**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

Dated: 4/11/2022

C O R A M

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

**Writ Petition No.4849 of 2017**
**a n d**
**W.M.P.No.5067 of 2017**

Axis Bank Ltd
rep. By its Authorised Signatory
K. Thiyagarajan
Retail Assets Centre, 4th Floor
ARCOT Plaza
Old No.38 New No.165
Arcot road, Kodambakkam
Chennai 600 024. ... Petitioner

Vs

1. The Assistant Provident Fund Commissioner & Recovery Officer
Employees Provident Fund Organisation
Ministry of Labour, Sub-Regional Office
S.J.Plaza, Swarnapuri
Salem 636 004.

2. Dharani Offset Printers
10 N.T.Road, Near Old Market
Sathyamangalam 638 401
Erode District. ... Respondents

**PRAYER :** Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus to direct the first respondent from proceeding with the recovery proceedings vide its impugned notice dated 1/2/2017 namely TN/SLM/90615/RECOVERY/8F/2016 issued in pursuance to the attachment order dated 4/1/2016 and 21/1/2016 to the petitioner for recovery of Rs.3,68,828/- in the light of full bench judgment dated 10/11/2016 in W.P.No.2675 of 2011 .

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| For Petitioner | ... | Mr.M.R.Uma Vijayan |
| For respondents | ... | Mr.R.Vishnu<br>for R.1<br><br>Mr.D.Gopal<br>for R.2. |

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**ORDER**

This writ petition has been filed praying to direct the first respondent from proceeding with the recovery proceedings, vide, its impugned notice, dated 1/2/2017, namely TN/SLM/90615/RECOVERY/8F/2016, issued in pursuance to the attachment order, dated 4/1/2016 and 21/1/2016 to the petitioner, for recovery of Rs.3,68,828/-, in the light of Full Bench judgment, dated 10/11/2016, made in W.P.No.2675 of 2011.

2. Brief facts which are necessary for the disposal of this writ petition are as follows:-

. The petitioner is a Company incorporated under the Companies Act, 1956, carrying on the business of banking under the Banking Regulation Act, 1949 and duly notified as "Financial Institution" under SARFAESI Act, 2002. The petitioner Bank is a scheduled commercial bank.

3. On the request made by the second respondent for Small and Medium Enterprises Loan (SME), upon scrutiny of necessary papers, the petitioner bank had sanctioned the loan to the tune of Rs.1,35,00,000/- and executed the loan documents, on 14/3/2013, which was later defaulted and resulted in declaring the said account as Non-Performing Asset, on 31/3/2016. The total outstanding in the said SME account by the second respondent is Rs.1,51,31,011.43. The second respondent availed the Bank Guarantee facility from the petitioner to the tune of Rs.5,00,000/-, on 15/5/2022. The said Bank Guarantee was issued against 100% cash margin of the fixed deposit and the said deposit is under Bank's lien which was created, on 14/5/2012.

4. The first respondent has initiated recovery proceeding against the petitioner, relying on Section 8 F 3 (i) of the Employees Provident Funds and

Miscellaneous Provision Act, 1952. No amount is due and payable to the second respondent by the petitioner nor does the petitioner hold any amount on behalf of the second respondent which is payable to the first respondent. Therefore, what is attachable in terms of the impugned notice is the amount held by the petitioner over and above the dues payable by the second respondent to the petitioner Bank. The petitioner is having statutory right, under Section 171 of the Indian Contract Act, which deals with General lien of bankers, factors, wharfingers, attorneys and policy-brokers. Thus, it is the contention of the learned counsel appearing for the petitioner that the Bank is entitled to enforce the security interest as the security creditor.

5. The learned counsel appearing for the petitioner further submitted that Bank is not only having right to lien, as per Section 171 of the Contract Act. Being the secured creditor, they are entitled to exercise the power to acquire the security interest. According to him, there was no amount held by the Bank, so as to pay the dues. The Fixed Deposit made by the second respondent has marked as lien as against the Bank Guarantee issued against him in the order, dated 14/5/2012 and the lien was marked on the Fixed Deposit on the same day. Bank Guarantee has been negotiated, on 23/11/2020. Hence submitted that the Bank exercises its power as a secured

creditor and there is no amount lying with them to recover as stated by the respondents. Therefore, submitted that the impugned order has to be set aside.

6. The learned counsel appearing for the petitioner cited a judgment reported in (2015) 2 SUPREME COURT CASES 1 ***BOMBAY STOCK EXCHANGE Vs. KANDALGAONKAR AND OTHERS***, wherein the Hon'ble Apex Court has held that Government debts have precedence only over unsecured creditors, whereas the petitioner being secured creditor has the first charge over the security interest. Hence impugned order sought to be quashed.

7. He has also relied on the Full Bench judgment of this Court in W.P.Nos.2675 of 2011, etc., batch, ***THE ASSISTANT COMMISSIONER (CT), ANNA SALAI – III, ASSESSMENT CIRCLE, CHENNAI 600 006 Vs. 1. THE INDIAN OVERSEAS BANK, rep. BY ITS MANAGER, CHENNAI AND ANOTHER,*** wherein the Hon'ble Full Bench has held that 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.

8. The learned counsel appearing for the first respondent submitted that the second respondent had failed to pay the Provident Fund, Pension Fund, Employees Deposit linked Insurance Fund contribution and the Administrative charges payable within the due dates, as prescribed under para 30 of the Employees Provident Fund Scheme, 1952 to the tune of Rs.1,09,624/- for the period from April, 2013 to November 2013 and Rs.11,666/- towards damages and interest for the period June 2012 to March 2014. In order to recover the total amount of Rs.1,21,290/-, first respondent had taken recovery action and issued notice, dated 21/1/2016, stating that Bank is having right to lien over the money, as the lien is marked on the F.D.

9. The learned counsel further submitted that as per Section 11 (2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, if any amount is due from an employer, or the employer's contribution, the amount so due, shall be deemed to be the first charge on the assets of the establishment, and shall notwithstanding anything contained in any other

law, for the time being in force, having priority over other debts. Hence the impugned order passed by the first respondent is in order and as per law.

10. The learned counsel has relied on the Full Bench judgment of the Hon'ble Supreme Court in ***CENTRAL BANK OF INDIA Vs. STATE OF KERALA AND OTHERS (Civil Appeal Nos.95 of 2005, etc., batch),*** wherein the Hon'ble Supreme Court has held that Statutory first charge over property of dealer will prevail over rights created in favour of secured creditors such as Banks and other financial institutions.

11. Whereas, the learned counsel appearing for the second respondent submitted that Provident Fund Act will prevail over the SARFAESI Act and recovery of provident fund is a statutory dues which will prevail over the secured creditor. It will be the first charge as against other debts. Hence submitted that orders have been passed on the basis of the power vested on the Provident Fund Act.

12. The learned counsel appearing for the second respondent submitted that Full Bench judgment of this Court referred by the petitioner, was challenged before the Hon'ble Apex Court in Appeal No.SLP (Diary) No.20471 of 2017 and status-quo has been ordered. It is not disputed that on

14/5/2012 fixed deposit for a sum of Rs.5 lakhs made by the second respondent with the writ petitioner Bank.

13. It is the contention of the Bank that only on the basis of the said fixed deposit, the Bank Guarantee for the same value was issued. According to them, lien has been created on the fixed deposit made by the petitioner with the second respondent. Therefore, according to the Bank, being the creditor, they are entitled to exercise the right to recover the dues and the Bank Guarantee is also encashed, on 23/11/2020.

14. It is relevant to note that though it is the contention of the Bank that they are secured creditors, in view of the lien created on the fixed deposit, it is relevant to refer to the following definitions.

15. The Provincial Insolvency Act, defines Section 2 (1) (e) as follows:-

> **"Secured Creditor"** means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt

due to him from the debtor."

16. Similarly, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in Section 2 (1) (zf), defines 'Security Interest' as follows:-

> **Security interest** – means right, title or interest of any kind, other than those specified in Section 31, upon property created in favour of any secured creditor and includes -
>
> (i). any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

> (ii). Such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset."

17. Section 31 of the Act in Chapter 6 of the SARFAESI Act makes it clear that provision of SARFAESI Act will not apply to lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of 1872) or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force. Section 31 makes it very clear that the lien on any goods or money under the Indian Contract Act will not come as a security interest.

18. In such a view of the matter, when the legislature itself has excluded the operation of lien on the money and lien under the Contract Act. Therefore, this Court is of the view that when the legislature itself has excluded the operation of SARFAESI Act to the lien under the Contract Act, the Bank cannot contend that merely on the basis of such lien they are secured

creditor. In a judgment of the Hon'ble Apex Court in (2015) 2 SCC – 1, at paragraph No.29, the Hon'ble Apex Court has held that

> "On a consideration of Section 529 read with the relevant provisions of the insolvency law, I come to the conclusion that the holder of a statutory lien or the holder of a lien created by contract and registered as required by Section 125 is a secured creditor in the matter of winding up of the insolvent company with regard to, among other things, debts provable in the winding up proceedings. The applicant Company being the holder of a statutory lien is thus in the position of a secured creditor."

19. It is relevant to note that in the above judgment, the Hon'ble Apex Court has considered the definition of secured creditor as defined under the Provincial Insolvency Act.

20. Whereas, under Section 2 (z) (f) of the SARFAESI Act, the word "lien" is conspicuously absent. Under Section 2 (z) (f) of the SARFAESI Act,

the word "lien" is omitted. Whereas in Section 31 of the Act makes it clear that the provisions of the Act will not apply to the lien. Therefore, this Court is of the view that judgment relied upon by the petitioner Bank cannot be applied to the facts of the case whereas the Bank claiming as a secured creditor under SARFAESI when the lien is not covered under SARFAESI as a security interest and the Act is also not applicable to the lien under Section 31, the Bank cannot contend that they have first charge over the lien on the deposit.

21. In Civil Appeal No.1661 of 2020 ***State Tax Officer Vs. RAINBOW PAPERS LIMITED,*** the Hon'ble Apex Court has held as follows:-

> "56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53 (1) (b) (ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of

24 months preceding the liquidation commencement date.

57. As observed above, the State is a secured creditor under the GVAT Act. Section 3 (30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority."

22. Considering the above and as there is no security interest is created on the fixed deposit and only lien is created and the lien is not classified as secured interest under the SARFAESI Act, it cannot be contended that they are secured creditor. As per Section 11 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, provident fund due has priority of payment of contributions over other debts.

**N. SATHISH KUMAR, J**

mvs.

In such a view of the matter, order impugned cannot be set aside, as this Court cannot treat the petitioner as secured creditor having right over the lien on the fixed deposit.

23. In the result, this writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

4/11/2022

Index : Yes / No
Internet: Yes
Speaking/non speaking order

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**W.P.No.4849 of 2017**