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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 07.04.2016

+ **CO.APP. 27/2013**

COMMISSIONER, COMMERCIAL TAX, GOVT OF MADHYA
PRADESH Appellant

versus

THE OFFICIAL LIQUIDATOR & ORS. Respondents

+ **CO.APP. 28/2013, C.M. APPL.7624/2013**

COMMISSIONER COMMERCIAL TAX, GOVT. OF MADHYA
PRADESH Appellant

versus

THE OFFICIAL LIQUIDATOR & ORS. Respondents

Through : Sh. R.D. Makheeja, Advocate, for
appellants in Item Nos. 7 and 9.

Sh. Buddy. A. Ranganadhan and Sh. D.V.
Raghuvanshi, Advocate, for Respondent No.5 in
Item No.7.

Sh. Jaswinder Singh, Advocate, for Central Bank
of India.

Sh. Rajiv Bahl, Advocate, for OL, for Item Nos. 7
and 9.

Ms. Sunita Arora, Advocate, for Respondent No.5
in Item No.9.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The State of M.P. [hereafter “the State”] appeals against a judgment and order of the Company Judge whereby its claim to be a secured creditor (of the revenue) was declined. In other words, the appellant State argued that

it had an overriding first charge over and above the claims of all other secured creditors in the winding-up proceedings.

2. The facts are not in dispute. Two companies, i.e. M/s. Varun Agro Proteins Ltd. and M/s. Consolidated Steel and Alloys Ltd. (hereafter collectively referred to as “the companies”) are under liquidation and were ordered to be wound-up. In the course of winding-up proceedings, the State pressed its claims, contending that Sales Tax dues were outstanding for the period 1980 to 31.03.1994. Concededly, the Official Liquidator [hereafter “OL”] held that the amounts as claimed were due and that the assessment orders remained outstanding. She, however, rejected the State’s claim as overriding preferential creditor and said that its demand could be recovered in terms of Section 530 of the Companies Act, 1956 (hereafter “the 1956 Act”). The State appealed, relying upon Section 33-C of the M.P. General Sales Tax Act, 1958 (hereafter “the 1958 Act”) and Section 53 of the M.P. Commercial Tax Act, 1994 (hereafter “the 1994 Act”).

3. The learned Single Judge rejected the appeal *inter alia* observing as follows:

“9. Judgments relied upon by the learned counsel for the appellant on this count are of no assistance to him. The judgment of the Apex Court reported as *Central Bank of India Vs. State of Kerala & Others* JT 2009 (3) SC 216 does not come to his aid as Section 529-A of the Companies Act was not the scope of discussion in terms of question which has been answered by the Apex Court and as is evident from para 2 of the judgment. The judgment of the Bombay High Court in *State of Maharashtra Vs. Official Liquidator of Reliance Heat Transfer Pvt. Ltd. (In liquidation)* (2004) 12 Comp Cas 648 which deals with the provisions of Section 38-C of the Bombay Sales Tax Act, 1959 is inapplicable; it is even otherwise not binding on this Court.

10. *Provisions of Section 529-A of Companies Act (a Central legislation) have to be override the provisions of Section 53 of the M.P. Commercial Tax Act of 1994 (a State legislation). Even otherwise as noted supra Section 53 of the Act of 1994 (under which the appellant is claiming his right) clearly specifies that the tax liability will be subject to the provisions of Section 530 of the Companies Act; Section 530 of the Companies Act has to be read subject to the provisions of Section 529-A of the said Act. There appears to be no conflict between the State Act and the Central Act. That apart, even if there is a conflict between a State legislation and a Central legislation, the Central legislation must prevail. See:- (2012) 7 SCC 106 State of Kerala and Others Vs. Mar Appraem Kuri Company Ltd.”*

4. Sh. R.D. Makheeja, learned counsel for the State relies upon Section 33-C of the 1958 Act and Section 53 of the 1994 Act. Besides, reliance is also placed upon a judgment of the Supreme Court in *State of Madhya Pradesh and Ors. v. State Bank of Indore and Ors.* 2002 (126) STC 1 (SC) which *inter alia* held as follows:

“Section 33-C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of Sales Tax dues of the second Respondent prevailed over the charge created in favour of the Bank in respect of the loan taken by the second Respondent.....”

5. Reliance was also placed upon the judgment reported as *State Bank of Bikaner and Jaipur v. National Iron and Steel and Ors.* 1996 STC 612, which *inter alia* observed that Section 53 enacted a statutory first charge which gave priority of charge over all other charges on the properties of the company in liquidation, including the charge of the mortgagee. Learned counsel also relied upon a judgment of the Bombay High Court in *State of*

Maharashtra v. OL. of Reliance 2004 (2) Comp. LJ 317 (Bom). The Court had, in that case, gone to consider the impact of Section 38C of the *Maharashtra Sales Tax Act*, introduced in 1999 over Section 529A of the Companies Act, 1956. The Bombay High Court rejected the State's revenue claim for primacy over debts and that it had to rank as secured creditor along with such other secured creditors.

6. Learned counsel for some of the secured creditors, who had been arrayed as respondents, urged that this Court should not entertain the appeal. They pointed out that in the earlier proceedings, the question as to the overriding nature of Section 529A of the 1956 Act and the impact of the State law had been noticed. It was urged, that by virtue of the decision of the Constitution Bench in *Kaiser-i-Hind Pvt. Ltd. and Anr. v. National Textile Corporation (Maharashtra North) Ltd. and Ors.* 2002 (8) SCC 182, a mere declaration in a State legislation that the assent of the President was obtained before its enactment (or the enactment of an amendment to the existing State law) is conclusive. In context of this case, it was urged that since Section 529A of the 1956 Act is imperative inasmuch as it overrides all other claims and places secured creditors and workmen inasmuch as their outstanding dues, at par, the question of State dues – either through its taxation enactments or under any other revenue laws, would not arise. Learned counsel relied upon Section 530 of the 1956 Act, which expressly sets such State's dues to the dues of secured creditors who are ranked first under Section 529-A. It was submitted consequently that any State enactment, either an amendment to an existing enactment or a new law, had to, necessarily seek the specific assent of the President, pointing out the need and the possible impact of the amendment to the existing Central enactment.

It was submitted that since this principle condition was not followed, the question of State's dues acquiring primacy and being ranked with those secured creditors did not arise in this case.

Analysis and conclusion:

7. As is evident from the above discussion, the questions which arises for decision is narrow. The State's Sales Tax dues and the extent are not in dispute. The OL has verified them. The only question is whether the State's claim that it can legitimately rank as a secured creditor in line with others is valid.

8. The relevant provisions of the Companies' Act are as follows:

"529A. OVERRIDING PREFERENTIAL PAYMENTS

(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company - (a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues, shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

530. PREFERENTIAL PAYMENTS

(1) In a winding up, subject to the provisions of section 529A, there shall be paid in priority to all other debts –

(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to

the company and due for a period not exceeding four months within the twelve months next before the relevant date, subject to the limit specified in sub-section (2);

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948 (34 of 1948), or any other law for the time being in force;

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by the company; and

(g) the expenses of any investigation held in pursuance of section 235 or 237, insofar as they are payable by the company.

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, [exceed such sum as may be notified by the Central Government in the Official Gazette.]

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923) is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (e) of sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the

employer made an application for that purpose under the said Act.

(4) Where any payment has been made to any employee of a company, - (i) on account of wages or salary ; or (ii) to him, or in the case of his death, to any other person in his right, on account of accrued holiday remuneration, out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right, would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall - (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except insofar as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof : Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8) For the purposes of this section - (a) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period ;

(b) the expression "accrued holiday remuneration" includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday ; (bb) the expression "employee" does not include a workman ; and (c) the expression "the relevant date" means - (i) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date ; and (ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

(9) This section shall not apply in the case of a winding up where the date referred to in sub-section (5) of section 230 of the Indian Companies Act, 1913 (7 of 1913) occurred before the commencement of this Act, and in such a case, the provisions relating to preferential payments which would have applied if this Act had not been passed, shall be deemed to remain in full force."

9. The State relies primarily upon two provisions. Section 33-C of the 1958 Act (introduced with effect from 19.01.1976) reads as follows:

***"33-C. Tax to be first charge** – Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and/or penalty, if any, payable by a dealer or other person under this Act shall be a first charge on the property of the dealer or such person."*

10. It is not in dispute that the original enactment, i.e. 1958 Act as it stood when it was brought into force with effect from 1959, contained a declaration that it had received the assent of the President. Likewise, the

subsequent law which replaced the 1958 Act, i.e. the 1994 Act also contained a similar declaration. The assent for the later enactment was – in terms of the Act itself received on 07.01.1995. Section 53 of this later law reads as follows:

“53. Tax to be first charge – *Notwithstanding anything to the contrary contained in any law for the time being in force and subject to the provisions of Section 530 of the Companies Act, 1956 (No.1 of 1956), any amount of tax and/or penalty or interest, if any, payable by a dealer or other person under this Act shall be first charge on the property of the dealer or such person.”*

11. There is no doubt that the previous ruling of the Supreme Court in *State Bank of Indore (supra)* does facially suggest that the provisions of Section 33-C enacts the first charge prioritising debts of the State over and above that of the secured creditors. Both these judgments did not deal with a situation where the dues of the State (of M.P.) were asserted in the course of winding-up proceedings. Consequently, the considerations which weighed with the Court in those judgments were entirely different. The introduction – by an amendment (in 1985) of Section 529A, in the opinion of the Court, is *prima facie* conclusive inasmuch as the Parliament intended that all secured creditors and workmen (inasmuch as their dues are concerned) are to be treated alike. The question of primacy of State’s dues can be validly distributed only if the State law specifically so provides and the State law is specifically reserved for President’s assent *on this aspect*. The latter aspect has been highlighted or rather brought home by the Constitution Bench decision in *Kaiser (supra)* in the following terms:

“14. In view of aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State legislature is in respect of one of the matters enumerated in the Concurrent List by mentioning entry/entries of Concurrent List and that it contains provision or provisions repugnant to the law made by the Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed State law and the earlier law made by the Parliament and the necessity of having such a law, in facts and circumstances of the matter, which is repugnant to a law enacted by the Parliament prevailing in a State. The word 'consideration' would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by the Parliament, the President may grant assent. This aspect is further reaffirmed by use of word "assent" in Clause (2) which implies knowledge of the President to the repugnancy between the State law and the earlier law made by the Parliament on the same subject matter and the reasons for grant of such assent. The word "assent" would mean in the context as an expressed agreement of mind to what is proposed by the State.

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16. Applying the aforesaid meaning of the word assent' and from the phraseology used in Clause (2) the object of [Article 254\(2\)](#) appears that even though the law made by the Parliament would have supremacy, after considering the situation prevailing in the State and after considering the repugnancy between the State legislation and earlier law made by the Parliament, the President may give his assent to the law made by the State legislature. This would require application of mind to both the laws and the repugnancy as well as the peculiar requirement of the State to have such a law, which is repugnant to the law made by the Parliament. The word assent is used purposefully indicating affirmative action of the proposal made by the State for having law repugnant to the earlier law made by the

Parliament. It would amount to accepting or conceding and concurring to the demand made by the State of such law. This cannot be done without consideration of the relevant material.

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18. Further, in [Gram Panchayat of Village Jamalpur v. Malwinder Singh and Ors.](#) 1985 (3) SCC 661, this Court has also held that the assent of the President under [Article 254\(2\)](#) of the Constitution is not a matter of idle formality and the President has at least to be apprised of the reason as to why his assent is sought and the special reason for doing so.

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20. It is true that President's assent as notified in the Act nowhere mentions that assent was obtained qua repugnancy between the State legislation and specified certain law or laws of the Parliament. But from this, it also cannot be inferred that as the President has given assent, all earlier law/ laws on the subject would not prevail in the State. As discussed above before grant of the assent, consideration of the reasons for having such law is necessary and the consideration would mean consideration of the proposal made by the State for the law enacted despite it being repugnant to the earlier law made by the Parliament on the same subject. If the proposal made by the State is limited qua the repugnancy of the State law or laws specified in the said proposal, then it cannot be said that the assent was granted qua the repugnancy between the State law and other laws for which no assent was sought for. Take for illustration -- that a particular provision, namely, Section 3 of the State law is repugnant to enactment A made by Parliament; other provision, namely, [Section 4](#) is repugnant to some provisions of enactment B made by Parliament and [Sections 5 and 6](#) are repugnant to some provisions of enactment C and the State submits proposal seeking assent mentioning repugnancy between State law and provisions of enactments 'A' and 'B' without mentioning anything with regard to enactment 'C'. In this set of circumstances, if the assent of the President is obtained, the State law with regard to

enactments 'A' and 'B' would prevail but with regard to 'C' there is no proposal and hence there is no 'consideration' or 'assent'. Proposal by the State pointing out repugnancy between the State law and of the law enacted by the Parliament is sine qua non for 'consideration and assent'. If there is no proposal no question of 'consideration' or 'assent' arises. For finding out whether 'assent' given by the President is restricted or unrestricted, the letter or the proposal made by the State Government for obtaining 'assent' is required to be looked into.

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25. In our view, for finding out whether the assent was given qua the repugnancy between the State legislation and the earlier law made by the Parliament, there is no question of deciding validity of such assent nor the assent is subjected to any judicial review. That is to say, merely looking at the record, for which assent was sought, would not mean that the Court is deciding whether the assent is rightly, wrongly or erroneously granted. The consideration by the Court is limited to the extent that whether the State has sought assent qua particular earlier law or laws made by the Parliament prevailing in the State or it has sought general assent. In such case, the Court is not required to decide the validity of the 'assent' granted by the President. In the present case, the assent was given after considering extent and nature of repugnancy between the Bombay Rent Act and [Transfer of Property Act](#) as well as the [Presidency Small Cause Courts Act](#). Therefore, it would be totally unjustified to hold that once the assent is granted by the President, the State law would prevail qua earlier other law enacted by the Parliament for which no assent was sought for nor which was reserved for the consideration of the President.”

12. In the present case, the State of M.P. has not been able to show that the assent received from the President either in 1958-59 or in 1995 or before the introduction of Section 33-C in 1976 had received such a particular assent. In other words, Presidential assent to this law which seeks to override

or recreate first charge or charge which alone can rank the State's dues along with those of secured creditors do not seem to have been established. To be fair to the Appellant, this question does not appear to have engaged the attention of the learned Single Judge who went by the plain language of the Section 529A of the 1956 Act and the provisions contained therein.

13. For these reasons, this Court is of the opinion that the matter should be enquired into by the learned Single Judge which the State may establish, according to law, by producing all relevant materials which it may possess as to whether assent was sought in respect of the express repugnancy, i.e. with respect to Section 33-C of the 1958 Act and Section 53 of the 1994 Act.

14. It was urged on behalf of the secured creditors that the State's debts cannot be characterised as charged at all. One of the secured creditors urged that the language of both Section 33-C of the 1958 Act and Section 53 of the 1994 Act does not permit enforcement of a charge but merely declare the existence of a charge. Learned counsel relied upon the judgment of the SC in *Ahmedabad Municipality v. Haji Abdul* AIR 1971 SC 1201, where it was held that provision for merely a charge would mean the enacting a charge without further providing its enforcement against the property charged. In the hands of a transferee for consideration without notice, such charge would not prevail over the dues of secured creditors who are subsequent transferees without notice. Since this question was not urged, the Court is of the opinion that the parties' right to raise the contentions in this regard should also be kept open. At the same time, this Court observes that both *Ahmedabad Municipality (supra)* and a subsequent judgment of the Supreme Court in *AI Champdany Industries Ltd. v. The Official Liquidator and Anr.* [Civil Appeal No.1118/2009] which followed *Ahmedabad Municipality (supra)* have

drawn a distinction between crown debt and the amounts due to a Municipality created by special statute. That apart, it seems a bit startling that the absence of some express words, the entire purpose and intent of the State in the creation of a charge is to be defeated in this manner. In any event, a final opinion in this regard is not expressed; as stated earlier, it is open to the parties to contend on the merits of this question as well.

15. In the light of the foregoing discussion, the impugned decision is hereby set aside and the matter remitted on the above question, i.e. whether the statute reserved for the assent of the President, specifically drew to the notice of the President (i.e. the Central Government) the issue of repugnancy between the provisions, i.e. Section 33-C of the 1958 Act and Section 53 of the 1994 Act on the one hand, and Section 529A and Section 530 of the 1956 Act on the other. The question of applicability or otherwise of the rules enunciated in *Ahmedabad Municipality (supra)* is also kept open for decision.

16. The interim order suspending the further disbursement of the secured creditors shall continue to bind the parties till the learned Single Judge decides the issues remitted in this judgment.

17. The appeals are allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

APRIL 7, 2016