

HIGH COURT FOR THE STATE OF TELANGANA

WRIT PETITION No.9272 of 2023

Between :

M/s. SLS Properties,
rep.by its Partner, Pailla Shekar Reddy,
having its Office at Sy.No.74/1, 74/2, 74/3,
Panathur Marathalli, Sarjapur, ORR,
Bengalure-560 013.

.... Petitioner

and

The State of Telangana,
rep.by its Principal Secretary,
Commercial Tax Department,
Secretariat, Hyderabad and others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED : 17.08.2023

**HONOURABLE SRI JUSTICE P. SAM KOSHY
AND
HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

1. Whether Reporters of Local Newspapers : No
may be allowed to see the Judgments ?
2. Whether the copies of judgment may be : **Yes**
marked to Law Reporters/Journals
3. Whether Their Lordship wish to : No
see the fair copy of the Judgment ?

*** HONOURABLE SRI JUSTICE P. SAM KOSHY
AND
HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

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... Petitioner

Vs.

\$ The State of Telangana,
rep.by its Principal Secretary,
Commercial Tax Department,
Secretariat, Hyderabad and others.

.... Respondents

!Counsel for the petitioner : Sri E.Madan Mohan,
learned senior counsel for
Sri B.Arjun

Counsel for the Respondents: Sri L.Venkateshwar Rao for
2nd respondent;
Ms. Gayatri for 3rd respondent;
Sri T.Nagender for 4th respondent

<Gist :

>Head Note:

? Cases referred:

2020 SCC Online Bom 4190
(2018) 55 GSTR 210 (MP)
AIR 2017 Madras 67
2019 SCC Online Gujarat 1892

**HONOURABLE SRI JUSTICE P. SAM KOSHY
AND
HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

WRIT PETITION No.9272 of 2023

ORDER: *(per Hon'ble Sri Justice Laxmi Narayana Alishetty)*

The instant writ petition is filed by the petitioner seeking following relief:

“... to issue an appropriate writ, order or direction, more particularly, on in the nature of writ of mandamus declaring the action of the respondents in not refunding the security deposit amount of Rs.3,28,41,795/-, as illegal, arbitrary, un-constitutional, violate of principles of natural justice and to direct the respondents to refund the security deposit amount, which was deposited before this Court along with interest to the petitioner.”

2. The brief facts as narrated in the writ petition are that petitioner is a partnership firm and it had purchased land admeasuring Acs.21.538 guntas in Sy.Nos.863 to 870 (part), plot Nos.49 to 54 and part of 48 and 55, situated in Industrial Development Area, Phase-IV, Patancheru, Medak District, Telangana, in an auction conducted by the 4th respondent. Earlier, the said land was purchased by the 3rd respondent from Andhra Pradesh Industrial Infrastructure Corporation Limited, vide registered sale deed bearing document No.417/2002, dated 19.01.2002.

3. The 3rd respondent obtained certain loan facilities from Andhra Bank and the same is secured by way of charge of the above property. The 3rd respondent defaulted in repayment of the loan amount and therefore, the loan account was classified as Non-Performing Asset (NPA). The Andhra Bank therefore, initiated measures under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, Act, 2002') against the 3rd respondent. Subsequently, Andhra Bank executed an Assignment Agreement dated 30.03.2017 assigning the loan account, debt in favour of 4th respondent.

4. After assignment, the 4th respondent auctioned the property, wherein the petitioner was declared as successful bidder, however, the sale certificate could not be registered by the concerned Sub-Registrar since the property was under attachment by the Income Tax Department. Aggrieved by the measures initiated under the Act, 2002, the 3rd respondent challenged the same by way of Securitization Application vide S.A.No.491 of 2017 (old No.45 of 2015) before the Debts Recovery Tribunal, Hyderabad.

5. It is the further case of the petitioner that the mortgaged property was under attachment by the Commercial Tax Department as some taxes were due from the 3rd respondent to Commercial Taxes Department. At the request of the 2nd respondent i.e., Commercial Tax Department, the subject property was included in list of prohibited properties.

6. Aggrieved by non-registration of property, the petitioner earlier filed W.P.No.39499 of 2018 and this Court, by an order dated 04.12.2018 in I.A.No.1 of 2018 directed the 4th respondent to deposit a sum of Rs.3,28,41,795/- with the Registrar-Judicial, within a period of three weeks. Upon such deposit being made, the Registrar-Judicial shall invest the same in a cumulative fixed deposit with the State Bank of India, High Court Branch. Consequent on such deposit being made, the Joint Sub-Registrar shall register the Sale Certificate in favour of the petitioner. Accordingly, sum of Rs.3,28,41,795/- was deposited by the petitioner on behalf of the 4th respondent and Sale Certificate dated 26.07.2018 was registered vide Document No.2675/2019 in favour of the petitioner and physical possession was also delivered to the petitioner.

7. It is further case of the petitioner that the secured creditor i.e., 4th respondent, the borrower i.e., 3rd respondent and the petitioner has settled the matter out of the Court and the same was confirmed by this Court in the common order dated 10.11.2022 in W.P.No.845 of 2020 and batch. The Government of Telangana has announced a One Time Settlement (OTS) Scheme and has agreed to settle the amount due from 3rd respondent for a sum of Rs.1,65,05,945/- and the said amount was paid by the 3rd respondent and no amount is due to the 2nd respondent. Thereafter, petitioner made an application to the 2nd respondent to issue No Due Certificate and in response to the said application, the 2nd respondent issued endorsement dated 01.03.2023.

8. It is further case of the petitioner that the amount deposited by the petitioner is still lying in the Court and since the Commercial Tax dues of the borrower are cleared in full, the petitioner is entitled to refund of amount deposited by the petitioner. Hence, this Writ Petition.

9. The respondent no.2 filed counter-affidavit and contended that the 3rd respondent had availed industrial incentives from Tax Department under APGST, VAT & CST Acts and it has

deferment dues to be paid to a tune of Rs.2,35,79,281/- for the period between Financial Year 2001-02 to 2013-14. Similarly, the 3rd respondent also due some other tax dues and penalty to a tune of Rs.92,62,514/-. As the 3rd respondent defaulted in repaying the deferred tax and other taxes, the 2nd respondent initiated measures under the Revenue Recovery Act for sale of immovable property belonging to 3rd respondent. Accordingly, a demand notice was issued to 3rd respondent on 12.01.2018 and thereafter, land and property were attached on 12.02.2018 and the same was also published in Gazette on 03.03.2018 by the District Collector. Further, responding to the attachment notice, 3rd respondent requested the 2nd respondent to grant time to pay the dues.

10. A protest petition was filed by 2nd respondent before the Sub-Registrar, Sangareddy for not transferring the immovable property pertaining to the 3rd respondent and to include the said property in the list of prohibited properties.

11. In so far as the amount lying with the Registrar (Judicial) is concerned, the Hon'ble Court directed the money to be kept in a cumulative interest bearing fixed deposit and it would be open for respondent no.3 or respondent no.4 to come back asking for

payment of the said amount, if they challenge the order or attachment made by the commercial Tax Authorities and succeed. Neither the 3rd respondent nor the 4th respondent challenged the order of attachment.

12. The Government of Telangana issued G.O.Ms.No.45 Revenue (CT-II) Department on 09.05.2022 for One Time Settlement (OTS) of tax arrears. This Scheme allowed for the settlement of disputes pending before various legal forums subject to withdrawal of the pending disputes by the dealers. It was later clarified by G.O.Ms.No.65, dated 25.06.2022 that cases pending before DRT, BIFR, NCLT, Government are treated as cases under dispute for the purpose of OTS.

13. It is further averred that 3rd respondent had filed for settlement of dispute under this scheme on 30.06.2022 surreptitiously without disclosing the fact of dismissal of W.P.No.39499 of 2018. That the 2nd respondent in a *bona fide* belief that the said writ petition was still pending accepted the proposal and allowed the 3rd respondent to pay the amount in accordance with the OTS scheme. However, the 2nd respondent has not issued the proceedings for settlement of balance tax as 3rd respondent has not filed the evidence of disposal of case by

way of withdrawal of the writ petition. Therefore, petitioner has no right over the fixed deposit amount, as it is either the assessee i.e., 3rd respondent or the 4th respondent i.e., Asset Reconstruction Company, who alone can claim the amount provided that they had challenged the attachment and succeeded in such challenge and prayed for dismissal of writ petition.

14. The respondent no.4 filed counter-affidavit and averred that 3rd respondent obtained financial facilities from Andhra Bank by creating charge over the subject property. After the account of the 3rd respondent has become NPA, the debt was assigned to 4th respondent under the Act, 2002 on 27.04.2018, the movable and immovable assets have been sold by 4th respondent to the petitioner by way of public auction and challenging the same, the 3rd respondent filed Securitization Application vide S.A.No.491 of 2017.

15. After purchasing the auctioned property, petitioner approached the Sub-Registrar for registration of the auctioned property. As the property was under attachment by the 2nd respondent for tax arrears due to them, the Sub-Registrar did not register the property. Aggrieved by the same, petitioner filed

W.P.No.39499 of 2018 and on 04.12.2018 this Court passed interim orders directing the 4th respondent to deposit a sum of Rs.3,28,41,795/- with the Registrar Judicial. The 4th respondent collected this amount from the auction purchaser i.e., petitioner and deposited the same with the Registrar Judicial and the property was registered in favour of the petitioner. Subsequently, the matter was amicably settled between the 3rd respondent and the petitioner and the 3rd respondent had withdrawn all objections to the sale and W.P.No.845 of 2020 filed by 3rd respondent has been withdrawn.

16. Respondent No.4 further contended that since the Commercial Tax Department i.e., 2nd respondent had also given endorsement dated 01.03.2023 confirming that 3rd respondent cleared the amount due to the 2nd respondent in-full and there are no arrears, the 4th respondent has no objection if the amount is refunded to the auction purchaser i.e., the writ petitioner.

17. Heard learned senior counsel Sri E.Madan Mohan for Sri B.Arjun for the petitioner, learned standing counsel Sri L.Venkateshwar Rao for the 2nd respondent, learned counsel

Ms. Gayatri for 3rd respondent and the learned counsel Sri T.Nagender for the petitioner no.4.

Consideration by the Court:

18. Now the points for consideration are,
- (i) Whether, the attachment affected by the 2nd respondent holds good ? and
 - ii) Whether the petitioner is entitled to refund of the security deposit amount of Rs.3,28,41,795/- lying with the Registrar Judicial ?
19. During the course of hearing, learned senior counsel Sri E.Madan Mohan Rao appearing for petitioner submitted that the petitioner was successful bidder and the sale certificate was presented for registration, however, the Sub-Registrar refused to register the sale certificate. Therefore, the petitioner filed W.P.No.39499 of 2018 and this Hon'ble Court vide order dated 04.12.2018 in I.A.No.1 of 2018 directed the 4th respondent to deposit a sum of Rs.3,28,41,795/- with the Registrar (Judicial) of this Court within a period of two weeks from the date of receipt of copy of the order. Upon such deposit being made, the Registrar (Judicial) shall invest the same in a cumulative fixed deposit in State Bank of India, High Court branch.

20. The learned senior counsel further contended that pursuant to the above directions, the petitioner deposited the amount with the Registrar (Judicial). Consequently, the sale certificate dated 26.07.2018 was registered as document No.2675/2019. He further contended that the 3rd respondent submitted a letter dated 27.02.2023 to the 2nd respondent to issue letter of consent for confirming the payment of Rs.1,65,05,945.30 p.s., under OTS scheme. Accordingly, the 2nd respondent vide endorsement dated 01.03.2023 issued No Due Certificate to the effect that respondent no.3 opted for OTS for an outstanding amount due to Department for Rs.3,42,91,540/-, for which settlement amount was arrived at Rs.1,65,05,945/- and the petitioner had paid the said settlement amount leaving no balance against OTS opted.

21. The learned senior counsel strenuously argued that in the light of the NOC issued by the 2nd respondent, the action of the respondents in not refunding the security deposit amount of Rs.3,42,91,540/- is illegal, arbitrary and unconstitutional. He further contended that there is no demand and no proceedings by the second respondent till date and since the amount was

deposited by the petitioner on behalf of 4th respondent and therefore, the petitioner is entitled to refund of the amount.

22. Learned senior counsel further contended that Amendment Act, 44/2016, dated 16.08.2016 was passed and by which, Section 31B is inserted to Recovery of Debt and Bankruptcy Act, 1993 (for short, Act, 1993) as well as Section 26E to the Act, 2002. As per which, secured creditors have given priority over all other debts including all revenues, taxes, cesses etc.

(i) Section 31B of the Act, 1993 reads as under:

“S.31B. Priority to secured creditors – Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realize secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.”

(ii) Section 26E of Act, 2002 reads as under:

“S.26E. Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the

Central Government or State Government or local authority.”

Explanation:- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”

23. In view of the above, the Bank has priority over all other debts and Government dues including revenue, taxes, cesses and rates due to the Central Government, State Government or local authority. Therefore, 2nd respondent does not have any right over the amount deposited and lying with the Registrar (Judicial) of this Court and petitioner is entitled to the said amount.

24. In support of his contention, learned counsel for the petitioner placed reliance on the following decisions:

- i) Judgment of Division Bench of this Court in W.P.Nos.41691 and 42450 of 2018 dated 13.06.2023.
- ii) Judgment of Division Bench of A.P. High Court in W.P.No.23312 of 2020, dated 08.12.2020.

25. On the contrary, learned counsel for respondent no.2 contended that the Government has announced a One Time Settlement Scheme and issued G.O.Ms.No.45 Revenue (CT-II) Department, dated 09.05.2022, by which One Time Settlement

scheme is introduced for disputed taxes to release the locked up revenue. As per clause (4) of the said G.O., 100% of undisputed tax will be payable. He further contended that the petitioner had obtained No Dues Endorsement on 01.03.2023 by misrepresenting and misleading the 2nd respondent that after issuance of letter of consent/No Due Certificate, W.P.No.39499 of 2018 would be withdrawn.

26. He strenuously argued that the OTS Scheme is applicable only to the disputed taxes and the 2nd respondent misrepresented that writ petition no. 39499 of 2018 was pending and on issuance of No Due Certificate, the writ petition will be withdrawn. However, fact remains that the said writ petition was already disposed of by this Court vide Order dated 26.12.2018. Therefore, as on the date of submission of application by the petitioner to the 2nd respondent i.e., 27.02.2023 and issuance of No Due Endorsement dated 01.03.2023, the writ petition was already stood disposed of.

27. He further contended that this Court, by common order dated 26.12.2018 in W.P.No.31410 and 39499 of 2018 observed that an order of attachment of Tax Department can be challenged only by the assessee or by the person in whose

hands the sale proceeds of the properties lie. It was further observed that if at all, the assessee or the mortgagees challenges the order of attachment and succeed, it is open for them to come back at that time asking for payment.

28. In the light of the above observations of this Hon'ble Court, petitioner is not entitled for refund of the amount, more so, when there is no challenge to the order of attachment either by 3rd respondent or 4th respondent till date.

29. He finally contended that Section 31B of the Act, 1993, and Section 26E of the Act, 2002, inserted by Amendment Act 44 of 2016 came into force only from 24.01.2020 vide S.O.4619(E) dated 26.12.2019 with prospective effect and, therefore, the attachment of the Department still holds good being much prior to the above amendment and, therefore, writ petition is liable to be dismissed.

Consideration by the Court:

Point No.(i):

30. Admittedly, neither 3rd respondent nor 4th respondent challenged the order of attachment of the 2nd respondent – Department and thus attachment still remain unchallenged. In view of the categorical observation of the Hon'ble Division Bench

of this Court in W.P.No.39499 of 2018 in the order dated 26.12.2018, it is either the assessee or the mortgagee i.e., respondent Nos. 3 and 4, are only entitled to challenge the order of attachment and seek refund of the amount deposited with the Registrar (Judicial). It is also relevant to note that the observations made by the Hon'ble Division Bench of this Court in W.P.No.39499 of 2018 remain unchallenged and binding on the parties.

31. Learned counsel for petitioner referred to two judgments passed by the Hon'ble High Court of Andhra Pradesh in W.P.No.23312 of 2020, dated 08.12.2020 and W.P.No.4063 of 2019 and batch dated 18.02.2021 in support of his contention. However, the facts of those cases and present case are slightly different.

32. It is relevant to refer to the judgment of Division Bench of Hon'ble High Court of Bombay passed in **State Bank of India vs. State of Maharashtra and others**¹, wherein, the division bench in similar circumstances by referring to the decisions of **Bank of Baroda vs. Commissioner of Sales Tax, M.P. Indore**

¹ 2020 SCC Online Bom 4190

and another²; Assistant Commissioner vs. Indian Overseas Bank and others³; Kalapur Commercial Co-operative Bank Ltd., Vs. State of Gujarat⁴, at paragraph 35 had held as under:

“35. In this view of the matter, though it would not be necessary for us to deal with the contention of the respondents relating to the date of effectiveness of section 26-E of the SARFAESI Act, however, we are of the view that even if section 26-E was effective only prospectively from 24th January, 2020 and not applicable to the facts at hand, that would not make any difference, as according to us section 31-B of the RDB Act itself would be sufficient to give priority to a secured creditor over the respondent’s charge for claiming tax dues.”

33. In **Kalapur** (supra), the Division Bench of Ahmedabad High Court at paras 57 & 58 held as under:

“57. While it is true that the Bank has taken over the possession of the assets of the defaulter under the SARFAESI Act and not under the RDB Act, Section 31B of the RDB Act, being a substantive provision giving priority to the “secured creditors”, the same will be applicable irrespective of the procedure through which the recovery is sought to be made. This is particularly because Section 2(la) of the RDB Act defines the phrase “secured creditors” to have the same meaning as assigned to it under the SARFAESI Act. Moreover, Section 37 of the SARFAESI Act clearly provides that the provisions of the SARFAESI Act shall be in addition to, and not in derogation of inter-alia the RDB Act. As such, the SARFAESI Act was enacted only with the intention of allowing faster recovery of debts to the secured credits without intervention of the court. This is apparent from the Statement of Objects and Reasons of the SARFAESI Act. Thus, an interpretation that, while the secured creditors will have priority in case they proceed under the RDB Act they will not have such priority if they proceed under the SARFAESI Act, will lead to

² (2018) 55 GSTR 210 (MP)

³ AIR 2017 Madras 67

⁴ 2019 SCC Online Gujarat 1892

an absurd situation and, in fact, would frustrate the object of the SARFAESI Act which is to enable fast recovery to the secured creditors.

58. The insertion of Section 31B of the RDB Act will give priority to the secured creditors even over the subsisting charges under other laws on the date of the implementation of the new provision, i.e. 01.09.2016. The Supreme Court, in the case of State of Madhya Pradesh v. State Bank of Indore, (2001) 126 STC 1 (SC), has held that a provision creating first charge over the property would operate over all charges that may be in force. The following observations made in para 5 of the said judgment are relevant:

“5. Section 33-C creates a statutory charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the bank in respect of the loan taken by the second respondent. There is no question of retrospectivity here, as on the date when it was introduced, section 33-C operated in respect of all charge that were then in force and gave sales tax dues precedence over them...”

34. In **Indian Oversea Bank** (supra), Full Bench of Madras High Court held 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.”

35. The sequence of events, facts of the case in **State Bank of India vs. State of Maharashtra** (supra) and present are identical i.e., prior charge of secured creditor, notice of

attachment by tax department prior to effective date of section 26E, SARFAESI, but after insertion of Section 31B of RDB Act; auction of property in the interregnum period. Therefore, in the facts and circumstances of case, we are in respectful agreement with the view taken by the Division Bench of High Court of Bombay.

36. The borrower / 3rd respondent availed credit facilities from Andhra Bank and created charge over the property vide Mortgage Deed No.1779/2010 dated: 2010, whereas, the respondent no.2 initiated measures under the Act, 2002 for sale of subject property and issued demand notice on 12.01.2018, which is subsequent to insertion of Section 31-B to RDB Act and, therefore, the charge of secured creditor has priority over the attachment of Tax Department.

Point no.(ii):

37. It is relevant to refer the common order dated 26.12.2018 passed by Hon'ble Division Bench of this Court in W.P.No.31410 & 39499 of 2018. At paragraph-9 of the order, Hon'ble Division Bench made it clear that the challenge of auction purchaser to the order of attachment is not maintainable and further observed that an order of attachment can be challenged only by

the assessee or by the person in whose hands the sale proceeds of the properties lie and concluded that the prayer made by the auction purchaser in W.P.No.39499 of 2018 is not maintainable.

38. Further, at paragraph no.10 of the order, Hon'ble Division Bench observed that if at all the assessee or the mortgagee challenges the order of attachment and succeed, it is open to them to come back at that time asking for payment of Rs.3,28,41,795/- deposited with the Registrar (Judicial) of this Court. Therefore, the petitioner does not have *locus standi* to seek refund of the amount. Accordingly, point no. (ii) answered against the petitioner.

39. For the aforesaid reasons, the Writ Petition fails and is accordingly dismissed. There shall be no order as to costs.

40. Pending miscellaneous applications if any shall stand closed.

P.SAM KOSHY, J

LAXMI NARAYANA ALISHETTY, J

Date: 17.08.2023
KKM

**HONOURABLE SRI JUSTICE P. SAM KOSHY
AND
HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

WRIT PETITION NO.9272 OF 2023

Date: 17.08.2023

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