

**HONOURABLE SRI JUSTICE P.SAM KOSHY
AND
HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

WRIT PETITION No.6628 of 2022

ORDER: *(per Hon'ble Sri Justice Laxmi Narayana Alishetty)*

The instant writ petition has been filed by the petitioner seeking following relief:

“...to issue a writ or order or direction more particularly one in the nature of Writ of Mandamus declaring the Attachment order R.C.No.B2/Arrears/2019, dated 18.03.2019 issued by Respondent No.3 directing respondent No.5 not to entertain any sale or transfer in respect of the properties belonging to the partners of M/s.Jadala Traders, respondent No.4 herein i.e., House No. 8-1-104, situated at Jammikunta Village and Mandal, Huzurabad, Karimnagar District and House No.2-7-104/C in Plot No.4 and 5 in Survey No.720/A/1 situated at Jammikunta Village and Mandal, Huzurabad, Karimnagar District and open land admeasuring 560.94 square yards in Survey No.778/A/1 situated at Jammikunta Village and Mandal, Huzurabad, Karimnagar District, until the payment and production of the clearance certificate from the Commercial Tax Department, as arbitrary, illegal, capricious and violative of principles of natural justice and against the provisions of Section 26(E) of the SARFAESI Act and Section 31(B) of the RDB Act and Section 48 of Transfer of Property Act and consequently, direct respondent No.5 to register the sale certificate(s) issued by petitioner Bank under SARFAESI Act and pass.....”

2. The brief facts as narrated in the writ petition are that 4th respondent i.e., M/s. Jadala Traders, approached the petitioner-

Union Bank of India (erstwhile Andhra Bank) to takeover the limits from the then State Bank of Hyderabad and the petitioner-Bank granted cash credit limit of Rs.400.00 lakhs for takeover from SBH and additional finance of Rs.200.00 lakhs was also granted i.e., total working capital limit of Rs.600.00 lakhs vide sanction letter dated 26.05.2017. As a security, 4th respondent and its guarantors mortgaged the properties including the properties on 15.06.2017 and 05.10.2017 by way of deposit of title deeds and the same were registered vide MODT Nos.2119/2017 and 4138/2017, respectively and same were also registered with Central Registry of Securitisation Asset Reconstruction and Security Interest of India (for short, 'CERSAI') as per the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, Act, 2002').

3. Respondent no.4 defaulted in repayment of the loan amount and therefore, the loan account was classified as Non-Performing Asset (NPA) and the petitioner-bank had issued notice dated 01.02.2019 demanding payment of Rs.6,28,28,555.58 Ps. as on 01.02.2019 together with interest with costs and the said notice was served on the respondent and other guarantors.

4. Respondent no.4 failed to pay the amount demanded within the statutory period and, therefore, petitioner-Bank issued possession notice dated 02.05.2019, followed by 30 days notice Rule 8(6) 30 days notice dated 13.06.2019 under Rule 8(6) of Security Interest (Enforcement) Rules, 2002 (Rules, 2002) by following the procedure contemplated under the Act. Petitioner-Bank also issued e-auction notice dated 07.10.2019 for sale of the subject properties on 15.11.2019. On 15.11.2019 e-auction was conducted in respect of property i.e., House No.2-7-104/C in Plot Nos.4 & 5 in Sy.No.720/A/1 situated at Jammikunta village and mandal, admeasuring 300 square yards and Mrs. Gundla Saroja was declared as successful bidder.

5. In the meanwhile, respondent no.4 filed W.P.No.24960 of 2019 before this Court challenging the said e-auction and obtained interim stay orders restraining the petitioner-Bank from confirming the sale in favour of auction purchaser. This Court by order dated 24.11.2021, dismissed the W.P.No.24960 of 2019 on merits.

6. Thereafter, the petitioner-Bank confirmed the sale in favour of auction purchaser and after receiving the entire price, sale certificate dated 19.01.2022 was issued in favour of the

auction purchaser. The petitioner-bank and the auction purchaser approached the Sub-Registrar of Assurances, Huzurabad (5th respondent) for registration of sale certificate. However, the respondent no.5 refused to register the same on the ground that the mortgaged property was under attachment by the Commercial Tax Department (3rd respondent) vide order R.C.No.B2/Arrears/2019, dated 18.03.2019.

7. The mortgage created by the partners of the respondent no.4 in favour of the petitioner-Bank on 15.06.2017 and 05.10.2017 is much prior to the attachment orders passed by the 3rd respondent i.e., 18.03.2019. As per Section 26(E) of the Act, 2002, a secured creditor will have priority over all other debts created in respect of secured asset.

8. When the petitioner-Bank came to know about the attachment order dated 18.03.2019, petitioner-Bank immediately approached the 5th respondent and apprised that the attachment order would not be applicable to the Bank when the property was sold under the Act, 2002 by exercising its mortgage rights and requested the 5th respondent to receive and register the sale certificate. However, 5th respondent refused to entertain the sale certificate. Hence, this Writ Petition.

9. No counter-affidavit has been filed on behalf of the respondents.

10. Heard learned counsel Ms. V.Dyumani for the petitioner-Bank, Sri Rajashekar, learned standing counsel for Commercial Tax, learned counsel Ms. Srilalitha for respondent no.4 and the learned Government Pleader for respondent no.5.

Consideration :

11. Now the points for consideration are,

(i) Whether the charge created in favour of the secured creditor over the secured interest shall have overriding effect over all other debts including revenue, Government, etc. ?

(ii) Whether the petitioner is entitled to the relief sought in the writ petition for registration of Sale Certificate?

12. During the course of hearing, learned counsel for petitioner submitted that attachment order of 3rd respondent would not be applicable to the Bank when it initiated measures under the Act, 2002 including sale and the action of the respondent no.3 in not registering the sale certificate is in violation of the provisions of Section 26(E) of the Act, 2002 read with Section 31(B) of Recovery of Debt and Bankruptcy Act,

1993 (for short, Act, 1993). He further submitted that the date of mortgage of the petitioner-Bank relates back to 15.06.2017 and 05.10.2017 and said mortgage was duly registered with the Registrar of Assurance as well as the Central Registry under the Act, 2002.

13. The petitioner-Bank also filed O.A.No.680 of 2019 before the Debts Recovery Tribunal-I at Hyderabad (DRT) against the 4th respondent for recovery of Rs.6,14,83,844.58 ps with future interest. The DRT by an order dated 2.01.2023 allowed the said O.A., and held that petitioner-bank is entitled to proceed against the person and properties of defendants 2 to 4 and properties of defendant no.1 therein for realization of the debt due. The learned counsel strenuously argued that the action of the 5th respondent in refusing to register the sale certificate by referring attachment order of 3rd respondent, is illegal, arbitrary and unconstitutional.

14. In support of his contention, learned counsel placed reliance on the following decisions:

- (i) **Pridhvi Asset Reconstruction and Securitization Co.Ltd., vs. State of Andhra Bank and others**¹;

¹ 2021 (3) ALT 104

- (ii) **City Union Bank Ltd., v. Sub-Registrar, Peddapalli and others²;**
- (iii) **State Bank of India vs. Union of India and others³.**

15. Learned counsel further contended that by an Amendment Act, 44/2016, dated 16.08.2016, Section 31B is inserted to Recovery of Debt and Bankruptcy Act, 1993 (for short, Act, 1993) w.e.f. 01.09.2016 and further, Section 26E is inserted to the Act, 2002 w.e.f. 24.01.2020. As per which, secured creditors have given priority over all other debts including revenue, taxes, cesses etc.

16. It is relevant to extract the Section 31B of the Act, 1993 and Section 26E of the Act, 2002:

- (i) Section 31B of the Act, 1993 reads as under:

“S.31B. Priority to secured creditors – Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realize secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.”

- (ii) Section 26E of Act, 2002 reads as under:

² 2018 (6) ALD 16

³ 2021 (5) ALT 185

“S.26E. 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.”

Explanation:- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”

17. In view of the above, the Bank has priority over all other debts and Government dues including revenue, taxes, cesses and rates due to the Central Government, State Government or local authority.

18. *Per contra*, the learned standing counsel for Commercial Tax, Sri Rajasekhar vehemently argued that the attachment of the Tax Department shall have priority over the charge of secured creditors. He further submitted that the attachment affected by the Department is prior to effective date of insertion of Section 26E of the Act, 2002 i.e., 24.01.2020 and, therefore, attachment of the Tax Department will sustain and shall have priority over the charge of secured creditor. When, this Court reminded him of judgments of **State Bank of India v. State of Maharashtra and others**⁴ and also **State Bank of India vs.**

⁴ 2020 SCC Online Bom 4190

Union of India and others (supra), Sri Rajasekhar tried to distinguish the same that in view of the judgment of Hon'ble Apex Court in **Central Bank of India vs. State of Kerala**⁵, the debt of revenue shall have priority over all the debts and, therefore, the attachment of the Tax Department over the subject property shall sustain and the writ petition is liable to be dismissed on that ground.

Consideration :

Point No.(i):

19. It is appropriate to refer to three judgments relied upon by the counsel for petitioner.

20. In **Pridhvi Asset Reconstruction** (supra), the Division Bench of Hon'ble High Court of Andhra Pradesh at Amaravati held as under:

“10. A reading of the above provisions of law makes it abundantly clear that the said provisions are analogous though under two different legislations. Section 26E of the Act, which came into force w.e.f 24-01-2020 begins with ‘*non obstante*’ clause and stipulates that after registration of the 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 or State Governments or local authority. Section.31B of the Bankruptcy Act is also to the same effect. When the language of the provisions of law is very lucid and clear, no other interpretation is possible.

11. In the instant case, the 3rd respondent created mortgage over the subject property by way of a registered

⁵ (2009) 4 SCC 94

deed in favour of Andhra Bank as long back as on 16-03-2013 and as the account of the loanee became NPA on 31-07-2016, the Bank authorities initiated action under the provisions of the Act by issuing notices under Section 13(2) and (4) of the Act. It is absolutely not in controversy that the petitioner herein clearly falls under the definition of “secured creditor” as defined under Section 2(zd) of the Act, since the petitioner herein is an Asset Reconstruction Company in whose favour Andhra Bank assigned the debt by way of registered document on 26-09-2017. In fact, the material available on record further reveals that on 18-11-2020 i.e., immediately after the sale notice came to be issued by the 2nd respondent, the petitioner herein brought to the notice of the Office of the 2nd respondent about the existence of the security interest in favour of the petitioner herein. In fact, when the provisions of Section 26E of the Act and 31B of the Bankruptcy Act fell for consideration of this court in W.P.No.43841 of 2018, when the registering authority failed to register the sale certificate, a Division Bench of this court, while holding that the secured creditor would have the priority of the charge over the mortgaged property, allowed the said writ petition directing the registering authority to register the sale certificate. In the said judgment, the Division Bench also held that the revenue has no priority of charge over the mortgaged property in question. Having regard to the language employed in Section 26E of the Act and 31B of the Bankruptcy Act, the contention of the learned Government Pleader that mortgage in favour of the petitioner herein should yield to crown debt coupled with charge cannot be sustained in the eye of law.”

21. In **City Union Bank Ltd.**, (supra), the Division Bench of this Hon’ble Court held as under:

“13. The preponderance of judicial opinion leads to the irresistible conclusion that the sale of the mortgaged property in favour of the auction purchaser and the sale certificate under the SARFAESI Act in such circumstances is free of all encumbrances. The attachments effected subsequent to the mortgage created in favour of the bank do not affect the rights of the secured creditor over the subject property. Such attachments have no impact on the sale conducted under the Act and the same ceases to have any effect or fall to the ground the moment the same is confirmed in favour of the secured creditor Bank and auction purchaser. Otherwise, those attachments would remain as a permanent taboo prejudicially affecting the marketability and title to the property even though they

ceased to have any legal efficacy and thereby it becomes necessary to register the sale certificate.”

22. However, the facts of above cases and the facts of present case are slightly different. In the present case, the attachment of Tax Department was in the interregnum period of insertion of Section 31-B of RDB Act and Section 26-E of the Act, 2002, whereas, in the above cases, the attachment of Tax Department was after 24.01.2020.

23. In **State Bank of India vs. Union of India and others** (supra), the Division Bench of this Court held as under:

24. Regarding the inclusion of the subject land in the prohibitory list prepared under Section 22-A of the Registration Act, 1908 on account of alleged VAT dues to the 3rd respondent and alleged Income Tax dues to the 4th respondent, it is undisputed that the security interest/charge of the Bank over the subject property was registered way back on 08.04.2000 and was reiterated on 21.09.2012 when the 5th respondent was in possession of the property and had created such charge for its working capital loan requirements.

25. Section 26-E of the SARFAESI Act, 2002 introduced by Act 44 of 2016 w.e.f. 24.1.2020 states:

“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. Explanation.- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”

26. Thus the above provision gives priority to claims of secured creditors like the petitioner Bank over the dues of the State such as Service Tax dues/ Income Tax dues and the non-obstante clause therein overrides the provisions of the Income Tax Act, 1961 and the Telangana VAT Act, 2005.

27. Section 35 of the SARFAESI Act, 2002 gives overriding effect to the said statute over anything inconsistent therewith in any other law. It states:

“ Sec.35. The provisions of this Act to override other laws.— The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

28. In our considered opinion, after introduction of Section 26-E of the SARFAESI Act, 2002 w.e.f. 24.01.2020, once the security interest created in favour of the Bank is registered with the Central Registry of Securitization Asset Reconstruction and Security Interest (CERSAI), the non-obstante clause contained in Section 26-E r/w Section 35 of the SARFAESI Act, 2002 will come into play and override the provision such as Section 26 of the Telangana VAT Act, 2005 (which give priority to VAT dues over any other claim) or the order of attachment dt.09.09.2016 issued by the Tax Recovery Officer under Rule 48 of the II Schedule to the Income Tax Act, 1961.”

24. It is also relevant to refer to the judgment of Division Bench of Hon'ble High Court of Bombay passed in **State Bank of India vs. State of Maharashtra and others** (supra), wherein, the Division Bench in similar circumstances by referring to the decisions of **Bank of Baroda vs. Commissioner of Sales Tax, M.P. Indore and another**⁶; **Assistant Commissioner vs. Indian Overseas Bank and others**⁷; **Kalupur Commercial Co-operative Bank Ltd., Vs. State of Gujarat**⁸, at paragraph 35 had held as under:

“35. In this view of the matter, though it would not be necessary for us to deal with the contention of the respondents relating to the date of

⁶ (2018) 55 GSTR 210 (MP)

⁷ AIR 2017 Madras 67

⁸ 2019 SCC Online Gujarat 1892

effectiveness of section 26-E of the SARFAESI Act, however, we are of the view that even if section 26-E was effective only prospectively from 24th January, 2020 and not applicable to the facts at hand, that would not make any difference, as according to us section 31-B of the RDB Act itself would be sufficient to give priority to a secured creditor over the respondent's charge for claiming tax dues."

25. In **Kalupur** (supra), the Division Bench of Ahmedabad High Court at paras 57 & 58 held as under:

"**57.** While it is true that the Bank has taken over the possession of the assets of the defaulter under the SARFAESI Act and not under the RDB Act, Section 31B of the RDB Act, being a substantive provision giving priority to the "secured creditors", the same will be applicable irrespective of the procedure through which the recovery is sought to be made. This is particularly because Section 2(la) of the RDB Act defines the phrase "secured creditors" to have the same meaning as assigned to it under the SARFAESI Act. Moreover, Section 37 of the SARFAESI Act clearly provides that the provisions of the SARFAESI Act shall be in addition to, and not in derogation of inter-alia the RDB Act. As such, the SARFAESI Act was enacted only with the intention of allowing faster recovery of debts to the secured credits without intervention of the court. This is apparent from the Statement of Objects and Reasons of the SARFAESI Act. Thus, an interpretation that, while the secured creditors will have priority in case they proceed under the RDB Act they will not have such priority if they proceed under the SARFAESI Act, will lead to an absurd situation and, in fact, would frustrate the object of the SARFAESI Act which is to enable fast recovery to the secured creditors.

58. The insertion of Section 31B of the RDB Act will give priority to the secured creditors even over the subsisting charges under other laws on the date of the implementation of the new provision, i.e. 01.09.2016. The Supreme Court, in the case of State of Madhya Pradesh v. State Bank of Indore, (2001) 126 STC 1 (SC), has held that a provision creating first charge over the property would operate over all charges that may be in force. The following observations made in para 5 of the said judgment are relevant:

“5. Section 33-C creates a statutory charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the bank in respect of the loan taken by the second respondent. There is no question of retrospectivity here, as on the date when it was introduced, section 33-C operated in respect of all charge that where then in force and gave sales tax dues precedence over them...”

26. In **Indian Oversea Bank** (supra), Full Bench of Madras High Court held as under:

“3. There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with “notwithstanding” clause and has come into force from 01.09.2016.”

27. The sequence of events, facts of the case in **State Bank of India vs. State of Maharashtra** (supra) and present are identical i.e., prior charge of secured creditor, notice of attachment by tax department prior to effective date of section 26E, SARFAESI, but after insertion of Section 31B of RDB Act; auction of property in the interregnum period. Therefore, in the facts and circumstances of case, we are in respectful agreement with the view taken by the Division Bench of High Court of Bombay.

28. The borrower/4th respondent availed credit facilities from the petitioner-Bank and created charge over the properties vide

MOD No.2119/2017 dated 15.06.2017 and MOD No.413/2017 dated 07.10.2017 and the petitioner-Bank initiated measures under the Act, 2002 and conducted e-auction on 15.11.2019. Whereas, 3rd respondent-Tax Department attached the property on 18.03.2019, which is subsequent to creation of charge and initiation of measures under the Act, 2002 (which is subsequent to insertion of Section 31-B of the Act, 1993) and therefore, the charge of secured creditor has priority over the attachment of Tax Department.

29. It is relevant to note that the petitioner-Bank had also filed O.A., vide O.A.No.680 of 2019 before the DRT for recovery of outstanding amount from the borrower and the same was decreed by the DRT on 02.01.2023.

30. The Division Bench of this Court in **State Bank of India vs. Union of India and others** (supra) at paragraph-28 has categorically held that “after introduction of Section 26-E of the SARFAESI Act, 2002 w.e.f. 24.01.2020, once the security interest created in favour of the Bank is registered with the Central Registry of Securitization Asset Reconstruction and Security Interest (CERSAI), the non-obstante clause contained in Section 26-E r/w Section 35 of the SARFAESI Act, 2002 will

come into play and override the provision such as Section 26 of the Telangana VAT Act, 2005 (which give priority to VAT dues over any other claim) or the order of attachment dt.09.09.2016 issued by the Tax Recovery Officer under Rule 48 of the II Schedule to the Income Tax Act, 1961.”

31. In view of the facts and legal position, the charge of secured creditor shall have priority over all other debts of Government, revenue including the attachment of the Tax Department. This point is answered in favour of petitioner-Bank.

Point no.(ii):

32. In considered view of this Hon’ble Court, the submission of learned standing counsel for Commercial Tax Department is that the charge of revenue shall have priority over secured creditor is liable to be rejected in view of the observations made by the Full Bench of Hon’ble Madras High Court, Hon’ble Division Bench of Bombay High Court and also the Division Bench of this Court.

33. In view of the above facts, legal position and in the light of answer to point no.1, there is no doubt that the rights of a secured creditor over secured asset would have priority over all

debts and Government dues including revenues, taxes, cesses etc., due to the Central Government, State Government or Local authority.

34. Since the petitioner-Bank has followed the procedure as contemplated under Section 26(E) of the Act, 2002 and also under Section 31B of the Act, 1993, the auction purchaser is entitled for registration of sale certificate issued by the security creditor over the subject property. The respondent no.5 cannot refuse registration of sale certificate on the ground of attachment by the 3rd respondent since the attachment of 3rd respondent does not affect the rights of the secured creditor over the subject property and therefore, the sale certificate is deserved to be registered. This point is answered accordingly.

35. For the aforesaid reasons, the Writ Petition is disposed of with the following directions:

- (i) The petitioner-Bank shall present the sale certificate before the 5th respondent for registration preferably within a period of four weeks from the date of receipt of copy of this order.
- (ii) On presentation of sale certificate for registration, the 5th respondent shall receive and register the

same in accordance with the law, without referring to the order of attachment of the 3rd respondent dated 18.03.2019, as expeditiously as possible.

There shall be no order as to costs.

36. Pending miscellaneous applications if any shall stand closed.

P.SAM KOSHY, J

LAXMI NARAYANA ALISHETTY, J

Date: 17.08.2023
KKM

**HONOURABLE SRI JUSTICE P. SAM KOSHY
AND
HON'BLE SRI JUSTICE LAXMI NARAYANA ALISHETTY**

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