IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9881 OF 2017

1] Sundarlal Sawji Urban Co.op. Bank Ltd.,
Branch Jalna Road, Aurangabad,
Through its authorized officer
Mr. Suhas Bhanukumar Jinturkar,
Age : 54 years,
Occu : Service (Recovery Manager)

2] Shivaji Gopinath Mahajan,
Proprietor, Shree Om Sai Engineering
Age : 34 years, Occ : Business,
R/o : Plot No. 68/69, Gut No.39, Ceat Road,
Waluj MIDC, Aurangabad .. Petitioners

VERSUS

1] Assistant Commissioner,
Customs, Central Excise & Service Tax,
Aurangabad III Division,
N-5, Town Center, CIDCO, Aurangabad

2] Maharashtra Industrial Development
Corporation (MIDC),
Through its Regional Manager,
Aurangabad .. Respondents

...

Mr. S.V. Adwant, Advocate for petitioners
Mr. D.S. Ladda, Standing Counsel for respondent no.1
Mr. S.S. Dande, Advocate for respondent no. 2

...

CORAM : SUNIL P. DESHMUKH &
S.M. GAVHANE, JJ.
DATE : 01-08-2019

JUDGMENT (PER – SUNIL P. DESHMUKH, J.) :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the parties finally, by consent.

2. There is no dispute in respect of factual aspects involved in the matter that, plot no. E-122 at Maharashtra Industrial Development Corporation (MIDC), Waluj Industrial Area, Aurangabad had been leased out under registered instrument by respondent no. 2 – MIDC, to a concern referred to as M/s. Integrated Automation and Robotics (IAR) on 07-12-2009. A tripartite agreement had been entered into among MIDC, Sundarlal Sawji Urban Co-operative Bank Ltd. – petitioner no. 1 - the financial institution (the Bank) and partners of IAR (the borrower), empowering the Bank to sell demised premises [(clause 2(b)], recognizing absolute right of the financial institution to realize undischarged debt of the Bank. Deed of mortgage in favour of the Bank had been executed by partners of IAR on 31-12-2009 at Aurangabad in respect of aforesaid plot for cash credit loan of Rs. 50,00,000/-.

3. IAR had breached terms and conditions for sanction of loan and had been classified as non-performing asset in 2016.

4. In exercise of its power under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFAESI Act'), the Bank issued a demand notice to IAR pursuant to section 13(2) on 11-05-2016 directing to discharge its liability of Rs. 59,10,132/-. The same having not been complied with, further measures under section 13 of the SARFAESI Act for recovering debt ensued and possession of secured assets had been taken over by the Bank. A notice in English and in vernacular had been published on 12-07-2016. Fresh valuation report from government valuer with a view to put property for sale was given to the tune of Rs.49,75,000/-. The Bank had issued auction sale notice inviting bids for sale of plot no. E-122 admeasuring 600 square meter on *'as is where is, whatever there is, and without recourse'* basis.

5. Thereafter, respondent no.1 – Central Excise Authority had issued a communication to the Bank on 27-09-2016, claiming an amount of Rs.1,08,17,846/- towards recovery of excise dues, referring to that the immovable property i.e. factory building situated on plot no. E-122 had been attached under *panchanama* dated 25-03-2015.

6. On 28-12-2016, the Bank – the financial institution responded to the claims of respondent no.1, stating that security interest has been created over the attached property under a registered mortgage. The Bank has a superior right which cannot be dilated or diluted by respondent no. 1. Section 26-E of the amended SARFAESI Act had been referred to, to state that security interest of creditor on registration has priority over all other debts and all revenues, taxes, cesses and other rates payable to the central or state government. Petitioner no.1 – the Bank is exercising statutory right, referring further to that realization of secured assets is not contingent upon consent of respondent no. 1 and, thus, it would proceed to recover its dues, and also purporting to intimate that respondent no. 1 – authority may not be able to seek recovery from the corpus of fund from the sale proceeds with the bank. The Bank, as such, had refuted claims of respondent no. 1.

7. The Bank proceeded with auction sale inviting bids in February, 2017. In response to the invitation, petitioner no.2 – the purchaser had given the highest bid and sale was confirmed in favour of petitioner no. 2.

8. Respondent no. 1 under a letter dated 22-03-2017 purported to communicate that it has been informed by IAR to said authority that the Bank – petitioner no. 1 has auctioned factory

building situated on plot no. E-122 along with the land for Rs.60 Lakhs. The valuation of property through government valuer obtained by central excise authority shows saleable value of the property over Rs.1 Crore and distress value was referred to as Rs. 87,26,00,000/-. Thus, it transpires that the property has been sold fetching Rs.27,26,000/- less (31%) than the distress value. The authority had intimated about central excise dues outstanding against IAR and had requested to keep the authority informed before taking action for recovery. It was requested to give details of process of selling the property and to inform as to whether any surplus amount has been received from the sale.

9. It appears that, MIDC – respondent no. 2 had under a communication dated 17-05-2017 asked for certain requirements, *inter-alia*, no-dues / no-objection from Sales Tax and Central Excise Departments, in response to request for transfer of property in the name of petitioner no. 2 – the purchaser. In the circumstances, the petitioners are before this court.

10. It is the case of petitioner no. 1, it being a secured creditor, in fact and in law, its dues will have precedence in recovery of amount from secured assets. Secured creditor has priority over dues of respondent no. 1. Secured assets of IAR (the borrower) have been sold and the proceeds thereof are appropriated towards

recovery of bank's dues. It is an action in accordance with the arrangement in agreements *inter-parte* and the same is having backing of law. Respondent no.1's dues in this case would seldom be recoverable from sale proceeds of secured assets. It is contended that IAR has not sold its business or trade to petitioner no. 2. The Bank has sold secured assets to petitioner no. 2 and not the business or trade of IAR. The property sold to petitioner no. 2 by petitioner no. 1 is not encumbered with the dues of respondent no. 1 either in fact or in law. Respondent no. 1 would not have first charge for its dues over the secured assets, in fact and in law, having regard to relevant provisions *viz.* Section 26-E and section 35. It is being submitted that the impugned communication from MIDC is untenable and transfer of property in favour of petitioner no.2 cannot be detained for no-objection or no-dues from Central Excise Department. Insistence to have the same to cause transfer is not proper and is not legitimate. MIDC cannot act as recovery agent for respondent no. 1. As a matter of fact, petitioner no. 1 has absolute right to sell secured property in case of default by borrower and said right has been exercised by petitioner no. 1 and the same is lawful.

11. It is the case of respondent no. 1 – Central Excise Authority that IAR had defaulted payment of central excise duty and

that an amount of Rs. 1,46,76,788/- is recoverable from said assessee. It has been referred to that a demand notice had been issued to said assessee in September, 2014. In furtherance of the same, notice of attachment had been issued on 17-09-2014 and 24-03-2015 and a corrigendum thereto correcting the defaulted amount had been issued on 13-05-2015. The property – plot no. E-122 was attached under regular *panchanama* on 25-03-2015 and a bungalow was also attached. The action of attachment by respondent no. 1 had been taken to this court under writ petition no. 4777 of 2015 by IAR – the borrower which subsequently came to be withdrawn in August, 2016. During pendency of said writ petition, an amount of Rs. 30 Lakh was deposited by assessee in this court and the same had been withdrawn by respondent no. 1. Referring to certain circumstances, it is sought to be imputed that attachment was within the knowledge of the financial institution and as a responsible institution, it was obligatory to take into consideration liability of defaulted taxes of the central government. Petitioner no. 1 ought to have called upon respondent no. 1 to give the status of tax dues and attachment. In the process, there was contravention of, provisions of Central Excise Act and the rules, taking undue advantage of SARFAESI Act as well as violation of provisions of rules 8 and 9 of Security Interest (Enforcement) Rules, 2002.

Though writ petition no. 4775 of 2015 was withdrawn by IAR on 09-08-2016, during pendency of writ petition subject to condition of deposit of the amount, coercive measures were restrained. Attachment of the property had continued.

12. It is contended that respondent no. 1 had started action for recovery of its dues before renewal of cash-credit facility in January, 2015. Provisions of Section 11(1) of Central Excise Act, 1944 vests the officer with powers to issue notice to petitioner no. 1 bank and notice is bound to be complied with. Proviso to section 11(1) has been referred to, to contend that it empowers realisation of dues from transferee of property. Section 11-E of said enactment has also been referred to claim first charge on the property of the assessee.

13. It is being claimed that the object underlying the attachment of 25-03-2015 by respondent no. 1 was to have realization of its dues from fair market value and/or sale proceeds of the property E - 122.

14. Learned counsel for petitioners Mr. S.V. Adwant, in support of his submissions has referred to and relied on various judgments. Mr. Adwant refers to and heavily relies on decision by supreme court in the case of *Rana Girders Limited Vs. Union of India and*

*others* reported in *2013 (10) SCC 746*, wherein the supreme court had considered that secured creditor would have priority over excise dues in the absence of specific provision in the Central Excise Act, 1944. It had been observed that debt which is secured or which by reason of provisions of statute becomes first charge over the property, must be held to prevail over debt which is not secured. He, therefore, submits that, secured creditor's dues would have priority over the dues of department.

15. He refers to decision in the case of *Tata Metaliks Limited Vs The Union of India (UOI)* reported in *MANU/MH/0158/2008* to consider that when the assets are sold in an auction under the SARFAESI Act, the purchaser will hold the assets free from all encumbrances. This is a decision dated 20-02-2008 by a division bench of this court at principal seat in writ petition no. 759 of 2006.

It was a case wherein the petitioners were refused excise registration on the ground of non-cancellation of registration in favour of respondent no. 7 for pending excise dues. In the same, it has been observed that government dues do not have priority over the dues of secured creditors. It had been considered that a successful bidder in an auction held under the SARFAESI Act is not bound to pay pending excise and customs dues of erstwhile owner. It was observed that having regard to its provisions, SARFAESI Act would prevail over the provisions of the Customs Act and Central Excise Act. Once the purchaser has purchased the assets in the auction held under the SARFAESI Act, he will hold the assets free from all encumbrances.

16. Mr. Adwant points out, it is not the case at all by respondent no. 1 that the entire business had been purchased by petitioner no. 2. In the circumstances, petitioner no. 2 – purchaser would not be liable to discharge central excise dues of erstwhile assessee.

17. He purports to point out, in the decision of supreme court in the case of *State of Karnataka and another Vs. Shreyas Papers (P) and others* reported in *(2006) 1 SCC 615*, it had been considered that the provision of Karnataka Sales Tax Act in section 15(1) is applicable only in the case of transfer of ownership of business and not to mere transfer of assets.

18. He refers to a decision of division bench of Gujarat high court in the case of *Surat Metallics Ltd. and another Vs Commissioner of Central Excise and another* reported in *MANU/GJ/1132/2011*, to consider that an attachment would not create any charge and would not be an encumbrance.

In said case, immovable property had been sold to petitioner therein under the SARFAESI Act by respondent – bank which was a secured creditor. There was no sale of business or trade in whole. Petitioner had not succeeded to the business. In the circumstances, it was considered by Gujarat high court that proviso to section 11 of the Central Excise Act would not be attracted. It was further held that any attachment made by the department would no longer survive.

19. He also points out decision of Gujarat high court in the case of *Lamifab Industries Vs Union of India* reported in *MANU/GJ/1457/2014* wherein there had been refusal to add plot purchased by petitioner therein, in registration certificate. It was held that the respondents could not refuse to grant registration in respect of premises on the ground that earlier registration had not been surrendered and there were outstanding dues. Impugned order therein had been set aside.

20. He refers to another decision of Gujarat high court in the case of *Shreejikrupa Spinners Pvt. Ltd. Vs Union of India and other* reported in *MANU/GJ/1458/2014*, which he contends that applies on all fours to present case. Mr. Adwant submits that by analogy, all aforesaid decisions would apply on all fours.

21. Learned counsel Mr. D.S. Ladda appearing for respondent no. 1 – Central Excise authority, purports to rely on provisos to, section 11(1) of Central Excise Act and section 142(1)(c)(ii) of the Customs Act. According to him those empower a proper officer to dispose of movable or immovable property belonging to an assessee and detain the same until amount is paid and in case of unpaid amount, such property can be sold to realise amount due from the assessee along with costs. He submits that under the same, even transferee would be responsible to discharge liability of taxes in case of transfer of business.

22. He purports to refer to and rely on section 11-E of Central Excise Act, 1944 which reads, thus,

> *" **11-E. Liability under Act to be first charge -** Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in section 529-A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002), be the first charge on the property of the assessee or the person, as the case may be."*

He contends that having regard to aforesaid provision, the Central Excise Department would have first charge over the assets of the assessee.

23. In support of his aforesaid submissions, he purports to refer to and rely on a judgment of supreme court in the case of *Central Bank of India Vs. State of Kerala and others* reported in *IndiaLawLib/268699 : (2010) AIR (SCW) 2436*. He submits, the question raised in the decision was, *asto* whether provisions of the State enactments would be considered to be inconsistent with the provisions contained in Recovery of Debts Due to Banks and Financial Institutions act, 1993 and the SARFAESI Act for enforcement of security interest and whether in the circumstances, central legislations would have primacy over the state legislations. Statutory first charge would prevail over charge or right of a mortgagee or secured creditor. He submits that supreme court had on analysis found that the provisions under section 26B of Kerala General Sales Tax Act, 1963 and section 38C of Bombay Sales Tax Act, 1949 create first charge on the property of dealer liable to pay sales tax.

24. Learned counsel also refers to decision in the case of *Thane Janata Sahakari Bank Ltd. Vs Commissioner of Sales Tax* decided by division bench of this court reported in *LAWS(BOM)-2006-4-91*, which was concerning section 38-C of Bombay Sales Tax Act, 1959 and section 35 of SARFAESI Act, wherein it had been considered section 35 of SARFAESI Act would not be able to prevail over provision of

section 38-C of Bombay Sales Tax Act and sales tax dues would have precedence over the banks charge.

25. Learned counsel Mr. Ladda has relied on the case of *Metal Box India Ltd. Vs Union of India* reported in *IndiaLawLib/1045212* delivered by a division bench of Punjab and Haryana high court.

26. Mr. Ladda also purports to refer to the decision of supreme court in the case of *Greater Bombay Co-operative Bank Limited Vs United Yarn Text Pvt. Ltd. and Ors.* reported in *2007 AIR(SC) 1584 : 2007(6) SCC 236* passingly contending that the DRT Act not being applicable to co-operative societies, by analogy, SARFAESI Act would not be legitimately invoked by a co-operative bank.

27. Section 11(1) of Central Excise Act, 1944 and proviso thereof, reads, thus,

> *" **11. Recovery of sums due to Government** — (1) In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, including the amount required to be paid to the credit of the Central Government under section 11-D the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums may deduct or require any other Central Excise officer or a proper officer referred to in section 142 of the Customs Act, 1962 (52 of 1962) to deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may be in his hands or under his disposal or control of such other officer, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the*

*Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue:*

*Provided that* ***where the person*** *(hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due,* ***transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded*** *in such business or trade* ***by any other person****, all* ***excisable goods****, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody* ***or possession of the person so succeeding may also be attached and sold*** *by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the principal Commissioner of Central Excise or Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.***"**

28. Section 142(1)(c)(ii) of the Customs Act, 1962 reads, thus,

***" 142. Recovery of sums due to Government*** *– (1) Where any sum payable by any person under this Act including the amount required to be paid to the credit of the Central Government under section 28-B is not paid, --*

*(a) ....*

*(b) ....*

*(c) if the amount can not be recovered from such person in the manner provided in clause (a) or clause (b) -*

*(i) ...*

*(ii) the proper officer may, on an authorisation by Principal Commissioner of Customs or Commissioner of Customs and in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the*

> *proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person:*
>
> *Provided that* ***where the person*** *(hereinafter referred to as predecessor),* ***by whom any sum payable*** *under this Act including the amount required to be paid to the credit of the Central Government under section 28-B is not paid,* ***transfers or otherwise disposes off his business or trade in whole or in part,*** *or effects any change in the ownership thereof,* ***in consequence of which he is succeeded*** *in such business or trade* ***by any other person, all goods,*** *materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody* ***or possession of the person so succeeding may also be attached and sold*** *by the proper officer, after obtaining written approval from the Principal Commissioner of Customs or Commissioner of Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer, or otherwise disposal or change."*

29. Section 11 of the Central Excise Act empowers the authorities to realise sums payable to the government by attachment and sale of excisable goods belonging to a person / assessee and in case of non-recovery, to recover the dues as it were an arrears of land revenue.

30. Provisos to section 11(1) and section 142(1)(c)(ii) are to similar effect. On purchase of business and trade, a transferee may incur liability to discharge excise or customs dues. However, it is not the case of Central Excise department that petitioner no. 2 – purchaser has purchased the entire business of IAR. The provisos do not refer to that it empowers the authorities to recover

department's dues from attachment and sale of security interest of secured creditor.

31. It is not the case of any of the respondents that the action taken by petitioner no. 1 is in breach of the SARFAESI Act nor the respondents have been in a position or are being able to show that the action taken by petitioner no. 1 is in breach of the Central Excise Act or the Customs Act. Section 11-E reproduced hereinabove specifically shows that the dues of the department - respondent no. 1 would be first charge subject to the SARFAESI Act showing that the Central Excise Act does not have overriding effect over the SARFAESI Act.

32. Although on behalf of respondent no. 1, question of application of SARFAESI Act is sought to be touched upon, it would be worthwhile to take into account that in quite a few cases, this particular submission has been dealt with and considered by division benches of this court, holding that the SARFAESI Act may be invoked by co-operative bank, vide, judgments *M/s Khaja Industries Vs State of Maharashtra and another* reported in *2007(6) All MR 887* and *Maharashtra State Co-operative Bank Ltd. Vs State of Maharashtra and others* reported in *2008(4) All MR 149.* These judgments have been followed subsequently. There is an order in writ petition no. 2123 of 2013 by

a division bench at principal seat passed on 27-10-2016. In the same, it has been considered that judicial discipline would require to lean in favour of applicability of SARFAESI Act to co-operative banks.

33. While section 26-E titled '***Priority to secured creditors-***' is being referred to on behalf of petitioners, the position emerges that said provision yet has not been enforced and in this respect, an order by division bench of this court in the case of *The Osmanabad District Central Co-operative Bank Ltd. Vs. Assistant Provident Fund Commissioner, Solapur and others* in writ petition no. 942 of 2018 dated 02-05-2019 can be usefully referred to.

34. It would be worthwhile to refer to section 35, reading, thus,

> " ***35. The provisions of this Act to override other laws.*** -
>
> *The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

35. No analogy can be drawn from the case of *Metal Box India Ltd.* (supra) which would be applicable to the present facts and circumstances. Said decision is given in a different context. As a matter of fact, in paragraph no. 16 thereof, the court has observed as under,

> " *16. Examining the principles laid down in the said judgment to the facts of the present case, we find that* ***Section 11E of the Excise Act gives overriding effect over*** *the provisions of all Central and State statutes* ***except*** *to the extent of the dues of* ***the workmen*** *and* ***the secured*** *creditors. Having regard to aforesaid, reliance on said case is hardly of any relevance to the present matter.* "

36. Though decision of supreme court in the case of *Builders Supply Corporation Vs The Union of India (UOI) Represented By The Commissioner Of Income Tax, West Bengal and Others* reported in *(1965) AIR(SC) 1061 : IndiaLawLib/277343* has been referred to, on behalf of respondent no.1, however, said decision appears to have been delivered in an altogether different context and would seldom have any application.

37. There is no provision like section 38-C of Bombay Sales Tax Act in the Central Excise Act, 1944 *albeit* section 11-E purports to let first charge to central excise. Yet, the very provision indicates that amount payable under the Central Excise Act, 1944 would be subject to provisions of various enactments including, *inter-alia*, SARFAESI Act. Judgments relied on, on behalf of respondent no. 1, in this respect, *viz*; *Central Bank of India* (supra) and *Thane Janata Sahakari Bank Ltd.* (supra), in view of aforesaid, do not appear to carry forward the case for respondent no. 1.

38. The cumulative effect of provisions, the agreements, the facts and circumstances, law and decisions would show that secured

creditor *viz*; the Bank claims would have priority over the revenue and taxes payable to respondent no.1.

39. Present petition has its genesis in the communication which is annexed to the petition at Exhibit - M (page – 79) requiring submission of, *inter-alia*, no-dues/no-objection from Central Excise Department.

40. The situation emerges that there is no dispute that petitioner no. 1 is a secured creditor and the property concerned – plot no. E-122 at MIDC Waluj, Aurangabad has been mortgaged by borrower IAR under sanction from MIDC – respondent no. 2. Pursuant to the empowerments under the agreement as well as the SARFAESI Act, the bank had proceeded with auction for recovery of its dues. Contentions on behalf of respondent no. 1 that provisions of Central Excise Act and Customs Act would empower authorities to cause recovery from property and give precedence to the central excise dues do not appear in the facts and circumstances of the case, bear any strength or substance. Reasons which have weighed with the courts in the decisions referred to by petitioners as well as provisions of the enactments relied on, on behalf of respondent no. 1 particularly sections 11 and 11-E of Central Excise Act do not appear to give priority to the central excise dues over the dues of secured creditor. Decisions referred to in foregoing discussion, while

it is not the case of respondents that entire business of IAR – the borrower has been sold are pointer to that a condition cannot be insisted upon to produce no-dues/no-objection certificate from the department referred to in impugned communication.

41. In the circumstances, it does not appear that the insistence under the impugned letter by MIDC to produce no dues / no-objection certificate from the Central Excise Department is sustainable. Requirement under impugned communication for no-dues/no-objection certificate from Central Excise department is unsustainable and, as such, communication to that extent and in that respect is set aside. The dues of the central excise with the erstwhile assessee IAR – the borrower would not impede transfer and it may not be detained on the ground of no-objection / no-dues certificate from respondent no. 1.

42. In the circumstances, the writ petition is allowed to aforesaid extent. Rule is made absolute accordingly.

43. Consequently, civil application no. 4010 of 2019 also stands disposed of.

Sd/-
[S.M. GAVHANE]
JUDGE

Sd/-
[SUNIL P. DESHMUKH]
JUDGE

arp/