

THE HIGH COURT OF MADHYA PRADESH : JABALPUR
(Division Bench)

Heard through Video Conferencing

Writ Petition No.9915/2020

Bank of Boarda ... Petitioner

versus

State of Madhya Pradesh and another ... Respondents

Appearance:

Shri Brian D'Silva, learned Senior Counsel with Shri Shreyas Dubey, learned counsel for the petitioner.

Shri Swapnil Ganguly, learned Deputy Advocate General, for the respondents/State and its functionaries.

CORAM :

Hon'ble Shri Justice Sanjay Yadav, Acting Chief Justice

Hon'ble Shri Justice Rajeev Kumar Dubey, Judge

Date of decision : **02.11.2020**

ORDER

Per Sanjay Yadav, Acting Chief Justice :-

Solitary question which arises for consideration is whether a charge of Bank on the leasehold plot mortgaged as security towards loan will have priority over other charges of third party including the State.

2. The relevant facts briefly are that M/s Anmol Agro Pvt. Ltd. availed the credit facilities aggregating to Rs.6,85,00,000/-. For securing the repayment thereof, the borrower sought to create mortgage of various immovable proprieties in favour of the petitioner-Bank including lease hold rights of the property situated at Plot No.30 (part of land admeasuring 14382 sq.ft.), Industrial Area, Bargawan, Katni. It is urged that after obtaining the 'No Objection Certificate' from the lessor, the mortgage deed was executed in favour of the Bank.

3. Later, because of default committed by the borrower, the credit facility was classified as Non-Performing Asset on 31.12.2018. Steps were taken under Sections 13 and 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short, "Act of 2002") and the Rules made thereunder, viz., the Security Interest (Enforcement Rules), 2002 on 21.02.2020.

4. In pursuant to the auction notice, auction purchaser viz., M/s Sanjay Pulses through its proprietor being successful bidder, a sale certificate was issued on 30.03.2020, which was informed to respondent No.2-General Manager, District Industrial Centre, Katni.

5. Responding to said information, respondent No.2 on 29.04.2020 questioned the securitisation proceedings which as stated could have been only after 90 days of intimation. Respondent No.2 while turning down the request made by the Bank for transferring the lease hold rights in favour of the auction purchaser, informed the petitioner-Bank vide communication dated 25.06.2020, relying on Clause 16(iii) of the Madhya Pradesh Rajya Audyogik Bhumi Evam Bhawan Prabandhan Niyam, 2015, that the borrower/lessee M/s Anmol Agro Pvt. Ltd. has not repaid the subsidy amount received by it from the Department and has not paid lease rent of Rs.1604/- and Rs.3208/- from the year 2018-19 to 2020-21.

6. Aggrieved, petitioner-Bank has filed this petition seeking quashment of communications dated 29.04.2020 and 25.06.2020 and the direction to respondent No.2 to transfer the lease-hold right of the plot in question in favour of auction purchaser on the ground that the mortgage deed was executed after obtaining NOC and that the auction proceedings were under the Act of 2002 for recovery of outstanding dues against the Bank; therefore, the Madhya Pradesh Rajya Audyogik Bhumi Evam Bhawan Prabandhan Niyam, 2015

(for brevity, 'Rules of 2015') will not defeat the purpose of Act of 2002, whereunder, the Bank has the priority right for recovery of its dues. On these contentions, the reliefs mentioned above are being sought.

7. Respondents have filed composite reply. While not disputing the lease agreement entered between respondent No.2 and the said borrower M/s Anmol Agro Pvt. Ltd. on 07.07.2012 in respect of the plot in question, it is urged that Clause 41 of the lease agreement covenanted that "on the request of bank/financial institution and the lessee, permission in favour of the concerned bank/financial institution, as referred to in the rules, will be granted as per prescribed format, by the lessor regarding assignment of lease hold rights. In all circumstances, the charge of the Department of Commerce, Industry and Employment on land/shed shall be over and above any subsequent charges to be created".

8. It is further urged that, as per stipulation in Clause 41, the State Government is having first charge over and above any financial institution. It is urged that even while granting NOC on 21.03.2013 for creating mortgage in favour of the petitioner-Bank, it was the condition of NOC that the Department will have priority

right. And, that before initiating the proceedings for recovery of the loan amount from the property mortgaged of atleast three months prior notice be given to the Department. It is urged that the original lessee i.e. M/s Anmol Agro Pvt. Ltd. was given subsidy in three phases, viz., the first subsidy in tune of Rs.30 Lakhs was granted in favour of the borrower/lease holder in the year 2015. That, during the period from 01.07.2013 to 30.06.2017, the subsidy was provided in terms of exemption into interest amounting to Rs.20 Lakhs and; thirdly, in the year 2018, a special expansion package of Rs.15 Lakhs was provided. It is contended that the original lease holder thus availed Rs.65 Lakhs subsidy from the State Government. Referring to Clause 16(iii) of the Madhya Pradesh Rajya Audyogik Bhumi Evam Bhawan Prabandhan Niyam, 2015, it is urged that since the subsidy has been credited to the term loan account of the original lease holder in the petitioner, the Bank cannot evade the payment of dues of the Department before getting the lease executed in favour of auction purchaser. Clause 16 of the Rules, 2015 makes provision regarding transfer of lease in favour of the Bank/Financial Institution, stipulating therein :

“(16) बैंक/वित्तीय संस्थाओं के पक्ष में पट्टाधिकार का अभिहस्तांकन—

(1) भारतीय रिजर्व बैंक से अनुज्ञा प्राप्त अनुसूचित बैंकों एवं कंपनी अधिनियम, 1956 की धारा 4 ए के अंतर्गत घोषित लोक वित्त संस्थाओं अथवा राज्य वित्त अधिनियम 1951 के अंतर्गत स्थापित वित्त निगम एवं अन्य वित्तीय संस्थान के पक्ष में पट्टाग्राहीता द्वारा उसे प्रदत्त पट्टाधिकारों को अभिहस्तांकन करने की अनुमति होगी। इन अभिहस्तांकन में भूमि या विभाग/ विभाग द्वारा पूर्व निर्मित भवन/ शेड शामिल नहीं होंगे। प्रत्येक स्थिति में भूमि, भवन/ शेड पर राज्य शासन के दायित्व का भार सर्वोपरि रहेगा।

(2) पट्टाग्राहीता इकाई एवं वित्तीय संस्था के बीच निष्पादित किसी अनुबंध की शर्तों के तहत वसूली की कोई भी कार्यवाही करने के पूर्व संबंधित वित्तीय संस्था को कम से कम तीन माह का नोटिस प्रबंध संचालक/महाप्रबंधक जिला व्यापार एवं उद्योग केन्द्र को देना होगा।

(3) बैंक/वित्तीय संस्था/निगम द्वारा अधिग्रहित इकाई किसी अन्य को हस्तांतरित करने पर भूमि/औद्योगिक भवन के हस्तांतरण की अनुमति जारी कर, पट्टाविलेख का निष्पादन तभी किया जावेगा जब बैंक/वित्तीय संस्था अथवा नवीन इकाई शासन के वाणिज्य, उद्योग और रोजगार विभाग की मूल पट्टेदार से प्राप्त होने वाली लेनदारी का भुगतान कर दे तथा नये आवंटी के पक्ष में पट्टाविलेख निष्पादित करायें। “

9. Further, referring to Rule 18(4) of M.P Industrial (Shed, Plot and Land Allotment) Rules, 1974, it is urged that before transfer of land to new allottee, all the dues to the erstwhile allottee required to be cleared. On these contentions, the respondent submits that the execution of lease in favour of the auction purchaser can only be after the dues of erstwhile lessee are cleared.

10. The petitioner, in the rejoinder in paragraph, contends that the petitioner has carried out a detailed study of the loan account of the borrower and no deposit by way of subsidy have been received in the said account. However, no cogent material document has been filed to substantiate these contentions; therefore, they are rejected outright. In the alternate, it is urged that even if the subsidy was created to the account maintained by the petitioner-Bank, it has legal priority to recover the dues. Section 26-E of Act of 2002 is relief upon to substantiate the contentions.

11. Considered rival submissions and perused the record.

12. So far as to the issue as priority right of secured creditors under the Act of 2002 and under the Recovery of Debts and Bankruptcy Act, 1993, the same has been given a quietus with the insertion of Section 26-E of the Act of 2002 vide Act 44 of 2016 w.e.f. 01.09.2016 vide S.O. 2831(E) dated 01.09.2016 and Section 31-B in 1993 Act by Act 44 of 2016, Section 41 (w.e.f. 01.09.2016 vide S.O. 2831(E) dated 01.09.2016.

13. Section 26-E of Act of 2002 stipulates :

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.

14. Similarly, Section 31-B of 1993 Act provides for:

“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.”

15. These Sections start with non-obstante clause, thus giving an overriding effect over any other law in case of a conflict. In **Union of India vs G.M. Kokil 1984 Supp SCC 196**, it is observed :

“11. Section 70, so far as is relevant, says “the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory”. It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the non obstante clause in Section 70, namely, “notwithstanding anything contained in that Act” must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the Act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the non obstante clause the Act is applicable even to employees in the factory who might not be ‘workers’ under Section 2(1),

the same non obstante clause will keep away the applicability of exemption provisions qua all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the non obstante clause Section 64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under Section 59 of that Act read with Section 70 of the Bombay Shops and Establishments Act, 1948.”

16. Since Sections 26-E of Act of 2002 and 31-B of 1993 Act override the provisions in any other law as to priority right of the secured creditor, the contention on behalf of respondent that the District Industrial Centre has priority right to recover its dues of M/s Anmol Agro Pvt. Ltd., cannot be upheld. It is, accordingly, held that in respect of the property mortgaged with Bank as secured asset, the Bank shall have the priority right to recover its dues.

17. The question, however, is whether the District Industrial Centre can be compelled to execute a lease of the plot in question in favour of the auction purchaser. Careful reading of the NOC No.जि. व्या.उ.क्रे./क./अधो.सं./2012/4814 dated 21.03.2013 reveals that the NOC was granted for conveyance of lease in favour of petitioner-

Bank and not in favour of third person i.e. the auction purchaser.

The said NOC is reproduced for ready reference :

कार्यालय जिला व्यापार एवं उद्योग केन्द्र कटनी

क्रमांक / जि.व्या.उ.के. / क. / अधो स. / 2012 / 4814 /

कटनी, दिनांक 21-03-13

प्रति,

मेसर्स अनमोल एग्री प्रोडक्ट्स प्रा.लि.

भू-खण्ड क्रमांक - 30 का भाग

संचालक - श्री विशाल आनन्द बुलानी,

औद्योगिक क्षेत्र कटनी

विषय :- बैंक ऑफ बड़ौदा शाखा हाउसिंग बोर्ड कालोनी कटनी के पक्ष में पट्टाधिकार अभिहस्तांकित करने बावत्।

संदर्भ:- आपका आवेदन पत्र दिनांक 11.03.2013।

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उपरोक्त विषय में आपने पत्र क्रं - दिनांक 11.03.2013 द्वारा औद्योगिक क्षेत्र बरगवॉ कटनी में आपको आवंटित भू-खण्ड क्रमांक -30 का भाग क्षेत्रफल 14382 वर्गफुट में प्राप्त पट्टाधिकारों को बैंक ऑफ बड़ौदा शाखा हाउसिंग बोर्ड कालोनी कटनी को अभिहस्तांकित करने की सहमति माँगी है, जो निम्न शर्तों के तहत प्रदान की जाती है :-

1. म.प्र. भूमि आवंटन नियम 1974 एवं आपके द्वारा दिनांक 01.08.2012 को निष्पादित पट्टाभिलेख के प्रावधानों के अनुसार औद्योगिक क्षेत्र बरगवॉ कटनी में आपको आवंटित भू-खण्ड क्रमांक 30 का भाग क्षेत्रफल 14382 वर्गफुट पर आपके पट्टेधारी अधिकारों को बैंक ऑफ बड़ौदा शाखा हाउसिंग बोर्ड कालोनी कटनी के पक्ष में अभिहस्तांकित करने की सहमति एतद्वारा प्रदान की जाती है।
2. विभाग का अधिकार सर्वोपरि होगा।
3. पट्टेदारी इकाई द्वारा वित्तीय संस्था (बैंक ऑफ बड़ौदा शाखा हाउसिंग बोर्ड कालोनी कटनी) के बीच सम्पादित किसी अनुबंध की शर्तों के तहत वसूली की कोई कार्यवाही करने के पूर्व वित्तीय संस्था को कम से कम तीन माह की सूचना विभाग का देना होगा।
4. यह अनुमति इकाई को कार्यशील पूंजी के लिये दी जा रही है।

महाप्रबंधक

जिला व्यापार एवं उद्योग केन्द्र,
कटनी म.प्र.

पृष्ठांकन/जि.व्या.उ.के./क./अधो. स./2012/4815/
कटनी, दिनांक 21/03/13

प्रतिलिपि :-

शाखा प्रबंधक, बैंक ऑफ बड़ौदा शाखा हाउसिंग बोर्ड कालोनी कटनी की ओर उनके पत्र क्रमांक – 83 दिनांक 08.03.2013 के संदर्भ में उपरोक्तानुसार लेख है, कि इकाई मेसर्स अनमोल एग्रो प्रोडक्ट्स प्रा. लि. भू-खण्ड क्रमांक – 30 का भाग संचालक – श्री विशाल आनन्द बुलानी औद्योगिक क्षेत्र बरगवाँ कटनी क्षेत्रफल 14382 वर्गफुट की मूल लीजडीड पृष्ठ क्रमांक 01 से 14 तक प्राप्त कर पावती से इस कार्यालय को अवगत कराने का कष्ट करे।

महाप्रबंधक
जिला व्यापार एवं उद्योग केन्द्र,
कटनी म.प्र.

18. It is clear from the NOC that permission was granted for conveyance of leasehold right in favour of Bank on satisfying the conditions stipulated therein. We are not commended to any instrument or any order empowering the Bank to further assign the leasehold right of the land in question in favour of the auction purchaser. It must be remembered that a mortgage is a transfer of an interest in a specific immovable property as security for the repayment of a debt. In case where the property in question is a leasehold property, as in the case at hand, and the lessor is not a privy to the credit facility/debt and has only consented for conveying such property in favour of creditor on express terms, then the creditor, in our considered opinion, will be bound by these

express terms irrespective whether the creditor is a Bank/Financial Institution or the private person.

19. Clause 41 of the lease agreement stipulates that on the request of bank/financial institution and the lessee, permission in favour of the concerned bank/financial institution, as referred to in the rules, will be granted as per prescribed format, by the lessor regarding assignment of leasehold rights. In all circumstances, the charge of the Department of Commerce, Industry and Employment on land/shed shall be over and above any subsequent charges to be created.

20. Since the permission to the original lessee was given to convey the leasehold rights in favour of Bank in the happening of event mentioned in the NOC and on express terms and conditions, the Bank being the privity is bound by these express terms.

21. Clause 25 of the lease agreement stipulates that the lessee shall not sublet, assign or otherwise transfer the said premises/land or any part thereof or any building constructed thereon for any purpose whatsoever, except as provided in the said rules.

22. Since the permission of conveyance of leasehold right in favour of Bank is granted with express terms and conditions, it is

reiterated that the Bank if they desire for execution of lease deed are bound to pay the arrears of rent and other dues and is further bound by the provisions contained in M.P Industrial (Shed, Plot and Land Allotment) Rules, 1974 and M.P. Rajya Audyogik Bhumi Evam Bhawan Prabandhan Niyam, 2015. That, sub-rule (iii) of Rule 16 clearly stipulates :

(16) बैंक/वित्तीय संस्थाओं के पक्ष में पट्टाधिकार का अभिहस्तांकन :-

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(iii) बैंक/वित्तीय संस्था/निगम द्वारा अधिग्रहित इकाई किसी अन्य को हस्तांतरित करने पर भूमि/औद्योगिक भवन के हस्तांतरण की अनुमति जारी कर, पट्टाविलेख का निष्पादन तभी किया जावेगा जब बैंक/वित्तीय संस्था अथवा नवीन इकाई शासन के वाणिज्य, उद्योग और रोजगार विभाग की मूल पट्टेदार से प्राप्त होने वाली लेनदारी का भुगतान कर दे तथा नये आवंटी के पक्ष में पट्टाविलेख निष्पादित करायें।

23. Similarly, Rules 19 and 20 of the Rules of 1974 as amended by the State vide Order No.F-15/60/90/11/डी, दिनांक 01.04.1999 stipulates:

18.	19 अंतरण	पूर्व प्रावधान को विलोपित करते हुये निम्न जोड़ा जाए— 1. भूमि का आंशिक हस्तांतरण पूर्वत प्रतिबंधित रहेगा। 2. हस्तांतरण की अनुमति निम्न शर्तों के अधीन होगी (अ) सम्पूर्ण भूमि तब हस्तांतरित होगी जब मूल आवंटी में
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		<p>स्थापित उद्योग अंतर्गत परियोजना का 25 प्रतिशत व्यय कर दिया हो।</p> <p>(ब) नये आवंटी की 100 प्रतिशत प्रब्याजि जमा करनी होगी तथा प्रचलित दर पर भू-नाटक देय होगा।</p> <p>(स) राज्य सरकार की मूल आवंटी से प्राप्त होने वाली समस्त लेनदारियों नये आवंटी को हस्तांतरित होगी।</p> <p>(द) वित्तीय संस्थाओं द्वारा अधिगृहित की गई इकाई किसी अन्य को हस्तांतरित करने पर हस्तांतरण तभी प्रभावशील माना जाए जब वित्तीय संस्थाएँ अथवा नवीन इकाई द्वारा राज्य शासन की मूल आवंटी से प्राप्त होने वाली लेनदारी का समायोजन करें तथा हस्तांतरण संबंधी समस्त शर्तों का पालन नवीन इकाई द्वारा किया गया हो।</p>
19.	20 बैंक / वित्तीय संस्थाओं के पक्ष में अभिहस्तारण	<p>पूर्व प्रावधान विलोपित कर निम्न जोडा जाए :</p> <p>“भारतीय रिजर्व बैंक से अनुज्ञा प्राप्त तथा अनुसूचित बैंकों के पक्ष में आवंटन प्राधिकारी पट्टेदार अधिकारों के अभिहस्तांकन की अनुमति दे सकेगा, किन्तु राज्य शासन का भार सर्वोपरि रहेगा। इसी प्रकार की व्यवस्था कम्पनी अधिनियम, 1955 की धारा 4(ए) के अंतर्गत लोक वित्तीय संस्थाओं/राज्य वित्त निगम अधिनियम, 1951 के अंतर्गत स्थापित निगम के लिये लागू होंगी।”</p>

24. When the impugned communications are tested on the anvil of above analysis, they cannot be faulted with.

25. Therefore, while holding that the petitioner-Bank has the priority right to recover its dues from the secured assets, cannot however insist upon to execute the lease deed in favour of the third party without settling the dues of the District Industrial Centre.

26. Consequently, the petition fails and is **dismissed**. No costs.

(Sanjay Yadav)
Acting Chief Justice

(Rajeev Kumar Dubey)
Judge

vinod