BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.07.2022

CORAM

THE HONOURABLE MR. JUSTICE M.NIRMAL KUMAR

W.P.(MD).No.532 of 2022
and
W.M.P.(MD).No.409 of 2022

M/s.Cholamandalam Investment
and Finance Company Limited
Represented by its Authorised Signatory. ... Petitioner

Vs.

1.The Principal Commissioner,
Income Tax Department,
No.2, V.P.Rathinasamy Nadar Road,
Bibikulam,
Madurai – 625 002.

2.The Assistant Commissioner,
Income Tax Department,
Central Circle 2 Madurai,
Kulamangalam Main Road,
Meenambalpuram,
Madurai – 625 002.

3.The Joint Commissioner,
Office of Additional / Joint Commissioner
of Income Tax Department,
No.19A, WGC,
Tuticorin – 628 001.

4.Tax Recovery Officer
TRO 1 Madurai,
Income Tax Office – Madurai MA,
No.2, V.P.Rathinasamy Nagar Road,
C.R. Building, Bibikulam,
Madurai – 625 002. ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, calling for the records pertaining to the order dated 02.11.2021 in TRC. No.672/TRO/MDU/2021-22 by the fourth respondent quash the same and consequently direct the fourth respondent to raise the order of attachments dated 20.03.2017, 09.10.2017, 06.12.2017 and 09.07.2018 on the Mortgaged Property / Secured Asset being Door No.205 and 205A in T.S.No.332/3 part in Ward No.35, Block No.9, George Road, Tuticorin.

For Petitioner : Mr.K.J.Parthasarathy
For Respondents : Mr.N.Dilip Kumar,
Standing Counsel.

ORDER

The petitioner herein, who is the Cholamandalam Investment and Finance Company Limited, has filed this Writ Petition to quash the order passed by the fourth respondent dated 02.11.2021 and consequently direct the fourth respondent to raise the order of attachments dated 20.03.2017, 09.10.2017, 06.12.2017 and 09.07.2018 on the Mortgaged Property / Secured Asset being Door Nos.205 and 205A in T.S.No.332/3 part in Ward No.35, Block No.9, George Road, Tuticorin.

2. The petitioner is a non-banking finance company registered under the Companies Act, 1956 and notified as a financial institution under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The petitioner is a secured creditor and the subject property being Door Nos.205 and 205A in T.S.No.332/3 part in Ward No.35, Block No.9, George Road, Tuticorin is the secured asset of the petitioner. The borrowers, R.Thanabalan (Sri Sivasankar Timber and Tiles) and T.Sathish Kumar (Sivasankar Traders) had availed loan of Rs.2,30,00,000/- executed loan agreement dated 29.01.2015, agreeing to repay the said sum in 122 and 104 EMIs of Rs.1,44,661/- and Rs.3,50,231/-. The borrowers had availed loan under variable rate of interest. At the time of sanction, it was 13.50% and the present rate of interest is 14.15%. The borrowers had also created equitable mortgage over the secured asset by deposit of title deeds on 19.02.2015 registered as Document No.190/2015 in the office of the Sub Registrar, Tuticorin Joint II.

3. As per the loan agreement, if there is any default in EMI, the loan would be declared as NPA. In this case, the borrowers had defaulted and their loan account declared as NPA on 05.08.2016. As secured creditor, the petitioner initiated recovery proceedings under the provisions of SARFAESI Act by causing demand notice, under Section 13(2) of the Act, dated 30.09.2016, calling upon the borrowers to discharge the debt within 60 days. This notice was duly served on the borrowers on 10.10.2016. The borrowers failed to comply with the demand made in 13(2) notice dated 30.09.2016. Under the provisions of the SARFAESI Act, the petitioner took symbolic possession of the secured asset on 04.01.2017 in strict compliance of Rule 8 of Security Enforcement Rules. The petitioner was facing resistance from the borrowers. Hence, the petitioner filed appropriate application before the District Magistrate under Section 14 of SARFAESI Act. The District Magistrate/Collector passed orders on 16.11.2018 directing the revenue officials to take possession of the secured asset and hand over the same to the petitioner. The actual possession of the secured asset was handed over to the petitioner on 03.03.2020.

4. The petitioner thereafter proceeded further for recovery of debt and contemplated sale of the secured asset as mandated under Rule 8 and 9 of the Security Enforcement Rules. Thereafter, on verification of the Encumbrance Certificate, it was found that the entries pertaining to order of attachment dated 20.03.2017, 09.10.2017, 06.12.2017 and 09.07.2018 by the Income Tax Department over the subject property reflected. Immediately, the petitioner caused a detailed representation dated 24.03.2021 to the third respondent narrating the facts and state of affairs with a request to raise the order of attachment enclosing requisite documents. The said representation dated 24.03.2021 was acknowledged by the third respondent on 26.03.2021. The third respondent neither replied nor complied with the request of the petitioner. The third respondent was silent and thereafter, on 22.04.2021, the petitioner filed a claim petition under Section 11(6) of II Schedule of the Income Tax Act seeking to raise the order of attachment dated 20.03.2017, 09.10.2017, 06.12.2017 and 09.07.2018.

5. On 16.07.2021, the fourth respondent sent a communication to the petitioner to produce the copies of documents enlisted in the communication. The petitioner submitted all the documents on 19.07.2021 and was awaiting for

orders. The fourth respondent orally after receipt of documents, sought an undertaking to remit the excess sale consideration, if any, with the Income Tax Department to issue NOC. Hence, to give quietus to the issue, the petitioner had sent a communication dated 23.08.2021 with an undertaking to remit the excess sale proceeds, if any, after satisfying its debt. The petitioner had also caused a sale notice dated 12.08.2021 fixing the sale on 31.08.2021. The sale did not fructify as the bidders were apprehensive to participate owing to the attachment made by the respondents and the same is reflected in the Encumbrance Certificate. The fourth respondent, despite knowledge of the fact that the secured asset ought not to have been subjected to an order of attachment as the mortgagee right/as the secured creditor has priority over the crown debt, failed to clarify and pass necessary orders.

6. The learned counsel for the petitioner submitted that it is settled law that the secured creditor will have a priority over the crown debt as held by the Hon'ble Supreme Court in the decision reported in ***2009 (2) SCC 121***. He further placed reliance on the decision of the Full Bench of this Court passed in ***W.P.No.39536 of 2005 [2006 (5) CTC 801]***, wherein, the Full Bench of this Court, by referring to the judgment of the Hon'ble Apex Court and various

other decisions, had held that the secured creditor is entitled to have preference over the claim of Deputy Commissioner of Central Excise / crown debt. In the case of ***Union of India and others Vs. Sicom Limited and another***, reported in ***(2009) 2 SCC 121***, the Hon'ble Apex Court had held that the secured creditor will have priority over the crown debts reiterating the principles laid down in *Dena Bank*'s case. Further, in the case of ***Connectedwell Industries Private Limited Vs. Union of India and others***, reported in ***(2020) 5 SCC 373***, the Hon'ble Supreme Court had held that it is trite law that unless there is preference given to the crown debt by a statute, the dues of a secured creditor have preference over crown debts. Further following the judgment of the Hon'ble Apex Court, recently, the Bombay High Court held in the case of ***Edelweiss Asset Reconstruction Company Limited Vs. Tax Recovery Officer, Income Tax Department and others***, reported in ***2021 SCC Online Bom 1311***, wherein, the decisions of the Hon'ble Supreme Court as well as Full Bench of this Court is referred, extracted and held that the secured creditors such as the petitioner have priority over the dues of the Income Tax Department and any attachment of the Income Tax Department cannot come in the way of the rights of the secured creditor.

7. The learned counsel referred to Section 35 of the SARFAESI Act, a non obstante clause, clarifying, notwithstanding anything inconsistent contained in any other law for the time being in force or any instrument having effect by virtue of any law, SARFAESI Act provisions will prevail. Further, referred to Section 26D of the Act, the right of enforcement of securities to be exercised unless the security interest created in its favour by the borrower has been registered with the Central Registry, which came into effect after 24.01.2020. In this case, the loan is earlier to this date, in any event, petitioner registered with the Central Registry, the mortgage. Hence, in all fairness, the Income Tax Department ought not to have created a charge over the property which is already mortgaged with the petitioner. Further, in the Encumbrance Certificate, the attachment of Income Tax Department gets reflected, which affects the petitioner's chance of realising his mortgage dues. He fairly submitted that after the mortgage dues realised, whatever is left over will be remitted to the Income Tax Department. The petitioner already gave an undertaking to that effect and continues to abide by the undertaking.

8. The learned Standing Counsel appearing for the respondents made objections to the prayer of the petitioner, on the ground that the order of

attachment by the Income Tax Department cannot be quashed for the only reason the property is mortgaged with secured creditor, the Income Tax Department has got every right to attach the property as per II schedule of the Act. He further submitted that the Tax Recovery Officer recorded the petitioner's mortgage over the property of R.Thanabalan and T.Sathish Kumar in T.S.No.332/3 part to an extent of 25.13 cents and 6.887 cents at Door Nos. 205 and 205A in Ward No.35, Block No.9, George Road, Tuticorin. The four attachment orders passed by the Department. The petitioner made a petition under Rule 11 of the Second Schedule to the Income Tax Act before the Tax Recovery Officer on 23.04.2021, requesting to raise the attachment on the property. Thereafter, the petitioner Company was required to furnish certain details with regard to its claim. In the meanwhile, the said Company furnished the details, simultaneously filed a Writ Petition in this Court in W.P.(MD).No. 16289 of 2021 to dispose of the petitioner's Rule 11 application. Thereafter, this Court, by order dated 09.09.2021, directed the Tax Recovery Officer to consider and decide the petition filed by the petitioner Company.

9. He submitted that the demand has been raised in this case against R.Thanabalan, Sathish Kumar and Sri Sivasankar Timber and Tiles during the

assessment years 2013-14, 2014-15 and 2015-16, totalling to tax due of Rs.63,51,449/-, further with the interest under Section 220(2), which is pending in their cases. The assessees, namely, R.Thanabalan, Sathish Kumar and Sri Sivasankar Timber and Tiles, had filed an appeal before the Commissioner of Income Tax (Appeals) and the same is pending. The said assessees so far have not paid anything towards the above demand. It is also found that the firm of the assessees is inactive. Further, the only source for collection of the above arrears of demand is the subject property. Hence, to safeguard the Government revenue, Income Tax Department to collect the tax due issued proper attachment orders.

10. He further referred to paragraph 9 of the impugned order dated 02.11.2021, which reads as follows:

> *"9.Under the above circumstances, as the demand is yet to be collected and the subject property is the only source for collection, and further the estimated value of the subject property is Rs.3,19,37,737/- (as per the applicant's submission), the attachment on the said property would be continued subject to the mortgage. The petition submitted under Rule 11 is thus disposed off."*

It is stated that the attachment on the property would be continued subject to the mortgage, i.e., the petitioner's right to realise mortgage amount is not disputed question. The Department, to safeguard its interest, made the said attachment. He fairly states that he has no quarrel over, the priority of the mortgage right of the petitioner. His objection is that the petitioner cannot say that the Income Tax Department has no right to make any attachment or to make any claim on the assessee's default in making tax payments, and to realise the same by attaching the property available, of course the realisation can be made only after the secured creditor / petitioner realising his mortgage due which has priority over the crown debt, after of sale of realisation, by the petitioner, for the balance the Income Tax Department can make its claim.

11. Considering the submissions made by the learned counsels and on perusing the materials and also in the light of the judgments of the Hon'ble Supreme Court, this Court as well as the Bombay High Court referred above, it is not in doubt that the right of the mortgagee prevails over the crown debts. The petitioner had followed all the rules and procedures as per SARFAESI Act, attached the property and brought the property for sale to realise his mortgage dues. His only apprehension is that due to the attachment of the Income Tax

Department, which is reflected in the Encumbrance Certificate, buyers are hesitating to participate in the sale proceedings, the mortgage property could not fetch the real market value, in the process petitioner is unable to realise the mortgage amount from the property. The learned counsel for the petitioner fairly submitted that whatever is realised over and above its dues, the same would be remitted to the Income Tax Department.

12. Recording the same, this Court allows this Writ Petition, clarifying that the attachment of the Income Tax Department/crown debt cannot be said to be an encumbrance for the auction purchaser. The encumbrance of the Income Tax Department reflected in the Encumbrance Certificate showing attachment will not bind the purchasers of the mortgage property, which is brought for sale by the petitioner. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

14.07.2022

Index : Yes / No
Internet : Yes/ No
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M.NIRMAL KUMAR, J.

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