(2016) 11 MAD CK 0104

In the Madras High Court

Case No : WP.(MD). No.16950 of 2012 and MP (MD) No.1 of 2012

Indra Ganesan Educational and Charitable Trust — APPELLANT

Vs

Deputy Commissioner — RESPONDENT

Date of Decision : 14-11-2016

Acts Referred:

Citation : (2017) 1 NIJ 623

Hon'ble Judges : Mr. M. Sathyanarayanan and Mrs. J. Nisha Banu, JJ.

Bench : Division Bench

Advocate : Mr. V. Panneerselvam for M/s. C.S. Associates, for the Petitioner; Mr. R. Karthikeyan, AGP, for the Respondent Nos. 1 and 2; Mr. V.V. Sivakumar, Advocate, for the Respondent Nos. 3 and 4

Final Decision : Disposed Off

Judgement

M. Sathyanarayanan, J.—The petitioner is an Educational and Charitable Trust and the Chairman of the Trust has sworn to the affidavit filed in support of this writ petition, stating among other things, that the Axis Bank - respondents 3 and 4 had issued the Auction-cum-Sale Notice by way of advertisement in Indian Express and Dinamani dated 09.02.2010, indicating that the proposed public auction is to be held on 15.03.2010 in respect of the property situate in S.F.Nos.378/2 and 3, at K. Kallukudi Village, Manikandam, Trichy District. The petitioner - Trust, evinced interest in purchasing the said properties as they lie adjacent to the Educational Institution run by them.

2. The petitioner would further state that the properties which are the subject matter of Auction-Sale, were originally belonged to M/s. Swastika Agro Foods Private Limited, Karaikudi, and they create an equitable mortgage for the purpose of providing security to the loan facilities availed from the Axis Bank and since they defaulted in payment of dues, Recovery Proceedings were initiated under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act].

3. The petitioner in pursuant to the Auction-Sale Notification, had submitted his bid for a sum of Rs.3,50,25,000/- and in the Offer Letter, has specifically indicated that - The Bank should pay the due to the Sales Tax directly as per the Notice dated 13.03.2010 ''Daily Thanthi and subject to the Tender, is filed that the Sales Tax due must be paid by the Bank out of the Sale Proceeds''.

4. The petitioner was declared as the successful bidder and they recorded the result of the auction as follows :-

"The successful bidder Mr. T. Ganesan, Chairman, Indra Ganesan Educational and Charitable Trust, sought clarification regarding the Sales Tax Deferral Dues of Rs.1,19,73,498/- being demand raised by Commercial Taxes Department, Trichy-20, on the Bank. The bidder requested that this Sales Tax issue/ Settlement to be taken care by the Bank stating that in order to proceed with the sale Transaction and to provide for 25% advance amount today."

"In response to that, Bank clarified that the Letter/demand from Sales Tax Department has been replied by the Bank stating that the Bank''s Dues are paramount and further assured the successful bidder that the sales tax issue would be dealt by the bank and requested the bidder to pay 25% advance amount for confirmation of sale."

5. The petitioner would further state that regarding Sales Tax dues payable by M/ s. Swastika Agro Foods Private Limited, he had also sought a clarification and the Axis Bank has responded by saying that their dues are paramount and also assured the petitioner that the sales tax issue would be dealt with by them and requested the petitioner/bidder to pay 25% of the sale consideration as advance amount for confirmation of sale.

6. The petitioner, under the genuine impression that the issue regarding the sales tax arrears will be dealt with by the Axis Bank with the Sales Tax Authorities, had paid 25% of the bid amount and in the interregnum, the borrower, viz., M/s. Swastika Agro Foods Private Limited, had invoked the jurisdiction of the Debts Recovery Tribunal, Madurai, challenging the Auction-sale proceedings initiated by the Axis Bank under the provisions of SARFAESI Act by filing SA.No.54/2010 and later on, it was dismissed as withdrawn in terms of One Time Settlement terms. The petitioner subsequently paid the balance sale consideration of Rs.3,50,25,000/- and after such payment, requested the respondents 3 and 4 - Axis Bank to execute the Sale Deed, free of all encumbrances which include sales tax arrears of Rs.1,19,73,498/-. The Axis Bank, in response to the said communication, sent a reply on 12.10.2010, stating that they are inclined to execute the Sale Deed with the following endorsement :

"The sale of the schedule property was made free from all encumbrances known to the Axis Bank Ltd ; save and accept the demand of Rs.1,19,73,498/- raised by Commercial Taxes Department, vide their notice dated 26.02.2010."

7. The petitioner thereafter represented to the respondents 3 and 4 - Axis Bank and also to the Regional Director of Reserve Bank of India requesting for execution of Sale Deed without any encumbrance of sales tax arrears and it was also followed by a reminder dated 12.11.2010.

8. Thereafter, the petitioner was constrained to file WP (MD) No.13906/2010 praying for issuance of a writ of mandamus directing the respondents 3 and 4 to execute the Sale Deed in his favour without any encumbrance including the encumbrance regarding the sales tax arrears to the tune of Rs.119,73,498/- and the writ petition was entertained and notices were ordered. The respondents 3 and 4, on entering appearance in the said writ petition, filed their counter, did not seriously dispute the conditional offer made by the petitioner as well as the assurance given by them regarding the priority of claim over the sales tax arrears and pendancy of the writ petition, the respondents 3 and 4 sent the impugned communication dated 24.11.2010 wherein it has been stated that they have never given any assurance either for clearing the encumbrance or registering the Sale Deed without any encumbrance and therefore, requested the petitioner to attend the registration formalities for the purpose of execution of the Sale Deed. The petitioner challenging the legality of the said communication, has filed this writ petition.

9. The learned counsel appearing for the petitioner has invited the attention of this Court to the typed set of documents filed by the respondents 3 and 4 filed along with the counter affidavit and would contend that M/s. Axis Bank has sent a letter dated 10.03.2010 to the Assistant Commissioner, Commercial Tax [FAC], Srirangam Assessment Circle, Trichy-20, wherein they have invited the attention of the said officials to section 35 of the SARFAESI Act and also to the judgment dated 16.07.2009 passed by a Division Bench of this Court in W.A.No.1360 of 2008 [Indian Bank v. CTO] and informed that in the light of the ratio laid down in the above cited decision, the Bank is not liable to pay the sales tax arrears of Rs.1,19,73,498/- or any other amounts out of the sale proceeds as their claim is paramount and the said stand was also reiterated in their subsequent letter dated 15.04.2010, addressed to the Deputy Commissioner, Commissioner Tax, Trichy Town and as such, it is not open to them to turn around and state that they will not clear the encumbrance or execute the Sale Deed without any encumbrance.

10. The learned counsel for the petitioner has also drawn the attention of this Court to the letter of the 3rd respondent dated 13.09.2010 addressed to the petitioner wherein the Bank took a stand in the light of the Hon''ble Supreme Court of India and their dues are paramount and shall prevail over the sales tax dues and requested them t get the Sale Deed registered before the jurisdictional Sub Registrar Office, at the earliest and despite the promise and assurance, they took a contra stand in the form of the impugned notices dated 25.10.2010 and 24.11.2010 and prays for quashment of the same.

11. Per contra, the learned Special Government Pleader appearing for the 2nd

respondent/Revenue, has invited the attention of this Court to the counter affidavit and would submit that M/s. Swastika Agro Foods Private Limited was permitted to avail an Interest Free Sales Tax [IFST] Deferral Scheme, for a sum not exceeding Rs.1,52,03,100/- for a period of nine years from March 2005 to February 2014 subject to the condition that the above payment will be repayable to the Commercial Tax Department immediately after the expiry of the nine years period, i.e., sales tax dues have to be paid from the tenth year, i.e., from March 2014 to February 2015 vide proceedings of the Assistant Commissioner, CT, Trichy Town dated 27.05.2005 and the said concern, vide their Letter dated 22.01.2010, had informed the Sales Tax Authorities about the loss suffered by them in their business and also indicated that they will not be in a position to repay the IFST amount payable under the IFST Deferral Scheme and since they have violated the terms and conditions of IFST Deferral Scheme, the entire tax amount availed by them becomes payable in one lump sum along with penalty under section 24[3] of the Tamil Nadu Value Added Tax Act [TNVAT Act]. The Sales Tax Authorities on becoming aware of the Recovery Proceedings initiated by the Axis Bank under the provisions of SARFAESI Act, had sent a communication to them, as to the dues due and payable to them and has also drawn the attention of this Court to sections 21 and 42 of the TNVAT Act, and would submit that the tax under section 21, shall become due without any notice of demand to the dealer on the last date of the period for filing the return and as per section 42[2], any tax assessed on or has become payable by, or any other amount due under this Act from any dealer or person and any fee due from him, shall, subject to the claim of the Government in respect of the land revenue and the claim of the Agricultural and Rural Development Bank in regard to the property mortgaged to it under section 28[2] of the Tamil Nadu Cooperative Societies Act, 1983, have priority over all other claims against the property of the said dealer or person and the same may without any prejudice to any other mode of collection to be recovered as ....? and as such, they are having superior claim or having first charge over the properties of M/s. Swastika Agro Foods Private Limited, and as such, the Bank cannot claim priority by invoking the provisions of the SARFAESI Act and prays for appropriate orders.

12. Per contra, Mr. V.V. Sivakumar, the learned Standing Counsel appearing for the respondents 3 and 4, has invited the attention of this Court to the counter affidavit and would submit that at no point of time, the said respondents had agreed or promised to the petitioner that it would pay the alleged sales tax arrears of M/s. Swastika Agro Goods Private Limited and the Auction-Sale is also subject to as is various conditions and even at the time of participating in the Auction-Sale, the petitioner was very well aware of the sales tax arrears and as such, it is not open to them to contend that it is for the Bank to satisfy the sales tax arrears and also clear the said encumbrance and execute the Sale Deed in their favour free of all encumbrances and even now, they are ready and willing to execute the Sale Deed. But the petitioner alone is postponing and prays for dismissal of the writ petition.

13. This Court paid it''s best attention to the rival submissions and also perused the materials placed before it.

14. In the decision reported in 2011 (1) CTC 828 [A. Senthil Kumar and another v. Assistant Commissioner (CT), Koyambedu Assessment Circle, No.426, P.N. High Road, Maduravoyal, Chennai 600 0095 and others], the writ petitioners therein, claiming to be the bona fide purchasers from the Indian Bank, prayed for quashment of the Auction-Sale Notice at the instance of the Sales Tax Authorities for recovery of arrears of tax of the borrowing Company, whose properties they have purchased. A Division Bench of this Court, while dealing with the said issue, had considered very many decisions including the Judgment of the Hon''ble Supreme Court of India reported in 2009 (6) CTC 656 : 2009 (4) SCC 94 [Central Bank of India v. State of Kerala] and held as follows :-

"20. In fine, this Court holds that :-

[1] Sale Tax arrears under the provisions of TNGST Act would prevail upon arrears under the claim of the secured creditor like Third Respondent-Bank.

[2] Petitioners are bona fide purchasers of the property for a valuable sale consideration without notice in a valid sale under the provisions of the SARFAESI Act.

[3] Petitioners'' property cannot be auctioned by the 1st respondent for tax dues of the borrowing company.

21. In view of the above reasonings and on equitable consideration also the Auction Notice dated 24.04.2009 issued by the First and Second Respondent to sell the property at No.300, Poonamallee High Road, Maduravoyal, Chennai- 600 095 for recovery of tax arrears of M/s. Pioneer Cashew Industries Limited is not sustained and the same is quashed. Accordingly, the writ petition is allowed. However, there will be no order as to costs."

15. The Division Bench, in the above cited decision, while answering the moot question, has followed the earlier judgment of the Division Bench reported in 2006 (3) MLJ 919 (DB) [Punjab National Bank, Asset Recovery Branch v. Commercial Tax Officer-II, Theni and Another], wherein, it has been held that the amount of Sales Tax payable under the provisions of the Tamil Nadu General Sales Tax has first charge over the properties of the dealer and it will have priority over all the other debts including prior mortgage and the said decision, in turn, relies upon the judgment of the Hon''ble Supreme Court of India reported in 1974 (2) SCC 799 [Dattatreye Shanker Mote v. Anad Chintama Datar] and concluded that a State has got priority over the Bank dues. However, having found that Auction purchasers were bona fide purchasers, has directed the Sales Tax Authorities, not to auction the properties for the tax dues of the borrowing company.

16. This Court, keeping in mind, the ratio laid down in the above cited decisions, has carefully scanned through the typed set of documents filed by the petitioner

along with the writ petition as well as by the respondents 3 and 4.

17. The Auction-Sale notice dated 09.02.2010 would indicate that the property was sold with the existing encumbrance, whether known or unknown to the Bank and any encumbrance that may arise after the date of notice, will also borne by the purchaser and further that, any other statutory dues, shall be borne by the purchaser. The Sales Tax Authorities, on becoming aware of the auction initiated by the Axis Bank under the provisions of SARFAESI Act, has sent them Form-U Notice for recovery of money due to the 4th respondent, informing that a sum of Rs.1,19,73,498/- is due and payable by M/s. Swastika Agro Foods Private Limited and therefore, calling upon the 4th respondent to remit the said amount in the Government Treasury at Trichy, failing which, the said amount will be a charge on the properties and will be recovered as if it is an arrear of land revenue. The Deputy Commissioner, Commercial Taxes, Trichy Town, vide proceedings dated 03.03.2010, has also informed the original borrower with a copy marked to the 4th respondent, informing that the sales tax have first priority in the realisation of the Government dues and informed the borrower that once the properties of the borrower have been taken possession by the Axis Bank, it will be a clear violation of the Deferral Scheme made with the Department and therefore, directed the original borrower/dealer to pay the IFST loan in one lump sum immediately along with the interest. The 3rd respondent has sent a reply dated 10.03.2010 to the Assistant Commissioner, Commercial Taxes, [FAC], Srirangam Assessment Circle, Trichy-20, the 2nd respondent herein, pointing out their priority in terms of section 35 of the SARFAESI Act as well as the judgment rendered by the Division Bench of this Court in WA.No.1360/2008 [cited supra] and informed the said officer that they are not liable to pay the sales tax arrears or any other amount out of the sale proceeds of the secured asset, as claimed by them in their communication dated 26.02.2010.

18. The 3rd respondent also sent a communication dated 15.03.2010 to the petitioner informing them that in the Auction-Sale held on 15.03.2010, the petitioner has become the successful bidder as their bid amount of Rs.3,50,25,000/- has been accepted and also acknowledged the remittance of Rs.88,00,000/- and calling upon the petitioner to remit the balance amount of Rs.2,62,25,000/- within fifteen days, i.e., on or before 29.03.2010, for transfer of the assets/properties in their favour. In page No.27 of the typed set of documents filed by the respondents 3 and 4, the Auction Sale proceedings were also enclosed and it is relevant to extract the same :-

"T. Ganesan, Chairman, Indra Ganesan Educational Charitable Trust, has sought clarification regarding Sales Tax Deferred Dues of the amount raised by Commercial Taxes Department, Trichy-20 on the Bank. The Sales Tax issue/ settlement to be taken care by the Bank in order to ......[illegible]..35% advance amount today. Bank clarified that the letter on demand from the Sales Tax Department has been replied and the Bank dues are paramount and further, assured the successful bidder that the Sales tax issue will be dealt with by the

Bank and requested to pay 25% of the advance amount for the confirmation of sale."

19. In the light of the assurance given by the Axis Bank/3rd respondent herein, it is the primordial submission put forth by the learned counsel for the petitioner that on account of the said assurance only, it has remitted 25% of the bid amount and M/s. Axis Bank - respondents 3 and 4, on more than one occasion, had addressed letters to the Commercial Tax authorities as to the priority over the debt and therefore, they are under obligation to settle the sales tax arrears and execute the Sale Deed free of all encumbrances and contrary to the said stand, they had sent the impugned communications, washing off their hands as to the settlement of the sales tax arrears and therefore, it should be held that their conduct is unreasonable and unsustainable and with a further direction, directing them to execute the Sale Deed in their favour free of all encumbrances, which include the sales tax arrears.

20. However, it is the submission of the learned Standing counsel appearing for the respondents 3 and 4 that even in the Auction-Sale notice, it has been clearly indicated that it is for the look out of the bidder to borne any statutory dues and in Clause No.9, it has been specifically indicated that ''the property is being sold with the existing encumbrance, whether known or unknown to the Bank and any encumbrance that may arise after the date of notice, will also be borne by the purchaser'' and the petitioner, while submitting the bid, was also aware of the same as even in his Tender Form, he has indicated that the Bank should pay the due to the sales tax directly as per the Notice dated 13.03.2010 and as such, the petitioner is liable to satisfy the sales tax arrears. It is the further submission of the learned Standing Counsel appearing for the respondents 3 and 4 that as against their arrears of dues to the tune of Rs.7,56,46,527.22p., due as on 28.08.2001, the property was sold only for Rs.3,50,25,000/- and in the light of the fact that the information regarding the sales tax arrears was known to the petitioner even at the time of participating in the Auction-Sale, the petitioner has to get it cleared and they cannot execute the Sale Deed free from the said encumbrance.

21. In the decision reported in 2009 (4) SCC 94 [Central Bank of India v. State of Kerala and others], the following question arose for consideration :-

"2. Whether Section 38-C of the Bombay Sales Tax Act, 1959, [for short ''the Bombay Act''] and section 26-B of the Kerala General Sales Tax Act, 1963 [for short ''the Kerala Act''] and similar provision contained in other State legislations by which first charge has been created on the property of the dealer or such other person, who is liable to pay sales tax, etc., are inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [for short ''the DRT Act''] for recovery of ''debt'' and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short ''the Securitisation Act''] for enforcement of ''security interest'' and whether by virtue of non obstante clauses contained in

Section 34[1] of the DRT Act and section 35 of the Securitisation Act, two Central Legislations will have primacy over State legislations are the questions which arise for determination in these appeals."

and the Hon''ble Apex Court, had gone through the relevant provisions of the Recovery of Debts Due to Banks and Financial Institutions Act [DRT Act] and the SARFAESI Act, 2002 and also various decisions as well as section 26-B of the Kerala General Sales Tax Act, and held that the statutory first charge created in favour of the State under the said provisions has primacy over the right of the Bank to recover its dues.

22. As already pointed out, as per section 42[2] of the Tamil Nadu Value Added Tax Act, 2002, any tax assessed or amount due under the Act from a dealer or a person, have priority over all other claims against the property of the said dealer or person and the analogous provision under the Tamil Nadu General Sales Tax Act, vis-a-vis, the SARFAESI Act, came for consideration before a Division Bench of this Court in the judgment reported in 2011 [1] CTC 828 [supra], wherein this Court, following the earlier Division Bench judgment reported in 2006 [3] MLJ 919 [Punjab National Bank''s case], had held that the State has got priority over the Bank dues and in the light of the statutory provisions as well as the ratio laid down in the above cited decisions, this Court is of the view that the arrears of the sales tax claimed by the respondents 1 and 2 would prevail over the dues of the respondents 3 and 4.

23. Incidentally, a further question arises for consideration is as to whether the petitioner claims to be the bona fide purchaser, as in the above cited decision reported in 2011 [1] CTC 828, though it has been held that the sales tax arrears will have priority over the Bank dues, the petitioners therein were granted the relief on the ground that they were bona fide purchasers of the properties for valuable sale consideration, is entitled to the relief of refund/repayment of sale consideration ?

24. The petitioner while submitting the Tender Form, has indicated that the Bank should pay the demand of sales tax directly as per their notice dated 13.03.2010 published in Daily Thanthi and subject to that, the Tender is filed and the sales tax dues must be paid by the Bank out of the sale proceeds. The Bank, after receipt of the communication of the Sales Tax Authorities, calling upon them to pay the sales tax arrears, also took a stand that their dues will prevail over the sales tax arrears and even in the Auction-Sale proceedings [the contents of which have been extracted in paragraph 4 of this order], the Bank had clearly given assurance that they will take care of the sales tax issue and in the light of the said assurance only, the petitioner has paid the entire bid amount and requested the respondents 3 and 4 to execute the Sale Deed free of all encumbrances which include the sales tax arrears. However, the Bank, in their impugned communications dated 25.10.2010 and 24.11.2010, had made a turn around stating that the request/demand made by the petitioner cannot be acted upon as he has purchased the properties knowing pretty well about the

attachment from the Sales Tax Department and they are prepared to execute the Sale Deed, subject to the incorporation of the clause regarding sales tax arrears. In the considered opinion of the Court, the stand taken by the respondents 3 and 4 is wholly untenable as the borrower submitted his bid subject to the clearance of the sales tax arrears/dues by them and the communication and the reply dated 10.03.2010 and 15.04.2010 sent by the Axis Bank to the Commercial Tax Authority would also indicate that they have taken a consistent stand that their claim will have priority over the sales tax arrears and even in the Auction Sale proceedings also, a positive assurance has been given to the borrower that the said issue will be taken care of by the Bank. Therefore, the respondents 3 and 4 cannot resile from that promise or undertaking. In the light of the above stand/ position taken by the respondents 3 and 4, two options are available to them, viz., [1] The Bank shall execute the Sale Deed in favour of the petitioner free of all encumbrances ; or in the alternative [2] shall return the entire sale consideration to the petitioner, with or without interest and in the event of their refund of the amount without any interest, the petitioner/Auction purchaser is at liberty to approach the competent Civil Forum to claim interest.

25. In the result, the writ petition is disposed of and the respondents 3 and 4 - M/s. Axis Bank, is at liberty to execute the Sale Deed in favour of the petitioner in respect of the auction property free of all encumbrances which include the sales tax arrears claimed by the respondents 1 and 2 ; or in the alternative, refund the sale consideration with or without interest to the petitioner and in the event of the amount being refunded without interest, the petitioner/auction purchaser is at liberty to invoke the common law remedy and recover the same. However, in the circumstances of the case, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.