BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.11.2023

C O R A M

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.(MD)No.18340 of 2021

State Bank of India,
Stressed Asset Recovery Branch,
Rep. through its Chief Manager,
LMS Compound, Opposite to Museum West Gate,
Vikas Bhavan Post,
Thiruvananthapuram, Kerala – 695 033. ... Petitioner

-vs-

1.The Sub Registrar,
O/o. Sub-Registrar, Pavoorchathiram,
Kamarajar Street, Pavoorchathiram,
Tenkasi District.

2.M/s. Sree Narayana Modern Rice Mills,
A Partnership Firm,
Rep. by its Partners,
Door No.10/936 D1, Melepavoor Road,
Kulasekharapatti Village,
Pavoorchatram Post, Tenkasi Taluk,
Tenkasi District.

3.N.Muthuselvi

4.S.Navamani

5. N.Karthiga

6.N.Revathi

7.Karuppayee

8.Shanmuga Lakshmi @ Priya

9.Shriram Transport Finance Company Ltd.,
No.25, MPM Building, 2nd Floor,
SN High Road, Tirunelveli Junction,
Tirunelveli - 627 001. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the first respondent to efface/delete the encumbrances namely the attachment found in Entry No.19, dated 22.07.2019 in Document no.76/2019 and the Entry No.20, dated 11.10.2019, bearing Document No.90/2019 and the Entry No.21, dated 04.11.2019, bearing Document No.96/2019 and the Entry No.25, dated 18.10.2019, bearing Document No.95/2019, reflected in the Encumbrance Certificate, bearing No.58/2021, dated 24.08.2021, in respect of the schedule of the properties annexed along with this writ petition, on the basis of the petitioner's representation dated 04.08.2021, within a time frame as may be fixed by this Court.

For Petitioner	:	Mr.M.Ponniah
For R1	:	Mr.A.K.Manikkam Special Government Pleader
For R2, R3, R5 and R6	:	Mr.R.Rajesh Kumar
For R4 and R7	:	No Appearance
For R8	:	Mr.A.Mathan

For R9 : Mr.R.Shankar Ganesh

ORDER

This Writ Petition has been filed by the State Bank of India for issuance of Writ of Mandamus, directing the first respondent to delete the entries found in the Encumbrance Certificate, by considering the representation made by the petitioner on 04.08.2021.

2. The specific case of the petitioner is that the respondents 2 to 7 had availed various loan facilities from the erstwhile State Bank of Travancore and created mortgage over the properties by virtue of deposit of title deeds on 21.04.2010, 12.09.2013, 13.01.2016 and 28.11.2016. All these mortgages were registered before the first respondent. The loan amount was not repaid. The State Bank of Travancore was merged with the State Bank of India by virtue of the Notification issued by the Government of India, dated 22.02.2017 and it became effective from 01.04.2017.

3. The further case of the petitioner is that the loan amount was not repaid back and hence, proceedings were initiated by the Bank for recovery of the loan. It is also brought to the notice of this Court that the property was brought for sale towards the recovery of loan and the sale certificate was also issued in favour of the successful bidder and the sale certificate was also registered on the file of the first respondent.

4. The grievance of the petitioner is that the respondents 2 to 7 had colluded with the respondents 8 and 9 and started creating encumbrance over the properties, which have already been mortgaged to the petitioner Bank and thereby, the Entry Nos.19, 20, 21 and 25 were made in the Encumbrance Certificate based on the collusive orders obtained from the Civil Court. The petitioner wants these entries to be deleted from the Encumbrance Certificate and a representation was made in this regard. Since the same was not considered, the present Writ Petition has been filed before this Court.

5. The issue that is involved in the present Writ Petition is squarely covered by the earlier orders passed by this Court. For proper appreciation, the order passed by this Court in **W.P.(MD)No.17254 of 2020, dated 24.03.2021** [State Bank of India vs. The Joint - II Sub – Registrar, Karur and others] can be relied upon and the relevant portions are extracted hereunder:-

*"10.The learned Counsel cited a number of decisions in support of his legal contention that the secured creditor is having precedence over other claims as against the property. The legal position has been repeatedly clarified and the issue is no longer res intergra. Among the citations, the learned Counsel would rely upon a Full Bench decision of this Court in **UTI Bank Vs Deputy Commissioner**, reported in **(2007) 1 MLJ 1** and he would draw the attention of this Court to paragraph Nos.24, 25 and 26 thereof, which are as hereunder:*

"24.All the decisions relied on by Mr.V.T.Gopalan, clearly show that the Government is entitled to claim its dues/taxes/duties in preference to other ordinary debts. In all those cases there is no provision as found in SARFAESI Act or a specific provision claiming to have "first charge."

... ... In Dena Bank case (cited supra) it is held that the Crown's preferential right to recover all debts over other creditors is confined to ordinary and unsecured creditors.

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.

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 a 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."

11.The learned Counsel would also rely upon yet another Full Bench judgment in ***The Assistant Commissioner Vs. The Indian Overseas Bank,*** *reported in* ***2016 (6) CTC 769*** *and the relevant paragraphs are extracted hereunder:*

"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.*

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".

12.The learned Counsel would also draw the attention of this Court to the decision in the case of ***Ansari Vs Commercial Tax Officer****, reported in* ***2016 SCC Online Madras 18565****, wherein the learned Judge of this Court in paragraph Nos.4,5 and 6 has held as hereunder;*

"4.At this stage, it would be worthwhile to refer to the decision of the Hon'ble Division Bench of this Court in the case in 1.D.Senthil Kumar, 2.C.P.Senthil, 3.C.P.Sakthivel vs. 1. The Commercial Tax Officer, Brough Road, Erode 2.The Sub-Registrar, No.1, Karungalpalayam, Erode (2006-3-L.W.627), wherein in an identical set of facts, the order of attachment was set aside. Paragraph No.12 of the judgment is usefully extracted hereunder:

"12. In the instant case, the property was sold by public auction on 10.03.2003. The sale was conducted in execution of the Recovery Certificates issued by the Debts Recovery Tribunal for recovery of dues to the City Union Bank. The appellants had paid the entire amount due on 25.3.2003 and the sale was confirmed in their favour on 23.4.2003. There is no indication of any sales tax arrears in the advertisement for auction sale and there was no application from any statutory or public authority seeking to set aside the sale. For the first time, by letter dated 25.6.2004, the Commercial Officer required the second respondent to create an encumbrance with regard to the property and consequently an entry was made in the register in respect of encumbrance of the first respondent. Thus, it is evident that the appellants had no actual notice of the charge prior to the transfer. There is also no material to show that the appellants had constructive notice of the charge and no submissions were made by the learned Special Government Pleader on this issue. In the circumstances, we are of the view that the appellants were the purchasers for value without notice for the sales tax arrears of the defaulting company or the consequent charge on the property. Thus, the property in the hands of the appellants was free of the charge and it is not open to the first respondent to enforce the liabilities of the defaulting company in this manner against the appellants."

5. Further, in the decision in the case of *Senthil Kumar vs. Assistant Commissioner, Chennai and Others, in W.P.No.9928 of 2009, dated 22.12.2010*, the Hon'ble Division Bench, in somewhat

identical circumstances, has held as follows:

"17. However in this case, the property was sold under the provision of SARFAESI Act for non-payment of dues to the Bank, the Third Respondent which brought the property for auction through tender-cum-auction sale on 19.5.2008; The Sale Certificate was also issued on 19.5.2008 and possession and also stated to be given to the petitioners. The rights already got accrued to the petitioners in view of the sale under the SARFAESI Act. The First respondent-s communication dated 24.12.2008 to the Third Respondent-Bank reads as follows:

"The Sub-Registrar, Virugambakkam has issued an Encumbrance Certificate on 24.12.2008 with the Commercial Tax Officer as one of the purchaser cannot claim the right on the said property."

The aforesaid communication would show that the Encumbrance (tax arrears) Certificate was only reflected on 24.12.2008. Whereas the Encumbrance Certificate dated 15.5.2008 issued by the Sub-Registrar Office, Virugambakkam did not reflect any encumbrance except the Sale Deed dated 9.6.1998 and no claim of the First Respondent was reflected. The sale was conducted on 19.5.3008 and subsequent only the encumbrance of the First Respondent was made on 24.12.2008. It is clear from Sale Notice dated 20.09.2008 by the First Respondent, the sales tax arrears were due from 1991-92 to 1996-97. However, the petitioners had no notice of charge over the property in question, in spite of their due *verification of Encumbrance Certificate dated 15.5.2008. Hence, it has to be held that the petitioners are bona fide purchasers without notice of charge under Section 24(2) of the TNGST Act and the rights accrued to them cannot be interfered with. For the reasons stated above, the respondents 1 and 2 belatedly could not proceed against the petitioner's property for the arrears of sales tax due of the Company which availed the loan from the Third Respondent-Bank."*

6. In the light of the above, the writ petition is allowed and the impugned attachment is quashed and the second respondent is directed to delete the said entry and make appropriate entries stating that the said attachment has been lifted. The above direction shall be complied with by the second respondent within a period of four weeks from the date on which the petitioner approaches the second respondent by way of representation, accompanied by a copy of this order. No cost. Connected miscellaneous petition is closed."

13.The petitioner has also cited the latest judgment of this Court in the case of ***Tamil Nadu Merchantile Bank Limited Vs the Joint-I Sub Registrar Office, Madurai and others [W.P(MD)Nos. 6976 and 1101 of 2021 dated 29.01.2021]*** *and referred to Paragraph Nos.8,9 and 13, which read as follows:*

"8. Considering the similar issue, a Division Bench of this Court, in which one of us [Hon'ble Mr.Justice M.M.SUNDRESH] is a

*party, in a batch of writ petitions in **W.P.(MD)Nos.8546 of 2020, etc., batch**, by order dated 09.09.2020, was pleased to hold that the proceedings under the SARFAESI Act would have primacy, especially in a case where the mortgage in favour of the Bank was earlier. The aforesaid decision was rendered after taking note of the judgment rendered by the Division Bench of the Gujarat High Court in **Bank of India v. State of Gujarat [Manu/GJ/0130/2020]** and a Full Bench judgment of this Court in **Assistant Commissioner (CT), Annasalai III Assessment Circle v. Indian Overseas Bank [(2016) 6 CTC 769].***

*9. Reliance has been made on the order passed by the learned Single Judge in **Govindhji Jewat & Co., v. Rukmani Mills Ltd.**, reported in **2020 (6) CTC 313,** wherein, the aforesaid principle has been reiterated. In the said case, the learned Single Judge has held that the mortgage being earlier, it creates a right in favour of the mortgagee and therefore, even the order of attachment passed by the Civil Court will have to yield. In the said judgment also, the learned Single Judge made reliance upon the judgment of the Division Bench in **S.Senthamarai Kannan v. Chief Manager, Canara Bank, Palani Branch, Dindigul District [CDJ 2020 MHC 2555].***

13. Therefore, looking from any perspective, we are of the view that the petitioner Bank cannot be denied the relief as sought for. In such view of the matter, both the writ petitions stand allowed. The first respondent in both the writ petitions are directed to register the sale certificates issued by the petitioner Bank in favour of the *respondents 7 & 8 in W.P.(MD)No.6976 of 2020 and the 7th respondent in W.P.(MD)No.1101 of 2021. Consequently, the encumbrance / attachment entry made on the file of the first respondent with respect to the properties, which are subject matter of the two mortgage deeds and the subject matter of these writ petitions, are directed to be deleted by the first respondent."*

14.The learned Counsel would thus submit that the issue has been settled in favour of the petitioner bank, giving no room for any adjudication in this writ petition, anymore.

15.Mr.K.Sathiya Singh, learned Additional Government Pleader appearing for the 1st respondent would submit that as far as the legal position is concerned he has nothing to add, as the Courts have consistently been holding that the secured creditor will have precedence over the other attachments. He would therefore, submit that any direction issued by this Court, the 1st respondent would comply with the same.

16.Mr.S.Ponsenthilkumaran, learned Counsel appearing for the 4th respondent has made his factual submission in regard to the attachments made at the instance of his client. For respondent Nos.2 and 3, there is no representation despite notice being served and the names have been printed in the cause list for the today's hearing.

17.In any case, when the legal principle has been well settled in favour of the petitioner claim, the presence and absence of the private respondents would not be material at all in disposing of this writ petition.

18.In consideration of the above narrative, this court is of the view that as contended by the learned Counsel for the petitioner, the claim of the petitioner has to be necessarily allowed. The facts would disclose that the charge has been created by the bank as early as on 04.07.2011 itself, that is much prior to the attachments made on the schedule property at the instance of the respondents 2 to 4 herein.

19.In view of the catena of decisions and a few of which, referred to for the sake of brevity, this Court being bound by the decisions has to mandatorily follow the legal precedents on the subject matter. Moreover, there appears to be no dispute in regard to the factual narrative as mentioned above and therefore, this Court has to allow this writ petition without any hesitation.

20.In the above said circumstances, a writ of Mandamus is issued to the 1st respondent to delete the encumbrances, namely the attachment entries as stated by the petitioner in the prayer of the writ petition, in respect of the schedule property, made at the instance of the respondents 2 to 4 herein. The 1st respondent is directed to implement this direction within a period of four weeks from the date of receipt of a copy of this order. The bank is also directed to make available a copy of the affidavit filed in support of the writ petition *for the 1st respondent to act in pursuance of the above direction of this Court."*

6. When the above order was passed, this Court took into consideration all the earlier orders and came to a conclusion that the subsequent encumbrances that were made, will not bind the Bank and accordingly, directed deletion of the encumbrances. The above order will squarely apply to the facts of the present case, since the encumbrance was already created in favour of the petitioner Bank and thereafter, in the year 2019, subsequent encumbrance was created. The same will not bind the petitioner Bank.

7. In view of the above, there shall be a direction to the first respondent to delete the encumbrances namely, the attachment found in Entry No.19, dated 22.07.2019 in Document no.76/2019 and the Entry No.20, dated 11.10.2019, bearing Document No.90/2019 and the Entry No.21, dated 04.11.2019, bearing Document No.96/2019 and the Entry No.25, dated 18.10.2019, bearing Document No.95/2019, reflected in the Encumbrance Certificate, bearing No.58/2021, dated 24.08.2021. This process shall be completed by the first respondent within a period of four weeks from the date of receipt of a copy of this order. The petitioner is directed to make a fresh representation to the first respondent along with all the relevant documents and also a copy of this order.

8. This Writ Petition is disposed of with the above directions. No costs.

NCC : Yes/No **09.11.2023**
Index : Yes/No
smn2

To

The Sub Registrar,
O/o. Sub-Registrar, Pavoorchathiram,
Kamarajar Street, Pavoorchathiram,
Tenkasi District.

N.ANAND VENKATESH, J.

smn2

W.P.(MD)No.18340 of 2021

09.11.2023