IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 09.09.2020
CORAM
THE HONOURABLE Mr.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE Mrs.JUSTICE R.HEMALATHA

Writ Petition Nos.8546, 8547, 8548 and 8549 of 2020
and
W.M.P.No.10335 of 2020 in W.P.No.8546 of 2020

M/s.Aachi Masala Foods Pvt. Ltd.
Rep. by its Director P.Ashwin Pandian
No.1926, 34th Street, I Block
Ishwarya Colony, Anna Nagar West
Chennai 600 040

... Petitioner in all WPs

Vs.

1.M/s.Edelwiss Assets Reconstruction Co. Ltd.
Acting in its capacity as Trustee of EARC Trust SC 28
Rep. by its Authorised Signatory
Regd. office at Edelwiss House
Off. CST Road, Kalina, Mumbai 400 098

2.M/s.Jai Bhavani Steels Enterprises Pvt. Ltd.
in liquidation rep. by Liquidator
6-H, Century Plaza, 560/562, Anna Salai
Chennai 600 018.

3.The Tax Recovery Officer
Income Tax Department, Govt. of India
Room No.327A, 3rd Floor, New Block
No.121, M.G.Road, Aayakar Bhavan
Chennai 600 034.

4.The Assistant Commissioner
Commercial Tax Department
No.46, Taluk Office Building
Greenways Road, Pasumpon Muthuramalingam Salai
Raja Annamalai Puram, Chennai 600 028

5.The Assistant Commissioner of Customs Bonds
O/o.The Commisioner of Customs (Port)
Chennai-V, 60 Rajaji Salai, Custom House
Chennai 600 001

6.The Sub-Registrar
Red Hills
No.44/5, Vallar Street, Red Hills
Chennai 600 052

... Respondents in all WPs

Prayer in W.P.No.8546 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the 5th respondent in respect of the impugned Emails dated 06.05.2020 and 19.05.2020 and to quash the same as illegal , arbitrary and direct the 1st respondent to receive the balance payment by excluding the period of Lockdown from 25.03.2020 till 30.05.2020.

Prayer in W.P.No.8547 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the 3rd respondent in respect of the attachment entry registered as Doc. No.8 of 2019 reflecting in the impugned encumbrance certificate on the file of the 6th respondent and to quash the same and further direct the 6th respondent to remove such entry of attachment reflecting in the impugned encumbrance certificate within a time frame to be specified by this Hon'ble Court.

Prayer in W.P.No.8548 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the 4th respondent in respect of the attachment entry registered as Doc. No.5 of 2012 reflecting in the impugned encumbrance certificate on the file of the 6th respondent and to quash the same and further direct the 6th respondent to remove such entry of attachment reflecting in the impugned encumbrance certificate within a time frame to be specified by this Hon'ble Court.

Prayer in W.P.No.8549 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the 5th respondent in respect of the attachment entry registered as Doc. No.11 of 2019 reflecting in the impugned encumbrance certificate on the file of the 6th respondent and to quash the same and further direct the 6th respondent to remove such entry of attachment reflecting in the impugned encumbrance certificate within a time frame to be specified by this Hon'ble Court.

For Petitioner (s)	:	Mr.Om Prakash, Senior Counsel for Mr.P.Elaya Raj Kumar for M/s.Ramalingam & Associates for petitioner in all WPs
For Respondent(s)	:	Mr.S.Ravi, Senior Counsel for M/s.Indhumathi for R1 in all WPs Mr.Sri Ganesh for R2 in all WPs Mr.T.M.Pappiah, Spl. GP for R6 in all WPs No Appearance for RR 3 to 5 in all Wps

COMMON ORDER

[The Order of the Court was made by M.M.SUNDRESH. J.]

The petitioner in all these writ petitions is one and the same. It is the successful bidder in the auctions conducted by the 1st respondent. In W.P.No.8546 of 2020, the petitioner could not repay the remaining amount. Subsequently, the amount has been paid and received by the 1st respondent.

2. In such view of the matter, the writ petition in W.P.No.8546 of 2020 stands disposed of by directing the 1st respondent to issue the sale certificate and thereafter, register the same.

3. Insofar as the other three writ petitions viz., 8547, 8548 and 8549 of 2020 are concerned, there is a common grievance which the petitioner seeks to raise before us. The Sub Registrar viz., the 6th respondent, entered the documents for which the sale certificates are given, but the registration declined on the premise that three encumbrances have been entered into. In W.P.No.8547 of 2020, the Encumbrance No. is 8 of 2010 on behalf of the Income Tax Department; W.P.No.8548 of 2020, the Encumbrance No. is 5 of 2012 on behalf of the Commercial Taxes Department; and in W.P.No.8549 of 2020, the Encumbrance No. is 11 of 2019 on behalf of the Customs Department.

4. A communication addressed by the 6th respondent to the Special Government Pleader, High Court of Madras, in Na.Ka.No.202/2020 dated 04.09.2020 has been produced, by which, it has been informed that the Encumbrances have been entered

wrongly by misconstruing the letters given by the above said departments. Therefore, The District Registrar (North Chennai) was asked to cancel the same.

5. We have heard the learned counsel for the petitioner; the learned counsels for the respondents 1 and 2 and the learned Special Government Pleader appearing for the 6th respondent.

6. We had also issued notices to the counsel appearing for the respondents 3 to 5. Unfortunately, there was no representation on behalf of them on the earlier occasion and even today also there is no representation. Therefore, we are inclined to proceed with the matter on merits.

7. The learned senior counsel appearing for the petitioner submitted that in view of the communication sent by the 6th respondent dated 04.09.2020, there is no difficulty in allowing the writ petitions as prayed for. However, on the question of law also, the issue involved is no longer res integra. A Full Bench of this Court, considered the said issue in UTI Bank Ltd v.The Deputy Commissioner of Central Excise Chennai II Division, 2007 (1) LW 50 and held as follows:-

> "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 statute 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 Actas well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown's debts."
>
> In view of our 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."

8. It was duly followed by another Full Bench of this Court reported in Manu/TN/3743/2016 [The Assistant Commissioner (CT), Annasalai-III Assessment Circle v. The Indian Overseas Bank W.P.No.2675 of 2029 etc., batch dated 10.11.2016]. Reliance has been made on the following para:

> "1.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.''
>
> 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.''

2.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.

3.The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

4.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.

5.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''.

6.We, thus, answer the aforesaid reference accordingly. The matters be placed before the roster Division Bench for dealing with the individual cases."

9. Taking note of the above, a Division Bench of Madurai Bench of this Court reported in Manu/TN/7117/2018 [Central Bank of India v. The Joint Sub Registrar No.1 and others W.P.No.10724 of 2018 dated 06.12.2018] has held as follows:-

8. For the sake of convenience, Section 26-E of the SARFAESI Act, is extracted hereunder:-

"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.

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.”

9. In the light of the judgment of the Full Bench of this Court reported in 2016 (6) CTC 769 (cited supra) and on a conjoint reading of Section 26-E of the SARFAESI Act and Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, there cannot be any doubt that the rights of a secured creditor to realise the 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, inasmuch as Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, was introduced with a “notwithstanding” clause and it has also come into force from 01.09.2016.

10. In such view of the matter, we are of the opinion that the order of attachment before judgment cannot be a bar for the first respondent to register the sale certificate in respect of the property in question and hence, there cannot be any impediment for the first respondent to register the sale certificate dated 20.03.2018 issued in favour of the fifth respondent.

11. Accordingly, this writ petition is allowed and the impugned order passed by the first respondent is quashed and consequently, the first respondent is directed to register the sale certificate dated 20.03.2018 issued by the petitioner bank in favour of the fifth respondent, within a period of two weeks from the date of receipt of a copy of this order. No costs. Consequently, connected Writ Miscellaneous Petitions are closed."

10. The learned senior counsel appearing for the petitioner placed a reliance upon the judgment of the Division Bench of Gujarath High court, which took into consideration of the earlier judgement referred to supra rendered by this court reported in Manu/GJ/0130/2020 [Bank of India v. State of Gujarat]. The following paragraphs are pressed into service.

> "16. Indisputably, the judgment of the Apex Court in the case of Central Bank of India (supra) was prior to the amendment in the Act, 2002 and 1993 respectively. However, what is important are the observations of the Supreme Court as contained in para-126 of this decision quoted above. The Supreme Court observed that while enacting the DRT Act, the Parliament was aware of the law laid down by the Supreme Court, wherein priority of the State dues was recognized. If the Parliament intended to create the first charge in favour of the Banks, Financial Institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529-A of the Companies Act or Section 11 (2) of the EPF Act and ensured that notwithstanding the series of judicial pronouncements, the dues of Banks, Financial Institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax etc. The Supreme Court proceeded to observe that the fact of the C/SCA/13863/2014 JUDGMENT matter was that no such provision had been incorporated in either of those enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal.
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> ....
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> 21. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding

> effect over the provision in the same or other Act mentioned in the non- obstante clause. It is equivalent to saying that inspite of the provisions or Act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. [See 'Principles of Statutory Interpretation', 9th Edition by Justice G.P. Singh Chapter V, Synopsis IV at pages 318 & 319] 22. When two or more laws or provisions operate in the same field and each contains a non-obstante clause stating that its provision will override those of any other provisions or law, stimulating and intricate problems of interpretation arise. In resolving such problems of interpretation, no settled principles can be applied except to refer to the object and purpose of each of the two provisions, containing a non-obstante clause. Two provisions in same Act each containing a non-obstante clause, requires a harmonious interpretation of the two seemingly conflicting provisions in the same Act. In this difficult exercise, there are involved proper consideration of giving effect to the object and purpose of two provisions and the language employed in each. [See for relevant discussion in para 20 in Shri Swaran Singh & Anr. v. Shri Kasturi Lal; (1977) 1 SCC 750]"

11. A further reliance has been made on the order passed by the learned single Judge of this Court and that of the High Court of Kerala wherein, once again, the amended provision has been taken into consideration by holding that claim of the secured creditor will prevail over Crown's debts.

12. In the judgement relied on by the learned senior counsel for the petitioner reported in Manu/KE/3448/2019 [State Bank of India v. State of Keral dated 30.07.2019], the scope and ambit

of Section 26(E) of The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 and Section 31-B of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 were considered in extenso. Accordingly, it was concluded that a secured creditor under the above said provisions get priority over the right, if any, claimed by the revenue.

13. The learned counsel appearing for the 1st respondent submitted that even on facts, the writ petitions are deserved to be allowed as the mortgage has been entered into on 25.08.2009 being prior to the charge, if any, in favour of the respondents 3 to 5. Therefore, even on merits, the writ petitions are deserved to be allowed.

14. Considering the submissions made, we are of the view that there is no fresh adjudication is required in the light of the judgements apart from the factual position which is not in dispute nor any contra materials produced.

15. These writ petitions are allowed accordingly with the above directions. No costs. Consequently, connected WMPs are closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

raa/kmk

To
1.The Assistant Commissioner,
Commercial Tax Department,
No.46, Taluk Office Building, Greenways Road,
Pasumpon
Muthuramalingam Salai,
Raja Annamalai Puram, Chennai 600 028.

2.The Assistant Commissioner of Customs Bonds,
O/o.The Commisioner of
Customs (Port),Chennai-V,60,
Rajaji Salai,Custom House,Chennai 600 001.

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No.44/5, Vallar Street, Red Hills
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+1 cc to Government pleader sr29705
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W.P.Nos.8546 to 8549 of 2020

aa28/10/2020