

(2022-1)205 PLR 044

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Jaswant Singh and Mr. Justice Vikas Bahl.

LOVE GARG and another – Petitioners,

versus

STATE OF PUNJAB and others – Respondents.

CWP-31198-2019 (O&M)

**(i) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), Section 26E – Transfer of Property Act, 1882, Section 48 – Criminal Procedure Code, 1973 (II of 1974) Section 83 – Clearly stipulates that where different rights have been created upon immoveable property at different times and in case same cannot co-exist, then, rights which have been created prior in time would have preference over the rights created subsequently – In the present case, it is not in dispute that mortgage in favour of the bank was created prior to the alleged order of attachment and thus, on the basis of the abovesaid principle also, the rights of the secured creditor as well as subsequent rights in favour of auction purchasers i.e. petitioners, would be protected. [Para 21]**

**(ii) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), Section 26E – Right to property is a constitutional right as enshrined under Article 300(A) of the Constitution of India – Once, the petitioners have purchased the property in auction duly conducted under a statute i.e. the SARFAESI Act, it was the constitutional right of the petitioner to enjoy the property to its fullest – By asking the petitioners to seek ‘No Objection Certificate’ from the Court of Judicial Magistrate Ist Class, Chandigarh, where the said property was attached under a proclamation made under Section 83 CrPC, the said rights have been infringed – Charge had been created by the JMIC on the property and attachment was only to secure the presence of the accused persons in the proceedings under [Section 138](#) of the Act of 1881 and not for recovery of any money – Even assuming any such charge has been created, then the same would not have priority over the mortgage in favour of the bank and cannot come in the way of the property being transferred in favour of the auction purchasers. [Para 24, 25]**

Cases referred to:-

1. (2020-4)200 PLR 669, *M/s Kamla Engg. & Steel Industries, Ludhiana v. Punjab National Bank, Ludhiana*.

2. 2011 PLRonline 0100 (SC), *Union of India v. Tania Construction Private Limited*.

*Mr. Aalok Jagga*, for the petitioners/Auction Purchasers. *Mr. Vikas Mohan Gupta, Addl. A.G. Punjab/respondent No.1. Mr. R.S. Bains, Sr. Advocate with Ms. Arushi Garg*, for respondent Nos.2 and 3/PSIEC. *Mr. Umang Khosla*, for respondent No.4/Bank. *Mr. Saurabh Gulia*, for respondent No.5. (through video conferencing )

\*\*\*\*

**Vikas Bahl, J.** - (7<sup>th</sup> September, 2021) - The primary prayer in the present writ petition is for the issuance of a writ in the nature of certiorari for quashing of order dated 16.05.2019 (Annexure P-3) passed by the Estate Officer, Punjab Small Industries & Export Corporation Limited-respondent No.3, vide which respondent No.3 had requested the Branch Manager, Bank of Baroda-respondent No.4 as well as the petitioners to submit 'No Objection Certificate' from the Court of Judicial Magistrate, 1st Class, Chandigarh regarding the attachment of plot No.C-149, Phase-V, Focal Point, Ludhiana in the matter of *M/s Bhushan Power and Steel Limited v. M/s Vidya Cycle Industries*.

2. Further prayer in the writ petition has been made for issuance of directions to the Punjab Small Industries and Export Corporation Limited (respondent No.2) and the Estate Officer, Punjab Small Industries and Export Corporation Limited (respondent No.3) to transfer the secured asset/plot No.C-149, Phase-V, Focal Point, Ludhiana, in favour of the petitioners/auction purchasers in pursuance of the auction having taken place under the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter to be referred as "the SARFAESI Act").

3. The brief facts of the present case are that on 22.01.2013, M/s Durga Impex, availed Cash Credit Facility of Rs.3,25,00,000/- from respondent No.4-Bank and for the said facility, M/s Vidya Cycle Industries was the Guarantor and had mortgaged the plot No.C-149, Phase-V, Focal Point, Ludhiana measuring 2083.33 square yards with the said bank.

4. Further, vide letter dated 22.01.2013, respondent No.4-Bank had requested the allotting agency i.e. respondent No.2 to mark lien on the Secured Assets.

5. On 01.01.2015, loan account of M/s Durga Impex was declared as Non-Performing Asset and on 05.02.2019, respondent No.4-Bank had issued a sale notice under Rule 8 Sub-Rule 6 read with Rule 9(1) of the Security Interest (Enforcement) Rules, 2002 (hereinafter to be referred as "the Rules of 2002") in the two newspapers i.e. Indian Express and Charhdikalan and fixed the date of auction as 28.02.2019 of the Secured Asset. On 28.02.2019, the auction was conducted by respondent No.4-Bank in which the petitioners had made a bid of Rs.1,99,25,000/- which was ultimately accepted. On 15.03.2019 a Sale Certificate (Annexure P-1 at page 20 of paper book), was issued under Rule 9 Sub-Rule 6 of the Rules of 2002 in favour of the petitioners, conveying the title of the Secured Asset.

6. Importantly, in the said Sale Certificate, it was specifically mentioned that the property/Secured Asset was being made free from all encumbrances. On 27.03.2019 (Annexure P-2 (Colly) at Page 23 of the paper book), respondent No.4-Bank had requested

the Estate Officer, Punjab State Industrial & Export Corporation, to transfer the Secured Asset in favour of the petitioners. A brief summary of the facts giving rise to the sale, was also mentioned in the said letter. On 28.03.2019 (Annexure P-2 at page 21 of the paper book), an application was moved by the petitioners to the Estate Officer, Punjab Small Industries and Export Corporation Limited, Chandigarh for transferring the Secured Asset/plot in question in the name of the petitioners. The requisite affidavits as well as copies of Aadhaar Cards of the sellers and purchasers were annexed with the application. The transfer fee of Rs.20,835/- by way of draft No.232596 dated 28.03.2019 (page 26 of the paper book) was also submitted. On 16.05.2019 (Annexure P-3), the petitioners were surprised to receive a letter from the Estate Officer, Punjab Small Industries & Export Corporation Limited-respondent No.3, vide which respondent No.4-Bank as well as the petitioners were requested to submit 'No Objection Certificate' from the Court of Judicial Magistrate Ist Class, Chandigarh, with respect to some alleged attachment of the plot in question/Secured Asset. After receiving the said letter, the petitioners learnt that M/s Bhushan Power & Steel Limited had written a letter dated 03.10.2013 (Annexure P-4, page 39 of the paper book) to the Punjab State Industries Development Corporation, Chandigarh, pointing out the fact that Dixit Gulati and Reeta Gulati, partners of M/s Vidya Cycle Industries, had been declared Proclaimed Offender under Section 82 of Cr.P.C and that Judicial Magistrate Ist Class, Chandigarh vide its order dated 13.06.2013, while noting that Dixit Gulati and Reeta Gulati had not appeared in the proceedings under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred as "the Act of 1881"), observed that a proclamation was required to be issued for their appearance and an order was passed for attachment of the property in question. Relevant portion of the said order is reproduced hereinbelow:-

"Detail of Property to be attached

1. Plot No.C-149, Phase-V, Focal Point, Ludhiana
2. Machineries installed in the above plot.
3. Computers, Printers, Air Conditioners etc.
4. Chairs, Tables Computer Tables etc."

7. From the above order as well as report dated 14.08.2013 (Page 44 of the paper book), it is not fully clear as to whether the said property was actually attached or not. However, a perusal of the pleadings would show that the aspect of attachment has not been disputed and thus, we proceed to decide the present case on the premise that the property in question has been attached.

8. Learned counsel for the petitioners has submitted that the petitioners have purchased the property in question/Secured Asset in E-auction for a sum of Rs.1,99,25,000/- and the entire amount has been paid.

9. The Sale Certificate has also been issued and the possession has also been handed over to the petitioners. Reference has been made to the Sale Certificate in order to show that it

was specifically stated in the same that the secured asset was free from all encumbrances. Learned counsel for the petitioners has further argued that the petitioners had no knowledge about the said alleged attachment and at any rate, in view of the provision of Section 48 of the Transfer of Property Act, 1882 (hereinafter to be referred as “the Act of 1882”), the mortgage having been created on 22.01.2013, being prior to the alleged order of attachment dated 13.06.2013, would have preference over a right created later on and the said provision, would protect the right of the Secured Creditor i.e. Bank and also the subsequent right created in favour of the petitioners i.e. auction purchasers who have purchased the property from the Secured Creditor.

10. Learned counsel for the petitioners has relied upon Section 31(B) of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter to be referred as “the Act of 1993”) as well as Section 26(E) of the SARFAESI Act, to submit that as per the said sections, the debts due to any secured creditors, are to have priority to all other debts including the debts/taxes/cesses to be paid to the Central Government or State Government or local authority. Further as per Section 35 of the SARFAESI Act, the said Act is to override other laws. It is, thus, argued that on the basis of the said provisions the rights created in favour of the bank and the petitioners stood on a higher pedestal. It is further submitted that Secured Creditor i.e. respondent No.4-Bank had advanced a loan against creation of security and hence, there is transaction of creation of security against advancing of the loan by specifically securing the asset for repayment of the debts and thus, the rights of the Secured Creditor would not be adversely effected by any subsequent attachment by any Court. It is also submitted that the attachment in case of suit for recovery etc. is at best an unsecured loan and it cannot prevail over the secured loan. In the present case, even if it is claimed that there is an attachment under Section 83 of Cr.P.C. in a criminal complaint filed under Section 138 of the Act of 1881, the said attachment is apparently for the purpose of only procuring the presence of the accused and not for the purpose of recovery of any debt. It has further been submitted that after searching on the internet, it has been found that the claim of respondent No.5-M/s Bhushan Power and Steel Limited, was rejected by the Civil Court at Chandigarh by returning the plaint and the matter was pending in the Court at Ludhiana. It is, thus, submitted that impugned order is absolutely illegal and against law and the petitioners are not required to take any ‘No Objection Certificate’ from any Court and the respondents should be directed to transfer the Secured Asset/plot in question in favour of the petitioners and the petitioners cannot be deprived of their right to property in the present illegal manner.

11. Learned counsel for the petitioners has also placed reliance upon the judgment passed by this Court in *M/s Kamla Engineering & Steel Industries, Ludhiana v. Punjab National Bank, Ludhiana and others*, <sup>1</sup> (2020-4)200 PLR 669 [in which one of us (Jaswant Singh. J) had authored the said judgment] and states that the present case is squarely covered by the said judgment.

12. Notice of motion was issued in the present case. Separate replies have been filed by respondent Nos.1, 2 and 4 and on behalf of the aforesaid respondents, learned counsel have also appeared and made their submissions.

13. Learned counsel for respondent No.4-Bank has referred to his reply as per which it has been admitted that respondent-Bank had proceeded under the SARFAESI Act and they auctioned the property on 28.02.2019 and the petitioners were declared as Successful Bidder. It has further been stated that the SARFAESI Act, being a special Act, has to be given preference over other Acts and has, thus, supported the case of the petitioners.

14. Learned Senior counsel for respondent No.2 has referred to her written statement, as per which the factum with respect to auction has been admitted and also the fact that the present petitioners were the highest bidders, has also been admitted. Reference has, however, been made to letter dated 03.10.2013 as well as order dated 13.06.2013, to state that the property in question was required to be attached in the manner specified in Section 83(2) of Cr.P.C. and it is in these circumstances that the impugned letter/order requiring the bank as well as the petitioners for getting 'No Objection Certificate', was issued.

15. Learned counsel for respondent No.1-State of Punjab has made submissions to the effect that the petitioners should approach the Court of Judicial Magistrate 1st Class, Chandigarh to get the property released from attachment instead of filing the present writ petition.

16. However, a perusal of the short reply by way of affidavit filed by Special Secretary, Government of Punjab, Department of Industries & Commerce, on behalf of respondent No.1 would show that it is their case that respondent No.1 is only a proforma party and that the contesting party is respondent No.2 and no objection as raised during the course of arguments has been taken in the written statement which has been filed on behalf of respondent No.1.

17. Learned counsel for the petitioners, however, to rebut the argument of counsel for respondent No.1, has submitted that apart from the fact that respondent No.1 has not taken any such objection in the written statement, he has submitted that the petitioners are not party to the attachment proceedings and in view of the judgment passed in *M/s Kamla Engineering* (Supra), the said attachment cannot come in the way of the petitioners in seeking direction to the respondent-authorities to transfer the property in favour of the petitioners and thus, the petitioners need not challenge the said order of attachment.

18. We have heard the learned counsel for the parties.

19. The provision of Sections 26(E) and 35 of the SARFAESI Act, are relevant for the adjudication of the present case and the same are reproduced here as under:-

*"Section 26E. Priority to secured creditors.*

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 (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.]

Section 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.”

20. A perusal of the said Section 26(E) of the SARFAESI Act would show that it has been specifically mentioned that debts due to any secured creditor shall be paid in priority over all other debts as well as all taxes/cesses/rates even payable to the Central Government or State Government or with the Local Authority. Thus, priority of right has been given to secured creditor to recover its dues. Further provision of Section 35 of the SARFAESI Act states that the said Act is to override other laws. The provision of Section 48 of the Act of 1882, which is also relevant to the case in hand, is also reproduced hereinbelow:-

“48. Priority of rights created by transfer-Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special [contract](#) or reservation binding the earlier transferees, be subject to the rights previously created.”

21. The above provision clearly stipulates that where different rights have been created upon immoveable property at different times and in case same cannot co-exist, then, rights which have been created prior in time would have preference over the rights created subsequently. In the present case, it is not in dispute that mortgage in favour of the bank was created on 22.01.2013 (Page 23 of the paper book) and the alleged order of attachment was issued on 13.06.2013 (Annexure P-5) and thus, on the basis of the abovesaid principle also, the rights of the secured creditor as well as subsequent rights in favour of auction purchasers i.e. petitioners, would be protected.

22. This Court, in *M/s Kamla Engineering* (Supra), after considering the abovesaid provisions and all the other relevant provisions, had come to the conclusion that the petitioners i.e. auction purchasers from the bank would be entitled to get the property transferred in their favour, irrespective of any due/attachment. Relevant portions of the said judgment is reproduced hereinbelow:-

“Present petition has been filed by petitioner, a partnership firm aggrieved against letter dated 15.10.2019 (Annexure P-3) issued by respondent No. 3 – Greater Ludhiana Area Development Authority (hereinafter referred as to “GLADA”), vide which it has expressed reluctance to transfer property bearing Plot No. BN-15 , MC No. B – XXX – 1845 , near HDFC Bank , Phase II , Focal Point , Ludhiana – 141010 (hereinafter referred to as “secured asset”) in favor of the petitioner. The secured asset was sold to the petitioner in an open



auction conducted on 09.05.2019, by Debts Recovery Tribunal (DRT), in execution proceedings initiated by Recovery Officer (RO) pursuant to Decree / Recovery Certificate (RC) obtained by Punjab National Bank (hereinafter referred to as “PNB” or “Secured Creditor”), inter alia on the ground that the erstwhile owner/ borrower has to pay certain dues to the Central Excise Department. It has further prayed that direction may be issued to respondent No. 3 to transfer the property in favor of petitioner by holding that the petitioner / auction purchaser is not liable to pay the dues of the erstwhile owner/borrower to the Central Excise. Petitioner has also made an alternative prayer seeking refund of the auction money i.e. Rs. 6,00,10,000/- in case, if the aforesaid prayer is not to be granted.

Xxx xxx xxxxxxxxx

8. Having not received any further response from Respondent No. 3 , petitioner has filed the present petition seeking quashing of letter dated 15.10.2019 (P-3) with a direction to Respondent No. 3 to transfer the said property/secured asset in favour of the petitioner, pursuant to sale certificate dated 25.07.2019 (P-2).

xxx xxxxxxxxx

#### ISSUES INVOLVED

12. Having heard the rival arguments, as advanced by the respective counsels for the parties, and with their able assistance scrutinized the record, we find the following issues would arise for determination:-

- i. Whether the dues of the secured creditor are to be paid in priority, by sale of secured assets specifically charged to it, vis-a-vis the arrears of outstanding dues under the Central Excise Act, 1944?
- ii. Whether the petitioner being successful auction purchaser, pursuant to an auction conducted by DRT under Recovery Act, 1993 would be liable to pay the dues being claimed by Central Excise originally payable by the erstwhile owner/assessee/borrower?
- iii. Whether respondent No. 3 could have refused the transfer of the property in question in the name of the petitioner?

Xxx xxx xxxxxx

14. The Recovery Act, 1993, was enacted with the object and reason that the Banks and Financial Institution, were experiencing considerable difficulties in recovering loans and enforcement of securities charged with them. There had been sizable dispute and litigation, where the banks, were claiming priority of charge and their entitlement to recover their secured debt from the secured assets, duly mortgaged to them vis-a-vis claims of Government Departments/Crown’s Debt. Acting in tune with the object of the Act, 1993 , the Legislature had finally set the controversy at rest by inserting Section 31B in the Recovery Act, 1993 by enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2016 (hereinafter referred to as “Amendment Act, 2016”) and the said

provision came into force on 01/09/2016. Section 31B and Section 34, of the Recovery Act, 1993 read as under:-

[ 31B. *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, 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.]

34. *Act to have overriding effect.* – (1) Save as provided under subsection (2), 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. (2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the [Unit Trust of India Act, 1963 (52 of 1963)], the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), [the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).] [Emphasis supplied]

A bare perusal of the above, would leave no manner of doubt that apart from the fact, that Section 31B starts with the non-obstante clause, it gives priority to the secured creditors to realise their secured debts by sale of assets over which security interest is created and the same shall be paid in priority over all other debts and Government dues. Still further, Section 34 of the Recovery Act, 1993, from its inception provides the overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

15. Even the Securitisation Act, 2002 witnessed an amendment with the insertion of Section 26E, by way of Section 18 of the Amending Act, 2016. The same was notified vide notification dated 26.12.2019 issued by Ministry of Finance, Government of India, whereby it appointed 24.01.2020 as the date on which Section 17-19 of the Amendment Act, 2002 was brought into force.

Xxx xx xxx

27.1. In so far as dues pertaining to Government are concerned, they are predominantly the taxation dues arising out of various taxing statutes. With the amendment brought in the Recovery Act, 1993 and the Securitisation Act, 2002 with the insertion of Section 31B and Section 26E respectively, prior right has been conferred upon the secured creditor to recover their dues vis-à-vis the dues payable to Centre or State Government or even local



authorities. As has been discussed in the previous paras, if the sale is conducted by the secured creditor and the secured asset, subject matter of sale, is charged with the dues of Government (not being dues emanating out of utilization of property as discussed in para 29 of the judgment), including the dues under the taxing statutes, it would not be the liability of the auction purchaser to pay the same in view the prior right secured in favor of the secured creditor by way of Section 31B of the Recovery Act, 1993 and Section 26E of the Securitisation Act, 2002 and their overriding effect of anything which inconsistent with the provisions of these twin Acts. It is to be noticed that the rights of the auction purchaser, on purchasing the secured asset, are virtually derivative rights from the secured creditor. Thus, if the auction purchaser has purchased the property from the secured creditor, it is the secured creditor which has exercised its right of priority to sell the secured asset to recover and appropriate its dues and hence the auction purchaser cannot be called upon to pay the dues of the previous owner / borrower.

27.2. In so far as dues of Semi Government and / or Government Agencies are concerned, it is commonly seen that the properties of the defaulters/borrowers are got attached, for recovery of their dues. For the purpose of illustration, it could be dues being claimed by various state procurement agencies, which allot paddy for purposes of milling of rice to various rice shellers pursuant to a milling agreement. If these millers default in supply of the contractual rice out of the allotted paddy or commit breach of milling agreement, it is commonly seen that these agencies proceed to attach the property of the defaulter miller/borrower to secure recovery of their dues and claims, either under Section 9 or Section 17 of the Arbitration and Conciliation Act, 1996 or during execution of the award against the defaulter miller/borrower. Incidentally, it is noticed that such millers have also availed credit facilities from Bank / Financial Institution and have already mortgaged the same property which has been attached by the agencies, and such credit facilities later on account of default committed by the miller are declared NPA by the banks. While the banks proceed to sell the mortgaged property to recover the secured debts, it is noticed that due to attachments orders obtained by the agencies upon the secured asset/s, it does not get adequate buyers because of the encumbrance of attachment. If at all, it is able to sell it, the auction purchaser faces difficulty in getting the property transferred in its favor. Such attachments upon the property, which are obtained by the agencies or such other similarly placed entities, from the courts or arbitral tribunals are all unsecured attachments. Such unsecured debts/claims cannot have precedence over the secured debts by virtue of prior mortgage rights of having been created in favor of the secured creditor by the owner/mortgagor and consequently cannot be treated as an encumbrance either for the secured creditor or for the auction purchaser. The auction purchaser who has purchased such property from the secured creditor cannot be put to any disadvantageous position because of the such third party attachments. [needless to say we are talking about mortgage as mentioned in para 27.5]

27.3. It would be useful to refer to the judgment of Hon'ble Supreme Court in *Dena Bank v. Bhikhabhai Prabhudas Parekh* 2000 (5) SCC 694, which dealt with an identical issue , though dealing with a situation which existed prior to the amendment under the Recovery Act, 1993 and Securitisation Act, 2002 with the insertion of Section 31B and 26E respectively, and held in para 9 held as under:-

“9. However, the Crown’s preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown’s right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles v. Grover*, 1832 All England Reporter 563 it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar v. State of Bihar and others*, AIR 1971 Supreme Court 1210, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L., Seventh Edition, p. 386) – ‘It seems a Government debt in India is not entitled to precedence over a prior secured debt.’” [Emphasis supplied]

Thus, it is apparent that such attachments are unsecured claims over the property and such unsecured claims even by the Government or Semi Government agencies, would not have preference over the dues of the secured creditor which are to be recovered from sale of mortgaged/secured assets in whose favor prior mortgage rights have been created by the owner/borrower.

Xxx xxx xxxxxx

27.7. There have been cases where the property of the borrower, who is absconding has been attached by the Court under Section 83 of the Code of Criminal Procedure. Such property if it is a secured asset by creation of mortgage prior to the passing of such attachment order under Section 83 CrPC, would give prior right to the secured creditor to recover its dues notwithstanding the attachment effected by the Court under Section 83 of the Cr.P.C. This is for the reason, that firstly the right upon the property has been created in favor of the secured creditor prior point in time i.e. before passing of the attachment order under Section 83 Cr.P.C. and hence principles of Section 48 of the Act, 1882 would apply.

Secondly, attachment is an unsecured claim which cannot prevail over the secured claim for the reasons explained in the previous paras especially in view of the judgment of Hon’ble Supreme Court in *Dena Bank’s case* (supra). Thirdly, because of the prior right of recovery reserved in favor of the secured creditors under the Recovery Act, 1993 and Securitisation Act, 2002 which have an overriding effect over anything which is inconsistent to the provisions of these twin Acts. Fourthly, it is the secured creditor which has advanced loan against the creation of security and hence, it is a transaction of creation of security against advancing of consideration from the creditor to the debtor, thereby specifically securing the asset for repayment of the dues. Hence, the rights of secured creditor would not be adversely effected by such later attachments by the court nor shall adversely effect the right and title of the auction purchaser purchasing the secured asset from such secured

creditor.

27.8. We, therefore, conclude the discussion on Point A, by laying down the above principles which would provide guidance to the parties and to minimize the disputes involving the secured assets on its enforcement by the secured creditor.”

23. A perusal of the above judgment would show that after discussing all the aspects of the matter, this Court had observed in para 27.7 that in case a person has absconded and the property has been attached under Section 83 of Cr.P.C., 1973 and such property is also a secured asset by creation of mortgage prior to the passing of such attachment order under Section 83 of Cr.P.C., as in the present case, then prior right would be given to the secured creditor to recover its dues notwithstanding the attachment effected by the Court under Section 83 of Cr.P.C.. The following four reasons were given for the same:-

- 1) Firstly, the rights upon the property have been created in favour of the secured creditor prior in time i.e. before passing of order of attachment under Section 83 of Cr.P.C. and hence, the principles as enshrined in Section 48 of the Act of 1882 would be applicable. The said reason is fully applicable in the present case.
- 2) Secondly, attachment, even in case the same is to recover money, is an unsecured claim and the same cannot prevail over the secured claim and the said aspect is also clear from the judgment of Hon'ble the Supreme Court in *Dena Bank v. Bhikhabhai Prabhudas Parekh* 2000 (5) SCC 694. In the present case, attachment under Section 83 of Cr.P.C. is on account of the fact that the Guarantor was proceeded against in the proceedings under Section 138 of the Act of 1881, for having absconded and the property in question was attached. Such attachment was for the purpose of procuring the presence of the said accused persons under Section 138 of the 1881 Act and cannot be stated to be an attachment for the recovery of any debt. At any rate, it is apparent that the period of more than 8 years has elapsed from the date of the said alleged attachment dated 13.06.2013 and yet no further proceedings, much less, any proceeding of sale etc. has been initiated by the Court and thus, the said fact cannot even remotely affect the rights of the petitioners.
- 3) Thirdly, it was held that prior right of recovery reserved in favour of the secured creditors under the SARFAESI Act and the Act of 1993 would have an overriding effect over anything which is inconsistent to the provisions of these twin Acts. The said principle would also fully apply to the present case.
- 4) Fourthly, it was held that since it is the secured creditor who had advanced loan against the creation of security and hence, the said secured asset is for the purpose of repayment of debts and thus, the rights of the secured creditor would not be adversely affected by any such subsequent attachment by the Court nor would have effect on the right and title of the auction purchasers purchasing the secured asset from such secured creditor. The said principle would also fully apply to the present case.

24. The abovementioned writ petition was found to be meritorious and allowed accordingly. The ratio of law as laid down in the said case fully applies to the present case on all fours. The right to property is a constitutional right as enshrined under Article 300(A) of the

Constitution of India. Once, the petitioners have purchased the property in auction duly conducted under a statute i.e. the SARFAESI Act, it was the constitutional right of the petitioner to enjoy the property to its fullest. By asking the petitioners to seek 'No Objection Certificate' from the Court of Judicial Magistrate Ist Class, Chandigarh, the said rights have been infringed.

25. Moreover, a perusal of the sale certificate (Annexure P-1) also shows that the transfer which has been made in favour of the petitioners is free from all encumbrances. It is not the case of the respondents that any such attachment was in the knowledge of the petitioners or was ever brought to the notice of the petitioners prior to the passing of the impugned order. Further in the present case, it cannot be stated that by virtue of the said attachment, any charge had been created on the property and attachment was only to secure the presence of the accused persons in the proceedings under Section 138 of the Act of 1881 and not for recovery of any money. Even assuming any such charge has been created, then the same would not have priority over the mortgage in favour of the bank and cannot come in the way of the property being transferred in favour of the auction purchasers. In the present case it is reiterated that no such charge has ever been created. Thus, the impugned order being illegal, deserves to be set aside.

26. Before we part with this judgment, we would like to deal with the objection raised by the learned counsel for the State to the effect that the petitioners should have first approached the Court of Judicial Magistrate Ist Class to get the attachment vacated instead of filing the present Writ Petition. The said argument deserves to be rejected for more than one reason. Firstly, as held in *M/s Kamla Engineering* (Supra), the fact that the property has been attached and that too subsequent to the mortgage created, the same cannot even remotely adversely affect the rights and title of the auction purchasers, purchasing the secured asset from the secured creditor.

27. Secondly, the petitioners are not party to the said proceedings and it is not their case that the said order of attachment could not have been passed, rather it is the case of the petitioners that even in spite of the said attachment order, the rights of the petitioners are not affected.

28. Thirdly, the present writ petition filed under Article 226 of the Constitution of India, which would be the appropriate remedy inasmuch as in the present case, the facts are not in dispute and to secure the ends of justice, this Court has ample power under Article 226 of the Constitution of India to issue necessary directions. It has been repeatedly held by the Hon'ble Supreme Court that even if there was an alternative remedy including arbitration clause, the High Court would always have jurisdiction under Articles 226/227 of the Constitution of India to step in, in case there is any injustice. The Hon'ble Supreme Court in para 27 of its judgment titled as *Union of India v. Tania Construction Private Limited*,<sup>2</sup> 2011 PLRonline 0100 (SC), 2011(5) SCC 697, has observed as under:-

"27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the

writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company.”

28. The Hon’ble Supreme Court, even in case in which there was an arbitration clause, had observed that “Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution” and thus, the judgment of the High Court which had entertained the petition despite there being an arbitration clause, was upheld. In the present case, we have come to the conclusion that injustice has been done to the petitioners inasmuch as, their right to property has been violated and thus, the present writ petition is allowed and the impugned order dated 16.05.2019 (Annexure P-3) is hereby quashed and respondent Nos.2 and 3 are directed to transfer the secured asset/plot No.C-149, Phase-V, Focal Point, Ludhiana in favour of the petitioners/auction purchasers as expeditiously as possible and in any case, within six weeks of the receipt of the certified copy of the present order.

29. Since the main case has been decided, an application for preponement bearing CM-8747-CWP-2021 as well as application CM-12550-CWP-2020, praying for the disposal of the present petition, have been rendered infructuous and are disposed of as such.

30. All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

**Sd/- Jaswant Singh, J.**

R.M.S.

–

*Petition disposed of.*