

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.04.2021

Pronounced on: 21.04.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. Nos.27409 & 27411 of 2019 and 1251 of 2018

and

WMP.Nos.1559 of 2018& 3342 of 2020

W.P. No.27409 of 2019:

Corporation Bank,
Rep. by its Authorised Officer/Assistant General Manager,
Old No.37, New no.77, First Avenue,
Indira Nagar, Adayar,
Chennai - 600 020. Petitioner

Vs.

1.The Commissioner,
Income Tax department,
Investigation Building,
46, MG Road, Nungambakkam,
Chennai - 600 034.

2.The Sub Registrar,
Office of the Sub-Registrar,
Uraiyur.

3.M/s.Vasan Health Care Pvt. Ltd.,
Rep. by its Managing Director,
No.70, West Minister Complex,
4th floor, Dr.R.K.Salai,
Mylapore, Chennai - 600 004.

4.A.M.Arun

5.Meera Arun

6.Dwarakanathan

7.D.Nirmala

8.Beena Veiraiah

9.A.M.Rajeswari

10.K.Karunanidhi

.... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of declaration, declaring the Order of Attachment bearing PAN AIGPM6898J/CC-2(1)/CHE/2016-17 dated 18.01.2017 and PAN ADKPA7987M/Cc-2(1)/CHE/2016-17 dated 14/7/17 passed by the 1st respondent subject to mortgage of the Petitioner Bank and consequently direct the 2nd respondent to register the sale certificate issued by the Petitioner bank.

W.P. No.27411 of 2019:

Corporation Bank,
Rep. by its Authorised Officer/Assistant General Manager,
Old No.37, New no.77, First Avenue,
Indira Nagar, Adayar,
Chennai - 600 020.

.... Petitioner

Vs.

1.The Commissioner,
Income Tax department,
Investigation Building,
46, MG Road, Nungambakkam,
Chennai - 600 034.

2.The Sub Registrar,
Office of the Sub-Registrar,
Sathanur.

3.M/s.Vasan Health Care Pvt. Ltd.,
Rep. by its Managing Director,
No.70, West Minister Complex,
4th floor, Dr.R.K.Salai,
Mylapore, Chennai - 600 004.

4.A.M.Arun

5.Meera Arun

6.Dwarakanathan

7.D.Nirmala

8.Beena Veiraiah

9.A.M.Rajeswari

10.K.Karunanidhi.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of declaration, declaring the Order of Attachment bearing No.CNo.2771/C-2/2016-17/2 Dated 13.07.2017 passed by the 1st respondent subject to mortgage of the Petitioner Bank and consequently direct the 2nd respondent to register the sale certificate issued by the Petitioner bank.

W.P. No.1251 of 2018:

Union Bank of India,
Regional Office, Represented by Chief Manager,
649/650, Oppanakara Street,
Coimbatore - 641 001.

.... Petitioner

Vs.

1.Sub-Registrar,
Tirupur,
Tirupur District.

2.Tax Recovery Officer,
Income Tax Department,
Room No.35, 1st Floor,
Main Building,
63, Race Course Road,
Coimbatore - 641 018.

3.M/s.Beetle Exports
No.17, SRP Nagar,
2nd Cross, Bharathi Park,
Saibaba Colony,
Coimbatore - 641 011.

4.V.Balasubramaniam

5.J.Swetha .

.... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorarified Mandamus, to call for the records of the 2nd Respondent pertaining to the attachment Notice dated 27.03.2017 in Form ITCP-16 and quash the same and lift the attachment and consequently direct the 1st Respondent to register the Sale Certificate.

For Petitioners : Mr.S.Sethuraman
(In WP.23409 & 27411/2019)

Mr.SrinathSridevan
(In WP.1251/2018)

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel
for R1 in WP.Nos.23409 & 27411 of 2019)
(for R2 in WP.No.1251 of 2018)

Mr.B.Murugavel
(In WP.23409 & 27411/2019) (for R10)

No Appearance
(In WP.23409 & 27411/2019) (for R2 , R3 to R9)

No Appearance
(for R1, R3to R5 in WP.1251/2018)

C O M M O N O R D E R

In all these cases, the petitioners are Banks and challenge orders encumbering properties that, according to them, have been offered to them as collateral by persons who have availed financial assistance. Memoranda of Deposit of Title Deeds (MOD) have been executed, under which the property in question was offered as security to the Bank by the borrowers/loanees.

2. There were defaults by the loanees, as a result that the Banks had initiated action under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI Act') and taken possession of the property thereafter under Section 13(4) thereof. Public notice for auction of the properties was issued and in all the cases sales have been concluded to successful bidders and certificates have been issued. The sales have been registered and sale certificates issued in all cases.

3. The loanees are assesses under the provisions of the Income Tax Act, 1961 (in short 'Act') and have defaulted in the payment of income tax arrears. It is the case of the Income tax department that, as result of the defaults, proceedings have been taken to attach the properties of the defaulters. It is the creation of conflicting charges upon the properties that has led to the lis in the present matters.

4. The above facts are common to all the Writ Petitioners except for specifics of the petitioner/financial institutions, the details of the loans extended, the dates of MOD and registration of same with the Sub-Registrar, the dates of creation of charge by the Income Tax Authorities, if any, and the details of sale by public auction. However, such differences do not change the overall fact pattern as is relevant for deciding the present issue, the issue being whether the banks would hold a priority of charge over that of the Income Tax Department qua the security interest created in the property held as collateral.

5. Let me refer to the specifics of the facts in W.P.No.1251 of 2018 for clarity in, and completion of narration.

W.P.No.1251 of 2018 has been filed by the Union Bank of India arraying Sub-Registrar, Tiruppur as R1/SRO, the Tax Recovery Officer (TRO) as R2, Beetle Exports (company), the income tax assessee, as R3 and two individuals, who were erstwhile Directors in the R3 company, as R4 and R5. The directors of R3 company had executed a MOD in regard to the property at No.17, SRP Nagar, 2nd Street, Bharathi Park Road, Saibaba Colony, Coimbatore (property/property in question) in favour of Union Bank of India of 10.02.2014, registered on the same day.

6. On account of defaults in the repayment of financial accommodation, a demand notice was issued on 17.03.2016 and possession of the property was taken by the Bank on 12.07.2017. Public notice was issued on 18.07.2017 and the property brought to auction under notice dated 17.07.2017. The auction was conducted and the bid confirmed in favour of one Mr.Charles, successful purchaser, on 23.08.2017.

7. In the meanwhile, it appears that the company had suffered orders of assessment for Assessment Years (AY) 2012-13 and 2013-14 and an order of attachment of immovable property in Form No.I.T.C.P-16 under Rule 48 of the 2nd Schedule to the Income Tax Rules (in short Rules) was issued by the TRO on 27.03.2017 and duly communicated to the SRO. According to the learned Senior Standing Counsel for the Department, this would suffice to create a charge and an enforceable right over the property.

8. This has given rise to the conflicting claims between the bank and the Income Tax Department over the schedule property. Upon publication of auction notice, there has been exchange of correspondences between the TRO and the Bank in regard to the title to the property in question and while the correspondences continued, the auction came to be conducted as scheduled, resulting in the registration of the sale on 25.10.2017 and issuance of sales certificate in favour of the successful bidder on the same day.

9. On 06.11.2017, R1, the Sub-Registrar communicated with the Bank informing it of the Tax recovery certificate issued by the Income Tax Department in regard to the same property. The requests of the Bank for lifting of the attachment and the objections for registering the sale certificate came to be refused by the TRO, who relied on Rule 12, Part I to the 2nd Schedule of the Act, stating that the attachment would continue till such time the arrears to the Department was remitted.

10. According to the Bank, the provisions of Section 26E of the SARFAESI Act would protect it in full, since, after

introduction and notification of the aforesaid provision, security interest created in favour of a secured creditor was paramount and would have priority over charges of all other creditors, including crown debts. The petitioner relies on the following judgments in support of this proposition:

i. The Assistant Commissioner (CT) v Indian Overseas Bank (2016 SCC Online Mad 10030)

ii. Canara Bank v The Recovery Officer (Unreported Judgment dated 25.01.2018 in W.P. No.25867 of 2017)

iii. State Bank of India v State of Maharashtra (2020 SCC Online Bom 4190)

iv. Bank of Baroda v State of Kerala (2020 SCC Online Ker 7152)

v. Pridhvi Asset Reconstruction and Securitisation Company Ltd v State of AP (2020 SCC Online AP 1936)

vi. Allahabad Bank v Canara Bank ((2000) 4 SCC 406)

vii. Solidaire India Ltd v Fairgrowth Financial Services Ltd & Ors ((2001) 3 SCC 71)

11. The respondent would rely on the provisions of Section 281 itself that render transfer of property certain transfers to be void, relying on the following decisions of the Courts:

(i) Department of Income-tax v. Vodafone Essar Gujarat Ltd ((2016) 66 taxmann.com 374 (SC))

(ii) Sri Sivalaya Advances v. Tax Recovery Officer, Madurai ((2018) 93 taxmann.com 143 (Madras))

(iii) D.S.Senthilvel v. Tax Recovery Officer, Madurai ((2018) 92 taxmann.com 354 (Madras))

(iv) Karnail Singh v. Union of India ((2011) 11 taxmann.com 323 (Punjab Haryana))

(v) Abdul Jamil v. Secretary, Income Tax Department ((1998) 101 Taxmann 332 (MAD))

(vi) Master Aditya Kumar Kedia v. Tax Recovery Officer ((2002) 120 Taxman 291 (Bombay))

(vii) JaymacLasetron (P.) Ltd. v. Commissioner of Income Tax ((2001) 116 Taxman 231 (CAL.))

(viii) Agasthiya Holdings (P.) Ltd. v. Commissioner of Income-tax, Madurai (2018) 93 taxmann.com 81 (Madras))

12. As regards the argument of the Revenue that Section 281 of the Act would protect its interests, the petitioner would state that protection under Section 281 is not envisaged in cases where there was a valid subsisting mortgage by a secured creditor and the latter would prevail over all other debts. Reliance is placed on the following three judgments to drive home the point that Section 281 only provides a protection to the revenue in cases where an assessee tries to circumvent recovery proceedings by alienating property and that no declaration of title is contemplated thereunder.

(i) Tax Recovery Officer v Gangadhar Vishwanath Ranade ((1998) 6 SCC 658)

(ii) Sancheti Leasing Company Ltd v Income Tax Officer ((2000) 246 ITR 814)

(iii) ICICI Bank Ltd v Tax Recovery Officer (2018 SCC Online Hyd 441)

13. Having heard learned counsel and perused the Writ Petitions as well as case law carefully, I believe that these Writ Petitions are liable to be allowed and my reasoning is as follows.

14. The rival claims at play emanate from the operation of Section 281 of the Income Tax Act, vis-a-vis Section 26E of the SARFAESI Act. Both provisions are extracted below:

Section 281 of the Income Tax Act:

Certain Transfers to be void

'281. (1) Where, during the pendency of any proceeding under this 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 any 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 :

Provided that such charge or transfer shall not be void if it is made—

(i) for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee ; or

(ii) with the previous permission of the Assessing Officer.

(2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.

Explanation.—In this section, "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee.

Section 26E of the SARFAESI Act:

"26E. Priority to Secured Creditors- 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 of 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 (31 of 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.'

15. Let us first analyze the provisions of Section 281 read with the proviso thereunder, and the umbrella of protection it offers, as well as the case law on point. Section 281 has been enacted to protect the interests of a bonafide purchaser lured

into the purchase of the property in question without the knowledge of recovery proceedings pending as against the vendor. Thus, Section 281 may be invoked only in cases where the transfer was a devise or an arrangement to circumvent a subsisting or anticipated demand by the Income Tax Department and to protect the interests of an unsuspecting purchaser who has paid valuable consideration for the purchase of the property in question.

16. Since Section 281 would apply in cases where the transfer of the property has been made during the pendency of proceedings or after the completion thereof, one has to examine whether there were any proceedings pending in the case of the company for AY 2012-13 at the time when the MOD was registered, which is 10.02.2014.

17. The counter filed by the TRO refers to a notice issued in terms of Section 143(2) of the Act without setting out any details thereof. It is also silent as to when the returns of income were filed by the petitioners or when notices were issued thereafter to indicate commencement of proceedings. However, Mr.Srinivas states that he is in possession of the assessment files and produces a notice under Section 143(2) of the Act dated 08.08.2013 relating to AY 2012- 2013, that has been issued to the company in August 2013, prior to registration of mortgage. There is no reference to any notice issued as far as AY 2013-14 is concerned.

18. According to the revenue, the issuance of notice under Section 143(2) would create an automatic charge over the property by the petitioner and any subsequent alienation of the property by the petitioner would be liable to be set aside in light of the protection under Section 281.

19. The power to initiate coercive recovery in terms of the 2nd Schedule to the Act has been the subject matter of discussion in various decisions. In the case of Gangadhar Vishwanath Ranade (supra) the Supreme Court considered a challenge by the TRO to a decision of the Bombay High Court that had set aside an attachment under Rule 11 of the 2nd Schedule to the Act on the ground that under Rule 11, the TRO had no power to declare a transfer void and one that had been effected with the intention of defrauding the revenue. The provisions of Section 281 do not confer the power of adjudication upon the authorities, but merely the power to declare the law, qua the aspect of attachment alone.

20. Section 281 states that any transaction of transfer engaged in after the commencement of proceedings, with the

intention of defrauding the revenue and circumventing proceedings for recovery, would be construed as void as against any claim of tax or other sum payable by that assessee. However, bona fide transactions that have been entered into for adequate consideration, with the parties being unaware of the pendency of proceedings before the Income Tax authorities/without being put to notice, shall stand excluded from the rigour of the provision. Transactions engaged in with the sanction of the Assessing Officer would also be excluded from the application of the provision.

21. The Supreme Court thus held that the TRO shall have the power to examine the alternate charge created by the assessee and attach the property if he came to the conclusion that the charge had been created only to circumvent the attachment by the income tax department. However, the power of the TRO shall not extend to declaration of title that may be made only by the Civil Courts in a Suit for declaration declaring the transaction void under Section 281 of the Act. This was for the reason that the TRO is himself an interested party and hence cannot sit himself in judgment in such a case.

22. Thus, while the attachment of the Income Tax Department over the subject property would be held to be valid, the power vested in the income tax authorities can extend no further than to effect an attachment. This is as per Rule 11(6) of the 2nd Schedule to the Act, reading thus:

Investigation by Tax Recovery Officer.....

11...

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

23. In *Sancheti Leasing Company Ltd (supra)*, Justice R. Jayasimha Babu says:

6. Section 281(1) of the Act had been relied upon by the Income-tax Officer. That section declares certain transactions as void. The section, however, does not vest the authority in the Income-tax Officer to make such a declaration.

7. Before a transaction involving immovable property can be declared as void, all the requirements of law must necessarily be satisfied. The fact that a statute provides for such a declaration being made, if the conditions mentioned in the statute are satisfied, does not imply that an officer exercising powers under the provisions of the statute can assume to himself the power and jurisdiction to declare what is otherwise a legally valid transaction as void. Adjudication is the function of the courts. Any declaration of a transaction being void must be sought in the civil court. The Income-tax Officer moreover in this case is an interested party as it is in the interests of the Revenue to make such a declaration and proceed to recover the vendor's arrears of tax from such person.

8. The Supreme Court of India in its recent decision rendered in the case of TRO v. Gangadhar Viswanath Ranade (Decd.) [1998] 234 ITR 188 has held that if the Department finds that the assessee has transferred a property to a third party with the intention to defraud the Revenue, the Revenue will have to file a suit under Rule 11(6) of Schedule II to the Income-tax Act to have the transfer declared void under Section 281 of the Income-tax Act.

24. I thus, find no merit in the submissions of the respondent to the effect that Section 281 constitutes a declaration of charge much less, one which is preferential to the revenue. The thrust of Section 281 is only a protection to a bona fide purchaser in cases where an errant assessee may seek to alienate property to circumvent anticipated recovery of outstanding arrears payable by him to the Income Tax Department. Nothing in Section 281 would support the submission that it, by itself creates a positive charge of property. The charge in this case was created by the Income Tax Department only after 27.03.2017 when the property was attached in terms of Rule 48 of the 2nd Schedule and duly communicated to the SRO.

25. Moreover, the aforesaid cases however do not take note of Section 26E of the SARFAESI that has been notified on 24.01.2020. Section 26E commences with a non-obstante clause and states that priority shall be accorded to the debts payable to secured creditors, notwithstanding anything in any other law for the time being in force, including the Income tax Act. The only exception, is as per the Explanation to Section 26E, cases pending under the Insolvency and Bankruptcy Code 2016. In the case of a secured creditor where a prior valid charge exists, as in the present case where the mortgage has been created on 10.02.2014, the provisions of Section 281 would not serve to disturb the same.

26. A matter similar to the present one came up for consideration before the Andhra Pradesh and Telangana High Court (prior to bifurcation) in the case of ICICI Bank Ltd (supra). Conflicting claims to the same property were set up by the ICICI Bank and the Tax Recovery Officer. After considering the interpretation of Section 281 and the power of recovery under the 2nd Schedule to the Income Tax Act, the Bench states that the attachment in that case was prior to the attachment by the Income Tax Department and thus, held priority over the subsequent attachment. Following the ratio of the judgment of the Supreme Court in the case of Gangadhar Vishwanath Ranade (supra), the claim of the Bank was allowed.

27. In this case the mortgage by the Bank is on 10.02.2014 and that by the Income tax Department, is post attachment, on 27.03.2017 only. The subsequent attachment thus fails in the light of Section 26E.

28. Incidentally, at the time when the above decision was rendered, Section 26E of the SARFAESI Act had not been notified, prompting the Bench to state at paragraph 6 of that decision (of the SCC online report) that the issue before them could have been resolved in a trice, had only the provisions of Section 26E been notified at the time when the decision was being rendered. The provisions of Section 26E have since been notified on 24.01.2020 and the benefit of the same is available for the present Writ Petitioners.

29. In the light of the discussion as above, these writ petitions are allowed. MPs closed. No costs.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Commissioner,
Income Tax department,
Investigation Building,
46, MG Road, Nungambakkam,
Chennai - 600 034.

2.The Sub Registrar,
Office of the Sub-Registrar,
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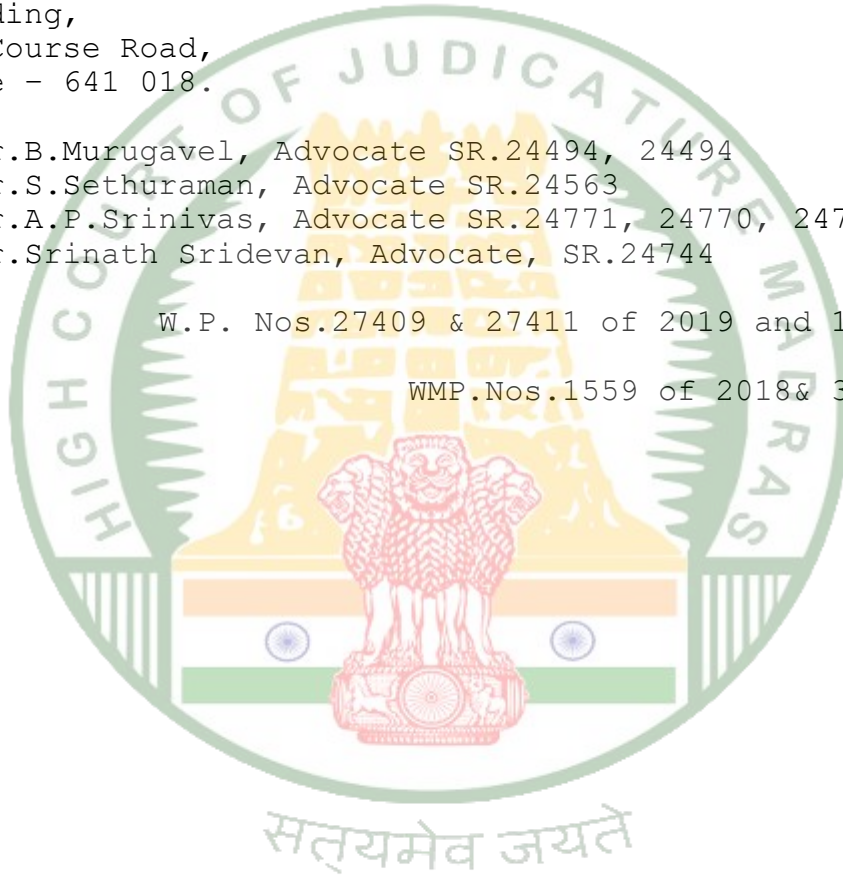
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+4cc to Mr.B.Murugavel, Advocate SR.24494, 24494
+2cc to Mr.S.Sethuraman, Advocate SR.24563
+3cc to Mr.A.P.Srinivas, Advocate SR.24771, 24770, 24772
+1cc to Mr.Srinath Sridevan, Advocate, SR.24744

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