

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 248 of 2020

Union Bank of India

... Petitioner

Versus

Deputy Commissioner of Sales Tax & Ors.

... Respondents

Mr. Deepak Saxena a/w Mr. Jitendra Bakliwal i/b Legal Prism, for
Petitioner.

Mrs. Jyoti Chavan, Addl. G.P. for State.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 22 JANUARY, 2024

Oral Order : (Per G. S. Kulkarni, J.)

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.
2. This petition under Article 226 of the Constitution of India is filed on 20 December 2020 praying for the following reliefs:

“(a) this Hon’ble Court be please to issue writ of Mandamus and/or Certiorari and/or any writ in the nature of Mandamus and/or Certiorari and/ or any appropriate writ, order or direction, to quash and set aside the attachment order dated 20th February 2019 passed by the Respondent no.1;

(b) Pending the hearing and final disposal of this petition, this Hon’ble Court be please to refrain the Respondent no. 1, his agents, servants and representatives from taking any action/steps in furtherance of the said order dated 20th February 2019.

- (c) ad-interim reliefs in terms of prayer clause (c) above.
- (d) For Cost of this Petition.
- (e) For such and other further reliefs as the nature and circumstances of this case.”

3. Briefly the facts are :- Respondent No.3 Mr. Vinod Kainya had availed loan / credit facilities from the petitioner as proprietor of M/s Kainya Steel Corporation. To secure such credit facilities, Respondent No.4 Mrs. Sunita Kainya had stood as a guarantor. They also created mortgage of the said secured assets on 2 December 2008, 20 January 2009, 18 April 2009 and 4 February 2011 in favour of the petitioner.

4. It is the case of the petitioner that on 1 October 2012 proprietorship of Mr. Vinod Kainya/respondent No.3, was taken over by M/s. Tarachand International Pvt. Ltd./respondent No.2 under an agreement to take over of business entered on the even date between the respondent Nos. 2 and 3. Thereafter on 28 December 2012 and 18 January 2013, the petitioner had issued further sanction letters in regard to the import letters of Credit Facilities of Rs.50 crores, having sub-limit of cash credit facility of Rs.7 crores, as granted to respondent No.2. It appears that respondent Nos.3 & 4 had executed letters of continuing Guarantee dated 26 February 2013 thereby unconditionally, absolutely, and irrevocably guaranteeing repayment of entire dues under the credit facilities together with interest, costs charges and expenses. Subsequent thereto on 18 March 2013 in relation to such credit facilities, respondent Nos.3

& 4 also deposited title deeds of the secured assets by way of constructive delivery and recorded Memorandum of entry dated 18 March 2013 in order to secure limits granted to respondent No.2. The petitioner had issued a further sanction letter dated 15 December 2014 and sanctioned Ad hoc cash credit limit of Rs. 7 crores, as requested by respondent No.2. Again on 17 December 2014 respondent Nos.3 & 4 had issued a letter of continuing guarantee, guaranteeing such repayment.

5. It is the case of the petitioner that on 13 July 2015 respondent Nos. 2, 3 & 4 failed and neglected to keep regular the loan account of respondent No.2 after which it was classified as a Non-Performing Asset (NPA) according to the directives issued by the Reserve Bank of India. As on 23 August 2015, a large sum of Rs.22,16,62,046.25/- was due and payable as outstanding dues.

6. The petitioner so as to recover the amounts due and payable, issued a notice to respondent Nos.2, 3 & 4 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") calling upon them to pay a total sum of Rs.22,16,62,046.25/-. As there was a default in not honoring such payment, as per the time lines as set out in the said notice, on 30 December 2015 the petitioner took symbolic possession of the secured assets. Thereafter, on 5 May 2016, the petitioner again issued a notice calling upon the respondent Nos.2, 3 & 4 to pay the outstanding dues with interest to the petitioner within a period

of seven days, however, as the same was not paid, the petitioner approached the learned Chief Metropolitan Magistrate, Esplanade, Mumbai, on 28 November 2017 and obtained an order under Section 14 of the SARFAESI Act. In pursuance thereof on 16 November 2018 petitioner took over the physical possession of the secured assets.

7. On the backdrop of such progress having achieved by the petitioner towards recovery of the debts payable by respondent Nos.2 to 4, on 20 February 2019, the petitioner received from respondent No.1/Deputy Commissioner of Sales Tax, an order of the even date attaching the secured assets for recovery of sales tax dues payable by respondent No.2.

8. On 19 May 2019, 23 June 2019 and 17 November 2019, the petitioner published e-auction notices under Rule 8(6) of Security Enforcement Rules, 2002 for sale of the said secured assets so as to recover the outstanding dues payable by the respondent Nos.2, 3 & 4. The auction of the secured assets was accordingly conducted on 14 June 2019, 26 July 2019 and 10 December 2019.

9. In order to take further steps to materialise the sale, by removal of the attachment of the sales tax department, the petitioner addressed letters dated 24 October 2019, 16 November 2019 & 19 November 2019 to the Deputy Commissioner of Sales Tax requesting him to remove the attachment order issued qua the secured assets inter alia contending that as the petitioner was a secured creditor the petitioner had priority over the secured assets in the

recovery of its dues from respondent Nos.2 to 4. However by the impugned order dated 20 December 2019 respondent No.1 refused to remove such attachment. It is in these circumstances, the petitioner is before the Court, praying for the reliefs which we have noted hereinabove.

10. Reply affidavit is filed by the respondent in opposing the petition. We also note from the orders passed on the present proceedings and more particularly, the orders dated 7 June 2022, 5 July 2022, 24 August 2022 and 20 March 2023 that the proceedings were adjourned, in view of the legal issues which would arise for consideration of the Court in the present case, were pending consideration before the full bench of this Court in the case of **Jalgaon Janta Sahakari Bank Ltd. And Anr. Vs. Joint Commissioner of Sales Tax Nodal 9, Mumbai and Anr.**¹, on which full bench delivered its judgment dated 30 August 2022 reported in [2022 (5) Mh.L.J. 691].

11. It is submitted on behalf of the petitioner that in view of the position in law, as laid down in the said decision of the full bench, the impugned attachment on the secured assets cannot be sustained and would be required to be set aside. This also for the reason that there was no registration of the charge by the State Government with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India. Thus, no legal rights can be recognized, for the State Government to assert any charge overriding the

1 [2022 (5) Mh.L.J. 691]

secured interest of the petitioner. It is hence submitted that in the aforesaid circumstances, the petition needs to succeed hence it be allowed in terms of prayer clause-(a).

12. We may also observe that in the present case as pointed out on behalf of the petitioner, the registration with the Central Registry of Securitization Assets, Reconstruction and Security Interest of India (for short “CERSAI”) in accordance with the provisions of chapter IIII of the SARFAESI Act was undertaken on 29 April 2013. This is clear from the report of the CERSAI, as annexed to the petition as also the particular of registrations as set out in respect of the properties at page 56-A, the details of which are as under:

“The particulars of the Registration with CERSAI are tabulated below:

Exhibit D1 to D8

Sr. No.	Challan Date	Challan No.	Security Interest ID	Asset ID	Asset Description
1	29-04-2013	200017572319	400004865191	200004859113	Plot ID:03, Locality: Thane Nhawe, Dist: Raigad - 410203
2	29-04-2013	200017572105	400004865134	200004859057	Plot ID:96, Locality: JB Nagar, Distt.: Mumbai - 400059
3	29-04-2013	200017568747	400004865021	200004858944	Plot ID:34, Locality: Santacruz, Dist.: Mumbai - 400054
4	29-04-2013	200017572521	400004865245	200004859167	Plot ID:201, Locality: Fort, Dist.: Mumbai - 400032
5	14-05-2013	200017640231	400004892528	200004886417	Plot ID:57, Locality: Thane Nhawe, Distt.: Raigad - 410203
6	14-05-2013	200017636953	400004891854	200004885750	Plot ID:34, Locality:

					Santacruz, Dist.: Mumbai - 400054
7	14-05-2013	200017640563	400004892634	200004886523	Plot ID: 12, Locality: Fort, Distt.: Mumbai - 400023
8	25-05-2013	200017640961	400004892763	200004886652	Plot ID:96, Locality: Andheri East, Distt.: Mumbai - 400059

The copies of the CERSAI certificate are annexed herewith and marked as Exhibit D1 to D8.”

13. The certificates as issued by the CERSAI is also annexed to the petition as Exhibit-D1 to D8.

14. We may observe that the full bench of this Court in **Janta Jalgaon Sahakari Bank (supra)** was considering an issue as to who between the secured creditor [as defined in section 2(1)(zd) of the SARFAESI Act and section 2(1)(la) of the RDDB Act], and the taxing/revenue departments of the Central/State Governments, can legally claim priority for liquidation of their respective dues qua the borrower/dealer upon enforcement of the ‘security interest’ [as defined in section 2(1)(zf) of the SARFAESI Act] and consequent sale of the ‘secured asset’ [as defined in section 2(1)(zc) of the SARFAESI Act], in view of the extant laws, was the broad question the Full Bench was tasked to decide. The Full Bench framed the following substantial questions to be answered:

“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 a 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?

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*"?"

15. The answers to question a & b which are relevant in the present context, the Court held that dues of secured creditor (subject of course to CERSAI registration) and subject to the proceedings under the Insolvency and Bankruptcy Code would rank superior to the dues of the relevant department to the State Government. The following are the relevant observations of the Full Bench :-

"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.

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 realized 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'."

"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 realized 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 specifically 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 section 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.

92. 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.”

“189. In the case at hand, we have seen that the secured creditor had registered the security interest with CERSAI on 25 October 2017. Post enforcement of Chapter IV-A of the SARFAESI Act, under sub-section (4) of section 26B of the SARFAESI Act, the department of the Government which professes to recover any tax or other Government dues, is enjoined to register such claim with CERSAI.

190. It does not appear that the respondent no. 1 registered its claim or attachment over the secured asset with CERSAI, post enforcement of Chapter IV-A of the SARFAESI Act. Sub-section (2) of section 26C provides that any attachment order subsequent to the registration of the security interest with CERSAI, shall be subject to such prior registered claim.

191. In our view, in the instant case, with the enforcement of Chapter IV-A of the SARFAESI Act, the claim of the respondent no.7 Bank, the secured creditor, was extolled to a higher pedestal and the subsequent act of recording a charge in the record of right of the secured asset cannot dilute the right of priority in payment, under sections 26C(2) and 26 of the SARFAESI Act. As a necessary corollary, the non-registration of the claim and/or attachment order by the respondent no.1 under section 26B(4) of the SARFAESI Act, can only be at the peril of the department. Mere recording of the purported charge in the record of right of the secured asset, in the absence of the registration with CERSAI, in our considered view, cannot be to the detriment of the auction purchaser, though the auction sale was on "as is where is and as is what is basis".

192. Mr. Sen, learned senior advocate appearing for the petitioner submitted that in the event the Court is persuaded to allow the writ petition, it is necessary to extend the time to adjudicate the stamp duty on the sale certificate and register the same. There are provisions in the Maharashtra Stamp Act, 1958 (sections 31 and 32) and the Registration Act, 1908 (sections 23 and 25) which stipulate the time for tendering the instrument for adjudication, determination of stamp duty thereon and registration of the instrument from the date of its execution. Since the petitioner had instantaneously lodged the sale certificate for adjudication, we are inclined to

direct that the time commencing from the lodging of the said sale certificate till the decision of this writ petition, be excluded from consideration in computing the statutory period for adjudication of the stamp duty and registration of the instrument.”

16. Thus in view of the clear position in law as laid down by the full Bench, the Sales Tax Department cannot claim priority over the dues payable to the petitioner who is the secured creditor as held by the Full Bench.

17. In the light of the above discussion the petition needs to succeed. It is accordingly allowed in terms of prayer clause-(a).

18. Needless to observe that the petitioner after appropriating its entire dues from the sale proceeds of the secured assets shall remit the surplus if any to respondent No.1. Respondent No.1 is also free to adopt such appropriate proceedings against respondent Nos.2, 3 & 5 as may be permissible in law to recover the said amount.

19. Disposed of in the above terms. No costs.

20. Rule is made absolute in the above terms.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKARNI, J.)