2024:BHC-AS:28034-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.962 OF 2023

INDIAN BANK THR. CHIEF MANAGER ..PETITIONER

VS.

STATE OF MAHARASHTRA & ORS. ..RESPONDENTS

Mr. Charles Desouza a/w. Mr. V. N. Ajikumar for Petitioner.
Mr. N. C. Walimbe, Addl. G.P. a/w. Smt. R. A. Salunkhe, AGP for Respondent - State.

CORAM : A.S. CHANDURKAR &
RAJESH S. PATIL, JJ

DATE : 16th JULY 2024.

JUDGMENT (PER : RAJESH S. PATIL) :

1. RULE. Rule is made returnable forthwith.

2. This writ petition is filed under Articles 226 and 227 of the Constitution of India, by Petitioner-Bank, challenging the Orders of Attachments dated 14/9/2022 and 15/9/2022 initiated by Respondent no.2 (the Deputy Commissioner of Sales Tax, Pune).

3. The Petitioner is a bank who lended various credit facilities from time to time to Respondent no.6 (M/s. Anupama Enterprises). In order to secure the credit facilities granted by the Petitioner-Bank, the Respondent no.6 and its mortgagers created equitable mortgage in respect of three residential flats, situated at Pune (for short 'the secured assets').

4. As the borrowers failed to maintain the loan account, the Petitioner-Bank declared the account of Respondent no.6 as NPA, on 28/2/2017. Subsequently, the Petitioner Bank issued a demand notice dated 6/6/2019, under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') to Respondent no.6 (borrower), demanding a sum of Rs.1,29,67,873/-, together with interest thereon within 60 days. As the borrower did not comply with the demand as made in notice under Section 13(2) of the SARFAESI Act. The Petitioner bank through its authorized officer took symbolic possession of the secured assets on 25/9/2019 and further issued Possession Notice under Section 13(4) of the SARFAESI Act, which was published in newspapers.

5. The Petitioner Bank thereafter filed an Application No.401/2022 before the District Magistrate, Pune under Section 14 of the SARFAESI Act for seeking assistance for taking physical possession of the secured assets. Consequently, by an order dated 10/6/2022, the District Magistrate, Pune, was pleased to allow the

Application No.401/2022, with direction to Tahsildar to take physical possession with police assistance and hand over the same to authorized officer of Petitioner Bank.

6. Soon after, the authorized officer of Petitioner bank issued an E-auction notice dated 16/7/2022 for sale of secured assets. Pursuant to the order passed by the District Magistrate, Pune, the Tahsildar took physical possession of one of the secured assets by preparing panchanama. Accordingly, the physical possession of one of the secured assets was handed over to the Petitioner bank. Thereafter, the Tahsildar also took physical possession of another secured assets and handed over physical possession of the same to the officer of the Petitioner Bank. Since the Petitioner Bank were in possession of two secured assets, on 10/8/2022, an E-auction sale of the said two secured assets was proceeded with. The Respondent nos.4 and 5 participated in the auction process and were declared as successful bidders. However, as regards the third secured asset, no bid was received. Hence, the Sale Confirmation Letter dated 10/8/2022 was issued by the Auction Agency under SARFAESI Act for two secured assets. Accordingly, a Certificate of Sale dated 15/9/2022 was issued in favour of auction purchaser under Rule 9(6) of the SARFAESI Rules, 2002. The Respondent No.2, addressed communication to Petitioner Bank informing that there were arrears of sales tax for the period of 2010 - 2011 to 2015-2016 and a further arrears of sales tax during the period **2011-2012 to 2015-2016**. The Respondent no.2 (The Deputy Commissioner of Sales Tax) by its notice dated 12/8/2022 sought documents pertaining to two mortgaged properties. The Petitioner Bank by its letter dated 18/8/2022 replied to Respondent no.2 (The Deputy Commissioner of Sales Tax) and informed that they have priority charge over the secured assets, being a secured creditor and in case of any residual amount, the same will be handed over to Respondent no.2.

7. The Tahsildar, thereafter, took physical possession of the third secured assets on 25/8/2022. Accordingly, possession notice was issued by Petitioner bank under Section 13(4) of the SARFAESI Act.

The Petitioner Bank issued an E-auction notice dated 24/8/2022. Pursuant to the said E-auction, bids were received by the Petitioner Bank, and Respondent no.3 was declared as a highest bidder and Sale Confirmation Letter dated 15/9/2022 was issued by an Auction Agency to Respondent no.3, confirming acceptance of highest bid amount.

8. Thereafter, Respondent no.2 (the Deputy Commissioner of Sales Tax), served attachment Orders dated 14/9/2022 and 15/9/2022 in respect of the secured assets of Respondent no.6 (borrower) for non-payment of Sales Tax and said orders of attachment were copied to the Petitioner bank, and the Chairman of the respective Co-operative Societies, wherein the secured assets were situated, ward officers, Tahsildars.

9. The Petitioner Bank registered the mortgage charge of Petitioner-Bank in respect of secured assets with Central Registry of Securitisation Asset Reconstruction and Security Interest of India (for short 'CERSAI') on 4/10/2022.

10. The present Writ Petition challenges the Orders of Attachment dated 14/9/2022 and 15/9/2022 issued by Respondent no.2 (the Deputy Commissioner of Sales Tax).

11. Respondent no.2 appeared in the matter and filed their reply opposing the Writ Petition.

12. It is submitted that the Petitioner-Bank's CERSAI registration was only on 4/10/2022. It is further submitted that Section 37 of MVAT mentions that the first charge on the property would be of Central Act. Therefore, the Writ Petition should be dismissed with costs.

SUBMISSIONS ON BEHALF OF THE LEARNED COUNSEL FOR THE PARTIES.

13. Mr. Charles D'Souza appeared on behalf of the Petitioner and made his submissions.

(i) Mr. D'Souza submitted that there was no prior charge or notice of publication in respect of the charge or claim of sales tax, registered under the SARFAESI Act, in CERSAI before creation of charge of secured creditors.

(ii) Mr. D'Souza submitted that a Bench of three Judges of this Court in ***Jalgaon Janta Sahakari Bank Ltd. and another vs. Joint Commissioner of Sale Tax Nodal 9, Mumbai and another***[1] has dealt with the issue of priority of claim of the secured creditors. The said judgment is squarely applicable to the present proceedings.

(iii) Mr. D'Souza submitted that despite the settled principle of law, the Sales Tax Department issued an order of attachment on the secured assets as well issued a purported notice to the Housing Society wherein the secured assets were situated, thereby restraining them from transfering or dealing with the secured assets.

(iv) Mr. D'Souza to buttress his submissions referred to the Full Bench judgment of this Court in ***Jalgaon Janta Sahakari Bank Ltd.*** (supra).

14. Learned Additional Government Pleader appeared on behalf of the Respondent no.2 (The Deputy Commissioner of Sales Tax) and made his submissions:-

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(i) Learned Additional Government Pleader submitted that the Sales Tax Department has claimed over the secured assets in form of arrears of Sales Tax and hence, they had a priority of claim.

(ii) Learned Additional Government Pleader referred to the judgment of the Division Bench of this Court in **Purushottam Prabhakar Chavan vs. CST**[2] passed in Writ Petition No.3477 of 2024, decided on 3/5/2024.

15. We have heard counsel from both sides and we have also considered the documents on record.

16. The issue to be answered in the present matter is ;

> "*Whether the Respondent no.2 (The Deputy Commissioner of Sales Tax) will have priority charge over the secured assets sold by Petitioner bank (secured creditor) under the SARFAESI Act.*"

17. The borrower or guarantor have not challenged the impugned orders of Attachment.

18. In the present proceedings, it is a matter of record that on 4/10/2022, the Petitioner bank registered the secured assets under

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the Central Registry of CERSAI.

19. There is no dispute that Respondent no.2 (The Deputy Commissioner of Sales Tax) has registered its claim of arrears of sales tax with regard to Respondent no.6 (M/s. Anupama Enterprises) on 20/2/2023 and 28/2/2023, only after the Petitioner Bank had registered the mortgage/charge of Bank in respect of secured assets. The Full Bench of this Court in ***Jalgaon Janta Sahakari Bank Ltd.*** (supra) has clarified the issue of priority of security creditor. Paragraphs 78, 79, 84, 85, 88 and 150 of the said judgment reads as under:-

> "78. Section 26-E, also beginning with a *non-obstante* clause, is unambiguous in terms of language, effect, scope and import. A 'priority' in payment over all other dues is accorded to a secured creditor in enforcement of the security interest, if it has a CERSAI registration, except in cases where proceedings are pending under the provisions of the Insolvency and Bankruptcy Code, 2016.
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> 79. The disabling provision in section 26D and the enabling provision in section 26-E, both begin with *non-obstante* clauses, as noticed above. The scheme of Parts III and IV-A of the SARFAESI Act envisages benefits to a secured creditor who is diligent and obtains CERSAI registration while depriving a secured creditor of even taking recourse to Chapter III without the requisite registration.
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> 84. The fact that the BST Act and the MVAT Act, which are under consideration, expressly make it subordinate or subservient to any Central legislation creating first charge cannot be ignored. The 2016 Amending Act being of recent origin, the first query that arises in this regard is : did the Parliament not know that there is a plethora of legislation in the country, both Central and State, that speaks of

creation of 'first charge' in favour of a department of the Central/State Government? The reply cannot but be in the affirmative. The next query that would obviously follow is : whether the word 'priority' appearing in section 26E of the SARFAESI Act, i.e., "... 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" (italics for emphasis by us), was used without a purpose? This reply has to be in the negative.

85. Priority means precedence or going before (Black's Law Dictionary). In the present context, it would mean the right to enforce a claim in preference to others. In view of the splurge of 'first charge' used in multiple legislation, the Parliament advisedly used the word 'priority over all other dues' in the SARFAESI Act to obviate any confusion as to inter-se distribution of proceeds received from sale of properties of the borrower/dealer. If a secured asset has been disposed of by sale by taking recourse to the Security Interest (Enforcement) Rules, 2002 it would appear to be reasonable to hold, particularly having regard to the non-obstante clauses in sections 31 B and section 26E, that the dues of the secured creditor shall have 'priority' over all other including all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

88. Bare perusal of the 2016 Amending Act would show that the dues of the Central/State Governments were in the specific contemplation of the Parliament while it amended the RDDB Act and the SARFAESI Act, both of which make specific reference to debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority and ordains that the dues of a secured creditor will have 'priority', i.e., take precedence. Significantly, the statute goes quite far and it is not only revenues, taxes, cesses and other rates payable to the State Government or any local authority but also those payable to the Central Government that would have to stand in the queue after the secured creditor for payment of its dues.

150. The contention that rules are yet to be framed for making sub-section (4) of section 20B operational is wholly incorrect. By a notification dated 24th January 2020 issued by the Department of Financial Services in the Ministry of Finance, Govt. of India, published in the Gazette of India of even date, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest(Central Registry) (Amendment) Rules, 2020 were duly notified whereby amendments were incorporated in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Rules, 2011 (hereafter '2011 Rules', for short). In view of the amendments that have now been incorporated in the 2011 Rules with effect from the date Chapter IV-A of the SARFAESI Act was made effective and enforceable, the relevant department of the State Government despite attachment orders being issued by the competent authority can only avoid

> compliance of sub-section (4) of section 26B at its own peril. We hold that attachment orders issued post 24th January 2020, if not filed with the Central Registry, any department of the Government to whom a person owes money on account of unpaid tax has to wait till the secured creditor by sale of the immovable property being the secured asset mops up its secured dues."

20. The dicta of the Full Bench in ***Jalgaon Janta Sahakari Bank Ltd.*** (supra) is squarely applicable to the present proceedings. The judgment ***Purushottam Prabhakar Chavan*** (supra) relied upon by the State is of no help to the State (Sale Tax Department) as even in the said judgment the ratio of ***Jalgaon Janta Sahakari Bank Ltd.*** (supra) has been referred to and the Court has come to a conclusion in paragraph 13 of the said judgment that even where there is an attachment order of the Sales Tax authorities prior to 24/1/2020, without any further steps being taken towards issuing a proclamation of sale, the Sales Tax Authorities cannot claim priority over the dues payable to the secured creditor, whose security interest is registered with CERSAI.

21. Section 26E of the SARFAESI Act, start with "Notwithstanding anything contained in any other law ……". Section 26E of the SARFAESI Act very clearly mentions that the secured creditors shall be paid in priority over all other debts and taxes. In the present proceedings it is Petitioner Bank who has registered its claim against the secured assets with CERSAI earlier i.e. 4/10/2022, in view of the law as laid down by the Full Bench of this Court, in ***Jalgaon Janta Sahakari Bank Ltd.*** (supra) and as per Section 26E of the SARFAESI Act, the Petitioner Bank (secured creditor) will have priority over the revenues and taxes of the State Government.

22. Hence, we are of the view that the present Writ Petition filed by Petitioner Bank (secured creditor) deserves to be allowed.

23. However, we hereby clarify that the Respondent No.2 (the Deputy Commissioner of Sales Tax, Pune) would be free to take such steps as they deem fit against the Respondent No.6 for recovery of Sales Tax dues as per law.

24. The Writ Petition is allowed. Rule is made absolute in terms of prayer clauses (a), (b) and (c) which read as under:-

> "(a) That this Hon'ble Court be pleased to issue writ of certiorari or any other appropriate Writ, Order or Direction

under Articles 226 and 277 of the Constitution of India calling for the records and proceedings initiated by Respondent No.2 and quash and set aside the order of attachment dated 14/9/2022 (Exhibit-KK hereto) and 15/9/2022 (Exhibit - LL hereto) in respect of the said secured assets more particularly mentioned at Exhibit -A hereto including all further action and references made therein;

(b) That the Hon'ble Court be pleased to declared and hold that the Petitioner Bank is having right to enforce the security by sale of the said secured assets more particularly mentioned at Exhibit - A hereto in accordance with law unhindered by the sales tax claim made by Respondent No.2.

(c) That the Hon'ble Court be pleased to permit the Authorized Officer of Petitioner Bank to complete the process of auction sale and give effect of transfer of un-encumbered rights in respect of the said secured assets more particularly as mentioned at Exhibit-A hereto under the SARFAESI Act, 2002."

25. The Writ Petition is disposed of accordingly.

[RAJESH S. PATIL, J.] **[A.S. CHANDURKAR, J.]**