

IN THE HIGH COURT OF ORISSA AT CUTTACK

1. RVWPET No.156 of 2022

(Arising out of W.P.(C) No.26500 of 2021)

**M/s. Maa Kalika Bhandar
and Others**

....
-versus-

Petitioners

***The Collector and District
Magistrate, Khordha and
Others***

....

Opposite Parties

2. RVWPET No.173 of 2022

(Arising out of W.P.(C) No.26500 of 2021)

**Tax Recovery Officer 1,
Bhubaneswar, Khurda**

....
-versus-

Petitioner

***M/s. Maa Kalika Bhandar
and Others***

....

Opposite Parties

3. RVWPET No.157 of 2022

(Arising out of W.P.(C) No.27775 of 2021)

**M/s. Dwarikamayee
Bhandar and Another**

....
-versus-

Petitioners

***The Collector and District
Magistrate, Khordha and
Others***

....

Opposite Parties

4. RVWPET No.174 of 2022

(Arising out of W.P.(C) No.27775 of 2021)

**Tax Recovery Officer 1,
Bhubaneswar**

....
-versus-

Petitioner

**M/s. Dwarikamayee
Bhandar and Others**

....

Opposite Parties

Advocates appeared in both the cases through Hybrid Mode:

For Petitioners : Mr. S.P. Misra, Senior Advocate
with Mz. Ekta Agarwal, Advocate
(In RVWPET Nos.156 & 157 of 2022)
Mr. T.K. Satapathy, Standing Counsel
for Income Tax Department
(In RVWPET Nos.173 & 174)

For Opposite Parties : Mr. S.P. Misra, Senior Advocate
with Mz. Ekta Agarwal, Advocate
(In RVWPET Nos.173 & 174)

**CORAM:
JUSTICE JASWANT SINGH
JUSTICE M. S. RAMAN**

**ORDER
02.12.2022
(Hybrid Mode)**

Order No.

- 03.** 1. This common order shall dispose of all the
aforementioned Review Petitions.
2. The aforementioned Review Petitions are clubbed
together as they are directed against the common
judgment dated 29.06.2022 in W.P.(C) No.26500 of 2021 &
W.P.(C) No.27775 of 2021. It is pertinent to note that
W.P.(C) No.26500 of 2021 & W.P.(C) No.27775 of 2021
were clubbed together as they involved a common question
of law and hence decided together.

I. **Brief facts in RVWPET Nos.156 & 173 of 2022**

The applicant-petitioner in RVWPET No.156 of 2022 i.e. M/s. Maa Kalika Bhandar (partnership firm) was also the petitioner in W.P.(C) No.26500 of 2021 whereas the petitioner in RVWPET No.173 of 2022 i.e. Tax Recovery Officer-1, Bhubaneswar claims to have not been impleaded as a party in W.P.(C) No.26500 of 2021 despite its pending application/request for impleadment. The Writ Petition was decided against the petitioner i.e. M/s. Maa Kalika Bhandar by a common judgment dated 29.06.2022.

II. **Brief facts in RVWPET Nos.157 & 174 of 2022**

The Petitioner in RVWPET No.157 of 2022 i.e. M/s. Maa Dwarikamayee Bhandar (partnership firm) was also the petitioner in W.P.(C) No.27775 of 2021 whereas the petitioner in RVWPET No.174 of 2022 i.e. Tax Recovery Officer-1, Bhubaneswar claims to have not been impleaded as a party in W.P.(C) No.27775 of 2021 despite its request. The Writ Petition was decided against the petitioner i.e. M/s. Maa Dwarikamayee Bhandar by common judgment dated 29.06.2022.

3. All the review petitioners herein are aggrieved against the common judgment dated 29.06.2022 passed by this Hon'ble Court and therefore seek review of the same.

4. Heard the learned counsels for the parties at length.

5. Mr. S.P. Mishra, learned senior counsel for the Review Petitioner Nos.1 & 3 i.e. M/s. Maa Kalika Bhandar and M/s. Maa Dwarikamayee Bhandar seeks revision on the ground that certain factual errors have crept into the judgment. The argument in a nutshell are:

(i) He contended that in W.P.(C) No.26500/2021, a challenge to the auction sale of the immovable properties mortgaged by M/s. Maa Kalika Bhandar was made by one Sidhant Narayan Singh Deo before DRT by filing S.A. No.41/2019. It is pertinent to mention that originally the disputed/mortgaged property stood in the name of Hitendra Pratap Singh Deo and upon his death, part of the property devolved to his wife R.R. Laxmi and one of his son Sourendra Narayan Singh Deo and both of them subsequently sold the property to Mr. Jay Kumar Jajodia Review Petitioner No.3 (partner in the petitioner firm i.e. M/s. Maa Kalika Bhandar) vide RSD No.1916 dated 19.12.2008. Mr. Sidhant Narayan Singh Deo who is the son of Sourendra Narayan Singh Deo (vendor of the partner of the petitioner) filed a case before the learned DRT, Cuttack vide S.A. No.41/2019 to quash the entire securitization proceeding and the successful auction. However, Para 3 of the common judgment dated 29.06.2022 wrongly mentions the petitioner in W.P.(C) No.26500/2021 i.e. M/s. Maa Kalika Bhandar to have

moved the S.A. No.41/2019 before the learned DRT, Cuttack.

(ii) He further contends that the Para 4 of the common judgment dated 29.06.2022 wrongly mentions that the mortgaged property in W.P.(C) No.27775 of 2021 has been successfully auctioned.

(iii) An argument is also raised that the properties in Writ Petitions W.P.(C) No.26500/2021 & W.P.(C) No.27775 of 2021 were attached by the Income Tax Department prior to their mortgage in favour of the Bank and hence the mortgage is void in terms of the provisions U/s.281 of the Income Tax Act, 1961. Hence, the findings in para 24 of the common judgment dated 29.06.2022 needs to be revisited.

6. Mr. T.K. Satapathy, learned counsel for the Review Petitioner Nos.2 & 4/Income Tax Department argues that the properties in Writ Petitions W.P.(C) No.26500/2021 & W.P.(C) No.27775 of 2021 were attached by the Income Tax Department prior to their mortgage in favour of the Bank on 28.06.2016 and hence the mortgage is void in terms of the provisions U/s.281 of the Income Tax Act and the corresponding relevant rules. It is his contention that the property was mortgaged in favour of the Bank on 28.06.2016 whereas the Income Tax Authorities had attached the same on 31.12.2015. Hence, the mortgaged transaction in favour of the Bank is void. It is thus submitted that observations in Para 24 of the common

judgment dated 29.06.2022 which is reproduced below, requires to be relooked:-

“24. As regards the contentions of the petitioner that property was already attached by the Income Tax Department, before the same was mortgaged we find that the said issue cannot be adjudicated in the present proceedings for the reason that firstly, it is a disputed question of fact as regard the date of mortgage and the date when the property was attached; as also whether such attachment actually lead to creation of a charge in terms of the section 100 of the Transfer of Property Act, 1882 or not as has been extensively dealt with by a Division Bench of Punjab and Haryana High Court in **Kamla Engg. And Steel Industries V/s Punjab National Bank**¹ (Para 22). Secondly, the argument that District Magistrate was required to adjudicate regarding the enforceability of the charge of mortgage by the secured creditor is untenable in view of the judgment of Hon’ble Supreme Court in **Standard Chartered Bank V/s V. Noble Kumar**² wherein it has been held that the satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the+ legal niceties of the transaction. Therefore, District Magistrate could not have determined the issue of enforceability of charge of the bank nor could have considered the argument of the petitioner that the transaction was void in terms of Section 281 of the Income Tax Act, 1961. Thirdly, this issue cannot be adjudicated in absence of Income Tax Department, which is seen to be contesting party but not impleaded in the present petition. Consequently, for the aforesaid two reasons we refrain ourself from commenting on the merits of this issue and leave it open to the petitioner to raise the same before DRT under Section 17 of the Act, 2002.”

7. After hearing learned counsel for the Review applicants, in the considered opinion of this Court even though we may correct the aforesaid factual aspect of S.A

¹ 2020 (4) PLR 669

² Supra 12

No.41 of 2019 having not been filed by the defaulting borrowers-M/s. Maa Kalika Bhandar or the property mortgaged as a Collateral Security in the case of M/s. Dwarikamayee Bhandar having not been auctioned, but still it does not persuade us to review our order on these ground. Even if M/s. Maa Kalika Bhandar had not approached the DRT to challenge the action of the Secured Creditor/Bank, it would still have the liberty to do so regarding the validity of the order passed by the District Magistrate under Section 14 of the Act, 2002 in view of the Judgment of the Hon'ble Supreme Court in ***Kaniyalal Lalchand Sachdev V/s State of Maharashtra 2011 (2) SCC 782***, wherein the order passed under Section 14 has been held to be an action under Section 13(4) of the Act, 2002 and thereby entitling the person aggrieved to approach the DRT by filing a petition under Section 17 of the Act, 2002. The aforesaid S.A. No.41 of 2019 having been filed by a different person other than M/s. Maa Kalika Bhandar in no way affects the right of the applicant-petitioner (M/s. Maa Kalika Bhandar) to approach the Tribunal to maintain its independent petition in accordance with law. The contention is thus rejected.

Similarly, in the case of M/s. Dwarikamayee Bhandar whether the mortgaged property offered as a Collateral Security was sold or not does not affect the independent right of the applicant-petitioner (M/s. Dwarikamayee Bhandar) to approach the Tribunal in accordance with law. For the same parity of reasoning the contention in the said case is also rejected.

8. The other argument raised is that in Para 24 of the Judgment that the question of priority of charge cannot be decided in the absence of Department of Income Tax is an error apparent on the face of the record, since the interim application(s) for impleadment of the Department of Tax stood already filed and were pending consideration in the Writ Petition(s).

Even this submission does not persuade us to review the order dated 29.06.2022. It is well accepted that any dispute relating to enforceability of charge by the Secured Creditor/Financial Institution is exclusively within the domain of adjudication before the DRT in terms of Section 34 of the Act, 2002 excluding the jurisdiction of Civil Court and Section 35 providing the provisions of the Act, 2002 to have an overriding effect. It may be correct

that applications for impleadment of Department of Income Tax stood filed, but since this Court had formed an opinion that *inter se* dispute regarding priority of charge based on various factors including the respective dates of creation of enforceable charge of the two separate entities, it would require a fact finding inquiry, which is better to be conducted before the DRT, therefore, even if the I.T. Department would have been impleaded, it would have no impact over the eventual findings rendered by us in Para 24 of the final order in question. Therefore, such a contention not being a sufficient ground for review, is thus rejected.

The next and the main argument stressed is that the properties in both the cases were mortgaged in favour of the Bank as a Collateral Security for the loans availed were **after** the properties stood attached with the Income Tax Authorities or the “proceedings” before the Income Tax Authorities were pending thereby rendering the subsequent mortgages as void in view of the provisions of Section 281 of the Income Tax Act read with the relevant provisions of the Income Tax Rules. Thus, the prayer made specially on behalf of the Income Tax Authorities is that a

clarification be issued that anything observed in Para 24 of the above judgment should not preclude the department from raising and seeking adjudication on such a plea before the appropriate authority.

9. It cannot be disputed that the question whether the attachment of the mortgaged property by the Tax Department or “any proceedings” stood initiated by the Income Tax Department prior to the mortgage are serious questions of disputed facts, which cannot be decided in writ jurisdiction under Article 226. The Income Tax Department was well within its right to seek a declaration of transaction being void before the forum of appropriate jurisdiction before seeking its simple impleadment before this Court, which concededly has not been done till now. Therefore, relegating the parties to seek adjudication on this issue by our order cannot be faulted with by any stretch of reasoning. The Income Tax Department is also free to seek its remedy before the appropriate forum including DRT to establish by leading cogent evidence that the action had been initiated which constituted “proceedings” prior in time of creation of an equitable mortgage in favour of the Bank so as to seek a declaration

of the mortgage being void or the attachment being prior in time so as to seek a priority of charge. The Secured Creditor/Bank would be equally free to stress the impact of Section 26(E) and Section 31(B) of the SARFAESI Act, 2002 *qua* the priority of the claim. Accordingly, the adjudication before this Court in view of Section 281 of the Income Tax Act is also rejected. However, we observe that the I.T. Department and the parties would be free to raise all these pleas before the DRT for adjudication in accordance with law.

10. In view of the above, we do not find any merit in all the four review applications. Accordingly, the same stands dismissed in terms of the aforesaid observations.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Basudev

2nd December, 2022
Cuttack