



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF JUNE, 2024

BEFORE

THE HON'BLE MR JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION NO. 10895 OF 2023 (GM-RES)

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BETWEEN:

CANARA BANK
ARM BRANCH,
CIRCLE OFFICE BUILDING,
BALMATTA ROAD,
MANGALURU-575001
REPRESENTED BY
CHIEF MANAGER.

...PETITIONER

(BY SRI. DHYAN CHINNAPPA, SENIOR COUNSEL FOR
SRI. SHETTY VIGNESH SHIVARAM .,ADVOCATE)

AND:

1. THE COMMISSIONER OF CUSTOMS
OFFICE OF THE COMMISSIONER OF CUSTOMS (APPEALS-I)
60, RAJAJI SALAI, CUSTOMS HOUSE,
CHENNAI-600 001.

2. THE ASSISTANT DIRECTOR
GOVERNMENT OF INDIA
OFFICE OF THE DEPUTY DIRECTOR,
DIRECTORATE OF ENFORCEMENT,
MANGALURU SUBZONAL OFFICE,
NO.E-7, CENTRAL EXCISE STAFF QUARTERS,
KANKANADY, MANGALURU-575 002.

3. MR. IQBAL AHMED
S/O LATE P.M. SHARIEF
H.NO.697-A12, SHARIEF,
S.L.MATHIAS ROAD,
FALNIR, MANGALURU-575 001

...RESPONDENTS

(BY SRI.H. SHANTHI BHUSHAN, DSGI FOR R-1
SRI. H. JAYAKAR SHETTY., ADVOCATE FOR R-2
R-3 SERVED BUT UNREPRESENTED)





THIS W.P IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER DTD 31.03.2022 PASSED BY THE ASSISTANT DIRECTOR, DIRECTORATE OF ENFORCEMENT, MANGALURUR SUB-ZONAL OFFICE, MANGALURUR (RESPONDENT NO.2) AS PER ANNEXURE-A IN RESPECT OF THE SCHEDULE PROPERTY MORTGAGED TO THE PETITIONER DATED 20.02.2015 AS PER ANNEXURE-B. AND ETC.

THIS PETITION, COMING ON FOR ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

In this petition, petitioner seeks for the following reliefs:-

“(i) Issue a writ of certiorari, by quashing the impugned order bearing File No. T-3/MGSZO/02/2022-213-219 dated: 31.03.2022 passed by the Assistant Director, Directorate of Enforcement, Mangaluru Sub-Zonal Office, Mangaluru (Respondent No.2) as per Annexure-A, in respect of the Schedule Property mortgaged to the Petitioner dated: 20.02.2015 as per Annexure-B.

(ii) Issue a direction/mandamus to Respondent No.2 to release the Schedule Property mortgaged to the Petitioner as per Annexure-b to dated: 20.02.2015 to enable the petitioner to sell the property to realize its dues.

(iii) Issue a direction/mandamus to the Sub-Registrar, Mangaluru Taluk, Mangaluru, regarding cancellation of the direction given by Respondent No.2 prohibiting from allowing any sale/transfer/alienation/modification in respect of the Schedule Property.

(iv) Issue any other direction or order as deemed just in the circumstances and the probabilities of the case



and the same may kindly be considered in the interest of justice and equity.”

2. The material on record discloses that for the purpose of availing two housing loans in sums of Rs.1,70,00,000/- and Rs.1,24,00,000/-, from the petitioner – Bank, the 3rd respondent mortgaged the schedule property along with the other property on 20.02.2015 by way of registered Memorandum of Title Deeds and letter handing over title deeds of the properties. Since the 3rd respondent defaulted in repayment of loan, the loan accounts were classified as ‘NPA’ by the petitioner – Bank. It is contended that when the petitioner – Bank was contemplated initiation of proceedings under the SARFAESI Act, 2002, it learnt that the 2nd respondent had seized the schedule property for alleged offences said to have been committed by the 3rd respondent under the provisions of the Foreign Exchange Management Act, 1999 (for short ‘the FEMA’) and passed the impugned order dated 31.03.2022 directing seizure of the schedule property and other properties of the 3rd respondent.

3. It is contended that the petitioner submitted a representation dated 29.07.2022 to the 2nd respondent requesting



release / cancellation of the attachment / seizure, to which, the 2nd respondent issued a reply dated 04.08.2022 intimating the petitioner that a petition under Section 37A(2) of FEMA had already been filed by the 2nd respondent before the competent authority and objections may be submitted by the petitioner before the authority. In pursuance of the same, petitioner submitted a representation / objections dated 23.08.2022 to the 1st respondent – Commissioner and since no decision has been taken by him and the order of seizure continues to subsist in respect of the schedule property, petitioner is before this Court by way of the present petition.

4. The 2nd respondent has filed statement of objections and has contested the petition.

5. Heard Sri.Dhyan Chinnappa, learned Senior counsel for the petitioner and Sri.H.Shanthi Bhushan, learned DSGI for 1st respondent and Sri.H.Jayakar Shetty, learned counsel for 2nd respondent.

6. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioner has made the following submissions:-



(i) That by virtue of Section 26E of the SARFAESI Act, the petitioner being a secured creditor, the debt due to the petitioner shall have priority and prevail over all other debts / dues including all revenues, taxes, cesses and other rates payable to the respondents 1 and 2 and the provisions of the SARFAESI Act overrides the provisions of the FEMA, since both are special laws and SARFAESI Act is a subsequent enactment, which would prevail over FEMA which was an earlier enactment.

(ii) That the impugned order was passed under Section 37A of the FEMA which was inserted vide Central Act No.20 of 2015 w.e.f. 09.09.2015, while the mortgage created in favour of the petitioner –Bank was prior / earlier thereto i.e., on 20.05.2015 and consequently, Section 37A of FEMA was neither applicable nor could be invoked in relation to the schedule property which had been mortgaged in favour of the petitioner –Bank much prior / earlier to Section 37A being inserted in FEMA and coming into force for the purpose of the present case.

(iii) That by virtue of Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 (for short 'the RDBI Act'), which applies to proceedings under the SARFAESI Act, the rights of the secured creditors viz., petitioner – Bank to realise secured debts due and



payable to them by sale of assets, over which security interest is created shall prevail and shall be paid in priority over all other debts / dues including Government dues viz., revenues, taxes, cesses and rates due to the respondents 1 and 2.

(iv) That the impugned seizure order dated 31.03.2022 passed under Section 37A(1) of the FEMA is illegal, arbitrary and without jurisdiction or authority of law and the same deserves to be quashed.

In support of his submissions, learned Senior counsel relied upon the following judgments:-

(i) SBICAP Ventures Ltd, Vs. Joint Director, Directorate of Enforcement (Bengaluru Zonal Office) and others- W.P.No.1360/2023 dated 20.03.2023(Bombay);

(ii) Solidaire India Ltd., Vs Fairgrowth Financial Services and others – (2001) 3 SCC 71;

(iii) Assistant Commissioner vs. Indian Overseas Bank – 2016 SCC Online MAD 10030.

7. Per contra, learned counsel for respondents 1 and 2 submits that the alleged dues payable in respect of the property attached in the impugned order would not be covered under any of the amounts / sums mentioned / stated in Section 26E of the SARFAESI Act and the contention of the petitioner was liable to be



rejected. It was also submitted that in the light of availability of equally efficacious alternative remedy before the appellate tribunal under Section 37A(5) of the FEMA, the present petition was not maintainable and liable to be dismissed.

8. By way of reply, learned Senior counsel for the petitioner submits that since the impugned order was without jurisdiction or authority of law, mere availability of an appeal under Section 37A(5) of the FEMA would not come in the way of this Court entertaining and adjudicating upon the present petition.

9. I have given my anxious consideration to the rival submissions and perused the material on record.

10. Before advertng to the rival contentions, it would be profitable to extract the statutory provisions which are germane and relevant for consideration of the issue involved in the present petition.

11. Section 26E of SARFAESI Act, reads as under:-

“ 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.

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."

12. As is clear from the aforesaid provision, debts due to any secured creditor shall be paid in priority over all other debts, dues and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or other local authority; it follows therefrom that the provisions of the SARFAESI Act would prevail over the provisions of other earlier enactments, under which, amounts are allegedly due to the Central Government; it is well settled that if there are two special Acts / enactments, it is the later enactment that shall prevail; in the instant case, it cannot be gainsaid that the FEMA (a special law / Act) is an earlier enactment, while the SARFAESI Act (a special law / Act) is a later / subsequent enactment which would prevail over FEMA in the light of the principles laid down by the Apex Court in several judgments



including ***Solidaire India's case supra***, wherein it was held as under:-

7. Coming to the second question, there is no doubt that the 1985 Act is a special Act. Section 32(1) of the said Act reads as follows:

“32. Effect of the Act on other laws.—(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.”

8. The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. A similar non obstante provision is contained in Section 13 of the Special Court Act which reads as follows:

“13. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority.”

9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions



cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. (1993) 2 SCC 144 ; Sarwan Singh v. Kasturi Lal (1977) 1 SCC 750 : (1977) 2 SCR 421 ; Allahabad Bank v. Canara Bank (2000) 4 SCC 406 and Ram Narain v. Simla Banking & Industrial Co. Ltd. AIR 1956 SC 614 : 1956 SCR 603.”

13. So also, in **SBICAP’s case supra**, the Division Bench of the Bombay High Court held that the provisions of the Prevention of Money Laundering Act, 2002 (for short ‘the PMLA’) would be subservient to the rights of a secured creditor under the SARFAESI Act which would prevail and override the provisions of the PMLA.

14. In the instant case, in the light of the undisputed fact that the SARFAESI Act, 2002 is a later Act / law, the same would prevail over the earlier Act / law, i.e., FEMA, 1999 and having regard to the language employed in Section 26E of the SARFAESI Act, the provisions contained therein would have an overriding effect over the provisions of the FEMA and the SARFAESI Act would prevail over FEMA; as a natural corollary, the dues payable in favour of the petitioner – Bank which is a secured creditor would prevail over the dues allegedly payable to the respondents 1 and 2 by the 3rd respondent under FEMA and consequently, the



impugned order purporting to seize / attach the schedule property for alleged dues under FEMA are clearly without jurisdiction or authority of law, inasmuch as since the schedule property had already been mortgaged in favour of the petitioner – Bank by the 3rd respondent, prior to the impugned order, the 2nd respondent was neither entitled to nor empowered to pass the impugned order of seizure / attachment of the property which had already stood mortgaged in favour of the petitioner prior to the impugned order; in other words, since the schedule property had already been mortgaged by the 3rd respondent in favour of the petitioner – Bank, by virtue of Section 26E of the SARFAESI Act which overrides and prevails over alleged dues of 3rd respondent under FEMA, the 2nd respondent was not entitled or empowered to invoke 37A of FEMA because of the overriding effect contained in 26E of the SARFAESI Act. Under these circumstances, I am of the view that the impugned order passed by the 2nd respondent is illegal and arbitrary in addition to being without jurisdiction or authority of law and the same deserves to be quashed.

15. A perusal of the material on record will indicate that the schedule property had been mortgaged in favour of the petitioner –



Bank on 20.02.2015; it is an undisputed fact that Section 37A of the FEMA came into force w.e.f. 09.09.2015 by virtue of Act No.20 of 2015, under which, Section 37A was inserted into the FEMA; the said provisions of Section 37A being substantive in character clearly cannot be construed or treated as being retrospective or retroactive in operation and the same cannot be made applicable to the schedule property which had undisputedly been mortgaged in favour of the petitioner – Bank prior to Section 37A of the FEMA coming into force; to put it differently, Section 37A, under which the impugned order has been passed by the 2nd respondent being prospective in nature and operation, the said provision could not have been invoked by the 2nd respondent for the purpose of passing the impugned order of seizure / attachment in relation to the schedule property which had undisputedly stood mortgaged in favour of the petitioner – Bank prior to Section 37A coming into force and consequently, the said provision was not applicable to the schedule property and the 2nd respondent did not have jurisdiction or authority of law to invoke or apply Section 37A of the FEMA for the purpose of passing the impugned order which deserves to be quashed on this ground also.



16. Section 31B of the RDBI Act, reads as under:-

“31B. Priority to secured creditors. –
Notwithstanding anything contained in any other law for the time being in force, the rights of secure creditor to realise secure 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.”

17. In the case of **Assistant Commissioner vs. Indian Overseas Bank supra**, the Full Bench of the Madras High Court held 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 September 1, 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."

18. A perusal of Section 31B of the RDBI Act and the principles laid down by the Full Bench of the Madras High Court supra, is sufficient to come to the conclusion that in the proceedings sought to be initiated by the petitioner –Bank under SARFAESI Act, which would be governed by the procedure prescribed under the RDBI Act, the petitioner –Bank being a secured creditor would have priority and the claim of the petitioner would prevail over the alleged dues payable under the FEMA as



directed in the impugned order in the light of the overriding effect of the RDBI Act over the FEMA and consequently, viewed from this angle also, I am of the view that the impugned order deserves to be quashed.

19. Insofar as the contention urged by the respondents that the dues payable to them under FEMA are not specifically covered by either Section 26E of the SARFAESI Act or by Section 31B of the RDBI Act is concerned, in the light of the express language employed in both the provisions which contemplate debts, government dues, revenues, taxes, cesses and rates due to the Central Government etc., the alleged dues under FEMA being payable to the respondents 1 and 2 who represent the Central Government, the same are covered by the aforesaid provisions and as such, the said contention urged by the respondents 1 and 2 cannot be accepted.

20. Insofar as the contention as regards availability of equally efficacious and alternative remedy by way of an appeal under Section 37A(5) of the FEMA is concerned, in the light of the findings recorded by me hereinbefore that the impugned order is without jurisdiction or authority of law and the same is not only



illegal and arbitrary but also contrary to the provisions contained in the SARFAESI Act and RDBI Act and consequently, mere availability of a remedy by way of an appeal cannot be construed or treated as denuding this Court of its jurisdiction under Article 226 of the Constitution of India and the said contention of the respondents 1 and 2 in this regard cannot be accepted.

21. In the result, I pass the following:

ORDER

(i) Petition is hereby allowed.

(ii) The impugned order at Annexure-A dated 31.03.2022 passed by the 2nd respondent insofar as it relates to the schedule property mortgaged by the 3rd respondent in favour of petitioner – Bank is hereby quashed.

(iii) The 2nd respondent is hereby directed to release the schedule property mortgaged to the petitioner as per Annexure-B dated 20.02.2015 as expeditiously as possible and at any rate, within a period of four weeks from the date of receipt of a copy of this order.

**Sd/-
JUDGE**

BMC/SRL