* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision : 31st August, 2022***

\+ **CS(COMM) 639/2016**

IFCI FACTORS LIMITED ..... Plaintiff
Through: Mr.Anupam Srivastava, Mr.Dhairya Gupta and Mr.VashuMisra, Advocates.

versus

BANK OF INDIA AND ORS. ..... Defendants
Through: Ms.Akanksha Das, Advocate BOI. Mr.Sanjay Kumar and Ms.E.Kadiayan, Advocates for R-3.

**CORAM:**
**HON'BLE MR. JUSTICE AMIT BANSAL**

**AMIT BANSAL, J. (Oral)**

1. The present suit has been filed seeking recovery of a sum of Rs.1,15,36,076/- along with *pendent lite* and future interest.

2. Originally, the suit was filed impleading only the defendant no.1 Bank as a party. Subsequently, vide order dated 14th May, 2018, the defendants no.2 to 4 were impleaded as parties in the suit. Vide order dated 6th May, 2019, the defendant no.3 was deleted from the array of parties.

3. The plaintiff company is engaged in the business of providing financial facilities to its clients and customers. The defendant no. 1 is a nationalized bank. The defendant no.2 company is engaged in the business of sub-distribution of computer hardware. The defendant no.3 is the Deputy Commissioner of Income Tax, Circle 12(1), New Delhi.

4. It is the case of the plaintiff company that the defendant no.2 had approached the plaintiff company to avail Domestic Sales Bill Factoring Facility in the year 2011. Subject to the defendant no.2 company adhering to certain terms and conditions, the plaintiff company made the said facility available to the defendant no.2 company for a sum of Rs.3,00,00,000/-. The directors of the defendant no.2 company had executed personal guarantees in favour of the plaintiff company. Additionally, on 27th March, 2012, the defendant no.2 company had placed a sum of money in a fixed deposit receipt (FDR) with the defendant no.1 Bank in the name of the plaintiff company, in order to secure the amount payable to the plaintiff company. The details of the said FDR are set out below:

- Fixed Deposit Number:600343710000632
- Deposit Date: 27th March, 2012
- Deposit Period: 18 months & 6 days
- Rate of interest: 9.35 %
- Amount: Rs. 70,00,000/- (Rupees Seventy Lacs)
- Maturity Date: 3rd October, 2013

5. Vide communication dated 27th March, 2012, the defendant no.1 Bank confirmed that the lien has been marked on the aforesaid FDR in favour of the plaintiff company and the payment shall be made to the plaintiff company as per its instructions.

6. A notice dated 7th August, 2013 was issued by the plaintiff company to the defendant no.1 Bank, requesting defendant no.1 Bank for encashment of the said FDR. In the reply dated 13th August, 2013 to the said notice, the defendant no.1 Bank stated that the said amount could not be released in

favour of the plaintiff company on account of the notice dated 5th February, 2013 issued on behalf of the Income Tax Department under Section 226(3) of the Income Tax Act, 1961, to the defendant no.1 Bank. On 18th September, 2013, the defendant no.1 Bank wrote to the plaintiff company and informed the plaintiff company that the Bank will be in a position to make payment to the plaintiff company only after it obtains a No objection Certificate (NOC) from the Income Tax Department.

7. Accordingly, the present suit was filed seeking recovery of a sum of Rs.79,92,509/- along with the interest accrued till the realization of the payment.

8. In the written statement filed on behalf of the defendant no.1 Bank, it has been pleaded that the defendant no.1 Bank did not release the amount deposited in the said FDR to the plaintiff on account of the notice dated 5th February, 2013 issued by the Income Tax Department to the defendant no.1 Bank, in terms of which the Income Tax Department demanded a sum of Rs. 59,38,320/- from the said FDR towards Income Tax dues of the defendant no.2 company.

9. An affidavit dated 29th April, 2019 has been filed on behalf of the defendant no.3 in which, it has been stated that there was an outstanding tax/interest demand against defendant no.2 company and hence, notice dated 5th February, 2013 has been issued under Section 226(3) of the Income Tax Act, 1961, to the defendant no.1 Bank. The said notice has been validly issued on behalf of the defendant no.3. Vide order dated 6th May, 2019 passed by this Court, the said affidavit filed by the Income Tax Department was treated as its written statement.

10. Following issues in the suit were framed on 27th October, 2016.

"*(i) Whether the plaintiff is entitled to a decree for a sum of Rs. 1,15,36,076/- along with pendente lite and future interest @ 24% per annum, till realization of payment? OPP*

*(ii) Whether the suit is not maintainable on account of the plaintiff having failed to implead the company known as H.M. Informatics Ltd, which had placed a sum of Rs.70.00 lakhs in fixed deposit with the defendant bank in favour of the plaintiff? OPD*

*(iii) Whether the suit is not maintainable on account of the plaintiff having failed to implead the Deputy Commissioner of Income Tax who issued a notice to the defendant bank under Section 226(3) of the Income Tax Act ? OPD*

*(iv) Whether the defendant is precluded from releasing the fixed deposit amount to the plaintiff even though the fixed deposit created for its benefit by the company known as H.M. Informatics Ltd. in order to secure repayment of the sums owed by the said company to the plaintiff had matured on 03.10.2013? OPD*

*(v) Relief*"

11. Vide order dated 6th May, 2019 passed by this Court, i) the defendant no.2 was proceeded *ex parte* and ii) the contention of the counsels for the parties was noted that no oral evidence would be required in the present matter.

12. The counsel for the plaintiff has made the following submissions:-

i) The defendant no.1 Bank has relied on a lien created under Section 226(3) of the Income Tax, 1961, for refusing encashment of the aforesaid FDR by the plaintiff. However, a garnishee order in terms of the said section can only be passed in respect of the admitted debts owed by any party to an assessee that is in default of Income Tax. However, in the present case, the amount that had been placed in the said FDR by the defendant no.2, was to ensure repayment of the debt owed by defendant no. 2 to the plaintiff.

ii) The plaintiff is a secured creditor in view of the lien possessed by the plaintiff on the said FDR. Therefore, the plaintiff will have a priority over the Income Tax Department, who is an unsecured creditor.

13. In view of the above, the only issue, which requires adjudication in the present case is, ***whether the plaintiff or the defendant no.3 has a preferred lien in respect of the amount deposited in the said FDR lying with the defendant no.1 Bank***.

14. The counsels for the defendants nos. 1 and 3 have reiterated the submissions made in their written statements.

15. I have heard the counsels for the parties.

16. Counsel for plaintiff has relied on the judgment of the Supreme Court in ***Bombay Stock Exchange* v. *V.S. Kandalgaonkar***, (2015) 2 Supreme Court Cases 1. The relevant paragraphs of the said judgment are set out below:

> *"25. ………....*
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> *Re: (3) 26. **It is settled law that Government debts have precedence only over unsecured creditors**. This was held in Dena Bank v. Bhikabhai Prabhudas Parekh Co. MANU/SC/0317/2000 : 2000 (5) SCC 694 as follows:*
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> *10. **However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts***

***over a mortgagee or pledgee of goods or a secured creditor.*** *It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already.* ***In Giles v. Grover [(1832) 131 ER 563 : 9 Bing 128] it has been held that the Crown has no precedence over a pledgee of goods. In Bank of Bihar v. State of Bihar [MANU/SC/0007/1971 : (1972) 3 SCC 196 : AIR 1971 SC 1210] the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (TLL, 7th Edn., p. 386) -- "It seems a government debt in India is not entitled to precedence over a prior secured debt.***

***What has been argued before us is that the moment the Stock Exchange has a lien over the member's securities, it would have precedence over income tax dues. We find there is force in this submission.***

***The Provincial Insolvency Act defines "secured creditor" Under Section 2(e) as follows:***

***(e) "Secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor****;*

*Similarly, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in Section 2(z)(f) defines "security interest" as follows:*

***Section 2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31***

*17. We shall now examine what the word 'lien' means. The word 'lien' originally means "binding" from the Latin ligamen. Its lexical meaning is "right to retain". The word 'lien' is now variously described and used under different context such as 'contractual lien', 'equitable lien', 'specific lien', 'general lien', 'partners lien', etc. etc. in Halsbury's Laws of England, Fourth Edition, Volume 28 at page 221, para 502 it is stated:*

***In its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied**....."*

*XXX XXX XXX*

*24.* ***The first thing to be noticed is that the Income Tax Act does not provide for any paramountcy of dues by way of income tax. This is why the Court in Dena Bank's case (supra) held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in Giles v. Grover (1832) (131) English Reports 563 in which it has been held that the Crown has no precedence over a pledgee of goods****. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, in Collector of Aurangabad and Anr. v. Central Bank of India and Anr. MANU/SC/0003/1967 : 1967 (3) SCR 855 after referring to various authorities held that the claim of the Government to priority for arrears of*

> *income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore "law in force" in the territory of India before the Constitution and was continued by Article 372 of the Constitution*
>
> *25. In the present case, as has been noted above,* ***the lien possessed by the Stock Exchange makes it a secured creditor. That being the case, it is clear that whether the lien under Rule 43 is a statutory lien or is a lien arising out of agreement does not make much of a difference as the Stock Exchange, being a secured creditor, would have priority over Government dues.*** *"*

17. In light of the aforesaid legal position, the Income Tax Department's preferential right to recovery of debts over other creditors is confined only to ordinary or unsecured creditors. It would not extend to secured creditors. The ratio of the aforesaid judgment is fully applicable to the facts and circumstances of the present case. In the present case, the FDR in question was created on 27th March, 2012 payable to the plaintiff and the lien was confirmed by the defendant no. 1 bank in favour of the plaintiff on the said date. This was much before the notice dated 5th February, 2013 issued on behalf of the Income Tax Department to the defendant no.1 Bank. The lien in favour of the plaintiff makes the plaintiff a secured creditor and therefore, the right of the plaintiff would prevail over that of the Income Tax Department.

18. Consequently, the plaintiff company would be entitled to the amounts under the said FDR. The only surviving issue as noted in the order dated 6th May, 2019, is decided in favour of the plaintiff and against the defendants. The suit is decreed in the aforesaid terms.

19. Counsel for the defendant no.1 Bank states that the original amount of Rs. 70,00,000/- has throughout been kept in an interest bearing fixed deposit. The defendant no.1 Bank is directed to release the aforesaid amount along with accrued interest in favour of the plaintiff company within six weeks from today. If the aforesaid amount is not released within six weeks, the defendant no.1 bank would be liable to pay interest @ 8% per annum on the said amount after the expiry of the aforesaid period of six weeks.

20. Decree sheet be drawn up accordingly.

21. No orders as to costs.

**AMIT BANSAL, J**

**AUGUST 31, 2022**
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