IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2024

CORAM:

THE HON'BLE MRS.JUSTICE.N.MALA

W.P.No.22710 of 2023
and
WMP.No.22159 of 2023

Lord's & Partners Property
Management Service Pvt. Ltd.,
(Formerly Lord's & Partners Property
Management Service (OPC) Pvt. Ltd.)
14, Selvapuram Main Road, First Floor,
Mannarai,
Tirupur – 641 605. … Petitioner

vs.

1.The Recovery Officer,
Employees' State Insurance Corporation
(Sub Regional Office),
1897 Trichy Road, Panchdeep Bhavan,
Ramanathapuram, Coimbatore – 641 045.

2.The Sub Registrar Joint – I,
Office of the Sub Registrar,
Tirupur.

3.Indian Overseas Bank,
Represented by its Authorisied Officer/
Assistant General Manager,
11/952, Cross Cut Road,
Coimbatore – 641 012.

4.The Director, M/s.PGC Corporation Ltd.,
(M/s.PGC Group of Companies),
No.5, Prem Gardens, Rajaji Nagar,
PN Road,
Tirupur – 641 604.
(R4 – Suo Motu impleaded as
per order dated 08.01.2024 in
W.P.No.22710 of 2023 by NMJ) … Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records of the 1st respondent in the impugned Attachment Order dated 30.10.2018 registered as Document No.13 of 2018 in the office of the 2nd respondent Sub Registrar, Joint – I, Tirupur and to quash the same. Consequently, to DIRECT the 2nd respondent Sub Registrar, Joint – I, to register the Sale Deed of the petitioner in Receipt No.9011 of 2023 and Document No.P/Tirupur Joint SRO-1/85/2023.

For Petitioner : Mr.Sanjay Pinto

For R1 : Mr.TNC.Kaushik
Standing Counsel

For R2 : Mrs.Raja Rajeswari
Government Advocate

For R3 : Mr.Somasundar

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ORDER

This Writ Petition is filed to call for the records of the 1st respondent in the impugned Attachment Order dated 30.10.2018 registered as Document No.13 of 2018 in the office of the 2nd respondent Sub Registrar, Joint – I, Tirupur and to quash the same. Consequently, to DIRECT the 2nd respondent Sub Registrar, Joint – I, to register the Sale Deed of the petitioner in Receipt No.9011 of 2023 and Document No.P/Tirupur Joint SRO-1/85/2023.

2.The petitioner was the successful bidder in an auction conducted by Indian Overseas Bank, the 3rd Respondent herein, on 09.10.2018 under the SARFAESI Act, 2002, for the property comprising 3 sites totally measuring 91,125 sq.ft. or 209.19 cents with building at SF.No.14 (Part), Tirupur Municipal Town Ward No.7, TS No.6/2B and 7/2, Ward No.D, Block No.4, Rajaji Nagar, Thottipalayam Village, Tirupur Taluk and District. The said 3 parcels of land measure 51,142 square feet, 12,919 square feet and 27,064 square feet. The petitioner deposited the full payment of Rs.10,06,00,000 (Rupees Ten Crore and Six Lakh Only) on 20.02.2019. The 3rd respondent Bank executed a Sale Certificate in his favour on 21.02.2019 for the above-mentioned property. It is pertinent to point out that way back on 23.09.2011, the Mortgage was created on the property by a third party (PGC Corporation) in favour of the 3rd respondent Bank. As the 2nd respondent Sub Registrar had then refused to register the Sale Certificate in the petitioner's name, citing an Attachment Order of the Income Tax Recovery Officer. The 3rd respondent Bank was constrained to file W.P.No.13493 of 2020, on the basis of the amendment in Section 26E of the SARFAESI Act on the claim of prior charge. It is a matter of record that the petitioner has nothing to do with ESI dues of the third parties mentioned in the impugned Attachment Order. In any case, the petitioner had purchased this property at an auction of the 3rd respondent Bank on 09.10.2018 even before the Attachment Order of the 1st respondent ESI Corporation. The Attachment Order No.13 of 2018 of the 1st respondent ESI Corporation mysteriously crept into the Encumbrance Certificate only on 15.07.2023. At the time of the bank auction on 09.10.2018 and even at the time of registration of the Sale Certificate in petitioner's favour on 11.03.2021, there was no attachment on the property. The petitioner claims to be absolute owner of the property, with unfettered rights. When he recently sold another part of the property measuring 27,064 square feet, vide Sale Deed dated 06.01.2023 in favour of Explicit Promoters and Agency Pvt. Ltd., registered as Document No.241 of 2023, there was NO ATTACHMENT reflected in the Encumbrance Certificate as on that date, namely 06.01.2023 and there was absolutely no impediment in registering the property. Even in the run up to the sale of the next parcel of land measuring 51,142 square feet, as part of due diligence, an Encumbrance Certificate dated 03.05.2023 was obtained. There was no Attachment Order of the 1st respondent ESI Corporation or any other attachment on the said property. When the petitioner sought to register the Sale Deed dated 23.06.2023 for 51,142 square feet of land in favour of J.P.Associates, to his utter shock the 2nd respondent Sub Registrar refused to register the Sale Deed on 22.07.2023 citing the Attachment Order No.13 of 2018 of the 1st respondent ESI Corporation. The petitioner as a real estate dealer borrows money for his business operations. The petitioner states that credit is a vicious cycle and if he is not able to sell or mortgage his property, legitimately purchased assets, and if, the statutory protection to secured creditors is denied, then his entire business operations would be reduced to a naught. Moreover, the petitioner's fundamental Right to Livelihood guaranteed under Article 21 of the Constitution coupled with his Right to Practise any Profession or carry on any Occupation, Trade or Business under Article 19(1)(g) and his Right to Property under Article 300A will be violated if he is prevented from selling and mortgaging his property legitimately purchased through bank auction. Hence the writ petition.

3.The first respondent filed counter stating that the Recovery Officer attached the property of the 4th respondent (M/s.PGC Textiles) by the impugned attachment order dated 30.10.2018 for the pending ESI dues to the tune of Rs.49,53,239/-. According to the respondent, the attachment order was communicated to the fourth respondent and also the Registrar of Lands, Tirupur, which was received and acknowledged by the District Registrar Office, Tirupur on 07.11.2018. The respondent contended that under Section 94 of the ESI Act, the ESI Corporation had priority over other debts. It was further contended that any mortgage created on the said property prior to 24.01.2020 on which date Section 26 E of the SARFAESI Act was not enforced will have zero effect on the proceedings for recovery by the first respondent by virtue of Section 94 of the ESI Act. Hence, according to the first respondent as on 30.10.2018, the date of attachment order under Section 94 of the ESI Act, the ESI Corporation had priority over the debts. It was further contended that as ESI Act was a beneficial, benevolent and social security legislation, the provisions of Section 94 of the ESI Act would prevail over Section 26 E of the SARFAESI Act. The first respondent relied on Section 9A of the ESI Act and submitted that the petitioner was liable to settle the ESI dues.

4.The third respondent filed counter and an additional counter. The third respondent in it's counter did not dispute the e-auction sale in favour of the petitioner. The third respondent further submitted that the attachment order of the first respondent was passed on 30.10.2018 and the same was served on the Sub Registrar Office on 07.11.2018, while the auction sale was conducted on 09.10.2018 much prior to the attachment order. The respondent replicated the contention of the petitioner that the encumbrance certificates obtained and verified did not disclose the purported attachment. It was further stated that the auction sale was registered with the second respondent SRO and that it was settled proposition of law that the attachment order which was not entered or noted in the records of the Registrar of Assurance/Sub-Registrar Offices would not operate against any one. The third respondent further contended that the SARFAESI Act being a Special Act, under Sections 31 B and 34 of the RDB Act and Section 26 E and 35 of the SARFAESI Act published on 05.09.2018 the Bank had priority over all other debts including Government dues and so auction conducted on 09.10.2018 and confirmed on 15.11.2018 would not be affected by the attachment order. It was contended that the claim of the first respondent could not be countenanced as the auction sale was much prior to the attachment order dated 30.10.2018. The third respondent further stated that in view of Clauses 12 and 13 of the e-auction public notice dated 01.09.2018 published in Dinamani and the New Indian Express, the prospective purchasers including the petitioner were required rather, obligated to enquire and satisfy themselves over the subsistence and existence of any encumbrances and statutory liabilities and further to meet out, without holding the bank responsible in that behalf.

5.The additional counter affidavit narrated the facts leading upto the auction of the property for recovering its secured debts. The third respondent further stated that the EPF Tirupur was by it's Communication dated 14.06.2023, directed to revoke its attachment order dated 28.12.2017 in respect of the fourth respondent. The third respondent therefore submitted that it was expedient to raise the attachment towards the property purchased by the petitioner in SARFAESI sale conducted on 09.10.2018 in pursuance of the bank's sale notice dated 01.09.2018, which came to be issued much prior to the purported attachment order. For all the reasons, the third respondent submitted that the writ petition was without merits and the same deserved to be dismissed.

6.The learned counsel for the petitioner made the following submissions.

1.The properties of the defaulting company could not be attached;

2.The first respondent's impugned attachment order was in violation of it's own mandate;

3.That a prior charge was created on the property in favor of the third respondent bank in 2011 which was 7 years prior to the impugned attachment; and

4.That the petitioner was an innocent auction purchaser who purchased the property without notice of the attachment order.

7.The learned counsel for the first respondent contended that the attachment order was passed on 30.10.2018 and the same was received and acknowledged by the District Registrar Office, Tirupur on 07.11.2018 and therefore the contention of the petitioner that there was no other attachment except the attachment of income tax was untenable. The learned counsel further submitted that Section 26E of the SARFAESI Act was enforced only on

24.01.2020 and as it was prospective in nature it would not affect the order of attachment of the first respondent dated 30.10.2018 in any manner. Prior to enforcement of Section 26E of Chapter IV-A of the SARFAESI Act, under Section 94 of the ESI Act, the first respondent's dues had priority and therefore the respondents attachment order cannot be assailed. According to the first respondent under the ESI Act, the Corporation had first charge over the property of the defaulter company for its due. The learned counsel relied on the decision of the Hon'ble Division Bench of Bombay High Court in order dated 30.08.2022 in W.P.No.2935 of 2018 in the case of ***Jalgoan Janta Sahakari Bank Ltd and Another Vs. Joint Commissioner of Sales Tax Nodal*** in support of his case. The learned counsel further submitted that as the act is a beneficial, benevolent and social security legislation meant for the benefit of the workers and their families, the provisions of Section 94 of the ESI Act would prevail over Section 26E of the SARFAESI Act.

8.The third respondent bank submitted that SARFAESI Act being a special enactment, the secured creditor like the Banks were accorded primacy and priority over all other debts and all revenues, taxes, cesses and other rates payable to the State Government, Central Government or local authority. The learned counsel further submitted that Section 26E and 35 of SARFAESI Act were published on 05.09.2018 much prior to the auction conducted on 09.10.2018 and therefore the bank as a secured creditor had priority and primacy under Section 26 E and 35 of the SARFAESI Act over all other claims including the first respondent's claim.

9.I have heard the learned counsels and I have perused the materials on record.

10.The petitioner is a real estate dealer who purchased three parcels of land in Tirupur in the auction conducted by the third respondent Bank on 09.10.2018 under SARFAESI Act. It is seen that the previous owners of the property mortgaged the property to the bank on 23.09.2011. In W.P.No.13493 of 2020, which was filed by the 3rd respondent bank challenging the attachment order of the Recovery Officer, Income Tax an order was passed by this Court on 11.01.2021, directing the second respondent Sub Registrar therein to register the sale certificate in favour of the petitioner. Subsequently on 29.09.2022 the attachment order of the Recovery Officer, Income Tax was quashed by this Court. The petitioner vide sale deed dated 06.01.2023 sold the property to an extent of 27,064 to one Explicit Promoters and Agency Pvt. Ltd., and the said sale deed was registered under Document No.241 of 2023. In the Encumbrance Certificate dated 03.05.2023 no attachment order was reflected. Thereafter, the petitioner sought registration of a sale deed in favour of J.P. Associates and the second respondent Sub Registrar refused to register it citing the attachment order No.13 of 2018 of the 1st respondent ESI Corporation. According to the petitioner the attachment order mysteriously crept into the Encumbrance Certificate only on 15.07.2023 because even in the encumbrance certificate taken as late as on 03.05.2023, the impugned attachment order of the first respondent was not reflected in the Encumbrance Certificate.

11.It is not disputed that the petitioner was a auction purchaser of three parcels of land in auction sale conducted on 09.10.2018. It is also not disputed that the sale certificate was issued by the third respondent Bank in favour of the petitioner on 11.03.2021 as Document No.3164 of 2021 in the office of the second respondent. It is seen that in pursuance of the order dated 11.01.2021 passed in W.P.No.13493 of 2020, the sale certificate was registered in favour of the petitioner. It is pertinent to note that this Court in the aforesaid Writ Petition vide final order dated 29.02.2022 quashed the order of attachment dated 01.03.2016 of the Income Tax Department stating that the bank's debt would take precedence in the light of Section 26E of the SARFAESI Act.

12.The prime contention of the first respondent is that the first respondent dues will have priority over the other claims in view of Section 94 of the ESI Act. The direct answer to the respondents submission can be found in the Full Bench Judgment of this Court in the case of ***Assistant Commissioner (Ct), Anna Salai-III Assessment Circle, Chennai Vs. Indian Overseas Bank and Another*** reported in ***AIR 2017 Mad 67 (FB)***. The reference answered by the Full Bench reads as follows:

> *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:-*
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> *"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."

13.The Hon'ble Full Bench referring to Section 41 of the amendment to the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, seeking to introduce Section 31 B in the Principal Act, held that the rights of the Secured creditor 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. The Hon'ble Full Bench of this Court observed that the Section was introduced in the Central Act with the "notwithstanding" clause and it came into force from September, 2016. The Hon'ble Full Bench of this Court further observed that the law having came into force it would naturally govern the rights of the parties in respect of even a pending lis. The Hon'ble Full Bench of this Court therefore found that the Bank, the Secured Creditor would have priority of charge over the mortgaged property. In view of the pronouncement of law of the Hon'ble Full Bench of this Court, the contention of the first respondent cannot be countenanced.

14.The learned counsel for the petitioner relied on several Judgments in support of his contention that the personal property of the Directors could not be attached, no recovery from a bonafide subsequent purchaser could be made that registration could not be refused on the ground that an order of attachment was passed, and that a duty was cast on ESI to verify encumbrance before passing the attachment order. No doubt the petitioner has raised several issues, but in my view, the main answers to the issues relating to the priority of claim of the first respondent and also whether the personal property of the Directors of the defaulter company can be attached for the ESI dues of the company are enough for the purpose of this case.

15.Though several Judgments were relied on by the learned counsel for the petitioner, I am of the view that the Judgment of the Hon'ble Supreme Court in the case of ***Employees State Insurance Vs. Gurdial Singh and others*** reported in ***1991 Supp (1) SCC 204*** clinches the issue. The Hon'ble Supreme Court in the aforesaid Judgment held that the Directors of a private limited company were not personally liable to pay the dues under the ESI Act as the Directors did not fall under the Clause (i) and Section 2 of the ESI Act. The said Judgment was subsequently followed by the Hon'ble Supreme Court in the case of ***ESI Corp Vs. S.K.Aggarwal*** reported in ***(1998) 6 SCC 288*** and by this Court in a judgment reported in ***2010 7 MLJ 984***.

16.It is also relevant to note here that the property was sold in favour of the petitioner much prior to the attachment order and therefore any subsequent attachment of the property would not affect the bona fide purchaser like the petitioner, who had no knowledge either real or constructive of the attachment order. The Hon'ble learned Judge of this Court in ***W.P.No.23410 of 2007 dated 08.03.2022*** relying on the Judgment of the Hon'ble Supreme Court in the case of ***Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussenbhai*** reported in ***1971 (1) Supreme Court Cases 757*** held that there is inherent duty on the tax authorities to inform the Registering Officers of the statutory charge created and that the bonafide purchasers of the subject property cannot be attributed with constructive knowledge of the statutory arrears of their vendor. Therefore, it is clear from the Judgment that even constructive knowledge of the attachment cannot be attributed to the bonafide purchasers of the property who purchased the same without Knowledge or notice and the same would not affect their rights over the property.

17.In the present case the attachment order was passed long after the registration of sale in favour of the petitioner. This Court in earlier round of proceedings with reference to income tax dues held that the Bank will have priority and dismissed the writ petition. The petitioner already sold a parcel of the lands purchased by him in the auction sale conducted by the Bank and it was also registered by the 2nd respondent. It was only when another parcel was sought to be sold that the 2nd respondent objected to the registration citing the impugned order. I am therefore of the view that once the sale of the petitioner is held to be valid and not affected by the attachment order the subsequent sale of the property by the petitioner would also not be affected. In the light of the above discussions, I am of the considered view that the impugned order of attachment cannot be sustained and hence it is quashed. Consequent thereof the 2nd respondent is directed to register the sale deed of the petitioner in Receipt No.9011/2023 and Document No.P/Tirupur Joint SRO-1/85/2023.

18.I therefore find merit in the writ petition and hence the same is allowed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

01.02.2024

Index : Yes / No
Internet : Yes / No
Speaking order/Non-speaking order
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To

1.The Recovery Officer,
Employees' State Insurance Corporation
(Sub Regional Office),
1897 Trichy Road, Panchdeep Bhavan,
Ramanathapuram, Coimbatore – 641 045.

2.The Sub Registrar Joint – I,

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N.MALA, J.

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W.P.No.22710 of 2023

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