

(1955) 02 CAL CK 0030
In the Calcutta High Court
Case No : Suit No. 2674 of 1953

Murli Tahilram

APPELLANT

Vs

T. Asoomal and Co.

RESPONDENT

Date of Decision : 11-02-1955

Acts Referred:

Bengal Public Demands Recovery Act, 1913 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 60, 73(3)
Constitution of India, 1950 — Article 19, 19(1), 372

Citation : AIR 1955 Cal 423 : 59 CWN 701

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : A.K. Sen, for the state, for the Appellant; M.N. Sen, for the Respondent

Judgement

P.B. Mukharji, J.—This is a race between the State and the private citizen for Law's rewards. It is an application by the State of West Bengal claiming priority over a private creditor in respect of certain funds in the hands of a Receiver and by specific order" of Court ear-marked for payment to the creditor who is the decree-holder.

2. The State is a stranger to the suit. The suit was brought by Murli Tahilram against the firm of T. Assomal and Co. On 10-9-1953 a decree was passed in this suit against the defendant for the sum of Rs. 2860-2-4 with interest at six per cent, per annum and costs. Prior to that date, on 4-8-1953 an order had been made in that suit appointing the Official Receiver of Calcutta the Receiver of the business of the defendant firm including all the goods, stock-in-trade, furniture and fittings at A 7/10, New Market, Calcutta. In execution of the decree a further order was made on 19-1-1954 in this suit directing the Official Receiver to sell the said goods, stocks and furniture. The Receiver was directed by that order to pay to the plaintiff decree-holder out of the sale proceeds in satisfaction of the decree.

It is material to set out the terms of this Court's order dated 19-1-1954 which are:

"It is ordered that the Official Receiver of this Court who was appointed herein do forthwith sell by public auction to the best purchaser or purchasers that can be got for the sale of the said property in execution of the said decree and it is further ordered that the said Receiver do pay to the plaintiff the proceeds of such sale as aforesaid after payment of costs and expenses of such sale and the commission payable thereon towards pro tanta satisfaction of his claim under the said decree, and the balance thereof, if any, to be held by the said Receiver subject to further orders of this Court."

3. The Official Receiver under this order has already sold the goods. He is now holding the sale proceeds. He was about to pay to the decree-holder when the State of West Bengal on 27-7-1954 intervened in this suit with this application presenting a claim for unpaid sales tax against the defendant Judgment-debtor and obtained an ex parte ad interim injunction restraining the plaintiff decree-holder from receiving the money from the Receiver.

4. On behalf of the State of West Bengal it is alleged that the defendant firm was a registered dealer under the Bengal Finance Sales Tax Act, 1941 and failed to pay the sales tax assessed for four quarters ending in March 1950, March 1951 and March 1952. It is the case of the State that by reason of the failure on the part of the defendant firm to pay such sales tax due, three certificate proceedings were instituted against the defendant before the Certificate Officer, 24 Parganas, Alipore. These three certificate cases are numbered separately -- (1) Certificate case No. 17S(A) of 1951-52, (2) Certificate Case No. 11S(A) of 1952-53 and (3) Certificate Case No. 91S(A) of 1953-54. In respect of Certificate Case No. 17S(A) of 1951-52 a sum of Rs. 4,664-5-0 has been realised by the State leaving a balance of Rs. 360/- still outstanding. In respect of Certificate Case No. 11S(A) of 1952-53 the State has realised a sum of Rs. 50/- leaving a balance of Rs. 7,664-13-6 still due in respect thereof. In respect of Certificate Case No. 91S(A) of 1953-54 it is said that nothing has been realised and the whole amount, namely, Rs. 6,367-3-0 is still due and owing. The State alleges that there is no other asset of the defendant except the sale proceeds that will be realised by selling the assets of the firm by the Official Receiver.

5. But for the ex parte ad interim injunction obtained by the State of West Bengal, the Official Receiver would have paid over the money to the plaintiff decree-holder in terms of the order of this Court made on 19-1-1954. The prayers of the State of West Bengal in this petition are:

"(1) That leave be granted to attach in execution of the said certificate proceedings the sale proceeds that would come in the hands of the Official Receiver, High Court, as such Receiver as aforesaid by sale of the stock of the defendant now being held by him.

(2) An injunction restraining the plaintiff, his agents and servants from realising

any amount of such sale proceeds without payment of the sales tax due to your petitioner.

(3) An order directing the said Official Receiver, High Court, not to make payments out of the sale proceeds of the stock of the defendant without paying the dues of your petitioner for sales tax as aforesaid."

6. On behalf of the State of West Bengal the Commercial Tax Officer who affirmed the petition and the affidavits submits:

"The claim of the State of West Bengal is a preferential claim and it is to be paid in priority to all other claims against the defendant."

That is the main question on this application. The competition is between the State with its claim for revenue and the private citizen with his claim under a decree and order of payment obtained prior to the present intervention by the State.

7. The question raises a controversy of very great importance. Its solution has to be judged primarily by the special Statutes that govern the imposition and collection of sales tax, but secondarily by the broader principles of State claim for priority for revenue debts.

8. I will examine first the legal position of the collection of sales tax under the special Statutes and the Rules thereunder. The position in respect of sales tax in this State is that it is regarded as a "public demand" within the meaning of the Bengal Public Demands Recovery Act and is governed by that Act and Rules made thereunder. Section 4 of the Act deals with the signing and filing of the certificate stating the demand that is due. Section 5 deals with requisition for certificate. Section 7 deals with the services of notice and copy of certificate on the certificate debtor. It provides, when a certificate has been filed in the offices of certificate officer u/s 4 or Section 6, he shall cause to be served upon the certificate debtor, in the prescribed manner, a notice in the prescribed form and a copy of the certificate.

Then follows Section 8 of the Act providing the effect of the service of the notice of certificate. It says that

"from and after the service of notice of any certificate u/s 7 upon a certificate debtor-

(a) Any private transfer or delivery of any of his immovable property situated in the district in which the certificate is filed or of any interest in such property, shall be void against any claim enforceable in execution of the certificate;

(b) the amount due from time to time in respect of "the certificate shall be a charge upon" the immovable property of the certificate debtor, wherever situated, to which every other charge created subsequently to the service of the said notice shall be postponed."

9. It will appear from a reading of Section 8 of the Public Demands Recovery Act that the Statute first provides that only a private transfer of immovable property, as distinguished from enforced transfer beyond the control of the transferor will be void against the claim in execution of the filed certificate and even that only in the particular district, and secondly that the State debt will be a charge on immovable property in the circumstances specified therein. It does not even say that such charge should always be a first charge whenever it arises. It stipulates expressly that it will only have priority over other charges which are created subsequently and not prior to the service of the notice u/s 7 of that Act.

Then again the Statute by clearly providing for a charge on immovable property for such certificate debt by necessary implication appears to exclude the idea of a charge on moveable property. Had it not been so then in describing the effect of the service of the notice of the certificate in Section 8 of the Act it would not have mentioned a charge only on immovable property leaving other properties out. This Statute appears to make a distinction between movable and immovable property in this respect. This Statute clearly does not provide anywhere that a debt due to the State under the certificate procedure under the Public Demands Recovery Act under all circumstances forms a charge on any movable property.

10. Coming to the Rules made u/s 38 of the Public Demands Recovery Act in Schedule II of the Statute, one finds Rule 18 providing for attachment of debts not secured by negotiable instrument or of other movable property not in possession of the certificate debtor with an express exception in favour of property deposited in or in the custody of any Court. That is Rule 18(1)(a) and Rule 18(1)(c). The moneys in this case are moneys in the hands of the Official Receiver and such moneys are in custodis legis. But even then Rule 18 does not provide for a charge. Rule 22 provides for attachment of property in custody of Court or a public officer and therefore appears to be the more relevant rule in this case. Such is the case before me in the present application. The money in this case is in the hands of the Official Receiver, who is a public officer and is an arm of this High Court. Now Rule 22 provides:

"Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the certificate officer by whom the notice is issued; provided that, where such property is in the custody of a Court, any question of title or priority arising between the certificate holder and any other person, not being the certificate debtor claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."

Now these words of Rule 22 are significant words. The certificate holder is the State. But the language of the proviso of Rule 22 makes it abundantly clear that any question of title or priority arising between the certificate holder and any person other than the certificate debtor has to be decided by the Court. If the

State has always the priority then such a provision would be redundant. The dispute here comes within the very language of this proviso of Rule 22. It is a dispute about the priority over or title to the fund in the hands of the Receiver between the State as the certificate holder and the decree-holder who is not the certificate debtor.

11. This survey of the statutory provision of the Public Demands Recovery Act for realisation of the arrears of sales tax by the State and the statutory rules made thereunder does not lend support to an unqualified general claim for priority for state debts over private creditors and specially in respect of movable property of the debtor.

12. On behalf of the State my attention has also been drawn to Section 60, Civil P. C. The arguments on behalf of the State on this section of the CPC are two-fold. First, it is said that the arrears of sales tax being a debt due to the State, the moneys in the hands of the Receiver are attachable property within the meaning of Section 60, Civil P. C. Secondly, it is contended on behalf of the State that the CPC while providing for rateable distribution among decree-holder creditors, in express language says that nothing in that section affects any rights of the State. In other words, the argument for the State is that inasmuch as Section 73(3), Civil P. C. says: "Nothing in this section affects any rights of the State", the State is not relegated to rateable distribution along with other decree-holder creditors but can claim priority over them. But even here the question is far from simple.

To avail of Section 60, Civil P. C. it is not enough to say that it is money that is going to be attached within the meaning of that section, but it has also to be shown in addition that it is money belonging to the judgment-debtor or over which the judgment-debtor "has a disposing power which he may exercise for his own benefit." Hereafter the ear-marking order of 19-1-1954 with a specific direction to the Receiver to pay that money to the decree-holder, it ceased to be attachable because it was no longer money belonging to the judgment-debtor or over which the judgment-debtor had any disposing power which he could exercise for his own benefit. That takes this money or fund in the hands of the Receiver out of the operation of attachment.

On Section 73, Civil P. C. there are many answers. The first obvious answer is that Section 73(3) of the Code does not confer any priority on the State but what it does is to say that the doctrine of rateable distribution will not prejudice the rights of any State. But the right to priority must be established first, and when that is done Section 73(3) protects that priority and will not allow the principle of rateable distribution to override it. Secondly, Section 73 of the Code is quite irrelevant in this context because it never applies where assets are held for a specific purpose as in this case by order of Court to pay the sum to the decree-holder, and it applies only when the application is made before the receipt of the assets in Court which again is not the fact in this case.

13. I therefore hold that Bengal Public Demands Recovery Act and the Statutory Rules made thereunder do not give priority to the State or allow preferential payment to the State of its dues in respect of arrears of Sales tax out of the moneys in the hands of a Receiver appointed by the Court and directed to be paid by the Court to the decree-holder prior to any intervention by the State. I also hold that Sections 60 and 73(3), Civil P. C., do not create such priority.

14. I will come now to the broader principles by which the State claims priority over other creditors. Many arguments in support of the State-claim for priority have been adduced. It is said that before the Constitution of India, the British Crown was recognised to have priority over other creditors by prerogative and common law, and the precedence as first charge was accorded to Crown debts. It is then contended that the Constitution of India has preserved this precedence.

15. Reference to the law on this point as embodied in the different decisions of the Courts in India before the Constitution is, therefore, unavoidable. The first case relied on is the -- "Secy, of State v. Bombay Landing and Shipping Co.", 5 Bom HCR (OC) 23 (A). In a very elaborate and learned judgment, Westropp J. discussed the doctrine of priority of Crown debts and its applicability here in India. There the question arose in connection with the then Indian Companies Act of 1866 and it was held that the Crown was not, either expressly or by implication, bound by that Act. The ratio in that case also is that the State had the same precedence in India as the Crown had in England in respect of payment of debts. This decision was followed in -- "Gayanoda Bala Dassi v. Buttokristo Bairagi", 33 Cal 1040 (B), where in connection with the question of court-fees, Sale J. at pp. 1044-45 of the Report holds that

"the Court-fees form the Crown debt and under ordinary circumstances the principle would apply that the Crown would be entitled to precedence in payment of this debt over all other creditors."

16. Reliance has also been placed on the more recent Bombay decision in -- GOVERNOR-GENERAL IN COUNCIL Vs. CHOTALAL SHIVDAS and ANOTHER., . There it is held that the arrears of unpaid Income Tax dues by an assessee is a debt due to the Crown and as such the debts must have precedence over all other debts. Consequently, it was held there that in the competition between the Crown and the subject in respect of payment of their respective debts of equal degree Crown's right must prevail. That case also decides the proposition that the Court can order payment of a Crown debt due by the debtor on the application of the Crown without a formal attachment being issued, where there are funds in Court belonging to the debtor.

Wassoodew J. of the Bombay High Court delivering judgment in that case expressly observes that by reason of Section 73(3), Civil P. C., stating that nothing in that section affects any right of the Government, that provision of the CPC by necessary implication should be construed to contain express reservation of the right to claim precedence for a Crown debt and the Court in whose hands

the assets are lying is bound as a Court of equity and justice, to respect the priority of Government if it is brought to its notice. Attention should also be drawn to the Rangoon decision in -- "Soniram Rameshur v. Mary Pinto", AIR 1934 Rang 8 (D). There it is held that the Crown has priority over unsecured creditors in payment of debts and where there are funds in court belonging to the debtor of the Court, the Court can order payment of a Crown debt due by the debtor on the application of the Crown without a formal attachment being issued. In that case the plaintiff sued the defendant on a mortgage and a Receiver was appointed to take charge of the mortgaged property and to collect the rents but the rents were not subject to the mortgage. The Commissioner of Income Tax applied to the Court for payment of the Income Tax due by the defendant out of the rents in the hands of the Receiver.

Leach J, decided that case in favour of the Crown and held that the Crown was entitled to such payment. The learned Judge left open the question there whether the crown could claim a preference in payment as against a secured creditor. There was also in the Rangoon case no specific order in favour of the plaintiff decree-holder for payment to him of any amount out of the moneys in the hands of the Receiver.

17. It has been contended before me on behalf of the respondent that the terms of the order of 19-1-1954, directing the Receiver to pay to the plaintiff decree-holder the sale proceeds, creates an equitable charge on the funds in the hands of the Receiver in favour of the decree-holder and, therefore, whatever preference the Crown may have in other respects, in the facts of this case both on the ground that it is in the nature of a charge in favour of the plaintiff decree-holder and on the ground that there is a prior order of payment out of a specific fund when the State had not put its claim, there cannot be any preference in favour of the State.

18. The first discordant note in the harmony of judicial decisions was sounded by Lort-Williams J. -- "In the matter of Northern Bengal Coal Co. Ltd.", 41 Cal WN 458 (E). That matter arose out of winding up proceedings under the Indian Companies Act. Lort-Williams, J. decides in that case that priority of Crown debts in the winding up proceedings is limited to those specifically mentioned in Section 230 of the Indian Companies Act and draws pointed attention to the fact that the modern tendency is to restrict this precedence, by legislation specially in cases where the debt due to the State arises not in relation to taxation and revenue but where it arises in connection with many trading activities in which modern States are taking an increasing part.

The views of Lort-Williams, J. found favour with the former Federal Court of India in -- AIR 1946 16 (Federal Court) . The decision of the Federal Court is that there is no priority of Crown debts in respect of a Company in liquidation save those expressly conferred and limited by Sections 230 and 232(2) of the Indian Companies Act. It expressed also the view that the Indian law on this point was the same as the English law. It was said there that where the arrears of Income

Tax were in respect of assessment made after the winding up order against the Company, the Crown could not even claim the limited priority given in Section 230 of the Indian Companies Act and could only rank as an ordinary un-secured creditor. This decision of the Federal Court disapproved the Calcutta decision of Page J. in -- In Re: West Laikdih Coal Co. Ltd., (G), and the Allahabad decision in -- Commissioner of Income Tax Vs. Official Liquidator, Agra Spinning and Weaving Mills Co., Ltd. .

19. This completes a brief review of the Indian decisions.

20. I shall briefly refer now to one or two English authorities to which the attention of the Court was drawn by Mr. M. N. Sen, learned Counsel for the respondent. The decision of the House of Lords in -- "Food Controller v. Cork", 1923 AC 647 (I), holding that the bankruptcy rule that Crown debts have no claim to priority of payment, other than such priority as is given by Statute, obtains in the case of the voluntary winding up of an insolvent company, was relied upon. Special emphasis was laid on the observations of Lord Atkinson at pp. 660-661 where the learned Lord said,

"I may say that I share the view which the Master of the Rolls states that he is inclined to entertain, --namely, that the Crown really is not entitled to two prerogatives, but only to one prerogative, enforced no doubt, in two different ways and by two different methods, the right enforced by each method being the same right--namely, the right to require a debtor to the Crown to pay his debt before he pays debts he may owe to others."

The respondent decree-holder's contention before me in this application is that where the debt to others has not remained a debt but has been followed by an order for payment, then this priority should not be allowed to prevail. The other English decision to which attention has been drawn is -- "Levasseur v. Mason and Barry Ltd.", (1891) 2 QB 73. There Lord Coleridge, C. J., Lord Esher, M. R. and Fry L. J. all emphasised that when an order for Receiver was made with a direction upon him to pay, the effect of such order was that the persons in whose favour the order was made

"were entitled in equity to the money which was the fruit of these goods as and from the date of the receivership order."

It was, therefore, submitted on behalf of the respondent that as the order for payment had been made in this case before the State put in its claim for arrears of sales tax, the State cannot claim priority, on the ground that the order for payment is just as good as payment itself and was only waiting to be carried out by conversion and sale of the goods by the Receiver. The limits of this doctrine of the English law based primarily on the law of prerogatives have to be carefully borne in mind.

On this point the law as stated in Article 749 of Volume VI of Halsbury's Edition of Halsbury's Laws of England is, "Where the Crown's right and that of the

subject meet at one and the same time, that of the Crown is in general preferred." It suggests two important features. One is that the Crown preference is not uniformly universal but is preferred generally indicating that there may be, and in fact are, exceptions; and, secondly, the two in order to compete must meet "at one and the same time". It is argued on this basis that where they do not meet "at one and the same time", the private creditor having already sued upon his debt and not only obtained his decree but obtained an actual order for payment, then a subsequent claim for debt due to the State cannot be said to be "one and at the same time" and so should not be preferred.

21. Historically, this claim for priority has played a very important part in the development of Jurisprudence. The Government was a privileged creditor under the Roman Law and entitled to priority in payment of debts. The "cessio bonorum" was made subject to this priority. In England the King's claim is preferred to that of a subject provided the King's process was commenced before the subject had obtained judgment. Support for this historical review will be found in Kent's Commentaries on American Law, Vol. I, 11th Edn., p. 257. But both Roman Law and English Law had a King to contend with. The position under a people's Constitution or a Republic although historically remains the same, requires separate treatment. Appeals to the Constitution of Canada, Australia, New Zealand or South Africa do not help because the concept of the British Crown operates in their legal systems. For this purpose the position under the American Law is more relevant. According to Kent, if before the right of preference has accrued, the debtor has made a bona fide conveyance of his estate to a third person or has mortgaged the same to secure a debt or if the property has been seized under an execution, the property is divested from the debtor and cannot be made liable to the United States.

In support of that proposition, Kent cites three cases -- "Thelusson v. Smith", (1817) 2 Wheat 396 (K), -- "Conard v. Atlantic Insurance Co. of New York", (1828) 1 Pet 386 (L), -- "Brent v. Bank of Washington", (1836) 10 Pet 596 (M). According to that learned author of the Commentaries on American Law, the priority of the United States does not affect any lien, general or specific, existing when the event took place, which gave the United States a claim of priority, nor prevent the transmission of the property to assignees, executors and administrators subject to the lien. For that proposition the case of the -- "United States v. Canal Bank" 3 Story CC 79 (N) is cited. Reference is also made by Kent to the English case of -- "Giles v. Grover" (1832) 131 ER 563 (O), before the House of Lords where after the most elaborate discussion in conformity with the opinion of a majority of 12 Judges, it was held that the goods of a debtor already seized under a "fieri facias" at the suit of a subject, "but not sold", might be taken under a writ of extent for a debt of the Crown and which writ of extent was tested after the seizure under the *fi. fa.*

The seizure under the *fi. fa.* was considered as not divesting the debtor of his general property in the goods seized or in any manner altering the property, and

that no property was thereby acquired therein by the execution creditor, or by the Sheriff. The claims of the Crown and the subject on the goods were held to stand in equal degree and the two executions to be in effect concurrent; and in such cases the King's prerogative had the preference. The Sheriff had the legal custody of the goods and special property in them by virtue of the seizure, for the purpose of protection and sale; but until the sale which was the dividing line as to the ownership of the goods, the absolute property of the debtor was not altered or divested.

Many controversial questions have been raised in American Jurisprudence and in American Courts on the conflicting claims of a judgment or attaching creditor under the State laws and the assignee under the bankruptcy laws of the United States. Mr. Justice Story in the Circuit Court of the United States in Massachusetts declared that an attachment under a State law was not an absolute lien but a contingent one dependent upon a subsequent judgment in the attaching suit. But the Courts of the United States and several of the State Courts maintain a different doctrine. The doctrine is that a creditor by his suit in equity, commonly called a creditor's bill on his unsatisfied judgment, acquires an equitable lien which operates as an attachment of property and creates a right to priority of payment as against the assignee of a bankrupt under a petition in bankruptcy subsequently made and that such a lien was not divested by a decree in bankruptcy.

22. At page 259 Kent is careful to observe:

"The priority was intended to operate only where, by law, or by the act of the debtor, his property was sequestered for the use of his creditors; and it is proper that this prerogative right of the United States should be strictly construed and precisely defined, for it is in derogation of the general rights of the creditors."

23. Then again finally at page 260 Kent observes:

"The common-law prerogative of the King, to be paid in preference to all other creditors is, therefore, not universally adopted in this country (United States)."

24. The English law recognising priority of Crown debts over other debts is fundamentally based on the law of prerogatives prevailing there. This prerogative in course of the evolution of English history came to be subject of control by Parliament.

When British Crown administered India, it applied the same law of prerogative for priority for Crown debts. Crown and its prerogatives are a very integral feature of English constitutional law. With the disappearance of the British Crown in India, it becomes necessary to consider the constitutional basis for a claim to legal priority. India is no longer a land of royal prerogatives. It is a land of written political constitution. The Crown as the fountain of prerogatives no longer operates as a constitutional concept. The point now is to find out whether the

prerogative now survives in substance, if not in form, by some other name to suit a people's Republic and Constitution like the Constitution of India.

25. Under Article 372 of the Indian Constitution it is expressly provided that notwithstanding the repeal by the Constitution of the Indian Independence Act, 1947, and the Government of India Act, 1935, but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. My reading of the decisions in India recognising priority of Crown debts is that such priority is a part of "the law in force in the territory of India immediately before the commencement of this Constitution." Preferential payment of debts due to the State, with its concomitant right to claim prior payment against other creditors, is therefore a part of the legal inheritance preserved under Article 372 of the Indian Constitution. That being so, effect must be given to that priority unless (1) it is in conflict with any other provision of the Constitution because of the language in Article 372 "subject to the other provisions of this Constitution", and (2) unless it is "altered or repealed or amended by a competent Legislature or other competent Authority."

26. Now taking up the second consideration first, I am not aware of any statute, Indian or State, which alters or repeals or amends the State's claim for priority in payment of debts owed to it. But this claim for priority by the State has also to be tested by the other standard, namely, whether it is in conflict with any other provisions of this Constitution. The point that has been urged in this connection is that to give priority to the State for its claim for arrears of sales tax in this case would be to defeat the decree-holder's right to a particular fund in the hands of the Court and its Officer the Receiver and would therefore be an infringement of the fundamental constitutional right under Article 19(1)(f) which gives every citizen the right to acquire, hold and dispose of property. It is said that by reason of the order of 19-1-1954 directing the Receiver to pay the sale-proceeds to the decree-holder, the decree-holder has a property in that specified fund. In my judgment that contention is sound and must be upheld. The Constitution gives him the right to hold that fund, he having obtained the same in a lawful proceeding from a competent Court under a lawful order.

I have already shown from the English decisions quoted elsewhere that Courts have gone to the extent of saying that such an order creates actually a charge on the fund. If such be the case, then the State's claim for priority cannot be allowed to defeat the subject's right to acquire that property and hold it. Sub-clause (5) of Article 19(1) of the Constitution only protects the State's right of making any law imposing reasonable restriction on the exercise of such right of acquiring and holding property. The State has made no such law in this case and the Bengal Public Demands Recovery Act and the Statutory Rules made thereunder have, as I have shown, made no difference; and therefore the ground of limited operation granted under Clause (5) of Article 19(1) of the Constitution

does not operate in this case.

27. This point is of fundamental importance in the context of the present Indian Constitution because every claim by the State for priority of payment of debts owing to it out of the property of its debtor will very often be met by this plea of infringement of the citizen's fundamental right to hold property wherever such citizen is another creditor of the same debtor and who has by attachment, charge or mortgage or other means acquired an interest in the property of the debtor. Mr. A. K. Sen, the learned Junior Standing Counsel appearing for the State, has argued that a prerogative cannot be taken away by implication and can only be taken away by Statute of a competent Legislature. That argument, by itself sound, however, misses the Indian context. The Indian Constitution expressly recognises certain fundamental rights and a citizen's right to hold and acquire property is such a fundamental right guaranteed by the Constitution, and that in any event is an express enough provision to defeat any notion of prerogative contrary thereto. The prerogative therefore is not taken away by implication but by the clear terms of the Constitution.

28. The origin in jurisprudence recognising priority of debts owing to the State must be sought in the fact of the conception of a State. This claim for priority arose in connection with the revenue claims of the State. A State in order to function had to collect revenue for the purpose of its administration. If the collection of such revenue was to be defeated by private claims as between subjects then it will be embarrassing for the Public Exchequer and will complicate, harass and impede the basic functions of the State. That is the juristic reason based on commonsense for the growth of the constitutional doctrine that the revenue claims of the State must have precedence over all other private claims. The peculiar evolution of English law gave it the character of a prerogative of the Crown to collect revenue and therefore Crown debt was given the priority on the basis of the law of prerogative. But the main justification for preserving the revenue claim's priority must remain in every State whether it is under a Crown or under the people or any other forms of government.

Notwithstanding the prerogative ideas of State in the modern age, the State still remains and has to remain by the very nature of its functions a tax collector. The jurisprudence and the law of public finance has, therefore, recognised the necessity of the priority for revenue claims. That is my reason why the republican character of the Constitution of India does not and cannot do away with the necessity of this constitutional doctrine of priority for State debts. It is a law of necessity and good sense. The question has grown more complex by the evolving concept of the State which has enlarged the ambit of its powers, functions and purposes. Today it is no longer merely a tax collector, but has chosen to engage itself in acquiring and holding property, in doing business, in running commercial undertakings, in providing transport, and in thousand other ways is doing the work which in recent pass was done by private citizens.

This development naturally has involved the State in becoming a creditor in respect of these expanded activities. For instance, the State today may be owning business and selling its products to the public. The price that the consumer will have to pay to the State will also be a debt owing to the State. So does it let out its own, property to a private tenant and the amount owing by the tenant will be a debt owing, to the State. It charges fares for the transport that it provides and the passengers owe the fares as debts to the State. The question is whether even such debts to the State will have priority over other private debts in transactions between the subjects. As I appreciate the origin and the cause of this constitutional doctrine I feel and I consider that such debts cannot claim priority. It is only the revenue claims of the State which have the priority, and not the claims which arise in favour of the State while it carries on its activities in competition with citizens. There in that sphere the State and the citizen compete on equal terms and the State is no higher creditor than an ordinary citizen. But where the claims of the State are the demands of public revenue then such demands are above this competition and must have precedence over all other claims.

That right to precedence was a part of the law in India under the British Crown and has been preserved by the Constitution of India subject to limitations and conditions in Article 372 of the Constitution which I have just discussed. I am, therefore, of the opinion that subject to the constitutional rights under the Constitution and subject to the provisions of Article 372 of the Constitution and subject to the special Statutes relating to the recovery of taxes, Indian taxes and State taxes have the precedence over private claims.

29. This formulation of the law illustrates the fact that it is possible today in the Indian context, to lay down a more general constitutional doctrine in favour of universal priority of State debts in every case. In each case it will depend on the terms of the particular Statute or law by which the recovery of the State claim is provided and by reference to the provisions of the Constitution. For instance, many Statutes provide that taxes will be a first charge. In such cases these taxes must be accorded the precedence. Even apart from the States many Statutes in India recognise municipal rates as the first charge in favour of Municipalities or Corporations. Statutes have granted them precedence over other claims and must therefore be recognised. In this case, for instance, under the Public Demands Recovery Act a first charge on immovable property is created by Section 8 which has expressly provided that the amount in respect of the tax will be a first charge on immovable property and sub-sequent charges thereupon after the service of the notice of the certificate must be postponed.

Statutes are replete with examples where debts are preferred or deferred or rateably distributed. Arrangement of priorities of debts is not an uncommon feature in Statutes. Its examples may be drawn from such diverse fields as the Insolvency Act, Succession Act, Companies Act, Civil Procedure Code, Municipal Act and other Statutes. Therefore, wherever there is such a Statute stipulating

particular priority, effect must be given to it by a Court of law. A lively question arose before the House of Lords whether an executor's right of retainer would prevail against the Crown claim for arrears of Income Tax and super-tax in -- "Attorney-General v. Jackson" 1932 AC 365 (P). The executor failed there and the speeches of the different law Lords, specially those of Lord Atkin and Lord Tomlin, clearly indicate the principle of statutory creation, interference and recognition of priorities of debts including those of the Crown.

Statutes, therefore regulate the question of priority whether in favour of the State or other creditors. Article 265 of the Constitution of India provides that no tax shall be levied or collected except by the authority of law. The result is that both the impositions as well as the collection of taxes have to be by the authority of law. It is by reference to the particular Statute or law that the State claim for priority must be judged in each individual case.

30. It will appear from this survey of the legal situation that there is no universal claim to priority for State debts. I am satisfied that whether in countries where the English law operates or in republican countries like America this much is certain that where a private citizen has sued another to judgment and has in fact got by an order of Court a Receiver appointed of his goods and such goods have been sold by the Receiver under orders of the Court and where there has been a prior direction in the Court's order to pay the sale proceeds to the private judgment-creditor, a subsequent claim by the State cannot defeat the judgment-creditor or deprive him of the fruits of his decree which is regarded as properly. By the Court's order for sale and direction for payment in this case the "dividing line", to use the expression used in one of the cases I have just discussed, has been crossed and thereby a divestiture of the property of the debtor has occurred, so that the State's claim against the debtor after the divestiture cannot prevail over the matured rights of the private judgment-creditor. Any other conclusion appears to me to be fraught with infinite uncertainty and disaster in private dealings between citizens. For instance, if there was a uniform priority of all State claims universally applicable, whenever or however such claims arise, then all that private debtor need do is not to pay his taxes or the State claims to deprive his private creditor of his dues. This will render insecure many essential and necessary transactions in the State and Society.

31. I, therefore, refuse the prayer of the State of West Bengal for injunction restraining the decree-holder from realising the amount of the sale proceeds without payment of sales tax and also its prayer for directing the Official Receiver to make payment out of the sale proceeds to the State first. But I would give the State leave to attach in execution of the said certificate proceeding the balance of the sale proceeds, if any, that may be left in the hands of the Official Receiver after payment of his costs, charges and expenses and after payment of the plaintiff decree-holder's dues. In the circumstances of this case I will make no order for costs except that the plaintiff decree-holder will be entitled to his costs of this application out of the sale proceeds in the hands of the Official Receiver

which will rank prior to the State's claim because the leave granted hereby to the State to attach this fund has not yet come into operation. But I also direct and order that in case the funds in the hands of the Official Receiver are insufficient to pay the costs of this application to the decree-holder, then in that event the State must pay whatever the short fall may be in respect of such costs, to the decree- holder.