



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.: 1638 of 2017

Reserved on 20.04.2021

Date of Decision: 19.05.2021

Punjab National Bank and anotherPetitioners.

Vs.

State of Himachal Pradesh and othersRespondents.

Coram:

The Hon'ble Mr. Justice Ajay Mohan Goel, Judge

Whether approved for reporting?¹ Yes.

For the petitioners: Mr. B.C. Negi, Senior Advocate, with M/s Vipul Dharmani, Sugam Seth, Arvind Sharma & Nitin Thakur, Advocates.

For the respondents: Mr. Ajay Vaidya, Senior Additional Advocate General, for respondents No. 1 to 3 & 5.

None for respondent No. 4.

Ajay Mohan Goel, Judge :

By way of this writ petition, the petitioners have primarily prayed for the following relief:

“(a) A writ in the nature of certiorari be issued quashing the impugned actions of the official respondents attaching the property in question already stands mortgaged with petitioners by respondent No. 4, by creating and claiming their first

¹Whether the reporters of the local papers may be allowed to see the Judgment?

charge upon the same and also quashing of the Notice dated 24.06.2017 (Annexure P-10) vide which the respondents have claimed the first charge over the secured assets of the petitioners notwithstanding the fact that the mortgagee rights of the petitioner over the mortgaged assets of a borrower prevails upon the tax liability of a defaulting borrower and all other actions undertaken by the respondents No. 1 to 3 in this regard.”

2. The case of the petitioners is that they are “Body Corporates” constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and are carrying on business as Bankers. Their grievance is primarily against respondents No. 1 to 3, who according to the petitioners have acted in contravention of law and failed to discharge their statutory duties.

3. Respondent No. 4, which is a private limited company, had started banking with petitioner No. 1 in the year 2004. Said respondent was released a cash credit hypothecation limit of Rs.140.00 lacs, cash credit (book debt) facility of Rs.100.00 lacs, term loan facility of Rs.1000.00 lacs, FLC DP within Term Loan of Rs.60.00 lacs and ILC/IFC facility of Rs.200.00 lacs by petitioner No. 1. In consideration thereof and in addition to the security documents having been executed, respondent No. 4 also created an equitable mortgage of its factory land and building. The facilities so extended to respondent No. 4 were

enhanced on the request of respondent No. 4 and said respondent was also advanced financial facilities by way of cash credit against stock and book debts, term loan for project expansion and letter of credit (F) for import of raw materials under DP/DA in the year 2006.

4. Petitioners No. 1 and 2 formed a consortium and combined all fund based working capital facilities and non-fund based facilities, which were granted to respondent No. 4. Petitioner No. 1 was acting as a lead Bank. An agreement in this regard was duly executed between the petitioners. Thereafter, a joint deed of hypothecation and working capital consortium agreement was also executed between the petitioners in favour of the consortium members in the year 2007.

5. Apart from other properties and secured assets, the land and building constructed on land measuring 71 bighas 13 biswas, situated in Village Bir Plasi, Hadbast No. 101, Pargana Plasi, Tehsil Nalagarh, District Solan, Himachal Pradesh in the name of M/s Rupana Paper Mills Private Ltd. and the plant and machinery lying therein was duly mortgaged in favour of petitioner No. 1 by respondent no. 4 while availing the loan facilities etc. and a mutation was duly sanctioned vide report No. 471, dated 12.07.2013 and the same was duly recorded in the revenue record by the concerned Department, evidencing the charge of the petitioner-Bank upon the said property.

6. The petitioner-Bank also got recorded the said charge in the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (see Annexure P-3). Petitioner-Bank also got recorded the charge of the said loan facility with the Registrar of Companies in the account of respondent No. 4-Company in terms of the provisions of the Companies Act.

7. As respondent No. 4 failed to adhere to the financial discipline enshrined in the loan documents and constantly defaulted in the timely payments of loan premiums, the petitioners classified the accounts of respondent No. 4, as Non Performing Assets. Petitioners jointly filed a recovery suit, i.e., Original Application bearing OA No. 151 of 2016, titled as Punjab National Bank and another Vs. M/s Rupana Paper Mills Pvt. Ltd. and others under Section 19 of the RDDBFI Act before the Debt Recovery Tribunal-I at Chandigarh for recovery of an amount of Rs.220,27,83,199/- as on the date of filing, i.e., 23.12.2015 alongwith pendente lite and future interest. This Original Application was transferred to learned Debts Recovery Tribunal-II, Chandigarh after change of territorial jurisdiction and was re-numbered as OA No. 934 of 2017. Said Original Application was allowed by the learned Tribunal vide order dated 28.06.2017 and it was held by the Tribunal that respondent No. 4 was liable to pay and petitioner-Bank was entitled to recover an amount of Rs.220,27,83,199.99/- alongwith simple interest @11% per

annum on reducing balance with costs from 22.12.2015 from all the defendants therein till recoveries are effected (see Annexure P-4).

8. To recover its outstanding dues, the petitioner simultaneously initiated proceedings under Section 13 of the Securitization and Reconstruction of Financial Assets Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act"). Notice under Section 13(2) of the Act dated 13.03.2015 was issued to respondent No. 4. As respondent No. 4 did not clear the outstanding dues within the statutory period of 60 days as per the mandate of the Act, petitioner-Bank acting within its rights, issued a "Possession Notice" and took possession of the "Secured Assets". It put the said "Secured Assets" on auction vide e-Auction/Sale Notice dated 03.06.2017, which was duly published in accordance with the provisions of the SARFAESI Act and Rules framed thereunder in the newspapers on 04.06.2017. The reserve price of the land and building constructed on the land measuring 71 bighas and 13 biswas, situated in Village Bir Palasi, Tehsil Nalagarh, District Solan, H.P. was valued at Rs.1300.00 lacs and the reserve price qua plant and machinery lying in the said premises was valued at Rs.2350.00 lacs and the date and time of auction was mentioned to be 29.06.2017. Copy of the said e-Auction/Sale Notice dated 03.06.2017 is appended with the petition as Annexure P-7. As per the petitioners, at the time of putting the said property in question alongwith plant and

machinery on auction vide Sale Notice dated 03.06.2017, the petitioner-Bank was not having any knowledge with regard to any payable dues by the respondent No. 4 to any Department of the Government of Himachal Pradesh. According to the petitioner-Bank, it was informed of this fact by some of the prospective bidders of the said e-auction that during their "due diligence" of the properties, it was found that respondent No. 2-Department had got a mutation bearing report No. 31 dated 15.09.2016 recorded regarding the fact that the said property stands charged with respondent No. 2. As per the petitioners, due to said attachment order, the Bank was unable to auction its Secured Assets by way of e-auction. The prospective bidders specifically informed the petitioner-Bank that they were ready and willing to bid for the properties, but due to notice of charge by respondent No. 2, they did not bid for the same. After this fact came into the notice of the petitioner-Bank, it approached the respondents No. 2 and 3 vide Legal Notice dated 17.06.2017 regarding creation of its charge upon the property belonging to respondent No. 4 without informing the Bank, especially when the Bank was having the first charge upon the said property being a Secured Creditor, coupled with the fact that even the physical possession of the said property was taken over by the Bank in the year 2015. The Bank asked respondents No. 2 and 3 to provide the authenticated copies of all the relevant documents, on the basis of which, charge in favour of said respondents

was created qua the property in issue. Respondents vide Notice dated 24.06.2017 represented that they were having the first charge upon the property by virtue of the provisions of Section 16-B of the Himachal Pradesh General Sales Tax Act, 1968 read with Section 26 of the Himachal Pradesh Value Added Tax Act, 2005 (hereinafter referred to as 'the 2005 Act'), which by virtue of a non obstante provision overrides and creates a mandatory first charge upon the dealer. It was further the stand of the respondents that since the Government was having first charge upon the property of the said dealer, therefore, the petitioner-Bank can not proceed with the sale of the assets. Respondent-Department further mentioned in the Notice that in case the petitioner-Bank had sold any plant and machinery or other capital goods lying in the said premises of respondent No. 4, then the Bank was liable to deposit the sale proceeds in the account of the State exchequer within 15 days from the date of receipt of Notice dated 24.06.2017, which is impugned by way of this petition as Annexure P-10.

9. Feeling aggrieved, the petitioners have filed this writ petition, seeking for the quashing of Notice dated 24.06.2017 (Annexure P-10), inter alia on the ground that the right of the petitioners to recover its outstanding dues from the defaulting borrower, as governed by the provisions of SARFAESI Act, 2002 as well as Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as "the RDB Act), which by

virtue of an amendment carried out in the Recovery of Debts and Bankruptcy Act, 1993 in the year 2016, vide which, Section 31B was added in the Act, clearly confers upon the petitioners an overriding right over the claims of the respondent-Department.

10. According to the petitioners, Section 35 of the SARFAESI Act provides that the provisions of said Act shall have an overriding effect on other laws. Section 17(7) of the SARFAESI Act provides that the Debts Recovery Tribunal shall deal with an application under the SARFAESI Act in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. This Act was amended in the year 2016 and its nomenclature has been changed by way of an amendment dated 28.05.2016 to “Recovery of Debts and Bankruptcy Act, 1993”. Section 31B of the Act specifically provides for priority to secured creditor by envisaging that “notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to release 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” by way of amendment. Respondent-Department claims first charge upon the property to recover the outstanding liability from respondent No. 4 by

relying upon Section 26 of the Himachal Pradesh Value Added Tax Act, 2005, without appreciating that Section 35 of the SARFAESI Act 2002 clearly provides that said Act shall have an overriding effect on any other law for the time being in force and ambiguity, if any, has already been removed by issuance of necessary clarification by the Legislators through the incorporation of Section 31B in the RDB Act. Further, according to the petitioners, even if it was to be presumed that respondent No. 4 was having a tax liability which was recoverable by respondents No. 1 to 3, then also, provisions of Section 26 of the Himachal Pradesh Value Added Tax Act, 2005 have to give way to the provisions of Section 35 of the SARFAESI Act 2002, which is a Central Act having been incorporated by virtue of Article 246(1) of the Constitution of India. Thus, as per the petitioners, they have the right to recover the outstanding dues flowing from the SARFAESI Act and the RDB Act and these Central Acts shall prevail over the State Acts to the extent of inconsistency. It is in this background that the petition has been filed praying for the reliefs already enumerated hereinabove.

11. The petition is opposed by respondents No. 1 to 3 on the strength of the reply filed by respondents No. 2 and 3, inter alia, on the ground that the statutory provisions of the Himachal Pradesh Value Added Tax Act, 2005, in view of the contents of Section 26 thereof, confer an overriding right in favour of the said respondents and, therefore, as an

amount of Rs.33,46,84,420/- was due from respondent No. 4 under the provisions of VAT Act, 2005 and Central Sales Tax Act, 1956, said respondents were having first charge over the concerned property. According to the revenue, the provisions of the 1993 Act and SARFAESI Act 2002 do not create any first charge in favour of the Banks, Financial Institutions or any other secured creditors, as has been held by the Hon'ble Supreme Court in **Central Bank of India Vs. State of Kerala**, (2009) 4 SCC 94. As per them, Communication dated 24.06.2017 is a valid Communication and, therefore, the petition deserves to be dismissed.

12. Respondent No. 5 has filed a separate reply and taken the stand that the Authorized Officer of petitioner No. 1-Bank had filed an application under Section 14 of the 2002 Act with a request to take steps against the borrower by taking possession of the secured assets in favour of the Bank and the then District Magistrate, Solan, after considering the application of petitioner No. 1, had passed an appropriate order on 14.08.2015 and has acted in a lawful manner and discharged its duties, as envisaged in law.

13. By way of rejoinders, which have been filed to the replies of the respondents, the petitioners have reiterated their claim by denying the stand, especially taken by respondents No. 1 to 3 in the reply filed by respondents No. 2 and 3.

14. I have heard learned counsel for the parties and also gone through the pleadings.

15. The moot issue involved in the present case is as to whether the petitioners will be having first charge upon the property of the dealer in terms of the provisions of the RDB Act and the SARFAESI Act, as amended from time to time or, whether the first charge shall be that of respondents No. 1 to 3 in terms of the provisions of Section 26 of the Himachal Pradesh Value Added Tax Act, 2005? During the course of arguments, there was no dispute between the parties that this is the main moot issue, which the Court has to decide.

16. Before proceeding any further, it is relevant to refer to the relevant statutory provisions, which have bearing upon the adjudication of this case.

17. “Secured Asset” is defined in Section 2(zc) of the SARFAESI Act 2002, which reads as under”

“2(zc) “Secured Asset” means the property on which security interest is created.”

Section 2(zf) defines the “Security Interest”, which reads as under:

“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.”

18.

Section 26E of the SARFAESI Act 2002 Act provides as

under:

“26E. Priority to secured creditors.—

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 or State Government or local authority.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”

This Section was incorporated by way of Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provision (Amendment) Act, 2016. This Section has come into force w.e.f. 24th January, 2020.

19. Section 35 of the SARFAESI Act 2002 Act provides as under:

“35. The provisions of this Act to override other laws:

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

20. Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 provides as under:

“Section 31B. Priority to secured creditor:

Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to release 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.”

This Section came into force w.e.f. 01.09.2016 by way of Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provision (Amendment) Act, 2016 in general and Chapter-III, Section 41 thereof in particular.

21. Section 26 of the Himachal Pradesh Value Added Tax Act, 2005, relied upon by learned Senior Additional Advocate General, appearing for respondents No. 1 to 3 & 5 provides as under:

“26. Notwithstanding anything to the contrary contained in any law, any amount of tax and penalty including interest, if any, payable by a dealer or any other person under this Act shall be a first charge on the property of the dealer or such other person.”

22. Before the aforesaid amendments were carried out in the SARFAESI Act and the RDB Act, the law as settled by the Hon’ble Supreme Court in **Central Bank of India** Vs. **State of Kerala**, (2009) 4 SCC 94 was to the effect that the non obstante Clauses contained in the RDB Act and Section 35 of the SARFAESI Act could not be invoked for declaring that the first charge created in State Legislations will not operate qua or affect the proceedings initiated by Banks/Financial Institutions/Other Secured Creditors for recovery of their dues or enforcement of security interest. Relevant paras of the judgment of Hon’ble Supreme Court in ***Central Bank of India’s case*** (*supra*) are quoted hereinbelow:

“106. In R.S. Raghunath v. State of Karnataka and another [(1992) 1 SCC 335], a

three-Judge Bench referred to the earlier judgments in *Aswini Kumar Ghose v. Arabinda Bose* [AIR 1952 SC 369], *Dominion of India v. Shrinbai A. Irani* [AIR 1954 SC 596], *Union of India v. G.M. Kokil* [1984 (Supp.) SCC 196], *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* [(1986) 4 SCC 447] and observed:

".....The non-obstante clause is appended to a provision with a view to give the enacting part of the provision an overriding effect in case of a conflict. But the non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules.....

109. The committees headed by Shri T. Tiwari and Shri M. Narasimham suggested that the existing legal regime should be changed and special adjudicatory machinery be created for ensuring

speedy recovery of the dues of banks and financial institutions. Narasimham and Andhyarujina Committees also suggested enactment of new legislation for securitisation and empowering the banks etc. to take possession of the securities and sell them without intervention of the Court.....

126. While enacting the *DRT Act* and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like *Section 529A* of the Companies Act or *Section 11(2)* of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

127. The definition of "secured creditor" includes securitisation/reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of "securitisation company" and "reconstruction company" in [Section 2\(v\)](#) and (za) shows that these companies may be private companies registered under [Companies Act, 1956](#) and having a certificate of registration from the Reserve Bank under Section 3 of Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

128. If the provisions of the [DRT Act](#) and Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in [Section 14A](#) of the Workmen's [Compensation Act](#), 1923, [Section 11\(2\)](#) of the EPF Act, [Section 74\(1\)](#) of the Estate Duty Act, 1953, [Section 25\(2\)](#) of the Mines and Minerals (Development and [Regulation](#)) Act, 1957, [Section 30](#) of the Gift- Tax Act, and [Section 529A](#) of the Companies Act, 1956 would have been incorporated in the [DRT Act](#) and Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to Workmen's [Compensation Act](#), etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the [DRT Act](#) and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non obstante clauses contained in [Section 34\(1\)](#) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be."

23. A perusal of the judgment of Hon'ble Supreme Court which was dealing with the statutory provisions of the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993 vis-a-vis the provisions of the Kerala Value Added Tax Act demonstrates that before the incorporation of Section 26E in SARFAESI Act 2002 and Section 31B in the Recovery of Debts and Bankruptcy Act, 1993, these Statutes were not operating in a manner so as to create a better right for recovery in favour of the Banks/Financial Institutions over the revenue. These provisions were incorporated in the respective Statutes post the judgment of the Hon'ble Supreme Court to override this lacunae. After amendments in the SARFAESI Act and the RDF Act, the situation has altered. Thereafter, by virtue of the amendments incorporated in the Central Statutes, the Financial Institutions now have priority over the rights claimed by the Revenue. Section 26E of the SARFAESI Act 2002 and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 create "First Charge" by way of priority in favour of the Banks and Financial Institutions de hors any non obstante Clause contained in any Local Statute. The Legislators were aware of the lacunae which were existing in the SARFAESI Act and the Recovery of Debts and Bankruptcy Act, on account of which, the Banks/Financial Institutions were not having first charge by way of priority to recover and satisfy their debts vis-a-vis the

Revenue in lieu of the statutory provisions contained in the Local Acts. It was to over ride this difficulty that the amendments were incorporated.

24. This entire aspect has been dealt with at length by the Hon'ble High Court of Kerala while deciding an issue akin to the one involved in this petition in **State Bank of India Vs. State of Kerala and others**, WP (C) No. 28316 of 2016 and other connected matters, decided on 30th July, 2019, relevant portions of which judgment are quoted hereinbelow in extensio:

"37. That so said, the next question that arises is whether Section 26E of the SARFAESI Act and Section 31B of the RDB Act create an overriding and first right in favour of the Banks/Financial Institutions to recover their dues, over and above the rights of the Revenue created through the KGST Act/KVAT Act. In fact, this enquiry has been rendered relatively easy for this Court because, in Central Bank of India v. State of Kerala and Others ((2009) 4 SCC 94), the Honble Supreme Court considered the right of the Banks/Financial Institutions as regards recovery of their dues prior to the afore two provisions being introduced in the SARFAESI Act and in the RDB Act. The conclusions of the Honble Supreme Court are unequivocally worded that, in the absence of these provisions in the respective Statutes, the Banks/Financial Institutions cannot claim any priority over the

Revenues First Charge on the properties concerned for recovery of dues of Sales Tax/Value Added Tax.

The disposition of the Honble Court in this area is lucid and available in paragraphs 126, 129 and 130 of the said judgment, which requires to be read in full and is, therefore, re-produced as under:

"126. While enacting the DRT Act and the Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529 A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the States statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14-A of the Workmens Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to the Workmens Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be."

38. When one reads the afore opinion of the Honble Supreme Court, it is left without any doubt that, but for Section 26E of the SARFAESI Act and Section 31B of the RDB Act, such Statutes do not, in any manner, operate to create a better right for recovery in favour of the Banks/Financial Institutions over that of the Revenue. However, these provisions were brought in and incorporated in the respective Statutes after this judgment, clearly with the intend to override this lacuna. Therefore, the resultant question is whether these provisions would create a better right in favour of the Banks/Financial Institutions, which is superior to that enjoyed by the Revenue under the KGST Act/KVAT Act.

39. The learned Additional Advocate General, as I have already seen above, has built his entire arguments on the assertion that the statutory First Charge creates a right for the State over the properties and that such right can be extinguished only if the Revenue sells the property and in no other manner. However, as has already been held by me above, the First Charge claimed by the Revenue does not and cannot create any right over the property but only enables it to deal with the same as a simple mortgagee would be entitled to. Obviously, therefore, the contention of the Revenue built on a claim of right over the properties fails, without any further requirement for expatiation;

corollarily, enjoining me to consider if the provisions of the KGST Act/KVAT Act would still grant to the Revenue the First Right to proceed against it for recovery of the tax arrears.

40. It is here that the specific provisions of Section 26E of the SARFAESI Act and Section 31B of the RDB Act become necessary for a detailed evaluation.

41. As has been extracted above, Section 26E of the SARFAESI Act provides that the debts due to any secured creditor shall be paid in priority over all other debts and all revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. Section 31B of the RDB Act takes this one step forward and elevates the right of the secured creditors to realise their debts, by sale of the secured assets, to enjoy priority and then re-affirms that such debts will be paid in priority over the revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. It is thus irrefragible and in fact, expressly conceded to by the learned Additional Advocate General that the Banks/Financial Institutions have the First Right to have their debts extinguished; but, as has been recorded above, the Revenue merely claims that they have right to sell the property first. This argument again is flawed because the First Charge creating no right over the property, the Revenue

cannot claim a First Right to proceed against it either in the face of the provisions of the SARFESI Act or RDB Act with which we are dealing in this case. In fact, on a closer look and in the ultimate analysis, the concept of First Charge and debt being paid in priority are fraternal twin provisions which virtually means the same - both giving the holder such rights, the benefit of selling the property and recovering their dues before any other.

42. A further test of the afore proposition, if so necessary, is not different because the principles of priority in payment of dues in the context of the Companies Act have been considered by the Honble Supreme Court in several judgments and many of them have been cited by the learned counsel for the respondents Banks/Financial Institutions. I will briefly deal with a few of them solely to confirm that my view as afore do not suffer from error.

43. In Textile Labour Association (supra), the provisions of Sections 529 and 529A of the Companies Act, 1956 were closely examined and the Honble Supreme Court declared its ambit as under:

"The effect of Sections 529 and 529-A is that the workmen of the company become secured creditors by operation of law to the extent of the workmens dues provided there exists secured creditor by contract. If there is no secured creditor then the workmen of the company become

unsecured preferential creditors under Section 529-A to the extent of the workmens dues. The purpose of Section 529-A is to ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the company and the assets of the company would remain charged for the payment of the workers dues and such charge will be *pari passu* with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529-A. This section overrides preferential claims under Section 530 also. Under Section 529-A the dues of the workers and debts due to the secured creditors are to be treated *pari passu* and have to be treated as prior to all other dues."

44. Thereafter, in Maharashtra State Cooperative Bank Limited (*supra*), the Honble Court alluded Textile Labour Association (*supra*) and re-affirmed the afore-extracted view, in paragraph 40 of the said judgment.

45. A year later, in 2011, the Honble Court, in Official Liquidator of Esskay Pharmaceuticals Limited (*supra*) exhaustively went into the issues relating to the recovery of crown debts juxtaposed against Sections 529/529A of the Companies Act and Section 11(2) of the EPF Act and held that the provisions of the Companies Act and the EPF Act offer a statutory priority to the amounts payable under it notwithstanding the States claim, thus

making it luculent that priority in recovery of the amounts protected by these two Statutes override the First Charge claimed by the State or its Revenue under the Taxing Statutes or such other.

46. Finally, in 2013, the Honble Supreme Court, in *Jitendra Nath Singh* (*supra*), again considered these issues in the context of certain specific facts relating to the priority in recovery of secured debts and the rights of workmen under Sections 529 and 529A of the Companies Act and emphatically stated as under in paragraphs 14 and 16.2 thereof:

"14. Section 529-A of the Companies Act states that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company - (a) workmens dues; and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act *pari passu* with such dues, shall be paid in priority to all other debts. This would mean that the workmens dues and only the debts due to the secured creditors to the extent such debts rank *pari passu* with workmens dues under clause (c) of the proviso to sub-section (1) of Section 529 will have priority over all other debts of the company. The entire object of Section 529-A of the Companies Act is to ensure overriding preferential payment of (a) the workmens

dues and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 *pari passu* with the workmens dues. The effect of the non obstante clause in the opening part of Section 529-A of the Companies Act, therefore, is that notwithstanding anything in the Companies Act and any other law including the Insolvency Act, workmens dues and dues of the secured creditor which could not be realised because of the *pari passu* charge in favour of the workmen under the proviso to sub-section (1) of Section 529 and only to the extent such dues rank *pari passu* with the dues of the workmen under clause (c) of the said proviso are paid in priority over all other dues.

16.2. Over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is *pari passu* with that of the secured creditor and is to the extent of the workmens portion in relation to the security of any secured creditor of the company as stated in clause (c) of sub-section (3) of Section 529 of the Companies Act."

47. The above cited judgments certainly support my views as afore and it axiomatically becomes justified for me to hold that Section 26E of

the SARFAESI Act and Section 31B of the RDB Act create a First Charge by way of a priority to the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any statutory First Charge in favour of the Revenue under the KGST Act/KVAT Act. It is so declared.

48. *My conclusions as afore being indited, it, normally, may not have been necessary to evaluate the submissions of the learned Counsel for the Banks/Financial Institutions with respect to the repugnancy between the Statutes involved or the principles of dominant legislation and primacy to the Central Legislation under Articles 254 and 246(1) of the Constitution of India. However, the submission of the Revenue that since Section 26E of the SARFAESI Act has not yet been notified, its provisions cannot be enjoyed by the Banks/Financial Institutions as claimed by them, enjoins me to consider these issues in some depth. As noticed earlier, the learned Additional Advocate General seeks substantial support for the Revenues claim over the property on the fact that Section 26E of the SARFAESI Act has yet not been notified and this is virtually accepted even by the petitioners. The crucial question, therefore, is whether this factum would enervate the claim of priority of the Banks/Financial Institutions. I am afraid that even this contention of the learned Additional Advocate General cannot be found legally untenable, because*

it has been unreservedly affirmed by the Honble supreme Court in *Mar Appraem Kuri Company Limited (supra)* that the concepts of primacy of legislation and repugnancy would be invited as soon as the Parliament made a Statute, which is to say even before it is notified. The above views of the Honble Court is available in paragraphs 47, 59 and 61 of the judgment, which are excerpted under:

"47. The question of repugnancy between parliamentary legislation and State legislation arises in two ways. First, where the legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the parliamentary legislation will predominate, in the first, by virtue of non obstante clause in Article 246(1); in the second, by reason of Article 254(1).

59. Let us assume for the sake of argument that the State of Kerala were to obtain the assent of the President under Article 254(2) of the Constitution in respect of the insertion of Section 4(1)(a) by the Kerala Finance Act 7 of 2002. Now, Article 254(2) deals with the situation where State legislation is reserved and having obtained the Presidents assent, prevails in the State over the Central law. However, in view of the proviso to Article 254(2), Parliament could have brought a legislation even to override

such assented-to State Finance Act 7 of 2002 without waiting for the Kerala Finance Act 7 of 2002 to be brought into force as the said proviso states that nothing in Article 254(2) shall prevent Parliament from enacting at any time, any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the State Legislature. [emphasis supplied].

61. The entire above discussion on Articles 245, 246, 250 and 251 is only to indicate that the word "made" has to be read in the context of the law-making process and, if so read, it is clear that to test repugnancy one has to go by the making of law and not by its commencement."

49. The above conclusions of the Honble Court certainly places a lid on this argument made on behalf of the Revenue and in any event of the matter, they themselves concede that Section 31B of the RDB Act has been notified. Hence, even assuming and is taken that Section 26E of the SARFAESI Act cannot apply for want of notification, it would be of no avail to the Revenue, because the provisions of Section 31B of the RDB Act clearly place the right of the secured creditor to proceed against the property as well as their right to recover the secured debts in a position of priority over all tax arrears claimed by the Revenue.

50. That said, solely for the purpose of completing the narrative, if one is to suspect that

there is either repugnancy or conflict between the provisions of the KGST Act/KVAT Act on one hand and the SARFAESI Act/RDB Act on the other, it is indubitable from a reading of *Santosh Gupta (supra)*, *J.B. Educational Society (supra)* and *Dipak Debbarma (supra)* that in the event of any such or even in the event of incidental encroachment of the provisions of the former into that of the latter under the constitutional mandate of Articles 254 and 246(1) of the Constitution of India, the latter would prevail, since they have been enacted under List II Entry 45 therein. Pertinently, no expatiation on this is required at my hand, since the learned Additional Advocate General concedes to this proposition and admits, as has been recorded *ut supra*, that even if the Revenue sells the property first, the secured debts will have to be honoured before the tax arrears can be recovered. I, therefore, leave it there.

51. The only remaining question is whether the provisions of the KGST Act/KVAT Act or that of the RR Act can obtain protection under Section 37 of the SARFAESI Act, thus enabling the Revenue to seek that their amounts also be allowed to be recovered complementary to the action of the secured creditors. The answer to this is not difficult to obtain since I have to only read paragraph 39 of the judgment of the Honble Supreme Court in *Madras Petrochem Limited (supra)*, which dispels all doubt that it is not so, while stating as under:

"This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statutes. Since neither Section 35 nor Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression "or any other law for the time being in force" in Section 37. If a literal meaning is given to the said expression, Section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Obviously this could not have been the parliamentary intendment, after providing in Section 35 that the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has, therefore, necessarily to be taken. According to us, the two apparently conflicting sections can best be harmonised by giving meaning to both. This can only be done by limiting the scope of the expression "or any other law for the time being in force" contained in Section 37. This expression will, therefore, have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the

only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market."

52. The position being ineluctably as above, as rightly pointed out by Sri. Madhu Radhakrishnan, the views of the other High Courts in *The Indian Overseas Bank* (supra) and *Axis Bank Limited* (supra) persuades me to follow them and hold that a secured creditor, under Section 26E of the SARFAESI Act and Section 31B of the RDB Act, obtains priority over the right claimed by the Revenue both in proceeding against the properties in question or in recovering the secured debt."

25.

At this stage, it is necessary to quote the provisions of Section 38 of the Kerala Value Added Tax Act, 2003 (KVAT Act), which read as under:

"Tax payable to be first charge on the property.-

Notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other

amount, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person.”

A perusal of the provisions of Section 38 of the KVAT Act and Section 26 of the HP VAT Act demonstrates that these provisions are almost *pari materia*. This Court concurs with the reasoning of the Hon'ble High Court of Kerala that after coming into force of Section 31B of the RDB Act read with Section 26E of the SARFAESI Act, the first charge is created by way of priority in favour of the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any local statutory “first charge” in favour of the Revenue.

26. It is also necessary to take note of one fact that though Section 26E of the SARFAESI Act has come into force from 24.01.2020, yet the same will not have any effect on the issue of the Banks/Financial Institutions having first charge on the property of the dealer, as the provisions of Section 31B of the RDB Act shall over ride the provisions of Section 26 of the HP VAT Act, 2005, especially in view of the observations contained in the judgment of Hon'ble Supreme Court in ***Central Bank of India's case*** (*supra*).

27. There is in force in the State of Tamil Nadu, the Tamil Nadu Value Added Tax Act, 2006. Section 42(2) of the said Act reads as under:

“42. Payment and recovery of tax, penalty, etc.--...

(2) Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall, subject to the claim of the Government in respect of land revenue and the claim of the Agriculture and Rural Development Bank in regard to the property mortgaged to it under sub-section (2) of section 28 of the Tamil Nadu Co-operative Societies Act, 1983 (Tamil Nadu Act 30 of 1983), have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered, -- (a) as land revenue, or (b) on application to any Magistrate, by such Magistrate as if it were a fine imposed by him: Provided that no proceedings for such recovery shall be taken or continued as long as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under sections 51,52,54,57,58,59 or 60.”

28. A reference was made to a Full Bench of the Hon'ble Madras High Court in **The Assistant Commissioner (CT) Anna Salai-III Assessment Circle, 'Chennai** Vs. **The Indian Overseas**

Bank, Chennai and another, AIR 2017 Madras 67 on the following issues:

“(a) As to whether the Financial Institution, which is a secured creditor, or the department of the Government concerned, would have the Priority of Charge’ over the mortgaged property in question, with regard to the tax and other dues.

“(b) As to the status and the rights of a third party purchaser of the mortgaged property in question.”

The same has been answered by the Hon’ble Full Bench of the Madras High Court as under:

“The writ petitions have been listed before the Full Bench in pursuance to the reference order in W.P.No.6267 of 2006 and W.P.No.253 of 2011, in respect of the following issues:-

“a) As to whether the Financial Institution, which is a secured creditor, or the department of the government concerned, would have the ‘Priority of Charge’ over the mortgaged property in question, with regard to the tax and other dues.

b) As to the status and the rights of a third party purchaser of the mortgaged property in question.”

2. We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and *Miscellaneous Provisions (Amendment) Act, 2016, Section 41* of the same seeking to introduce *Section 31B* in the Principal Act, which reads as under:-

"31B. Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

3. There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses

and rates due to the Central Government, State Government or Local Authority. This section introduced in the [Central Act](#) is with "notwithstanding" clause and has come into force from 01.09.2016.

4. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

5. The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

6. In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of [Section 31B](#), as it includes "secured debts due and payable to them by sale of assets over which security interest is created".

7. We, thus, answer the aforesaid reference accordingly.

8. The matters be placed before the roster Division Bench for dealing with the individual cases."

29. Section 48 of the Gujarat Value Added Tax Act, 2003 reads as under:

“48. Tax to be first charge on property.-

Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person or account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person.”

This provision is also *pari materia* to the provisions of Section 26 of the Himachal Pradesh Value Added Tax Act, 2005.

The Hon'ble High Court of Gujarat in **Bank of Baroda through its Assistant General Manager Vs. State of Gujarat & 3 others**, R/Special Civil Application No. 12995 of 2018, decided on 16.09.2019, while interpreting the provisions of Section 48 of the Gujarat VAT Act vis-a-vis the provisions of Section 26 of the SARFAESI Act and Section 31B of the RDB Act has held that the first priority over the secured assets shall be of the Bank and not of the State Government on account of Section 48 of the Gujarat VAT ACT, 2003.

30. The Hon'ble Madhya Pradesh High Court also in **Bank of Baroda Vs. Commissioner of Sales Tax, M.P., Indore and another**, (2018) 55 GSTR 210 (MP) had the occasion to consider an identical issue while interpreting Section 31-B of the RDB Act vis-a-vis Section 33 of the MP VAT Act, 2002, which contained a non obstante

Clause and created first charge on the property of a dealer in favour of the Government. It held that the State Government cannot be permitted to auction the property as the Bank was having priority in the matter in light of the amendment, i.e., Section 31B of the RDB Act.

31. A similar view has been taken by the Hon'ble High Court of Bombay in **State Bank of India** Vs. **The State of Maharashtra**, Writ Petition (ST.) No. 92816 of 2020, decided on 17th December, 2020, in which, the said Court has held that if any Central Statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a State for a tax due under the value added tax of the State.

32. Thus, Hon'ble High Court of Bombay has also held that in light of the provisions of Section 31B of the RDB Act, 1993, the first charge shall be that of the Banks/Financial Institutions and not the Revenue. However, it is important to state at this stage that there is a slight difference in the statutory provisions of Section 26 of the HP VAT Act vis-a-vis Section 37 of the Maharashtra Value Added Tax Act, 2002, which Section expressly also contains that the first charge on the property of the dealer of the State shall be subject to any provision regarding creation of first charge in any Central Act for the time being in force.

33. Be that as it may, a perusal of the judgment of the Hon'ble High Court of Bombay demonstrates that it has taken into consideration the pronouncements of all other Hon'ble Courts with regard to their respective VAT Acts, which contained a non obstante Clause in favour of the State akin to Section 26 of the H.P. VAT Act, 2005 vis-a-vis the amendments contained in the SARFAESI Act and the RDB Act

34. Thus, from what has been discussed above, now there is no ambiguity that in view of the provisions of Section 26E of the SARFAESI Act 2002 and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993, a secured creditor has priority over the rights claimed by the Revenue.

35. During the course of arguments, learned Senior Additional Advocate General has not been able to draw the attention of this Court to any judgment post amendments in the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993, referred to hereinabove, from which it can be inferred that even after the amendments so incorporated in the said Statutes, the Revenue has priority over the debts, as compared to a secured creditor.

36. Therefore, this Court has no hesitation in holding that the petitioners being "Secured Creditors" have preference over the respondent-State with regard to the debts due from respondent No. 4.

Accordingly, this writ petition is allowed by quashing Annexure P-10, dated 24.06.2017 and by holding that the respondent-Department cannot claim first charge over secured assets of the petitioners belonging to the private respondent-Company, as the petitioners have first charge over the secured assets in view of the provisions of the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993, as amended from time to time. It is further held that the provisions of Section 26 of the H.P. VAT Act, 2005 shall have to give way to the provisions of Section 26E of the SARFAESI Act 2002 and Section 31B RDB Act, 1993. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

(Ajay Mohan Goel)
Judge

May 19, 2021
(bhupender)