

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.Nos.24864 and 32325 of 2015
MP.Nos.1, 1 and 2 of 2015

State Bank of India represented by its
Chief Manager, Stressed Assets Management Branch
Coimbatore 641037 Petitioner in W.P.24864/15

State Bank of India
rep by its Assistant Manager
stressed Assets Management Branch (SAMB)
Coimbatore 641 037 Petitioner in W.P.32325/15

Vs

- 1.The Joint Director General of Foreign Trade
Ministry of Commerce, Coimbatore-18
- 2.M/s.Gangotri Textiles Limited represented
by Directors, Coimbatore 641 002 Respondents-WP.24864/15
- 1.The Assistant Director, Directorate of Revenue Intelligence
Ministry of Finance, Regional Unit 1103, Coimbatore
- 2.M/s.Gangotri Textiles Limited represented
by Directors, Coimbatore 641 002 Respondents-
WP.32325/15

Prayer:- These Writ Petitions are filed to issue a Writ of Certiorari to call for the records in public notice dated 14.7.2015 published in the English Daily "The Hindu" by the 1st Respondent and to call for the records in F.No.VIII/48/05/ 2015 DRI Coimbatore, dated 1.10.2015 of the 1st Respondent and to quash the same (W.P.24864/15) and to direct the 1st Respondent to drop all further proceedings against the Petitioner bank, (W.P.No.32325/15) respectively.

For Petitioner : Mr.M.L.Ganesh

For Respondent : Mr.Venkatasamy Babu-R1-WP.24864/15
Mr.R.Selvakumar-R2

ORDER

In these Writ Petitions, the Petitioner seeks to quash the public notice dated 14.7.2015, issued by the Joint Director General of Foreign Trade, Ministry of Commerce and the seizure notice dated 1.10.2015 issued by the Directorate of Revenue Intelligence, Ministry of Finance and to direct them to drop all further proceedings against the Petitioner Bank.

2. The case of the Petitioner is as follows:-

a. The Petitioner Bank along with other consortium banks had granted various credit facilities to the 2nd Respondent Company, for which various loan security documents to cover the credit facilities were executed by the 2nd Respondent Company. The Petitioner bank sanctioned a sum of Rs.118.31 crores on 23.02.2009 to the 2nd Respondent Company, for which they executed joint security documents on 26.3.2009 and renewed the credit facilities on 29.6.2009, vide sanction letter dated 29.6.2009, whereby enhanced the credit facilities to Rs.118.44 crores. They issued the sanction letter on 23.7.2010, renewing the working capital limits and sanctioning funded interest loan to the tune of Rs.99.57 crores. The 2nd Respondent Company also filed Form 8 before the Registrar of Companies, confirming the charge created on their movable and immovable securities. Subsequently, the 2nd Respondent Company committed default in repaying the outstanding loan amount to the other consortium banks. Hence, the Petitioner bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, by issuing a demand notice under Section 13(2) of the Act, dated 4.4.2013 and possession notices under Section 13(4) of the Act, dated 10.6.2013, 11.6.2013 and 9.7.2013. However, the 2nd Respondent did not repay the outstanding amount of Rs.420,20,84,488.46 as on 15.12.2013 payable to the consortium banks. The 2nd Respondent Company is due and liable to pay a sum of Rs.149 crores as on 31.5.2015 with interest and penal interest to the Petitioner Bank under the aforesaid credit facilities.

b. The Petitioner Bank caused sale notices from 20.12.2013 to 31.8.2015 for auction to recover the outstanding loan amount. While so, the 1st Respondent (JDGFT) caused a public notice on 14.7.2015 in the English Daily, "The Hindu", informing the public to first settle the revenue due to the Government towards the custom duty. In the mean time, the 1st Respondent (JDGFT) sent a letter dated 25.6.2015 to the Petitioner Bank, stating that the customs duty payable by the 2nd Respondent works out to Rs.60 crores, but whereas in the said public notice, they claimed a sum of Rs.100 crores. Thereafter, the 1st Respondent (DRI) issued the impugned seizure notice dated 1.10.2015, directing the Petitioner not to conduct any sale of the machineries in favour of any third parties in lieu of import duty liability of Rs.14.65 crores with interest of Rs.22.85, payable by

the 2nd Respondent herein and stating that they would seize the machineries under Section 110 of the Customs Act. The Petitioner bank sent a reply dated 22.7.2015 to the 1st Respondent (JDGFT) to recall the said public notice, but, no action has been taken so far. As against the seizure notice, the auction purchaser M/s.Textech Indo (I) Pvt Limited, who purchased a portion of the hypotheticated machineries under the SARFAESI proceedings, had already approached this Court in WP.No.30446 of 2015, which is pending. In such circumstances, these Writ Petition have been filed for the relief as stated above.

3. Though the 2nd Respondent Company is represented by a counsel, no counter has been filed on behalf of the 2nd Respondent Company. The 1st Respondent (JDGFT) alone has filed a counter affidavit, wherein it is averred as follows:-

a. The Petitioner bank cannot challenge the public notice without authorities from the consortium banks. Though in all the imports of the 2nd Respondent Company, the customs duty foregone works out to 95% to 97%, only a nominal duty of 5% or 3% was paid instead of full duty. The total customs duty exempted from payment by the Government works out to Rs.100/- crores along with interest. Out of total 70 EPCG Authorizations, 46 EPCG Authorizations for a total duty saved value of Rs.28,16,02,238/- are still outstanding. The foreign exchange to be earned by the 2nd respondent Company would work out to Rs.225.28 Crores approximately. In the event of failure to fulfil the obligation to export and earn foreign exchange, the Letter of Undertaking executed by them would be enforced for recovering the Government Revenue along with interest. Further, penal action shall also be initiated against the Licensee Company as per Para 5.17 of the Hand Book of Procedures (HBP) read with the Foreign Trade (Development and Regulation) Act, 1992, Rules and the orders made thereunder. In order to protect the Government interest, a Public Notice in "The Hindu" & "Dinamalar" on 14.7.2015 was issued, informing the interested parties the e-auction about the liability of the 2nd respondent Company to the 1st Respondent (JDGFT). The 2nd Respondent Company also filed their reply dated 3.6.2015.

b. In case the Petitioner proceeds with the e-auction proceedings under the SARFAESI Act and collects sale proceeds by selling the properties of the 2nd Respondent Company, the customs duty foregone and exempted in the import of capital goods through the EPCG scheme would have the "first charge" on the sale proceeds of the properties. In the event of failure to fulfil the export obligation by the 2nd Respondent Company and to realise foreign exchange as undertaken by them, the Government dues will have to be recovered by enforcement proceedings as per Chapter IV Clause 11 of FT (D &R) Act, 1992 under the proceedings of the Revenue Recovery Act of the State Government. The Petitioner Bank failed to issue appropriate notice to the 1st Respondent (JDGFT) prior to the issuance of the 13(2), 13(4) sale notices. As per Section 37 of the SARFAESI Act, the others laws being in force are not

barred. Hence, the recovery proceedings initiated by the Petitioner Bank herein as secured creditor against the secured assets is subject to the first charge and lien of the 1st Respondent (JDGFT). Section 31(a) clearly mandates that the provisions of the SARFAESI Act, shall not apply to a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force. Therefore, the recovery proceedings initiated by the Petitioner Bank are subject to the 1st charge and the decision of the 1st respondent (JDGFT). In such circumstances, these Writ Petitions are liable to be dismissed.

4. The learned counsel for the Petitioner contended that the impugned public notice dated 14.7.2015 is against the rule of law and the principles of natural justice, inasmuch as per the decision of this court reported in AIR-2007-Madras-118 (UTI Bank Limited Vs. Deputy Commissioner of Central Chennai II Division), the Central Excise, Customs and Income Tax departments are not entitled to claim priority over the secured creditor and the right to recover all debts over other creditors is confined to ordinary and unsecured creditors. The learned counsel further contended that as per Section 142A of the Act, the Central Government is not having first charge on the properties put to e-auction under the provisions of the SARFAESI Act, which overrides the Customs Act and the Central Excise Act, on priority of charge and Section 35 of the SARFAESI Act overrides the other laws and that without issuing summons or a show cause notice to the Petitioner, the impugned seizure notice has been passed, which is against the provisions of the SARFAESI Act and the Customs Act, 1962 and the Foreign Trade (Development and Regulation) Act, 1992 and hence, prayed for quashing of the impugned public notice and the impugned seizure notice.

5. The learned Standing Counsel for the 1st Respondent (JDGFT) reiterated the averments made in the counter affidavit and supported the impugned public notice and the seizure notice, placing reliance on the decision of the Andhra Pradesh High Court reported in 2012-TIOL-803-HC-AP-CX (IDBI Limited and others Vs. The Deputy Commissioner (Arrears Recovery Cell) Central Excise and Customs and another).

6. This court heard the learned counsel on either side and considered their rival submissions and also perused the materials placed on record, including the relevant provisions of the Acts and Rules.

7. The undisputed facts are that the Petitioner bank sanctioned a sum of Rs.118.31 crores on 23.02.2009 to the 2nd Respondent Company, for which they executed joint security documents on 26.3.2009 and renewed the the same by letter dated 29.6.2009, enhancing the credit facilities to Rs.118.44 crores. By sanction letter dated 23.7.2010, working capital limit was renewed to the tune of Rs.99.57 crores. Since the 2nd Respondent failed to repay the loan amount, the Petitioner Bank initiated SARFAESI proceedings by issuing the demand notice under Section 13(2) of

the Act, dated 4.4.2013 and possession notice under Section 13(4) of the Act on 10.6.2013, 11.6.2013 and 9.7.2013. The Petitioner Bank also issued sale notices from 20.12.2013 to 31.8.2015 for auction to recover the outstanding loan amount. While so, the 1st Respondent (JDGFT) issued the impugned public notice dated 14.7.2015 to first settle the revenue due to the Government towards the custom duty. Thereafter, the 1st Respondent (DRI) issued the impugned seizure notice dated 1.10.2015, directing the Petitioner Bank not to conduct any sale of the machineries in favour of any third parties in lieu of import duty liability of Rs.14.65 crores with interest of Rs.22.85, payable by the 2nd Respondent Company.

8. The first and foremost contention raised by the learned counsel for the Petitioner is that the Respondents (JDGFT, Ministry of Commerce and DRI, Ministry of Finance) (hereinafter referred to as the Central Government) are not entitled to claim priority over the secured creditor since as per Section 142A of the Act, the Central Department is not having first charge on the properties put to e-auction under the provisions of the SARFAESI Act, which overrides the Customs Act and Central Excise Act, on priority of charge and Section 35 of the SARFAESI Act overrides the other laws.

9. On the contrary, it is the contention of the Central Government that they can claim priority over the secured creditor/ Petitioner Bank, who has exercised its powers under the provisions of the SARFAESI Act and that only the Central Government would have the "first charge" on the sale proceeds of the properties as per Section 31(a) of the SARFAESI Act.

10. From the above averments and submissions of either side, the point that arises for determination is as to whether the Petitioner Bank has got statutory first charge over the secured assets, when they took possession of the same in exercise of the statutory rights under the SARFAESI Act or the Central Government is having priority over the properties for its dues as per the provisions of the Customs Act and the Central Excise Act.

11. Since the 2nd Respondent Company failed and neglected to repay the dues and outstanding liabilities, the Petitioner Bank, as a consortium leader and on behalf of the consortium banks, issued the demand notice dated 4.4.2013, under Section 13(2) of the Act, calling upon the Petitioner Bank to discharge the liabilities. Since there was no response from the 2nd Respondent Company, the Petitioner Bank issued possession notice dated 10.06.2013 under Section 13(4) of the Act. Pursuant to the possession of the properties, the Petitioner Bank issued the sale notice dated 20.12.2013. By order dated 24.02.2015, the District Collector also issued directions for taking over possession of the secured assets. By proceedings dated 30.08.2015, the District Magistrate and District Collector, issued directions to avail the assistance of police force for taking possession of the properties in question. Thereafter, the e-auction sale notice dated 1.6.2015 came to be issued. At this stage, the impugned public notice dated 14.7.2015 and the seizure

notice dated 1.10.2015 came to be issued.

12. Before advertizing into the subject, at this juncture, it is relevant and necessary to extract the relevant provisions hereunder.

13. (1) Chapter I of the SARFAESI Act:- 2. Definitions:-

2(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

(i) debenture trustee appointed by any bank or financial institution; or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution;

in whose favour security interest is created for due repayment by any borrower of any financial assistance;

2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31; "

(2) Chapter III of the SARFAESI Act:- Section 13. Enforcement of security interest.-

(1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.

(2)

(3)

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the

borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b)

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(5)

(6)

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests. "

(3) CHAPTER VI MISCELLANEOUS:- Section 31:- Provisions of this Act not to apply in certain cases. The provisions of this Act shall not apply to--

(a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of 1872; or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force;

(4) 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.

(5) The Central Excise Act, 1944:

(a) Section 11: Recovery of sums due to Government.-

In respect of duty and any other sums of any kind payable to the Central Government under any of the

provisions of this Act or of the rules made thereunder, including the amount required to be paid to the credit of the Central Government under Section 11D, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.

(b) Section 12. Application of the provisions of Act 8 of 1878 to Central Excise Duties:-

The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Customs Act, 1962 (52 of 1962), relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to

like matters in respect of the duties imposed by Section 3."

(6) The Customs Act, 1962:- Section 142:- Recovery of sums due to Government.-

(1) Where any sum payable by any person under this Act including the amount required to be paid to the credit of the Central Government under section 28B is not paid:-

(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or

(b) the Assistant Commissioner of Customs or Deputy Commissioner of Customs may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the Assistant Commissioner of Customs or Deputy Commissioner of Customs or such other officer of customs; or

(c) if the amount cannot be recovered from such person in the manner provided in clause (a) or clause (b)-

(i) the Assistant Commissioner of Customs or Deputy Commissioner of Customs may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified thereunder as if it were an arrears of land revenue; or

(ii) the proper officer may, on an authorisation by a Commissioner of Customs and in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person.

Provided that where the person (hereinafter referred to as predecessor) by whom any sum payable under this Act including the amount required to be paid to the credit of the Central Government under this Act including the amount required to be paid to the credit of the Central Government under section 28B is not paid, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by the proper officer, after obtaining written approval from the Commissioner of Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.

(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section."

14. It is seen from the provisions of the SARFAESI Act that it has been enacted with a view to regulate the securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected thereto. The Act enables the banks and financial institutions to realize long term assets, manage problems of liquidity to the assets liability and to improve recovery by exercising powers to take possession of security, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. Under the SARFAESI Act, a secured creditor will be allowed to enforce security interest i.e. sell the secured assets or if required for the purpose of the same, to take possession of the secured assets without the intervention of the Courts by following the procedures stipulated under Section 13.

15. The very fact that under Section 35 of SARFAESI Act, an overriding effect has been given to SARFAESI Act to any other laws shows that between the Acts relied on either side, the SARFAESI Act is presumed to have been preferred by the law-makers. By virtue of Section 35 of the SARFAESI Act, the provisions of SARFAESI Act would override the other laws and the provisions of the Customs Act and the Central Excise Act, which have no provision creating first charge over the dues of the secured creditor. Under the SARFAESI Act, a secured creditor can take possession of a secured asset from the borrower or any person

who has occupied such asset from the borrower.

16. There is no such corresponding provision either under the Central Excise Act, 1944 or the Indian Customs Act, 1862. The effect of Section 35 would be that in respect of secured assets, the disposal of the secured asset would be in terms of the provisions of the SARFAESI Act. Though the sale would be under the provisions of SARFAESI Act, the proceeds thereof, however, will have to be distributed in the order of priority of the creditors.

17. Even though, an attempt is made on behalf of the Central Government and the 2nd Respondent Company that the overriding effect of the SARFAESI Act is subjected to the situation that the terms are not inconsistent with any other laws, this court is of the considered view that the overriding provision shows that notwithstanding any inconsistency contained in any other laws, the SARFAESI Act, 2002 will have the overriding effect. That apart, there is no similar provision under the Acts relied on by the Central Government, viz. the Central Excise Act and the Customs Act. In any event, the SARFAESI Act, 2002 being the later Act with a clear overriding effect under Section 35, there is absolutely no difficulty to come to the conclusion that the SARFAESI Act, 2002 is entitled to be given preference when compared to the other Acts relied on by the Central Government.

18. A similar issue as to whether the Central Excise Department can claim priority over the secured debt of a secured creditor under the Central Excise Act, 1944 also came up for consideration before different High Courts and the Supreme Court. The Full Bench of this Court, in the case of UTI Bank Ltd. vs. The Dy. Commissioner of Central Excise, Chennai II Division (2007 (1) Law Weekly, 50), while dealing with the Central Excise Act, 1944 the Customs Act, 1962 and the SARFAESI Act, 2002, considered whether the Crown's debts, for which there is no priority or charge is created under the statute, should have precedence over the secured creditors or not. Considering the facts of the said case that the UTI Bank had taken possession of the property under Section 13(4) of the SARFAESI Act and having noticed that there are no specific provisions under the Central Excise Act or the Customs Act to claim first charge, as provided under other enactments, the Full Bench held that generally the dues to the Government i.e. tax, duties, etc. (Crown's debts) get priority over ordinary debts and that only when there is a specific provision in the statute claiming first charge over the property, the Crown's debt is entitled to have priority over the claim of others. In the absence of any such provision to claim first charge, the Government cannot claim precedence under the Central Excise Act over the claim of the secured creditor under the SARFAESI Act, 2002. The tax dues under the Customs Act and Central Excise Act, do not have priority of claim over the dues of a secured creditor as there is no specific provision either in the Central Excise Act or the Customs Act giving those dues first charge, in view of the provision of Section 35 of SARFAESI Act.

19. In AIR 2007 Mad 118 relied on by the learned counsel

for the Petitioner, it has been held as under:-

"26. In the light of the above discussion, we conclude,

"(i) Generally, the dues to Government, i.e., tax, duties, etc. (Crown's debts) get priority over ordinary debts.

(ii) Only when there is a specific provision in the statute claiming "first charge" over the property, the Crown's debt is entitled to have priority over the claim of others.

(iii) Since there is no specific provision claiming "first charge" in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner Bank.

(iv) In the absence of such specific provision in the Central Excise Act as well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown's debts."

In view of our above conclusion, the petitioner UTI Bank, being a secured creditor is entitled to have preference over the claim of the Deputy Commissioner of Central Excise, first respondent herein.

27. It is made clear from our above conclusion and of the fact that the petitioner Bank being a secured creditor, the first respondent, the Deputy Commissioner of Central Excise Department is not entitled to bring the property viz., Plot No.55, Ambattur Industrial Estate, Ambattur, Chennai 600 058 into auction for their dues payable by the borrower company, viz., M/s. Sumeet Research and Holdings Private Limited. It is further made clear that after clearance of the petitioner's debt, the first respondent is free to proceed further if any property is available.

In the result, the writ petition is allowed. No costs. Connected miscellaneous petitions are closed."

20. In another occasion, the same issue came up for consideration before the Honourable Supreme Court in the case of Union of India vs. Sicom Limited n (2009 2 SCC 121), wherein, having noticed the provisions of the Central Excise Act, 1944, the Honourable Supreme Court has rejected the claim of the Government to have first charge over the secured debt.

21. In yet another decision of this court rendered in the case of Kotak Mahindra Bank vs. District Magistrate (2011 (1) GLR 18), a similar issue was dealt with in depth. In the said case, the proceedings under the Central Excise Act, 1944 was

initiated on 24.2.1987 and 26.2.1991, when Rule 173Q(2) and Rule 211 of the Central Excise Rules, 1944 were in vogue..... Having noticed the different provisions of the Central Excise Act, 1944, Central Excise Rules, 1944 and the Central Excise Rules, 2001 including Rule 28 of the Central Excise Rules, 2001 which related to the property to be vested in the Central Government on confiscation and different decisions of the High Courts and Supreme Court, this Court held that Excise and Customs Department of the Central Government cannot claim any priority over the secured debt of a secured creditor as created under the SARFAESI Act.

22. It has been held by the High Court of Gujarat in 2012 (1) GLR 214 (Asset Reconstruction Company (India) Ltd. Vs Commissioner of Income Tax) as under:-

"21. In the above view of the matter, the petition is allowed. It is declared that the claim put-forward by respondent No.1 Income Tax Department by way of attachment of assets covered by Section 13(2) notice for priority over the petitioner for realization of the income-tax dues is contrary to the settled position of law and illegal. It will be open for the petitioner to exercise his right under the SARFAESI Act and the Rules made thereunder and the Income Tax Department shall not in any manner hamper or restrain the petitioner in proceeding further under the SARFAESI Act, regardless of the attachment orders passed by the Income Tax Department for realization of income-tax dues of respondent No.2 company. Rule is made absolute."

23. In AIR 2008 Kant 70:2008 (126) ECC 112 (The Assistant Commissioner Of Central Excise vs Nandi Rerolling Mills), it has been held as under:-

"20. Thus, from a reading of the provisions under which, the petitioner claims primacy over the debts due to it as against the respondent-Banks, it is clear that there is no specific provision either under the Central Excise Act or the Customs Act, to enable the Central Excise Department to claim a precedence over the claim of a secured creditor such as the respondent-Banks. On the other hand, under the provisions of the SARFAESI Act, the State Bank of Mysore having initiated proceedings thereunder, would clearly claim precedence insofar as enforcing its right is concerned. The precedence, vis--vis the State Bank of Mysore and the Hirekerur Urban Co-operative Bank is not the subject matter of this writ petition and is a matter to be resolved as between the said respondents as the same would involve question of fact which are purely matters concerning the said respondents. The question insofar as the petitioner is concerned, would clearly have to be answered against

the petitioner.

21. The petition stand dismissed. The interim order granted earlier stands vacated."

24. In the decision reported in 2012-TIOL-803-HC-AP-CX relied on by the learned counsel for the 1st Respondent (JDGFT), it is seen that the Customs Department is entitled to claim its dues/taxes/duties in preference to other ordinary debts and there is no provision as found in SARFAESI Act or a specific provision claiming to have "first charge". The provisions of the Central Excise Act and the Customs Act envisage the procedures to be followed and how the amounts due to the Departments are to be recovered. There is no specific provision either in the Central Excise Act or the Customs Act, claiming "first charge" as provided in other enactments.

25. In the present case, the Petitioner Bank, which took possession of the properties, is a secured creditor. Hence, the Petitioner Bank, under the SARFAESI Act, is entitled to have preference over the claim of the Central Government, who however, is free to proceed further, after clearance of the debt of the Petitioner Bank. Since there is no provision for claiming a first charge under the Central Excise Act and the Customs Act, there is no legal basis for the Central Government to claim any such priority, whereas the Petitioner Bank as a secured creditor, is in a position to do so.

26. From the object of the SARFAESI Act and the pronouncements of the various High Courts and the Honourable Supreme Court, it is clear that the purpose of the SARFAESI Act is to provide a speedy remedy to the Bank and the secured creditor to recover the loan amounts.

27. Thus, from a reading of the provisions under which, the Petitioner Bank claims primacy over the debts due to it as against the 2nd Respondent Company and the other provisions of the Central Excise Act and the Customs Act, it is clear that there is no specific provision either under the Central Excise Act or the Customs Act to enable the Central Government to claim a precedence over the claim of a secured creditor. On the other hand, under the provisions of the SARFAESI Act, the Petitioner Bank, having initiated proceedings thereunder, can clearly claim precedence in so far as enforcing its right is concerned.

28. In view of the above reasons and discussions and in the light of the various decisions of various courts cited supra, particularly the language of Section 35 of the SARFAESI Act, the Petitioner Bank being a secured creditor, the Respondents, both the Joint Director General of Foreign Trade and the Directorate of Revenue Intelligence cannot claim first charge over the properties put into auction by the Petitioner Bank for their dues payable under the SARFAESI Act. Hence, the impugned notices have no legal basis and unsustainable. However, where the debts, due to both the first charge holder and the second charge holder, are to be realized from the properties belonging to the borrower, the first

charge holder will have to be repaid first. It is also further made clear that after clearance of the Petitioner's debt, the above referred Central Government Authorities are free to proceed further if any property is available, in accordance with law.

29. In the result, these Writ Petitions are allowed. No costs. Consequently, the connected MPs are closed.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

Srcm/rsb

To:

1.The Joint Director General of Foreign Trade, Ministry of Commerce, Coimbatore-18

2.The Assistant Director, Directorate of Revenue Intelligence Ministry of Finance, Regional Unit 1103, Coimbatore

2 ccs to Mr.M.L. Ganesh, Advocate, Sr. 68602, 68603

1 cc to Mr. Venkataswamy babu, SPC, GOI Sr. 68526

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