BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.02.2021

PRONOUNCED ON : 24.03.2021

CORAM

THE HONOURABLE MR.JUSTICE **V.PARTHIBAN**

W.P(MD) No.17254 of 2020
and
W.M.P(MD)No.14443 of 2020

State Bank of India,
Stressed Asset Recovery Branch (SARB),
represented by its
Chief Manager,
Vinayaga Nagar Branch (upstairs),
8, Dr.Ambedkar Road,
Madurai - 625 020. .. Petitioner

Vs

1.The Joint - II Sub-Registrar,
Office of the Joint II Sub-Registrar,
Karur.

2.M/s.Jeyamalar Enterprises,
represented by its Partner S.Nallusamy,
No.338, Vaiyapurai Nagar,
2nd Cross Street, Karur Town,
Karur Taluk, Karur District

3.K.Kumaravel
4.M/s.Sundaram Finance Limited,
represented by its Senior Manager
G.S.Narayana Krishnan,
Patullos Road,
Express Estate,
Royapettah, Chennai,
Tamil Nadu - 600 002. .. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a writ of mandamus directing the 1st respondent Joint II Sub-Registrar, Karur to efface/ delete the encumbrance attachment entry dated 24.02.2014 in Doc.No.7/2014, encumbrance attachment entry dated 29.04.2014 in Doc.No.9/2014, encumbrance attachment entry dated 04.06.2015 in Doc.No.22/2015, encumbrance attachment entry dated 09.05.2017 in Doc.No.15/2017, encumbrance attachment entry dated 09.05.2017 in Doc.No.16/2017, encumbrance attachment entry dated 09.05.2017 in Doc.No.17/2017, encumbrance attachment entry dated 24.08.2017 in Doc.No.28/2017 and encumbrance attachment entry dated 04.11.2019 in Doc.No.23/2019 all on the 1st respondent, Joint - II Sub-Registrar, Karur as against the schedule mentioned property.

Schedule of Property

Three Individual residential building having ground and first floor measuring total plinth area of 3872 sq.ft spread across the land measuring 8720 sq.ft as per title deed (8070 sq.ft as per revenue records) belonging to Shri V.Dhanarajan, situated at New Door No.2/ 203, Merkur Manmangalam Village, Karur, S.No.271/2, Joint No.II, Sub – Reg. Dist, Karur Taluk, Karur District.

Boundaries

North	:	Kaliappa gounder land
South	:	Muthusamy land
East	:	K.C.Vyapuri vagayara land
West	:	North-South Common foot path

For Petitioner	: Mr.N.Dilip Kumar
For R1	: Mr.K.Sathiya Singh, Additional Government Pleader
For R4	: Mr.Ponsenthilkumaran
For R2 & R3	: No appearance

ORDER

The petitioner is a nationalised bank having its branch at Madurai represented by its Chief Manager. The case of the petitioner is that one Dhanarajan and his wife being partners of M/s.SMT Transport availed cash credit loan facility of Rs.35,00,000/- from the petitioner's bank. While obtaining loan and sanction of the same by the bank, the said Dhanasekaran and his wife as partners of the above said firm, mortgaged the schedule property vide registered memorandum of deposit of title deeds dated 04.07.2011 registered as document No.1421/2011 in the office of the Joint II Sub-Registrar, Karur by creating a valid security interest in favour of the bank towards securing the credit facilities availed by the firm. On 19.03.2012 the cash credit facility was enchanced to Rs.50,00,000/- at the request of the borrower.

2.The borrower did not discharge their obligation under the terms of the credit facilities availed by them and committed serious defaults in repayment of the advances and eventually the loan account was classified as Non Performing Assets (NPA) with effect from 30.01.2013. Thereafter, the petitioner has filed O.A.No.53 of 2016 before the Debts Recovery Tribunal (DRT), Madurai for recovery of the loan outstanding and the OA was transferred on the file of the Debts Recovery Tribunal, Coimbatore in T.A.No.1384 of 2019. The petitioner in the meanwhile, issued statutory notice under Section 13(2) of the SARFEASI Act on 04.02.2013 demanding repayment of the outstanding loan amount of Rs.74,09,367.35 followed by a statutory possession notice under Section 13(4) of the SARFEASI Act on 10.04.2013.

3.According to the petitioner bank, despite the demand notices being issued to and received by the borrowers, there was no response to the notices and therefore, the bank proceeded to issue sale notice under Section 13(4) of the SARFEASI Act, on 22.02.2014 seeking to bring the secured assets for auction sale. At this, the borrowers field S.A.No.134 of 2014 before the DRT, Madurai and there was an order of interim stay by the DRT, Madurai on condition that the borrowers shall deposit a sum of Rs.20,00,000/-, apart from other usual conditions vide order dated 26.03.2014. In pursuance of which, the borrowers failed to comply with any other conditions. In the said circumstances, the said S.A.No.134 of 2014 was disposed by the DRT, Madurai on 19.08.2014.

4.According to the petitioner bank that the auction sale originally did not materialise to the satisfaction of the bank and subsequent sale notice did not fructify into sale. But finally auction sale notice was issued on 17.09.2020 scheduling for the public auction sale on 05.10.2020 for recovery of the present outstanding loan amount of Rs.1,42,69,635/- as on 31.08.2020. A sale notice was also widely published in two newspapers namely, 'the Hindu' and 'the Daily Thanthi'. In the auction one P.Muthulingam purchased the property for a valuable sale consideration of Rs.69,25,000/- on 05.10.2020 and the sale was also confirmed by the bank on 20.10.2020.

5.In the meanwhile, it appeared that various attachment charges had been registered from the year 2014, 2015, 2017 and 2019 upon the property at the instance of the private respondents 2 to 4 herein, on which the petitioner has a prior charge. The bank therefore, submitted a representation dated 04.07.2011 to the 1st respondent to delete the subsequent charges registered from the year 2014, 2015, 2017 and 2019, clarifying the legal position in favour of the bank.

6.According to the petitioner bank that the 1st respondent failed to consider the representation, but insisted that the bank should obtain orders from the Court to lift the attachments made upon the property at the instance of the respondents 2 to 4 herein. Therefore, the petitioner is before this Court.

7.Mr.N.Dilip Kumar, learned Counsel appearing for the petitioner bank reiterated the above case and emphasised that the legal position is very clear that the bank which has prior charge over the schedule property against other attachments and the law has been settled consistently and clearly in favour of the bank.

8.According to the learned Counsel in this case the charge has been created upon the schedule property way back on 04.07.2011 admittedly prior to the other attachments made upon the property in the year 2014 onwards and therefore, the 1st respondent legally bound to delete the other encumbrances, namely, the attachments and the entries to that effect.

9.The learned Counsel also would submit that the auction purchaser is entitled to enjoy the property free from any encumbrance and auction sale had taken place prior to the attachment at the instance of the private respondents herein, such attachments entries made upon the property cannot be enforced as against the bank as well as against the auction purchaser.

10.The learned Counsel cited a number of decisions in support of his legal contention that the secured creditor is having precedence over other claims as against the property. The legal position has been repeatedly clarified and the issue is no longer *res intergra*. Among the citations, the learned Counsel would rely upon a Full Bench decision of this Court in ***UTI Bank Vs Deputy Commissioner***, reported in ***(2007) 1 MLJ 1*** and he would draw the attention of this Court to paragraph Nos.24, 25 and 26 thereof, which are as hereunder:

> "*24.All the decisions relied on by Mr. V.T. Gopalan, clearly show that the Government is entitled to claim its dues/taxes/duties in preference to other ordinary debts. In all those cases there is no provision as found in SARFAESI Act or a specific provision claiming to have "first charge."*
>
> *... ... ... In Dena Bank case (cited supra) it is held that the Crown's preferential right to recover all debts over other creditors is confined to ordinary and unsecured creditors.*
>
> *25.In the case on hand, the petitioner Bank which took possession of the property under Section 13 of the SARFAESI Act, being a special enactment, undoubtedly is a secured creditor.*
>
> *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."*

11.The learned Counsel would also rely upon yet another Full Bench judgment in ***The Assistant Commissioner Vs. The Indian Overseas Bank***, reported in ***2016 (6) CTC 769*** and the relevant paragraphs are extracted hereunder:

> *"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 4 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.*
>
> *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''.*

12.The learned Counsel would also draw the attention of this Court to the decision in the case of ***Ansari Vs Commercial Tax Officer***, reported in ***2016 SCC Online Madras 18565***, wherein the learned Judge of this Court in paragraph Nos.4,5 and 6 has held as hereunder;

"4.At this stage, it would be worthwhile to refer to the decision of the Hon'ble Division Bench of this Court in the case in 1.D.Senthil Kumar 2.C.P.Senthil 3.C.P.Sakthivel vs. 1. The Commercial Tax Officer, Brough Road, Erode 2.The Sub-Registrar, No.1, Karungalpalayam, Erode (2006-3-L.W.627), wherein in an identical set of facts, the order of attachment was set aside. Paragraph No.12 of the judgment is usefully extracted hereunder:

> *"12. In the instant case, the property was sold by public auction on 10.03.2003. The sale was conducted in execution of the Recovery Certificates issued by the Debts Recovery Tribunal for recovery of dues to the City Union Bank. The appellants had paid the entire amount due on 25.3.2003 and the sale was confirmed in their favour on 23.4.2003. There is no indication of any sales tax arrears in the advertisement for auction sale and there was no application from any statutory or public authority seeking to set aside the sale. For the first time, by letter dated 25.6.2004, the Commercial Officer required the second respondent to create an encumbrance with regard to the property and consequently an entry was made in the register in respect of encumbrance of the first respondent. Thus, it is evident that the appellants had no actual notice of the charge prior to the transfer. There is also no material to show that the appellants had constructive notice of the charge and no submissions were made by the learned Special Government Pleader on this issue. In the circumstances, we are of the view that the appellants were the purchasers for value without notice for the sales tax arrears of the defaulting company or the consequent charge on the property. Thus, the property in the hands of the appellants was free of the charge and it is not open to the first respondent to enforce the liabilities of the defaulting company in this manner against the appellants."*

5. Further, in the decision in the case of Senthil Kumar vs. Assistant Commissioner, Chennai and Others, in W.P.No.9928 of 2009, dated 22.12.2010, the Hon'ble Division Bench, in somewhat identical circumstances, has held as follows:

> *"17. However in this case, the property*

was sold under the provision of SARFAESI Act for non-payment of dues to the Bank, the Third Respondent which brought the property for auction through tender-cum-auction sale on 19.5.2008; The Sale Certificate was also issued on 19.5.2008 and possession and also stated to be given to the petitioners. The rights already got accrued to the petitioners in view of the sale under the SARFAESI Act. The First respondent's communication dated 24.12.2008 to the Third Respondent-Bank reads as follows: "The Sub-Registrar, Virugambakkam has issued an Encumbrance Certificate on 24.12.2008 with the Commercial Tax Officer as one of the purchaser cannot claim the right on the said property."

The aforesaid communication would show that the Encumbrance (tax arrears) Certificate was only reflected on 24.12.2008. Whereas the Encumbrance Certificate dated 15.5.2008 issued by the Sub-Registrar Office, Virugambakkam did not reflect any encumbrance except the Sale Ded dated 9.6.1998 and no claim of the First Respondent was reflected. The sale was conducted on 19.5.3008 and subsequent only the encumbrance of the First Respondent was made on 24.12.2008. It is clear from Sale Notice dated 20.09.2008 by the First Respondent, the sales tax arrears were due from 1991-92 to 1996-97. However, the petitioners had no notice of charge over the property in question, in spite of their due verification of Encumbrance Certificate dated 15.5.2008. Hence, it has to be held that the petitioners are bona fide purchasers without notice of charge under Section 24(2) of th TNGST Act and the rights accrued to them cannot be interfered with. For the reasons stated above, the respondents 1 and 2 belatedly could not proceed against the petitioner's property for the arrears of sales tax due of the Company which availed the loan from the Third Respondent-Bank."

6. In the light of the above, the writ petition is allowed and the impugned attachment is quashed and the second respondent is directed to delete the said entry and make appropriate entries stating that the said attachment has been lifted. The above direction shall be complied with by the second respondent within a period of four weeks from the date on which the petitioner approaches the second respondent by way of

representation, accompanied by a copy of this order. No cost. Connected miscellaneous petition is closed.”

13.The petitioner has also cited the latest judgment of this Court in the case of ***Tamil Nadu Merchantile Bank Limited Vs the Joint-I Sub Registrar Office, Madurai and others*** [***W.P(MD)Nos.6976 and 1101 of 2021 dated 29.01.2021***] and referred to parAgraph Nos.8,9 and 13, which read as follows:

“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****].*

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.”*

14.The learned Counsel would thus submit that the issue has been settled in favour of the petitioner bank, giving no room for any adjudication in this writ petition, anymore.

15.Mr.K.Sathiya Singh, learned Additional Government Pleader appearing for the 1st respondent would submit that as far as the legal position is concerned he has nothing to add, as the Courts have consistently been holding that the secured creditor will have precedence over the other attachments. He would therefore, submit that any direction issued by this Court, the 1st respondent would comply with the same.

16.Mr.S.Ponsenthilkumaran, learned Counsel appearing for the 4th respondent has made his factual submission in regard to the attachments made at the instance of his client. For respondent Nos.2 and 3, there is no representation despite notice being served and the names have been printed in the cause list for the today's hearing

17.In any case, when the legal principle has been well settled in favour of the petitioner claim, the presence and absence of the private respondents would not be material at all in disposing of this writ petition.

18.In consideration of the above narrative, this court is of the view that as contended by the learned Counsel for the petitioner, the claim of the petitioner has to be necessarily allowed. The facts would disclose that the charge has been created by the bank as early as on 04.07.2011 itself, that is much prior to the attachments made on the schedule property at the instance of the respondents 2 to 4 herein.

19.In view of the catena of decisions and a few of which, referred to for the sake of brevity, this Court being bound by the decisions has to mandatorily follow the legal precedents on the subject matter. Moreover, there appears to be no dispute in regard to the factual narrative as mentioned above and therefore, this Court has to allow this writ petition without any hesitation.

20.In the above said circumstances, a writ of Mandamus is issued to the 1st respondent to delete the encumbrances, namely the attachment entries as stated by the petitioner in the prayer of the writ petition, in respect of the schedule property, made at the instance of the respondents 2 to 4 herein. The 1st respondent is directed to implement this direction within a period of four weeks from the date of receipt of a copy of this order. The bank is also directed to make available a copy of the affidavit filed in support of the writ petition for the 1st respondent to act in pursuance of the above direction of this Court.

21.In the result, the writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(AS)

// True Copy //

/ /2021
Sub Assistant Registrar(CS)

dsk

To
The Joint - II Sub-Registrar,
Office of the Joint II Sub-Registrar,
Karur.

+1 CC to M/s.S.DEENADHAYALAN, Advocate (SR-13403[F] dated 24/03/2021)

+1 CC to M/s.S.PON SENTHIL KUMARAN, Advocate (SR-13406[F] dated 24/03/2021)

W.P(MD) No.17254 of 2020
24.03.2021

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