in dispute that the petitioner-Bank has become the secured creditor and the properties so, mortgaged by the fourth respondent with the first respondent has become the properties covered under the secured credit.

8. It is well settled that the claim of the secured creditor over the property will prevail over all other dues/debts including the crown debts. The following decisions were already made by this Court and the Apex Court to that effect.

(i) In the case of ICICI Bank Ltd., .Vs. The Official Liquidator, reported in 2005 (1) CTC 758, the Division Bench of this Court has held at Paragraph No.3 as follows:

> "This issue is no longer res integra in view of the decision of the Supreme Court in Dena Bank V. Bhikhabhai Prabhudas Parekh & Co., MANU/SC/0317/2000 where it has been held that the claim of a secured credit will prevail over crown debts."

(ii) In the Case of Bombay Stock Exchange Vs. Kandalgaonkar & Others, reported in (2015) 2 SCC 1, the Hon'ble Supreme Court has held at Paragraph No.39 as follows:

> 39. The first thing to be noticed is that the Income Tax Act does not provide for any paramountcy of dues by way of income tax. This is why the Court in Dena Bank case [Dena Bank v. Bhikhabhai Prabhudas Parekh and Co., (2000) 5 SCC 694] held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in Giles v. Grover [(1832) 9 Bing 128 : 131 ER 563] in which it has been held that the Crown has no precedence over a pledgee of goods. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, Collector v. Central Bank of India [AIR 1967 SC 1831 : (1967) 3 SCR 855] after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore "law in force" in the territory of India before the Constitution and was continued by Article 372 of the Constitution (AIR pp. 1835-36, para 7 : SCR at pp. 861-62).

(iii) An unreported decision made in Special Leave to Appeal No.6483 of 2018 dated 10.08.2018, the Apex Court has observed as follows:

> "We may also refer in this connection to Dena Bank Vs. Bhikhabahai Prabhudas Parekh and Co. & Ors. (2000) 5 SCC 694 and its progeny, making

it clear that Income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons."

(iv) A learned Single Judge of this Court has also taken similar view in WP.Nos.40656 of 2015 etc., dated 18.07.2017, at Paragraph Nos.9 & 10, it has been observed as follows:

"9. Thus, for the above reasons, it is held that the petitioner would have priority over all other debts and Government dues including taxes, cesses, etc., due to the Income Tax Department, Central Government, State Government or Local Authority. Therefore, the impugned orders of attachment are liable to be set aside.

10. In the result, the writ petitions in W.P.No.34703 of 2016 and 3572 of 2017 are allowed and the impugned orders are set aside and the attachment stands raised. In the light of the orders passed in these writ petitions, no further orders are required in W.P.No.40656 of 2015, as the said properties is covered in the list of the properties, which are the subject matter of the other two writ petitions. Hence, W.P.No.40656 of 2015 is dismissed. As this Court has allowed the writ petitions filed by Assets Reconstruction Company India Limited, The Sub-Registrar, Saidapet, Chennai is directed to remove the entries in the encumbrance certificate of the subject properties. No costs. Consequently, the connected miscellaneous petitions are also closed."

9. Therefore,in view of the above settled position of law, even assuming that the properties belonged to the third respondent, still the petitioner-Bank has priority over the said properties as secured creditor than the first respondent. Even, that question does not arise in this case, when admittedly, the properties so attached by the first respondent do not belong to the third respondent and on the other hand, they belong to the fourth respondent. Admittedly, the fourth respondent is not the defaulter before the first respondent. Therefore, the very attachment made by the first respondent of the properties belonging to the fourth respondent for realizing the tax dues from the third respondent, cannot be justified. In any event, in view of the fact that the petitioner being the secured creditor and their claim prevails over the other claims including Crown debts, this Court is of the view that the first respondent is not entitled to continue the attachment over the

subject matter properties any further.

10. Accordingly, this writ petition is allowed and the first respondent is directed to raise the attachment and communicate the same to the second respondent within a period of two weeks from the date of receipt of a copy of this order, so as to enable the petitioner to get the sale certificate registered before the second respondent. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Tax Recovery Officer (TDS)
Coimbatore
No.1510, 1st Floor
May Flower MidCity
Trichy Road, Coimbatore.

2.The Joint-I Sub Registrar
Tiruppur
Registration District of Tiruppur.

+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No.1323
+1cc to Mr.M.C.Ganesh, Advocate, S.R.No.1615
+1cc to the Government Pleader, S.R.No.2348

WP No.26144 of 2018

SPD(CO)

rrs 05/02/2019