IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.06.2021

CORAM :

THE HONOURABLE MR. JUSTICE S.M. SUBRAMANIAM

W.P. No.33771 of 2018
and
W.M.P.No.39209 of 2018

Lakshmi Vilas Bank,
Rep. by its Senior Manager,
Ramanathapuram Branch,
1678, Trichy Road, Ramanathapuram,
Coimbarore - 641045.

..Petitioner

Vs.

1. Tax Recovery Officer-I
Income Tax Department,
Room No.35, 1st Floor, Main Building,
63, Race Course Road, Coimbatore-641018.

2. The Sub-Registrar
Peelamedu Sub-Registrar Office,
Coimbatore.

3. Champa Devi

4. M/s.NEPC India Limited.,
1678, Trichy Road,
Ramanathapuram,
Coimbatore-641045.

.. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of declaration to declare that the attachment made by the 1st respondent dated 24.01.2014 relating to property registered as Document No.1 of 2014, on the file of 2nd respondent as null and void and raise the attachment dated 24.01.2014 made in petitioner's property.

For Petitioner : Mr.Krishna Prasad.R for
M/s.Sarvabhauman Associates

For Respondents : Mr.A.P.Srinivas, Sr.St.counsel for R1
Mr.V.Nanmaran
Government Advocate for R2
No appearance for R3 and R4

ORDER

The Case has been heard through video conferencing

The writ petition on hand is filed to declare that the attachment made by the 1st respondent, dated 24.01.2014, relating to the property registered as Document No.1 of 2014 on the file of 2nd respondent, as null and void and raise the attachment, dated 24.01.2014, made in the petitioner's property.

2.The petitioner is Lakshmi Vilas Bank. The petitioner Bank sanctioned loan to the 3rd respondent. The property under dispute originally belonged to one Mr.K.M.M Rasooludeen, who had purchased the same from one Mr.P.Ramesh, vide sale deed dated 14.06.1989 vide Document No.2521 of 1989 on the file of the 2nd respondent, and thereafter, the said Rasooludeen had sold the said property to the 4th respondent on 17.03.1995 vide Document No.704 of 1995 registered on the file of the 2nd respondent. The petitioner states that the purchaser improved the property by putting up construction of RCC building measuring to an extent of 1100 sq.ft.. While so, the 3rd respondent/Smt.Champa Devi purchased the property under dispute from the 4th respondent company and the same was registered as Document No.1044 of 2006 on the file of the 2nd respondent.

3.The learned counsel for the petitioner made a submission that, during the said purchase, no encumbrance was created by the 1st respondent, more specifically till the sanctioning of the loan during the year 2010. The 3rd respondent was a bona fide purchaser, and therefore, her interest is to be protected. Thereafter, a memorandum of deposit of title deed of the property was executed on 07.10.2010 by the 3rd respondent in favour of the petitioner Bank, which was registered as Document No.3516 of 2010 on the file of the 2nd respondent. The mortgage was extended on 19.12.2013 by a Memorandum of Understanding between the petitioner Bank and the 3rd respondent and the loan sanctioned to the 3rd respondent was renewed on 14.01.2017.

4.It is contended that the 1st respondent issued notice on 13.11.2018 informing the petitioner Bank that the 4th respondent is the defaulter in paying the income tax dues, penalty and interest, amounting to Rs.25.80 Crores and the property under dispute is under attachment registered as Document No.1 of 2014 on the file of the 2nd respondent and the Income Tax Department has proposed to sell the property by way of public auction in the month of December 2018 to realise the arrears of tax amount due to the Department. The Income Tax arrears pertains to the assessment years 1994-95, 2010-2011 and 2012-2013.

5.The petitioner Bank sent a reply to the 1st respondent on 17.11.2018, stating that they hold the first charge in respect of the property and even before the attachment made by the Income Tax Department, the property was mortgaged in favour of the petitioner Bank, and therefore, they got priority under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act" for brevity) and thus, the attachment made by the 1st respondent is contrary to law. It is further stated that the petitioner also has taken steps to recover the loan dues by auctioning the said property and thus, the 1st respondent shall not proceed against the property belongs to the 3rd respondent. However, the said reply sent by the petitioner Bank to the 1st respondent was not acted upon, and under these circumstances, the petitioner was constrained to move the present petition.

6.The learned counsel for the petitioner mainly contended that, under Section 26(e) of the SARFAESI Act, the Bank holds priority in respect of all the dues, and therefore, the Income Tax Department has no authority to proceed based on the attachment which was made in the year 2014, which is later than the mortgage executed in favour of the petitioner Bank.

7.The learned Senior Standing Counsel appearing on behalf of the 1st respondent/Income Tax Department disputed the facts as well as the principles relied on by the petitioner by stating that the 4th respondent company filed its return of income for the assessment year 1994-95 on 30.11.1994. The assessing officer, ACIT, Company Circle-IV(4), Chennai, vide order dated 27.03.1997, under Section 143(3) of Income Tax Act, 1961 ("I.T. Act" for brevity), raised a demand of Rs.23,33,93,982/-. The said order was revised subsequently. To recover the dues, the Assistant Commissioner of Income Tax, Company Circle-IV(4), Chennai, referred the case to TRO-VII, Company Range-IV, Chennai, who in turn, issued notice of demand to the 4th respondent/NEPC India Ltd., in Form ITCP-1 dated 17.04.2009. The case was transferred from Chennai to Coimbatore on 10.05.2010. Subsequently, the tax recovery file was received by the TRO-1, Coimbatore, on transfer from TRO-VII, Company Range-IV, Chennai. Based on the arrear details communicated by TRO-VII, Chennai, to recover the outstanding dues, the TRO-1, Coimbatore, issued notice of demand to the defaulter company, NEPC India Ltd., on 09.09.2010, and served on 16.09.2010.

8.The learned Senior Standing Counsel pointed out the fact that, on 05.09.2011, the 4th respondent company transferred its property consisting of land measuring 3916 sq.ft., with three storied RCC building of 1700 sq.ft., in each floor, situated at Door No.1678, Ramanathapuram, Trichy Road, Coimbatore-641 045, to Smt.Champa Devi/3rd respondent, wife of Sri.Ravi Prakash Khemka, the Chairman of NEPC India Ltd., for a consideration less than the guideline value, as per the sale deed.

9.On 29.02.2012, the TRO-1, Coimbatore, issued notice of attachment of immovable property in Form No.ITCP-16, to NEPC India Ltd., attaching the property transferred to Smt.Champadevi. On 07.03.2012, a letter was sent by TRO-1, Coimbatore, to Smt.Champadevi intimating that, since the said transfer of property to her name was null and void in view of Section 281(1) and Rule-16 of 2nd Schedule to I.T. Act, the property at Trichy Road, Coimbatore, is attached by the Department against the dues of the defaulter company, M/s.NEPC India Ltd.

10.Against the order of attachment, the 3rd respondent-Smt.Champadevi filed a writ petition before the High Court of Madras on 26.03.2012. The writ petition was dismissed by this Court as "non-maintainable" vide order dated 12.07.2018 in W.P.No.8148 of 2012 and a direction was issued to the petitioner to file a claim before the TRO-1, Coimbatore, in terms of Rule 11(1) of 2nd schedule to the I.T. Act, within a period of four weeks from the date of receipt of a copy of the order and directing the respondent, TRO-1, Coimbatore, to investigate the claim in accordance with law.

11.On 24.01.2014, another property adjacent to the one mentioned earlier, consisting of 2035 sq.ft., with three storied building of 1100 sq.ft., in each floor, in T.S.No.10/1734 Part in Ramanathapuram Village, Trichy Road, Coimbatore, was attached by the Income Tax Department against the outstanding demand of the 3rd respondent/Smt.Champadevi and the property was in the name of the 3rd respondent with reference to the assessment years 1994-95, 1996-97, 1998-99 and 2002-03. The said property was acquired by Smt.Champadevi on 29.03.2006 from NEPC India Ltd., for a consideration of Rs.32,00,000/- against the market value of Rs.35,80,000/- as per the sale deed in Document No.1044 of 2006.

12.Earlier, Smt.Champadevi had deposited the title deeds of the property with the Lakshmi Vilas Bank Ltd., Trichy Road, Coimbatore, on 07.10.2010 for the term loan availed by herself and also extended the property to the credit facilities availed by M/s.SRC Green Power P Ltd., on 09.12.2012.

13.The learned Senior Standing Counsel contended that, demand of the Income Tax Department existed on the date of execution of memorandum of title deed by the Lakshmi Vilas Bank Ltd., on 07.10.2010. Smt.Champadevi/3rd respondent is aware of the demand from the notice of demand, dated 02.03.2009, issued by ITO, Business Ward-VI(1), Chennai and served on her.

14.Though the said statement is objected by the learned counsel appearing on behalf of the petitioner, he could not be able to substantiate the same as the said notice was served to the 3rd respondent-Smt.Champadevi and not communicated to the petitioner Lakshmi Vilas Bank.

15.This Court is of the considered opinion that, as per Section 281(1) of Income Tax Act, 1961, 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.

16.Undoubtedly, under Section 26(e) of the SARFAESI Act and under Section 31-B of the Recovery of Debts and Bankruptcy Act, 1993, the Bank holds priority over the other dues. However, the Income Tax Act also provides priority and it goes further to the extent of contemplating that, 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. The Income Tax Act contemplates that any such transaction becomes void.

17.Under these circumstances, the Courts are bound to scrutinize whether as on the date of creation of any such charge, the charge in favour of the Bank, the Income Tax Department proceedings are pending or not. In the present case, even before creation of charge in favour of the petitioner/ Lakshmi Vilas Bank on 07.10.2010, the demand of Income Tax Department existed, and therefore, as on the date of creation of charge in favour of Lakshmi Vilas Bank/petitioner, the mortgage becomes void under Section 281(1) of the I.T. Act. When the mortgage itself became void under Section 281(1) of the I.T. Act, the creator of the charge in the present case, the 3rd respondent has committed fraud in respect of the transaction between the petitioner Bank and the petitioner Bank has to proceed against the 3rd respondent to recover the dues and initiate all further action for suppression of material facts or committing fraud against the Bank or otherwise.

18.Contrarily, when there are provisions both under the Income Tax Act and SARFAESI Act, which provides priority over the other dues, the Courts are bound to consider the relevant facts, which would be important for the purpose of forming an opinion. In the present case, when the demand of the Income Tax Department existed even prior to the creation of mortgage in favour of the petitioner Bank, then, as on the date when the mortgage is created in favour of the petitioner Bank, Section 281(1) of the Income Tax Act will operate and the transaction becomes null and void. Thus, claiming priority relying on Section 26(e) of the SARFAESI Act by the petitioner would not arise at all.

19.This being the factum established, the petitioner Bank has an option to approach the 1st respondent/Tax Recovery Officer by filing appropriate application in the prescribed format under Rule 11, 2nd Schedule, and in the event of any such application, the 1st respondent/Tax Recovery Officer shall adjudicate the same, take a decision and pass appropriate orders, by affording opportunity to all the parties concerned in respect of fraudulent transaction or suppression of facts by the borrower. The petitioner Bank is at liberty to initiate all further action in the manner known to law.

20.With these directions, this writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

rpl/mkn

To

1. The Tax Recovery Officer-I
Income Tax Department,
Room No.35, 1st Floor, Main Building,
63, Race Course Road, Coimbatore-641018.

2. The Sub-Registrar
Peelamedu Sub-Registrar Office,
Coimbatore.

+1cc to M/s.Sarvabhauman, Advocate, S.R.No.30630/2021
+1cc to the Government Pleader, S.R.No.30398/2021

W.P. No.33771 of 2018
and W.M.P.No.39209 of 2018

AK(CO)
SB(22/07/2021)