

(2017) 05 SHI CK 0062
In the High Court Of Himachal Pradesh
Case No : 154 of 2017

H.P. State Cooperative Bank Ltd.

APPELLANT

Vs

State of H.P. and another

RESPONDENT

Date of Decision : 11-05-2017

Acts Referred:

Code of Civil Procedure, 1908, Section 100 - Second appeal
Workmens Compensation Act, 1923, Section 14A - Compensation to be first charge on assets transferred by employer
Companies Act, 1956, Section 529A - Overriding preferential payments.
Gift Tax Act, 1958, Section 30 - Gift-tax to be charged on property gifted
Estate Duty Act, 1953, Section 74 - Estate duty a first charge on property liable thereto
Mines and Minerals (Regulation and Development) Act, 1957, Section 25 - Recovery of certain sums as arrears of land revenue
State Financial Corporations Act, 1951, Section 46B - Rajasthan Sales Tax Act, 1954, Section 11AAAA - Madhya Pradesh General Sales Tax Act, 1958, Section 33C - Punjab Excise Act, 1914, Section 60 - Recovery of dues
Himachal Pradesh Land Revenue Act, 1954, Section 28 - Himachal Pradesh Excise Act, 2011, Section 73

Citation : (2017) 05 SHI CK 0062

Hon'ble Judges : Tarlok Singh Chauhan

Bench : Single Bench

Advocate : Y.P. Sood, Meenakshi Sharma, Neeraj Sharma, J.S. Guleria

Final Decision : Dismissed

Judgement

1. The plaintiff is the appellant, who aggrieved by the judgment and decree passed by the learned courts below, has filed this Regular Second Appeal invoking section 100 of the Code of Civil Procedure. The parties shall be referred

to as the plaintiff and defendant.

2. The plaintiff filed a suit for declaration and injunction against the defendants on the allegation that the suit property owned by one Sh. Kewal Krishan Sood was mortgaged with the plaintiff-bank in order to secure repayment of the loan advanced to him. The charge of the bank was duly recorded in the revenue record and requisite mutations in this behalf also stood entered and attested in its favour. Since the borrower did not repay the loan, as per the agreement, therefore, the plaintiff had the right to recover the loan by sale of the mortgaged property having first charge on the same. It was the further case of the plaintiff that the order dated 4.2.2004 passed by defendant No.1 attaching the suit property for recovery of the Government dues was illegal, wrong, null and void and not binding upon the plaintiff-bank so far as the same was against the plaintiff. Lastly, it was contended that the suit property be put to sale through auction subject to the rights of the plaintiff created under the valid mortgage.

3. The suit was contested by the defendants, who raised various legal objections regarding the maintainability, jurisdiction etc. On merits, it was averred that the Assistant Excise and Taxation Commissioner, Shimla had passed legal and valid order by exercising powers of the Collector under section 28 of the H.P. Land Revenue Act, 1954 and the order of attachment passed by him were legal and valid. It was further averred that the arrears of excise duty payable to the State of Himachal Pradesh was to be recovered being prior charge on the property of defaulter and the property is to be sold free from all encumbrances. It was lastly contended that the right of recovery of Government dues has precedence over any other debt or claim whatsoever.

4. As observed earlier, both the courts below have concurrently dismissed the claim of the plaintiff. Yet undeterred the plaintiff has filed the instant appeal claiming therein that the findings recorded by the courts below to the effect that the defendant-State in a sovereign function has a preferential right of recovery are erroneous besides illegal and contrary to law.

5. I have heard Sh. Y.P. Sood, learned counsel for the appellant.

6. The principle of priority of Government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues.

7. The Hon''ble Constitution Bench of the Hon''ble Supreme Court in Builders Supply Corporation v. Union of India, AIR 1965 SC 1061, considered the question

whether tax payable to the Union of India has priority over other debts. After making a reference to the judgments of the Bombay High Court in *Bank of India vs John Bowman and Ors.*, Madras High Court in *Kaka Mohammad Ghouse Sahib & Co. vs United Commercial Syndicate and Ors.* (1963) 49 I.T.R. 25 and *Manickam Chettiar vs Income-tax Officer, Madura*, it was held:

(i) The Common Law doctrine of the priority of Crown debts had a wide sweep but the question in the present appeal was the narrow one whether the Union of India was entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over unsecured debts due from the said citizen to his other private creditors. The weight of authority in India was strongly in support of the priority of tax dues.

(ii) The Common Law doctrine on which the Union of India based its claim in the present proceedings had been applied and upheld in that part of India which was known as British India prior to the Constitution. The rules of Common Law relating to substantive rights which had been adopted by this country and enforced by judicial decisions, amount to law in force in the territory of India at the relevant time within the meaning of Article 372(1). In that view of the matter, the contention of the appellant that after the Constitution was adopted the position of the Union of India in regard to its claim for priority in the present proceedings had been altered could not be upheld.

(iii) The basic justification for the claim for priority of Government debts rests on the well-recognised principle that the State is entitled to raise money by taxation, otherwise it will not be able to function as a sovereign government at all. This consideration emphasizes the necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues.

8. The Hon'ble Supreme Court in *State Bank of Bikaner and Jaipur versus National Iron and Steel Rolling Corporation and Ors.*, (1995) 2 SCC 19, again recognized the priority of the State's statutory first charge under Section 11-A of the Rajasthan Sales Tax Act, 1954 vis-a-vis claim of the bank to recover its dues from the borrower.

9. The Hon'ble Supreme Court in *Dena Bank versus Bhikhabhai Prabhudas Parekh & Co. and Ors.* (2000) 5 SCC 694, reviewed the entire case law on the subject and observed as under:

"The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in

respect of its tax dues (see Builders Supply Corpn.). In the same case the Constitution Bench has noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts and that this rule of common law amounts to law in force in the territory of British India at the relevant time within the meaning of Article 372(1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is founded, the priority would be available only to such debts as are incurred by the subjects of the Crown by reference to the State's sovereign power of compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to commercial transactions. Having reviewed the available judicial pronouncements their Lordships have summed up the law as under:

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.
2. The common law doctrine about priority of Crown debts which was recognised by Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372(1) and continues to be in force.
3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.
4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which may be undertaken by the State for achieving socio-economic good. In other words, where the welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration."

10. The Hon'ble Supreme Court in *State of M.P. and Anr. versus State Bank of Indore and Ors.*, (2002) 10 SCC 441, considered whether statutory first charge created under Section 33-C of the M.P. General Sales Tax Act, 1958 would prevail over the bank's charge. The facts of that case show that in 1974, respondent No. 2 obtained a term loan from State Bank of Indore and executed a promissory note and pledged certain machinery to the bank for securing repayment of loan. Two more loans were taken by respondent No. 2 in 1979. The bank sued respondent No. 2 for recovery of its dues. During the pendency of the litigation, Section 33-C was inserted in the State Act. The State claimed first charge under Section 33-C upon the machinery of respondent No. 2 in lieu of sales tax dues. The trial Court and the High Court declined to accept the State's claim. The High Court observed that the bank's charge on the machinery was prior to the insertion of Section 33-C in the State Act and the subsequent loans taken in 1979 do not alter the position in favour of the State. The High Court then

proceeded to hold that the charge created in favour of the bank remain valid and operative till repayment of the loan.

11. The question whether first charge created by taxing statutes enacted by State legislatures will prevail over the debts due to secured creditors was considered by a Hon''ble three Judges Bench of the Hon''ble Supreme Court in Central Bank of India versus State of Kerala, 2009 4 SCC 94 and was answered in affirmative. In that case, the Hon''ble Supreme Court was called upon to consider whether the first charge created on the property of the dealer by the legislations enacted by State legislatures for levy and collection of sales tax would prevail over the debts due to banks, financial institutions and other secured creditors, which could be recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and/or the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Hon''ble Supreme Court referred to the relevant provisions contained in the DRT Act, the Securitisation Act and Sales Tax legislations of different States as also Section 14A of the Workmen's Compensation Act, 1923, Section 11 of the EPF Act, Section 74 of the Estate Duty Act, 1953, Section 25 of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, 1958, Section 529A of the Companies Act, 1956, Section 46B of the State Financial Corporations Act, 1951 and observed as under:

"112. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis--vis Section 69 or Section 69-A of the Transfer of Property Act. In terms of that subsection, a secured creditor can enforce security interest without intervention of the court or tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a Receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of the Narasimham Committee's Second Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act.

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis-a-vis other mortgagees who could exercise rights under Sections 69 or 69-A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38-C of the Bombay Act and Section 26-B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. Sub-section (7) of Section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under subsection (4) merely regulates distribution of money received

by the secured creditor. It does not create first charge in favour of the secured creditor.

114. By enacting various provisos to sub-section (9) of Section 13, the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529-A of the Companies Act, 1956 vis-a-vis the secured creditors like banks is duly respected. This is the reason why first of the five unnumbered provisos to Section 13(9) lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. This and other provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognise the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.

115. It is thus clear that provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof."

12. The Hon"ble Supreme Court then referred to the earlier judgments in Builders Supply Corporation v. Union of India, State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation, 1995 2 SCC 19, Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., 2000 5 SCC 694 , State of M.P. v. State Bank of Indore, 2002 10 SCC 441, Allahabad Bank v. Canara Bank, 2000 4 SCC 406, the judgment of the Division Bench of the Kerala High Court in Recovery Officer and Asstt. Provident Fund Commissioner v. Kerala Financial Corporation and observed 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 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 Sections 2(1)(za) and (v) shows that these companies may be private companies registered under the Companies Act, 1956 and having a certificate of registration from Reserve Bank under Section 3 of the 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 the 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 14-A 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 (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 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 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.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot

be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors."

13. Applying the ratio of aforesaid exposition of law to the facts obtaining in the instant case, it would be noticed that under section 60 of the Punjab Excise Act, 1914, as applicable to the State of Himachal Pradesh read with section 73 of the Himachal Pradesh Excise Act, 2011, the excise revenue has the first charge on the property of the person from whom any amount of excise revenue is due and the same is to be recovered as land revenue under the Himachal Pradesh Land Revenue Act, 1954, as under:

60. Recovery of dues.- (1) The following moneys namely -

(a) all excise revenue,

(b) any loss that may accrue, when in consequence of default a grant has been taken under management by the Collector or had been resold by him under Section 39, and

(c) all amounts due to the Government by any person on account of any contract relating to the excise revenue, May be recovered from the person primarily liable to pay the same, or from his surety (if any), by distress and sale of his movable property, or by any other process for the recovery of arrears of land revenue due from land-holders or from farmers of land or their sureties,

(2) When a grant has been taken under management by the Collector or has been resold by him under Section 39, the Collector may recover in any manner authorized by subsection (1), any money due to the defaulter by any lessee or assignee.

(3) In the event of the default by any person licensed or holding a lease under this Act all his distillery, brewery, warehouse or shop, premises, fittings or apparatus and all stocks of (intoxicant) or materials for manufacture of the same held in or upon premises shall be liable to be attached in satisfaction of any claim for excise by revenue or in respect of losses incurred by the Government through such default and to be sold to satisfy such claim, which shall be a first charge upon the sale proceeds."

73. Excise revenue to be first charge and recoverable as arrears of land revenue.- (1) Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of excise revenue including all other amounts due to the State Government under this Act from any person shall be the first charge on the property of such person including the distillery, brewery, winery, warehouse, shop, premises, fittings, apparatus and all stocks of liquors or materials for manufacture of the same.

(2) All excise revenue including all other amounts due to the State Government under this Act, which remain unpaid after the due date, shall be recoverable as arrears of land revenue under the provisions of the Himachal Pradesh Land

Revenue Act, 1954."

14. In view of the well settled legal position coupled with the statutory provisions, as referred to above, no exception can be taken to the judgments and decrees passed by the learned courts below.

15. Resultantly, there is no merit in this appeal and accordingly, the same is dismissed, leaving the parties to bear their own costs.

16. However, before parting, it is clarified that in the event of the property of the borrower being put to sale, the first charge shall be that of Excise Department and in the event of realization of the entire amount from the sale proceed, the remaining amount, if any, will be given to the plaintiff. Since the stakes of the plaintiffbank are also involved, it shall be at liberty to participate or even get a better buyer at the time of auction.