IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7022 OF 2021

ASREC (India) Limited ...Petitioner

Versus

The State Of Maharashtra Through The Office Of The Govt. Pleader, Public Works Dept. And Ors. ...Respondents

Mr. Adv Charles Disouza a/w Adv. Trupti Shetty, *Advocates for Petitioner.*

Ms. S.D. Vyas, 'B' Panel *for State/Respondent.*

Adv. Rishabh Botadra a/w Adv. Aditya Rajeev Khare, *Advocates for Respondent No. 5 & 6.*

CORAM : B. P. COLABAWALLA &
M.M. SATHAYE, JJ.
DATE: SEPTEMBER 14, 2023

P. C.

1. Rule. With the consent of the contesting parties, rule is made returnable forthwith and heard finally.

2. Leave granted to the Petitioner to carry out amendment in prayer clause (a) to substitute the words Exhibit "M" with the words Exhibit "L". The amendment be carried out forthwith in front of the Associate.

Re-verification is dispensed with.

3. The Petitioner is an Asset Reconstruction Company under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("***SARFAESI Act***").

4. Respondent No. 1 is the State of Maharashtra, Respondent No. 2 is the Department of Sales Tax, Mumbai, Respondent No. 3 is the borrower whose debt was subsequently assigned to the Petitioner, Respondent No. 4 is the New Putli Bai Kapol Niwas Cooperative Housing Society Ltd in which the Flat / Secured Asset forming the subject matter of the present Writ Petition is situated, and Respondent Nos. 5 and 6 are the purchasers of the flat being Flat No. 54, A Wing, 3rd Floor , New P.K. Niwas , S V Road, New Vile Parle, West, Mumbai ("said ***Flat/Secured Asset***") as more particularly described in the Writ Petition.

5. The Petitioner has filed the present Writ Petition praying that this Court:-

> *"**(a)** issue a writ of Certiorari or any other writ, order or direction in the nature of writ of Certiorari calling for the records of the Respondent No.2 Sales Tax Department with regards to the attachment order dated 7th November,*

2019 in respect of the Respondent No.3 and to quash and/or set aside the attachment order dated 7th November, 2019 being Exhibit "M" to the Petition

***(b)** to issue a writ of Mandamus or any other writ, order or direction in the nature of writ of Mandamus to the Respondent No.4 to record the transfer of the flat pursuant to the Sale dated 19th October, 2019 and*

***(c)** to issue a writ of Prohibition or any other writ, order or direction in the nature of writ of Prohibition restraining the to the Respondent No.2 by themselves or through their agents, representatives and/or subordinates from in any manner acting upon and /or implementing the attachment order dated 7th November, 2019."*

6. Briefly, the relevant facts are that Respondent No. 3 availed of certain financial facilities aggregating to Rs. 22,00,00,000 (Rupees Twenty Two Crores Only) from the erstwhile State Bank of Patiala, India. ("***Assignor Bank***") for business purposes. These financial facilities were secured by mortgages / guarantees and the charge of the Assignor Bank was registered with the Registrar of Companies as well. One such mortgage created to secure the financial facilities advanced by the Assignor Bank was of the said Flat / Secured Asset which was owned by the Director of Respondent No.3. The mortgage of the said Flat / Secured Asset was created by a Memorandum of Deposit of Title Deeds.

7. On 25th March 2012, the Assignor Bank registered its charge on the said Flat / Secured Asset with the Central Registry of Securitisation

Asset Reconstruction and Security Interest of India (***"CERSAI"***).

8. Respondent No. 3 defaulted in repayment of the financial facility and, on 3rd September, 2014, the account of Respondent No. 3 was classified as a Non-Performing Asset (***NPA***) in accordance with the guidelines issued by the Reserve Bank of India (***RBI***). On 11th December 2014, the Assignor Bank issued a demand notice under Section 13 (2) of the SARFAESI Act calling upon Respondent No.3 and the mortgagors/guarantors to repay the outstanding dues as specified therein. On 19th December 2014 Respondent No. 3 replied to the notice issued by the Assignor Bank under Section 13(2) of the SARFAESI Act and the Assignor Bank dealt with the response of Respondent No. 3 *vide* a letter dated 29th December 2014.

9. As and by way of abundant caution, the notice dated 11th December 2014 [under Section 13(2) of the SARFAESI Act] was also published by the Assignor Bank in the Business Standard and Mumbai Lakshwadeep on 7th January 2015. Thereafter, Respondent No. 3 addressed another letter dated 16th January 2015 which was responded to by the Assignor Bank on 24th January 2015. Respondent No. 3 thereafter addressed another letter to the Assignor Bank on 9th February

2015.

10. Whilst matters stood thus, by an assignment agreement dated 29th June 2015, the Petitioner acquired the outstanding dues and the underlying securities in respect of the financial facilities advanced to Respondent No. 3 from the Assignor Bank. The Petitioner also registered its charge on the said Flat / Secured Asset with CERSAI on 7th July 2015.

11. Thereafter, on 14th November 2017, the Petitioner obtained an order from the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act and physical possession of the said Flat / Secured Asset was scheduled on 17th January 2018. The Petitioner attempted to take physical possession of the said Flat / Secured Asset on 17th January 2018, when, at the request of Mr. Manoj Mehta, the occupant of the said Flat / Secured Asset, physical possession was deferred. Thereafter, on 2nd February 2018 the Petitioner took peaceful physical possession of the said Flat/ Secured Asset from Mr. Manoj Mehta, in compliance with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (***SARFAESI Rules***) and affixed a possession notice on the door of the Flat / Secured Asset and, in compliance with Rule 8(2) of the SARFAESI

Rules, published a notice of possession of the said Flat / Secured Asset in the Business Standard and Dainik Mumbai Lakshwadeep on 6th February 2018.

12. After completing the aforesaid formalities, on 5th August 2019, the Petitioner issued a notice, under Rule 8(6) of the SARFAESI Rules, for sale of the said Flat / Secured Asset and scheduled a public auction on 12th September 2019. The notice dated 5th August 2019 was sent *inter alia* to Respondent No. 3, published in the Business Standard and Dainik Mumbai Lakshwadeep on 6th August 2019 and, as required by Rule 8(7) of the SARFAESI Rules, was affixed on a conspicuous part of the said Flat / Secured Asset as well. However, the auction scheduled on 12th September 2019 failed for want of bids.

13. Thereafter, on 27th September 2019, the Petitioner issued another notice, under Rule 9(1) of the SARFAESI Rules, for sale of the said Flat / Secured Asset and scheduled a public auction on October 18, 2019. The notice dated 27th September 2019 was again sent *inter alia* to Respondent No. 3, published in the Business Standard and Dainik Mumbai Lakshwadeep on 28th September 2019 and, as required by Rule 8(7) of the SARFAESI Rules, was affixed on a conspicuous part of the said Flat / Secured Asset as well. In this auction, Respondent Nos. 5 and 6 participated and were declared the highest bidders for purchasing of the said Flat / Secured Asset. The sale of the said Flat / Secured Asset was therefore confirmed in their favour in accordance with Rule 9(2) of the SARFAESI Rules.

14. Thereafter, Respondent Nos. 5 and 6 paid the bid amount to the Petitioner on various dates between 18th October 2019 and 7th November 2019 and, in accordance with Rule 9(6) of the SARFAESI Rules the sale certificate was issued by the Petitioner in favour of Respondent Nos. 5 and 6 on 7th November 2019. On 9th November 2019, Respondent No. 4 (the Society) issued a no objection in favour of the Petitioner for sale of the said Flat / Secured Asset and the Petitioner executed a Sale Agreement in favour of Respondent Nos. 5 and 6 on 15th November 2019.

15. At this juncture, by a letter dated 14th November 2019, Respondent No. 4 informed the Petitioner that Respondent No. 2 had passed an Order dated 7th November 2019 attaching the said Flat / Secured Asset and the said Order was received by the Respondent No. 4 on November 11, 2019. Respondent No. 4 thus invalidated the no objection granted to the Petitioner. Resultantly, the Petitioner has filed the present Writ Petition for the reliefs more particularly reproduced earlier.

16. In this factual backdrop, Mr. D'souza, the Counsel for the Petitioner, submitted that the claim of the Petitioner was squarely covered by the ruling in ***Jalgaon Janata Sahakari Bank Ltd and Anr. Vs. Joint Commissioner of Sales Tax Nodal, 9 Mumbai and Anr.*** reported in [(2022) 5 Mh.L.J. 691] and particularly paragraphs 151 to 154 thereof which are reproduced below:

> *151. However, there could be attachments orders which might have been issued much prior to giving effect to the 2011 Rules, as amended. In respect of such orders of attachment, we consider it appropriate to express our views.*
>
> *152. The procedure to be followed in terms of the CPC when an immovable property is put up for auction sale to satisfy a decree of the court is to be found in Order XXI Rules 54 and 66 of the CPC. It is mandatory for the court executing the decree, to comply with the following stages before such property is sold in execution for a particular decree:*
> *(a) attachment of the immovable property;*
> *(b) proclamation of sale by public auction;*
> *(c) sale by public auction.*
>
> *At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property*

which is sold, without notice to the person whose property is being sold, is a nullity and all actions pursuant thereto are liable to be struck down/quashed. However, the proceedings before us do not concern execution of any decree.

153. In these proceedings we are as much concerned with proclamation itself as much with attachment. Insofar as recovery pursuant to the MLR Code is concerned, not only the provisions contained therein but also the provisions contained in the 1967 Rules are to be complied with. Simply ordering an attachment is not enough; a proclamation has to be issued in the prescribed form and such proclamation must be made public by beating of drum and such other mode as specified in section 192 of the MLR Code and rule 11(2) of the 1967 Rules before the property attached is sold.

154. We are of the considered opinion, on facts and in the circumstances, that unless attachment of the defaulter's immovable property is ordered in the manner ordained by the MLR Code and as prescribed by the MRLR Rules and due proclamation thereof is made, even the creation of charge on such immovable property may not be of any real significance, not to speak of demonstrating with reference to evidence that the transferee had actual or constructive notice of such charge. If there has been an attachment and a proclamation thereof has been made according to law prior to 24th January, 2020 or 1st September, 2016, i.e., the dates on which Chapter IV-A of the SARFAESI Act and section 31B of the RDDB Act, respectively, were enforced, the department may claim that its dues be paid first notwithstanding the secured dues of the secured creditors; but in the absence of an order of attachment being made public in a manner known to law, i.e., by a proclamation, once Chapter IV-A of the SARFAESI Act or section 31B, as the case may

> *be, has been enforced, the dues of the secured creditors surely would have 'priority'. In other words, if the immovable property of the defaulter is shown to have been attached in accordance with law prior to Chapter IV-A of the SARFAESI Act, or for that matter section 31B of the RDDB Act, being enforced, and such attachment is followed by a proclamation according to law, the 'priority' accorded by section 26E of the former and section 31B of the latter would not get attracted.*
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> (emphasis supplied)

17. The Learned Counsel for Respondent No. 2 opposed the Writ Petition and, as stated in an Affidavit in Reply dated 14th June, 2023, submitted that **(a)** Respondent No. 2 has a claim against Respondent No. 3 for a sum Rs. 5,89,07,000 (Rupees Five Crores Eighty Nine Lakhs and Seven Thousand Only) under the Maharashtra Value Added Tax 2002 (***MVAT Act***) and Central Sales Tax Act 1956 (***CST Act***) and that the Department has a first charge on the property of Respondent No. 3; **(b)** an ex-parte order was passed on 20th June 2019 in respect of the claim of Respondent No. 2; **(c)** recovery action under the Maharashtra Land Revenue Code 1966 r/w Section 34 of the MVAT Act and Section 9 (2) of the CST Act was initiated and an attachment order dated 7th November 2019 was passed by the Sales Tax Officer under the said provisions; **(d)** by a letter dated 25/09/2014 the claim of Respondent No. 2 was communicated to Central Bank of India Kandivali Branch and thus the Petitioner was bound by the same; **(f)** the sale of the Flat / Secured Asset by the Petitioner was not in accordance with the provisions of the SARFAESI Act and the SARFAESI Rules; and **(e)** as the sale by the Petitioner was on an as is where is whatever there is basis, Respondent Nos. 5 and 6 were bound to discharge the claim of Respondent No. 2. For all the aforesaid reasons, the learned Advocate for Respondent No. 2 submitted that the Writ Petition be dismissed.

18. We must mention that by Order dated 3rd August 2023 this Court permitted the Petitioner to file an Affidavit demonstrating compliance with the provisions of the SARFAESI Act and the SARFAESI Rules *qua* the sale of the said Flat / Secured Asset. By the said Order this Court also permitted Respondent No. 2 to file an Affidavit, if deemed necessary, to demonstrate the steps, if any, taken by Respondent No. 2 after the attachment order of 7th November 2019 was passed, and especially keeping in mind the ruling of the Full Bench of this Court in the case of ***Jalgaon Janata Sahakari Bank Ltd and Anr (supra)***.

19. The Petitioner has filed an Affidavit in Rejoinder dated 10th August 2023 by which the Petitioner has contended that **(a)** Respondent No. 2 could not challenge the sale of the said Flat / Secured Asset in the present Writ Petition as Respondent No. 2 had not taken any steps in that regard till date; and **(b)** Respondent No. 2 had not complied with the mandate of the Full Bench of this Court in ***Jalgaon Janata Sahakari Bank Ltd and Anr. (supra)*** and particularly paragraphs 151 to 154 thereof, *qua* publication of the attachment order dated 7th November 2019. By the said Affidavit the Petitioner also set out the compliances with the provisions of the SARFAESI Act and the SARFAESI Rules *qua* the said Flat / Secured Asset, the relevant portions of which have been alluded to by us in the foregoing paragraphs. Therefore, the Petitioner submitted that in view of the provisions of Section 26E of the SARFAESI Act, the ruling of the Full Bench of this Court in ***Jalgaon Janata Sahakari Bank Ltd and Anr. (supra) ,*** and as the said Flat / Secured Asset was already sold on the date of the attachment order dated 7th November 2019, the present Writ Petition ought to be allowed. Respondent No. 2 did not file any Affidavit pursuant to the liberty granted by Order of 3rd August 2023.

20. We have heard the Learned Counsels for the Petitioner, Respondent No. 2 and Respondent Nos. 5 and 6. The singular question that arises for determination in the present case is whether the attachment order of 7th November 2019 passed by Respondent No. 2 was communicated/intimated to the Petitioner, actually or constructively, prior to the sale of the said Flat/Secured Asset on 7th November 2019.

21. The fact that the Petitioner was taking measures under the SARFAESI Act against the said Flat / Secured Asset was in the public domain since 7th January 2015 (when the Section 13(2) Notice was published), on 6th February 2018(when the physical possession notice was published), 6th August 2019 (when the first sale notice was published) and again on 27th September 2019 (when the second sale notice was published).

22. Despite this, the attachment order of 7th November 2019 does not appear to have been communicated / intimated to the Petitioner, actually or constructively, prior to the sale of the Flat / Secured Asset on 7th November 2019. Respondent No. 2 has not produced any evidence on record to demonstrate that the attachment order of 7th November 2019 was communicated / intimated to the Petitioner, actually or constructively, prior to the sale of the said Flat / Secured Asset on 7th November 2019.

23. As borne out from the sequence of events set forth above, the attachment order of 7th November 2019 was communicated by Respondent No. 2 to Respondent No. 4 only 11th November, 2019 by which time the Flat / Secured Asset was already sold to Respondent No. 5 and 6. Further, the intimation to Central Bank of India *qua* the claim of Respondent No. 2 dated 25th September, 2019 as mentioned in the Affidavit in Reply of Respondent No. 2 would also not be of much assistance as the said intimation was in the nature of a garnishee notice. More importantly, the debt of Respondent No. 3 was acquired by the Petitioner from State Bank of Patiala, and not from Central Bank of India.

24. In these circumstances, the present Writ Petition deserves to be, and is allowed in terms of prayer clauses (a) and (b) which read thus:-

> *"**(a)** that this Hon'ble Court be pleased to issue a writ of Certiorari or any other writ, order or direction in the nature of a writ of Certiorari calling for all the records of the Respondent No.2, Sales Tax Department with regards to the attachment order dated 7th November, 2019 in respect of the Respondent No.3 and after perusing the same be pleased to*
> *to quash and/or set aside the attachment order dated 7th November, 2019 being Exhibit "L" to the Petition.*
>
> ***(b)** that this Hon'ble Court be pleased to issue a writ of Mandamus or any other writ, order or direction in the nature of a writ of Mandamus to the Respondent No.4 to record the transfer pursuant to the Sale dated 19th October, 2019"*

25. It is needless to clarify that if the Petitioner, after appropriating the sale proceeds towards its dues, has any surplus, the same shall be paid over to Respondent No. 2.

26. Rule is made absolute in the aforesaid terms. However, there shall be no order as to costs.

27. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[M.M. SATHAYE, J.] **[B. P. COLABAWALLA, J.]**