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WP (MD) NOS. 6238 OF 2011, 2747 OF 2013 & 20355 OF 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDERS RESERVED ON: 14 / 06 / 2018

ORDERS PRONOUNCED ON: 03 / 11 / 2020

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

WP (MD) NOS. 6238 OF 2011, 2747 OF 2013
AND 20355 OF 2014

AND CONNECTED MISCELLANEOUS PETITIONS
(MP (MD) .1/11, MP (MD) .2/12, MP (MD) .1/13, MP (MD) 1 & 2/14)

WP (MD) NO. 6238/2011

M/s.Dollar Industries (Spinning Division)
Rep. By its General Manager Shri K.Gururaj
Minukkampatti Post, Vedasandur Taluk,
Dindigul - 624 711. ..

Petitioner

Vs.

1.The Assistant Commissioner
Office of the Assistant Commissioner of
Central Excise
Customs and Service Tax
Dindigul - I Division, Tax Recovery Cell,
No.68, Nehruji Nagar, R.M.Colony Road,
Dindigul - 624 001.

2.The Deputy Commissioner
Office of the Deputy Commissioner of
Central Excise
Dindigul - I Division
No.30, Mengles Road, Dindigul - 624 001.

3.Commissioner of Central Excise
Central Revenue Building,
Bibikulam,
Madurai.

4.State Bank of India
Stressed Assets Management Branch
"Red Cross Building"
32, Monteith Road, Egmore,
Chennai - 600 008. ..

Respondents



PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, to call for the records of the first respondent in C.No.IV/11/04/2009-TRC and to quash the demand dated 24.02.2011 and 24.05.2011 for payment of arrears of Rs.12,50,577/- along with interest and duty foregone on plant and machinery material without payment of duty under EOU Scheme made thereon.

For Petitioner : Mr.I.Irulappan
For Respondents :
1 to 3 : Mr.R.Aravindan
For Respondent 4 : Mr.S.Sethuraman

WP (MD) NO.2747 / 2013

M/s.Dollar Industries Ltd.,
Rep. By its Factory Manager S.Nagaraj
S.F.No.440, V.Pudukottai Village,
Vedasanthur Taluk, Dindigul District.

.. Petitioner

Vs.

1.The Employees' State Insurance Corporation
Rep. by its Recovery Officer
Office of the Recovery Officer
Sub Regional Office (Madurai)
2nd West Street, K.K.Nagar,
Madurai - 20.

2.The State Bank of India
Stressed Assets Management Branch
"Red Cross Buildings"
32, Monteith Road, Egmore,
Chennai - 600 008.

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Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, to call for the records relating to the impugned order vide Ref. No. 57 / RRC / 00 / 047568 / 000 / 0101 / SRO/MDU/12 dated 29.01.2013 issued by the 1st respondent and quash the same.

For Petitioner : Mr.T.Antony Arul Raj
For Respondent-1 : Mr.P.Ganapathysamy
For Respondent-2 : Mr.S.Sethuraman



WP (MD) NO.20355 / 2014

M/s.Dollar Industries Ltd.,
Rep. by its Factory Manager S.Nagaraj
S.F.No.440, V.Pudukottai Village,
Vedasanthur Taluk, Dindigul District.

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"Red Cross Buildings"
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.. Respondents

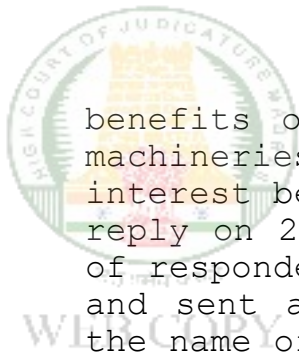
PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, to call for the records relating to the impugned vide Ref.No. 57 / RRC / 00 / 047568 / 000 / 0101 / SRO / MDU/1625/14 dated 21.11.2014 issued by the 1st respondent r/w. Ref.No. SRO/MDU/RRC/47568/0101 dated 05.12.2014 issued by the 1st respondent and quash the same.

For Petitioner	:	Mr.T.Antony Arul Raj
For Respondent-1	:	Mr.P.Ganapathysamy
For Respondent-2	:	Mr.S.Sethuraman

COMMON ORDER

WP (MD) NO.6238 OF 2011

The writ petitioner is an auction purchaser of the properties belonging to a defaulter, namely M/s.Rajam Mills Spinning Company Limited in a public auction conducted on 19.06.2010 by the fourth respondent under the provision of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act]. A sale certificate was issued, confirmed and duly registered in favour of the petitioner. After taking over of possession and commencement of business, a demand was made by the respondents 1 to 3 that in view of cancellation of concession



benefits on 20.04.2010, duty foregone at the time of purchase of machineries under the EOU Scheme to the tune of Rs.12,50,577/- plus interest be recovered from the petitioner. The petitioner has sent a reply on 28.04.2011 and 10.05.2011. Despite the same, the officials of respondents 1 to 3 visited the petitioner premises for inspection and sent a letter dated 24.02.2011 to the petitioner's address in the name of M/s.Rajam Mills Spinning Company Limited, marking a copy to the petitioner demanding payment of Rs.12,50,577/- failing which recovery action will follow. Immediately, the petitioner wrote a letter to the fourth respondent on 10.05.2011, who in turn by reply dated 18.05.2011 directed the petitioner to deal with respondents 1 to 3 directly. In reply to its letter dated 10.05.2011, respondents 1 to 3 sent a reply dated 24.05.2011, which virtually rejected their response dated 10.05.2011. Hence, the writ petition.

2. According to the petitioner, he had purchased the land, buildings and machineries at a huge cost of Rs.31,00,02,500/- and invested an additional sum of Rs.10 Crores, employed more than 300 persons and functioning in full swing. At this juncture, any order of attachment will put the petitioner to very serious and irreparable loss and prejudice. The auction was conducted by a secured creditor, in which, the respondents 1 to 3 do not have any charge and Section 11 of the Central Excise Act, 1944, does not create any charge over arrears of tax. As per the judgment of the Hon'ble Supreme Court in **UNION OF INDIA AND OTHERS VS. SICOM LIMITED AND ANOTHER [2009 (2) SCC 121]** Crown's preferential right is confined only to unsecured debts and not to secured debts. In fact, respondents 1 to 3 have addressed a letter to the fourth respondent for recovery of arrears due to them on 29.03.2010, which was replied by fourth respondent on 11.06.2010 that if any surplus amount left after Bank's dues are met, they will make payment towards Central Excise arrears. In spite of receiving the letter from fourth respondent, they have kept quiet without taking any action to exercise their preferential right or claim that from the defaulter, but demand it from the petitioner, which totally unsustainable in view of the following judgments:

(i) **AHMEDABAD ELECTRICITY CO. LTD., VS. GUJARAT INNS PVT. LTD. [2004 (3) SCC 587]**

(ii) **HARYANA STATE ELECTRICITY BOARD VS. HANUMAN RICE MILLS, DHANAURI AND OTHERS [2010 (9) SCC 145]**

(iii) **SPECIAL OFFICER, COMMERCE, NORTH EASTERN ELECTRICITY SUPPLY COMPANY OF ORISSA (NESCO) AND ANOTHER VS. RAGHUNATHAN PAPER MILLS PRIVATE LIMITED AND ANOTHER [2012 (13) SCC 479]**



(iv) **SOUTHERN POWER DISTRIBUTION COMPANY OF
TELENGANA LTD.,. VS. GOPAL AGARWAL AND OTHERS [2017
SCC ONLINE SC 819]**

(v) **UTI BANK LTD. VS. THE DEPUTY COMMISSIONER
OF CENTRAL EXCISE [2006 (5) CTC 801] [Full Bench -
Madras].**

(vi) **THE ASSISTANT COMMISSIONER (CT) VS. THE
INDIAN OVERSEAS BANK [2016 (6) CTC 769] [Madras High
Court].**

(vii) **UNION OF INDIA AND OTHERS VS. SICOM
LIMITED AND ANOTHER [2009 (2) SCC 121]**

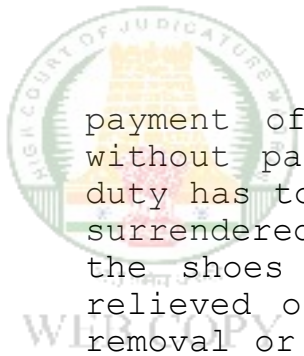
(viii) **M/S.WELL STORES (MADRAS) PRIVATE
LIMITED AND OTHERS VS. THE TAX RECOVERY OFFICER - IV
AND OTHERS [WP NOS.40656 OF 2015, 34703 OF 2016 AND
3572 OF 2017 DECIDED ON 18.07.2017] [Madras High
Court].**

(ix) **MAHARASHTRA TUBES LTD. VS. STATE
INDUSTRIAL & INVESTMENT CORPORATION OF MAHARASHTRA
LTD. AND ANOTHER [1993 (2) SCC 144]**

(x) **SOLIDAIRE INDIA LTD., VS. FAIRGROWTH
FINANCIAL SERVICES LTD., AND OTHERS [2001 (3) SCC 71]**

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3.Countering the submissions, respondents 1 to 3 would contend that M/s.Rajam Mills Spinning Company Limited were granted an industrial license under 100% Export Oriented Unit (EOU) Scheme for manufacture and export of cotton vide LOP No.PER-A/2000/202/EOU/TN/2360 dated 06.11.2000 and Green Card No.833/MEPZ, dated 07.11.2000 was issued by the Development Commissioner, MEPZ, Chennai, subject to terms and conditions. Private Bonded Warehouse License No.01/2001 dated 15.02.2001 by Assistant Commissioner of Central Excise, Dindigul - I Division was issued and renewed upto 13.04.2010. The Licensee had executed B-17 Bond on 22.02.2011 and another on 21.03.2005, binding themselves for discharge of obligations under Central Excise Act, 1944, and Customs Act, 1962. The manufacturer commenced production from 14.04.2005. The LOP granted is valid for five years and the manufacturer has to fulfill export obligations within the stipulated period for availing exemption from payment of duty, for the capital goods imported under EOC Scheme without payment of duty. They are bound by the provision of the Act on the goods manufactured. Since the Licensee failed to apply for renewal nor replied to the show cause notice dated 20.04.2010 declared that they were no more an EOU and cancelled LOP. Therefore, all capital goods imported by the Assessee without

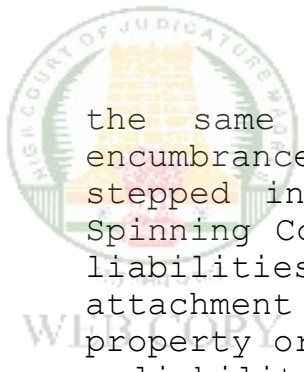


payment of customs duty and capital goods procured indigenously without payment of Central Excise duty loses concession and the duty has to be paid. The Assessee failed to make the payment and not surrendered the registration as EOU. But the petitioner stepped into the shoes of M/s.Rajam Mills Spinning Company Limited cannot be relieved of the liability. As per the provisions of Customs Act, removal or attempt to remove of dutiable goods from customs area without permission are liable for confiscation. M/s.Rajam Mills Spinning Company Limited have removed the imported goods into DTA and failed to fulfill or observe the conditions, therefore, the imported goods are liable for seizure. Thus, the Assessee is liable to pay the duty prior to the date of alleged sale and public auction and the right of the department proceed against the goods remains unaffected by the sale or purchase. The Assessee cannot transfer a better right to the purchaser. Even though the sale is made by the Bank, it is deemed as a direct sale by the Assessee to the writ petitioner in the eyes of law. As per the judgment in **CENTRAL BANK OF INDIA VS. STATE OF KERALA AND OTHERS [2009 (6) CTC 656]** Governmental dues will have preference over the dues payable to the financial institutions and Section 13 of the SARFAESI Act does not create first charge. As per the judgment in **FRIENDS TRADING CO. VS. COMMISSIONER OF CUSTOMS, JALANDHAR [2011 (267) ELT 57 (Tri Delhi)]** it was held that public revenue not to suffer on account of fraudulent transfer. Section 11 of the Central Excise Act, 1944, empowers recovery of excise due from the assets owned by the predecessors and the liabilities could be recovered for the successor as per **MACSON MARBLES PVT. LTD., VS. UNION OF INDIA [2008 (15) SCC 481]**. Therefore, the demand made by the department is in order. Against the notice issued, the petitioner has a remedy of appeal. Non-exhaustion of alternative remedy disentitles the petitioner to maintain the writ petition. Public interest shall not be prejudiced and the Government money shall be safeguarded from the fraudulent transfers. Therefore, a prayer is made to dismiss the writ petition.

4.Fourth respondent has taken a dual defense to disown its liability relying on the judgment of the Full Bench of this Court that Crown debt will not prevail over the secured debt. Even if it prevails over, in the publication calling for bids, it is specifically disclosed that a demand of central excise arrears to the tune of Rs.12,50,577/- made by respondents 1 - 3. The purchaser, with open eyes, had purchased the property. Hence, they are not liable to make any payment.

5.I have considered the submissions.

6.The facts are not disputed. According to the petitioner, they purchased the property in a public auction conducted on 19.06.2010 by the 4th respondent under the provisions of the SARFAESI Act. The purchase made by the petitioner is an absolute purchase and



the same has been registered, possession delivered, free of encumbrance. According to the respondents, the petitioner has stepped into the shoes of the purchaser namely, M/s.Rajam Mills Spinning Company Limited and therefore, the purchase is attached is liabilities. Now that, it has to be analysed as to whether there was attachment of liabilities and the same was passed along with the property or not? When the question of recovery comes, there shall be a liability to pay the sum? and the liability to pay the debts in general is different from the secured debts.

7.It is well settled that in the case of ordinary or unsecured debts, preference goes to the Crown's debt. The wages of the employees, statutory payments and other liabilities to the Government or Local Body shall be appropriated first and the residue shall be shared among the creditors on pro rata basis. It is not the same case in respect of the secured debts, the secured creditor will prevail over the other debtors. The preference of the crown debt, will not be applicable in the cases of secured debts.

8.In the instant case, one M/s.Rajam Mills Spinning Company Limited was granted a license as Export Oriented Unit (EOU) and availed the exemption of duty under the Customs and Central Excise Act, 1944. In that case, the availment of concession or tax exemption is personal to the licensee or assessee in favour of whom it was granted. It is not transferable without permission from the authorities concerned. When the sale of goods takes place, the liability is attached with the goods and the assessee is liable to pay the duty or tax in respect of the goods manufactured or sold. On the other hand, when the property sold on outright purchase, the concession granted for manufacturing and selling the goods cannot be extended to the property unless there is a prior charge over the same. The grant of licence or permission to import machineries or goods or materials or manufacture and sell goods at concessional duty applies only to the grantee or licensee concerned and as such, it is a right or concession in personam to such licensee or assessee and it cannot be extended to third parties without permission.

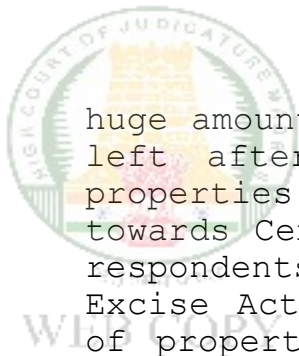
9.In so far as the sale of properties is concerned, it is two fold. One, the properties of an ongoing concern, along with the business sold. In other words, the transfer of business or taking over of a Sick industry or revival of a Closed industry the same business is continued. The continuance of the same business involves the same employees, the same plant and machinery, the benefits of the tax exemption or concession, goodwill and also the old and new customers. In such cases, by transfer or revival or taking over, the business as such is continued and the advantage or disadvantage, profit and liabilities also go along with it. When the benefits and goodwill of the business is taken over or revived, automatically the liability also goes along with that. The relationship between the parties as Licensor - Licensee, Assignor - Assignee, Creditor - Debtor continues. In such cases, the right to recover continues,



along with the business. But, on the contrary to the same, when the properties alone are sold, without taking over or continuing the business, the right to recover the liabilities of the business is restricted. In sale of the property without ongoing business of later type, it is only the land, building, plant and machinery or whatsoever are sold, without venturing into the business activity of the defaulter or erstwhile establishment or company or factory. The purchase is only with respect to the properties and not that of the business. The purchaser may use the property or commence his business in the same nature or of a different nature. For example, the purchaser may modify the industry and start a new business of the same nature or he may use the property for some other new business or in other cases, he may sell away the plant and machinery and use the land and building for an entirely different purpose. For example, the buildings can be converted into School or Marriage Hall or Commercial Complex etc. In yet other cases, the land alone may be sold and the building may be put to his personal use or on the reverse, the land and building may be sold only using the plant and machineries at a different place. In cases of major industries, those properties can be used for starting a new division of the same or different business. Therefore, in all these cases, there is no relationship between the auction purchaser and the previous owner of the property or his business or the transaction personal to him. The transaction of the previous owner and his liability over the business are not binding on the third party purchaser. In other words, the business of the erstwhile owner of the industry, if not transferred, the liabilities will be personal to him. The licensee can start a new business with the same license after clearing the dues at a different property. Therefore, purchase of the property in an auction will not be binding on the third party purchaser.

10. In the instant case, the borrower M/s. Rajam Mills Spinning Company Limited, borrowed from the fourth respondent. The fourth respondent is the lead bank to the consortium of the banks. The borrower was indebted to various financial institutions and on their behalf, a common recovery proceedings was initiated. Materials goes to show that a notice was issued on 10.02.2010 under Section 13(4) of the SARFAESI Act, 2002. On 14.02.2010, possession notice was published in the newspapers. Again on 19.06.2020, a tender cum auction sale notice was published by a leading Bank namely, State Bank of India, fixing 02.08.2010 as date of auction.

11. It is seen that the respondent Nos. 1 to 3 have issued a letter to the fourth respondent Bank on 23.03.2010 stating that the borrower owed a sum of Rs. 12,50,577/- plus interest being the arrears of excise duty. Since the properties were pledged cum hypothecated with State Bank of India, Indian Overseas Bank and State Bank of Mysore, the respondents 1 to 3 have requested to include the excess duty payable by the defaulter also the recovery amount and to remit the same into Central Excise Department. It is also noted that the fourth respondent by his reply dated 11.06.2010 informed the respondents 1 to 3 that the defaulted company owes a



huge amount to the consortium of banks and if any surplus amount is left after Bank's dues are met from and out of the sale or properties of the defaulter company, they will make the payment towards Central Excise arrears. After the receipt of the reply, the respondents 1 to 3 kept quite. Even though the Customs and Central Excise Act, confers power for confiscation, seizure and attachment of properties of the defaulting company, they have not taken any action. It means that the respondents 1 to 3 accepted the priority right of the financial institution under the provisions of SARFAESI Act and that they do not have any charge or hold over the sale.

12.As per Section 111(j) of Customs Act, 1962, any dutiable or prohibited goods removed or attempted to be removed from customs area or warehouse without permission of the proper officer or contrary to the terms of such permission, such goods are liable for confiscation.

13.Likewise, as per Section 111(O) of the above Act, any goods exempted, subject to any conditions from duty moved in violation of conditions are liable for confiscation. If payment of duty is not made, Section 110 of the Customs Act, make it liable for confiscation.

14.As per Section 125 of the Customs Act, read with Rules 24 and 25 of the Central Excise Rules, 2002, has power to seize the goods.

15.As per Section 112 and 114(A) of the Customs Act, penal action can be taken against the defaulter. Therefore, there is lot of powers conferred on the authorities to confiscate the assessee and assess the goods. However, after writing a letter dated 23.03.2010, the respondents 1 to 3 have kept quite. Unless the respondents have any prior charge or attachment over the property, they cannot lay their claim prevailing upon the secured creditor.

16.Admittedly, the fourth respondent being a secured creditor, as per the provisions of the SARFAESI Act, has preferential claim over the debt by sale of the properties. When the claim of the secured creditor is satisfied whatever surplus left is open for distribution among the other creditors.

17.The contention of the respondents 1 to 3 that as per the judgment of the Hon'ble Supreme Court in **CENTRAL BANK OF INDIA VS. STATE OF KERALA AND OTHERS [2009 (6) CTC 656]** the Crown debts will prevail over the secured creditor is not sustainable.

18.The Hon'ble Supreme Court in **RANA GIRDERS LIMITED VS. UNION OF INDIA AND OTHERS [2013 (10) SCC 746]** has held as under:

"14. Before us, it was strenuously argued by the learned counsel for the Revenue that since the excise duty is a statutory liability such a duty has



to be paid by the person who purchased the property of borrower in default even when sold in auction under section 29 of the State Financial Corporation Act. He further argued that in any case the High Court was right in holding that by virtue of the stipulations in the Sale Deed as well as in the Agreement of Sale, so far as the appellant is concerned, it was liable to discharge the excise liability. In the circumstances, two questions arise for consideration namely:

(1) on the interpretation of stipulation contained in the Sale Deed of the land and building and Agreement of Sale of plant and machinery, whether the appellant had agreed to discharge the dues payable to the excise department by the borrower?

(2) Whether such a liability arises in law (dehors the stipulation in Sale Deed /Agreement of Sale) having regard to the legal provisions contained in the Excise Act and State Financial Corporation Act?

15.

16. Whether UPFC would have priority being a secured creditor by virtue of Deed of Mortgage or the Central Excise in respect of its dues having regard to the Rule 230(2) of the Central Excise Rules, came up for consideration before this Court in State of Karnataka & Anr. Vs. Shreyash Papers (P) Ltd. & Ors. JT 2006 (1) SC 180. Dealing with the provisions of Rule 230 of the Excise Rules, the Court held that this provision authorises detention of all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles, in the custody or possession of the person or persons carrying on such trade or business or from person succeeding the business or trade or part thereof for such time till dues are paid or recovered. However, the rule does not in any way create a charge over any of the goods enumerated therein. After explaining the term "charge" as defined in Section 100 of Transfer of Property Act, it was held that charge would be different from the word "detained". As Rule 230 only empowers detention and there was no other provision under the Central Excise Act or the Rules which envisages to create any charge over the assets of a unit to enable the realization of the Central Excise Duty on top priority. The Court held that UPFC had a priority being a secured creditor on the one hand and Central Excise having no "charge" over the property. The Court specifically took note of the fact that the petitioner



in that case was not the successor of the erstwhile owner in business or trade and having acquired the property without any charge independent of business or trade of the previous owner, was not a person in custody or possession of the property as a successor of the previous owner against whom there was a demand of excise duty.

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18. In so far dues of the Government in the form of tax or excise etc. are concerned, the Court was of the opinion that rights of the Crown to recover the dues would prevail over the right of the subject. Crown debt means the debts due to the State or the King. Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt pertains to the common law principle. When Parliament or State Legislature makes an enactment, the same would prevail over the common law and thus the common law principles which existed on the date of coming into force of the Constitution of India, must yield to a statutory provision. A debt, which is secured or which by reason of the provisions of a statute becomes the first charge over the property must be held to prevail over the Crown debt which is an unsecured one. On this reasoning, the debt payable to secured creditor like the Financial Corporation was prioritised vis-a- vis the Central Excise Dues.

19. For this principle, the Court referred to its earlier judgment in Dena Bank v.. Bhikhabhai Prabhudas Parekh & Co. & Ors. (2000) 5 SCC 694 explaining the doctrine of priority to Crown Debts, thus:

"What is the common law doctrine of priority or precedence of Crown debts/ Halsbury, dealing with general rights of the Crown in relation to property, states that where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "detur digniori (Laws of England, 4th Edn., Vol.8, para 1076, at p.666). Herbert Broom states:

"Quando jus domini regis et subditi concurrunt jus regis praeferri debet. - Where the title of the kind and the tile of a subject concur, the king's title must be preferred. In this case detur digniori is the rule.where the titles of the kind and of



a subject concur, the king takes the whole.where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred." (Legal maxims; 10th Edn., pp.35-36) This Common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as "law in force" within the meaning of Article 372(1) of Constitution." It was, furthermore, observed :

"However,, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledge of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the king commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles v. Grover* it has been held that the Crown has no precedence over a pledge of goods. In *Bank of Bihar v. State of Bihar* the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawner on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. *Rashbehary Ghose* states in *Law of Mortgage* (TLL, 7th Edn., p.386) - "it seems a government debt in India is not entitled to precedence over a prior secured debt."

20. Coming to the liability of the successor in interest, the Court clarified the legal position enunciated in *M/s. Macson* by observing that such a liability can be fastened on that person who had purchased the entire unit as an ongoing concern and not a person who had purchased land and building or the machinery of the erstwhile concern. This distinction is brought out and explained in paragraph



24 and 25 and it would be useful for us to reproduce herein below:

"Reliance has also been placed by Ms.Rao on Macson Marbles Pvt.Ltd. (supra) wherein the dues under Central Excise Act was held to be recoverable from an auction purchaser, stating:

We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of the same any conflict arises this aspect need not be examined. In this case, no such conflict arises between the corporation and the Excise Department. Hence it is unnecessary to examine this aspect of the matter.

The Department having initiated the proceedings under Section 11A of this Act adjudicated liability of respondent No.4 and held that respondent No.4 is also liable to pay penalty in a sum of Rs.3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisputed. The appeal is disposed of accordingly." The decision, therefore, was rendered in the facts of that case. The issue with which we are directly concerned did not arise for consideration therein. The Court also did not notice the binding precedent of Dena Bank as also other decisions referred to hereinbefore."

21. A harmonious reading of the judgments in Macson and SICOM would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming "first charge for the purchaser". As far as Central Excise Act is concerned, there was no such specific provision



as noticed in SICOM as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department."

19. The Hon'ble Full Bench of this Court in **UTI BANK LIMITED VS. DEPUTY COMMISSIONER OF CENTRAL EXCISE [2006 (5) CTC 801]** has observed as under:

"25. In the case on hand, the petitioner Bank which took possession of the property under Section 13 of the SARFAESI Act, being a special enactment, undoubtedly is a secured creditor. We have already referred to the provisions of the Central Excise Act and the Customs Act. They envisage 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, which we have pointed out in earlier paragraphs. (Emphasis supplied)

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."

20.The Hon'ble Full Bench of this Court in **THE ASSISTANT COMMISSIONER (CT) VS. THE INDIAN OVERSEAS BANK [2016 (6) CTC 769]** has observed as under:

"3.There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with 'notwithstanding' clause and has come into force from 01.09.2016.

4.The law having now come into force, naturally it would govern the rights of the parties in respect of even a *lis pending*.

5.The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

6.In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of Section 31B, as it includes 'secured debts due and payable to them by sale of assets over which security interest is created'.

21.The Hon'ble Supreme Court in **UNION OF INDIA AND OTHES VS. SICOM LIMITED AND ANOTHER [2009 (2) SCC 121]** has observed as under:

"2.Whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of the State Financial Corporation Act, 1951 (1951 Act) is the core question involved herein.



6. The principal question which, as noticed hereinbefore, arose for consideration before the High Court was as to whether dues of the first respondent-corporation will have priority over the Central Excise dues. The High Court, upon consideration of a large number of decisions opined that despite the fact that the dues of the appellant were recoverable as land revenue in terms of Rule 213(2) of the Central Excise Rules read with Section 32(g) and Section 151 of the Maharashtra Land Revenue Code, 1966, the same by itself would not mean that a first charge of the appellant-corporation would give way thereto. It was held :

"30. Turning to provisions of Section 169 of the Code, sub-section (1) provides that the arrears of land revenue due on account of land shall be paramount charge on the land and every part thereof and shall have precedence over any other debt demand or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment, or otherwise however, against any land or the holder thereof, sub-section (2) provides that claim of the State Government to any monies other than arrears of land, revenue but recoverable as a revenue demand under Chapter II shall have priority over all unsecured claims against any land or holder thereof.

31. It is thus clear that the arrears of land revenue dues on account of land shall be paramount charge on the land or every part thereof. Those will have precedence over any other dues, debts, demands, or claim. But other claims of the State Government which are recoverable as arrears of land revenue get priority over all unsecured claims against any land of holder. In the case of secured loan of the Government and other creditors, priority will depend upon precedence of such loan, it is thus clear that security of the Corporation being prior in point of time, it being in the nature of mortgage of priority, the dues claimed by Corporation will have priority over the dues of Customs."

9. Generally, the rights of the crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the king; debts which a prerogative entitles the Crown to claim priority for before all other creditors. [See Advanced Law Lexicon by P. Ramanatha



Aiyer (3rd Edn.) p. 1147]. Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.

10. It is trite that when a Parliament or State Legislature makes an enactment, the same would prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, the Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore providing that the statutory dues shall be the first charge over the properties of the tax-payer. This aspect of the matter has been considered by this Court in a series of judgments.

13. These aspects of the matter, however, have been considered at some length by a Three Judge Bench of this Court in *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. & Ors.* [(2000) 5 SCC 694]. Dealing extensively with the doctrine of priority to Crown Debts, it was held:

"7. What is the common law doctrine of priority or precedence of Crown debts? Halsbury, dealing with general rights of the Crown in relation to property, states that where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "detur digniori" (Laws of England, 4th Edn., Vol. 8, para 1076, at p. 666). Herbert Broom states:

"Quando jus domini regis et subditi concurrunt
jus regis praeferri debet.--Where the title of the



king and the title of a subject concur, the king's title must be preferred. In this case detur digniori is the rule. ... where the titles of the king and of a subject concur, the king takes the whole. ... where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred." (Legal Maxims, 10th Edn., pp. 35-36) This common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as "law in force" within the meaning of Article 372(1) of Constitution."

It was, furthermore, observed :

"10. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles v. Grover* it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar v. State of Bihar* the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. *Rashbehary Ghose* states in *Law of Mortgage* (TLL, 7th Edn., p. 386) -- "It seems a government debt in India is not entitled to precedence over a prior secured debt."

The principles enunciated therein have been reiterated by the Andhra Pradesh High Court in *Sitani Taxtiles & Fabrics (P) Ltd. v. Asstt. Commissioner of Customs & Central Excise, Hyderabad-I* [1999 (106) ELT 296 (AP)] where the applicability of the provisions



of the 1951 Act vis-à-vis the Central Excise dues were in question holding:

"22. From the above it follows: That in the case of a pledge, pawnee has special property and lien which is not of an ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away goods or its price. The right of a pawnee could not be extinguished by the subsequent attachment/seizure of the goods under any other law. It gives the Pawnee a primary right to sell the goods in satisfaction of the liability of the pawner. An unsecured creditor could not have any higher rights than the pawner and was entitled only to the surplus money after satisfaction of the secured creditor's dues."

14. The principles laid down in Dena Bank were reiterated recently in Bank of India v. Siriguppa Sugars & Chemicals Ltd. [(2007) 8 SCC 353] wherein it was held:

"There is no dispute that the sugar was pledged with the appellant Bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant bank. In view of the fact that the goods were validly pawned to the appellant bank, the rights of the appellant bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, under Section 529 and 529-A of the Companies Act, 1956, stand only as unsecured creditor and their rights cannot prevail over the rights of the pawnee of the goods. Thus, the rights of the appellant bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen."

21. We may notice that a Division Bench of Orissa High Court in Suburban Ply & Panels Pvt. Ltd. v. Assistant Commissioner of Central Excise & Customs, BBSR [2002 (144) ELT 257 (Ori)], despite noticing Dena Bank (supra) as also other decisions, relying on Section 11 of the Central Excise Act and



Rule 230(2) of the Central Excise Rules held as under

"The rule is prima facie wide in its operation. There is no challenge to the validity of the rule in this proceeding. Going by Sub-Rule (2) of Rule 230, it appears to us that a change in ownership of the undertaking would not in any manner effect the obligation of the person liable to pay excise duty and authority concerned has the right to proceed against the successor in business or transferee even though the duty is assessed subsequently but the liability had arisen before such transfer. In other words, the right is given to the department to proceed against the Undertaking or its products or machinery even though it may be in the hands of the transferee. On a plain reading of the rule, it appears to us that if the defaulter had sold the Undertaking, the transferee would be liable for the excise duty that remained outstanding as on the date of transfer in its favour."

The High Court, with utmost respect, proceeded on a wrong premise that only in terms of sub-section (4) of Section 29, proceeds of the sale will be held in trust by the Financial Corporation and appropriated towards the discharge of the debt due to it after first applying the proceeds in payment of cost charges and expenses incurred and the balance to be paid to the person entitled and having regard to the doctrine of Crown debt, the auction purchaser must satisfy it.

22.The Orissa High Court failed to notice the binding precedent of this Court in Dena Bank in its proper perspective. We are concerned here with the respective rights of a secured creditor and unsecured creditor over a property. If the finding of the Orissa High Court is correct, there was no necessity for the State Legislatures or the Parliament to amend laws incorporating provisions to create first charge over the properties of the debtor. The High Court failed to notice Article 372 of the Constitution as also the well settled principles of law that a statutory provision shall prevail over the Crown debt.

23.Furthermore, the right of a State Financial Corporation is a statutory one. The Act contains a



non- obstante clause in Section 46B of the Act which reads as under :

"Section 46B--Effect of Act on other laws--The provision of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern."

The non-obstante clause shall not only prevail over the contract but also other laws."

22. In the judgment of this Court in **M/S.WELL STORES (MADRAS) PRIVATE LIMITED AND OTHERS VS. THE TAX RECOVERY OFFICER-IV AND OTHERS [W.P.NOS.40656 OF 2015, 34703 OF 2016 AND 3572 OF 2017 DECIDED ON 18.07.2017]** it has been held as under:

"2. There are three writ petitions, relating to the orders of attachment passed by the Income Tax Department on the properties, which were initially mortgaged with the Indian Bank by the borrower. In W.P.Nos.34703 of 2016 and 3572 of 2017, the petitioner is Asset Reconstruction Company (India) Limited and they have challenged two orders of attachment of the subject properties and also seeking for a direction to raise the attachment. The short ground, on which the impugned order have been challenged, is by placing reliance on the decision of the Hon'ble Full Bench in the case of Assistant Commissioner (CT), Anna Salai-III Assesment Circle Vs. The Indian Overseas Bank in W.P.No.2675 of 2011 etc. dated 10.11.2016. The issue, which was referred to Hon'ble Full Bench, for decision is as follows:

a) As to whether the Financial Institution, which is a secured creditor, or the department of the government concerned, would have the 'Priority of charge' over the mortgaged property in question, with regard to the tax and other dues.

b) As to the status and the rights of a third party purchaser of the mortgaged property in question.



3. The Full Bench after taking note of the Enforcement of Security interest and Recovery of Debts and Laws and Miscellaneous Provisions (Amendment) Act, 2016, held that there is no doubt that the rights of the a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including Revenues, Taxes, Cesses and rates due to the Central Government, State Government or local authority. The operative portion of the judgment of the Full Bench is as follows:

2.We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31B in the Principal Act, Which reads as under:-

31B.Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation:-for the purposes of this Section, it is hereby clarified that on or after the commencement of the insolvency and bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that code.

3.There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This Section



introduced in the Central Act is with notwithstanding clause and has come into force from 01.09.2016.

4.The law having now come into force, naturally it would govern the rights of the parties in respect of even a *lis* pending.

5.The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

6.In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of Section 31B, as it includes secured debts due and payable to them by sale of assets over which security interest is created.

7.we, thus, answer the aforesaid reference accordingly. "

5. The answer to the two submissions raised by the revenue lies in the decision of the Full Bench referred supra. That apart the interpretation given by the Income Tax Department to the Assignment Agreement dated 07.12.2017, stating that it should be treated as a sale transaction is not tenable. This is so because, the terms and conditions of the agreement clearly shows it is an assignment of security interest created in favour of the Indian Bank and by that the Indian Bank had transferred in favour of the petitioner, the loans disbursed under the financing documents together with all its rights, title and interest in the financing documents and any underlying Security Interests, Pledges and/or guarantees in respect of such loans.

9.Thus, for the above reasons, it is held that the petitioner would have priority over all other debts and Government dues including taxes, cesses, etc., due to the Income Tax Department, Central Government, State Government or Local Authority. Therefore, the impugned orders of attachment are liable to be set aside.



10. In the result, the writ petitions in W.P.Nos.34703 of 2016 and 3572 of 2017 are allowed and the impugned orders are set aside and the attachment stands raised. In the light of the orders passed in these writ petitions, no further orders are required in W.P.No.40656 of 2015, as the said properties is covered in the list of the properties, which are the subject matter of the other two writ petitions. Hence, W.P.No.40656 of 2015 is dismissed. As this Court has allowed the writ petitions filed by Assets Reconstruction Company India Limited, The Sub-Registrar, Saidapet, Chennai is directed to remove the entries in the encumbrance certificate of the subject properties."

23. The Hon'ble Supreme Court in **MAHARASHTRA TUBES LTD., VS. STATE INDUSTRIAL & INVESTMENT CORPORATION OF MAHARASHTRA LIMITED AND ANOTHER [1993 (2) SCC 144]** it has been observed as under:

"9. Having reached the conclusion that both the 1951 Act and the 1985 Act are special statutes dealing with different situations the former providing for the grant of financial assistance to industrial concerns with a view to boost up industrialization and the latter providing for revival and rehabilitation of sick industrial undertakings, if necessary, by grant of financial assistance, we cannot uphold the contention urged on behalf of the respondent that the 1985 Act is a general statute covering a larger number of industrial concerns than the 1951 Act and, therefore, the latter would prevail over the former in the event of conflict. Both the statutes have competing non-obstante provisions. Section 46B of the 1951 Act provides that the provision of that statute and of any rule or order made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force whereas section 32(1) of the 1985 Act also provides that the provisions of the said Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law. Section 22 (1) also carries a non-obstante clause and says that the said provision shall apply notwithstanding anything contained in Companies Act, 1956 or any other law. The 1985 Act being a subsequent enactment,



the non-obstante clause therein would ordinarily prevail over the non-obstante clause found in section 46B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. In that event the maxim generalia specialibus non derogant would apply. But in the present case on a consideration the relevant provisions of the two statutes we have come to the conclusion that the 1951 Act deals with pre-sickness situation whereas the 1985 Act deals with the post-sickness situation. It is, therefore, not possible to agree that the 1951 act is a special statute vis-a-vis the 1985 Act which is at general statute. Both are special statutes dealing with different situations notwithstanding a slight overlap here and there, for example, both of them provide for grant of financial assistance though in different situations. We must, therefore, hold that in cases of sick industrial undertakings the provisions contained in the 1985 Act would ordinarily prevail and govern."

24.The Hon'ble Supreme Court in *SOLIDAIRE INDIA LIMITED VS. FAIRGROWTH FINANCIAL SERVICES LTD. AND OTHERS* [2001 (3) SCC 71] has held as under:

"7.Coming to the second question, there is no doubt that the 1985 Act is a special Act. Section 32 (1) of the said Act reads as follows:

"32. Effect of the Act on other laws-(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act."

8.The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. A similar non-obstante provision is contained in Section 13 of the Special Court Act which reads as follows:



"13. Act to have overriding effect-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any: instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority."

9.It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. & Anr., [1993] 2 SCC 144; Sarwan Singh & Anr. v. Kasturi Lal, [1977] 2 SCR 421; Allahabad Bank v. Canara Bank & Anr., [2000] 4 SCC 406 and Shri Ram Narain v. The Simla Banking Industrial Co. Limited, [1956] SCR 603.

10.We may notice that the Special Court had in another case dealt with a similar contention. In Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd. [1997] v. 89 Company Cases 547, it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The head-note which brings out succinctly the ratio of the said decision is as follows :

"Where there are two special statutes which contain non-obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non-obstante clause. If the Legislature still confers the later enactment with a non-obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.

The Special Court (Trial of Offences Relating to Transactions and Securities) Act, 1992, provides in Section 13, that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special



Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies Act from the ambit of the said Act, the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.

Under Section 3 of the 1992 Act, all property of notified persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. Under Section 22 of the 1985 Act, recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the Appellate Authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under section 11(2) of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985.

It is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an

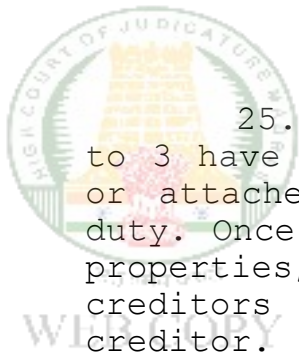


interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985, is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction against considering a scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by the Special Court. The Special Court can, if it is convinced grant time or instalments.

There can, therefore, be no stay of any proceedings for recovery against a sick company so far as the Special Court under the 1992 Act is concerned."

11. We are in agreement with the aforesaid decision or the case, more so when we find that whenever the Legislature wishes to do so it makes appropriate provisions in the Act in that behalf. Mrs. Shiraz Rustomjee has drawn our attention to Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 wherein after giving an overriding effect to the 1993 Act it is specifically provided that the said Act will be in addition to and not in derogation of a number of other Acts including the 1985 Act. Similarly under Section 32 of the 1985 Act the applicability of the Foreign Exchange Regulation Act and the Urban Land Ceiling Act is not excluded. It is clear that in the instant case there was no intention of the Legislature to permit the 1985 Act to apply notwithstanding the fact that proceedings in respect of a company may be going on before the B.I.F.R. The 1992 Act is to have an overriding effect notwithstanding any provision to the contrary in another Act."

In view of the ratio laid down in the above judgments, it is crystal clear that the priority right of the secured creditor will prevail over all other unsecured creditor.



25. In the present case, as discussed above, the respondents 1 to 3 have not exercised the powers conferred under them and seized or attached the goods for which, they have granted exemption of duty. Once there is no charge over the plant or machinery, or other properties, the respondents 1 to 3 will fall under the unsecured creditors and they cannot prevail over the rights of the secured creditor.

26. As discussed above, the transaction between the assessee or licensee and authorities is personal between them. It will not continue unless and otherwise there is a specific condition attached to the same. The auction purchasers cannot be held liable for the arrears incurred by the previous licensee or industry in favour of whom the tax benefits are granted.

27. Section 11 of the Central Excise Act, 1944, does not create any charge over the property. In this context, it is useful to refer to the judgment of the Hon'ble Supreme Court in **RANA GIRDERS LIMITED VS. UNION OF INDIA AND OTHERS [2013 (10) SCC 746]** wherein it is observed as under:

"21. A harmonious reading of the judgments in **Macson and SICOM** would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming "first charge for the purchaser". As far as Central Excise Act is concerned, there was no such specific provision as noticed in **SICOM** as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department. "

28. The Hon'ble Supreme Court in **AHMEDABAD ELECTRICITY CO. LTD. VS. GUJARAT INNS PVT. LTD. AND OTHERS [2004 (3) SCC 587]** has held as under:

"3. In our opinion, the present two cases are the cases of fresh respondents (auction purchasers)



connections and they have no objection in as fresh connections given on the dates on which the supply of electricity was restored to the premises. We are clearly of the opinion that in case of a fresh connection though the premises are the same, the auction purchasers cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply to the premises in the absence of there being a specific statutory provision in that regard. Though we find some merit in the submission of the learned counsel for the appellant calling for reconsideration of the wide propositions of law laid down in *Isha Marbles'* case (supra), we think the present one is not a case for such exercise. We leave the plea open for consideration in an appropriate case."

29.The Hon'ble Supreme Court in **HARYANA STATE ELECTRICITY BOARD VS. HANUMAN RICE MILLS, DHANAURI AND OTHERS [2010 (9) SCC 145]** has observed as under:

"12.The position therefore may be summarised thus:

(i)Electricity arrears do not constitute a charge over the property. Therefore, in general law, a transferee of a premises cannot be made liable for the dues of the previous owner / occupier.

(ii)Where the statutory rules or terms and conditions of supply which are statutory in character, authorise the supplier of electricity to demand from the purchaser of a property claiming reconnection or fresh connection of electricity, the arrears due by the previous owner / occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser.

Position in this case

13.The appellant did not plead in its defence that any statutory rule or terms and conditions of supply authorised it to demand the dues of previous owner from the first respondent. Though the appellant contended in the written statement that the dues of Durga Rice Mills were transferred to the account of the first respondent, the appellant did not specify the statutory provision which enabled it to make such a claim. The decision in *Paramount Polymers* shows that such an enabling term was introduced in the terms and conditions of electricity supply in Haryana, only in the year 2001.



14.The appellant did not demand the alleged arrears, when the first respondent approached the appellant for electricity connection in its own name for the same premises and obtained it in the year 1991. More than three years thereafter, a demand was made by the appellant for the first time on 16-1-1995 alleging that there were electricity dues by the previous owner. In these circumstances, the claim relating to the previous owner could not be enforced against the first respondent."

30.The Hon'ble Supreme Court in *SPECIAL OFFICER, COMMERCE, NESCO VS. RAGHUNATH PAPER MILLS (P) LTD.* [2012 (13) SCC 479] has observed as under:

"18.If we apply the above principles as pointed out by Mr.Tripathy, learned counsel for the appellant, undoubtedly, Respondent 1, purchaser of the premises is liable to pay entire arrears or outstanding of power dues. However, as pointed out by Mr.P.P.Rao, learned Senior Counsel, Respondent 1 is not a party to the contract with the supplier i.e. NESCO. We have already quoted the relevant clauses, particularly, sub-clause 10(b) of Regulation 13 of the Electricity Supply Code, which is not applicable to Respondent 1 herein. In other words, as mentioned in the earlier paras, in the case on hand, Respondent 1 has not applied for transfer of service connection from the name of the erstwhile company to its name but applied for a fresh connection to its unit after purchasing the same from the Official Liquidator.

19.It is also relevant to refer a decision of a three - Judge Bench of this Court reported in *Ahmedabad Electricity Co. Ltd., v. Gujarat Inns (P) Ltd.* This Court, after finding that the cases are of fresh connection, in para 3 held as under:

"3.... We are clearly of the opinion that in case of a fresh connection though the premises are the same, the auction - purchasers cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply to the premises in the absence of there being a specific statutory provision in that regard:

20.In a recent decision i.e. In *Haryana SEB v. Hanuman Rice Mills*, this Court, after referring to all the earlier decisions including *Isha Marbles and Paschimanchal Vidyut Vitran Nigam Ltd., etc,*



summarised the position in the following manner which is as under: (Hanuman Rice Mills case, SCC pp. 150-51, para 12)

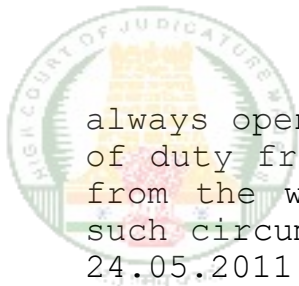
12..... (i)Electricity arrears do not constitute a charge over the property. Therefore, in general law, a transferee of a premises cannot be made liable for the dues of the previous owner / occupier.

(ii)Where the statutory rules or terms and conditions of supply which are statutory in character, authorise the supplier of electricity to demand from the purchaser of a property claiming reconnection or fresh connection of electricity, the arrears due by the previous owner / occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser".

21.In the light of the above discussion, specific factual details regarding the position of Respondent 1 which purchased the said premises under court auction-sale from the Official Liquidator on "as-is-where-is" and "whatever - there - is" basis and in the light of the Regulations quoted above, particularly, sub-clause 10(b) of Regulation 13, we hold that the request was not for the transfer from the previous owner to the purchaser, on the other hand, it was a request for a fresh connection for the unit of Respondent 1 herein. We are in entire agreement with the decision arrived at by the learned Single Judge as affirmed by the Division Bench of the High Court."

31.In all the above judgments, the categorical declaration is that the auction purchaser is not liable to pay any arrears, or duty or statutory dues for the default of the previous establishment. The right of the auction purchaser is absolute and independent of all the liabilities of the erstwhile establishment or owner. That transaction is personal, *right or interest in personam* between those parties will not bind on the auction purchaser. The above judgments would fortify the discussions made above.

32.In view of the above judgments, the notice issues by the respondents 1 to 3 demanding arrears of tax or duty, committed by the previous owner from the petitioner / auction purchaser is without jurisdiction. The auction purchaser need not file an appeal against the notice or demand or order passed by the respondents. Since the notice is without jurisdiction, the writ petition is maintainable without any exhaustion of alternative remedy. It is



always open to the respondents 1 to 3 to claim or demand the arrears of duty from the licensee or the beneficiary of the license and not from the writ petitioner who is a third party to that license. In such circumstances, the impugned demand notices dated 24.02.2011 and 24.05.2011 of the first respondent are quashed.

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33.In the above writ petitions, the demand notices dated 29.01.2013, 21.11.2014 and 05.12.2014 respectively, of the first respondent Employees' State Insurance Corporation have been impugned.

34.For better appreciation, the contents of the impugned orders are quoted below for ready reference:

"Impugned order dated 29.01.2013

"Whereas M/s.Rajam Mills Spinning Co. Ltd., S.F.No.440, V.Pudukkottai Village, Vedasanthur Taluk, Dindigul being the defaulter - Principal employer, has failed to pay the arrears due from them in respect of recovery certificates to the tune of Rs.4,58,002/- + Further Interest as on date.

And whereas the said M/s.Rajam Mills Spinning Co. Ltd., Dindigul being the defaulter's premises has now been occupied by you. Hence, you are hereby required under section 45G (3) read with sec-93-A of the ESI Act 1948 to pay forthwith to me as Recovery Officer the above mentioned amount.

Any payment made by you in compliance with this notice is in law deemed to have been made under the authority of the defaulter - principal employer, and my receipt there of, will constitute a good and sufficient discharge of your liability to the defaulter - principal employer (transferor) to the extent of the amount referred to in the receipt.

Further, if you discharge any liability to the defaulter - principal employer after receipt of this notice, you will be personally liable to me as Recovery Officer to the extent of the liability discharged or to the extent of the liability of the defaulter - principal employer referred to in the first part, whichever is less.

Furthermore, if you fail to make the payment in pursuance of this notice to me as Recovery Officer, you shall be deemed to be in default in respect of the amount specified in the notice and



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further proceeding may be initiated against you for the realization of the amount as if it were an arrear due from you, in the manner provided under Sec.45C to 45I of the ESI Act and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under Section 45C."

Impugned order dated 21.11.2014

WHEREAS a Certificate No.57-00-047568-000-0101/468/11-C-19 dated 11.11.14 has been forwarded by the Authorized Officer Ins.I for the recovery of an amount of Rs.7,18,257/- (Rupees Seven Lakh Eighteen Thousand Two Hundred and Fifty Seven only) details of which are given below:

2.You are hereby directed to pay the above sum along with process fee within 15 days of the receipt of this notice failing which the recovery shall be made in accordance with the provisions of 45(C) to 45 (I) of the ESI Act, as amended.

3.In addition to the sums aforesaid you will also be liable for:

(a)Such interest as is payable in accordance with sub-section (5)(a) of Section 39 and Section 45 to 45(I) of the ESI Act.

(b)All costs, charges and expenses incurred in respect of the service of this notice and of warrants and other processes and all other proceedings taken for realizing the arrears."

Impugned order dated 05.12.2014

As directed by the Recovery Officer, I visited your factory or establishment or residence a defaulter and demanded immediate payment of the produce EVIDENCE OF PAYMENT OF ALREADY MADE. against recovery notices under reference. But no payment was made not on evidence of payment shown.

You are requested to remit the dues mentioned above in ESI Fund Account No.1, with designated branches of State Bank of India produce challan after payment within 7 days thereof. It may please be noted that if you fail to earlier made within this period recovery same will be effected resorting to any one



or more of the following modes of recovery without after notice:-

1. Attachment and sale of movable or immovable properties.

2. By appointing receiver to manage the business assets defaulter.

3. Arrest of defaulter and his detentions in civil prison observing the due procedure."

35. According to the learned counsel for the respondent ESIC, as per the judgment of this Court in **PROTCHEM INDUSTRIES INDIA LTD. VS. RPF COMMISSIONER [2010 (4) LLJ 480 (MAD)]** the purchaser under the SARFAESI Act would not escape the liability to pay PF or ESI contribution.

36. In the considered opinion of this Court, the said judgment will not apply to the present case on hand. As already discussed elaborately that the difference between the purchase of the business and the purchase of the properties on outright sale. The judgment referred by the learned counsel for the respondent ESIC will apply only where the business is continued or revived and the person who was taken over the company or revive the company becomes the successor. But, in the instant case, it is not so. The auction purchaser has commenced a new business by investing huge amount of money and employing the different employees. It is not the case of the ESIC that the same employees are continuing in the same Insurance Corporation. In the absence of any continuance of business as successor in the business or as an occupier continuing the same business with the same employees with the same registration or code of ESI, the claim cannot be made against an independent establishment.

37. The judgment of this Court in **BOOPATHY ASSOCIATES PRIVATE LIMITED VS. ESIC AND OTHERS [2013 (III) LLJ 518 (MAD)]** relied on by the learned counsel for the respondent ESIC will also not applicable as the notice issued to the writ petitioner is without jurisdiction and he need not exhaust the alternative remedy, as the demand made by the ESIC is not binding on them.

38. On the other hand, the judgments of the Hon'ble Supreme Court as well as the judgments of the Full Bench of this Court, discussed above, will apply to the present writ petitions filed against the ESIC also.

39. In view of the same, the impugned orders dated 29.01.2013 and 21.11.2014 and 05.12.2014 respectively, of the first respondent Employees' State Insurance Corporation are without jurisdiction and accordingly, stand set aside.



40. In fine, all the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

TK

To

1. The Assistant Commissioner
Office of the Assistant Commissioner of
Central Excise
Customs and Service Tax
Dindigul - I Division, Tax Recovery Cell,
No.68, Nehruji Nagar, R.M.Colony Road,
Dindigul - 624 001.
2. The Deputy Commissioner
Office of the Deputy Commissioner of
Central Excise
Dindigul - I Division
No.30, Mengles Road, Dindigul - 624 001.
3. The Commissioner of Central Excise
Central Revenue Building,
Bibikulam,
Madurai.
4. State Bank of India
Stressed Assets Management Branch
"Red Cross Building"
32, Monteith Road, Egmore,
Chennai - 600 008.
5. The Recovery Officer
Employees' State Insurance Corporation
Office of the Recovery Officer
Sub Regional Office (Madurai)
2nd West Street, K.K.Nagar,
Madurai - 20.



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WP (MD) NOS.6238 OF 2011, 2747 OF 2013 & 20355 of 2014

+3ccs to Mr.T.Antony Arul Raj, Advocate Sr.Nos.21063, 21064, 21065
+2ccs to Mr.V.Karthikeyan, Advocate Sr.Nos.20926

COMMON ORDER MADE IN
WP (MD) NOS.6238 OF 2011, 2747 OF 2013
AND 20355 OF 2014

03 / 11 / 2020

SJ (CO)

NR (11/11/2020) 37P : 11C