



2023:KER:39011

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

FRIDAY, THE 30TH DAY OF JUNE 2023 / 9TH ASHADHA, 1945

WP(C) NO. 11422 OF 2021

PETITIONER/S:

DHANALAXMI BANK LTD
REGD. OFFICE DHANLAXMI BUILDING, NAICKANAL,
TRISSUR - 680 001.
BY ADV C.K.KARUNAKARAN

RESPONDENT/S:

- 1 SECURITIES AND EXCHANGE BOARD OF INDIA
HEAD OFFICE, PLOT NO.C4-A, G BLOCK BANDRA-KURLA
COMPLEX, BANDRA (EAST), MUMBAI - 400 051, REP.
BY ITS CHAIRMAN.
- 2 RECOVERY OFFICER AND DEPUTY GENERAL MANAGER
SECURITIES AND EXCHANGE BOARD OF INDIA, SOUTHERN
REGIONAL OFFICE, 7TH FLOOR, 756-L, OVERSEAS
TOWERS, ANNA SALAI, CHENNAI - 600 002.
- 3 QUIKR REALTY LTD.
RAMON HOUSE, BACKBAY RECLAMATION H.T.PAREKH
MARG, CHURCHGATE, MUMBAI - 400 020.
- 4 G.UNNIKRISHNAN NAIR
MULASSERIL, CHATHANNOOPUZHA, CHOORAKKODU P.O.,
ADOOR, PATHANAMTHITTA - 691 551.
BY ADVS.
K.M.JAMALUDHEEN
RAJU JOSEPH (SR.)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
05.01.2023, THE COURT ON 30.06.2023 DELIVERED THE
FOLLOWING:



W.P.(C) No.11422 of 2021

-2-

JUDGMENT

Dated this the 30th day of June, 2023

The petitioner is a banking company as defined under Section 5(c) of the Banking Regulation Act, 1949 and one among the scheduled banks listed under the 2nd schedule to the Reserve Bank of India Act, 1934. The 4th respondent availed a housing loan of Rs.35,00,000/- from the petitioner on 11.02.2011, for purchasing a residential apartment under construction together with undivided share in the land on which the apartment building is being constructed. As security for the loan, the fourth respondent mortgaged, by deposit of his title deeds, the apartment and the undivided share. The mortgage was created on 04.02.2011 and the original title deeds were deposited on



W.P.(C) No.11422 of 2021

-3-

02.01.2012. The mortgage was registered in the portal of the Central Registry of Securitisation, Asset Reconstruction and Security Interest of India (CERSAI) on 29.09.2012. The fourth respondent having defaulted repayment, the petitioner was contemplating recovery measures. While so, the first respondent, Securities and Exchange Board of India (SEBI), received a reference from the National Housing Board, alleging that a Company by name Kerala Housing Finance Limited (KHFL) had raised share capital and accepted subscription amount in violation of the statutory provisions and the prescribed procedure. Based on the complaint, SEBI conducted an enquiry into the money mobilisation activities of KHFL. The enquiry revealed various violations and the explanation offered by KHFL and its Directors not being



W.P.(C) No.11422 of 2021

-4-

satisfactory, SEBI passed a final order on 10.08.2017, calling upon the Company and its directors to jointly and severally refund the monies collected, with 15% interest, within 180 days. The fourth respondent was one among the directors of KHFL thus called upon to refund the money. The appeal filed by the Company and its directors before the Securities Appellate Tribunal having been dismissed, the SEBI issued demand notices for recovery of rupees 261.35 Crores. Thereafter attachment orders dated 26.06.2019 were issued, followed by prohibitory order dated 02.08.2019.

2. As proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) had been initiated against company and a moratorium order passed by National Company Law Tribunal, recovery proceedings against the company was kept in abeyance and proceedings



against the directors/promoters, continued. During the course of such proceedings, the Recovery Officer of SEBI attached the property of the fourth respondent given as security for the loan availed from the bank and put up that property for sale as per Ext.P3 notice. On coming to know about the proposal to sell the mortgaged property, the Bank issued Ext.P4 communication to the SEBI, requesting to stop the proceedings. In its reply, the SEBI took the stand that the amounts due to SEBI has precedence over any claim, including the bank's claim and hence, the sale will be conducted, considering the paramount interest of the investors. This writ petition was filed thereupon, seeking the following reliefs;

"1. Call for the records of the case up to and including Exhibits 3 and P3 A and to quash Exhibits P 3 and P3 A.

2. Issue a writ of mandamus or such



other appropriate writ, order or direction commanding the 1st and 2nd Respondents to specify the encumbrance on the property in favour of the Petitioner for the amount due to the Petitioner, before any further steps are taken to enforce sale of the property.

3. To declare that the prior charge mortgage rights on the property in favour of the Petitioner have priority over any right of sale vested in the 1st and 2nd Respondents under SEBI Act, 1992.

Alternately,

4. To direct the 1st and 2nd Respondents to deposit the amount due to the Bank in the Bank, from out of the sale proceeds received by the said Respondents from any sale of the subject property prior to appropriating any portion of the said proceeds.

5. Stay all further action pursuant to Exhibit P 3 and P 3 A, pending adjudication of the Writ Petition."

3. While admitting the writ petition, this Court passed an order permitting the sale notified as per Ext.P3 to be continued, but directed to deposit the entire sale



W.P.(C) No.11422 of 2021

-7-

proceeds in a separate escrow account. Accordingly, the property of the 4th respondent mortgaged with the petitioner bank was sold by the SEBI for Rs.45 lakhs and the amount is deposited in a separate escrow account.

4. Heard Adv.C.K.Karunakaran for the petitioner Bank and Senior Advocate Raju Joseph, instructed by Adv.K.M.Jamaludheen, for the first respondent.

5. Learned Counsel for the petitioner put forth the following contentions in substantiation of the reliefs sought in the writ petition;

(i) The mortgage in favour of the bank was created as early as on 14.02.2011 and the security interest registered with CERSAI on 28.09.2012. The property is thus a Secured Asset under the provisions of the SARFAESI Act, 2002. Hence, the bank can



proceed against the property, for realisation of the 4th respondent's debt, in accordance with the provisions of the SARFAESI Act, without intervention from any Court or Tribunal.

(ii) It is settled law that any attachment subsequent to creation of security interest is of no consequence and hence, the mortgage in favour of the Bank has precedence. In support of this contention, learned Counsel placed reliance on the decision in Madhan v. Sub Registrar, Kollam and Others [2014 (1) KLT 406] and Bank of Baroda v Sub Registrar, Kuthiyathode and Others [MANU/KE/3467/2020].

(iii) When there is conflict between the provisions of two special statutes, the later statute will prevail, as the legislature, while enacting the later



W.P.(C) No.11422 of 2021

-9-

statute, was cognizant of the provisions of the earlier statute. The SEBI Act, 1992 and the SARFAESI Act, 2002 are special statutes. The SEBI Act was amended and Section 28A introduced with effect from 18.07.2013 vide the Securities Laws (Amendment) Act 2014. Section 28A(3) of the SEBI Act gives precedence to recovery effected under subsection (1) of Section 28, over other claims. The SARFAESI Act was amended and Chapter IVA introduced by the SARFAESI (Amendment) Act, 2016 (Act 44 of 2016) dated 01.09.2016 and notified on 24.01.2020. As per Section 26E of Chapter IVA, once the security interest is registered, the debts due to the secured creditor has to be paid in priority over all other debts, revenues, taxes, cesses and other rates payable to the Central Government or State Government or



local authority. The only exception carved out, through the Explanation to Section 26E, is regarding the proceedings under the Insolvency and Bankruptcy Code, 2016. Section 26E of the SARFAESI Act being the later provision with a *non obstante* clause, it will override all other provisions, including Section 28A(3) of SEBI Act. In support of this proposition, reliance is placed on the decisions in **Sarwan Singh and another v. Kasthuri Lal [(1977) 1 SCC 750]**, **Solidaire India Ltd v. Fairgrowth Financial Services Ltd and Others [(2001) 3 SCC 71]** and **Punjab National Bank v. Union of India [2022 Live Law (SC) 208]**.

(iv) While Section 35 of the SARFAESI Act contains a non-obstante clause, Section 37 states that the Act is in addition to and not in derogation of four statutes,



including the SEBI Act. Although Section 28A(3) of the SEBI Act contains a non-obstante clause, Section 32 makes it clear that the application of the other laws is not barred. The SEBI is empowered to initiate action for recovering and disgorging the money collected by a Company from its investors, who had chosen to invest in that company without due diligence. On the other hand, the Banking Sector is the backbone of the national economy and it is imperative that the banks promptly recover dues from defaulting borrowers. Therefore, on a larger perspective also, Section 26E of SARFAESI Act should be given precedence.

6. Adv.Raju Joseph, learned Senior Counsel appearing for SEBI advanced the following arguments, in answer to the contentions of the petitioner;

(i) There is no conflict between the two



W.P.(C) No.11422 of 2021

-12-

enactments under consideration as they operate in different fields. The SARFAESI Act was introduced for regulating the securitisation and reconstruction of financial assets and enforcement of security interest whereas the SEBI Act was introduced for the establishment of a Board to protect the interest of the investor in securities and to regulate the market etc. As such, the SARFAESI Act is not intended to protect the interest of the general public, whereas the objective of the SEBI Act is to protect the interest of the investors in securities, who are members of the public. In **SEBI v Ajay Agarwal [(2010) 3 SCC 765]**, the Apex Court has termed the SEBI Act a social welfare legislation and held that, when the court is called upon to interpret provisions of a social welfare legislation the



paramount duty of the court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one that frustrates it. Section 11 of the SEBI Act gives wide power to its Board for taking necessary measures for protecting the interest of the investors in securities, promote the development of the securities market and regulate the market. Under Section 11B, the Board is conferred with the power to issue directions and impose penalties. Section 28A provides for recovery of the amounts and the non-obstante clause in Section 28A(3) gives precedence to such recovery, over any other claim.

(ii) Section 26E of the SARFAESI Act gives priority over recovery of debts, revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority, whereas



recovery of amount by SEBI under Section 28A of the SEBI Act has nothing to do with any amount falling within the meaning of debts, revenues, taxes, cesses and other rates payable to the Central Government. As such the non-obstante clause in Section 26B of SARFAESI Act is of no avail when it comes to recovery under Section 28A(3) of the SEBI Act. A similar view was taken by the Supreme Court in **Central Bank of India v State of Kerala and Others [(2009) 4 SCC 94]**.

Therein, it was held that the statutory first charge available to sales tax will override the security debt of the Bank, since sales tax dues not fall within the meaning of any of the terms mentioned in Section 26E of the SARFAESI Act.

(iii) The impact of Sections 35 and 37 of the SARFAESI Act was considered by the



W.P.(C) No.11422 of 2021

-15-

Apex Court in **KSL & Industries Ltd v. Arihant Threads Ltd (M/s.) and Others [(2015) 1 SCC 166]**. Therein, the question was regarding supremacy of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) over the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 ('RDDB Act'). Taking note of Section 34(2) of RDDB Act, which made the provisions of the Act and Rules in addition to and not in derogation of six enactments, one among which was the SICA, the Apex Court held that the term 'not in derogation' expresses the intention of the Parliament not to detract from or abrogate the provisions of SICA in anyway. Hence, it was held that, even though RDDB Act is the later enactment, the proceedings under SICA, for reconstruction of the sick company,



should go on and all other proceedings against the Company and its properties should be stayed, pending the process of reconstruction. Although a different view was taken in **Madras Petrochem Ltd and another v BIFR and Others [(2016) 4 SCC 1]**, wherein the primacy of the provision of SICA, as against the SARFAESI Act was the issue, even in that judgment, the supremacy of the SEBI Act is indicated, in view of Section 37 of the SARFAESI Act.

(iv) The contention of the petitioner, based on Section 26E of the SARFAESI Act, that the only exception from priority of the secured creditor over security interest is with respect to the proceedings under the IBC is misconceived, since the Explanation to Section 26E can only be utilised for understanding the provision and not for



W.P.(C) No.11422 of 2021

-17-

enlarging the scope of the original section, which it seeks to explain. To buttress this contention, reference is made to the decision in **S. Sundaram Pillai and Others v V.R. Pattabiraman and Others [(1985) 1 SCC 591]**. Further, while the Explanation to Section 26E clarifies that, on or after commencement of IBC, priority to secured creditors in payment of debt shall be subject to the provisions of that IBC, in the absence of any amendment to Section 37 of the SARFAESI Act, no priority can be claimed over the provisions of the SEBI Act.

7. As contended by the Counsel for the petitioner, attachment affected after creation of the equitable mortgage cannot be preferred over the rights of a mortgagee. At the same time, it is essential to note that, in **Central Bank of India v State of Kerala**



and Others [(2009) 4 SCC 94], while upholding the primacy of sales tax dues over the security interest created, the Apex Court held that that the provisions of the SARFAESI Act cannot be read as creating first charge in favour of banks. Paragraph 128 of the judgment being of importance is extracted below;

"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."

In my opinion, the effect of prior mortgage



is not relevant for deciding the issue regarding the primacy of Section 26E of the SARFAESI Act over Section 28A of the SEBI Act.

8. The contention that Section 26E of SARFAESI Act will prevail over Section 28A(3) of the SEBI Act, Section 26E being the later provision, is no longer *res integra*, in view of the precedents, including the latest decision in **Kotak Mahindra Bank Ltd v Girnar Corrugators (P) Ltd and Others [(2023) 3 SCC 210]**, paragraphs 27 and 30 of which reads as under;

"27. It is the case on behalf of Respondent 1 that in view of Section 24 of the Msmed Act which provides that the provisions of Sections 15 to 23 of the Msmed Act would have overriding effect and shall have effect notwithstanding anything inconsistent therewith contained in any other law



for the time being in force and in view of the fact that the Msmed Act being a later enactment, then the Sarfaesi Act, the Msmed Act would prevail over the Sarfaesi Act.

30. At this stage, it is required to be noted that Section 26-E of the Sarfaesi Act which is inserted in 2016 is also having a non obstante clause. Even as per the submission on behalf of Respondent 1, two enactments have competing non obstante provision and nothing repugnant, then the non obstante clause of the subsequent statute would prevail over the earlier enactments. As per the settled position of law, if the legislature confers the later enactment with a non obstante clause, it means the legislature wanted the subsequent/later enactment to prevail. Thus, a "priority" conferred/provided under Section 26-E of the Sarfaesi Act would prevail over the recovery mechanism of the Msmed Act. The aforesaid is to be considered along with the fact that under the provisions of the Msmed Act, more particularly Sections 15 to 23, no "priority" is provided with respect to



the dues under the Msmed Act, like Section 26-E of the Sarfaesi Act."

9. The next question is regarding the impact of Sections 35 and 37 of the SARFAESI Act. For this purpose, Sections 35 and 37 are extracted hereunder;

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

37. Application of other laws not barred- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

While Section 35 stipulates that the



provisions of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force, Section 37 clarifies that the provisions of the Act shall be in addition to, and not in derogation of, the four enactments mentioned therein, one among being the SEBI Act. In this context, it is essential to understand the dictum in **KSL & Industries Ltd** and **Madras Petrochem Ltd** (*supra*). In **KSL & Industries Ltd** (*supra*), the DRAT order, passed in an original application filed by the IDBI Ltd, simultaneously to the Company invoking the provisions of SICA by filing a reference before the Board of Industrial Finance and Reconstruction, as affirmed by the DRAT, was challenged before the High Court. The High Court set aside the order holding that, in



view of the bar contained in Section 22 of the SICA, no recovery proceedings could be effected against the respondent Company. The judgment of the High Court was challenged before the Supreme Court. After elaborate consideration, the Apex Court held as under;

"36. Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term "in derogation of" means "in abrogation or repeal of". The Black's Law Dictionary sets forth the following meaning for "derogation":

"derogation.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force."



It is clear that sub-section (1) contains a non obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law."

10. In **Madras Petrochem Ltd** (supra), the question was with respect to the interplay between the SICA and the SARFAESI Act. Therein, recovery steps under SARFAESI Act were initiated while reconstruction measures under SICA was in progress. After elaborate reference to the relevant provisions, the Apex Court found that, unlike Section 34(2) of the RDDB Act, the SICA is not included in Section 37 of the SARFAESI Act. The court also noted that Section 35 of the SARFAESI Act is not made subject to Section 37 therein. Based on the findings, the



provisions of the SARFAESI Act was held to be having primacy over SICA. The reasoning of the court, available at paragraphs 34 to 36 of the judgment, is extracted below;

"34.And in Raheja Universal Ltd. v. NRC Ltd. [Raheja Universal Ltd. v. NRC Ltd., (2012) 4 SCC 148 : (2012) 2 SCC (Civ) 339] , the Transfer of Property Act, 1882 had to yield to the Sick Industrial Companies (Special Provisions) Act, 1985 being a general Act, as against the Sick Industrial Companies (Special Provisions) Act, 1985 which was a special Act, together with a reading of the non obstante clause contained in the Sick Industrial Companies (Special Provisions) Act, 1985. (See paras 91 to 93.)

35. In KSL & Industries Ltd. v. Arihant Threads Ltd. [KSL & Industries Ltd. v. Arihant Threads Ltd., (2015) 1 SCC 166 : (2015) 1 SCC (Civ) 462] , it was the turn of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985. This Court in resolving the controversy in favour of the Sick Industrial Companies (Special



Provisions) Act, 1985 held: (SCC pp. 180-81 & 183-84, paras 36, 39-40 & 48)

"36. Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term 'in derogation of' means 'in abrogation or repeal of'. The Black's Law Dictionary sets forth the following meaning for 'derogation':

'derogation.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force.'

It is clear that sub-section (1) contains a non obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB



Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law."

Thus, it is beyond cavil that the provisions of the SARFAESI Act are not in derogation, but in addition to the provisions of the SEBI Act.

11. The next question is whether Section 26E of the SARFAESI Act is to be understood as providing priority over the recovery measures initiated under the SEBI Act. In order to answer this question, it is essential to scrutinise Section 26E of the SARFAESI Act and Section 28A(3) of the SEBI Act.

"SARFAESI ACT: 26E- 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.

SEBI ACT: 28A(3) Every legal representative shall be personally liable for any sum payable by him in his capacity as legal representative if, while his liability for such sum remains undischarged, he creates a charge on or disposes of or parts with any assets of the estate of the deceased, which are in, or may come into, his possession, but such liability shall be limited to the value of the asset so charged, disposed of or parted with."

A plain reading of Section 26E reveals that the priority provided therein is over debts, revenues, taxes, cesses and other rates payable to the Central Government, State Government or local authority. As against this, the words used in Section 28A(3) of SEBI Act is to the effect that the recovery of amounts by the Recovery Officer



W.P.(C) No.11422 of 2021

-29-

under sub-section (1) will have precedence over any other claim. Recently, a Division Bench of the High Court of Telangana considered this question in **State Bank of India v. M/s.Midfiled Industries Limited** (Writ Petition Nos.9375 of 2019 and 29648 of 2021) and held that the recovery measures initiated by the SEBI is not for realising any amount due to it and is only discharging its statutory duty to compel the company to pay the interest amounts due to the investors. As SEBI is only seeking enforcement of the statutory requirements, its actions are not falling within the four corners of Section 26E of the SARFAESI Act. I am in respectful agreement with the above finding. Insofar as the recovery measures of SEBI are not intended for realisation of debts, revenues, taxes, cesses or other



W.P.(C) No.11422 of 2021

-30-

rates payable to the Central Government or State Government or local authority, the priority contemplated in Section 26E of the SARFAESI Act cannot have any overriding effect over recovery proceedings under Section 28A of the SEBI Act, there being no conflict between the two Sections. Being so, the sale of the 4th respondent's property, conducted as part of recovery proceedings under Section 28 of the SEBI Act warrants no interference.

In the result, the writ petition is dismissed.

Sd/-

V.G.ARUN
JUDGE

Sc1/



W.P.(C) No.11422 of 2021

-31-

APPENDIX OF WP (C) 11422/2021

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY OF THE HOUSING LOAN SANCTION LETTER DATED 09/02/2011.
Exhibit P2	TRUE COPY OF THE ACKNOWLEDGMENT OF REGISTRATION ISSUED BY CERSAI
Exhibit P3	True copy of the publication dated 03.05.2021
Exhibit P3A	True copy of full version of the Public Notice for e-auction for Sale of Immovable Property, including the Conditions of Tender- Cum-E-Auction, and the Annexures.
Exhibit P4	True copy of letter dated 17.05.2021 of the Manager, Adoor Branch
Exhibit P5	True copy of 2 nd Respondent's email dated 17.05.2021.