
(2008) 01 SHI CK 0002
In the High Court Of Himachal Pradesh

Punjab National Bank

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 02-01-2008

Acts Referred:

Himachal Pradesh General Sales Tax Act, 1968 — Section 16B

Citation : (2008) 1 ShimLC 409 : (2008) 15 VST 365

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

V.K. Ahuja, J.—This is a writ petition filed by the petitioner for issuance of directions restraining respondents from affecting sale of the immovable property of respondent No. 4 for recovery of alleged arrears of sales tax as well as for quashing Section 16-B of the Himachal Pradesh General Sales Tax Act, 1968 (referred to as Sales Tax Act), being ultravires of the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, (referred to as Banking Act).

2. Briefly stated the facts of the case are that in August, 1984, respondent No. 4 company was sanctioned term loan of Rs. 12.85 lakhs and working capital loan of Rs. 9.70 lakhs on 3.1.1985 which was sanctioned by the petitioner bank for manufacturing of carpets. Respondents No. 5 and 6 stood as guarantors for the loan. The loan account of respondent No. 4 company became irregular in the year 1990 and was transferred to the protested account category on 29.10.1990 with a debit balance of Rs. 33.20 lakhs. A suit for recovery of Rs. 42.29 lakhs was filed on 26.2.1992 by the petitioner bank against respondents No. 4 to 6. The suit was transferred to the Debt Recovery Tribunal, Jaipur and a consent decree was passed on 12.11.1998 in favour of the petitioner bank and against respondents No. 4 to 6. Pursuant to the said decree, respondent No. 4 deposited Rs. 50,000/- on 13.8.1998 but did not make the balance payment as per the decree. The bank proceeded with execution of recovery certificate for an amount

of Rs. 2,65,97,162.50 before the Debt Recovery Tribunal, Jaipur on 14.5.1999, which execution of recovery certificate was transferred to Debt Recovery Tribunal, Chandigarh on 2.11.2000. and the proceedings are pending there.

3. It was further alleged by the petitioner bank that the loans of the petitioner bank are secured by mortgage of the factory premises of respondent No. 4 situated at Industrial Area, Baddi.

4. It was further alleged that a sum of Rs. 4,31,18,676.00 is due from respondents No. 4 to 6 to the petitioner bank and the Tribunal had fixed the sale of mortgaged property of respondent No. 4 for 14.2.2000 with the reserve price of Rs. 50 lakhs, which was reduced to Rs. 30 lakhs. The fresh value of the property was submitted before the Tribunal and the Recovery Officer has not fixed any date for sale of the mortgaged property. In the mean while, a notice was issued by the Collector-cum-Assistant Excise Commissioner, Solan (Respondent No. 2), in "The Tribune" dated 12.2.2000 for auction of the mortgaged property of respondent No. 4 as mentioned above. The date of auction was fixed for 3.3.2001. Thus, it was alleged that the said property of respondent No. 4 is being put to auction by respondent No. 2 for recovery of alleged arrears of sales tax amounting to Rs. 32,72,365/- and are being recovered as land revenue arrears under the H.P. Land Revenue Act, 1953. An application was submitted by the petitioner bank before the Recovery Officer, Debt Recovery Tribunal Chandigarh for stay of the sale by respondent No. 2.

5. It was further alleged that the Recovery Officer has come to the conclusion that in view of the judgment of the Hon'ble Supreme Court in State Bank of Bikaner v. National Iron and Steel Rolling, the claim of the petitioner bank against the mortgaged property has become secondary in view of the recovery of sales tax by the H.R Government. It was alleged by the petitioner bank that the loan was advanced to respondent No. 4 by the petitioner in 1984-85 and the property was equitably mortgaged in favour of the bank in 1984 for recovery of its dues. Thus, it was pleaded that the decision of the Recovery Officer was illegal, null and void and contrary to Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The debt of the petitioner bank is secured and is prior in time as against the alleged liability of sales tax which is even not disputed by the party and therefore, the bank has the prior right to recover its debt.

6. It was also pleaded that Section 16-B of Sales Tax Act is also repugnant to and ultra vires of the provisions of the Transfer of Property Act, 1872 as well as the Banking Act, 1993 and the money recoverable by the Bank is entitled to priority since it is under a Central legislation and as such, respondents No. 1 and 2 be restrained from auctioning the mortgaged property of respondent No. 4 for recovery of sales tax dues and the provisions of Section 16-B of Sales Tax Act be also struck down being in valid law.

7. In reply filed by respondents No. 1 and 2, they pleaded that Section 16-B of

Sales Tax Act is having an over-riding effect to the provisions of Banking Act. It was pleaded that since respondent No. 4 had failed to discharge his liabilities, the outstanding amount was declared as arrear of land revenue by the Assistant Excise & Taxation Commissioner, Solan (Respondent No. 2) who had proceeded to realize the outstanding arrears of land revenue by exercising the powers of Collector under the Himachal Pradesh Land Revenue Act. Thus, it was submitted that the Government has the first charge on the property of the defaulter as per the provisions of Section 16-B of Sales Tax Act. It was entitled to sell the property and reliance was placed upon the decision of Dena Bank case which shall be referred below. It was pleaded that Section 16-B of Sales Tax Act, 1968 came into force on 21.10.1994, whereas the consent decree was passed by the Debt Recovery Tribunal, Jaipur on 12.11.1998 and the same was yet to be executed and, therefore, Section 16-B of the Act was applied and the petitioner bank is not entitled to any relief.

8. We have heard the learned Counsel for the parties and have gone through the record of the case including the pleadings of the parties.

9. The submissions made by the learned Counsel for the petitioner bank were that the decision in Dena Bank case applies to the present facts and it does not give priority to the recovery of sales tax of the State over the secured creditors as the petitioner bank. It was submitted that the State has a priority to recover the tax over the unsecured creditors, but in the present case since the property stood mortgaged with the petitioner bank, they have priority over the property and the balance amount left if any, can be payable to the State Government for payment of sales tax of respondent No. 4.

10. On the other hand, learned Advocate General for respondents No. 1 and 2 submitted that crown debt had a priority over the loan of private party like petitioner bank and under the provisions of Section 16-B of Sales Tax Act, the amount could be recovered by the State Government in priority over the loan of the petitioner bank and as such, the petitioner bank is not entitled to the relief claimed by it.

11. Coming to the decision in Dena Bank case relied upon by the petitioner as well as even by the respondents it is reported as Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, The issue raised in that case pertained to the doctrine of priority of tax due on account of arrears of tax in favour of the State over the secured debt of other creditor. The question was considered by their Lordships in detail as to whether the Crown or State's right to recover arrears of tax due to it is to be given priority over the right of private persons to recover private debts from an assessee. It was observed that the doctrine of priority or precedence of State debts is based on rule of necessity and of public policy, the reason being that without being adequate revenue, the State would not be able to function as a sovereign entity. The question was dealt with at length by their Lordships by referring to the common law about the priority of crown debts which was recognized by the Indian High Courts prior to 1950 and

reference was made to various decisions in this regard.

12. This question of doctrine of priority of crown debt was also discussed in detail by a Single Judge of Punjab & Haryana High Court in Union of India v. Punjab Financial Corporation 2007 (1) ISJ 258, wherein also the reference was also made to various decisions in this regard including under the English law and similar conclusions were also drawn in Para-22 of the judgment as shall be referred below. It was finally concluded that the preferential right of the crown to recover debt is only against ordinary or unsecured creditors.

13. This decision was again referred to by a Division Bench of this Court in M/s. A.J. Infrastructures Pvt. Ltd. v. State of H.P. and Ors. CWP No. 306 of 2007, decided on 7.9.2007 and the conclusions drawn in Dena Bank case were summed up by the Division Bench of this Court at Page-12, which may be summarized 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.

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 commercial activities which may be undertaken by the State for achieving socio-economic good. In other word, where 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. However, the Crowns preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgage or pledgee of goods or a secured creditor. It is only in cases where the Crowns right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already?.

14. The provisions of Section 16-B of Sales Tax Act were also considered in the above Division Bench case. Section 16-B of the Himachal Pradesh General Sales Tax Act, 1968 reads as under:

16-B. Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and penalty including interest, if any, payable

by a dealer or any other person under this Act shall be a first charge on the property of the dealer or such other persons.

15. The Division Bench had observed at page 13 as under:

The Court found that by virtue of provisions of Section 15 of the Karnataka Sales Tax Act, the State had right of recovery of its dues over and above the lender. The Court, however, was not dealing with any provision, which was in conflict with the Karnataka Sales Tax Act and was only deciding, based on the application and interpretation of Section 15 of the Karnataka Sales Tax Act, whether the State had a preferential right of recovery over the lender or not.

16. In referring to the effect of Section 16-B of the H.P. General Sales Tax Act and the Banking Companies Act, passed by the Parliament, Division Bench of this Court had observed at Page-21 as under:

Undoubtedly, Section 16-B of the Tax Act also contains a non-obstante clause, which makes the amount of tax payable by a dealer to be a first charge on the property of the dealer. There is, thus, obviously a conflict between the provisions of the two statutes.

The powers are absolute and in view of the non-obstante clause contained in Section 35 of the Act, would have an overriding effect over all inconsistent provisions contained in any other law. The Act being a special statute, enacted later in point in time and that too by the Central Government, in our view, would override the inconsistent provisions contained in the Tax Act. This is in the scheme of constitutional provisions also. Therefore, the Bank is well within its right to take over the property and sell the same notwithstanding the 1st charge of the State on the property of the dealer.

17. The Division Bench has observed further as under:

The issue needs to be examined from another perspective under the provisions of the Tax Act, the Assessing Authority is required to assess the amount of tax due from the dealer on the basis of returns filed. If the Assessing Authority is not satisfied that the returns furnished are correct and complete or that no returns have been filed at all he shall serve a notice, given an opportunity of hearing and as the case may arise, adopt the best judgment method and assess the amount of tax due from the dealer. This is so provided u/s 14 of the Tax Act. The amount so assessed is required to be paid by the assessee within the time stipulated in the notice to be issued by the Assessing Authority, failing which the amount due is recoverable as arrears of land revenue as provided for u/s 16, which, however, in view of non obstante clause contained in Section 16A comes into operation only after the dealer fails to pay the amount due when a notice in writing is issued to him.

18. Thus, it was held by the Division Bench that since the bank has already exercised its right and taken decision of the property much prior to the assessment order dated 18.1.2005 passed by the Assessing Authority, therefore,

the provisions of Section 35 of the Act would override the inconsistent provisions of Section 16-B of the Tax Act leading to the only conclusion and that there is no prior charge on the property except for that of the bank with whom the property was mortgaged. In the present case, the mortgage was created in the year 1984 and the consent decree was passed on 12.11.1998 in favour of the petitioner bank and against respondents No. 4 to 6. There is nothing on record to show that any notice of demand was firstly issued under Sections 14 and 16 A before action u/s 16 of the Sales Tax Act was taken. The copies of the notice of demand issued and when it was issued have not been placed on record by the respondents No. 1 and 2 except by pleading about their right to sell the property and recover the amount as arrears of land revenue in preference to the petitioner bank. Therefore, in view of the decision in Dena Bank's case it is clear that it only gives preferential right to the State to recover the sales tax in preference to unsecured creditors but once the property in question already stood mortgaged and they had proceeded prior in time, they can recover the amount in pursuance of the consent decree passed in their favour, the State has no preferential right to sell the property and, therefore, the petitioner bank is entitled to sell the mortgaged property and realize the arrears of amount due to them and State shall be entitled to recover the balance amount, if any, left with the bank or in the alternative, they are at liberty to proceed against respondents No. 4 to 6 for recovery of the amount by proceeding against them in accordance with law. The Division Bench in the above case has already taken the view that the provisions of Section 35 of the Act would override the inconsistent provisions of Section 16-B of the Tax Act and as such these provisions of the Sales Tax Act Section 16-B as they are inconsistent with Section 35 of the Act are declared ultra vires of the Constitution.

19. The writ petition filed by the petitioner bank is accordingly allowed in terms of the above and they are entitled to sell the property of respondent No. 4 in accordance with law. Parties are left to bear their own costs.