(2011) 07 MAD CK 0114

In the Madras High Court

Case No : Writ Petition No''s. 5329 of 2010 and 5593 of 2010

Anjani Synthetics Limited APPELLANT

Vs

The Sub-Registrar and Others RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Constitution of India, 1950 — Article 372, 372(1)
Income Tax Act, 1961 — Section 222(1)
Income Tax Rules, 1962 — Rule 51
Registration Act, 1908 — Section 89(4)

Citation : (2012) 1 MLJ 1009

Hon'ble Judges : Hariparanthaman, J

Bench : Single Bench

Advocate : N. Anand Venkatesh, for the Appellant; R. Ravi Chandran, Additional Government Pleader for R1, J. Naresh Kumar, for R2, Benjamin George, for R3 in W.P. No.5329 of 2010, Elayaraj Kumar, for Ramalingam Associates for R4, for the Respondent

Final Decision : Allowed

Judgement

Hariparanthaman, J.—The Petitioner participated in an auction sale, which was conducted by the Recovery Officer on 23.12.2009, for

certain properties, pursuant to the order of the Debts Recovery Tribunal-I, Chennai. Those properties were mortgaged with the 3rd Respondent

Bank by the Debtor on 06.09.2001. The 3rd Respondent Bank initiated auction for Recovery of debts due to them before the Debts Recovery

Tribunal. As the order of the Debts Recovery Tribunal was not complied with by the Debtor, the properties were brought to sale on 23.12.2009

as stated above, which was a public auction. Apart from the Petitioner, others also participated in the auction.

2. The Petitioner was the highest bidder who offered a sum of Rs. 1,26,50,000/-.

Since he was the highest bidder, the Recovery Officer confirmed

the sale and issued a Certificate of Sale on 27.01.2010. After obtaining the sale certificate, the Petitioner approached the first Respondent and

sought to file the same. But, the first Respondent returned the same through a check-slip dated 08.02.2010. The Petitioner offered to pay the

stamp duty as if it is a registration of a sale deed. But the first Respondent informed the Petitioner that a communication was received from the

Income Tax Department that the said properties, for which the Petitioner wanted to file the sale certificate in the office of the first Respondent, was

attached on 05.01.2010 by the Income Tax Department u/s 222(1) of the Income Tax Act.

3. In these circumstances, the Petitioner has filed a writ petition in W.P. No. 5329 of 2010 seeking for a direction to the first Respondent to

receive the sale certificate dated 27.01.2010 issued by the Recovery officer, Debts Recovery Tribunal-I, Chennai and file a copy of the same by

making necessary entries in his book-I in accordance with Section 89(4) of the Registration Act, 1908.

4. The Petitioner also filed another writ petition in W.P. No. 5593 of 2010, seeking a direction to the first Respondent to receive the sale

certificate dated 19.01.2010 issued by the Recovery Officer, Debts Recovery Tribunal-II, Chennai and file a copy of the same by making

necessary entries in his Book No. I in accordance with Section 89(4) of the Registration Act, 1908.

5. The facts leading to file the writ petition in W.P. No. 5593 of 2010, are as follows:

The Petitioners in W.P. No. 5593 of 2010 participated in Auction sale, which was conducted by the Recovery Officer, Debts Recovery Tribunal-

II on 16.12.2009 for certain properties. Those properties were mortgaged on 29.08.2002 with the 3rd Respondent Bank by the Debtor and he

failed to clear the debts. Hence, the 3rd Respondent Bank approached the Debts Recovery Tribunal-II, Chennai for recovery of the debts. The

Debts Recovery Tribunal-II, Chennai passed an order, directing the debtor to clear the debts, which was due to be paid to the 3rd Respondent

and the same was not complied with. Therefore, the Debts Recovery Tribunal-II, Chennai, directed to conduct Public Auction for the above properties.

6. In the auction sale, the Petitioners were the highest bidders. The Petitioners were the highest bidders and they offered a sum of Rs.

1,85,00,000/-for the above properties. In these circumstances, the Recovery Officer confirmed the sale and issued Certificate on 19.01.2010. The

Petitioners approached the first Respondent and sought to receive the sale certificate dated 19.01.2010, which was issued by the Recovery

Officer, Debts Recovery Tribunal-II and to file a copy of the same by making necessary entries in his book No. I, in accordance with Section

89(4) of the Registration Act, 1908. But the first Respondent returned the sale Certificate with a check-slip, stating that the second Respondent

attached the same properties on 05.01.2010 for the tax arrears. In the said circumstances, the Petitioners filed the aforesaid writ petition in W.P.

No. 5593 of 2010.

7. The second Respondent filed a counter affidavit, refuting the allegations. It is stated that the Income Tax Department attached the properties on

05.01.2010, which were subject to auction sale by the Recovery Officer. The attachment was pursuant to ITCP-I certificate dated 26.09.2007

regarding the tax arrears. The attachment was to realize the tax arrears. The Income Tax Department attached the properties in view of the power

vested with them u/s 222(1) of the Income Tax Act.

8. Heard the learned Counsel appearing for the Petitioners as well as the learned Government Advocate appearing for the first Respondent and the

learned Counsel appearing for the Respondents 2 to 4.

9. Mr. Anand Venkatesh, learned Counsel appearing for the Petitioners submits that the properties, which were purchased by the Petitioners in the

Public Auction conducted by the Recovery Officer, were mortgaged by the debtor much prior to the ITCP-1 certificate issued by the Income Tax

Department. According to him, the properties involved in W.P. No. 5329 of 2010 were subjected to mortgage on 06.01.2001 and in W.P. No.

5593 of 2010, the mortgage took place on 29.08.2002, while the ITCP-1 Certificate of the Income Tax Department was issued on 26.09.2007.

The attachment by the Income Tax Department took place on 05.01.2010 and the same could relate back to the date of issuance of ITCP-1

certificate, i.e. attachment could relate back to 26.09.2007 under Rule 51 of the

II Schedule to the Income Tax Act 1961 (43 of 1961) and the

Income Tax (Certificate Proceedings) Rules, 1962.

10. According to the learned Counsel for the Petitioners, the secured debts would prevail over the dues payable to the Income Tax Department,

particularly when there is no provision in the Income Tax Act giving priority over the secured debts. In this regard, the learned Counsel has relied

on a decision of the Division Bench judgment of this Court in Indian Bank rep. by Authorised Officer v. The Commercial Tax Officer and Ors.

reported in 2009 6 MLJ 659. Relying on the said decision, he prays for a direction as sought for in the writ petition.

11. On the other hand, the learned Counsel for the Income Tax Department submits that the Income Tax Department attached the properties,

pursuant to the power vested with them u/s 222(1) of the Income Tax Act. The attachment took place on 05.01.2010 and the ITCP-I notice was

issued on 26.09.2007, demanding tax arrears. As per Rule 51 referred to above, the attachment would relate back to the year 2007. He made

submission based on the counter affidavit filed by the Department and sought for dismissal of these writ petitions.

12. I have considered the submissions made on either side.

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 u/s

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.

15. In these circumstances, I am of the view that the first respondent is not correct in filing the sale certificate by making necessary entries in their

book No. I in accordance with Section 89(4) of the Registration Act,1908. The matter is squarely covered by the Division Bench judgment of this

Court reported in Indian Bank Vs. The Commercial Tax Officer, Tajura Leathers and Surya Leather Export, . Para-12 of the judgment is

extracted hereunder:

12. Having noticed the relevant provisions, the Division Bench, by aforesaid unreported judgment dated 12.06.2009 in M. Nagarajan (supra), held

as under:

15. Having regard to the judicial pronouncements rendered by Courts and noticed above, we may sum up the law as under:

(i) Arrears of tax due to the State can claim priority over unsecured debts.

(ii) The common law doctrine about priority or Crown debts/State debts is recognized law in force within the meaning of Article 372(1) of the

Constitution of India.

(iii) The doctrine will not apply it first charge by way of priority is not claimed under the statute.

(iv) The doctrine of first charge/priority of the State over the property will prevail over the private debts, which is an unsecured debt, but such

doctrine of first charge/priority over the property cannot prevail over secured debts of a person. If the statute permits to have first charge/priority

over the property having regard to the plain meaning of Article 372 of the Constitution of India, then only the State can claim priority over an

unsecured debt.

The aforesaid Division Bench judgment of this Court squarely applies to this case.

16. Therefore, the Petitioners are entitled to succeed and accordingly, the writ petitions are allowed and a direction is issued to the first

Respondent to file a copy of the sale certificates concerned in the respective writ Petitioners, by making necessary entries in the Book No. I, in

accordance with Section 89(4) of the Registration Act, 1908. No costs.

