IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20-01-2022

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.6686 of 2016
And
WMP No.5922 of 2016

State Bank of India,
Stressed Assets Management Branch,
Red Cross Building,
Montieth Road,
Egmore,
Chennai – 600 008.
.. Petitioner

vs.

1.The Tax Recovery Officer,
Income Tax Department,
Government of India,
D.P.Thottam,
Muthialpet,
Pondicherry – 605 003.

2.The Sub Registrar of Puducherry,
Government of Puducherry,
Puducherry.

3.Smt.Devaki Thirunavakkarasu .. Respondents

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the impugned communication of the first respondent in TRC No.593 and 708 dated 29.01.2016, reiterating the order of attachment in ITCP-16 dated 10.12.2015 attaching the properties of the third respondent in derogation of the rights of the petitioner and to quash the same, being arbitrary, non-considerable, derogation of the statutory provisions and being against the principal of natural justice and fair play.

For Petitioner : Mr.E.Om.Prakash,
Senior Counsel for
Mr.P.Elaya Rajkumar for

M/s.Ramalingam and Associates.

For Respondent-1 : Mr.A.P.Srinivas,
Senior Standing Counsel for
Income Tax Department.

For Respondents-2 and 3 : No Appearance

O R D E R

The order issued by the Tax Recovery Officer, Income Tax Department in proceedings dated 29.01.2016, is under challenge in the present writ petition.

2. The order impugned states that the subject property belongs to the third respondent was already attached by the Income Tax Authorities and therefore, any subsequent mortgagee with the Bank is void under the provisions of the Income Tax Act.

3. The said actions of the Income Tax Department is under challenge by the State Bank of India mainly on the ground that they hold the priority charge as the valid mortgage was executed by the petitioner-State Bank of India and under the provisions of the Debt Recovery Act and SARFAESI Act, the Bank holds the priority and therefore, the Income Tax Department has no authority to pass such an order affecting the rights of the Bank in respect of the subject property under mortgage.

4. The dispute arose between the State Bank of India and the first respondent-Tax Recovery Officer, when the second respondent refused to register the Sale Certificate dated 12.01.2016 issued under the SARFAESI Act, on the ground that the subject property being vacant plot bearing Plot No.39, “FLOS CARMELI”, Layout, Carmel Convent, Muthiyalpet, Village No.40, Pondicherry Revenue Village, comprised in R.S.No.4/1, measuring an extent 6055 sq. ft., covered by Doc. No.7359/2011, among other properties, is attached by the first respondent-Tax Recovery Officer for the alleged tax dues of the third respondent and the said attachment is recorded in the Books of the second respondent.

5. The petitioner had issued the Sale Certificate dated 12.01.2016 in terms of the auction sale held on 18.12.2015 and pursuant to the E-Auction Sale Notice dated 07.11.2015 issued under the provisions of the SARFAESI Act. The petitioner therefore seeks to quash the communication of the first respondent dated 29.01.2016.

6. The third respondent is the Sole Proprietrix of M/s.Devaki Agencies had availed the credit facilities from the State Bank of India, SME Branch, Puducherry for the business development. The said facilities were availed against specific securities created including mortgage of various immovable properties owned by the third respondent. The third respondent also extended the mortgage of the said properties to secure the facilities availed by the different business concerns of her family, namely (1) Devaki Traders, (2) Devaki Steels, (3) Devaki Steels and Cements, and (4) Devaki Cement Agencies.

7. The credit facilities availed by the said concerns are secured by the mortgage of immovable properties of the third respondent. The equitable mortgages so created were also confirmed by execution of separate Memorandums relating to deposit of title deeds and the same were also registered on the file of the second respondent, confirming the equitable mortgage for the total credit facilities availed by the family concerns of the third respondent.

8. The petitioner-State Bank of India furnished tabulations providing details of various immovable properties owned by the third respondent, which are mortgaged in the petitioner to secure various credit facilities availed by the third respondent and also the other family concerns.

9. In this context, the learned Senior Counsel appearing on behalf of the petitioner reiterated that the claim of the fourth respondent for priority against the assets of the third respondent for the alleged income tax arrears does not have any statutory sanction and as such the action of the first respondent in interfering with the right of the petitioner to proceed against the mortgaged assets under the provisions of the SARFAESI Act, is illegal, arbitrary and unsustainable in law.

10. It is contended that the impugned order passed by the first respondent is contrary to the provisions of the enactment, more particularly, the rights vested on the petitioner-Bank under the Special Statute to recover their dues as a secured creditor and hence the impugned communication is liable to be set aside. When tax arrears under the Income Tax Act do not constitute a priority on the assets of the defaulter by a statutory recognition and therefore, cannot defeat the rights of the secured creditor in whose favour the interest has been created over the said properties, even prior to the attachment of the properties. It is contended by the petitioner that the attachment said to have been made in ITCP-16 is only on 10.12.2015, whereas even earlier to the same, the

third respondent had created mortgages over her various immovable properties in favour of the State Bank of India, SME Branch, Puducherry and therefore, the petitioner-Bank is entitled to enforce the said mortgage for the recovery of huge outstanding dues.

11. The petitioner-Bank, in exercise of their right under the SARFAESI Act and, after compliance with all the statutory provisions had in fact issued an E-Auction Sale Notice dated 07.11.2015, bringing the properties of the third respondent as well as the other family members for auction sale, scheduled on 18.12.2015.

12. Relying on these facts and circumstances, the learned Senior Counsel for the petitioner reiterated that this Court in the case of State Bank of India, Stressed Assets Management Branch, represented by its Assistant General Manager vs. Assistant Commissioner of Income Tax And Another [MANU/TN/4044/2017], wherein this Court held that the impugned notice issued by the Income Tax Department cannot be enforced in that particular case.

13. In the case of Corporation Bank vs. Commissioner of Income Tax Department [MANU/TN/7177/2021], wherein this Court, in paragraph-28 of its judgment held as under:-

> "28. Incidentally, at the time when the above decision was rendered, Section 26E of the SARFAESI Act had not been notified, prompting the Bench to state at paragraph 6 of that decision (of the SCC online report) that the issue before them could have been resolved in a trice, had only the provisions of Section 26E of the Act, been notified at the time when the decision was being rendered. The provisions of Section 26E of the Act, have since been notified on 24.01.2020 and the benefit of the same is available for the present Writ Petitioners."

14. The learned Senior Standing Counsel appearing on behalf of the first respondent-Tax Recovery Officer objected the contentions raised on behalf of the petitioner by stating that no doubt certain cases are decided in favour of the Bank by this Court and even in those cases, the facts are distinguishable.

15. Section 281 of the Income Tax Act is unambiguous. Any mortgage entered into between the parties, after initiation of the action by the Income Tax Department for

recovery of arrears, then such mortgages are void and cannot be a valid execution in the eye of law. The said statutory provision under the Income Tax Department, empowers the authorities to initiate action in such circumstances.

16. This apart, in the event of establishing that the mortgage was prior to the initiation of action by the Income Tax Department, prior to the default of the Assessee under the Income Tax Department, then the Bank may claim right over such mortgages. However, in order to ascertain the clear facts and circumstances, an enquiry is to be conducted by the Tax Recovery Officer. Therefore under Rule 11 of Schedule II of the Income Tax Act, the petitioner-Bank has to approach the Tax Recovery Officer for adjudication of the facts, so as to form an opinion whether the petitioner-Bank is entitled to enforce their rights or not.

17. It is not as if in every case, Bank can enforce their rights only under the SARFAESI Act, without reference to the provisions of the Income Tax Act. When such conflict arises, the priority to be considered has been elaborately considered by this Court and detailed findings are provided in the judgment dated 19.07.2021 in WP No.15437 of 2014. The right of priority and adjudication of facts, which all are required and the issues involved are elaborately discussed and the parties were given an opportunity to approach the Tax Recovery Officer by filing an appropriate application under Schedule II of Rule 11 of the Income Tax Act.

18. Therefore, the said principle, which is being followed by this Court, is to be adopted in the present case, as the first respondent-Tax Recovery Officer made a finding in the impugned order itself that the attachment of immovable property made on 10.12.2015 would relate back to 01.03.2013. It has come to the knowledge of the Tax Recovery Officer that the defaulter has mortgaged the subject property with the petitioner-Bank and the same was registered on 04.04.2013. Thus, the first respondent-Tax Recovery Officer formed an opinion that the attachment date precedes the mortgage date and hence the mortgage of the subject property and transfer of the subject property is void under the provisions of the Income Tax Act.

19. This Court in the case of Janata Sahakari Bank Ltd vs. Tax Recovery Officer VII, Income Tax Department, Chennai-34 {MANU/TN/5263/2021] elaborately considered the issues as follows:-

> "ANALYSIS:
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> 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: (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 became 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 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 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 Sate should be able to discharge its primary governmental functions and in order to 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 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 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 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 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.”

20. In view of the principles elaborately considered in the judgment cited supra, the petitioner-Bank in the present case, is at liberty to approach the first respondent-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 evidences and pass appropriate orders as expeditiously as possible.

21. With the abovesaid liberty, the writ petition stands disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

Svn
To

1.The Tax Recovery Officer,
Income Tax Department,
Government of India,
D.P.Thottam,
Muthialpet,
Pondicherry - 605 003.

2.The Sub Registrar of Puducherry,
Government of Puducherry,
Puducherry.

3.State Bank of India,
Stressed Assets Management Branch,
Red Cross Building,
Montieth Road,
Egmore,
Chennai - 600 008.

+2cc to Mr.Ramalingam & Associates, Advocate, S.R.No.3664
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.3481

WP 6686 of 2016

PMK(CO)
CB(01/02/2022)