

(2008) 12 SC CK 0035

In the Supreme Court Of India

Case No : Civil Appeal No. 7128 of 2008 (Arising out of SLP (C) No. 13004 of 2007) and Civil Appeal No. 7132 of 2008 (Arising out of SLP (C) No. 21137 of 2007)

Union of India (UOI) and Others

APPELLANT

Vs

SICOM Ltd. and Another

RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:

Bengal Tenancy Act, 1885 — Section 98
Central Excise Rules, 1944 — Rule 230(2)
Central Excises and Salt Act, 1944 — Section 11, 11A
Civil Procedure Code, 1908 (CPC) — Section 73(2), 73(3)
Companies Act, 1956 &mdashl; Section 9, 529, 529A

Citation : (2009) 1 AWC 847 Supp : (2009) 147 CompCas 531 : (2009) 2 CompLJ 23 : 111 CWN 368 : (2009) 161 ECR 1 : (2009) 233 ELT 433 : (2009) 1 JT 87 : (2009) 1 SCALE 10 : (2009) 2 SCC 121 : (2010) 18 STR 673 : (2009) 18 STT 100

Hon'ble Judges : S. B. Sinha, J;Cyriac Joseph, J

Bench : Division Bench

Advocate : B. Sunita Rao, for B. Krishna Prasad, for the Appellant; Shekhar Naphade Jay Savla and Reena Bagga, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Leave granted.

2. Whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of the State Financial Corporation Act, 1951 (1951 Act) is the core question involved herein.

3. Respondent No. 2 borrowed a sum of Rs. 51,00,000/- from the first respondent by an Indenture of Mortgage executed on 22.12.1986. Indisputably, the mortgage created under the said document is governed by the provisions of the 1951 Act. It also owed a sum of Rs. 19,00,000/- by way of Central Excise duty for the period April 1983 to May 1988. Assessment of central excise duty for

the said sum was confirmed.

4. Indisputably the provisions of Sections 27, 29, 30, 31, 32A to 32F, 41 and 41A of the 1951 Act have been extended in favour of the respondent by the Government of India in exercise of its power conferred upon it under Sub-section (1) of Section 46 of the said Act by issuing an appropriate notification.

5. Respondent No. 2 having committed defaults in repayment of the principal amount of loan as also the interest accrued thereon, the first respondent invoked Section 29 of the 1951 Act by issuing notice to take possession of the said securities. Actual physical possession of the mortgaged assets was taken over. Respondent No. 2, however, continued to commit defaults as a result whereof the first respondent recalled the entire amount of loan wherefor a notice dated 19th March, 1996 was served.

6. Respondent No. 2 owed a sum of Rs. 48,08,242/- to the appellant. It expressed its intention to attach and seize its properties. First Respondent, however, by its letter dated 11.11.1996 informed them that they had the first charge of the said properties which are mortgaged in their favour. Despite the same, the appellant expressed intention to proceed to recover the amount from the said properties. First Respondent, by its letters dated 21.7.2000 and 22.8.2000 followed by a lawyer's notice, called upon the appellants to desist from taking any action against their securities and to remove their seal, if any, from the properties of the borrower. As the appellant did not respond thereto, a writ petition was filed. The principal question which, as noticed hereinbefore, arose for consideration before the High Court was as to whether dues of the first respondent-corporation will have priority over the Central Excise dues.

7. The High Court, upon consideration of a large number of decisions opined that despite the fact that the dues of the appellant were recoverable as land revenue in terms of Rule 213(2) of the Central Excise Rules read with Section 32(g) and Section 151 of the Maharashtra Land Revenue Code, 1966, the same by itself would not mean that a first charge of the appellant- corporation would give way thereto. It was held :

30. Turning to provisions of Section 169 of the Code, Sub-section (1) provides that the arrears of land revenue due on account of land shall be paramount charge on the land and every part thereof and shall have precedence over any other debt demand or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment, or otherwise however, against any land or the holder thereof, Sub-section (2) provides that claim of the State Government to any monies other than arrears of land, revenue but recoverable as a revenue demand under Chapter II shall have priority over all unsecured claims against any land or holder thereof.

31. It is thus clear that the arrears of land revenue dues on account of land shall be paramount charge on the land or every part thereof. Those will have precedence over any other dues, debts, demands, or claim. But other claims of

the State Government which are recoverable as arrears of land revenue get priority over all unsecured claims against any land of holder. In the case of secured loan of the Government and other creditors, priority will depend upon precedence of such loan, it is thus clear that security of the Corporation being prior in point of time, it being in the nature of mortgage of priority, the dues claimed by Corporation will have priority over the dues of Customs.

8. Ms. Sunita Rao, learned Counsel appearing on behalf of the appellant, would submit that the crown debt and, in particular, arrears of tax will have a priority over all other debts and in that view of the matter, the impugned judgment is wholly unsustainable. Strong reliance has been placed in this behalf upon a decision of this Court in *Macson Marbles Pvt. Ltd. Vs. Union of India (UOI)*, .

9. Mr. Shekhar Naphade, Learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that principle that a crown debt prevails over other debts is confined only to the unsecured ones as secured debts will always prevail over a crown debt. Our attention in this behalf has been drawn to the non obstante clause contained in Section 56 of the 1951 Act. It was furthermore contended that for the self-same reason Section 529A in the Companies Act was inserted in terms by way of special provisions creating charge over the property and some of the State Governments also amended their Sales Tax Laws incorporating such a provision. The Central Government also with that view, amended the Employees Provident Fund and (Miscellaneous) Provisions Act, 1952 and Employees State Insurance Act, 1948.

10. The learned Counsel appears to be right.

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

12. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision.

13. To achieve the same purpose, the Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to

hereinbefore providing that the statutory dues shall be the first charge over the properties of the tax-payer. This aspect of the matter has been considered by this Court in a series of judgments.

14. In Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, , this Court construing Section 46(2) of the Income Tax Act, 1922 which enabled the Income Tax Officer to forward to the Collector a certificate specifying the amount of arrears due from an assessee and requiring the Collector, on receipt of such certificate, to proceed to recover from the assessee in question the amount specified as if it were an arrear of land revenue, held :

Section 46(2) 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 it were an arrear of land revenue. This provision cannot be said to convert arrears of tax into arrears of land revenue either; all that it purports to do is to indicate that after receiving the certificate from the income tax Officer, the Collector has to proceed to recover the arrears in question as if the said arrears were arrears of land revenue. We have already seen that other alternative remedies for the recovery of arrears of land revenue are prescribed by Sub-section (3) and (5) of Section 46. In making a provision for recovery of arrears of tax, it cannot be said that Section 46 deals with or provides for the principal of priority of tax dues at all; and so, it is impossible to accede to the argument that Section 46 in terms displaces the application of the said doctrine in the present proceedings.

{See also Superintendent and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta AIR 1967 SC 99}

15. Yet again in The Bank of Bihar Vs. The State of Bihar and Others, , it was laid down :

4. Now it is common ground that the plaintiff (which is the appellant before us) held the sugar which was seized from its custody as security for payment of the debts or advances made to Defendant 2 in its cash credit account. There were arrears of certain cess due from Defendant 2. As stated before, the Cane Commissioner took proceedings under the Public Demands Recovery Act and attached the price of the sugar which had been deposited by the appropriate authorities in the Government Treasury instead of being paid to the plaintiff. The Cane Commissioner indisputably did not have any right of priority over the other creditors of Defendant 2 and, in particular, the secured creditors. Section 172 of the Contract Act defines a pledge to mean the bailment of goods as security for payment of debt or performance of a promise.

{See also Revathinnal Balagopala Varma Vs. His Highness Shri PadmanabhaDasa Bala Rama Varma (Since Deceased) and Others, }.

16. These aspects of the matter, however, have been considered at some length

by a Three Judge Bench of this Court in *Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others*, . Dealing extensively with the doctrine of priority to Crown Debts, it was held:

7. What is the common law doctrine of priority or precedence of Crown debts? Halsbury, dealing with general rights of the Crown in relation to property, states that where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "*detur digniori*" (Laws of England, 4th Edn., Vol. 8, para 1076, at p. 666). Herbert Broom states:

Quando jus domini regis et subditi concurrunt jus regis praeferri debet.--Where the title of the king and the title of a subject concur, the king's title must be preferred. In this case *detur digniori* is the rule. ... where the titles of the king and of a subject concur, the king takes the whole. ... where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred." (Legal Maxims, 10th Edn., pp. 35-36)

This common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as "law in force" within the meaning of Article 372(1) of Constitution.

It was, furthermore, observed :

10. However, the Crown's 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 Crown's 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* it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar v. State of Bihar* 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* (TLL, 7th Edn., p. 386) -- "It seems a government debt in India is not entitled to precedence over a prior secured debt.

17. The principles enunciated therein have been reiterated by the Andhra Pradesh High Court in *Sitani Textiles and Fabrics (P) Ltd Vs. Asst. Collector of Customs and Central Excise, Hyderabad and Another*, where the applicability of

the provisions of the 1951 Act vis-à-vis the Central Excise dues were in question holding:

22. From the above it follows: That in the case of a pledge, pawnee has special property and lien which is not of an ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away goods or its price. The right of a pawnee could not be extinguished by the subsequent attachment/seizure of the goods under any other law. It gives the Pawnee a primary right to sell the goods in satisfaction of the liability of the pawnor. An unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the secured creditor's dues.

18. The principles laid down in Dena Bank were reiterated recently in Central Bank of India Vs. Siriguppa Sugars and Chemicals Ltd. and Others, wherein it was held:

There is no dispute that the sugar was pledged with the appellant Bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant bank. In view of the fact that the goods were validly pawned to the appellant bank, the rights of the appellant bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, u/s 529 and 529A of the Companies Act, 1956, stand only as unsecured creditor and their rights cannot prevail over the rights of the pawnee of the goods. Thus, the rights of the appellant bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen.

19. This Court also in State Bank of Bikaner and Jaipur Vs. National Iron and Steel Rolling Corporation and Others, , stated the law thus:

6. The claim of the Commercial Taxes Officer, Bharatpur rests on the provisions of Section 11- AAAA of the Rajasthan Sales Tax Act, 1954. Section 11-AAAA has been introduced in the Rajasthan Sales Tax Act, 1954 by way of an amendment in 1989. Section 11-AAAA is as follows:

11-AAAA. Liability under this Act to be the first charge.-- Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, penalty, interest and any other sum, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person.

Under this section the amount of sales tax or any other sum due and payable by a dealer or any other person under the Rajasthan Sales Tax Act, 1954, is a first charge on the property of the dealer or of such person. It is on account of the provisions of this section that the Commercial Taxes Officer claimed priority for

the recovery of the sales tax dues from the sale proceeds of the mortgaged property. The appellant, however, contended that since the mortgage in their favour is prior in point of time, their claim will have precedence over the claim of the sales tax authorities.

20. If a company had a subsisting interest despite a lawful seizure, there cannot be any doubt whatsoever that a charge /mortgage over Immovable property will have the same consequence.

{See also Karnataka State Industrial Investment and Development Corporation Limited Vs. The Secretary Government of India and Others, }.

21. In ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , this Court held as under:

48. Section 9 of the Companies Act only states that provisions thereof would override the memorandum or articles of association of the company or any other agreement executed or resolution passed by the company. There does not exist any provision in the Companies Act which provides that the provisions of Section 48 of the Transfer of Property Act would not be applicable in relation to the affairs of a company. Unless, expressly or by necessary implication, such a provision contrary to or inconsistent therewith carrying a different intent can be found in the Companies Act, Section 48 of the Transfer of Property Act, cannot be held to be inapplicable.

49. Section 48 of the Transfer of Property Act reads as under:

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.

50. The said provision, as noticed hereinbefore, deals with a specific situation. The exceptions to the provisions of Section 48 are as under:

(i) where parties execute a registered deed at any point in time which is subsequent to a prior but an unregistered deed. This is also subject to the doctrine of notice i.e. that parties to the registered deed executed after the unregistered deed did not have notice of the same;

(ii) where there are exceptions carved out by a statute--for example, Section 98 of the Bengal Tenancy Act;

(iii) a mortgage executed on the directions of the court to preserve a property;

(iv) where a "salvage lien" is created i.e. where lien is created for moneys advanced for the purposes of saving the property from destruction or forfeiture. The salvage lien is confined in English law to maritime lien.

22. Strong reliance, however, has been placed by Ms. Sunita Rao on Union of

India Vs. Somasundram Mills (P) Ltd. and Another, wherein this Court while construing the provisions of Sub-section (2) and (3) of Section 73 of the Code of Civil Procedure, held as under:

It is a general principle of law that debts due to the State are entitled to priority over all other debts. If a decree holder brings a judgment- debtor's property to sale and the sale proceeds are lying in deposit in court, the State may, even without prior attachment exercise its right to priority by making an application to the executing court for payment out. If however, the State does not choose to apply to the court for payment of its dues from the amount lying in deposit in the court but allows the amount to be taken away by some other attaching decree holder, the State cannot thereafter make an application for payment of its dues from the sale proceeds since there is no amount left with the court to be paid to the State. However, if the State had already effected an attachment of the property which was sold even before its sale, the State would be entitled to recover the sale proceeds from whoever has received the amount from the court filing a suit. Section 73(3) read with 73(2) CPC contemplate such a relief being granted in a suit.

23. This Court in that case was dealing with conflict of interest between a secured creditor and an unsecured creditor and not with a question we have to deal with.

24. Reliance has also been placed by Ms. Rao on Macson Marbles Pvt. Ltd. (supra) wherein the dues under Central Excise Act was held to be recoverable from an auction purchaser, stating :

7. We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of the same any conflict arises this aspect need not be examined. In this case, no such conflict arises between the corporation and the Excise Department. Hence it is unnecessary to examine this aspect of the matter.

8. The Department having initiated the proceedings u/s 11A of this Act adjudicated liability of respondent No. 4 and held that respondent No. 4 is also liable to pay penalty in a sum of Rs. 3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisputed. The appeal is disposed of accordingly.

25. The decision, therefore, was rendered in the facts of that case. The issue with which we are directly concerned did not arise for consideration therein. The Court also did not notice the binding precedent of Dena Bank as also other decisions referred to hereinbefore.

26. Section 11 of the Central Excise Act, 1944 reads as under :

Section 11.--Recovery of sums due to Government--In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, including the amount required to be paid to the credit of the Central Government u/s 11D the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and sent it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein, as if it were an arrear of land revenue.

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.

27. A bare perusal of the aforementioned provision clearly goes to show that the right to recover must start with the sale of excisable goods. It is only when the dues of the Central Excise Department are not satisfied by sale of such excisable goods, proceedings may be initiated to recover the dues as land revenue.

28. We may notice that a Division Bench of Orissa High Court in Suburban Ply and Panel Pvt. Ltd. Vs. Assistant Commissioner, Central Excise and Customs, Bhubaneswar Division and Others, , despite noticing Dena Bank (supra) as also other decisions, relying on Section 11 of the Central Excise Act and Rule 230(2) of the Central Excise Rules held as under:

The rule is prima facie wide in its operation. There is no challenge to the validity of the rule in this proceeding. Going by Sub-Rule (2) of Rule 230, it appears to us that a change in ownership of the undertaking would not in any manner effect the obligation of the person liable to pay excise duty and authority concerned has

the right to proceed against the successor in business or transferee even though the duty is assessed subsequently but the liability had arisen before such transfer. In other words, the right is given to the department to proceed against the Undertaking or its products or machinery even though it may be in the hands of the transferee. On a plain reading of the rule, it appears to us that if the defaulter had sold the Undertaking, the transferee would be liable for the excise duty that remained outstanding as on the date of transfer in its favour.

29. The High Court, with utmost respect, proceeded on a wrong premise that only in terms of Sub-section (4) of Section 29, proceeds of the sale will be held in trust by the Financial Corporation and appropriated towards the discharge of the debt due to it after first applying the proceeds in payment of cost charges and expenses incurred and the balance to be paid to the person entitled and having regard to the doctrine of Crown debt, the auction purchaser must satisfy it.

30. The Orissa High Court failed to notice the binding precedent of this Court in Dena Bank in its proper perspective. We are concerned here with the respective rights of a secured creditor and unsecured creditor over a property. If the finding of the Orissa High Court is correct, there was no necessity for the State Legislatures or the Parliament to amend laws incorporating provisions to create first charge over the properties of the debtor. The High Court failed to notice Article 372 of the Constitution as also the well settled principles of law that a statutory provision shall prevail over the Crown debt.

31. Furthermore, the right of a State Financial Corporation is a statutory one. The Act contains a non-obstante clause in Section 46B of the Act which reads as under:

Section 46B--Effect of Act on other laws--The provision of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.

32. The non-obstante clause shall not only prevail over the contract but also other laws. [See Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala,]

33. For the reasons aforementioned, there is no merit in the appeals. The appeals are dismissed accordingly with costs. Counsel's fee quantified to Rs. 50,000/-

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