

(1954) 12 BOM CK 0010

In the Bombay High Court

Case No : O.C.J. Appeal No. 108 of 1954 and Miscellaneous Application No. 239 of 1954

Bank of India

APPELLANT

Vs

John Bowman and Others

RESPONDENT

Date of Decision : 02-12-1954

Acts Referred:

Bombay City Land Revenue Act, 1876 — Section 10, 11, 13, 37, 8
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54
Constitution of India, 1950 — Article 13, 14, 226, 372(1)
Contract Act, 1872 — Section 23
Income Tax Act, 1961 — Section 151, 46
Land Revenue Code (Amendment) Act, 1913 — Section 1(2)
Revenue Recovery Act, 1890 — Section 5

Citation : AIR 1955 Bom 305 : (1955) 57 BOMLR 345 : (1955) ILR (Bom) 402

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : H.M. Seervai and R.J. Joshi, for the Appellant; M.P. Amin, General, M.M. Desai, G.N. Joshi and R.N. Dalal, for the Respondent

Judgement

Chagla, C.J.—This is a petition by the Bank of India challenging an attachment levied by the Collector of Bombay u/s 13, Bombay City Land Revenue Act, 1876, and also requiring the Court to prevent the Collector from selling the properties under attachment.

2. It appears that the Bank of India, the petitioners, advanced to the National Tube Wells" Company a sum of Rs. 2,50,000 on 14-2-1953. Respondent 3 guaranteed this loan. On 1-11-1951, a contract was arrived at between the State of. Bombay and the National Tube Wells Company with regard to the National Tube Wells Company erecting 400 tube wells in the State of Bombay. Under this contract the tube wells had to be completed by 31-3-1953. On 12-6-1953, another agreement was arrived at between the State of Bombay and the National Tube Wells Company.

By this" agreement the Government agreed to advance a sum of Rs. 9,75,000 to the Company. This advance was guaranteed by the various directors of the National Tube Wells Company including respondent 3 and the extent of the guarantee of respondent 3 was Rs. 2,56,125. Time for the performance of the contract was extended to 31-3-1955. The contract provided that the amount advanced by Government was to be repaid by a certain date.

There was default in payment of that amount. Now, under the agreement of 12-6-1953, respondent 3 along with the other directors had agreed that the sum payable by them was recoverable by the State as arrears of land revenue. On 7-10-1953, the sum of Rs. 2,56,125 was demanded by the State. On 10-12-1953, the Collector of Bombay issued a warrant of attachment against three Immovable properties of respondent 3 u/s 13, Bombay City Land Revenue Act.

On the same day notices intimating the date of the sale were pasted on these properties. On 5-1-1954, the Bank of India filed a suit in this Court to realise the loan advanced by them on 14-2-1953, and in this suit a consent decree was passed on 23-2-1954. By this consent decree respondent, 3 along with others made himself liable to pay the decretal amount. On 16-2-1954, respondent 3 filed a petition challenging the warrant of attachment and the threatened sale by the Collector. The petition was dismissed by Tendolkar J.

Respondent 3 appealed to this Court and this Court upheld the decision of Tendolkar J., and concurred with him in dismissing the petition. This was on 7-4-1954. On 23-4-1954, the Bank of India! in execution of the decree they had obtained, obtained a warrant of attachment from this Court. On 30-4-1954, the Collector gave notice that he would sell the property on 25-5-1954. This sale was "postponed to 22-6-1954. On 10-6-1954, the Bank of India obtained a warrant of sale in their execution proceedings.

On 21-6-1954, the Bank of India presented the present petition from which this appeal arises. The trial Judge on an "ex parte" application made by the bank refused to stay the sale, but issued an injunction against the Collector restraining him from getting the sale confirmed. The result was that the sale has taken place, but the sale has not been confirmed.

On the merits of the petition the learned Judge came to the" conclusion that the attachment and the sale held by the Collector were valid and in accordance with law and that the execution proceedings taken out by the Bank of India could not in law prevent the Collector from realising the dues from respondent No. 3. It is against this decision of the learned Judge that this appeal is preferred.

3. Now, very strong reliance has been placed by the Advocate General on the decision of the Appellate Court in respondent 3's petition, and what has been argued by the Advocate General is that in that decision we held that the contract between the State and respondent 3, by which respondent 3 agreed to his debt being realised as arrears of land revenue, was a valid contract.

We also held that the State was entitled to proceed against respondent 3 u/s 13, Bombay City Land Revenue Act and therefore that decision is binding upon us, and if it is binding upon us, it is not open now to the Bank of India to bring into issue the very questions that were decided by the Court of Appeal on the earlier petition.

Now, there are two important aspects of that judgment to which attention must be drawn. The contesting parties on that petition were the State of Bombay on the one hand and .respondent 3 on the other. The contest was between the debtor and the creditor and the primary question that arose for our consideration was whether the debtor was bound by the contract which he had solemnly entered into with the State of Bombay.

The second important aspect of the matter which is clearly referred to in our judgment is that we expressed the opinion that whatever the legal rights of the petitioner might be we were not inclined to give him relief under our special jurisdiction under Article 226 of the Constitution.

We pointed out that the petitioner had no defence on the merits and he had agreed to the particular procedure by which his debt should be realised and justice did not demand that this Court should give any relief to the petitioner. Now, in our opinion, the position that arises on this petition is entirely different, and the position that arises is whether the contract between the State and respondent 3, even though it be a valid contract, can be enforced against the petitioners who were not parties to that contract.

In our opinion it is open to the Bank of India to contend that however valid the contract may be, as between the State and respondent 3, and whatever our view might have been about the contractual rights and liabilities of the State and respondent 3, as far as the Bank of India is concerned that contract cannot be binding on them and cannot be enforced against them. It is on this aspect of the case that we have decided that the Bank of India is entitled to put forward its contentions notwithstanding the judgment delivered in -- "Bhagwandas Narottam Divecha v. The State of Bombay", O. C. J. Appeal No. 37 of 1954 decided by Chagla C. J. and Dixit J. on 7-4-1954 (Bom.) (A).

4. Now, let us try and understand what is the position of the Bank of India before us. The petitioners, the Bank of India, have obtained a decree of this Court. They have attached the properties of the judgment-debtor and they propose to proceed to sell those properties and appropriate the sale proceeds in satisfaction of their judgment-debt. The properties admittedly belong to the Judgment-debtor. Admittedly the judgment-debtor at the date of attachment had the disposing power over those properties.

The State by attaching those properties not through any process of a civil Court asserts its right to sell those properties and defeat the attachment and execution proceedings taken out by the petitioners, and the real question that arises for our determination is whether there is anything in law which permits the State to

claim that a debt due to it under a contract can be preferred to the decree obtained against its debtor by another creditor and whether that claim can be preferred even to the execution proceedings taken out by the other creditor in due process of law through a civil Court.

If this is the real issue we have to determine, it will be immediately noticed that that is a question which was never considered in "Bhagwandas Narottam Divecha v. The State of Bombay (A)".

5. Now, in order to decide this question we must first look at the Bombay City Land-Revenue Act of 1876. The claim put forward by the State is that it is entitled to levy attachment and sell respondent 3's property u/s 13 of the Act because respondent 3 has failed to discharge his contractual debt to the State. This Act was put on the statute book primarily for the purpose of enabling the State to collect land revenue in the city of Bombay. In that sense it corresponds to the Land Revenue Code which deals with the collection of land revenue in the State of Bombay outside the city, and Sections 8, 9 and 10 of Part III deal with assessment and collection of land revenue. Then comes Section II and that section provides: "The claim of the Provincial Government to any moneys recoverable under the provisions of this Act shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage, judgment, decree, execution, attachment or otherwise howsoever, against any land, or the superior holder thereof." Therefore, this section gives precedence to the State Government in respect of any claim which is recoverable, under the provisions of this Act. But unless the claim arises under the provisions of this Act the State cannot claim the precedence given to its claims under this section. The moneys recoverable under the provisions of this Act are either moneys recoverable for arrears of land revenue or they are moneys recoverable u/s 37 of "the Act, and that section provides:

"All arrears of rent payable by any person in respect of the occupation of any house the property of the Crown, and all fees, fines and penalties chargeable under this Act, and all moneys leviable under the provisions of this Act on account of the value of any land, or on account of the alteration, removal, renewal or repair of survey-boundary-marks, or on account of the abatement or removal of an encroachment, shall be realised in the same manner as other revenue-demands, under the provisions of Section 13 of this Act."

Therefore, either there must be arrears of land revenue due under the provisions of this Act or there must be moneys due u/s 37 of the Act which would come within the ambit of Section 11 and which would have precedence as set out in Section 11.

It will be noticed that the precedence given by Section 11 is complete and absolute. It is precedence over mortgage, judgment, decree, execution, attachment or otherwise howsoever.

6. Now, the Advocate General has fairly conceded that he cannot possibly urge

that the contractual debt due by respondent_ 3 is a claim that can come within the purview of Section 11, and he has also conceded that he cannot claim precedence for this claim of the State over the decree or execution of the petitioners.

It may be urged that if Section 11 has no application and if the claim of the State does not fall under that section, then the State cannot rely upon Section 13 of the Act which is a procedural section. That section provides, that if land revenue is not paid, the Collector has got to give a notice of demand. Then the fourth paragraph of that section provides that if the superior holder or person in possession does not discharge the revenue due for 20 days after service of the notice of demand, it shall be lawful for the Collector to levy the same by attachment and sale of such portion of the land on which revenue is due or of such portion of any other property, moveable or immovable, as would be required to satisfy the demand.

The next paragraph provides that the sale shall be by public auction and shall not take place until at least 15 days after notice thereof shall have been published in the Official Gazette. The next paragraph contains a penal clause that the defaulter may be arrested and confined to civil jail, provided however that such imprisonment shall cease at any time upon payment of the sum due, and shall in no case exceed one day for each rupee of the said sum.

Now, it is clear that Section 13 is a procedural section and it can only apply as far as this Act is concerned to default in payment of land revenue and to the dues mentioned in Section 37 because Section 37 in terms provides that the dues mentioned therein are to be realised in the same manner as other revenue demands under the provisions of Section 13. It is because of this that the Advocate General has placed reliance on Section 5, Revenue Recovery Act. That section provides;

"Where, any sum is recoverable as an arrear of land-revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate shall, on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land-revenue which has accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act, as if the sum were payable to" himself."

Now, what happened in this case was that the Secretary to Government, Public Works Department, Mr. Dravid, requested the Collector to recover from respondent 3 a sum "of Rs. 2,56,125 and acting on that request the Collector proceeded to recover it as if it were an arrear of land revenue and put into operation the machinery provided in Section 13 for the arrears of land revenue.

Now, Section 5, Revenue Recovery Act can only apply provided a sum is recoverable by the State as an arrear of land revenue, and Mr. Seervai's contention is that Section 5 is only procedural and the right to recover is not

conferred upon the State by this section. In the judgment referred to in "Bhagwandas Narottam Divecha v. The State of Bombay (A)" we have pointed out that in our opinion "recoverable" means the right to recover and we have drawn a distinction between the right to recover and the power to recover.

We adhere to the view we took in that decision, but even so it is clear that, the whole of this Act, the Revenue Recovery Act, is a procedural Act and it does not purport to confer any substantive right upon the State or its public officers. Therefore we must find the right to recover in some other statute or in some other provision of the law.

7. It is pointed out that as far as the Land Revenue Code is concerned, the right to recover contractual debts is expressly conferred by Section 187. It is also pointed out that this provision was embodied in the Land Revenue Code, by Act IV of 1905, and when by Act IV of 1913 Section 1(2) of the Land Revenue Code was amended, this particular section was not extended to the city of Bombay although parts of Chap. XA were made applicable to the city.

Therefore it is urged that the Legislature advisedly did not confer upon the State the right to recover contract debts in the city of Bombay, whereas it did confer such a right in the districts. It is said that this may have been done out of policy because Bombay is a large industrial and commercial centre, and if Government were given the right to claim priority with regard to contract debts, it may seriously impede commercial and industrial activity in the city of Bombay.

We are not really concerned with the policy of the State, but the undoubted fact remains that the provision of the Land Revenue Code u/s 187 with regard to the Government's right to recover contract debts as if they were arrears of land revenue has not been made applicable to the city of Bombay. As a matter of legislative curiosity it may be pointed out that it is only after we delivered our judgment in "Bhagwandas Narottam Divecha v. The State of Bombay (A)" that the Bombay Legislature has amended the Bombay City Land Revenue Act and has brought it into line with Section 187, Land Revenue Code.

But the question that we have to address ourselves to is whether the right to recover any sum by the State is confined to a right arising out of a statute or whether Section 5, Revenue Recovery Act, also contemplates a right arising out of contract. We considered this very question in "Bhagwandas Narottam Divecha v. The State of Bombay (A)" and we came to the conclusion that there was no reason why we should give a narrow restricted interpretation to the expression "recoverable" used by the Legislature in Section 5, and our view was that whether the right to recover a sum arose out of statute or out of contract, Section 5 was equally applicable. Adhering to that view it follows that the State had the right to recover the amount due from respondent 3 under a contract and by reason of that right a certain sum became recoverable within the meaning of Section 5, Revenue Recovery Act, and if that sum became recoverable by any public officer -- in this case it was Mr. David-- then the Collector of Bombay on

the request of that public officer was given the power to proceed to recover that sum as if it were an arrear of land revenue.

If that be the true position, then in our opinion the State of Bombay could justify the conduct of the Collector in proceeding against the debtor u/s 13, Bombay City Land Revenue Act as he has done.

8. It has been urged by Mr. Seervai that the contract between the State and respondent 3 is bad on more than one ground. In the first place it is said that it is not open to parties to legislate by means of a contract, nor is it open to the parties to decide that debts would be recoverable in 3 manner other than the manner provided by law. It is said that a debt can only be recovered in law by a suit being filed,- a decree obtained, and the decree being executed.

What according to Mr. Seervai the State and respondent 3 have done by this contract is to override the provisions of the CPC and to substitute for the provisions of the Code a special law, as it were, dealing with their own contractual rights and liabilities. The answer to that contention in our opinion is simple. Parties who are "sui juris" can enter into any contract provided it is not opposed to public policy, and we see no reason why it was not open to respondent 3 to agree with the State of Bombay that his debt should be recovered by a particular mode. We are now only dealing with this contract so far only as it affects the rights of the debtor. A coercive machinery was available to the State and the debtor agreed that that machinery should be availed of by the State instead of the State having to recover its debt by the long and dilatory process of going to a civil Court. Therefore, to the extent that it did not affect the rights of the bank there seems to be no reason whatsoever why we should take the view that the State and respondent 3 were not competent to enter into a contract of this nature.

9. It is then suggested that this contract is void because it is against public policy. Now, there is no topic in the law of contract which has given greater difficulty to Courts and Judges than the question of what is and what is not public policy. In the first place, it is stated that this contract has incidence attached to it which would justify the Court in characterising it as -- to use the language of the English Courts -- a servile contract, and it is said that by this contract respondent 3 agreed to have this property sold by the coercive machinery of the State and which provided for imprisonment for an indefinite period and therefore jeopardized both his person and property, and Mr. Seervai says that a Court will not countenance a contract of so servile a nature.

Now, it is very difficult to take the view that a contract is against public policy when the Legislature itself countenances such a contract and permits the State to enter into such a contract. It is difficult to accept the position that if a contract was opposed to the best interests of the public, the Legislature would put on the statute book a legislation which would permit the State to enter into such a contract, because admittedly u/s 187 the Legislature has permitted the State to

enter into a contract by which the debtor might agree to have his debt realised as if it was an arrear of land revenue. Even Section 13, Bombay City Land Revenue Act, permits the Government to recover at least the arrears of land revenue and the dues by the mode laid down in Section 13.

Therefore we refuse to be appalled by what Mr. Seervai suggests are the barbarous incidents of this contract mildly and meekly entered into by respondent 3. When we analyse it, all that it means is that the debtor has agreed to have his property sold if he fails to pay his debt and also to submit himself to imprisonment in a civil jail. We had occasion to point out in "*Bhagwandas Narottam Divecha v. The State of Bombay (A)*" that the period of imprisonment contemplated in Section 13 was one which no humane Legislature would possibly contemplate.

We also pointed out that no Collector in these "modern times would ever think of exercising his power under that section, and we are glad to know that our Legislature has immediately acted "on our " suggestion and has amended that part of Section 13 which gave the Collector the power indefinitely to imprison a defaulting debtor.

10. It is then urged that the principle of public policy requires that we must judge of the tendency of the transaction at the time when the contract was entered into and it is said that the tendency of the contract when it was entered into by Government was to defeat the rights of third parties and therefore on that ground also the contract must be held to be against public policy.

Now, it is rather difficult to appreciate this argument. Either" the contract binds third parties, in which case no question of public policy arises, or the contract does not bind third parties, in which case also no question of public policy arises, and the view we are inclined to take in this case, which we shall presently point out, is that this contract though valid between respondent 3 and the State cannot deprive the Bank of India of their rights under the law.

If that be the true position, then it is difficult to understand how the contract entered into by Government had any particular tendency which is repugnant either to good morals or to the interests of the public. In our opinion there is not much substance in the contention that the contract is against public policy and therefore it should be held void. We may point out that this very argument was also advanced in perhaps different form in "*Bhagwandas Narottam Divecha v. The State of Bombay (A)*" and we rejected that contention there also.

11. Therefore, if the contract between the State and respondent 3 is a valid contract and if respondent 3 is bound by that contract and if u/s 5, Revenue Recovery Act, the amount due under the contract becomes a debt recoverable by the State and the State has legally and properly taken action u/s 13, Bombay City Land Revenue Act, what is the position of the Bank of India and what are the rights of the Bank in this matter.

We agree with Mr. Seervai that it is not open either to private parties or even to the State contracting with a private party to deprive a third party of his rights under the law. That is the function only of the Legislature and it is only the Legislature that can affect or prejudice the rights of third parties. The doctrine that parties "sui juris" can contract to do or perform anything subject to its not being against public policy cannot apply to the contracting parties affecting the rights of third parties who are not parties to the contract.

Therefore, even if the State and respondent 3 purported to override the provisions of the CPC to the extent that those provisions could be availed of by a third party, such an attempt would be entirely futile. It would not be open to the debtor to contract with the State that not only will the State recover its dues by the procedure laid down in Section 13, Bombay City Land Revenue Act, but that the State will have priority over any decree obtained, by a third party against the debtor or any execution taken out by the third party against the debtor.

Now, this in effect is the claim of the State. When we decided "*Bhagwandas Narottam Divecha v. The State of Bombay (A)*" the claim of the State was restricted to the process taken out by it against its own debtor and we upheld the action of the State because contractually the debtor had bound himself to discharge the debt in the manner provided under the contract. But in this petition the claim of the State is not against its debtor, the claim of the State is against a third party, the Bank of India, and the claim of the State amounts to this that its claim against respondent 3 must have precedence and priority over the decree obtained by the Bank and the execution taken out by the Bank.

The claim of the State would have been justified if the claim had been put forward u/s 11, Bombay City Land Revenue Act, but as we have already pointed out, the Advocate General has conceded that its claim does not come within the ambit of that section, and therefore we had to ask the Advocate General to point out to us any provision of the law by which the claim of the State must be preferred to the decree passed by a competent Court and the execution taken out by a competent Court, and again the Advocate General fairly conceded that there was no provision in any law, but what he relied on was the Common law doctrine that if the debts due to the Crown are of equal degree to the debts due to a private citizen, then the Crown must have priority in recovering those debts as against the private citizen, and this takes us to the very interesting question that has been debated at the Bar as to what are the rights of the State after the Indian Constitution was enacted.

12. Now, as far as the English law is concerned, the learned author in Halsbury enunciates the law very succinctly in 2nd edn., Vol. VI, at p. 584, and this is how the law is enunciated. "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, the rule being "*detur digniori*".

It was urged by Mr. Seervai that a Crown has priority only where there was a

judgment-debt in favour of the Crown and that judgment-debt was competing with the judgment-debt in favour of a private individual. Mr. Seervai says that it may also be true that without there being a judgment-debt, if there was a specialty-debt in the sense of the debt due to the Crown under a statute, the Crown might have priority over the debts due to a private individual.

But Mr. Seervai contested the position that where the debt due to the Crown was a contractual debt which had not been crystallised into a judgment-debt, the Crown could claim priority over the judgment-debt in favour of the private individual. It is true that as far as our High Court is concerned the question has been considered in a very early decision reported in -- "Secy, of State for India v. Bombay Landing & Shipping Co.", 5 Bom HCR (OC) 23, and the bench consisting of Couch C. J. and Westropp J. held that the judgment-debt due to the Crown is in Bombay entitled to the same precedence in execution as a like judgment-debt in England, if there be no special legislative provision affecting that right in the particular case.

It is true that the Court was only considering a judgment-debt due to the Crown, but it will be noticed that priority was conceded to the Crown not by reason of any legislative provision but by reason of the position obtaining in law in England, and far from the Court requiring any legislative provision in favour of the Crown what was held was that unless there, was a legislative provision to the contrary the Crown was entitled to this privilege.

This case came to be considered in a later judgment reported in -- The Secretary of State for India Vs. Vedavyas Venkatesh Bhatta, and the divisional bench consisting of Barlee and N.J. Wadia JJ. points out at p. 217 that it is not disputed that the Crown is given priority by -Common law, and a reference is made to "Secy, of State for India v. Bombay Landing & Shipping Co. (B)" and the comment made is that the Common law priority is confined to unsecured debts.

But it is rather interesting to note that these learned Judges took the view that the priority given to the Crown was by Common law of England. But with respect to the bench that decided the case in "Secy." of State-for India v. Bombay Landing & Shipping Co. (B)", it is clear from English decisions that the priority claimed by the Crown is not confined to judgment-debts. It is sufficient to refer to two judgments on this point.

13. One is the case reported in -- "In re Henley & Co.", (1878) 9 Ch D 469. It is true that the actual case the Court was considering was the case of a property tax due to the Crown, and what was held was that the Crown had a right to payment in full of a debt due from the company for property tax before the commencement of winding up in priority to the other creditors, but what is of interest is the observation made, by the learned Judges. At p. 481 Lord Justice James says:

" .Whenever the right of the Crown and the right of a subject with respect to the payment" of a debt of equal degree come into competition, the Crown's right

prevails."

Therefore, the priority given to the Crown is not on the basis of its debt being a judgment-debt or a debt arising out of statute, but the principle is as enunciated by Halsbury that if the debts are of equal degree and the rights of the Crown and the subject are equal, the Crown's right will prevail over that of the subject. Lord Justice Brett at p. 482 enunciates the same proposition:

"...in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown, must prevail."

Perhaps we might notice the expression "prerogative" used by Lord Justice Brett, because we have had a very able argument advanced by Mr. Seervai on this aspect of the case with which we shall have to deal a little later. The Privy Council in -- "New South Wales Taxation Commissioners v. Palmer", (1907) AC 179 approved of the decision in "In re Henley & Co, (D). At page 185 Lord Macnaghten who delivered the judgment of their Lordships quoted with approval the remarks of Macdonald C. B. in -- "The King v. Wells", (1812) 16 East 278 that the prerogative of the Crown rested upon a principle (p. 282):

"...perfectly distinct . and far more general; determining a preference in favour of the Crown in all cases and touching all rights of what kind so ever, where the Crown's and the subject's right concur, and so come into competition,"

In that case in the administration of the assets of a bankrupt the Crown was claiming preferential payment over all other creditors in respect of amounts due for land and Income Tax and fines. It is true that this was also a case of a specialty debt, but the observations of the Privy Council are sufficiently wide to cover also contractual debts due to the Crown.

14. The Indian High Courts have also accepted the same position here. There is a judgment of a Full Bench of the Madras High Court reported in -- MANICKAM CHETTIAR Vs. Income Tax OFFICER, MADURA,. There also it is true that the debt due to the Crown was a debt due under a statute, viz. the Income Tax Act, and the facts which were rather significant were that a decree passed in favour of a private individual was being executed, that moneys were realised in the execution of the decree, and the Income Tax Officer applied that he should be paid the Income Tax dues by the debtor in preference to the judgment-creditor, and what the Full Bench held was that the Court had inherent jurisdiction u/s 151 to recognise the prior claim of the Crown and to discharge the debt of the Crown although the procedure laid down in the Income Tax Act u/s 46 had not been followed, and it is in this connection that certain observations have been made by the learned Chief Justice Leach which are of some interest: At p. 363 the learned Chief Justice says:

"The learned Advocate for the petitioner then contends that as a private person

cannot enforce payment without first obtaining a decree, the Crown is in the same position. The argument is that a private person is governed by the provisions of the Civil P. C. and as there is nothing in that Code which places the Crown in a different position the procedure there contemplated must be followed. "I am unable to agree. This argument ignores the special position of the Crown, the special circumstances and the Court's inherent powers.

It cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognized in India. If the Crown is entitled as it is, to prior payment over all unsecured creditors, the position of secured creditors does not arise. I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course it must be a debt which is not disputed or is indisputable. In this case the debt represents money due to the Crown under the Income Tax Act and the demand of the Income Tax Officer is not open to question."

Therefore, in the opinion of the learned Chief Justice it had never been disputed in India that the Crown had priority with regard to its debts over all unsecured debts. No question arose of the debts being judgment-debts or otherwise. If the other competing debts were unsecured, "then the right of the Crown to priority or precedence arose.

15. Mr. Seervai has contended that the English principle of the debts of the Crown having priority is based upon the prerogative of the Crown, and that principle would not apply to India. In our opinion, whatever may have been the historical origin of the principle which gives priority to the debts due to the Crown, when the English Courts came to consider this question the principle had become a part of the Common law of England.

It is not so much because the Crown has any special privileges in England that this principle has been upheld, "but it is because the State in England has taken the place of the Crown and the English Courts have continued the privilege which was once the privilege of the King and have afforded the same privilege to the State because they have realised that the State has certain rights and privileges which cannot be overlooked.

Mr. Seervai says that to uphold the King's prerogative in India after 1950 would be to go counter to the basic structure of our Constitution. It is true that our Constitution sets up a democratic socialist republic and we would be loath to give effect to any principle of law which was inconsistent with the democratic or socialistic principles which we have accepted in our Constitution. But it would be an exaggeration even to suggest that the England of today is not democratic or socialistic, and if the English Courts have upheld this principle, they could not have done so if they had realised that it was no longer consistent with the modern trends of constitutional theory prevailing in England today.

Even in a democracy and even under socialism the State must have certain rights and privileges. The State has to govern, the State has to find money to be used for socialistic principles, and the Courts have always given every facility to the State to realise moneys which are not collected for any private purpose but are intended for the public coffer and which are ultimately intended for the public need. The principle which has been enunciated in the English Courts and which has been accepted by our Courts is not a principle which is peculiar to British jurisprudence.

As far back as "*Secy, of State for India v. Bombay Landing & Shipping Co. (B)*", Mr. Justice Westropp, as he then was, pointed out at p. 48 that this principle was no novelty in India, and he refers to Hindu jurists who have laid down that a debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first discharging those of a priest or the King. Fortunately, under our Constitution the priest does not play any part, but the King undoubtedly does, not the King of the old days in his personal dictatorial capacity but the King in the form and shape of the State.

The learned Judge also points out that Muslim Rulers in India were not prone to waive or abandon such royal prerogatives as they found existing in India, and he also points out that though this royal prerogative has been recognised in many statutes it does not follow that where there is no statutory recognition of this prerogative the prerogative should not be upheld as forming part of the Common law of England.

If this principle formed part of the Common law of England, then that law has been preserved under Article 372(1) of the Constitution. This was the law in force in India immediately before the commencement of the Constitution and it must continue in force until altered or repealed or amended by a competent Legislature or other competent authority.

16. It has then been urged by Mr. Seervai that this part of the Common law is incompatible with Article 14 of the Constitution and by reason of Article 13 as it is inconsistent with the provisions of Part III it must be declared to be void.

Now, it is not true to say that the State is denying equality before the law to any person by claiming this special privilege. Article 14 would only be offended against if the State made a discrimination between one creditor and another or between one class of creditors and another. The principle of Common law is that the State has priority over all competing creditors if the debts are of the same quality. Mr. Seervai says that the competition here is between two creditors and one creditor cannot be preferred to another, and if that was done, there would not be equality before the law under Article 14.

The answer to that submission is that the State; here is not claiming as a creditor. It may be a creditor, but the right which it claims is in its capacity as the State and its contention is that as it is the custodian of public welfare, as moneys which it is claiming belong to the coffers of the State and are to be used in public

interest, it should be given precedence over private creditors who have not to discharge the duties or responsibilities of the State. In our opinion, therefore, the Common law with regard to priority of debts due to the State is not in any way inconsistent with the fundamental rights embodied in Part III of the Constitution.

17. But even if we come to the conclusion that the State has priority with regard to this contractual debt over the debt due to the Bank of India, the two debts being of equal degree, even so the State has no right to override a decree of a competent Court or an execution taken out in respect of a decree unless specially empowered by law. Section 11, Bombay City Land Revenue Act, is an illustration where the Legislature has empowered the State to override decrees, judgments and executions of a Court.

It is also an instance where the Legislature has given precedence to the amount claimed by the State under the provisions of that Act over not only ordinary debts but judgment-debts and secured debts. But the Advocate General has not been in a position to draw our attention to any provision in the law where in respect of a contract debt, such as we have before us today, any precedence has been given to the State by the Legislature.

18. The position therefore that we find in this case is that the property of the judgment-debtor, respondent 3, has been attached by the Bank of India in execution of the decree obtained by the bank against him, and once the property is attached, the property is in the custody of the Court. Therefore to the extent that the Collector asserts his right to sell that property he is clearly in the wrong. It is only the Court that has the authority to sell the property as a consequence of the property being attached by the judgment-creditor.

The Collector cannot disturb that attachment, nor can he take the property out of the custody of the Court.

There is another aspect of the case which Mr. Seervai has emphasised and in our opinion lightly emphasised. All the cases to which our attention has been drawn have one significant feature and that is that the State always made an application to the civil Court to establish its precedence with regard to its debts over the debts claimed by private parties, and even in the Full Bench case to which reference has been made the Madras High Court exercised its inherent jurisdiction u/s 151, Civil P. C. in order to direct the executing Court to pay to the State in preference to the judgment-creditor.

Therefore, in our opinion, inasmuch as the property of respondent 3 has been lawfully attached by the Bank of India and inasmuch as that property is in the custody of the Court, the proper procedure for the State to follow is to make an application to the executing Court for payment of the amount due to it in priority to the debt of the judgment-creditor, the Bank of India. We understand that as a matter of fact the State has taken out a summons. Therefore it would be on that summons that the Court will have to decide whether the State should be paid in priority to the executing creditor.

19. Now, it is just as well that we should lay down the practice which should be followed in cases like this because this is a novel case, and as far As Bombay is concerned, it has arisen for the first time. If a claim like this is made by the State, notices must be given by the executing Court to all parties concerned. If the debt is undisputed or indisputable, the Court would undoubtedly allow the claim of the State. If not, the Court will have to adjudicate upon the debt claimed by the State. It may even be that if the claim requires an elaborate and lengthy investigation, the Court may refer the State to a suit, and pending the disposal of the suit the Court may safeguard the property or the sale proceeds of the property.

20. Mr. Seervai has raised a rather interesting question as to whether if respondent 3 admits the claim of the State, it is open to the bank to challenge that claim in the executing Court. It would be for the executing Court, if and when such a contention is raised, to decide whether it is tenable. We may point out in fairness to the Advocate General that he did argue that once the revenue authority attached the property the civil Court cannot question the attachment.

Now, it may be, as we held in the earlier appeal, that the debtor may not be able to challenge the attachment because he is bound by the contract which he has entered into with the State. But the bank, as we have already pointed out, is not a party to the contract and therefore the bank cannot be bound by the terms of the contract. The bank would only be bound by some law or some provision in any law, but as we have already said the Advocate General has failed to draw our attention to any law or any provision in any law by which the bank would be bound by this attachment issued at the instance of the Collector.

Therefore it is clear that once a valid order of attachment has been made by a civil Court, the revenue authority has no right to sell the property in enforcement of its own attachment so long as the attachment of the civil Court continues, unless a case falls u/s 11, and it is also clear that the property must be sold by the Court, and it is only in execution proceedings in the civil Court that the question of the right of the State to claim its debts in priority to those of the judgment-creditor can arise and can be decided and determined.

21. Now, it has also been argued by Mr. Seervai that there is no valid attachment in this case and therefore no question of the right of sale by the Collector can arise. It is true that u/s 13, Bombay City Land Revenue Act, the Collector can levy the revenue due under that Act by attachment and sale, and therefore before the Collector can sell the property of the defaulter that property has to be attached, and the question that falls for determination is whether there was a proper attachment in this case.

Now, the Privy Council in dealing with attachments under the CPC has laid down that the attachment is the real thing and that attachment itself is something separate from the mere order of attachment. The CPC contains elaborate rules as to how an attachment is to be effected. When we turn to the Bombay City Land

Revenue Act no procedure is laid down as to how an attachment is to be effected, and therefore in order to come to the conclusion that there is an attachment under the provisions of that Act all that we have to be satisfied about is that the provision with regard to attachment has been substantially complied with.

22. Now, Mr. Seervai in the first place draws our attention to the warrant of attachment. That warrant is issued to three process servers, one of them being Ramalingam who was a witness in the Court below, and he is authorised by the Collector to enter into and take possession of the land and other property moveable or Immovable as mentioned in the accompanying Schedule and to continue in such possession. Mr. Seervai says that if the attachment was to be effected by possession of the property, then Ramalingam should have taken possession of the property, the possession being such as the nature of the property was capable of, and as this property was tenanted, Ramalingam should have asked the tenants not to pay rent any further to respondent 3, their landlord.

But Mr. Seervai says that it is common ground that no possession was taken of this property either -physically or constructively and respondent 3 continued in possession of the property. Therefore Mr. Seervai's contention is that the mode of attachment was laid down in the warrant of attachment itself, that that mode was not complied with, and therefore there was no attachment of the property at all. Mr. Seervai also draws our attention to the evidence of Ramalingam who admits in cross-examination that he did not go to serve the warrant of attachment on respondent 3 nor did he serve such a warrant. So, says Mr. Seervai, there is not even a service of the warrant of attachment upon the debtor.

23. Now, as we have pointed out that no procedure is laid down in the Bombay City Land Revenue Act with regard to the mode of attachment, what we have to consider is what is the object of attachment. The object of an attachment is to give notice to the debtor and to the public that they should not deal with the attached property and also to give notice to the debtor that the property is liable to be sold if he does not discharge his debt.

Now, when we look at the evidence, we are satisfied that that object has been amply achieved and the debtor had notice of the attachment, the public had notice of the attachment, that everybody concerned, knew that the debtor had defaulted, and that his property would be sold unless he paid up his dues. In the first place, the Advocate General rightly points out that the warrant of attachment does not in terms say that the attachment is to be effected by Ramalingam going into possession of the property. This warrant authorises him to enter into possession, and the mere fact that he does not act upon this authority does not mean that in law there was no attachment.

There is the evidence of respondent 3 himself that Ramalingam came to him and demanded the moneys from him, whereupon respondent 3 informed him that he

was unable to pay. He then told him that Government would attach his properties and he produced a piece of paper and asked for details of his properties which were set out on that piece of paper. Although respondent 3 denies the fact that the warrant of attachment was shown to him,-the learned Judge below has accepted the evidence of Ramalingani on this point when he says that he showed respondent 3 the warrant of attachment and told him that if he did not pay the amount his properties would be attached.

He has also given evidence that after showing respondent 3 the warrant of attachment he went to the property and he pasted there the notices of sale and that was done with a beat of "battaki". This evidence, therefore,- clearly establishes that the real purpose for which the attachment is made was carried out by what Ramalingam did in connection with this warrant of attachment.

It may be that service was not effected as required by the Civil Procedure Code. It may be that the attachment was not effected with the formality required by the Code. But the Bombay City Land Revenue Act does not provide for service of the order of attachment, nor does it provide that the formalities laid down in the Code should be complied with. In our opinion there is no substance in this contention and we must hold that there was a valid attachment by the Collector.

24. The result, therefore, is that the petition must succeed. The order of the learned Judge below will be set aside and we will issue an order and direction upon the Collector not to proceed with the confirmation of the sale, and we will also direct the Court below to proceed with the execution application of the Bank of India in accordance with law.

25. We think that the fair order to make with regard to costs would be that the State of Bombay, respondent 2, should pay half the costs of the petition in the Court below and half the costs of this appeal. There will be no order as to costs of respondents 1, 3, 4 and 5 of the petition or of the appeal. Costs of the petition and of the appeal to be taxed.

26. Petition allowed.