IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

Writ Petition No.4850 of 2022

The South Indian Bank Limited
Pogalur Branch, 7/08, Annur, MTP Road
Coimbatore – 641 697. …. Petitioner

-Vs-

1.The Assistant Commissioner(ST)
Annur Circle C.T.O Complex
Coimbatore-641 018.

2.M/s. Sri Balamurugan Spintex
India Pvt Ltd Rep by its
Director Mr.K.Balamurugan
268/1 Kovai Main Road
Kariyampallayam Village, Annur,
Coimbatore- 641 653.

3.The Sub-Registrar, Annur. …. Respondent

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the first respondent culminating in the Impugned attached order dated 22.08.2016 of the first Respondent reflected in the encumbrance certificate as document No. 17 of 2016 and the consequent Demand Notice letter dated 21.12.2021 on the file of the 1st Respondent and Quash the same as Null and Void and consequentially direct the 3rd Respondent to remove the attachment entry over the secured asset from the Encumbrance certificate being in derogation to the rights of the petitioner under the SARFAESI Act.

For Petitioner : Mr.E.Om Prakash, Senior Counsel
for M/s.Ramalingam and Associates

For Respondents : Mr.V.Prashanth Kiran,
Government Advocate - for RR 1
Mr.S.Ravichandran,
Additional Government Pleader
- for R3

O R D E R

The prayer sought for herein is for a Writ of Certiorarified Mandamus to call for the records of the first respondent culminating in the Impugned attached order dated 22.08.2016 of the first Respondent reflected in the encumbrance certificate as document No. 17 of 2016 and the consequent Demand Notice letter dated 21.12.2021 on the file of the 1st Respondent and Quash the same as Null and Void and consequentially direct the 3rd Respondent to remove the attachment entry over the secured asset from the Encumbrance certificate being in derogation to the rights of the petitioner under the SARFAESI Act.

2. That the petitioner is a Bank viz., South Indian Bank Limited, which has created mortgage against the second respondent with regard to the advancement of loan sometime in the year 2014 of the property of the second respondent.

3. Thereafter, since there has been default in payment of the loan by the second respondent, it seems that, the petitioner Bank has proceeded to execute the securitisation ie., mortgage of the property, where they found a hindrance from the office of the third respondent. By proceedings dated 17.08.2016, the first respondent ie., the tax authority had directed the third respondent / registering authority to create a charge over the very same property against the second respondent and accordingly the charge was created.

4. In view of the said charge having been created pursuant to the directive issued by the first respondent by his communication dated 17.08.2016 to the third respondent, the petitioner Bank is not able to execute their securitisation and that is how there is a hindrance insofar as the execution of the mortgage which has already been made in the year 2014, according to the petitioner, by the second respondent in favour of the Bank.

5. Only at this juncture, after having come to know about this charge created at the behest of the first respondent at the third respondent office in respect of the property belongs to the second respondent, the petitioner has moved the present writ petition challenging the order of the first respondent dated 17.08.2016 and the consequential demand notice dated 21.12.2021.

6. Heard Mr.E.Om Prakash, learned Senior Counsel appearing on behalf of the petitioner Bank, who would submit that, insofar as the priority as to by whom the charge already

created by way of mortgage or otherwise has to be executed between the petitioner bank and the first respondent tax authority is concerned, the issue is no more res integra as that has been given a quietus by the pronouncement of the Full Bench of this Court dated 10.11.2016 made in W.P.No.2675 of 2011 etc., batch reported in 2016 (6) CTC Page 769.

7. In the said Full Bench judgment, according to the learned Senior Counsel, in view of the insertion of Section 31B in the Act called Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, the law was declared that, the rights of secured creditors to realise the secured debts due and payable to them by sale of assets over which security interest is created shall have a priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

8. Following the said Full Bench judgment, when similar circumstances arose, where writ petition was filed in W.P.(MD) No.12643 of 2020 in the matter of State Bank of India -Vs- The Assistant Commissioner (ST), Madurai and Others, a Division Bench of this Court at Madurai Bench, by an order dated 15.04.2021, has passed a detailed order, taking into account the Full Bench judgment as well as other related decisions, where similar writ petitions were allowed. Thus, a direction was given to the Registration Department to clear or remove the encumbrance created or charge created pursuant to the directive issued by the commercial taxes department for the alleged due payable to the said department by the tax payer.

9. Relying upon this decision, the learned Senior Counsel would contend that, the issue raised in this writ petition since has already been decided by more than one decision as cited above, there could be no further impediment for the petitioner to go ahead for executing the securitisation for recovery of the debts against the debtor who was advanced loan by the petitioner Bank which has become Non-Performing Asset (NPA).

10. Since the charge created by the tax department at the hands of the second respondent is a hindrance, now the present writ petition has been filed with the aforesaid prayer and the learned Senior Counsel appearing for the petitioner seeks the indulgence of this Court to allow the writ petition.

11. However, Mr.V.Prashanth Kiran, learned Government Advocate appearing for the first respondent, on instructions

would submit that, though the law has been declared by the Full Bench of this Court referred to above in the judgment cited supra ie., 2016 (6) CTC Page 769, as against the said order, a Special Leave Petition has been filed by the Revenue before the Hon'ble Supreme Court in S.L.P.(Civil) Diary No.20471 of 2017, where the Hon'ble Supreme Court, by an interim order dated 16.03.2018, has directed to maintain status quo as it exists that day. He would further submit that, when that interim order in the said SLP and connected SLPs are pending consideration before the Hon'ble Supreme Court, it cannot be stated that the issue raised and decided by the Full Bench in the cited judgment has been concluded.

12. Therefore, citing the said position, the learned Government Advocate submitted that, at this juncture the prayer sought for by the petitioner cannot be granted unless and until the issue is concluded by an authoritative decision of the highest Court of the land, where it is pending as stated supra.

13. I have considered the submissions made by the learned counsel on either side and have perused the materials placed on record.

14. The issue is in a very narrow compass, where, 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 taxes and other dues which was exactly the issue before the Full Bench referred to above and after having taken note of the insertion of Section 31B of the 2016 Act, by considering the non-obstante clause ie., 'notwithstanding anything contained in any other law for the time being in force' , the Full Bench has passed the following order.

> " 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:-
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> > ''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''.

15. Though it was contended by the learned Government Advocate appearing for the first respondent that appeal has been filed against this judgment and the SLP is pending before the Hon'ble Supreme Court, where status quo was directed to be maintained on 16.03.2018, if we peruse the order of the Hon'ble Supreme Court, it reads thus,

"Status quo, as it exists today, shall be maintained by the parties, in the meantime."

16. The status quo as it exists that day was directed to be maintained by the parties in the meantime. The word 'parties in the meantime' means, according to the learned Senior Counsel appearing for the petitioner, only relates to the parties of the said petition or petitions and in the absence of any complete stay granted in the matter as against the law declared by the Full Bench cited supra, it cannot be stated, according to the learned Senior Counsel for the petitioner, that the Full Bench decision of this Court referred to above has been stayed.

17. Moreover, subsequent to the said Full Bench judgment, in a recent decision dated 15.04.2021, when a similar issue came up for consideration before a Division Bench in W.P.(MD) No.12643 of 2020 in the matter of State Bank of India -Vs- The Assistant Commissioner (ST), Madurai and Others, the Division Bench, after taking note of not only the Full Bench order, but also other similar orders passed by other Division Bench and connected orders, has come to the conclusion that, the secured creditor ie., the Bank will have the first charge and whatever the charge created at the instance of the tax authorities shall have no precedence.

18. The relevant portion of the order of the Division Bench reads thus,

"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."

19. Therefore, if we take the clue from the order passed by the Division Bench cited supra, since it is a later order dated 15.04.2021 ie., after the status quo order passed by the Hon'ble Supreme Court dated 16.03.2018, this Court feels that, the status quo order dated 16.03.2018 made in the SLP filed arising out of the Full Bench order, as rightly pointed out by the learned Senior Counsel appearing for the petitioner, is in respect of those cases ie., parties to the said cases.

20. Since the Division Bench, in the State Bank case cited supra, has categorically held that, the first charge created by the secured creditor ie., the Bank will have the precedence over the charge created by any tax authorities or any Government authorities for any due payable to the Government and that has been the law as declared by the Full Bench of this Court, of course on the basis of Section 31B of the 2016 Act, this Court has no hesitation to hold that, the petitioner is entitled to get the relief as sought for herein.

21. In that view of the matter, this Court is inclined to dispose of this writ petition with the following order.

"That the impugned order dated 17.08.2016 passed by the first respondent shall not stand in the way for the execution of securitisation in respect of the property belongs to the second respondent at the hands of the petitioner Bank and therefore, there shall be a direction to the third respondent / registering authority to remove or cancel the charge created pursuant to the impugned order dated 17.08.2016 issued by the first respondent. By thus, it will pave way for the petitioner to execute their securitisation against the second respondent in respect of the property in question."

22. With the above directions, this writ petition is disposed of. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

KST

To

1.The Assistant Commissioner(ST),
Annur Circle C.T.O Complex
Coimbatore-641 018.

2.M/s. Sri Balamurugan Spintex India Pvt Ltd
Rep by its Director
Mr.K.Balamurugan 268/1 Kovai Main Road,
Kariyampallayam Village, Annur,
Coimbatore- 641 653.

3.The Sub-Registrar,
Annur.

+2cc to Mr.Ramalingam and Associates, Advocate SR.No.15796
+1cc to the Government Pleader SR.No.16679
+1cc to Special Government Pleader(Taxes), SR.No.16351

W.P.No. 4850 of 2022

AK II(CO)
GN(09/06/2022)