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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2021

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THE HON'BLE Mr. JUSTICE S.M.SUBRAMANIAM

W.P.No.25325 of 2017

and

W.M.P.Nos.26783 & 26784 of 2017

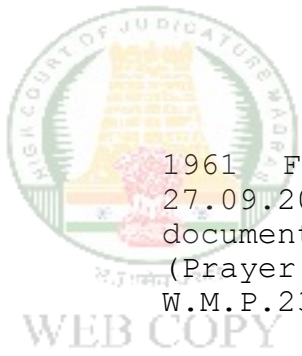
Aditya Birla Finance Limited  
having its Registered Office at  
Indian Rayon Compound, Veraval,  
Gujarat - 362 266 and a branch at  
Srinivas Towers, # 5, 1<sup>st</sup> Floor, Cenotaph  
Road, Teynampet, Chennai - 600018  
And represented by its Chief Manager & authorised  
Signatory Mr.Karthik Kumar ... Petitioner

Vs

1. The Deputy Commissioner of Income Tax  
Circle 3 (1) No.44, Williams  
Cantonment, Tiruchirapalli.
2. The Assistant Commissioner of Income Tax  
Central Circle 1I(1), Room No.122, 1<sup>st</sup> Floor,  
Investigation Wing, 46 Nungambakkam High  
Road, Chennai - 600 034.
3. The Joint Sub-Registrar,  
Chennai Central Joint-I,  
Sub-Registrar Office, Mylapore,  
Chennai - 600 004.
4. Dr.A.M.Arun
5. Mrs. A.Meera  
(R4 & R5 - impleaded as per order, dated 07.06.2018 by TSSJ in  
W.M.P.Nos.9163 & 9260 of 2018 in W.P.25325 of 2017.  
... Respondents

PRAYER:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to lift and /or raise or remove the Order of attachment of immovable properties under Section 281 of the Act,



1961 Form No.ITCP 16 TRC No.36, 37, 38/C-2/201-18 dated 27.09.2017 passed by the first respondent and registered as document No.1 of 2017 before the third respondent.  
(Prayer amended as per Order dated 14.08.2018 by KRCBJ in W.M.P.23675 of 2018 in W.P.25325 of 2017 by KRCBJ)

For Petitioner : M/s.U. Vinay Metha

For Respondents: 1. Mr.A.P.Srinivas,  
Senior Standing Counsel for  
Respondents 1 & 2

2. Mr.V.Veluchamy,  
Govt. Advocate for Respondent No.3

3. Mr.K.Pradeep  
for Respondents 4 & 5

#### ORDER

The relief sought for in the present Writ Petition is to direct the first and second respondents to lift and/or raise or remove the Order of attachment of immovable properties under Section 281 of the Act, 1961 Form No.ITCP 16 TRC No.36, 37, 38/C-2/201-18 dated 27.09.2017 passed by the first respondent and registered as document No.1 of 2017 before the third respondent.

2. The petitioner, Aditya Birla Finance Limited is a Non-Banking Financial Company duly registered with the Reserve Bank of India and incorporated under the provisions of the Companies Act, 1956.

3. The learned counsel for the petitioner states that the property belongs to the impleaded respondents 4 and 5 was mortgaged with the petitioner Finance Company on 23.04.2013 vide document No.453 of 2013. On 18.08.2014 another mortgage was created in favour of the petitioner vide document No.2467 of 2014 and on 22.10.2015, the third Mortgage was created in favour of the petitioner vide document No.3168 of 2015.

4. The learned counsel for the petitioner states that when the properties belong to the respondents 4 & 5 are under mortgage, the first respondent / Deputy Commissioner of Income Tax, passed an Order of Attachment on 03.11.2015, which all are reflected in the Encumbrance Certificate of the third respondent / Joint Sub-Registrar. In view of the fact that the mortgage in favour of the writ petitioner was created prior to the Attachment Order, the petitioner made a request to the second



respondent to lift the attachment enabling them to deal with the property as the borrower failed to repay the loan amount.

5. The question of priority based on the date of mortgage is also raised by the petitioner. The learned counsel for the petitioner has reiterated that the Attachment by the Income Tax Department was made at latter point of time in the year 2015 and the subject properties were mortgaged in favor of the petitioner through registered documents during the years 2013, 2014 & 2015. Thus, the Attachment became null and void and liable to be set aside.

6. Regarding the priority issue with reference to the provisions of the Income Tax Act and under the provisions of the SARFAESI Act and Debt Recovery Tribunals Act, this Court has elaborately considered the issue in W.P.No.15437 of 2014 dated 19.07.2021 and the relevant paragraphs are extracted hereunder:

"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 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:

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(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 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 Bunkruptcy 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,



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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 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 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.

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 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



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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, 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



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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 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



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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 altered 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-A 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



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



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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."

7. As far as the factual dispute raised by the petitioner, it is to be adjudicated before the Competent Authority under the Income Tax Act. High Court cannot adjudicate those disputed facts involving scrutinization of original documents and evidences. The petitioner in this regard is bound to approach the Competent Authority under Rule 11 Schedule II of the Income Tax Act for investigation of the facts for arriving a decision. When the provisions of the Income Tax provides a remedy for complete adjudication of these disputed facts, the said remedy is expected to be exhausted by the petitioner. Thereafter they are at liberty to approach the Competent Court of Law, in the event of any other civil dispute or otherwise.

8. The learned Senior Standing Counsel made a submission that even at the time of mortgage, the income tax proceedings with reference to the Assessment Years 2009 - 10, 2010 - 11 and 2011 - 12 were pending and therefore, mortgage becomes null and void and in view of the Section 281 of the Income Tax Act. When it is brought to the notice of this Court that the Income Tax proceedings were pending in relation to the Assessment Year 2009 - 10, all those facts are to be adjudicated before the Competent Authority under Rule 11 Schedule II of the Income Tax Act.

9. In view of the facts and circumstances, the following orders are passed:

(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



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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.

10. Accordingly, the writ petition stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-  
Assistant Registrar

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Sub Assistant Registrar

Pns/Kbs

To

1. The Deputy Commissioner of Income Tax  
Circle 3 (1) No.44, Williams  
Cantonment, Tiruchirapalli.
2. The Assistant Commissioner of Income Tax  
Central Circle 1I(1), Room No.122, 1st Floor,  
Investigation Wing, 46 Nungambakkam High  
Road, Chennai - 600 034.
3. The Joint Sub-Registrar,  
Chennai Central Joint-I,  
Sub-Registrar Office, Mylapore,  
Chennai - 600 004.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.43884

W.P.No.25325 of 2017 and  
M.P.Nos. 26783 & 26784 of 2017

KG(CO)  
CT(16/09/2021)