IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO. 2 OF 2023
IN
WRIT PETITION NO. 2935 OF 2018

Jalgaon Janta Sahakari Bank Ltd. & Anr. ..Petitioners
Versus
Joint Commissioner of Sales Tax, Nodal-9,
Mumbai & Anr. ..Respondents

WITH
INTERIM APPLICATION (L) NO. 20151 OF 2023
IN
REVIEW PETITION NO. 2 OF 2023
IN
WRIT PETITION NO. 2935 OF 2018

Vilas Vishnu Joshi ..Applicant

<u>In the matter between</u>
Jalgaon Janta Sahakari Bank Ltd. & Anr. ..Petitioners
Versus
Joint Commissioner of Sales Tax, Nodal-9,
Mumbai & Anr. ..Respondents

WITH
INTERIM APPLICATION (L) NO. 19959 OF 2023
IN
REVIEW PETITION NO. 2 OF 2023
IN
WRIT PETITION NO. 2935 OF 2018

Riddhi Gopal Talreja ..Applicant

<u>In the matter between</u>

Jalgaon Janta Sahakari Bank Ltd. & Anr. ..Petitioners
Versus
Joint Commissioner of Sales Tax, Nodal-9,
Mumbai & Anr. ..Respondents

Mr. Rajiv Narula a/w Ms. Mehek Chodhary i/b Jhangiani, Narula and Associates for the Petitioners.

Ms. Naira Jeejeebhoy, Spl. Counsel a/w Mr. Himanshu Takke, AGP for the State.

CORAM : G.S. KULKARNI, M.S. KARNIK & N.J. JAMADAR, JJJ.

DATED : APRIL 4, 2024

P.C. :

1. A full bench of this Court comprising of Dipankar Datta, Chief Justice (as His Lordship then was) and two of us (M.S. Karnik, J. and N.J. Jamadar, J.) by judgment and order dated 30 August 2022 decided the aforesaid writ petition. On the specific reasons as recorded in the judgment, the petitioner's Writ Petition No.2935 of 2018 was dismissed. By this review petition, the petitioner has prayed for review of the said judgment.

2. We may at the outset observe that the petitioner's writ petition alongwith the batch of petitions was considered by the Full Bench on the substantial questions of law which came to be noted in paragraph

44 of the Judgment, which read thus:-

> “(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 ?
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> (b) Whether, despite section 26E in the SARFAESI Act or section 31B 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 ?
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> (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 ?
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> (d) Whether section 31B 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 ?
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> (e) Whether the priority of interest contemplated by section 26E 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 (2020) 2 Bom CR 243 (ASREC (India) Ltd. v. State of Maharashtra) and in paragraph 35 of the Division Bench decision, reported In [2021] 89 GSTR 24 (Bom); (2021) 2 Mah. J 721 (State Bank of India v. State of Maharashtra)?
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> (f) 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 January 24, 2020? and
>
> (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"?

The aforesaid questions came to be answered by the Full Bench.

3. The Writ Petition filed by the petitioners (Writ Petition No. 2935 of 2018) came to be decided by the Court in terms of the observations of the Court in paragraph Nos. 224 to 241, thereby dismissing the Writ Petition. For convenience, the said paragraphs need to be extracted which read thus:

> "224. Petitioner no.1, a Scheduled Bank, is a society registered under the Maharashtra Co-operative Societies Act, 1960 (hereafter "Cooperative Societies Act", for short). In August 2010, the petitioner had advanced a loan of Rs.6 crore to M/s. Om Sai Auto World, a partnership firm, of which Mr. Uday K. Shetty and Mr. Gangadhar S. Shetty were the partners. Under a deed of mortgage registered on 24 th September 2010 and a deed of Modification dated 13th September 2012, five flats including Flat Nos.501 and 503 (the secured assets) owned by Mr. Uday Shetty and Mr. Gangadhar Shetty were mortgaged in favour of the petitioner no.1 to secure the said loan.
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> 225. On account of default in repayment of the loan amount, the Deputy Registrar, Co-operative Societies, on 1st April 2013 issued a recovery certificate under section 101 of the Cooperative Societies Act. On 9th July 2013, the learned Chief Metropolitan Magistrate passed an order under section 14 of the SARFAESI Act, directing taking over of the possession of the secured assets and its delivery to the petitioner no.1.
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> 226. In the meanwhile, the respondent no.2 passed orders prohibiting transfer of the secured assets and other flats owned by Mr. Uday Shetty and Mr. Gangadhar Shetty. On 26th May 2013 the respondent no.1 issued a public notice for auction of Flat Nos.601 and 602 for purported recovery of the arrears of the sales tax dues.
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> 227. Petitioners instituted Writ Petition No.1878 of 2013. However, since the auction notice dated 26th May 2013 was not acted upon, the

petitioners were allowed to withdraw the said writ petition. Petitioners claimed to have taken possession of all the five flats on 10th February, 2015. In response to a public possession notice issued by the petitioner no.1, the respondent no.1 raised objection to the action of taking over possession of the immovable property of Om Sai Auto World claiming the State had first charge thereon for recovery of sales tax dues under section 37 of the MVAT Act.

228. Amidst raging controversy over competing claims in respect of the secured assets, the petitioner no.1 claimed to have sold Flat Nos.601, 602 and 502, and issued auction notices to sell the secured assets, twice. Respondent no.1, on its part, issued auction notice to sell Flat No.503 on 1st January 2018 and Flat No.501 on 9th January 2018. The sale proclamation notice was issued on 17th January 2018 scheduling the sale on 22nd February 2018.

229. On 23rd January 2018, the respondent no.1 addressed a communication to the Chairman/Secretary of Omkareshwar Co-op. Housing Society Limited (in which the secured assets are situated) directing them not to grant no objection certificate for transfer of the secured assets. Thus, aggrieved by the aforesaid action on the part of the respondents, the petitioners have approached this Court seeking directions to the respondent no.2 to withdraw the impugned notices dated 1st January 2018 and 9th January 2018 as well as to restrain the respondents from proceeding with the auction of Flat Nos.501 and 503. It is also prayed that the petitioners be allowed to auction the secured assets to enforce its security interest.

230. During the pendency of this writ petition, in the auction sale held on 15th February 2018, since no bid was received, the petitioners' officer, after complying with the provisions of section 13(5A) of the SARFAESI Act, and after obtaining authorization to bid, claimed to have purchased the secured assets for Rs.92,09,814/- being the reserve price and thereby the petitioners became the auction purchasers. Share certificates dated 17th February 2018 have been issued in favour of the petitioners.

231. Respondents have resisted the writ petition by filing affidavits in reply. Even before the grant of recovery certificate under section 101 of the Cooperative Societies Act, the respondents contend, a demand notice was issued under section 34 of the MVAT Act on 31st August 2012, the warrant of attachment was issued on 27th September 2012 and the Sales Tax authorities took over possession of Flat No.501 on 15 th March 2013, evidenced by the Panchanama dated 15th March 2013. An order of attachment was thereafter passed on 16 th March 2013 in

respect of the said flat. Respondents claimed to have, likewise, taken possession of Flat No.503 on 14 th June 2013 and issued an order of attachment of even date. Petitioners' claim, if any, according to the respondents, was subservient to the first charge of the State under section 37 of the MVAT Act. Since the provisions contained in Section 26E of the SARFAESI Act were not brought into force earlier than 24th January 2022, the petitioners claim for priority in payment was also misconceived.

232. Respondents have further contended that the petitioners' conduct disentitles them from claiming any relief. Petitioners have suppressed material facts. As against the distress value of Rs.97,94,400/- and Rs.1,01,20,000/- for Flat No.501 and for Flat No.503, respectively, the petitioners have self-purchased the subject flat for an amount of Rs.92,09,814/- which appears to be the reserve price for one flat only.

233. We deem it superfluous to delve into the thickets of facts. In the order dated 7th August 2019 the Division Bench recorded that the sale of the subject assets took place during the pendency of this writ petition, without taking prior permission of this Court. In that context, the Court declined to accept the prayer of the petitioners to retain the amount of Rs.92,09,814/- subject to furnishing an undertaking that the amount would be brought back, along with interest, in the event the writ petition is dismissed, and instead directed the petitioners to deposit the amount realized on the sale of the secured assets i.e. Rs.92,09,814/- with the registry. The said amount has, accordingly, been deposited.

234. For the determination of the controversy in this writ petition, in the backdrop of the questions of law which we have answered above, it would suffice to note that answers to question nos. (e) and (f) would govern the facts of the case. Undisputedly, the petitioners do not claim to have registered the security interest with CERSAI. The contention of Mr. Narula that the mortgage deed was registered under the Registration Act and hence the same would amount to sufficient compliance for the purposes of the SARFAESI Act has been countered by Ms. Jeejeebhoy, as noted above. We are in agreement with her that the deeming provision under section 20A comes into effect only after integration of certain registration systems with the Central registry and that such integration has to be notified by the Central Government. We have not been shown that steps have been taken in the manner dictated by the statute to enable the petitioner derive any advantage of registration of the mortgage deed under the Registration Act.

235. **Further, Mr. Narula, learned counsel for the petitioners endeavoured to impress upon the Court that the disqualification for**

non-registration came into operation with effect from 24th January 2020 and, therefore, the petitioners cannot be visited with the consequences of non-registration. We are unable to accede to this submission. We have also indicated in answer to question (e) (paragraph 129) that unless security interest is registered, neither can borrower seek enforcement invoking the provisions of Chapter III of the SARFAESI Act nor does the question of priority in payment arise without such registration.

236. If the submission of Mr. Narula is taken to its logical end and the rights and liabilities of the secured creditor are considered in the context of the statutory regime before the enforcement of Chapter IV-A of the SARFAESI Act, in our view, the dicta of the Supreme Court in the case of Central Bank of India (supra) that the RDDB Act and the SARFAESI Act do not contain provisions giving priority to the secured creditors over the first charge created under the State legislations, would govern the field. It would be contextually relevant to note that the petitioners cannot take refuge under the provisions of section 31B of the RDDB Act, for the reasons recorded above in answering question no.(d) in the negative.

237. **In our view, even otherwise, the situation would be governed by the determination in paragraph 154 above as there is material to indicate that the action of sale proclamation initiated by the respondents was preceded by notice under section 178 of the MLR Code, warrant of attachment under section 267(3), order of attachment in Form 4 and auction proclamation notice in Form 7 under the MRLR Rules.**

238. **In the backdrop of the materials brought on record by the respondents, especially in the form of the valuation reports issued by Archimage Designers (Annexures A and B to the affidavit in reply), which indicate that the distress sale value of Flat No.501 was shown at Rs.97,94,400/- and that of Flat No.503 at Rs.1,01,20,000/-, the sale of the secured assets for the purported reserve price of Rs.92,09,814/-, which in a sense, amounts to transfer by the right hand to the left, also leaves much to be desired.**

239. **In our view, the petitioners do not deserve any relief.**

240. **Since the subject flats were purchased by the petitioners during the pendency of this writ petition, without permission of the Court, we annul the sale and direct that the sale certificates in favour of the petitioners shall stand cancelled. Further, the amount of Rs.92,09,814/- deposited by the petitioners be returned to them along with interest accrued thereon. Also, it is needless to observe that the rights and**

> **liabilities of the parties shall be governed by the law which we have clarified.**
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> 241. Subject to the above, the writ petition stands dismissed."
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> (emphasis supplied)

4. Mr. Narula, learned counsel for the petitioners in praying for review of the judgment would contend that the security interest in respect of two flats in question viz. flat Nos. 501 and 503 was in fact registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (hereafter referred to as "**CERSAI**") as per the requirement of the provisions of Section 26B under Chapter IV-A of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter referred to as "**SARFAESI Act**"). His contention is that at the relevant time when the proceedings were decided by this Court, the documents pertaining to the registration were not available and were not placed for consideration of the Court and the same have been subsequently obtained. It is hence his contention that as the security interest as per the requirement of Section 26E of the SARFAESI Act was fulfilled by the petitioner, this would entitle the petitioners for the reliefs as prayed for in the Writ Petition. It is submitted that on such contention the findings which were rendered by the Court in paragraph no. 234 to the extent the Court observing that 'the petitioners do not claim to have any registered security interest with CERSAI' is not a correct observation. It is, hence, Mr. Narula's contention that once document of registration of the security interest was available qua the facts in question, the petitioner was certainly entitled to claim that it had a priority over the secured asset in the petitioner's legal capacity as a secured creditor, over the debts payable to the Sales Tax Department, by the defaulting borrowers of the petitioner. It is on such contention, review of the judgment is prayed for. In support of his contentions, Mr. Narula placed reliance on the decision of the Supreme Court in the case of **Shivaji Balaram Haibatti Vs. Avinash Maruthi Pawar**[1] to contend that the observation of the Court in paragraph No. 234 when it records that the petitioner does not have the registration of the security interest with the CERSAI, would be required to be considered to be without jurisdiction.

5. On the other hand, Ms. Jeejeebhoy, learned special counsel for the respondents has opposed the Review Petition. She has drawn our attention to the various findings in the judgment under review as recorded by this Court, while deciding the Writ Petition and more

[1] 2018 11 Supreme Court Cases 652

particularly the observations made in paragraph No. 237, which we have noted hereinabove, which are required to be read along with observations made in paragraph No. 154 of the judgment on the legal position. Her contention is that in the facts of the present case, merely because the petitioner had failed to place on record the certification of the security interest by CERSAI, would not entitle the petitioner to seek a review of the judgment and order passed by the Court, considering the other substantive observations made against the petitioner. She submits that the contentions as urged on behalf of the petitioner needs to be rejected, taking into consideration the clear observations made by the Court, considering the facts of the case even otherwise than the petitioner having CERSAI registration. To this effect, she has drawn the Court's attention to the observations of the Court in paragraph No. 237 of the judgment (supra), in which it is clearly observed that even otherwise the situation would be governed by the determination as rendered by the Court in paragraph No. 154 of the decision as there was material to indicate that the action of sale proclamation initiated by the respondents was preceded by notice under Section 178 of the Maharashtra Land Revenue Code, warrant of attachment under Section 267(3), order of attachment in Form 4 and auction proclamation notice in Form 7 under the Maharashtra Realisation of Land Revenue Rules. It is her submission that considering the glaring facts of the case and observations made by the Court in paragraph Nos. 238 to 240, certainly a review petition on such grounds is not maintainable. It is submitted that moreover to seek review of the judgment would amount to recall of the entire adjudication as rendered by the Court without any case for interference in review proceedings being made out. In support of her contention, reliance is placed on the decision of the Supreme Court in the case of the **State of West Bengal and Others Vs. Kamal Sengupta and Another**[2] and on the decision passed by the Division Bench of the Allahabad High Court in case of **Mahabir Prasad Vs. The Collector of Allahabad**[3]. She would accordingly submit that the Review Petition be dismissed.

6. Having heard learned counsel for the parties, we are not persuaded to accept the contentions raised by Mr. Narula that a case for review of the judgment has been made out by the petitioner. We are in agreement with the submissions of Ms. Jeejeebhoy that the discovery of

[2] (2008) 8 Supreme Court Cases 612
[3] Volume XXXVL Allahabad Series The Indian Law Reports 277

such new particulars on the basis of which the petitioner intends to canvass the case in the Review proceedings would certainly not assist the petitioner. This, more particularly, considering the clear findings as recorded by the Court in paragraph No. 237 as noted hereinabove, in which the Court has clearly observed that the situation would be governed by the determination in paragraph 154 therein as there is material to indicate that the action of sale proclamation initiated by the respondents was preceded by notice under Section 178 of the MLR Code, warrant of attachment under Section 267(3), order of attachment in Form 4 and auction proclamation notice in Form 7 under the MRLR Rules.

7. Further what is significant is that the petitioner cannot get over the observations of the Court rendered by the Court in paragraph No. 154 of the judgment under review, as specifically applicable to the petitioner's case as noted in paragraph No. 237. We extract the observations of the Court in paragraph 154, which reads thus:

> "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."

8. It is thus clear that the entire procedure as known to law has been followed by the respondent/Sales Tax Department as observed and accepted by the Court. Moreso having already taken a chance to argue the case in the alternative, based on the provisions of Section 31B of the Recovery Of Debts And Bankruptcy Act, 1993, we cannot permit the petitioners to have a second round of arguments on the same issues under the garb of a review petition.

9. The principles on the exercise of the review jurisdiction are well settled. The Supreme Court in **Kamal Sengupta** (supra) has clearly held that a review cannot be sought on the ground of discovery of new matter or evidence. Such matter or evidence would be relevant and must be of such a character that if the same has been produced, it might have altered the judgment. It was thus observed that the mere discovery of new or important matter or evidence is not a sufficient ground for review *ex debito justitiae*. It was further held that parties seeking review also need to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier. Applying these principles to the facts of the present case as canvassed in the review petition, we are of the clear opinion that there is no mistake or error apparent on the face of the judgment rendered by this Court. In fact, accepting the argument of Mr. Narula involves the exercise of re-scrutiny and reconsideration of the facts and legal position, which stands already considered and concluded in the judgment under review. In the light of the above discussion, we are of the clear opinion that the review petition is devoid of any merit. It is accordingly rejected. No costs.

10. In view of the dismissal of the review petition, the Interim Applications would also not survive, the same stand disposed of.

(N.J. JAMADAR, J.) (M.S. KARNIK, J.) (G.S. KULKARNI, J.)