IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9449 OF 2023

Microfiber Corporation Pvt. Ltd.
Survey No.209/3, Masat Industrial Estate,
Village Masat, Samarwarni, Silvassa, (DNH)
396230.] ...Petitioner

Versus

1. State Bank of India,
Stressed Assets Management Branch, The Arcade,
2nd floor, World Trade Centre, Cuffe Parade,
Colaba, Mumbai 400 005.

2. Dy. Commissioner of Income Tax,
Vapi Circle-GUJ-410-91, Fortune Square Bldg.
7th Floor, Chala Road, Vapi, Gujarat-391 191.

3. The Sub Registrar of Assurances,
Sub Registrar Office, Khanvel, Silvassa,
Dadra Nagar and Haveli - 396 230.

4. The Mamlatdar, Khanvel,
Mamlatdar Office, Khanvel, Khanvel Char Rasta,
Silvassa, Dadra Nagar and Haveli - 396 230.

5. Union of India,
Through Office of Public Prosecutor,
High Court, Bombay] ...Respondents

Mr. Prathamesh Kamat *a/w. Kayush Zariwala & Vivek Vasant Phadke, Advocates for Petitioner.*

Mr. Vivek Sawant*, for Respondent No.1.*

Ms Swapna Gokhale*, for Respondent No.2.*

Mr. Harsh Dedhia *i/b. H.S. Venegaonkar, Advocates for Respondent Nos.3 and 4.*

CORAM : B. P. COLABAWALLA & SOMASEKHAR SUNDARESAN, JJ.

DATE : FEBRUARY 23, 2024

P. C.

1. This Writ Petition is filed by a purchaser of certain land ("***Secured Property***") placed in auction by State Bank of India/Respondent No.1 under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (***"SARFAESI Act"***). The Petitioner primarily prays for removal of lien/charge/encumbrances/mutation entry over the secured property acquired by him in the auction, which had come to be placed by a reason of Provisional Attachment Order passed by the Income Tax Department/Respondent No.2 on 23rd December, 2010 (***"Provisional Attachment Order"***) under Section 281B of the Income Tax Act, 1961 (***" the IT Act , 1961"***).

2. Based on the foregoing Provisional Attachment Order, the Sub-Registrar of Assurances, Silvassa and the Mamlatdar, Silvassa, have refused to register the transfer of the Secured Property in favour of the Petitioner and enter its name in the records, despite being a successful acquirer in the auction under the SARFAESI Act. The Petitioner seeks a direction to the Sub-Registrar of Assurances to register the transfer and the direction to the Mamlatdar to amend the land records and insert the name of the Petitioner as the owner of the Secured Property.

3. A brief review of the relevant facts would be in order.

4. The Provisional Attachment Order under Section 281B of the IT Act, 1961 was passed on 23rd December, 2010. In its affidavit-in-reply, the Assistant Commissioner of Income Tax, Vapi Circle has confirmed on oath that the said Provisional Assessment Order did not lead to any further order of extension or other order in terms of recovery of tax under Second Schedule of the IT Act of 1961. In this context, it would be fruitful to extract Section 281B of the Act of 1961 (so far as is relevant) :-

> *"**281B.** **Provisional attachment to protect revenue in certain cases.**—(1) Where, **during the pendency of any proceeding** for the **assessment** of any income or for the assessment or **reassessment of any income** which has **escaped assessment** or for **imposition of penalty** under section 271AAD where the amount or aggregate of amounts of penalty likely to be imposed under the said section exceeds two crore rupees, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, **attach provisionally any property** belonging to the assessee **in the manner provided in the Second Schedule.***
>
> *(2) **Every such provisional attachment shall cease to have effect** after the **expiry of a period of six months from the date of the order made***

under sub-section (1):

> ***Provided*** *that the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director* ***may, for reasons to be recorded in writing****,* ***extend the aforesaid period*** *by such further period or periods as he thinks fit, so, however, that* ***the total period of extension shall not in any case exceed two years*** *or sixty days after the date of order of assessment or reassessment, whichever is later.*
>
> *(3) to (9)* ********

[Emphasis supplied]

5. A plain reading of the provision would show that a Provisional Attachment Order under Section 281B of the IT Act, 1961 has a life span of six months from the date of the order. In the facts of the instant case, it becomes apparent that the Provisional Attachment Order dated 23rd December, 2010 ceased to have effect upon the expiry of six months from its issuance. Indeed, a Provisional Attachment Order may be extended by the designated tax authorities referred to in the proviso to Section 281B(2) of the IT Act, 1961 for further periods, but its an admitted position that no such extension was issued in the facts of the instant case.

6. It was the Provisional Attachment Order dated 23rd December, 2010 that came to be entered into the land records on 25th December, 2011 as an attachment / encumbrance, and is the basis of refusal by Respondent Nos. 3 & 4 to register the transfer of the Secured Property to the Petitioner, and refusal to update the land records with full title to the Petitioner. Therefore, it transpires that the very foundation of the objection i.e. the Provisional Attachment Order, did not exist in the eyes of law by the time it was marked in the land records. Over one year had passed since the date of the Provisional Attachment Order, when it was marked in the land records, by which time, the Provisional Attachment Order itself had ceased to have effect.

7. Therefore, the very basis of the resistance to register the Secured Property in the Petitioner's name and to update the land records to reflect the same, had lapsed. The Petition, therefore, deserves to be allowed, since the very *substratum* of the opposition to entering the Petitioner's name in the land records (i.e. the Provisional Attachment Order) does not exist in the eyes of law.

8. In this context, it is also noteworthy that the auction of the property took place pursuant to enforcement of a mortgage that had been created on 12th April, 2004 i.e. nearly seven years prior to the Provisional Attachment Order of the Income Tax Department (which itself, as seen above, ceased to have effect). Therefore, it is quite clear that the rights of the mortgagee i.e. Respondent No. 1, which were enforced and led to the auction being conducted, were superior, and were created well before the subsequent Provisional Attachment Order came to be passed. Therefore, the Petitioner is fully entitled to the property in question.

9. In this regard, it would be fruitful to extract from a judgment of the Hon'ble Supreme Court in ***Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. & Ors. [2000) 5 SCC 694]***, which succinctly summarizes the law on priority, if any, between debts owed to the State and debts owed to secured creditors. Paragraphs 7 to 10 of the said judgment read thus:

> *7. What is the common law doctrine of priority or precedence of Crown debts? Halsbury, dealing with general rights of the Crown in relation to property, states that* ***<u>where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred</u>****, the rule being "detur digniori" (Laws of England, 4th Edn., Vol. 8, para 1076, at p. 666). Herbert Broom states:*
>
> > *"Quando jus domini regis et subditi concurrunt jus regis praeferri debet.— Where the title of the king and the title of a subject concur, the king's title must be preferred. In this case detur digniori is the rule. ... where the titles of the king and of a subject concur, the king takes the whole. ... where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred." (Legal Maxims, 10th Edn., pp. 35-36)*
>
> *This common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence* ***<u>the doctrine has been treated as "law in force" within the meaning of Article 372(1) of Constitution.</u>*** *An illuminating discussion of the subject made by Chagla, C.J. is to be found in Bank of India v. John Bowman [AIR 1955 Bom 305]. We may also refer to the Full Bench decision of the Madras High Court in Manickam Chettiar v. ITO [AIR 1938 Mad 360 : ILR 1938 Mad 744 (FB) as also to two Judicial Commissioner's Court decisions in People's Bank of Northern India Ltd.v.Secy. of State for India [AIR 1935 Sind 232] and Vassan Bai Topandas v. Radhabai Tirath Das [AIR 1933 Sind 368]. Without multiplying the authorities we would straight away come to the Constitution Bench decision in*

Builders Supply Corpn. v. Union of India [AIR 1965 SC 1061 : (1965) 56 ITR 91].

*8 **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. [AIR 1965 SC 1061 : (1965) 56 ITR 91]). 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.

9. *The Constitution Bench decision has been followed by a three-Judge Bench in Collector of Aurangabad v. Central Bank of India [AIR 1967 SC 1831 : (1968) 21 STC 10] .*

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 [(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."*

[Emphasis Supplied]

10. As seen above, the very *substratum* of the objections from Respondent Nos.3 and 4 being found to be non-existent, the Writ Petition deserves to be allowed in terms of prayer clause (a), which reads thus:-

"a. that this Hon'ble Court be pleased to issue the Writ of

> *Mandamus or Writ direction or Order in the nature of Mandamus, any other Writ, direction or Order directing the Respondent No.2 to; (i) forthwith remove its lien/charge/encumbrance/mutation entry over all that part and parcel of the property consisting of Survey No.168/2/1 admeasuring 23,200 sq. mtrs. and Survey No.168/2/1 admeasuring 13,807 sq. mtrs. situated at Villge Rudana, Khanvel within registration sub-district and district Silvassa, in the Union Territory of Dadra & Nagar Haveli and (ii) forbear from interfering in any manner with the rights of the Respondent No.1 and the Petitioner to proceed under the provisions of the SARFAESI Act to enforce its security interest; (iii) direct the concerned Sub-Registrar of Assurances to register the document of sale/sale certificate issued by the Respondent No.1 in respect of the said property; and (iv) direct the concerned Mamlatdar/Talathi to amend their record and insert the name of the Petitioner as owner of the said property;"*

11. We, therefore, direct Respondent No.3 to register the transfer within a period of two weeks from today and Respondent No.4 to effect appropriate amendments in the land records within a period of two weeks thereafter.

12. The Writ Petition is accordingly disposed of in the aforesaid terms. However, there shall be no order as to costs.

13. Although the above Writ Petition is disposed of, we place the matter on Board for reporting compliance, on 26th March, 2024.

14. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**