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W.P.No.15014 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.08.2023

PRONOUNCED ON : 05.09.2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.15014 of 2022

&

W.M.P.No.14231 of 2022

Indian Overseas Bank,
Asset Recovery Management Branch,
No.11/952, Cross Cut Road,
Coimbatore-641 012.
Represented by its Chief Manager.

...Petitioner

Vs.

1. The Assistant Commissioner of
Central Excise and service Tax,
Salem I Division,
No. 21 Theerthamali Arcade,
Veerapandiyar Nagar, Salem-636 004.

2. M/s. Hi-Tech Minerals Industries Covai Pvt. Ltd. (In Liquidation),
Represented by its Official Liquidator High Court,
Corporate Bhawan (UTI building)
2nd Floor, No.24 Rajaji Salai, Chennai-01.

3. The Sub Registrar,
Omalur, Salem District,
Tamil Nadu.

..Respondents



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Prayer : Writ Petition filed Under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the First respondent to remove the attachment effected on 03.12.2014 as mentioned in EC with the office of the 3rd respondent in respect of secured property belonging to the 2nd respondent so as to enable the petitioner bank to register the sale certificate / sale deed in favour of auction purchaser / third party(s) in accordance with law.

For Petitioner : Mr.M.L.Ganesh

For Respondens

(R1) : Mr.Umesh Rao .K,
Senior Standing Counsel
(R2) : Mr.B.Dhan Raj
(R3) : Mr.D.Ravichander,
Special Govt.Pleader

ORDER

The lis on hand has been instituted to direct the 1st respondent to remove the attachment effected on 03.12.2014, as mentioned in the Encumbrance Certificate, with the Office of the 3rd respondent, in respect of secured property belonging to the 2nd respondent, so as to enable the petitioner Bank to register the sale certificate / sale deed in favour of auction purchaser / third party(s) in accordance with law.



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WEB COPY **Facts of the Case:**

2.The petitioner is the Indian Overseas Bank, Asset Recovery Management Branch. The 2nd respondent had purchased the land and building together with plant, machineries, accessories etc., belonging to M/s.Tamil Nadu Sponge Limited, pursuant to the sealed tender invited by DRT, Coimbatore in TA.No.995/2002, which was filed by ICICI Bank Limited, IDBI and IFCI. The DRT, Coimbatore had received 16 tenders and out of which the 2nd respondent-Company was declared as highest bidder and on remittance of entire sale price, the DRT, Coimbatore issued sale certificate on 30.09.2003 in favour of the 2nd respondent.

3. The sale certificate was duly registered as Document No.566/2004 SRO, Omalur in favour of the 2nd respondent, in respect of the properties morefully described in the affidavit filed in support of the writ petition.

4. The 2nd respondent-Company had availed various credit facilities from the petitioner-Bank from time to time in order to run its business



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operations on the aforesaid property and the last credit facilities, namely, cash credit facility, working capital demand loan, term loan (9Nos) LG, LC and A & E were extended by the petitioner-Bank for Rs.241.52 Crores and in order to secure the aforesaid credit facilities, the 2nd respondent had created primary security on hypothecation of stocks, stocks in trade, book debts, receivables, consumables and collateral security for the aforesaid property. Besides, the aforesaid property belonging to the 2nd respondent and guarantors also offered some immovable properties to secure the immovable properties. The 2nd respondent had defaulted in repaying the loan amount, and the loan accounts were slipped into NPA category on 31.12.2023 in terms of Reserve Bank of India (RBI) guidelines. The 2nd respondent-Company had become non-functional ever since from the year 2014 onwards and virtually defunct due to stoppage of business operations. The Guarantors also had failed and neglected to repay the outstanding loan amount. The petitioner-Bank had invoked SARFAESI actions and thus, caused demand notice under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002, on 21.02.2014 to the 2nd respondent and the



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possession had been taken by the petitioner-Bank. The Bank continued its actions under the SARFAESI to recover the huge outstanding loan amount of Rs.216,63,91,070.59/- as on 21.02.2014. The petitioner-Bank has so far caused more than 10 notices to auction the secured property belonging to the 2nd respondent but could not be sold for want of bidders mainly due to the attachment effected by the 1st respondent / Assistant Commissioner of Central Excise and Service Tax towards its dues.

5. The petitioner-Bank had so far sold the secured properties belonging to the guarantors and recovered only a sum of Rs.51,79,77,500/- as against the staggering outstanding amount of Rs.216,63,91,070.59 as on 21.02.2014.

6. The petitioner-Bank mainly contended that they are struggling to auction the secured properties because of the attachment made by the 1st respondent. They are unable to register the sale deed and necessary entries are not made in the Encumbrance Certificate. Thus, the 3rd party purchasers are unable to deal with the properties, which they purchased through public



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auction conducted by the Bank. The respondent is not having any priority over the debts of the creditor. The petitioner-Bank admittedly is the secured creditor and hold first charge over the debts. More so, the dues to the Bank itself has not been realised and thus, question of clearing the dues to the other creditors does not arise at all.

7. The 1st respondent being an un-secured creditor does not have precedent over the secured creditor in the light of Section 26-E of the SARFAESI Act and Section 31-B of the Recovery of Debts and Bankruptcy Act, 1993.

8. As per Section 142-A of the Customs Act, the petitioner is entitled to have first charge over the debts and knowing the fact that the 1st respondent, being an unsecured creditor, the attachment was made by the 1st respondent and therefore, the present writ petition is to be considered.

9. The petitioner states that in the absence of specific provisions in the Central Excise Act as well as in Customs Act, the claim of secured



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creditor will prevail over Crown's debts. The petitioner-Bank being a secured creditor, the Deputy Commissioner of Central Excise is not entitled to bring the property in auction. The petitioner-Bank had sent letters to the 1st respondent to lift the attachment on the secured property. But the first respondent refused to do so. Thus, the petitioner is constrained to move the present writ petition.

10. The learned counsel, appearing on behalf of the petitioner, mainly contended that the current dues to the Bank is Rs.714.39 Crores as on 29.03.2022 and the auction purchaser has knocked down the bid for Rs.105.38 Crores for the secured property attached by the 1st respondent. The borrower has to pay substantial amount to the petitioner-Bank and there is no sufficient security available to the petitioner-Bank to recover the outstanding dues. The petitioner-Bank had caused a sale notice on 09.03.2022 to bring the secured assets of E-Auction 2022 in order to recover the outstanding loan amount of Rs.714.39 Crores as on 29.03.2022. The petitioner-Bank has duly informed the public about the dues claimed by the Commercial Tax Department, Central Excise and Service Tax



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Department. It is specifically mentioned that the Bank dues will be appropriated as per the provisions of the law and the Bank dues will be given priority over the Statutory Rules. The petitioner-Bank has to appropriate the sale proceeds in terms of Section 38(7) of SARFAESI Act. On account of non-lifting of the attachment by the 1st respondent, the petitioner-Bank is unable to proceed further and realise the loan dues.

11. In support of the contentions, raised by the petitioner, the learned counsel for the petitioner made the following legal submissions.

“i)UTI bank Ltd vs. Deputy Commissioner, Central Excise, 2006 SCC online Madras 1182.

The Hon'ble Full Bench of this Hon'ble High Court observed as follows:

"Para No.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. We have already referred to the provisions of the Central Excise Act and the Customs Act. They envisage procedures to be



followed and how the amounts due to the Department are to be recovered. There is no specific provision either to in the Central Excise Act or the Customs Act, claiming "first charge" as prescribed in other enactments, which we have pointed out in earlier paragraphs.

Para No. 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 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.

(iii) Since there is no specific provision claiming "first Charge" in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditors viz. the Petitioner Bank.

(iv) In the absence of much specific provision in the Central Excise Act as well as in Customs Act, we hold



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that the claim of secured creditor will prevail over Crown's debts".

ii) Civil Appeal No. 2196 of 2012, Punjab National Bank Vs. Union of India and others.

The Hon'ble Apex Court reiterated aforesaid position against the Central Excise Department.

*iii) As per **Section 142A of the Customs Act**(came into force by Section 51 of the Finance Act, 2011) which runs as follows.*

"Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assessee or any other person, under this Act, shall, save as otherwise provided in Section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) be the first charge on the property of the assessee of the person, as the case may be.



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*The aforesaid provision is also incorporated in **section 11(E) of Central Excise Act**. Despite knowing the same, the 1st respondent had attached the mortgaged property belonging to the 2nd respondent.*

iv) The Hon'ble Division Bench of this Hon'ble Court, in Writ Appeal No. 3249/2019 dated 27.6.2022 following the aforesaid decisions rendered by this Hon'ble Court and Apex Court directed the Customs Department to lift the attachment over the property in question within a period of two weeks from the date of judgement.”

12. The learned counsel for the petitioner drew the attention of this Court with reference to the sale certificate issued by the authorised officer which indicates the non-encumbrance, including the attachment made by the 1st respondent.

Reply by the 1st Respondent:

13. The 1st respondent has mainly contended that the writ petition is pre-mature. The written submissions made on behalf of the 1st respondent are as under:



“1. Writ Petition is Pre-mature

This Writ Petition is pre-mature, as there is nothing on record filed by the Petitioner to show that the Sale Certificate was sent to the 3rd Respondent viz., Sub- Registrar, Omalur. There is absolutely no averment in the Writ Affidavit to show that the Sale Certificate sought to be registered has been sent and refused and at the same time there is no document in typed set of documents filed by the Petitioner. Therefore, there is no cause of action for this Writ Petition and this Writ Petition is premature and abuse of process of Court.

2. Certiorari, not Mandamus

Though the Writ Petition has been filed for a Mandamus, in effect, it's also a Certiorari, for the reason that the prayer prayed for is to remove the attachment of the 1st Respondent with the office of the 3rd respondent - the attachment of with the office of the 3rd Respondent is nothing but an entry in the encumbrance and removing that entry could only be done by quashing that particular entry. Therefore, this Writ Petition is quintessentially as "Certorified - Mandamus".

3. Dispute between, only, the Petitioner and 1st Respondent/



Central Govt.

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Though there are Two other Respondents along with the 1st Respondent, the main lis to be decided is between the Petitioner and the 1st Respondent i.e., the Assistant Commissioner of Central Excise and Service Tax. All the averments in the Affidavit accompanying the Writ Petition alleges cause of action against the 1st Respondent only. Similarly, the Grounds raised in the Writ Affidavit are only against the 1st Respondent.

The 2nd Respondent is not a necessary party as the property belonging to them has already been sold by the Petitioner under SARFAESI Act. There are no averment or grounds raised against the 2nd Respondent.

The 3rd Respondent is only a formal party and there is no real lis/ dispute between the Petitioner and the 3rd Respondent. There are no averment or grounds raised against the 3rd Respondent.

4. Wrong fora

Since the main lis in this Writ Petition is between the Petitioner and the 1 Respondent, mandatory procedure has not



been followed. The Petitioner is a Nationalised Bank and owned by the Government of India and the 1st Respondent is a Department of the Central Government. Whenever Two departments of the Central Government or through its instrumentalities require to resolve a dispute, then the matter must be referred to AMRD. Office Memorandum bearing No. 334774/DOLA/AMRD/2019 dated 31.03.2020 issued by the Department of Legal Affairs. Ministry of Law and Justice, Government of India, talks about Settlement of disputes other than taxation between Government Ministries / Departments inter se and between Government Ministries / Departments and other Ministries / Departments / Organisation(s) Administrative Mechanism for Resolution of Disputes (AMRD). I state that the 1st Respondent though is Taxing Department, the dispute between the Petitioner and the 1st Respondent is not a taxing dispute, but a dispute concerning the Right to attach property. Therefore the supra mentioned Office Memorandum squarely applies to the case in hand.

5. Auction Purchaser, not the Petitioner

The bank after issuance of Sale Certificate, becomes funtus officio. The property now vests in the hands of auction purchaser. If at all aggrieved, it is the auction purchaser who has to file a Writ Petition.



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6. One Lot/ property ID, Two Sale Certificates

a) Attention is invited to the E-Auction Sale Notice dated 09.03.2022. In that document, under Schedule – 1, there are Two different LOTS viz., LOT I and LOT II.

b) The Property ID for LOT I is IOBA15510003 and the reserve price is Rs.92,15,08,000/-.

c) The Property ID for LOT II is IOBA15510005 and the reserve price is Rs. 62,70,11,000/-.

d) LOT I, there are Three items viz.,

- Land;*
- Building;*
- and Plant & Machinery. Equipment & Electricals, more particularly mentioned in supra para 4 of this Affidavit.*

e) LOT II. consists of Plant & Machinery, Stores. TMT Bars, scraps etc.

f) The E-Auction Sale Notice further has clearly stated that under the caption "known encumbrance if any" that the Central Excise and Service Tax, Salem Division for Rs.



30,24,15,407/-. Further an undertaking was given in the Sale Notice itself that the dues of the Central Excise and Service Tax Division will be appropriated as per the provisions of law. This encumbrance is for both the lots.

g) It is also pertinent to note that the Sale Notice itself states that State Bank of India has Pari-Pasu charges.

h) According to the Sale Confirmation Advice dated 04.04.2022, it is understood that the SKM Animal Feds and Foods (India) Private Limited was the successful bidder for LOT I having property ID IOBA15510003 for Rs. 105,35,08,000/- against the reserve price of Rs. 92,15,08,000/-.

i) At this juncture, this Respondent is unable to understand as to how LOT I was further split and that Two different Sales Certificates were issued to the successful bidder, one for Movable and another for Immovable.

j) It is pertinent to note that LOT I nowhere uses the word "movable" and it is also pertinent to note that the reserve price for LOT I is for all three items in that LOT and there is no independent split up for each Item under LOT I.



k) Though the reserve price for LOT I Is for all three item together and that no Independent break up has been given for each item, it is required to take note that the alleged sale of movables fetched Rs.65 crores approximately and the sale of immovable i.e., land and building fetched only Rs.39 crores approximately. This means movable realized 26 approximately than the sale of immovable. This peculiar fact appears very strange as normally/ generally sale of immovables such as land and building would fetch more than sale of movables.

l) LOT I containing all three Items must have been sold and evidenced by one Sale Certificate as opposed to Two different Sale Certificates.

m) Though none of the three items under LOT I describe themselves as "movables", classification of Item III as movable and issuing a separate Sale Certificate is ex-facie illegal, for the reason that even as per the description of Item III, the nature of Item III is of that of an "immovable" only.

n) Words "movable" or "immovable" are not defined under the SARFAESI Act, 2002.

o) The words "movable" and "immovable" are defined under



the General Clauses Act under S. 3(36) and S. 3(26) respectively.

p) As per S. 3(26) of the General Clauses Act, Immovable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

q) It is important to note that in Item III, the words "embedded" is consciously used and therefore, going by the definition under the General Clauses Act, Item III also is in the nature of an Immovable and therefore, classifying it as "movable" and evidencing it in a separate Sale Certificate is ex-facie illegal.

r) Therefore, the Petitioner should have issued one single comprehensive Sale Certificate for all Three Items in Lot I having property ID IOBA15510003.

7. Rule 9 of the Security Interest (Enforcement) Rules against the Petitioner

The procedure for selling a secured asset is enshrined in Rule 9(7) of the Security Interest (Enforcement) Rules, 2002, the authorized officer should have deemed fit and allowed the



purchaser to deposit with the authorized officer, the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further costs, expenses and interest as may be determined by the authorized officer.

*Cases where the authorized officer directs payment to be made for the encumbrances under Rule 9(7), only in that particular situation, as per Rule 9(9), the authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor. **In all other cases, the authorized officer as per Rule 9(10), must issue a Sale Certificate under Rule 9(6) and shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not. Even going by the Petitioner's own Sale Certificate bearing Stamp Paper No. CU 330007, the Petitioner himself admits and enlists this Respondent as 'known encumbrance' for Rs. 30,24,15,407/-. Once the Petitioner himself admits the same in the Sale Certificate that there is encumbrance, this Respondent fails to understand how this Writ Petition is maintainable, more particularly when the prayer is to remove the encumbrance.***

8. Registration of Sale certificate, not mandated by law



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Registration of Sale Certificate is not compulsory under Law - Bell Tower Enterprises LLP vs. State of Tamilnadu & Ors 2022(5)CTC 454.

9. Judgments relief by Petitioner, not precedent

Judgments relied by the Petitioner not binding precedent. Judgments hit by rule of Sub-Silentio. Municipal Corporation of Delhi vs. Gauram Kaur AIR 1989 SC 38. All judgment quoted by the Petitioner does not pertain to issuance of Sale Certificate. They are with respect to a situation pertaining sale notice or situation before confirmation of Sale.

10. Mandamus, not maintainable

A Mandamus can be maintained only when there is a statutory duty. Hero Motor Corp Ltd. Vs. Union of India - AIR 2022SC5572.”

14. The learned Senior Standing counsel appearing on behalf of the 1st respondent, in addition to the above contentions, referred the Government of India Memorandum in proceedings



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No.334774/DOLA/AMRD/2019 dated 31.03.2020 issued by the Ministry of

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Law and Justice, Department of Legal Affairs. The Office Memorandum is about the settlement of disputes other than taxation between Government Ministries / Departments inter se and between Government Ministries / Departments and Other Ministries / Departments / Organisation(s) – Administrative Mechanism for Resolution of Disputes (AMRD). Paragraph 3 of the Memorandum speaks about Applicability of the Office Memorandum. It is applicable to the facts of the present case. Paragraph 5 contemplates procedures. Paragraph 6 stipulates Appeal. When the Ministry of Law and Justice issued the Office Memorandum to resolve the disputes between the Government Ministries, Departments and the Organisations with the petitioner as well as the 1st respondent, are bound to resolve the same by approaching the Forum / Administrative Mechanism for Resolution of Disputes (AMRD).

15. In the said Forum, the complex nature of the facts and circumstances may be adjudicated so as to resolve the disputes. In the present case, the writ petition is pre-mature and Writ of Mandamus is not



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maintainable and more so, the petitioner-Bank has not made any attempt to resolve the issues through Office Memorandum issued by the Ministry of Law and Justice. Thus, the writ petition is to be rejected.

Reply by the 3rd Respondent:

16. The learned Government Pleader, appearing on behalf of the 3rd respondent, mainly contended that the Registering Authority, under the Registration Act, is bound by the provisions of the Act. If any attachment is made by the Central Government, State Government or under the Central Act or State Act, then the Registering Authority is empowered to refuse the document for registration. The Attachment already entered in the Encumbrance Certificate can be removed only if it is lifted. The sale certificate can be registered under Section 89(4) of the Registration Act by communicating the copy of the sale certificate by the Authorised Officer to the Registering Authority for entering the same in Book-I. Thus, for removal of attachment from the Encumbrance Certificate, such attachment should be lifted. Without lifting the attachment, if the Encumbrance is cleared, then it will project false information to the public in general. Such



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false information if allowed in the encumbrance certificate, there is a possibility of fraud, impersonation etc. Therefore, in terms of Section 22-B of the Registration Act, the attachment, if any, by the Central Government or State Government, is to be lifted and on production of such order, the Registering Authority would be in a position to remove such entries in the Encumbrance Certificate. The dispute between the petitioner-Bank and the 1st respondent is unconnected with the procedures to be followed by the Registering Authority under the provisions of the Registration Act, 1908. If the documents presented by the presentent is in consonance with the provisions of the Registration Act, then the Registering Authority would be in a position to follow the procedure and register the same or to make necessary entries in the encumbrance Certificate, which is consequential. Simply a request given by the Bank to remove the attachment from the Encumbrance Certificate cannot be done. The present writ petition has been filed to direct the 1st respondent to remove the attachment effected on 03.12.2014 as mentioned in the Encumbrance Certificate in the Office of the 3rd respondent. The Attachment made by the 1st respondent was communicated and accordingly, entry was made in the Encumbrance



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Certificate. In order to remove the entries, the attachment is to be lifted, otherwise the informations provided in the Encumbrance Certificate would be wrong by projecting false informations and the 3rd respondent cannot mislead the Public at large. Thus, the relief as such sought for against the 3rd respondent deserves no merit consideration as long as the attachment issued by the 1st respondent is in force. Once it is lifted, the 3rd respondent would be in a position to make necessary entries in the Encumbrance Certificate.

Discussion:

17. It is not in dispute between the parties that the petitioner-Bank is the secure creditor and holds first charge and priority in recovery. The Hon'ble Supreme Court of India ruled that the Bank holds first charge as it is the secure creditor. Further, it is not in dispute that the 1st respondent, being an unsecured creditor does not have precedent over the secured creditor in the light of Section 26-E of the SARFAESI Act and Section 31B of Recovery of Debts and Bankruptcy Act, 1993.



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18. With reference to the above settled principles, this Court has to consider the facts and circumstances and the provisions of the Statutes and Rules and also the procedures followed by the parties to the lis on hand.

19. Admittedly, the petitioner-Bank initiated action under the SARFAESI Act to recover the loan dues to the petitioner-Bank to the tune of Rs.714.39 Crores as on 29.03.2022. The Bank struggled to auction the property and they faced many difficulties to realise the loan dues. No doubt, the petitioner-Bank would be interested only to recover their dues since the dues are running more than the security offered by the borrower and the guarantors. However, one cannot neglect the other statutory creditors since attachments are made under the special enactments to recover the Public dues. The 1st respondent admittedly attached the property since their dues are running in Crores. Beyond that, the sale certificate indicates that the 2nd respondent has to settle the dues to the Commercial Tax Department, Omalur for Rs.1,14,23,179/-, The Central Excise and Service Tax, Salem District for Rs.30,24,15,407/- and the Tamil Nadu Electricity Board has claimed a sum of Rs.10,35,65,898/- for power consumption to the company.



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All these Statutory dues are on one hand and the dues to the petitioner-Bank, who is the secured creditor holding first charge over the property is running to the extent of Rs.714.39 Crores.

20. Thus the question arises, whether the procedures followed by the Bank under the provisions of the SARFAESI Act and Rules are proper or otherwise.

21. As rightly pointed out by the 1st respondent, there is no proof on record filed by the petitioner to show that the sale certificate was properly sent by the Authorised Officer to the 3rd respondent for making entries as contemplated under Section 89(4) of the Registration Act. In the absence of any such proof, the relief as such sought for against the 3rd respondent is not entertainable and is pre-mature. The 1st respondent has further stated that the Writ of Mandamus is not maintainable since the entry in the Encumbrance certificate could be quashed but by merely seeking Writ of Mandamus, the petitioner is not entitled for the relief.



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22. In respect of such complex facts and circumstances, the Bank, secured Creditor, the Central Government Department, Tamil Nadu Electricity Board and State Government may also resolve the issues through the Government of India memorandum, issued by the Ministry of Law and Justice dated 31.03.2020. The Bank has not initiated any steps to resolve the issues through **AMRD** as per the Government of India memorandum. It is not as if the Bank's interests alone is to be protected by the Courts. The Courts are bound to consider the plight of Crown's debt equally. In the event of any procedural violations or violations of the provisions of the SARFAESI Act or Rules, then the Court may not be in a position to grant the relief in favour of the petitioner, as such sought for in the writ petition.

23. Let us consider the procedures as contemplated and followed by the Bank in the present case.

Section 26 E of the SARFAESI Act stipulates that “*Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and*



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other rates payable to the Central Government or State Government or local authority.” Therefore the petitioner Bank holds first charge and they are entitled to auction the property of realise the loan dues by priority.

The **Security Interest (Enforcement) Rules 2002**, contemplates procedures.

- **Rule 9 stipulates** *“Time of sale, issue of sale certificate and delivery of possession, etc.”*
- **Sub Rule (6) to Rule 9** states that *“ On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.”*
- **Sub Rule (7) to Rule 9** states that *“ Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be*



determined by him.”

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- **Sub Rule (8) to Rule 9** states that “*On such deposit of money for discharge of the encumbrances, the authorised officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.*”
- **Sub Rule (9) to Rule 9** denotes that “*The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.*”
- **Sub Rule (10) to Rule 9** indicates that “The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.”

24. Pertinently, in the present case, the sale certificate issued by the authorised officer indicates that there are known encumbrances to Commercial Taxes Department, Omalur; Central Excise and Service Tax,



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Salem Division and Tamil Nadu Electricity Board. When, there are known encumbrances at the time of auctioning the secured assets, the procedures as contemplated under Rule 9 has been followed by the petitioner-Bank or not, is to be examined.

25. The petitioner Bank is entitled to auction the secured assets. On confirmation of sale by the Secured creditors / petitioner Bank, the authorized officer, exercising the power of sale, shall issue certificate of sale of the immovable property in favour of the auction purchaser in the form given in Appendix-V. Appendix-V provides sale certificate format. There is a column to indicate list of encumbrances. In the present case, the sale certificate issued in favour of the second respondent indicates known encumbrances for 3 organisations (Central Government, State Government and Tamil Nadu Electricity Board). Under Sub Rule (7) to Rule 9, the authorised officer has to examine if there is any encumbrances. In the event of any encumbrance, whether statutory or non-statutory, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances to meet out the



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contingencies. On such deposit of money, for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue and accordingly clear the encumbrances.

26. On compliance of Sub Rule (7) and (8) after issuing the sale certificate, the authorised officer shall deliver the property to the purchaser, free from encumbrances known to the secured creditor on deposit of money as specified under Sub Rule (7).

27. The procedures contemplated under Rule 9 of the Security Interest (Enforcement) Rules 2002, unambiguously stipulates that the secured creditors / Bank has got responsibility and accountability to consider the statutory creditors and their dues, while dealing with the secured assets. Unilateral actions, by neglecting the statutory creditors, are impermissible, since the procedures contemplated under the rules indicate the protections provided to unsecured creditors, statutory creditors etc. While realising the loan dues, the secured creditors are mandated to protect the interest of the unsecured creditors, statutory creditors etc. The spirit of



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the Rules amplifies that the sale must be made free from all encumbrances to the third party auction purchaser, who is not expected to suffer unnecessarily on account of the procedural violations, if any committed by the secured creditors/ Banks.

28. On issuance of sale certificate under Sub Rule (6) to Rule 9, the purchaser may be allowed to deposit the money required to discharge the other encumbrances. On such deposit of money, the encumbrances may be cleared by the authorised officer. After clearing all the encumbrances, the authorised officer shall deliver the property to the purchaser free from any encumbrances. Sub Rule (10) to Rule 9 denotes that “ *The certificate of sale issued under Sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.*”

29. Therefore, the secured creditors are empowered to make two kind of auction sales. Firstly they can auction the secured assets and issue sale certificate under the form given in Appendix-V of the Rules by indicating



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the other encumbrances. While indicating the other encumbrances, steps have to be taken by the secured creditors to clear the other encumbrances.

Thereafter, under Sub Rule (9) to Rule 9, the authorised officer shall deliver the property to the auction purchaser, free from encumbrances. The process does not complete on issuance of the sale certificate by the authorised officer. Sub Rules (7) to (10), to Rule 9, indicate the subsequent procedures to be followed by the authorised officer to protect the other encumbrances / non-secured statutory or other creditors. It is not as if the secured creditors/ Banks can auction the secured assets, issue the sale certificate and wash off their hands. They have duty towards the other non-secured statutory creditors under the provisions of the Security Interest (Enforcement) Rules 2002. In the event of non-compliance of the statutory rules issued under the SARFAESI Act, the Bank is not entitled for any relief from the hands of the Constitutional Courts. Unilateral actions of the secured creditors, at no circumstances be appreciated. They, being a public sector, is duty bound to protect the interest of the other statutory creditors as it is Crown's debt. The power conferred under the SARFAESI Act cannot be exercised, so as to deprive the other statutory creditors from realising their



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dues. This exactly is the reason why the legislature thought fit and contemplated the procedures so as to protect the interest of the Crown's debt and the interest of the non-secured creditors. Thus, mandatory procedures contemplated under the Rules, if violated or not complied with, then the secured creditor/ Bank is not entitled for the relief to lift the attachment without clearing the dues or to remove the attachment from the encumbrance certificate under the provisions of the Registration Act.

30. If the above procedures are not complied with and the sale certificate has not been issued stating that the purchaser has purchased the immovable secured asset free from any encumbrances, then the sale certificate issued would fall under the second category, i.e., with encumbrance.

31. The second category of sale certificate, in the form given in Appendix-V of the Rules, indicates that the list of encumbrances must be furnished in the sale certificate. In the present case, such list of encumbrances are furnished by the authorised officer including the



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attachment, made by the first respondent in respect of the secured assets. In the event of mentioning the list of encumbrances in the sale certificate, then it is to be construed that the sale certificate was not issued free from encumbrances. When the sale certificate was issued with encumbrances then such sale certificate cannot be registered under the Registration Act nor encumbrances made can be removed without lifting the same.

32. Question arises, whether the interest of the third party purchaser can be protected in such circumstances, when the sale certificate was issued with encumbrances? The simple answer is that the third party auction purchaser, knowing the encumbrances notified by the secured creditor, has purchased the property through public auction. When the purchaser is aware of the encumbrances, then he has to discharge the encumbrances and convert the sale free from encumbrances for the purpose of registering the sale certificate or for alienating the property. By Applying the principles of Caveat emptor, the third party purchaser, who purchased the property through public auction was made aware of the encumbrances. Once the purchaser has the knowledge about the encumbrances and purchased the



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property through auction, then it is his obligation to discharge the encumbrances and convert the encumbered property free from encumbrances. The Bank cannot file a writ petition so as to protect the interest of the third party, who has purchased the property knowing the fact that there are other encumbrances. Once the Bank auctioned the property and issued a sale certificate under Sub Rule (6) to Rule 9 of Security Enforcement Rule 2002 by mentioning the list of other encumbrances, then such sale certificate cannot be registered by the registering authority. Thus, only on lifting the attachment, necessary entries can be made in the encumbrance certificate or to remove the encumbrances under the provisions of the Registration Act.

33. The legislative intention of the SARFAESI Act and Security Interest (Enforcement) Rules, 2002, is not restricted by providing priority to the secured creditors / Banks, but extends its protection to the non-secured and statutory creditors. Therefore, the secured creditors / financial institutions, while invoking the provisions of the SARFAESI Act, and the rules framed thereunder are mandated to follow the procedures scrupulously



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so as to ensure that other non-secured creditors are not deprived of their rights to realise their statutory or other dues.

34. Under the provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules 2002, the Auction Sale by the secured creditors, completes on delivery of the secured assets to the auction purchasers, free from all encumbrances. Violation of procedures, if any committed by the secured creditors, if resulted in denial of the rights of other non-secured creditors and statutory dues, then the secured creditors are not entitled for a direction from the High Court to remove the encumbrances notified. While realising the loan dues by the secured creditors, they are equally bound to provide space for the non-secured creditors to realise their dues. Thus, compliance of the procedures contemplated in the rules are not only mandatory but the non-compliance would result in denial of an opportunity to the non-secured creditors to recover their dues.



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35. No doubt, in the present case, the secured creditor is not in a position to recover their dues in entirety. In such circumstances, Sub Rule (10) of Rule 9 contemplates that the certificate of sale issued under Sub Rule (6) shall specifically mention whether the auction purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not. If the auction sale is made with encumbrances, then the registering authority under the Registration Act cannot remove the same.

36. Registering Authority, under the Registration Act is bound by the provisions of the Act. When the Sale Certificate was issued with known encumbrances and the auction purchaser purchased the property accepting the known encumbrances, the Registering Authority is empowered to refuse registration, so also he cannot remove encumbrances.

37. The auction purchaser is made aware of the known encumbrances by the secured creditors. The secured creditors, to cover up their misdeeds, cannot file a writ petition and seek a direction against the Registering



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Authority to remove the encumbrances, which would deprive the other non-secured creditors from realising their dues. Importantly, such directions, if issued to remove the encumbrances, the public in general would be misled on account of such entries in the public records and there is a possibility of fraud, misrepresentation or otherwise at the time of further alienation of properties. Further the non-secured creditors and the statutory creditors would lose their opportunity to recover their dues permanently. The principle of 'Buyer Beware' would be applicable in respect of the auction purchase made by the persons along with the known encumbrances. It is not in dispute that the secured creditor notified the encumbrances even at the initial stage of publication of auction notice. Thus, the purchasers are aware of the fact regarding the other encumbrances. High Court cannot grant waiver of other encumbrances, thereby depriving the non-secured creditors from realising their dues. Such waiver would result in infringement of the statutory rights of the non-secured creditors and therefore, the secured creditors are duty bound to follow the procedures as contemplated under the rules scrupulously.



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38. If the auction sale has been completed in all respects in compliance with the provisions of the SARFAESI Act and Rules, then alone the sale certificate issued by the authorised officer can be construed as free from all encumbrances as stipulated under Rule 9 of the Security Interest Enforcement Rules. In the event of notifying any other encumbrances in the sale certificate, then it is to be construed as sale certificate with encumbrances. In respect of the sale certificate issued with known encumbrances, then the Registering Authority under the Registration Act is not empowered to remove encumbrances. Such refusal is made in order to protect the interest of the non-secured statutory creditors and to protect the public interest and therefore, such actions of the Registering Authority cannot be held to be infirm or perverse.

39. In the present case, the petitioner / Indian Overseas Bank conducted public auction of the secured assets. They recovered their dues partly. The sale certificate was issued by the authorised officer notifying the known encumbrances. The petitioner Bank thereafter filed the present writ petition seeking a direction against the Sub-Registrar to register the sale



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certificate, but the sale certificate was issued by the Authorised Officer with known encumbrances. Thus, the sale certificate issued cannot be construed as free from encumbrances as contemplated under Rule 9 of the Security Interest Enforcement Rules. Thus, the sale certificate issued with encumbrances is non-registrable and the Registering Authority is not empowered to remove encumbrances at the request of the Bank.

40.The auction purchaser purchased the property along with the known encumbrances. After realising the dues partly by the secured creditor, the auction purchaser, along with the secured creditors/ Bank, cannot deprive the statutory rights of the other non-secured or statutory creditors under various enactments to realise their dues. The secured creditors has no right to cause infringement of the rights of the other non-secured creditors and statutory creditors. Thus, adherence of the Security Interest Enforcement Rules scrupulously is of paramount importance in order to protect the other encumbrances and any violation by the secured creditors would disentitle them from seeking the relief of direction to remove encumbrances under the Registration Act. Thus, the writ petition is



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not only premature but also the sale certificate issued with encumbrances cannot be registered under the provisions of the Registration Act, nor encumbrances can be removed, at the request of the Bank since such removal would result in misguidance to the public in general for further alienation of the properties. Unless, the encumbrances are cleared, the attachment will continue, and it cannot be removed as such sought for by the petitioner Bank.

41. In view of the factum established, this Court has to arrive at an inevitable conclusion that the writ petition filed by the petitioner Bank and the relief as such sought for are untenable. Consequently, the writ petition stands **dismissed**. No costs. Consequently, connected miscellaneous petition is closed.

05.09.2023

Index: Yes
Speaking Order
Neutral Citation: Yes
sha/jeni



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To
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1. The Assistant Commissioner of
Central Excise and service Tax,
Salem I Division,
No. 21 Theerthamali Arcade,
Veerapandiyar Nagar, Salem-636 004.
2. M/s. Hi-Tech Minerals Industries Covai Pvt. Ltd. (In Liquidation),
Represented by its Official Liquidator High Court,
Corporate Bhawan (UTI building)
2nd Floor, No.24 Rajaji Salai, Chennai-01.
3. The Sub Registrar,
Omalur, Salem District,
Tamil Nadu.



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S.M.SUBRAMANIAM, J.

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