

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.06.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J. SATHYA NARAYANA PRASAD

Writ Appeal No. 3249 of 2019

Assistant Commissioner of Customs (Bonds)
Office of the Principal Commissioner of Customs
Chennai-III Commissionerate
Customs House
No.60, Rajaji Salai
Chennai - 600 001 ..Appellant/1st Respondent

Versus

1. M/s. Annam Steels Private Limited
represented by its Director
Mr. C. Vijaykumar
No.244, T.H. Road, Tondiarpet
Chennai - 600 081 ..1st Respondent/Petitioner
2. Indian Overseas Bank
represented by its Authorised Officer
Central Office Annexe Building
1st Floor, No.763
Chennai - 600 002 ..2nd Respondent/2nd Respondent

Appeal filed under Clause 15 of Letters Patent against the Order dated 12.02.2019 passed in W.P. No. 25185 of 2018 on the file of this Court.

Prayer in W.P. No. 25185 of 2018: Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified call for the records relating to the proceedings of the Respondent in F.No.S.Misc/391/2017-Bonds (sea) dated 20.07.2018 quash the same.

For Appellant : Mr. V. Sundareswaran

For Respondents : Mr. R.N. Amarnath for R1

Mr.F.B. Benjamin George for R2

JUDGMENT

R.MAHADEVAN, J.

The order of the learned Judge dated 12.02.2019 made in WP.No. 25185 of 2018 is questioned by the appellant / Revenue, in this writ appeal.

2.The first respondent herein viz., M/s.Annam Steels Pvt Limited, has preferred the aforesaid writ petition to issue a writ of certiorari to quash the proceedings issued by the appellant in F.No.S.Misc/391/2017-Bonds (Sea) dated 20.07.2018.

3.The case projected by the first respondent in the writ petition is that the property comprised in S.F.Nos.199/1 and 199/2 admeasuring 2.12 ½ acres and pathway running along with S.F. Nos. 197/2B2, 185/2, 197/2A1 and S.F.No.197/1A1B admeasuring 30 feet situated at Panchetty Village, Ponneri Taluk, Chengalpattu District, was originally in possession and enjoyment of one Pramad Kumar Saraf, who mortgaged the said property with the second respondent Bank during the year 2008 for securing loan for and on behalf of M/s. DDS Steel Rolling Mills Private Limited. Since the borrower committed default in payment of the loan amount, the second respondent bank took possession of the secured assets on 09.07.2010 in exercise of the powers conferred under Section 13 (4) of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "the SARFAESI Act"). Thereafter, the second respondent bank conducted an auction sale, in which, the first respondent became the successful bidder and a sale certificate dated 23.01.2012 was also issued to them. Subsequently, at the request of the first respondent, a Corrigendum to the sale certificate came to be issued on 29.06.2017 by including the right over the pathway leading to the property purchased in the auction sale. After obtaining the sale certificate, the first respondent approached the office of the Sub-Registrar, Red Hills, requesting to register the same. However, it was informed that the sale certificate cannot be registered in view of the subsistence of charge over the property by the appellant herein. On enquiry, the first respondent came to know that on 14.12.2010, the Commissioner of Customs passed an order of attachment against the properties owned by M/s. Jai Bhavani Steels Enterprises Limited and M/s. SDS Steels Private Limited, having their factories in the adjoining lands purchased by the first respondent in the auction sale; and also requested the Registration Department not to entertain any instrument that may be presented for registration in respect of the lands mentioned therein. In view of the same, the first respondent submitted a representation 16.09.2017 and reminder dated 05.10.2017 to the appellant requesting them to exclude the land purchased by them in the auction sale conducted by the second respondent Bank. Consequently, the first respondent also furnished the copies of the sale certificates issued to them, through a communication dated 25.10.2017. However, the claim of the first respondent was not considered. Thereafter, pursuant to the order dated 25.04.2018, passed in WP

No. 10457 of 2018, the appellant passed an order dated 20.07.2018 rejecting the claim of the first respondent to exclude the land purchased by them in the auction sale conducted by the second respondent bank. Challenging the same, the first respondent preferred WP.No.25185 of 2018.

4.It was contended by the appellant in the writ court that M/s.Jai Bhawani Steel Enterprises Limited had stored 29,668.635 MT of Steel scrap having a total value of Rs.45,44,43,625/- with duty involved being Rs.11,63,19,227/- covered under 170 Bonds in their bonded warehouse. M/s. SDS Steels Private Limited had stored 14,515.257 MT of steel scrap having a value of Rs.28,94,48,427/- with duty involved being Rs.4,58,43,507/- covered under 99 bonds in their private bonded warehouse. The goods were imported during 2007-2009, however, the importers had not applied for extension of the warehousing period of the bonded goods. In view of the same, notices under Section 72 (1) of The Customs Act were issued, which were not responded by the importers. Therefore, in order to safeguard the interest of the revenue, notices dated 09.12.2010 under Section 141 (1) (a) & (b) of the Customs Act were issued to all the Central Excise/Customs/Service Tax authorities. Similarly, notice dated 14.12.2010 was also issued to the District Collector, Thiruvallur District and Inspector General of Registration, with a copy marked to the Sub-Registrar, Red Hills requesting not to entertain any instruments relating to sale/lease/mortgage in respect of the properties morefully set out in the annexure to the letter dated 14.12.2010. Subsequently, notice under Section 142 (1) (C) (i) of The Customs Act was issued on 10.01.2011 to the District Collector, Thiruvallur indicating recovery of the Government dues from M/s. Jai Bhawani Steel Enterprises Limited for Rs.11,63,19,227/- and M/s. SDS Steels Private Limited for Rs.4,58,43,507/-. At this stage, the first respondent herein claimed to have purchased the land measuring 4.25 acres in Survey Nos. 199/1, 199/2 and 199/3 in an auction sale conducted by the second respondent bank and requested the appellant to lift the attachment raised over the same. By order dated 20.07.2018, the appellant rejected the request of the first respondent stating that the dues of the department are sovereign dues which have to be recovered from the defaulters. Stating so, the appellant sought to dismiss the writ petition.

5.The learned Judge, after hearing both sides and following the decision of the Full Bench of this court in UTI Bank Limited v. Deputy Commissioner Central Excise [2006 (5) CTC 801], allowed the writ petition and directed the appellant to lift the attachment over the property in question within a period of two weeks from the date of receipt of a copy of the order. The observation of the learned Judge is quoted below for ready reference:

"13.That apart, Section 26E the the SARFAESI Act reads as follows:

....

14.The Section is unambiguous and provides that a charge created over a property to a secured creditor, being a financial institution, would

prevail over all other charges created over the asset in question and is absolute in its obligation. In the present case, the charge created by the Bank is prior in time to the demand raised by the customs authorities. Moreover, the customs authorities have not even registered an encumbrance or created a charge but only written a letter to the Registrar not to entertain any transfer of the property in question. This cannot, in any way stand in the way of the Bank, as secured creditor, taking recourse under SARFAESI."

Feeling aggrieved, the appellant is before this court with this writ appeal.

6.Mr. Sundareswaran, learned counsel for the appellant submitted that Section 26E of the SARFAESI Act is subject to exceptions contained under Section 31 of the SARFAESI Act and thus, the same is not applicable to the securities given under the Contract Act, 1872 and morefully defined under Section 2(zg) under the SARFAESI Act. Further, the bond given by the defaulter with regard to the duty assessed on the imported goods clearly indicates that the appellant had a lien over the goods deposited in the licenced private bonded ware houses, over which the appellant will have a prior and first charge. The ware house bond given by the defaulter is an undertaking enforceable under the Indian Contract Act, 1872 and is excluded from the provisions of the SARFAESI Act, in view of Section 31 of the SARFAESI Act. By referring to the sale notice issued by the second respondent Bank, the learned counsel for the appellant submitted that even the Bank has clearly indicated that any statutory dues like property tax, EB charges etc., having priority over the charges of the secured creditor shall be borne by the purchaser. Therefore, the first respondent was well informed about the arrears of revenue payable over the property brought under auction and they ought to have refrained from purchasing the same. The sale of the property in question by the first respondent would amount to purchasing the same with encumbrance. Above all, the second respondent bank conducted the auction sale only on 22.12.2011 and issued the sale certificate on 23.01.2012. However, the appellant made a charge over the same property by issuing a letter dated 14.12.2010 to all the instrumentalities of the Government including the Registration Department. While so, the learned Judge ought not to have allowed the writ petition and directed the appellant to lift the attachment over the property purchased by the first respondent. With these submissions, the learned counsel prayed to allow this writ appeal by setting aside the order of the learned Judge.

7.The learned counsel for the first respondent would contend that the first respondent was a bonafide purchaser of the property in question in the auction sale conducted by the second respondent bank and they were issued with sale certificate, after payment of the entire sale consideration. However, the Sub Registrar, Redhills refused to register the same, in view of the charge raised by the appellant in respect of the property purchased. Adding further, the learned counsel

submitted that the appellant did not create any encumbrance over the property in question, but merely sent a communication dated 14.12.2010 to the Inspector General of Registration, to desist from entertaining any instrument that may be presented for registration. Even in the said communication, reference was made only to the warehouses situated at Nos.2/220B and 2/221, GNT Road, Panjetty Village, Ponneri Taluk-601 204, which are situated adjacent to the land purchased by the first respondent in the auction sale. Therefore, the communication dated 14.12.2010 issued by the appellant will not operate as a bar for the registering authority to register the sale certificate issued to the first respondent. Pointing out the same, the learned Judge has rightly allowed the writ petition by the order impugned herein, which does not call for any interference by this court.

8.1. The learned counsel for the second respondent Bank would contend that the borrowers committed default in repayment of the dues to the tune of Rs.19,31,97,562.70 as on 21.07.2010 and hence, the proceedings under the SARFAESI Act were initiated by issuing a demand notice dated 16.04.2010 and consequently, physical possession was taken on 27.08.2011. Thereafter, the secured assets were brought for sale by issuing a sale notice dated 17.11.2011. Before issuing such sale notice, an encumbrance certificate was obtained in which an entry dated 20.12.2010 was noticed. On enquiry, it came to light that the appellant made a claim over the same property in exercise of the power conferred under Section 142 (1) (a) & (b) of Customs Act, 1962. As the bank was holding a prior mortgage, the claim of the appellant was considered to be subordinate to such claim and/or dues to be realised by the bank. Therefore, in the sale notice dated 17.11.2011, the claim of the appellant was clearly mentioned, however, the Bank neither gave any concession, while fixing the reserve price on account of the claim of the appellant nor undertook to clear the alleged dues of the appellant. As per the SARFAESI Rules, the Bank has revealed all the informations that are necessary for the purchaser to more perfectly assert a right over the property, but such disclosure will not operate as a lien or any charge over the asset in favour of the appellant.

8.2. The learned counsel for the second respondent Bank further proceeded to contend that Section 142 of the Customs Act, 1962 does not provide specific provision for creation of first charge. Merely because in the sale notice the bank has referred to the claim of the appellant, it will not be a ground for the appellant to insist the auction purchaser to pay the amount due and payable to them as it would amount to forcing the purchaser to make dual payment, one to the Bank and the other to the appellant. It is also submitted that the secured assets are not bonded goods; the claim of the appellant under Section 142 of the Customs Act, 1962 is not against M/s. DDS Steel Rolling Mills Private Limited, in which account, the properties were sold; and the claim of Rs.2 crores of the appellant is towards penalty imposed on the guarantor on account of statutory dues in respect of the two other companies namely SDS Steels and Jai

Bhavani Steels. In any event, SARFAESI Act has an overriding effect over other laws and therefore, the appellant has to file an appeal invoking Section 17 of the SARFAESI Act before the Debts Recovery Tribunal. Therefore, the learned Judge is wholly justified in allowing the writ petition.

8.3. To buttress his contentions, the learned counsel for the second respondent Bank placed reliance on the order dated 10.11.2016 passed by the Full Bench of this Court in WP Nos. 2675 of 2005 etc., batch in the Assistant Commissioner (CT), Chennai - 6 v. Indian Overseas Bank and another, wherein it was held 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".

9. Heard all the parties and perused the materials placed on record.

10. The facts remain undisputed are that the property in question was purchased by the first respondent through auction sale conducted by the second respondent Bank on payment of the entire consideration and the sale certificate was issued to them on 23.01.2012. However, in view of the charge created by the appellant over the said property, in connection with the alleged dues payable by the importers, the sale certificate was not registered by the Sub Registrar, Redhills. When the first respondent made a request to the appellant to lift the attachment over the property, it was rejected by order dated 20.07.2018, which was challenged in the writ petition bearing no.25185 of 2018. The learned Judge allowed the said writ petition and directed the appellant to lift attachment over the property in question, vide order dated 12.02.2019, which is impugned herein.

11. The main contention of the learned counsel for the appellant is that the sale certificate was issued in favour of the first respondent by the second respondent Bank only on 23.01.2012, whereas the customs department had raised attachment over the property in question much earlier i.e., on 14.12.2010 itself. The appellant has preferential right over the secured creditor, in recovery of the dues payable by the assessee. Therefore, the learned Judge ought not to have directed the appellant to lift the attachment raised on the property in question.

12. On the other hand, the learned counsel for the first respondent as well as the second respondent submitted that the hypothecation and mortgage were created by the second respondent in respect of the property in question on 26.12.2006 for the loan availed by M/s.DDS Steel Rolling Mills Pvt Ltd. The second respondent Bank initiated the SARFAESI proceedings by raising a demand on 16.04.2010 and took symbolic possession of the secured asset on 09.07.2010 and physical possession on 27.08.2011. The first respondent was a bona fide purchaser of the property in

question in the auction sale conducted by the second respondent Bank and they were issued with a sale certificate dated 23.01.2012. Though the claim of the appellant was mentioned in the sale certificate, the mortgage created over the property in question has priority over the claim of the appellant, which is in respect of the alleged penalty imposed on the guarantor by name, Pramod Kumar Saraf, on account of the statutory dues payable by two companies viz., SDS Steels and Jai Bhavani Steels. Therefore, the order of the learned Judge, directing the appellant to lift the attachment over the property, does not require any interference at the hands of this court.

13. On a reading of the materials placed before this court, it could be seen that at the time of executing the mortgage deed in the year 2006, there was no charge or attachment over the property in question by any one, and the second respondent bank was the first charge holder of the same. The appellant issued notices under section 142(1)(a)&(b) of the Customs Act, 1962, against the two companies for recovery of the alleged dues payable by them, in connection with the goods imported during 2007-2009, on 09.12.2010. Thus, the cause of action arises for the appellant to create charge over the property in question only on 09.12.2010.

14. Further, it is to be pointed out that the appellant did not register an encumbrance or create a charge by passing any order of attachment over the property in question and they merely sent a communication on 14.12.2010 to the Inspector General of Registration, Chennai-1, a copy of which was marked to the Sub Registrar, Redhills, requesting not to entertain any sale / lease/ mortgage/ transfer / power of attorney / attachment of the properties mentioned in the list of survey numbers appended therein, in order to safeguard the customs duty and interest recoverable from the importers. For better appreciation, the contents of the said communication are reproduced below:

"This office has detected a case of illegal removal of non duty paid warehoused goods against M/s. Jai Bhavani Steels Enterprises Ltd & M/s. SDS Steels P.Ltd who have been granted with Licence Nos. P-795 & P-909 respectively for customs notified Private Bonded Warehouses and permitted to stock imported HMS/LMS/Turnings & Borings/Steel scrap at 2/220-B & 2/221, GNT Road, Panjetty, Ponneri Taluk, Thiruvallur District.

2. There are substantial dues of Customs duties to be recovered from the aforesaid two importers. However, the importers have not responded to any of the notices issued by the Department and other efforts made by the Department to secure such customs dues payable by them have not yielded any fruitful results. Instead, the importers have resorted to surreptitious removal of the non duty paid bonded goods, action for recovery of due under section 142 of the Customs Act, 1962 is underway.

3.The premises of customs notified private bonded warehouses situated at 2/220B & 2/221, GNT Road, Panjetty Village, Ponneri Taluk-601 204, falls under the jurisdiction of Thiruvallur District. During the search of the office premises of these importers by the Special Intelligence & Investigation Bureau, Custom House, Chennai, a list of documents pertaining to the land registration at 2/220B & 2/221, GNT Road, Panjetty Village, Ponneri Taluk-601 204 in favour of the Directors of the said companies viz., M/s.Jai Bhavani Steels Enterprises Ltd. & M/s.SDS Steels P. Ltd. were recovered and the same have been listed within the survey Nos. as noted in Annexure-I (copy attached)

4.In the meantime, it is requested that your office may issue necessary directions to respective field formations not to entertain any sale / lease/ mortgage/ transfer / power of attorney / attachment of the properties mentioned in the list falling under the list of Survey Nos. enclosed herewith without prior consent of this office in order to safeguard the customs duty and interest recoverable from the said importers."

That apart, be it noted, the first respondent claimed that the property in question is situated adjoining the land of the importers and the same was wrongly mentioned in the list of survey numbers appended to the said communication. Hence, the preferential right claimed by the appellant over the property in question, based on the said communication dated 14.12.2010, stating that the sale certificate was issued in favour of the first respondent by the second respondent Bank only on 23.01.2012, cannot be countenanced by this court.

15.Pertinently, it is to be mentioned here that though the sale certificate dated 23.01.2012 proceeds to state that notice of attachment by Customs Authorities on the mortgaged property was filed in the office of SRO, Redhills, the second respondent has categorically stated in the sale certificate itself that 'the mortgage created in favour of the bank is prior in point of time and the bank being the secured creditor, the mortgage created in favour of the bank has priority over the charge of the customs and as such, the charge created in favour of Customs Authorities is subordinate to the charge in favour of the bank'. An explanation has also been forth coming on the side of the second respondent bank during the course of hearing that any ambiguity in the language employed in the sale certificate is only a genuine mistake and the appellant cannot take advantage over the same.

16.In the light of the factual matrix and also taking note of the decision rendered by the Full Bench of this court in UTI Bank Limited case(supra) and the provisions of section 26E of the SARFAESI Act, the learned Judge has rightly allowed the writ petition and directed the appellant to lift the attachment over the property in question, by holding that the charge created by

the second respondent Bank / financial institution, being a secured creditor, would prevail over all other charges created over the property in question and is absolute in its obligation.

17. At this juncture, it is apt to refer to the latest decision of the Hon'ble Supreme Court, in Punjab National Bank v. Union of India and others [2022 SCC Online SC 227] wherein, it was categorically held that "the dues of the secured creditor will have priority over the dues of the Central Excise Department, as even after insertion of section 11E in the Central Excise Act, 1944 with effect from 08.04.2011 and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act of 1944". While holding so, the Hon'ble Supreme Court placed reliance on several judgments of various High Courts, one among which was the order of the Full Bench of this court in UTI Bank Limited (supra) referred to by the learned Judge in the order impugned herein and the same was confirmed by the Hon'ble Supreme Court vide order dated 12.09.2009 in Civil Appeal No.3627 of 2007. The relevant paragraphs of the said decision of the Hon'ble Supreme Court are usefully extracted below:

"40. Secondly, coming to the issue of priority of secured creditor's debt over that of the Excise Department, the High Court in the impugned judgment has held that "In view of the matter, the question of first charge or second charge over the properties would not arise." In this context, we are of the opinion that the High Court has misinterpreted the issue to state that the question of first charge or second charge over the properties, would not arise.

41. A Full Bench of the Madras High Court in the case of UTI Bank Ltd. Vs. Dy. Commissioner Central Excise [2006 SCC Online Madras 1182], while dealing with a similar issue, has held that:

"25. In the case on hand, the petitioner Bank which took possession of the property under Section 13 of the SARFAESI Act, being a special enactment, undoubtedly is a secured creditor. We have already referred to the provisions of the Central Excise Act and the Customs Act. They envisage procedures to be followed and how the amounts due to the Departments are to be recovered. There is no specific provision either in the Central Excise Act or the Customs Act, claiming "first charge" as provided in other enactments, which we have pointed out in earlier paragraphs:

26. In the light of the above discussion, we conclude,

"(i) Generally, the dues to Government, i.e., tax, duties, etc. (Crown's debts) get priority over ordinary debts.

(ii) Only when there is a specific provision in the statute claiming "first charge" over the property, the Crown's debt is entitled to have priority over the claim of others.

(iii) Since there is no specific provision claiming "first charge" in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner Bank.

(iv) In the absence of such specific provision in the Central Excise Act as well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown's debts."

In view of our above conclusion, the petitioner UTI Bank, being a secured creditor is entitled to have preference over the claim of the Deputy Commissioner of Central Excise, first respondent herein."

(emphasis supplied)

42. This Court, while dismissing the Civil Appeal No. 3627 of 2007 filed against the judgment of the Full Bench, vide order dated 12.09.2009 held as under:

"Having gone through the provisions of the Securitization Act, 2002, in light of the judgment of the Division Bench of this court in the case of Union of India v. Sicom Ltd. reported in (2009) 2 SCC 121 : 2009 (1) SCALE 10, we find that under the provisions of the said 2002 Act, the appellants did not have any statutory first charge over the property secured by the respondent bank. In the circumstances, the Civil Appeal is dismissed with no order as to costs"

(emphasis supplied)

43. Hence the reasoning given by the High Court stands strong and has been affirmed by this Court.

44. This Court, in Dena Bank v. Bhikhabhai Prabhu Dass Parikh. [(2000) 5 SCC 694], wherein the question raised was whether the recovery of sales tax dues (amounting to Crown debt) shall have precedence over the right of the bank to proceed against the property of the borrowers mortgaged in favour of the bank, observed as under:

"10. However, the Crown's preferential right of recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and

good conscience (as applicable to India) do not accord the Crown a preferential right of recovery of its debts over a mortgagee or pledgee of goods or a Secured Creditor."

(emphasis supplied)

45. Further, in Central Bank of India v. Siriguppa Sugars & Chemicals Ltd. [(2007) 8 SCC 353], while adjudicating a similar matter, this Court has held as under:

"18. Thus, going by the principles governing the matter, propounded by this Court there cannot be any doubt that the rights of the appellant - bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursal to the cane growers and to the employees. There is no dispute that the sugar was pledged with the appellant bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant-bank. In view of the fact that the goods were validly pawned to the appellant bank, the rights of the appellant - bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods."

(emphasis supplied)

46. The Bombay High Court in Krishna Lifestyle Technologies Ltd. v. Union of India [2008 SCC Online Bombay 137], wherein the issue for consideration was "whether tax dues recoverable under the provisions of The Central Excise Act, 1944 have priority of claim over the claim of secured creditors under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" held that:

"Considering the language of Section 35 and the decided case law, in our opinion it would be of no effect, as the provisions of SARFAESI Act override the provisions of

the Central Sales Tax Act and as such the priority given to a secured creditor would override Crown dues or the State dues.

In so far as the SARFAESI Act is concerned a Full Bench of the Madras High Court in UTI Bank Ltd. v. Deputy Commissioner of C.Excise, Chennai - II has examined the issue in depth. The Court was pleased to hold that tax dues under the Customs Act and Central Excise Act, do not have priority of claim over the dues of a secured creditor as there is no specific provision either in the Central Excise Act or the Customs Act giving those dues first charge, and that the claims of the secured creditors will prevail over the claims of the State. Considering the law declared by the Apex Court in the matter of priority of state debts as already discussed and the provision of Section 35 of SARFAESI Act we are in respectful agreement with the view taken by the Madras High Court."

(emphasis supplied)

47. An SLP (No. 12462/2008) against the above judgement of the Bombay High Court stands dismissed by this Court on 17.07.2009 by relying upon the judgement in the matter of Union of India v. SICOM Ltd. Reported in [(2009) 2 SCC 121], wherein the question involved was "Whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of the State Financial Corporation Act, 1951" and this Court held as under:

"9. Generally, the rights of the crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the king; debts which a prerogative entitles the Crown to claim priority for before all other creditors. [See Advanced Law Lexicon by P. Ramanatha Aiyer (3rd Edn.) p. 1147]. Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the

first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.

(emphasis supplied)

48. In view of the above, we are of the firm opinion that the arguments of the learned counsel for the Appellant, on the second issue, hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the present case, where the land, building, plant machinery, etc. have been mortgaged/hypothecated to a secured creditor, having regard to the provisions contained in section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, the Secured Creditor will have a First Charge on the Secured Assets. Moreover, section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, shall have overriding effect on all other laws. It is further pertinent to note that even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002.

49. Thus, as has been authoritatively established by the aforementioned cases in general, and Union of India v. SICOM Ltd. (supra) in particular, the provisions contained in the SARFAESI Act, 2002, even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, will have an overriding effect on the provisions of the Act of 1944.

50. Moreover, the submission that the validity of the confiscation order cannot be called into question merely on account of the Appellant being a secured creditor is misplaced and irrelevant to the issue at hand. The contention that a confiscation order cannot be quashed merely because a security interest is created in respect of the very same property is not worthy of acceptance. However, what is required to be appreciated is that, in the present case, the confiscation order is not being quashed merely because a security interest is created in respect of the very same property. On the contrary, the confiscation orders, in the present case, deserve to be quashed because the confiscation orders themselves lack any statutory backing, as they were rooted in a provision that stood omitted on the day of the passing of the orders. Hence, it is this inherent defect in the confiscation orders that paves way for its quashing

and not merely the fact that a security interest is created in respect of the very same property that the confiscation orders dealt with.

51. Further, the contention that in the present case, the confiscation proceedings were initiated almost 8 - 9 years prior to the charge being created in respect of the very same properties in favour of the bank is also inconsequential. The fact that the charge has been created after some time period has lapsed post the initiation of the confiscation proceedings, will not provide legitimacy to a confiscation order that is not rooted in any valid and existing statutory provision.

52. To conclude, the Commissioner of Customs and Central Excise could not have invoked the powers under Rule 173Q(2) of the Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said Rule 173Q(2) was not in the Statute books, having been omitted by a notification dated 12.05.2000. Secondly, the dues of the secured creditor, i.e. the Appellant- bank, will have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act of 1944.

53. Accordingly, the Appeal is Allowed and the confiscation orders dated 26.03.2007 and 29.03.2007, passed by the Commissioner Customs and Central Excise, Ghaziabad, are quashed."

18. Applying the ratio laid down in the aforesaid decision of the Hon'ble Supreme Court to the facts of the present case, this court is of the opinion that the second respondent bank being a secured creditor and created right over the property in question prior to the alleged attachment raised by the appellant and hence, they have preferential right over the claim of the appellant. In such view of the matter, the order of the learned Judge cannot be interfered with.

19. In fine, the writ appeal fails and is accordingly, dismissed. The appellant is directed to lift the attachment over the property in question, within a period of two weeks from the date of receipt of a copy of this judgment. There is no order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

rsh

To

The Assistant Commissioner of Customs (Bonds),
Office of the Principal Commissioner of Customs,
Chennai-III Commissionerate, Customs House
No.60, Rajaji Salai, Chennai - 600 001.

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.F.B.Benjamin George, Advocate SR. No. 40937
+lcc to Mr.V.Sundareswaran, Advocate SR. No. 39666
+lcc to Mr.R.N.Amarnath, Advocate SR. No. 39748

WA No. 3249 of 2019

RR (CO)
PR (13/07/2022)