2024:BHC-AS:14256-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11733 OF 2023

Indian Overseas Bank,
a body corporate constituted under the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1070 having Central Office at 763, Anna Salai, Chennai-600 002 and having Asset Recovery Management Branch at 5th floor Maker Tower, "E" Wing Cuffe Parade, Mumbai – 400 005
through its Authorised Officer

.. Petitioner

Versus

1. Deputy Commissioner of State Tax,
GST Department, having office at Room No. 725, 7th floor, Konkan Bhavan,
Raigad Division, CBD Belapur,
Navi Mumbai-400 614.

2. State Tax Officer, Raigad Division,
having office at Room No. 206, 2nd floor,
Konkan Bhyavan, Raigad Division, CBD Belapur, Navi Mumbai – 400 614.

3. Savair Energy Limited,
having address at flat No.A-2601, Tower-4,
Lodha New Cuffe Parade, Wadala,
Mumbai – 400 037

4. Maharashtra Industrial Development Corporation, A Government of Maharashtra Undertaking, having office at A-33, Additional MIDC, Anand Nagar, Ambernath (East),
District : Thane – 421 506.

5. State of Maharashtra,

Shraddha Talekar, PS

through Government Pleader, High Court, Bombay ...Respondents

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Mr.Siddharth Samantaray a/w. Mr. T.N. Tripathi, Ms.Kalyani Wagle and Ms. Somya Tripathi i/b T.N. Tripathi & Co., *Advocate for Petitioner.*

Mrs.S.D. Vyas *Addl. G.P. for Respondent Nos.1, 2 and 5-State.*

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

RESERVED ON : JANUARY 11, 2024.

PRONOUNCED ON : MARCH 21, 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 petition challenges attachments of assets made, and consequential actions taken, by Respondent No. 1, Deputy Commissioner of State Tax, GST Department, Government of Maharashtra and Respondent No. 2, the State Tax Officer, Raigad Division, under the Maharashtra Value Added Tax Act, 2002 ("***MVAT Act***"). Such attachment and consequential enforcement are directed against

immovable property that was mortgaged way back in 2014, by Respondent No.3, Savair Energy Ltd. ("***Borrower***") in favour of a consortium of banks led by the Petitioner, Indian Overseas Bank ("***IOB***").

3. For reasons set out in this judgement, we hold that such enforcement action by Respondent Nos. 1 and 2 ("***MVAT Authorities***") is in direct conflict with the explicit provisions of Section 26-E of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("***SARFAESI Act***") read with Section 37 of the MVAT Act.

Factual Matrix:

4. A brief narration of facts relevant for disposing of this petition may be summarised thus:

a) The Borrower availed of credit facilities from a consortium of banks led by the Petitioner. Various loan and security documents were executed among them from time to time;

b) The security interest of these secured creditors included a mortgage over land admeasuring 1035 square metres, along with factory and other construction thereon, situated at Plot No.

N-3, Additional Ambernath Industrial Area, Anand Nagar, MIDC, Village: Jambhivali, Ambernath, District: Thane – 421 506 ("***N-3 Property***"), and factory land and building admeasuring 60 square metres at Plot No. A-564, TTC Industrial Area, MIDC, Mahape, Navi Mumbai – 400 710 ("***A-564 Property***") (collectively "***Secured Assets***");

c) The mortgage over the Secured Assets was registered under Section 26-B of the SARFAESI Act with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India ("***CERSAI***") on 8th November, 2014. The charge over the Secured Assets is also evidenced by a Charge Registration Certificate dated 3rd November, 2014, registered with the Registrar of Companies;

d) As of 31st March, 2018, the Borrower's account was classified as a non-performing asset owing to defaults in payment of the dues owed to the consortium;

e) On 14th June, 2019, a demand notice under Section 13(2) of the SARFAESI Act was issued by the Petitioner, claiming a total indebtedness of Rs. 35.31 crores as of 31st May, 2019;

f) On 16th September, 2019, the Petitioner took symbolic possession of the Secured Assets. The Petitioner eventually filed an application under Section 14 of the SARFAESI Act, before the District Magistrate, Thane, who passed an order dated 7th June, 2022, directing the Tahsildar to take physical possession of the Secured Assets. Physical possession was eventually taken by the Petitioner on 30th August, 2022;

g) Seven attempts to sell the Secured Assets by way of e-auction have been made since then. The A-564 Property was eventually sold on 19th June, 2023, but the N-3 Property has remained unsold;

h) Meanwhile, the MVAT Authorities embarked upon a course of intense effort to recover tax dues allegedly owed by the Borrower – first from the Borrower, and later from the Petitioner. Pursuing recovery from the Petitioner, the MVAT Authorities asserted that they have a statutory first charge over the Secured Assets and the charge of any secured creditor over mortgaged assets would have to yield to such statutory first charge. The numerous steps taken by the MVAT Authorities to assert this position include:-

i. an order of attachment dated 7th April, 2022 issued by Respondent No. 2 over the N-3 Property for a sum of Rs. 47.01 lakhs issued to the Borrower;

ii. letters dated 20th June, 2023 and 21st June, 2023 by Respondent No. 1 asserting to the Petitioner, that recovery of sales tax dues to the tune of Rs.16.61 crores, enjoys the first charge over properties of the Borrower under Section 37 of the MVAT Act, and that Section 38 of the MVAT Act voids fraudulent transfers. Accordingly, the MVAT Authorities called upon the Petitioner not to auction the Secured Assets, and asserted that if any amounts were to be recovered, the proceeds should first be appropriated towards sales tax dues in full;

iii. email dated 14th July, 2023 to the Petitioner, along with an attachment order dated 24th February, 2022 that had been issued to the Borrower to attach *inter alia* the Secured Assets, and drawing the Petitioner's attention to the fact that such an attachment over the Secured Assets had already been in place;

iv. summonses dated 26th July, 2023 and 31st July, 2023 issued to the Petitioner, calling for documents and records relating to the attempts to auction the Secured Assets;

v. attachment order dated 31st July, 2023, attaching a bank account earmarked by the Petitioner for receipt of proceeds in the conduct of the auction of the Secured Assets;

vi. letter to the Talathi, Ambernath, Thane, asking him to mark a statutory lien towards tax dues on the land records relating to the Secured Assets; and

vii. demand notice dated 4th August, 2023 under Section 32 of the MVAT Act asking the Petitioner to pay Rs. 16.60 crores towards sales tax dues of the Borrower within 30 days, failing which, the same would be recovered as arrears of land revenue from the Petitioner.

5. The aforesaid three attachments (*vide* orders dated 24th February, 2022 and 7th April, 2022 issued to the Borrower; and order dated 31st July, 2023 issued to the Petitioner attaching the auction bank account) and the demand notice dated 4th August, 2023 issued to the Petitioner

(collectively, "***Impugned Actions***") have led to the Petitioner approaching this Court, seeking intervention under Article 226 of the Constitution of India, to quash and set aside the same, along with consequential action, whether in the form of recovery proceedings (insofar as it relates to the Petition) or in the nature of marking any statutory lien in the land records relating to the Secured Assets.

6. On 26th September, 2023, as an interim measure, this Court stayed the effect, operation and implementation of the Impugned Actions and any further consequential action. This Court permitted the Petitioner to operate the bank account frozen by the MVAT Authorities, pending hearing and final disposal of this petition.

Petitioner's Submissions:

7. In a nutshell, Mr. Sidharth Samantray, the learned counsel appearing for the Petitioner would submit that the assertions of the MVAT Authorities are directly contrary to the provisions of Section 26-E of the SARFAESI Act, which is a *non-obstante* provision conferring a superior charge in favour of secured creditors, in priority over claims of the MVAT Authorities.

8. Mr. Samantray would rely on the judgement of a Full Bench of this

Court in *Jalgaon Janta Sahakari Bank Ltd. vs. Joint Commission of Sales Tax Nodal*[1] ("***Jalgaon Janta Sahakari Bank***") and a decision of a Division Bench of this Court in *Punjab National Bank vs. Assistant Commissioner of State Tax*[2] ("***PNB***") to submit that the Petitioner's rights as a secured creditor are superior to the revenue recovery rights of the MVAT Authorities by reason of Section 26-E of the SARFAESI Act. He would submit that despite the clear position in law, the disruptive intervention by the MVAT Authorities is frustrating the smooth conduct of the auction and appropriate price discovery, resulting in multiple failures of attempts to auction the Secured Assets.

MVAT Authorities' Submissions:

9. A common affidavit in reply filed by the MVAT Authorities and the Government of Maharashtra (Respondent No. 3) states that the dues owed by the Borrower include MVAT dues of Rs. 16.10 crores (before the introduction of the Goods and Services Tax) and dues of Rs. 1.10 crores (after such introduction). The period to which the dues pertain ranges from 2006-07 to 2018-19, and the adjudication orders are all passed between 28th January, 2019 and 25th March, 2022.

[1] 2022 (5) MhLJ 691

[2] (2023) SCC OnLine Bom 682

10. Mrs. Vyas, learned counsel appearing on behalf of the MVAT Authorities would submit that the attachments were effected prior to the auction by the Petitioner and therefore, even before the auction was conducted, the Secured Assets stood attached. Mrs. Vyas would submit that the Petitioner had been put to notice by the MVAT Authorities that they claimed a first charge over the Secured Assets. Yet, the Petitioner went ahead with attempts to auction the Secured Assets, on an as-is-where-is; as-is-what-is; and whatever-there-is basis. The Petitioner's disclosures about the claims of the MVAT Authorities were not adequate and were inaccurate since the Petitioner had wrongly asserted that dues owed to a bank have priority over dues owed to the MVAT Authorities. She submitted that the attempts by the Petitioner to auction the Secured Assets were also a violation of the letter of prohibition issued on 21st June, 2023.

11. Mrs. Vyas would submit that since the Petitioner has auctioned the A-564 Property and has attempted to auction the N-3 Property with full knowledge of the MVAT Authorities' charge, and that too on an as-is-where-is basis, the Petitioner is now duty-bound to deposit the proceeds of the sale to discharge the amounts claimed by the MVAT Authorities. The purchaser of the A-564 Property cannot claim to be unaware of the tax claims, Mrs. Vyas would submit, relying on the decision of a Division

Bench of this Court in the case of *Medineutrina Pvt. Ltd. vs. District Industries Centre & Ors.*[3] ("***Medineutrina***"), which would point to there being a public notice of all statutory charges. According to her, a secured creditor is simply meant to stand first in queue to recover its dues from the sale of a secured asset, but the burden of paying the dues owed to the statutory authorities to discharge the statutory encumbrance would have to be discharged by the secured creditor or the auction purchaser. Mrs.Vyas was granted leave to file written submissions when the judgment was reserved on 11th January, 2024. The written submissions were received on 2nd February, 2024.

Section 26-E of the SARFAESI Act:

12. While it would be instructive to notice the provisions of Section 26-E of the SARFAESI Act, it would be fruitful to notice the provision in context of Section 26-B to Section 26-D. It is noteworthy that all these provisions were introduced into the SARFAESI Act by way of an amendment made on 1st September, 2016, but were brought into force only with effect from 24th January, 2020. We shall advert to the timing later in this judgement.

13. These provisions are first extracted below:-

[3] 2021 SCC OnLine Bom 222

26-B. Registration by secured creditors and other creditors.-- (1) The Central Government may by notification, extend the provisions of Chapter IV relating to Central Registry to all creditors other than secured creditors as defined in clause (zd) of sub-section (1) of section 2, for creation, modification or satisfaction of any security interest over any property of the borrower for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower.

(2) From the date of notification under sub-section (1), any creditor including the secured creditor may file particulars of transactions of creation, modification or satisfaction of any security interest with the Central Registry in such form and manner as may be prescribed.

(3) A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.

(4) Every authority or officer of the Central Government or any State Government or local authority, entrusted with the function of recovery of tax or other Government dues and for issuing any order for attachment of any property of any person liable to pay the tax or Government dues, shall file with the Central Registry such attachment order with particulars of the assessee and details of tax or other Government dues from such date as may be notified by the Central Government, in such form and manner as may be prescribed.

(5) If any person, having any claim against any borrower, obtains orders for attachment of property from any court or other authority empowered to issue attachment order, such person may file particulars of such attachment orders with Central Registry in such form and manner on payment of such fee as may be prescribed.

26-C. Effect of the registration of transactions, etc.--(1) Without prejudice to the provisions contained in any other law, for the time being in force, any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry for creation, modification or satisfaction of such security interest or attachment order, as the case may be.

(2) Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration under the provisions of Chapter IV and this

Chapter, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or licence of such property or attachment order subsequent to such registration, shall be subject to such claim:

Provided that nothing contained in this sub-section shall apply to transactions carried on by the borrower in the ordinary course of business.

26-D. Right of enforcement of securities. -- Notwithstanding anything contained in any other law for the time being in force, from the date of commencement of the provisions of this Chapter, no secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry.

[Emphasis Supplied]

14. A brief review of the foregoing provisions would be essential. As a plain reading of the provisions would show, secured creditors and officials enforcing recovery of tax may register their security interest and attachment orders respectively with CERSAI. Such registration is a constructive public notice of the charge over the property in question. The ranking of priority of competing charges so registered would be in the sequential order of the registration. The registrant with a prior registration would have priority over subsequent registrants. Without such registration, the secured creditor shall not have the right to take enforcement action under the SARFAESI Act.

15. Against such context, the provisions of Section 26-E are extracted below:-

> *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.*
>
> *[Emphasis Supplied]*

16. A plain reading of Section 26-E would show that once a secured creditor registers its security interest (under Section 26-B), notwithstanding any other law in force, the debts owed to the secured creditor shall be paid in priority over all other debts including taxes payable to the State Government. The "registration of security interest" referred to in Section 26-E of the SARFAESI Act, is the registration of such interest with CERSAI under Section 26-B.

17. The interplay between Section 26-D and Section 26-E of the SARFAESI Act has been pithily summarised in ***Jalgaon Janta Sahakari Bank*** in Paragraph 77 to Paragraph 79, which are extracted below:

> *77. The plain reading of section 26-D reveals that it has the effect of stripping a secured creditor of its right of enforcement of security interest under Chapter III in the absence of a CERSAI registration. Beginning with a non-obstante clause, section 26-D has overriding effect qua any other law that is inconsistent therewith and underscores the importance of a CERSAI registration. Promotion of a CERSAI*

registration of a security interest being at the forefront of the legislative intent, the same has to be honoured.

78. Section 26-E, also beginning with a non-obstante clause, is unambiguous in terms of language, effect, scope and import. A 'priority' in payment over all other dues is accorded to a secured creditor in enforcement of the security interest, if it has a CERSAI registration, except in cases where proceedings are pending under the provisions of the Insolvency and Bankruptcy Code, 2016.

79. The disabling provision in section 26-D and the enabling provision in section 26-E, both begin with non-obstante clauses, as noticed above. The scheme of Parts III and IV-A of the SARFAESI Act envisages benefits to a secured creditor who is diligent and obtains CERSAI registration while depriving a secured creditor of even taking recourse to Chapter III without the requisite registration.

[Emphasis Supplied]

18. Applying this legal position to the facts of the case, it is an admitted position that the registration of the Petitioner-led consortium's security interest was effected on 8th November, 2014. The first attachment order by the MVAT Authorities against the Borrower and its assets was passed on 24th February, 2022. The earliest adjudication order that provided the basis for an attachment, as seen from the affidavit in reply, was passed on 28th January, 2019. Without even going into whether an attachment order by the MVAT Authorities is itself a security interest capable of being registered with CERSAI (we deal with this issue later), on a mere chronological reading of the facts, it would follow that the mortgage over the Secured Assets was effected well before any adjudication order, leave alone, any attachment order passed by MVAT Authorities. Therefore, it

is established as a matter of fact, that nearly five years before the MVAT Authorities passed the very first adjudication order demanding tax, and nearly seven years before the first attachment order was passed, the mortgage in favour of the Petitioner-led consortium of banks had been created and registered with CERSAI. Such prior registration accorded the Petitioner-led consortium the entitlement to priority under Section 26-C(2) of the SARFAESI Act, read with Section 26-E, no sooner than these provisions were brought into force on 24th January, 2020.

Section 37 of the MVAT Act:

19. Next, it would be instructive to notice Section 37 of the MVAT Act, which is the very foundational provision on which the MVAT Authorities base their claim to a statutory first charge. The same is extracted below:-

> *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]*

20. 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. Therefore, while Section 37(1) 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. Section 26-E of the SARFAESI Act, is evidently a provision in a Central Act that gives first priority to secured creditors, subject to such charge being registered with CERSAI.

21. As seen above, in the instant case, the mortgage in favour of the secured creditors (the Petitioner-led consortium of banks) was registered with CERSAI in 2014, giving priority to such secured creditors. Therefore, Section 37 of the MVAT Act itself makes it clear that the statutory charge created thereunder would be subject to anyone enjoying priority under Section 26-E of the SARFAESI Act, which, in this case, is enjoyed by the Petitioner-led consortium.

Analysis and Findings :

22. The net effect of the aforesaid facts, and applying the law declared to the facts at hand, would be that the statutory charge of the MVAT Authorities would give way to the priority enjoyed by the Petitioner-led consortium. Therefore, in a sale of a mortgaged asset, where the mortgage in favour of a secured creditor is registered prior in time with

CERSAI, and the MVAT Authorities too have a charge, the proceeds of the

enforcement of the mortgage would first go towards discharging the dues owed to the secured creditor. It is only the residue, if any, after discharging the dues of the mortgagee, that may flow to the MVAT Authorities. Once the mortgage is enforced, there would be no asset left to exercise any charge over and the charge would move to the proceeds of the enforcement of the mortgage. The proceeds of enforcement of the mortgage would go towards discharging the mortgagee with highest priority in full, and only the remainder, if any, of the proceeds would then go to the person next in priority.

23. Therefore, the MVAT Authorities' claim that they have a charge in priority to the secured creditors whose security interest is actually registered earlier in time with CERSAI, is untenable. Such a stance would turn on its head, a carefully devised statutory scheme of priority of dues.

24. It is also noteworthy that the first of the seven auction attempts was on 29th March, 2022 i.e. well after Section 26-E of the SARFAESI Act came into force on 24th January, 2020. The Petitioner was a protectee of the provisions of Section 26-C and Section 26-E, with effect from 24th January, 2020. Therefore, when the Petitioner took its first step to auction the Secured Assets, it was a statutory protectee of having the

highest priority. Therefore, even if the Petitioner knew at that stage about the attachment order, it would be entitled to the protection by the operation of the provisions of Section 26-C(2) read with Section 26-E of the SARFAESI Act. In fact, it appears from the material on record that the Petitioner was not even aware of the attachment order dated 24th February, 2022. The MVAT Authorities brought the attachment order of 24th February, 2022 to the Petitioner's attention only on 14th July, 2023. Indeed, by 20th June, 2023, the MVAT Authorities asserted to the Petitioner that they had the first charge under Section 37 of the MVAT Act and that any transfer would be void under Section 38 of the MVAT Act, but that is a stance contrary to the law discussed above. Besides, the Petitioner did disclose the MVAT Authorities' claim to the public, even while making its own assertion that dues owed to secured creditors enjoy priority over dues under claims of tax authorities. Therefore, the Petitioner inserting an as-is-where-is; as-is-what-is; or whatever-there-is condition as a term applicable to the auction is of no relevance to the priority of encumbrances and charges between the MVAT Authorities and the Petitioner-led consortium.

25. A bidder in the auction too would be aware of the law and therefore know that purchase of a secured asset from a secured creditor whose security interest is registered with CERSAI to enjoy the highest priority,

would give him a free, marketable and clear title to the secured asset on purchase in the auction.

26. At the same time, it can be nobody's case that this declaration of law would lead to the MVAT Authorities' tax claims getting extinguished, as sought to be argued by Mrs. Vyas. The only effect of the interplay between Section 26-E of the SARFAESI Act and Section 37 of the MVAT Act would be that MVAT Authorities would ***not*** have priority in the recourse to the assets that are secured in favour of the secured creditor and registered in priority with CERSAI. The MVAT Authorities would be free to chase other properties of the assessee that are not the subject matter of a security interest registered ahead of their attachment. If there are no assets left to chase, the MVAT Authorities would still be unsecured creditors, with a right to continue proceedings to recover their dues in accordance with law.

27. Therefore, we are not persuaded by the argument that a grave and unintended outcome of wiping out liabilities owed to the MVAT Authorities would be visited upon them. In fact, the formulation of the two provisions in the SARFAESI Act and the MVAT Act respectively, is a conscious policy choice of balancing of interests of competing creditors who have finite assets to pursue in enforcing recovery of their claims. Dues owed to banks, if not paid, can have a harsher and wider adverse

social impact. A collapse of banks would not only hurt the interests of various depositors but also inflict a wider deleterious impact on other segments of the economy. Potentially, it would be tax-payers' funds that would have to be infused into the banks to bail them out to avoid such adverse social impact. On the other hand, if the banks are given a priority in recovery, and in the process, the secured assets are sold without hindrance to an auction purchaser, such asset would continue to be put to economic use, which would also generate tax revenues. In addition, other assets that are not the subject matter of a security interest registered prior in time can continue to be proceeded against in enforcement proceedings to recover tax dues.

Jalgaon Janta Sahakari Bank:

28. In fact, the issue at hand has been extensively analysed in ***Jalgaon Janta Sahakari Bank***. Examining multiple fiscal statutes that create a statutory charge over assets of an assessee and their interplay with Section 26-E of the SARFAESI Act where such assessee has created a security interest in favour of secured creditors, the Full Bench of this Court held that where Section 26-E is attracted, the position in law is not that dues owed to a department of the State Government would have to be paid first. The Full Bench repelled exactly the same argument we were

presented with – that Section 26-E only provides a "priority" but does not actually create a "first charge", whereas provisions akin to Section 37 of the MVAT Act create a first charge. The Full Bench held that the secured creditor whose security interest is registered with CERSAI prior in time, would get precedence over the dues owed to the State. The Full Bench ruled that such a formulation is a conscious choice made by the legislature. The following extracts from ***Jalgaon Janta Sahakari Bank*** would bring out the articulation of the Full Bench in this regard:-

> *82. Each of the aforesaid several legislations operate in their particular field. Pertinently, wherever the legislature of the State intended the particular provision to be the dominant legislation or subordinate or subservient to any other legislation, it has expressed such an intention in no uncertain terms. Section 169(1) of the MLR Code is the dominant legislation providing that the arrears of land revenue due on account of land shall be a paramount charge on the land and on every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment, or otherwise howsoever, against any land for the holder thereof. The municipal laws and the MRTP Act, however, despite creation of first charge on property taxes due to the Corporations and sums due to a planning authority, respectively, are expressly made subordinate to the paramount charge on a land if in respect of such land, land revenue is in arrears. Viewed from this angle, there is no magic in the words 'first charge'. Even a 'first charge', by express statutory intendment, can be made subordinate or subservient to a paramount charge such as arrears of land revenue. We, therefore, are unable to accept the argument of the State/respondents that since neither the SARFAESI Act nor the RDDB Act uses the words 'first charge' but the word 'priority', such 'priority' cannot have precedence over 'first charge' created by the State legislations.*
>
> *83. However, notwithstanding that section 169(1) of the MLR Code is the dominant legislation and does not expressly say that it would be subordinate or subservient to any Central Act creating 'first charge', nothing really turns on it. The express language of section 26-E of the SARFAESI Act and section 31B of the RDDB Act, wherever applicable, is sufficient to off-set the 'paramount charge' created by sub-section (1) of section 169. Similarly, even if there were no express intendment in the*

relevant provisions of the BST Act (section 38C) and the MVAT Act (section 37) to the effect that such provisions would be subordinate to any Central Act creating 'first charge', the same would obviously have to be read, invoked and exercised subject to section 26-E of the SARFAESI Act and section 31B of the RDDB Act, wherever applicable.

84. The fact that the BST Act and the MVAT Act, which are under consideration, expressly make it subordinate or subservient to any Central legislation creating first charge cannot be ignored. The 2016 Amending Act being of recent origin, the first query that arises in this regard is: did the Parliament not know that there is a plethora of legislation in the country, both Central and State, that speaks of creation of 'first charge' in favour of a department of the Central/State Government? The reply cannot but be in the affirmative. The next query that would obviously follow is: whether the word 'priority' appearing in section 26-E 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" (italics for emphasis by us), 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 31B and section 26-E, 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.

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 26-E 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 26-E 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 26-E 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.

90. We may answer the question from a different angle. The RDDB Act and the SARFAESI Act are Central Acts. If any provision therein is discerned to be seemingly inconsistent with any provision in a State legislation, reconciliation of the same ought to be attempted failing which the Central Acts will prevail over the State legislations, in view of the principle of repugnancy that Article 254 of the Constitution contemplates. Further, section 37 of the MGST Act and section 38C of the BST Act expressly make it subject to the provisions of any Central Act creating 'first charge'. Also, section 26-E of the SARFAESI is a subsequent legislation, as it was notified on 24th January 2020. Subject to compliance of the terms of Chapter IV-A, section 26-E of the SARFAESI Act would, thus, override any provision in the MGST Act and the BST Act in case of a conflict with the SARFAESI Act.

91. The further contention of learned counsel for the State/respondents that 'enforcement of first charge' and 'shall be paid in priority over all other debts' are not synonymous and that the latter is subordinate to the former, in our view, is misconceived. If enforced, 'first charge' would ultimately lead to priority in payment only. Where the end result is the same, mere change in expression would not make the provisions different. While agreeing with the opinion of the learned Judge of the Kerala High Court in State Bank of India vs. State of Kerala (supra), we reject such contention.

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.

[Emphasis Supplied]

29. Having set out the aforesaid extracts, we hardly need to say anything more. Mr. Samantray is right in his submission that the facts of the instant case are squarely covered by the analysis in ***Jalgaon Janta Sahakari Bank***. When the Petitioner embarked on the auction attempts (the first auction was 29th March, 2022), Section 26-E had been brought into effect. The Petitioner's assertion of its reading of the law was an accurate one and was declared to be the accurate reading by the Full Bench (on 30th August, 2022).

30. The next auction attempt by the Petitioner was on 13th February, 2023. By the time the MVAT Authorities wrote to the Petitioner purporting to prohibit the Petitioner from conducting the auction and invoking Section 37 and Section 38 of the MVAT Act, the law was well declared in ***Jalgaon Janta Sahakari Bank***. Therefore, the assertion of the MVAT Authorities that they had priority over secured creditors was totally misconceived and without basis in law. Statutory authorities enforcing law must necessarily refrain from conducting themselves in a manner that conflicts with the law declared by a Full Bench of a

constitutional court. We have no hesitation in declaring that none of the attachment orders can result in the MVAT Authorities stealing a march in priority over the registered security interest enjoyed by the Petitioner-led consortium of banks.

Medineutrina and its effect :

31. We also find that Mrs. Vyas' reliance on ***Medineutrina*** is totally misplaced. *First*, ***Medineutrina*** was rendered by a two-judge Division Bench prior to ***Jalgaon Janta Sahakari Bank***, which was rendered by a Full Bench. *Second*, the Full Bench indeed noticed ***Medineutrina*** and analysed its contents while declaring the law emphatically, also taking note of the fact that Paragraph 41 of ***Medineutrina*** (the paragraph that summarises all the findings and consequential directions) had been stayed by the Hon'ble Supreme Court.

32. That apart, with the deepest respect, we do note that ***Medineutrina*** had not noticed that Section 26-E of the SARFAESI Act, although legislated, had not been brought into force. Paragraph 28 thereof had proceeded on the footing that the provision had been brought into force on 1st September, 2016. Parliament had given the Central Government the authority to notify the date from which Section 26-E would take effect. Evidently, the legislature gave the executive time to take a

considered policy decision on when to bring such an important, nuanced and significant legislative intervention, into force. It must follow that since it took over three years to bring this significant and fundamental piece of reform into effect, deliberations among the various arms of the government would have been involved, before the provision was brought into force on 24th January, 2020.

33. In any case, the combined effect of the stay of the operative part of ***Medineutrina*** by the Hon'ble Supreme Court, and the emphatic declaration of the law by the Full Bench, would mean that ***Medineutrina*** stands completely overtaken, and is of no assistance to the MVAT Authorities in persisting with their reading of the law in a manner that is diametrically contrary to ***Jalgaon Janta Sahakari Bank***.

34. After 24th January, 2020, Section 26-E would give a security interest of a secured creditor registered prior in time, priority over even a proclamation for recovery of land revenue. Since in the facts of this case, the attachment orders came to be passed well after 24th January, 2020, and no registration was effected in CERSAI, and indeed no proclamation for recovery of revenue had been made, we refrain from delving further into whether an attachment would suffice or a proclamation would be necessary in respect of tax recovery proceedings.

35. As a last ditch-effort, Mrs. Vyas presented us with a unique proposition. It was her contention that notwithstanding the fact that the secured creditor has the first charge and priority for recovery of dues from the sale of the secured asset, the MVAT Authorities can once again chase the very same asset in the hands of the purchaser and put it up for sale towards recovery of their dues.

36. Such a proposition has only to be stated to be rejected. The creation of the mortgage over the asset would mean that the charge is over the asset. Once the security interest is enforced, the asset would no longer be available for further enforcement. The proposition canvassed by Mrs. Vyas would render Section 26-E meaningless, because if that were the legal position, the creation of priority in favour of the secured creditor would have no meaning. Put differently, according to the proposition suggested, the secured creditor would first enforce its charge against the asset and thereafter the MVAT Authorities would yet again enforce their charge against the very same asset to recover their dues. Thereafter if there are other security interests with an inferior priority, every single beneficiary of every such security interest would keep enforcing their security interest against the very same asset. Such an absurd proposition turns on its head, the very meaning of having a security interest over an asset in priority over others. Needless to say, no person in his right mind

would ever bid for an asset against which enforcement of multiple charges is contemplated. This because he would have to face the endless queue of subsequent enforcement actions against the very same asset. To underline the absurdity, for example, if the secured asset were being sold when its market value is Rs.5 Crores and the dues of the MVAT Authorities are Rs.10 Crores, a potential purchaser of the property would effectively have to be ready to pay Rs.15 Crores for the property worth Rs.5 Crores. This would indeed be absurd to say the least. We therefore have no hesitation in rejecting this argument canvassed by Mrs.Vyas.

Directions and Declarations :

37. Therefore, in our opinion, the writ petition deserves to be allowed. We, therefore, issue the following directions and declarations:-

a) The impugned attachment orders of the MVAT Authorities dated 24th February, 2022, 7th April, 2022 (issued to the Borrower) and 31st July, 2023 (issued to the Petitioner) would not confer any priority over the registered security interest enjoyed by the Petitioner-led consortium banks over the Secured Assets;

b) The Petitioner has the first priority in respect of enforcement

against the Secured Assets by reason of Section 26-E and having a prior registration of the security interest with CERSAI. The Petitioner is therefore entitled to enforce such security interest enjoying priority over the MVAT Authorities;

c) The Petitioner is entitled to enforce the mortgage over the Secured Assets without hindrance and disturbance from the MVAT Authorities, who cannot claim against the Petitioner, except to seek any excess residual amounts from the proceeds of the enforcement of the mortgage over the Secured Assets, after extinguishing the dues owed by the Borrower to the mortgagees constituting the Petitioner-led consortium;

d) If the sale of the Secured Assets realises any amount in excess of the amounts owed by the Borrower to the Petitioner-led consortium of banks, the MVAT Authorities may make a claim for such residual excess amount towards the dues owed by the Borrower to the MVAT Authorities;

e) The demand notice dated 4th August, 2023 asking the Petitioner to pay the tax dues allegedly owed by the Borrower is misconceived, unsustainable and without legal basis, and is

hereby quashed and set aside;

f) Consequently, any mutation entries purporting to mark an encumbrance in favour of the MVAT Authorities in the land records shall be invalid. Accordingly, Respondent Nos. 1, 2 and 5 shall cause such entries, if any, to be removed from the land records within a period of two weeks from today; and

g) Nothing contained in this judgement is an expression of an opinion on the right of the MVAT Authorities to undertake enforcement action in accordance with law against any other assets, properties and persons that are not subject matter of a registered security interest registered in favour of any secured creditor under the SARFAESI Act, and which may therefore be amenable to enforcement for recovery of tax arrears owed by the Borrower.

h) It is clarified that the MVAT dues of the Borrower cannot be sought to be recovered from any purchaser of the Secured Assets, who acquire them from the Petitioner-led consortium under the SARFAESI Act

38. Rule is made absolute in the aforesaid terms. The writ petition is disposed of accordingly. Although the petition stands disposed of, we place the same for reporting compliance on 12th April 2024.

39. This order 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 order.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**