IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2020

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

W.P.No.48989 of 2006
and
M.P.No.1 of 2006

Kotak Mahindra Bank Ltd.,
Rep.by its Authorised Signatory
Assets Reconstruction Division,
1st floor, Ceebros Centre,
39, Montieth Road,
Egmore, Chennai 600 008. ...Petitioner

Vs.

The Commercial Tax Officer,
Valluvarkottam Assessment Circle,
621, Anna Salai, Chennai 600 006. ...Respondent

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records of the respondent which culminated in the impugned notice Rc.3834/97/A3 dated 23.11.2006, quash the same and forbear the respondent from taking any action against the petitioner.

For Petitioner : Mr.M.R.Thiagarajan,
Senior Advocate for
M/s.A.S.Kailasam & Associates

For Respondent : Mr.Hariharan, AGP (T)

O R D E R

This is a petition for the issuance of a writ of Certiorari calling for the records of the respondent in his proceedings Rc.No.3834/97/A3 and quash the notice along with Form B6, dated 23.11.2006.

2.The brief facts leading to the filing of this writ petition are as follows:

One M/s.Dyna Lamps & Glass Works Ltd, having office at

No.35, Nungambakkam High Road, Chennai - 600 034, hereinafter referred to as 'company', is a manufacturer of fluorescent lights and G.L.S. Bulbs. The said company availed financial assistance from many financial institutions, one among which is erstwhile ICICI Ltd., for which, it created a mortgage on 15.12.1993 over the property in Plot No.D-17, SIPCOT Industrial Complex, Gummidipoondi, Tiruvallur District. Subsequently, the said ICICI Bank assigned the debt to the petitioner herein on 31.03.2005, due to which, the petitioner became the holder of the assets along with the underlying securities and the assets of the company vested in the petitioner insofar as the security interest was concerned and the same was further confirmed by ICICI Bank Ltd in favour of the petitioner vide agreement dated 20.04.2005. Thereafter, the company was wound up by order dated 01.03.2006 in CP.No.209 of 2003; SARFAESI proceedings was initiated by the ICICI Bank Ltd; after obtaining the consent from all the secured creditors, possession was taken on 07.02.2005; auction was conducted and it was confirmed in favour of the highest bidder, M/s.Annam Steels Pvt. Ltd., for a sum of Rs.4.16 crores and after adjusting the expenses incurred on the assets, the available sale proceeds were distributed to all the secured creditors and other lenders. As per the said proceedings, the petitioner was holding the sale proceeds amounting to Rs.97,17,224/-. Since the company is a defaulter in payment of sales tax to the tune of Rs.4,80,05,508/- for the assessment years from 1992-93 to 2000-01, the respondent sent a demand notice on 18.09.2006, in the form of garnishee proceedings under Section 26 of the TNGST Act, calling upon them to remit the entire amount. On receipt of the same, the petitioner filed its reply on 31.10.2006. However, the respondent issued the notice dated 23.11.2006 along with Form B6, which is impugned herein.

3.Upon notice, the respondent filed a detailed counter affidavit, wherein, it is inter alia stated that the company, whose property was brought for sale by way of public auction, is the defaulter and liable to pay sales tax to the tune of Rs.4,80,05,508/- due to the Government under the TNGST Act; a statutory charge has been created long time back and in view of the priority conferred on the liability arising under the Act, the State is entitled to have its statutory dues settled in preference to all other creditors, whether secured or unsecured, notwithstanding the existence of any right under mortgage anterior in point of time, prior to creation of charge under Section 24 of the TNGST Act by operation of law; and hence, the respondent is legally entitled to proceed against the petitioner to the extent of the sale proceeds realised by them under the SARFAESI Act and accordingly, issued the impugned notice to the petitioner. Stating so, the respondent prayed to dismiss this writ petition.

4.The learned counsel for the petitioner submitted that the petitioner is neither a debtor of the company nor is it holding any money belonging to the company; and the sale proceeds from the assets of the company have been distributed to all the secured creditors including the petitioner on a pro rata basis and hence, the impugned notice issued by the respondent for recovery of the arrears of sales tax payable by the company, that too without prior notice to the petitioner, is arbitrary, illegal and without any basis.

5.Reiterating the averments as were made in the counter affidavit filed by the respondent, the learned Additional Government Pleader (T) submitted that the impugned notice issued by the respondent is legally valid and justified. According to him, the petitioner is a mortgagee bank and the defaulter is the mortgagor and thereby, interest in immovable property is created in favour of the mortgagee bank conferring the right of foreclosure; similarly, the mortgagee bank could have very well redeemed the property in exercise of the right of redemption; creation of rights between the mortgagor and mortgagee bank is the transfer in inter ivos i.e., 'right in personam' arising between the parties; on the other hand, the amount due to the Government is 'right in rem', which prevails over any other debt as crown debt; and hence, the petitioner bank is bound to pay the amount due to the Government, since they have effected sale of the defaulter's properties and realised the amount to the tune of Rs.97,17,224/-.

6.Heard the rival submissions and perused the materials placed before this Court.

7.Apparently, the company is the defaulter in payment of sales tax to the tune of Rs.4,80,05,508/- for the assessment years from 1992-93 to 2000-01 to the respondent. There was a mortgagee and mortgagor relationship between the petitioner and the company with effect from 31.03.2005. The property, on which the mortgage was created, was brought to public auction, through SARFAESI proceedings and the sale proceeds were distributed to all the secured creditors and other lenders. However, the arrears of sales tax due to the respondent have not been settled. Hence, the respondent issued the notice impugned herein, calling upon the petitioner to remit the entire sale proceeds of Rs.97,17,224/- realised by them from the immovable property of the company, towards partial fulfillment of the demand made in Form B6.

8.According to the petitioner, they are neither a debtor of the company nor they are holding any money belonging to the company and hence, the notice issued by the respondent calling upon the petitioner to pay the arrears of sales tax payable by the company out of the sale proceeds realised through SARFAESI proceedings, is illegal and without any basis, whereas, it is the categorical stand of the respondent that the Government charge is having priority over all other claims against the property and the petitioner is burdened with the obligation of making payment to the Government.

9.Now, the point to be considered herein is the priority of charge arising out of sales tax arrears, vis-a-vis the arrears due to others including the petitioner mortgagee.

10.The Supreme Court, in State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation [(1995) 96 STC 612], held that the claim of the Sales Tax Department took priority over the claim of the appellant-Bank as mortgagee of the property in question. In that case, the State Bank of Bikaner and Jaipur had given cash credit facilities to National Iron & Steel Rolling Corporation and as security, created a mortgage of the factory premises on October 18, 1977 and the Plant and machinery installed in the premises were also pledged subsequently as security on June 10, 1981. In civil suit for recovery of the advance amounting to Rs.3,79,672/- under the cash credit facility and future interest, the mortgaged property was brought to sale. While the suit was pending, the department got impleaded on May 18, 1990 on the ground that the department had a prior claim for a recovery of a sum of Rs.1,19,122/- as sales tax due from National Iron & Steel Rolling Corporation. In that case, the Supreme Court categorically held that the charge of the Sales Tax Department is the first charge on the property and it has priority over all other charges on the property including a mortgage. The Supreme Court categorically stated that the charge operates on the entire property of the dealer including the interest of the mortgagee therein. Referring to Dattatreya Shanker Mote's case reported in (1974) 2 SCC 799, the Supreme Court held that :

> ".........a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore, when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage."

11.This decision of the Supreme Court has been followed by this Court in the case of Central Bank of India v. State of Tamil Nadu [(1999) 113 STC 145] and it was categorically held that :

> "Sections 24(2) and 26(6) of the Tamil Nadu General Sales Tax Act, 1959 as amended by Tamil Nadu Act 78 of 1986, sufficiently safeguard and

also enable the State to enforce the recovery of the taxes and other dues under the Tamil Nadu General Sales Tax Act, 1959, as the first statutory charge holder in supersession of even the claims of an existing mortgagee, who claims to be a secured creditor."

12.Further, in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., [2000 (120) STC 610], it was held by the Supreme Court that "the State shall have a preferential right to recover its dues over the rights of the appellant Bank and the property of the partners shall also be liable to be proceeded against."

13.Thus, definitely, the sales tax arrears take precedence over the claims of an existing mortgagee also. In the present case, the respondent issued the notice along with Form B6 on 18.09.2006 to the petitioner, demanding the arrears of sales tax to the tune of Rs.4,80,05,508/- payable by the company, which, according to the petitioner, was received only on 12.10.2006. In the mean while, the auction was confirmed in favour of M/s.Annam Steels Pvt. Ltd and the sale certificate was issued to them under the SARFAESI Act on 26.09.2006 and the available sale proceeds were distributed to all the secured creditors and the other lenders by 30.09.2006. But, in terms of the decisions cited, the demand raised by the respondent prior to the appropriation of the sale proceeds, will have precedence over the claims of the petitioner - mortgagee. Hence, the petitioner is bound to pay the sale proceeds realised by them towards partial fulfillment of the demand raised by the respondent.

14.In such view of the matter, this writ petition deserves no consideration and is accordingly, dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS I)

//True Copy//

Sub Assistant Registrar

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To

The Commercial Tax Officer,
Valluvarkottam Assessment Circle,
621, Anna Salai, Chennai 600 006.

+1cc to Mr.A.S.Kailasam & Associates, Advocate, S.R.No.24269
+1cc to Special Government Pleader, S.R.No.24018

W.P.No.48989 of 2006

NRJK(CO)
KKV/21/07/2020