IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3345 OF 2023

ASREC (India) Ltd. & Anr. .. Petitioners

Versus

State of Maharashtra & Ors. .. Respondents

Mr. Charles De Souza a/w Nikhil Rajani i/b. M/s. V. Deshpande & Co., *for the Petitioners*

Mr. M. M. Pobale, AGP, *for the State.*

CORAM : B. P. COLABAWALLA &
M.M. SATHAYE, JJ.
DATE : JULY 04, 2023

P. C.

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

2. The above Writ Petition is filed by the Petitioners *inter-alia* seeking a declaration that by virtue of the provisions of Section 26-E of the SARFAESI Act, 2002, the Petitioner has priority of charge on the property which forms the subject matter of the Petition, namely, Plot bearing Survey No. 56, Hissa No. 2/1, admeasuring 00 H 21 R from a

total area admeasuring 00 H 47 R at Village Vadgaon Sheri, Taluka Haveli within the Pimpri limits of Pune Municipal Corporation and also within the limits of Registration District Pune, Sub Registration District Haveli, Dist-Pune (for short "**the secured asset**"). The Petitioner has also sought a direction that the warrant of attachment levied by Respondent No.2 on the secured asset be quashed and set aside and Respondent No.6, being the concerned land revenue authority, be directed to raise the lien/charge/encumbrances so that the secured asset becomes free from encumbrance of the claim of Respondent No.2 by carrying out the necessary modifications in mutation entry.

3. The brief facts in the aforesaid Petition are this. In or around June, 2007, Respondent No.3 approached Oriental Bank of Commerce at its Pune Branch with a request to sanction credit facilities. Accordingly, Oriental Bank of Commerce, vide its sanction letter dated 26th June, 2007 granted to Respondent No.3 Working Capital Term Loan in the sum of Rs. 2 crores. To secure the aforesaid facilities, various security documents were executed including personal guarantees given by Respondent Nos. 4 and 5. The repayment of the said facilities were also secured by mortgaging several immovable properties, one of which is the secured asset. The said Oriental Bank of

Commerce had also registered its charge with the Central Registry of Securitization and Asset Reconstruction and Security Interest of India ("**CERSAI**") as required under Section 26-B of the SARFAESI Act, 2002. This registration was effected on 17th March, 2012.

4. It appears that Oriental Bank of Commerce had also issued a notice under Section 13(2) of the SARFAESI Act, 2002 to Respondent Nos. 3 to 5 to pay the sum of Rs. 8.62 crores along with interest as detailed in the said notice. After this, the said Oriental Bank of Commerce assigned their entire debts due and payable by Respondent Nos. 3 to 5 to Petitioner No.1 vide an Assignment Agreement dated 26th June, 2014. After the said assignment, Petitioner No.1 brought itself on record in CERSAI as the holder of the secured asset.

5. Since the 1st Petitioner was the assignee of the debt due and payable by Respondent Nos. 3 to 5, it continued with the SARFAESI proceedings initiated by Oriental Bank of Commerce, and in furtherance thereof, took symbolic, and thereafter, physical possession of the secured asset. After physical possession of the secured asset was taken, Petitioner No.1 tried to sell the same through e-auction on three occasions i.e. 15th September, 2015, 4th May, 2020 and 23rd February,

2023 without any success. The reason given is that no bids were received because of the huge dues claimed by Respondent No.2 (The Sales Tax Authority). It is in these circumstances, that the present Petition is filed inter-alia asking for quashing of the attachment leased by Respondent No.2 on the secured asset and for Respondent No.6 to carry out the necessary modifications in the mutation entry of the secured asset.

6. In this factual backdrop, the learned Advocate appearing for the Petitioners submitted that the charge of Petitioner No.1 has been duly registered with CERSAI as contemplated under Section 26(B)(2). He submitted that this apart, the Sales Tax Authority has not registered their charge and/or any attachment order as required under Section 26B(4) of the SARFAESI Act, 2002. Since the charge of the 1st Petitioner is registered with CERSAI and that too prior to any charge being registered by Respondent No.2. The learned Counsel submitted that the dues of the secured creditor namely, Petitioner No.1, would get priority as contemplated under Section 26-E of the SARFAESI Act, 2002. He submitted that this issue is no longer res-integra and is covered by a decision of the full Bench of this Court in the case of ***Jalgaon Janata***

Sahakari Bank Ltd. and Another Vs. Joint Commissioner of Sales Tax, Nodal 9, Mumbai and another [2022 (5) Mh.L.J. 691].

7. Consequently, the learned Counsel submitted that the above Writ Petition be made absolute in terms of prayer clauses [a1], [a(i)] and [a(ii)] thereof.

8. The learned AGP appearing for the Respondents fairly stated that in the light of the Judgment passed by the full bench of this Court in the case of ***Jalgaon Janata Sahakari Bank Ltd.*** (supra), in the facts of the present case, the 1st Petitioner would have priority over the dues of the Sales Tax Department. He, however, submitted that after the dues of the 1st Petitioner are appropriated by it, if there is any surplus, the same should be remitted to the Sales Tax Authorities.

9. We have heard the learned Counsel for the parties at some length. We have also perused the papers and proceedings in the above Writ Petition. The facts in the above Writ Petition are really undisputed. The mortgage of the secured asset created in favour of Oriental Bank of Commerce is not disputed. This mortgage was registered under CERSAI on 17th March, 2012. This too is undisputed. The Sales Tax Authority

have their charge noted in the mutation entry only some time in the year 2016. They have till date not registered their charge with CERSAI as contemplated under Section 26-B(4) of the SARFAESI Act, 2002. Once this is the position, we find that under Section 26-E of the SARFAESI Act, 2002, the debts of the 1st Petitioner would have to be paid in priority over all other debts and all revenue, taxes, cesses and other debts payable to the Central Government or State Government or Local Authority. This, of course, is subject to any proceedings that are initiated under the provisions of the Insolvency and Bankruptcy Code, 2016. In the view that we take, we are supported by the decision of the Full Bench of this Court in the case of ***Jalgaon Janata Sahakari Bank Ltd.*** **(supra)**. The relevant paragraphs of the aforesaid decision read thus:

> "84. ....The next query that would obviously follow is: whether the word 'priority' appearing in section 26E of the SARFAESI Act, i.e., "...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", was used without a purpose? This reply has to be in the negative.
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> 85. Priority means precedence or going before (Black's Law Dictionary). In the present context, it would mean the right to enforce a claim in preference to others. In view of the splurge of 'first charge' used in multiple legislation, the Parliament advisedly used the word 'priority over all other dues' in the SARFAESI Act to obviate any confusion as to inter-se distribution of proceeds received from sale of

properties of the borrower/dealer. If a secured asset has been disposed of by sale by taking recourse to the Security Interest (Enforcement) Rules, 2002 it would appear to be reasonable to hold, particularly having regard to the non-obstante clauses in sections 31 B and section 26, that the dues of the secured creditor shall have 'priority' over all other including all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

86. A debt that is secured or which, by reason of the provisions of a statute, becomes a 'first charge' on the property, in view of the plain language of Article 372 of the Constitution, must be held to prevail over a Crown debt, which is an unsecured one. The law, as it stands even today, is that a Crown debt enjoys no priority over secured debts. This principle has been repeatedly reaffirmed including, inter alia, in the decision of the Supreme Court reported in (2000) 5 SCC 694 (Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co.) where the Court observed:

> "10. However, the Crown's preferential right to 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 for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of

> the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover it has been held that the Crown has no precedence over a pledge of goods. In Bank of Bihar v. State of Bihar the principle has been ealizedd by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (TLL, 7th Edn., p. 386) – 'It seems a government debt in India is not entitled to precedence over a prior secured debt'."

87. It would also not be inapposite to draw guidance from the decision of the Supreme Court reported in (2006) 10 SCC 452 (ICICI Bank Ltd. vs. SIDCO Leathers Ltd.) where the Court ruled as follows:

> "41. While enacting a statute, Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act claim of the first charge-holder shall prevail over the claim of the second charge- holder and in a given case where the debts due to both, the first charge-holder and the second charge-holder, are to be ealized from the property belonging to the mortgagor, the first charge-holder will have to be repaid first. There is no dispute as regards the said legal position.

42. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to Parliament. Thus, while enacting the Companies Act, Parliament cannot be held to have intended to deprive the first charge-holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen v. Firestone Tyre and Rubber Co. of India (P) Ltd., (1973) 1 SCC 813].

43. If Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge-holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

44. Section 529(1)I of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-à-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated.

45. If we were to accept that inter se priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifi-

cally stated that on his failure to do so, he will be excluded from the benefits of the dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him on par with an unsecured creditor. The logical sequitur of such an inference would be that even unsecured creditors would be placed on par with the secured creditors. This could not have been the intendment of the legislation."

88. Bare perusal of the 2016 Amending Act would show that the dues of the Central/State Governments were in the specific contemplation of the Parliament while it amended the RDDB Act and the SARFAESI Act, both of which make specific reference to debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority and ordains that the dues of a secured creditor will have 'priority', i.e., take precedence. Significantly, the statute goes quite far and it is not only revenues, taxes, cesses and other rates payable to the State Government or any local authority but also those payable to the Central Government that would have to stand in the queue after the secured creditor for payment of its dues.

89. The effect of using the word 'priority' in section 26E of the SARFAESI Act, according to us, is this. The rights accorded to 'first charge' holders by Central as well as State legislation having been known to the Parliament, in such a situation, what the Parliament intended by exercising its legislative power by introducing amendments in the SARFAESI Act, more particularly by incorporating section 26E therein, was to explicitly make the valuable right of the 'first charge' holder, subordinate to the dues of a second creditor. The rights of such of the first charge holders accorded by several legislations enacted by the State, having regard to the language in which sec-

tion 26E is couched, would rank subordinate to the right of the secured creditor as defined in section 2(1)(zd) subject, of course, to compliance with the other provisions of the statute. Acceptance of the contra-arguments of learned counsel for the State/respondents would undo what the Parliament has chosen to do.

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92. <u>In view of the foregoing discussion, we have no hesitation to hold that the dues of a secured creditor (subject of course to CERSAI registration) and subject to proceedings under the I & B Code would rank superior to the dues of the relevant department of the State Government.</u>"

(emphasis supplied)

10. In light of this authoritative pronouncement of the Full Bench of this Court, we are of the view that the reliefs sought by the Petitioners deserve to be granted.

11. In these circumstances, rule is made absolute in terms of prayer clauses a1, a(i) and a(ii) which read thus:-

"a1. That this Hon'ble Court be pleased to order and declare that by virtue of provisions of Section 26E of SARFAESI Act, the Petitioner has priority of charge on the subject property viz. Plot bearing Survey No.56 Hissa No.2/1, admeasuring 00 Hector 21 Aar from total area admeasuring 00 Hector 47 Aar at Village Vadgaon Sheri, Taluka Haveli within the Pimpri within the limits of Pune Municipal Corporation and also within the limits of Registration District Pune, Sub Registration District

Haveli, District-Pune over and above the charge of Respondent No.2 or such other statutory authority.

a. that this Hon'ble Court exercise its powers under Article 226 of the Constitution of India and be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India ordering and directing to;

i. forthwith quash set aside the warrant of attachment levied by the Respondent No.2 on the subject property viz; Plot bearing Survey No.56 Hissa No.2/1, admeasuring 00 Hector 21 Aar from total area admeasuring 00 Hector 47 Aar at Village Vadgaon Sheri, Taluka Haveli within the Pimpri within the limits of Pune Municipal Corporation and also within the limits of Registration District Pune, Sub Registration District Haveli, District-Pune.

ii. direct the Respondent No.6 being the concerned land revenue authority to raise the lien /charge /encumbrances and to discharge /denote in his record their lien/ charge/ encumbrances as recorded in respect of the subject Secured Asset as described in Exhibit "A" whereto so that the subject Secured Asset becomes free from encumbrance of the claim of the Respondent No.2 by carrying out necessary mutation entry;"

12. The 1st Petitioner, after appropriating its entire dues from the sale proceeds of the secured asset, shall remit the surplus, if any, to Respondent No.2.

13. The Writ Petition is accordingly disposed of. However, there shall be no order as to costs.

14. 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.]**