IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8012 OF 2022

Punjab & Sind Bank .. Petitioner

Versus

State of Maharashtra & Ors. .. Respondents

WITH
INTERIM APPLICATION NO.2393 OF 2023
IN
WRIT PETITION NO.8012 OF 2022

Punjab & Sind Bank .. Applicant

Versus

State of Maharashtra & Ors. .. Respondents

Mr. O. A. Das, Advocate for the Petitioner.

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

CORAM : B. P. COLABAWALLA &
M.M. SATHAYE, JJ.
DATE : OCTOBER 19, 2023

P. C.

1. The above Writ Petition is filed seeking a writ, order or direction under Article 226 of the Constitution of India to quash and set aside the attachment of the mortgaged properties and/or any claim of Respondent No.2, namely, Sale Tax Authorities.

2. The facts in the present case are in a very narrow compass and are not really disputed. The Petitioner is a Bank *inter alia* carrying on the business of the Banking. It had sanctioned various credit facilities to Respondent Nos.3 to 5. To secure those credit facilities, Respondent Nos. 3 to 5 had mortgaged the following properties in favour of the Petitioner-Bank:-

a) Commercial Plot, at Ludhiana, viz.; property measuring 500 sq. yards X 3 out of total property measuring 3659 sq. yards bearing MC No.B-XVII-2820/9 comprised in Khasra No.300/55/1, 265/48/4/1, 633/297/264/48, 265/48, 632/297/264/48 265/48, Khata No.129/210 as per Jamabandi for the year 1999-2000 (Khata No.135/215 as per Jamabandi for the year 2009-10 situated at village Noor Bhaini, Hadbast No.169, locality known as ToyeWaliJagah, BastiAbdullapur, Tehsil and District Ludhiana, as per sale deed duly registered with the office of sub-registrar, Ludhiana vide wasika Nos.17646 dated 24.01.2006; 17647 dated 24.01.2006 and 17648 dated 24.01.2006 belonging to Mr. Jatinder Pal Singh son of Late Shri Surinder Pal Singh [for short "***the Ludhiana Property***"]; and

b) **Shop No.G003**, adm. 51.20 sq. meters (carpet) equal to 61.44 sq.meters (B.U.) together with front Open space adm.30.90 adm. Sq.meters and **Basement No.B-011** adm.132.75 sq. meters (carpet) equal to 159.30 sq. meters (B.U.) situated in the Ground Floor, of the Building known as Vikas Centre, 104 FP No.21, T P S VI, S.V. Road, Santacruz (W), Mumbai 400 054 and Shop No. **G-004**, adm 51.20 sq. meters (carpet) equal to 61.44 sq. meter (B.U.) together with front open space adm 30.90 adm sq. meters, situated in the Ground floor, of the building known as Vikas Centre, 104 FP No.21, TPS VI, S.V. Road, Santacruz (West), Mumbai 400 054; stands in the name of Respondent No.3, M/s. Tornado Motors Pvt. Ltd. [for short **"*the Mumbai Property*"**].

3. The subject matter of the present Petition is only the *Mumbai Property*. As Respondent Nos.3 to 5 failed and neglected to repay their dues to the Petitioner-Bank, their account was declared as a NPA on 31st December 2014. Considering this, on 15th February 2015 the Petitioner-Bank issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 [for short '**the SARFAESI Act, 2002**']. The said notice was also published in the newspapers. Thereafter, on 12th June 2015, the Petitioner-Bank issued a possession notice under Section 13(4) of the SARFAESI Act, 2002 [to Respondent Nos. 3 to 5] in relation to the *Mumbai Property*. The said notice was published in the

newspapers and the same was also affixed on the *Mumbai Property*. Thereafter, the Petitioner-Bank approached the Chief Metropolitan Magistrate's Court under Section 14 of the SARFAESI Act, 2002 to obtain physical possession of the *Mumbai Property*. On 9th March 2017, the Chief Metropolitan Magistrate directed that the Petitioner-Bank can take physical possession of the *Mumbai Property* under Section 14 of SARFAESI Act, 2002. Accordingly, physical possession of the *Mumbai Property* was taken on 3rd April 2018. Thereafter, several attempts have been made for sale of the *Mumbai Property* but the same has not fructified due to failure to receive any bids. According to the Petitioner-Bank, they came to know about the attachment of the Sales Tax Authorities [of the *Mumbai Property*] around 24th February 2022, and to which the Petitioner replied by its letter dated 31st March 2022.

4. It is in these facts that Mr. Das, the learned counsel appearing on behalf of the Petitioner-Bank, submitted that by virtue of Section 26-E of the SARFAESI Act, 2002 the Petitioner-Bank has a prior charge on the secured assets and the dues of the secured creditor [the Petitioner-Bank] would get priority over all other dues, including that of the revenue, and which would include the Sales Tax Authorities. In this regard, he also brought to our attention the provisions of Section 26-E

of the SARFAESI Act, 2002. Mr. Das submitted that the issue raised by him in the present petition is no longer *res integra* and has already been decided by a Full Bench of this Court in the case of ***Jalgaon Janta Sahakari Bank Ltd. and Anr. V/S Joint Commissioner of Sale Tax Nodal 9, Mumbai and Anr. [2022 (5) Mh.L.J.691]***. He therefore submitted the attachment levied by Respondent No.2 [Dy. Commissioner of State Tax] be quashed and set aside.

5. On the other hand, Ms. Vyas, the learned advocate appearing on behalf of Respondent Nos. 1 and 2, brought to our attention the affidavit-in-reply dated 23rd January 2023 filed by the Joint Commissioner of State Tax, Mazgaon, Mumbai. Ms. Vyas submitted that in the facts of the present case Respondent No.3 is a defaulter in making payment of the Maharashtra Value Added Tax to Respondent No.2 and is a defaulter for an amount of Rs.1,51,53,889/- for the period 1st December 2013 to 31st December 2014.

6. Be that as it may, Ms. Vyas pointed out that to recover the dues of Sales Tax, Respondent No.2, on 3rd February 2016, issued a Bank Attachment Notice in Form-318 to HDFC Bank, Santacruz Branch. Thereafter, on 8th February 2016, Vikas Centre Condominium was

informed about the arrears of Sales Tax dues. After this, on 8th March 2017, Form-1 under the Maharashtra Land Revenue Code, 1966 [for short "**the MLRC, 1966**"] was also issued to the assessee, namely Respondent No.3, for recovery of Rs.1,51,53,889/-. To take this recovery forward, on 6th April 2017, the warrant of attachment [Annexure-8 of the MLRC, 1966] was also issued. Thereafter, on 7th April 2017, Form-4 was issued (under MLRC, 1966) thereby prohibiting the assessee (Respondent No.3) from transferring or charging the property as specified in the said schedule. On the same date, namely on 7th April 2017, a panchanama was also drawn in the presence of the Director of Respondent No.3 as per Annexure-12 to execute the warrant of attachment. Thereafter, on 15th April 2017, a letter was issued by the Sale Tax Authorities to the Petitioner-Bank intimating them about the arrears of sales tax of Rs.1,51,53,889/- and a demand of Rs.29,76,13,691/- by passing the assessment order. Ms. Vyas submitted that despite the Petitioner-Bank being put to notice that there are dues of the Sales Tax Authorities, and which are not paid by Respondent No.3, in the auction proclamation notice published by the Petitioner-Bank on 12th November 2018, it failed and neglected to disclose this fact, and in fact stated that to the best of the knowledge and information of the Petitioner-Bank there were no encumbrances on the *Mumbai Property* that was proposed to be sold.

7. Be that as it may, Ms. Vyas submitted that on 10th October 2017 an assessment order was passed. Thereafter for subsequent periods also assessment orders have been passed and the dues towards Sales Tax [from Respondent No.3] are approximately Rs.52,45,72,603/-. It is to recover these dues, the Sales Tax Authorities after following the due procedure, got the *Mumbai Property* valued as per the Valuation Report dated 7th February 2019. Thereafter, an auction proclamation notice dated 31st May 2019, was issued and the same was published in the 'Sakal' newspaper on 7th June 2019. This auction proclamation notice categorically states that the *Mumbai Property* would be auctioned on 29th July 2019. This sale was subsequently postponed. Ms. Vyas submitted that by virtue of these actions taken by the Sales Tax Authorities their charge was crystalized prior to 24th January 2020 [being the date when Section 26-E of the SARFAESI Act, 2002 was brought into force].

8. Ms. Vyas also relied upon the Full Bench judgment in ***Jalgaon Janta Sahakari Bank Ltd. and Anr.*** **(supra)** and more

particularly paragraph 151 to 154 thereof to contend that for all attachments levied by the Sales Tax Authorities prior to the cutoff date (i.e. 24th January 2020) would give precedence/priority to the Sales Tax Authorities provided the procedure under the Maharashtra Land Revenue Code, 1966 is duly followed by the Sales Tax Authorities. She therefore submitted that in the facts of the present case, the Petitioner-Bank cannot claim priority over the Sales Tax dues by resorting to Section 26-E of the SARFAESI Act, 2002.

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 as well as the reply filed by the Sales Tax Authorities. To understand the present controversy, it would be apposite first to refer the law laid down by this Court in the case of ***Jalgaon Janta Sahakari Bank Ltd. and Anr. (supra).*** The Full Bench, based on the arguments before it, at paragraph 44, formulated the following questions:-

> "44. Keeping in view the rival submissions, we have considered it appropriate to formulate the following substantial questions of law for answers:
>
> a. Having regard to the statutory provisions under consideration, does a secured creditor (as defined in the SARFAESI Act and the RDDB Act) have a prior right over the relevant department of the Government [under the BST Act/MVAT Act/ MGST Act]

to appropriate the amount realized by the sale of a secured asset?

b. Whether, despite section 26-E in the SARFAESI Act or section 31-B of the RDDB Act being attracted in a given case, dues accruing to department of the Government ought to be repaid first by reason of 'first charge' created over any property by operation of law (viz. the legislation in force in Maharashtra) giving such dues precedence over the dues of a secured creditor?

c. Are the provisions, inter alia, according 'priority' in payment of dues to a secured creditor for enforcing its security interest under the provisions of the SARFAESI Act prospective?

d. Whether section 31-B of the RDDB Act can be pressed into service for overcoming the disability that visits a secured creditor in enforcing its security interest under the SARFAESI Act upon such creditor's failure to register the security interest in terms of the amendments introduced in the SARFAESI Act?

e. Whether the priority of interest contemplated by section 26-E of the SARFAESI Act could be claimed by a secured creditor without registration of the security interest with the Central Registry? Depending on the answer to this question, whether correct proposition of law has been laid down (extracted infra) in paragraph 21 of the Division Bench decision reported in *2019 MhLJ Online 96=2020 (2) Bom. C.R.243 (OS) [ASREC (India) Limited vs. State of Maharashtra and ors.]* and in paragraph 35 of the Division Bench decision, reported in *2021(2) Mh.L.J. 721 (State Bank of India vs. the State of Maharashtra and ors.)*?

f. <u>When, and if at all, can it be said that the statutory first charge under the State legislation, viz. the BST Act, the MVAT Act and the MGST Act, as the case may be, stands displaced having regard to introduction of Chapter IV-A in the SARFAESI Act from 24th January, 2020</u>?

g. Whether an auction purchaser of a secured asset would be liable to pay the dues of the department in order to obtain a clear and marketable title to the property having purchased the same on "*as is where is and whatever there is basis*"?"

(emphasis supplied)

10. The answer to question (f) starts from paragraph 134 of the Full Bench decision. While answering question (f), the Full Bench at paragraph 150 came to the conclusion that in view of the amendments that have now been incorporated in the 2011 Rules with effect from the date when Chapter IV-A of the SARFAESI Act was made effective and enforceable (i.e. 24th January 2020), the relevant department of the State Government, despite attachment orders being issued by the Competent Authority, can only avoid compliance of sub-section (4) of Section 26-B at its own peril. The Full Bench therefore held that attachments orders of any department of the Government to whom a person owes money on account of unpaid tax, issued after 24th January 2020, if not filed with the Central Registry, has to wait till the secured creditor, by sale of the immovable property being the secured asset, mops up its secured dues. However, the Full Bench also took notice that there could be cases where attachments orders might have been issued much prior to giving effect to the 2011 Rules as amended and which were brought into force on 24th January 2020. It is in respect of such orders of attachment that the Full Bench observed that by merely attaching the secured property, the Sales Tax Authorities would not get a prior charge. They would have to take the matter further so as to not attract the 'priority' accorded by Section 26-E [of the SARFAESI Act,

2002] to the secured creditor. The relevant portion of the Full Bench decision on this aspect reads as under:-

"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 of 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 creditor 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."

(emphasis supplied)

11. As can be seen from this decision, the Full Bench opined that 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 MLRC, 1966 and Rule 11(2) of the 1967 Rules before the property attached is sold. The Full Bench opined that unless the attachment of the defaulter's immovable property is ordered in the manner ordained by the MLRC, 1966 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 according to law, and that too prior to 24th January 2020, the department may then claim that its dues be paid first notwithstanding the secured dues of the secured creditors. In other words, the Full Bench has categorically opined in what circumstances the sales tax dues get precedence or priority over the dues of the secured creditor.

12. When we apply the ratio of the above Full Bench decision to the facts of the present case, we find that the Sale Tax Authorities, in the present case, have not only attached the property but have also issued a proclamation of sale prior to the cutoff date of 24th January 2020. As mentioned above the attachment of the *Mumbai Property* was levied on

7th April 2017, and subsequently the *Mumbai Property* was also put up for sale, the details of which are given in the Affidavit filed by the Joint Commissioner of State Tax dated 23rd January 2023.

13. Once this is the factual position before us, we are of the view that the facts of the present case would squarely fall within a ratio laid down by the Full Bench in paragraphs 151 to 154 of its decision in ***Jalgaon Janta Sahakari Bank Ltd. and Anr. (supra)***. In the facts of the present case, we find that the Sale Tax Authorities have in fact complied with all the provisions of law for having a valid attachment, and in such circumstances, as per the Full Bench decision, it would get priority over the dues of the secured creditor. This is for the simple reason that all this was already done and completed prior to the cutoff date, namely, 24th January 2020. Once this is the case, we are unable to agree with Mr. Das that the Petitioner-Bank, by virtue of Section 26E of the SARFAESI Act, 2002, would have priority over the dues of the Sales Tax Department. Once this is finding, then there is no question of quashing the attachment levied on the *Mumbai Property* and/or any claim of Respondent No.2, as sought for in prayer clause (a) of the Writ Petition.

14. In view of the foregoing discussion, we find that the Writ Petition fails and is accordingly dismissed. However, in the facts and circumstances of the present case there shall be no order as to costs.

15. In view of the disposal of the above Writ Petition, nothing survives in the above Interim Application and the same is disposed of accordingly.

16. 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.]**