

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3477 OF 2024

Purushottam Prabhakar Chavan
age: 52, having address at – A-901, Swastik Alps,
GB Road, Azad Nagar, Thane, West – 400 607

...Petitioner

Versus

1. Deputy Commissioner of Sales Tax (GST),
NAS – VAT-E-013
Room No.107, Ground Floor,
GST Bhavan, Prashant Nagar Pathardi Phata,
Nashik – 422 010.
2. Encore Asset Reconstruction Company Pvt. Ltd.
Having Registered Office at Caddle Commercial
Tower, Regus Business Centre, 5th Floor,
Aerocity (Dial), New Delhi – 110 037 and
having Corporate Office at 5th Floor, Plot
No.137, Sector – 44,
Gurugram – 122 002, Haryana.
3. Kallappa Anna Awade Ichalkaranji Janata
Sahakari Bank Having its head office at
Janata Bank Bhavan, Main Road, Ichalkaranji
416 115.
Tal. Hatkanagale, Dist. Kolhapur, Having its
branch office at New Rajiv Gandhi Bhavan,
Sharanpur Road, Old Gangapur Naka,
Nashik – 422 002.

...Respondents

Mr. Karl Tamboly, a/w Anoshak Daver, Abhishek Matkar &
Malhar Bageshwar, Advocates for Petitioner.

Mr. K.B. Dighe, Addl. GP, a/w R.S. Pawar, AGP, for State-
Respondent No.1.

**Mr. Archit Virmani a/w Atul Gupte, Advocates for Respondent
No.2.**

**CORAM : B.P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.**

Reserved on : April 29, 2024.

Pronounced on : May 03, 2024.

JUDGMENT : (Per, Somasekhar Sundaresan, J.)

1. Rule. With the consent of the parties, rule is made returnable forthwith and the Writ Petition is taken up for final disposal.

2. This Writ Petition is essentially a challenge to a persisting attachment by the sales tax authorities over an apartment in Mumbai that has been purchased by the Petitioner, Mr. Purushottam Prabhakar Chavan, from an asset reconstruction company in the course of enforcement proceedings. For the reasons contained in this judgment, we allow the Writ Petition, with appropriate directions and declarations.

The Parties:

3. The attachment impugned in this Writ Petition has been issued by the State's sales tax authorities due to which the Deputy Commissioner of

Sales Tax (GST) (“**DCST**”) has been arraigned as Respondent No. 1. Encore Asset Reconstruction Company Private Limited (“**Encore ARC**”), the asset reconstruction company is Respondent No. 2. Kallappaanna Ichalkaranji Janta Sahakari Bank Ltd. (“**Lender Bank**”), the original lender to a set of borrowers, is Respondent No. 3. The loans and the attendant security interests have been assigned by the Lender Bank to Encore ARC.

Factual Matrix:

4. The factual matrix relevant for purposes of adjudicating this Writ Petition is set out below:—

A) Between 31st May, 2010 and 31st January, 2013, the Lender Bank sanctioned various credit facilities to: (i) See Megh Industries (“**SMI**”), a partnership firm of which Mr. Bharat Yeshwant Shah (“**Bharat**”) and Mrs. Seema Bharat Shah (“**Seema**”) are partners; (ii) See Megh Industrial Electricals Private Limited (“**SMIEPL**”); and (iii) See Ram Industries (“**SRI**”), a proprietorship firm of Seema;

B) The aforesaid facilities were secured by varying combination of mortgages created over the following properties :-

i. Flat No. 602, Banganga Anurag Co-operative Housing Society Limited, Plot No. 9, Banganga Road, Walkeshwar,

Mumbai – 400006, together with attendant rights to common areas and facilities (“***Walkeshwar Flat***”); and

ii. Plot No. H-39, Nashik (Satpur) Industrial Area of MIDC, Village Satpur, Taluka Nashik, District Nashik, admeasuring 828 square metres, together with buildings and construction thereon (“***Nashik Property***”), collectively, the “***Secured Assets***”;

C) The details of the borrowings by the aforesaid borrowers and the security interests created to secure such borrowings, may be summarised thus:-

Borrower	Loan Amount	Secured Asset mortgaged
SMI	3,20,00,000	Walkeshwar Flat and Nashik Property
SMIEPL	85,00,000	Walkeshwar Flat
SRI	80,00,000	Walkeshwar Flat and Nashik Property

D) The Walkeshwar Flat was owned by one Mrs. Praffulata Yeshwant Shah (“***Mrs. PY Shah***”), the mother of Bharat, and the mortgage was created by her on 18th June, 2010;

E) Mrs. PY Shah passed away on 10th June, 2013;

F) All the loans taken by the SMI, SMIEPL and SRI came to be classified as non-performing assets on 16th October, 2013;

G) On 5th October, 2015, an order of restraint was passed by the

Assistant Commissioner of Sales Tax, Nashik in respect of specified movable properties and the Nashik Property in connection with the alleged default by SMI in payment of value added tax dues. Pertinently, this order did not cover the Walkeshwar Flat;

H) On 2nd June, 2016, the Lender Bank invoked Section 13(2) of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (“**SARFAESI Act**”) to issue a demand notice;

I) On 6th September, 2016, the Lender Bank issued notices for possession of the Secured Assets including the Walkeshwar Flat, under Section 13(4) of the SARFAESI Act;

J) On 28th November, 2016, the Lender Bank filed applications for taking physical possession of, among others, the Walkeshwar Flat, under Section 14 of the SARFAESI Act;

K) This was followed by arbitration proceedings, with an attachment before judgment being secured on 24th November, 2016, after which actual physical possession was taken by the Lender Bank on 5th January, 2017;

L) On 27th July, 2017, the DCST wrote to the Lender Bank asserting priority of charge over the Secured Assets under Section 37¹ of the *Maharashtra Value Added Tax Act, 2002* (“**MVAT Act**”) owing to tax dues owed by SMI;

M) On 23rd August, 2017, a notice under the Maharashtra Land Revenue Code, 1966 (“**MLRC**”) prohibiting transfer of identified moveable properties and identified immovable properties was issued by the DCST. This notice included the Walkeshwar Flat, although identified as belonging to Mrs. PY Shah;

N) A warrant for taking possession of the Secured Assets was issued by the DCST to a sales tax inspector on 8th October, 2017. On 9th October, 2017, the process of triggering recovery proceedings under the MLRC was initiated against the Secured Assets (including the Walkeshwar Flat shown as owned by Mrs. PY Shah). The tax defaulter for the enforcement was SMI. Bharat was identified as the

¹ **Section 37 : Liability under this Act to be the first charge-**

- (1) **Notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer or, as the case may be, person.**
- (2) **The first charge as mentioned in sub-section (1) shall be deemed to have been created on the expiry of the period specified in sub-section (4) of section 32, for the payment of tax, penalty, interest, sum forfeited, fine or any other amount.**

[Emphasis Supplied]

owner of SMI;

O) On 8th November, 2017, an order of restraint (attachment) was passed by the DCST in respect of the Secured Assets (including the Walkeshwar Flat identified as owned by Mrs. PY Shah);

P) On 13th November, 2017, the Lender Bank wrote to the DCST asserting its priority by way of a mortgage over the Walkeshwar Flat. The Lender Bank also asserted that the Walkeshwar Flat belonged to Mrs. PY Shah and not to SMI or its partners;

Q) Protracted correspondence followed between the Lender Bank and the DCST, each asserting its priority. On 11th August, 2018, the DCST passed yet another order restraining sale of a few properties (including Mrs. PY Shah's Walkeshwar Flat);

R) The Lender Bank registered the mortgage over the Walkeshwar Flat with the Central Registry of Securitisation and Security Interest of India ("**CERSAI**") on 2nd January, 2020. Thereafter, the loan accounts came to be sold and assigned by the Lender Bank to Encore ARC on 21st March, 2020 and the registration at CERSAI too

was eventually modified to reflect the name of Encore ARC in place of the Lender Bank;

S) The arbitration proceedings between the Lender Bank and the borrowers culminated in an award dated 8th April, 2022 against the borrowers, after which, on 11th April, 2022, an auction notice was published. Attempts to auction were made between 11th May, 2022 and 26th December, 2022;

T) Correspondence disputing priority between the DCST and Encore ARC continued, and yet another order dated 23rd August, 2022 came to be passed by the DCST asserting that, among others, the Walkeshwar Flat must not be sold since the MVAT authorities enjoyed priority;

U) Eventually, in an auction held on 28th February, 2023, the Petitioner made the highest bid for the Walkeshwar Flat and on 25th April, 2023, the sale certificate certifying sale of the Walkeshwar Flat to the Petitioner was issued on 20th March, 2023;

V) Meanwhile, the housing society relating to the Walkeshwar Flat asked the Petitioner to get a no-objection certificate from the DCST owing to communications issued by the sales tax authorities to the

society; and

W) The Petitioner and Encore ARC have competing versions on state of knowledge of the claims of the DCST. With the DCST's claims over the Walkeshwar Flat persisting, the Petitioner has been unable to have the Walkeshwar Flat transferred to his name, leading to the filing of this Writ Petition.

Core Issue:

5. Against this backdrop, the core issue that falls for consideration is whether as a matter of law, the Petitioner, the auction purchaser of the Walkeshwar Flat under the SARFAESI Act, is a valid recipient of free and marketable title to it. The Lender Bank (and thereby Encore ARC, which stands in the Lender Bank's shoes) and the DCST have asserted as specifically therein first priority over the Walkeshwar Flat.

6. In our opinion, this conflict stands resolved by operation of Chapter IVA of the SARFAESI Act, which was brought into force on 24th January, 2020. Multiple judgments have now declared the law contained in the provisions of Chapter IVA. We believe such declared position of the law puts a *quietus* to this protracted battle.

Demise of Mrs.PY Shah:

7. Before analysing the law, it is important to deal with the demise of Mrs. PY Shah, the mortgagor. Mrs. PY Shah, the mother of Bharat, provided third-party security on behalf of SMI, the partnership firm of which Bharat and Seema are partners. Due to the mortgage, there is direct privity between Mrs. PY Shah (and her estate after her demise) and the Lender Bank (and thereby Encore ARC). As regards the DCST, the right to recover tax dues from Bharat is due to the statutory joint and several liability of Bharat as a partner of SMI, the partnership firm. It is common ground that Mrs. PY Shah was not a partner of SMI. The DCST does not have or assert any statutory right to move against a person providing third-party security to lenders, or to move against parents of a firm's partner. The right to enforce against the Walkeshwar Flat is asserted on the premise that Bharat is a legal heir of the Late Mrs. PY Shah. The stance of the DCST is best extracted from the DSCT's additional affidavit dated 13th February, 2024, which is extracted below:-

*“.....M/s. See Megh Industries is a partnership firm and Mr.Bharat Shah is the partner in the firm. **Mr. Bharat Shah is a son of late Smt. Praffulata Yeshwant Shah, then owner of the property.** Being the **legal heir Mr.Bharat Shah** (It is mentioned by Respondent No.3 in Arbitration dispute No.1 & 2 before the Hon'ble Arbitral Tribunal, Nashik) **is naturally and legally supposed to inherit the property** hence the action by the R No. 1 is legal and in the interest of securing revenue of the Department. **M/s. See Megh Industries is a partnership firm and Mr.Bharat Shah is the partner in the firm.***

Warrant of attachment in Form No.4 under MLRC, 1966 was already issued by R No.1 on 08-11-2017.

R No.1 has already initiated actions as per MLRC and created the encumbrance by serving attachment orders dated 05.10.2015, 08.11.2017, 23.08.2022 and 15.06.2023.....”

[Emphasis Supplied]

8. There are three legal heirs of Mrs. PY Shah – apart from Bharat, one Mr. Amit Yeshwant Shah and another Mrs. Bhawana Himanshu Agashiwala. Therefore, what share of interest in the Walkeshwar Flat would go to Bharat as a legal heir is a question of fact that would have to be determined before examining if that component of interest is amenable to attachment and recovery by the tax authorities. However, without getting into the extent of Bharat’s interest (assuming for the sake of argument that Bharat was entitled to the entire Walkeshwar Flat as legal heir to Late Mrs. PY Shah), the key question to ask is who, between the DCST and Encore ARC has the priority in enforcement against the Walkeshwar Flat.

9. The DCST started asserting its rights against SMI right since 5th October, 2015, but the attachment order of that date did not even impose any restraint on the Walkeshwar Flat. By this time, Mrs. PY Shah had passed away. It was on 8th November, 2017 that an attachment order first

covered the Walkeshwar Flat. Well prior to that, in 2016, various steps under Section 13 of the SARFAESI Act had been taken by the Lender Bank, in respect of the Walkeshwar Flat, including attachment before judgment in arbitration proceedings. Physical possession of the Walkeshwar Flat too was taken on 5th January, 2017.

10. Be that as it may, the real question to answer is the position in law in terms of who among the DCST and the Lender Bank (thereby, Encore AMC) has priority over the Walkeshwar Flat.

Jalgaon Janta and Consequent Judgements:

11. The law is well declared by a Full Bench of this Court in Jalgaon Janta Sahakari Bank & Anr. Vs. Joint Commissioner of Sales Tax Nodal 9, Mumbai & Anr.² (**Jalgaon Janta**), which has been applied by various Benches of this Court to the facts before them. In studying how **Jalgaon Janta** has been applied, we need not look beyond a decision of a Division Bench of this Court in Union Bank of India vs. Deputy Commissioner of

Sales Tax & Ors.³ (**Union Bank**), as indeed two decisions by this very Bench in the case of Indian Overseas Bank vs. Deputy

² 2022 SCC OnLine Bom 1767

³ 2024 SCC OnLine Bom 405

Commissioner of State Tax & Ors.⁴ (*Indian Overseas Bank*) and in Bhushan Ramesh Bramgankar vs. State of Maharashtra & Anr.⁵ (*Bhushan Bramgankar*).

12. Even where multiple creditors have registered their security interests over an asset with CERSAI, upon Chapter IVA of the SARFAESI Act coming into force on 24th January, 2020, the order of priority of such security interests would follow the sequence in which such registration has been effected. Pursuant to Section 26-C(2) of the SARFAESI Act, the enforcement of a security interest registered with CERSAI prior in time would have priority over any subsequent security interest registered over the same asset. The claim of the subsequently-registered creditor would be subject to the claim of the creditor whose security interest is registered prior in time. Under Section 26-E of the SARFAESI Act⁶, once a secured creditor registers its security interest, notwithstanding any other law in force, the debts owed to such secured creditor shall be paid from the proceeds of enforcement over that asset, in priority over all other debts, including taxes payable to the State Government.

⁴ 2024 SCC OnLine Bom 907

⁵ Judgement dated 30th April, 2024 in Writ Petition (L) No. 31816 of 2023

⁶ 26-E. Priority to secured creditors.—

Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be 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.

[Emphasis Supplied]

13. It is clear from ***Jalgaon Janta*** that even where there is an attachment order of the Sales Tax authorities prior to 24th January, 2020, without any further steps being taken towards issuing a proclamation of sale, the tax authorities cannot claim priority over the dues payable to the secured creditor, whose security interest is registered with CERSAI.

14. This law declared by the Full Bench in ***Jalgaon Janta***, brings about a *quietus* to the conflicts between secured creditors and tax authorities, with effect from 24th January, 2020. The proliferation of a “first charge” across fiscal legislation was dealt with in ***Jalgaon Janta***, and the first principles of the law was declared. The parties to this Writ Petition (and indeed this Bench) are bound by the law so declared.

15. The Lender Bank registered the mortgage over the Walkeshwar Flat with CERSAI on 2nd January, 2020. The priority of claims stipulated in Section 26-C(2) came into effect on 24th January, 2020. There is no record of any registration of attachment by the DCST with CERSAI. With effect from 24th January, 2020, the priority of claims could only be determined with reference to the sequence of registration with CERSAI. Another noteworthy feature of the factual matrix extracted above is that well prior to the first attachment order against the Walkeshwar Flat (8th November, 2017), various enforcement measures had been taken by the

Lender Bank under the SARFAESI Act, including physical possession. With a registration of security interest in favour of the Lender Bank, and the DCST having neither registered their attachment order u/s.26-B(4) of the SARFAESI Act with CERSAI, nor having issued a proclamation of sale of the Walkeshwar Flat, a priority accrued to the Lender Bank on 24th January, 2020 over the DCST.

16. In ***Union Bank***, another Division Bench dealt with a similar conflict between a secured creditor and the sales tax authorities. In that case, enforcement of the lender's security interests (created between 2008 and 2011) commenced in 2015. The registration with CERSAI had been effected in 2013. The sales tax authorities initiated attachment proceedings in February 2019. The lender conducted auctions in 2019 and its requests to the tax authorities to remove their attachments was not paid heed to. Citing copiously from ***Jalgaon Janta*** (Paragraphs 84 to 89; Paragraph 92; and Paragraphs 189 to 192 thereof), the Division Bench held that the Sales Tax Department cannot claim priority over the dues payable to the secured creditor.

17. Likewise, in ***Indian Overseas Bank***, this Bench, also relying on ***Jalgaon Janta*** (Paragraphs 82 to 85; and Paragraphs 88 to 92 thereof),

returned a similar finding. In the interest of brevity, the extracts from *Jalgaon Janta* cited in *Union Bank* and in *Indian Overseas Bank* are not extracted again.

18. In *Bhushan Bramgankar*, this Bench took a similar view relying on *Union Bank* and *Indian Overseas Bank* in the facts of that case.

Section 26-E (SARFAESI) vs. Section 37A (MVAT):

19. Section 37 of the MVAT Act, on its own showing, points to the manner of its reconciliation and harmonious construction with Section 26-E of the SARFAESI Act. While Section 37(1) of the MVAT Act would override any provision of contract that creates a charge, it would be subservient to any provision in a Central Act that gives first charge to some other entity. The Full Bench has ruled in *Jalgaon Janta* that the first charge provided for in Section 37(1) of the MVAT Act would yield to the priority provided for in Section 26-E of the SARFAESI Act, evidently a Central Act that gives first priority to secured creditors, subject to the security interest being registered with CERSAI.

20. Therefore, when Encore ARC enforced the mortgage over the Walkeshwar Flat, it enjoyed priority over the statutory first charge of the

⁷ Relevant portions from each of these provisions are extracted earlier in this Judgement.

DCST under the MVAT Act (assuming the Walkeshwar Flat in its entirety was even available for enforcement of dues owed by SMI). Therefore, the Petitioner, as a purchaser of the Walkeshwar Flat has the benefit of a clear and marketable title to the Walkeshwar Flat, free of encumbrances enjoyed by the DCST, since it was in the enforcement of a security interest enjoying priority that led to the purchase by the Petitioner.

21. Once the mortgage is enforced against a secured asset, there would be no scope left for any further enforcement against the same asset. The competing and subservient charge enjoyed by creditors with lower priority (in this case, the DCST) would then move to the proceeds of the enforcement after such proceeds have been deployed towards discharging the claim enjoying higher priority in full. The residual amount of such proceeds would then go to the creditor with the next priority. Consequently, the auction proceeds of the Walkeshwar Flat would first go towards discharging the dues owed to Encore ARC. The residue, if any, after discharging the dues of Encore ARC, may flow to the DSCT, in the proportion of Bharat's interests in the estate of the Late Mrs. PY Shah. There can be no claim whatsoever by the DCST against the Petitioner (the auction purchaser), or for that matter, against the Walkeshwar Flat (the Secured Asset that is already enforced against).

22. The aforesaid legal position in respect of priority of security interests is an integral element of any as-is-where-is; as-is-what-is; or whatever-there-is condition imposed as a term of the auction of the Walkeshwar Flat. The enforcing lender, the bidder, and the tax authorities are all bound by the law declared. Therefore, such a stipulation of such a condition in the auction (which is conventional in enforcement auctions under the SARFAESI Act), is of no relevance in the adjudication of this Writ Petition.

23. The DCST would indeed be free to chase other properties of SMI that are not the subject matter of a security interest registered ahead of them. If there are no assets left to chase, the DCST would still have the position of an unsecured creditor, with a right to continue proceedings to recover their dues from SMI and its partners, in accordance with law.

Lender Bank's prior Writ Petition:

24. There is one other facet of the matter, to which we have given our anxious consideration. In the List of Dates tendered by Mr. Karl Tamboly, learned counsel appearing for the Petitioner, it has been fairly disclosed that the Lender Bank had filed Writ Petition No. 15278 of 2018 on 4th June, 2018 challenging a demand notice issued to it by the DCST. That petition came to be dismissed owing to non-appearance of the

Lender Bank's advocates. A Civil Application No. 171 of 2020 for restoration of that Writ Petition was filed on 5th October, 2018, and is pending.

25. As explained above, the law on *inter-se* priority of security interests changed on 24th January, 2020 and altered the position on priority of claims for all existing and new cases, with effect from that date. This Writ Petition is by the auction purchaser, who is entitled in law, to a clear and marketable title, free from competing encumbrances. Therefore, the dismissal for non-appearance of counsel, of a writ petition by the Lender Bank is of no detriment to the Petitioner's case in this Writ Petition.

Conclusions and Directions:

26. Therefore, the Writ Petition deserves to be allowed with the following directions and declarations:-

- a) The Lender Bank had first priority in enforcement against the Walkeshwar Flat with effect from 24th January, 2020, having been the first to register with CERSAI, which was done on 2nd January, 2020;

- b) Encore ARC, which conducted the auction on 28th February, 2023, acquired the entitlement to priority from the Lender Bank along with the assignment of the loans to the borrowers with attendant security interests on 21st March, 2020;
- c) Although the DCST has repeatedly issued orders of restraint, there is no evidence of registration with CERSAI. The DCST has fairly stated on oath in an additional affidavit filed pursuant to directions by this Court, that no proclamation of sale has been issued. Therefore, in view of the law laid down in ***Jalgaon Janta***, it cannot be said that there is a competing charge in favour of the DCST over the Walkeshwar Flat;
- d) The attachment orders issued prior to 24th January, 2020 are of no assistance in giving priority to the DCST in claims over the Walkeshwar Flat. With no registration with CERSAI having been made by the DCST, and no proclamation of sale having been issued, the Lender Bank's entitlement to priority has not been undermined. That entitlement flowed to Encore ARC. The consequences of such priority has led to the Petitioner having a free and marketable title free of the encumbrance claimed by the DCST;

- e) Consequently, any attachment sought to have been issued in respect of value added tax and central sales tax dues owed by SMI, insofar as it relates to the Walkeshwar Flat, is hereby quashed and set aside. The Petitioner is entitled to have the Walkeshwar Flat registered in his name and the DCST can have no objection to such registration;
- f) The DCST is entitled to any residual proceeds from the sale of the Walkeshwar Flat, after discharge of dues owed to Encore ARC, to the extent of Bharat's proportion of entitlement to the estate of Mrs. PY Shah. Towards this end, Encore ARC is directed to provide to the DCST, a statement of accounts in respect of the dues owed by the borrowers to Encore ARC, and the appropriation of sale proceeds by Encore ARC pursuant to the auction of the Secured Assets; and
- g) This judgment will not in any manner constrain the statutory right of the DCST to chase, in accordance with law, any other asset of SMI and its partners, to the extent that there is no conflicting priority enjoyed by any secured creditor pursuant to Chapter IVA of the SARFAESI Act. Our consideration of the law and its application of facts is restricted to the entitlement of the Petitioner in respect of the Walkeshwar Flat.

27. The Writ Petition is allowed accordingly. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

28. This judgment will be signed digitally 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 judgment.

[SOMASEKHAR SUNDARESAN, J.]

[B.P. COLABAWALLA, J.]