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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 1796 OF 2015

AXIS BANK LIMITED, a banking ] **PETITIONER.**  
company incorporated under the ]  
Companies AXIS Bank Ltd, 1956 ]  
having its registered office at ]  
"Trishul" 3<sup>rd</sup> Floor, Opposite ]  
Samartheshwar Temple, Law ]  
Garden, Ellis Bridge, AXIS Bank Ltd ]  
380 006 and Corporate Office at ]  
AXIS House, C-2, Wadia ]  
International Center, P.B. Marg, ]  
Worli, Mumbai 400 025. ]

**VERSUS**

- 1) State of Maharashtra through the  
Office of the Assistant Commissioner  
of Sales Tax Investigation (D-001),  
Pawar Industrial Estate, 2<sup>nd</sup> Floor,  
Near Makhmali Talao, Edulji Road,  
Charai, Thane (West) 400 601. ]

- 2) Official Liquidator of M/s Jay ] **RESPONDENTS.**  
Mechanical Private Limited, ]  
attached to Hon'ble High Court of ]  
Bombay, having his office at 5<sup>th</sup> ]  
Floor, Bank of India Building, M.G. ]  
Road Fort, Mumbai-23. ]

**APPEARANCE :-**

Mr.Venkatesh Dhond, Senior Counsel a/with Mr. Rohit Gupta and Mr. Nikhil Rajani i/by V. Deshpande and Co. for the petitioner.

Mrs. Jyoti Chavan, AGP for Respondent No.1.  
None for Respondent No.2.

**CORAM : R.M. BORDE &  
A.S.GADKARI, JJ.**

RESERVED ON : 8<sup>th</sup> February, 2017.  
DELIVERED ON : 7<sup>th</sup> March, 2017.

**JUDGMENT (PER : R.M. BORDE, J)**

1) The petitioner Axis bank Ltd., is seeking quashment of the notices dated 12<sup>th</sup> August, 2013 and 19<sup>th</sup> September, 2013 issued by Respondent No.1/Assistant Commissioner of Sales Tax, (Investigation) (D-001), Thane City Division Thane. The petitioner is also aggrieved by the notice in Form No. 318 under section 33 (1) of the Maharashtra Value Added Tax Act, 2002 issued by the Assistant Commissioner of Sales Tax as well as the consequential communication issued by the Reserve Bank of India on 12<sup>th</sup> February, 2015.

2) According to the petitioner, one M/s. Jay Mechanical Pvt. Ltd., (represented by the Official Liquidator, in the instant petition as respondent No.2), approached the petitioner in the year 2008 with a request to extend financial assistance. The petitioner bank extended the financial assistance to the respondent No.2 - Company and in order to secure the finances the Company mortgaged its immovable property as well as hypothecated its assets in favour of petitioner-bank. The respondent No.1 Company defaulted in making repayment of the loan. As such the petitioner-bank was constrained to initiate action for recovery of dues.

3) The petitioner bank through its authorized officer issued notice under section 13 (2) on 6<sup>th</sup> June, 2011 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (for short, SARFAESI Act, 2002) calling upon the Company to repay an amount of Rs. 4,30,51,432.51 ps within a period of 60 days from the date of the notice. In addition to the initiation of proceedings under the provisions of SARFAESI Act, 2002, the Bank has also presented proceedings before the Debt Recovery Tribunal (DRT) under Section 19 of the

Recovery of Debts due to Banks Act, 1993 (for short, “RDDB Act,1993”). The amount claimed in the Original Application No. 464 of 2013 by the petitioner Bank as against the Respondent No.2 Company is to the tune of Rs. 2,81,43,918.17 ps.

4) The Company failed to honour the demand notice dated 6<sup>th</sup> June, 2011 issued under section 13(2) of the SARFAESI Act and as such the petitioner bank took possession of the secured assets on 5<sup>th</sup> December, 2011. The petitioner through its Authorized Officer published the possession notice dated 5<sup>th</sup> December, 2011 in two news papers on 23<sup>rd</sup> December, 2011. The petitioner received a copy of the Prohibitory Order issued by respondent No.1 to Respondent No.2 Company under Section 38 of the Maharashtra Value Added Tax Act, 2002 (for short, MVAT Act, 2002) restraining it from transferring and/or alienating any of the assets of the Company. There was no demand made by Respondent No.1 in respect of the taxes in the notice.

5) Petitioner No.1 through its authorized officer took over physical possession of the property and thereafter in observance of the SARFAESI Act, said property was put to

public auction and sale under sale notices dated 19<sup>th</sup> and 20<sup>th</sup> June, 2012. The auction sale was conducted on 8<sup>th</sup> February, 2013 and one M/s Vinals Precisions Pvt. Ltd., being the highest bidder for an amount of Rs. 3,25,25,000/-the property was sold in its favour. A sale certificate came to be issued on 18<sup>th</sup> March, 2013 in favour of the auction purchaser.

6) The petitioner thereafter on 22<sup>nd</sup> July, 2013 received a notice under Section 38 of the MVAT Act, 2002 issued to Respondent No.2 Company a copy of which was marked to the petitioner calling upon the petitioner to intimate respondent No.1 about transfer undertaken by the said Company. The petitioner received two notices issued by respondent No.1 on 12<sup>th</sup> August, 2013 and 19<sup>th</sup> September, 2013 respectively calling upon the petitioner to deposit an amount of Rs.46,49,317/- with the respondent No.1.

7) The petitioner contends that the petitioner bank being a secured creditor has preferential claim over the secured assets and is entitled to take appropriate steps for realization of the amount due and recoverable from Respondent No.2 Company. The petitioner contends that the provisions of the SARFAESI Act override the provisions of the

MVAT Act, 2002, since the company is under liquidation. It is contended that in view of provisions of Section 529A of the Companies Act, 1956 in the winding up of an insolvent Company, debts due to secured creditor to the extent of such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 (of the Companies Act, 1956) *pari passu* with such dues shall be paid in priority to all other debts. Where a secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security interest such dues shall be paid in priority to all other debts.

8) It is contended that the respondent No.2 company is under liquidation and an application was moved to the Company Court in Company Petition No. 340 of 2011 and the Company was ordered to be wound up by an order dated 19<sup>th</sup> November, 2014 and an Official Liquidator came to be appointed. It is contended that since the Respondent-Company is under liquidation, the petitioner bank, as a secured creditor can stand out of the liquidation proceedings and enforce its security interests. Secondly, it is contended that respondent No.1 has an option to approach DRT for protection of its interests and cannot be permitted to proceed

against the petitioner bank.

9) It is further contended that the action taken by the Respondent No.1 is in violation of provisions of Section 35 of the SARFAESI Act, 2002. It is also contended that since the lis is pending provisions of Section 26-E (inserted by Act 44 of 2016) shall apply and the petitioner shall have priority claim over the claim of the respondent-State. In short, it is contended that Section 26-E of the SARFAESI Act, 2002 is in the nature of a statutory recognition of priority claim of the secured creditor i.e. the petitioner herein.

10) The contentions raised in the petition and the relief claimed is strenuously resisted on behalf of the respondent-State. It is contended that in view of the provisions of Section 37 of the MVAT Act, 2002, the State has the first charge on the property belonging to respondent No.2 in preference to the claim of the petitioner bank. It is contended that in the matter of Thane Janta Sahakari Bank Ltd. Vs. Commissioner of Sales Tax & Ors reported in 148 STC 32, (Writ petition No. 6383 of 2005 decided on 18<sup>th</sup> April, 2006) it has been held that Section 35 of the SARFAESI Act has no effect whatsoever in operation

of Section 38C of the Bombay Sales Tax Act, 1959. Section 35 of the SARFAESI Act, 2002 does not override Section 38C of the Bombay Sales Tax Act, 1959 and, therefore, based on Section 35 of the SARFAESI Act, the bank shall not have precedence or for that matter priority over the statutory first charge under Section 38C of the Bombay Sales Tax Act, 1959. Rather the statutory first charge under Section 38C of the Bombay Sales Tax Act has precedence over the bank's charge based on contract. The judgment of the Division Bench of this Court was carried in appeal to the Hon'ble Supreme Court and the Apex Court has up held the view of the Division Bench of this Court in the matter of Central Bank of India Vs State of Kerala & Ors reported in (2009) 4 SCC 94. It is contended that the provisions of Section 38C of the Bombay sales Tax Act, 1959 is identical to the Section 37 of the MVAT Act, 2002 which has been enacted to replace Bombay Sales Tax Act, 1959. It is further contended that the petitioner was aware of the Sales Tax proceedings and the Salex Tax demand before the property was attached and sold in auction.

11) It would be appropriate to refer to Section 37 and 38 of the MVAT Act, 2002. The relevant provisions are quoted below :-

**37. Liability under this Act to be the first charge -**

Notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer or, as the case may be, person.

**38. Transfer to defraud revenue void.**

- (1) Where, during the pendency of any proceedings under this Act or after the completion thereof, [the Commissioner has reason to believe that the liability of the dealer to pay tax or any other sum payable under this Act, is likely to be in excess of rupees twenty-five thousand and the dealer] creates a charge on, or parts with the possession by any mode of transfer whatsoever, including sale, mortgage, gift or exchange of any of the assets of his business valued at rupees ten thousand or more in favour of any other person with intent to defraud revenue, then, notwithstanding anything contained in any Act or contract to the contrary such charge or transfer shall be void as against any claim in respect of any tax or other sum payable by the dealer as a result of the

completion of such proceedings or otherwise:

PROVIDED that, such charge or transfer shall not be void if made for adequate consideration and without notice of the pendency of the proceeding or of the liability to pay any sum on completion of any proceedings.

(2) Where any person liable to pay tax or other sum payable under this Act has, during the pendency of any proceeding under this Act or after completion thereof, created a charge on or parted with possession by any mode of transfer including sale, mortgage, gift or exchange of any of his assets in favour of any other person and the Commissioner, is of the opinion that such charge or transfer becomes void under sub-section (1), then the Commissioner shall issue a notice and hold enquiry and decide whether the charge or transfer became void under sub-section (1).

(3) If, after holding such enquiry the Commissioner is satisfied that the charge or transfer is void, he shall make an order declaring such charge or transfer to be void for the purposes of this Act.

Explanation: In this section, "assets" include land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee.

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Section 38-C of the Bombay Sales Tax Act, 1959 is pari-materia

to Section 37 of MVAT Act, 2002.

Section 529A and Section 530 of the Companies Act, 1956 read thus :

**Section 529A. :- Overriding preferential payment.** - 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, in so far 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 in so far 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.

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12) There is no controversy in respect of the Respondent company being under liquidation and appointment of an Official Liquidator. There is also no controversy that the assets sold by way of auction by the petitioner bank are the secured assets mortgaged by respondent No.2-company with the petitioner bank. There is also apparently no controversy that the notice is issued under Section 38 of the MVAT Act and Respondent No.1 claimed tax liability against respondent No.2 Company to the tune of Rs.42,49,317/-. The respondent placing reliance on the judgment in the matter of Thane Janata Sahakari Bank Ltd Vs. The Commissioner of Sales Tax (Writ Petition No. 6383 of 2005) decided on 18<sup>th</sup> April, 2006, has strenuously contended that Section 35 of the SARFAESI Act, has no effect whatsoever in the operation of Section 38C

of the Bombay Sales Tax Act. Section 35 of the SARFAESI Act, does not override Section 38C of the Bombay Sales Tax Act and as such bank does not get precedence or for that matter priority over the statutory first charge of respondent No.1 in respect of the sale tax liability. In the aforesaid matter, it was contended by the bank that there being a conflict under section 38-C of the Bombay Sales Tax Act, 1959 and Section 35 of the SARFAESI Act, 2002, being the Central Act, must prevail.

(i) Even otherwise SARFAESI Act being the later enactment having been enacted in the year 2002 must prevail over the Bombay Sales Tax Act, 1959 and under Section 169 of the Maharashtra Land Revenue Code, 1966 the State Government can claim priority over the unsecured debts but the bank being the secured creditor, the bank has first and exclusive charge over the properties of the Company and has priority over the sales tax dues. The Division Bench of this Court has considered the contentions and has recorded the negative finding as has been specified above.

13) The judgment of the Division Bench of this Court in the matter of Thane Janata Sahakari Bank was a subject to

challenge along with the other Special Leave Petitions, the first one being presented by the Central Bank of India against the State of Kerala & Ors to the Hon'ble Supreme Court reported in (2009) 4 SCC 94.

14) The Hon'ble Supreme Court delivered the common judgment in the matter of Central Bank of India v. State of Kerala reported in (2009) 4 SCC 94 and in paragraph 158 of the judgment observed that, “the DRT Act and the Securitisation Act do not create first charge in favour of banks, financial institutions and other secured creditors and the provisions contained in Section 38-C of the Bombay Act and Section 26-B of the Kerala Act are not inconsistent with the provisions of the DRT Act and the 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.”

It would be relevant to refer to paragraphs 114 to 116 of the Judgment, which read thus :

114. “By enacting various provisos to sub-section (9) of Section 13, the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529-A of the Companies Act, 1956 vis-

a-vis the secured creditors like banks is duly respected. This is the reason why first of the five unnumbered provisos to Section 13(9) lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. This and other provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognise the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.

115. It is thus clear that provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditors in accordance with Section 13 thereof.

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or the Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38-C of the Bombay Act and Section 26-B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of the State's charge over other debts, which was recognised by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws.”

15) The Hon'ble Apex Court has taken note of the provisions of Section 529-A of the Companies Act, 1956 in respect of Company in liquidation and has observed that the

legislator has insured the priority given to the claim of the workers vis-a-vis secured creditors like banks. Section 529-A (b) refers to debts due to secured creditors and such claim is parri passu with such dues like workmen's dues and shall be paid in priority to all other debts. In paragraph 126 of the judgment in the matter of Central Bank of India vs. State of Kerala, the Apex Court has observed thus :

126. "While enacting the DRT Act and the Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529-A of the Companies Act or Section 11 (2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies."

16) The petitioner contends that judgment of the Supreme Court delivered by three-Judges Bench in the matter of Central Bank of India (supra) shall have to be considered in preference to the decision in the matter of Allahabad Bank Vs. Canara Bank & Ors (2000) 4 SCC 406. In the instant matter, the question is not simplicitor relating to priority of claims based on appreciation of Section 37 of the MVAT Act and Section 35 of the SARFAESI Act. However, distinguishing feature is that the Respondent company is under liquidation and as such provisions of Section 35 of the SARFAESI Act are attracted which lends precedence to the claim of a secured creditor. An identical issue was raised in the matter of SICOM Ltd vs. State of Maharashtra through the Assistant Commissioner of Sales Tax and O.L. of Konkan Steel Ltd and the Thane Janata Sahakari Bank Ltd Vs. State of Maharashtra through the Asstt. Commissioner of Sales Tax and OL of United Airtech Pvt Ltd. reported in 2010(6) Bombay Cases Reporter 537 in the matters arising before the Division Bench it was claimed on behalf of the State Government that in view of provisions of Section 38C of the Bombay Sales Tax Act statutorily the State Government becomes a secured creditor

and therefore is entitled to payment of its dues along with secured creditor and the workers. The contention raised by the State Government was upheld by the learned Single Judge relying upon the judgment of the Supreme Court in the matter of Central Bank of India v. State of Kerala & Ors (2009) 4 SCC 94. The appellants before the Division Bench were covered by the provisions of Section 529A and 530 of the Companies Act, 1956. The Division Bench of this Court considered the arguments raised on behalf of the State relying upon the judgment in the matter of the Thane Janata Sahakari Bank Ltd. v. The Commissioner of Sales Tax & Anr and recorded its conclusions in paragraph Nos.11 and 12 of the Judgment as recorded below :

11. The learned Counsel appearing for the State Government relied on observations made in the judgment of the Division Bench in The Thane Janata Sahakari Bank Ltd's case, in that case the Court was not considering the situation whether the provisions of Section 529A of the Companies Act operate. The Division Bench in that case was considering the

question whether in view of the provisions of the Securitisation Act and D.R.T. Act, the provisions of Section 38C apply. The Court held that the provisions of the Securitisation Act do not create any first charge in favour of the Banks and financial institutions. In other words, the Securitisation Act does not have any provisions which will displace operation of the provisions of Section 38C of the Bombay Sales Tax Act. The Division Bench, thereafter, held that because Section 38C operates, the amount of sales-tax is elevated to the level of dues of land revenue and therefore under the Maharashtra Revenue Code it becomes paramount charge. The Division Bench in this case was not considering the case, where Section 38C does not operate. So far as the judgment of the Supreme Court in Central bank of India is concerned, there also the Supreme Court was considering the provisions of the Securitisation Act vis-a-vis the provisions of Section 38C of the Bombay Sales Tax Act and other parameteria provisions. In our opinion, paragraph 148 of that judgment makes the position clear.

148. After decree of the suit, the appellant along with IFCI and IDBI filed an application before the Company Judge for consideration of their claim on pro rata basis and also for exclusion of the claim of Punjab National Bank. The learned Company Judge allowed the first prayer of the appellant but declined the second one by relying upon the judgment in Allahabad Bank's case (supra). The intra-court appeal was dismissed by the Division Bench by relying upon the provisions of Section 529A. On further appeal, this Court referred to the judgment in Allahabad Bank's case (supra) as also Rajasthan State Financial Corporation v. Official Liquidator MANU/SC/1033/2005 : (2005) 8 SCC 190 and held :

32. 'Allahabad Bank' therefore, is not an authority for the proposition that in terms of Section 529A of the Companies Act the distinction between two classes of secured creditors does no longer survive. The High Court, thus, in our considered opinion, was not correct in that behalf.

33. In fact in Allhabad Bank it was categorically held that the adjudication officer would have such powers to

distribute the sale proceeds to the banks and financial institutions, being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priority in law.

34. Section 529A of the Companies Act no doubt contains a non obstante clause but in construing the provisions thereof, it is necessary to determine the purport and object for which the same was enacted.

35. In terms of Section 529 of the Companies Act, as it stood prior to its amendment, the dues of the workmen were not treated pari passu with the secured creditors as a result whereof innumerable instances came to the notice of the Court that the workers may not get anything after discharging the debts of the secured creditors. It is only with a view to bring the workmen's dues pari passu with the secured creditors, that Section 529A was enacted.

36. The non obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the

legislative policy. Only because the dues of the workmen and the debts due to the secured creditors are treated *pari passu* with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of *inter se* priorities amongst the secured creditors had thereby been intended to be given a total go-by.

37. A non obstante clause must be given effect to, to the extent Parliament intended and not beyond the same.

38. Section 529A of the Companies Act does not *ex facie* contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read there into things, which Parliament did not comprehend.

12. The above observations make it clear that by operation of Section 529A, priority is given to the dues of the secured creditors and workers over State first statutory charge. In this view of the matter, therefore, in our opinion, the learned single Judge was not justified in holding that dues of the State Government are recoverable *pari passu* with the dues of the Appellant.”

17) It is, thus, clear that in view of provisions of Section 529A of the Companies Act, priority is given to the dues of the secured creditor and the workers over the statutory charge claimed by the State. The Judgment delivered by the Division Bench of this Court in the matter of SICOM Ltd. was subject to challenge by the State before the Supreme Court in Special Leave to Appeal (CC 1965/2011) decided on 4<sup>th</sup> March, 2011. The Hon'ble Apex Court while dismissing the Special Leave Petition has observed thus :

“We have heard learned counsel for the petitioner and perused the record.

In Central bank of India vs. State of Kerala (2009) 4 SCC 94, this Court interpreted Section 38-C of the 1959 Act and similar provisions contained in Sales Tax Legislations of other States and held that the first charge created by the legislator will prevail over the dues of other secured creditors including the Banks and Financial Institutions. In that case, the three Judge Bench referred to large number of precedents on the subject including the judgments in State of Bank of Bikaner & Jaipur vs. National Iron and Steel Rolling Corporation – (1995) 2 SCC 19; Dena Bank vs. Bhikhabhai Prabhudas Parekh

& Co. - (2002) 5 SCC 694; State of M.P. vs. State of Bank of Indore (2002) 10 SCC 441; Allahabad Bank vs. Canara Bank (2000) 4 SCC 406 and approved the ratio of the judgment of Division Bench of the Kerala High Court in Recovery Officer as Assistant Provident Fund Commissioner vs. Kerala Financial Corporation ILR (2002) 3 Ker 4, which held that the primacy of the first charge created under Section 11(2) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 will prevail over the primacy of the first charge created under Section 46-B of the State Financial Corporations Act, 1951.

Since the 1956 Act is a Central Legislation and 1959 Act is a State Legislation, and the former legislation is subsequent in point of time, the non obstante clause contained in Section 529 A of the 1956 Act will override the non obstante clause contained in Section 38-C of the State Act.

Even from the plain language of Section 38-C of the 1959 Act, it is clear that the non obstante clause contained therein operates subject to any other provision contained in the Central Act by which the first charge is created. Section 529-A of the 1956 Act declares that notwithstanding anything contained in any other provision of this Act or any other law for the time

being in force, for the winding up of a company, the dues of the workers shall be paid in priority to all other dues.

In view of the above, we do not find any valid ground to interfere with the judgment under challenge.

The special leave petition is, accordingly, dismissed.”

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18) It would be appropriate to refer to the judgment delivered by the Supreme Court in the matter of Allahabad Bank Vs. Canara Bank & Ors (2000) 4 SCC 406. The Supreme Court has observed in paragraph 62 of the Judgment in the matter of Allahabad Bank's case that the secured creditors fall under two categories; those who desire to go before the Company Court and those who like to stand outside the winding up. The observations made in paragraphs 63 to 65 are relevant for the purposes those are as below :

“63. The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of that Act states that a secured creditor who wishes to come before the official liquidator

has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section [529\(2\)](#). Till today, the Canara Bank has not made it clear whether it wants to come under this category.

64. The second class of secured creditors referred to above are those who come under Section [529A\(1\)\(b\)](#) read with proviso (c) to Section [529\(1\)](#). These are those who opt to stand outside the winding up to realise their security. Inasmuch as Section [19\(19\)](#) permits distribution to secured creditors only in accordance with Section [529A](#), the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the Company Court (here, the Tribunal) and claim priority over all other creditors for release of amounts out of the other monies lying in the Company Court (here, the Tribunal). This limited priority is declared in Section [529A\(1\)](#) but it is restricted only to the extent specified in Clause (b) of Section [529A\(1\)](#). The said provision refers to Sub-clause (c) of the proviso to Section [529\(1\)](#) and it is necessary to understand the scope of the said provision.

65. Under Sub-clause (c) of the proviso to Section [529\(1\)](#), the priority of the secured creditor who stands outside the winding up is confined to the "workmen's portion" as defined in Section [529\(3\)\(c\)](#). 'Workmen's portion' means the amount which bears to the value of the security, the same

proportion which the amount of the workmen's dues bears to the aggregate of (a) workmen's dues and (b) the amounts of the debts due to all the creditors. This is explained in the illustration under the said provision. If the workmen's dues in all are (say) Rs. 1 lakh and the debt due to all secured creditors is Rs. 3 lakhs, the total amount due to all of them comes to Rs. 4 lakhs. Therefore, the workmen's share come to 25% (Rs. 1 lakh out of Rs. 4 lakhs). Now if the value of the security of a secured creditor (like Canara Bank) is Rs. 1 lakh, the 'workmen's portion' will be Rs. 25,000 which is the pro-rata amount to be shared by the said secured creditor. By virtue of Section [529A\(1\)\(b\)](#) his priority over all others out of other monies available in the Tribunal is restricted to Rs. 25,000 only.

19) Coming to the facts of the instant matter, it is open for the petitioner to stand outside the winding up proceedings and claim enforcement of its Security Interest. If the petitioner instead of deciding to stand outside preferred to go before the Company Court for decision, it would become necessary to relinquish its security in accordance with Insolvency Rules mentioned in Section 529. The petitioner is a Secured Creditor in accordance with Ind clause under Section 529-A(i) (b) read with proviso (c) to Section 529 (I) having overriding preferential claim and opts to stand outside winding up to realize its security. In view of clause (c) to the proviso to

Section 529 (I) the priority of the Secured Creditor who stand outside the winding up is confined to workmens portion as defined in Section 529 (iii) (c). The petitioner who stands outside the winding up proceedings in view of provisions of Section 529-A can surely have priority over the claim of the State in respect of statutory dues. In the matter of Pegasus Assets Reconstruction Pvt. Ltd. Vs. Haryana Concast Ltd & Anr reported in (2016) 4 SCC 47 the Hon'ble Supreme Court considered the provisions of Section 529-A together with 529 of the Companies Act and the aspect of overriding effect of the provisions of Section 529-A concerning liability of the workmen of the Company.

20) The main question of law framed for consideration in the matter of Pegasus Assets Reconstruction Pvt. Ltd. (supra) is as below :

“Whether the Company Court enjoys supervisory jurisdiction to issue direction to a securitisation company/secured creditor in connection with a company in liquidation or under winding up in the face of Section 13 of the SARFAESI Act or securitisation company opting to stand outside the winding up is absolutely free to utilise the sale proceeds of assets of the company in liquidation?”

21) While dealing with the question, the Hon'ble Supreme Court has quoted, with agreement, the views recorded in paragraph 26 of the Judgment in the matter of Megnostar Telecommunications (P) Ltd reported in (2012) 193 DLT 371, delivered by the Delhi High Court, as under:

“26. If it were to be held that the Official Liquidator (who acts under the dictates of the Company Court) is to be also associated with the sale, it will naturally open up the fora of the Company Court also for entertaining matters relating to such sale and which as aforesaid is not only likely to lead to conflicts but is also contrary to the spirit of the SARFAESI Act of sale being without the intervention of the Court”.

It is further observed by the Apex Court in paragraphs 22 and 23 of the judgment as quoted below:-

“22. In contrast, the SARFAESI Act was enacted in 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. Inter-alia, one of the main objects

of this Act is to clothe the banks and financial institutions in India with power to take possession of securities and sell them. All its significant provisions have been noted in detail in **Mardia Chemicals** in which vires of this Act were examined and upheld.

23. A reading of Sections [9](#) and [13](#) of the SARFAESI Act leaves no manner of doubt that for enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the court or tribunal but detailed procedure has also been prescribed to take care of various eventualities such as when the borrower company is under liquidation for which proviso to sub-section (9) of Section [13](#) contains clear mandate keeping in view the provisions of Section 529 and 529A of the Companies Act, 1956. Since significant amendments were introduced in Section 529 while inserting Section 529A through Amendment Act 35 of 1985, effective from 24.5.1985 and with the aid of a non obstante clause in sub-section (1) of Section 529A workmen's dues were given preference over other dues and made to

stand pari passu with dues of the secured creditors, in case of apparent conflict, this Court through various judgments has upheld the proceedings under the RDB Act as it happens to be a later Act with overriding effect over other laws. The interest of the workmen in respect of dues payable to them as per Section 529 and 529A of the Companies Act has been protected by permitting, wherever necessary, association of the Official Liquidator with the proceedings before the Debts Recovery Tribunal under the RDB Act. In our considered judgment, the same view is required to be taken in context of SARFAESI Act also, for the additional reason that Section [13](#) requires notice to the borrower at various stages which in the case of a company under winding up being a borrower would mean requirement of notice to the Official Liquidator. The Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules') framed under the provisions of the SARFAESI Act also require notice upon the borrower or his agent at different stages. For sale of immovable secured assets, as per Rule 8, the authorized officer can take possession

by delivering a Possession Notice to the borrower and by affixing Possession Notice on the outer door or at some conspicuous place of the property. Before the sale also, the authorized officer is required to serve to the borrower a notice of 30 days. Thus the Rules also ensure that the Official Liquidator is in knowledge of the proceedings under the SARFAESI Act in case the borrower happens to be a company under winding up. As a borrower, the Official Liquidator has ample opportunity to get the details of the workers dues as ascertained under the Companies Act, placed before the authorized officer and seek proper distribution of the amount realised from the sale of secured assets in accordance with various provisos Under Sub-section (9) of Section [13](#) of the SARFAESI Act.”

22) Though the learned counsel appearing for the respondent State is justified in contending in normal circumstances in view of the provisions of SARFAESI Act (Unamended) primacy can be extended to the provisions like

Section 38-C of the Bombay Sales Tax Act or Section 37 of the MVAT Act. Section 13 envisages application of money received by the secured creditor and by adopting any of the measures specified in Section 13 (4) merely regulates distribution of money received by the secured creditor and it does not create first charge in favour of the secured creditor. Though in normal course in view of Section 35 of the SARFAESI Act, 2002 no priority can be claimed by the bank or financial institutions over the State's statutory first charge in the matter of recovery of dues of sales tax etc. However, in respect of company under liquidation, in view of the provisions of Section 529-A of the Companies Act, a distinction has to be made and as has been laid down by the Division Bench of this Court in the matter of SICOM Ltd, which view has been upheld by the Supreme Court, the claim of the secured creditor in respect of the company being under liquidation shall have the priority in view of the language applied in Section 529-A of the Companies Act, 1956. It also must be taken note of that there is statutory recognition of priority claim of the secured creditor in view of the amendment brought into effect by virtue of Act No.44 of 2016 thereby introducing section 26E

providing for priority to secured creditor over all other debts and all taxes, cess and other rates payable to Central Government or the State Government or the Local Authority. The applicability of provisions of Section 31-B of RDB Act which is pari materia to Section 26E of the SARFAESI Act was subject matter for consideration before the Full Bench of the Madras High Court in the matter of Assistant Commissioner (CT) Chennai vs. the Indian Overseas Bank decided on 11.11.2016 and the Full Bench has observed in paragraph 4 of the Judgment that “the law having now been come into force naturally it would govern the rights of the parties in respect of even lis pendence” We do not propose to analyse the Full Bench judgment delivered by the Madras High Court.

23) However, for the reasons recorded in the foregoing paragraphs of the instant judgment, we are of the opinion that the petitioner bank has a priority claim over the statutory dues claimed by respondent no.1.

24) The impugned notices dated 12<sup>th</sup> August, 2013 and 19<sup>th</sup> September, 2013 deserve to be quashed and set aside and those are accordingly quashed and set aside. As a consequence thereof the notices issued in Form No. 318 to the Reserve

Bank of India and the communication issued by the Reserve Bank of India on 12<sup>th</sup> February, 2015 shall not be enforced.

25) Rule is accordingly made absolute.

26) In the facts and circumstances of the case, there shall be no order as to costs.

(A.S. GADKARI,J)

(R.M. BORDE, J.)