HIGH COURT OF JUDICATURE AT BOMBAY

Jvs/UI/SP.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2935 OF 2018

Jalgaon Janta Sahakari Bank Ltd. & Anr. ..Petitioners

Vs.

Joint Commissioner of Sales Tax Nodal 9, Mumbai, & Anr. ..Respondents

WITH
WRIT PETITION NO. 3197 OF 2019

ICICI Bank Ltd. ..Petitioner

Vs.

The State of Maharashtra & Ors. ..Respondents

WITH
WRIT PETITION NO. 436 OF 2021
And
INTERIM APPLICATION NO. 868 OF 2022

Fullerton India Credit Company Ltd. ..Petitioner

Vs.

Tornado Motors Pvt. Ltd. & Ors. ..Respondents

WITH
WRIT PETITION (L) NO. 939 OF 2020

Bank of Baroda ..Petitioner

Vs.

State of Maharashtra ..Respondent

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HIGH COURT OF JUDICATURE AT BOMBAY

WITH
WRIT PETITION (L) NO. 7999 OF 2021

Edelweiss Asset Reconstruction Company Ltd. ..Petitioner

Vs.

Principal Commissioner of GST and Central Excise & Ors. ..Respondents

WITH
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2720 OF 2021

The Authorized Officer Bharati Sahakari Bank Ltd. ..Petitioner

Vs.

The Dy. Commissioner of Sales Tax and Ors. ..Respondents

WITH
WRIT PETITION NO. 3553 OF 2021

JM Financial Asset Reconstruction Company Ltd. & Anr. ..Petitioners

Vs.

State of Maharashtra & Anr. ..Respondents

WITH
WRIT PETITION NO. 2248 OF 2021

Saraswat Co-Op. Bank Ltd. & Anr. ..Petitioners

Vs.

State of Maharashtra & Ors. ..Respondents

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HIGH COURT OF JUDICATURE AT BOMBAY

WITH
WRIT PETITION NO. 2251 OF 2021

Saraswat Co-Op. Bank Ltd. & Anr. ..Petitioners

Vs.

The State of Maharashtra & Ors. ..Respondents

WITH
WRIT PETITION NO. 2336 OF 2021

Dr. Prince John Edavazhikal ..Petitioner

Vs.

The Union of India & Ors. ..Respondents

WITH
WRIT PETITION NO. 6297 OF 2021

Asset Reconstruction Company Ltd. ..Petitioner

Vs.

The State of Maharashtra & Ors. ..Respondents

WITH
WRIT PETITION NO. 3120 OF 2021

JM Financial Asset Reconstruction Company Ltd. & Anr. ..Petitioners

Vs.

State of Maharashtra & Ors. ..Respondents

Mr. Rajiv Narula a/w Ms. Mehek Choudhary i/b. Jhangiani Narula and Associates for the petitioners in WP/2935/2018.

Mr. Shakib Dhorajiwala a/w Mr. Rushab Chopra i/b. Vidhi Partners for the petitioners in WP/3197/2019.

Mr. Venkatesh Dhond-Senior Advocate with Mr. Sanjeev Sawant, Mr. Murlidhar Kale, Ms. Garima Joshi, Ms. Juhi Bhogle,

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HIGH COURT OF JUDICATURE AT BOMBAY

Ms Vinodini Shrinivasan Mr Pratik Pansare i/b. OM Gujar Law Chambers for the petitioners in WP/436/2021.

Mr. Ranbir Singh a/w Mr. Nahush Shah i/b. Nahush Shah Legal for the petitioners in WPL/939/2020.

Dr. Birendra Saraf-Senior Advocate a/w Mr. Vaibhav Charalwar a/w Mr. Sachin Chandarana a/w Mr. Vijayendra Purohit i/b M/s. Manilal Kher Ambalal & Co. for the petitioners in WPL/7999/2021.

Mr. Nitin Deshpande for Petitioner in W.P.No.2720/2021.

Mr. J. P. Sen, Sr. Advocate a/w. Mr. Nikhil Rajani, Mr. Apoorva Kulkarni, Mr. Rupak Sawangikar i/b. M/s. V. Deshpande and co for Petitioner in W.P.No.2336/2021.

Mr. Charles De'Souza a/w. Mr. Nikhil Rajani, Mr. Apoorva Kulkarni, Mr Rupak Sawangikar i/b. M/s. V. Deshpande and Co. for Petitioner in W.P.No.3553/2021 and W.P.No.3120//2021.

Mr. Nikhil Rajani a/w Mr. Apoorva Kulkarni a/w Mr. Rupak Sawangikar i/b M/s. V. Deshpande and Co. for Petitioner in WP/2248/2021 and WP/2251/2021.

Mr. Charles De Souza a/w Priyansh Jain i/b. M/s. Apex Law Partners for Petitioners in W.P.No.6297/2021.

Mr. Karan Adik i/b Mr. Padmakar S. Patkar for respondent No.1 in WPL/7999/2021.

Mr. D. P. Singh for Respondent No.10/UOI in W.P.No.436/2021.

Ms. Naira Jeejeebhoy - Special Counsel with Mr. Himanshu B. Takke-AGP for State in WP/2935/2018.

Mr. Himanshu B. Takke-AGP for State in WP/3197/2019 and in WPL/939/2020.

Mr. V. A. Sonpal-Special Counsel with Mr. Himanshu B. Takke-AGP for State in WP/436/2021.

Ms. Jyoti Chavan-AGP for State in WPL/7999/2021.

Mr. Mohamedali M. Chunawala a/w Mr Parshuram S. Gujar i/b. A. A. Ansari for R.No.1/ UOI in W.P.No.2336/2021.

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HIGH COURT OF JUDICATURE AT BOMBAY

Mr. Rakesh L. Singh a/w. Heena Shaikh i/b. M. V. Kini and Co. for R.No.7 in W.P.No.2336/2021.

Mr P. P. Kakade, GP a/w Mr. B.V. Samant – AGP for State in W.P.No.2720/2021, W.P.No.2336/2021, W.P.No.6297/ 2021 and W.P.No.3120/ 2021.

Mr. P. P. Kakade, GP a/w Mr. M. M. Pable – AGP for State in WP/2251/2021.

Mr. P. P. Kakade, GP a/w Mrs. R. A. Salunkhe – AGP for State in WP/2248/2021.

C0RAM: DIPANKAR DATTA, CJ.,
M. S. KARNIK &
N. J. JAMADAR, JJ.

RESERVED ON: APRIL 7, 2022
PRONOUNCED ON: AUGUST 30, 2022

JUDGMENT:

INTRODUCTION

1. A Division Bench of this Court (cor. Chief Justice and M.S. Karnik, J.) while considering this batch of writ petitions was of the view that the issues emerging for decision therein can be advantageously heard and disposed of by a larger Bench. In deference to the order dated 25th November 2021 passed by such Bench and in exercise of power conferred on the Chief Justice by rule 8 of Chapter I of the Bombay High Court Appellate Side Rules, 1960, this larger Bench was constituted. The parties were put on notice and heard at length on multiple legal and factual issues.

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HIGH COURT OF JUDICATURE AT BOMBAY

2. The controversy lies in a narrow compass, with the Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (hereafter "SARFAESI Act", for short) and the Recovery of Debts and Bankruptcy Act, 1993 (hereafter "RDDB Act", for short) taking centre-stage. Who between a secured creditor [as defined in section 2(1)(zd) of the SARFAESI Act and section 2(1)(la) of the RDDB Act], and the taxing/revenue departments of the Central/State Governments, can legally claim priority for liquidation of their respective dues *qua* the borrower/dealer upon enforcement of the 'security interest' [as defined in section 2(1)(zf) of the SARFAESI Act] and consequent sale of the 'secured asset' [as defined in section 2(1)(zc) of the SARFAESI Act], in view of the extant laws, is the broad question that we are tasked to decide. This question, in turn, raises certain other substantial questions of law, which would also call for answers and we propose to answer them too.

3. The parties have, in course of their arguments, referred to the provisions of the Maharashtra Land Revenue Code, 1966 (hereafter "MLR Code", for short), the Maharashtra Value Added Tax Act, 2002 (hereafter "MVAT Act", for short), the Bombay Sales Tax, 1959 (hereafter "BST Act", for short) and the Maharashtra Goods and Services Tax Act, 2017 (hereafter "MGST Act", for short), more particularly sections 37 and 38C of the MVAT Act and the BST Act, respectively. These similarly worded sections, starting with *non-obstante* clauses, provide that any amount of tax, penalty, interest, sum forfeited, fine or any other sum payable by a dealer or any other person shall be

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HIGH COURT OF JUDICATURE AT BOMBAY

the first charge on the property of the dealer or the person, as the case may be, subject to any provision regarding creation of first charge in any Central Act for the time being in force. Section 82 of the MVAT Act is similarly worded, except that creation of such first charge would be subject to any Central Act for the time being in force is not to be found there. These provisions have necessarily to be read with section 26E of the SARFAESI Act and section 31B of the RDDB Act to ascertain the correct legal position.

4. Several decisions of various High Courts, including decisions rendered by Division Benches of this Court, have been brought to our notice by learned advocates appearing for the secured creditors on the effect of 'priority' that section 26E of the SARFAESI Act and section 31B of the RDDB Act accord to secured creditors, but none directly on the point rendered by the Supreme Court as on date the judgment on these writ petitions was reserved. We propose to notice all such decisions separately at a later part of this opinion.

BACKGROUND FEATURES

5. It would be appropriate to preface our opinion by briefly tracing the developments in the field of law relating to recovery of dues of banks and financial institutions (hereafter "lenders", for short, when referred to collectively) relevant for the purpose of answering the questions of law formulated *infra*.

6. Prior to 1993, for effecting recovery of debts, the lenders were required to institute suits regulated by the provisions of the Code of Civil Procedure (hereafter "CPC", for short).

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HIGH COURT OF JUDICATURE AT BOMBAY

However, the normal time-consuming process of recovery through suits did not suit the recovery of dues. Multifarious problems surfaced. Drying up of financial liquidity, thereby retarding economic progress, emerged as the prime problem. Without recovery of the dues, the lenders found it difficult to lend further financial assistance. It is at this stage that the Parliament enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereafter "RDBFI Act", for short) making provisions for establishment of Tribunals for expeditious adjudication and recovery of debts due to the lenders and for matters connected therewith or incidental thereto. The RDBFI Act, which came into force w.e.f. 24th June 1993 all over the country except Jammu and Kashmir, was the legislative source of creation of Debts Recovery Tribunals (hereafter "DRTs", for short) in various states. Upon becoming functional, the lenders started pursuing their remedy before the DRTs by instituting recovery proceedings before it in accordance with the RDBFI Act.

7. Challenges to the constitutional validity of the RDBFI Act were laid before the Delhi High Court, the Gauhati High Court and the Karnataka High Court. Such challenges succeeded. However, the Supreme Court by its decision reported in (2002) 4 SCC 275 (**Union of India vs. Delhi High Court Bar Association**) overruled the judgment and order impugned before it and upheld the provisions of the RDBFI Act.

8. In due course of time, recourse taken by the lenders to the DRTs under the RDBFI Act on a large scale coupled with other reasons, which we need not discuss here, led to the

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HIGH COURT OF JUDICATURE AT BOMBAY

perception that the desired results were not being achieved. This led to constitution of various committees to suggest ameliorative measures keeping in view the changing times and the economic situation for overcoming old and conventional methods of financing and recovery of dues. Based on the suggestions that were received and after thorough deliberations, the Parliament enacted the SARFAESI Act and made it applicable throughout the country three days short of the eighth birthday of the RDBFI Act, on 21st June 2002, to be precise. Securitisation of debts, classification of Non-Performing Assets (hereafter "NPA", for short) and evolving means for faster recovery of dues without judicial intervention were, *inter alia*, the key features of the SARFAESI Act, with quick enforcement of security interest at its heart.

9. The SARFAESI Act having been challenged before the Supreme Court as *ultra vires*, the Court by its decision reported in (2004) 4 SCC 311 (**Mardia Chemicals Ltd. vs Union of India**) upheld all but one of the provisions, i.e., section 17(2). Also, the said decision resulted in amendment of section 13 and consequent insertion of sub-section (3A) in section 13.

10. Provisions of the SARFAESI Act vis-à-vis the RDBFI Act came up for consideration before the Supreme Court within three years of the decision in **Mardia Chemicals Ltd.** (supra). In the decision reported in AIR 2007 SC 712 (**Transcore vs Union of India**), the Court was, *inter alia*, seized of the question as to whether withdrawal of an original application instituted in terms of the first proviso to section 19(1) of the RDBFI Act (inserted by Amending Act 30 of 2004) is a condition

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HIGH COURT OF JUDICATURE AT BOMBAY

precedent for taking recourse to the SARFAESI Act. The Court noticed the reasons for enactment of the SARFAESI Act and made a deep analysis of both the Acts. Upon hearing learned counsel for the parties and on consideration of Order XXIII, CPC and the relevant two enactments, the Court answered this question in the negative.

11. Within a couple of years therefrom came the decision reported in (2009) 4 SCC 94 (**Central Bank of India vs. State of Kerala**). The questions arising out of the several civil appeals for decision were, whether section 38C of the BST Act, 1959 and section 26B of the Kerala General Sales Tax Act, 1963 and similar provisions contained in other State legislations by which first charge was created on the property of the dealer or such other person, who is liable to pay sales tax, etc., are inconsistent with the provisions contained in the RDBFI Act for recovery of 'debt' and the SARFAESI Act for enforcement of 'security interest', and whether by virtue of *non-obstante* clauses contained in section 34(1) of the RDBFI Act and section 35 of the SARFAESI Act, the said two Central Acts will have primacy over the several State legislations. Here too, the Court considered the scheme of the two Central Acts in depth as well as several other Central legislations providing for creation of first charge, viz. the Workmen's Compensation Act, 1923, the State Financial Corporations Act, 1951, the Employees Provident Fund and Miscellaneous Provisions Act, 1952, the Estate Duty Act, 1953, the Companies Act, 1956, the Mines and Minerals (Regulation and Development) Act, 1957 and the Gift Tax Act, 1958.

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HIGH COURT OF JUDICATURE AT BOMBAY

12. It would be profitable for us to reproduce below the relevant paragraphs from the said decision, which learned counsel for the parties referred to and relied upon. Such paragraphs read thus:

> "108. The DRT Act and the Securitisation Act were enacted by Parliament in the backdrop of recommendations made by the Expert Committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms.
>
> ***
>
> 110. The DRT Act facilitated establishment of two-tier system of tribunals. The tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of Civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the courts or tribunals. The Securitisation Act also made provision for registration and regulation of securitization/ reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions.
>
> 111. However, what is most significant to be noted is that there is no provision in either of these enactments by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower.
>
> 112. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-à-vis Section 69 or Section 69-A of the Transfer of Property Act. In terms of that sub-section, a secured creditor can enforce security interest without intervention of the court or tribunal and if the

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HIGH COURT OF JUDICATURE AT BOMBAY

borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a Receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of the Narasimham Committee's Second Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act.

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis-à-vis other mortgagees who could exercise rights under Sections 69 or 69-A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38-C of the Bombay Act and Section 26-B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. Sub-section (7) of Section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-section (4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor.

114. By enacting various provisos to sub-section (9) of Section 13, the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529-A of the Companies Act, 1956 vis-à-vis the secured creditors like banks is duly respected. This is the reason why first of the five unnumbered provisos to Section 13(9) lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. This and other provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognise the existing priority of their claim

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HIGH COURT OF JUDICATURE AT BOMBAY

under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.

115. It is thus clear that provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof.

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or the Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38-C of the Bombay Act and Section 26-B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of the State's charge over other debts, which was recognised by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws.

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126. While enacting the DRT Act and the Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529-A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and

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HIGH COURT OF JUDICATURE AT BOMBAY

other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

127. The definition of 'secured creditor' includes securitisation/reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of 'securitisation company' and 'reconstruction company' in Sections 2(1)(*za*) and (*v*) shows that these companies may be private companies registered under the Companies Act, 1956 and having a certificate of registration from Reserve Bank under Section 3 of the Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

128. If the provisions of the DRT Act and the Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14-A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act,

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HIGH COURT OF JUDICATURE AT BOMBAY

and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors.

***

155. In none of the aforementioned judgments this Court held that by virtue of the provisions contained in the DRT Act or the Securitisation Act, first charge has been created in favour of banks, financial institutions, etc. Not only this, the Court was neither called upon nor it decided competing priorities of statutory first charge created under Central legislation(s) on the one hand and State

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HIGH COURT OF JUDICATURE AT BOMBAY

> legislation(s) on the other nor it ruled that statutory first charge created under a State legislation is subservient to the dues of banks, financial institutions, etc. even though statutory first charge has not been created in their favour.
>
> ***
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> 158. On the basis of the above discussion, we hold that the DRT Act and the Securitisation Act do not create first charge in favour of banks, financial institutions and other secured creditors and the provisions contained in Section 38-C of the Bombay Act and Section 26-B of the Kerala Act are not inconsistent with the provisions of the DRT Act and the Securitisation Act so as to attract non obstante clauses contained in Section 34(1) of the DRT Act or Section 35 of the Securitisation Act.
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> 159. Another argument of some of the learned counsel for the appellants is that the prior charge created in favour of the bank would prevail over the subsequent mortgage created in favour of the State.
>
> ***
>
> 175. The argument of learned counsel for the appellants that the State legislations creating first charge cannot be given retrospective effect deserves to be negatived in view of the judgment in *State of M.P.* v. *State Bank of Indore, (2002) 10 SCC 441*. In that case, it was held that the charge created in favour of the State under Section 33-C of the Madhya Pradesh General Sales Tax Act, 1958 in respect of the sales tax dues prevail over the charge created in favour of the Bank in respect of the loan taken by the second respondent and the amendment made in the State operates in respect of charges that are in force on the date of introduction of Section 33-C."
>
> (emphasis ours)

13. A few years after the aforesaid decision, the title of the RDBFI Act underwent an amendment. By Act XXXI of 2016, the word "Bankruptcy" replaced the words "Due to Banks and Financial Institutions", resulting in the rechristening of the RDBFI Act as the RDDB Act.

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HIGH COURT OF JUDICATURE AT BOMBAY

14. The decision in **Central Bank of India** (supra) **[**holding, *inter alia*, that the RDBFI Act and the SARFAESI Act do not contain provisions giving priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations because Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State (paragraph 126) and also that if Parliament intended to give such priority then provisions similar to those contained in the referred Central legislations would have been incorporated in the RDBFI Act and the SARFAESI Act (paragraph 129)**]** is presumed to have acted as a catalyst leading to the enactment of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, being Amendment Act No. XLIV of 2016 (hereafter "2016 Amending Act", for short). The Statement of Objects and Reasons as contained in the Bill for the 2016 Amending Act introduced in the Lok Sabha reads as follows:

> "**Statement of Objects and Reasons**
>
> The Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, were enacted for expeditious recovery of loans of banks and financial institutions. Presently, there are approximately seventy thousand cases pending in Debts Recovery Tribunals. Though the Recovery of Debts due to Banks and Financial Institutions Act provides for a period of 180 days for disposal of recovery applications, the cases are pending for many years due to various adjournments and prolonged hearings. In order to facilitate expeditious disposal of recovery applications, it has been decided to amend the

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HIGH COURT OF JUDICATURE AT BOMBAY

said Acts and also to make consequential amendments in the Indian Stamp Act, 1899 and the Depositories Act, 1996.

2. The amendments in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are proposed to suit changing credit landscape and augment ease of doing business which, *inter alia*, include (i) registration of creation, modification and satisfaction of security interest by all secured creditors and provision for integration of registration systems under different laws relating to property rights with the Central Registry so as to create Central database of security interest on property rights; (ii) conferment of powers upon the Reserve Bank of India to regulate asset reconstruction companies in a changing business environment; (iii) exemption from stamp duty on assignment of loans by banks and financial institutions in favour of asset reconstruction companies; (iv) enabling non-institutional investors to invest in security receipts; (v) debenture trustees as secured creditors; (vi) specific timeline for taking possession of secured asset; and (vii) priority to secured creditors in repayment of debts.

3. The amendments proposed in the Recovery of Debts due to Banks and Financial Institutions Act, 1993, *inter alia*, include (i) expeditious adjudication of recovery applications; (ii) electronic filing of recovery applications, documents and written statements; (iii) priority to secured creditors in repayment of debts; (iv) debenture trustees as financial institutions; (v) empowering the Central Government to provide for uniform procedural rules for conduct of proceedings in the Debts Recovery Tribunals and Appellate Tribunals.

4. The Bill also seeks to amend the Indian Stamp Act, 1899, so as to exempt assignment of loans in favour of asset reconstruction companies from stamp duty and the Depositories Act, 1996 for facilitating transfer of shares held in pledge or on conversion of debt into shares in favour of banks and financial institutions.

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HIGH COURT OF JUDICATURE AT BOMBAY

5. The Bill aims to improve ease of doing business and facilitate investment leading to higher economic growth and development.

6. The Bill seeks to achieve the above objectives."

15. Section 31B incorporated in the RDDB Act by the 2016 Amending Act and introduced with effect from 1st September 2016, reads as follows:

> "**31-B. Priority to secured creditors**.— Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise 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.
>
> *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."

16. Although a new chapter, i.e., Chapter IV-A, was sought to be introduced in the SARFAESI Act by the 2016 Amending Act, it was not immediately given effect. Effect was given as late as on 24th January 2020. The entirety of Chapter IV-A, titled 'Registration by Secured Creditors and Other Creditors', is reproduced hereunder:

> "**26-A. Rectification by Central Government in matters of registration, modification and satisfaction, etc.**—
>
> (1) The Central Government, on being satisfied—

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HIGH COURT OF JUDICATURE AT BOMBAY

(*a*) that the omission to file with the Registrar the particulars of any transaction of securitisation, asset reconstruction or security interest or modification or satisfaction or such transaction or; the omission or misstatement of any particular with respect to any such transaction or modification or with respect to any satisfaction or other entry made in pursuance of Section 23 or Section 24 or Section 25 of the principal Act was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors; or

(*b*) that on other grounds, it is just and equitable to grant relief,

may, on the application of a secured creditor or asset reconstruction company or any other person interested on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for filing of the particulars of the transaction for registration or modification or satisfaction shall be extended or, as the case may require, the omission or misstatement shall be rectified.

(2) Where the Central Government extends the time for the registration of transaction of security interest or securitisation or asset reconstruction or modification or satisfaction thereof, the order shall not prejudice any rights acquired in respect of the property concerned or financial asset before the transaction is actually registered.

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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.

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."

17. A reference was pending before the Full Bench of the Madras High Court prior to Chapter IV-A of the SARFAESI Act being enforced. The said Full Bench by a short order reported in AIR 2017 Madras 67 **[Asst. Commissioner (CT) vs. Indian Overseas Bank]** disposed of the reference holding, *inter alia*, that:

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HIGH COURT OF JUDICATURE AT BOMBAY

"1. The writ petitions have been listed before the Full Bench in pursuance of the reference order in W.P. No.6267 of 2006 and W.P. No.253 of 2011, in respect of the following issues: -

'a) As to whether the Financial Institution, which is a secured creditor, or the department of the government concerned, would have the 'Priority of Charge' over the mortgaged property in question, with regard to the tax and other dues.

b) As to the status and the rights of a third party purchaser of the mortgaged property in question.'

2. We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, ***

3. There is thus, no doubt that the rights of a secured creditor to realise secured debts over which security interest is created 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 or Local Authority. This section introduced in the Central Act is with 'notwithstanding' clause and has come into force from 01.09.2016.

4. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

5. The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

6. Insofar as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of section 31B, as it includes 'secured debts due and payable to them by sale of assets over which security interest is created'.

7. We, thus, answer the aforesaid reference accordingly."

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HIGH COURT OF JUDICATURE AT BOMBAY

18. Several other judgments of this Court as well as other High Courts followed in quick succession, more or less taking the consistent view that introduction of sections 31B and 26E in the RDDB Act and the SARFAESI Act, respectively, by the 2016 Amending Act have tilted the scales in favour of the secured creditors and being a pre-2016 Amending Act decision, **Central Bank of India** (supra) is no longer relevant to hold that the secured creditors would not have first charge or priority in the matter of recovery of their dues.

SUBMISSIONS OF THE PARTIES

19. Having taken note of the background features, let us now briefly notice the broad submissions advanced on behalf of the contesting parties.

20. It has been contended on behalf of the secured creditors that the priority created by section 31B is not restricted to enforcement under the RDDB Act; section 31B recognizes priority generally. Referring to section 26E, it has further been contended that priority is also recognized by the SARFAESI Act. The secured creditors have, thus, contended that in view of amendments brought about by the 2016 Amending Act in both the Central enactments, i.e., the RDDB Act and the SARFAESI Act, they are entitled to assert priority over claims of the State sales tax department under the MVAT Act, both or either under section 31B of the RDDB Act and/or section 26E of the SARFAESI Act.

21. The secured creditors have further contended that there is no dispute that the Central Acts and the State legislations

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HIGH COURT OF JUDICATURE AT BOMBAY

operate in different fields and there is no apparent repugnancy; on the contrary, the State legislations are clear to this extent that the same would yield to Central Acts creating first charge. We have been invited to read sections 37 and 38C of the MVAT Act and the BST Act, respectively, in support of such contention.

22. Before proceeding further, it would be apposite to note section 37 of the MVAT Act. It reads:

> **"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 ours)

23. Notwithstanding that section 37 of the MVAT Act begins with a *non-obstante* clause, it is explicit that such provision is subject to the creation of a first charge in a Central Act. It has been submitted that the secured debt of the secured creditors would have priority over any first charge created by the MVAT Act in favour of the relevant department of the Government. This is because the statutory priority accorded to secured creditors is the same as creation of first charge and the very enactment under which the department claims its right,

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HIGH COURT OF JUDICATURE AT BOMBAY

recognizes the primacy of provisions in Central Acts regarding creation of priority in charge.

24. Similar argument has been advanced in respect of section 38C of the BST Act, which is similarly worded as sub-section (1) of section 37 of the MVAT Act. Section 38C of the BST Act reads as follows:

> **"38-C. Liability under this Act to be first charge.—** Notwithstanding anything contained in any contract to the contrary but subject to any provision regarding first charge in any Central Act for the time being in force, any amount of tax, penalty, interest 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."
>
> (emphasis ours)

25. Our attention has also been invited to sections 82 and 142 of the MGST Act, providing as follows:

> "**82. Tax to be first charge on property**
> Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person."
>
> "**142. Miscellaneous Transitional Provisions**
>
> (8)(a) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;
>
> ***"

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HIGH COURT OF JUDICATURE AT BOMBAY

26. It has also been contended that in the event this Court holds that section 26E of the SARFAESI Act is not applicable without registration of the security interest, the secured creditors are entitled to the reliefs claimed on account of statutory priority of charge accorded to them in terms of section 31B of the RDDB Act. According to the secured creditors, bare perusal of section 31B of the RDDB Act would evidence the fact that even *de hors* registration of security interest under the SARFAESI Act, and even prior to section 26E of the SARFAESI Act coming into force on 24th January 2020, the claims of the secured creditors had priority with respect to payment of their dues, over all other debts and government dues, including revenues, taxes, cesses and rates due to the Central Government, State Government or local authorities on and from 1st September 2016, being the date on which the said provision of law was brought into effect.

27. The further contention has been that section 31B of the RDDB Act will apply even to cases where proceedings under the RDDB Act have not been preferred by secured creditors for the following reasons:

(i) The said section is contained in Chapter VI titled 'MISCELLANEOUS' and is therefore not in relation to cases where a recovery certificate may have been issued by the DRT under the provisions of, and on proceedings initiated under the RDDB Act, which is dealt with in the independent chapters preceding Chapter VI.

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HIGH COURT OF JUDICATURE AT BOMBAY

(ii) The explanation contained in section 31B clarifies that for the purposes of the said section, after the commencement of the Insolvency & Bankruptcy Code, 2016 (hereafter "I & B Code", for short), in cases where insolvency or bankruptcy proceedings are pending in respect of the secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code. In other words, when the legislature intended to restrict the application of the said section in relation to proceedings taken under a different piece of legislation, i.e., the I & B Code, the legislature clarified its position explicitly by way of adding an explanation to section 31B. In the absence of such a clarification or explanation with respect to steps taken under the SARFAESI Act, it is apparent that the legislature intended the provisions of section 31B to be applicable even to cases where no proceedings under the RDDB Act or before the DRT were taken by a secured creditor.

(iii) Section 31B and section 26E were introduced into their respective parent statutes by the same amending act, i.e., the 2016 Amending Act. A perusal of the statement of objects and reasons with respect to the said Act would demonstrate that the objects and reasons of the said amendments to the SARFAESI Act as well as the RDDB Act, was the same, i.e. to give "*priority to secured creditors in repayment of debts*". However, section 31B was brought into effect on 1st September 2016, whereas section 26E was brought into effect on 24th January 2020.

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HIGH COURT OF JUDICATURE AT BOMBAY

In the above stated background of facts and circumstances and especially in the light of the manner, object and purpose with which the said sections were introduced into the statute books, it could never have been the intention of the legislature that if a secured creditor resorted to the provisions of the RDDB Act for realisation of debts due to it, they would have the benefit of priority in repayment of debts while, if they resorted to the provisions of the SARFAESI Act, they would not. Such an interpretation would lead to arbitrariness and would fall foul of Article 14 of the Constitution of India.

(iv) A bare perusal of the other sections contained in the said Chapter VI (viz. sections 34, 35, 36 and 37) make it clear that they do not all apply only to proceedings before the DRT or proceedings initiated under the RDDB Act.

28. Having recorded the contentions advanced on behalf the secured creditors, to the extent we found them to be relevant, we now proceed to record the submissions advanced on behalf of the State Government and its departments.

29. First, the arguments advanced by Mr. Sonpal, learned special counsel for the respondents 6 to 9 in W.P. No.436 of 2021 may be noticed.

30. According to Mr. Sonpal, section 26E was inserted on 1st September 2016 and made effective from 24th January 2020; however, conspicuously, section 26E does not create 'first charge' in favour of the secured creditors. It only provides for 'priority' of payment to secured creditors over other creditors.

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HIGH COURT OF JUDICATURE AT BOMBAY

Referring to the decision in **Central Bank of India** (supra), he contended that the Supreme Court in paragraph 95 referred to various enactments and their provisions, viz. the BST Act, the Kerala Sales Tax Act, 1963, the Workmen's Compensation Act, 1923, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Estate Duty Act, 1953, the Mines and Minerals (Regulation and Development) Act, 1957, and the Gift Tax Act, 1958, and noticed that these enactments use the words 'first charge'. According to him, in paragraph 129 of the said decision, it has been held that if Parliament intended to give priority to the dues of banks, financial institutions, and other secured creditors over the 'first charge' created under State legislations, then provisions similar to those contained in section 14-A of the Workmen's Compensation Act, section 11(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, section 74(1) of Estate Duty Act, section 25(2) of the Mines and Minerals (Regulation and Development) Act, section 30 of the Gift Tax Act, and section 529-A of the Companies Act would have been incorporated in the RDDB Act and the SARFAESI Act.

31. Mr. Sonpal further contended that the 2016 Amending Act does not, either in the RDDB Act or the SARFAESI Act, consciously and conspicuously provide for similar provisions or any such provisions where the 'first charge' of the State is displaced. This is despite the fact that the Central Government was conscious of the decision of the Supreme Court in **Central Bank of India** (supra). The interpretation of the amendments, according to him, is that 'priority' as inserted by the 2016

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HIGH COURT OF JUDICATURE AT BOMBAY

Amending Act shall not displace the 'first charge' of the State wherever the respective enactments provide so and the secured creditors shall be having 'priority' over Government dues only in cases where dues arising out of an enactment did not provide for the 'first charge'. Since section 26E does not provide for 'first charge', hence the 'first charge' of the State under section 37 of the MVAT Act survives.

32. Mr. Sonpal continued by contending that there is no conflict between section 26E of the SARFAESI Act and section 37 of the MVAT Act, and the *non-obstante* clauses in section 37 of MVAT Act and section 26E in SARFAESI Act operate in altogether different fields. A *non-obstante* clause in a section, according to him, only overrides a contrary provision in any other law if it is in the same field. Since the sphere and field of operations of section 26E of the SARFAESI Act and section 37 of the MVAT Act are different, in absence or presence of conflict, both survive in their respective fields. Viewed from a different angle, if the dues of the Central Government or the State Government or a local authority are to be affected by section 26E, the same must arise from List I or List III and not List II of Schedule VII of the Constitution. The SARFAESI Act and more particularly section 26E has Item 45 of List I as its source whereas Item 54 of List II is the source of existence of section 37 of the MVAT Act. Hence, there cannot be operation of *non-obstante* clause against one another in different fields of legislation.

33. Next, Mr. Sonpal argued that section 26E having come into force on 24th January 2020 and not on 1st September 2016,

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HIGH COURT OF JUDICATURE AT BOMBAY

it denotes that the Central Government did not intend to bring the provisions of section 26E in force till 24th January 2020 and hence the provisions of section 26E are not retrospective but prospective in the absence of any provision in the 2016 Amending Act to make the amendment retrospective. The charge under the section attaches to the properties of dealer, mortgaged or not, immediately on transaction of sale, although payment of such tax is deferred till 21st day of the next month. Hence, in other words, charge under section 37 of the MVAT Act clings to the property on the occasion of sale though due date of payment can be on a later date. Thus, once the charge is created on incident of sale, it cannot be destroyed by subsequent amendment coming into force on a subsequent date. Therefore, on that count also, he contended that section 37 of the MVAT Act is not affected by section 26E of the SARFAESI Act.

34. Moving further, Mr. Sonpal contended that the language of section 26E of the SARFAESI Act and section 37 of the MVAT Act is germane for interpretation of scope and effect of the two sections. Whereas the language of section 37 of the MVAT Act speaks of creation of 'first charge', subject to creation of 'first charge' by a Central Act, section 26E of the SARFAESI Act speaks of payment of proceeds (without using the word 'proceeds') in priority to secured creditors. It implies that whenever the occasion for payment arises, it shall be first paid to the secured creditors and not others who may have independent right to receive first over others. Since section 26E does not provide for 'first charge', therefore such provision

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HIGH COURT OF JUDICATURE AT BOMBAY

cannot affect section 37 of the MVAT Act which can be affected only when a Central Act provides for 'first charge'. He further contended that section 26E provides for the manner of distribution and not right to distribution; consequently, 'first charge' under section 37 shall survive with all consequential rights. No judgment of any High Court, he also contended, has held that 'first charge' has been diluted by section 26E.

35. The next contention advanced by Mr. Sonpal has been that the MGST Act was enacted w.e.f. 1st July, 2017. Not only does section 82 of the MGST Act start with a *non-obstante* clause, any amount payable by a taxable person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person. Under section 142(8), dues under any existing law is recoverable as dues under the MGST Act. According to him, if the first charge is applicable to dues under the MGST Act and also the existing law on the appointed day, the *non-obstante* clause in the MGST Act shall override section 26E of the SARFAESI Act.

36. Finally, Mr. Sonpal contended that the pre-requisite of claiming benefit of section 26E of the SARFAESI Act is that the secured creditor has to register the security interest as provided in section 26B. In the absence of registration, section 26E does not come into operation or effect.

37. Ms. Jeejeebhoy, learned special counsel for the State in W.P. No.2935 of 2018 contended as follows:

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HIGH COURT OF JUDICATURE AT BOMBAY

(i) The State has a statutory charge on the property of the dealer which the sales tax authorities are entitled to enforce by exercising the right to attach and sell the same for recovery of its outstanding dues notwithstanding introduction of section 26E in the SARFAESI Act and section 31B in the RDDB Act.

(ii) Section 26E of the SARFAESI Act and section 31B of the RDDB Act do not create any charge in favour of the secured creditor but merely provide for 'priority' in payment. More importantly, such provisions do not negate or nullify the statutory charge created under the MVAT Act or the MLR Code.

(iii) Provisions inserted by amendment in the RDDB Act are not attracted where no recourse has been taken to the DRT thereunder. Section 31B of the RDDB Act has to be read in the context of the scheme of the relevant enactment, which relates to recovery through proceedings conducted in accordance with the provisions of the RDDB Act by the DRTs. The long title of the RDDB Act would reveal the object and purpose thereof, which is establishment of DRTs, *inter alia*, for expeditious adjudication and recovery of debts due to banks and financial institutions.

(iv) Chapter IV of the RDDB Act titled 'Procedure of Tribunals' and Chapter V titled 'Recovery of Debt Determined by Tribunal' contain provisions for

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HIGH COURT OF JUDICATURE AT BOMBAY

determination by the DRTs of the causes brought before it by secured creditors and the mode of recovery of debts, respectively. Section 31B, inserted in Chapter VI titled 'MISCELLANEOUS', is an overarching provision which could be attracted to those proceedings for adjudication of a claim under Chapter IV or even at the appellate stage under the same chapter or at the time of recovery under Chapter V, when any amount found due and payable is sought to be recovered by sale of the property mortgaged. However, what is significant is that the debt must be due and payable, after which the rights of the secured creditor to have its debt paid in priority to those of the other creditors is recognized under the RDDB Act.

(v) The concern that proceedings under the RDDB Act could take time and, therefore, the scope of section 31B ought to be expanded to action taken under the SARFAESI Act is not well founded. DRTs under the RDDB Act have powers to pass interim protective orders which could adequately safeguard the interests of the lenders.

(vi) Chapter IV-A of the SARFAESI Act, appearing as it does after Chapter IV titled 'CENTRAL REGISTRY', has to be given full effect. Section 26E cannot be considered in a vacuum. It has to be seen in the context of the other provisions of the SARFAESI Act and the applicable law. Notably, section 26E gives

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HIGH COURT OF JUDICATURE AT BOMBAY

priority in payment over other debts without negating the effect of other charges/interest in the property including statutory first charges. Further, it has to be read harmoniously with the other provisions of the SARFAESI Act, including section 26C under which any sale of the property has to be subject to the claims of registered creditors including the Government.

(vii) Having regard to the provision in section 13(2), except sections 69 and 69A of the Transfer of Property Act, 1882 (hereafter "ToP Act", for short) all other provisions thereof would be applicable. In **Transcore** (supra), the Supreme Court has even clarified that the RDBFI Act does not rule out the applicability of the ToP Act. Section 100 of the ToP Act explains when a person is said to have 'charge' on the property and section 3 thereof, *inter alia*, explaining 'when a person is said to have notice' read with section 89A(2) of the Registration Act, 1908, as applicable in Maharashtra pursuant to the Maharashtra Amendment Act, 2010, throws light on at least one way in which a diligent purchaser of property would acquire notice of the statutory charge.

(viii) The amendments in the RDDB Act and the SARFAESI Act would only apply prospectively and cannot affect rights crystallized in favour of the State prior to such amendments being brought into force. Section 26D

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HIGH COURT OF JUDICATURE AT BOMBAY

expressly refers to forfeiture of right of a secured creditor to exercise the rights of enforcement of securities under Chapter III if the security interest is not registered. This provision in clear terms ordains that the bar to invoke Chapter III in the absence of a registration would start from the commencement of the provisions of Chapter IV-A. Harmoniously read with section 26E, the conclusion is inescapable that section 26E does not apply retrospectively.

(ix) Registration of mortgage under the Registration Act cannot be deemed to be a registration with the Central registry by virtue of section 20A of the SARFAESI Act. Such a contention advanced on behalf of the petitioner in W.P. 2935 of 2018 fails to take into consideration the fact that the deeming provision under the said section, i.e., section 20A, comes into effect only after the integration of certain registration systems with the Central registry. This integration has to be notified by the Central Government. As on date, there is no notification in respect of integration of the Registration Act system with the Central registry. In the circumstances, registration under the Registration Act is not sufficient and the benefit of the deeming provision in section 20A is not available to the petitioner.

She prayed for disposal of the writ petitions taking into consideration the aforesaid contentions.

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HIGH COURT OF JUDICATURE AT BOMBAY

38. Mr. Samant, learned Addl. Govt. Pleader appearing for the respondents in quite a few of the writ petitions contended that though section 31B of the RDDB Act is a substantive provision, it is applicable only in cases where the secured creditor takes recourse to recover its debt by instituting proceedings before the DRT resulting in a judicial adjudication; but section 31B cannot be made applicable in all cases of recovery and irrespective of the procedure through which the recovery is sought to be made by the secured creditor.

39. Next, on the question as to whether the words 'first charge' and 'in priority' are synonymous or one and the same, Mr. Samant contended that the said words are not the same. According to him, the words 'first charge' show superiority of the charge of the concerned party whereas the words 'in priority' only indicate hierarchy of payment without disturbing the superiority of charge attached to any specific property. This would further mean that even if the property is sold in disregard of the 'first charge' applicable to it, the mortgagee of the property may claim the entire sale price but the 'first charge' on such property will not be wiped out. The person dealing with such property having 'first charge' will be bound by it.

40. It was further contended that had the Parliament intended to give equality to mortgage dues of bankers to 'first charge' holder of tax dues, it would have done so specifically and would not have used the words 'in priority'. Regarding the aspect of reading the intention of the Parliament, the observations in

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HIGH COURT OF JUDICATURE AT BOMBAY

Central Bank of India (supra) in paragraph ns. 131 to 136 were relied upon.

41. Mr. Samant made an endeavor to explain the working of the MVAT Act. According to him, tax under the MVAT Act is levied on every 'dealer' on account of sales transacted by the dealer in the particular year. As such, the tax is on the sale amount and is over and above the sale price. The 'dealer' recovers the amount from the 'transferor' of goods or the ultimate purchaser. As such, the 'dealer' recovers the amount of tax from a third person and keeps it with him for payment to the Government. It can, thus, be seen that the amount of tax under the MVAT Act is held in custody by the 'dealer' as a trustee for the Government. Such an amount is having very high ranking as compared to mortgage dues, which are the result of commercial transaction. In case of commercial transaction with mortgage as a kind of security, the success of the security depends upon due performance by the parties. No third-party funds are involved. As such, the tax collected by a MVAT 'dealer' is having a class of its own, and the State Legislature has considered this aspect while giving 'first charge' to dues under the MVAT Act. Such, 'fist charge' is a status which is not given to all types of taxes, for e.g., Income Tax dues which is based on income earned and which is not having the status of 'first charge' and is having the status of unsecured dues.

42. On the question as to whether restrictions put under section 100 of the ToP Act regarding charge dilute the 'first charge' under the MVAT Act, Mr. Samant contended that two

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HIGH COURT OF JUDICATURE AT BOMBAY

alternative arguments are possible here. First, the MVAT Act being a special enactment and the ToP Act being a general enactment, the 'first charge' under the MVAT Act should be held to prevail over the provisions of the ToP Act. Therefore, it can be argued that requirements of knowledge of third party or person dealing in the property about existence of 'first charge' becomes irrelevant. It can be further argued that the authorities under the MVAT Act are not bound to give notice to the world at large. It can also be argued that giving such notice is practically not possible. In the alternative, even if it is presumed that provisions of section 100 of the ToP Act regarding restrictions on application of 'charge' are binding, the same stands complied with as demonstrated by him. The MVAT Act creates 'first charge' in respect of the property of the 'dealer' in case of default. The intending purchaser is expected to make enquiry with the tax department before dealing in the said property. Such intending purchaser must find out the nature of business and the tax records of the defaulter. The department can share all the information through the Right to Information Act, 2005 and such intending purchaser has every access to the records of the department. An intending purchaser can, thus, by following due diligence easily come to know the tax liability of the defaulting 'dealer'. The bank/secured creditor can also come to know by using the same method. In fact, the bank and the third-party purchaser are deemed to have notice of such charge if they try to find out information about the title of the property. In this behalf, the meaning of "a person is said to have notice" is given in section

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HIGH COURT OF JUDICATURE AT BOMBAY

3 of the ToP Act. The said definition shows that a person should blame himself for his negligence for not making necessary enquiry with the Tax Department before entering into any kind of transaction about the property of the defaulter.

43. Ms. Jyoti Chavan, learned Addl. Govt. Pleader adopted the submissions of Mr. Narula, Ms. Jeejeebhoy and Mr. Samant, hereinbefore recorded.

THE QUESTIONS

44. Keeping in view the rival submissions, we have considered it appropriate to formulate the following substantial questions of law for answers:

a. Having regard to the statutory provisions under consideration, does a secured creditor (as defined in the SARFAESI Act and the RDDB Act) have a prior right over the relevant department of the Government [under the BST Act/MVAT Act/MGST Act] to appropriate the amount realized by the sale of a secured asset?

b. Whether, despite section 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?

c. Are the provisions, *inter alia*, according 'priority' in payment of dues to a secured creditor for enforcing its

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HIGH COURT OF JUDICATURE AT BOMBAY

security interest under the provisions of the SARFAESI Act prospective?

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?

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. C. R. 243 (OS) **[ASREC (India) Limited vs. State of Maharashtra and Ors.]** and in paragraph 35 of the Division Bench decision, reported in 2021 (2) Mh. LJ 721 **(State Bank of India vs. the State of Maharashtra and Ors.)**?

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 24th January 2020?

and

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HIGH COURT OF JUDICATURE AT BOMBAY

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*"?

CONSIDERATION OF DECISIONS:

45. Before we answer the questions formulated above, we consider it appropriate to note the law laid down in various decisions of the High Courts to which our attention was drawn by the parties.

46. A learned Single Judge of the Jaipur Bench of the Rajasthan High Court in the decision reported in 2017 SCC OnLine Raj 4319 (**G. M. G. Engineers and Contractor Pvt. Ltd. and Anr. vs. State of Rajasthan and Ors.**) was called upon to decide a challenge made to an attachment order dated 19th April 2017 by the Sales Tax Officer, respondent no. 3. The attached property was auctioned by ICICI Bank, respondent no. 5, though in view of section 47 of the Rajasthan Value Added Tax Act, 2003, the department had first charge on the property. The learned Judge was called upon to consider as the first issue whether the amended provisions of section 26E of the SARFAESI Act and section 31B of the RDDB Act would apply to the present case having regard to the fact that such provisions were incorporated in the respective Central enactments in 2016, whereas, the attachment order was issued in the year 2014. The learned Judge recorded that the parties did not claim retrospective operation of the amended provisions; even

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HIGH COURT OF JUDICATURE AT BOMBAY

otherwise, perusal of the amended provisions did not show the same and, thus, the same were found to apply prospectively. The learned judge was of the further view that property already attached towards recovery of State dues cannot be nullified by a subsequent legislation when the amending provisions had not been given retrospective effect. A contention was raised before the learned Judge that the decision in **Central Bank of India** (supra) had been rendered prior to the amendments incorporated in the SARFAESI Act and the RDDB Act; hence, the same would have no application to cases covered by the amended provisions. The learned Judge, upon consideration of the decision in **Central Bank of India** (supra), held as follows:

> " *****
>
> 27. Learned Senior Counsel appearing for the petitioner-company submits that Section 26E of the amended Act gives priority to the secured creditor against all other debts and Government dues. In view of the above, effect of first charge gets nullified. I have considered the aforesaid argument also and find that Section 26E of the Act of 2002 gives priority to the secured creditor. It cannot be construed to nullify the statutory first charge. If the intention of Parliament would have been to nullify statutory first charge then language of the amended provision would have been as provided in Workmens' Compensation Act, Employees' Provident Fund Act, etc.
>
> 28. The State dues may be without a provision of first charge and in that situation, the secured creditors would have priority over the State dues and, accordingly, amended provision is to be given interpretation. It cannot, however, nullify a provision for first charge on the property. The first charge on the property creates right even as per the Act of 1882. It has already been observed that if intention of the Central Government was to nullify first charge, the

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HIGH COURT OF JUDICATURE AT BOMBAY

> language of amended provision would have been in the manner indicated by the Apex Court in the case of Central Bank of India (supra). It is otherwise a case where attachment of the property in pursuance of first charge of the State government is much prior to the amended Act of 2002 and 1993 thus those amendments would not apply even if subsequently auction of the property was made. It is nothing but auction of the property already attached by the Government, that too, after initiation of proceedings under the Act of 1956.
>
> *****"

47. In **G. M. G. Engineers and Contractor Pvt. Ltd.** (supra), the property was attached before the 2016 Amending Act was enacted and the learned Judge held the provisions of the 2016 Amending Act as prospective in its application. The learned Judge also proceeded on the basis that the first charge on the property creates right even as per the ToP Act and if intention of the Parliament was to nullify first charge, the amended provisions of the RDDB Act and the SARFAESI Act would have been couched in language as indicated in **Central Bank of India** (supra). Interestingly, when **G. M. G. Engineers and Contractor Pvt. Ltd.** (supra) was decided, neither had section 26E been brought on the statute book nor does it appear that any proceedings under the RDDB Act had been initiated.

48. Having noted what was laid down in **G. M. G. Engineers and Contractor Pvt. Ltd.** (supra), we move on to notice the decision reported in 2018 (55) GSTR 2010 (M.P.) **(Bank of Baroda vs. Commissioner of Sales Tax, Madhya Pradesh, Indore)**. There, a learned Single Judge presiding over a bench of the Madhya Pradesh High Court at Indore had before His

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HIGH COURT OF JUDICATURE AT BOMBAY

Lordship a challenge by the petitioning bank to a sale proclamation dated 17th July 2017 issued by the Commercial Tax Officer. Such proclamation was the result of action initiated to recover commercial tax dues from a company which was a debtor of the petitioning bank. The learned Judge considered the provisions contained in section 31B of the Madhya Pradesh Value Added Tax Act, 2022 creating first charge on the property to the dealer and, thereafter, opined as follows:

> "*****
>
> In the considered opinion of this Court, the Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provision (Amendment) Act, 2016 came into force w.e.f. 01.09.2016 and by virtue of the said amendment, the right of secured creditors to realise the secured dues and debts dues, which are payable to the secured creditors by sale of assets over which security has been created, is having priority over all other debts and government dues including revenue, taxes, ceases and rates due to Central Government, State Government and local authorities.
>
> Not only this, it is having overriding effect over all other enactment including the provisions of MP VAT Act, Central Sales Tax Act, Entry Tax Act and any other Tax Act.
>
> Though, an attempt has been made by the State Government to demonstrate before this Court that the amendment will not dis-entitle to recover the dues by them as the dues are outstanding since 2012.
>
> Nothing prevented the State Government to recover the dues since 2012 and the State Government woke up from plumber only after the amendment has come into force and by virtue of the amendment in the Central Act, this Court is of the considered opinion that by no stretch of imagination, the State Government can be permitted to auction the property in question as the Bank of Baroda

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HIGH COURT OF JUDICATURE AT BOMBAY

is having priority in the matter in light of the amendment which has been quoted above.

*****"

49. What is significant is that no argument was advanced on behalf of the sales tax authorities that section 31B of the RDDB Act may not have application in the facts of the case without any proceedings having been initiated under the RDDB Act by the petitioning bank. Since the judgment also does not refer to any proceedings having been initiated under the RDDB Act by the petitioning bank, we are constrained to observe that such decision must be held to be one rendered on its own facts and may not be of any assistance for us to decide the questions that we have formulated.

50. A learned Judge of the Kerala High Court, in the decision reported in (2019) SCC OnLine Ker 2890 (**State Bank of India vs. State of Kerala**), was seized of writ petitions instituted by various banks and financial institutions challenging the action of the State's revenue machinery in taking possession of and attempting to sell certain properties for alleged arrears of sales tax and value added tax from its respective owners which the bank/financial institutions claimed to be their secured assets consequent to equitable mortgages having been created over them in their favour towards security for financial facilities/assistance availed of by its owners.

51. While the petitioning banks/financial institutions claimed primary rights as secured creditors to proceed against the properties in question under section 26E of the SARFAESI Act and section 31B of the RDDB Act, the revenue claimed first

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HIGH COURT OF JUDICATURE AT BOMBAY

charge over such properties under section 26B of the Kerala General Sales Tax Act and section 38 of the Kerala Value Added Tax Act. After considering various decisions, the learned Judge recorded as follows:

> "33. A close survey of the afore judgments thus renders it beyond contest that the words `First Charge' and 'priority in payment of debts' are virtually synonymous and means the same, except for its semantic variation on account of differing phraseology. In both events, the holder obtains the privilege of recovery before anyone else and hence, whether it is the `First Charge' or the right to claim `priority' in recovery, the ultimate effect and consequence is the same.
>
> 34. Thus, even though the KGST Act/KVAT Act creates a `First Charge' in favour of the Revenue to recover the arrears of tax, the afore provisions of the SARFAESI Act and RDB Act make the secured dues entitled to be paid in priority over such taxes and in fact, elevates the rights of the secured creditor, to recover such dues, also to a position of priority.
>
> 36. Irrefragibly, when the secured creditors have a right in priority to have their debts extinguished, obviously, their right to proceed against the property would also rank high than that is claimed by the Revenue. The assertion of the Revenue that their `Charge' will continue over the property until it is sold by them, hence, is rendered without forensic support to stand on.
>
> 37. That so said, the next question that arises is whether Section 26E of the SARFAESI Act and Section 31B of the RDB Act create an overriding and first right in favour of the Banks/Financial Institutions to recover their dues, over and above the right of the Revenue created through the KGST Act/KVAT Act. In fact, this enquiry has been rendered relatively easy for this Court because, in Central Bank of India v. State of Kerala (2009) 4 SCC 94, the Hon'ble Supreme Court considered the right of the Banks/Financial Institutions as regards recovery of their dues prior to the afore two provisions being introduced in

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HIGH COURT OF JUDICATURE AT BOMBAY

the SARFAESI Act and in the RDB Act. The conclusions of the Hon'ble Supreme Court are unequivocal worded that, in the absence of these provisions in the respective Statutes, the Banks/Financial Institutions cannot claim any priority over the Revenue's First Charge on the properties concerned for recovery of dues of Sales Tax/Value Added Tax. *****.

38. When one reads the afore opinion of the Hon'ble Supreme Court, it is left without any doubt that, but for Section 26E of the SARFAESI Act and Section 31B of the RDB Act, such Statutes do not, in any manner, operate to create a better right for recovery in favour of the Banks/Financial Institutions over that of the Revenue. However, these provisions were brought in and incorporated in the respective Statutes after this judgment, clearly with the intend (sic, intent) to override this lacuna. Therefore, the resultant question is whether these provisions would create a better right in favour of the Banks/Financial Institutions, which is superior to that enjoyed by the Revenue under the KGST Act/KVAT Act.

41. As has been extracted above, Section 26E of the SARFAESI Act provides that the debts due to any secured creditor shall be paid in priority over all other debts and all revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. Section 31B of the RDB Act takes this one step forward and elevates the right of the secured creditors to realise their debts, by sale of the secured assets, to enjoy priority and then re-affirms that such debts will be paid in priority over the revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. It is thus irrefragible (sic, irrefragable) and in fact, expressly conceded to by the learned Additional Advocate General that the Banks/Financial Institutions have the First Right to have their debts extinguished; but, as has been recorded above, the Revenue merely claims that they have right to sell the property first. This argument again is flawed because the 'First Charge' creating no right over the property, the Revenue cannot claim a First Right to proceed against it

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HIGH COURT OF JUDICATURE AT BOMBAY

> either in the face of the provisions of the SARFAESI Act or RDB Act with which we are dealing in this case. *****.
>
> 47. The above cited judgments certainly support my views as afore and it axiomatically becomes justified for me to hold that Section 26E of the SARFAESI Act and Section 31B of the RDB Act create a `First Charge' by way of a priority to the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any statutory 'First Charge' in favour of the Revenue under the KGST Act/KVAT Act. It is so declared.
>
> 49. The above conclusions of the Hon'ble Court certainly places a lid on this argument made on behalf of the Revenue and in any event of the matter, they themselves concede that Section 31B of the RDB Act has been notified. Hence, even assuming and is taken that Section 26E of the SARFAESI Act cannot apply for want of notification, it would be of no avail to the Revenue, because the provisions of Section 31B of the RDB Act clearly place the right of the secured creditor to proceed against the property as well as their right to recover the secured debts in a position of priority over all tax arrears claimed by the Revenue."

52. The dicta in **State Bank of India vs. State of Kerala (supra)** is clear. It supports the contention that in view of section 31B of the RDDB Act and section 26E of the SARFAESI Act, first charge in favour of the banks/financial institutions is created for recovery/realization of their dues in priority to the dues of a department of the Government.

53. A Division Bench of the Gujarat High Court, in its decision reported in (2019) SCC Online Guj 1892 (**Kalupur Commercial Co-operative Bank Ltd. vs. State of Gujarat**) considered an issue with regard to the priority of the petitioning cooperative bank over the dues vis-à-vis the sales tax dues which the State Government intended to recover from the

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HIGH COURT OF JUDICATURE AT BOMBAY

assets of the defaulter. In other words, the question was whether by virtue of section 26E of the SARFAESI Act the same would override the charge of the State Government under section 48 of the Gujarat Value Added Tax Act, 2003. The Division Bench was of the view that section 48 of the relevant VAT Act would come into play only when the liability is finally assessed and the amount becomes due and payable. It is only thereafter, if there is any charge, the same would operate.

54. Giving due regard to a decision rendered previously by the presiding Judge of the Division Bench, it was held in **Kalupur Commercial Co-operative Bank Ltd.** (supra) by the Division Bench that it had no hesitation in arriving at the conclusion that the first priority over the secured asset shall be of the petitioning cooperative bank and not of the State Government by virtue of section 48 of the relevant VAT Act. This resulted in setting aside of the impugned attachment dated 22nd January 2018 and the communication dated 19th April 2018, whereby first charge over the property was claimed.

55. We have noted that the decision in **Kalupur Commercial Co-operative Bank Ltd.** (supra) was rendered on 23rd September 2019, i.e., prior to enforcement of section 26E of the SARFAESI Act. This decision supports the contentions of the secured creditors before us. We, however, wish to consider the law laid down in paragraph 57 of the decision at a later part of this judgment.

56. In the decision of the Division Bench of this Court in **ASREC (India) Limited** (supra), the controversy arose as to

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HIGH COURT OF JUDICATURE AT BOMBAY

who between the petitioner and the Sales Tax Officer would be entitled to the proceeds of sale of the subject property in a sum of Rs. 8.02 crore, which was fetched upon the same being sold in terms of the liberty granted by the Division Bench. The State of Maharashtra and the Sales Tax Officer, respondents 1 and 2, respectively, relied upon the statutory charge created in favour of the sales tax department under section 37 of the MVAT Act. On behalf of the petitioner, it was contended that section 37 itself records that it would be subject to any Central legislation creating first charge and highlighted that the RDDB Act being the Central legislation and section 31B thereof having accorded first priority in favour of the secured creditor over and above the Government dues, including revenues, taxes, etc. and also because section 31B of the RDDB Act is not restricted to any sale conducted under the provisions of such legislations only and it would operate in respect of sale conducted under any other mechanism, including provisions of the SARFAESI Act, it was immaterial whether section 26E of the SARFAESI Act had not been brought into force.

57. Reliance was placed by the petitioner on the decisions in **Assistant Commissioner (CT)** (supra)**, G. M. G. Engineers and Contractor Pvt. Ltd.** (supra)**, Bank of Baroda** (supra), and **Kalupur Commercial Cooperative Bank Ltd.** (supra).

58. On the contrary, the respondents 1 and 2 contended that since section 26E of the SARFAESI Act had not been brought into force and notwithstanding section 31B of the RDDB Act being in force, for the purposes of action taken under the

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HIGH COURT OF JUDICATURE AT BOMBAY

SARFAESI Act, the charge created by section 37 of the MVAT Act shall prevail.

59. In paragraph 12, the Court observed as follows:

> "12. A perusal of Section 37 of MVAT Act, 2002 reveals that though it commences with a non-obstante clause, but it recognises that the same shall be subject to any provision regarding creation of the first charge in any Central Act. Therefore, if, by virtue of any provision under a Central Act any priority or charge is created in favour of any party the same shall prevail."

60. Thereafter, the Division Bench referred to section 31B of the RDDB Act, the decision in **G. M. G. Engineers and Contractor** (supra), **Assistant Commissioner (CT)** (supra), **Bank of Baroda** (supra) and and **Kalupur Commercial Cooperative Bank Ltd.** (supra), while recording its concurrence in paragraph 19 with the consistent view taken by 3 (three) Division Benches of 3 (three) High Courts and the view taken by the Full Bench of the fourth High Court. Prior to allowing the writ petition and quashing the impugned notice dated 13th November 2016 issued by the respondent no. 2 initiating a process for auction under the MLR Code, the Division Bench recorded in paragraphs 20 and 21 as follows:

> "20. The only contention which needs to be noted which was made by learned counsel for Respondent Nos.1 and 2 which was not made before the four learned Benches of the four High Courts in their opinions above noted, is that Chapter IVA which was inserted in SARFAESI 2002 comprising Sections 26B to 26E warrants a record to be made in the Central Register by the Central Registry creating a security interest. As per learned Counsel as per Sub-section (2) of Section 26B which is a part of Chapter IVA a secured creditor has to ensure that the security interest is recorded in the record of the Central

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HIGH COURT OF JUDICATURE AT BOMBAY

> Registry. The argument therefore was that unless this is done, the priority of interest contemplated by Section 26E would not be applicable.
>
> 21. The argument is without any substance because the law declared in the four opinions above referred to is that if any Central Statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a State for a tax due under the Value Added Tax of the State. But we note the fact that the security interest has been entered in the record of the Central Registry."

61. What follows from a reading of the aforesaid paragraphs (20 and 21) is that the contention advanced by the respondents 1 and 2 regarding mandatory registration of the security interest with the Central registry prior to invocation of section 26E of the SARFAESI Act was, in the opinion of the Division Bench, an *"argument without substance"*.

62. Another Division Bench of this Court had the occasion to consider a somewhat similar point in **State Bank of India vs. the State of Maharashtra and Ors.** (supra). The petitioning bank, the secured creditor challenged attachment of a plot under the provisions of section 32 of the MVAT Act and proceedings initiated by the Deputy Commissioner of Sales Tax, respondent no. 2, for recovery of Value Added Tax dues of the respondent no. 3 under the MLR Code. The petitioning bank was claiming priority of charge on the said plot as secured creditor in respect of the debt owed by the respondent no. 3 to such creditor over the sales tax dues payable by the respondent no. 3 to the respondent no. 2. An original application under the RDDB Act had been filed by the petitioning bank to recover dues of Rs. 2.49 crore from the respondent no. 3. While the said

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HIGH COURT OF JUDICATURE AT BOMBAY

application was pending adjudication before the DRT, Pune, the petitioning bank invoked the provisions of the SARFAESI Act by issuing a demand notice dated 27th November 2017 under section 13(2) of the SARFAESI Act, whereafter, physical possession was taken on 29th May 2019. In terms of e-auction conducted by the petitioning bank on 17th July 2019, the said plot being the secured asset was sold for Rs. 89.25 lakh. On behalf of the petitioner, strong reliance was placed on **ASREC (India) Ltd.** (supra), while the respondents 1 and 2 contended that the decision in **ASREC (India) Ltd.** (supra) had been challenged before the Supreme Court and a decision thereon was pending. A prayer was made that till such time hearing of the case before the Supreme Court is concluded, hearing of the writ petition may be deferred. On merits, it was contended that the petitioning bank had not registered the security interest with the Central registry as required under section 26D of the SARFAESI Act and, as such, the debts due to the petitioning bank cannot be paid in priority over the tax dues of the respondent no. 2. It was further contended that section 26E of the SARFAESI Act having been notified on 24th January 2020, the same is effective prospectively. Also, it was contended that there being an assertion of claim by the respondents 1 and 2 for recovery of tax dues and an attachment having been initiated to protect the interest of the revenue, contentions of the petitioning bank were liable to be rejected.

63. The Division Bench, after considering various provisions of the SARFAESI Act as well as section 31B of the RDDB Act, proceeded to observe in paragraphs 34 and 35 as follows:

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HIGH COURT OF JUDICATURE AT BOMBAY

> "34. In our considered view the facts in the case at hand being similar to the facts in the case of ***ASREC (India) Limited (Supra)*** that decision would squarely be applicable to the facts of this case that if any Central statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a State for a tax due under the value added tax of the State. Therefore, in our view what becomes relevant in the facts of this case is the issue of priority of charge on the said assets of secured debt over tax dues and not whether the charge is first or not in time.
>
> 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 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."
>
> (underlining in original)

64. While dealing with **Central Bank of India** (supra), the Division Bench opined that the said decision would be of no application since section 31B of the RDDB Act not being on the statute book then, the impact of such a provision did not come up for consideration before the Supreme Court and also that the decision was prior to the amendments introduced in the RDDB Act and the SARFAESI Act by the 2016 Amending Act. Reliance was also placed by the Division Bench on paragraphs 16 and 17 of the decision in **Kalupur Commercial Cooperative Bank Ltd.** (supra) for holding that the decision in **Central Bank of India** (supra) was of no assistance to drive home the point raised by the respondents 1 and 2.

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HIGH COURT OF JUDICATURE AT BOMBAY

65. The decision in **ASREC (INDIA) Ltd.** (supra) and **State Bank of India vs. the State of Maharashtra** (supra) would engage our further attention while we answer the questions formulated above.

66. A Division Bench of this Court at its Bench at Nagpur, while rendering its decision reported in AIR 2021 BOMBAY 135 (**Medineutrina Pvt. Ltd. (Company) vs. District Industries Centre and Ors.**) had the occasion to consider several issues. The first issue was as to who between the respondent no. 2 (Assistant Commissioner, Sales Tax) and the respondent no. 3 (Punjab National Bank) would have priority. Such issue was answered in favour of the respondent no. 3 having regard to the provisions contained in section 26E of the SARFAESI Act as well as the decisions in **Assistant Commissioner (CT)** (supra), **State Bank of India vs. State of Maharashtra** (supra) and the decision reported in 2019 SCC OnLine Bom 9527 (**Cosmos Co-operative Bank Ltd. vs. State of Maharashtra and Ors.**). The Division Bench consequently held that the provisions of section 26E of the SARFAESI Act would prevail over those contained in section 37(1) of the MVAT Act. While the Division Bench proceeded to add a few more reasons why section 26E would prevail over section 37(1) of the MVAT Act, it considered 'charge' as defined in section 100 of the ToP Act and held that for such charge to become effective, it is necessary that the transferee ought to have had prior notice of such charge, be it either express, implied or constructive or the prior existence of such charge is shown to have been within the knowledge of the transferee. Section 55

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HIGH COURT OF JUDICATURE AT BOMBAY

of the ToP Act was further referred to. The Division Bench held that such provision creates an obligation upon every seller to disclose to the buyer any material defect in the property or his title, of which he is aware and which the buyer cannot, with ordinary care, discover and pay all public charges and discharge all encumbrances on the property then existing. The Division Bench then proceeded to consider how the Supreme Court in its decision reported in (2009) 4 SCC 486 (**A. I. Champdany Industries vs. Official Liquidator and Anr.**) had given meaning to the word "encumbrances" in relation to the words "immovable property" and quoted the following paragraph: -

> "18. *****. There cannot, thus, be any doubt or dispute that a provision of law must expressly provide for an enforcement of a charge against the property in the hands of the transferee for value without notice to the charge and not merely create a charge."

Then followed certain observations in paragraphs 28 and 30, which we quote below: -

> "28. The language of Section 37(1) of the MVAT Act 2002, has to be viewed in that contextual background. Section 37(1) of the MVAT Act, 2002, creates a 'First Charge on the property of the dealer', or as the case may be, person, for any amount of tax, penalty, interest, sum forfeited, fine or any other sum payable under the MVAT Act 2002. Though the dues of the Bank as a secured creditor, in light of the language of Section 26-E of the SARFAESI Act, which has now been brought into force w.e.f. 1/9/2016, will have priority, that does not have the effect of wiping out the dues payable under any Central/State/Local Act, where, for the recovery of such dues, a first charge has been created on the property by such statute, which in the case of the MVAT Act, 2002, has been so created. It goes without saying that when a statutory charge is created on the property,

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HIGH COURT OF JUDICATURE AT BOMBAY

the same would go with the property and would follow the property, in whosoever's hands the property goes.

30. As Section 37(1) of the MVAT Act, 2002, creates a charge on the property, a successful auction purchaser, thus would hold the property, upon which a statutory charge has been created, subject to such charge and the property would thus continue to be liable for any statutory charges created upon it, even in the hands of such auction purchaser, though for non disclosure of such charge by the secured creditor, the auction purchaser may sue the secured creditor and have such redress, as may be permissible in law. This is more so for the reason that the priority given in Section 26-E of the SARFAESI Act, to the Banks, which is a secured creditor, would only mean that it is first in que for recovery of its debts by sale of the property, which is a security interest, the other creditors being relegated to second place and so on, in the order of their preference as per law and contract, if any, as the case may be. Thus the dues under Section 37(1) of the MVAT Act, 2002, being a statutory charge on the property, would also be recoverable by sale of the property, and that puts a liability upon the auction purchaser, who, in case he wants an encumbrance free title, will have to clear such dues."

Insofar as purchase of a property on *'as is where is and what is there is basis'* is concerned, the following observations were made: -

"36. Thus the purchase of the property on 'as is where is and what is there is' basis, would mean that the property was being had by the auction purchaser, with all its rights, obligations and liabilities, whatsoever they may be, which would include, all dues, impositions, restrictions as may have been imposed upon the same and consequent to acquiring title to the property, cannot be permitted to quibble out of it, on the alleged plea of not being noticed about any such liability/imposition. In case the auction purchaser, did not want to have the property, with its liabilities, he

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HIGH COURT OF JUDICATURE AT BOMBAY

> ought to have insisted on having the same free of all encumbrances, altogether, before bidding for the same. That apart, it is equally a duty of the auction purchaser, before bidding for the same, to make inquiries about the impositions upon the property, so that he can have it free of any encumbrances. After acquiring title to the property, the auction purchaser cannot be heard to say that he will have the rights associated with the property and not the liabilities. He takes it lock, stock and barrel, with everything.
>
> 37. ***** Thus the obligation to deliver the property to the auction purchaser free from encumbrances known to the secured creditor includes the responsibility to make reasonable enquiries about the encumbrances and liabilities and to include such liabilities in the notice inviting the bids, or if that is not done, in the reserve price, fixed for sale of the security interest, so that the encumbrances can be taken care of. This is also spelt out from Rule 9(7) and (8) of the Security Interest (Enforcement) Rules, 2002."

This was followed by directions in paragraph 41, which every secured creditor under the SARFAESI Act was required to ensure.

67. Learned advocates for the parties have placed before us orders of the Supreme Court in appeals that have been carried from the decision in **Medineutrina Pvt. Ltd.** (supra). While the directions contained in paragraph 41 have been stayed by the Supreme Court by an order dated 9th April 2021 in an appeal carried by Kotak Mahindra Bank, a non-party to the proceedings before the Division Bench, the appeal carried from **Medineutrina Pvt. Ltd.** (supra) by the writ petitioner has been dismissed by an order dated 18th November 2021 on a ground different from those assigned in the judgment and order under challenge.

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HIGH COURT OF JUDICATURE AT BOMBAY

ANALYSIS OF THE RELEVANT LAW AND ANSWERS TO THE QUESTIONS

68. Having noted the submissions of the parties and bearing in mind the rulings in the various decisions referred to above, we would now advert to the questions that have been formulated and answer the same.

ANSWER TO QUESTIONS (a) AND (b):

69. The questions being related are answered together.

70. Chapter IV of the SARFAESI Act, in its original avatar, comprised of 6 (six) sections, i.e., 20 to 26 which, *inter alia*, provided for:

i. Setting up a 'Central Registry', mainly to facilitate registration of transaction of securitisation and reconstruction of financial assets and creation of security interests under the SARFAESI Act;

ii. Appointing a Central Registrar and appointing other officers for discharging the Registrar's functions under his superintendence and direction;

iii. Maintenance of a 'Central Register' of transactions relating to securitization of financial assets, reconstruction of financial assets and creation of security interest;

iv. Requirement of filing of transactions relating to securitisation, reconstruction and creation of security interest;

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HIGH COURT OF JUDICATURE AT BOMBAY

v. Reporting by asset reconstruction companies regarding satisfaction of their security interest; and

vi. Right to inspect the particulars of securitisation, reconstruction and creation of security interest transactions by any person.

71. Section 26A was inserted in Chapter IV of the SARFAESI Act by an amendment w.e.f. January 15, 2013. It provided for rectification by the Central Government in matters of registration, modification and satisfaction, etc. of the registered transactions.

72. Sections 20A and 20B were inserted in Chapter IV by the 2016 Amending Act w.e.f. September 1, 2016. While the former was intended to integrate registration systems with the Central Registry, the latter pertained to delegation of powers.

73. The 2016 Amending Act also introduced a fresh chapter (Chapter IV-A) in the SARFAESI Act adding four more sections thereto, i.e., sections 26B to 26E. The object that the Parliament had in mind while incorporating Chapter IV-A in the SARFAESI Act seems to be clear as crystal. The dominant theme of the additions in the statute were intended to emphasize upon the need to register transactions of securitisation, reconstruction and creation of security interest with the Central registry (hereafter "CERSAI", for brevity) and, accordingly, provisions were made to make such registration mandatory for a secured creditor or other creditor to avail the benefits flowing therefrom, as we would presently proceed to notice.

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HIGH COURT OF JUDICATURE AT BOMBAY

74. Section 26B enables creditors [apart from secured creditors as defined in section 2(1)(zd)] to file the particulars of creation, modification or satisfaction of any security interest in their favour with the Central Registry, while making it explicit that such creditors shall not be entitled to exercise any right of enforcement of securities under the SARFAESI Act. The provisions therein also enable any person who has obtained an order for attachment of property, to file particulars of such attachment orders with the CERSAI in the form and manner as may be prescribed.

75. Section 26C providing for the effect of registration of transactions for creation, modification or satisfaction of security interest declares that such registration would constitute public notice thereof. The said provision also declares that a secured creditor who has registered the security interest or other creditor who has registered the attachment order in its favour, shall have priority of claims over subsequent security interest created over the property in question, any transfer by way of sale, lease, assignment or licence of such property or attachment order subsequent to such registration. The legislative intent of requirement and benefits flowing from such a registration with the CERSAI can hardly be overlooked.

76. It is now time to consider sections 26D and 26E. Public sector banks proceeding for creation of equitable mortgage, i.e., mortgage by deposit of title deeds, at the time of providing financial assistance has been a common practice over the years. However, the economy and simplicity of this process was not without its complex problems. Since equitable mortgage

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HIGH COURT OF JUDICATURE AT BOMBAY

could be created without registration, the transaction between the lender and the borrower largely remained secret. There was no way anyone else could get an inkling thereof, until the provisions for CERSAI registration were enacted. It was well-nigh possible for a dishonest borrower to conceal the transaction of mortgage and sell the mortgaged property to an innocent third party by creating document of title leading to the purchaser unknowingly incurring a liability despite paying the consideration. In such a situation, the purchaser would be chased by the lending bank and necessarily to bear the brunt of its efforts geared towards recovery of its dues. Instances were also not rare of more than one loan being sanctioned by different banks on the strength of mortgage of a single property without one bank knowing of a prior mortgage with another bank. This brewed multiple funding in respect of one property, making it difficult for lenders to recover debts and consequent breeding of non-performing assets. Notwithstanding the concept of principal mortgagee and a puisne mortgagee, the minimum requirement of the mortgagee having the means to gauge and assess the worth and status of the property mortgaged before creation of mortgage for any mortgage transaction to be termed proper had to be achieved. We are inclined to the view that the Parliament, to curb such problems and other undesirable consequences, designed Chapter IV-A in such a manner to include provisions which, on the one hand, would disable any secured creditor to exercise the right of enforcing security interest under Chapter III of the SARFAESI Act without the CERSAI registration (section 26D) and, on the

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HIGH COURT OF JUDICATURE AT BOMBAY

other, enable the secured creditor, if it has the CERSAI registration, to claim priority over all other debts and all revenues, taxes, etc., in the matter of payment of the debts due to it (section 26E).

77. The plain reading of section 26D 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 26D 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 26E, 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 26D and the enabling provision in section 26E, 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.

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HIGH COURT OF JUDICATURE AT BOMBAY

80. The aforesaid provisions of Chapter IVA of the SARFAESI Act in mind, we would now turn our attention and take a look at the relevant State legislations.

81. In Maharashtra, there are multiple legislation providing, by express statutory intendment, for 'first charge' on property of a person who defaults in payment of Government dues, by whatever name the dues are called. Such statutory intendment, apart from the BST Act, the MVAT Act and the MGST Act, is traceable in at least 4 (four) other legislations in the State of Maharashtra. Section 212 of the Mumbai Municipal Corporation Act, 1888, section 141 of the Maharashtra Municipal Corporations Act, 1949, section 109 of the Maharashtra Town and Country Planning Act, 1966 and section 331(1)(iii)(b) of the MLR Code, 1966, are the various sources of creation of first charge on property/plot. It would equally be important to note what section 169 of the MLR Code provides. For facility of appreciation, all such provisions are quoted hereunder:

> **Section 212 of the Mumbai Municipal Corporation Act, 1888:**
>
> **"212. Property taxes to be a first charge on premises on which they are assessed**
>
> Property taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land revenue, if any, due to the State Government thereupon be a first charge in the case of any building or land held immediately from the Government upon the interest in such building or land of the person liable for such taxes and upon the goods and chattels, if any, found within or upon such building or land, and belonging to such person; and, in the case of any other building or land, upon the said building or land and upon the goods

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HIGH COURT OF JUDICATURE AT BOMBAY

and chattels, if any, found within or upon such building or land and belonging to the person liable for such taxes."

Section 141 of the Maharashtra Municipal Corporations Act,

"141. Property taxes to be a first charge on premises on which they are assessed.

(1) Property taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land revenue, if any, due to the provincial Government thereupon, be a first charge, in the case of any building or land held immediately from the Government, upon the interest in such building or land of the person liable for such taxes and upon the moveable property, if any, found within or upon such building or land and belonging to such person; and, in the case of any other building or land, upon the said building or land and upon the moveable property, if any, found within or upon such building or land and belonging to the person liable for such taxes.

Explanation.— The term 'property tax' in this section shall be deemed to include charges payable under section 134 for water supplied to any premises and the costs of recovery of property taxes as specified in the rules.

(2) In any decree passed in a suit for the enforcement of the charge created by sub-section (1), the court may order the payment to the Corporation of interest on the sum found to be due at such rate as the Court deems reasonable from the date of the institution of the suit until realisation, and such interest and the cost of enforcing the said charge, including the costs of the suit and the cost of bringing premises or movable property in question to sale under the decree, shall, subject as aforesaid, be a fresh charge on such premises and movable property along with the amount found to be due, and the Court may direct payment thereof to be made to the Corporation out of the sale proceeds."

Section 109 of the Maharashtra Regional and Town Planning Act, 1996:

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HIGH COURT OF JUDICATURE AT BOMBAY

"**109. Recovery of arrears**

(1) Any sum due to a Planning Authority under this Act, rule or any regulation made thereunder shall be a first charge or the plot on which it is due, subject to the prior payment of land revenue, if any, due to the Government thereon.

(2) Any sum due to the Planning Authority under this Act, rule or any regulation made thereunder which is not paid on demand on the day on which it becomes due or on the day fixed by the Planning Authority, shall be recoverable by the Planning Authority from the defaulter as if they were arrears of land revenue.

(3) If any question arises whether a sum is due to the Planning Authority within the meaning of sub-section (2), it shall be referred to a tribunal constituted by the State Government consisting of one or more persons not connected with the Planning Authority or any authority subordinate to it or with the person by whom the sum is alleged to be payable which the tribunal shall, after making such inquiry as it may deem fit and after giving to the person by whom the sum is alleged to be payable, an opportunity of being heard, decide the question; and the decision of the tribunal thereon shall be final and shall not be called in question in any court or before any other authority.

(4) The procedure to be followed by the tribunal in deciding questions referred to it under sub-section (2) shall be such as may be prescribed by the State Government."

Section 169 of the MLR Code:

"**169. Claims of State Government to have precedence over all others**

(1) 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.

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HIGH COURT OF JUDICATURE AT BOMBAY

(2) The claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under the provisions of this Chapter shall have priority over all unsecured claims against any land or holder thereof."

Section 331(1)(iii)(b) of the MLR Code:

"**331. Certain provisions to apply to alienated villages**

(1) The provisions of section 68 and of Chapters V, VI, VII, VIII and IX shall be applicable to all alienated villages and alienated shares of villages, subject to the following modifications, that is to say––

(i) *****

(ii) *****

(iii) on the introduction of a settlement under Chapter V or VI in any such village or share, the holder or holders of such village or share shall, in proportion to his share in the rent or revenue of the village or share, be liable to pay––

(a) *****

(b) the costs of the levy of a cess under sections 144, 151 and 152 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961;

***"

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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 26E 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

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HIGH COURT OF JUDICATURE AT BOMBAY

to section 26E 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 26E of the SARFAESI Act, i.e., "… paid in *priority* over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority" (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,

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HIGH COURT OF JUDICATURE AT BOMBAY

particularly having regard to the *non-obstante* clauses in sections 31 B and section 26E, that the dues of the secured creditor shall have 'priority' over all other including all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

86. A debt that is secured or which, by reason of the provisions of a statute, becomes a 'first charge' on the property, in view of the plain language of Article 372 of the Constitution, must be held to prevail over a Crown debt, which is an unsecured one. The law, as it stands even today, is that a Crown debt enjoys no priority over secured debts. This principle has been repeatedly reaffirmed including, *inter alia*, in the decision of the Supreme Court reported in (2000) 5 SCC 694 (**Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co**.) where the Court observed:

> "10. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover it has been held that the Crown has no precedence over a pledgee of goods. In Bank of Bihar v. State of Bihar the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the

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HIGH COURT OF JUDICATURE AT BOMBAY

> pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (TLL, 7th Edn., p. 386) – 'It seems a government debt in India is not entitled to precedence over a prior secured debt'."

87. It would also not be inapposite to draw guidance from the decision of the Supreme Court reported in (2006) 10 SCC 452 **(ICICI Bank Ltd. vs. SIDCO Leathers Ltd.)** where the Court ruled as follows:

> "41. While enacting a statute, Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act claim of the first charge-holder shall prevail over the claim of the second charge-holder and in a given case where the debts due to both, the first charge-holder and the second charge-holder, are to be realised from the property belonging to the mortgagor, the first charge-holder will have to be repaid first. There is no dispute as regards the said legal position.
>
> 42. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to Parliament. Thus, while enacting the Companies Act, Parliament cannot be held to have intended to deprive the first charge-holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See *Workmen* v. *Firestone Tyre and Rubber Co. of India (P) Ltd., (1973) 1 SCC 813*].
>
> 43. If Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge-holder, we see no reason why it could not have stated so explicitly. Deprivation of legal

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HIGH COURT OF JUDICATURE AT BOMBAY

right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

44. Section 529(1)(*c*) of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-à-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated.

45. If we were to accept that *inter se* priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifically stated that on his failure to do so, he will be excluded from the benefits of the dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him on a par with an unsecured creditor. The logical sequitur of such an inference would be that even unsecured creditors would be placed on a par with the secured creditors. This could not have been the intendment of the legislation."

88. Bare perusal of the 2016 Amending Act would show that the dues of the Central/State Governments were in the specific contemplation of the Parliament while it amended the RDDB Act and the SARFAESI Act, both of which make specific reference to debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority and ordains that the dues of a secured creditor will have 'priority', i.e., take precedence. Significantly, the statute goes quite far and it is not only revenues, taxes, cesses and other rates payable to the State Government or any local

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HIGH COURT OF JUDICATURE AT BOMBAY

authority but also those payable to the Central Government that would have to stand in the queue after the secured creditor for payment of its dues.

89. The effect of using the word 'priority' in section 26E of the SARFAESI Act, according to us, is this. The rights accorded to 'first charge' holders by Central as well as State legislation having been known to the Parliament, in such a situation, what the Parliament intended by exercising its legislative power by introducing amendments in the SARFAESI Act, more particularly by incorporating section 26E therein, was to explicitly make the valuable right of the 'first charge' holder subordinate to the dues of a second creditor. The rights of such of the first charge holders accorded by several legislations enacted by the State, having regard to the language in which section 26E is couched, would rank subordinate to the right of the secured creditor as defined in section 2(1)(zd) subject, of course, to compliance with the other provisions of the statute. Acceptance of the contra-arguments of learned counsel for the State/respondents would undo what the Parliament has chosen to do.

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

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HIGH COURT OF JUDICATURE AT BOMBAY

Act expressly make it subject to the provisions of any Central Act creating 'first charge'. Also, section 26E 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 26E 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.

ANSWER TO QUESTION (c)

93. There are more reasons than one for which we are inclined to answer the question in the affirmative.

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HIGH COURT OF JUDICATURE AT BOMBAY

94. That the intention of the Legislature, at the first instance, has to be gathered from the language employed by it in the statute in question, is beyond any doubt.

95. Section 1(2) of the 2016 Amending Act states that the same shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. Insofar as the date of coming into effect and operation of Chapter IV-A of the SARFAESI Act as inserted therein by the 2016 Amending Act is concerned, perusal of section 2 of the 2016 Amending Act would reveal that different dates were required to be appointed for different provisions of the 2016 Amending Act to take effect and make it operational. On 26th December 2019, the Department of Financial Services in the Ministry of Finance, Government of India issued a notification appointing 24th January 2020 as the date on which sections 17 to 19 of the 2016 Amending Act would come into force. Section 18, which is relevant for the present purpose, was brought into force from 24th January 2020 and, thus, Chapter IV-A became operational with effect from that date. Surely, if the Parliament had intended that the provisions of Chapter IV-A were to be made applicable from a previous date, the notification would have said so. Therefore, on the face of it, the 2016 Amending Act has not been made applicable retrospectively but has taken effect from the date notified by the Central Government.

96. There is one other perspective from which the matter could be viewed. The Statement of Objects and Reasons as contained in the Bill for the 2016 Amending Act introduced in the Lok Sabha have been noted above. A reading thereof leads

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HIGH COURT OF JUDICATURE AT BOMBAY

to the inference that the amendment was proposed to bring about a substantive change in the law, *inter alia*, by (i) denuding secured creditors of their rights of enforcement of securities under Chapter III of the SARFAESI Act if security interest created in their favour had not been registered with the CERSAI; and (ii) granting 'priority' to the secured creditors over all other dues and taxes, after registration with the CERSAI except in cases where proceedings under the provisions of the I & B Code are pending. These changes were introduced for the first time *"to suit changing credit landscape and augment ease of doing business"*, as appears from the Statement for the amendment. These substantial changes, remedial in nature, having been brought in force for the first time amount to substantive law and cannot, therefore, be given retrospective effect.

97. We may profitably refer to the decision of the Supreme Court reported in (1969) 1 SCC 609 (**Sukhram Singh vs. Harbheji**). There, in paragraph 12, law is laid down in the following words:

> "12. Now a law is undoubtedly retrospective if the law says so expressly but it is not always necessary to say so expressly to make the law retrospective. There are occasions when a law may be held to be retrospective in operation. Retrospection is not to be presumed for the presumption is the other way but many statutes have been regarded as retrospective without a declaration. Thus it is that remedial statutes are always regarded as prospective but declaratory statutes are considered retrospective. Similarly sometimes statutes have a retrospective effect when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the context of connected

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HIGH COURT OF JUDICATURE AT BOMBAY

> provisions. It is always a question whether the Legislature has sufficiently expressed itself. To find this one must look at the general scope and purview of the Act and the remedy the Legislature intends to apply in the former state of the law and then determine what the Legislature intended to do. This line of investigation is, of course, only open if it is necessary. In the words of Lord Selborne in *Main* v. *Stark, (1890) 15 AC 384 at 388,* there might be something in the context of an Act or be collected from its language, which might give to words prima facie prospective a larger operation. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the Legislature."

98. In its decision reported in (2011) 2 SCC 721 (**Executive Engineer Dhenkanal vs. N.C. Budharaj**), the Supreme Court has clarified that 'substantive law' is that part of the law which creates, defines and regulates rights in contrast to what is called adjective or remedial law which provides the method of enforcing rights.

99. Applying these tests to Chapter IV-A, coupled with the express provision in section 26D regulating the exercise of power by secured creditors by barring them to take recourse to Chapter III of the SARFAESI Act without the CERSAI registration, there could be little hesitation to hold that section 26E of the SARFAESI Act would apply prospectively.

100. Pertinently, in the cases that we have in hand, the newly incorporated provisions cast certain mandatory duty and obligation on secured creditors. If they seek to invoke the provisions of Chapter III of the SARFAESI Act and enforce the security interest, the same needs to have a CERSAI registration. Such creditors would be entitled to seek 'priority'

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HIGH COURT OF JUDICATURE AT BOMBAY

in terms of section 26E only after the security interest is registered and other provisions of the SARFAESI Act are complied with. Provisions in Chapter IV-A cannot be construed in a manner so as to disturb, impair or divest the State of its accrued rights. Sections 26D and 26E of the SARFAESI Act no doubt begin with *non-obstante* clauses. However, such *non-obstante* clauses would override any law for the time being in force evincing a result contrary to or inconsistent with sections 26D and section 26E but may not be so read so as to override and nullify an exercise of right by the relevant department of the State under any other law for the time being in force, and action taken in pursuance thereof, leading to accrual of some legal interest or benefit.

101. On the flip side, if the newly incorporated provisions casting a mandatory obligation on a secured creditor to register the security interest created in its favour to claim priority in payment is read to apply with retrospective effect, it could bring about at least one perceivable disastrous consequence. Actions taken under Chapter III of the SARFAESI Act including measures to take over possession of the secured asset prior to Chapter IV-A becoming operational, i.e., without CERSAI registration of the security interest sought to be enforced, could be challenged as *ultra vires* the SARFAESI Act itself. If such a challenge were to succeed, there could be sort of a cloudburst of complications. A reading that Chapter IV-A applies prospectively would, however, save all such exercises of enforcement of unregistered security interest, thereby not being liable to interdiction on the ground of absence of

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HIGH COURT OF JUDICATURE AT BOMBAY

registration of the security interest upon a challenge being thrown by a defaulting borrower.

102. We, thus, agree with the decisions in **Bank of Baroda** (supra) and **ASREC (INDIA) Ltd.** (supra) and answer the question by holding that the provisions of Chapter IV-A of the SARFAESI Act would have application prospectively from the date the same was brought into force, i.e., January 24 2020.

ANSWER TO QUESTION (d)

103. We are left with no option but to answer this question in the negative based on settled principles of law.

104. An enlightening passage on how statutes are to be interpreted is found in the decision of the Supreme Court reported in (1987) 1 SCC 424 (**Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd.**). The same reads as under:

> "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each

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HIGH COURT OF JUDICATURE AT BOMBAY

> word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. ***"

In the light of the above, a statute has to be construed after ascertaining the legislative intent and in the context and scheme of the enactment.

105. We have noticed the legislative intent behind enactment of both the SARFAESI Act and the RDDB Act hereinbefore. We, however, consider a recapitulation of the same.

106. First, although the end result of both the statutes, i.e., the RDDB Act and the SARFAESI Act is recovery of money, yet, while the process of recovery under the former enactment is entirely through the procedure laid down therein and is largely court driven, the process of recovery under the latter is essentially without court intervention. Nature of the two proceedings is, therefore, completely different.

107. In view of **Reserve Bank of India** (supra), any provision of a statute cannot be interpreted in a manner wholly unrelated to the scheme of the statute in which it appears.

108. Much has been argued on behalf of the secured creditors by referring to the *non-obstante* clause in section 31B of the RDDB Act. Before adverting our attention to such section, it would not be inapposite to consider how a statutory provision beginning with a *non-obstante* clause ought to be construed.

109. In the decision reported in AIR 1984 SC 1022 (**Union of India vs. G.M. Kokil**), a *non-obstante* clause has been held to

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HIGH COURT OF JUDICATURE AT BOMBAY

be a legislative device, which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment or in some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

110. The Supreme Court in its decision reported in AIR 1987 SC 117 (**Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram**), while considering the provisions in section 15A of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947, had the occasion to hold as follows:

> "68. A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in *South India Corpn*. (*P*) *Ltd.* v. *Secretary, Board of Revenue, Trivandrum, AIR 1964 SC 207 at p.215*.
>
> 69. It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. ***."

111. One finds reiteration of the same legal position in the decision reported in (2005) 9 SCC 129 (**State of Bihar & Ors.**

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HIGH COURT OF JUDICATURE AT BOMBAY

vs. Bihar Rajya M. S. E. S. K. K. Mahasangh). The Court held that:

> "47. Normally the use of a phrase by the legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure (see *Law Lexicon* words 'notwithstanding anything in this Act to the contrary'). Use of such expression is another way of saying that the provision in which the *non obstante* clause occurs usually would prevail over other provisions in the Act. Thus, *non obstante* clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the *non obstante* clause is attached.***"

112. The decision in **Sidco Leathers Limited** (supra), however, reveals a little shift in approach. The Supreme Court held that the impact of a *non-obstante* clause must be kept measured by the legislative policy and it has to be limited to the extent it is intended by Parliament and not beyond that. In other words, the *non-obstante* clause must be given effect to, to the extent Parliament intended and not beyond the same.

113. Back home, there is this decision of the Full Bench of this Court reported (2008) 6 Mah LJ 941 (FB) (**Mohd. Riyazur Rehman Siddiqui vs Deputy Director of Health Services**), where it has been held that the wide meaning of the *non-obstante* clause and the enacting words following it may not be curtailed when the use of wide language accords with the object of the Act.

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HIGH COURT OF JUDICATURE AT BOMBAY

114. The text of section 31B of the RDDB, beginning with a *non-obstante* clause, has been noticed above. Also, bearing the principles laid down in the aforesaid authorities with regard to the effect or impact of a *non-obstante* clause, the conclusion is inescapable that section 31B cannot be pressed into service in all cases where a secured creditor seeks enforcement of a security interest by taking recourse to the SARFAESI Act. The *non-obstante* clause in section 31B would kick in should there be proceedings before the DRT and in furtherance of orders passed therein, a process is initiated for recovery of the dues of the secured creditor. We are inclined to be restrictive in our view that in such cases only, where the proceedings originate in the DRT under the RDDB Act, would the *non-obstante* clause in section 31B override all other provisions whereunder interest in respect of the same property may have been created in favour of other persons or authorities and the rights of the secured creditor to realize secured debts shall have priority and be paid in priority. Thus, such provision (section 31B) cannot be invoked or applied to a sale under the SARFAESI Act, which is a sale by the secured creditor without court intervention. The contention of Mr. Narula, resting on **Transcore** (supra), is that action under the RDDB Act can be abandoned and recourse taken to the SARFAESI Act and, therefore, the converse is also permissible. It is indeed permissible for a secured creditor to abandon steps taken by it under Chapter III of the SARFAESI Act because of any legal disability to carry the action forward and to initiate original proceedings under the RDDB Act for recovery of dues, but Mr. Narula’s contention would not

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HIGH COURT OF JUDICATURE AT BOMBAY

commend further acceptability for us to hold that whenever a secured creditor is faced with the disability posed by sections 26D and 26E of the SARFAESI Act, it can overcome the same by invoking section 31B of the RDDB Act.

115. Secondly, it is well settled that where a statute provides for a thing to be done in a particular manner, then it has either to be done in that manner or not at all. We may draw useful guidance from the relevant passage in the decision reported in (2014) 2 SCC 401 (**J. Jayalalithaa v. State of Karnataka**) where the Court applied the maxim *expressio unius est exclusio alterius* and held:

> "34. There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim *expressio unius est exclusio alterius*, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible."

116. Sections 26D and 26E of the SARFAESI Act, read together, in effect provide a special manner in which a secured creditor may enforce its security interest in supersession of others, without the intervention of courts. That special manner, *inter alia*, includes a prior CERSAI registration. In such view of the matter, enforcement of security interest under the SARFAESI Act by any other method is, if not expressly, impliedly barred.

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HIGH COURT OF JUDICATURE AT BOMBAY

The provision of section 31B of RDDB Act cannot be invoked to undo the disability that is expressly imposed by section 26D of the SARFAESI Act, more so when both these provisions have been brought on the respective statute books by the same 2016 Amending Act (notwithstanding that the two sections were made operative on different dates).

117. Thirdly, we need to remember that both the enactments, i.e., the RDDB Act and the SARFAESI Act, are special enactments laying down special but separate schemes for recovery of money from defaulting borrowers. One cannot be permitted to take a part of a special scheme and apply it to a separate special scheme. It could not have been the legislative intent that a secured creditor, faced with the disability arising out of an absence of a CERSAI registration after having illegally taken recourse to Chapter III of the SARFAESI Act, would be permitted to shift track and claim a priority in payment of dues relying on section 31B of the RDDB Act. If such a course were allowed, serious consequences arise. First, the illegal action of taking possession of the second asset without the intervention of the court could get legalized, which would run counter to the schemes for recovery of debts envisaged in the SARFAESI Act as well as the RDDB Act. Secondly the entire object of introduction of Chapter IV-A in the SARFAESI Act would get frustrated and be rendered futile.

118. That apart, a provision similar to that of section 31B of the RDDB Act is already there in the SARFAESI Act, 2002 in the form of section 26E can hardly escape notice. The Parliament definitely did not intend to render the provisions of section 26D

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HIGH COURT OF JUDICATURE AT BOMBAY

otiose and superfluous by inserting section 26E immediately after section 26D in the same chapter by the same Amending Act. Both were intended to be and have to be read together; both have to be respected and given effect to, in the context of the situation that may be obtaining at the material point of time. In such view of the matter, relying on a similar provision of a different statute in order to undo the effect of another statute would amount to doing exactly that, which the other statute does not permit.

119. Section 26D, or for that matter, the entirety of Chapter IV-A, we repeat, was introduced in the SARFAESI Act with a purpose. The said chapter was introduced to address the myriad problems that arose post equitable mortgage that tricked and troubled both general people and the bankers alike (as exemplified hereinabove). Such purpose cannot be lost sight of and should not be rendered insignificant. The need of purposive interpretation has always been stressed by the Supreme Court and all the High Courts across the country. Placing reliance on section 31B of the RDDB Act and drawing conclusions in favour of the secured creditors in respect of security interest sought to be enforced under the SARFAESI Act would be against the very grain of sections 26D and 26E and as such, such an interpretation should be avoided.

120. The final aspect, which needs to be adverted to, is with regard to a comparative study of the words used in sections 31B and 26E. While section 26E, *inter alia*, ordains that "the debts due to any secured creditor shall be paid in priority over all other debts", the words used in section 31B though resemble

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HIGH COURT OF JUDICATURE AT BOMBAY

section 26E are not a mirror image of the latter. Section 31B ordains that "the rights of secured creditors to realise 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" (underlining ours). Section 26E neither refers to a right of the secured creditor nor to debts "due and payable". This is because in an action under Chapter III of the SARFAESI Act, which culminates in sale of a secured asset, there may not be intervention by courts in all cases. A secured creditor's statutory right to enforce a security interest under the SARFAESI Act is normally not interfered till such time possession of the secured asset ~ physical or symbolic ~ is taken. The debt due to the secured creditor also does not invariably become payable upon a determination by the DRT under section 17 of the SARFAESI Act. If a borrower chooses not to approach the DRT, the second creditor may set the process in motion by initiating action under rule 8 of the 2002 Rules. However, the situation is different in an action under section 19 of the RDDB Act. The secured creditor acquires a right to be paid in priority only after a determination by the DRT and that is indeed a significant step in claiming and having a priority; it is then that the secured debt becomes due and payable. Till such time a determination is not made by the DRT, there is neither any question of right being exercised by the secured creditor nor any sum becoming payable to it.

121. In **State Bank of India vs State of Maharashtra** (supra), the Division Bench held that the contention was largely irrelevant as section 31B of the RDDB Act alone was sufficient

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HIGH COURT OF JUDICATURE AT BOMBAY

to accord priority to secured creditors. Learned counsel for the secured creditors have heavily relied on the same.

122. For the foregoing reasons, we regret our inability to agree with such decision.

123. Our attention was also drawn to the decision in **Kalupur Commercial Cooperative Bank** (supra), in particular paragraph 57 which reads as follows:

> "57. While it is true that the Bank has taken 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 creditor', 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 (sic, creditors) 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 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."

124. It is settled law, as it appears from **Reserve Bank of India** (supra), that interpretation of any provision must depend on its text as well as the context.

125. While interpreting provisions of the SARFAESI Act, the context in which such provisions were enacted must be

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HIGH COURT OF JUDICATURE AT BOMBAY

unfailingly noticed. While placing reliance on similar provisions of a different statute to decipher the real legislative intent behind a certain provision of a given statute may be permissible in certain cases where the context of both the statutes match, but such an exercise would surely not be permissible if the contexts vary. Here, section 31B of the RDDB Act has to be seen in the context of the original proceedings instituted before the DRT and a determination having been obtained from the DRT in such proceedings. The SARFAESI Act being a statute which permits lenders to take possession of secured assets without judicial intervention, a greater degree of protection against arbitrary action by lenders and a corresponding higher standard of care to be taken by such lenders has now been prescribed. This position, emerging from section 26D of the SARFAESI Act, underscores the importance of CERSAI registration of security interest and makes the legislative intent behind promoting CERSAI registration of security interest more conspicuous than the other provisions. We have not been shown any principle of interpretation following which the consequences of violation of a mandatory provision of any given special statute may be avoided by relying on a different provision of another special statute. Placing reliance on section 31B to displace the mandate of section 26D would amount to outlawing section 26D without holding it *ultra vires*.

126. One other aspect which strongly points to keenness of the Legislature to ensure CERSAI registration is this. The disabling provision under section 26D and the enabling provision under

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HIGH COURT OF JUDICATURE AT BOMBAY

section 26E, as earlier noticed, begin with *non-obstante* clauses. Thus, while those secured creditors who register the security interest can legitimately claim 'priority' whereas those who do not, are denuded of any power to enforce the security interest by taking recourse to Chapter III of the SARFAESI Act. A secured creditor who fails to register the secured asset in terms of the provisions of section 26B of the SARFAESI Act with the CERSAI and faces the disability to obtain the benefit that section 26E envisages, cannot be rewarded by relieving it of the statutory obligation created on it to get such registration by allowing it the benefit envisaged by section 31B of the RDDB Act. If it is so done, such secured creditor would be placed in a happy or more comfortable position than a secured creditor who obeys the command of law and applies for registration of the secured asset. Adherence to and obedience of the law should be obvious and necessary in a system governed by the rule of law.

127. These important aspects do not appear to have been brought to the attention of the Bench deciding **Kalupur Commercial Cooperative Bank** (supra) and, therefore, we express our doubt with what has been laid down in paragraph 57 thereof.

128. In view of the foregoing discussions, we agree with learned counsel for the State/respondents and answer the question by holding that

(a) a secured creditor, finding that it is disabled from obtaining the benefit of 'priority' in terms of section

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HIGH COURT OF JUDICATURE AT BOMBAY

26E of the SARFAESI Act for want of CERSAI registration, cannot fall back on section 31B of the RDDB Act to claim 'priority';

(b) the overwhelming factor of determination of a *lis* by the DRT has to be given its due worth and hence, the benefit of 'priority' that section 31B envisages is for a secured creditor who institutes proceedings under the RDDB Act and is successful in having an interim or final determination in its favour that a sum is due and payable (in section 31B) as distinguished from the debts due (in section 26E).

(c) section 31B of the RDDB Act being a substantive provision, it cannot be invoked by a secured creditor faced with the disability posed by section 26E of the SARFAESI Act; and

(d) without recourse having been taken to the procedure envisaged in the RDDB Act for recovery of its dues and without there being a determination of its claim by the DRT to the effect that any sum due from the borrower is payable to it, a secured creditor is not entitled to invoke the provisions of section 31B.

ANSWER TO QEUSTION (e)

129. The entire scheme of Chapter IV-A of the SARFAESI Act, as introduced by the Amending Act of 2016, leaves no manner of doubt that the object for its introduction is salutary. We have,

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HIGH COURT OF JUDICATURE AT BOMBAY

in fact, discussed the noble objects that introduction of Chapter IV-A of the SARFAESI Act intends to achieve. The drastic power made available to a secured creditor by provisions contained in section 13 and the other provisions of the SARFAESI Act to dispossess the borrower/guarantor from the secured asset without intervention of Courts but necessarily upon compliance with the procedural safeguards laid down therefor has seemingly been arrested to a limited extent by incorporation of section 26D by the 2016 Amending Act. Section 26D, which also opens with a *non-obstante* clause, prohibits a secured creditor from exercising the rights for enforcement of security interest conferred by Chapter III, unless the secured interest created in its favour by the borrower has been registered with the CERSAI. Not only therefore registration with the CERSAI has been made a mandatory pre-condition for invocation of the provisions contained in Chapter III of the SARFAESI Act, the provisions relating to debts that are due to any secured creditor being payable to such creditor in priority over all other debts and revenue, taxes etc. is available to be invoked only after the registration of security interest. This being the text of section 26E, which is to be read in the context in which it is set, leads to the irresistible and inevitable conclusion that unless the security interest is registered, neither can the borrower seek enforcement invoking the provisions of Chapter III of the SARFAESI Act nor does the question of priority in payment would arise without such registration.

130. As has been noticed above, **ASREC (India) Ltd.** (supra) rejected the contention that section 26E of the SARFAESI Act

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HIGH COURT OF JUDICATURE AT BOMBAY

cannot be invoked unless the security interest were registered with the CERSAI. The Division Bench, in the process of rejecting the said contention, referred to what according to it were previous decisions rendered by 3 (three) Division Benches of various High Courts and a decision of the Full Bench of the Madras High Court, and observed that its rejection of such a contention followed from all such decisions. Although the decisions in **G. M. G. Engineers and Contractor Pvt. Ltd.** (supra) and **Bank of Baroda** (supra) are not opinions of Division Benches, nothing really turns on the bench strength. We have failed to find any discussion in any of such 4 (four) decisions rejecting a contention like the one under consideration in **ASREC (India) Ltd.** (supra). The Full Bench of the Madras High Court in **Assistant Commissioner (CT)** (supra) did not have the occasion to consider the point. Even the Division Bench decision of the Gujarat High Court in **Kalupur Commercial Cooperative Bank** (supra) did not strictly dwell on such point. Also, the point under consideration did not arise in **G. M. G. Engineers and Contractor Pvt. Ltd.** (supra) and in **Bank of Baroda** (supra) at all. Interestingly, the Division Bench itself noted in paragraph 20 of the decision in **ASREC (India) Ltd.** (supra) that the said point had not been raised before any of the other High Courts. In the setting of such a factual position, it seems to us that rejection of the contention, as if law had been declared in the 4 (four) opinions of the High Courts, occasioned either through an oversight or a misreading of the said decisions.

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HIGH COURT OF JUDICATURE AT BOMBAY

131. In our considered opinion, on the face of the express provisions in sections 26D and 26E of the SARFAESI Act and in the absence of any discussion on the object of introduction of Chapter IV-A of the SARFAESI Act by the Division Bench in **ASREC (India) Ltd.** (supra), we are constrained to hold that a law has been declared which runs clearly contrary to the statutory mandate and, therefore, paragraph 21 of such decision does not represent the correct position of law.

132. The other Division Bench in **State Bank of India vs. State of Maharashtra** (supra) may not have considered sections 26D and 26E of the SARFAESI Act in such great depth in the absence of proper assistance from the parties while holding that even if the secured creditor does not register the mortgage under section 26D of the SARFAESI Act, such alleged non-registration, in view of the Division Bench's discussion on section 31B of the RDDB Act, would not affect the legal position on the issue of priority.

133. We have no hesitation to hold that the views expressed by the Division Benches in **ASREC (India) Ltd.** (supra) and **State Bank of India** (supra), as discussed above, on the question under consideration are not the correct exposition of law and, to that extent, stand overruled.

Answer to question (f)

134. Much has been argued by the petitioners by referring to the decision in **Assistant Commissioner (CT)** (supra) where it was held that section 31B of the RDDB Act would govern rights even in respect of a pending *lis*. There is not much

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HIGH COURT OF JUDICATURE AT BOMBAY

elaboration by assigning any reason in support of the said observation. That apart, it bears a mention that the parties have brought to our notice that the said decision has been carried in appeal to the Supreme Court and an order directing maintenance of *status quo* has been passed. Hence, with due respect to the Full Bench of the Madras High Court, we prefer to assign our own reasons for the conclusions.

135. A decision necessarily has to be rendered by us bearing in mind the State legislations under consideration vis-à-vis the RDDB Act and the SARFAESI Act for the same to be applicable in this State; hence, it would be appropriate to decide when exercise of the right by the department of the State can be said to be complete so as to avoid the rigours of section 31B and section 26E, as the case may be.

136. We have noted what section 37 of the MVAT Act is all about. Section 37 in sub-section (1) provides for the creation of first charge on the property with respect to a tax or sum payable thereunder. Sub-section (2) provides that the said first charge shall be deemed to have been created upon the expiry of the period specified in sub-section (4) of section 32. Therefore, the charge attaches to the property of the dealer from the time it comes into effect, i.e., from the time the tax becomes payable under section 32(4) of the Act.

137. Let us now take a look at sub-section (4) of section 32 of the MVAT Act. It reads:

> "32 … :
>
> (4) (a) (i) The amount of tax due where the return or revised return has been furnished without full payment thereof shall be paid forthwith.

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HIGH COURT OF JUDICATURE AT BOMBAY

(ii) The amount of tax which it becomes necessary to pay on account of the reduction in set-off because of any contingency specified in the rules, shall be paid at the time prescribed for making payment of tax for the period in which such contingency occurs.

(b) (i) The amount of tax due as per any order passed under any provision of this Act, for any period, less any sum already paid in respect of the said period; and

(ii) the amount of interest or penalty or both, if any, levied under any provision of this Act; and

(iii) the sum, if any, forfeited and the amount of fine, if any, imposed under the Act or rules; and

(iv) the amount of tax, penalty and interest demanded in the context of excess availment of incentives or availment of incentives not due; and

(v) any other amount due under this Act,

shall be paid by the person or dealer or the person liable therefor into the Government treasury within thirty days from the date of service of the notice issued by the Commissioner in respect thereof:

Provided that, the Commissioner may, in respect of any particular dealer or person, and for reasons to the recorded in writing, allow him to pay the tax, penalty, interest or the sum forfeited, by installments but the grant of installment to pay tax shall be without prejudice to the other provisions of this Act including levy of penalty, or interest, or both."

138. Thus, where a return is filed but the admitted tax has not been paid, the charge is created on the date of such filing as the tax is payable forthwith under section 32(4)(a)(i). In other cases, the tax, penalty or interest is payable within 30 days from the date of notice [section 32(4)(b)(i)-(v)]. Therefore, the charge would crystallize on the expiry of 30 days in respect of such amounts.

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HIGH COURT OF JUDICATURE AT BOMBAY

139. However, mere creation of charge is not enough. The expression 'charge' does not appear to have been defined in the MVAT Act. Nonetheless, this concept is well known in property law and we may draw guidance from section 100 of the ToP Act, where 'charge' is defined as follows:

> "100. **Charges.-** Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.
>
> Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."
>
> (emphasis ours)

140. The section itself in unambiguous terms indicates that a charge may not be enforced against a transferee if he did not have any notice of the same, unless by law the requirement of such notice has been waived. This position seems to be the accepted position in law.

141. We have not been shown any law that exempts the requirement of notice of the charge for its enforcement against a transferee who had no notice of the same.

142. It would also be necessary to keep in mind what section 3 of the ToP Act, which is the interpretation clause, says as to

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HIGH COURT OF JUDICATURE AT BOMBAY

when a person can be said to have notice. It is provided therein as follows:

> "3. ***
>
> 'a person is said to have notice' of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.
>
> *Explanation I*.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908 (XVI of 1908) from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:
>
> Provided that—
>
> (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (XVI of 1908) and the rules made thereunder,
>
> (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and
>
> (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.
>
> *Explanation II*.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

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HIGH COURT OF JUDICATURE AT BOMBAY

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

143. The procedure for effecting recovery of unpaid tax now needs to be ascertained. Section 33(6) of the MVAT Act provides that unpaid tax is to be recovered as arrears of land revenue. Sub-section (6) reads thus:

"(6) Subject to the provisions of sub-section (5), any amount of money which a person is liable to pay to the Commissioner, shall, under sub-section (1) read with sub-section (4), if it remains unpaid, be recoverable as if it is a sum demanded under section 32 and accordingly any notice served under this section shall be deemed for the purposes of this Act to be a notice served under section 32 and the unpaid amounts shall be recoverable as arrears of land revenue."

Therefore, a notice under section 32 to the person from whom tax is due would be the first step towards recovery of unpaid amounts as arrears of land revenue.

144. It is further noticed that section 34 of the MVAT Act confers powers under the MLR Code on the Sales Tax Authorities. It reads:

"34. Special powers of Sales Tax authorities for recovery of tax as arrears of land revenue: -

(1) For the purpose of effecting recovery of the amount of tax, penalty, interest, amount forfeited or any other sum, due and recoverable from any dealer or other person by or under the provisions of this Act, as arrears of land revenue, -

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HIGH COURT OF JUDICATURE AT BOMBAY

(i) the Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Commissioner under the Maharashtra Land Revenue Code, 1966 (Mah. XLI of 1966);

(ii) the Additional Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Additional Commissioner under the said Code;

(iii) the Joint Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Collector under the said Code;

(iv) the Senior Deputy Commissioner and the Deputy Commissioner of Sales Tax shall have and exercise all the powers (except the powers of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform, all the duties of the Assistant or Deputy Collector under the said Code;

(v) the Assistant Commissioner and the Sales Tax Officer shall have and exercise all the powers (except the powers of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform all the duties of the Tahsildar under the said Code.

(2) Every notice issued or order passed in exercise of the powers conferred by sub-section (1) shall, for the purposes of sections 24, 25, 26, 27 and 85 be deemed to be a notice issued or an order passed under the said Act.

The sections referred to in section 34(2) of the MVAT Act are preceding provisions therein, with section 24 providing for rectification of mistakes, section 25 providing for review, section 26 providing a right of appeal to the Tribunal and section 27 providing a right of appeal to this Court.

145. In this context, it is relevant to note that section 72 of the MLR Code provides that land revenue is to be a paramount charge on land. The provisions contained in sections 173 to 184 and 191 to 221 of the MLR Code

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HIGH COURT OF JUDICATURE AT BOMBAY

encapsulate the procedure for recovery of unpaid amounts as arrears of land revenue. Section 265 of the MLR Code (which is applicable only within the city of Bombay) confers precedence on the arrears of land revenue due on any land under the relevant chapter.

146. The exhaustive procedure that the MLR Code conceives relating to recovery of unpaid amounts as arrears of land revenue need not be examined in any great detail here. We may only refer to the decision of the Division Bench reported in 2004 SCC OnLine Bom 1247 (**Satish Arjun Surve vs. State of Maharashtra**), where the Court has noted the same.

147. However, what appears to be clear is that if there be a default and the defaulter does not pay what he owes to the relevant department of the Government, power is available under rule 17 of the Maharashtra Realization of Land Revenue Rules, 1967 (hereafter 'MRLR Rules', for short), framed under section 328 read with Chapter XI of the MLR Code, for the Tehsildar, on receipt of a requisition from such department, to proceed in accordance with the MLR Code and the 1967 Rules and cause the defaulter's immovable property to be attached and sold. Necessarily, prior to effecting a sale, a proclamation has to be made in the manner ordained.

148. Sub-section (4) of section 20B of the SARFAESI Act, which we have noticed above, ordains that 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

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HIGH COURT OF JUDICATURE AT BOMBAY

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.

149. Although the said provision demands compliance by the Central Government, any State Government and any local authority entrusted with recovery of tax to file with the Central Registry any attachment order issued by it, avoidance of such compliance was attempted by referring to the fact that the form and manner of filing attachment orders have not yet been prescribed by rules framed under the SARFAESI Act and, therefore, sub-section (4) has still not been made operative.

150. The contention that rules are yet to be framed for making sub-section (4) of section 20B operational is wholly incorrect. By a notification dated 24th January 2020 issued by the Department of Financial Services in the Ministry of Finance, Govt. of India, published in the Gazette of India of even date, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) (Amendment) Rules, 2020 were duly notified whereby amendments were incorporated in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Rules, 2011 (hereafter '2011 Rules', for short). In view of the amendments that have now been incorporated in the 2011 Rules with effect from the date Chapter IV-A of the SARFAESI Act was made effective and enforceable, the relevant department of the State

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HIGH COURT OF JUDICATURE AT BOMBAY

Government despite attachment orders being issued by the competent authority can only avoid compliance of sub-section (4) of section 26B at its own peril. We hold that attachment orders issued post 24th January 2020, if not filed with the Central Registry, any department of the Government to whom a person owes money on account of unpaid tax has to wait till the secured creditor by sale of the immovable property being the secured asset mops up its secured dues.

151. However, there could be attachments orders which might have been issued much prior to giving effect to the 2011 Rules, as amended. In respect of such orders of attachment, we consider it appropriate to express our views.

152. The procedure to be followed in terms of the CPC when an immovable property is put up for auction sale to satisfy a decree of the court is to be found in Order XXI Rules 54 and 66 of the CPC. It is mandatory for the court executing the decree, to comply with the following stages before such property is sold in execution of a particular decree:

(*a*) attachment of the immovable property;
(*b*) proclamation of sale by public auction;
(*c*) sale by public auction.

At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold, is a nullity and all actions pursuant thereto are liable to be struck down/quashed.

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HIGH COURT OF JUDICATURE AT BOMBAY

However, the proceedings before us do not concern execution of any decree.

153. In these proceedings we are as much concerned with proclamation itself as much with attachment. Insofar as recovery pursuant to the MLR Code is concerned, not only the provisions contained therein but also the provisions contained in the 1967 Rules are to be complied with. Simply ordering an attachment is not enough; a proclamation has to be issued in the prescribed form and such proclamation must be made public by beating of drum and such other mode as specified in section 192 of the MLR Code and rule 11(2) of the 1967 Rules before the property attached is sold.

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.,

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HIGH COURT OF JUDICATURE AT BOMBAY

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.

ANSWER TO QUESTION (g)

155. To answer this question, we need to take note of some provisions of the Security Interest (Enforcement) Rules, 2002 (hereafter '2002' Rules, for short). However, it must be borne in mind that while a secured creditor is concerned only with sale of the immovable property, being the secured asset, and no other property of the defaulting borrower, the concern of the department need not necessarily be confined only to the secured asset but could well spill over and any other asset of the defaulter in payment of State's dues could be put up for sale to realize such dues in terms of the MLR Code and the 1967 Rules.

156. The procedure for 'sale of an immovable secured asset' and 'time of sale, issue of sale certificate and delivery of possession', consequent upon measures taken by a secured creditor under sub-section (4) of section 13 of the SARFAESI

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HIGH COURT OF JUDICATURE AT BOMBAY

Act, have been laid down in rules 8 and 9, respectively, of the 2002 Rules.

157. Provisions contained in sub-rule (7) of rule 8 of the 2002 Rules read thus:

> "(7) Every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorized officer shall upload the detailed terms and conditions of the sale, on the web-site of the secured creditor, which shall include, -
>
> (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
>
> (b) the secured debt for recovery of which the property is to be sold;
>
> (c) reserved price of the immovable secured assets below which the property may not be sold;
>
> (d) time and place of public auction or the time after which sale by any other mode shall be completed;
>
> (e) deposit of earnest money as may be stipulated by the secured creditor;
>
> (f) any other terms and conditions, which the authorized officer considers it necessary for a purchaser to know the nature and value of the property.

Sub-rules (7), (8) and (9) of rule 9 of the 2002 Rules lay down that:

> "(7) Where the immovable property sold is subject to any encumbrances, the authorized officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further

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HIGH COURT OF JUDICATURE AT BOMBAY

cost, expenses and interest as may be determined by him:

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalization of the sale.

(8) On such deposit of money for discharge of the encumbrances, the authorized officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above."

158. A conjoint reading of the aforesaid rules admits of no doubt that the authorized officer while putting up an immovable property, i.e., the secured asset, for sale, is under a duty to notify, *inter alia*, the details of the encumbrances (in respect of such property that is proposed to be sold) which are known to the secured creditor as well as to require the purchaser to deposit money to discharge the encumbrances.

159. The Supreme Court in its decision in **AI Champdany Industries Ltd.** (supra) after considering the definition of 'encumbrance' in several law dictionaries, held that an 'encumbrance' "must be capable of being found out either on inspection of the land or the office of the Registrar or a statutory authority. A charge, burden or any other thing which impairs the use of the land or depreciates in its value may be a mortgage or a deed of trust or a lien or an easement. Encumbrance, thus must be a charge on the property. If by

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HIGH COURT OF JUDICATURE AT BOMBAY

reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance".

160. Till 24th January 2020, it may not have been possible for a secured creditor to know precisely all encumbrances in respect of the immovable property. With the insertion of section 26B in the SARFAESI Act read with the 2011 Rules, a secured creditor is expected to know some of such encumbrances if at all compliance of section 26B is resorted to by the Central Government, any State Government or a local authority, to whom money is owed by the defaulter being an owner of the property. Such a statutory mechanism for knowing the encumbrances in respect of the immovable property being put up for sale by auction not being available before 24th January 2020, the authorized officers were found to play it safe by inserting the *"as is where is, whatever there is basis"* clause in the sale advertisement. Once such clause is inserted in the advertisement and the prospective purchaser upon bidding in the auction emerges as the highest bidder, normally such purchaser cannot insist upon issuance of sale certificate without clearing the liability of meeting other dues in relation to such property. This is because he participates in the auction and bids, with his eyes open, that the sale would be on *"as is where is, whatever there is basis".* Having so participated, the prospective purchaser cannot wriggle out of the consequences and claim that the other dues are not payable by him if he cannot disprove constructive notice of the charge created on the property put up for auction sale. If indeed the department

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HIGH COURT OF JUDICATURE AT BOMBAY

of the Government fails to act in terms of section 26B of the SARFAESI Act read with the 2011 Rules, consequences are bound to follow which have to be accepted by such department.

161. We, therefore, answer this question by observing that notwithstanding the duty of the authorized officer to indicate in the sale advertisement inviting bids the encumbrance(s) attached to the immovable property, i.e., the secured asset, as known to the secured creditor, if at all any detail in regard to such encumbrance(s) is not indicated but the sale is expressly made on *"as is where is, whatever there is basis"*, the transferee shall be duty bound to deposit money for discharge of the encumbrance(s) provided, of course, that such liability may be overcome if he is in a position to disprove the claim of the department that he had no constructive notice of the charge, far less actual notice.

162. Having answered the substantial questions of law, we now proceed to decide the individual writ petitions.

WRIT PETITION NO.436 OF 2021

AND

INTERIM APPLICATION NO.868 OF 2022

163. Petitioner, Fullerton India Credit Company Ltd., is a non-banking finance company notified under the SARFAESI Act. Petitioner had advanced a loan of Rs.9,06,85,020/- vide sanction Letter dated 30th July, 2014 to the respondents 1 to 4, the borrowers. The loan was secured by a mortgage of a duplex flat, bearing no.12/C, 12th and 13th floors, Cenced Apartment,

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HIGH COURT OF JUDICATURE AT BOMBAY

318, Union Park, Pali Hill Road, Dr. Ambedkar Marg, Khar (W), Mumbai – 400 052 ('the secured asset'), registered on 30th August 2014.

164. As the borrowers committed default in repayment, the account was declared a non-performing asset (NPA) and a notice under Section 13(2) of the SARFAESI Act came to be issued on 22nd August, 2016. When the petitioner moved the learned Chief Metropolitan Magistrate, Mumbai under section 14 of the SARFAESI Act, for possession of the secured assets, it transpired that an Execution Application No.765 of 2015 to execute an arbitral award dated 6th November 2014 against the respondent no.2 was filed in this Court.

165. Petitioner moved Chamber Summons No.993 of 2017 in Execution Application No.765 of 2015. This Court by an order dated 12th February 2018 ordered *inter alia* raising of the attachment on the secured asset and delivery of possession of the secured asset to the petitioner by the Court Receiver, who had been put in possession of the secured asset in the said execution proceedings. On 15th December 2018 after recording that the Court Receiver had delivered possession of the secured asset to the petitioner, the Chamber Summons came to be disposed of.

166. Petitioner published an e-auction notice dated 28th February 2018 to sell the secured asset. On 9th March 2018, the respondent no.6 addressed a communication to the respondent no.5 Society contending *inter alia* that M/s. Tornado Motors Private Limited, respondent no.1, was in arrears of Rs.5,49,68,048/- to the Sales Tax Department for the period

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HIGH COURT OF JUDICATURE AT BOMBAY

1st April 2011 to 31st December 2014 and thus, the respondent no.5 shall not permit the transfer of the secured asset without no objection certificate of the Sales Tax Department.

167. Petitioner has invoked the writ jurisdiction as the said communication operates as a clog on the rights of the secured creditor to enforce the security interest.

168. In the affidavit in reply on behalf of the respondents 6 to 9, the action is sought to be justified on the ground that the secured asset stands in the name of the respondent no.2, the director of the respondent no.1, and under section 44(6) of the MVAT Act the directors are jointly and severally liable to pay the tax dues. A notice was issued to the directors on 15th January 2019 calling upon them to show cause as to why action under section 44(6) of the MVAT Act should not be initiated. As none appeared to show cause, an order came to be passed on 30th January 2019 holding the respondents 2 and 3, the directors of the respondent no.1, jointly and severally liable to pay the sales tax dues of the respondent no.1.

169. It would be contextually relevant to note that the petitioner had registered the security interest over the secured asset with the Central Registry on 17th February 2015. A copy of the search report evidencing registration in CERSAI portal came to be filed along with the additional affidavit dated 23rd November, 2021.

170. Evidently, the respondent no.1, the dealer is not the owner of the secured asset. Respondents 6 to 9 professed to proceed against the secured asset by resorting to the special

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HIGH COURT OF JUDICATURE AT BOMBAY

provision contained in section 44(6) of the MVAT Act. Section 44(6) of the MVAT Act, reads as under:

> "44(6) – Subject to the provisions of the Companies Act, 2013, where any tax or other amount recoverable under this Act from a private company, whether existing or wound up or under liquidation, for any period, cannot be recovered, for any reason whatsoever, then every person who was a director of the private company during such period shall be jointly and severally liable for the payment of such tax or other amount unless, he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the said company."

171. The aforesaid provision, on its plain reading, indicates that in the event the tax or other amount recoverable under the MVAT Act cannot be recovered from a private company, then its directors shall be jointly and severally liable for the payment of the dues, unless they are able to demonstrate that such non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on their part in the management of the affairs of the said company. This provision enables the Sales Tax Department to proceed against the directors of a private company, in case of non-recovery, and casts burden on the directors to show that the non-recovery is not attributable to their acts or conduct.

172. In the case at hand, the material shows that the respondent no.6 initially gave a notice on 15th January 2019 calling upon the respondents 2 and 3 to show cause and, thereafter, by an order dated 30th January 2019 held the

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HIGH COURT OF JUDICATURE AT BOMBAY

respondents 2 and 3 jointly and severally liable to pay the dues. Interestingly, even before such determination, the respondent no.6 had addressed the impugned communication dated 9th March 2018 to the respondent no.5 prohibiting the transfer of the secured asset without permission of the Sales Tax Department.

173. If the law which we have declared in answer to question no.(f) (supra) is applied to the aforesaid facts, it becomes abundantly clear that consequent to the registration of the security interest on 17th February, 2015, the right of the petitioner as a secured creditor to be paid in priority crystalized on 24th January 2020, the day Chapter IV-A of the SARFAESI Act was brought into force.

174. Conversely, there is no material to show that the secured asset was attached in accordance with law and the said attachment was followed by proclamation, prior to section 26E of the SARFAESI Act being enforced, thereby denuding the secured creditor of the preferential right under section 26E.

175. To sum up, the respondent no.6 as of date of the enforcement of Chapter IV-A of the SARFAESI Act was content with determination of the liability of the directors of the respondent no.1 and no action to enforce the liability so as to dislodge the superior claim of the secured creditor was taken.

176. We are thus inclined to allow the writ petition with the following orders:

(a) The letter dated 9th March, 2018 addressed by respondent no.6 to the respondent no.5 stands quashed and set aside.

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HIGH COURT OF JUDICATURE AT BOMBAY

(b) It is further declared that the order dated 30th January 2019 passed under section 44(6) of MVAT Act by the respondent no.6 against the respondents 2 and 3 does not constitute an embargo on the right of the petitioner to enforce the security interest in accordance with the provisions of the SARFAESI Act and the Rules.

(c) Interim Application No.868 of 2022 also stands disposed of.

WRIT PETITION NO.2336 OF 2021

177. Petitioner is the purchaser of an immovable property situated at Survey No.379/1, admeasuring 4.21 hectares at Village Abitghar, Taluka Wada, Dist. Palghar (the secured asset) in an auction sale held by the respondent no.7 Bank, on 11th January 2021. Respondent No.7 had created security interest therein over the secured asset for the financial facilities extended to M/s. Indo Bonito Multinational Ltd. (in liquidation) in respect whereof the Official Liquidator has been appointed.

178. After the confirmation of the sale, the respondent no.7 issued a sale certificate in favour of the petitioner on 25th January 2021 and, thereupon, the petitioner approached the Collector of Stamps and Joint District Registrar, Palghar and the Sub-Registrar of Assurances, Wada, respondents 2 and 3, respectively, to adjudicate the stamp duty on the said sale certificate and to register the same.

179. Respondent No.2 refused to adjudicate the stamp duty on the count that the Tax Recovery Officer (15), respondent no.1, had attached the secured asset for non-payment of the income tax dues. It further transpired that the purported charge of the

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HIGH COURT OF JUDICATURE AT BOMBAY

respondent no.1 was entered in the record of rights pertaining to the secured asset vide mutation entry no.1211, certified on 20th March 2020. Hence, this writ petition.

180. An affidavit in reply is filed by the Tahasildar, Tal. Wada, respondent no.4. The action of the respondents 4 and 5 was stated to be in conformity with the order passed by the Income Tax authority prohibiting transfer of the secured asset.

181. It would be necessary to note that the petitioner's assertion that he had addressed a letter to the Principal Commissioner, Income Tax (15), requesting the withdrawal of the recovery certificate No. ITCP-1 dated 11th January 2016 for AY 2012-13 enforced through Form No. ITCP-16 dated 24th December 2018 and there was no response thereto, is uncontroverted.

182. Consistent with the view which we have recorded, the primary question would be whether the security interest has been duly registered with CERSAI to reap the benefit of priority in payment envisaged by section 26E of the SARFAESI Act.

183. Petitioner has filed an additional Affidavit dated 24th November 2021. A copy of the search report annexed thereto indicates that the security interest was registered with CERSAI on 25th October 2017. The said registration would enure to the benefit of the secured creditor the moment Chapter IV-A of the SARFAESI Act was brought into force w.e.f. 24th January 2020 and the priority in payment thereunder would get cemented.

184. As noted above, the respondent no.1 professed to create a charge on the secured asset by recording an entry in the record of rights of the secured asset. Evidently, the said entry

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HIGH COURT OF JUDICATURE AT BOMBAY

No.1211 was recorded on 20th March 2022, post enforcement of Chapter IV-A of the SARFAESI Act. Consequently, the said exercise does not displace the superior claim of the secured creditor with the enforcement of section 26E of the SARFAESI Act, on 24th January 2020. Even otherwise, the claim of the respondent no.1 partakes the character of a crown debt.

185. We have already noted that a crown debt enjoys no priority over the secured debt. Since the Income Tax Act, 1961 does not contain a provision like the one in section 37 of the MVAT Act, in a strict sense, there does not seem to be any scope for conflict between competing claims based on statutory provisions.

186. A factor which, however, assumes salience in this writ petition is the terms of sale. The communication dated 11th January 2021 (Exhibit B to the writ petition) accepting the bid of the petitioner, indicates that the e-auction was held on "as is where is and as is what is basis".

187. Mutation Entry No.1121 was recorded on 20th March, 2020. It could be urged that the petitioner had, in the least, a constructive notice of the purported charge of the respondent no.1, which found mention in the record of right.

188. While answering question (g), we have held that where sale is expressly made on "as is where is and whatever there is basis", the transferee shall be duty bound to deposit money for discharge of the encumbrance(s), provided that such liability may be overcome if the transferee is in a position to disprove the claim of the department that he had no actual or constructive notice. We have also observed that if the

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HIGH COURT OF JUDICATURE AT BOMBAY

department of the Government fails to act in terms of sub-section (4) of section 26B of the SARFAESI Act read with the 2011 Rules, the department concerned is bound to suffer the consequences.

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

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

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

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HIGH COURT OF JUDICATURE AT BOMBAY

registration with CERSAI, in our considered view, cannot be to the detriment of the auction purchaser, though the auction sale was on "as is where is and as is what is basis".

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

193. In view of the aforesaid discussion, we are inclined to allow the writ petition.

194. The writ petition stands allowed and it is ordered as follows:

(a) Respondent no.2 is directed to adjudicate the stamp duty on the sale certificate in accordance with law and, thereafter, the respondent no.3 shall register the instrument, also in accordance with law.

(b) The time commencing from the lodging of the sale certificate for adjudication of the stamp duty with the

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HIGH COURT OF JUDICATURE AT BOMBAY

respondent no.2 till the decision of this writ petition, stands excluded in computing the statutory period for such adjudication and registration.

(c) Mutation Entry No.1121 dated 20th March 2020 stands quashed. Respondents 4 and 5 shall forthwith delete the said mutation entry and correct the record of right.

WRIT PETITION (L) NO.7999 OF 2021

195. Petitioner is an asset reconstruction company registered under section 3 of the SARFAESI Act. The predecessors-in-interest of the petitioner, namely, the State Bank of India and Indusind Bank had extended credit facilities to M/s. Classic Diamonds (India) Ltd. (in liquidation) being the borrower, and the Official Liquidator, High Court, Bombay, has since been appointed to take charge of the affairs of the company in liquidation. To secure the financial facilities, security interest was created in the property, i.e., Flat Nos.1002, 1003 and 1004, Prasad Chambers, Opera House, Mumbai – 400 004 (secured assets) by way of an equitable mortgage. In the wake of default on the part of the borrower, the State Bank of India had instituted O.A.No.205 of 2013 and Indusind Bank had instituted O.A.No.198 of 2012 in the DRT, Mumbai, for grant of recovery certificates.

196. Under the Deeds of Assignment dated 19th March 2014 executed by the State Bank of India and 29th March 2014 executed by Indusind Bank in favour of the petitioner, it acquired all the right, title and interest in the facilities granted and security interest created by the assignors. Armed with

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HIGH COURT OF JUDICATURE AT BOMBAY

those rights, the petitioner issued a notice under section 13(2) of the SARFAESI Act, on 25th May 2017.

197. In the meanwhile, by an order dated 20th September 2017 passed in Company Petition No.317 of 2012, M/s. Classic Diamonds Ltd. was ordered to be wound up. Eventually, the petitioner took possession of the secured assets on 9th November 2017 under section 13(4) of the SARFAESI Act. At that stage, the petitioner found the attachment order dated 19th August 2017 pasted on the concerned premises. Upon inquiry, it transpired that the respondent no.3, Assistant Commissioner of Sales Tax, had proceeded to attach the assets of the company in liquidation for the alleged sales tax dues. Representation of the petitioner to the respondents 1 to 3 to remove the said attachment did not yield any response from them. The attachment dated 19th August 2017 constitutes an unjust impediment in the petitioner's endeavour to enforce the security interest by sale of the secured assets. Hence, this writ petition.

198. On the touchstone of the legal position, which we have attempted to expound hereinabove, we found that the security interest was registered with CERSAI in respect of Flat No.1002 on 24th April, 2017, and in respect of Flat Nos.1003 and 1004 on 22nd June, 2012 and, thus, with the enforcement of Chapter IV-A of the SARFAESI Act, the petitioner's right to have priority in payment stood crystalized on 24th January 2020. In paragraph no.154, we have specifically observed that if the immovable property of the defaulter is shown to have been attached in accordance with law prior to Chapter IV-A of the

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HIGH COURT OF JUDICATURE AT BOMBAY

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 SARFAESI Act, and section 31B of the RDDB Act, would not get attracted.

199. The case at hand, seems to be squarely governed by the aforesaid enunciation. We do not find any material on record which would show that the sales tax authorities had passed an order of attachment in conformity with the governing provisions of the MLR Code and the MRLR Rules, followed by a proclamation duly promulgated in the manner ordained by law.

200. We are, therefore, persuaded to hold that the restraint on the right of the secured creditor to enforce the security interest in exercise of the right of priority in payment under section 26-E of the SARFAESI Act, sought to be imposed by simply pasting the order of attachment, cannot be countenanced.

201. The writ Petition, thus, deserves to be allowed and we hereby direct as follows:

(a) It is hereby declared that the order of attachment dated 19th August 2017 will not affect the rights of the secured creditor to realize its debt by the sale of the secured assets.

(b) The purported order of attachment dated 19th August 2017 passed by the respondent no.3 stands quashed and set aside.

WRIT PETITION No.3197 of 2019

202. Petitioner, a banking company, had sanctioned a home loan of Rs.1.52 crore and mortgage insurance loan of Rs.3.88 crore to the respondent no.5. The home loan was sanctioned to

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HIGH COURT OF JUDICATURE AT BOMBAY

finance the acquisition of a commercial premises, i.e., Office No.101, 1st Floor, Swastik High Point, Gloria, Devchand Housing Compound, next to Arihant Plaza, Ghodbunder Road, Ovale, Thane 400 615 (the secured asset).

203. To secure the repayment of the loan, the said property was mortgaged in favour of the petitioner by depositing the title deeds. Respondent No.5 committed default in repayment of the installments. Consequently, the account was declared NPA on 30th April, 2017. A notice under section 13(2) of the SARFAESI Act, was issued on 5th September 2017. The District Magistrate passed an order directing delivery of possession to the petitioner under section 14 of the SARFAESI Act, on 16th March 2019.

204. On 11th April 2019, when the officers of the petitioner visited the secured asset, a notice for purported recovery of the sales tax dues of Rs.2,75,70,303/- was found pasted thereon. Respondents 3 and 4, directors of M/s. Global Gallarie Agencies Pvt. Ltd., were stated to be in arrears of the sales tax to the tune of Rs.2,75,70,303/- and, thus, the said property was attached. It further transpired that the secured asset was put up for auction sale on 23rd April 2019 by the Sales Tax Authorities by publishing the auction proclamation notice dated 8th March, 2019 (Exhibit H). Petitioner addressed a communication on 16th April 2019 to the respondent no.2 *inter alia* claiming right of priority in payment and asserted that it has also instituted proceedings, i.e., O.A.(L) No.396 of 2018 before the DRT for grant of recovery certificate. As the respondent No.2 did not remove the attachment, the petitioner

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HIGH COURT OF JUDICATURE AT BOMBAY

was constrained to institute this writ petition seeking to quash the attachment order dated 1st December 2018 and the auction proclamation notice dated 16th March 2019.

205. Mr. Shah, learned counsel for the petitioner, submitted that the petitioner has registered the security interest with CERSAI on 13th July, 2007. The account of the respondent no.5 was declared NPA much before the order of attachment. In the circumstances, the provisions contained in section 26E of the SARFAESI Act, are squarely attracted and the statutory right of the petitioner cannot be defeated.

206. We are constrained to observe that the record does not equip the court to adjudicate this writ petition in the light of the position in law indicated above.

207. We have in terms observed that the provisions contained in Chapter IV-A of the SARFAESI Act, are prospective in operation. We have indicated that if there are valid attachment orders followed by due proclamation before the enforcement of Chapter IV-A of the SARFAESI Act, then the priority envisaged by section 26E of the Act would not come to the aid of the secured creditor. Whether there is such an attachment order followed by proclamation is essentially rooted in facts.

208. Though the respondents have not filed an affidavit to assist the Court in adjudicating this aspect, yet, from the perusal of the auction proclamation notice dated 8th March 2019 (Exhibit H) it becomes abundantly clear that the notice was issued under section 178 read with section 267 of the MLR Code on 17th October 2018. The warrant of attachment was issued on 1st December 2018 followed by an order in Form No.4 under

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HIGH COURT OF JUDICATURE AT BOMBAY

rule 11 of the MRLR Rules, dated 2nd January 2019. *Prima facie*, auction proclamation notice seems to be preceded by the action envisaged by the MLR Code and the MRLR Rules.

209. We are, therefore, of the view that the respondents 1 to 3 deserve an opportunity to meet the case sought to be urged by the petitioners lest the interest of the public exchequer may be prejudicially affected.

210. We deem it, in the fitness of things, to direct that this writ petition be re-notified for hearing before the appropriate Division Bench for decision in the light of determination of the questions of law in this judgment.

211. Ordered accordingly.

WRIT PETITION NO.2720 OF 2021

212. Petitioner, a co-operative society, registered under the Multi-State Co-operative Societies Act, 2002 had advanced a loan of Rs.5 crore each to the respondents 4 and 5 in the month of May 2016. Respondents 4 to 6 had executed registered mortgage of immovable properties including the land situated at Gut No.247, Tal. Baramati, Pune, admeasuring 5H (the secured asset) and thereby created a valid security interest therein, in favour of the petitioner.

213. As the respondents 4 and 5 as borrowers committed default in repayment of the installments, the accounts were declared NPA on 5th August 2016. A notice under section 13(2) of the SARFAESI Act was addressed to the respondents 4 and 5 on 16th September 2016. While the action for enforcing the security interest was underway, the petitioner noticed that on 18th November 2017, a letter was addressed by the Deputy

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HIGH COURT OF JUDICATURE AT BOMBAY

Commissioner of Sales Tax, respondent no.1, to the Talathi, Tal. Baramati, Pune, to the effect that M/s. Hi-tech Engineering Corporation India Pvt. Ltd. owed a huge amount of Rs.10,12,38,061/- for the years 2010-11 to 2016-17 towards the sales tax dues and the arrears were likely to increase and, therefore, an encumbrance be noted on the land bearing Gut No.247 (the secured asset), which was the property of Mr. Sanjay J. Awate and Mr. Rajendra C. Ingawale (respondents 4 and 6), directors of M/s. Hi-tech Engineering Corporation India Pvt. Ltd. The said communication was followed by letter dated 29th December 2017. It seems vide Mutation Entry No.35661 dated 23rd December 2017, a charge of the sales tax department to the tune of Rs.10,12,38,061/- was entered on the secured asset (Exhibit D to the writ petition).

214. Petitioner took exception and addressed notices to the respondent no.1 on 18th February 2019 and 10th May 2019. In response thereto, the respondent no.1 claimed first charge over the secured asset under section 37 of the MVAT Act. Aggrieved thereby, the petitioner has invoked the writ jurisdiction of this Court to set aside the encumbrance created by the respondent no.1 by an entry in the record of right of the secured asset.

215. An affidavit came to be filed on behalf of the petitioner on 22nd November, 2021 to affirm that the security interest has been duly registered with CERSAI. A copy of the security interest acknowledgment report annexed to the said affidavit, indicates that the security interest in the secured asset, i.e., Gut No.247 was registered in CERSAI portal on 18th May, 2021.

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HIGH COURT OF JUDICATURE AT BOMBAY

216. An affidavit in reply is filed on behalf of the respondents 1 and 2. It is contended that Hi-tech Engineering Corporation India Pvt. Ltd. owes a huge amount of Rs.65,11,68,518/- to the respondents towards tax dues for the financial years 2010-11 to 2015-16. Under section 44(6) of the MVAT Act, the directors of a private company are jointly and severally liable for the tax dues. Thus, the respondents 1 and 2 had proceeded against the property of the respondents 4 and 5 by addressing communication to the revenue authorities on 18th November 2017 to enter encumbrance on the secured asset. Since the petitioner has assailed the said order dated 18th November 2017 and the resultant mutation recording the sales tax encumbrance, before the Sub-Divisional Officer, Baramati in RTS Appeal No.118 of 2019, this Court may not entertain the writ petition as the petitioner has an efficacious alternative remedy.

217. Respondents 1 and 2 have further contended that the underlying transaction of advancement of loan is fraudulent. Personal loans were advanced despite the fact that respondents 4 and 5 and Hi-Tech Engineering Corporation India Pvt. Ltd., were heavily indebted. Respondents 1 and 2 alleged collusion between the petitioner and the respondents 4 and 5 to defraud the revenue.

218. We have perused the Assessment Order dated 26th December 2014 for the period 1st April, 2010 to 31st March 2011 leading to the demand notice for a sum of Rs.1,70,75,972/-; the order dated 2nd December 2015 granting installments for payment for the tax then due for the period 1st April 2013 to

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HIGH COURT OF JUDICATURE AT BOMBAY

31st March 2014, and the Assessment Order dated 31st March 2018 for 1st April 2013 to 31st March 2014 levying the demand of Rs.21,99,74084/-, which are annexed to the affidavit in reply.

219. In the light of the view which we are persuaded to take, we do not deem it expedient to delve deep into the aspects of the quantum of sales tax arrears and the period for which they were due. The materials on record, *prima facie*, indicate that M/s. Hi-Tech Engineering Corporation India Pvt. Ltd., of which the respondents 4 and 5 are the directors, was in arrears of huge amount towards sales tax since prior to advancement of the loan in question. A deed of simple mortgage dated 4th May 2016 under which the security interest came to be created in the secured asset, indicates that Hi-Tech Engineering Corporation India Pvt. Ltd. was one of the guarantors to the term loan of Rs.5 crore advanced to Mr. Sanjay Awate, its director. The assets of the dealer, Hi-Tech Engineering Corporation India Pvt. Ltd., enlisted in Schedule II were also mortgaged.

220. As indicated above, under less than four months, the accounts were declared NPA, i.e., on 5th August 2016 and action under Chapter III of the SARFAESI Act was initiated. This time of four months is too short for comfort. The allegation of creation of security interest fraudulently so as to defraud the claim of the revenue, in our view, warrants consideration.

221. Since the security interest in the secured asset came to be registered post enforcement of Chapter IV-A of the SARFAESI Act, we deem it appropriate to direct that this writ

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HIGH COURT OF JUDICATURE AT BOMBAY

petition be decided after providing further opportunity of hearing to the parties by the appropriate Division Bench in the light of the law laid down hereinabove.

222. Ordered accordingly.

223. We, however, clarify that we may not be understood to have expressed any opinion on the merits of the rival claims, especially the allegations of fraud.

WRIT PETITION NO.2935 OF 2018

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 24th 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.

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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HIGH COURT OF JUDICATURE AT BOMBAY

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.

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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 15th March 2013, evidenced by the Panchanama dated 15th March 2013. An order of attachment was thereafter passed on 16th March 2013 in respect of the said flat. Respondents claimed to have, likewise, taken possession of Flat No.503 on 14th June

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HIGH COURT OF JUDICATURE AT BOMBAY

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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

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HIGH COURT OF JUDICATURE AT BOMBAY

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.

241. Subject to the above, the writ petition stands dismissed.

WRIT PETITION NO.3553 OF 2021

242. Petitioner, an asset reconstruction company, is an assignee of the Karnataka Bank, which had extended financial facilities to Maxwell Metallic Wires Pvt. Ltd., in the year 2010. An equitable mortgage of land bearing Survey no.441, Hissa No.3, situated at Village Mahim, Taluka Palghar, Dist. Thane along with the plant and machinery thereon (the secured asset), was created in favour of Karnataka Bank under an Instrument dated 16th July 2010.

243. The assignor had initiated measures under Chapter III of the SARFAESI Act. A notice under section 13(2) of the SARFAESI Act was issued on 26th July, 2013, followed by possession notice dated 11th October 2013. Post execution of the deed of assignment on 15th December 2014, the possession of the secured assets was delivered to the petitioner on 31st March 2015.

244. Two attempts to sell the secured assets by public auction did not materialize as there were no bidders. In the meanwhile, on 9th October 2015, the respondent no.1 addressed a letter to the Talathi, Mahim, Tal Palghar, to enter the encumbrance of

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HIGH COURT OF JUDICATURE AT BOMBAY

the Sales Tax Department for the dues owed by M/s. Maxwell Metallic Wires Pvt. Ltd., respondent no.2, in terms of an earlier communication dated 22nd October 2012. Another notice was addressed to the petitioner on 28th October 2015 inviting its attention to the arrears of the sales tax which the respondent no.2 was allegedly liable to pay with a request to take note of the said Government dues while carrying out auction sale of the secured assets. In another communication dated 30th September 2020, the Assistant Commissioner of Sales Tax apprised the petitioner that the dealer, respondent no.2, was liable to pay VAT to the tune of Rs.1,60,80,806/- for the period 2009-10 to 2011-12 and the petitioner was called upon to remit the said amount.

245. It further appears that on 5th October 2020, a demand notice was addressed to the respondent no.2 by the Assistant Commissioner of Sales Tax under section 178 read with section 267 of the MLR Code. Simultaneously, a warrant of attachment and an order of attachment in Form 4 under the MRLR Rules were issued on the very day. Hence, this writ petition.

246. In an additional affidavit filed on 24th January 2021, it is affirmed that the security interest was registered with CERSAI on 2nd March 2012. A copy of the search report is annexed to the said affidavit.

247. At the outset, we may note that the averments in the writ petition remained uncontroverted. Facts seem to be rather incontrovertible.

248. In view of the registration of the security interest with CERSAI on the day Chapter IV-A of the SARFAESI Act was

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HIGH COURT OF JUDICATURE AT BOMBAY

brought into force, the right of the secured creditor to have priority in payment stood reinforced. The State Tax authorities, as is evident, were content with addressing letters to the revenue authorities and the secured creditor to take note of its dues. It was on 5th October 2020, well past nine months of the enforcement of Chapter IV-A of the SARFAESI Act, the Assistant Commissioner of Sales Tax issued demand notice under section 178 read with section 267 of the MLR Code, warrant of attachment and order of attachment, in one stroke.

249. Since the predecessor-in-interest of the petitioner had initiated steps for enforcement of security interest under section 13 of the SARFAESI Act in the year 2013 and the right to enforce security interest got further fortified with the enforcement of Chapter IV-A, with effect from 24th January 2020, the subsequent action of the respondent no.1 does not supplant the right of priority in payment. We are, thus, inclined to allow the writ petition.

250. The writ petition stands allowed, with the following directions:

(a) The order of attachment of the secured assets dated 5th October 2020 stands quashed and set aside.

(b) It is declared that the petitioners have a right to enforce the security by sale of secured assets in accordance with law unhindered by the tax claim of the respondent no.1.

WRIT PETITION NO.3120 OF 2021

251. Petitioner no.1, an asset reconstruction company, is an assignee of Cosmos Cooperative Bank Limited (hereafter "Cosmos", for short), a lender of M/s. Shree Ambe Metsteel Pvt.

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HIGH COURT OF JUDICATURE AT BOMBAY

Ltd., respondent no.5. At the request of the respondent no.5, Cosmos had taken over financial facilities from Union Bank of India, the prior lender of respondent no.5, and had also sanctioned additional financial facilities. To secure the said loan, the respondent no.5 had executed a composite deed of hypothecation and mortgage on 20th September 2010 and thereby created a security interest over the land bearing Survey No.195, admeasuring 2H 40R situated at Vadavali, Tal. Wada, Dist. Palghar (the secured asset). In the month of July 2011, further facilities were extended which were also covered by a composite deed of mortgage and hypothecation dated 6th July 2011.

252. In the wake of default, the assignor issued a notice under section 13(2) of the SARFAESI Act on 13th December 2013. In the meanwhile, by an order dated 10th November 2014 in Company Petition No.593 of 2012, M/s. Shree Ambe Metsteel Pvt. Ltd. was ordered to be wound up and the Official Liquidator came to be appointed to take charge thereof. Pursuant to an order passed by the District Magistrate, the petitioner took possession of the secured asset on 29th September 2015. O.A. No.1237 of 2016 was also instituted to recover the secured debt before the DRT – II, Mumbai, which awaits adjudication.

253. On 19th May 2021, the petitioner published e-auction notice. One of the prospective bidders brought to the notice of the petitioner that the respondents 2 and 3, State Tax authorities, have got entered encumbrance in the record of right of the secured asset vide Mutation Entry No.1153. Hence, this writ petition.

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HIGH COURT OF JUDICATURE AT BOMBAY

254. Petitioner has filed an additional affidavit on 24th November 2021 and affirmed that the security interest came to be registered with CERSAI on 30th May 2014. A copy of the security interest acknowledgment registration report is annexed to the said affidavit.

255. The averments in the writ petition are untraversed. The only document which appears to constitute a clog on the rights of the secured creditor is the extract of Mutation Entry No.1153. It was certified on 12th December 2019 based on an order passed by the Deputy Commissioner of Sales Tax, respondent no.3, on 6th July 2018, directing the revenue authorities to enter the encumbrance of the State for the sum of Rs.4,28,26,502/- towards the sales tax dues.

256. We have noted that mere creation of charge, in itself, is not enough. It does not appear that before the rights of the petitioner as a secured creditor, who had registered the security interest with CERSAI, were crystalized, with the enforcement of Chapter IV-A of the SARFAESI Act, the State tax authorities had not ordered the attachment of the secured asset in the manner known to law and followed it up with a proclamation. In the absence thereof, the priority created by section 26E of the SARFAESI Act operates with full force and vigor. Consequently, the writ petition deserves to be allowed.

257. The writ petition stands allowed. We also direct as follows:

(a) Mutation Entry No.1135 recording the encumbrance of sales tax dues in the record of right of the secured asset stands quashed and set aside.

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HIGH COURT OF JUDICATURE AT BOMBAY

(b) It is hereby declared that the petitioner has a right to enforce the security interest by sale of the secured asset in accordance with law unhindered by the tax claim of the respondents 1 to 4.

WRIT PETITION NO.6297 OF 2021

258. Petitioner, an asset reconstruction company, is an assignee of Central Bank of India, a leading lender of the consortium of lenders, which had extended credit facilities to Yog Industries Limited, Mr. Narendra V. Jadhav and Mrs. Kamala V. Jadhav (the borrowers). The loan was secured, *inter alia*, by creating security interest over the immovable property bearing Gut No.99, situated at Parola, Tal. Paithan, Dist. Aurangabad (the secured asset), then owned by the borrowers.

259. Central Bank of India, the lead lender, initiated measures for enforcing the security interest by issuing a notice under section 13(2) of the SARFAESI Act, on 27th April 2011. Subsequently, in a petition under section 9 of the I & B Code, the Insolvency Resolution Professional came to be appointed on 22nd August 2017. By an order dated 12th April 2018, Yog Industries Limited was ordered to be liquidated. In a further order dated 10th April 2019, passed under section 52 of the I & B Code, the petitioner was permitted to exercise its option under clause (b) of sub-section (1) of section 52 thereof and realize its security interest in accordance with the provisions of the I & B Code.

260. In deference to the said order, the Official Liquidator delivered possession of the secured asset to the petitioner on 24th July 2019. While in the process of selling the secured asset,

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HIGH COURT OF JUDICATURE AT BOMBAY

the petitioner learnt that the State Tax department has marked an encumbrance in the record of right of the secured asset vide Mutation Entry No.1132. Assailing the aforesaid action, the petitioner has invoked the writ jurisdiction of this Court.

261. Along with the affidavit filed on 10th March 2022, the petitioner has annexed a copy of the CERSAI search report, which indicates that the security interest over the secured asset was created on 2nd May 2017.

262. Respondents have not filed an affidavit in reply to controvert the averments in the writ petition.

263. Perusal of the record of right of the secured asset reveals that an encumbrance to the tune of Rs.3,62,33,272/- towards sales tax dues was entered in the other rights column at the instance of the Assistant Commissioner of Sales Tax, Aurangabad. Evidently, the respondents 2 and 3 do not seem to have initiated measures before the enforcement of Chapter IV-A of the SARFAESI Act, to enforce the first charge over the assets of the dealer by attaching the immovable property and putting up the same for sale in accordance with the provisions contained in MLR Code and the MRLR Rules.

264. In such circumstances, mere marking of encumbrance in the record of right of the secured asset does not advance the cause of the revenue. In the absence of such steps, and particularly with the enforcement of section 26E of the SARFAESI Act the right of the petitioner to have priority in payment deserves to be enforced in preference to the claim of the revenue. We are, thus, inclined to allow the writ petition.

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HIGH COURT OF JUDICATURE AT BOMBAY

265. The writ petition stands allowed and we order as follows:

(a) Mutation Entry No.1132 recording encumbrance of sales tax dues in the record of right of the secured asset stands quashed and set aside.

(b) It is hereby declared that the petitioner has a right to enforce the security interest by sale of the secured asset in accordance with law unhindered by the tax claim of the respondents 1 to 3.

WRIT PETITION NO.2248 OF 2021

266. Petitioner no.1 is a Scheduled Bank registered under the Multi-State Cooperative Societies Act, 2002. During the period 2007 to 2011, in three tranches, the petitioner had extended credit facilities to M/s. Blue Star Agro and Winery (India) Pvt. Ltd., respondent no.4. The loan was secured by creating a mortgage by deposit of title deeds of the immovable properties including the agricultural land, admeasuring 60H 7R out of Gut No.50/2, situated at Biradwadi, Tal. Khed, Dist. Pune (the secured asset).

267. As the loan account became NPA, a notice under section 13(2) of the SARFAESI Act was issued on 24th August 2011. Possession of the secured asset was taken by the petitioner under a Panchanama dated 16th July 2012. While the petitioner was in the process of initiating measures to sell the secured asset, on 20th September 2020, the respondent no.2 addressed a notice to the petitioner claiming that the dealer, respondent no.4, was in arrears of VAT and CST aggregating to Rs.1,39,77,469/- and the State had the first charge under

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HIGH COURT OF JUDICATURE AT BOMBAY

section 37 of the MVAT Act. Petitioner was thus called upon to hold the amount to the extent of the arrears of the sales tax for the respondents. The said communication was accompanied by an order of attachment in Form 4.

268. Upon enquiry, it transpired that the respondents 1 and 2 had also marked an encumbrance in the record of right of the secured asset. Mutation Entry No.1455 was certified by the respondent no.3 on the basis of a communication from the State Tax department on 22nd September 2019 for an amount of Rs.96,32,005/- as on 31st March 2019. It was noticed that on the basis of the communication dated 7th January 2015 addressed by the Sales Tax Officer, vide Mutation Entry No.1207, an encumbrance to the tune of Rs.33,76,440/- towards the arrears of sales tax had also been recorded in the record of right of the secured asset. As the communication to the respondents did not yield the desired result, this writ petition has been instituted.

269. In an additional affidavit filed on behalf of the petitioner on 22nd November 2021, it is averred that the security interest was duly registered with CERSAI on 12th March 2007. Copies of the general details of the security interest are annexed to the said affidavit.

270. The sales tax authority, respondent no.2, seems to have resorted to a two-pronged approach. First, it made an entry of encumbrance of the sales tax dues in the record of right of the secured asset. Next, it passed an order of attachment on 28th September 2020, i.e., after Chapter IV-A was introduced in the SARFAESI Act.

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HIGH COURT OF JUDICATURE AT BOMBAY

271. If we were to proceed on the basis of the additional affidavit dated 22nd November 2021, the writ petition would probably succeed. In the light of the view which we have recorded above, none of the measures is of any assistance to the revenue. A mere entry in the record of rights of the secured asset bereft of any order of attachment, followed by a proclamation in the manner known to law, is of no consequence. From the perusal of Mutation Entry Nos.1207 dated 7th January, 2015 and 1455 dated 23rd July, 2019, it becomes evident that the encumbrances were sought to be recorded merely on the basis of the communication addressed by the Sales Tax authorities.

272. As the order of attachment was evidently passed on 28th September, 2020, post section 26E of the SARFAESI Act having been brought into force, the right of the petitioner to have priority in payment of the secured debt, over all other debts, revenue and taxes, would crystalize. Subsequent action of attachment of the secured asset purportedly in exercise of the right under section 37 of the MVAT Act would not dislodge the superior claim of the secured creditor.

273. However, despite noting the above facts, we are unable to grant relief to the petitioner. We find that the 2011 Rules were notified on 31st March 2011. Therefore, the CERSAI registration of the security interest could not have been possible on 12th March 2007 as alleged in the additional affidavit. On the contrary, the security interest in respect of the secured asset which was created on 12th March 2007 in favour of the petitioner appears to have been recorded in the documents

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HIGH COURT OF JUDICATURE AT BOMBAY

annexed to the said additional affidavit. Thus, there is a clear misstatement about the CERSAI registration. Having examined the said documents, we have not been able to locate the exact date of the CERSAI registration of the security interest.

274. Though the respondents have chosen not to contest the factual assertions, we are of the opinion that the writ petition ought not to be decided without the date of the CERSAI registration being brought on record.

275. We, thus, direct that this writ petition be re-notified for hearing before the appropriate Division Bench for decision in the light of what has been recorded above in this judgment while answering the questions formulated.

276. Petitioner is granted liberty, within three weeks from date, to file a supplementary affidavit bringing on record the date of the CERSAI registration with supporting documentary proof. The respondents may file reply affidavit within two weeks thereafter. Liberty is given to the parties to seek circulation of the writ petition after six weeks.

WRIT PETITION NO.2251 OF 2021

277. Petitioner No.1 is a Scheduled Bank registered under the Multi-State Co-operative Societies Act, 2002. In the month of March 2009, the petitioner had extended financial facilities to M/s. Delta Automobiles Pvt. Ltd., respondent no.4. In order to secure the credit facilities, Ms. Maya Arvind Toley, respondent no.5, the then director of the respondent no.4, had mortgaged an immovable property, i.e., Amit Bungalow, situated at 2019, E-2, Ward K-37, 6th Lane, Rajarampuri, Kolhapur 416 008 (the

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HIGH COURT OF JUDICATURE AT BOMBAY

secured asset) by depositing the title deed under letter dated 20th April 2009.

278. In view of the default in repayment of the loan amount, the petitioner initiated measures for enforcing the security under section 13 of the SARFAESI Act. Petitioner claimed to have eventually taken possession of the secured asset by publishing possession notice dated 17th March 2020.

279. In the intervening period, on 11th March 2020, the Deputy Commissioner of Sales Tax, respondent no.2, addressed a communication to the petitioner contending that the respondent no.4, was in arrears of sales tax dues to the tune of Rs.7,99,57,316/- and the department had already initiated process of recovery in the month of August 2017. As a part thereof, it was asserted, the secured asset was attached on 31st January 2018 and even possession thereof was taken on 28th March 2018 by publishing a notice in the daily Pudhari, Kolhapur. It was further contended that the copies evidencing the aforesaid action were already forwarded to the petitioner vide communication dated 16th October, 2018. Yet the petitioner moved the District Magistrate under section 14 of the SARFAESI Act, suppressing the aforesaid facts and obtained an order dated 11th December 2019. Another communication was addressed on 18th March 2020 reiterating the aforesaid position.

280. As the department did not cave in to the petitioner's claim of superior right of recovery and firmly stood by its claim, the petitioner has approached this Court to quash and set aside the demand notice and attachment order dated 30th January 2018

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HIGH COURT OF JUDICATURE AT BOMBAY

and to direct the respondent no.6 to remove encumbrance noted in the record of right of the secured asset.

281. In an additional affidavit filed on behalf of the Petitioner on 22nd November 2021, it is affirmed that the security interest over the secured asset was registered with **CERSAI on 24th May, 2012**. The same is evidenced by the search report, annexed thereto.

282. Though the respondents 1 to 3 have not filed an affidavit in reply to contest the averments in the writ petition, we find that from the very averments therein and the documents annexed thereto, the instant case would be governed by the later part of the observations in paragraph 154 (supra), as it appears that the secured asset came to be attached in accordance with law, prior to Chapter IV-A of the SARFAESI Act being enforced.

283. On a careful perusal of the writ petition, it becomes abundantly clear that the petitioner claimed to have learnt about the claim staked by the Sales Tax authority in the month of March 2020, upon receipt of the communications dated 11th March 2020 and 18th March 2020. However, the fact that the petitioner has known about the said fact, much prior in point of time, is betrayed by prayer clause (a), whereby the petitioner seeks to quash and set aside the impugned demand notice and attachment order dated 30th January 2018 informed to the petitioner by the respondent no.2 along with the letter dated 16th October 2018, a copy of which is annexed to the writ petition at Exhibit A.

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HIGH COURT OF JUDICATURE AT BOMBAY

284. A perusal of the aforesaid letter dated 16th October 2018 indicates that the respondent No.2 had specifically brought to the notice of the petitioner that the respondent no.4 was in arrears of the sales tax and was served with a demand notice on 22nd August 2017; the attachment order in respect of immovable properties including the secured asset was passed on 30th January 2018 and that the possession notice was also published in the daily Pudhari, Kolhapur on 28th March 2018. Petitioner was further informed that a charge was noted in the record of right of the secured asset as well. Copies of the demand notice, order of attachment and possession notice published in the newspaper, were also forwarded along with the said communication dated 16th October 2018.

285. It is imperative to note that in the reply to the letter dated 11th March 2020, addressed on behalf of the petitioner, a stoic silence was maintained about the fact that vide communication dated 16th October 2018, the aforesaid facts were brought to the notice of the petitioner. What accentuates the situation is the fact that, in the said reply, an endeavour was made to demonstrate that Mrs. Maya Arvind Toley, respondent no.5, was not the director of the respondent no.4 and, therefore, the sales tax authorities were not entitled in law to attach the secured asset, which was the property of the respondent no.5.

286. We find that the said stand of the petitioner is in stark contrast to the substratum of the petitioner's claim that the respondent No.5 had furnished security in the capacity of a director of the respondent no.4. This ambivalent stand of the petitioner further erodes the veracity of its case. It also

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HIGH COURT OF JUDICATURE AT BOMBAY

indicates that instead of meeting the case of the department that it had enforced the 'first charge' over the secured asset in exercise of the right under section 37 of the MVAT Act, the petitioner endeavoured to deflect the issue by questioning the action of the department in proceeding against the property of the director of the dealer.

287. The situation which thus obtains is that before the enforcement of Chapter IV-A of the SARFAESI Act, the department had initiated measures to enforce its 'first charge' under section 37 of the MVAT Act, passed attachment order and also published a possession notice on 13th March 2018.

288. The dealer, in particular, and the public, in general, were forewarned not to deal with the secured asset as the transaction would be void under section 38(1) of the MVAT Act. To add to this, all these facts were duly brought to the notice of the petitioner.

289. In view of the aforesaid material, we are persuaded to hold that the instant case would be governed by the legal regime as postulated by the Supreme Court in the case of **Central Bank of India** (supra), before the enforcement of Chapter IV-A of the SARFAESI Act. Thus, the petitioner does not deserve any relief.

290. Resultantly, the writ petition stands dismissed.

WRIT PETITION (L) NO.939 OF 2020

291. This writ petition happens to be a second round of litigation between the parties before this Court, and obviously

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HIGH COURT OF JUDICATURE AT BOMBAY

presents a different twist of facts when compared with the other writ petitions.

292. Aggrieved by the action of the Sales Tax authorities in laying attachment over Flat No.903, A and B, 9th Floor, Heritage Co-op. Housing Soc. Ltd., High Street, Hiranandani Garden, Powai, Mumbai – 400 076 (the secured asset), the petitioner had instituted Writ Petition (L) No.3041 of 2019.

293. The said writ petition came to be disposed of on 15th November 2019, with the following order:

> "2. Whether the State of Maharashtra would have a first charge on the subject property in terms of Section 37 of the Maharashtra Value Added Tax Act, 2002 or the Petitioner would be the first charge holder in terms of Section 26E of the SARFAESI Act, 2002 is the issue which needs to be decided with respect to disbursement of the amount received by sale of the secured asset. But as regards the buyer, the price paid would entitle the buyer to transfer of title in the secured asset free from any kind of lien either of the Bank or the State of Maharashtra.
>
> 3. Thus, we dispose of the Petition declaring that the unilateral assertion by the Sales Tax Officer in the letters dated 23rd June, 2016 and 7th July, 2016 that tax dues are the first charge on the property is void at this stage.
>
> 4. We permit the Petitioner to sell the secured assets but retain the sale value in a no lien account with it.
>
> 5. If the sale price satisfies the claim of the Petitioner as well as the State of Maharashtra that would be the end of the dispute. But if the sale price realized is less than the total dues of the Petitioner and the Respondent the issue could be sorted out at that stage by the

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HIGH COURT OF JUDICATURE AT BOMBAY

> Petitioner seeking a declaratory relief from this Court by way of a Writ Petition."

294. Petitioner claimed to have auctioned the secured asset and confirmed sale in favour of the successful bidder for a consideration of Rs.4,86,00,000/- and the said amount, according to the petitioner, does not cover even 50% of the outstanding amount. Hence, this writ petition availing the liberty granted by the Division Bench to seek a declaratory relief that the petitioner is entitled to appropriate the entire sale proceeds in preference to the claim of the Respondent.

295. The facts leading to the initiation of measures to enforce the security furnished by Mr. Ganesh B. Patel, the sole proprietor of M/s. K.K. Steel, whom the petitioner had extended the financial facilities are, by and large, not in dispute. A notice under section 13(2) of the SARFAESI Act was addressed on 8th February 2013. The authorized officer of the petitioner took physical possession of the secured asset on 10th October 2014. When resistance was put forth by the Sales Tax authorities to the auction of the secured asset, the petitioner invoked the writ jurisdiction. As noted above, the petitioner was permitted to sell the secured asset keeping open the issue of determination of priority.

296. Petitioner has filed an additional affidavit dated 9th July 2021 affirming that the security interest was registered with CERSAI on 9th July, 2020. Consistent with the view which we have recorded above, until the security interest was registered with the CERSAI, the petitioner could not claim priority in

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HIGH COURT OF JUDICATURE AT BOMBAY

payment under section 26E of the SARFAESI Act, i.e., till 9th July 2020.

297. A question that comes to the fore is whether the petitioner would be deprived of the right of priority in payment on account of the measures initiated by the respondents before the registration of the security interest with the CERSAI?

298. Two affidavits in reply are filed on behalf of the respondents. In the first affidavit filed by Mr. Pradeep G. Kadu, Joint Commissioner of State Tax, the claim of the petitioner is resisted on the ground that the department had lodged its claim with the petitioner bank before the 2016 Amending Act. In the affidavit in reply filed by Mr. Prasad Joshi, Joint Commissioner of State Tax, it is contended that a demand notice was issued to K.K. Steel on 29th February 2016, levying a demand of Rs.1,08,91746/- for the period 1st April 2010 to 31st March 2011. When it was noticed that the auction sale notice was published by the petitioner on 6th June, 2016, the department apprised the petitioner by a letter dated 7th July 2016 that K.K. Steel owed sales tax dues to the tune of Rs.1,62,58,945/- plus interest thereon. Petitioner was directed to take note of the 'first charge' and make a full disclosure to the prospective purchasers. It was further affirmed that on 30th June 2016, the department had informed the Chairman of the Heritage Co-op. Housing Society Ltd. as well to take note of the first charge and to not permit transfer of the secured asset, without NOC from the department.

299. The aforesaid correspondence emanating from the department, at best, shows that the department had levied a

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HIGH COURT OF JUDICATURE AT BOMBAY

demand of the sales tax dues on the proprietor of K.K. Steel, the borrower, and asserted that under section 37 of the MVAT Act, the State had first charge on the asset of the assessee. In the two affidavits filed on behalf of the respondents, what is conspicuous by its absence is the assertion that the respondents had ordered attachment of the secured asset in conformity with the provisions of MLR Code and the MRLR Rules. No endeavour was made by the respondents to show that the warrant of attachment and order of attachment were issued and there was a proclamation of the attachment order.

300. Likewise, the Sales Tax Commissioners did not claim that they registered the claim with the CERSAI to adhere to the mandate contained in section 26B(4) of the SARFAESI Act. Non-registration of the claim and/or order of attachment entails the consequences envisaged by sub-section (2) of section 26C of the SARFAESI Act. Thus, dual disability sets in. First, in the absence of material to show that the first charge under section 37 of MVAT Act was enforced by a valid attachment order before the registration of security interest by the petitioner with the CERSAI, the petitioner cannot be deprived of the right of priority under section 26E of the SARFAESI Act. Secondly, with the registration of the security interest with the CERSAI on 9th July 2020, coupled with the absence of registration of the department's demand and/or order of attachment, the claim of the respondents becomes subservient to the right of the secured creditor.

301. For the foregoing reasons, we are impelled to allow the writ petition.

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HIGH COURT OF JUDICATURE AT BOMBAY

302. The writ petition, thus, stands allowed in terms of prayer clauses (a) and (b).

303. Pending application(s), if any, in the writ petitions would also stand disposed of accordingly.

304. Parties to the writ petitions shall, however, bear their own costs.

305. Before parting, we record our sincere appreciation for the able assistance rendered by the learned senior advocates, learned counsels for the petitioners, the learned Special Counsel and learned Government Pleaders appearing for the State in determining the questions of law which arose for consideration and also in disposing of majority of the writ petitions that were under consideration.

(N. J. JAMADAR, J.) (M. S. KARNIK, J.) (CHIEF JUSTICE)

Later:

Mr. Shakeeb Shaikh, learned advocate appearing for the petitioners in Writ Petition No. 2935 of 2018 prays for continuation of interim relief granted earlier. The prayer is considered and refused.

(N. J. JAMADAR, J.) (M. S. KARNIK, J.) (CHIEF JUSTICE)

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