IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.No.5857 of 2018
and
W.M.P.Nos.7195 to 7197 of 2018

State Bank of India,
Rep., by its Chief Manager
RACPC, OMR,
New No.4/952, 4/952A, III Floor,
Rajiv Gandhi Salai, Perungudi,
Chennai-96. .. Petitioner

-vs-

1.The Tax Recovery Officer,
Income Tax Department,
TRO-1, Coimbatore.

2.The Sub Registrar,
Selaiyur,
Kanchipuram District.

3.The Sub Registrar,
Joint-I, South Chennai,
Saidapet, Chennai-15.

4.Mr.V.Balasubramaniam,

5.Mrs.J.Swetha .. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus directing the first respondent to remove the attachment registered as Doc Nos.8 & 9/2017 on the file of the second respondent and document No.13/2017 on the file of the third respondent in respect of the property situate at Plot No.A1, Peurmal Koil Street, Arasangkazhanai Village, Sholinganallur Taluk, Kancheepuram District comprised in Survey No.25, measuring an extent of 1263.28 sq.ft belonging to the 5th respondent and Plot No.3B, Phase-I, Nagalakshmi Nagar, Endee Villa, Ottiyambakkam Main Road, Sithalapakkam, Chennai-126, forming Sithalapakkam Village, Sholinganallur Taluk, Kancheepuram District comprised in O.S.No.39/1, R.S.Nos.39/3A, 39/C, 39/4A, 39/4D, 39/4J, present Survey No.39/4A2, land measuring an extent of 861 sq.ft and building measuring an extent of 2300 sq.ft belonging to the 5th respondent with the office of second respondent and Plot No.H 49 B, Kalashetra Colony, Besant Nagar, Chennai-90, comprised in Survey No.171, forming part of Thiruvanmiyur Village, Velachery Taluk, Chennai District, measuring an extent of 1593 sq.ft belonging to the fourth respondent with the office of third respondent so as to enable the petitioner bank to register the sale certificate issued under SARFAESI Act in favour of successful bidder.

For Petitioner : Mr.M.L.Ganesh

For R1 : Mr.A.P.Srinivas,
Senior Standing Counsel

For RR2 to 5 : No appearance

ORDER

The relief sought for in the present writ petition is to direct the first respondent-Tax Recovery Officer, Income Tax Department to remove the attachment registered as Document Nos.8/2017 and 9/2017 on the file of the second respondent and Document No.13/2017 on the file of the third respondent in respect of the property situated at Plot No.A1, Peurmal Koil Street, Arasangkazhanai Village, Sholinganallur Taluk, Kancheepuram District comprised in Survey No.25, measuring an extent of 1263.28 sq.ft belonging to the 5th respondent and Plot No.3B, Phase-I, Nagalakshmi Nagar, Endee Villa, Ottiyambakkam Main Road, Sithalapakkam, Chennai-126, forming Sithalapakkam Village, Sholinganallur Taluk, Kancheepuram District comprised in O.S.Nos.39/1, R.S.Nos.39/3A, 39/C, 39/4A, 39/4D, 39/4J, present Survey No.39/4A2, land measuring an extent of 861 sq.ft and building measuring an extent of 2300 sq.ft belonging to the 5th respondent with the office of second respondent and Plot No.H 49 B, Kalashetra Colony, Besant Nagar, Chennai-90, comprised in Survey No.171, forming part of Thiruvanmiyur Village, Velachery Taluk, Chennai District, measuring an extent of 1593 sq.ft belonging to the fourth respondent with the office of third respondent so as to enable the petitioner bank to register the sale certificate issued under SARFAESI Act in favour of successful bidder.

2.The petitioner is State Bank of India. The petitioner states that the subject properties, which were mortgaged with the petitioner-Bank by way of raising loan by the fourth and fifth respondents, were attached in an illegal manner by the first respondent. In view of the said attachment, the petitioner-Bank is unable to deal with the said properties with reference to the terms and conditions stipulated in the Deed of Mortgage. Thus, they are constrained to move the present writ petition.

3.The facts regarding the mortgage of the properties in favour of the Bank and their capacity as a secured creditor are not disputed by the first respondent.

4.The learned counsel for the petitioner reiterated that the petitioner-Bank holds the first charge over the properties in view of Section 26E of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as "the 1993 Act"). Thus, the first respondent has no authority to attach the subject properties, which is violation of the provisions of SARFAESI Act and therefore, the direction as such sought for is to be granted.

5.To substantiate the contentions, the learned counsel for the petitioner relied on Section 26E of the SARFAESI Act, which enumerates that "notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the dates due to any security creditor shall be paid in priority overall other debts and all revenues, taxes and cesses and other rates payable to the Central Government or State Government or local authority". Section 31B of the 1993 Act also provides "priority to secured creditors".

6.In the present case, the petitioner-Bank is admittedly the secured creditor and the subject properties are admittedly mortgaged and the original title deeds are deposited by the borrowers with the petitioner-Bank. Thus, the first respondent has no authority to override the provisions of the SARFAESI Act and the 1993 Act and thus, the attachment made by the first respondent in respect of the subject properties is to be raised.

7.In reliance, the learned counsel referred to the judgment of the Hon'ble Supreme Court of India in the case of Bombay Stock Exchange vs. Kandalgaonkar & Ors., reported in (2015) 2 SCC 1 wherein, the following observations are made:-

> "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 vs. 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 vs. Grover (1832) 9 Bing 128 in which it has been held that Crown has no precedence over a pledge of

goods. ...."

8.Further, the learned counsel relied on the orders passed by this Court in M/s.Well Stores (Madras) Private Limited & Ors. Vs. Tax Recovery Officer, Chennai & Ors. [W.P.Nos.40656 of 2015 etc., batch dated 18.07.2017] wherein, the following observations are made:-

> "6.Therefore the petitioner being the successor would step into the shoes of the financing Bank, which admittedly, is a secured creditor. Further more, the document has been valid by stamped for the purpose of stamp duty as assignment deed as could be seen from the endorsement in the reverse of page No.1 of the Assignment agreement dated 07.02.2017. Thus, in the light of the decision of the Full Bench, taking note of the Amendment Act, 2016, the order of attachment made by the Income Tax Department should yield to rights of the petitioner, secured creditor. Therefore, they are required to be set aside."

9.Relying on the judgments, the learned counsel for the petitioner reiterated that the Bank holds the first charge over the subject properties and when the properties in question were mortgaged as per the terms and conditions, the petitioner must be allowed to deal with the properties and the attachment made illegally by the first respondent is to be raised.

10.The learned counsel for the petitioner has further stated that the order of attachment passed by the first respondent on 23.05.2017 is after the mortgage and the deposit of title documents with the petitioner-Bank by the fourth and fifth respondents on 27.01.2016 and 06.02.2016 respectively. When the mortgage was executed prior to the passing of the order of attachment by the first respondent on 23.05.2017, then the petitioner-Bank holds the first charge over the properties. Thus, the subsequent order passed by the first respondent is invalid in the eye of law.

11.The learned Senior Standing Counsel appearing on behalf of the first respondent-Income Tax Department strenuously objected the contentions raised on behalf of the petitioner by stating that admittedly the subject properties were mortgaged in favour of the petitioner-Bank and the Bank is the secured creditor. There is no much dispute with reference to the facts pleaded by the petitioner-Bank. However, the legality of the mortgage is to be gone into with reference to the provisions of the Income Tax Act, 1961 (hereinafter referred to as "the IT Act") as well as the SARFAESI Act.

12.It is contended that the demands of the assessees, i.e., M/s.Beetle Experts and M/s.Ultimate Solutions, in which Shri.V.Balasubramaniam and Smt.J.Swetha are the partners, were initially raised by the Income Tax Department on 31.05.2015, that is, prior to the date of creation of mortgage by the petitioner-Bank on 27.01.2016 and 06.02.2016 and therefore, the mortgage is void as per Section 281 of the IT Act.

13.Elaborating the said contentions, the learned Senior Standing Counsel for the first respondent states that the demands outstanding were relating to the income tax assessment years 2012-13 and 2013-14 and the earliest demand notice was issued on 31.03.2015. In spite of the repeated reminders, the assessees failed to remit the dues and subsequently, the subject properties were attached on 23.05.2017. Therefore, the Department has first charge over the properties of the assessees and its partners with effect from 31.03.2015 onwards. Consequently, the properties were attached by the first respondent on 23.05.2017 and even at that point of time, the Income Tax Office was not aware of the fact that the scheduled properties are under mortgage with the petitioner-Bank. It is stated that there had been no board displayed by the Bank at the subject properties stating that the same are under attachment. The fact regarding mortgage came to the notice of the Income Tax Department only through the present writ petition filed by the petitioner-Bank. The Income Tax Department is empowered to attach the properties in the interest of revenue, even though the properties are attached by the other agencies.

14.The learned Senior Standing Counsel mainly contended that Section 281 of the Act provides about "certain transfers to be void". However, the charge of the Income Tax Department, over the immovable properties attached, precedes the charge of the Bank and the claim of precedent by the Bank is no basis. Overriding powers in terms of Section 35 of the SARFAESI Act applies to the Bank only, if it has precedent of the charge on the properties of its clients. In the case on hand, it is the Income Tax Department, which holds the first charge, as the initial demand was made prior to the subject properties were mortgaged and the mortgage to the Bank is void as per the IT Act.

15.At the outset, it is contended that the initial demand was raised by the Department on 31.03.2015, whereas the properties are mortgaged with the Bank only on 27.01.2016 and 06.02.2016 and hence, the Income Tax Department do not have charge much less first charge over the assets of its partners.

16.Lets us now consider the provisions of Section 281(1) of the IT Act, which contemplates that where, during the pendency of any proceeding under the IT Act or after the completion thereof, but before the service of notice under Rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or an other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise.

17.The question arises whether the present facts pleaded in the writ petition would fall under the definition of "certain transfers to be void" or not. In this contest, it is relevant to consider Rule 2 of II Schedule of the IT Act. The said Rule reads as "when a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under the Second Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realise the amount under the Second Schedule". Therefore, even before the service of notice under Rule 2, which contemplates that when a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears and during the pendency of any proceedings under the IT Act, if certain transfers as denoted in Section 281 are executed, then all such transfers are declared as void under the said provision. The provision contemplates that the transfers by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever shall be void as against any claim in respect of any tax or any other sum payable by the assessee.

18.Section 26E of the SARFAESI Act contemplates priority to secured creditors. Section 31B of the 1993 Act reads pari materia with Section 26E of the SARFAESI Act. Admittedly, the petitioner-Bank is the secured creditor in the present case. Thus, under the SARFAESI Act, the petitioner-Bank gains priority over the revenue tax payable to the Central Government or the State Government. As per the above provision, the petitioner-Bank holds the first charge in respect of the properties mortgaged. What is relevant in the present case is that the question of understanding the priority to secured creditor under Section 26E of the SARFAESI Act would arise only if the mortgage is in existence or valid in the eye of law.

19.Contrarily, Section 281 of the IT Act unambiguously stipulates that during the pendency of any proceedings under the IT Act, if certain transfers are made, such transfers are void as against any claim in respect of any tax or other sum payable by the assessee. In this context, it is made clear that as far as the demands outstanding in respect of respondents 4 and 5 are concerned, they are relating to the income tax assessment years

2012-13 and 2013-14 and the earliest demand notice was issued by the Income Tax Department on 31.03.2015. Thereafter, repeated reminders were sent to the assessees and the assessees failed to remit dues and thereafter, the subject properties were attached on 23.05.2017. Thus, the Income Tax Department claims first charge over the properties of the assessees and its partners with effect from 31.03.2015, the date on which the earliest demand notice was issued.

20.However, the learned counsel appearing on behalf of the petitioner contended that the properties were purchased from and out of the housing loan sanctioned in favour of the assessees/fourth and fifth respondents in the present case and therefore, subject properties itself were purchased from and out of the loan raised from the petitioner-Bank. In this regard, it is relevant to consider the factual details provided in the notices under Section 13(2) of the SARFAESI Act issued to respondents 4 and 5 dated 11.11.2016 and 08.12.2016 respectively and the notice dated 11.11.2016 contains the details of security documents including all supplementary documents and documents evidencing creation of mortgage. The notice dated 08.12.2006 would reveal the facts regarding the second property. Schedule-B provides details of application and regulation. Perusal of the above details would reveal that housing loan application forms for individuals were issued on 09.10.2015 and 14.09.2015; however, Deeds of Undertaking of Mortgage were made on 26.10.2015 and 21.09.2015; minimum deposit was executed on 27.01.2016 and 06.02.2016; and the confirmation letters were issued on 28.01.2016 and 07.02.2016. Thus, it is clear that all the dates relatable to the mortgage fall after the issuance of the earliest demand notice by the Income Tax Department on 31.03.2015. Undoubtedly, the properties were purchased after receipt of demand notice dated 31.03.2015 by the Income Tax Department. However, Section 281 of the IT Act is to be interpreted that where during the pendency of any proceedings under the IT Act, if at all the properties purchased or owned even prior to the proceedings, the properties are subject to be dealt with in accordance with Section 281 of the IT Act and if any of such properties were transferred, then the Income Tax Authorities are competent to invoke Section 281 of the IT Act, holding that such transfers are void. However, in the present case, the housing loan applications itself were issued on 09.10.2015 and on 14.09.2015 after the issuance of the earliest demand notice by the Income Tax Department on 31.03.2015. Thus, respondents 4 and 5, the partners of M/s.Beetle Experts and M/s.Ultimate Solutions were aware of the fact that they have to clear the dues to the Income Tax Department. In spite of the fact that they are aware of the dues, they have mortgaged the properties in favour of the petitioner-Bank.

21.The learned counsel for the petitioner made a submission that the registration was done before the Sub Registrar on 22.09.2015 and the attachment of immovable properties was done by the Income Tax Department on 23.05.2017. Thus, even before issuing the attachment order by the Income Tax Department, the mortgage was in existence and therefore, the petitioner-Bank holds the first charge over the subject properties. Undoubtedly, the deposit of title deeds was made on 22.09.2015. However, before such date, the income tax proceedings were pending under the provisions of the IT Act against the assessees concerned.

22.Section 281 of the IT Act stipulates that if any mortgage or transfer is made in any manner, then all such transfers, mortgage, gift, etc., became void and therefore, such mortgage, gift or transfer is non-existence in law. In such circumstances, the question of priority would not arise at all.

23.The concept of priority would arise, if there are more than one claim between two or more transfers, who all are holding valid right in respect of the subject property. If more than two persons are having right over the property and such more than two or more persons are claiming the benefits from and out of the subject property, then only the question of priority would arise. If the priority question arises, then as per Section 26E of the SARFAESI Act, the first charge must be to the secured creditor/Bank. Thus, the priority to secured creditors is not disputed and such priority would arise only if rights regarding the subject property are established by more than two persons.

24.Section 26E of the SARFAESI Act is not connected with the declaration contemplated under Section 281 of the IT Act. Therefore, the said provisions cannot be construed as repugnant and in fact, the scope of Section 281 of the IT Act is absolutely unconnected with the priority contemplated under Section 26E of the SARFAESI Act. However, Section 26E of the SARFAESI Act provides that when the rights are claimed by more than two persons in respect of any property, then the priority would lie on the secured creditor, in the present case, the petitioner/Bank. Thus, the provisions are independent and different. The scope of these two provisions are to be distinguished, more specifically, with reference to the facts and circumstances of each case. It is not as if the SARFAESI Act will prevail over the IT Act or the IT Act will prevail over the SARFAESI Act, it is a question with reference to the factual matrix established before the Court of law, which would throw light in respect of the decision to be taken.

25.When it is established that the earliest demand notice under the IT Act with reference to the assessment years 2012-13 and 2013-14 was issued by the Income Tax Authorities on 31.03.2015 prior to the mortgage executed in favour of the petitioner-Bank on 27.01.2016 and 06.02.2016, the provisions of Section 281 of the IT Act would be applicable and the question of priority would not arise, in view of the fact that once the provision of Section 281 of the IT Act is applied, then the said transfer become void ab initio and the mortgage or transfer made thereafter is consequently void. Such transfers are to be construed as fraudulent transfers or mortgage and therefore, the mortgage in favour of the petitioner-Bank cannot be held as valid in the eye of law and since it is held as invalid, the question of invoking Section 26E of the SARFAESI Act would not arise at all.

26.In the case of Abdul Jamil and Others vs. Secretary, Income Tax Department and Others [Second Appeal No. 1294 of 1984, dated 26.03.1998], the scope of Section 281 of the IT Act was considered by this Court and it was held as follows:-

> “In considering s. 281 of the said Act, the said provision is declaratory in nature. It declares that the transfers effected by any assessee with intent to defraud the Revenue during the pendency of any proceedings under the Act shall be void against any claim in respect of any tax or any sum payable by the assessee as a result of the completion of the said proceedings
> ". Therefore, the three requirements under the section are :
> (i) that there must be a transfer of the property;
> (ii) that it should be during the pendency of a proceeding under the Act; and
> (iii) that the transfer must be with intent to defraud the Revenue
> and if these conditions are satisfied, then the transfer shall be void in respect of any tax or sum payable by the assessee as a result of the completion of the proceedings during the pendency of which the transfer was effected. The effect of the section is that, if such transfer with intent to defraud the Revenue has been made and any claim for tax arises after completion of the proceedings during the pendency of which the transfer took place, such tax or other sum can be recovered by proceeding against the property notwithstanding the said transfer.”

27.In view of the facts and circumstances that the earliest demand notice at the first instance issued by the Income tax Department on 31.03.2015 is not disputed, it is to be construed that the proceedings under the IT Act for recovery of tax dues were pending on the date, i.e., 31.03.2015 and therefore, any transfer made thereafter is hit by the provision of Section 281 of the IT Act and all such transfers are void and therefore, the subsequent mortgage became consequently invalid in the eye of law and therefore, the application of SARFAESI Act would not arise at all. Further, the scope of Section 26E of the SARFAESI Act is relatabe to the priority and the priority would arise only if more than one person could able to establish the right over the property and in the present case, when there is no right to mortgage was vested with the assessees, the question of priority would not arise at all. Once the proceedings are initiated, Section 281 of the IT Act provides power to the Income Tax Authorities to attach the property and further, the assessee ceases to exercise the power of right regarding transfer of such properties, once the notice is issued. When the assessee has no right to mortgage the property purchased, then the Bank cannot accrue any right to deal with the mortgaged property or to claim priority based on the provision of Section 26E of the SARFAESI Act.

28.These being the principles to be followed, the petitioner could not able to establish any right to deal with the property and even in such cases where such right are claimed, the persons aggrieved has to approach the Income Tax Authorities under Schedule 2 Rule 11 of the IT Act and in the present case, the question does not arise as the transfer itself became void.

29.Accordingly, the writ petition fails and stands dismissed. Though the demand notice was issued to the partnership firm, subject properties were purchased in the name of the partners, in respect of the tax dues, the partners as well as the company are individually and jointly liable as per the provisions of the Act. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

Abr

To

1.The Tax Recovery Officer,
Income Tax Department,
TRO-1, Coimbatore.

2.The Sub Registrar,
Selaiyur,
Kanchipuram District.

3.The Sub Registrar,
Joint-I, South Chennai,
Saidapet, Chennai-15.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No. 25639

W.P.No.5857 of 2018

RP(CO)
GN(06/07/2021)