

PUNJAB NATIONAL BANK

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v.

UNION OF INDIA & ORS.

(Civil Appeal No. 2196 of 2012)

FEBRUARY 24, 2022

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[L. NAGESWARA RAO AND VINEET SARAN, JJ.]

Central Excise Rules, 1944: r.173(Q)(2) – Confiscation and penalty – On facts, issuance of notice to RIL company for evasion of excise duty and violation of Central Excise Act – Demand of excise duty confirmed and imposition of penalty u/r. 173(Q)(1) and order of confiscation of land, building plant and machinery u/r.173(Q)(2) passed –Subsequently, confiscation order set aside by the tribunal and the matter remanded back to de novo proceedings since r.173(Q)(2) had been omitted by notification dated 12.05.2000 – Thereafter, RIL availed credit facilities from the appellant Bank, mortgaged all its movable and immovable properties, and also created a charge on the assets and block of the company – Subsequently, the Commissioner again confirmed the demand of excise duty, imposed penalty and also ordered for confiscation of all land, building, plant, machinery of RIL – Besides this, RIL was also issued notice u/s. 13(2) and also s.13(4) of the SARFAESI Act since RIL failed to clear loan amount of the appellant Bank – Writ petition by the appellant Bank challenging the orders of confiscation – Dismissed by the High Court – On appeal, held: Commissioner of Customs and Central Excise could not have invoked the powers u/r. 173Q(2) on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said r. 173Q(2) was not in the Statute books, having been omitted by a notification dated 12.05.2000 – Dues of the secured creditor, the appellant- bank, would have priority over the dues of the Excise Department, as even after insertion of s. 11E in the 1944 Act w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 would have an overriding effect on the provisions of the 1944 Act – Thus, the confiscation orders quashed – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Central Excise Act, 1944 – ss. 11E, 38A – General Clauses Act, 1897 – s. 6.

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A **Allowing the appeal, the Court**

- HELD:1.** The Commissioner of Customs and Central Excise could not have invoked the powers under Rule 173Q(2) of the Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said Rule 173Q(2) was not in the Statute books, having been omitted by a notification dated 12.05.2000. Secondly, the dues of the secured creditor, i.e. the Appellant- bank, would have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 would have an overriding effect on the provisions of the Central Excise Act of 1944. The confiscation orders dated 26.03.2007 and 29.03.2007, passed by the Commissioner Customs and Central Excise are quashed. [Para 47, 48][694-F-H]
- D** 2.1 There is no find merit in the submission of the respondent that notwithstanding the omission of Section 173Q(2) from the Central Excise Rules, 1944 vide notification dated 12.05.2000, the respondent No. 3 was entitled to continue the proceedings on account of Section 38A(c) and Section 38A(e) of the Central Excise Act, 1944, read along with Section 6 of the General Clauses Act, 1897. [Para 33][686-A-B]
- F** 2.2 In the instant case, the proceedings initiated under the erstwhile Rule 173Q(2) would come to an end on the repeal of the said Rule 173Q(2) of the Central Excise Rules, 1944. Respondent counsel's submission that the proceedings would be saved on account of Section 38A(c) and 38A(e) of the Central Excise Act, 1944 and Section 6 of the General Clauses Act, 1897, is misplaced and lacks statutory backing. Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a "Rule". Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the respondent would not be able to

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enjoy its protection because Section 38A(c) and 38A(e) are attracted only when “unless a different intention appears”. In the instant case, the legislature has clarified its intent to not restore/revive the power of confiscation of any land, building, plant machinery etc., after omission of the provisions contained in Rule 173Q(2) w.e.f 12.05.2000. This intention of the legislature can be drawn out from the fact that power to confiscate any land, building, plant, machinery etc. after omission w.e.f. 12.05.2000 has not been introduced in the subsequent Central Excise Rules, 2001, Central Excise Rules, 2002 and Central Excise Rules, 2017. Additionally, this intent is also fortified by the fact that Rule 211 of the Central Excise Rules, 1944, inter alia, provided that “anything” confiscated under the Rules shall thereupon vest in Central Government, whereas Rule 28 of the Central Excise Rules of 2001, 2002 and 2017, which are pari materia to the earlier Rule 211 of the 1944 Rules, instead of the word “anything”, provided for vesting of confiscated “Goods” in the Central Government. Lastly, after omission of Rule 173Q(2) of 1944 Rules w.e.f. 12.05.2000 and after supersession of Rule 211 of 1944 Rules in the year 2001, the newly enacted Rule 28 of the Rules of 2001, Rule 28 of the Rules of 2002 and Rule 28 of the Rules of 2017, did not provide for confiscation of any land, building, plant, machinery etc. and their consequent vesting in the Central Government, as Rule 28 only provided for vesting in the Central Government of the “Goods” confiscated by the Central Excise Authorities under the Excise Act, 1944. This derivation of the legislature’s intent, in conjunction with the ratio laid in the case of *Kotak Mahindra Bank*’s case which makes it apparent that the confiscation proceedings were not saved by these mentioned provisions and that the final confiscation order dated 26.03.2007 and 29.03.2007 were passed without jurisdiction by the Commissioner of Central Excise and Customs. [Para 36] [688-E-H; 689-A-F]

Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. (2000) 2 SCC 536 : [2000] (1) SCR 518 – followed.

*Kotak Mahindra Bank Ltd. Vs. District Magistrate 2010
SCC online Gujarat 10656 – approved.*

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- A **2.3 As regards, the priority of secured creditor's debt over that of the Excise Department, the High Court in the impugned judgment held that "in view of the matter, the question of first charge or second charge over the properties would not arise."** The High Court misinterpreted the issue to state that the question of first charge or second charge over the properties, would not arise. The submissions of the counsel for the appellant hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the instant case, where the land, building, plant machinery, etc. have been mortgaged/hypothecated to a secured creditor, having regard to the provisions contained in section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, the Secured Creditor would have a First Charge on the Secured Assets. Moreover, section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, would have overriding effect on all other laws. Even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002. The provisions contained in the SARFAESI Act, 2002, even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, would have an overriding effect on the provisions of the Act of 1944. [Paras 37, 43, 44][689-F-G; 693-E-G; 694-A-B]

Union of India vs SICOM Ltd. & Anr. (2009) 2 SCC

F **121 : [2008] (17) SCR 120 – relied on.**

UTI Bank Ltd. vs. Dy. Commissioner Central Excise 2006

SCC Online Madras 1182; Krishna Lifestyle

Technologies Ltd. vs. Union of India & Ors. 2008 SCC

Online Bombay 137 – approved.

G *Dena Bank vs Bhikhabhai Prabhu Dass Parikh & Anr. (2000) 5 SCC 694 : [2000] (3) SCR 509; Central Bank of India vs. Siriguppa Sugurs & Chemicals Ltd. & Ors. (2007) 8 SCC 353 : [2007] (8) SCR 898 – referred to.*

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2.4 Moreover, the submission that the validity of the confiscation order cannot be called into question merely on account of the appellant being a secured creditor is misplaced and irrelevant to the issue at hand. The submission that a confiscation order cannot be quashed merely because a security interest is created in respect of the very same property is not worthy of acceptance. However, what is required to be appreciated is that, in the instant case, the confiscation order is not being quashed merely because a security interest is created in respect of the very same property. On the contrary, the confiscation orders, in the instant case, deserve to be quashed because the confiscation orders themselves lack any statutory backing, as they were rooted in a provision that stood omitted on the day of the passing of the orders. Hence, it is this inherent defect in the confiscation orders that paves way for its quashing and not merely the fact that a security interest is created in respect of the very same property that the confiscation orders dealt with. [Para 45][694-B-E]

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2.5 The submission that the confiscation proceedings were initiated almost 8-9 years prior to the charge being created in respect of the very same properties in favour of the bank is also inconsequential. The fact that the charge has been created after some time period has lapsed post the initiation of the confiscation proceedings, would not provide legitimacy to a confiscation order that is not rooted in any valid and existing statutory provision. [Para 46][694-E-F]

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Bank of Bihar vs State of Bihar (1972) 3 SCC 196 : [1971] (0) Suppl. SCR 299; Rana Girders Ltd. vs Union of India & Ors. (2012) 10 SCC 746; Sitani Textiles and Fabrics (Pvt.) Ltd. vs. Assistant Collector of Customs & Central Excise 1998 SCC Online Andhra Pradesh 416; Nagarjuna Construction Company Ltd. vs. Government of Andhra Pradesh (2008) 16 SCC 276 : [2008] (14) SCR 859; Canara Bank vs Debasis Das (2003) 4 SCC 557 : [2003] (2) SCR 968; Gammon India vs Special Chief Secretary (2006) 3 SCC 354 : [2006] (2) SCR 304; Ambalal Sarabhai Enterprises Ltd. vs Amritlal (2001) 8 SCC 397 : [2001] (2) Suppl. SCR

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- A **195; Brihan Maharashtra Sugar Syndicate Ltd. vs Janarand Ramachandra Kulkarni [1960] 3 SCR 85 – referred to.**

Case Law Reference

B	[1971] 0 Suppl. SCR 299 (2012) 10 SCC 746 [2008] 14 SCR 859 [2003] 2 SCR 968	referred to referred to referred to referred to	Para 17 Para 17 Para 22 Para 22
C	[2006] 2 SCR 304 [2001] 2 Suppl. SCR 195 [1960] 3 SCR 85 [2000] 1 SCR 518	referred to referred to referred to followed	Para 22 Para 24 Para 24 Para 36
D	[2000] 3 SCR 509 [2007] 8 SCR 898 [2008] 17 SCR 120	referred to referred to relied on	Para 39 Para 40 Para 44

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2196

E Of 2012.

From the Judgment and Order dated 05.08.2008 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 1464 of 2008.

Dhruv Mehta, Sr. Adv., Rajesh Kumar-I, Anant Gautam, Nipun Sharma, M/s Mitter & Mitter Co., Advs. for the Appellant.

F K. M. Nataraj, ASG, Ms. Rashmi Malhotra, Mukul Singh, Shailesh Madiyal, Indira Bhakar, M. K. Maroria, B. Krishna Prasad, Pradeep Jain, Ms. Manjula Gupta, Buddy A Ranganadhan, A. V. Rangam, Advs. for the Respondents.

G The Judgment of the Court was delivered by
VINEET SARAN, J.

1. The present Civil Appeal arises out of the judgment and order dated 05.08.2008 passed by the Allahabad High Court, wherein the writ petition filed by the Appellant was dismissed in limine.

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2. The brief facts of the case, relevant for the purpose of the present appeal, are that the Commissioner, Customs and Central Excise, Ghaziabad (Respondent No. 2) issued a show cause notice dated 31.12.1996 to M/s Rathi Ispat Ltd./Respondent No. 4 (for short “RIL”) for evasion of excise duty and violation of the Central Excise Act, 1944. By an order dated 25.11.1997, Respondent No. 2 confirmed an excise duty demand of Rs.6,97,62,102/- against RIL and imposed a penalty of Rs.7,98,03,000/- under Rule 173Q(1) and confiscated the land, building, plant and machinery of RIL under Rule 173Q(2) of the Central Excise Rules, 1944 (for short “1944 Rules”). Sub-rule 2 of Rule 173Q of the Central Excise Rules, 1944, came to be omitted by a notification dated 12.05.2000 issued by the Government of India. Subsequently, the order dated 25.11.1997 was set aside by the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT), now known as the Customs Excise and Service Tax Appellate Tribunal (CESTAT), on the ground of violation of principles of natural justice, and the matter was remanded back for de novo proceedings.

3. In 2005, RIL availed credit facilities under various schemes from the consortium of banks, with the Appellant/Punjab National Bank as the lead bank, and mortgaged/hypothecated all its movable and immovable properties for securing the loan. RIL created a charge on both the assets (raw material, stock in progress, finished goods, receivables etc.) and block (land, building, plant, machinery and other fixed assets) of the company in favour of the Appellant bank.

4. Subsequently, the Commissioner Customs and Central Excise, Ghaziabad vide order dt. 26.03.2007, confirmed the demand of excise duty of Rs.7,98,02,226/- and a penalty of Rs.7,98,03,000/- on RIL. The Commissioner also ordered, under rule 173Q(2) of the 1944 Rules, for the confiscation of all the land, building, plant, machinery and materials used in connection with manufacture and storage.

5. The Central Excise Commissioner, vide another order dated 29.03.2007, confirmed a demand of central excise duty amounting to Rs.2,67,00,348 and Rs.74,24,332 from RIL. The Commissioner also imposed a penalty of Rs.3,41,24,680/- and further, under rule 173Q(2) of the 1944 Rules, ordered confiscation of land, building, plant, machinery, material, conveyance etc. of RIL that were used in connection with manufacture, production, storage or disposal of goods.

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- A 6. However, in light of the fact that RIL had defaulted in clearing the loan amount and had failed to liquidate outstanding dues, the Appellant bank, on 02.08.2007, issued notice to RIL under section 13(2) of the SARFAESI Act, 2002, further, notice was issued to RIL under section 13(4) of SARFAESI Act, 2002.
- B 7. In light of the section 13(4) notice, the Office of the Assistant Commissioner, Customs and Central Excise Division informed the bank, vide a letter dated 27.11.2007, that the property was already confiscated by virtue of Rule 173Q(2) of 1944 Rules and that an appeal is pending against the orders and the matter is sub-judice. Appellant bank replied to
- C the above letter on 22.12.2007, whereby it informed the department that the properties in question had been mortgaged with the bank and RIL was required to satisfy the debts. In furtherance of this, the Appellant bank took symbolic possession of the properties on 28.12.2007. Subsequently, the Appellant bank was informed by the Assistant Commissioner, Customs and Central Excise, vide a letter dated 15.01.2008,
- D that the properties of RIL should not be dealt with without their written consent.
- E 8. In essence, it has been the contention of the Customs & Excise Department that in view of the fact that all the movable and immovable properties of RIL stand confiscated by the orders passed by the
- F E Commissioner, Customs & Central Excise, Ghaziabad, the possession of the property in question cannot be taken by the Appellant bank.
- G 9. Aggrieved by the orders of confiscation (dated 26.03.2007 and 29.03.2007) and the further communications/letters by the department (dated 27.11.2007 and 15.01.2008), the Appellant bank filed a Writ Petition before the Allahabad High Court, which was dismissed with the observations that:
- "We find that in the present case, taxes are not sought to be recovered from M/s Rathi Ispat Ltd., respondent No. 4, by way of attachment or otherwise from the movable or immovable assets of the respondent no.4, but the stand of the Central Excise Authorities is that the properties stand confiscated and vests in the Central Government as a result of the order of confiscation"*
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The High Court further held that:

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“From the meaning of the word confiscate/confiscation”, we find that if any property has been confiscated it vests in the state and no person can claim any right, title, or interest over it.”

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While dismissing the Writ Petition of the Appellant bank, the Allahabad High Court, eventually held that:

“In view of the matter, the question of first charge or second charge over the properties would not arise. The debt does not get extinguished but it cannot be recovered from the confiscated property that being the position, we do not find any merit in the Writ Petition. So far as the challenge to the order of confiscation is concerned, we may mention that the petitioner has no locus standi to challenge the order of confiscation as the Respondent no. 4 has already preferred an appeal against it. However, if in appeal preferred by Respondent no. 4, the order of confiscation is set aside then the bank can proceed against the properties in question in accordance with law”

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10. Aggrieved by the abovementioned High Court Order, this appeal has been filed by way of Special Leave Petition.

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11. Mr. Dhruv Mehta, learned Senior Counsel for the Appellant Bank has raised before us the following two issues which arise for our consideration:

Issue No.1: Whether the Ld. Commissioner Custom and Central Excise could have invoked the powers under Rule 173(Q)(2) of Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the rule 173Q(2) was not on the Statue Book having been omitted w.e.f. 17.05.2000?

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Issue No.2: Whether in the absence of any provisions providing for First Charge in relation to Central Excise dues in the Central Excise Act, 1944, the dues of the Excise department would have priority over the dues of the Secured Creditors or not?

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- A 12. With respect to the **first issue**, it has been argued by the learned Counsel for the Appellant bank that the Commissioner could not have passed the orders dated 26.03.2007 and 29.03.2007 by invoking the powers under Rule 173Q(2), which was not in existence in the Statute Books as on the said date, having been omitted by a notification dated 12.05.2000.
- B 13. It has been contended that reliance upon the provisions contained in Section 38A of the Central Excise Act, 1944 and Section 6 of the General Clauses Act, 1897 to support the orders of the Commissioner is liable to be rejected for the reason that a Constitution Bench of this Court, in the matter of **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536**] has held that the provisions contained in section 6 of the General Clauses Act, 1897 are not applicable to the Central Excise Rules. It has further been contended that no reliance can be placed on section 38A for the reason that the provision contained in the said section 38A are attracted “unless a different intention appears”. In the present case, the contra-intention of the legislature that the legislature did not intent to revive/restore the power of confiscation of any land, building, plant machinery etc., after omission of the provisions contained in Rule 173Q(2) w.e.f 12.05.2000 is evident from the following:
- E I. The provisions contained in Rule 173Q(2) i.e. power to confiscate any land, building, plant, machinery etc. after omission w.e.f. 12.05.2000 has not been introduced in the subsequent Central Excise Rules, 2001, Central Excise Rules, 2002 and Central Excise Rules, 2017.
- F II. Further, Rule 211 of the Central Excise Rules, 1944, inter alia, provided that “anything” confiscated under the Rules shall thereupon vest in Central Government, whereas Rule 28 of the Central Excise Rules of 2001, 2002 and 2017, which are pari materia to the earlier Rule 211 of the 1944 Rules, instead of the word “anything”, provided for vesting of confiscated “Goods” in the Central Government.
- G III. Thus, after omission of Rule 173Q(2) of 1944 Rules w.e.f. 12.05.2000 and after supersession of Rule 211 of 1944 Rules in the year 2001, the newly enacted Rule 28 of the Rules of 2001, Rule 28 of the Rules of 2002 and Rule 28 of the Rules of 2017, did not provide for confiscation of any land,

building, plant, machinery etc. and their consequent vesting in the Central Government, as Rule 28 only provided for vesting in the Central Government the “Goods” confiscated by the Central Excise Authorities under the Excise Act, 1944. A

In support of the abovementioned submissions, Mr. Dhruv Mehta relies upon a judgment of the Gujarat High Court, in the matter of *Kotak Mahindra Bank Ltd. Vs. District Magistrate [2010 SCC online Gujarat 10656]*. B

14. With respect to the first issue, the Senior Counsel for the Appellant concluded his submission by stating that the Commissioner had no power, authority or jurisdiction to invoke the provisions contained in Rule 173Q(2) of the Central Excise Rules, which stood omitted from the Statute book w.e.f. 12.05.2000, much prior to the passing of the orders dated 26.03.2007 and 29.03.2007. C

15. The second issue raised by the learned Senior Counsel for the Appellant is “*Whether in the absence of any provisions providing for First Charge in relation to Central Excise dues in the Central Excise Act, 1944, the dues of the Excise department would have priority over the dues of the Secured Creditors or not?*” It has been contended that prior to insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like the present case, where the land, building, plant machinery, etc. had been mortgaged/ hypothecated in favour of the secured creditor, having regard to the provisions contained in section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, the secured creditor will have a First Charge on the Secured Assets. D E F

16. The learned Senior Counsel has further submitted that section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the said Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law, the provisions of the SARFAESI Act, 2002 shall have overriding effect on all other laws. It was further contended that even the provisions contained in section 11E of the Central Excise Act, 1944, which has been inserted w.e.f. 08.04.2011, provides for First Charge on the property of the Assessee and is a non-obstante G H

- A Clause. However, the provisions contained in Section 11E are subject to the provisions contained in the SARFAESI Act, 2002. Thus, the provisions of SARFAESI Act, 2002, even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, has overriding effect on the provisions of the Act of 1944.
- B 17. In addition to the abovementioned submissions, the learned Senior Counsel for the Appellant has argued that it is well settled law laid down by this Court that the Crown debts (Unsecured) have no priority over the Secured dues of the Secured Creditors/ Pawnee/ Bailee. In support of the above submission, reliance has been placed upon the following judgements:
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- i. *Bank of Bihar vs State of Bihar* [(1972) 3 SCC 196]
 - ii. *Dena Bank vs Bhikhabhai Prabhu Dass Parikh & Anr.* [(2000) 5 SCC 694]
 - iii. *Central Bank of India Vs. Siriguppa Sugurs & Chemicals Ltd. & Ors.* [(2007) 8 SCC 353]
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- iv. *Union of India vs SICOM Ltd. & Anr.* [(2009) 2 SCC 121]
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- v. *Rana Girders Ltd. Vs Union of India & Ors.* [(2012) 10 SCC 746]
 - vi. *Sitani Textiles and Fabrics (Pvt.) Ltd. Vs. Assistant Collector of Customs & Central Excise* [1998 SCC Online Andhra Pradesh 416]
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- vii. *UTI Bank Ltd. Vs. Dy. Commissioner Central Excise* [2006 SCC Online Madras 1182 (Full Bench)]
 - viii. *Krishna Lifestyle Technologies Ltd. Vs. Union of India & Ors.* [2008 SCC Online Bombay 137]
- G 18. Mr. Mehta has, thus, submitted that in view of the above submissions and decided cases, the Appellant bank, being a secured creditor under the provisions of SARFAESI Act, 2002, had First Charge on the secured Assets and is entitled to recover its secured dues, prior to the dues of the Excise Department. It has also been submitted that the intention of the Legislature, apart from the provisions contained in Section 11E in the Central Excise Act, 1944 [inserted w.e.f. 08.04.2011], is also evident from the subsequent provisions inserted in RDBA Act, 1993, by
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way of Section 31B [notified w.e.f. 01.09.2016] and insertion of Section 26E in the SARFAESI Act [w.e.f. 24.01.2020], that the Legislature has always intended that the Banks and Financial Institutions will have priority to recover its secured dues from the Secured Assets prior to payment/recovery of the dues of Revenue/Taxes, Government dues. A

19. Per contra, Mr. K.M. Nataraj, learned Additional Solicitor General appearing for the respondent has contended that the appeal raises the following two questions of law: B

(A) *Issue No. 1: Whether a confiscation order passed by Respondent No. 2 in respect of the land, building, plant and machinery of the Respondent No. 4 (RIL) can be defeated by a security interest created by the said Respondent No. 4 (RIL) in favour of the Appellants and other banks, almost 8 years after the confiscation proceedings (under Rule 173Q(2) of the Central Excise Rules, 1944) had been initiated by the respondent No. 2 against RIL?* C D

(B) *Issue No. 2: Whether the Proceedings initiated by the Respondent no.2, Commissioner Custom & Central Excise under rule 173Q(2) of the Central Excise Rules, 1944, prior to the omission of the said Rule from the Statute Book are not saved on account of Section 38A(c) and 38A(e) of the Central Excise Act, 1944 and consequently, Whether the Commissioner was not justified in passing orders of confiscation dated 26.03.2007 and 29.03.2007, although on such date, the said Rule 173Q(2) was omitted and the 1944 rules were replaced with the Central Excise Rules 2001 subsequently.* E F

20. The learned Additional Solicitor General submitted that the first issue raised by the Appellant was never raised by the Appellant either before the Tribunal or in the Appeal before this Court and has been raised for the first time in this Appeal. G

21. With respect to the second issue raised by the Appellant, it has been argued by the Learned ASG that this question, as framed and answered by the Appellant, is entirely alien to the dispute at hand. The present dispute is not at all one of priority of charges or debts. On the H

- A other hand, what was challenged before the High Court was the order of confiscation, and the relevant question for consideration of this Court is whether a confiscation order passed by the Central Excise Authorities in respect of the land, building, plant and machinery of RIL can be defeated by a security interest created by RIL in favour of the Appellant and other banks, almost 8 years after the confiscation proceedings (under Rule 173Q(2) of the Central Excise Rules, 1944) had been initiated by the respondent No. 2 against RIL?

22. Mr. K.M. Nataraj, ASG, has contended that the proceedings under Rule 173Q(2) of the 1944 Rules commenced by show cause notice dated 31.12.1996. Notwithstanding the omission of Section 173Q(2) from

- C the 1944 Rules vide notification dated 12.05.2000, the respondent No. 3 was entitled to continue proceedings on account of Section 38A(c) and Section 38A(e) of the Central Excise Act, 1944. The respondent No. 2 was therefore entitled to pass orders dated 26.03.2007 and 29.03.2007 in exercise of his powers under the repealed Rule 173Q(2) of the 1944 Rules, even though as on the date of the said orders, the 1944 Rules had been replaced. In support of the same he submitted that it is not in dispute that the confiscation proceedings against RIL were initiated in 1996 i.e. much before the repeal of the 1944 Rules and although the order initially passed in those proceedings was set aside by the CEGAT on account of the violation of the principles of natural justice, it is evident from the remand order itself that the proceedings (post remand) were a continuation of what had been initiated vide show cause notice dated 31.12.1996. To buttress this submission, reliance has been placed upon the decision rendered in the case of *Nagarjuna Construction Company Ltd. Vs. Government of Andhra Pradesh (2008) 16 SCC 276*, wherein it is held that when an order is struck down as invalid, being in violation of principles of natural justice, all that is done is vacation of the order assailed by virtue of its inherent defect, but the proceedings are not terminated. While doing so, this court relied upon *Canara Bank vs Debasis Das (2003) 4 SCC 557*.

- G 23. It was thus urged, that once it is established that the confiscation proceedings under Rule 173Q started much prior to the omission of the said Rule from the Statute, the question for consideration would be whether the proceedings against RIL could be continued under a provision which no longer existed on the Statute. Mr. K.M. Nataraj, ASG has submitted in this context that section 38A of the Central Excise Act, H 1944, provides, inter alia, that even when a Rule is repealed, amended or

superseded, unless a different intention appears, such repeal would not affect any right or liability acquired or accrued or affect any investigation, legal proceeding or remedy in respect of any such right or liability.

24. In context of the application of section 6 of the General Clauses Act, 1897, learned ASG relied upon decisions of this Court in the cases of *Gammon India vs Special Chief Secretary [2006] 3 SCC 354]*; *Ambalal Sarabhai Enterprises Ltd. Vs Amritlal [2001] 8 SCC 397]*; *Brihan Maharashtra Sugar Syndicate Ltd. Vs Janarand Ramachandra Kulkarni (1960) 3 SCR 85*) and contended that although Rule 173Q(2) was initially omitted from the 1944 Rules and subsequently the 1944 Rules were repealed and were substituted by the 2001 Rules, there was nothing expressly stated in the new Rules which manifested any intention to destroy the liabilities which came into existence on account of the 1944 Rules or which manifested any intention to nullify any investigation that was pending in respect of such accrued liability. Learned ASG thus submitted, that Section 38A(c) and 38A(e) of the Central Excise Act would apply with full force to save the proceedings which had already been initiated under Rule 173Q(2) of the 1944 Rules, as Section 38A(c) of the Act saves the rights and liabilities which were not only acquired but also accrued as on the date of the amendment or repeal of a provision, and Section 38A(e) of the Act saves investigations that had commenced into such rights and liabilities.

25. Mr. Natraj, learned ASG has further submitted that the second issue raised by the Appellant (regarding the priority of the dues of the secured creditor over that of crown debts or government debts) does not arise at all in the facts of the present case, since the confiscation order by the Respondent No. 2 is not merely an order for recovery of dues but instead is in the nature of a penal order to punish the wrongdoer i.e. RIL. This, is evident from the fact that even under the 1944 Rules, confiscation is provided for under Rule 173Q whereas mere recovery of dues is provided for under section 11 of the Central Excise Act, 1944.

26. It is contended by Mr. K.M. Nataraj, ASG, that in the present case, the confiscation proceedings were initiated almost 9 years prior to the charge being created in respect of the very same properties. At the time of creation of security interest, it was for the Appellant bank to be aware of the existence of the confiscation proceedings. It is further submitted that a charge or security interest created on a property cannot defeat or affect confiscation proceedings initiated by a statutory body in any manner.

- A 27. Mr. Natraj, learned ASG also contended that the decisions relied upon by the Appellant are distinguishable on facts, since those cases deal with the question of priority of a secured creditor over the Crown's debts and does not even touch on the issue of confiscation proceedings with respect to the interest of a secured creditor.
- B 28. It has been submitted that a similar question did arise in the case of *Bank of Bihar vs State of Bihar [1972] 3 SCC 196*, where a question was as to whether a valid seizure can defeat the right of a secured creditor. In that case, this Court did not interfere with the seizure but only held that after the goods had been seized by the government, the secured creditors may still retain his right to satisfy his debt. This principle finds reflection in Section 13(4)(d) of the SARFAESI Act. It has, thus, been submitted that, at best, the Appellant may resort to the mechanism prescribed under section 13(4)(d) of the SARFAESI Act to recover the amounts due to it, if and when the properties are sold by the respondent authorities. Therefore, assuming the existence of any right of recovery from Respondents, the Appellant may, at best, be entitled to issue a notice as envisaged in Section 13(4)(d) of the SARFAESI Act and then take the further steps mentioned therein.

- C 29. Lastly, Mr. K.M. Nataraj, ASG has submitted that the validity of the confiscation order cannot be called into question merely on account of the Appellant being a secured creditor. The question as to whether the amounts due to the Customs Department would have priority over the debts due to the secured creditor does not arise in this case, since what is challenged is the confiscation order and nothing else. A confiscation order, cannot be quashed merely because a security interest is created in respect of the very same property.
- D 30. For ready reference, the relevant provisions of the concerned Act and Rules are extracted below:-

(Central Excise Act, 1944)

- E “**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 under Section 11D, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue*
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Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums [may deduct or require any other Central Excise officer or a proper officer referred to in section 142 of the customs act, 1962 (52 of 1962) to 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 be in the hands or under disposal or control of such other officer, 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 send 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.

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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 Principal Commissioner of Central Excise or 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.”

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“Section 38A. Effect of amendments, etc., of rules, notifications or orders. - Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -

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- A *a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or*
- B *b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or*
- C *c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or*
- C *d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or*
- D *e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.”*
- E *e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.”*

(Central Excise Act, 1944) w.e.f. 08.04.2011

“Section 11E.Liability under Act to be first charge. -

- F *Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in section 529A of the Companies Act, 1956, (1 of 1956) the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, (54 of 2002) be the first charge on the property of the assessee or the person, as the case may be.”*
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Rule 173 Q of Central Excise Rules, 1944 Prior to 12.5.2000 A

"Rule 173 Q. Confiscation and Penalty- (1) If any manufacturer, producer or licensee of a warehouse-

(a) Removes any excisable goods in contravention of any of the provisions of these rules; or

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(b) Does not account for any excisable goods manufactured, produced or stored by him; or

(c) Engages in the manufacture, production or storage of any excisable goods without having applied for the license required under section 6 of the Act; or

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(d) Contravenes any of the provisions of these rules with intent to evade payment of duty,

Then all such goods shall be liable to confiscation and the manufacturer producer or licensee of the warehouse, as the case may be shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed or five thousand rupees, whichever is greater.

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(2) Where-

(a) In case of a contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) of sub rule (1), the duty leviable on the excisable goods referred to in that sub rule exceeds one lakh rupees, or

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(b) Any manufacturer, producer or licensee of a warehouse, whose excisable goods were confiscated under sub rule (1) and upon whom penalty was imposed under that sub rule, contravenes against any of the provisions of clause (a) or clause (b) or clause (c) or clause (d) of sub rule (1) and the duty leviable on the excisable goods in respect of the contravention for the second or any subsequent occasion exceeds ten thousand rupees.

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Then, in a case falling under clause (a) of this sub rule or in a case falling under clause (b) thereof (whether the

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- A *contravention under that clause has been committed for the second or any subsequent occasion), the officer adjudging the case under section 33 of the Act may, in addition to the award of the confiscation and penalty under the sub rule (1), direct, for reasons to be recorded in writing, the confiscation of any or all of the following belonging to such manufacturer, producer or licensee of a warehouse, namely:-*
- B *(i) any land, building, plant, machinery, materials, conveyance, animal or any other thing used in connection with the manufacture, production, storage, removal or disposal of such goods, or*
- C *(ii) any other excisable goods on such land, or in such building or produced or manufactured with such plant, machinery, materials or thing]*"
- D ***(Central Excise Rules, 1944)***
"Rule 211. On confiscation, property to vest in Central Government: -
(1) When anything is confiscated under these rules, such things shall thereupon vest in" Central Government.
- E *(2) The officer adjudging confiscation shall take and hold possession of the things confiscated, and every Officer of Police, on the requisition of such officer, shall assist him in taking and holding such possession."*
- F ***Rule 28 of Central Excise Rules, 2001***
[Issued in supersession of Central Excise Rules, 1944]
"Rule 28. Confiscated property to vest in Central Government:-
When any goods are confiscated under these rules, such things shall thereupon vest in the Central Government.
- G *The Central Excise Officer adjudging confiscation shall take and hold possession of the things confiscated, and every officer of police, on the requisition of such Central Excise Officer, shall assist him in taking and holding such possession."*
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Rule 28 of Central Excise Rules, 2002 A

[Issued in supersession of Central Excise Rules, 2001]

"Rule 28. Confiscated property to vest in Central Government:

When any goods are confiscated under these rules, such things shall thereupon vest in the Central Government. B

The Central Excise Officer adjudging confiscation shall take and hold possession of the things confiscated, and every officer of police, on the requisition of such Central Excise Officer, shall assist him in taking and holding such possession. C

Rule 28 of Central Excise Rules, 2017

[Issued in supersession of Central Excise Rules, 2002]

"RULE 28. Confiscation and penalty. — (1) Subject to the provisions of section 11 AC of the Act, if any producer, manufacturer, registered person of a warehouse, or an importer who issues an invoice on which CENVAT credit can be taken, or a registered dealer, D

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or E

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or F

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse, or an importer who issues an invoice on which CENVAT credit can be taken, or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any G H

- A *contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or five thousand rupees, whichever is greater.*
- (2) *An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.”*
- B **SARFAESI Act, 2002**
- Section 2(zc) to 2(zf)**
- “(zc) “**secured asset**” means the property on which security interest is created;
- C **(zd) “secured creditor” means—**
- (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
- D (ii) debenture trustee appointed by any bank or financial institution; or
- (iii) an asset reconstruction company whether acting as such or managing a trust set up by
- E such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or
- F (v) any other trustee holding securities on behalf of a bank or financial institution,
- in whose favour security interest is created by any borrower for due repayment of any financial assistance.]*
- G **(ze) “**secured debt**” means a debt which is secured by any security interest;**
- (zf) “**security interest**” means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—**
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- (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or A
- (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset." B C

Section 13

“13. Enforcement of security interest.—(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. D E

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). F

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. G

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured H

- A creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—
- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- B [(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
- Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:
- C Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;
- D (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- E (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.
- F (5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.
- G (6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.
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(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

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SARFAESI Act, 2002

Section 35

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"35. The provisions of this Act to override other laws.—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

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(emphasis supplied)

31. We have heard learned counsel for both the parties at length and have carefully perused the record.

32. The Commissioner Customs and Central Excise, Ghaziabad vide order dt. 26.03.2007, ordered the confiscation of all the land, building, plant, machinery etc. of RIL. This confiscation order was passed under rule 173Q(2) of the Central Excise Rules, 1944. However, in the impugned order, the High Court has not considered that on the date of the confiscation orders i.e. 26.03.2007 and 29.03.2007, Rule 173Q(2)

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- A stood omitted from the statute books vide government notification dated 12.05.2000.

33. We do not find merit in the submission of the learned Counsel for the Respondent that notwithstanding the omission of Section 173Q(2) from the 1944 Rules vide notification dated 12.05.2000, the Respondent B No. 3 was entitled to continue the proceedings on account of Section 38A(c) and Section 38A(e) of the Central Excise Act, 1944, read along with Section 6 of the General Clauses Act, 1897.

34. Constitution bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [(2000) 2 SCC 536]** has held C that:

- D “11. In the factual backdrop of the case discussed earlier the question that arises for determination is whether after omission of the old Rule 10 and 10-A and its substitution by the new Rule 10 by the Notification No 267/77 dated 6.8.77 the proceedings initiated by the notice dated 27.4.77 could be continued in law. If the question is answered in the affirmative then the order dated 15/27th October, 1977 of the Asstt. Collector of Central Excise confirming the demand for re-credit of the amount of Rs. 61,41,930 cannot be interfered with. On the other hand, if the question is answered in the negative then the said order is to be taken as non-est.
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- F “34. (...) It is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of the rule after the said provision was omitted the Court is not to look for a provision in the newly added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. It is our considered view that in such a case the Court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending

proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceeding was initiated being deleted/omitted. It is relevant to note here that in the present case the question of divesting the Revenue of a vested right does not arise since no order directing refund of the amount had been passed on the date when Rule 10 was omitted.

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35. We, therefore, hold that the decisions of the Full Bench of the Gujarat High court and the Division Bench of the Karnataka High Court noted above were not correctly decided. The said decisions are overruled.

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36. In the case in hand, Rule 10 or Rule 10-A is neither a “Central Act” nor a “Regulation” as defined in the Act. It may be a Rule under Section 3(51) of the Act. Section 6 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”.

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37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus, the operation of repeal

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- A *or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.”*
- (emphasis supplied)
- B 35. The Gujarat High Court in **Kotak Mahindra Bank Ltd. Vs. District Magistrate [2010 SCC online Gujarat 10656]** has held that from a perusal of Rule 28, it is clear that the Legislature intended to confiscate only “goods” which is distinct from immovable property like land, building, plant, machinery etc. We quote, with approval, the reason for which, the High Court held that “*The competent authority of Excise and Customs Department, including the Commissioner of Central Excise and Customs, Vadodara-II had no jurisdiction to confiscate the land under Rule 173Q (2), the said rule having been omitted and substituted by Rule 28, by the time the Order dated 25.02.2006 was passed. The order being without jurisdiction is nullity in the eye of law and thereby the authorities cannot derive advantage of the order dated 25.02.2006.”*
- C 36. In the case at hand, the proceedings initiated under the erstwhile Rule 173Q(2) would come to an end on the repeal of the said Rule 173Q(2) of the Central Excise Rules, 1944. Respondent Counsel’s submission that the proceedings would be saved on account of Section 38A(c) and 38A(e) of the Central Excise Act, 1944 and Section 6 of the General Clauses Act, 1897, is misplaced and lacks statutory backing. Firstly, as has been held by a Constitution Bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536]**, Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”. Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section
- D 37. The Constitution Bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536]**, Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”. Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section
- E 38. The Constitution Bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536]**, Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”. Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section
- F 39. The Constitution Bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536]**, Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”. Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section
- G 40. The Constitution Bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536]**, Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”. Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section
- H 41. The Constitution Bench of this Court in **Kolhapur Canesugar Works Ltd. Vs Union of India & Ors. [2000] 2 SCC 536]**, Section 6 of the General Clauses Act, 1897 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a “Rule”. Hence, the question of applicability of Section 6 is decided in the negative. Secondly, on the issue of applicability of Section 38A(c) and 38A(e) of the Central Excise Act, 1944, it is held that the Respondent would not be able to enjoy its protection because Section

38A(c) and 38A(e) are attracted only when “unless a different intention appears”. In the present case, the legislature has clarified its intent to not restore/revive the power of confiscation of any land, building, plant machinery etc., after omission of the provisions contained in Rule 173Q(2) w.e.f 12.05.2000. This intention of the legislature can be drawn out from the fact that power to confiscate any land, building, plant, machinery etc. after omission w.e.f. 12.05.2000 has not been introduced in the subsequent Central Excise Rules, 2001, Central Excise Rules, 2002 and Central Excise Rules, 2017. Additionally, this intent is also fortified by the fact that Rule 211 of the Central Excise Rules, 1944, inter alia, provided that “anything” confiscated under the Rules shall thereupon vest in Central Government, whereas Rule 28 of the Central Excise Rules of 2001, 2002 and 2017, which are pari materia to the earlier Rule 211 of the 1944 Rules, instead of the word “anything”, provided for vesting of confiscated “Goods” in the Central Government. Lastly, after omission of Rule 173Q(2) of 1944 Rules w.e.f. 12.05.2000 and after supersession of Rule 211 of 1944 Rules in the year 2001, the newly enacted Rule 28 of the Rules of 2001, Rule 28 of the Rules of 2002 and Rule 28 of the Rules of 2017, did not provide for confiscation of any land, building, plant, machinery etc. and their consequent vesting in the Central Government, as Rule 28 only provided for vesting in the Central Government of the “Goods” confiscated by the Central Excise Authorities under the Excise Act, 1944. This derivation of the legislature’s intent, in conjunction with the ratio laid in the case of **Kotak Mahindra Bank**(supra) makes it apparent that the confiscation proceedings were not saved by these mentioned provisions and that the final confiscation order dated 26.03.2007 and 29.03.2007 were passed without jurisdiction by the Commissioner of Central Excise and Customs.

37. Secondly, coming to the issue of priority of secured creditor’s debt over that of the Excise Department, the High Court in the impugned judgment has held that “In view of the matter, the question of first charge or second charge over the properties would not arise.” In this context, we are of the opinion that the High Court has misinterpreted the issue to state that the question of first charge or second charge over the properties, would not arise.

38. A Full Bench of the Madras High Court in the case of **UTI Bank Ltd. Vs. Dy. Commissioner Central Excise [2006 SCC Online Madras 1182]**, while dealing with a similar issue, has held that:

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- A “25. In the case on hand, the petitioner Bank which took possession of the property under Section 13 of the SARFAESI Act, being a special enactment, undoubtedly is a secured creditor. We have already referred to the provisions of the Central Excise Act and the Customs Act. They envisage procedures to be followed and how the amounts due to the Departments are to be recovered. There is no specific provision either in the Central Excise Act or the Customs Act, claiming ‘first charge’ as provided in other enactments, which we have pointed out in earlier paragraphs.
- C 26. In the light of the above discussion, we conclude,
- C “(i) Generally, the dues to Government, i.e., tax, duties, etc. (Crown’s debts) get priority over ordinary debts.
- D (ii) Only when there is a specific provision in the statute claiming “first charge” over the property, the Crown’s debt is entitled to have priority over the claim of others.
- D (iii) Since there is no specific provision claiming “first charge” in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner Bank.
- E (iv) In the absence of such specific provision in the Central Excise Act as well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown’s debts.”
- F In view of our above conclusion, the petitioner UTI Bank, being a secured creditor is entitled to have preference over the claim of the Deputy Commissioner of Central Excise, first respondent herein.”
- (emphasis supplied)
- G This Court, while dismissing the Civil Appeal No.3627 of 2007 filed against the judgment of the Full Bench, vide order dated 12.09.2009 held as under:
- H “Having gone through the provisions of the Securitization Act, 2002, in light of the judgment of the Division Bench of this court in the case of Union of India vs Sicom Ltd. & Anr., reported in 2009 (1) SCALE 10, we find that under the

provisions of the said 2002 Act, the appellants did not have any statutory first charge over the property secured by the respondent bank. In the circumstances, the Civil Appeal is dismissed with no order as to costs”

(emphasis supplied)

Hence the reasoning given by the High Court stands strong and has been affirmed by this Court. B

39. This Court, in **Dena Bank vs Bhikhhabhai Prabhu Dass Parikh & Anr.** [(2000) 5 SCC 694], wherein the question raised was 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, observed as under:

“10. However, the Crown's preferential right of 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 of recovery of its debts over a mortgagee or pledgee of goods or a Secured Creditor.”

(emphasis supplied)

40. Further, in **Central Bank of India Vs. Siriguppa Sugars & Chemicals Ltd. & Ors.** [(2007) 8 SCC 353], while adjudicating a similar matter, this Court has held as under:

“18. Thus, going by the principles governing the matter, propounded by this Court there cannot be any doubt that the rights of the appellant-bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursal to the cane growers and to the employees. 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,

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- A *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, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods.”*
- B *(emphasis supplied)*

41. The Bombay High Court in *Krishna Lifestyle Technologies Ltd. Vs. Union of India & Ors. [2008 SCC Online Bombay 137]*, wherein the issue for consideration was “whether tax dues recoverable under the provisions of The Central Excise Act, 1944 have priority of claim over the claim of secured creditors under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002” held that:

- D *Considering the language of Section 35 and the decided case law, in our opinion it would be of no effect, as the provisions of SARFAESI Act override the provisions of the Central Sales Tax Act and as such the priority given to a secured creditor would override Crown dues or the State dues.*
- E *In so far as the SARFAESI Act is concerned a Full Bench of the Madras High Court in UTI Bank Ltd. v. Deputy Commissioner of C. Excise, Chennai-II has examined the issue in depth. The Court was pleased to hold that tax dues under the Customs Act and Central Excise Act, do not have priority of claim over the dues of a secured creditor as there is no specific provision either in the Central Excise Act or the Customs Act giving those dues first charge, and that the claims of the secured creditors will prevail over the claims of the State. Considering the law declared by the Apex Court in the matter of priority of state debts as already discussed and the provision of Section 35 of SARFAESI Act we are in respectful agreement with the view taken by the Madras High Court.”*

- F *(emphasis supplied)*
- G 42. An SLP (No. 12462/2008) against the above judgement of the Bombay High Court stands dismissed by this Court on 17.07.2009 by relying upon the judgement in the matter of *Union of India vs SICOM*

Ltd. & Anr. Reported in [2009] 2 SCC 121], wherein the question involved was “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” and this Court held as under:

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“9. 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 Aiyear (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. (emphasis supplied)

43. In view of the above, we are of the firm opinion that the arguments of the learned counsel for the Appellant, on the second issue, hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the present case, where the land, building, plant machinery, etc. have been mortgaged/hypothecated to a secured creditor, having regard to the provisions contained in section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, the Secured Creditor will have a First Charge on the Secured Assets. Moreover, section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, shall have overriding effect on all other laws. It is further pertinent to note that even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002.

- A 44. Thus, as has been authoritatively established by the aforementioned cases in general, and *Union of India vs SICOM Ltd.* (*supra*) in particular, the provisions contained in the SARFAESI Act, 2002, even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, will have an overriding effect on the provisions of the Act of 1944.
- B 45. Moreover, the submission that the validity of the confiscation order cannot be called into question merely on account of the Appellant being a secured creditor is misplaced and irrelevant to the issue at hand. The contention that a confiscation order cannot be quashed merely because a security interest is created in respect of the very same property
- C is not worthy of acceptance. However, what is required to be appreciated is that, in the present case, the confiscation order is not being quashed merely because a security interest is created in respect of the very same property. On the contrary, the confiscation orders, in the present case, deserve to be quashed because the confiscation orders themselves lack
- D any statutory backing, as they were rooted in a provision that stood omitted on the day of the passing of the orders. Hence, it is this inherent defect in the confiscation orders that paves way for its quashing and not merely the fact that a security interest is created in respect of the very same property that the confiscation orders dealt with.
- E 46. Further, the contention that in the present case, the confiscation proceedings were initiated almost 8-9 years prior to the charge being created in respect of the very same properties in favour of the bank is also inconsequential. The fact that the charge has been created after some time period has lapsed post the initiation of the confiscation proceedings, will not provide legitimacy to a confiscation order that is
- F not rooted in any valid and existing statutory provision.
- G 47. To conclude, the Commissioner of Customs and Central Excise could not have invoked the powers under Rule 173Q(2) of the Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said Rule 173Q(2) was not in the Statute books, having been omitted by a notification dated 12.05.2000. Secondly, the dues of the secured creditor, i.e. the Appellant-bank, will have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise
- H Act of 1944.

48. Accordingly, the Appeal is Allowed and the confiscation orders dated 26.03.2007 and 29.03.2007, passed by the Commissioner Customs and Central Excise, Ghaziabad, are quashed. A

Nidhi Jain

Appeal allowed.