

(2010) 09 GUJ CK 0049
In the Gujarat High Court

Case No : Letters Patent Appeal No. 309 of 2010 in Special Civil Application No. 9483 of 2009 and Civil Application No. 1915 of 2010

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

District Magistrate and Another

RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Bombay City Land Revenue Act, 1876 — Section 11
Central Excise Rules, 1944 — Rule 173Q(1), 173Q(2), 211
Central Excise Rules, 2001 — Rule 28
Central Excises and Salt Act, 1944 — Section 33, 35B, 37, 38A, 3A(3)
Constitution of India, 1950 — Article 13, 372, 372(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14, 17

Citation : (2011) 2 BC 249 : (2011) 267 ELT 614 : (2010) 3 GLH 472 : (2011) 52 GLR 18

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; K. M. Thaker, J

Bench : Division Bench

Advocate : Navin K. Pahwa and Pratik Thakkar, for the Appellant; Krina P. Calla, AGP for Respondent 1 and R.J. Oza, for Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, C.J.—One Amod Petrochem Pvt. Ltd. on or around 24.6.1985 was granted financial facility by State Bank of India ("SBI" for short) on hypothecation of all present and future goods, book debts and movable and immovable properties. Another Amod Transformers Pvt. Ltd. was also granted financial facility by SBI in the year 1987 on hypothecation of present and future goods, book debts and other movable and immovable properties. On the request of those two Companies, SBI sanctioned and enhanced the facilities. Later on, Amod Transformers Pvt. Ltd. changed its name to Amod Industries Ltd. Subsequently, Amod Petrochem Pvt. Ltd. was amalgamated with Amod Industries Ltd. with all assets, liabilities and statutory charges.

2. In the year 2002, SBI filed Original Application for recovery of its dues before the Debts Recovery Tribunal, Ahmedabad. When the matter was pending, the debts of the borrower due to SBI was assigned to the petitioner Kotak Mahindra Bank Ltd. ("the bank" for short) on 23.3.2006 alongwith all underlying securities. The petitioner initially issued notice on the borrower on 25.1.2007 u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2005 (hereinafter referred to as "the Securitization Act"). The borrower having failed to pay the dues, the petitioner took measures u/s 13(4) of the Securitization Act on 12.4.2007 for taking possession. An application u/s 14 of the Securitization Act was filed by the petitioner before the 1st respondent - District Magistrate, Bharuch, who by order dated 23.9.2008 allowed the application and directed the Mamlatdar, Amod to arrange for police protection and videography and to take possession of the secured assets.

3. The 2nd respondent is an Officer of the Excise & Customs Department of the Central Government. He issued a letter dated 10.12.2008 to the petitioner informing the confiscation of plant, machinery and other movable and immovable properties of the borrower. The petitioner replied that the 2nd respondent could not do so and if aggrieved against the action taken u/s 13(4) of the Securitization Act, the 2nd respondent may move before the Debts Recovery Tribunal u/s 17 of the Securitization Act.

4. The Mamlatdar having not acted upon the order passed by the 1st respondent -District Magistrate, Bharuch, the petitioner requested the 1st respondent on 2.3.2009 to direct the Mamlatdar to take possession of the secured assets and to hand over the same to the petitioner - bank immediately, but no action having taken, the writ petition was filed by the bank for a direction on the respondents to hand over the possession.

5. The learned Single Judge by the impugned order dated 3.2.2010 refused to grant relief on the ground that the Excise & Customs Department of the Central Government having its charge over the property, it is beyond the scope and power to take possession u/s 13(4).

6. The learned Counsel appearing on behalf of the appellant - petitioner would contend that the 2nd respondent Excise & Customs Department of the Central Government and the Central Government do not have priority of charge over the secured creditor. There is no specific provision in the Central Excise Act or the Rules framed thereunder whereby the Central Government can claim "first charge" over secured charge created in favour of the secured creditors as per the contract.

7. The learned Counsel for the petitioner would further submit that the dues of the Government (Crown Debts) get priority only over ordinary debts and only when there is a specific provision in the statute claiming first charge over the property, the Central Government can claim priority over the claim of a secured creditor.

8. The learned Counsel appearing on behalf of the Excise & Customs Department of the Central Government, per contra, submits that the property in question having confiscated stands vested in the Central Government under Rule 211 of the Central Excise Rules, 1944. Therefore, the question of taking possession u/s 13(4) read with Section 14 of the Securitization Act does not arise in the present case. He would further contend that the Central Government has the priority claim over the charge created in favour of the petitioner - bank. The learned Counsel relied upon Sub-rule (2) of Rule 173Q of the Central Excise Rules, 1944 wherein the power has been vested with the competent authority of the Excise & Customs Department of the Central Government to confiscate the land, building, plant, machinery, etc. It was contended that the adjudicating Commissioner having confiscated the land, building, plant and machinery, etc. of M/s Amod Transformers Pvt. Ltd. in exercise of the power conferred under Sub-rule (2) of Rule 173Q, such confiscated property stands vested with the Central Government under Rule 211.

9. Per contra, the learned Counsel appearing on behalf of the petitioner while opposed such submission, submitted that Rule 173Q(2) and Rule 211 are not attracted, having deleted. But, according to the learned Counsel for the 2nd respondent, action having taken much prior to deletion of the Rules, the parties will be guided by the old Rules.

10. From the record, the following facts emerge.

For manufacturing and illicitly removing 429 transformers by M/s Amod during the year 1985-86 and 1986-87 without accounting in their statutory Central Excise records and without payment of Central Excise duty, a show cause notice was issued by the 2nd respondent on 24.2.1987. After hearing the parties, it was adjudicated by the then Commissioner of Central Excise & Customs, Vadodara by order dated 28.8.1989 whereby the demand of Central Excise and imposition of penalty was confirmed.

11. During the period from 1.4.1987 to 31.5.1987, M/s Amod has cleared transformers at the concessional rate of duty by availing exemption pursuant to a Government notification to which it was not eligible. Mistake having noticed, the respondent proposed to charge duty and impose penalty for which a show cause notice was issued on 26.2.1991 and after certain notices to M/s Amod, the Commissioner of Central Excise & Customs, Vadodara by order dated 19.1.1992 confirmed the demand of Central Excise duty and imposed penalty. It was ordered to confiscate the land, building, plant, machinery, etc. of M/s Amod under 173Q(2) of the Central Excise Rules, 1944 with an option to redeem the same on payment of redemption fine of Rs. 2,00,000/- in lieu of confiscation.

12. Against the aforesaid orders, the assessee preferred Appeal Nos. 2030-2035/97 wherein the CEGAT, by order dated 26.6.1997 and the order dated 4.8.1998 respectively, remanded both the cases for de nova adjudication with a direction to the competent authority to dispose of the matter.

13. The Commissioner of Central Excise & Customs, Vadodara - II thereafter given opportunity of personal hearing to the assessee M/s Amod on 27.1.2006 and 14.2.2006, but the assessee did not choose to appear. On inquiry, it was found that both the units of M/s Amod and M/s Apex were closed since long and their promoters/owners were not available. Therefore, without waiting for their reply, the Commissioner of Central Excise & Customs, Vadodara - II passed order dated 25.2.2006, issued on 4.4.2006. With regard to the first notice dated 24.2.1987, the demand of duty of Rs. 8,67,011/- and penalty of Rs. 9,00,000/- and order of confiscation of land, building, plant, machinery, etc. was confirmed with an option to the assessee to redeem the confiscation on payment of redemption fine of Rs. 2,00,000/-. With regard to the second notice dated 26.2.1991, the demand of duty of Rs. 9,87,877/- and penalty of Rs. 9,00,000/- and the order of confiscation of land, building, plant, machinery, etc. was confirmed with option to redeem the confiscation on payment of redemption fine of Rs. 2,00,000/-.

14. The case of the 2nd respondent is that the order of the Commissioner is appealable u/s 35B of the Central Excise Act, 1944 within three months, but the said order was not challenged by M/s Amod Transformers Pvt. Ltd. within the time allowed or even thereafter. Thus, the action in the meantime taken to confiscate the land, plant and machinery, etc. of M/s Amod Transformers Pvt. Ltd. in exercise of the powers conferred under Rule 173Q(2) has attained the finality at the first point of time on expiry of the period of limitation. Therefore, as per Rule 211 of the Central Excise Rules, 1944, the land vested with the Central Government.

15. The learned Counsel for the 2nd respondent placed much reliance on Section 38A of the Central Excise Act, 1944 whereunder the effect of amendments to the rules, notifications, orders ,etc. has been provided. He would submit that as the legal proceedings deemed to have continued, the operation of Rule 173Q(2) and Rule 211 deemed to be in operation having amended u/s 38A (b),(c),(d) & (e) of the Central Excise Act, 1944.

16. We have heard the parties, perused the record and also noticed the decisions of one or other Courts including the Supreme Court as referred to by the learned Counsel appearing on behalf of the parties.

17. Under old Rule 173Q(2) of the Central Excise Rules, 1944, the competent authority was empowered to confiscate anything including movable and immovable properties, as evident from the said Rule and quoted hereunder:

173Q(2) Where :

(a) in the case of a contravention of the nature referred to in Clause (a) or Clause (b) or Clause (c) or Clause (d) of Sub-rule (1), the duty leviable on the excisable goods referred to in that sub-rule exceeds one lakh of rupees, or

(b) any manufacturer, producer, registered person of a warehouse or a registered

dealer, whose excisable goods were confiscated under Sub-rule (1) and upon whom a penalty was imposed under that sub-rule, contravenes against any of the provisions of Clause (a) or Clause (b) or Clause (c) or Clause (d) of Sub-rule (1) and the duty leviable on the excisable goods in respect of the contravention for the second or any subsequent occasion exceeds ten thousand rupees,

then, in a case falling under Clause (a) of this sub-rule or in a case falling under Clause (b) thereof (whether the contravention under that clause has been committed for the second or any subsequent occasion), the officer adjudging the case u/s 33 of the Act may, in addition to the award of confiscation and penalty under Sub-rule (1), direct, for reasons to be recorded in writing, the confiscation of any or all of the following belonging to such manufacturer, producer, registered person of a warehouse or a registered dealer, namely:

any land, building, plant, machinery, materials, conveyance, animal or any other thing used in connection with the manufacture, production, storage, removal or disposal of such goods, or any other excisable goods on such land, or in such building or produced or manufactured with such plant, machinery, materials or thing.

As per Rule 211 of the Central Excise Rules, 1944, on confiscation, the property vests in the Central Government, as evident from the said Rule and mentioned hereunder:

211. On confiscation, property to vest in Central Government.- (1) When anything is confiscated under these rules, such things shall thereupon vest in Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the things confiscated, and every officer of Police, on the requisition of such officer, shall assist him in taking and holding such possession.

18. It is not in dispute that Rule 173Q(2) has been omitted by notification dated 12.5.2000 issued in exercise of the powers conferred by Section 37 read with Sub-section (3) of Section 3A of the Central Excise Act, 1944. In view of such amendment, Rule 211 has also been omitted with effect from 1.7.2001.

19. In the present case, the proceedings under the Central Excise Act, 1944 were initiated on 24.2.1987 and 26.2.1991 when Rule 173Q(2) and Rule 211 were in vogue at that stage. At the time the first order of confiscation was passed, the authority had jurisdiction under Rule 173Q(2) to confiscate the land, building, plant, machinery, etc.. But the said order was set aside and remitted for de nova decision. The final order was passed on 25.2.2006, by this time both Rule 173Q(2) and Rule 211 stood omitted.

20. The question arises whether in the present case, the respondent can avail the benefit of Section 38A for passing order under Rule 173Q(2) for confiscation of land and can take directly advantage of Rule 211, which now stood omitted.

21. The learned Counsel for the 1st respondent has relied on Section 38A of the Central Excise Act, 1944 to suggest that the amendment of Rule or supersession or rescinding of the Rule cannot affect the previous operation of any rule, but such a contention cannot be accepted in view of the specific provision as made u/s 38A and quoted hereunder:

38A. Effect of amendments, etc., of rules, notifications or orders, - Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule is amended, repealed, superseded or rescinded, then unless a different intention appears, such amendment, repeal, supersession or rescinding shall not

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty forfeiture or punishment incurred in respect of any offence committed under on in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

From the aforesaid provisions, it will be evident that while the amendment, repeal, supersession or rescinding of any rule, as referred to under Clauses (a), (b), (c), (d) and (e), in normal course will not be effected, but if the intention of the legislature is different, Section 38A is not attracted.

Initially, the legislature empowered the Commissioner of Central Excise & Customs to confiscate anything, whether movable or immovable, such as land, building, plant, machinery, materials, conveyance, etc., but later on after deletion of the Rule, a new Rule 28 was inserted in the Central Excise Rules, 2001, as quoted hereunder:

28. Property to vest in Central Government, - (1) When any goods are confiscated under these rules, such thing shall thereupon vest in the Central Government.

(2) The Central Excise Officer adjudging confiscation shall taken and hold possession of the things confiscated, and every Officer of Police, on the requisition of such Central Excise Officer, shall assist him in taking and holding such possession.

From the aforesaid Rule 28, it is clear that the legislature intended to confiscate only -goods which has distinct from immovable property like land, building, plant, machinery, etc.

For the reason aforesaid, we hold that the competent authority of Excise & Customs Department, including the Commissioner of Central Excise & Customs, Vadodara - II had no jurisdiction to confiscate the land under Rule 173Q(2), the said Rule having omitted and substituted by Rule 28, by the time the order dated 25.2.2006 was passed. The order being without jurisdiction is nullity in the eye of law and thereby the authorities cannot derive advantage of the order dated 25.2.2006.

22. The next question is whether the respondent Central Government has the first charge or priority over the secured charge of the secured creditor - bank.

23. Similar issue fell for consideration before different High Courts and the Supreme Court from time to time. In the case of Bank of India v. John Bowman, reported in 1955 Bom 305, Hon"ble Mr. Justice Chagla, Chief Justice (as he then was), noticed that 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, the Bombay High Court held as follows:

It cannot be denied that the Crown had the right of priority in payment of debts due to it. It s 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 securing 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.

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.

Thus, we find that the Bombay High Court held that if Crown debt is unsecured debt, it can compete with other unsecured debt and has priority and precedence of the same, but no such priority can be claimed on secured debt.

24. In the case of *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.*, reported in (2000) 5 SCC 694, the Supreme Court held as follows:

8. The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognized 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 emphasizes the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues (see *Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others*, 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 received the available judicial pronouncements their Lordships have summed up the law as under:

1. There is 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 recognized 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.

25. In the case of *The Bank of Bihar Vs. The State of Bihar and Others*, the Supreme Court recognized the principle that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied.

26. In *Central Bank of India Vs. State of Kerala and Others*, the Supreme Court decided the question whether the Crown debt was in conflict with any provision of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Apex Court held that the State Act was not in conflict with the Securitization Act.

27. Priority or precedence of Crown debts under the Central Excise Act vis-a-vis secured debts under the State Financial Corporations Act, 1951 fell for consideration before the Supreme Court in *Union of India (UOI) and Others Vs. SICOM Ltd. and Another*. In the said case, the Supreme Court while held that a debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one and observed as follows:

9. Generally, the rights of the Crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the King; debts which a prerogative entitles the Crown to claim priority for before all other creditors. [See *Advanced Law Lexicon* by P. Ramanatha Aiyar (3rd Edn.), p. 1147.] Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.

10. It is trite that when Parliament or a State Legislature makes an enactment, the same would prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, Parliament as

also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore providing that the statutory dues shall be the first charge over the properties of the taxpayer. This aspect of the matter has been considered by this Court in a series of judgments.

28. The relevant provisions of the Central Excise Act, 1944 also fell for consideration before a Full Bench of the Madras High Court in *UTI Bank Ltd. v. The Dy. Commissioner of Central Excise, Chennai II Division*, reported in 2007 (1) LW 50. In the said case, while dealing with the Central Excise Act, 1944, Customs Act, 1962 and the Securitization Act, the Full Bench considered whether the Crown's debts, for which there is no priority or charge is created under the statute, should have precedence over the secured creditors or not. Considering the facts of the said case that the bank had taken possession of the property u/s 13(4) of the Securitization Act and having noticed that there are no specific provisions under the Central Excise Act or the Customs Act to claim first charge, as provided under other enactments, the Full Bench held that generally the dues to the Government i.e. tax, duties, etc. (Crown's debts) get priority over ordinary debts; only when there is a specific provision in the statute claiming first charge over the property, the Crown's debt is entitled to have priority over the claim of others and in absence of any such provision to claim first charge, the Government cannot claim precedence under the Central Excise Act over the claim of the secured creditor under the Securitization Act.

29. A Division Bench of this Court having noticed different judgments of other Courts and the Supreme Court, in the case of *Baroda City Co-operative Bank Ltd. v. State of Gujarat*, reported in 2010 (2) GLH 525, held as follows:

16. From the judgments referred to above, it will be evident that -

- (a) The arrears of tax due to the State can claim priority over the unsecured debt.
- (b) If first charge by way of priority is not claimed under the statute, the said doctrine is not applicable.
- (c) Normally, the doctrine of first charge/priority of State will prevail over the private debt which is an unsecured debt.
- (d) In normal course, the doctrine of first charge/priority cannot prevail over secured debts, but if first charge of the State is over the secured debts, both debts being equal, the State can claim priority even over the secured debts, and
- (e) The secured debts under the Securitization Act or debt under the RDDB Act has no first charge and thereby cannot compete with first charge/priority claim of the State if made under the statute.

30. In the present case, there is nothing on record to suggest that under the Central Excise Act or the Rules framed thereunder priority of charge over the secured debt has been created. No such law has been brought on record to suggest that the Central Government has any first charge or priority over the

secured or unsecured debt. Similar contention was raised on behalf of the Central Government referring to certain provisions of the Central Excise Act, 1944 in the case of Union of India (UOI) and Others Vs. SICOM Ltd. and Another, the Supreme Court rejected such claim. The Madras High Court also while dealing with the provisions of the Central Excise Act, also rejected the claim of the Excise & Customs Department of the Central Government to have priority over the secured or unsecured debt. In that view of such authoritative pronouncements of the Supreme Court and the decision of the Full Bench of the Madras High Court, we hold that the Excise & Customs Department of the Central Government cannot claim any priority over the secured debt of a secured creditor - Kotak Mahindra Bank as created under the Securitization Act.

31. In view of our above finding, we are of the view that the District Magistrate, Bharuch rightly directed the Mamlatdar, Amod to provide protection to the secured creditor Kotak Mahindra Bank while disposed of the application u/s 14 of the Securitization Act.

32. The learned Single Judge failed to notice the aforesaid provisions and erred in rejecting the claim, particularly while direction has already been issued by the District Magistrate for handing over the possession of the secured assets in favour of the secured creditor.

33. The appeal and the writ petition are accordingly allowed. The District Magistrate, Bharuch and the Mamlatdar, Amod are directed to ensure compliance of the order passed by the District Magistrate and thereby assist the appellant petitioner in getting the possession of the secured asset within one month from the date of receipt/production of a copy of this judgment. The order passed by the learned Single Judge dated 3.2.2010 is set aside.

34. The appeal and the writ petition both are allowed with the aforesaid observations and directions. In the facts and circumstances, there shall be no order as to costs.