BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.08.2023

PRONOUNCED ON : 28.11.2023

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).No.14573 of 2021 and
W.M.P.(MD)No.11505 of 2021

M/s. City Union Bank Limited,
represented by its Manager (Legal),
R.M.Renganath,
23, Kallamman Koil Street,
Trichirappalli,
Tamil Nadu-620 002. ... Petitioner

Vs.

1.Tax Recovery Officer-2, Income Tax,
No.44, Williams Road,
Cantonment, Trichy-620 001.

2.The Sub Registrar-1,
Woraiyur, Tiruchirappalli.

3.M/s.Vasan Medical Centre (India)
Private Limited,
Represented by its Director,
15A, Thillai Nagar Main Road,
Trichy-620 018.

4.Meera Arun
5.Bala Yudish Murugaiah Arun
6.Tharana Arun
7.Rajeswari ... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a ***Writ of Certiorarified Mandamus,*** to call for the records on the file of the 1st respondent in C.No.Rule 13/TRC No.02/17-18 TRO 2/TRY/2017-18 and to quash the impugned order of attachment in F.O.R.M No. I.T.C.P.16 in so far as Item 22 of the schedule of property attached to the said form dated 04.01.2018 namely in the Property measuring about 33.43 cents Vacant land at Chinthamani Village Salai limit T.S.No.21-part, New Ward B, Block 19, Trichy-2 as illegal, arbitrary and violation of the principles of natural justice and consequently, to direct the 2nd respondent to strike the name of the 1st respondent from the EC with respect to the property measuring about 33.43 cents vacant land at Chinthamani Village Salai limit T.S.No.21-part, New Ward B, Block 19, Trichy-2.

For Petitioner : Mr.R.Sivaraman
For R1 : Mr.N.Dilip Kumar
For R2 : Mr.R.Suresh Kumar
Additional Government Pleader
For R3 to 7 : No appearance

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O R D E R

This writ petition is filed for writ of ***Certiorarified Mandamus,*** to quash the impugned order of the 1st respondent in C.No.Rule 13/TRC No. 02/17-18 TRO 2/TRY/2017-18 and the impugned order of attachment in F.O.R.M No. I.T.C.P.16 in so far as Item 22 of the schedule of property attached to the said form dated 04.01.2018 namely in the Property measuring about 33.43 cents Vacant land at Chinthamani Village Salai limit T.S.No.21-part, New Ward B, Block 19, Trichy-2 as illegal, arbitrary and violation of the principles of natural justice and consequently, to direct the 2nd respondent to strike the name of the 1st respondent from the EC with respect to the property measuring about 33.43 cents vacant land at Chinthamani Village Salai limit T.S.No.21-part, New Ward B, Block 19, Trichy-2.

2. The petitioner is M/s. City Union Bank Limited. The contention of the petitioner is that the M/s. Vasan Medical Centre (India) Private Limited which is the 3rd respondent herein had availed various credit facilities from the

petitioner bank during the year 2009 and the Director of the 3rd respondent had mortgaged various properties with the petitioner by way of memorandum of deposit of title deeds dated 02.04.2009 and extended equitable mortgage dated 17.04.2009. The said Director stood as a guarantor especially for the property admeasuring 33.43 cents vacant land at Chinthamani Village Salai limit T.S.No. 21-part, New Ward B, Block 19, Trichy-2. However, the said Director died on 16.11.2020, hence, the legal heirs are arrayed as respondents 4 to 7. The 3rd respondent failed to repay the loans, thereafter, the accounts were classified as non-performing assets on 24.10.2015. The petitioner being secured creditor had initiated proceedings under SARFAESI Act, 2002 for recovering the outstanding loan amount. The petitioner had approached the 2nd respondent Registration Department to enquire about the registration of sale certificate and to the shock and surprise of the petitioner, there was an attachment by the Income Tax Department towards the mortgage property. Hence, the petitioner bank approached the 2nd respondent, the petitioner was made to run from pillar to post, finally the 2nd respondent issued a letter stating that the 1st respondent

had attached the mortgage property.

3. The petitioner further submits the mortgage by the memorandum of deposit of title deeds was executed on 02.04.2009 and the same was further extended. The 4th respondent executed a registered mortgage deed in favour of the petitioner bank on 17.04.2014. Whereas the attachment of the 1st respondent as per the Encumbrance Certificate in 3616 of 2017 was on 03.11.2015. It is pertinent to point out the deposit title deed was on 02.04.2009 whereas the 1st respondent attached the property on 03.11.2015. Hence, the petitioner is entitled to have priority over the 1st respondent. The further contention of the petitioner is unless the order of attachment is raised by the 1st respondent, the petitioner will not be able to satisfy the bidders and to persuade them to purchasing the mortgaged property though public auction. Hence, the petitioner filed this writ petition to lift the attachment regarding the mentioned property.

4. The 1st respondent has filed a counter affidavit stating that the

assessee namely A.M.Arun was subjected to scrutiny assessment initiated under section 143(3) of Income tax Act for the assessment year 2008-2009, 2010-2011, 2011-2012 and 2012-2013. And for assessment year 2009-2010 the assessment was reopened in 2015. Moreover, there was a search under section 132 of the Income tax Act in the case of M/s.Vasan Health Care Private Limited group of cases on 01.12.2015. Subsequently, search assessments under section 153A from assessment year 2010-2011 to assessment year 2016-2017 were initiated against the said Arun who was one of the Directors of the said group of cases. Pursuant to the assessment proceedings, an order of provisional attachment of his immovable property including the subject properties ware passed on 03.11.2015, 27.07.2016, 18.01.2017 and 14.07.2017. The case was referred to the Tax Recovery Officer and the properties were attached by the Tax Recovery Officer on 04.01.2018 following the recovery proceedings under Second Schedule of Income Tax Act. Demand raised in the order passed under section 143(3) read with 148 for assessment year 2009-2010 and that in order under section 153A for assessment years 2010-2011 to 2016-2017 are pending

in appeal before Commissioner of Income Tax (Appeals). The primary contention of the bank is that the property was already mortgaged with the bank and hence under section 26-E the bank had priority as a secured creditor. In the demand notice dated 02.11.2017 indicates the subject property owned by Mr.A.M.Arun is shown as item I of the schedule “C”. In the demand notice reference had been made to various registered memorandum of deposit of title deeds of the year 2014 and subsequently, but does not contain any reference to the unregistered memorandum of deposit of title deeds dated 02.04.2009. The SARFEASI Act provides that only upon registration of security interest under chapter IV or under chapter IV-A, a secured creditor is entitled to exercise the rights of enforcement including the public auction sale of the property under chapter III. Further, the overriding provision of giving priority to the secured creditor can be given effect to only upon registration of the secured interest. When the security interest was registered only on 10.12.2014, the petitioner bank can claim priority only after 10.12.2014 and not prior to that. The Income Tax Act provides that any transfer by way of sale mortgage, gift, exchange or

any other mode shall be void, if undertaken during the pendency of proceedings and section 281(1) declares the same as void.

5. The 1st respondent relied on the case of State Bank of India Vs. The Tax Recovery Officer, Coimbatore, in W.P.No.5857 of 2018, this Court vide order, dated 27.04.2021 has held that such transfers can be construed as fraudulent transfers. Therefore, mortgage in favour of the petitioner bank cannot be held valid in the eye of law. Applying the above principles to the present facts, it is evident that the proceedings under Income Tax Act was pending even before the creation of mortgage interest and the subsequent registration of security interest was on 10.12.2014, therefore, the said mortgage is void. Consequently, seeking the deletion of attachment or removing the name of the Income Tax Department from the encumbrance certificate does not arise. Moreover, the properties in the name of the deceased Arun were attached under section 281B of Income Tax Act on 03.11.2015, provisionally following the approval of Income Tax Department, vide proceedings dated 03.11.2015.

Subsequently, there was a search in the group of cases on 01.12.2015. Approval of Principal CIT, Central-2, Chennai, was granted on 22.07.2016, for a list of 46 properties including the subject property. Subsequently, fresh approval was granted on 18.01.2017 for provisional attachment of immovable properties under section 281B and the same was extended for another 6 months vide proceedings dated 13.07.2017. After completion of proceedings in December 2017, the property at Trichy including the subject property was attached on 04.01.2018 by the tax recovery officer, after issuing tax recovery certificate on 14.09.2017. In the list of properties the 22nd property is the property in question and the petitioner bank claimed that the defaulter Mr.A.M.Arun had mortgaged to the bank on 02.04.2009, further claimed that it had been extended on 17.04.2014 and it has to be noted that there is no encumbrance in the records of Registration Department with regard to mortgage on 02.04.2009, hence the alleged deed was not registered. Further on the claimed date of mortgage on 17.04.2014, there was pending assessment proceedings for the assessment year 2012-2013 in the name of Mr.A.M.Arun

and notice under section 143(2) was issued on 16.08.2013 for scrutiny assessment and the assessment was pending during April 2014. Hence, the respondents submitted that the 1st charge is that of the respondent Income Tax Department. Hence, the mortgage ought to be declared as null and void. Though the petitioner claims that he is entitled as priority mortgager, the mortgage has been made at the time of pending assessments and hence, it is void as per Section 281. Further, Rule 15 of Income Tax Certificate Proceedings Rules, 1962, provides that Tax Recovery Officer can attach even property with encumbrance, hence, the petitioner's statement that Tax Recovery Officer has exceeded jurisdiction is not correct. Moreover, there is no provision in the Income Tax Act to lift the attachment without realization and reduction of the outstanding demand. As per the amendment in SARFAESI Act, 2002 with effect from 24.01.2020, secured creditors shall be entitled to enforce securities under SARFAESI Act only if the security interest is filed with CERSAI. In the CERSAI report, there are no details found with regard to the attachment of the property. The petitioner claims that the Tax Recovery Officer had attached the

property of the person who is not an assessee. Further the petitioner claims that the Tax Recovery Officer has to invoke section 179 to take action against Director of a company or invoke section 226 of Income Tax Act, but the respondents submitted that the owner of the property Mr.A.M.Arun is an assessee and a Tax Recovery Certificate under section 222 was drawn for a demand of Rs.565.34 crores plus interest for assessment years 2009-2010 to 2016-2017. The property was attached by Tax Recovery Officer on 04.01.2018, earlier during pending assessments, it was under provisional attachment under section 281B since 03.11.2015 with prior approval of the Principal Commissioner, Trichy and later Principal Commissioner, Chennai. Hence invoking section 179 or section 226 is not necessary in this case and it is not correct to state that the attachment by Tax Recovery Officer is ex-facie illegal and liable to be set aside. Hence, the 1st respondent prayed to dismiss the writ petition.

6. Heard Mr.R.Sivaraman, learned Counsel appearing for the petitioner, Mr.N.Dilip Kumar, learned Senior Standing Counsel appearing for 1st respondent and Mr.R.Suresh Kumar, learned Additional Government Pleader appearing for the 2nd respondent and perused the records.

7. The petitioner bank had challenged the attachment order dated 04.01.2018 issued in ITCP No. 16 under Rule 48 of the Second Schedule of Income Tax Act. Also questioned the consequential entry made by the Sub Registrar, Woraiyur, which reflects in the Encumbrance Certificate. The contention of the petitioner bank is that the borrower had executed mortgage by deposit of title deeds on 02.04.2009 and subsequently executed the memorandum of extension of equitable mortgage dated 17.04.2014, hence the bank has priority over the IT department. But the contention of the respondent Income Tax Department is that the alleged deposit of title deeds dated 02.04.2009 was not registered and moreover the alleged mortgage was not referred in the demand notice dated 02.11.2017, hence the date of mortgage of

deposit of title deeds cannot be taken as 02.04.2009. The date of registered mortgage is on 17.04.2014 and as on 17.04.2014 the assessment proceedings were initiated / pending before the authorities, hence any mortgage executed during that period is void as per Section 281 of the Income Tax Act. After hearing the rival submissions this Court is of the considered opinion that the mortgage of deposit of title deeds may be liable for registration, but the instrument written subsequently evidencing the agreement of deposit of title deeds was not liable for registration. In other words, registration was not compulsory where the instrument evidencing the agreement relating to deposit of title deeds until 30.11.2012 under the Registration Act. And the present deposit of title deeds dated 02.04.2009 falls under the category of "not compulsory". Thereafter, under the Tamil Nadu Amendment Act 2012 with effect from 01.12.2012 the registration of instrument evidencing the agreement relating to the deposit of title deed was made compulsory under section 17(i) of the Registration Act. When subsequently the registration of mortgage of deposit of title deeds was made compulsory as stated supra, therefore, the contention of

the respondent that the earlier mortgage is not registered cannot be accepted and the petitioner bank is in advantageous situation. Moreover, non-registration of the deposit of title deeds alone, would not determine the rights of the parties. As far as the allegation of not referring the deposit of title deeds dated 02.04.2009 in the demand notice dated 02.11.2017 is concerned, the petitioner bank had produced the copy of the deposit of title deeds and hence the doubt entertained by the Revenue is unnecessary.

8. The petitioner bank and the borrower had executed memorandum of extension of equitable mortgage by way of deposit of title deeds on 17.04.2014 and the same was registered. But the contention of the Revenue is that at the time of registered mortgage the assessment proceedings were pending, hence the revenue is protected under section 281. But under proviso to section 281 any bonafide purchaser, who had purchased the property without the knowledge of recovery proceedings pending against the assessee/seller, is protected. It protects the interest of the purchaser who has

paid valuable consideration for the purchase of the property. Hence the rigorous of section 281 may be invoked by the Revenue when the transfer was to deceive or an arrangement to circumvent the demand by the Revenue. The section 281 is extracted hereunder:

> *"281. Certain transfers to be void.—(1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise:*
>
> *Provided that such charge or transfer shall not be void if it is made—*
>
> *i) for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee; or*
> *(ii) with the previous permission of the 2 [Assessing Officer]."*

Hence the proviso covers the situation if the mortgage is executed without notice of assessment proceedings. Further the Hon'ble Supreme Court in Tax Recovery Officer Vs. Gangadhar Vishwanath Ranade reported in (1998) 6 SCC 658 had held that the Assessing Officer or Tax Recovery Officer has no power to declare the transactions as void. The provisions of section 281 do not confer the power of adjudication upon the authorities, but merely the power to state the law. And the reason stated in the judgment is that the respondent Department is an interested party and no party can act as judge for his own cause.

9. An identical case was considered by another Learned Single Judge of this Court in W.P.Nos.27409 & 27411 of 2019 vide order dated 21.04.2021, wherein it held as under:

> *"15. Let us first analyze the provisions of Section 281 read with the proviso thereunder, and the umbrella of protection it offers, as well as the case law on point. Section 281 has been enacted to protect the interests of a bonafide purchaser lured into the purchase of the property*

in question without the knowledge of recovery of 2019 proceedings pending as against the vendor. Thus, Section 281 may be invoked only in cases where the transfer was a devise or an arrangement to circumvent a subsisting or anticipated demand by the Income Tax Department and to protect the interests of an unsuspecting purchaser who has paid valuable consideration for the purchase of the property in question.

16. Since Section 281 would apply in cases where the transfer of the property has been made during the pendency of proceedings or after the completion thereof, one has to examine whether there were any proceedings pending in the case of the company for AY 2012-13 at the time when the MOD was registered, which is 10.02.2014.

17. The counter filed by the TRO refers to a notice issued in terms of Section 143(2) of the Act without setting out any details thereof. It is also silent as to when the returns of income were filed by the petitioners or when notices were issued thereafter to indicate commencement of proceedings. However, Mr.Srinivas states that he is in possession of the assessment files and produces a notice under Section 143(2) of the Act dated 08.08.2013 relating to AY 2012- 2013, that has been issued to the company in August 2013, prior to registration of mortgage. There is no reference to any notice issued as far as AY 2013-14 is concerned.

18. According to the revenue, the issuance of notice under Section 143(2) would create an automatic charge over the property by the petitioner and any subsequent alienation of the property by the petitioner would be liable to be set aside in light of the protection under Section 281.

19. The power to initiate coercive recovery in terms of the 2nd Schedule to the Act has been the subject matter of discussion in various decisions. In the case of Gangadhar Vishwanath Ranade (supra) the Supreme Court considered a challenge by the TRO to a decision of the Bombay High Court that had set aside an attachment under Rule 11 of the 2nd Schedule to the Act on the ground that under Rule 11, the TRO had no power to declare a transfer void and one that had been effected with the intention of defrauding the revenue. The provisions of Section 281 do not confer the power of adjudication upon the authorities, but merely the power to declare the law, qua the aspect of attachment alone.

20. Section 281 states that any transaction of transfer engaged in after the commencement of proceedings, with the intention of defrauding the revenue and circumventing proceedings for recovery, would be construed as void as against any claim of tax or other sum payable by that assessee. However, bona fide transactions that have been entered into for adequate consideration, with the parties being unaware of the

pendency of proceedings before the Income Tax authorities/without being put to notice, shall stand excluded from the rigour of the provision. Transactions engaged in with the sanction of the Assessing Officer would also be excluded from the application of the provision.

21.The Supreme Court thus held that the TRO shall have the power to examine the alternate charge created by the assessee and attach the property if he came to the conclusion that the charge had been created only to circumvent the attachment by the income tax department. However, the power of the TRO shall not extend to declaration of title that may be made only by the Civil Courts in a Suit for declaration declaring the transaction void under Section 281 of the Act. This was for the reason that the TRO is himself an interested party and hence cannot sit himself in judgment in such a case.

22. Thus, while the attachment of the Income Tax Department over the subject property would be held to be valid, the power vested in the income tax authorities can extend no further than to effect an attachment. This is as per Rule 11(6) of the 2nd Schedule to the Act, reading thus:

Investigation by Tax Recovery Officer.....

11... (6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

23. In Sancheti Leasing Company Ltd (supra), Justice R.Jayasimha Babu says:

6. Section 281(1) of the Act had been relied upon by the Income-tax Officer. That section declares certain transactions as void. The section, however, does not vest the authority in the Income-tax Officer to make such a declaration.

7. Before a transaction involving immovable property can be declared as void, all the requirements of law must necessarily be satisfied. The fact that a statute provides for such a declaration being made, if the conditions mentioned in the statute are satisfied, does not imply that an officer exercising powers under the provisions of the statute can assume to himself the power and jurisdiction to declare what is otherwise a legally valid transaction as void. Adjudication is the function of the courts. Any declaration of a transaction being void must be sought in

the civil court. The Income-tax Officer moreover in this case is an interested party as it is in the interests of the Revenue to make such a declaration and proceed to recover the vendor's arrears of tax from such person. 8. The Supreme Court of India in its recent decision rendered in the case of TRO v. Gangadhar Viswanath Ranade (Decd.) [1998] 234 ITR 188 has held that if the Department finds that the assessee has transferred a property to a third party with the intention to defraud the Revenue, the Revenue will have to file a suit under Rule 11(6) of Schedule II to the Income-tax Act to have the transfer declared void under Section 281 of the Income-tax Act.

24. I thus, find no merit in the submissions of the respondent to the effect that Section 281 constitutes a declaration of charge much less, one which is preferential to the revenue. The thrust of Section 281 is only a protection to a bona fide purchaser in cases where an errant assessee may seek to alienate property to circumvent anticipated recovery of outstanding arrears payable by him to the Income Tax Department. Nothing in Section 281 would support the submission that it, by itself creates a positive charge of property. The charge in this case was created by the Income Tax Department only after 27.03.2017 when the property was attached in terms of Rule 48 of the 2nd Schedule and duly communicated to the SRO.

25. Moreover, the aforesaid cases however do not take note of Section 26E of the SARFAESI that has been notified on 24.01.2020. Section 26E commences with a non-obstante clause and states that priority shall be accorded to the debts payable to secured creditors, notwithstanding anything in any other law for the time being in force, including the Income tax Act. The only exception, is as per the Explanation to Section 26E, cases pending under the Insolvency and Bankruptcy Code 2016. In the case of a secured creditor where a prior valid charge exists, as in the present case where the mortgage has been created on 10.02.2014, the provisions of Section 281 would not serve to disturb the same.

26. A matter similar to the present one came up for consideration before the Andhra Pradesh and Telangana High Court (prior to bifurcation) in the case of ICICI Bank Ltd (supra). Conflicting claims to the same property were set up by the ICICI Bank and the Tax Recovery Officer. After considering the interpretation of Section 281 and the power of recovery under the 2nd Schedule to the Income Tax Act, the Bench states that the attachment in that case was prior to the attachment by the Income Tax Department and thus, held priority over the subsequent attachment. Following the ratio of the judgment of the Supreme Court in the case of Gangadhar Vishwanath Ranade (supra), the claim of the Bank was allowed.

27. In this case the mortgage by the Bank is on 10.02.2014 and that by the Income tax Department, is post attachment, on 27.03.2017 only. The subsequent attachment thus fails in the light of Section 26E.

28. Incidentally, at the time when the above decision was rendered, Section 26E of the SARFAESI Act had not been notified, prompting the Bench to state at paragraph 6 of that decision (of the SCC online report) that the issue before them could have been resolved in a trice, had only the provisions of Section 26E been notified at the time when the decision was being rendered. The provisions of Section 26E have since been notified on 24.01.2020 and the benefit of the same is available for the present Writ Petitioners."

10. In the present case as per the counter of the respondents the assessment was pending. But even as per the counter the assessee was subjected to scrutiny assessment initiated under section 143(3) of Income tax Act for the assessment year 2008-2009, 2010-2011, 2011-2012 and 2012-2013. And for assessment year 2009-2010 the assessment was reopened in the year 2015, which means as on the date of mortgage there was no pending assessment

proceedings for the assessment year 2009-2010. For the assessment year 2012-2013, the respondents had issued notice dated 16.08.2013 under section 143(2) for scrutiny assessment. According to the revenue the issuance of notice under section 143(2) would create an automatic charge over the property and any subsequent alienation would be liable to be set aside under section 281. But as per the Hon'ble Supreme Court judgment in Gangadhar Vishwanath Ranade's case under Rule 11 of Second Schedule the Tax Recovery Officer had no power to declare a transfer void. When the Revenue has no power under Rule 11(6) to declare as void, likewise the Revenue has no authority to claim section 281 as automatic. Following the aforesaid judgment, this Court is of the considered opinion that when the Tax Recovery Officer has no power to declare as void, likewise the Revenue has no authority to claim the charge or attachment over the property as automatic.

11. The above position would further be substantiated by section 281B, wherein the authority has to obtain prior permission from the Principal

Commissioner for passing temporary attachment that too for six months and may be extended for another period of six months with prior approval of the Principal Commissioner of Income Tax. When the temporary attachment is restricted with time limit, then the power is not absolute. In the present case the Revenue had passed an order of provisional attachment on 03.11.2015 after approval of Principal Commissioner of Income Tax. Moreover, there was a search under section 132 of the Income tax Act in the case of M/s.Vasan Health Care Private Limited group of cases on 01.12.2015. And all other subsequent proceedings are on later dates, especially the approval of Principal CIT, Central-2, Chennai, was granted on 22.07.2016, for a list of 46 properties including the subject property and fresh approval was granted on 18.01.2017 for provisional attachment under section 281B and the same was extended for another 6 months vide proceedings dated 13.07.2017. Then Tax Recovery Certificate was issued on 14.09.2017 and the subject property was attached on 04.01.2018. The Revenue had created charge in this case on 04.01.2018. The respondents had reopened the assessment proceedings in the year 2015 for the

assessment year 2009-2010 and the respondents had not stated the exact date of reopen in their counter. From the above narration of events, it is evident that the mortgage is on 17.04.2014 and the same is registered on 10.12.2014 which is prior to the reopen of assessment in the year 2015 and prior to attachment dated 04.01.2018, hence this Court is of the considered opinion that no assessment proceedings were pending when the petitioner bank has executed registered mortgage deed dated 10.12.2014, hence the petitioner bank's debt has priority over the respondent's crown debt.

12. The learned Senior Standing Counsel appearing for the Revenue submitted that the attachment is a statutory duty mandated on the Income Tax Department, therefore, there cannot be any positive direction for lifting the attachment. If the Hon'ble Court comes to the conclusion that the charge over the property is prior to the attachment of the Revenue, the Hon'ble Court may direct the Revenue to issue "no objection certificate", but the

petitioner cannot demand to lift the attachment. This contention of the Revenue was vehemently objected by the learned Counsel appearing for the petitioner bank stating that if the attachment is there, the property cannot be auctioned, it will not fetch higher value. And it is for the benefit of both the bank as well as the debtor, the attachment of the Revenue ought to be lifted. Further the petitioner bank submitted that the said issue was elaborately considered by the High Court of Andhra Pradesh and Telangana in the case of ICICI Bank Limited Vs. Tax Recovery Officer vide order dated 04.12.2018 reported in [2019] 105 Taxman.com 257. The challenge in the said judgment is an attachment order 14.03.2018, issued by the tax recovery officer under rule 48 of second schedule. After considering section 281 and rule 48, the Court has elaborately dealt with the issue and has held that there is no provision in the Income Tax Act by which a first charge is created automatically on the properties of the assesses. And also held it is now well settled that wherever the statute does not create a first charge over the property, the crown's debt does not take precedents over the claim of the secured creditor. The relevant portion of

the judgment is extracted hereunder:

> *"31. But the mortgage was created by the 3rd respondent in favour of the petitioner-bank on 11-07-2011, much before the order of assessment was passed under Section143(3) on 27-12-2011. In other words, the assessee was nowhere near the point of being declared as an assessee in default on the date of creation of the mortgage. Hence, the creation of the mortgage cannot be said to have automatically become void in terms of Section 281(1) merely because of the pendency of the proceedings under Section 143 and 142. It required something more to be done, but the same was not done in this case. As a matter of fact even an investigation under Rule 11 was not carried out in this case. Therefore, the order of attachment is clearly illegal. On the date on which the order of attachment was passed, the property had already been sold by the petitioner-bank, in exercise of the power conferred upon the bank under the Securitisation Act, 2002.*
>
> *32. It is important to note one more aspect. Section 281(1), by its very nature operates only up to the stage of service of notice under Rule 2 of the Second Schedule. Therefore, Section 281(1) obviously deals with a situation, which can be compared to fraudulent preferences dealt with by the Insolvency Laws. Therefore, what is applied to an assessee (or an*

insolvent under the Insolvency Laws) cannot be applied to a secured creditor like the bank.

33. There appears to be no provision in the Income Tax Act, by which a first charge is created automatically on the properties of the assessee. There is no provision in the Income Tax Act similar to Section 16C of the Andhra Pradesh General Sales Tax Act, 1957.

34. It is by now well settled that wherever the statute does not create a first charge over the property, the crown's debt does not take precedence over the claim of the secured creditor. A useful reference can be made in this regard to the decision of the Full Bench of the Madras High Court in U.T.I. Bank Ltd., V. Deputy Commissioner of Central Excise (2007) 75 SCL 20 (Mad.) (FB).

35. In Central Bank of India V. State of Kerala, a Three Member Bench of the Supreme Court had an occasion to consider two questions (i) whether Section 36 C of the Bombay Sales Tax Act, 1959 and Section 26 B of the Kerala General Sales Tax Act, 1963, by which a first charge was created on the property of the dealer, are inconsistent with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitisation Act); and (ii) whether by virtue of the non-

obstante clauses contained in RDDB Act and Securitisation Act, the two Central Legislations will have primacy over State Legislations. Eventually, the Court held (i) that the RDDB Act, 1993 and Securitisation Act, 2002 do not create a first charge in favour of the secured creditor, (ii) that the relevant provisions of the Sales Tax Laws AIR 2007 Madras 118 2009 21 VST 505 (SC) are not inconsistent with the provisions of the Central Legislations, so as to attract the non obstante clause and (iii) that the charge created under the relevant Sales Tax Laws would prevail over the charge created in favour of the Bank.

36. But in a more recent decision in the Stock Exchange V. V.S. Kandalgoankar (2014) 187 Comp. Cas. 143 (SC), a question arose as to whether a lien created by the operation of the Rules of the Stock Exchange, on the security provided by a member, would have precedence over the dues to the Income Tax Department. After quoting with approval the decision of the Supreme Court in Dena Bank V. Bhikabhai Prabhudas Pareks Co. (2000 (5) SCC 694), the Supreme Court came to the conclusion that the Income Tax Act does not provide for any paramountcy of dues by way of income tax and that the Government dues have priority only over unsecured debts. In its decision in Stock Exchange, the Supreme Court went to the extent of holding that the lien possessed by the Stock Exchange made it a secured creditor and that irrespective of whether the lien was a statutory lien or

a lien arising out of an agreement, the same made the holder of the lien a secured creditor, who would have priority over Government dues.

37. Therefore, in the light of the fact that the mortgage was created by the assessee much before a demand was made under Rule 2 and even before an order of assessment was passed and in the light of the fact that before the stage of issue of a certificate of recovery, the voidity under Section281(1) is not automatic, the petitioner-bank deserves to succeed.

38. Accordingly, the writ petition is allowed and the impugned order of attachment is set aside. The Sub-Registrar may proceed to register the sale certificate issued by the Bank upon compliance with the necessary formalities. There shall be no order as to costs."

13. The said judgment is followed by Hon'ble Division Bench of Madras High Court in W.P.(MD)Nos.1251 of 2018 and batch. Vide judgment dated 01.09.2022, the Hon'ble Division Bench has held that the section 281 of Income Tax Act and section 26E of SARFAESI Act and 31B of the Recovery of Debts and Bankruptcy Act cannot operate simultaneously and there arises conflict and hence the attachment ought to be lifted whenever the challenge is

made and whenever the mortgage by bank is prior to the attachment under Income Tax Act. The relevant portion of the judgment is extracted hereunder:

> *"24. Keeping the above background in mind, it does not seem that section 281 of the Income Tax Act and sections 26E of the SARFAESI Act and 31B of the Recovery of Debts and Bankruptcy Act can operate simultaneously without conflict. In other words, the conflict is inevitable. Application of section 281 could result in two possible outcome:*
>
> *(i)the transfer / charge can either be saved under the proviso (or)*
>
> *(ii)transfer / charge could come under the mischief of section 281 and its declaration of voidity.*
>
> *In the first case, if the transfer / charge falls under the proviso, Section 281 of the Income Tax Act would not get attracted and the secured creditor will be entitled to enforce in view of its priority. If the transfer / charge falls within the mischief of Section 281 of the Income Tax Act as discussed supra, it would suffer from the declaration of voidity. 'Void' as explained by the Hon'ble Supreme Court in Kalawati v. Bisheshwar [AIR 1968 SC 261] and State of Kerala v. M.K.Kunhikannan Nambiar Manjeri Manikoth [(1996) 1 SCC 435 : AIR 1996 SC 906], would mean 'non-existent from its very inception' and 'nullity'. Sections 26E and 31B presuppose an existence of a valid charge / mortgage and if the declaration of voidity in section 281 of the Income Tax Act destroys*

the very foundation on which sections 26E and 31B exists, it appears doubtful that a banker or a financial institution can take advantage of the priority provided therein. In this regard, it may be necessary to bear in mind the Maxim sublato fundamento, cadit opus, meaning, "if the foundation is removed, the superstructure falls" [See: Kalabharati Advertising v. Hemant Vimalnath Narichania and others, (2010) 9 SCC 437 : 2010 SCC Online SC 970 at page 447]

"25. Thus, once the security interest is declared a nullity, it will be non-est and there is no question of applying SARFAESI or Recovery of Debts and Bankruptcy Act and consequentially, no question of priority. This would essentially lead to a conflict, as in the present case, primacy to section 281 will render the priority accorded to secured creditors nugatory. We must thus examine, whether section 281 of the Income Tax Act or sections 26E and 31B of the SARFAESI and Recovery of Debts and Bankruptcy Act would prevail. It appears that the non-obstante clause in Sections 26E and 31B of the SARFAESI Act and Recovery of Debts and Bankruptcy Act would prevail over the declaration of voidity contained in Section 281 of the Income Tax Act, for unless it is nullified, the primacy contained in the provisions of Sections 26E and 31B of the SARFAESI Act and Recovery of Debts and Bankruptcy Act would stand nullified, thereby defeating the object of Sections 26E and 31B of the SARFAESI Act and Recovery of Debts and

Bankruptcy Act.

26. While interpreting the scope of the non-obstante clause contained in Sections 26E and 31B of the SARFAESI Act and Recovery of Debts and Bankruptcy Act, we may take guidance from the Heydon's Rule, commonly known as "Purposive Construction", which provides that when the material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) is the rule laid down in Heydon's case which has now attained the status of a "classic". The rule which is also known as "purposive construction" or "mischief rule" enables consideration of four matters in construing an Act: (i) What was the law before the making of the Act, (ii) What was the mischief or defect for which the law did not provide, (iii) What is the remedy that the Act has provided, and (iv) What is the reason of the remedy. The rule then directs that the courts must adopt that construction which "shall suppress the mischief and advance the remedy". Four things are to be discerned and considered:

> *Firstly, what was the common law before the making of the Act.*
> *Secondly, what was the mischief and defect for which the common law did not provide,*

Thirdly, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and
Fourthly, the true reason of the remedy,

Then to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro priuate commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bone publico.

27. Applying the mischief or Heydons Rule to Sections 26E and 31B of the SARFAESI and Recovery of Debts and Bankruptcy Act, we can infer the following:

The Mischief- Inadequacy of the non-obstante clause in Section 34 and 35 of the Recovery of Debts and Bankruptcy Act and SARFAESI Act, which was found to be limited in operation to grant to primacy only in case of inconsistency with other laws.

The remedy - To get over the above mischief of Section 26E and 31B of the SARFAESI and Recovery of Debts and Bankruptcy Act, containing non- obstante clause was introduced. The said non-obstante clause is very wide in scope and operation and grants

primacy against any other law, which is not confined to circumstances, wherein, there is inconsistency between the SARFAESI Act and Recovery of Debts and Bankruptcy Act.

Thus, applying the Heydon's Rule or Purposive construction, the non-obstante clause contained in Sections 26E and 31B of the SARFAESI Act and Recovery of Debts and Bankruptcy Act, which was introduced to give primacy to the secured creditors and expressly provides that it would prevail over all taxes, cesses clc., ought to be construed/interpreted in a manner that would promote and not defeat the object of the Parliament to protect and safeguard the interest of the secured creditors, intended in larger public interest and as a matter of policy.

28. One more rule of construction is that when two competing Acts construed to further the purposes behind them produce a conflict; the court may resolve the conflict by taking into consideration as to which Act represents "the superior purpose", as held in the case of Allahabad Bank v. Canara Bank [(2000) 4 SCC 406], which reads as under:

"34. While it is true that the principle of purposive interpretation has been applied by the Supreme Court in favour of jurisdiction and powers of the Company Court in Sudarsan Chits (1) Ltd. case [(1984) 4 SCC 657), and other cases, the said principle, in our view, cannot be invoked in the present case against the Debts Recovery Tribunal in view of the superior purpose of the RDB Act and the special provisions contained therein. In our opinion, the very same principle mentioned above equally applies to the Tribunal/Recovery Officer under the RDB Act, 1993 because the purpose of the said Act is something more important than the purpose of Sections 442, 446 and 537 of the Companies Act. It was intended that there should be a speedy and summary remedy for recovery of thousands of crores which were due to the banks and to financial institutions, so that the delays occurring in winding-up proceedings could be avoided."

If the above rule is applied, then there is no room for doubt that Section 26 E of the SARFAESI Act and Section 31 B of the Recovery of Debts and Bankruptcy Act which was introduced with a specific purpose to override and grant priority to recovery of debts due to secured creditors over all other debts, taxes, cesses etc., must be understood as prevailing over Section 281 of the Income Tax Act, in the event of conflict of priority. This is also in view of the fact that the Parliament must be

understood to have given priority to the secured creditors under Section 26E of the SARFAESI Act and Section 31B of the Recovery of Debts and Bankruptcy Act, fully aware and conscious of the status and importance that taxes enjoy under the Constitution. Therefore, with regard to operation of section 281 of the Income Tax Act vis-a-vis the operation of sections 26E and 31B of the SARFAESI Act and Recovery of Debts and Bankruptcy Act, sections 26E and 31B according priority to secured creditors shall prevail and thus, the attachment by the Tax Recovery Officer is impermissible in the facts and circumstances of the case.

29. Now coming to the question of whether the amendments by way of Section 26E of the SARFAESI Act and Section 31B of the Recovery of Debts and Bankruptcy Act, would be applicable to the Bankers in the present case in view of the fact that Section 31B was inserted with effect from 01.09.2016, while Section 26 E was inserted and notified to come into force on 24.01.2020. The above question need not detain us long for the following reasons:

a) *Firstly, the Full Bench of this Court in W.P.No.2675 of 2011 etc. batch, dated 10.11.2016 has held that it would govern the rights of the parties even in respect of a pending lis. The relevant portion of the same reads as under:*

"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. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending."

The Special Leave Petition is stated to be pending before the Apex Court and there is an order of "Status Quo" in SLP (Civil) No. 20471 of 2021 dated 16.03.2018. In view thereof, the Full Bench Order of this Court would continue to bind/govern.

b) *Secondly, we would think the examination of the above question may be academic, in view of the fact that even if the recovery proceeding is setaside for any reason, the same may not serve any purpose. The claim of the Bankers/ Financial Institutions is admittedly still outstanding, hence it is open for the Bankers/ Financial Institutions on proceeding being set-aside to invoke Section 26 E of the SARFAESI Act and Section 31 B of the Recovery of Debts and*

Bankruptcy Act as it is applicable presently in any view. In similar circumstances, the Hon'ble Supreme Court in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh and Co. [(2000) 5 SCC 694] while examining the question whether the State would have precedence to recover the tax dues over that of secured creditors after clarifying the position on the above issue, proceeded to examine the further contention that the petitioners therein who were partners of a firm that Section 15(2-A) of the Karnataka Sales Tax Act, which provided that where any firm is liable, the firm and each of the partners would be jointly and severally liable was introduced only with effect from 18.11.1983, however the taxes that were sought to be recovered related to periods prior to 1964-65 i.e., prior to the insertion of the above provision. The Apex Court after holding that it would be prospective, however proceeded to hold that even if the recovery proceedings were to be set aside, it may not serve any purpose since it was open for the State to resort to the amended Section 15(2-A) of the Karnataka Sales Tax Act which would prevail over the right of the appellant Bank. The following portion is relevant and thus extracted:

> *"21.....Even if we were to set aside the sale held by the State, it will merely revive the arrears outstanding on account of sales tax to which further interest and penalty shall have to be added. The amended Section 15(2-A) of the Karnataka Sales Tax Act shall*

apply. The State shall have a preferential right to recover its dues over the rights of the appellant Bank and the property of the partners shall also be liable to be proceeded against. No useful purpose would, therefore, be served by allowing the appeal which will only further complicate the controversy."

The position here is no different. Apart from the fact that the Full Bench has while considering the applicability of Section 31 B of the Recovery of Debts and Bankruptcy Act has held that it would apply even to lis pending, which would be the position in respect of Section 26E of the SARFAESI Act as well. Even if this Court were to set aside the recovery proceedings for any reason, the Bankers/ Financial Institutions right to claim priority in terms of Section 31 B of the Recovery of Debts and Bankruptcy Act and Section 26 E of the SARFAESI Act would be available and the right to recover under the Income Tax Act, 1961 must yield to the provisions under the SARFAESI Act and the Recovery of Debts and Bankruptcy Act and thus, the above exercise may not serve any useful purpose. Therefore, the above issue appears to be a mere academic exercise and we do not intend to examine the question any further."

14. The two judgments cited supra had held in categorical terms

that the Income Tax Act has not provided any 1st charge of its debts. But there is 1st charge over the bank's debt under SARFAESI Act. Moreover, the amendment of Section 26E is applicable to pending lis. Therefore, this Court is of the considered opinion that even though it is a statutory duty to attach property by the Income Tax Department, as and when the bank claims and exercise its 1st charge over the property, the Income Tax Department is liable to issue no objection certificate and also lift the attachment. In the present case this Court has already held that the mortgage by bank is prior to the attachment of the Revenue. In such circumstances by following the aforesaid judgments this Court is of the considered opinion that the impugned orders are liable to be quashed.

15. In the subsequent judgment rendered by Hon'ble Supreme Court in the case of ***M/s. Connectwell Industries Private Limited, Vs. Union of India*** in Civil Appeal No.1919 of 2010 vide judgment dated 06.03.2020, the Hon'ble Supreme Court has held that when the charge over the property was

created much prior than the notice issued by Income Tax Department then the bank has first charge than the department. As and when the charge over the property was created much prior to the notice under rule 2 Second Schedule, the bank is entitled to seek no objection certificate. Hence, the Hon'ble Supreme Court directed the Income Tax Department to issue no objection certificate and also restrained the Income Tax Department from enforcing the attachment order.

16. The Hon'ble First Bench of High Court of Madras in W.P.No. 19742 of 2022 batch vide order date 27.09.2023 had held that the secured creditor has priority charge over the claim of the Revenue. The Hon'ble Division Bench had followed the judgment of the Hon'ble Full Bench rendered of this Court in the case of ***Assistant Commissioner (CT) Anna Salai-III Assessment Circle Vs. Indian Overseas Bank and another*** reported in ***AIR 2017 Mad 67 (FB)***. The Hon'ble Full Bench of Bombay High Court in the case of ***Jalgaon Janta Sahakari Bank Ltd. and another Vs. Joint Commissioner of***

Sales and another reported in ***2022 Online SCC Bom 1767*** has held the secured creditor would have the priority if the same is registered. Based on the above said judgment, 1st respondent is bound to issue no objection certificate and also the 1st respondent is bound to lift the attachment.

17. Therefore, for the reasons stated supra the impugned order of attachment, dated 04.01.2018, is quashed and consequently, the 1st respondent is directed to lift the attachment. The 2nd respondent is directed to strike the name of the 1st respondent from the Encumbrance Certificate with respect to the property measuring about 33.43 cents vacant land at Chinthamani Village Salai limit T.S.No.21-part, New Ward B, Block 19, Trichy-2. The said exercise shall be completed within a period of six weeks from the date of issue of the copy of the order.

18. With the above said observations and directions, the writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

28.11.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No

Tmg

To

The Sub Registrar-1,
Woraiyur, Tiruchirappalli.

S.SRIMATHY, J.

Tmg

W.P.(MD).No.14573 of 2021

28.11.2023