

(2012) 08 AHC CK 0035

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 40632 of 2012

Smt. Urmila Devi and Others

APPELLANT

Vs

Debts Recovery Appellate Tribunal, Allahabad and Others

RESPONDENT

Date of Decision : 29-08-2012

Acts Referred:

Constitution of India, 1950 — Article 372(1)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34
Registration Act, 1908 — Section 89
Trade Marks Act, 1999 — Section 8(8)
Transfer of Property Act, 1882 — Section 100, 48, 58(a)
Uttar Pradesh Trade Tax Act, 1948 — Section 8, 8(8)
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 154, 241, 245, 246, 247

Citation : AIR 2013 All 11 : (2013) 1 BC 646

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Judgement

Hon. Dilip Gupta, J.—This petition seeks the quashing of the order dated 16th March, 2001 passed by the Debts Recovery Tribunal, Allahabad in Transfer Application No. 408 of 2000 by which the application filed by the Allahabad Bank for recovery of Rs. 35, 56, 192.46/- was decreed ex-parte, the order dated 5th January, 2010 by which the application filed by the petitioners for recall of the order dated 16th March, 2001 was rejected by the Debts Recovery Tribunal, Allahabad and the order dated 17th July, 2012 passed by the Debts Recovery Appellate Tribunal, Allahabad by which the appeal filed by the petitioners for setting aside the order dated 5th January, 2010 passed by the Debts Recovery Tribunal, Allahabad was dismissed. It transpires from the records of the writ petition that M/s. N.C. Carpet Company, a partnership firm with Saroj Sekhari, Rajat Sekhari, Vijay Kumar Sekhari and Rajendra Kumar Sekhari as partners, was sanctioned limit facilities by the respondent-Allahabad Bank and to secure the interest of the Bank, Vijay Kumar Sekhari mortgaged properties by deposit of title deeds of Plot No. 235-Ka and Plot No. 3085. On account of the default in

payment of the money, the respondent-Bank filed Original Suit No. 272 of 1991 for recovery of a sum of Rs. 35, 56, 192.46/- with interest from M/s. N.C. Carpet Company and the partners which was subsequently transferred to the Debts Recovery Tribunal Allahabad and was numbered as Transfer Application No. 408 of 2000.

2. It is further transpires from the records that as sales tax dues of Rs. 3, 82, 000/- were not paid by M/s. N.C. Carpet Company, a recovery certificate was issued by the Trade Tax Department for recovery of the dues as arrears of land revenue and consequently Plot No. 235-Ka was put to auction and the sale in favour of the highest bidder Bankey Lal Gupta was confirmed on 29th January, 1996. A sale certificate was thereafter issued by the Sub-Divisional Officer on 5th February, 1996 under Rule 285-M of the U.P. Zamindari Abolition & Land Reforms Rules, 1952 (hereinafter referred to as the "Zamindari Abolition Rules"). All this was done during the pendency of the aforesaid Transfer Application filed by the Bank before the Debts Recovery Tribunal.

3. The respondent-Bank filed objections before the Additional District Magistrate, but since the sale had been confirmed, the Additional District Magistrate, rejected the objections by the order dated 31st January, 1996. The Bank then filed objections under Rule 285-I of the Zamindari Abolition Rules before the Commissioner, Varanasi Division Varanasi, who after hearing the auction purchasers, rejected the objections filed by the Bank on 28th November, 2000 for the reason that the Bank was not the defaulter and the Bank should wait for the decision of the Transfer Application it had filed before the Debts Recovery Tribunal.

4. Transfer Application No. 408 of 2000 was ultimately decreed ex-parte by the Debts Recovery Tribunal against M/s. N.C. Carpet Company and its partners on 16th March, 2001 for recovery of Rs. 35, 56, 192.46/- and the defendants were also directed to pay pendente lite and future interest @ 15.5% with quarterly rest on the amount till it was paid. It was also observed that the applicant-Bank could recover the Bank dues from the defendants after sale of the property mortgaged and hypothecated with the Bank. The Recovery Officer of the Debts Recovery Tribunal, Allahabad, accordingly, published a notice in the newspaper on 2nd December, 2002 for sale of the properties mentioned in the notice through public auction to be held on 11th December, 2002.

5. It also transpires from the records of the writ petition that Bankey Lal Gupta in whose favour the sale certificate had been issued on 5th February, 1996, sold the aforesaid Plot No. 235-Ka to the petitioners by means of the registered sale deed dated 27th March, 2002 and the petitioners have stated in paragraph-13 of the writ petition that they came to know for the first time about the loan advanced by the Bank to M/s. N.C. Carpet Company through the newspaper publication dated 2nd December, 2002 and after making enquiries, filed the application before the Debts Recovery Tribunal, Allahabad for recalling its order dated 16th March, 2001 by which it had issued the recovery certificate in favour of the

Allahabad Bank for sale of the properties mortgaged with the Bank which included Plot No. 235-Ka. This application filed by the petitioners was registered as Miscellaneous Application No. 160 of 2002. The Debts Recovery Tribunal, Allahabad by the order dated 5th January, 2010 rejected this application and the appeal filed by the petitioners before the Debts Recovery Appellate Tribunal, Allahabad was also dismissed by the order dated 17th July, 2012.

6. The Debt Recovery Appellate Tribunal, Allahabad has dismissed the appeal filed by the petitioners for the following reasons:

(1) Plot No. 235-Ka that was put to auction for recovering the arrears of trade tax had earlier been mortgaged in favour of the Bank by M/s. N.C. Carpet Company and its partners by deposit of the title deeds as security towards the loan taken by them. The sale certificate dated 5th February, 1996 that was issued by the Sub-Divisional Officer in the proceedings initiated for recovery of trade tax from M/s. N.C. Carpet Company and its partners by auction of Plot No. 235-Ka mentions that the sale was subject to the rights of the original owner and only those rights which were held by the original owners were being transferred to the auction purchasers. The sale was, therefore, not absolute and was a conditional sale and the auction purchasers could not have acquired a better right than that possessed by the original owners. The condition imposed in the sale certificate was not assailed by the auction purchasers in any proceedings.

(2) The Bank had filed objections before the Commissioner under Rule 285-I of the Zamindari Abolition Rules which were dismissed with the observation that the Bank was not the defaulter and the Bank should wait for the decision in the suit it had instituted for recovery of the debts. The order of the Commissioner, therefore, by virtue of Section 48 of the Transfer of Property Act, 1882 cannot preclude the Bank from recovering the dues pursuant to the order passed by the Debt Recovery Tribunal.

(3) Section 284(5) of the U.P. Zamindari Act Abolition & Land Reforms Act, 1950 (hereinafter referred to as the "Zamindari Abolition Act") will not come to the aid of the appellants and the sale certificate in favour of the original owner, who was the borrower from the Bank, also imposed a condition that only the rights held by the defaulters were being transferred.

(4) Section 241 of the Zamindari Abolition Act will not also come to the aid of the appellants as it merely provides that the land revenue assessed on any holding shall be the first charge on such holding and Section 8(8) of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the "Trade Tax Act") provides that any tax or other dues payable to the State Government under the said Act shall be recoverable as arrears of land revenue.

(5) Section 34 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the "Recovery of Debts Act") stipulates that save as provided in sub-section (2), the provision of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for

the time being in force or in any instrument having effect by virtue of any law for the time being in force other than the Act and, therefore, the Debts Recovery Act will prevail over the Zamindari Abolition Act so that the recovery certificate issued by it will have an overriding effect over other instruments.

(6) The appellants had knowledge of the institution of the suit by the Bank for recovery of the loan advanced by the Bank to the original owners and the mortgage of the property as the auction purchasers were opposite party in the objections filed by the Bank before the Commissioner under Rule 285-I of the Zamindari Abolition Rules and were also heard by the Commissioner and, therefore, the appellants should have taken appropriate steps for participating in the proceedings before the Debts Recovery Tribunal.

7. Sri Abhishek Kumar, Learned Counsel for the petitioners has made the following submissions:

(1) In view of the provisions of Section 284(5) of the Zamindari Abolition Act, the property was sold to the auction purchasers free from all encumbrances and, therefore, the charge created in favour of the Bank by mortgage of the property by the borrowers of the loan became null and void and ineffective and the rider imposed in the sale certificate is of no consequence and cannot prevent the petitioners from raising this issue even if the auction purchasers had not challenged this condition.

(2) Section 48 of the Transfer of Property Act, on which reliance has been placed by the Debts Recovery Appellate Tribunal, will not be applicable as the provisions of the Zamindari Abolition Act will prevail over the Transfer of Property Act as it is a special law. This apart, in view of the provisions of Section 284(5) of the Zamindari Abolition Act, the property stood transferred free from all encumbrances when the sale certificate was issued.

(3) Even if Section 8(8) of the Trade Tax Act provides that any tax or other dues payable to the State Government under the Act can be recovered as arrears of land revenue, still in view of the provisions of Section 241 of the Zamindari Abolition Act which provides that the land revenue assessed on any building shall be the first charge, the finding recorded by the Debts Recovery Appellate Tribunal is perverse and deserves to be set aside.

(4) The Debts Recovery Appellate Tribunal committed an illegality in holding that the Recovery of Debts Act shall prevail over the Zamindari Abolition Act in view of the provisions of Section 34 of the Recovery of Debts Act as there is no inconsistency between the two Acts and when the property had been sold in auction under the provisions of Zamindari Abolition Act and the Bank cannot have encumbrances on the said property in view of the provisions of Section 284(5) of the Zamindari Abolition Act, the Bank cannot proceed against the said property under the Recovery of Debts Act.

(5) The finding of the Debts Recovery Appellate Tribunal that the Government

debts in the shape of sales tax do not have priority over the secured debts is not correct in the facts and circumstances of the case.

(6) The finding recorded by the Debts Recovery Appellate Tribunal that the appellants should have got themselves impleaded in the transfer application pending before the Debts Recovery Tribunal is not justified and it was for the Bank to have impleaded the auction purchasers.

8. Sri V.D. Chauhan, Learned Counsel appearing for the respondent-Bank has made the following submissions:

(1) The right of State to realise the arrears of trade tax as arrears of land revenue u/s 8(8) of the Trade Tax Act cannot take precedence over the right of the Bank which is a secured creditor and the sale certificate dated 5th February, 1996 in favour of the auction purchasers cannot confer any better right than that possessed by the owner of the plot. Even otherwise, the sale certificate mentions that only those rights, as were possessed by the owner, were being transferred to the auction purchasers. The provisions of Section 284(5) of the Zamindari Abolition Act will, therefore, not come to the aid of the petitioners as the property had been mortgaged by deposit of title deed to secure the loan taken by the borrowers from the Bank.

(2) In view of the provisions of Section 48 of the Transfer of Property Act, which deals with priority of rights created by transfer, the rights previously created by the owner by execution of the mortgage deed by deposit of title deed will prevail.

(3) The provisions of Section 241 of the Zamindari Abolition Act will not come to the aid of the petitioners as it is applicable only when the land revenue assessed on any building becomes due and is recovered.

(4) There was no necessity for the Bank to implead the petitioners in the Transfer Application and it was for Bankey Lal Gupta and the petitioners to have contested the case in case they so desired.

9. I have considered the submissions advanced by Learned Counsel for the parties.

10. The main question that arises for consideration in this petition is whether the right of the State Government to realise the arrears of trade tax will take precedence over the right of the Bank to proceed against the property of the borrowers mortgaged in favour of the Bank by deposit of title deed. Reliance has been placed by Learned Counsel for the respondents on the decision of the Supreme Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, but before coming to this decision it would be appropriate to refer to the various provisions of the Acts relied upon by Learned Counsel for the parties to examine whether at all Section 284(5) of the Zamindari Abolition Act, on which reliance has been placed by Learned Counsel for the petitioner to contend that the plot was transferred free from all encumbrances including the encumbrance created by the mortgage deed, will be attracted when the arrears of Trade Tax

are realised as arrears of land revenue.

11. The payment and recovery of Trade Tax dues is dealt with u/s 8 of the Trade Tax Act and sub-section (8) of Section 8, which relates to recovery of tax, is as follows:

8 (8) Any tax or other dues payable to the State Government under this Act, or any amount of money which a person is required to pay to the assessing authority under sub-section (3) or for which he is personally liable to the assessing authority under sub-section (6) shall, notwithstanding anything contained in any other law for the time being in force and subject to any special or general order of the State Government, be recoverable as arrears of land revenue or in the prescribed manner by the assessing authority or any other officer authorised by the State Government in that behalf and such authority or officer shall, for the purposes of such recovery-

(i) have all the powers which a Civil Court has under the Code of Civil Procedure, 1908 for the purpose of recovery of an amount due under a decree;

(ii) have the power to require the assessing authority or such authorised officer, having jurisdiction in any other area to make such recovery if the defaulter is or has property within the area of such other assessing authority or officer, and thereupon such other assessing authority or officer shall proceed to make recovery in the prescribed manner.

12. Chapter X of the Zamindari Abolition Act deals with Land Revenue and the relevant Sections which have been referred to by the Learned Counsel for the parties are as follows:

241. Land revenue assessed on a village.- The land revenue assessed on any holding shall be first charge on such holding and also on trees or buildings standing thereon or the rents, profits or produce thereof.

242. Land held by bhumidhar liable to payment of land revenue.- (1) All land held by a person who is or is deemed to be a bhumidhar as such and wherever situate, is liable to the payment of land revenue to the State Government, except such land as may hereafter be exempted whether wholly or partially from such liability by grant of, or contract with the State Government.

(2) Land Revenue may be assessed on land notwithstanding that such land revenue, by reason of its having been assigned, released, compounded for or redeemed, is not payable to the State Government.

(3) No length of occupation of any land, nor any grant made before the commencement of this Act, by the Crown, the State Government or the landholder, shall release such land from the liability to pay land revenue.

245. Land revenue payable by Bhumidhars.- (1) Subject to the provisions of this Act, every bhumidhar, shall for every agricultural year commencing on or after July 1, 1976, be liable to pay to the State Government for land held by him, land

revenue determined in accordance with the provisions of sub-section (2) and Sections 246 and 247.

(2) The amount of land revenue payable by a bhumidhar shall be equal to an amount computed at double the hereditary rates applicable to the respective plots of land comprised in his holding:

Provided that the land revenue so computed shall not be-

(i) less than rupees five per acre or more than rupees twenty per acre in respect of an unirrigated plot of land.

(ii) less than rupees ten per acre or more than rupees twenty per acre in respect of an irrigated plot of land.

248. Dates and instalments for payment of land revenue under Sections 245 and 246.-(1) The State Government may prescribe the date or dates from which the instalments in which the land revenue shall be payable by bhumidhar referred to in Section 245 and 246.

(2) The land revenue or any instalments thereof not paid on or before the due date becomes an arrear of land revenue and the persons liable for it become defaulters.

279. Procedure for recovery of an arrear of land revenue.-(1) An arrear of land revenue may be recovered by any one or more of the following processes:-

(a) by serving a writ of demand or a citation to appear on any defaulter,

(b) by arrest and detention of his person.

(c) by attachment and sale of his movable property including produce,

(d) by attachment of the holding in respect of which the arrear is due,

(e) by lease or sale of the holding in respect of which the arrear is due,

(f) by attachment and sale of other immovable property of the defaulter, and,

(g) by appointing a receiver of any property movable or immovable of the defaulter.

(2) The costs of any of the processes mentioned in sub-section (1) shall be added to and be recoverable in the same manner as the arrear of land revenue.

284. Attachment, lease and sale of holding.-(1) The Collector may in addition to or instead of any of the order processes hereinbefore specified either of his own motion or on the application of the Land Management Committee, attach the holding in respect of which an arrear is due.

(2) Where any holding is so attached the Collector may, notwithstanding anything contained in this Act, but subject to such conditions as may be prescribed, let out the holding, for such period not exceeding ten years

commencing from the first day of July next following as he deems fit, to any person, other than the defaulter, who pays the whole of the arrear due on the holding and agrees to pay the same amount of land revenue during this period of the lease as has been payable by the defaulter in respect of the holding immediately preceding its attachment.

(3) If during the period of lease, the lessee commits default in payment of the land revenue due under the lease, the arrear may be recovered from him by any one or more of the processes mentioned in clauses (a) to (c), (f) and (g) of sub-section (1) of Section 279 and his lease shall also be liable to be determined.

(4) Upon the expiry of the period of lease the holding shall be restored to the tenure-holder concerned free of any claim on the part of the State Government for any arrear of revenue in respect thereof.

(5) If the Collector is satisfied that no suitable person is forthcoming to take the land on lease under sub-section (2) then notwithstanding anything contained in this Act he may sell the holding free from all encumbrances in such manner as may be prescribed and appropriate the proceeds in satisfaction of the arrears, and refund the excess, if any, to the defaulter.

(6) The Collector shall report to the Board of Revenue any sale made under sub-section (5).

286. Power to proceed against interest of defaulter in other immovable property.-

(1) If any arrears of land revenue cannot be recovered by any of the processes mentioned in clauses (a) to (c) of Section 279, the Collector may realize the same by attachment and sale of the interest of the defaulter in any other immovable property of the defaulter.

(2) Sums of money recoverable as arrears of land revenue but not due in respect of any specific land, may be recovered by process under this section from any immovable property of the defaulter including any holding of which he is a bhumidhar.

13. The Zamindari Abolition Rules on which Learned Counsel for the parties have also placed reliance are reproduced below:

281. Section 284.-(1) Recourse can only be had to the sale of the holding u/s 284 when the process specified in Clauses (a), (b), (c) or (d) of Section 279 would be insufficient for the recovery of the arrear.

(2) Process for sale of holding u/s 284 and of other immovable property u/s 286 shall be issued by the Collector.

(2-A) In the case of sale of a holding the Collector shall auction the holding in lots of 1-26 hectares (3.125 acres) to 5.04 hectares (12.50 acre) after working out and announcing the land revenue and the estimated value of each lot.

It should also be made clear that only those persons would bid in the auction,

acquisition of land by whom would not contravene the provisions of Section 154.

285-A-Every sale under Sections 284 and 286 shall be made either by the Collector in person or by an Assistant Collector specially appointed by him in this behalf. No such sale shall take place on a Sunday or other gazetted holiday or until after the expiration of at least thirty days from the date on which the proclamation under Rule 282 was issued.

....

285-M.-(i) After a sale of holding or other immovable property under the Act, has been confirmed in the manner aforesaid, the Collector shall put the person declared to be purchaser into possession of such property, and shall grant him a certificate to the effect that he has purchased the property to which the certificate refers and such certificate shall be deemed to be a valid transfer of such property, but need not be registered as a conveyance except as provided by Section 89 of the Registration Act, 1908.

(ii)The certificate shall state the name of the person declared at the time of sale to be the actual purchaser and any suit brought or application made in a Civil or Revenue Court against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used shall be dismissed with costs.

285-N. When sale of property under the provisions of Section 286 has been confirmed, the proceeds of the sale shall be applied in first instance to the payment of any arrears including costs incurred for the recovery thereof, due to the Government from the defaulter at the date of confirmation of the sale, whether the arrears are of revenue or sums recoverable as arrears of revenue; and in the second place if the sale took place for the recovery of an amount recoverable as an arrear of revenue but not due to Government:

to the payment of that amount including cost as aforesaid;

and the surplus, if any shall be paid to the person whose property has been sold; or

if the property sold was held in shares then the co-sharers collectively or according to the amount of their recorded interests, at the discretion of the Collector.

14. Learned Counsel for the parties have also placed reliance on Section 48 and 100 of the Transfer of Property Act, which are reproduced below:

48. Priority of rights created by transfer.-Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined. (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument if any by which the transfer is effected is called a mortgage-deed.

.....

100. Charges.- Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [which apply to a simple mortgage shall, so far as may be, apply to such charge.]

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, [and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

15. Section 34 of the Recovery of Debts Act on which reliance has also been placed is reproduced below:

34. Act to have over-riding effect.- (1) Save as provided in sub-section (2), the provision of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made there under shall be in addition to, and not in derogation of the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951) the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) and the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).

16. Chapter X of the Zamindari Abolition Act deals with Land Revenue. From the various provisions of the Zamindari Abolition Act referred to above, it is seen that it is the land held by bhumidhar which is liable to payment of Land Revenue to the State Government. The Land Revenue is determined under Sections 245 and 246 and u/s 248(1), the State Government prescribes the date or dates from which and the instalments in which the land revenue shall be payable by bhumidhar. u/s 248(2), the land revenue or any instalment thereof not paid on or before the due date becomes an arrear of land revenue and the persons liable

for it become defaulters. Section 241 provides that the land revenue assessed on any holding shall be the first charge on such holding. Section 279 (1) gives the processes in clauses (a) to (g) for recovery of an arrear of land revenue. Section 280 to 286A deal with each of these clauses (a) to (g). Section 280 corresponds to clause (a), Section 281 corresponds to clause (b), Section 282 corresponds to clause (c), Section 284 corresponds to clauses (d) & (e), Section 286 corresponds to clause (f) and Section 286A corresponds to clause (g).

17. There is a difference between the recovery made for collection of arrears of land revenue and the recovery made for collection of the money due as arrears of land revenue. This distinction is apparent from a perusal of Sections 284 and 286. Section 284 puts into action the processes mentioned in clause (d) as well as clause (e) of section 279 (1). This provision empowers the Collector to attach, to lease and to sell a particular holding in respect of which arrears of land revenue is outstanding. It is thus clear that section 284 is not a process to be used for the recovery of sums realisable as arrears of revenue. Section 286 has to be read along with section 279(1)(f) of the Act. This Section is divided into two sub-sections. Sub-section (1) deals with the recovery of arrears of land revenue pure and simple, and it provides that if such arrears cannot be realised by the processes referred to in clauses (a) to (e) of section 279 (1), the Collector may attach and sell the interest of the defaulter in any other immovable property belonging to him. The second sub-section of Section 286 relates to other miscellaneous dues such as Trade tax, Income Tax dues etc. which are recoverable as arrears of land revenue.

18. This distinction is also maintained in Rules 281 and 285-N of the Zamindari Abolition Rules. Rule 281, which refers to Section 284 of the Zamindari Abolition Act provides that recourse can only be had to the sale of the holding u/s 284 when the processes specified in Clauses (a), (b), (c) or (d) of Section 279 would be insufficient for the recovery of the arrear. This Rule does not refer to sub-clause (f) since that would be covered by Section 286(2) of the Act. Rule 285-N also draws a distinction between recovery of revenue arrears and sums recoverable as arrears of land revenue.

19. This distinction between recovery of arrears of land revenue and recovery of an amount realisable as arrears of land revenue has also been highlighted by the Supreme Court in *Padrauna Rajkrishna Sugar Works Ltd. and Others Vs. Land Reforms Commissioner, U.P. and Others*, . The property was put to auction for collection of arrears of sums realisable as arrears of land revenue and the Supreme Court held that this could be done only u/s 286(2) of the Zamindari Abolition Act and not Section 284 which would be applicable only when arrears of land revenue were being recovered. The observations are:

8. The amount for the recovery of which the sale of the assets of the Company was held, included income tax dues, sugarcane cess and the amount due for cane supplied to the Company. This amount was recoverable as arrears of land revenue because of the provisions of the Indian income tax Act, 1922, the U.P.

Sugar Factories Control Act, 1938, and the Co-operative Societies Act 1912. Section 286(2) of the U.P. Zamindari Abolition and Land Reforms Act provides :

Sums of money recoverable as arrears of land revenue, but not due in respect of any specific land, may be recovered by process under this section from any immovable property of the defaulter.

20. Though the amount for which the property was put up for sale was recoverable as arrears of land revenue, no part of it was due in respect of any specific land. The amount could prima facie be recovered from the immovable property of the defaulter. But relying upon the expression "under this section" in Section 286(2) of Act 1 of 1951 it was contended that the immovable property of the Company could be attached and sold only after the processes prescribed in Section 279 Clauses (a) to (e) were resorted to and the Collector was unable to recover the dues. It was urged that this is the true effect of Section 286(1) and Section 279 of Act 1 of 1951. Section 286(1) provides :

If any arrears of land revenue cannot be recovered by any of the processes mentioned in Clauses (a) to (e) of Section 279, the Collector may realize the same by attachment and sale of the interest of the defaulter in any other immovable property of the defaulter.

21. Section 279 of the Act sets out the procedure for recovery of arrears of land revenue. The section as it stood at the date of sale provided :

An arrear of land revenue may be recovered by any one or more of the following processes :

- (a) by serving a writ of demand or a citation to appear on any defaulter,
- (b) by arrest and detention of his person,
- (c) by attachment and sale of his movable property including produce,
- (d) by attachment of the holding in respect of which the arrear is due,
- (e) by sale of the holding in respect of which the arrear is due.
- (f) by attachment and sale of other immovable property of the defaulter.

Section 280 deals with the mode of recovery prescribed by Clause (a) of Section 279; Section 281 with the mode prescribed by Clause (b) i.e. by arrest and detention; and Section 282 with the mode prescribed by Clause (c) i.e. by attachment and sale of the movable property including produce. Section 284 sets out the procedure for sale of the holding in respect of which the arrear was due and Section 286(1) deals with the power to proceed against the interest of the defaulter in other immovable property.

9. For recovery of arrears of land revenue, the Collector is bound to resort to one or more of the processes mentioned in Section 279 read with Sections 280, 282, 284 and 285 of the Act, before he attaches and sells the immovable property of

the defaulter, other than the holding in respect of which the land revenue is due. That clearly follows from the terms of sub-section (1) of Section 286. Sub-section (2) of Section 286 makes the same process applicable for recovery of sums of money which are recoverable as arrears of land revenue. But the liability to pay the amount so recoverable arises by virtue of the provisions of other Acts and is not due in respect of any holding of the defaulter. It is only recoverable as arrears of land revenue by virtue of the provisions of the Act under which the liability has arisen. Since U.P. Act 1 of 1951 provides by Section 286(2) that sums of money recoverable as arrears of land revenue may be recovered from any immovable property of the defaulter, the procedure prescribed by the Act applies to such recovery. Because of the use of the expression "under this section" in sub-section (2) of Section 286 it is not intended that the Collector must resort in the first instance to the processes prescribed by clauses (a) to (e) before he resorts to clause (f) of Section 279. Clauses (d) and (e) of Section 279 have no application, where income tax dues and sugarcane cess or cane price are recoverable from the defaulter: and clause (b) is inapplicable where the defaulter is an artificial person like a Company. Power to recover arrears of land revenue from a defaulter is governed by the processes mentioned in Section 279 clauses (a) to (e), and Section 286 (1) places certain restrictions upon the power of the Collector to recover land revenue by attachment and sale of lands other than the holding in respect of which the land revenue is due. But the restrictions on the power of the Collector operate only when land revenue is in arrears. Restrictions if any, upon the power of the Collector to recover dues under other statutes, as arrears of land revenue arise from the statute which is the source of the liability and not from Act 1 of 1951 which merely sets out the processes for recovery of the dues.

(emphasis supplied)

22. Section 8(8) of the Trade Tax Act, provides that the tax or other dues payable to the State Government under the Trade Tax Act, shall be recoverable as arrears of land revenue. It is this Section which enables the Trade Tax Department to recover the dues as arrears of land revenue. Thus, the recovery of the money due as arrear of Trade Tax, has to be made in accordance with the provisions of Section 286(2) and not Section 284 of the Zamindari Abolition Act. Reliance placed by the Learned Counsel for the petitioners on Section 284(5) of the Zamindari Abolition Act is, therefore, misconceived.

23. Learned Counsel for the petitioners is, therefore, not justified in asserting that the sale certificate transferred the plot free from encumbrances as Section 286(2) does not contain such a condition as is contained in Section 284(5) of the Zamindari Abolition Act. Such being the position, the plot was sold to the auction purchasers with the condition that only such rights, as were possessed by the owners who were in arrears of Trade Tax, were being transferred. Bankey Lal Gupta, in whose favour the sale certificate was issued, therefore, purchased the plot with the condition of mortgage by deposit of title deed attached to it and

likewise the petitioners also purchased the plot from Bankey Lal Gupta with the same condition attached to it. The contention of the Learned Counsel for the petitioners that the provisions of the Zamindari Abolition Act will prevail over the provisions of the Transfer of Property Act, in such circumstances, is not required not be examined.

24. Section 241 of the Zamindari Abolition Act on which reliance has also been placed by Learned Counsel for the petitioner, will also not applicable as a bare perusal of the said Section shows that the land revenue assessed on any holding shall be first charge on such holding. As noticed hereinabove, M/s. N.C. Carpet and Company and its partners were not in arrears of land revenue. They were in arrears of Trade Tax.

25. The decision of the Supreme Court in Dena Bank (*supra*), which has been relied upon by Learned Counsel for the respondents, now needs to be examined. The question that arose for consideration before the Supreme Court was whether the recovery of sales tax dues shall have precedence over the right of the Bank to proceed against the property of the borrowers mortgaged in favour of the Bank. Dena Bank had filed a suit for recovery of a sum of Rs. 19, 27, 142.29 paise with future interest and costs against the partnership firm M/s Bhikhabhai Prabhudas Parekh & Co. and its partners. The suit was based on a mortgage by deposit of title deeds made by the partnership firm and its partners on 24-4-1969. During the pendency of the suit, the State of Karnataka attached and sold the mortgaged properties for recovery of sales tax arrears due and payable by the partnership firm. The State of Karnataka itself purchased the property in the auction held on 30-4-1976. On behalf of the Bank, as also on behalf of the borrowers who supported the Bank in this regard, it was submitted that the right of the State to realise its arrears of tax could not take precedence over the right of the Bank to enforce its security, it being a secured creditor. The Bank had filed the appeal before the Supreme Court as it felt aggrieved by the decree of the High Court to the extent to which it recognised the right of the State to proceed against the suit property and that too in preference to the Bank's right to proceed against the mortgaged property for realisation of its dues.

26. It is in this context that the Supreme Court observed:

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 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 M/s. Builders Supply Corporation, (*Supra*)).

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 States 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 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.
9. The Constitution Bench decision has been followed by three-judges Bench in Collector of Aurangabad and Another Vs. Central Bank of India and Another, .
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 mortgagee 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. In *Giles v. Grover* 1832 131 ER 563 it has been held that the Crown has no precedence over a pledgee of goods. In *The Bank of Bihar Vs. The State of Bihar and Others*, , the principle has been recognised by this Court holding 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. Rashbehary Ghose states in Law of Mortgage (T.L.L., Seventh Edition, p.386)- It seems a Government debt in India is not entitled to precedence over a prior secured debt.

27. The Supreme Court then examined the aforesaid proposition of law in the light of the provisions of Section 158 contained in Chapter XVI of the Karnataka Land Revenue Act, 1964 and observed that the said Section specifically provides that the claim of the State Government to any money recoverable under the provisions of Chapter shall have priority over any other debts, demand or claim whatsoever including that with respect to the mortgage deed. The relevant observation contained in paragraph 15 of the judgment are as follows:-

15. We have seen that the common law doctrine of priority of crown debts would not extend to providing preference to crown debts over secured private debts. It was submitted by the Learned Counsel for the appellant that under the Karnataka Land Revenue Act as also under the Karnataka Sales Tax Act the arrears of sales tax do not become arrears of land revenue; they have been declared merely to be recoverable as arrears of land revenue. Relying on the observations of this Court in Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, , the Learned Counsel for the appellant submitted that the appellant being a secured creditor the arrears of sales tax could not have preference over the rights of the appellant. It is true that the Constitution Bench has in Builders Supply Corporation case (supra) observed by reference to Section 46(2) of the Income Tax Act, 1922 that that provision does not deal with the doctrine of the priority of crown debts at all; it merely provides for the recovery of the arrears of tax due from an assessee as if it were an arrear of land revenue which provision cannot be said to convert arrears of tax into arrears of land revenue either. The submission so made by the Learned Counsel omits to take into consideration the impact of Section 158(1) of the Karnataka Land Revenue Act which specifically provides that the claim of the State Government to any moneys recoverable under the provisions of Chapter XVI shall have precedence over any other debts, demand or claim whatsoever including in respect of mortgage. Section 158 of the Karnataka Land Revenue Act not only gives a statutory recognition to the doctrine of State's priority for recovery of debts but also extends its applicability over private debts forming subject matter of mortgage, judgment-decree, execution or attachment and the like. In Collector of Aurangabad and Another Vs. Central Bank of India and Another, , the provision of Hyderabad Land Revenue Act and Hyderabad General Sales Tax Act had come up for consideration of this Court. this Court had refused to grant primacy to the dues on account of sales tax over secured debt in favour of the Bank. A perusal of the relevant statutory provisions quoted in the judgment goes to show that any provision *pari materia* with the one contained in Section 158 of Karnataka Land Revenue Act was not to be found in any of the local Acts under consideration of this Court in

Collector of Aurangabad v. Central Bank of India. The effect of Section 190 is to make the procedure for recovery of arrears of land revenue applicable for recovery of sales tax arrears. The effect of Section 158 is to accord a primacy to all the moneys recoverable under Chapter XVI, which will include sales tax arrears.

28. In the present case, there is no such provision in the Trade Tax Act or the Zamindari Abolition Act which may give precedence to the claim of the State Government to any money recoverable as arrears of Land Revenue. In such circumstances, as observed by the Supreme Court in Dena Bank (supra), the decisions of the Supreme Court in M/s. Builders Supply Corporation Vs. The Union of India & Ors., AIR 1965 SC 1061 and Collector of Aurangabad and Another Vs. Central Bank of India and Another, will be applicable and it has, therefore, to be held that the sales tax dues shall not have precedence over the right of the Bank to proceed against the property of the borrower mortgaged in favour of the Bank as the Bank was a secured creditor.

29. The aforesaid decision of the Supreme Court in Dena Bank (supra) was also relied upon and followed by a Division Bench of this Court in State Bank of India Vs. State of U.P. and Others, and the relevant paragraphs are:

5. It is alleged in Paragraph 14 of the writ petition that the petitioner Bank has first charge over the properties of the company which have been mortgaged and hypothecated. However, it appears that there were certain dues of respondent No. 4 owing to the Trade Tax Department and towards payment of these dues the hypothecated and mortgaged properties of the company were attached by the tahsil authorities and 31.12.2001 was fixed for the auction but the auction was not held on that date and we are informed that it has not yet been held. It is alleged in Paragraph 16 of the writ petition that the petitioner-Bank is a secured creditor and the respondent No. 4 company has to pay Rs. 3.92 crores to the Bank. It is further alleged in Paragraph 17 of the writ petition that the petitioner-Bank being a secured creditor has priority over any other liabilities including the dues of the Trade Tax Department.

6. When the officials of the petitioner-Bank came to know that the State Government is proposing to auction the properties of the respondent No. 4 company, it filed a detailed objection on 29.12.2001 before the Assistant Commissioner, Trade Tax, Meerut. That objection has not yet been decided.

7. The short controversy in this case is as to whether the debts owed to the petitioner have priority over the debt owed to the State Government towards the Trade Tax dues.

30. After making reference to the decision of the Supreme Court in Dena Bank (supra) the Division Bench observed :

10. A perusal of the above observation of the Supreme Court shows that the Crown's preferential right to recovery of debts over other creditors is confirmed

to ordinary or unsecured creditors. It will not over-ride the right of a secured creditor unless there is a statute to the contrary.

11. In *State of Madhya Pradesh v. State Bank of Indore*, 2002 STC 1, it appears that there was retrospective amendment in the M.P. General Sales Tax Act by which the tax dues of the Sales Tax Department were to be treated to be first charge over the property. In the present case we have not been shown any statutory provision, which over-ride the rights of the secured creditor. Hence reading both these decisions, namely, *Dena Bank's case* (supra) and *State of M.P.'s Case* (supra), the legal position emerges that the secured creditors right to recover dues over-rides the right of the State unless there is statute to the contrary.

12. In *State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others*, , there was a statutory provision to the effect that the sales tax dues will be first charge over the property. Hence this decision will not be of any avail to the State Government. In the present case there is no statutory provision giving priority to State Government dues over the debts owed to the State Bank which is a secured creditor.

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14. In view of this we are of the opinion that the State Bank of India has first charge over the property in question being a secured creditor and its right to recover its dues over-ride that of the State Government.

15. For the reasons given above, the writ petition is allowed. The impugned recovery certificate and citation and consequential proceedings are quashed. The petitioner will be entitled to auction sell the property of respondent No. 4, and if after the auction sale and meeting the debts of the petitioner some property of the respondent No. 4 still remains then of course the State Government can proceed against this property for recovery of its dues.

31. The Supreme Court also dealt with the issue whether the recovery of Bank debts get primacy over the recovery of sales tax dues in *Central Bank of India Vs. State of Kerala & Ors.*, (2010) AIR SCW 2436 but it is seen that the Sales Tax Act which came up for consideration created a first charge on the property of the dealer. Section 8(8) of the Trade Tax Acts does not creat a first charge over the property of the dealer. This decision, therefore, will not help the petitioner.

32. Reference also needs to be made to Section 48 of the Transfer of Property Act on which reliance has been placed by the Learned Counsel for the respondents but before that Section 58(a) of the Transfer of Property Act which deals with mortgage also needs to be noticed.

33. Mortgage is defined in Section 58(a) of the Transfer of Property Act as the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. Different kinds of mortgages are also specified in the section of which clause (f)

states what a mortgage by deposit of title deed is.

34. So far mortgage is concerned, it being a transfer of interest in property, the mortgagee has always a security in the property itself. Whether the mortgage is with possession or a simple mortgage, the interest in the property enures to the mortgagee so that any subsequent mortgage or sale always preserves the rights of the mortgagee whether subsequent dealings in the property are with or without notice. The obvious reason for this is that in a mortgage there is always an equity of redemption vested in the owner so that the subsequent mortgagees or transferees will have, if they are not careful and cautious in examining the title before entering into a transaction, only the interest which the owner has at the time of the transaction. This is what has been observed by the Supreme Court in *Dattatreya Shanker Mote and Others Vs. Anand Chintaman Datar and Others*, .

35. Thus, if M/s. N.C. Carpet Company and its partners had mortgaged the property to the Bank by deposit of title deeds and subsequently they were sold to Bankey Lal Gupta then only equity of redemption was sold as was held in *Sobhagchand Vs. Bhaichand* (1882) KR 6 Bombay 193. This is also clear from the sale certificate which stated that only such rights as were possessed by M/s. N.C. Carpet Company and its partners were being transferred.

36. A charge on the other hand, u/s 100 of the Transfer of Property Act, is neither a sale nor a mortgage because it creates no interest in or over a specific immoveable property but is only a security for the payment of money. Reliance placed by Learned Counsel for the petitioners on Section 100 of the Transfer of Property Act is, therefore, misconceived as it is with respect to a charge and not a mortgage.

37. The contention of Learned Counsel for the petitioner that it was for the Bank, in the Transfer Application, to have impleaded the petitioners as opposite parties cannot also be accepted. Bankey Lal Gupta, who was the auction purchaser was aware of the pendency of the Transfer Application as he was a party in the objections which had been filed by the Bank before the Commissioner u/s 285I of the Zamindari Abolition Rules. He had sold the property to the petitioners. The Bank had impleaded M/s. N.C. Carpet Company and its partners, who had taken the loan from the Bank and it cannot be said that the petitioners were a necessary party in the Transfer Application. There is, therefore, no merit in any of the contention raised by Learned Counsel for the petitioners.