

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Writ Petition No.21583 of 2014

Date of decision: 24.04.2015

The Punjab & Sind Bank Branch Office, Mani Majra, Chandigarh

...Petitioner

Versus

The State of Punjab & another

...Respondents

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL**

Present: Mr. B.P.S.Dhaliwal, Advocate,
for the petitioner.

Mr. Vinod S. Bhardwaj, Additional Advocate General, Punjab,
for respondent No.1.

HEMANT GUPTA, J.

Challenge in the present writ petition is to the communication dated 23.05.2014 (Annexure P-1), whereby the possession of the assets of the borrower were taken by the Collector -cum- Assistant Excise Taxation, Ropar circle, Ropar and the management of the land handed over to the Tehsildar, SAS Nagar.

The petitioner, a public sector Bank, advanced loan to respondent No.2 – M/s Sumit Engineering Pvt. Ltd., when the said respondent mortgaged its immovable properties. After the loan was declared non-performing asset on 31.08.2013, the petitioner-Bank initiated proceedings under the Securitization and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (for short 'the Act'), when it served a notice under Section 13(2) of the Act on 06.09.2013 followed by a notice under Section 13(4) of the Act on 29.11.2013. The physical possession of the property was taken by the petitioner-Bank in August, 2014, when none of the Director of

respondent No.2 was available. The property was put to auction on 29.09.2014, but the same could not be auctioned. In the meantime, the petitioner-Bank received a letter dated 07.05.2014 in respect of attachment of the property for recovery of dues of the State under the Punjab Value Added Tax Act, 2005 (for short 'the VAT Act'). The grievance of the petitioner is that respondent No.1 is a preferential creditor, as against the crown debt, therefore, the property could not be attached in terms of the VAT Act.

In the reply filed on behalf of respondent No.1, the stand is that respondent No.2 – M/s Sumit Engineering Pvt. Ltd. was under arrears of Rs.4,63,17,087/- towards the tax liability under the provisions of the VAT Act. Reference was made to the Hon'ble Supreme Court judgment reported as Central Bank of India Vs. State of Kerala & others (2009) 4 SCC 94, wherein the dues of the State were treated as preferential creditor in terms of the amendments made in the local laws. Reference was also made to Section 35 of the VAT Act, whereby first charge has been created for the payment of amount of tax, penalty, interest and other sum payable. The relevant Section 35 of the VAT Act reads as under:

“35. Notwithstanding anything to the contrary contained in any contract or law for the time being in force, any amount of tax, penalty, interest and any other sum, payable by a taxable, registered or any other person under this Act, shall be the first charge on the property of such person from the date on which the amount becomes due and payable.”

Learned counsel for the petitioner relies upon a Division Bench judgment of this Court rendered in CWP No.4281 of 2009 titled 'The Punjab National Bank Vs. The State of Haryana & others' on 15.10.2009 to contend that the arrears of sales tax under the Haryana General Sales Tax Act, 1973 are not to be treated as a priority debts. Reliance is also placed on a

judgment reported as Bombay Stock Exchange Vs. V.S.Kandalgaonkar & others (2015) 2 SCC 1.

On the other hand, Mr. Bhardwaj, learned Additional Advocate General, Haryana representing respondent No.1 – State, apart from relying upon the judgment in Central Bank of India's case (supra), referred to judgments of Division Bench of this Court in CWP No.3875 of 2005 titled 'Punjab State Industrial Development Corporation Vs. Union of India' decided on 30.01.2007 and CWP No.2431 of 2009 titled 'Axis Bank Ltd. Vs. The Commissioner of Income Tax, Ludhiana & another' decided on 02.12.2011 to contend that the State debts in terms of a statute will have a preference.

Having heard learned counsel for the parties at length, we do not find any merit in the present writ petition. The judgment in the Punjab National Bank's case (supra), referred to by the learned counsel for the petitioner, deals with the recovery of the arrears of sales tax under the Haryana General Sales Tax Act, 1973. There is no provision under the said Act giving preference to the payment of arrears of tax as preferential dues. The Bench held that the reliance on the provisions of Section 61 of the VAT Act are unwarranted, as the said provisions only contemplate that all arrears of tax and other amount due at the commencement of the VAT could be recovered if the same had accrued under the VAT Act, but there is no provision in the Haryana General Sales Tax Act corresponding to Section 26 of the VAT Act giving preference to the dues of the State. The relevant extract from the said judgment reads as under:

“22. A perusal of the aforesaid provision shows that merely because HGST Act has been repealed, it was not to affect the provisions of the repealed Act or anything duly done or suffered thereunder. The repeal was also not to affect any title, liability incurred under that Act nor it was to affect any act done. All arrears

of tax and other amount due at the commencement of VAT Act could be recovered as if the same had accrued under the VAT Act. It is not disputed that there is no provision in the HGST Act corresponding to Section 26 of the VAT Act. Therefore, Section 26 of VAT Act cannot be read as part of HGST Act because Section 61 is aimed at asserting only those rights which have accrued under the HGST Act. There is no charge created on a property as has been created by Section 26 of VAT Act. Therefore, by no stretch of imagination, it could be assumed that the arrears of tax under the HGST Act could be recovered by creating a charge over the mortgaged property belonging to respondent No.3, therefore, we are of the view that the argument advanced by the learned State counsel is wholly unwarranted and does not commend itself to us.”

On the other hand, in Central Bank of India’s case (supra), the Hon’ble Supreme Court examined the provisions of Bombay Sales Tax Act, 1959 and the Kerala General Sales Tax Act, 1963 creating first charge over the property on account of unpaid arrears of tax etc. The Hon’ble Supreme Court held to the following effect:

“158. On the basis of above discussion, we hold that the DRT Act and Securitisation Act do not create first charge in favour of banks, financial institutions and other secured creditors and the provisions contained in Section 38C of the Bombay Act and Section 26B of the Kerala Act are not inconsistent with the provisions of the DRT Act and Securitisation Act so as to attract *non obstante* clauses contained in Section 34(1) of the DRT Act or Section 35 of the Securitisation Act.”

In V.S.Kandalgaonkar’s case (supra), the Hon’ble Supreme Court said to the following effect:

“38. It was argued that *Black’s Law Dictionary*, 5th Edn. defines “statutory lien” as follows:

“Statutory lien - A lien arising solely by force of statute upon specified circumstances or conditions, but does not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute.”

Based on this it was further argued that such lien would not include any lien provided by or dependent on an agreement to give security, whether or not such lien is also provided by or dependent upon statute, and whether or not such lien is made fully effective by statute.

39. The first thing to be noticed is that the Income Tax Act does not provide for any paramountcy of dues by way of income tax. This is why the Court in *Dena Bank Vs. Bhikhabhai Prabhudas Parekh & Co. (2000) 5 SCC 694* held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in *Giles Vs. Grover 131 ER 563* in which it has been held that the Crown has no precedence over a pledgee of goods. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, *Collector Vs. Central Bank of India AIR 1967 SC 1831* after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore “law in force” in the territory of India before the Constitution and was continued by Article 372 of the Constitution (AIR pp. 1835-36, para 7 : SCR at pp. 861-62).

40. In the present case, as has been noted above, the lien possessed by the Stock Exchange makes it a secured creditor. That being the case, it is clear that whether the lien under Rule 43 is a statutory lien or is a lien arising out of agreement does not make much of a difference as the Stock Exchange, being a secured creditor, would have priority over Government dues.”

In fact, in the aforesaid case, the Income dues were not given any statutory preference. But in the case in hand, the statutory preference has been given to the tax arrears under the VAT Act. In view of the Supreme Court judgment in Central Bank of India’s case (supra), we find that the claim of the petitioner that it had preference over the tax dues of the borrower of the petitioner, does not merit any acceptance in view of the

provisions of Section 35 of the VAT Act. Thus, we do not find any merit in the present writ petition. Consequently, the same is dismissed.

[HEMANT GUPTA]
JUDGE

24.04.2015
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[LISA GILL]
JUDGE