(2011) 06 MAD CK 0499

In the Madras High Court

Case No : Writ Petition No. 36547 of 2007 and M.P. No''s. 2 of 2007, 1 of 2008 and 2 of 2011

K. Ravindranath APPELLANT

Vs

The Authorised Officer and Chief Manager, Regional Provident Fund Commissioner II and Recovery Officer, Employee's Provident Fund Organisation and The Sub Registrar RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4)

Citation : (2011) 06 MAD CK 0499

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : Yashodvardhan for P. Sesubalan Raja, for the Appellant; K. Muthuramalingam, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—The writ petition is directed against the order of the second Respondent, Regional Provident Fund Commissioner and Recovery Officer dated 04.10.2007, by invoking the powers u/s 11(2) of the E.P.F. and M.P. Act, 1952 in respect of payment of Rs. 1,57,303.60, and for direction to make the continuance of the payment with a statutory charge in respect of the property measuring 18125 sq.ft. or 41.62 cents situated in Plot No. 49 and also the property measuring 19760 sq.ft. or 45.36 cents situated in plot No. 81 in Survey No. 70(P) of Karai Village, Walajah Taluk, Vellore District, preventing from alienating the same.

2. The said plot Nos. 49 and 81 situated in SIDCO Industrial Estate, Ranipet, originally belonged to one M/s. Industries and Chemical Ltd., when the bank took action against the said M/s. Industries and Chemical Ltd., under the Securitization and Reconstruction of Financial Assets and Enforcement of Security

Interest Act (in short, "SARFAESI Act") in respect of failure and repayment of Rs. 2,60,75,650.50 by issuing notice u/s 13(2) of the SARFAESI Act and ultimately, after having taken possession u/s 13(4) of the SARFAESI Act, it sold the plots in public auction, in which the Petitioner is the bidder of plot No. 49 while his wife is the successful bidder of plot No. 81 and the sale was confirmed by the authorized officer of the Indian Bank, who issued the sale certificate on 11.06.2007, after receiving the entire sale consideration and the said sale certificates were also registered in the Office of the Sub Registrar, Walajahpet and the Petitioner is in possession of plot No. 49 and his wife is in plot No. 81.

(a) While so, the second Respondent has issued the impugned notice as stated above, demanding an amount of Rs. 1,57,303.60, stated to be the arrears payable by the previous owner viz., M/s. Industries and Chemical Ltd. It is stated in the said impugned order that in respect of the amount due from M/s. Industries and Chemical Ltd., after the certificate was issued, the Recovery Officer ordered attachment of plot Nos. 49 and 81 on 14.03.2007 and proclaimed on 21.03.2007, served the same on M/s. Industries and Chemical Ltd., as well as the Sub Registrar, Walajahpet on 21.3.2007.

(b) It is also stated in the impugned order that if any amount is due from the employer in respect of the employees contribution or employers contribution, there will be a first charge on the assets of the establishment. The Petitioner purchased the property under public auction for Rs. 28 lakhs from the Bank in exercise of its powers under the SARFAESI Act as a bona fide purchaser and therefore, the impugned order is illegal; that the Petitioner has purchased the property from the first Respondent Bank, has taken possession of the property on 18.06.2006, which is long before the attachment order stated to have been issued by the second Respondent on 14.3.2007 and proclamation issued on 21.3.2007; that the said attachment order or proclamation was not recorded by the Sub Registrar, Walajahpet and that the Petitioner being the bona fide purchaser, his right cannot be obstructed.

3. The second Respondent having been served notice, has not chosen to appear, nor filed any counter affidavit. However, the first Respondent Bank entered appearance even though there was no appearance by the counsel.

4. Mr. Yashodvardhan, learned senior counsel appearing for the Petitioner would submit that inasmuch as the purchase of property by the Petitioner is much before the order of attachment and proclamation and especially when such proclamation or attachment has not been entered in the encumbrance certificate produced in the typed set of papers, the Petitioner is a bona fide purchaser. He has also brought to the notice of the Court that in respect of attachment and proclamation made by the second Respondent, entry has been made in the encumbrance certificate only on 11.03.2009, while the purchase under the SARFAESI Act was much earlier. He would rely upon the judgment of this Court in A. Senthil Kumar v. Assistant Commissioner (CT), A. Senthil Kumar and Another Vs. Assistant Commissioner (CT) and Others, , and submit that even though law

is well settled that the priority of charge is in respect of claim of provident fund, since it is established that the purchaser is a bona fide purchaser under the SARFAESI Act without valid notice, the property cannot be auctioned for recovery of tax. He would also submit that even otherwise, the Bank from which the Petitioner has purchased the property under SARFAESI Act, is alone responsible for payment, by relying upon the judgment of the Supreme Court in Central Bank of India Vs. State of Kerala and Others, . Therefore, according to the learned senior counsel for the Petitioner, the impugned order of the second Respondent in effecting attachment and making claim from the Petitioner is not valid in law.

5. On facts, it is clear that the Petitioner''s purchase under SARFAESI Act from the first Respondent Bank was on 14.06.2007, when the Bank by virtue of the powers conferred u/s 13(4) of the SARFAESI Act, has brought the property for sale and executed the certificate of sale. In the sale certificate, which has been registered with the Registrar, who has been sought to be impleaded by way of application by the Petitioner, it is specifically stated that there is no encumbrance, and therefore, it has to be presumed that the Petitioner being the purchaser by public auction, was not aware of any attachment over the property at the time of his purchase in 2007. In the encumbrance certificate filed by the Petitioner in the additional typed set of papers, it is seen that the claim of attachment was registered by the Registrar only on 11.03.2009 as document No. 17/09 while the purchase by the Petitioner as stated above was on 14.06.2007 itself.

6. It is on record to show that the possession had been taken by the first Respondent Bank u/s 13(4) of the SARFAESI Act from M/s. Industries and Chemical Ltd., who are the borrowers even on 8.6.2006 and it was pursuant to that, the sale was effected and sale certificate was executed in favour of the Petitioner on 11.6.2007. The attachment made by the second Respondent and the proclamation on 14.3.2007 and 21.03.2007 are stated to have been informed to the Registrar, but as stated above, such registration has been effected only on 11.3.2009. Therefore, it cannot be said that the Petitioner is not a bona fide purchaser.

7. It is no doubt true that between the second Respondent and the bank, the claim of the second Respondent will have priority. It was held in Central Bank of India Vs. State of Kerala and Others, that in such cases, the claim of the Bank to have priority over the Commercial Tax Department''s claim in the light of the Bombay Sales Tax Act, 1959 was rejected, which is as follows:

179. In this case the Bank had taken possession of the mortgaged assets on 15.2.2005 and sold the same. On 11.7.2005, the officers of the Commercial Tax Department informed the bank about outstanding dues of sales tax amounting to Rs. 3,62,82,768. The Assistant Commissioner issued notice u/s 39 of the Bombay Act for recovery of Rs. 48,48,614.35 of the Securitisation Act does not have overriding effect over Section 33C of the Bombay Act.

8. While upholding the stand that the claim of arrears of sales tax will prevail over the claim of secured creditors like, Bank since the Government will have first charge over the property by construing the TNGST Act, 1959 a Division Bench of this Court in A. Senthil Kumar and Another Vs. Assistant Commissioner (CT) and Others, , however, held that if the Petitioners are bona fide purchasers of the property for valuable consideration without notice, the property cannot be auctioned by the Commercial Tax Department. It was held as follows:

20. In fine this Court hold 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 valuable sale consideration without notice in a valid sale under the provisions of the SARFAESI Act.

(3)Petitioners'' property cannot be auctioned by the first Respondent for tax dues of the borrowing Company.

9. On the facts of the present case, there is absolutely nothing to presume that the Petitioner was aware of any proclamation or attachment of the property for the claim of the second Respondent when the first Respondent Bank brought the property for sale by virtue of its powers u/s 13(4) of the SARFAESI Act by public auction. If at all there is any responsibility, it can be by the Bank as a lender of money towards M/s. Industries and Chemical Ltd., especially when in the sale certificate executed by the Bank, viz., first Respondent in categoric terms, it has been stated that there has been no encumbrance over the property. In such view of the matter, while it is true that the second Respondent has got priority right in respect of the claim, such priority right can be exercised only from the first Respondent Bank, who had already sold the property by exercise of its power u/s 13(4) of the SARFAESI Act, and the Petitioner having purchased the property as a bona fide purchaser, cannot be affected by such claim of the second Respondent. It is always open to the second Respondent to make such claim to the first Respondent and in my considered view, the Petitioner being a bona fide purchaser for valuable consideration, without knowing the defective title, his right over the property cannot be affected. Therefore, absolutely there is no justification or legality on the second Respondent in making the claim from the Petitioner and restraining him from enjoying or alienating the property.

In such view of the matter, while leaving it open to the second Respondent to make its claim towards the first Respondent Bank, the impugned order of the second Respondent in making the claim against the Petitioner and restraining the Petitioner''s right of alienating the property stands set aside. Accordingly, the writ petition is allowed. No costs. Connected miscellaneous petitions are closed.

