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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.08.2021

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P. No. 4075 of 2015 and  
W.M.P. No. 2 of 2015

The Manager,  
Indian Overseas Bank,  
Reddiarpalayam Branch,  
Villianur Main Road,  
Pondicherry - 605 110.

... Petitioner

-vs-

1. The Assistant Commissioner,  
Commercial Taxes,  
Commercial Tax Office,  
Cuddalore.
2. M/s.Rajarajan & Sons,  
Represented by its Partner,  
Mr.K.Rajarajan,  
223/2B, Chidambaram Main Road,  
Cuddalore - 5.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari, calling for the records of auction sale notice bearing Na.Ka.Aa3/1048/2014 dated 12.01.2015 on the file of the first respondent and to quash the same.

For Petitioner : Mr.Y.T.Aravind Gosh

For Respondents : Mr.V.Veluchamy  
Government Advocate for R1  
No appearance for R2

O R D E R

The auction notice dated 12.01.2015 issued by the first respondent is sought to be quashed in the present Writ Petition. The petitioner is the Indian Overseas Bank and it states that the second respondent and its group have availed various credit facilities and as security had mortgaged the schedule mentioned property among other properties by way of Equitable Mortgage on



12.01.2011 by deposit of title deeds at Indian Overseas Bank, Villupuram Branch being a notified town and also executed a registered Memorandum of Deposit of Title Deeds dated 07.02.2011 bearing D.No.455 of 2011 in the office of Sub-Registrar, Villupuram. The petitioner states that they are the secured creditors and therefore, they hold priority over the charge. The second respondent had defaulted in payment of loan dues and consequently, the petitioner Bank initiated action against the second respondent by issuing a demand notice on 10.11.2014 under Section 13(2) of the SARFAESI Act. While so, the petitioner Bank received an information on 22.01.2015 through the second respondent that the schedule property is sought to be brought for auction sale by the first respondent Commercial Tax Department for the arrears of tax dues payable by the second respondent to the first respondent and further provided a copy of the impugned auction sale notice dated 12.01.2015. Immediately, the petitioner sent a legal notice to the first respondent on 29.01.2015 stating that they are the secured creditors and hold first charge over the property. Thereafter, the Writ Petition is filed to quash the auction. However, the first respondent sent a reply to the legal notice also.

2. The issue of priority over the charge with reference to various enactments are elaborately considered by this Court and judgment was delivered on 19.07.2021 in W.P. No. 15437 of 2014. In the said writ petition, the priority over charge claimed by the Income Tax Department was considered. Thus, it is useful to extract the relevant paragraphs of the said judgment.

"30.Let us now consider the scope of Section 281 of the Income Tax Act. Chapter XXIII Section 281 of the Income Tax Act contemplates certain transfers to be void. Sub~clause (1) enumerates that where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise". A close reading of the above provision would reveal that where during the pendency of any proceedings under this Act or after the completion thereof, but before service of notice under rule 2 of the Second Schedule, if any charge is created by an assessee in favour of any other person shall be void as against any claim in respect of any tax or any other some payable by the



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assessee. Therefore, it is unambiguous that, during pendency of the proceedings if any charge is created, then such charge created by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever shall be void.

31. Schedule II Rule 11 of the Income Tax Act which contemplates investigation by Tax Recovery Officer. Sub~Clause (1) to Rule 11 states that "where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection".

32. Sub~clauses (5) and (6) to Rule 11 of the Income Tax Act reads as under:

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject, to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

33. A perusal of the entire Rule would reveal that it is not an appeal or Revision. It is an investigation by the Tax Recovery Officer, which is contemplated. Therefore, any third person if involved in such transfer of property, which is declared as void under Section 281 of the Income Tax Act may submit an application for investigation by Tax Recovery Officer. Therefore, the statute does not assume that every third person is liable under the Income Tax Act. Schedule II Rule 11 of the Income Tax Act is a beneficial provision in respect of the person, who was otherwise cheated by any of the defaulter of tax arrears, who in turn can submit an application for further investigation in order to cull out the truth or genuinity with reference to the transactions or transfers. Therefore, the Tax Recovery Officer during the pendency found that the



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charge created in favour of the petitioner Bank is valid, then he can pass appropriate orders withdrawing the attachment made under the provisions of the Act. If the Tax Recovery Officer is of an opinion that the attachment made under the provisions of the Act was prior to the mortgage or otherwise, then he can pass appropriate orders confirming the attachment. However, the said Rule is not relatable to declaration or in the form of an appeal by any third person. It is only an enabling provision for effective adjudication of the actual facts and to find out the genuinity of certain transfers made during the pendency of the Income tax proceedings and with reference to the provision under Section 281 of the Income Tax Act.

34.Looking into the provisions of the SARFAESI Act, more specifically, Section 26E, which contemplates priority to secured creditors which reads that "notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any Secured Creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government of State Government or local authority".

35.Let us now consider Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 and the said section Section 31B was inserted by Act 44 of 2016 with effect from 01.09.2016. The said provision also deals with priority to secured creditors, which reads that "notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realize 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".

36.It is necessary to consider the conflicting provisions of the Income Tax Act, SARFAESI Act and Recovery of Debts and Bankruptcy Act, 1993.

37.On the one hand, the Income Tax Act states that, where during the pendency of any proceedings under the Income Tax Act or after completion thereof,



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any assessee creates a charge on or parts with the possession by way of mortgage, sale, etc. Shall be void against any claim in respect of any tax. So also, the SARFAESI Act states that Section 26E contemplates that the secured creditors shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government of State Government or local authority. Therefore, equal weightage is given in respect of the secured creditors. So also Section 31B of Recovery of Debts and Bankruptcy Act, 1993 states that 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.

38. Thus, conflicting provisions in these three independent statutes are creating heart burning issues between the secured creditors as well as the Tax Department. Some of the decisions are in favour of the Tax Department and some of the decisions are in favour of the Banks. With reference to Section 26E of the SARFAESI Act and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993, judgments are given in favour of the Banks in view of the fact that the said provisions contemplates priority over the Government dues is to be given to the Banks. The tenor of Section 281 of the Income Tax Act which contemplates that any such transaction made during the pendency of any proceedings under the Income Tax Act shall be void. Thus, the understanding would be that if the proceedings under the Income Tax Act are pending at the time of creating mortgage, sale, gift, etc., then Section 281 of the Income Tax Act would be pressed into operation. The next question is at the time of creation of mortgage, sale, gift etc., the Income Tax Proceedings are pending as contemplated under Section 281 of the Income Tax Act, such transactions became void. Thus, it is unambiguous that the transactions or transfers made during the pendency of the Income tax proceedings are void. This being the purposive interpretation to be adopted, all transfers, mortgages etc., made during the pendency of the Income tax proceedings shall become void under Section 281 of the Income Tax Act. Once Section 281 of the Income Tax Act was pressed into service and the transactions or transfers became void, any mortgage, transfer etc., thereafter would be of no validity. In other words, the transfer or



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transactions made against the void transactions under the Income Tax Act are invalid in the eye of law. Therefore, even before invoking the provisions of the SARFAESI Act and DRT Act, Section 281 of the Income Tax Act intervenes and declares the transactions or transfers as void, if any such transactions or transfers are made during the pendency of the Income Tax proceedings. In such circumstances, invoking the provisions of the SARFAESI Act or DRT Act for the purpose of claiming priority would not arise at all. Law expects that the parties to be prudent and careful. Before mortgage, transfer or transactions, an enquiry is required by the respective parties as the buyer must beware (caveat emptor) of the encumbrances or the statutory implications or the genuinity of the title etc., Thus, the principles of caveat emptor would be applicable in such circumstances, where a transactions or transfers are made during the pendency of the Income tax proceedings. In such cases, the Income tax proceedings are known only to the tax defaulter and not to the third party purchaser or the mortgagee Bank or otherwise. Thus, the void transfers or transactions made during the pendency of the Income tax proceedings cannot be the subject matter for any mortgage or further transfers or transactions etc., This being the possible perceptions, the Courts are bound to consider, which transaction will prevail over and which Act would be applicable with reference to the facts and circumstances.

39. More elaborately the facts at the first instance to be considered and then the application of law which is to be applied at the first instance also to be considered. For instance in the case where the income tax proceedings are pending under the Income Tax Act and if a mortgage is entered into by the tax defaulter with any Bank, then it is the duty of the Bank to ensure that no other proceedings are pending and it is the duty of the person who is borrowing loan to inform the same to the Bankers. Under these circumstances, the Income Tax Department is alien to the transaction of mortgage between the bank and the tax defaulter and therefore, the Act will automatically come to the rescue of the Income Tax Department declaring such transfers as void under Section 281 of the Income Tax Act.

40. Where the Bank entered into a mortgage well before the pendency of proceedings under the Income Tax Act, then Section 26E of the SARFAESI Act would



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be applicable and in such circumstances, the Bank will hold priority over all other claim including the Government dues. Even in such circumstances, this Court has to consider the other principles which all are to be followed in such cases. Admittedly, the SARFAESI Act and Recovery of Debts and Bankruptcy Act, 1993 provides priority to the secured creditors and the Income Tax Act provides priority to the tax arrears to be recovered. Under these circumstances, this Court is inclined to consider the common law Doctrine of priority of crown debts.

41.The doctrine of constitutional priority? will have precedence over the other priorities. If the priority clause is provided under various enactments, the question arises as to which priority is to be held precedence over the other priorities. The test of traceability and recognition under the constitutional provisions would be the proper procedure to form an opinion.

42.In the present scenario, the SARFAESI Act and the DRT Act provides priority to secured creditors, i.e. the banks hold priority. The Income Tax Act contemplates any such mortgage or sale during the pendency of any proceedings under the Income Tax Act shall be void. Thus, this Court has to test the supremacy on the basis of the constitutional recognition, which is supreme than the statutes enacted under the constitution. The taxation laws are constitutionally recognized with reference to the sovereignty and the policies of the Government. Thus the supremacy of the Constitution overtakes the statutes enacted and such enactments constitutionally recognized directly takes precedence over the other statutes.

43.The principles of -doctrine of constitutional priority- is to be defined as, in the event of the similar provisions of priority under various enactments, then the statute which is recognised directly by the Constitution for the purpose of upholding the sovereignty and integrity of the Nation is to be considered as holding precedence over the other statutes providing priority.

44.The Constitutional Bench of the Hon-ble Supreme Court of India in the case of Builders Supply Corporation vs. Union of India [1965 AIR 1061] considered the principles laid down in the case of



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Kaka Mohamed Ghouse Sahib and Co. vs. United Commercial Syndicate and others [(1886) ILR 7 Mad. 434], wherein the Madras High Court has held that it is a settled principle of constitutional law that as between creditors of the same rank the Government is entitled to priority and the republican character of the Constitution of India has not abrogated this general doctrine of priority of State debts. In dealing with this question, Justice Ramamurti has referred to the relevant decisions in relation to the arrears of income tax due to the Government and has pointed out there is a consensus of judicial opinion on the question that the arrears of tax due to the State can claim priority over private debts. This position has not been seriously disputed.

45. Similarly, the basic justification for the claim of priority made by the Income Tax Department in the present case rests on the well recognised principle that the State is entitled to raise money by taxation, because unless adequate revenue is received by the State, it would not be able to function as sovereign Government at all. It is essential that as a sovereign the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues.

46. In this context, Part XII of the Constitution of India, more specifically, Article 265 which states that tax not to be imposed save by authority of law; Article 266 speaks about Consolidated funds and public accounts of India and the States; Article 267 states Contingency fund; Article 268 states Duties levied by the Union but collected and appropriated by the States; Article 268A denotes service tax levied by Union and collected and appropriated by the Union and the States; Article 269 states taxes levied and collected by the Union but assigned to the States; Article 269A denotes levy and collection of goods and service tax in course of inter-state trade or commerce and Article 270 states that taxes levied and distributed between the Union and the States. The chapter deals with the taxes and its constitutional importance are to be considered by this Court. Undoubtedly, tax is the backbone of our Nation's economy and it holds top priority. In this context,



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the tax collected goes to the welfare of the people in general, however the mortgage or sale transaction between the bank and the tax defaulter can be at no circumstances be compared with the constitutional importance of tax being collected from the people for the purpose of achieving the constitutional goals and perspectives. Therefore, the provisions of various Acts if there are conflicting provisions or grant of priority to various institutions, then the Constitution of India will be the guiding factor to form an opinion and confer priority. The nature of transaction, the implications, Constitutional importance and the other principles enunciated under the Constitution of India are the principal factors to be considered to form an opinion that, which claim shall be given priority over the other claims as various statutes enacted by the Parliament gives priority to such institutions irrespective of the fact that the other Acts are also providing similar priority to other institutions.

47. In support of the said observation, this Court would like to draw the attention with reference to the judgment of the Three Judges Bench of the Hon-ble Supreme Court of India in the case of Central Bank of India vs. State of Kerala and others [Civil Appeal No.95 of 2005 dated 27.02.2009], wherein the Apex Court considered the provisions of the DRT Act and SARFAESI Act and the following observations are made:

33. 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 Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38C of the Bombay Act and Section 26B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of State's charge over other debts, which was recognized 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. In Builders Supply Corporation v. Union of India [(1965) 2 SCR 289], the



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Constitution Bench considered the question whether tax payable to the Union of India has priority over other debts. After making a reference to the judgments of the Bombay High Court in *Bank of India v. John Bowman and Ors.*, [AIR 1955 Bom. 305], Madras High Court in *Kaka Mohammad Ghouse Sahib & Co. v. United Commercial Syndicate and others* [(1963) 49 I.T.R. 25] and *Manickam Chettiar v. Income-tax Officer, Madura*, [(1938) 6 ITR 180], the Court held :

(i) "The Common Law doctrine of the priority of Crown debts had a wide sweep but the question in the present appeal was the narrow one whether the Union of India was entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over unsecured debts due from the said citizen to his other private creditors. The weight of authority in India was strongly in support of the priority of tax dues.

(ii) The Common Law doctrine on which the Union of India based its claim in the present proceedings had been applied and upheld in that part of India which was known as 'British India- prior to the Constitution.

The rules of Common Law relating to substantive rights which had been adopted by this country and enforced by judicial decisions, amount to 'law in force- in the territory of India at the relevant time within the meaning of Art. 372(1). In that view of the matter, the contention of the appellant that after the Constitution was adopted the position of the Union of India in regard to its claim for priority in the present proceedings had been alerted could not be upheld.

(iii) The basic justification for the claim for priority of Government debts rests on the well-recognised principle that the State is entitled to raise money by taxation, otherwise it will not be able to function as a sovereign government at all. This consideration emphasizes the necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues."

34. In *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation and others* [(1995) 2 SCC 19], the Court again recognized the priority of the State-s statutory first charge under Section 11~AAAA of the Rajasthan Sales Tax Act, 1954 vis~`~vis claim of the bank to recover its dues from the borrower.

35. In *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and others* [(2000) 5 SCC 694], the Court



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reviewed case law on the subject and observed:

"The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues (see Builders Supply Corpn.). In the same case the Constitution Bench has noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts and that this rule of common law amounts to law in force in the territory of British India at the relevant time within the meaning of Article 372(1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is founded, the priority would be available only to such debts as are incurred by the subjects of the Crown by reference to the State's sovereign power of compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to commercial transactions. Having reviewed the available judicial pronouncements their Lordships have summed up the law as under:

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.

2. The common law doctrine about priority of Crown debts which was recognised by Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372(1) and continues to be in force.

3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which



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may be undertaken by the State for achieving socio-economic good. In other words, where the welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration."

48. One of the principles, which is impressive in the judgment cited supra is that the basic justification for the claim for priority of Government dues rests on the well recognized principles that the State is entitled to raise money by taxation otherwise it will not be able to function as sovereign Government at all. This consideration emphasises the necessity and wisdom of conceding to the State, the right to claim priority in respect of its tax dues. The importance of the above reading is to be considered regarding the present facts and circumstances."

3. As far as the disputes raised in the present writ petition is concerned, the petitioner in fact claims that they hold priority over the charge as they are secured creditors. The first respondent / Revenue equally claims the priority over all other charges as it is arrears of tax and State revenue. Further, the first respondent-Commercial Tax department claims that actions for recovery of arrears of tax was initiated long back and during the pendency of the proceedings under the taxation law, the bank has dealt with the property and therefore, they cannot claim any priority over the property, as far as the tax arrears are concerned.

4. However, such disputed fact cannot be adjudicated by the High Court in a writ petition under Article 226 of the Constitution of India. Which are all the proceedings initiated at the first instance and which proceedings has to be construed as an initial proceedings, are the disputed facts which are all to be adjudicated by scrutinising the original documents and evidences made available. An enquiry has to be conducted in this regard.

5. This being the factum and considering the judgment of the Hon'ble three Judges bench of Hon'ble Supreme Court of India, in the case of Central Bank of India (cited supra), this Court is of the opinion that such disputes are to be adjudicated before the competent appellate authority under the tax laws.



6. The TNVAT Act contemplates appeals to the authority. The appellate authority under the said Act are exercising the power of the Quasi judicial authorities. Therefore, they have to adjudicate the issue, by affording opportunity to all the parties concerned and take a decision in respect of such claims. As far as the tax laws are concerned, both the assessee and the revenue are preferring appeal before the appellate authorities and before the tribunal.

7. Similarly, the bank being aggrieved from and out of the action initiated by the first respondent, Commercial Tax department, is entitled to file an appeal before the appellate authority for adjudication of complete facts and circumstances. The appellate authorities are the final fact finding authority. While deciding the issues, the principles laid down by this Court in the cases cited supra are to be taken into consideration and accordingly, the disputes are to be resolved. This being the principles to be followed, this Court is inclined to pass the following final orders.

"(i) The relief as such sought for in the present writ petition stands rejected.

(ii) The petitioner is at liberty to approach the appellate authorities as contemplated under the provisions of the TNVAT Act, 2006, by filing an appropriate appeal. In the event of filing any such appeal, the said appeal is to be entertained without reference to the ground of delay in filing and entertain the appeal, dispose of the same on merits and in accordance with law, by affording opportunity to all the parties. Such exercise is directed to be done as expeditiously as possible."

8. With these directions, the writ petition stands disposed of. However, there shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-IV)

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Sub Assistant Registrar

vji

To

The Assistant Commissioner,  
Commercial Taxes,  
Commercial Tax Office,  
Cuddalore.



+1cc to Special Government Pleader(Taxes), S.R.No.40980

W.P. No. 4075 of 2015  
and

W.M.P. No. 2 of 2015

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PMK (CO)  
CB(17/09/2021)