

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (ST.) NO. 92816 OF 2020

State Bank of India, a body corporate]
 constituted under the provisions of]
 State Bank of India Act 1955, having its]
 Corporate Centre, at State Bank Bhawan,]
 Madame Cama Road, Mumbai – 400 021]
 and its Branch amongst others at]
 Stressed Assets Recovery Branch,]
 2nd Floor, 321/A/3, Mahatma Phule Peth,]
 Seven Loves Chowk, Shankarsheth Road,]
 Pune 411 042]
 through its Chief Manager,]
 Mr. Jagdish Mohan Nakade] ... Petitioner

V/s.

1. The State of Maharashtra,]
 through Finance Department,]
 Mantralay, Mumbai.]

2. The Deputy Commissioner of Sales Tax,]
 Office of the Deputy Commissioner of]
 Sales Tax, KOL-VAT_E-008, GST Bhavan,]
 Kasba Bawada, Kolhapur 416 006.]

3. Krishna Industries,]
 a Partnership Firm, having its address at]
 W-7, MIDC, Gokul Shirgaon,]
 Tal.- Karveer, Dist.- Kolhapur,]
 Maharashtra.] ... Respondents

Mr. Vivek Sawant, for the Petitioner.

Ms. S. D. Vyas, “B” panel Counsel for the Respondent-State.

None for Respondent No.3.

**CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.
RESERVED ON : 26th NOVEMBER 2020
PRONOUNCED ON : 17th DECEMBER, 2020.**

JUDGMENT (Per ABHAY AHUJA, J.):-

Heard. Rule. Rule made returnable forthwith. By consent of the learned counsel for the Petitioner and the Respondent Nos.1 and 2, this petition is being finally heard. Respondent No.3 is not represented despite service. However, considering the issue in the matter, we proceed on the basis of the pleadings and submissions on behalf of the Petitioner and the Respondents Nos.1 and 2.

2. By this petition filed under Article 226 of the Constitution of India 1950, Petitioner as secured creditor is challenging the attachment of the Plot No.W-7 in Gokul Shirgoan Industrial Area in Kolhapur (the said property/Plot No.W-7) under the provisions of Section 32 of the Maharashtra Value Added Tax Act, 2002 (the “MVAT Act”) and proceedings under the Maharashtra Land Revenue Code (“MLRC”) initiated by the Respondent No.2 for recovery of VAT dues of Respondent No.3 as detailed in the communication dated 28th March 2018 from Respondent No.2 even though the said property has

been mortgaged by Respondent No.3 in favour of the Petitioner. In short, Petitioner is claiming priority of charge on the said property as secured creditor in respect of secured debt owed by Respondent No.3 to Petitioner over the sales tax dues payable by Respondent No.3 to Respondent No.2.

3. Petitioner has filed this petition seeking the following reliefs:

a. *for Writ of Mandamus or Writ direction or Order in the nature of Mandamus, any other Writ, direction or Order directing the Respondent Nos.1 and 2 to:*

- (i) *forthwith remove their charge from the Plot No.W-7; and*
- (ii) *forthwith raise their attachment on the said Plot No.W-7 informed vide the Notice dated 28.03.2018 bearing Ref. No. DCST/KOL-VAT-E-008/Krishna Industries/Recovery/B-271.*

b. *for an interim order and injunction of this Hon'ble Court pending hearing and final disposal of this Petition directing the Respondent Nos.1 and 2 to;*

- (i) *forthwith remove their charge from the said Plot No.W-7; and*
 - (ii) *forthwith raise their attachment on the said Plot No.W-7 informed vide the Notice dated 28.03.2018 bearing Ref. No. DCST/KOL-VAT-E-008/Krishna Industries/Recovery/B-271.*
 - (iii) *forbear from interfering in any manner with the Petitioner's right to proceed under the provisions of the SARFAESI Act to enforce its security interest in the said Plot No.W-7 of the Respondent No.3.*
- c. *Ad-interim reliefs in terms of prayer (b) above;*
- d. *for costs of this petition;*

e. *for such other and further reliefs as the nature and circumstances of the case may require and this Hon'ble court may deem fit and proper.*

4. Before we proceed to deal with the controversy at hand, brief facts of the case are set out as under.

5. Petitioner is a Bank, constituted and functioning under the State Bank of India Act 1955 with its Corporate Center at State Bank Bhawan, Madame Cama Road, Mumbai- 400 021 and its Branch amongst others at Stressed Assets Recovery Branch, Shankarsheth Road, Pune 411 042.

6. Respondent No.1 is the State of Maharashtra through Finance Department and Respondent No.2 who is the Deputy Commissioner of Sales Tax exercises powers and functions under the Maharashtra Value Added Tax Act, 2002 (“MVAT” Act). Respondent No.3 is the borrower of the Petitioner as well as dealer being assessed by the authority under the MVAT Act.

7. Pursuant to request of Respondent No.3, Petitioner had sanctioned various credit facilities in favour of Respondent No.3 by sanction letters being Letters of Arrangement dated 13.01.2014, 22.02.2014, 02.02.2015, 26.03.2015 and 31.03.2016. That to avail of

the sanctioned credit facilities, Respondent No.3 from time to time executed in favour of the Petitioner various security documents including security by way of mortgage/charge over, *inter-alia*, the said property being the piece and parcel of land known as Plot No.W-7 admeasuring 720 sq. mtrs. along with the construction of 112.50 sq. mtrs. built up in Gokul Shirgaon Industrial Area within the Village limits of Gokul Shirgaon and outside the limits of Kolhapur Municipal Corporation. To evidence the said mortgage/charge, necessary documents for creation of equitable mortgage commencing from 13th January, 2014 were executed. It is the case of the Petitioner that the mortgage charge is duly registered with the Central Registry of the Securitisation Asset Reconstruction and Security Interest of India (the “CERSARSI”), though the same is disputed by the Respondent No.2.

8. Since Respondent No.3 failed to regularly maintain their loan accounts with Petitioner, it is submitted that the Petitioner initiated proceedings under the Recovery of Debts and Bankruptcy Act 1993 (the “RDB Act”) by filing Original Application for recovery of bank dues of Rs. 2.49 crores from the Respondent No.3 i.e., M/s.Krishna Industries, which is pending adjudication before the Debts Recovery Tribunal (DRT) at Pune as well as under the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the “SARFAESI Act”) to enforce their security interest in the mortgaged and hypothecated assets. Notice dated 27th November, 2017 was issued under Section 13(2) of the SARFAESI Act; symbolic possession of the said Plot No.W-7 was taken on 21st February, 2018 and the physical possession was taken on 29th May, 2019.

9. Petitioner received notice dated 28th March 2018 bearing Ref. No. DCST/ KOL- VAT- E- 008/ Krishna Industries /Recovery /B-271 from Respondent No.2 informing the Petitioner regarding the attachment of the said Plot No.W-7 under the provisions of Section 32 of the MVAT Act in pursuance of which proceedings under the MLRC were initiated by them for recovery of VAT dues. Petitioner also received a communication / notice dated 28th March 2018 being Ref.No.DC/E-008/KOP/213/F-318/REC/B-270 issued under Section 33(1) of the MVAT Act requiring to pay Respondent No.2 any amount due from the Petitioner to or held by the Petitioner for or on behalf of Respondent No.3 upto the amount of sales tax arrears as detailed in the said notice. Provisions of Section 37 of the MVAT Act regarding first charge of the State in respect of liability under the MVAT Act

subject to any provision regarding creation of first charge in any Central Act was also brought to the notice of the Petitioner. Provisions of Section 38 of the MVAT Act regarding transfers or parting of possession during the recovery proceedings under the Act or after completion thereof being void was also brought to the notice of the Petitioner.

10. It appears that Petitioner conducted an e-auction on 17th July 2019 under the provisions of the SARFAESI Act and sold the said property being Plot No.W-7 through e-auction for Rs.89.25 Lakhs.

11. Petitioner took up the issue with the Sales Tax Department, had personal meetings with the officials of the Respondent No.2 and addressed letters dated 20th August 2019 and 27th August 2019 to the Respondent No.2. The Respondent No.2 was informed of the aforesaid e-auction sale and was requested to remove the charge on the said property to enable the Petitioner to transfer the property to the successful auction purchaser since the purchaser had to pay the auction amount within the stipulated time. It was stated that despite notice, Respondent No.2 had not taken any action and that the officials of MIDC Gokul Shirgoan Industrial area were refusing to issue No Objection Certificate (NOC) and that inaction by

the said Respondent would jeopardize the purchase transaction. The Respondent No.2 was requested to remove charge at the earliest to enable the completion of transaction within time. Respondents were also informed of the decision of the Bombay High Court in the matter of priority of charge and that since no surplus funds would remain Petitioner would be unable to remit any amount towards the sales tax dues.

12. By the Petitioner's advocate's letter dated 18th September 2019, Respondents were informed that the Petitioner had already auctioned the property and had confirmed the sale but was unable to transfer the said property in the name of the auction purchaser due to non-issuance of NOC by the Respondent No.2. By the said Advocate's letter, Respondent No.2 was called upon to issue NOC for recording the property in the name of the auction purchaser, further stating that in case the sale proceeds received from the said property were more than the Petitioner's dues/claim, the same would be handed over to the Respondent No.2 for settlement of its claim.

13. Despite the above, Respondent No.2 failed to favourably respond or raise the charge/attachment on the said Plot No.W-7 and that by letter dated 11th September 2019 Respondent No.2 intimated

that VAT dues of Respondent No.3 as on 06th September 2019 were Rs.85,56,784/- alongwith further interest and that they had first charge/claim of sales tax.

14. It is however submitted in the Petition that sale of Plot No.W-7 stands cancelled and as such the said auction sale has become irrelevant for the purpose of this writ petition.

15. Respondent No.2 has published public notice on 24th September 2019 in the newspaper “Pudhari, Kolhapur edition” to the general public that (i) the Respondent No.3 was in arrears of sales tax dues as detailed therein, (ii) that they had a first charge on the movable/ immovable assets of the Respondent No.3 as per the provisions of the relevant Statute, (iii) that any transaction of purchasing/renting of assets of the Respondent No.3 without the No Objection of the Respondent No.2 shall be presumed to have been done with an intention to avoid payment of sales tax dues and that such transaction shall be declared as void in terms of the relevant provisions of law.

16. Petitioner states and submits that the aforesaid act of the Respondent No.2 in placing their charge/attaching the said Plot

No.W-7, not raising/removing the same despite being appraised and informed of the correct position in law, is *per se* illegal, unlawful, unreasonable and in violation and breach of the statutory provisions.

17. It is the case of the Petitioner that the charge of the Petitioner as secured creditor over the assets of Respondent No.3 has priority over the charge, if any, of the Sales Tax authority. Action of the Respondent No.2 in attaching the said Plot No.W-7, mortgaged in favour of the Petitioner and not removing the attachment despite repeated requests in writing is illegal and contrary to law requiring intervention of this Court.

18. On the other hand in the reply filed on behalf of Respondent No.2, it is submitted that Respondent No.3 is a partnership firm and is a dealer having its place of business on Plot No.W-7, Kolhapur who is liable to pay dues as per returns for the period of 2014-15, 2015-16 and 2016-17 being assessed by the authority as per the MVAT Act. It is submitted that comprehensive assessment and issue based assessment orders were passed by the proper authority which resulted into total payable dues of Rs.98,68,699/- under the MVAT Act and the Central Sales Tax 1956 (the “CST Act”) which are payable to Respondent No.2. The said

Respondent has given details for three years as well as the chronology of events where the issue based assessment order was passed on 13th January 2020 for the period of 1st April 2014 to 31st March 2017, whereas for the period of 1st April 2014 to 31st March 2014, the assessment was dated 2nd December 2019. It is submitted that since Respondent No.3 had failed to pay the dues as per demand notices served on it, recovery action under Sections 33 and 34 of the MVAT Act for pending VAT and CST dues of Rs.85,56,789/- were initiated on 10th March 2016. For recovery of the said dues, proceedings under the MLRC were initiated pursuant to notice dated 17th March 2016, 2nd March 2017 and 20th March 2018. Claim for the property was lodged vide letter dated 20th March 2018 with MIDC Kolhapur for an amount of Rs.22,54,133/-. It is contended that pursuant to Section 37 of the MVAT Act, the State authorities have first charge on the said property with respect to any amount of tax, penalty, interest etc. Further contention is that the recovery proceedings initiated by the Respondent No.2 were before the notification of amendment including Section 26-E in the SARFAESI Act which came to be notified prospectively on 24th January 2020. In the meanwhile, Respondent Nos.1 and 2 had already asserted the claim of the State Government

for recovery of dues of Respondent No.3. It is therefore submitted that in view of the prospective nature of the amendment and the decision of the Bombay High Court being after initiation of recovery proceedings, the State Government has priority charge over the bank dues. Accordingly, it is contended that the petition be rejected.

19. Mr. Vivek Sawant, learned counsel for the Petitioner submits that rejoinder affidavit is not required and the matter can be argued on the basis of pleadings on record. He has placed reliance upon the provisions of Section 31-B of the RDB Act and Section 26-E of the SARFAESI Act to submit that the act of the Respondent No.2 in placing their charge/attaching the said Plot No.W-7, not raising/removing the same despite being appraised and informed of the correct position in law, is *per se*, illegal, unlawful, unreasonable and in violation and breach of the statutory provisions. He would submit that the said Plot No.W-7 of the borrower (Respondent No.3) on which Respondent No.2 has levied charge/attachment was already mortgaged in favour of the Petitioner by security documents dated 13th January 2014 and extension dated 22nd February 2014. Therefore, there is first charge of the Petitioner on the mortgaged assets which is prior in point of time than the sales tax dues. In any event secured

debt has priority over state taxes. He submits that by virtue of the mortgage charge, the Petitioner is exclusively entitled to realise the security in repayment of dues payable by the borrower, leaving surplus, if any, for the Sales Tax Department. Therefore, the Sales Tax Department cannot claim priority or preferential charge on the properties of the borrower mortgaged to the Petitioner. He relies upon the decision of this Court in the case of ***ASREC (India) Limited Vs. The State of Maharashtra & Ors.*** in ***Writ Petition No.1039 of 2017***, in support of his contention. He would further submit that despite repeated requests, Respondent No.2 did not remove the charge / attachment on the said Plot No.W-7. According to him the said approach on the part of the Respondent No.2 clearly demonstrates an arbitrary and high handed approach. He accordingly submits that Petitioner's rights as secured creditor are liable to be protected by this Court and that the attachment by the Respondent No.2 on Plot No.W-7 is liable to be interfered with by this Court. In support of his submissions, he has laboriously taken us through the provisions of the RDB Act, the SARFAESI Act, the MVAT Act as well as the decision of this Court in the case of ***ASREC (India) Limited (Supra)***.

20. Learned AGP Ms. Vyas on behalf of Respondent Nos.1

and 2 reiterates the stand taken in the reply-affidavit. She further submits that the decision of the Bombay High Court in ***ASREC (India) Limited (supra)*** has been challenged in the Supreme Court and is pending. Although there is no stay, she submits that the hearing of this case may be deferred in view of the filing of SLP. Referring to Section 26-B of SARFAESI Act, she submits that the Petitioner has not registered any security interest with the Central Registry of Securitisation and Asset Reconstruction and Security Interest of India (“CERSARSI”) as required under Section 26-D of the SARFAESI Act which provides that no secured creditor shall be entitled to exercise the rights of enforcement of securities under the SARFAESI Act unless the security interest has been registered with the Central Registry. As the Petitioner has failed to disclose any such registration, the debts due to the Petitioner cannot be paid in priority over the tax dues. According to her, Section 26-E of the SARFAESI Act is not applicable to the facts of this case as the said section has been notified on 24th January, 2020 and is effective prospectively. She would submit that the Respondent Nos.1 and 2 have already asserted the claim of the State Government for recovery of tax dues and that the attachment has been initiated to protect the interest of the revenue. She reiterates

that the notification making Section 26-E effective prospectively is with effect from 24th January 2020 whereas the case of the Petitioner falls prior to the notification of the amendment. She would submit that the contentions of the Petitioner-Bank are therefore liable to be rejected.

21. We have heard learned counsel for the parties and also perused the papers and proceedings in the matter.

22. This is a case where Petitioner had lent monies to Respondent No.3, *inter-alia*, on the basis of security of the equitable mortgage of the said property created on 13th January 2014 and extended on 22nd February 2014. Since there was failure to maintain its loan account with the Petitioner i.e. the outstanding could not be repaid to the Petitioner, proceedings under the RDB Act and the SARFAESI Act were instituted by the Petitioner against Respondent No.3. The physical possession of the said Plot No.W-7 was taken on 29th May 2019 pursuant to the order under the SARFAESI Act. Though the e-auction conducted by the Petitioner-Bank stands cancelled, nevertheless the Bank is claiming priority of its mortgage on the said property over the charge of the Sales Tax Department.

23. Therefore, the question that arises for the consideration of this Court is of priority of debt, whether secured creditor or state taxes will get priority.

24. Before we proceed to deal with the issue at hand, it would be relevant to consider the definition of “secured creditor” as given in the RDB Act. Section 2(la) defines “secured creditor” as under:

“secured creditor” shall have the meaning as assigned to it in clause (zd) of sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

25. Section 2(1)(zd) of the SARFAESI Act referred to above defines “secured creditor” as under:

(zd) “secured creditor” means—

- (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
- (ii) debenture trustee appointed by any bank or financial institution; or
- (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or
- (v) any other trustee holding securities on behalf of a bank or financial institution.

26. Section 2(l) of the SARFAESI Act referred to above defines “financial asset” as under:

(l) “**financial asset**” means debt or receivables and includes—

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
- (vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or]
- (vi) any financial assistance;"

27. Thus, from a combined reading of the aforesaid definitions, it is clear that Petitioner is a secured creditor as it has a debt / receivable due to it which has been secured by mortgage on the said Plot No.W-7 as discussed above.

28. Further, it will be also be useful to quote Section 31-B of the RDB Act which reads as under:

"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.

29. Likewise Section 26-E of the SARFAESI Act reads as under:-

“Section 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.

30. From a plain and conjoint reading of Section 31-B of the RDB Act and Section 25-E of the SARFAESI Act it is clear that by virtue of the non-obstante language contained therein, the rights of secured creditors to realise secured debts by sale of assets over which security interest is created, shall have priority over Government dues including revenues, taxes, cesses and rates due to the Central/State Government or to the Local Authority. We also note the reference in the pleadings to the dates of creation of charge/security interest as well as lodging of the claim and dates of commencement of recovery proceedings to

stake a claim of first charge over the said property. Petitioner's mortgage was created on the said property on 13th January 2014 and as secured creditor it has claimed priority of charge over the charge of the Sales Tax Department. We find that Respondent No.2 had claimed first charge on the said property, *inter alia*, stating that it had initiated recovery proceedings under Sections 33 and 34 of the MVAT Act on 10th March 2016 whereas attachment under Section 32 of the MVAT Act was vide letter dated 28th March, 2018 to the Petitioner. Petitioner had initiated proceedings under the provisions of the RDB Act. It has also taken steps as noted above to enforce the security interest in the said property vide notice dated 27th November 2017 under Section 13(2) of the SARFAESI Act prior to the notice dated 28th March 2018 of Respondent No.2.

31. Answering Respondents have relied on Section 37 of the MVAT Act which is quoted as under:-

"37. Liability under this Act to be the first charge.- 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".

32. Respondent Nos. 1 & 2 have contended that by virtue of

Section 37 of the MVAT Act, the State has a first charge over the said property. We are however unable to agree with this submission in-as-much as according to the plain language of the Section 37, that first charge is clearly subject to any provision regarding creation of first charge in any Central Act for time being in force, which prior mortgage/charge has been created in favour of the Petitioner Bank on 13th January, 2014 and has a priority under Section 31-B of the RDB Act and Section 26-E of the SARFAESI Act. Therefore, by virtue of Section 37 of the MVAT Act, Respondent cannot claim priority of charge over the Petitioner's mortgage.

33. At this stage, we may draw our attention to the decision of this Court in the case of **ASREC (India) Limited (Supra)**. This was a case where the challenge to an auction notice by the Petitioner who was the assignee of the debt of borrower where the Respondent No.2 viz. in that case Sales Tax Department had published an auction notice under the provisions of the MLRC for recovery of tax dues of the company by attaching the assets of its directors. The original lender in that case was Bank of India who had lent monies to the borrower company in respect of which the Petitioner therein had been substituted as applicant on the assignment of debt in the proceedings

under the RDB Act. In that case also physical possession of the concerned property was taken over by the Petitioner therein pursuant to Section 13(2) notice under the SARFAESI Act. In short, similar issue as in this case arose in that case regarding the priority of charge. Referring to the provisions Section 31-B of the RDB Act, Section 37 of the MVAT Act, the SARFAESI Act as well as to the decisions of the Rajasthan High Court in the matter of **G.M.G. Engineers & Contractor Pvt. Ltd.**, of the High Court of Madhya Pradesh reported in (2018) 55 GSTR 210(MP) **Bank of Baroda Vs. Commissioner of Sales Tax, M.P Indore & Anr.**, the Full Bench Decision of the Madras High Court reported in AIR 2017 Madras 67, in **Assistant Commissioner Vs. Indian Overseas Bank & Ors.** of the High Court of Gujarat in **Special Civil Application No.17891 of 2018 Kalupur Commercial Co-operative Bank Ltd. Vs. State of Gujarat.**, this Court agreed with the consistent view taken in the above decisions and held that if any central statute creates priority of charge in favour of the secured creditor, the same will rank above the charge in favour of the State for its dues under the value added tax of the State. The relevant paragraphs of the decision in the case of **ASREC (India) Limited (Supra)** are quoted as under :

“12. A perusal of Section 37 of MVAT Act, 2002 reveals that though it commences with a non-obstante clause, but it recognizes 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.

13. The claim of the Petitioner is based on Section 31B of RDB Act, 1993 which reads as follows -

“31B. 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.”

14. Section 31B in RDB Act 1993 was introduced by an Amendment in the year 2016 and was brought into force on 2nd September 2016. The non-obstante clause in the Section thus overrides any other law for the time being in force. The Section accords priority No.1 to secured creditors with respect to the secured assets.

15. This issue came up before the Rajasthan High Court in the matter of G.M.G Engineers & Contractor Pvt. Ltd.. The Court, after taking into consideration, the provisions of Section 47 of VAT Act in Rajasthan as well as Section 31B of RDB Act, held as follow: –

*“We are yet considering the effect of the amended provision. The Apex Court has made analysis of a provision of first charge vis a vis secured creditor in the case of Central Bank of India (*supra*). The first charge was given supremacy than rights under mortgagee or to a secured creditor. The distinction between “first charge and secured creditor” is necessary to analyse scope of Section 26E of the Act of 2002 and Section 31B of the Act of 1993. The amended provisions are having overriding effect and give priority to the secured creditors vis a vis State dues. It does not, however, nullify the*

*effect of first charge created on the property under the State Act. If intention of Parliament would have been to nullify the effect of first charge, the language of Section 26E of the Act of 2002 and Section 31B of the Act of 1993 would have been different as indicated by the Apex Court in the case of Central Bank of India (*supra*). It should have been with non-obstante clause and that secured creditors would have priority over the first charge created under a State legislation. The amendment made by Parliament is to give priority to the secured creditors vis a vis State dues without speaking about the first charge.”*

16. *Dealing with a pari materia provision in the Value Added Tax Act in Madhya Pradesh, in Bank of Baroda Case (*Supra*) , the Madhya Pradesh High Court held as under:-*

“8. In the present case, undisputedly a notice of sale by the respondent/ Commercial Department has been issued on 19.07.2017. The Amendment Act, 2016, which incorporates Section 31B reads as under: -

“31B 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, 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.”

9. *Thus, the aforesaid statutory provisions makes it very clear that the dues of the banks are to be recovered at the first instance. Section 33 of the MP VAT Act, 2002 reads as under: -*

“33: Tax to be first charge (1) Notwithstanding anything to the contrary, contained in any law for the time being in force and subject to the provisions of section 350 of the Companies Act, 1956 (No.1 of 1956), any amount of tax and/ or penalty or interest, if any, payable by a dealer or other person under this Act shall be first charge on the property of the dealer or such person.

(2) Notwithstanding anything contained in this Act, where a dealer or person is in default or is deemed to be in default under clause (a) of subsection (11) of section 24 and whose property is being sold by a bank or financial institution for recovery of its loan, the Commissioner may forgo the right of first charge as mentioned in subsection (1) against the property sold on the following conditions: -

(a) if the arrears of tax, penalty, interest or part thereof or any other amounts is up to 25 percent of the total auction value, the arrears shall be paid in full by the bank or financial institution;

(b) if the arrears of tax, penalty, interest or part thereof or any other amounts is more than 15 percent of the total auction value, the 25 percent of the total auction value and the amount value as the remaining arrears bear to the total dues of the bank or financial institution, shall be paid by the bank or financial institution.”

In our considered opinion, 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 the secured creditors to realise the secured dues and debt due, which are payable to the secured creditors by sale of assets over which security has been created, shall have priority over all other debts and government dues in including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authorities.

Not only this, it also has an overriding effect over all other enactments including the provisions the provisions of MP VAT Act, Central Sales Tax Act, Entry Tax Act and any other Tax Act. Though, an attempt has been made 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 slumber only after the amendment came 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 Bank of Baroda has priority charge over the said property in light of the amendment which has been quoted above.”

17. Considering a pari materia provision in the Value Added Tax Act in the State of Tamil Nadu, in Indian Overseas Bank Case (supra) the Full Bench of the Madras High Court took a similar view.

18. Considering another pari materia provision in the Gujarat Value Added Tax 2003, in Kalupur Commercial Co-operative Bank Ltd. (Supra), a Division Bench of the Gujarat High Court held as under:

“35. While it is true that the Bank has taken over the possession of the assets of the defaulter under the SARFAESI Act and not under the RDB Act, Section 31 B of the RDB Act being a substantive provision giving priority to the “secured creditors”, the same will be applicable irrespective of the procedure through which the recovery is sought to be made. This is particularly because Section 2(la) of the RDB Act defines the phrase “secured creditors” to have the same meaning as assigned to it under the SARFAESI Act. Moreover, Section 37 of the SARFAESI Act clearly provides that the provisions of the SARFAESI Act shall be in addition to, and not in derogation of inter-alia the RDB Act. As such, the SARFAESI Act was enacted only with the intention of allowing faster recovery of debts to the secured 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 secured creditors will have priority in case they proceed under the RDB Act they will not have such priority if they proceed under the SARFAESI Act,

will lead to an absurd situation and, in fact, would frustrate the object of the SARFAESI Act which is to enable fast recovery to the secured creditors.

36. The insertion of Section 31B of the RDB Act will give priority to the secured creditors even over the subsisting charges under the other laws on the date of the implementation of the new provision i.e. 1.9.2016 .The Supreme Court ,in the cases of State of Madhya Pradesh v. State Bank of Indore ,(2001) 126 STC1(SC), has held that a provision creating first charge over the property would operate over all charges that may be in force. The following observations made in para 5 of the said judgment are relevant:

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

19. We respectfully agree with the consistent view taken by three Division Benches of three High Courts and the view taken by the Full Bench of the fourth High Court.

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 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”

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.

36. The following observations of the Full Bench of the Madras High Court authored by Chief Justice Sanjay Kishan Kaul (as his Lordship then was) in the case of *The Assistant Commissioner (Ct) vs The Indian Overseas Bank* relied upon by our court in the case of *ASREC (India) Limited (Supra)* are relevant and are quoted as under:

"The writ petitions have been listed before the Full Bench in pursuance to 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, Section 41 of the same seeking to introduce Section 31B in the Principal Act, which reads as under:-

"31B. 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, 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."

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

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. In so far 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.

8. The matters be placed before the roster Division Bench for dealing with the individual cases."

37. It is also worth quoting the following paragraph from the decision of the Gujarat High Court in the case ***Kalupur Commercial Co-operative Bank Ltd. (supra)*** which has also been relied upon by our Court in ***ASREC (India) Limited (Supra)***:

"35. While it is true that the Bank has taken over the possession of the assets of the defaulter under the SARFAESI Act and not under the

RDB Act, Section 31B of the RDB Act, being a substantive provision giving priority to the "secured creditors", the same will be applicable irrespective of the procedure through which the recovery is sought to be made. This is particularly because Section 2(la) of the RDB Act defines the phrase "secured creditors" to have the same meaning as assigned to it under the SARFAESI Act. Moreover, Section 37 of the SARFAESI Act clearly provides that the provisions of the SARFAESI Act shall be in addition to, and not in derogation of inter-alia the RDB Act. As such, the SARFAESI Act was enacted only with the intention of allowing faster recovery of debts to the secured 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 RDB Act they will not have such priority if they proceed under the SARFAESI Act, will lead to an absurd situation and, in fact, would frustrate the object of the SARFAESI Act which is to enable fast recovery to the secured creditors."

38. Again, coming to another issue raised by the Respondents with respect to Section 26-D of the SARFAESI Act, which provides that the secured creditor shall not be entitled to exercise 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, we are of the view that even if the Petitioner's mortgage was not registered under Section 26-D of the SARFAESI Act, in view of our above discussion on Section 31-B of the RDB Act, the alleged non registration, would not affect the legal position on the issue of priority.

39. In view of the above and being in respectful agreement

with the views expressed in the cases cited above, we hold that the mortgage of the secured creditor viz. the Petitioner Bank gets prior charge over the charge of the Respondents for tax/VAT dues.

40. We therefore quash and set aside the attachment /charge on the said Plot No. W-7 under Section 32 of the MVAT Act as well as notices issued in relation thereto by Respondent No.2.

41. Before parting with the record we would like to state that we are conscious of the decision of the Supreme Court in the case of **Central Bank of India Vs. State of Kerala [2009] 4 SCC 94** wherein the Supreme Court took the view that if the State Act creates first charge on the property, then secured creditor cannot have claim against the statutory provision. The Supreme Court was considering the provisions of Section 38-C of the Bombay Sales Tax Act 1959 and Section 26-B of the Kerala General Sales Tax Act 1963, vis-a-vis the provisions of Section 34(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (now the RDB Act) and Section 35 of the SARFAESI Act. However, firstly, since Section 31-B was not on the statute book then, the impact of this Section did not come up for consideration while deciding the matter. Also with respect, it must be observed that the judgment in the case of Central Bank of India

(supra) was prior to the amendment in the RDB Act as well as the SARFAESI Act, which inserted Section 31-B in the RDB Act and Section 26-E in the SARFAESI Act.

42. It would in this context be pertinent to quote the following paragraphs from the decision of the Gujarat High Court in the case of *Kalupur Commercial Co-op. Bank (supra)*.

“16. Indisputably, the judgment of the Apex Court in the case of Central Bank of India (supra) was prior to the amendment in the Act, 2002 and 1993 respectively. However, what is important are the observations of the Supreme Court as contained in para-126 of this decision quoted above. The Supreme Court observed that while enacting the DRT Act, the Parliament was aware of the law laid down by the Supreme Court, wherein priority of the State dues was recognized. If the Parliament intended to create the first charge in favour of the Banks, Financial Institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding the series of judicial pronouncements, the dues of Banks, Financial Institutions and 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. The Supreme Court proceeded to observe that the fact of the matter was that no such provision had been incorporated in either of those 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.

17. In our prima facie opinion, such observations probably might have weighed with the Parliament which ultimately might have led to the introduction of Section 31B in the RDB Act, 1993 and 26E in the SARFAESI Act, 2002.”

43. Thus, upon a thorough consideration of all aspects of the matter, we are of the view that the writ petition deserves to be

allowed. Writ petition is accordingly allowed and Rule is made absolute in the above terms. Interim order passed earlier stands vacated.

44. No order as to costs.

45. This judgment will be digitally signed by the Private Secretary/ Personal Assistant of this court. All concerned will act on production by fax or e-mail of a digitally signed copy of this order.

(ABHAY AHUJA, J.)

(UJJAL BHUYAN, J.)