BEFORE THE MADURAI BENCH OF MADRAS HIGH Court

DATED: 14.12.2023

CORAM

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

W.P. (MD).No.16112 of 2021

The State Bank of India
Stressed Assets Recovery Branch (SARB)
Rep.by its Chief Manager,
Vinayaga Nagar Branch

... Petitioner

Vs

1. The Income Tax Department,
   Rep. by its Tax Recovery Officer-1,
   Office of the Tax Recovery, Income Tax Office,
   No.2, V.P.Rathinasamy Road,
   Bibikulam, Madurai 625 002.

2. The Tamil Nadu Registration Department,
   Rep. by its Sub Registrar,
   Sathur Sub Registrar Office,
   Virudhunagar District.

3. M/s.Nayagi Fireworks Pvt Ltd,
   Rep. by its Director, V.Kesavan

4. M/s.Nayagi Fireworks Industries,
   Rep. by its Partner, V.Kesavan

5. V.Alagarsamy

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus directing the 2nd respondent to efface/delete encumbrance attachment entry, dated 05.02.2019 in document no.9 of 2019 encumbrance attachment entry, dated 31.12.2018 in Doc No.61 of2018 encumbrance attachment entry, dated 31.12.2018 in Doc Nos. 65 and 66 of 2018 as against the schedule mentioned property within the period stipulated by this Court.

For Petitioner	: Mr.Ananth C.Rajesh
For Respondents	: Mr.J.Parekhkumar (R1) Standing Counsel
	Mr.K.S.Selvaganesan (R2) Additional Government Pleader

O R D E R

This writ petition has been filed for the issue of a writ of mandamus directing the second respondent to delete the encumbrance attachment entry, dated 05.02.2019 pertaining to Doc.No.9 of 2019, encumbrance attachment entry, dated 31.12.2018 pertaining to Doc No. 61 of 2018, encumbrance attachment entry, dated 31.12.2018 pertaining to Doc Nos. 65 and 66 of 2018, with respect to the subject properties.

2.The case of the petitioner is that the third and fourth respondents have approached the petitioner Bank for financial assistance for developing their business. Accordingly, the Bank extended financial assistance to the tune of Rs.4 Crores against the securities that were given by the fourth respondent Partnership Firm. The security was also registered through a mortgage deed, dated 11.09.2015 in Doc.No. 6580 of 2015 before the second respondent. The financial assistance was thereafter, enhanced by Rs.90 lakhs and supplementary mortage deed was also registered on 22.02.2016 in Doc.No.4130/16 on the file of the second respondent.

3.The further case of the petitioner is that the fourth respondent Partnership Firm also received financial assistance to the tune of Rs.1Crore and this loan was also secured through mortgage by deposit of title deeds registered on 16.07.2015 as Doc.No. 4784/2015 before the second respondent. They also took an additional loan of Rs.50 lakhs through a supplementary mortgage deed, dated 10.06.2016 registered as Doc.No.3119/16 on the file of the second respondent.

4.The third and fourth respondents failed to pay back the loan and their loan accounts were classified as 'Non-Performing Assets' on 25.11.2018. Hence, the petitioner Bank initiated proceedings under the SARFAESI Act, 2002 (hereinafter referred to as ‘the Act’) by issuing demand notice under Section 13(2) of the Act in the year, 2020. In spite of the receipt of the notice, the third and fourth respondents failed to pay back the loan. Hence, possession notice was issued under Section 13(4) of the Act. Thereafter, the petitioner Bank took steps to bring the property for sale for the purpose of adjusting the consideration towards the loan account.

5.The grievance of the petitioner is that the first respondent has attached the properties of the third and fourth respondents towards the income tax dues for the year 2018-19. In view of the same, even though the mortgage properties were sold, the encumbrance certificate reflected, as if, there is a clog in the title by virtue of the entries made in the Encumbrance Certificate due to attachment order passed by the first respondent. It is under these circumstances, the present writ petition has been filed before this Court.

6.The copy of sale certificate that was issued in favour of the auction purchasers, dated 01.02.2023 and 10.02.2023 were also placed before this Court.

7.When the matter was taken up for hearing on 22.11.2023, this Court found that the affidavit filed in support of the writ petition lacks clarity in details and therefore, directed the petitioner to file an additional affidavit. Accordingly, an additional affidavit has been filed before this Court. The relevant portions in the additional affidavit are extracted hereunder:

"4.I submit that the correlation of MOD schedule and the attachment order schedule are given below.

A.The schedule II A in MOD doc.No.4784 of 2015 dated 16.07.2015 and the attachment order, dated 01.02.2019 are one and the same.

Sl.No	*Survey No.*
1	*95/1A*
2	*95/1B*
3	*95/2A1*
4	*95/2A2*
5	*101*
6	*102*
7	*103/2*

B.The schedule II D in MOD doc.No.6580 of 2015 dated 11.09.2015 and the attachment order, dated 31.12.2018 are one and the same.

Sl.No	*Survey No.*	*Extent (Hec)*
1	*91/2*	*0.31.5-78 cents*
2	*91/3*	*0.27.5-68 cents*
3	*91/4*	*0.02.0-5 cents*
4	*91/5*	*0.21.0-71 cents*
5	*94*	*1/29/5=3 acres 18 cents*
6	*91/1*	*0.32.0=79 cents*
7	*95/1C*	*1.41.5=3 acres 50 cents*
8	*89/1A*	*0.57.0=1 acre 41 cents*
9	*87/2A*	*0.61.0=1 acre 50 cents*
10	*88/3*	*1.57.0=3 acres 88 cents*
11	*89/1B*	*1.09.5=2 acres 70 cents*
12	*89/2*	*1.34.5=3 acres 32 cents*
13	*90*	*1.18.5=2 acres 93 cents*

8.Heard the learned counsel appearing for the petitioner, the learned Standing Counsel appearing for the first respondent and the learned counsel appearing for the second respondent.

9.It is quite clear from the materials placed before this Court that the properties, which were attached by the first respondent in the year 2018-19, were already a subject matter of mortgage with the petitioner Bank in the year 2015 itself and it is apparent from the particulars that have been extracted supra. It is now too well settled that the Bank as a secured creditor will have a priority over the dues that are payable to the first respondent.

10.For proper appreciation, Judgment pertaining to the same issue can be taken note of. This Court in ***Anjani Synthetics Limited & Others Vs The Sub Registrar & Others*** reported in ***2012(1) MLJ 1009*** held as follows:

> *"13. The issue involved in these cases are whether the Income Tax Department can claim priority over the secured debts in favour of the 3rd respondent Bank pursuant to the mortgage, which took place much prior to the Tax arrears being demanded in ITCP-1 notice. It is not in dispute that the Mortgage of the properties, which were brought to the Public Auction on 23.12.2009 in the case of the properties involved in W.P.No.5329 of 2010 and on 16.12.2009, in the case of the properties involved in W.P.No.5593 of 2010, took place prior to ITCP certificate. The 3rd respondent is a secured Creditor. The 3rd respondent Bank initiated auction for recovery of debts, pursuant to the non payment of debts on the basis of the mortgage, which resulted in auction sale took place on*

23.12.2009 for the properties concerned in W.P.No.5329 of 2010 and on 16.12.2009 for the properties concerned in W.P.No.5593 of 2010. It is also admitted that the petitioner is the highest bidder in the public auction. The recovery officer of the Debts Recovery Tribunal issued a sale certificate. The petitioner moved the first respondent for filing a copy of the sale certificate in his Book No.I, maintained by the first respondent in accordance with Section 89(4) of the Registration Act, 1908. The first respondent returned the sale certificate with the check-slip stating that a communication was received from the Income Tax Department that the properties were attached by the Income Tax Department on 05.01.2010. The attachment was made by the Income Tax Department under Section 222(1) of the Income Tax Act for the tax arrears. The attachment was made, pursuant to the ITCP-I certificate dated 26.09.2007. As per Rule 51 of the II Schedule to the Income Tax Rules, the date of attachment could relate back to the date of ITCP-I certificate. Rule 51 is extracted hereunder:

"51. Attachment to relate back from the date of service of notice.- Where any immovable property is attached under the Schedule, the attachment shall relate back to, and take effect from, the date on which the notice to pay the arrears, issued under this Schedule, was served upon the defaulter."

Hence the date of attachment could be taken as 26.09.2007.

14. But, prior to the attachment, the properties were mortgaged with the 3rd respondent/Bank in the year

2001-2002. Therefore, the 3rd respondent Bank has got priority over the Income Tax Department in receiving its dues. The 3rd respondent Bank brought to auction sale of the properties, pursuant to the order passed by the Debts Recovery Tribunal. As the petitioner being the highest bidder, the recovery officer issued a sale certificate. The first respondent refused to file the sale certificate by making necessary entries in the Book No.I, in accordance with Section 89(4) of the Registration Act, on the ground that the properties were attached by the Income Tax Department. In my view, the Income Tax Department can not claim a right over the properties, which were already brought to auction sale, on the ground that the properties were attached by them on 05.01.2010. The tax arrears is nothing but crown debts. The crown debts could have priority over the unsecured debts. But, the crown debts could not have priority over the secured debts unless there is a specific statutory provision giving such priority. The learned counsel for the Income Tax Department is not able to show any provision of the Income tax giving priority over the secured debts".

11.Subsequently, the decision of the Hon'ble Supreme Court in ***The Stock Exchange, Bombay Vs V.S.Kandalgaonkar & Others*** reported in ***2014(7) MLJ 489 and 2015(2) SCC 1*** can also be taken note of, wherein, it has been held as follows:

"39.The first thing to be noticed is that the Income Tax Act does not provide for any paramountcy of dues by way of income tax. This is why the Court in Dena Bank's case (supra) held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in Giles vs. Grover (1832) (131) English Reports 563 in which it has been held that the Crown has no precedence over a pledgee of goods. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, in Collector of Aurangabad and Anr. vs. Central Bank of India and Anr. 1967 (3) SCR 855 after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore "law in force" in the territory of India before the Constitution and was continued by Article 372 of the Constitution (at page 861, 862)."

12.The Full Bench judgment of this Court in ***UTI Bank Ltd Vs The Deputy Commissioner of Central Excise, Chennai & Another*** reported in ***2006(5) CTC 801*** also took note of the priority of the Bank over the dues as against the crown's debts.

13.In view of the above, the relief as sought for by the petitioner is granted. There shall be a direction to the second respondent to make necessary footnote and delete the attachment entries made by the first respondent.

14.It is made clear that this order will not stand in the way of the first respondent to recover the income tax dues from the third and fourth respondents, if other properties are available for sale and recovery of dues.

15.In the result, this writ petition stands allowed in the above terms. No costs.

14.12.2023

NCC : Yes/No
Internet : Yes/No
Index : Yes/No
PNM

To

1. The Tax Recovery Officer-1, Income Tax Department,
   Office of the Tax Recovery, Income Tax Office,
   No.2, V.P.Rathinasamy Road,
   Bibikulam, Madurai 625 002..

2. The Sub Registrar,
   Tamil Nadu Registration Department,
   Sathur Sub Registrar Office,
   Virudhunagar District.

N.ANAND VENKATESH, J.

PNM

ORDER IN
W.P. (MD).No.16112 of 2021

14.12.2023