Supreme Court of India
Builders Supply Corporation vs The Union Of India Represented By ... on 30 November, 1964
Equivalent citations: 1965 AIR 1061, 1965 SCR (1) 289
Author: P Gajendragadkar
Bench: Gajendragadkar, P.B. (Cj), Hidayatullah, M., Shah, J.C., Sikri, S.M., Bachawat, R.S.

PETITIONER:
BUILDERS SUPPLY CORPORATION

Vs.

RESPONDENT:
THE UNION OF INDIA REPRESENTED BY THE COMMISSIONER OF

DATE OF JUDGMENT:
30/11/1964

BENCH:
GAJENDRAGADKAR, P.B. (CJ)
BENCH:
GAJENDRAGADKAR, P.B. (CJ)
HIDAYATULLAH, M.
SHAH, J.C.
SIKRI, S.M.
BACHAWAT, R.S.

CITATION:
1965 AIR 1061 1965 SCR (1) 289
CITATOR INFO :
MV 1967 SC 997 (33,34,48)
R 1967 SC1581 (19)
R 1967 SC1831 (7)
RF 1973 SC 569 (43)
RF 1974 SC2009 (3)

ACT:
Doctrine of priority of Crown Debts under Common Law--Whether applicable to India.
Income-tax arrears due to Union Government-Recovery thereof--Whether has priority above claims of unsecured creditors of common debtors-Doctrine of priority of Crown Debts in relation to the tax dues--Whether a 'law in force ' in India at commencement of Constitution --Constitution of India Art. 372(1).
Indian Income Tax Act 1922, s. 46, and provision of Public Demands Recovery Act whether displace doctrine of priority of Government Debts.

HEADNOTE:
The appellant filed a suit against Respondent No. 2 and

secured a decree against him for Rs. 12,275-9-0. The Judgment-debtor had a sum of Rs. 50,000 in deposit with the Superintending Engineer, Calcutta, by way of security for the due execution of a contact. The Executing Court at the instance of the appellant attached a sum equivalent to the decretal amount from the above security deposit, and the Superintending Engineer transmitted the attached amount to the court. At this stage the Union of India through the Commissioner of Income-tax represented to the court that income tax arrears of more than Rs. 5,000 were due from the Judgment-debtor for which a certificate under s. 46(2) of the Income-tax Act, 1922 bad been issued to the Collector and proceedings under the Public Demands Recovery Act had been commenced. The Union of India claimed that the tax amount due to it from the Judgment-debtor had priority over the judgment-debt due to the appellant from the same debtor and so it was entitled to the whole amount under attachment in partial satisfaction of the Income-tax dues. The Executing Court accepted this plea. The appellant filed a revision before the High Court but failed to get relief. Thereupon he appealed to the Supreme Court with a certificate of fitness.

It was contended on behalf of the appellant

(1) The High Court had wrongly held that the Common Law doctrine of the priority Crown debts on which the case of the Union of India was based, applied in the present case : (2) Even if the doctrine was applicable it was not a 'law in force' at the commencement of the Constitution within the terms of Art. 372(1), and there was no scope for continuing its operation after the Constitution came into force : (3) The doctrine of the priority of Crown debts could not also be enforced because it was specifically Provided for and covered by the provisions of s. 44 of the Indian Income-tax Act, 1922, and by the relevant provisions of the Recovery Act.

HELD : (i) The Common Law doctrine of the priority of Crown debts had a wide sweep but the question in the present appeal was the narrow file one whether the Union of India was entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over unsecured debts due from the said citizen to his other private

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creditors. The weight of authority in India was strongly in support of the priority of tax dues. [300 D]

The Secretary of State in Council for India v. The Bombay Landing & Shipping Co. (Limited), (1868-69) 5 Bom. H.C.R. p. 23; Manickam Chettiar v. Income-tax Officer, Madura, (1938), 6 I.T.R. 180, Ramachandra v. Pitchaikanni, (1884) I.L.R. 7 Mad. 434; Bank of India v. John Bowman and Ors., A.I.R. 1955 Bom. 305, Beil v. The Municipal Commissioners for the City of Madras, (1902) I.L.R. 25 Mad. 457.... discussed.

Kaka Mohammad Ghouse Sahib & Co. v. United Commercial Syndicate and Others, (1963) 49 I.T.R. 824, disapproved.

(ii) The Common Law doctrine on which the Union of India based its claim in the present proceedings had been applied and upheld in that part of India which was known as 'British India' prior to the Constitution. The rules of Common Law relating to substantive rights which had been) adopted by this country and enforced by judicial decisions, amount to law in force' in the territory of India at the relevant time within the meaning of Art. 372(1). In that view of the matter, the contention of the appellant that after the Constitution was adopted the position of the Union of India in regard to its claim for priority in the present proceedings had been alerted could not be upheld. [302 B-C]

Director of Rationing and Distribution v. The Corporation of Calcutta & Ors., [1961] 1 S.C.R. 156 relied on.

Quaere : Whether Art. 372(1) would assist the enforcement of the said doctrine in the States where it was not accepted as part of the law before the Constitution ? If this doctrine is supposed to be an essential attribute of sovereignty where does sovereignty reside after the Constitution ? Does it reside in the Union as well as in the constituent States? If yes, what would be the position if competing claims were made by the States inter se, or by one of the States against the Union ? [302 E-H]

(iii) The basic justification for the claim for priority of Government debts rests on the well-recognised principle that the State is entitled to raise money by taxation, otherwise it will not be able to function as a sovereign government at all. This consideration emphasizes the necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues. [303 A-B]

Quaere : Whether the doctrine will be equally applicable in respect of debts due to the State if they are contracted by citizens in relation to commercial activities of the modem State ? [303 C-D]

(iv) In making a provision for the recovery of arrears of tax, it cannot be said that s. 46 deals with or provides for the principle of priority of tax dues at all. [306 H]

The Recovery Act also is intended mainly to provide for the procedure to recover public debts. This act is not directly concerned with the right to recover arrears or with priority of tax dues. Rule 22 can no doubt be invoked to recover arrears of tax, but that is because the procedure prescribed by the said rule applies to the recovery of public debts, and tax arrears can be treated as public debts inasmuch as by virtue of s. 46(2) Of the Income-tax Act they become recoverable as arrears of land revenue. [308 F, H]

Neither the provisions of s. 46 of the Income-tax Act nor those of the Recovery Act can thus be said to have displaced the doctrine of priority of arrears of tax over private debts.

Governor-General in Council v. Shiromani Sugar Mills Ltd.

(In liquidation), [1946] F.C.R. 40 distinguished.
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Province of Bombay v. Municipal Corporation of the City of Bombay, (1946) L.R. 73 I.A. 271, Attorney-General v. De Keyser's Royal Hotel, Ltd., [1920] A.C. 508 at 526, Purshottam Govindji Halai v. Shree B. M. Desai, Additional Collector of Bombay & Others, [1955] 2 S.C.R. 887 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 824 of 1963. Appeal from the judgment and order dated June 21, 1955 of the Calcutta High Court in Civil Revision Case No. 231 of 1954.

S. C. Das Gupta and Sukumar Ghose, for the appellant. S. V. Gupte, Solicitor-General, N. D. Karkhanis and R. N. Sachthey, for respondent No. 1.

The Judgment of the Court was delivered by Gajendragadkar, C.J. The short question of law which arises in this appeal is whether respondent No. 1, the Union of India, is entitled to claim that the tax due to it from respondent No. 2, M/s. R. K. Das & Co., on account of the assessment years 1946-47 and 1947-48 has priority and precedence over the decretal amount due to the appellant, M/s. Builders Supply Corporation, from respondent No. 2. This question has been answered against the appellant by the Calcutta High Court, and by its present appeal brought to this Court with a certificate issued by the said High Court, the appellant contends that the decision of the Calcutta High Court is erroneous in law.

It appears that respondent No. 2 secured a building contract from the Government in connection with the construction of the Mint and in that behalf it had to make a deposit of Rs. 50,000 as security for the due execution of the contract. In connection with the execution of the said, contract, respondent No. 2 obtained a supply of building materials from the appellant. The appellant was unable to secure payment for the goods thus supplied by it, and so, it had to sue respondent No. 2 for recovery of the dues. In that suit, on the 18th April, 1949, the appellant obtained an order for attachment before judgment of Rs. 5,000 out of the aforesaid security deposit of Rs. 50,000. This deposit was lying with the Superintending Engineer, Calcutta Central Circle No. 1. Subsequently, on the 16th June, 1950, the appellant's suit was decreed by the 5th Additional Subordinate Judge, 24 Parganas, for a sum of Rs. 12,275-9-0. This decree was put in execution by the appellant on the 14th February, 1952, in the court of the 7th Sub-Judge and in consequence, Money Execution Case No. 9 of 1952 was started. Four days thereafter, the Subordinate Judge issued an order for the attachment of a further sum of Rs. 7,275-9- 0 out of the aforesaid security amount deposited by respondent No. 2 Whilst writing to the Superintending Engineer in that behalf, the Subordinate Judge asked him to remit to the court the sum of Rs. 5,000 which had already been attached before judgment. On receiving this communication, the Superintending Engineer placed a further sum of Rs. 7,275-9-0 under attachment, but did not comply with the requisition of the court to remit Rs. 5,000 to it. On the 30th April, 1952, the Executing Court wrote to the Superintending Engineer and asked him to

transmit the whole of the amount of Rs. 12,275-9-0 which was under attachment as a result of the two previous orders passed in that behalf, but this requisition also was not complied with till March 9, 1953.

Meanwhile, the Certificate Officer of 24 Parganas bad addressed a letter to the Subordinate Judge on the 23rd July, 1952, and requested him that if the Superintending Engineer had transmitted any money to his court, its payment to the appellant should be withheld in order to enable a cl aim under 0.21 r. 52 of the Civil Procedure Code to be preferred on behalf of the Government. Along with that letter, the Certificate Officer sent a copy of another letter which had been addressed by him to the Superintending Engineer asking him not to make any payment out of the amount deposited by respondent No. 2, but to retain it after deducting the departmental dues. The Superintending Engineer was informed by this letter that arrears of income- tax due from respondent No. 2 exceeded Rs. 50,000 with the result that the whole of the security deposit, less departmental dues, was liable to be applied to the satisfaction of the tax debt in respect of which Government had priority over all unsecured creditors. In spite of this letter, however, the Superintending Engineer sent the whole of the amount attached at the instance of the appellant to the Executing Court and it was received in the Executing Court on the 9th March, 1953. On the 21st March, 1953, the Executing Court addressed a letter to the Certificate Officer in reply to the communication received by it from him, requiring him to state why the amount in question should not be paid to the appellant and adding that in case no effective step was taken on or before the 10th April, 1953, the said amount would be paid to the appellant. At this stage, the Commissioner of Income-tax, representing respondent No. 1, intervened and moved the Executing Court for adjournment on several occasions. On every such occasion, the Commissioner intimated to the Executing Court that respondent No. 1 would show cause why the amount in question should not be paid to the appellant. During the course of these proceedings, on the 17th June, 1953, the Certificate Officer addressed a letter to the Executing Court under Rule 22 of Schedule 11 to the Public Demands Recovery Act (hereinafter called the 'Recovery Act') and asked the court to hold the amount subject to further intimation from him. This letter was received by the Executing Court on the 24th June, 1953, and in consequence, the Executing Court passed an order withholding payment to the appellant until further orders. Finally, on the 15th July, 1953, respondent No. 1 made an application to the Executing Court in which it claimed that the tax amount due to it from respondent No. 2 had a priority over the judgment debt due to the appellant from the same debtor, and so, the whole of the amount under attachment ought to be paid to it towards partial satisfac- tion of the said income-tax dues. A similar application was made on the 11th September, 1953, and this application gave material details in respect of the income-tax demand against respondent No. 2. In both these applications, it was alleged that a certificate tinder s. 46(2) of the Income-tax Act, 1922 (No. 11 of 1922) bad been duly forwarded to the Collector, 24 Parganas. and thus proceedings under the recovery Act had already been commenced in that behalf. The Executing Court set down these applications for hearing and elaborate arguments were urged before it by the appellant and respondent No. 1 in support of their respective contentions. In the result, the Executive Court upheld respondent No. 1's plea that the tax amount due to it from respondent No. 2 had a priority over the decretal amount due to the appellant from the same debtor and in consequence, it issued a direction that the amount of Rs. 12,275-9-0 lying in its custody under attachment should be paid to respondent No. 1.

This order was challenged by the appellant before the Calcutta High Court by a revision application under S. 115 of the Code. The proceedings taken before the Executing Court were initiated by the two applications made by respondent No. 1 under s. 151 of the Code. Apparently, the Executing Court passed its order in favour of respondent No. 1, purporting to exercise its jurisdiction under the said section. It was urged before the High Court as a prelimaniry point that the Executing Court was in error in allowing its jurisdiction under s. 151 of the Code to be invoked in the present proceedings. The High Court has held that it was unnecessary to consider whether s. 151 was properly invoked or not, because in its opinion, the claim could be sustained under Rule 22 of the Statutory Rules framed under the Recovery Act. This rule corresponds to 0.21 r. 52 of the Code and the High Court thought that the Executing Court had jurisdiction to deal with the claim of respondent No. 1 under r. 22 read with 0.21 r. 52 of the Code. It is unnecessary to deal with this part of the controversy between the parties, because the finding of the High Court on this point has not been challenged before us. The High Court then examined the merits of the dispute. It held that it had been accepted by all the High Courts in India that the tax amount due from an assessee to respondent No. 1 has priority "vis-a-vis and over claims of other creditors, though only unsecured creditors". The High Court rejected the appellant's contention that the relevant provisions of the Recovery Act prevented a claim for priority made by respondent No. 1 in the present case. The appellant had also urged before the High Court that the claim for priority made by respondent No. 1 could no longer be sustained, having regard to the fact that it was inconsistent with the provisions of the Constitution of India. This claim, it was urged, was based on the common law doctrine of the Crown prerogative and it could not be claimed by respondent No. 1 inasmuch as it did not fall within the scope of Art. 372(1) of the Constitution. This contention has been rejected by the High Court, and the High Court has also held that the said claim cannot be said to be covered by any of the provisions of the Recovery Act and as such can be legitimately enforced by respondent No. 1. As a result of the findings, the High Court has discharged the rule which was issued at the instance of the appellant in the revision application preferred by it before the High Court under S. 115 of the Code. The appellant then applied for and obtained a certificate from the High Court and it is with this certificate that the matter has been brought before us in appeal.

The first point which falls for our decision in the present appeal is whether the High Court was right in holding that the common law doctrine about the priority of Crown debts on which the claim of respondent No. 1 was based, applied in the present case. This common law doctrine has no doubt been evolved by the special attributes associated with the Crown in England in early days. It is the part of the Crown prerogative. AS Halsbury has observed "the royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over, and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England"(1). This doctrine as originally evolved by common law in England, had a very wide sweep and it purported to take within its scope many privileges and powers. Considered in the light of its wide sweep, some of these privileges may sound archaic and feudal, but it is not necessary for our purpose to examine the said doctrine in all its width; in the present appeal we are concerned with the narrow question as to whether respondent No. 1 is entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over unsecured debts due from the said citizen to his other private creditors. The competition in the present case is between

respondent No. 1's claim to recover its tax dues and the appellant's claim to recover its decretal dues from the same debtor, respondent No. 2. The appellant is an unsecured creditor, though undoubtedly at its instance, the amount in question has been attached partly before judgment and partly in execution proceedings after the judgment was pronounced. The question about the applicability of this part of the Crown prerogative in India was considered by the Bombay High Court as early as 1868. In The Secretary of State in Council for India v. The Bombay Landing & Shipping Co. (Limited),(2) Westropp, J. has elaborately examined this problem. The learned Judge held that a judgment debt due to the Crown was in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there be no special legislative provision affecting that right in the particular case. Similarly, it was held that a judgment debt due to the Secretary of State in Council for India was in Bombay entitled to the like precedence for the reason that such debt is vested in the Crown, and when realised, falls into the State Treasury. Tracing the origin of this doctrine, the learned Judge referred to the Commentary of Lord Coke on Littleton, where Lord Coke has put the matter in these words; "The King, by his prerogative, regularly is to be preferred, in payment of his duty or debt, before any subject although the King's debt or duty be the latter" (p.

48). The learned Judge then referred to some English decisions bearing on this point and concluded that "in England the right of the Crown to precedence does not arise out of any peculiar quality in the writ of extent. The reasoning of Lord Coke and Chief Baron Parker rests on a broader foundation, namely, that the destination of the debt, when recovered, is the State Treasury" (p. 50). (1) Halsbury's Laws of England, 3rd Edn. Vol. 7, p. 221, para 463.

(2) [1868-69] 5 Bom. H.C.R. p. 23.

up.165-3 It is significant that Westropp, J. considered the question from -a larger juristic point of view and observed that the common law ,doctrine was "no novelty in India" and he referred to the rule enunciated by Yajnavalkya in that behalf. Says Yajnavalkya, "A debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first discharging those of a priest or the King". (1) On this topic, Katyayana says, "if there be many ,debts at once, that which was first contracted shall be first paid, ,after those of a King or of a priest learned in the Veda".(2) The reference to the priority of a debt due to priests learned in Vedas is obviously obsolete and can have no relevance at the present time. But the point that Westropp, J. has made is that the common law doctrine cannot be said to be a novelty to Hindu Jurisprudence. He has also added that "Muhammadan sovereigns were not prone to waive or abandon such royal prerogative as they found existing ,in India" (p. 49). We have referred to this aspect of the matter, because if the larger question about the validity of the Crown prerogative in respect of claims other than tax claims falls to be considered in future, it may become necessary to enquire whether a .similar doctrine was recognised by Hindu Jurisprudence or not. That enquiry is, however, foreign to the scope of the controversy in the present appeal. So far as respondent No. 1's claim in the present appeal is concerned, there is no doubt that this claim has been consistently recognised by all the Indian High Courts.

Before referring to these decisions, however, it will be convenient to read the relevant provisions of the Indian Income-tax Act as it stood at the relevant time (Act No. 1 1 of 1922). Section 46 (2) of this

Act provides that the Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such a certificate, shall proceed to recover from such an assessee the amount specified therein as if it were an arrear of land revenue. There is a proviso to this sub- section which lays down that without prejudice to any other powers of the Collector in this behalf, he shall, for the purposes of recovering the said amount, have the powers which under the Code of Civil Procedure, 1908 a ,-Civil Court has for the purpose of the recovery of an amount due under a decree. Section 46(3) lays down that in any area with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of .an arrear of any Municipal tax or local rate imposed under any (1) Yaj. 11, 41. (2) Kat. 514. (Vide also Kane, History of Dharamsastra, p. 441) enactment for the time being in force in any part of the, State, the Income-tax Officer may proceed to recover the amount due by such process. This provision prescribes an alternative procedure for the recovery of the debts in regard to cases filling under it. Section 46(5) provides yet another alternative remedy; it lays down that if any arrear is in respect of any income chargeable under the head " salaries" the Income-tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears due from such an assessee; and it requires that such requisition shall be complied with. The Explanation to s. 46 provides that it shall be lawful for the Income-tax Officer, if for any special reasons to be recorded he so thinks fit, to have recourse to any such mode of recovery notwithstanding that the tax due is being recovered from an assessee by any other mode. These provisions indicate the several remedies open to the Incometax Officer to adopt in order to recover arrears of income-tax due from any assessee. In construing the relevant provisions of S. 46, the High Courts in India have had frequent occasions to consider whether the Government of India is entitled to claim priority for arrears of income-tax due to it from assessees over the private debts due from them to their creditors, and this claim has been consistently upheld. In Manickam Chettiar v. Income-tax Officer Madura, (1) a Full Bench of the Madras High Court has held that the income-tax debt has priority over private debts and that the Court had inherent power to make an order on the application for payment of moneys due to the Crown. In that connection, the Court held that S. 46 of the Income-tax Act is not exhaustive of the remedies of the Crown to cover arrears of income-tax and does not preclude an application of this nature. The Court further held that it was also not necessary for the Crown to obtain a decree against the assessee or to effect an attachment before making such an application. The application in question had been made under S. 151 of the Code. Leach, C.J., who delivered the-principal judgment of the Full Bench, referred to the fact that the argument which had been urged before the Court was that there was nothing in the Code which placed the Crown in a different position from that of a private person, and so, no application could be made by the Crown to recover its tax dues unless a decree had been obtained in that behalf; and observed that the argument ignored the special position of the Crown, the special circumstances and the Court's inherent powers. The learned Chief Justice stated that it could not be

(1) [1938] 6 I.T.R. 180.

denied that the Crown had the right of priority in payment of debts due to it; it is a right which has always existed and has been repeatedly recognised in India. In the case before the Court, the debt represented money due to the Crown under the Indian Incometax Act and the demand of the Income-tax Officer was not open to questions. We ought to add that Varadachariar, J. who had referred this matter to the Full Bench, apparently entertained some doubt about the correctness of

the procedure adopted by the Income-tax Department in seeking to recover the arrears in question. With that aspect of the matter we are not concerned in the present appeal. It is, however, noteworthy that Varadachariar, J. recognised the fact that there was overwhelming weight of authority in favour of the recognition of the priority of the Crown debts over the private debts due from the same debtor. His attention was drawn to a note of dissent on this point which had been struck down by an earlier decision of the Madras High Court in Ramachandra v. Pitchaikanni,(1) but he did not attach any importance to the opinion there expressed, because in his opinion, "the weight of authority in favour of the recognition of the priority in question even in this country is so strong that this expression of doubt cannot help the petitioner to any material degree".

In the Bank of India v. John Bowman and Ors., (2) the Bombay High Court had occasion to consider the same point. In dealing with the question, Chagla, C.J., observed that the priority given to the Crown is not on the basis of its debt being a judgment debt or a debt arising out of statute, but the principle is that if the debts are of equal degree and the Crown and the subject are equal, the Crown's right will prevail over that of the subject. It was urged before the High Court that the democratic set-up which had been ushered in this country by the Constitution was inconsistent with the doctrine of Crown priority, but the learned Chief Justice rejected this argument and observed that whatever may have been the historical origin of the principle which gives priority to the debts due to the Crown, when the English Courts came to consider this question, the principle had become a part of the Common law of England. It is not so much because the Crown has any special privileges in England that this principle has been upheld, but it is because the State in England has taken the place of the Crown and the English Courts have continued the privilege which was once the privilege of the King and have afforded the same privilege to the State because they have realised that the State has certain rights and privileges which cannot be overlooked.

(1) [1886] I.L.R. 7 Mad. 434. (2) A.I.R.

1955 Bom. 305.

In Kaka Mohamed Ghouse Sahib & Co. v. United Commercial Syndicate and Others,(1) the Madras High Court has held that it is a settled principle of constitutional law that as between creditors of the same rank the Government is entitled to priority, and the Republican character of the Constitution of India has not abrogated this general doctrine of priority of State debts. In dealing with this question, Ramamurti, J. has referred to the relevant decisions in relation to the arrears of income-tax due to the Government and has pointed out that there is a consensus of judicial opinion on the question that the arrears of tax due to the State can claim priority over private debts. This position has not been seriously disputed before us, and so, it is unnecessary to refer to other decisions which deal with this problem.

As we have already indicated, there is one decision in which a note of dissent was struck by the Madras High Court, and that is the decision in the case of Ramachandra(2). In that case, certain land had been sold under the provisions of s. 10 of the Madras Abkari Act, 1864, for arrears due by an abkari renter. It was held that the purchaser at the sale did not take the land free of all encumbrances as in the case of a sale for arrears of land revenue under the provisions of the

Revenue Recovery Act (Madras Act II of 1864). With the actual decision in the case, we are not concerned in the present appeal; but it appears that the learned Judges in that case made a reference to the question as to whether Crown debts have priority, and they expressed the opinion that the said doctrine would not be universally applicable and three reasons were cited in support of this view. The first reason was that the East India Company was only a corporation with limited powers of sovereignty delegated to it, and in the Courts it was treated as a subject; the second reason was that the right of Government to priority to a mortgage was not recognised in the mufassil which was evident by the express language of the Act which declared the land revenue to be a first charge on the land; and according to the Court, such a provision would have been unnecessary, if by Common law every debt due to the Crown was a first charge on the land. The third reason given by the Court was that the Court hesitated to import into places outside the Presidency towns the doctrine of the Common law of England which would cause inconveniences to purchasers. Having set out these reasons, the Court, however, took the precaution of adding that it was not necessary for the purpose of the appeal before it whether debts due to Government in this country have the same preference over (1) [1963] 49 I.T.R. 824.

(2) [1884] I.L.R. 7 mad. 434.

private debts as Crown debts in England. This observation was made, because in the case with which the Court was concerned, the hypothecation was in 1874, and the abkari revenue fell into arrear in a subsequent year, and it was held that even in England the lien of the Crown attached only from the time when the owner of the land became a debtor to the Crown, and since 1839 the common law has been greatly modified in England by statute for the protection of purchasers. It would thus be seen that the observations in question are obiter observations and it does not appear that the matter was elaborately argued before the Court; and considerations relevant for the purpose of deciding the point as to priority of tax dues have not been fully examined. Besides, this view has been dissented from by Bhashyam Ayyangar, J. of the Madras High Court in Bell v. The Municipal Commissioner v. for the City of Madras,('-) and as we have already indicated, in the words of Varadachariar, J. in Manickam Chettiar(2), the weight of authority in support of the applicability of the common law doctrine in regard to tax dues in this country is so strong that no significance can be attached to these obiter observations.

That takes us to the second argument urged before us by Mr. Das Gupta for the appellant. He contends that though this doctrine of the priority of tax dues might have been recognised by judicial decisions in India prior to 1950, there is no scope for continuing its operation after the Constitution came into force. This argument naturally proceeds on the assumption that the judicial recognition of the relevant Common law doctrine cannot claim the protection of Art. 372(1). It will be recalled that Art. 372(1) provides, inter alia, for the continuance in force of existing laws. It lays down that notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. The question which arises is whether this doctrine of priority which is based on common law and which was recognised by our High Courts prior to 1950, can be said to constitute "law in force" in the territory of India at

the relevant time. In other words, is this doctrine of common law which was introduced in this country and followed, law in force within the meaning of Art. 372(1) ? If it is, then by virtue of Art. 372(1) itself, the same law would continue to be in force until it is validly altered, repealed or amended.

(1) [1902] I.L.R. 25 Mad. 457.

(2) [1938] 6 I.T.R. 180.

This question can no longer be in doubt because of the decision of this Court in the Director of Rationing and Distribution v. The Corporation of Calcutta & Ors.(1). In that case, this Court was called upon to consider the question as to whether the decision of the Privy Council in Province of Bombay v. Municipal Corporation of the City of Bombay(2) which had laid down a certain rule of interpretation could be said to be 'law in force' within the meaning of Art. 372(1). The majority judgment indicates that the rule of interpretation of statutes enunciated by the Privy Council amounted to law in force and as such, it continued to be in force even after the Constitution was adopted, with the result that according to the majority opinion, the rule of interpretation of statutes that the State is not bound by a statute unless it is so provided in express terms or by necessary implication, is still good law.

On this part of the decision, there was some difference of opinion. Sarkar, J. held that the rule that the Crown is not bound by the provisions of any statute unless it is directly or by necessary implication referred to, is really a rule of construction of statutes and is not dependent on royal prerogatives. There was, therefore, no reason, according to the learned Judge, why it should not be applied to the interpretation of statutes after the Constitution. Wanchoo, J., however, took a different view. He held that the rule in question was based on the royal prerogative as known to the common law of England and it could not be applied to India when there was no Crown in India and when the Common law of England was not applicable. According to him, the proper rule of construction which should be applied now is that the State is bound by a statute unless it is exempted expressly or by -necessary implication. It is, however, clear that there was no difference of opinion on the question that Common law was included within the expression "law in force" used by Art. 372(1). The majority judgment expressly states that the relevant expression "law in force" includes not only statutory law, but also custom or usage having the force of law and as such, it must be interpreted as including the Common law of England which was adopted as the law of this country before the Constitution came into force (p. 173). Wanchoo, J. has also agreed with this view, because he has expressly observed that "the royal prerogative where it deals with substantive rights of the Crown as against its subjects, as, for example, the priority of Crown debts over debts of the same nature owing to the subject, stands on a different footing from the royal prerogative put forward (1) [1961]1 S.C.R. 158.

(2) [1946] L.R. 73 I.A. 271.

in the present case, which is really no more than a rule of construction of statutes passed by Parliament. Where, for example, a royal prerogative dealing with a substantive right has been

accepted by the Courts in India as applicable here also, it becomes a law in force which will continue in force under Art. 372(1) of the Constitution" (p. 188). Therefore, this decision clearly shows that the rules of Common Law relating to substantive rights which had been adopted by this country and enforced by judicial decisions, amount to 'law in force' in the territory of India at the relevant time within the meaning of Art. 3 72 (1). In that view of the matter, the contention of Mr. Das Gupta that after the Constitution was adopted, respondent No. 1's position in regard to its claim for priority in the present proceedings has been altered, cannot be upheld. At this stage, we ought to make it clear that in the present appeal we are dealing with a very narrow point, and that relates to respondent No. 1's claim that arrears of tax due to it have precedence or priority over money debts due to a private creditor from the same debtor. We think it necessary to emphasise this aspect of the matter, because the basic doctrine of Crown privileges as originally evolved by Common law in England may lead to different categories of claims made in different circumstances and by different States in India; and we want to make it clear that our present decision should be confined only to the narrow point with which we are directly concerned. Questions may arise as to whether the relevant Common law doctrine was accepted in some Indian States. If it is shown that it was not, it may have to be considered whether Art. 372(1) would assist the enforcement of the said doctrine in such States. One thing is clear that if the said doctrine was accepted as a part of the law in any part of the country, it will not cease to be operative, because it is included in the expression "law in force" under Art. 372(1); but the position would be different in respect of such parts of the territory of India where the said doctrine was not recognised or applied prior to 1950. Then again, if this doctrine is supposed to be an essential attribute of sovereignty, where does sovereignty reside after the Constitution'.? Does it reside in the Union as well as all the constituent States ? If yes, what would be the position if competing claims were made by the States inter se, or by one of the States against the Union ? That is another aspect of the matter which may need careful examination in future.

Similarly, the basic justification for the claim for priority made by respondent No. 1 in the present case 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.

But the same principle may not equally be applicable in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which, no doubt, may be undertaken by the State for achieving socioeconomic good. It is well-known that a Welfare St ate often enters commercial fields which cannot be regarded as an essential and integral part of the basic governmental functions of the State, and-if the State seeks to recover debts from its debtors arising out of such commercial activities, it may become necessary to consider whether the doctrine of priority can be extended to such transactions. We are referring to some of the difficult problems which may arise in future in regard to the application of this doctrine, because we want to make it clear that our decision in the present appeal should not be taken to deal with any of them. Our conclusion, therefore, is that the claim for priority made by respondent No. 1 in the present proceedings has to be sustained, because it is based on a Common law doctrine which had been

applied and upheld in that part of India which was known 'British India' prior to the Constitution.

The next contention which Mr. Das Gupta has raised is that the doctrine of the priority of Crown debts cannot be enforced because it is specifically provided for and covered by the provisions of s. 46 of the Income-tax Act and by the relevant provisions of the Recovery Act. He argues that if it is shown that the particular doctrine has become the subject-matter of legislative provision, it is the legislative provision which will prevail, and during the operation of the said legislative provision, the doctrine will remain in abeyance and cannot be enforced. In support of this argument, lie has relied on the decision of the House of Lords in Attorney General v. De Keyser's Royal Hotel, Ltd.(). In that case, it was held that the Crown was not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the land or buildings of a subject for administrative purposes in connection with the defence of the realm without paying compensation (1) [1920] A.C. 508, 526.

for their use and occupation. One of the points which arose for decision in that case was, what was the effect of Regulation 2 of the Defence of the Realm Regulations issued under the Defence of the Realm Consolidation Act, 1914, when read with sub-s. 2 of s. 1 of the Act, on the prerogative of the Crown to take possession of the property of a subject for administrative purposes in connection with the defence of the realm ? In that connection, the provisions of the Defence Act , 1842 (5 & 6 Vict. c. 94) authorising taking possession of land also had to be considered. In dealing with this question, Lord Dunedin observed that the prerogative as defined by learned constitutional writers was "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown", and he added that inasmuch as the Crown is a party to every Act of Parliament, it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed. It is in the light of this principle that the provisions of the Regulation read with the relevant section of the Act were examined, and it was held that the Crown could not claim to take possession of the property of a subject without being liable to pay compensation in the manner provided for by the Defence Act, 1842.

In that case, Lord Atkinson dealt with this matter thus : "It was suggested", said Lord Atkinson, "that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent : that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance" (p. 559-40).

In support of the same contention, Mr. Das Gupta has also relied on a decision of the Federal Court in the Governor- General in Council v. Shromani Sugar Mills Ltd. (In Liquidation) (1). In that case, the Federal Court was examining the provisions of s. 230 of the Indian Companies Act (No. VII of 1913). Section 230 prescribes the order in which preferential payments should be made in winding

up proceedings. Clauses (a) to (f) of S. 230(1) lay down (1) [1946] F.C.R. 40.

the order of preference in which the payments should be made; cl. (a) gives the highest priority in that order to all revenues, taxes, cesses and rates, whether payable to the Government or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date. Reading this section along with s. 232(2) which provides that nothing in S. 232 applies to proceedings by the Government, the Federal Court held that it was difficult to think of any reason for qualifying the priority in respect of the Crown debts specified in s. 230(1) (a), if it was intended that other debts due to the Crown should enjoy unqualified priority. Spens, C.J., who spoke for the Court, contrasted the provision contained in s. 230(1) (a) with the provisions of s. 49 of the Presidency Towns Insolvency Act (No. III of 1909), and s. 61 of the Provincial Insolvency Act (No. V of 1920), and held that priority could be claimed by the Crown in winding up proceedings only as prescribed by s. 230(1) (a) and within the limits specified therein. It would be noticed that this conclusion postulates the applicability of the doctrine of priority of the debts due to the Crown and holds that as a result of the specific provision contained in s. 230 (1)(a) the said doctrine must be worked in the manner prescribed by the said section and not outside it. Basing himself on these two decisions, Mr. Das Gupta contends that s. 46 of the Income- tax Act and the relevant provisions of the Recovery Act displace the application of the doctrine of Crown priority on which respondent No. 1 relies in the present case. Let us first consider this argument in relation to s. 46 of the Income-tax Act. In dealing with this section, we may incidentally refer to the decision of this Court in Purshottam Govindji Halai v. Shree B. M. Desai, Additional Collector of Bombay & Others(1). In that case, the validity of s. 46(2) was impeached, inter alia, on the ground that it contravened Art. 14 of the Constitution. One of the grounds on which the validity of s. 46(2) was challenged, was based on the fact that the recovery of arrears of income-tax is authorised to be made by S. 46(2) in different modes and manners in the different States of India. It would be recalled that s. 46(2) enables the Income-tax Officer to forward to the Collector a certificate specifying the amount of arrears due from an assessee, and requires the Collector, on receipt of such certificate, to proceed to recover from the assessee in question the amount specified as if it were an arrear of land revenue. Now, the procedure prescribed (1) [1955] 2 S.C.R. 887.

for recovering arrears of land revenue differs in different States. In the City of Bombay it is recovered under s. 13 of the Bombay City Land Revenue Act (Bombay Act 2 of 1876). In the rest of the Bombay State it is recovered under s. 157 of the Bombay Land Revenue Code, 1879 (Bombay Act 5 of 1879). In Madras, the relevant provision is S. 48 of the Madras Revenue Recovery Act, 1864 (Madras Act 2 of 1864). In West Bengal, the relevant provision has been prescribed by the Recovery Act. In Punjab, it is s. 69 of the Punjab Land Revenue Act, 1887 (Punjab Act 27 of 1887), and in Uttar Pradesh, it is s. 148 of the U.P. Land Revenue Act, 1901 (U.P. Act III of 1901). The argument based on the diversity of the procedures prescribed by these different Acts was repelled, because it was held that though the procedure prescribed by the different Acts prevailing in different States was not uniform or even similar, the classification on which the application of the different statutes rested was justified inasmuch as the grouping of the income-tax defaulters into separate categories or classes State wise was certainly a territorial classification which is based on an intelligible differentia and the subjection, for the purposes of the recovery of the certified demand, of each of

such classes of defaulters to the same coercive process devised by their own State, on a consideration of local needs, for the recovery of their own public demands, cannot be regarded as benefit of a reasonable nexus or correlation between the basis of classification and the object sought to be achieved by the Indian Income-tax Act any more than it can be so regarded with respect to the respective State laws (p. 900).

We have referred to this decision, because it brings out emphatically the real character of the provisions prescribed by s. 46(2). Section 46(2) does not deal with the doctrine of the priority of Crown debts at all; it merely provides for the recovery of the arrears of tax due from an assessee as if it were an arrear of land revenue. This provision cannot be said to convert arrears of tax into arrears of land revenue either; all that it purports to do is to indicate that after receiving the certificate from the Income-tax Officer, the Collector has to proceed to recover the arrears in question as if the said arrears were arrears of land revenue. We have already seen that other alternative remedies for the recovery of arrears of land revenue are prescribed by sub-sections (3) and (5) of s. 46. In making a provision for the recovery of arrears of tax, it cannot be said that s. 46 deals with or provides for the principle of priority of tax dues at all; and so, it is impossible to accede to the argument that s. 46 in terms displaces the application of the said doctrine in the present proceedings.

That takes us to the provisions of the Recovery Act on which the same argument has been based. The Recovery Act has been passed, because it was thought expedient to consolidate and amend the law relating to the recovery of public demands in Bengal. A public demand is defined by s. 3 (6) of this Act as meaning, inter alia, any arrear or money mentioned or referred-to in Schedule 1; and clause 3 of Sch. I deals, inter alia, with any money which is declared by any law for the time being in force to be recoverable or realizable as an arrear of revenue or land revenue. rliat is how the arrears of tax in respect of which a certificate has been issued by the Income-tax Officer attract the provisions of the Recovery Act. A "Certificate Officer" means under s. 3 (3) a Collector and other officers mentioned in it. A "certificate-holder" under s. 3 (2) means the Government or person in whose favour a certificate has been filed under this Act, and "certificate-debtor" under s. 3 (1) means a person named as debtor in a certificate filed under this Act. The effect of the provisions contained in ss. 4 to 10 in Part II of the Recovery Act, appears to be that when a Certificate Officer is satisfied that any public demand payable to the Collector is due, he proceeds to sign a certificate in the prescribed form. This certificate is a certificate properly so-called for the purpose of this Act. The certificate issued under s. 46(2) of the Income-tax Act is in a sense a public demand, but S. 5 of the Recovery Act seems to require that when any requisition is received by the Certificate Officer, he has to examine whether the demand in question is recoverable and whether the recovery by suit is not barred by law. On this prima facie examination, if he is satisfied that further action is justified, he proceeds to sign a certificate stating that the demand is due; that is the effect of s. 6. A certificate so issued is then served on the certificate-debtor under S. 7, and S. 8 prohibits private transfer of the immovable property of the certificate-debtor after the service of notice of any certificate has been effected on him under s.

7. It is at that stage that the certificate-debtor is empowered to file a petition denying his liability under s. 9; and his objections are heard under s. 10. That, in brief, is the scheme of Part 11 with which we are concerned. There is one more provision of the Recovery Act to which we ought to refer,

and that is s. 26. This section deals with the disposal of proceeds in execution, and subsection (1) of this section provides that where assets are realized, by sale or otherwise in execution of a certificate, they shall be disposed of in the manner indicated by its clauses (a) to

(d). Section 38 provides that statutory rules included in Sch. 11 shall have effect as if enacted in the body of this Act, until altered or annulled in accordance with the provisions of Part V. Statutory Rule 22 which is relevant for our purpose deals with cases of attachment of property in custody of Court or public officer; it reads thus :-

> "Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Certificate- Officer by whom the notice is issued : Provided that, where such property is in the custody a Court, any question of title or priority arising between the certificate- bolder and any other person, not being the certificate-debtor, claiming to be interested in such property by virtue of any assignment, attachment or 0otherwise, shall be determined by such Court".

Having thus considered the broad features of the Recovery Act, the question which we have to decide is whether these provisions can be said to amount to a statutory provision in respect of the doctrine of priority of arrears of income-tax due to respondent No. 1 over private debts due from the same debtor. We have already examined the two decisions on which Mr. Das Gupta's -contention rests. Take, for instance, s. 230 of the Indian Companies Act. Can we say that any provisions of the Recovery Act can be compared to the provisions of s. 230 of the Companies Act ? In our opinion, the answer to this question has to be in the negative. Broadly stated, the Recovery Act is intended mainly to provide for the procedure to recover public debts. This Act is not directly concerned with the right to recover arrears, or with priority, of tax dues. Arrears of tax fall within the scope of the proceedings contemplated by it, because they attract the provisions -of clause 3 of Sch. 1. Even a superficial glance at the fourteen clauses of Sch. 1 to the Recovery Act would indicate that this Act is concerned with public demands of various kinds, and it would not be reasonable to suggest that any of its provisions are intended to deal directly or even indirectly with the principle of law with which we are concerned. These provisions merely indicate the manner in which and the procedure according to which public debts should be recovered. There is no positive provision in respect -of respondent No. 1's claim to recover arrears of tax. Rule 22 to which we have referred which corresponds to 0.21 r. 52 of the -Code of Civil Procedure, can no doubt be invoked to recover ,.arrears of tax; but that is because the procedure prescribed by the said Rule applies to the recovery of public debts and tax arrears can be treated as public debts inasmuch as by virtue of S. 46(2) of the Income-tax Act they become recoverable as arrears of land revenue. In our opinion, it is difficult to accept the argument that the application of the doctrine of priority of arrears of tax over private debts can be said to be displaced by any of the provisions of the Recovery Act. That being so, we must hold that the High Court was right in coming to the conclusion that respondent No. 1 was entitled to claim priority in the matter of arrears of tax due from respondent No. 2 over the decretal debt due to the appellant from the same debtor.

The result is, the appeal fails and is dismissed with costs. Appeal dismissed.