BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDER RESERVED ON : 11.08.2022

ORDER PRONOUNCED ON : 18.08.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

W.P.(MD).No.16001 of 2012

1.T.Selvaraj (deceased)

2.S.Bakkia Lakshmi

3.S.Suriya Prakash

4.S.Rathinakumar

5.Alzheswari ....Petitioners

(Petitioners 2 to 5 are substituted
as per order dated 27.08.2014)

Vs

1.The Sub Registrar
Tamaraipatti (E), Chitampatti, Thirumogur Road
Y.Othakadai, Madurai District

2.The Commercial Tax Officer
(Now re-designated as Assistant Commissioner)
Tamil Sangam Road Assessment Circle
Commercial Taxes Building
Dr.Thangaraj Salai
Madurai

3.The Branch Manager
Tamil Nadu Mercantile Bank Ltd.,
Shennoy Nagar Branch
Door No.28, Kakan Street
Madurai

4.The Authorities Officer
Tamil Nadu Mercantile Bank Ltd.,
Madurai Regional Office
30, Besant Road
Chinnachokkikulam
Madurai 2

5.Ligi George ...Respondents

Prayer: This Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the first respondent to delete the entry in the encumbrance Certificate as per request of the second respondent with respect to the Survey No.174/3 Uthangudi Village purchased by the petitioner through the sale deed Nos. 1923 and 1924 of 2010 dated 03.05.2010 executed and registered by the fourth respondent with the first respondent.

For Petitioner	: Mr.M.Ajmalkhan Senior Counsel For Mr.A.S.Mujibur Rahman
For R1 & R2	: Mr.K.S.Selvaganesan Additional Government Pleader
For R3	: Mr.C.Jawahar Ravindran
For R4 & R5	: No appearance

ORDER

The above writ petition has been filed to issue a writ of mandamus directing the first respondent to delete the entry in the encumbrance certificate which are created as per request of the second respondent in respect of Survey No.174/3 Uthangudi Village purchased by the petitioner through the sale deed Nos.1923 and 1924 of 2010 dated 03.05.2010.

2.According to the petitioners, the property in dispute was mortgaged by the fifth respondent herein in favour of the third respondent Bank and security was created on 14.07.1994. Thereafter, due to default in making repayment, proceedings under SARFAESI Act were initiated by the fourth respondent. Accordingly, possession was taken under Section 13(4) of the SARFAESI Act on 09.02.2007. Thereafter, an auction sale was conducted on 22.03.2010. Since the petitioner has deposited the entire sale consideration on the same day, the sale was confirmed. A sale certificate was issued in favour of the writ petitioner on 03.05.2010 and the same was also registered.

3. The petitioners herein found in the encumbrance certificate that an encumbrance has been entered into on 07.03.2007 at the instance of the second respondent herein on the ground that the fifth respondent was in arrears of sales tax and hence, an order of attachment has been passed. The

petitioner had submitted a representation to the first respondent herein on 24.08.2012 requesting him for removal of the said encumbrance on the ground that the security created in favour of the Bank is anterior in point of time and the order of attachment at the instance of the second respondent herein on 07.03.2007 is not legally sustainable. Since the said request of the petitioners was not considered, the present writ petition has been filed for deletion of the said encumbrance.

4.The learned Senior Counsel appearing for the writ petitioners had contended that the property in dispute was mortgaged to the third respondent Bank in the year 1994 itself and possession was taken on 09.02.2007 by the third respondent Bank. Only thereafter on 07.03.2007, an order of attachment has been entered into in the encumbrance relating to the disputed property. When the Bank being a secured creditor and the security being anterior in point of time, it prevails over the order of attachment effected by the second respondent herein.

5.The learned Senior Counsel relied upon Section 24(2) of Tamil General Sales Tax Act which is extracted as follows:

> *"24(2). Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall subject to the claim of the*

Government in respect of land revenue and the claim of the Land Development Bank in regard to the property mortgaged to it under Section 28(2) of the Tamil Nadu Co-operative Land Development Banks Act, 1934 (Tamil Nadu Act X of 1934) have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered.

(a) as land revenue, as

(b) on application to any Magistrate, by such Magistrate as if it were a fine imposed by him:

Provided that no proceedings for such recovery shall be taken or continued as along as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under Sections 31, 31-A, 33, 35, 36, 37 or 38".

6.The learned Senior Counsel also relied upon Section 31-B of the SARFAESI Act which is extracted as follows:

*"**31-B. Priority to secured creditors-** 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 (31 of 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."

7.The learned Senior Counsel further relied upon a Full Bench Judgement of our High Court reported ***in (2016) 6 CTC Page 769 (Assistant commissioner (CT) Anna Salai-III Assessment Circle, Sire Mansion Vs. Indian Overseas Bank represented by its Manager and another)*** and contended that the rights of the secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, shall have priority over all other debts and Government dues including revenues, taxes and rates due to the Central Government, State Government or local authority. In the present case, being a secured creditor and the security being anterior in point of time, dues of the Government will not prevail over the said security created by the Bank.

8.The learned Senior Counsel further relied upon a Division Bench Judgement of our High Court reported ***in (2009) 25 VST 175 (Mad) (M.Nagarajan Vs. Deputy Commercial Tax Officer, Dindivanam and another)*** , in which the following paragraphs is extracted:

"It will be evident from the Bombay Sales Tax Act, Rajasthan Sales Tax Act and the Kerala General Sales Tax Act that in all those Acts it was specifically mentioned that notwithstanding anything contrary contained in any law for the time being in force, any amount of tax, etc., due from a dealer or person under these Acts shall be the first charge in the property of the dealer. The rights of the State under the GST Act have to been seen in the context of the statutory provisions. All that the provision contemplates is that the tax assessed on or which has become payable by, or any other amount due under the said Act from, a dealer or person or any due from him under the said Act, shall be subject to the claim of the Land Development Bank in regard to the property mortgaged to it under Section 28(2) of the Tamil Nadu Co-operative Land Development Banks Act, 1934 and it will have priority over all other claims against the property of the said dealer or person to be recovered as land revenue. By so holding, the provision (Section 24 of the GST Act) by itself does not create the first charge as under the other enactments and the claim of the State is to subserve the claim of the secured creditor, who, by the anterior charge created in its favour, has a superior claim over even the State's claim.

25.Apart from the aforesaid position of law, in the present case, it will be evident that the assessee (dealer – M/s.Jay Flash Ceramics Ltd.,) mortgaged the land in question in favour of Indian Bank on August 1, 1990. After promulgation of NPA Act, the bank being the secured creditor and mortgaged property being a secured debt, the bank had right to auction sell the property. The assessee (dealer – M/s.Jay Flash Ceramics) becomes eligible for interest-free sales tax *on July 5, 1993 ie. Much after the property was mortgaged. Sales Tax deferment agreement was reached on September 1, 1993, and April 22, 1996, ie. Much after the properties in question were mortgaged in favour of the bank. In that view of the matter also, the State cannot claim first charge over the property in question nor can it claim any priority over the debts due to the bank"*

9.The learned Senior Counsel further relied upon a Division Bench Judgment of our High Court reported in ***(2009) 25 VST 187 (Mad) (Indian Bank Vs. Commercial Tax Officer, Navalpur, Ranipet and others)***, the following paragraph was referred by the learned Senior Counsel:

" It is not in dispute that the bank is a " secured creditor" within the meaning of Section 2(zd) of the SARFAESI Act, 2002. It has "secured interest" over the secured asset. Section 2(zc) defines "secured asset" as property on which security interest is created. Security interest is defined under Section 2(zf), as right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31. Security agreement is already existing between the bank and borrower, as defined under Section 2(zb) which means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor"

10.Relying upon the above said provisions, a Full Bench Judgment and the Division Bench Judgments of our High Court, the learned Senior Counsel had contended that the third respondent Bank being a secured creditor, will be entitled to proceed further and realise the amount through the security assets by way of invoking the SAFAESI proceedings. The statutory rules of either the State Government or the Central Government will not prevail over the said rights of the secured creditor. The statutory rules will prevail only over the rights of an unsecured creditor and not over the rights of the secured creditor. Hence, in the present case, the Bank being a secured creditor, rights of the said secured creditor will prevail and the auction conducted by the secured creditor is perfectly valid and the second respondent authority cannot have any right of attachment over the said property, that too on 07.03.2007 after possession was taken by the respondent Bank on 09.02.2007. Hence, he prayed for allowing the writ petition and deletion of the entry relating to the order of attachment made in the encumbrance certificate.

11.Per contra, the learned Additional Government Pleader appearing for the first and second respondents contended that the as per Section 24(2) of the Tamil Nadu General Sales Tax Act, 1959, the statutory rules of the State Government will prevail over the dues of any other private parties. He had further contended that a Full Bench Judgment of our High Court has been challenged by the Hon'ble Supreme Court and the same is pending in SLP (Civil) Diary No.20471 of 2017. Hence, he contended that a Full Bench Judgment of our High Court has not attained finality and hence, the same cannot be relied upon by the learned Senior Counsel appearing for the petitioner. He had further contended that the order of attachment has been entered into in the encumbrance certificate on 07.03.2007 itself. However, the sale certificate was issued only on 03.05.2010. Even in the sale certificate, there is a reference about the order of attachment effected by the second respondent herein. Hence, the petitioner cannot claim himself to be a bonafide purchaser without having knowledge about the order of attachment made by the second respondent . Hence, he prayed for dismissal of the writ petition.

12.I have considered the submissions made on either side and perused the materials available on record.

13.There is no dispute that the property in dispute has been mortgaged to the third respondent Bank on 14.07.1994 by the fifth respondent herein. As per Paragraph No.4 of the counter affidavit of the second respondent, the fifth respondent was in arrears of tax for the assessment year 1996-1997 to 2006-2007. Hence, it is clear that after a security was created to the third respondent Bank, the fifth respondent had fallen in arrears due to non-payment of sales tax in the year 1996. The Bank has initiated proceedings under SARFAESI Act and has taken possession under Section 13(4) of SARFAESI Act on 09.02.2007. Only thereafter, an order of attachment has been passed on 07.03.2007 and it has been entered into in the encumbrance certificate. Hence, it is clear that the third respondent Bank is a secured creditor and the security has been created in an anterior point of time even before the fifth respondent has fallen in arrears of sales tax.

14.Though the learned counsel for the second respondent had contended that the order of Hon'ble Full Bench of our High Court reported ***in (2016) 6 CTC Page 769 (Assistant commissioner (CT) Anna Salai-III Assessment Circle, Sire Mansion Vs. Indian Overseas Bank represented by its Manager and another)*** has been challenged before the Hon'ble Supreme Court, the same has not yet been numbered and no interim order has been passed by the Hon'ble Apex Court. That apart, the learned Senior Counsel has also relied upon two Division Bench Judgements of our High Court reported ***in (2009) 25 VST 175 (Mad)(M.Nagarajan Vs. Deputy Commercial Tax Officer, Dindivanam and another)*** and ***(2009) 25 VST 187 (Mad) (Indian Bank Vs. Commercial Tax Officer, Navalpur, Ranipet and others).*** As per the Judgements of the Hon'ble Division Bench in both the cases, it has been held that the rights of the secured creditor will prevail over the Government dues. These two judgments have not been reversed by the Hon'ble Supreme Court and the same are binding upon this Court.

15.In view of the above said facts, the third respondent Bank being a secured creditor and the security being created much anterior to the date of attachment by the second respondent department, I find that the order of attachment would not have any binding effect on the writ petitioner who is an auction purchaser from the third respondent Bank. Since the claim of the State is to subserve the claim of the secured creditor, who by the anterior charge created in its favour, has a superior claim over even the State's claim.

16.In view of the above said discussion, the writ petition is allowed. The first respondent is directed to delete the encumbrance created at the instance of the second respondent herein on 07.03.2007 in Doc.No.2 of 2007. The said exercise shall be completed within a period of twelve (12) weeks from the date of receipt of a copy of this order. No costs.

18 .08.2022

Internet : Yes/No
Index : Yes/No
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To

1.The Sub Registrar
Tamaraipatti (E), Chitampatti, Thirumogur Road
Y.Othakadai, Madurai District

2.The Commercial Tax Officer
(Now re-designated as Assistant Commissioner)
Tamil Sangam Road Assessment Circle
Commercial Taxes Building
Dr.Thangaraj Salai
Madurai

R.VIJAYAKUMAR, J.

msa

Pre-delivery order made in

W.P.(MD).No.16001 of 2012

18.08.2022