Dena Bank vs Bhikhabhai Prabhudas Parekh & Co. & Ors on 25 April, 2000

Equivalent citations: AIR 2000 SUPREME COURT 3654, 2000 (5) SCC 694, 2000 AIR SCW 4237, 2001 CLC 118 (SC), (2000) 5 JT 307 (SC), 2000 (5) JT 307, 2000 (4) SCALE 125, 2000 (4) LRI 1251, 2000 KERLJ(TAX) 642, 2000 (6) SRJ 136, (2000) ILR (KANT) 4578, (2000) 1 BANKCAS 651, (2000) 2 RECCIVR 729, (2001) 247 ITR 165, (2000) 120 STC 610, (2001) 1 KANTLJ(TRIB) 96, (2000) 4 ANDHLD 93, (2000) 4 SUPREME 500, (2000) 4 SCALE 125, (2000) BANKJ 758, (2001) 107 COMCAS 157, (2001) 166 CURTAXREP 86

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Bench: R.C.Lahoti, S.R.Babu

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            PETITIONER:
DENA BANK

        Vs.

RESPONDENT:
BHIKHABHAI PRABHUDAS PAREKH & CO.  & ORS.

DATE OF JUDGMENT:       25/04/2000

BENCH:
R.C.Lahoti, S.R.Babu



JUDGMENT:
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R.C. Lahoti, J.

On 12.4.1972 Dena Bank (hereinafter the Bank for short), who is appellant before us, filed a suit for recovery of a sum of Rs.19,27,142.29 paise with future interest and costs against a partnership firm namely, M/s Bhikhabhai Prabhudas Parekh & Co. and its partners. The suit was based inter alia on a mortgage by deposit of title deeds made by the partnership firm and its partners on 24.4.1969. The suit sought for enforcement of the mortgage security. During the pendency of the suit some of the defendants expired and their legal representatives were brought on record. Three tenants in the mortgage property were also joined as parties to the suit so as to eliminate the possibility of their causing any hindrance in the enforcement of the charge created by the equitable mortgage of the property in favour of the Bank. During the pendency of the suit the State of Karnataka tried to attach

and sell the mortgaged properties for recovery of sales tax arrears due and payable by the partnership firm, the first defendant. The arrears of sales tax related to the assessment years 1957-58, 1966-67 to 1969-70 under the State Act and to the assessment years 1958-59 to 1964-65 and 1967-68 to 1969-70 under the Central Act. It appears that there was a court receiver appointed who tried to resist the States attempt to attach and sale the mortgaged property by preferring objections but he was unsuccessful. It appears (as is stated by the Trial Court in para 4 of its judgment) the State of Karnataka itself purchased the property in auction held on 30.4.1976. Upon a prayer made by the Bank the State of Karnataka was impleaded as a defendant in the suit. The Trial Court found all the material plaint averments proved and the Bank entitled to a decree. The charge created on suit properties by mortgage was also held proved. The trial court also held that the State could not have attached and sold the said properties belonging to partners for recovery of sales tax dues against the firm. However, the suit was directed to be dismissed as in the opinion of the Trial Court, Shri R.K. Mehta the Chief Manager and Power of Attorney holder of the Bank was not proved to be a person duly authorised to sign and verify the plaint and institute the suit.

The Bank preferred an appeal before the High Court. The High Court has held Shri R.K. Mehta to be a person duly authorised to sign, verify and present the plaint. During the course of hearing of the appeal, on 27.1.1992 a compromise was entered into between the Bank and the borrowers (firm and the partners). The settlement as arrived at between the Bank and the borrowers provided for a mode of payment of the decretal amount as agreed upon between the parties. Clauses 7 and 8 of the Deed of Compromise provide as under:-

> (7) That the defendant-respondent Nos.1-4, 6, 8-12, 14 & 15 are at liberty to sell the plaint schedule property either in portion or in one lot within a period of 2 years from the date of the decree. The plaintiff-appellant shall co-operate with the defendants-respondents in such sale or sales and the price (sale proceeds) shall be credited by the defendants-respondents to the account of the plaintiff-appellant Bank and the plaintiff-appellant shall thereafter give their consent and no objection to such sale or sales.

(8) The plaintiff-appellant shall be entitled to refund of the Court fee paid on the appeal memo and an appropriate direction may be issued by the Honble Court.

As the State of Karnataka was not a party to the compromise, the appeal had to be decided as contested insofar as the rights of the State are concerned. On behalf of the Bank, as also on behalf of the borrowers who supported the Bank in this regard, two pleas were raised. Firstly, 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. Secondly, it was submitted that the property mortgaged in favour of the Bank was the property belonging to the partners while the arrears of sales-tax related to the partnership firm which was assessed as a legal entity; the arrears of tax could be recovered from the assets of the partnership firm and not by proceeding against the property of the individual partners. Both the contentions were repelled by the High Court. While recording the compromise and passing a decree in terms thereof by its judgment dated 3.8.1992 the High Court has excluded clauses (7) and (8) aforesaid being illegal and not enforceable against the

State. Accordingly the suit filed by the Bank has been decreed by the High Court superseding the judgment and decree of the Trial Court. The operative part of the decree passed by the High Court reads as under:-

> We have already held that the sales tax arrears due to the State from the first respondent- partnership, shall have preference over the plaintiffs claim. Therefore, we accept the compromise except Clauses 7 and 8 and other terms which affect the preferential claim of the State to recover Sales Tax arrears by sale of the suit properties, and decree the suit of the plaintiff in terms of the compromise subject to exemption as stated above, and subject to the condition that the sales tax arrears including the penalty, if any, due under the Sales Tax Act from the 1st respondent and its partners shall have preference over the plaintiffs claim, and the plaintiff shall have to first pay the amount recovered during the course of execution to the State towards the sales tax arrears and the other amount due under the Sales Tax Act from the 1st respondent and its partners and thereafter the plaintiff is entitled to adjust the remaining amount towards the amount due under the decree.
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> On the basis of the submission made by Sri K.R.D. Karanth and the learned Advocate General, we further direct that though the State has a preferential claim, the right to recover the amount is assigned to the plaintiff on condition that the amount recovered shall first be paid towards the arrears of sales tax plus penalty, if any, under the Sales Tax Act and then adjust the balance amount if any towards the amount due under the decree.
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> The appeal is allowed. The judgment and decree of the trial Court are set aside. The suit of the plaintiff is decreed for a sum of Rs.25 lakhs as per the terms of the compromise subject to exceptions and conditions specified above. The amount deposited by the receiver into the Court upto this date shall be paid over to the plaintiff. The period of six months from today is fixed for redemption. If the contesting respondents fail to discharge the decretal amount, the plaintiff shall bring the property for sale immediately on the expiry of six months and complete the execution within a period of one year from today. In the event the contesting respondents pay the decretal amount within the aforesaid stipulated period, the State will be at liberty to recover its sales tax arrears with penalty, if any, under the Act, by sale of the suit schedule properties. As far as the plaintiff and the contesting respondents are concerned, they have compromised and in the compromise they have agreed to bear the respective costs through out. As far as the State is concerned, it is one of the defendants in the suit and it is one of the respondents in this appeal. The trial court also has directed the parties to bear their own costs. Further, the State is benefited by getting its right of preference adjudicated in a suit filed by the Bank. Under these circumstances, we order no costs in this appeal as far as the State is concerned.

> The Bank has come up in appeal by special leave to this Court feeling aggrieved by the decree of the High Court to the extent to which it recognises the right of the State to proceed against the suit property and that too in preference to the Banks right to proceed against the mortgaged property for realisation of its dues.
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> We have heard the learned counsel for the Bank and the learned counsel for the partnership firm and its partners, i.e., the borrowers. There has been no appearance on behalf of the State of Karnataka though served.
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> Two questions arise for consideration. Firstly, whether the recovery of sales tax dues (amounting to crown debt) shall have precedence over the right of the Bank to proceed against the property of the borrowers mortgaged in favour of the Bank. Secondly, whether property belonging to the partners can be proceeded against for recovery of dues on account of sales-tax assessed against the partnership firm under the provisions of the Kartanaka Sales Tax Act, 1957.

What is common law doctrine of priority or precedence of crown debts? Halsbury, dealing with general rights of the crown in relation to property, states where the Crowns 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, Fourth Edition Vol.8 para 1076 at page 666). Herbert Brown 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 kings title must be preferred. In this case detur digniori is the rulewhere the titles of the king and of a subject concur, the king takes the whole.where the kings title and that of a subject concur, or are in conflict, the kings title is to be preferred (Legal Maxims 10th edition, pp.35-36). This common law doctrine of priority of States 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 Constituiton. An illuminating discussion of the subject made by Chagla C.J. is to be found in Bank of India Vs. John Bowman AIR 1955 Bombay 305. We may also refer to Full Bench decision of Madras High Court in Manickam Chettiar Vs. Income Tax Officer, Madura AIR 1938 Mad. 360 as also to two Judicial Commissioners Court decisions in Peoples Bank of Northern India Ltd. Vs. Secretary of State for India AIR 1935 Sind 232 and Vassanbai Topandas Vs. Radhabai Tirathdas and ors. AIR 1933 Sind 368. Without multiplying the authorities we would straightaway come to the Constitution Bench decision in M/s Builders Supply Corporation Vs. Union of India AIR 1965 SC 1061.

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.
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> 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.
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> 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.

The Constitution Bench decision has been followed by three- judges Bench in Collector of Aurangabad Vs. Central Bank of India AIR 1967 SC 1831. 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 Bank of Bihar v. State of Bihar & Ors. AIR 1971 SC 1210, 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. The abovesaid being the position of law, the High Court has however proceeded to rely on certain provisions contained in Chapter XVI of Karnataka Land Revenue Act, 1964 as also the provisions contained in Sections 13 and 15 of Kartanaka Sales Tax Act, 1957 for holding that the arrears of sales-tax would be entitled to a preference even over the debt secured by mortgage in favour of the appellant Bank. We would notice the relevant legal provisions.

Chapter XVI of Kartanaka Land Revenue Act, 1964 is titled as Realisation Of Land Revenue And Other Public Demand. Sections 158, 190 and 2 (relevant parts thereof) are extracted and reproduced hereunder:-

> 158. Claim of State Government to have precedence over all others. (1) Claim of the State Government to any moneys recoverable under the provisions of this Chapter shall have precedence over any other debt, demand or claim whatsoever whether in respect of mortgage, judgment-decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.

(2) In all casees, the land revenue for the current revenue year, of land for agricultural purposes, if not otherwise discharged, shall be recoverable in preference to all other claims, from the crop of such land.

(2) Definitions In this Act, unless the context otherwise requires, -

xxx xxx xxx (14) land includes benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth, and also shares in, or charges on, the revenue or rent of villages or other defined areas;

190. Recovery of other public demands.- The following moneys may be recovered under this Act in the same manner as an arrear of land revenue, namely :-

> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) all sums declared by this Act or any other law for the time being in force to be recoverable as an arrear of land revenue.

(Emphasis supplied) Section 13 of the Karnataka Sales Tax Act, 1957 is also relevant. Sub-sections (1) and (3) (to the extent relevant) are extracted and reproduced hereunder :-

> Sec.13. Payment and Recovery of Tax. [(1) The Tax [or any other amount due] under this Act shall be paid in such manner [in such instalments, subject to such conditions, on payment of such interest] and within such time, as may be prescribed.] xxx xxx

xxx xxx xxx xxx (3) Any tax assessed, or any other amount due under this Act from a dealer or any other person may without prejudice to any other mode of collection be recovered xxx xxx xxx xxx xxx xxx

(a) as if it were an arrear of land revenue, or xxx xxx xxx xxx xxx xxx (emphasis supplied) The Act had come into force on 1.10.1957. With effect from 18.11.1983 the following sub-section (2-A) was inserted into the body of Section 15 of the Kartanaka Sales Tax Act, 1957 by Amending Act No.23 of 1983 and came into force on the same day:-

(2-A) Where any firm is liable to pay any tax or penalty or any other amount under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment.

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 case (supra), vide para 28, 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 debt, 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 States 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 Vs. Central Bank of India (Supra), the provisions 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 Vs. 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.

The learned counsel for the appellant submitted that sub-section (2-A) of Section 15 of Karnataka Sales Tax Act could not be given a retrospective operation. This submission is misconceived. A legislation may be made to commence from a back date, i.e. from a date previous to the date of its enactment. To make a law governing a past period on a subject is retrospectivity. A legislature is competent to enact such a law. The ordinary rule is that a legislative enactment comes into operation only on its enactment. Retrospectivity is not to be inferred unless expressed or necessarily implied in the legislation, specially those dealing with substantive rights and obligations. It is a misnomer to say that sub-section (2A) of Section 15 of the Karnataka Sales Tax Act is being given retrospective operation. Determining the obligation of the partners to pay the tax assessed against the firm by making them personally liable is not the same thing as giving the amendment a retrospective operation. In Principles of Statutory Interpretation (by Justice G.P. Singh, Seventh Edition, 1999, at page 369) it is stated :- The rule against retrospective construction is not applicable to a statute merely because a part of the requisites for its action is drawn from a time antecedent to its passing. If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its operation and the rule may well result in virtual nullification of most of the statutes. An amending Act is, therefore, not retrospective merely because it applies also to those to whom pre-amended Act was applicable if the amended Act has operation from the date of its amendment and not from an anterior date.

There is, therefore no question of sub-section (2-A) of Section 15 of the Karnataka Sales Tax Act being given a retrospective operation. It is prospective. However, it does not make any difference for the facts of the present case.

The High Court has relied on Section 25 of the Partnership Act, 1932 for the purpose of holding the partners as individuals liable to meet the tax liability of the firm. Section 25 provides that every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. A firm is not a legal entity. It is only a collective or compendious name for all the partners. In other words, a firm does not have any existence away from its partners. A decree in favour of or against a firm in the name of the firm has the same effect as a decree in favour of or against the partners. While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of the firm. This principle cannot be stretched and extended to such situations in which the firm is deemed to be a person and hence a legal entity for certain purpose. The Karnataka Sales Tax Act, with which we are concerned, also gives the firm a legal status by treating it as a dealer and hence a person for the limited purpose of assessing under the Sales Tax Act. It was, therefore, held by a three-judges Bench in Commissioner of Sales Tax, M.P. & Ors. v. Radhakrishan & Ors. AIR 1979 SC 1588:- ..a firm in a partnership and a Hindu undivided family are recognised as legal entities and as such proceedings can only be taken against the firm or undivided family as the case may be. Neither the partners of the firm nor the members of the Hindu undivided family will be liable for the tax assessed against the firm or the undivided Hindu family.

However, this principle would have no applicability if there be a statutory provision to the contrary. In the case of Radhakrishan & Ors. (supra), vide para 7 itself, this Court observed :- It may be noted that S. 276 (d) of the Income-tax Act specifically includes all partners within the definition of the word firm and a company includes directors. In Bombay Sales Tax Act, 1959, under Section 18 it is specifically provided that where any firm is liable to pay tax under the Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment. In the absence of a specific provision as found in Section 18 of the Bombay Act the partners of the firm cannot be held liable for the tax assessed on the firm.

A provision similar to the one included in Section 18 of the Bombay Sales Tax Act has been incorporated in the Karnataka Sales Tax Act as referred to hereinabove and that is why the partners of the borrower firm in the case before us cannot take shelter behind the law laid down by this court in Radhakrishan & Ors. (supra). Here we may also refer to a two-judge Bench decision of this Court in Third Income- tax Officer & Anr. Vs. Arunagiri Chettiar (1996) 220 ITR 232 SC in which provisions of S.188 A Income-tax Act, 1971 have been noticed. S.188 A declares a partner and his legal representatives jointly and severally liable along with the firm to pay any tax, penalty or sum payable for the year in which he was a partner. It was observed that S.188 A explicitly provides what was implicit hitherto. In the case at hand the partners are being held liable by reason of Sec.15(2A) of the Karnataka Sales Tax Act, 1957.

The learned counsel for the appellant is right in submitting that on the day on which the State of Karnataka proceeded to attach and sell the property of the partners of the firm mortgaged with the Bank, it could not have appropriated the sale proceeds to sales tax arrears payable by the firm and defeating the Banks security in view of the law as laid down by this Court in Commissioner of Sales Tax, M.P. Vs. Radhakrishan & Ors. (supra). However, still in the facts and circumstances of the case, the appellant Bank cannot be allowed any relief. Section 15 (2A) of Kartanaka Sales Tax Act had come into force on 18.12.1983 while the decree in favour of the Bank was passed on 3.8.1992 and is yet to be executed. The claim of the appellant Bank is still outstanding. Even if we were to set aside the sale held by the State, it will merely revive the arrears outstanding on account of sales tax to which further interest and penalty shall have to be added. The amended Section 15 (2-A) of the Karnataka Sales Tax Act shall apply. The State shall have a preferential right to recover its dues over the rights of the appellant Bank and the property of the partners shall also be liable to be proceeded against. No useful purpose would, therefore, be served by allowing the appeal which will only further complicate the controversy.

For the foregoing reasons, the appeal is dismissed though without any order as to the costs in the facts and circumstances of the case.