pdp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9947 OF 2019

The Cosmos Co-operative Bank Ltd.
& Anr. .. Petitioners

Vs.

The State of Maharashtra & Ors. .. Respondents

Mr. Joel Carlos a/w Mr. Nikhil Rajani i/by V. Deshpande & Co. for Petitioners.
Mr. K. S. Thorat, AGP for Respondent No.1.

CORAM: PRADEEP NANDRAJOG, CJ. &
SMT. BHARATI DANGRE, J.

NOVEMBER 20, 2019.

P.C.

1. Heard learned counsel for the parties.

2. The Petitioner-Bank, a secured creditor, is aggrieved by an attachment order dated 12.12.2018 issued by the Deputy Commissioner of Sales Tax, Ahmednagar recording sales tax dues in sum of ₹ 1,95,43,279/- and attaching the secured asset available with the Petitioner-Bank. The debtor is Respondent No.5 which is under liquidation.

2. On 13.11.2019 we had decided Writ Petition No. 3820 of 2018. The order reads as under :-

> *"1. On 1st September, 2016 the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFESI Act) was amended by a Central Legislation vide Act No. 44 of 2016. Section 26E was inserted in the statute book. It reads as under :-*
>
> > *"**26E. Priority to secured creditors.** - 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 (31 of 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."*

2. The Maharashtra Value Added Tax Act, 2002 which came into force on 1st April, 2005. Vide Section 37 it was stipulated as under:-

> *"**37. Liability under this Act to be the first charge.**- Notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer or, as the case may be, person".*

3. Suffice it to state that Section 26E of the SARFESI Act has a non obstante clause and so does Section 37 of the Maharashtra Value Added Tax Act, 2002, but notwithstanding the non obstante clause in Section 37 it is subject to any provision regarding creation of first charge in any Central Act. Meaning thereby, harmoniously read, a secured creditor would have a first charge over an asset and the charge created in favour of the State of Maharashtra under Section 37 of the Maharashtra Value Added Tax Act, 2002 would be subject to the first charge created by the Central Legislation which in the instant case would be SARFESI Act, 2002.

4. Thus, we hold that the Petitioner, Co-operative Bank, would have the first lien over the sale proceeds realised by selling the secured assets.

If there is any surplus, the same would be credited to the account of the State of Maharashtra.

3. Noting that the dues of the Petitioner as claimed in the notice under Section 13(2) of the SARFESI Act were ₹ 123/- Crores, we direct that the amount lying in this Court pursuant to sale of Flat No. 302, Heera Kunj, Bhagat Singh Road, Vile Parle (W), Mumbai 400 056 together with interest which is accrued thereon shall be released by the Registry of this Court in the name of the Petitioner for the reason the said amount is much less than ₹ 123/- crores.

4. The Writ Petition is accordingly disposed of."

3. In the instant case in the absence of dates on which relating to sales tax dues the alleged charge was created, we dispose of the Petition declaring that the secured asset has to be sold and the buyer purchases the same free from any tax liabilities. *Inter se* the Petitioner and the Sales Tax Department on the issue of priority of charge, the issue could be resolved thereafter.

4. The question of setting aside the attachment by the Sales Tax Department does not arise and indeed the Sales Tax Department would be entitled to attach the property for realizing the tax dues. However, as clarified in our decision dated 13th November, 2019, this would not have any bearing on the sale

of the property which is secured to the Petitioner and has been attached by the Sales Tax Authorities.

SMT. BHARATI DANGRE, J. **CHIEF JUSTICE**