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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2021

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THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.No.15437 of 2014

and

M.P.No.1 of 2014

Janata Sahakari Bank Ltd.,
Represented by its authorized signatory,
Umesh Khanderao Kokil,
1444, Shukrawar Peth,
Thorale Bajirao Road,
Pune - 411 002.

...Petitioner

vs

Tax Recovery Officer VII,
Income Tax Department,
Company Range IV,
121, M.G.Road,
Chennai - 600 034.

...Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, calling for the records of letter of the respondent bearing reference T.R.No.N.23/2007-08 dated 27.12.2007 and quash the same.

For Petitioner : Mr.Satish Parasaran
Senior Counsel
for Mr.B.N.Suchindran

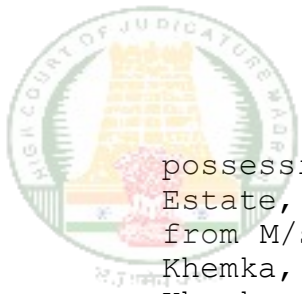
For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

ORDER

The writ on hand is filed questioning the validity of the proceedings dated 27.12.2007 passed by the respondent.

CONTENTION OF THE PETITIONER:

2.The impugned proceedings reveals that it was issued for recovery of income tax arrears in the case of M/s.NEPC Agro Foods Limited and its Directors Shri.Raj Kumar Khemka, Shri.Ravi Prakash Khemka and Shri.Thirupathy Kumar Khemka. The respondent had noticed from the advertisement published in the daily newspaper 'Dinamalar' on 20.12.2007 that the Bank has taken



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possession of the property at Plot No.83 at Ambattur Industrial Estate, Chennai-53 for the loan amount of Rs.28,89,35,552/- due from M/s.NEPC Agro Foods Ltd., and its Directors Shri.Raj Kumar Khemka, Shri.Ravi Prakash Khemka and Shri.Thirupathy Kumar Khemka.

3.The impugned order further proceeds that the above defaulters M/s.NEPC Agro Foods Ltd. and its Directors Shri.Raj Kumar Khemka, Shri.Ravi Prakash Khemka and Shri.Thirupathy Kumar Khemka are in tax arrears to the Income Tax Department as below:

1.M/s.NEPC Agro Foods Ltd.	Rs.20,37,11,265
2.Shri.Raj Kumar Khemka	Rs. 51,08,289
3.Shri.Ravi Prakash Khemka	Rs. 2,11,52,008
4.Shri.Thirupathy Kumar Khemka	Rs. 59,35,011

4.In this connection, the respondent informed that the property mentioned in the newspaper, i.e. Plot No.83, Ambattur Industrial Estate, Chennai-53 was already attached in Form ITCP 16 by the Income Tax Department on 18.06.2003 and the same was served to the defaulter assessee company on 18.06.2003. A copy of the Form ITCP 16 also enclosed along with the impugned order which was communicated to Shri.A.S.Bapalt, the Authorised Officer, Janatha Sahakari Bank Ltd., Pune [the petitioner herein].

5.The petitioner Janata Sahakari Bank Ltd., made a submission that the attachment was made against M/s.NEPC Agro Foods Ltd. and they are neither a proper nor necessary party since the petitioner Bank was under lawful possession of the subject property since from 19.12.2007 which was affirmed by the Debt Recovery Tribunal, Debt Recovery Appellate Tribunal and the Madras High Court.

6.The petitioner states that M/s.NEPC Agro Foods Ltd. originally entered into a loan agreement dated 31.03.1999 with the petitioner bank for a sanctioned amount of Rs.12,80,00,000/- @ 18% interest per annum. As security for the said loan, M/s.NEPC Agro Foods Ltd. mortgaged its property at plot No.83, Ambattur Industrial Estate, Chennai - 53 admeasuring 02.00 acres together with all buildings and superstructures thereon comprised in S.No.14, 15, 16(part), 18, 19, 20 bounded on the North by land covering S.No.12, 13 South by New Avadi road, East by compound wall of Spheroidal Industries and West by Nallikanam Street, within the sub registration of Ambattur, and the Registration district of Chingelpet, Madras. NEPC India Ltd, the parent company, stood as corporate guarantor of the loan.

7.The petitioner states that the borrower, NEPC Agro foods Ltd and the corporate guarantor NEPC India Ltd both defaulted on the repayment of loan as per the payment schedule given in the loan agreement. This default



constrained the petitioner to classify the loans as C-100 under the NPA classification rules as mandated by the Reserve Bank of India.

8. Before the Cooperative Court, NEPC Agro foods Ltd and NEPC India Ltd, admitted their joint liability and entered into duly recorded consent award dated 15.2.2007, wherein they agreed to repay a sum of Rs. 15,51,00,000/- on or before 15.3.2007 as full and final settlement of dues. It was an expressed term of the consent award that failing repayment the petitioner could proceed with its remedies under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act [SARFAESI Act], 2002. Both NEPC Agro foods Ltd and NEPC India Ltd defaulted on the terms of the consent award and no payments were made.

9. The said default by these two Companies forced the petitioner to proceed and take possession of the property on 19.12.2007 in continuation of the action already initiated under the SARFAESI Act, 2002. It is contended that since 2007 the Petitioner is in possession of the schedule mentioned property.

10. The SARFAESI action initiated by the Petitioner Bank was challenged before the DRT-I, Chennai but the original stay was vacated by the High Court. On remand, DRT dismissed S.A. No. 68 of 2008. An Appeal was made before the Debts Recovery Appellate Tribunal, which was also dismissed. At the time of filing of the writ petition, no proceedings were pending relating to the loan agreement entered into between the petitioner bank and the NEPC Agro Foods Ltd. It is contended that the petitioner bank initiated winding up proceedings before the Madras High Court against M/s. NEPC Agro Foods Ltd. in C.P.No.247 of 2008. Meanwhile, the petitioner bank received the notice dated 27.12.2007 consequent to the advertisement dated 20.12.2007 in the Dinamalar newspaper from the respondent informing the petitioner of an Income Tax attachment by the respondent on the same schedule property vide Form ITCP6 dated 18.06.2003.

11. The petitioner states that the encumbrance certificate issued by the Inspector General of Registration reflects the charge created by the respondent vide Form ITCP 16 bearing reference No.T.R.No.130/CEN.I(1)/2003-04 dated 18.06.2003. The attachment was registered and started reflecting on the encumbrance certificate from 31.12.2007 as other charge after possession of the property was undertaken under SARFAESI Act by the petitioner. The petitioner bank's charge has been registered as a mortgage since 16.10.2002.

12. Based on the above facts as narrated, the learned senior counsel appearing on behalf of the petitioner has stated that, even before attachment by the Income Tax Department, the



mortgage was in existence from 16.10.2002 onwards. However, it is clarified that the mortgage was registered between the petitioner and M/s.NEPC Agro Foods Ltd. on 11.12.1998 and the said mortgage was reflected in the encumbrance certificate also. Thus the petitioner bank holds priority over the charge and therefore the impugned order passed by the respondent is null and void.

13.The learned senior counsel for the petitioner strenuously contended that the actions of the Income Tax Department is absolutely untenable and not in consonance with the terms of priority as contemplated under the SARFAESI Act and Debt Recovery Tribunal Act. The learned senior counsel made a submission that M/s.NEPC Agro Foods Limited is an independent entity and absolutely unconnected with M/s.NEPC India Limited, who was the income tax defaulter as per the respondent. Thus the mortgage between the petitioner and the M/s.NEPC Agro Foods Limited is no way responsible for the income tax arrears due to the Department. The subject property mortgaged belongs to the M/s.NEPC Agro Foods Limited which is a separate entity and a company registered and therefore, the very initiation of proceedings under the Income Tax Act is untenable. The learned senior counsel in support of the said contention cited the judgments wherein the priority of the mortgage was upheld. The learned senior counsel cited the judgment of the Hon'ble Full Bench of this Court dated 10.11.2016 in W.P.No.2675 of 2011 [Assistant Commissioner (CT), Anna Salai-III Assessment Circle vs. The Indian Overseas Bank], wherein the Hon'ble Full Bench made an observation as under:

"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



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Company Ltd. vs. Income Tax Officer [2018 SCC Online Hyd 441], wherein Justice R.Jayasimha Babu made an observation as follows:

"6. Section 281(1) of the Act had been relied upon by the Income-tax Officer. That section declares certain transactions as void. The section, however, does not vest the authority in the Income-tax Officer to make such a declaration.

7. Before a transaction involving immovable property can be declared as void, all the requirements of law must necessarily be satisfied. The fact that a statute provides for such a declaration being made, if the conditions mentioned in the statute are satisfied, does not imply that an officer exercising powers under the provisions of the statute can assume to himself the power and jurisdiction to declare what is otherwise a legally valid transaction as void. Adjudication is the function of the courts. Any declaration of a transaction being void must be sought in the civil court. The Income-tax Officer moreover in this case is an interested party as it is in the interests of the Revenue to make such a declaration and proceed to recover the vendor's arrears of tax from such person.

8. The Supreme Court of India in its recent decision rendered in the case of TRO v. Gangadhar Viswanath Ranade (Decd.) [1998] 234 ITR 188 has held that if the Department finds that the assessee has transferred a property to a third party with the intention to defraud the Revenue, the Revenue will have to file a suit under Rule 11 (6) of Schedule II to the Income-tax Act to have the transfer declared void under Section 281 of the Income-tax Act."

16. Relying the said judgment, the learned senior counsel is of an opinion that Section 26E commences with a non-obstante clause and states that priority shall be accorded to the debts payable to secured creditors notwithstanding anything in any other law for the time being in force including the Income Tax Act. The only exception is that as per explanation to section 26E, cases pending under the Insolvency and Bankruptcy Code, 2016 in the case of secured creditors where a prior valid charge exist as in the present case where the mortgage has been created on 10.02.2014, the provisions of section 281 of the Income Tax Act would not serve to disturb the same.

17. In the case cited supra, the facts considered by this Court was that the mortgage was well prior to the attachment made by the Income Tax Department. In such circumstances, the Court formed an opinion that as per Section 26E of the SARFAESI



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Act the Bank holds priority over the charge and therefore, the subsequent attachment made by the Income Tax Department is not valid. Even the judgment in the case of Sancheti Leasing Company Limited, this Court held that "the fact that a statute provides for such a declaration being made, if the conditions mentioned in the statute are satisfied, does not imply that an officer exercising powers under the provisions of the statute can assume to himself the power and jurisdiction to declare what is otherwise a legally valid transaction as void". The consideration was whether the Income Tax Authority has got power under the Income Tax Act to issue a declaration declaring certain civil transactions as void, more specifically, the mortgage or otherwise. The Court held that any declaration of transaction being void must be sought in the Civil Court.

18. This Court has no quarrel or any contra opinion with reference to the principles settled in the said case. The Income Tax authorities have no powers under the Act to issue any such declaration, declaring the civil transactions as null and void and such a power is vested with the competent Civil Court of Law.

19. Under these circumstances, this Court is bound to examine the scope of Section 281 of the Income Tax Act as well as the priority conferred in favour of the Bank under the provisions of the SARFAESI Act and Debt Recovery Tribunal Act. The principles settled in the case of Corporation Bank vs. The Commissioner, Income Tax Department and others in W.P.No.27409 of 2019 dated 21.04.2012 is not in dispute and this Court is bound to consider the facts circumstances independently and the scope of the relevant provisions with reference to the provisions of the Income Tax Act.

20. In this regard, it is relevant to rely on the judgment of the Hon'ble Three Judges Bench of the Supreme Court of India in the case of Official Liquidator vs. Dayanand and others, reported in 2008 (10) SCC 1, wherein the Apex Court in an unambiguous terms held that "there have been several instances of different Benches of High Court not following the judgments/orders of co-ordinate and even larger Benches". In some cases, High Courts were gone to the extent of ignoring the law laid down by this Court without any tangible reason. Therefore, if there are factual differences or the reasons or conflicting decisions, then the reasons must be considered in clear terms for the purpose of distinguishing the judgment or otherwise. Thus, it is not as if every judgment produced by the respective learned counsels appearing on behalf of the parties to the lis is to be followed as it is. The Courts are bound to apply the facts and circumstances of each case and distinguish the principles if necessary with reference to the provisions of the statute as well as the Rules. Conflicting decisions are



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common in our Country. The duty of the Courts are to ensure that such conflicting judgments are taken into consideration for the purpose of dealing with the facts, which all are placed before the Courts. Even in some circumstances, certain interpretation of the provisions, which all are not considered or not interpreted in its letter and spirit, then also the Courts are bound to look into those aspects. Ultimately, while following the principles laid down, independent application of mind by the Courts are of paramount importance and it is not as if every judgment is to be followed in a routine and mechanical manner. This exactly is the principle reiterated by the Apex Court on several occasions. Thus, this Court has to consider the provisions as well as the judgments.

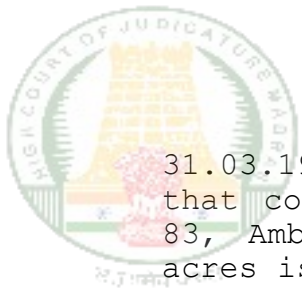
CONTENTIONS OF THE RESPONDENTS:

21.The learned senior standing counsel made a submission that factually there are certain disputes which all are to be adjudicated, and High Court cannot venture into the adjudication of such disputed facts and in this regard, the Income Tax Act provides an avenue for the aggrieved person to prefer an appeal before the Tax Recovery Officer under Schedule II Rule 11, wherein the factual adjudications can be made. Thus the petitioner has to approach the Tax Recovery Officer under Schedule II Rule 11 of the Income Tax Act for clarifying certain aspects which all are made available. Contrarily, a writ proceedings need not be entertained as adjudication of facts in the present case is vital.

22.In order to substantiate the said contention, the learned senior standing counsel contended that the assessee defaulter is in arrears to the tune of Rs.34,52,12,985/-. The following demands were raised prior to 31.03.1999, the alleged date of mortgage to the petitioner Bank.

Asst. Year	Date of Order	Amount (in Rs.)
1993-94	143(3) dated 25.03.1996	3,84,14,746
1994-95	143(3) dated 27.03.1997	6,17,58,825
1995-96	143(3) dated 19.11.1998	1,69,74,612
1996-97	143(3) dated 30.03.1999	1,59,54,741

23.It is contended on behalf of the respondent that the defaulter company had failed to pay the above demands. The petitioner M/s. JanataSahakari Bank Ltd, Pune claims that it had sanctioned the term loan of Rs.12,80,00,000/- to the defaulter company only on 31.03.1999 and the said loan were dispersed during the financial year 1999-2000. Moreover, the Bank had sanctioned the loan without verifying the tax arrears and it is the bank's obligation to verify the same. Considering the above facts, it is submitted that the department has the first charge with respect to the tax dues which were created prior to



31.03.1999 and it is clear that the liability of the said bank that costs the encumbrance in the property located at Plot No. 83, Ambattur Industrial Estate, Chennai-600053 admeasuring two acres is void against the Income tax dues.

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24.It is further contended that when the file was at Chennai, the property belonging to the assessee-defaulter, NEPC Agro Foods Limited, located at D.No.83, MTH Road, Ambattur Industrial Estate, Chennai-98 was attached by Tax Recovery Officer-I, Central, Chennai, vide ITCP 16 in T.R. Dated 18.06.2003. A copy of the above ITCP 16 was served on 18.06.2003 itself on the assessee-defaulter, NEPC Agro Foods Limited. Later on, on 20.12.2007, the petitioner bank M/s/.Janata Sahakari Bank issued an advertisement in the tamil daily newspaper Dina Malar informing that the aforesaid property had been taken possession by the petitioner-bank for default in payment of the loan to the tune of Rs.28.89 crores by the assessee-defaulter and its directors. After the advertisement, the then TRO (TRO-VII, Company Range-IV, Chennai, issued a letter dated 27.12.2007 intimating the petitioner-bank that the aforesaid immovable property was already attached by the Income Tax Department on 18.06.2003. This attachment is being questioned by the petitioner-bank by filing of writ petition before the Hon'ble High Court of Madras W.P.No.15437 of 2014 and the petitioner - bank is praying before the Hon'ble High Court to quash the above letter dated 27.12.2007.

25.It is submitted that the property belonging to the assessee-defaulter, NEPC Agro Foods Limited, located at D.No.83, MTH Road, Ambattur Industrial Estate, Chennai-98 was attached by Tax Recovery Officer, Central, Chennai, vide ITCP 16 in T.R.No.130/Cen.I(1)/2003-04, dated 18.06.2003. A copy of the above ITCP 16 was served on 18.06.2003 itself on the assessee-defaulter, NEPC Agro Foods Limited. Once the ITCP 16 is issued, an assessee-defaulter is prohibited and restrained from the date of the aforesaid notice until further order from the Income Tax Department, from transferring or charging the subject mentioned properties, which are included in the property of the defaulter by virtue of the Explanation to sub-section (1) of the section 222 of the Income-tax Act 1961 in any way and that all persons be and they are prohibited from taking any benefit under such transfer or charge. Further, notices in ITCP 17 dated 12.01.2012 was issued by the TRO, Tirupur, requesting the assessee-defaulter and its directors, copy of the notices were sent to the Coimbatore and Chennai address of the assessee-defaulter and its directors, to bring to the notice of the department any encumbrances, charges, claims or liabilities attaching to the above said Ambattur Industrial Estate property. Against the aforesaid notice, the assessee-defaulter filed a writ petition before the Hon'ble High Court of Madras which on 05.07.2012 stayed further proceedings pursuant to the aforesaid notice



(ITCP 17 dated 12.01.2012) pending disposal of the WP No.2361 / 2012. It is seen from the records, the aforesaid WP is yet to be disposed of.

26. It is further submitted that since the notice of attachment [ITCP 16 in T.R. No.130/Cen.I(1)/2003-04, dated 18.06.2003] of the aforesaid immovable property was served on NEPC Agro Foods Limited on 18.06.2003, the petitioner- Janata Sahakari Bank cannot be said to be the lawful owner of the immovable property from the later period of 19.12.2007. While the petitioner-Janata Sahakari Bank is claiming to be in possession of the said immovable property from the year 2007, the Income Tax Department had attached the said immovable property much earlier on 18.06.2003. Consequent to the advertisement issued by the petitioner-Janata Sahakari Bank in the tamil daily newspaper DINA MALAR dated 20.12.2007, the then TRO-VI, Company Range-IV, Chennai, vide letter in T.R. No.23/2007-08, dated 27/12/2007, brought to the notice of the petitioner- Janata Sahakari Bank that the aforesaid immovable property had already been attached by the Income Tax Department on 18.06.2003 and the attachment notice in ITCP 16 was served on the NEPC Agro Foods Limited on 18.06.2003. Whereas, as already mentioned in the comments for para 2, once the ITCP 16 is issued, an assessee-defaulter is prohibited and restrained from the date of the aforesaid notice until further order from the Income Tax Department, from transferring or charging the under mentioned properties which are included in the property of the defaulter by virtue of the Explanation to sub-section (1) of the section 222 of the Income- tax Act 1961 in any way and that all persons be and they are prohibited from taking any benefit under such transfer or charge.

27. The learned senior standing counsel to rebut the contentions with reference to the judgments relied on by the petitioner drawn the attention of this Court regarding the judgment in the case of Abdul Jamil and others vs. Secretary, Income Tax Department and others [(1998) 101 Taxman 332 (Madras)], wherein the scope of Section 281 of the IT Act was considered by this Court and it was held as follows:-

"In considering s. 281 of the said Act, the said provision is declaratory in nature. It declares that the transfers effected by any assessee with intent to defraud the Revenue during the pendency of any proceedings under the Act shall be void against any claim in respect of any tax or any sum payable by the assessee as a result of the completion of the said proceedings

". Therefore, the three requirements under the section are :

(i) that there must be a transfer of the property;



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(ii) that it should be during the pendency of a proceeding under the Act; and
(iii) that the transfer must be with intent to defraud the Revenue
and if these conditions are satisfied, then the transfer shall be void in respect of any tax or sum payable by the assessee as a result of the completion of the proceedings during the pendency of which the transfer was effected. The effect of the section is that, if such transfer with intent to defraud the Revenue has been made and any claim for tax arises after completion of the proceedings during the pendency of which the transfer took place, such tax or other sum can be recovered by proceeding against the property notwithstanding the said transfer."

28. The learned senior standing counsel further relied on the judgment in the case of D.S.Senthilvel vs. Tax Recovery Officer [(2018) 405 ITR 202 (Madras)], wherein this Court made an observation as under:

"19. The learned counsel appearing for the petitioners also emphasised that this Court should defer to the decision rendered by the Division Bench of the Gujarat High Court. But this Court is unable to agree with the said submission. It is true that the Division Bench of this Court in the decision reported in [1986]159 ITR 646 (Mad) observed that it is an acceptable principle in the matter of construction of an Indian statute as far as possible that there must be uniformity of construction and if the provision of law which falls for consideration before the Court has already been construed by another High Court, normally that construction should be accepted. But then the Honourable Division Bench also added a caveat that if there are compelling reasons to depart from the view taken by the other High Court, the said construction need not be accepted. This Court is of the considered opinion that there are compelling reasons to depart from the view taken by the Division Bench of the Gujarat High Court. Again as already pointed out, this Court treading the path taken by the Hon'ble Division Bench of the Punjab and Haryana High Court.

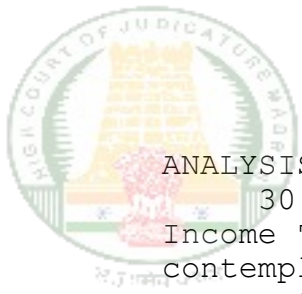
20. Yet the orders impugned in these writ petitions cannot be sustained as such. The Hon'ble Supreme Court in (1998)6 SCC 658 has held that it is the function of the civil court to declare a transactions to be null and void and that the Tax Recovery Officer cannot exercise the said



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function. Therefore, the respondent clearly erred in declaring the transactions to which the petitioners are parties as null and void. Therefore, the orders impugned in these writ petitions stand quashed to that extent. It would certainly be open to the petitioners herein to avail the remedy set out in Rule 11(6) of the second schedule of the Income Tax Act. If the respondent authority wants to have the transactions nullified, it is the respondent who must go to the civil court to seek declaration to that effect. If the writ petitioners want the attachment to be lifted, it is for them to move the civil Court and obtain relief as provided in Rule 11(6) of the second schedule of the Income Tax Act."

29. Relying on these judgments, the learned senior standing counsel reiterated that even as per the petitioner, the corporate guarantee was provided by the NEPC India Limited and the directors of these two Companies, NEPC India Limited and M/s. NEPC Agro Foods Ltd. are one and the same and even as per the impugned order, the tax arrears to the Income Tax Department was fixed not only on NEPC Agro Foods Limited but also to its Directors who is having interest over the NEPC India Limited also. If at all M/s. NEPC Agro Foods Limited is an independent entity and unconnected with NEPC India Limited, then it is for the petitioner to adjudicate the same before the Tax Recovery Officer by filing an application under Schedule II Rule 11 of the Income Tax Act. This apart, the defaulter has not been impleaded as party respondent in the writ petition. Therefore, those facts are to be adjudicated and if at all the judgment made by the Income Tax Department is not in consonance with the Income Tax Officer, then the petitioner may elaborate the same before the Tax Recovery Officer who in turn is competent to pass an order either way by considering the merits and demerits of the case. Instead the High Court cannot go into those facts and circumstances which all are to be established through certain documents which all are to be produced by the defaulter and the defaulter being not a party to the writ petition, the petitioner Bank cannot assume the role of the Income tax arrears defaulters and make certain submissions. Drawing inference on these lines, the learned senior standing counsel appearing for the Income Tax Department reiterated that even presuming the petitioner's case is to be considered, the writ petition would not be an appropriate proceedings and the application before the Tax Recovery Officer under Schedule II Rule 11 of the Income Tax Act would be an appropriate procedure for adjudication of these facts. Thus, the writ petition is to be rejected.



ANALYSIS:

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 sum payable by the 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 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 Bunkruptcy Act, 1993 and the said 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 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".

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



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 recognised 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 recognised directly takes precedence over the other statutes.

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 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.

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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, 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



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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 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



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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-à-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 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



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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 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.

49. Let us consider the dispute raised in the present case. The Income Tax Department in their counter affidavit had stated that the assessee defaulter is in arrears to the tune of Rs.34,52,12,985/-. The demands were raised by the Income Tax Department prior to 31.03.1999, the date of mortgage to the petitioner bank. The Income Tax Department in other words claims that the proceedings under the Income Tax Act was pending even before the date of mortgage. The petitioner relying on the encumbrance certificate issued by the Registration Department of the State contends that the attachment is made after the mortgage by the petitioner bank. However, Section 281 of the Income Tax Act unambiguously states that during the pendency of any proceedings under the Income Tax Act. Thus, pendency of any



proceedings is sufficient to treat any other transfer/mortgage as void.

50. Thus, the mortgages, transactions or transfers are made during the pendency of the Income Tax proceedings, then all such transfers, mortgages, transactions are void under Section 281 of the Income Tax Act and any such mortgage or attachment made by the Bank during the pendency of the Income tax proceedings, cannot be a ground to claim priority based on the provisions of the SARFAESI Act or DRT Act.

51. The disputed factors cannot be adjudicated by the High Court under Article 226 of the Constitution of India and it is for the petitioner to establish the details regarding the mortgage and the pendency of Income tax proceedings under the Income Tax Act. It is for the petitioners to produce the documents in original and adjudicate the same in the manner prescribed under Schedule II Rule 11 of the Income Tax Act. Thus, it would be improper to form an opinion regarding the disputed facts between the parties to the lis in the present case, which requires adjudication of facts based on the documents and evidences. High Court cannot conclude the disputed facts merely based on the affidavits and counter affidavits filed by the parties in a writ proceedings. However, this Court cannot conclude that the petitioner Bank holds priority over the Income tax arrears due to the Income Tax Department. The principles elaborately considered and discussed in the aforementioned paragraph would highlight the constitutional importance, which all are to be considered to grant priority to the institutions. Thus, this Court is inclined to pass the following orders:

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

(2) The petitioner is at liberty to approach the Tax Recovery Officer by filing an appropriate application under Schedule II, Rule 11 of the Income Tax Act. In the event of filing any such application, the Tax Recovery Officer is directed to investigate the same with reference to the original documents and pass appropriate orders as expeditiously as possible.

52. With these directions, the writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

cse



To

Tax Recovery Officer VII,
Income Tax Department,
Company Range IV,
121, M.G.Road,
Chennai - 600 034.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.35030

W.P.No.15437 of 2014

RGN(CO)
RVM(19/08/2021)