2024:BHC-NAG:9868-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3471 OF 2024

Union Bank of India,
A Banking Company duly constituted
under the provisions of Banking Companies
(Acquisition and Transfer of Undertaking)
Act No. V of 1970, having its registered
office at Union Bank Bhavan, 239, Bankbay
Reclamation, Nariman Point, Mumbai and
Assets Recovery Branch at Seminary Hills
Nagpur, through its Bank Authorised
Officer Mr. Rohit s/o Pradeep Gulkari,
Aged about 40 years, Occ. - Service,
R/o C/o Union Bank of India, Assets
Recovery Branch at Seminary Hills, Nagpur. .... **PETITIONER**

VERSUS

1) The State of Maharashtra,
through its Secretary, the Ministry of
Finance and Revenue, Mantralaya,
Mumbai.

2) The Deputy Commissioner of Sales Tax,
(Nag-Vat-E-010), Nagpur, office situated
at 1st Floor, GST Bhavan, (Vikrikar Bhavan),
in front of the High Court, Civil Lines, Nagpur.

3) M/s. Ashul Impex Pvt. Ltd.,
A company registered under the provisions
of Companies Act, 1956, having its Regd.
Office at 15-B, Pushpakunj, Commercial
Complex, Farmland, Central Bazar Road,
Ramdaspeth, Nagpur – 440010,
through its Director.

4) Mr. Yugpradhan s/o Pannalal Mehta,
Aged about 66 years, Occ. - Business,

R/o 50-51, Bajiprabhu Nagar, Behind
Sarveshwar Temple, Nagpur – 440033.

5) Smt. Pramila w/o Yugpradhan Mehta,
Aged about 59 years, Occ.- Household,
R/o 50-51, Bajiprabhu Nagar, Behind
Sarveshwar Temple, Nagpur – 440033.

6) M/s. Nifty Chemicals Pvt. Ltd.,
A Private Limited Company registered
under the provisions of the Companies Act,
1956, having its registered office at
15-B, Pushpakunj, Commercial Complex,
Farmland, Central Bazar Road, Ramdas-
peth, Nagpur – 440010. .... **RESPONDENTS**

Mr. S.D. Ingole, Counsel for the petitioner,
Ms. N.P. Mehta, Addl. G.P. for respondent Nos.1 and 2,
Mr. J.M. Gandhi, Counsel for respondent Nos.3 to 6.

CORAM : NITIN W. SAMBRE &
ABHAY J. MANTRI, JJ.
DATED : 23rd AUGUST, 2024

ORAL JUDGMENT : (Per : Abhay J. Mantri, J.)

Rule. Rule is made returnable forthwith. Heard finally, by consent of the learned counsel, appearing for the parties.

2. The petitioner-bank is challenging the order/ communication dated 05-09-2024 (Annexure-P/2) issued by respondent No. 2, which directed the authority to attach the immovable properties of respondents No. 3 to 5.

3. The petitioner is a bank. Respondent No.3 is a company. Respondent Nos. 4 and 5 are the Promoter and Director of respondent No.3 company. Respondent No. 6 is also another company.

4. In the year 2010, respondent No.3 company availed the various credit facilities from the petitioner bank, which were renewed and enhanced from time to time. In order to secure the said credit facilities, the respondent Nos. 3 to 6 had executed a registered mortgage-deed/equitable mortgage-deed in respect of the properties in question in favour of the petitioner-bank on 29-08-2016. With the mortgages, the petitioner-bank created a security interest/charge over the said immovable properties.

5. Pursuant to the mortgages, the petitioner-bank has created a security interest in respect of the credit facilities with the Central Registry as per the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "***the SARFAESI Act***"). The loan account of respondent No.3 is highly irregular and sub-standard, as a result of which, it was declared as N.P.A. on 31-08-2017. As per the statement of accounts maintained by the petitioner bank, Rs.78,92,00,000/- was due against respondent Nos. 3 to 6 as of 31-10-2017.

6. On 29-11-2017 the petitioner-bank had issued a demand notice under Section 13(2) of the SARFAESI Act to respondent Nos. 3 to 6 and called upon them to make repayment of the outstanding dues. Despite the service of the notice, respondent Nos. 3 to 6 failed to comply with the same. Therefore, the petitioner-bank had taken recourse to the provisions of the SARFAESI Act. Accordingly, the District Magistrate, Yavatmal, passed the order under Section 14 of the SARFAESI Act and directed the petitioner-bank to take possession of the mortgaged properties. Tahsildar was appointed to take possession of the properties and directed him to hand them over to the petitioner bank under the panchanama. The petitioner-bank also filed the recovery proceedings under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (for short, "*the Act of 1993*") vide Original Application No. 274 of 2019 before the Debt Recovery Tribunal, and the same is pending.

7. It is further averred that on 05-09-2023, respondent No.2 has illegally and without issuing any notice to the petitioner-bank passed an order to attach the mortgaged properties in question under Sections 178, 267 of the Maharashtra Land Revenue Code, 1966, read with Section 34 of the Maharashtra Value Added Tax Act, 2002, Section 38 B(1)(V) of the Maharashtra Sales Tax Act, 1956 and Section 9(2) of

the Central Sales Tax Act, 1956 for the recovery of alleged dues of VAT and GST to the extent of **Rs.26,45,20,691**/-. Therefore, the petitioner contended that prior to initiation of the alleged action of the attachment of the properties in question by respondent No.2, it had first charge over the above-referred properties as per Section 26-E of the SARFAESI Act and as per Section 31-B of the Act of 1993. Therefore, passing the impugned order/issuance of the communication by respondent No.2 for attachment of the mortgaged properties is illegal and contrary to the said provisions. That being so, the petitioner-bank, on 21-03-2024, issued a letter to respondent No.2 and requested them to release the said properties from its charge. However, despite the receipt of the said notice/letter, respondent No.2 has neither complied nor replied to the said request and has not released the said properties. Hence, the petitioner has preferred this petition.

8. Despite granting sufficient opportunities to respondents Nos.1 and 2, they have chosen not to file a reply to the petition. Therefore, an adverse inference can be drawn that they do not have any grievance about the claim of the petitioner.

9. Respondents Nos.3 to 6 have also not filed a reply to the petition. However, during an argument, Mr. J. M. Gandhi, learned Counsel for respondents Nos.3 to 6, submitted that they support the petitioner's claim.

10. Mr. S.D. Ingole learned Counsel for the petitioner has vehemently contended that the properties in question were mortgaged in favour of the petitioner-bank by respondents No.3 to 6 vide mortgage-deed dated 29-08-2016 against the credit facilities availed by them. Since then, the petitioner-bank has had its charge over the properties in question and, therefore, as per provisions of Section 26-E of the SARFAESI Act and Section 31-B of the Act of 1993, the petitioner-bank has first charge over the properties in question. As such, issuance of the communication/passing of the order dated 05-09-2023 by respondent No.2 over the properties in question for attachment of the said properties is illegal and contrary to the provisions of law and, therefore, the same is liable to be quashed and set aside. To buttress his contentions, he has drawn support from the judgments passed by the Division Bench of this Court in (i) ***Writ Petition No. 1747/2023*** (Ronak Industries v. Assistant Commissioner, Central Excise and Customs, Daman and others); (ii) **Writ Petition No.11733/2023** (Indian Overseas Bank v. Deputy Commissioner of Sales Tax, Navi Mumbai and others; and (iii) ***Writ Petition No.962/2023*** (Indian Bank, through Chief Manager v. State of Maharashtra and others) and accordingly, urged for allowing the petition.

11. *Per contra,* Ms. N.P. Mehta, learned Additional Government Pleader for respondents Nos. 1 and 2, argued that the respondents also have the right to recover the VAT and GST dues from respondents Nos.3 to 6 by attaching the properties in question. Therefore, the issuance of the communication is just and proper. Hence, she urged for dismissal of the petition.

12. We have considered the submissions and perused the record and judgments relied upon by the petitioner.

13. At the outset, it appears that in the year 2010, respondent No.3 had availed the various credit facilities from the petitioner-bank and to secure the said credit facilities, respondents Nos.3 to 6 had executed a registered mortgage-deed/equitable mortgage-deed in favour of the petitioner-bank on 29-08-2016. The said fact itself denotes that the petitioner-bank has first charge over the properties in question. Subsequently, respondent No.2 vide order/communication dated 05-09-2023, without apprising the petitioner-bank, passed an order of attachment of the properties in question to recover dues against respondents Nos. 3 to 6 towards VAT and GST charges to the extent of Rs.26,45,20,691/-. It also appears that the petitioner-bank has initiated proceedings under the provisions of the SARFAESI Act

against respondents Nos.3 to 6 as well as under Section 19 of the Act of 1993 before the Debt Recovery Tribunal, and the same is pending. All these facts collectively depict that the petitioner-bank has initiated the action of attachment of the properties in question prior to the issuance of the impugned communication by respondent No.2.

14. It is to be noted that the issue involved in the present petition is covered by the judgment of the Full Bench of this Court in the matter of ***Jalgaon Janta Sahakari Bank Ltd. and Another v. Joint Commissioner of Sales Tax Nodal 9, Mumbai, (2022) 5 Mah. L.J. 691***, followed by this Court in judgments passed in ***W. P. No. 1747/2023***, **W.P. No.11733/2023** and ***W. P. No.962/2023*** referred above. Thus, it can be inferred that the issue in dispute is no more *res integra*.

15. In such circumstances, we would like to reproduce Section 26-E of the SARFAESI Act.

Section 26-E of the SARFAESI Act reads thus;

> *"**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."*

A plain reading of Section 26-E shows that once a security interest under Section 26-B is registered, notwithstanding anything contained in any other law for the time being in force, the debts due to any secured creditor shall be paid in priority over all other debts, including the taxes payable to the State Government. Also, provisions of Section 26-B to 26-D- of the said Act are relevant.

16. It is undisputed that the petitioner-bank had executed the registered mortgage deed dated 29-08-2016 prior to issuance of the impugned communication by respondent No.2. By virtue of the said registered mortgage deed, the petitioner-bank has got first charge over the property in question.

17. Moreover, it can be inferred from the factual matrix of the present case that the issue is covered by the Full Bench judgment of this Court in the case of ***Jalgaon Janta Sahakari Bank Ltd. and another*** (cited supra), more particularly paragraph Nos.82 to 92 and 189 to 192. *Furthermore*, the said Full Bench judgment is followed in all the three decisions cited by the learned Counsel for the petitioner. That being so, the dictum laid down in the above judgments is applicable to the case at hand.

18. In the background above, the contention that the petitioner will have priority over the mortgaged properties needs to be accepted.

19. However, considering the submissions made by Ms. N.P. Mehta, it can be safely recorded that if any excess amount is received after satisfying the liability of the petitioner's financial institution, the petitioner can make over the said amount towards the satisfaction of the tax liability to respondent No.2.

20. As such, we allow the petition in terms of prayer clause (a) subject to furnishing the undertaking by the petitioner that *"if the sale of the Secured Assets realizes any amount in excess of the amounts owed by the Borrower to the Petitioner bank, the MVAT Authorities may claim such residual excess amount towards the dues owed by the Borrower to the MVAT Authorities."*

21. As a consequence, the revenue authorities have to take action to modify the entry of charge in the revenue record.

(ABHAY J. MANTRI, J.) **(NITIN W. SAMBRE, J.)**

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