



WEB COPY

W.P.[MD]No.12643 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

and

THE HONOURABLE MRS.JUSTICE S.ANANTHI

W.P.[MD]No.12643 of 2020

and

W.M.P[MD]No.10773 of 2020

State Bank of India,
Stressed Asset Recovery Branch (SARB),
Represented by Assistant General Manager,
Vinayaga Nagar Branch (Upstairs),
8, Dr.Ambedkar Road,
Madurai - 625 020.

... Petitioner

Vs.

1.The Assistant Commissioner (ST),
Commercial Tax Department,
Madurai Rural (South) Circle,
Madurai.

2.The Joint - IV Sub-Registrar,
Office of the Joint IV Sub-Registrar,
Madurai South,
Madurai.

3.G.Christopher
(R3 impleader vide order dated 15/04/2021)

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, directing the second respondent, the Joint IV Sub-Registrar, Madurai South, Madurai, to register the Sale Certificate dated 20.02.2020 issued in respect of the schedule mentioned property by the petitioner Bank and for a consequential direction to efface / delete the encumbrance attachment entry dated 21.12.2018 in Doc.No.73/2018, on the file of the second respondent, the Joint IV Sub-Registrar, Madurai South, Madurai as against Item No.1 & 2 of schedule mentioned property.

For Petitioner

: Mr.N.Dilip Kumar

For Respondent No.1

: Mr.K.P.Krishnadass,
Special Government Pleader

For Respondent No.2

: Mr.K.Sathiya Singh
Additional Government Pleader

For Respondent No.3

: Mr.D.Stanley David



O R D E R

[Order of the Court was made by **T.S.SIVAGNANAM, J.**]

Heard Mr.N.Dilip Kumar, learned Counsel appearing for the petitioner, Mr.K.P.Krishnadass, learned Special Government Pleader appearing for the first respondent, Mr.K.Sathiya Singh, learned Additional Government Pleader appearing for the second respondent and Mr.D.Stanley David, learned Counsel appearing for the third respondent.

2.This writ petition has been filed by the State Bank of India, to register the Sale Certificate dated 20.02.2020, issued in respect of the schedule mentioned property by the petitioner Bank and for a consequential direction to efface / delete the encumbrance attachment entry dated 21.12.2018 in Doc.No.73/2018, on the file of the second respondent, the Joint IV Sub-Registrar, Madurai South, Madurai as against Item No.1 & 2 of schedule mentioned property.

3.The legal issue involved in this writ petition is no longer *res integra* and has been considered in several decisions of this Court and the latest of which being in the case of **Tamil Nadu Mercantile Bank Limited Vs. The Joint I Sub Registrar** in **W.P.[MD] No.6976 of 2020 and 1101 of 2021** dated **29.01.2021**, to which one of us [Hon'ble Justice S.Ananthi] was a party. The operative portion of the judgment reads as follows:

"5.The learned Counsel appearing for the petitioner has also made reliance upon the following judgments to buttress his submission:

i) 2005 (7) SCC 610, in the case of *M/s.S.B.P. & Co. v. M/s.Patel Engineering Ltd* and another;

ii) 2017 Supreme (MAD) 274, in the case of *Express Infrastructure Private Ltd., Chennai v. B.L.Kashyap & Sons Ltd., New Delhi* and others;

iii) 2019 Supreme (SC) 1198, in the case of *M/s.Sterling Industries v. Jayprakash Associates Ltd.*, and others;

iv) *W.P.(C)No.3875 of 2017 (H)* in the case of *South Indian Bank, Thrissur* and another *v. Sub Registrar, Ernakulam, Kochi* and others [Kerala High Court];

v) *W.P.(MD)No.4861 of 2018* in the case of *Tamilnad Mercantile Bank Ltd., Virudhunagar v. Joint Sub Registrar No.1, Virudhunagar* and others;

vi) *W.P.(MD)No.19694 of 2019* in the case of *Tamilnad Mercantile Bank Ltd., Madurai v. Sub Registrar, Chockikulam SD, Madurai* and others;

vii) *W.P.Nos.8546 of 2020, etc., batch*, in the

<https://hcservices.ecourts.gov.in/hcservices/> *case of M/s.Aachi Masala Foods Pvt Ltd., Chennai v.*



M/s.Edelwiss Assets Reconstruction Co., Ltd., Mumbai and others;

viii) 2006~3~L.W.~627, in the case of D.Senthil Kumar and others v. Commercial Tax Officer, Brough Road, Erode and another;

WEB COPY

ix) (2007) 1 MLJ 1, in the case of UTI Bank Ltd., Chennai v. Deputy Commissioner of Central Excise, Chennai II Division, Chennai and another;

x) (2016) 6 CTC 769, in the case of Assistant Commissioner (CT), Anna Salai III Assessment Circle v. Indian Overseas Bank, Central Office and another;

xi) 2016 SCC OnLine Mad 18565, in the case of Ansari v. Commercial Tax Officer, Koyambedu Assessment Circle, Chennai and another; and

xii) 2016 SCC OnLine Mad 33329, in the case of State Bank of India v. Assistant Commissioner (CT), Puraswalkam Assessment Circle, Chennai.

6.Mr.H.Velavadhas, learned Counsel appearing for the 9th respondent in W.P.(MD)No.6976 of 2020, who is arrayed as 8th respondent in W.P.(MD)No.1101 of 2021, submitted that the writ petition is not maintainable. The petitioner Bank indirectly seeks to set aside the interim order passed by the Arbitration Tribunal. There is a non~compliance of the mandate and the only remedy open to the petitioner is to challenge the interim order passed by the Arbitration Tribunal in the manner known to law. Thus, the petitions require to be dismissed.

7.Though the borrowers are represented by a Counsel, no valid submission is made on their behalf, as obviously they are the ones, who are responsible for the present situation.

8.Considering the similar issue, a Division Bench of this Court, in which one of us [Hon-ble Mr.Justice M.M.SUNDRESH] is a party, in a batch of writ petitions in W.P.(MD)Nos.8546 of 2020, etc., batch, by order dated 09.09.2020, was pleased to hold that the proceedings under the SARFAESI Act would have primacy, especially in a case where the mortgage in favour of the Bank was earlier. The aforesaid decision was rendered after taking note of the judgment rendered by the Division Bench of the Gujarat High Court in Bank of India v. State of Gujarat [Manu/GJ/0130/2020] and a Full Bench judgment of this Court in Assistant Commissioner



(CT), Annasalai III Assessment Circle v. Indian Overseas Bank [(2016) 6 CTC 769].

9. Reliance has been made on the order passed by the learned Single Judge in Govindhji Jewat & Co., v. Rukmani Mills Ltd., reported in 2020 (6) CTC 313, wherein, the aforesaid principle has been reiterated. In the said case, the learned Single Judge has held that the mortgage being earlier, it creates a right in favour of the mortgagee and therefore, even the order of attachment passed by the Civil Court will have to yield. In the said judgment also, the learned Single Judge made reliance upon the judgment of the Division Bench in S.Senthamarai Kannan v. Chief Manager, Canara Bank, Palani Branch, Dindigul District [CDJ 2020 MHC 2555].

10. In the case on hand also, the registered mortgage was admittedly prior. The 9th respondent in W.P.(MD)No.6976 of 2020 / 8th respondent in W.P.(MD)No.1101 of 2021 sought for an attachment in an arbitration proceedings, in which, the petitioners Bank was obviously not a party, as the transaction has got nothing to do with it. The said order was also subsequent to the mortgage created in favour of the petitioner. Now, a third party right has also been created through the sale certificate issued in favour of the auction purchasers, viz., respondents 7 & 8 in W.P.(MD)No.6976 of 2020 and the 7th respondent in W.P.(MD)No.1101 of 2021. If the 1st respondent raise a contention that in view of the recording of the attachment order by it already, the subsequent sale deed cannot be registered, then the very act of recording the said interim order of attachment passed by the Tribunal itself ought not to have been done, as there was a subsisting mortgage on that date.

11. The learned Counsel appearing for the 9th respondent in W.P.(MD)No.6976 of 2020 / 8th respondent in W.P.(MD)No.1101 of 2021 submitted that there is a procedure violation. We are not concerned with the said issue. The question for consideration is as to whether the earlier mortgage would prevail as against the subsequent interim attachment. The question of procedural violation can only be raised by the borrower, who did not do so. Therefore, the said contention has got no relevance to the case on



hand.

12.The submission made on the maintainability of the writ petitions is also rejected. We are not on the merits of the order passed by the Arbitration Tribunal, which is by way of an interim measure. The question is with regard to the upholding of one's own existing right, which is prior to the loan given by the 9th respondent in W.P.(MD)No.6976 of 2020 / 8th respondent in W.P.(MD)No.1101 of 2021, in favour of the borrowers. Certainly, a mortgage deed creates right over the properties mentioned thereunder in favour of the mortgagee.

13.Therefore, looking from any perspective, we are of the view that the petitioner Bank cannot be denied the relief as sought for. In such view of the matter, both the writ petitions stand allowed. The first respondent in both the writ petitions are directed to register the sale certificates issued by the petitioner Bank in favour of the respondents 7 & 8 in W.P.(MD)No.6976 of 2020 and the 7th respondent in W.P.(MD)No.1101 of 2021. Consequently, the encumbrance / attachment entry made on the file of the first respondent with respect to the properties, which are subject matter of the two mortgage deeds and the subject matter of these writ petitions, are directed to be deleted by the first respondent. The aforesaid exercise shall be carried out within a period of four weeks from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed."

4.The learned Counsel for the petitioner bank submitted that in the light of the above referred decision, the sale certificate is required to be registered by the second respondent. However, the encumbrance in favour of the commercial Tax Department will remain and may affect the right of the auction purchaser. The right of the Commercial Tax Department qua the secured creditor was subject matter of consideration by the Full Bench in the case of **Assistant Commissioner (CT), Anna Salai-III Assessment Circle Vs. Indian Overseas Bank** reported in (2016) 6 CTC 769 and it was held that the secured creditor namely the Bank will have precedence over the dues payable to the Commercial Tax Department. The judgment reads as follows:

"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.'

2.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.'

3.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.

4.The law having now come into force, naturally



it would govern the rights of the parties in respect of even a lis pending.

5.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.

6.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'".

7.We, thus, answer the aforesaid reference accordingly."

5.In the light of the above, the Sub Registrar has to necessarily delete the schedule mentioned property attachment reflected in the encumbrance certificate at the instance of the commercial tax department. In the result, the writ petition is allowed. It is made clear that though the attachment at the instance of the first respondent Commercial Tax Department has been directed to be deleted, it will not in any manner affect the department's right to collect the dues from the default assessee by proceeding in accordance with law.

6.Accordingly, the Writ Petition stands allowed on the above terms. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

MR

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

<https://hcservices.ecourts.gov.in/hcservices/>



To

1.The Assistant Commissioner (ST),
Commercial Tax Department,
Madurai Rural (South) Circle,
Madurai.

2.The Joint - IV Sub-Registrar,
Office of the Joint IV Sub-Registrar,
Madurai South,
Madurai.

+1 CC to M/s.SPL GP (SR-15967[F] dated 16/04/2021)

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-16077[F] dated 16/04/2021)

W.P. [MD]No.12643 of 2020

15.04.2021

RK (19.07.2021) 8P 5C