Bank Of Baroda Through Its Assistant ... vs State Of Gujarat on 16 September, 2019

Equivalent citations: AIRONLINE 2019 GUJ 371

Author: J. B. Pardiwala

Bench: J.B.Pardiwala

C/SCA/12995/2018 CAVJUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 12995 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

BANK OF BARODA THROUGH ITS ASSISTANT GENERAL MANAGER
PREM NARAYAN SHARMA
Versus
STATE OF GUJARAT & 3 other(s)

Appearance:
MR BHARAT T RAO for the Petitioner(s)No. 1
for the Respondent(s) No. 4
MR RONAK RAVAL, AGP for the Respondent(s)No. 1, 2, 3

CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date: 16/09/2019

CAV JUDGMENT

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant, a nationalized bank, has prayed for the following reliefs :

"(A) To issue a writ of mandamus or a writ in the nature of

mandamus or any other appropriate writ, order or direction by quashing and setting aside the public notice issued by the respondent no.3 at Annexure-P published in Gujarat Samachar newspaper dated 20.08.2018, for the reasons stated in the Memo of Petition and in the interest of justice;

(B) Pending admission, hearing and final disposal of the above Special Civil Application, Your Lordships may be pleased to restrain the respondent nos.1 to 3 from taking any further action, pursuant to the public advertisement given by them in Gujarat Samachar newspaper dated 20.8.2018 (Annexure-P), in view of the provisions of Section 26-E of the SARFAESI Act, 2002 coupled with the fact that the petitioner is in possession of the property in question from 02.08.2017 and making efforts to dispose of the property in question through public auction, for the reasons stated in the Memo of Petition and in the interest of justice;

(C) The Hon'ble Court may kindly be pleased to grant any other appropriate relief as the nature circumstances of the case may require."

2. The facts giving rise to this writ-application may be summarised as under :

> (1) On 12th June 2012, the writ-applicant Bank sanctioned loan to the tune of Rs.1,40,00,000=00 in favour of the respondent no.4, a partnership firm. By way of security, the respondent no.4 created a mortgage in favour of the Bank of non-agricultural land bearing Block No.806/ C/SCA/12995/2018 CAVJUDGMENT paiki/5 admeasuring 1443 sq.meters along with the construction admeasuring about 518 sq.meters standing thereon in the name of Kothari Industrial Estate, Rakanpur-Santej Road, Santej, Taluka Kalol, District Gandhinagar. The original title-deeds of the properties were handed over by the respondent no.4 in favour of the Bank.

The registered mortgage deed referred to above came to be executed on 20th August 2012 and the same was registered with the office of the Sub-Registrar, Kalol.

(2) On 19th June 2013, a supplementary mortgage-deed came to be executed by the partners of the borrowing firms, namely Shri Navinbhai Dahyabhai Patel and Smt.Pallaviben Navinbhai Patel, in their personal capacity by mortgaging their bungalow bearing No.2/A, Plot No.B/1 admeasuring 290 sq.yards with undivided share in the land known as 'Maruti Hills' situated on Final Plot No.6/2/p and 7/2/p, Sub-Plot No.1 7/2/B of Survey No.965/6 of Mouje Vejalpur and also residential immovable property bearing City Survey No.906/A admeasuring 256.85 sq.meters situated at Visnagar, Taluka Visnagar, District Mehsana.

(3) On 31st January 2014, a third mortgage-deed was executed by the two partners referred to above in their personal capacity registered with the Sub-Registrar, Kalol, on the very same day and date.

(4) It appears that over and above the credit facility aggregating to Rs.140.00 lakh which was sanctioned first in point of time, the said facility later came to be enhanced to Rs.320.66 lakh and from Rs.320.66 lakh, the same C/SCA/12995/2018 CAVJUDGMENT came to be enhanced to Rs.485.15 lakh. It appears that the respondent no.4 defaulted in the repayment of the loan amount.

(5) On 3rd May 2016, a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act') came to be issued upon all the partners of the firm. The partners were restrained from selling or transferring the secured assets without the prior permission of the Bank.

(6) On 2nd September 2016, a notice was issued for the purpose of taking over of the possession of the secured assets. Ultimately, after complying with all the legal procedures under the provisions of the SARFAESI Act, the physical possession of the secured assets was taken over by the Bank on 2nd August 2017. This fact was published in the English and Gujarati Newspapers by way of a public notice.

(7) On 23rd August 2017, the partners were informed that if they would not pay the requisite amount with interest, the secured assets would be put to auction.

(8) On 23rd August 2017, the first auction notice was issued by the Bank.

(9) It appears that the auction notice dated 20th August 2018 came to be issued by the Assistant Commissioner, Commercial Tax, State of Gujarat, in the local daily newspaper, namely Gujarat Samachar.

C/SCA/12995/2018 CAVJUDGMENT

3. The clash is now between the Bank and the State Government. The question is, who would have the precedence over the secured assets.

4. The following facts are not in dispute :

(1) The original title deeds of the immovable properties of M/s.Waterforce Pumps as well as the residential properties of Navin Patel and Pallavi Patel situated at Ahmedabad and Visnagar are mortgaged with the Bank of Baroda by registered mortgage deed.

(2) The original borrowers, viz. Navinbhai Dahyabhai Patel and Pallaviben Navinbhai Patel, are absconding and have left India. They are not traceable.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

5. Mr.B.T.Rao, the learned counsel appearing for the writ- applicant - Bank, has tendered his written submissions. The submissions are as under :

"(1) Once the charge is created in favour of the Bank and the original title deeds of the properties are with the Bank, the Bank has got the first and the foremost charge over the properties of the partnership firm and its partners. The SARFAESI Act has been amended by the Amendment Act No.44 of 2016. The Notification was published in the Government Gazette on 16th August 2016 in Part-II Sec.1.

The effective date of the notice of the Amendment Act No.44 of 2016 as far as Section 26E is concerned, is 1st September C/SCA/12995/2018 CAVJUDGMENT 2016. Section 26E came into effect from 12th August 2016, which reads as under :

"26-E. Priority to secured creditors.- Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority."

(2) It is submitted that the Bank had made several efforts to sell the properties but the Bank could not get offer as per the upset price.

(3) It is submitted that for the first time the attachment order had been passed on 29th July 2017 by the Commercial Tax Officer to the partners of M/s.Waterforce Pumps.

(4) It is submitted that the Bank had taken symbolic possession of the property in 2016 and since then made all the efforts to sell the properties.

(5) In view of Section 26E of the SARFAESI Act which came into force on 12th August 2016 and notified on 1st September 2016, the Bank has got first charge over the property and in view of the specific language of the section which specifically provides that the secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

(6) It is submitted that Section 48 of the VAT Act would

not apply in view of the amendment to the provisions of the SARFAESI Act by the Amendment Act No.44 of 2016 and the Bank of Baroda has got the first priority over the said Act.

(7) It is submitted that Section 46 of the VAT Act provides for the special power to the tax authority for recovery of the arrears of land revenue. It is pertinent to note that the proceedings can be initiated for recovery of the arrears of land revenue only after the final order is passed by the VAT Commissioner under the VAT Act and a certificate issued thereafter.

(8) Section 48 of the VAT Act provides that the tax to be first charge on the property. But, in view of the provisions of Section 26E of the SARFAESI Act and the fact that the Bank has been given primacy from all the taxes of the Central Government and the State Government and the local authorities, therefore in view of the amendment in the SARFAESI Act which is a Central Act, Section 48 of the VAT Act cannot march over Section 26E of the SARFAESI Act."

6. Mr.Rao placed strong reliance on a decision of the Rajasthan High Court in the case of G.M.G. Engineers & Contractor Pvt. Ltd. and another v. State of Rajasthan and others (S.B. Civil Writ Petition No.6872 of 2017, decided on 5.7.2017). Mr.Rao submitted that the Bank has already initiated the proceedings for the purpose of putting the secured assets to auction. The first public notice issued in the newspaper is dated 23rd August 2017, followed thereafter on 6th November 2017 C/SCA/12995/2018 CAVJUDGMENT and 7th August 2018 respectively. According to him, the authority concerned, by merely addressing a letter to the Mamlatdar as regards the claim, a charge could not be said to have been created in favour of the State.

7. Mr.Rao, in the last, submitted that in view of the provisions of Section 26E of the SARFAESI Act, the Bank of Baroda has got the first charge over the secured assets.

SUBMISSIONS ON BEHALF OF THE STATE :

8. Mr.Ronak Raval, the learned AGP has also tendered his written arguments. The arguments are as under :

> "(1) Section 26E of the SARFAESI Act is not notified by the Central Government in the Official Gazette and, therefore, it has not come into force and therefore, Section 26E of the SARFAESI Act would not have applicability and therefore, the State Government would have first charge over the property of M/s.Water Force Pumps in view of Section 48 of the GVAT Act, 2003. Annexed herewith and marked as Annexure R1 is the copy of the Amendment Act No.44 of 2016 bringing into the statute several amendments. Suffice it to say that Section 26E, which the petitioner is relying upon, is falling within Section 18 of the Amendment Act No.44 of 2016 which

is not made effective which is very evident from the appointed dates prescribed by the Government, bringing the Amendment Act No.44 of 2016 into effect. The SO 2831 (E) dated 1st September 2016 issued by the Central Government prescribing the dates of coming into force of Sections is annexed herewith and C/SCA/12995/2018 CAVJUDGMENT marked as Annexure R2. To be precise, the said clarification issued by the Central Government clearly mentions that Sections 22 to 31 of the Amendment Act No.44 of 2016 refers to the following sections of the SARFAESI Act and of the Debts Due to Banks and Financial Institutions Act, 1993, and the details of the same are as under :

Amendment Act No.44 of Sections 22 31 SARFAESI Act 23 31(A) SARFAESI Act 24 32 SARFAESI Act 25 38 SARFAESI Act 26 2 of Debts Due to Banks and Financial Institutions Act, 27 4 of Debts Due to Banks and Financial Institutions Act, 28 6 of Debts Due to Banks and Financial Institutions Act, 29 8 of Debts Due to Banks and Financial Institutions Act, 30 11 of Debts Due to Banks and Financial Institutions Act, 31 of Debts Due to Banks and Financial Institutions Act, C/SCA/12995/2018 CAVJUDGMENT (2) Even otherwise, Section 26(E) has no retrospective applicability and it has not come into force and even assuming that the same has come into force, the charge of the State Government cannot be nullified.

(3) The dues of the State Government have accrued from the year 2012 onwards and prior to 2016.

(4) That, where the State creates a first charge on the property of a dealer, the said charge shall have the precedence over the other existing mortgages. The term 'charge' is wider than a mortgage, and hence, would cover within its ambit, a mortgage also. The said aspect of a statutory first charge having the precedence over a mortgage has been decided by the Supreme Court in the case of State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others, reported in (1995)2 SCC 19, wherein the Apex Court has observed that when a first charge is created by operation of law over any property, that charge will have the precedence over an existing mortgage.

(5) The said aspect of statutory first charge is having precedence over the SARFAESI Act, 2002. The Supreme Court, in the case of E.P.F. Commissioner v. O.L. of Esskay Pharma, reported in (2011)5 GLR 3739, has taken a very categorical view on considering the SARFAESI Act, 2002 vis- a-vis E.P.E. Act, interpreting the said legal proposition, has held considering several judgments if there is a specific provision in these enactments creating first charge but the Parliament has not made any such provisions in the enactments, the first charge created by the State legislation C/SCA/12995/2018 CAVJUDGMENT on the property of the dealer cannot be destroyed by implication or inference, notwithstanding the fact that banks fall in the category of secured creditors.

(6) The Supreme Court, in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh and Company, reported in (2000)5 SCC 694, has considered the doctrine of priority or comprehend of the State debts as a rule of necessity and public policy. The basic justification for the claim of priority of the State debts rests on the well recognized 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. It is further held that the arrears of banks dues to the State can priority over private debts.

(7) The SARFAESI Act, 2003 falls within the subject 'banking' in Schedule 7 List I Entry 45 read with Entry 95 by virtue of Article 246 of the Constitution of India and thus the State enactment base legislative competence of being an Act indicated by the Parliament. The Apex Court, in the case of State of Maharashtra v. Bharat Shanti Lal Shah and others, reported in (2008)13 SCC 5, has held that where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any Entry in List I, the court has to look to the substance of the State Act, if it is found that it falls under an entry in the State List but there is only an incidental encroachment on topics in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the topics in the Union List. It is further held by the C/SCA/12995/2018 CAVJUDGMENT Apex Court that if it could be shown that the area and subject of the legislation is also covered within the purview of the entry of the State List and the Concurrent List, in that event, incidental encroachment to an entry in the Union List will not make a law invalid.

(8) The aspect of conflict between the Central Legislation vis-a-vis the State legislation and the non-obstante clause prevailing in the State legislation by way of first charge, its overriding effect over Section 35 of the Securitization Act has been dealt by the Supreme Court in Central Bank of India v. State of Kerala and others, reported in (2009)4 SCC 94, whereby the Supreme Court has recognized the sales tax dues shall prevail being the charge created under the provisions of the Kerala General Sales Tax Act being statutory first charge. The Supreme Court also dealing with the aspect of legislative competence and repugnancy has held that the question of repugnancy between law made by the Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List. In the present case, there is no such overlapping which would make the Gujarat Value Added Tax Act, 2003 redundant in operation. The core issue herein in the present case is that the Gujarat Value Added Tax Act, 2003 is enacted having its legislation competence falling within the term 'banking' which find its place in List 1 Schedule 7 Entry 45 and 94 hence both the said enactments operate in different areas, hence there is no question of repugnancy between the State enactment and the Central legislation.

C/SCA/12995/2018 CAVJUDGMENT

(9) This High Court, in the Special Civil Application

No.3372 of 2012 passed an order dated 23.7.2012 and held that the first charge over the property shall be of the department/government under Section 48 of the GVAT Act, 2003.

(10) Considering the above, the petitioner is required to be dismissed and the amount fetched in the auction conducted by the petitioner Bank, may be directed to be transferred to the State

Government."

9. Mr.Raval has placed strong reliance on the following decisions :

(1) State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others, (1995)2 SCC 19;

(2) Nisar and another v. State of U.P., (1995)2 SCC 23;

(3) State of M.P. and another v. State Bank of Indore and others, (2002)10 SCC 441;

(4) Assistant Collector of Central Excises and another v.

Kashyap Engineering & Metallurgicals (P) Ltd., (2002)10 SCC 443;

(5) Employees Provident Fund Commissioner v. Official Liquidator of Esskay Pharmaceuticals Limited, (2011)10 SCC 727;

(6) Laxman alias Laxman Mourya v. Divisional Manager, Oriental Insurance Company Limited and another, (2011)10 SCC 756;

C/SCA/12995/2018 CAVJUDGMENT (7) Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and others, (2000)5 SCC 694;

(8) State of Maharashtra v. Bharat Shantilal Shah and others, (2008)13 SCC 5;

(9) Central Bank of India v. State of Kerala and others, (2009)4 SCC 94;

10. Mr.Rao, in rejoinder to what has been submitted by Mr.Raval, the learned AGP in writing, has submitted as under :

"3. First of all, the State Government has contended that Section 26 (E) of the SARFAESI Act is not notified by the Central Government in the Official Gazette, and therefore, it has not come into force, and therefore, Section 26 (E) of the SARFAESI Act would not have applicability, and therefore, the State Government would have first charge over the property of the M/s. Water Force Pumps, in view of Section 48 of the GVAT Act, 2003.

This contention of the State Government is not correct. It is submitted that, the Government of India, Ministry of Finance has notified the provisions of Section 26 (E) on 01.09.2016. Copy of notification issued by the Government of India published in the Official Gazette Part-II Section-3 at serial no. 2142 dated 01.09.2016 is annexed herewith and marked as ANNEXURE-W-1 to this written submission. Therefore, the contention raised by the State Government has no merit. The

Notification has been published in the Official Gazette.

C/SCA/12995/2018 CAVJUDGMENT

4. It is submitted that, prior to 2016, Chapter-5 (A) was not there and it was brought into effect by virtue of Enforcement of Security Interest and Recovery of Debts Law and Misc. Provisions Amendment Act, 2016.

5. It is submitted that, after the judgment of the Central Bank of India v. State of Kerala and others reported in (2009)4 SCC 94, the Central Government has amended the Securitization Act by amendment Act 44 of 2016 on 16.08.2016. The date of Notification of this Act is 01.09.2016. Therefore, Amendment Act has been come into force on 01.09.2016. Only Section 4 (13), Section 7 and 32 came into force on 04.11.2016.]

6. It is submitted that, what is stated by the State Government is also not correct. It is submitted that, the Bank has a registered mortgage in his favour executed on 28.08.2012, 19.06.2013 and 31.01.2014. On the date of registration of mortgage, there was no order of State Government under GVAT Act, and order of State Government has been passed for the first time for assessment year 2012-2013 on 24.03.2017. Before the order of assessment has been passed, the account has been declared as N.P.A. on 30.04.2016 by the Bank of Baroda (pg. 100 of the petition) and notice under Section 13 (2) has been issued on 03.05.2016 and thereafter, symbolic possession has been taken on 02.09.2016 (pg. 121 Annexure-E of the petition). Therefore, the Bank has first charge, has taken steps in advance.

C/SCA/12995/2018 CAVJUDGMENT

7. It is submitted that, the State Government has for the very first time passed the order of assessment on 24.03.2017, 25.05.2017 and 07.05.2017 cannot march over the right of the bank. It is submitted that, assessment has to be done under Section 34 of the GVAT Act for each year. In the present case, assessment of 2012-2013 was held only on 24.03.2017.

8. It is submitted that, when the bank has declared account as N.P.A. and issued Notice under Section 13 (2) and taking symbolic possession on 02.09.2016, there was no assessment of the State Government of tax.

9. It is submitted that, furthermore, intentionally, the State Government has not given the specific date, when the CTO (Commercial Tax Officer) has initiated the proceedings of recovery under Section 44 of the Act. It is pertinent to note that, under the provision of Section 42, the assessee has to pay the tax and interest on delayed payment within a period of 30 days from the date of service of notice of demand. It is submitted that, after the right of the bank has been accrued and bank has started the

proceedings, taking over the possession, a subsequent Act cannot give priority to his claim. It is submitted that, the State Government has not given details of the notice, because on 24.03.2017 assessment order has been passed for the year 2012-2013. Therefore, notice only can be issued thereafter and no dates have been given either in reply or in the written submission by the State Government.

C/SCA/12995/2018 CAVJUDGMENT

10. It is interesting to note that Notice under Section 44 of the GVAT Act, 2003 is also not annexed, on which date Section 44 notice has been issued by the Commissioner to the Company.

11. It is submitted that, order under Section 46 of the Act is only special power of act for recovery of tax, as arrears of land revenue. It is submitted that, provisional order of attachment has been passed under Section 45 of the Act and this order has been passed only on 29.07.2017, and at that point of time, the possession of the premises is already with the bank. Therefore, this also subsequent action. It is submitted that, for taking action under Section 46, the Commissioner has to take steps under the Bombay Land Revenue Code, and under Bombay Land Revenue Code first a recovery certificate is required to be issued, and thereafter, proceedings have to be initiated, on this issue also, the written submission filed by the State Government is silent and on the contrary, the CTO without passing any order under Section 46, straightaway wrote a letter dated 28.05.2017 to the Mamlatdar which could not have been made, because the stage of entering the name of the Government dues will come only after the stage of Sections 44 and 45 of the Act are over. It is submitted that, notice Section 200 of the Bombay Land Revenue Code has been issued on 29.07.2017 to the Company and attachment order was also issued on 29.07.2017. Therefore, letter issued by the CTO, Kalol on 28.05.2017 is also against the provisions of law. It is submitted that, no such notices and documentary evidences have been C/SCA/12995/2018 CAVJUDGMENT produced before this Hon'ble Court by the State Government.

12. It is submitted that, as far as the case of the petitioner is concerned, the account of the borrower become N.P.A. on 30.04.2016, notice under Section 13 (2) has been issued on 03.05.2016.

13. It is submitted that, all action taken by the CTO is after the symbolic possession been taken over by the petitioner bank on 02.09.2016. It is submitted that, merely because notice under Section 200 of the Bombay Land Revenue Code on 29.07.2017 issued by the C.T.O. does not give preferential treatment to the State Government.

14. As far as judgment of the Hon'ble Supreme Court in the case of State Bank of Bikaner & Jaipur v. National Iron and Steel Rolling Corporation and others, rep orted in (1995) 2 SCC 19 is concerned, it is pertaining to charge and mortgage. It is

submitted that, in Rajasthan Sales Tax Act, Section 11AAAA was existence in the statute book since 1989. Not only that, the suite has been filed by the Bank in the court of Bharatpur for recovery of a sum of Rs.3,79,672/- and in the pending suit, the C.T.O. has made application for joining party for recovery of amount of Rs.1,19,122/-. In the said judgment, the C.T.O. is claiming recovery on prior point of time, therefore, the aforesaid judgment of (1995)2 SCC 19 would not applicable in the present case.

C/SCA/12995/2018 CAVJUDGMENT

15. It is submitted that, in the case of Employees Provident Fund Commissioner v. Official Liquidator of Esskay Pharmaceuticals Limited reported in (2011) 10 SCC 727, priority over Section 529-A of the Companies Act versus Section 11 of the EPF Act. In the case of Esskay Pharmaceuticals, the amount has been due and order under Section 7 (A) has been passed by the EPF authority in 2001. Then winding up order has been passed on 11.03.2004 by the High Court of Gujarat.

Therefore, before the winding up order, the amount of Rs.10,00,000/- (approximately) is due and payable to EPF department. It is also stated that EPF Act being Special Act, and therefore, it has a priority over the Companies Act. Therefore, the ratio laid down in the judgment of (2011) 10 SCC 727 cannot be made applicable in the present case.

It is submitted that, the SERFAESI Act being a special Act enacted in the year 2002 and it has enacted only with a view to speedy recovery of the financial institution from the borrower, therefore, looking to the provisions of the Act, the State Government cannot claim over the priority of the claim of the petitioner bank, because the State Government has passed first assessment order on 24.03.2017. Therefore, it cannot claim priority over the same.

16. It is submitted that, as far as judgment in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh and Company & ors. reported in 2000 (5) SCC 694 is concurred, where priority of precedence of State debts C/SCA/12995/2018 CAVJUDGMENT have been discussed. In the case of Dena Bank the dues of the Sales Tax department is of the year 1957-1958, 1966-1967 to 1969-1970 under the State Act and for the years 1958-1959 to 1964-1965 and 1967-1968 to 1969- 1970 under the Central Act. Therefore, the dues of the Sales Tax department is much prior to the mortgaged created by Shri Bhikhabhai Prabhudas Parekh & Co. in favour of the bank on 24.04.1969. In Dena Bank's case, Section 15 (2A) of Kartanaka Sales Tax Act had come into force on 18.12.1983 while the decree in favour of the Bank was passed on 3.8.1992 and is yet to be executed. Therefore, looking to the case on hand before the Hon'ble Supreme Court, the Hon'ble Supreme Court has held that, "Karnataka Sales department has priority over the bank dues.

17. In the case of State of Maharashtra v. Bharat Shantilal Shah & Ors. reported in 2008 (13) SCC 5, in this case, the question before the Hon'ble Supreme Court was the constitutional validity of the Maharashtra Control of Organised Crime Act, 1999 (for short the `MCOCA' or the `Act') on the ground that the State Legislature did not have the legislative competence to enact such a law and

also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India. The said judgment has already on a different subject and the issue was under

Articles 245 and 246 of the Constitution of India, wherein, doctrine of pith and substance has been invoked, meaning thereby subject of the State Act falls under an entry within the competence of the State C/SCA/12995/2018 CAVJUDGMENT Legislature, mere incidental encroachment on topics in the Union List would not make the State Act invalid and ultra vires the Constitution. That is not the issue over here. SARFAESI Act has been enacted specially for the purpose of recovery of debts of financial institution's amount given by way of loan and it operates in the separate field. The Sales Tax is enacted by the State Government for the sales tax amount from its dealer which also operates in a different field, there is no encroachment of topics of State list and Union list, therefore, the said judgment cannot be made applicable in the present case.

In the present case, the State Government has enacted the Act, the Gujarat VAT Act, 2003, where Section 48 has come into power when the sales tax become due and payable.

In the case on hand, the bank has declared account as NPA on 03.05.2016, taken symbolic possession on 02.09.2016, and therefore, possession is with the bank. The first order of State Government was passed for the assessment year of 2012-2013 in March, 2017, therefore, in March, 2017, the amount become due, therefore, they cannot claim priority by virtue of Section 48 of the Act. Section 48 of the Act came into picture only when order has been passed, amount become due and payable and thereafter, it operates as a charge, but order has been passed much later than the bank has taken symbolic possession of the property C/SCA/12995/2018 CAVJUDGMENT under SARFAESI Act, therefore, the bank has first charge over the property in question.

18. In the case of Central Bank of India v. State of Kerala & Ors., reported in 2009 (4) SCC 94, it pertains to Article 254, 245 and 246 of the Constitution of India and scope of applicability of Article 254. It is submitted that, the aforesaid judgment is about the conflict of Article 254, 245 and 246 of the Constitution of India and priority of the State. In all these matters, the fact remains that the sales tax dues have been adjudicated and ascertained and order has also been passed by the competent authority and on the basis of that priority was claimed over. While in the present case the State has first time passed an order dated 20.03.2017, therefore, merely passing of subsequent order cannot give priority over the same. It is submitted that, in view of the fact that the judgment which is relied upon by the State Government cannot be made applicable in the present case.

19. It is submitted that, the Rajasthan High Court has examined the provisions of Section 26-E of the SARFAESI Act. There also Section 47 of the Act, 2003 of

> Rajasthan is pari-materia of Gujarat Act. The judgment of the Hon'ble Supreme Court in the case of Central Bank of India was prior to the amendment of the Act, 2000 and 1993, Thus would not apply to the amended provisions of the Act. In the case hand also the amended provision does not apply. It is submitted that, the Rajasthan High Court has examined the Section 26 (E) of the Act and it is held in view of the amended provisions of Section 26 (E), C/SCA/12995/2018 CAVJUDGMENT looking to the language of section, the effect of Section 48 has been nullified, because Section 26 (E) specifically stated that secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

In the present case, the bank has taken steps to recover the amount from 03.05.2016, taken symbolic possession on 03.09.2016 and process in taking physical possession, at that time, for the very first time, in March, 2017, first order has been passed and thereafter, three orders have been passed. This is done only after the bank has given advertisement in the newspaper to Section 13 - demand notice and possession notice, and merely because the order has been passed by the State Government, after bank has initiated action, does not give first priority to the State Government.

It is submitted that, Section 26 E of the Act came into force by amendment and has to be given effect, and therefore, Section 48 cannot be made applicable. It is submitted that, it has to be seen that when first order of assessment has been passed and when the notice has been issued by the department for taking steps of recovery of the dues/amount, if it is considered, it is crystal clear that all action of the State Government is subsequent to the action taken by the bank, therefore, the bank has first right over the property in question, therefore, the petition is required to be allowed.

C/SCA/12995/2018 CAVJUDGMENT

20. It is submitted that, judgment rendered by the Hon'ble High Court of Gujarat in Special Civil Application No. 3372 of 2012 in the case of Cosmos Cooperative Bank Ltd. v. State of Gujarat and ors., dated 23.07.2012, does not apply in the present case. Here in the case, the bank has given loan in the year 2007 and thereafter when account became NPA, proceedings were started. While amount of sales tax has been assessed by the department on 30.03.2009 for the assessment year 2006-2007 and thereafter order has been passed. Therefore, the amount was outstanding before the bank has released the loan amount, therefore, the company has to pay sales tax dues to the State Government of the year 2006-2007, therefore, the said judgment does not apply in the present case.

21. It is submitted that, in the case of Ahmedabad Municipal Corporation v. Saurashtra Paints Pvt. Ltd. reported in 2002 (2) GLR 1109, where, meaning of creation of charge, first charge, scope and meaning of enforcement of charge over property has been considered and examined by the Hon'ble Division Bench of this Hon'ble Court. The Hon'ble Division Bench has examined the provisions of the Bombay Provincial Municipal Corporation Act and Section 100 of the Transfer of Property Act. The fact of the case is that, the Corporation has outstanding dues of the years 1965-66, 1966-67, 1967-68 and 1968-69. It is submitted that, the City Civil Court has held auction of the property on 17.07.1973, prior to that the Corporation has already claimed the charge for the outstanding amount.

The Corporation C/SCA/12995/2018 CAVJUDGMENT property tax amount has due for the aforesaid period of years, much prior to the property put in auction. Therefore, that first charge over the property cannot be made applicable in the present case. Therefore, when the bank has taken possession of the property in question in advance/first point of time, before first order which has been passed by the assessment authority/ State Government, the State Government cannot be has preference over the same."

ANALYSIS :

11. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is, whether the Central Legislation would prevail over Section 48 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as, 'the VAT Act'). To put it in other words, whether the Bank will have the first priority to recover its dues being a secured creditor in view of Section 26E of the SARFAESI Act or the State will have the first priority by virtue of Section 48 of the VAT Act.

12. Before adverting to the rival submissions canvassed on either side, it is necessary to look into few relevant provisions of the statutes.

13. The Value Added Tax Act, 2003, came into force from 1st April 2006 in the State of Gujarat. The Act was enacted to consolidate and amend the laws relating to the levy and collection of tax on the value added basis in respect of the sale of goods in the State of Gujarat. Section 48 of the Act, 2003, is with regard to the charge on the property. Section 48 reads as under :

C/SCA/12995/2018 CAVJUDGMENT

"48. Tax to be first charge on property.- Notwithstanding

anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person."

14. Section 46 of the VAT Act is with regard to the special powers of the tax authorities for recovery of tax as arrears of land revenue. Section 46 of the VAT Act reads as under :

"46. Special powers of tax authorities for recovery of tax as arrears of land revenue.

(1) For the purposes of effecting recovery of the amount of tax, penalty or interest due from any dealer or other person by or under the provisions of this Act or under any earlier law, as arrears of land revenue. -

(i) The Commissioner, the special Commissioner, Additional Commissioner and the joint Commissioners shall have and exercise all the powers and perform all the duties of the Collector under the Bombay Land Revenue Code, 1879.

(ii) The Deputy Commissioners and Assistant Commissioner shall have and exercise all the powers (except the powers of arrest and confinement of a C/SCA/12995/2018 CAVJUDGMENT defaulter in a civil jail) and perform all the duties the assistant Collector or Deputy Collector under the said Code.

(iii) The Commercial Tax Officers shall have and exercise all the powers (except the powers of arrest and confinement of a defaulter in a civil jail) and perform all the duties of the Mamlatdar under the said Code.

(2) Every order passed in exercise of the powers conferred buy sub-section (1) shall, for the purpose of section 73, 75, 79, or 94, be deemed to be an order passed under this Act."

15. Sections 31B and 34 of the Recovery of Debts and Bankruptcy Act, 1993, read as under :

"31B. Priority to secured creditors.- Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation.- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority C/SCA/12995/2018 CAVJUDGMENT to secured creditors in payment of debt shall be subject to the provisions of that Code."

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

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act,

1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) [the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989)."

16. Sections 26E, 35 and 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, read as under :

"26-E. Priority to secured creditors.- Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

C/SCA/12995/2018 CAVJUDGMENT Explanation.- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

"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."

"37. Application of other laws not barred.--The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

17. The plain reading of Section 48 of the VAT Act indicates that it starts with a non-obstante clause 'notwithstanding anything to the contrary contained in any law for the time being in force'.

18. Section 31B of the RDB Act also starts with a non-obstante clause 'notwithstanding anything contained in any other law for the time being in force'.

C/SCA/12995/2018 CAVJUDGMENT

19. Section 26E of the SARFAESI Act also starts with a non- obstante clause 'notwithstanding anything contained in any other law for the time being in force'.

20. As regards the non-obstante clause, this Court deems it fit to consider few decisions :

(i) In State of West Bengal v. Union of India, AIR 1963 SC 1241, it is observed as under:

> "The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs."

(ii) In Union of India v. Maj I.C. Lala, AIR 1973 SC 2204, the Supreme Court held that non-obstante clause does not mean that the whole of the said provision of law has to be made applicable or the whole of the other law has to be made inapplicable. It is the duty of the Court to avoid the conflict and construe the provisions to that they are harmonious.

(iii) In Union of India v. G.M. Kokil, AIR 1984 SC 1022, the Supreme Court, at Paragraph 10, held as follows:

> "It is well-known that a non-obstante clause is a legislative device which is usually employed to give over- riding effect to certain provision over some contrary provision that may be found either in the same C/SCA/12995/2018 CAVJUDGMENT enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."

(iv) In Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, [1986] 4 SCC 447, at Paragraph 67, the Supreme Court held as follows:

> "67. A clause beginning with the expression "notwithstanding any thing contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non- obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non- obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in The South India Corporation (P.) Ltd., v. The Secretary, Board of Revenue, Trivandrum & Anr., AIR 1964 SC 207 at 215-[1964] 4 SCR 280."

(v) In Vishin N. Kanchandani v. Vidya Lachmandas Khanchandani, AIR 2000 SC 2747, at Paragraph 11, the Supreme Court held that, "There is no doubt that by non-obstante clause the C/SCA/12995/2018 CAVJUDGMENT Legislature devices means which are usually applied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other statute. In other words such a clause is used to avoid the operation and effect of all contrary provisions. The phrase is equivalent to showing that the Act shall be no

impediment to measure intended. To attract the applicability of the phrase, the whole of the section, the scheme of the Act and the objects and reasons for which such an enactment is made has to be kept in mind."

(vi) In ICICI Bank Ltd. v. SIDCO Leathers Ltd., [2006] 67 SCL 383 (SC), the Supreme Court, at Paragraphs 34, 36 and 37, held as follows:

> "34. Section 529-A of the Companies Act no doubt contains a non-obstante clause but in construing the provisions thereof, it is necessary to determine the purport and object for which the same was enacted....
>
> 36. The non-obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy....
>
> 37. A non-obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same."

(vii) The Supreme Court, in the case of Central Bank of India v. State of Kerala, [2009] 4 SCC 94, at Paragraphs 103 to C/SCA/12995/2018 CAVJUDGMENT 107, considered many cases on non-obstate clause, which are extracted, "103. A non obstante clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. This rule of interpretation has been applied in several decisions.

104. In State Bank of West Bengal v. Union of India, [(1964) 1 SCR 371], it was observed that:

> "68... the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs."

105. In Madhav Rao Jivaji Rao Scindia v. Union of India and another [(1971) 1 SCC 85], Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not C/SCA/12995/2018 CAVJUDGMENT permissible to hold that it excludes the whole Act and stands all alone by itself. A search has, therefore, to be made with a view to determining which provision answers the description and which does not.

106. In R.S. Raghunath v. State of Karnataka and another [(1992) 1 SCC 335], a three-Judge Bench referred to the earlier judgments in Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369],

Dominion of India v. Shrinbai A. Irani [AIR 1954 SC 596], Union of India v. G.M. Kokil [1984 (Supp.) SCC 196], Chandravarkar Sita Ratna Rao v. Ashalata S. Guram [(1986) 4 SCC 447] and observed:

> "... The non-obstante clause is appended to a provision with a view to give the enacting part of the provision an overriding effect in case of a conflict. But the non-obstante clause need not necessarily and always be co- extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non- obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and C/SCA/12995/2018 CAVJUDGMENT scope of the Special Rules."

107. In A.G. Varadarajulu v. State of Tamil Nadu [(1998) 4 SCC 231], this Court relied on Aswini Kumar Ghose's case. The Court while interpreting non obstante clause contained in Section 21-A of Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 held :-

> "It is well settled that while dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369], Patanjali Sastri, J. observed:
>
> "The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;""

21. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provisions or Act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or C/SCA/12995/2018 CAVJUDGMENT the provision in which the non-obstante clause occurs. [See 'Principles of Statutory Interpretation', 9th Edition by Justice G.P. Singh Chapter V, Synopsis IV at pages 318 & 319]

22. When two or more laws or provisions operate in the same field and each contains a non-obstante clause stating that its provision will override those of any other provisions or law, stimulating and intricate problems of interpretation arise. In resolving such problems of interpretation, no settled principles can be applied except to refer to the object and purpose of each of the two provisions, containing a non-obstante clause. Two provisions in same Act each containing a non-obstante

clause, requires a harmonious interpretation of the two seemingly conflicting provisions in the same Act. In this difficult exercise, there are involved proper consideration of giving effect to the object and purpose of two provisions and the language employed in each. [See for relevant discussion in para 20 in Shri Swaran Singh & Anr. v. Shri Kasturi Lal; (1977) 1 SCC 750]

23. Normally the use of the phrase by the Legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure [See Law Lexicon words 'notwithstanding anything in this Act to the contrary']. Use of such expression is another way of saying that the provision in which the non-obstante clause occurs usually would prevail over the other provisions in the Act. Thus, the non-obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions C/SCA/12995/2018 CAVJUDGMENT which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the non-obstante clause is attached. [See Bipathumma & Ors. v. Mariam Bibi; 1966(1) Mysore Law Journal page 162, at page 165]

24. Having regard to the nature of the controversy which I am called upon to resolve, I would like to look into two decisions of the Supreme Court; one, in the case of Kumaon Motor Owners' Union Ltd. and another v. State of U.P., reported in AIR 1966 SC 785, and another, in the case of Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and others, reported in (2001)3 SCC 71. Although the ratio of the two decisions referred to above may not be directly applicable to the case on hand, yet having regard to certain principles of law enunciated, I would like to follow and apply the same for the purpose of resolving the controversy as regards Section 48 of the VAT Act, Section 31B of the RDB Act and Section 26E of the SARFAESI Act.

25. In Kumaon Motor Owners' Union Ltd. (supra), the Supreme Court had the occasion to resolve the conflict between the provisions of the Defence of India Act (No.51 of 1962) and the Motor Vehicles Act. The Supreme Court noticed that there was an apparent conflict between Section 43 of the Defence of India Act on the one hand and Section 68-B of the Motor Vehicles Act, 1939 read with Section 6(4) of the Act on the other. The Supreme Court resolved the conflict by holding that the provisions of Section 43 of the Act would prevail over the provisions of Section 68-B of the Motor Vehicles Act for the following reasons :

> (1) Section 43 appears in an Act which is later than the Motor Vehicles Act and, therefore, unless there is anything repugnant, the provisions in the later Act must prevail.
>
> C/SCA/12995/2018 CAVJUDGMENT (2) If the object behind the two statutes is to be looked into, namely, the Act and the Motor Vehicles Act, the Act which was passed to meet an emergency arising out of the Chinese invasion of India in 1962 must prevail over the provisions contained in Chapter IV-A of the Motor Vehicles Act which were meant to meet a situation arising out of the taking over of the motor transport by a State.

> (3) The language of Section 43 was found to be more emphatic than the language of Section 68-B. The Supreme Court took notice of the fact that Section 43 provided that the provisions of the Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act.

This, according to the Supreme Court, was indicative of the intention of the legislature that the Act shall prevail over the other statutes.

26. The observations made in para-12 of the judgment are relevant. The observations are as under :

> "12. This argument is met on behalf of the State by reference to S. 43 of the Act which lays down that "the provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

It does appear that there is some apparent conflict between S.43 on the one hand and S.68-B of the Motor Vehicles Act C/SCA/12995/2018 CAVJUDGMENT read with S.6(4) of the Act on the other, and that conflict has to be resolved. The only way to do it is to decide whether in such a situation, S.43 of the Act will prevail or S.68-B of the Motor Vehicles Act will prevail. We are of opinion that S.43 of the Act must prevail. In the first place, S.43 appears in an Act which is later than the Motor Vehicles Act and therefore in such a situation unless there is anything repugnant, the provisions in the later Act must prevail. Secondly, if we look at the object behind the two statutes, namely, the Act and the Motor Vehicles Act, there can be no doubt that the Act, which was passed to meet an emergency arising out of the Chinese invasion of India in 1962, must prevail over the provisions contained in Ch.IV-A of the Motor Vehicles Act which were meant to meet a situation arising out of the taking over of motor transport by the State. Thirdly, if we compare the language of S.43 of the Act with S.68-B of the Motor Vehicles Act we find that the language of S.43 is more emphatic than the language of S.68-B. Section 43 provides that the provisions of the Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act. This would show that the intention of the legislature was that the Act shall prevail over other statutes. But we do not find the same emphatic language in S.68-B which lays down that the provisions of Ch.IV-A would prevail notwithstanding anything inconsistent therewith contained in Ch.IV of the Motor Vehicles Act or in any other law for the time being in force. The intention seems to be clear in view of the collocation of the words "in Chapter IV of this Act" with the words "in any other law for the time being in force" that C/SCA/12995/2018 CAVJUDGMENT Ch.IV-A was to prevail over Ch.IV of the Motor Vehicles Act or over any other law of the same kind dealing with motor vehicles or for compensation. On the other hand s. 43 of the Act emphatically says that the Act will prevail over any enactment other than the Act, and this suggests that the legislature intended that the emergency legislation in the Act will be paramount if there is any inconsistency between it and any other provision of any other law whatsoever. Such a provision is understandable in view of the emergency which led to the passing of the Act."

27. The principles discernible from the decision of the Supreme Court in the case of Kumaon Motor Owners' Union Ltd. (supra) are that, if there is a conflict between the provisions of the two Acts and if there is nothing repugnant, the provisions in the later Act would prevail. The second principle discernible is that, while resolving the conflict, the court must look into the object behind the two statutes. To put it in other words, what necessitated the legislature to enact a particular provision, later in point of time, which may be in conflict with the provisions of the other Acts. The third principle discernible is that the court must look into the language of the provisions. If the language of a particular provision is found to be more emphatic, the same would be indicative of the intention of the legislature that the Act shall prevail over the other statutes.

28. The Supreme Court, in the case of Solidaire India Ltd. (supra), had the occasion to consider the effect of conflict between two special Acts. In the case before the Supreme Court, the conflict was between the provisions of the Special Court C/SCA/12995/2018 CAVJUDGMENT (Trial of Offences Relating to Transactions in Securities) Act, 1992 with the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The Supreme Court took the view that the later one would prevail. I may quote the relevant observations thus :

> "7. Coming to the second question, there is no doubt that the 1985 Act is a special Act. Section 32(1) of the said Act reads as follows:
>
> "32. Effect of the Act on other laws-(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act."

8. The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. A similar non-obstante provision is contained in Section 13 of the Special Court Act which reads as follows:

C/SCA/12995/2018 CAVJUDGMENT "13. Act to have overriding effect-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any: instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority."

9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. & Anr., [1993] 2 SCC 144; Sarwan Singh & Anr. v. Kasturi Lal, [1977] 2 SCR 421; Allahabad Bank v. Canara Bank & Anr., [2000] 4 SCC 406 and Shri Ram Narain v. The Simla Banking Industrial Co. Limited, [1956] SCR 603.

10. We may notice that the Special Court had in another case dealt with a similar contention. In Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd. [1997] v. 89 Company Cases 547, it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The head- note which brings out succinctly the ratio of the said decision is as follows :

C/SCA/12995/2018 CAVJUDGMENT "Where there are two special statutes which contain non-obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non-obstante clause. If the Legislature still confers the later enactment with a non-obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.

The Special Court (Trial of Offences Relating to Transactions and Securities) Act, 1992, provides in Section 13, that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies Act from the ambit of the said Act, the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.

Under Section 3 of the 1992 Act, all property of notified persons is to stand attached. Under Section C/SCA/12995/2018 CAVJUDGMENT 3(4), it is only the Special Court which can give directions to the custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. Under Section 22 of the 1985 Act. recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the Appellate Authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under section 11(2) of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of C/SCA/12995/2018 CAVJUDGMENT the Sick Industrial Companies (Special Provisions) Act, 1985.

It is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985, is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction against considering a scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by the Special Court. The Special Court can, if it is convinced grant time or instalments."

11. We are in agreement with the aforesaid decision or the case, more so when we find that whenever the Legislature wishes to do so it makes appropriate provisions in the Act in that behalf. Mrs. Shiraz Rustomjee has drawn our attention to Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 wherein after giving an C/SCA/12995/2018 CAVJUDGMENT overriding effect to the 1993 Act it is specifically provided that the said Act will be in addition to and not in derogation of a number of other Acts including the 1985 Act. Similarly under Section 32 of the 1985 Act the applicability of the Foreign Exchange Regulation Act and the Urban Land Ceiling Act is not excluded. It is clear that in the instant case there was no intention of the Legislature to permit the 1985 Act to apply notwithstanding the fact that proceedings in respect of a company may be going on before the B.I.F.R. The 1992 Act is to have an overriding effect notwithstanding any provision to the contrary in another Act."

29. The principles of law discernible from the decision of the Supreme Court in the case of Solidaire India Ltd. (supra) are that, if there is a conflict between the two special Acts, the later Act must prevail. To put it in other words, when there are two special statutes which contain the non-obstante clauses, the later statute must prevail. This is because at the time of enactment of the later statute, the legislature could be said to be aware of the earlier legislation and its non-obstante clause. If the legislature still confers the later enactment with a non-obstante clause, it means that the legislature wanted that enactment to prevail.

30. Let me clarify that in the case on hand there is no conflict between the two special statutes enacted by the Parliament. The conflict is with the State Act and the Central Act. I am trying to understand the true purport and effect of Section 26E of the SARFAESI Act which came to be enacted later in point of time and also the effect of Section 31B of the RDB Act which came to be enacted later in point of time.

C/SCA/12995/2018 CAVJUDGMENT

31. Let me, at the outset, clarify that the Government of India, Ministry of Finance, notified the provisions of Section 26(E) on 1st September 2016. The copy of the Notification issued by the Government of India, published in the Official Gazette Part-II, Section 3, at Serial No.2142 dated 1st September 2016 has been placed on record. The Notification reads as under :

"MINISTRY OF FINANCE (Department of Financial Services) NOTIFICATION New Delhi, the 1st September, 2016 S.O. 2831 (E).--In exercise of the powers conferred by sub-section (2) of section 1 of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016), the Central Government hereby appoints the 1st day of September, 2016 as the date on which the following provisions of the said Act shall come into force, namely :-

Sl. No. Sections

1. Sections 2 and 3 (both inclusive);

2. Sections 4 [except clause (xiii)];

3. Section 5 and 6 (both inclusive);

4. Sections 8 to 16 (both inclusive);

5. Sections 22 to 31 (both inclusive);

6. Sections 33 to 44 (both inclusive).

[F.No. 3/5/2016 - DRT] ANANDRAO VISHNU PATIL, Jt. Secy."

C/SCA/12995/2018 CAVJUDGMENT

32. Section 31B has been inserted in the Recovery of Debts and Bankruptcy Act, 1993 (herein after referred to as "the RDB Act") by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1.9.2016, which contains a non-obsante clause and which expressly provides that the secured debts shall be paid in priority over all other debts and Government dues including the State taxes.

33. Apart from the fact that Section 31B of the RDB Act is a later enactment, the language of the said provision also clearly indicates the intention of the Parliament to give precedence even over the Government dues notwithstanding anything to the contrary in any other law.

34. I am sure of one thing that there exists no repugnancy in the two legislations. The intention of the Parliament could not be said to nullify the State enactment providing the first charge on the property. The legislations have been made by the Central Government and the State respectively under Entries I and II of the Schedule and not of the Concurrent List. The amendment made by the Parliament is to give priority to the secured creditors vis-a-vis the State dues without speaking about the first charge. This aspect was duly considered by the Supreme Court in the case of Central Bank of

India (supra). The amended provision, i.e. Section 26E of the SARFAESI Act and Section 31B of the RDB Act, would have been different as indicated by the Apex Court in the case of Central Bank of India (supra).

C/SCA/12995/2018 CAVJUDGMENT

35. While it is true that the Bank has taken over the possession of the assets of the defaulter under the SARFAESI Act and not under the RDB Act, Section 31B of the RDB Act, being a substantive provision giving priority to the "secured creditors", the same will be applicable irrespective of the procedure through which the recovery is sought to be made. This is particularly because Section 2(la) of the RDB Act defines the phrase "secured creditors" to have the same meaning as assigned to it under the SARFAESI Act. Moreover, Section 37 of the SARFAESI Act clearly provides that the provisions of the SARFAESI Act shall be in addition to, and not in derogation of inter-alia the RDB Act. As such, the SARFAESI Act was enacted only with the intention of allowing faster recovery of debts to the secured creditors without intervention of the court. This is apparent from the Statement of Objects and Reasons of the SARFAESI Act. Thus, an interpretation that, while the secured creditors will have priority in case they proceed under the RDB Act they will not have such priority if they proceed under the SARFAESI Act, will lead to an absurd situation and, in fact, would frustrate the object of the SARFAESI Act which is to enable fast recovery to the secured creditors.

36. The insertion of Section 31B of the RDB Act will give priority to the secured creditors even over the subsisting charges under other laws on the date of the implementation of the new provision, i.e. 1.9.2016. The Supreme Court, in the case of State of Madhya Pradesh v. State Bank of Indore, (2001) 126 STC 1 (SC), has held that a provision creating first charge over the property will operate over all charges which were then in force.

The following observations made in para 5 of the said judgment are relevant:

C/SCA/12995/2018 CAVJUDGMENT "5. Section 33-C creates a statutory charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the bank in respect of the loan taken by the second respondent. There is no question of retrospectivity here, as on the date when it was introduced, section 33-C operated in respect of all charge that where then in force and gave sales tax dues precedence over them..."

37. The Rajasthan High Court, in the case of G.M.G. Engineers & Contractor Pvt. Ltd. (supra), has taken the view as under :

"The first issue for my consideration is as to whether amended provisions of Section 26E of the Act of 2002 and Section 31B of the Act of 1993 would apply to the present

case. It is for the reason that both the provisions were inserted in the year 2016, whereas, attachment of the property in question to recover the dues was made by the respondent-department in the year 2014 itself. It is not the case of either of the parties that amended provision is retrospective and otherwise perusal of amended provision does not show it thus would apply prospectively. The property already attached towards recovery of State dues cannot be nullified by the subsequent legislation when it has not been given retrospective effect. If argument of the learned counsel for petitioner about priority rights of the secured creditors vis a vis Government dues is accepted, it C/SCA/12995/2018 CAVJUDGMENT would apply from the date of amendment, whereas, attachment of the property was made in the year 2014, thus it was not free for auction. The enforcement of statutory first charge by attachment cannot be nullified by subsequent auction when no priority right was existing in favour of the secured creditors at the relevant time. Section 47 of the Act of 2003 is relevant for it, thus quoted hereunder for ready reference:

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

Section 47 of the Act of 2003 starts with non-obstante clause and creates first charge on the property. The issue about priority claim of the secured creditor vis a vis first charge on the property under the State legislation was considered by the Supreme Court in the case of Central Bank of India (supra). If State Act creates first charge on the property then secured creditors cannot have claim against the statutory provision. Therein, consideration was also made even in reference to Section 100 of the Act of 1882. The relevant paras of the judgment in the case of Central Bank of India (supra) are quoted hereunder for ready reference:

C/SCA/12995/2018 CAVJUDGMENT "111. However, what is most significant to be noted is that there is no provision in either of these enactments by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower.

112. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-a-vis Section 69 or Section 69A of the Transfer of Property Act. In terms of that sub-section, secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of Narasimham Committee's 2nd Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act.

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section

13 and gave primacy to the right of secured creditor vis a C/SCA/12995/2018 CAVJUDGMENT vis other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. Sub-section (7) of Section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-section (4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor.

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38C of the Bombay Act and Section 26B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of State's charge over other debts, which was recognized by Indian High Courts even before 1950. In other words, these sections and C/SCA/12995/2018 CAVJUDGMENT similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws.

126. While enacting the DRT Act and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State C/SCA/12995/2018 CAVJUDGMENT legislations then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift- Tax Act, and Section 529A of the Companies Act, 1956 would have been incorporated in the DRT Act and Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to

read any conflict or inconsistency or overlapping between the provisions of the DRT Act and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis a vis Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar other State legislations only if C/SCA/12995/2018 CAVJUDGMENT there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as the Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors.

It is submitted that judgment of the Apex Court in the case of Central Bank of India (supra) was prior to the amendment in the Act of 2002 and 1993 thus would not apply to the cases governed by the amended provisions. In the case in hand, the attachment of property by the State is prior to the amendment thus amended provision would not apply. Section 47 of the Act of 2003 was invoked prior to the amendment.

I am yet considering the effect of the amended provision. The Apex Court has made analysis of a provision of first charge vis a vis secured creditor in the case of Central Bank of India (supra). The first charge was given supremacy than rights under mortgagee or to a secured creditor. The distinction between "first charge and secured creditor" is necessary to analyse scope of Section 26E of the Act of 2002 and Section 31B of the Act of 1993. The amended provisions are having overriding C/SCA/12995/2018 CAVJUDGMENT effect and give priority to the secured creditors vis a vis State dues. It does not, however, nullify the effect of first charge created on the property under the State Act. If intention of Parliament would have been to nullify the effect of first charge, the language of Section 26E of the Act of 2002 and Section 31B of the Act of 1993 would have been different as indicated by the Apex Court in the case of Central Bank of India (supra). It should have been with non-obstante clause and that secured creditors would have priority over the first charge created under a State legislation. The amendment made by Parliament is to give priority to the secured creditors vis a vis State dues without speaking about the first charge.

38. The Madhya Pradesh High Court, in the case of Bank of Baroda v. Commissioner of Sales Tax, M.P., Indore and another, reported in (2018)55 GSTR 210 (MP), had the occasion to consider identical issue. The Madhya Pradesh High Court took cognizance of the notice of sale by the commercial department. The notice of sale was issued on 19th July 2017. The High Court took notice of the fact that Section 31-B came into force with effect from 1st September 2016, and by virtue of the said amendment, the right of the secured creditors to realise the secured dues and

debts dues, which are payable to the secured creditors by sale of assets over which security has been created, has priority over all other debts and Government dues including revenue, taxes, cesses and rates due to the Central Government, C/SCA/12995/2018 CAVJUDGMENT State Government and local authorities. The relevant observations are as under :

> "8. In the present case, undisputedly a notice of sale by the respondent/Commercial Department has been issued on 19.07.2017. The Amendment Act, 2016, which incorporates Section 31B reads as under:-
>
> "31B. Notwithstanding anything contained in any law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all the other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.
>
> Explanation - For the purpose of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that code."

9. Thus, the aforesaid statute makes it very clear that the dues of the bank are to be recovered at the first instance. Section 33 of the MP VAT Act, 2002 reads as under:-

C/SCA/12995/2018 CAVJUDGMENT "33 : Tax to be first charge (1) Notwithstanding anything to the contrary, contained in any law for the time being in force and subject to the provisions of section 530 of the Companies Act, 1956 (No.1 of 1956), any amount of tax and/ or penalty or interest, if any, payable by a HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE W.P. No.4909/17 & W.P. No.6297/17 (- 4-) dealer or other person under this Act shall be first charge on the property of the dealer or such person.

(2) Notwithstanding anything contained in this Act, where a dealer or person is in default or is deemed to be in default under clause (a) of sub- section (11) of section 24 and whose property is being sold by a bank or financial institution for recovery of its loan, the Commissioner may forgo the right of first charge as mentioned in subsection (1) against the property sold on the following conditions:-

> (a) if the arrears of tax, penalty, interest or part thereof or any other amounts is up to 25 percent of the total auction value, the arrears shall be paid in full by the bank or financial institution;
>
> (b) if the arrears of tax, penalty, interest or part thereof or any other amount is more than 25 C/SCA/12995/2018 CAVJUDGMENT percent of the total auction value, the 25 percent of the total auction value and the amount in the same proportion of the

> remaining auction value as the remaining arrears bear to the total dues of the bank or financial institution, shall be paid by the bank or financial institution."

In the considered opinion of this Court, the Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provision (Amendment) Act, 2016 came into force w.e.f. 01.09.2016 and by virtue of the said amendment, the right of secured creditors to realise the secured dues and debts dues, which are payable to the secured creditors by sale of assets over which security has been created, is having priority over all other debts and government dues including revenue, taxes, cesses and rates due to Central Government, State Government and local authorities.

Not only this, it is having overriding effect over all other enactment including the provisions of MP VAT Act, Central Sales Tax Act, Entry Tax Act and any other Tax Act.

Though, an attempt has been made by the State Government to demonstrate before this Court that the amendment will not dis-entitle to recover the dues by them as the dues are outstanding since 2012.

Nothing prevented the State Government to recover the dues since 2012 and the State Government woke up from C/SCA/12995/2018 CAVJUDGMENT plumber only after the amendment has come into force and by virtue of the amendment in the Central Act, this Court is of the considered opinion that by no stretch of imagination, the State Government can be permitted to auction the property in question as the Bank of Baroda is having priority in the matter in light of the amendment which has been quoted above."

39. The Full Bench of the Madras High Court, in the case of The Assistant Commissioner (CT), Anna Salai-III Assessment Circle v. The Indian Overseas Bank and others, reported in AIR 2017 Mad 67, was called upon to answer the following two questions :

> "(i) As to whether the Financial Institution, which is a Secured Creditor, or the Department of the Government concerned, would have the 'Priority of Charge' over the Mortgaged property in question, with regard to the tax and other dues, and
>
> (ii) As to the status and the rights of a Third party Purchaser of the Mortgaged property in question."

40. Sanjay Kishan Kaul, CJ. (as His Lordship then was) observed as under :

> "...We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 C/SCA/12995/2018 CAVJUDGMENT of the same seeking to introduce Section 31B in the Principal Act, which reads as under:-

> "31B. Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.
>
> Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

2. There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

C/SCA/12995/2018 CAVJUDGMENT

3. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

4. The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

5. In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of Section 31B, as it includes "secured debts due and payable to them by sale of assets over which security interest is created."

41. The Full Bench decision of the Madras High Court referred to above has been referred to and relied upon by a Division Bench of the Bombay High Court in the case of Punjab National Bank, Bandra (E), Mumbai v. Maa Banbhori Steel Industry Pvt. Ltd. & Ors. (Writ Petition No.11018 of 2018, decided on 29t October 2018).

42. The Division Bench was dealing with Section 37 of the Maharashtra Value Added Tax Act, 2002 (for short, 'the MVAT Act'). The Division Bench observed as under :

> "A Division Bench of this Court in Writ Petition No. 1796 of 2015 in the case of Axis Bank Limited Vs. State of Maharashtra and Ors. (MANU/MH/0379/2017) decided C/SCA/12995/2018 CAVJUDGMENT on 07.03.2017 had an occasion to consider the import of legislative change, in view of introduction of the Section 26-E of the

SARFAESI Act. This Court had, inter alia, observed in paragraph 22 as under:

> "22. Though the learned counsel appearing for the respondent State is justified in contending in normal circumstances in view of the provisions of SARFAESI Act (Unamended) primacy can be extended to the provisions like Section 38-C of the Bombay Sales Tax Act or Section 37 of the MVAT Act. Section 13 envisages application of money received by the secured creditor and by adopting any of the measures specified in Section 13 (4) merely regulates distribution of money received by the secured creditor and it does not create first charge in favour of the secured creditor. Though in normal course in view of Section 35 of the SARFAESI Act, 2002 no priority can be claimed by the bank or financial institutions over the State's statutory first charge in the matter of recovery of dues of sales tax etc. However, in respect of company under liquidation, in view of the provisions of Section 529-A of the Companies Act, a distinction has to be made and as has been laid down by the Division Bench of this Court in the matter of SICOM Ltd, which view has been upheld by the Supreme Court, the claim of the secured creditor in respect of the company being under liquidation shall have the priority in view of the language applied in Section C/SCA/12995/2018 CAVJUDGMENT 529-A of the Companies Act, 1956. It also must be taken note of that there is statutory recognition of priority claim of the secured creditor in view of the amendment brought into effect by virtue of Act No.44 of 2016 thereby introducing section 26E providing for priority to secured creditor over all other debts and all taxes, cess and other rates payable to Central Government or the State Government or the Local Authority. The applicability of provisions of Section 31B of RDB Act which is pari materia to Section 26E of the SARFAESI Act was subject matter for consideration before the Full Bench of the Madras High Court in the matter of Assistant Commissioner (CT) Chennai vs. the Indian Overseas Bank decided on 11.11.2016 and the Full Bench has observed in paragraph 4 of the Judgment that "the law having now been come into force naturally it would govern the rights of the parties in respect of even lis pendence" We do not propose to analyse the Full Bench judgment delivered by the Madras High Court." "

43. The Madras High Court (Madurai Bench), in the case of Indian Overseas Bank v. The Sub Registrar, Tuticorin Keelur, Tuticorin District and others (Writ Petition No.14618 of 2018, decided on 18th December 2018), had the occasion to consider Section 31B of the RDB Act. The Division Bench of the Madras High Court observed as under :

> "Similar issue came up for consideration before this Court in W.P.(MD).No.10724 of 2018, dated 06.12.2018, Central C/SCA/12995/2018 CAVJUDGMENT Bank of India Vs the Joint Sub-Registrar No.1, wherein this Court has held as follows:-
>
> "7. In Assistant Commercial Tax Officer (CT) v. Indian Overseas Bank reported in 2016 (6) CTC 769, the Full Bench of this Court has held as under:

> "... 2. We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31B in the Principal Act, which reads as under:-
>
> "31B. Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.
>
> Explanation - For the purpose of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where C/SCA/12995/2018 CAVJUDGMENT insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

3. There is, thus, no doubt that the rights of a secured creditor to realise debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

4. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending."

44. In the course of the hearing of this matter, two judgments, one of the Supreme Court, and another, of the Bombay High Court, were also discussed. The Supreme Court decision is in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and others, reported in (247) ITR 165 (SC), and the Bombay High Court decision is in the case of Stock Exchange, Bombay v. V.S.Kandalgaonkar, reported in (2014)51 taxmann.com 246 (SC). In the case of Dena Bank (supra), it was held that, "The Crown's preferential right to recovery of debts, over C/SCA/12995/2018 CAVJUDGMENT other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. Sec. 158(1) of the Karnataka Land Revenue Act specifically provides that the claim of the State Government to any moneys recoverable under the provisions of Chapter XVI shall have precedence over any other debts, demand or claim whatsoever including in respect of mortgage. Sec. 158 of the Karnataka Land Revenue Act not only gives a

statutory recognition to the doctrine of State's priority for recovery of debts but also extends its applicability over private debts forming subject- matter of mortgage, judgment-decree, execution or attachment and the like.--Builders Supply Corporation vs. Union of India AIR 1965 SC 1061 relied on; Collector of Aurangabad vs. Central Bank of India AIR 1967 SC 1831 distinguished. A legislation may be made to commence from a back date, i.e., from a date previous to the date of its enactment. To make a law governing a past period on a subject is retrospectivity. A legislature is competent to enact such a law. The ordinary rule is that a legislative enactment C/SCA/12995/2018 CAVJUDGMENT comes into operation only on its enactment. Retrospectivity is not to be inferred unless expressed or necessarily implied in the legislation, specially those dealing with substantive rights and obligations. It is a misnomer to say that sub-s. (2A) of s. 15 of the Karnataka Sales-tax Act is being given retrospective operation. Determining the obligation of the partners to pay the tax assessed against the firm by making them personally liable is not the same thing as giving the amendment a retrospective operation. Principle of s. 25 of Partnership Act cannot be stretched and extended to such situations in which the firm is deemed to be a person and hence a legal entity for certain purpose. The Karnataka Sales-tax Act also gives the firm a legal status by treating it as a dealer and hence a person for the limited purpose of assessing under the Sales-tax Act.--CST vs. Radhakishan AIR 1979 SC 1588 and ITO vs. Arunagiri Chettiar (1996) 134 CTR (SC) 167 : (1996) 220 ITR 232 (SC) relied on. The counsel for the appellant is right in submitting that on the day on which the State of Karnataka proceeded to attach and sell the property of the partners of the firm mortgaged with the bank, it could not have appropriated the sale proceeds to sales-tax arrears payable by the firm and defeating the bank's security in view of the law as laid down by this Court in CST vs. Radhakishan (1979) 43 STC 4 : AIR 1979 SC 1588. However, still in the facts and circumstances of the case, the appellant bank cannot be allowed any relief. Sec. 15(2A) of Karnataka Sales-tax Act had come into force on 18th Dec., 1983 while the decree in favour of the bank was passed on 3rd Aug., 1992 and is yet to be executed. The claim of the appellant bank is still C/SCA/12995/2018 CAVJUDGMENT outstanding. Even if the sale held by the State is set aside, it will merely revive the arrears outstanding on account of sales-tax to which further interest and penalty shall have to be added. The amended s. 15(2A) of the Karnataka Sales- tax Act shall apply. The State shall have a preferential right to recover its dues over the rights of the appellant bank and the property of the partners shall also be liable to be proceeded against. No useful purpose would therefore, be served by allowing the appeal which will only further complicate the controversy.--CST vs. Radhakishan AIR 1979 SC 1588 distinguished. State had preferential right to recover sales-tax dues over the rights of bank and property of the partners could also be liable to be proceeded against for the dues of the firm."

45. Thus, the dictum of law as laid by the Supreme Court in the aforesaid decision is that the State's preferential right to the recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Supreme Court took the view that the Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for the recovery of its debts over a mortgagee or pledgee of the goods or a secured creditor. It is true that ultimately the bank was not granted any relief, but the same was not granted in the peculiar facts of the case. Otherwise, the principle of law as explained is very clear. In no uncertain terms, the Supreme Court held that the appellant, i.e. the bank, was right in submitting that on the date on which the State of Karnataka proceeded to attach and sell the property of the partners of the firm

mortgaged with the bank, it could not have appropriated the sale proceeds to the sales-tax arrears payable C/SCA/12995/2018 CAVJUDGMENT by the firm, thereby defeating the bank's security. In taking such view, the Supreme Court relied on its earlier decision in the case of CST vs. Radhakishan, (1979) 43 STC 4 : AIR 1979 SC 1588.

46. In the case of Stock Exchange, Bombay v. V.S.Kandalgaonkar, reported in (2014)51 taxmann.com 246 (SC), it was held by the Bombay High Court that, "By virtue of lien on securities under rule 43 of Bombay Stock Exchange Rules, BSE being secured creditor of defaulting member would have priority over dues of Income - tax department." While dealing with the tax recovery under Section 226 of the Income-tax Act, 1961, read with Sections 8 and 9 of the Securities Contracts (Regulation) Act, 1956, it was held by the Apex Court that collection and recovery of tax has to be based on proper appreciation of facts of the case. While deciding Other modes of recovery (Priority over debts), the Apex Court duly considered the power of Central Government to direct rules to be made or to make rules and observed that a membership card is only a personal permission from Stock Exchange to exercise rights and privileges that may be given subject to Rules, Bye-Laws and Regulations of Exchange and moment a member is declared a defaulter, his right of nomination shall cease and vest in Exchange because even personal privilege given is at that point taken away from defaulting member. It therefore held that by virtue of rule 43 of Bombay Stock Exchange Rules security provided by a member shall be a first and paramount lien for any sum due to Stock Exchange. Thus, Bombay Stock Exchange being secured creditor would have priority over Govt. dues and if a member of BSE was declared a defaulter, Income-tax department would not have priority over all debts owned by defaulter member. The first thing to be noticed is that the Income Tax Act does not provide for any C/SCA/12995/2018 CAVJUDGMENT paramountancy of dues by way of income tax. This is why the Court in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. [2005] 5 SCC 694 (para 19) held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in Giles v. Grover (1832) (131) English Reports 563 in which it has been held that the Crown has no precedence over a pledgee of goods. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, in Collector of Aurangabad v. Central Bank of India [1967] 3 SCR 855 after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore "law in force" in the territory of India before the Constitution and was continued by Article 372 of the Constitution (at page 861, 862). In the present case, as has been noted above, the lien possessed by the Stock Exchange makes it a secured creditor. That being the case, it is clear that whether the lien under Rule 43 is a statutory lien or is a lien arising out of agreement does not make much of a difference as the Stock Exchange, being a secured creditor, would have priority over Government dues.

47. The two decisions referred to above, one of the Supreme Court and another of the Bombay High Court, as such may not be helpful to the Bank because the principal issue in the case on hand is with regard to the statutory charge which is created by C/SCA/12995/2018 CAVJUDGMENT the State

enactment. The Bombay High Court was dealing with a matter under the Income Tax Act and under the Income Tax Act, there is no provision analogous to Section 48 of the VAT Act which creates a statutory charge.

48. There is one another important argument of Mr.B.T.Rao which is quite appealing and I am at one with Mr.Rao on the same. It is necessary to note that the Bank declared the account as 'NPA' on 3rd May 2016. The symbolic possession of the secured assets was taken over on 2nd September 2016. The possession, therefore, could be said to have been taken over by the Bank. The first order of the State Government with regard to the liability under the provisions of the VAT Act was passed for the Assessment Year 2012-13 in March 2017. Legally speaking, the liability of the respondent no.4 under the VAT Act could be said to have been determined and became due only in March 2017.

49. Section 48 of the VAT Act would come into play only when the liability is finally assessed and the amount becomes due and payable. It is only thereafter if there is any charge, the same would operate. The authority under the VAT Act passed the assessment order later in point of time.

50. The language of Section 48 of the VAT Act is plain and simple and the phrase 'any amount payable by a dealer or any other person on account of tax, interest or penalty' therein assumes significance. The amount could be said to be payable by a dealer on account of tax, interest or penalty once the same is assessed in the assessment proceedings and the amount is C/SCA/12995/2018 CAVJUDGMENT determined accordingly by the authority concerned. Without any assessment proceedings, the amount cannot be determined, and if the amount is yet to be determined, then prior to such determination there cannot be any application of Section 48 of the VAT Act. I may also refer to Section 47 of the VAT Act. Section 47 of the VAT Act is with respect to transfer of property by s dealer to defraud the Revenue. According to Section 47, if a dealer creates a charge over his property by way of sale, mortgage, exchange or any other mode of transfer after the tax has become due, then such transfer would be a void transfer. The reason why I am referring to Section 47 is that the phrase therein 'after any tax has become due from him' assumes significance. The same is suggestive of the fact that before the assessment proceedings, or, to put it in other words, before a particular amount is determined and becomes due to be payable if there is any transfer of property of the dealer, such transfer would not be a void transfer. Therefore, the condition precedent is that the tax should become due and such tax which has become due shall be payable by a dealer. Once this part is over, then Section 48 of the VAT Act would come into play. It is preposterous to suggest in the case on hand that as the assessment year was 2012-13, Section 48 could be said to apply from 2012-13 itself. Even in the absence of Section 26E of the SARFAESI Act or Section 31B of the RDB Act, Section 48 of the VAT Act would come into play only after the determination of the tax, interest or penalty liable to be paid to the Government. Only thereafter it could be said that the Government shall have the first charge on the property of the dealer.

51. In view of the aforesaid discussion, I have no hesitation in coming to the conclusion that the first priority over the secured C/SCA/12995/2018 CAVJUDGMENT assets shall be of the Bank and not of the State Government by virtue of Section 48 of the VAT Act, 2003.

52. In the result, this writ-application succeeds and is hereby allowed. It is hereby declared that the writ-applicant Bank is entitled to put the secured assets to auction and recover the dues payable by the respondent no.4 to the Bank. It is further declared that the State will have no precedence in this regard on the strength of Section 48 of the VAT Act, more particularly, in view of the provisions of Section 26E of the SARFAESI Act, 2002.

53. Rule made absolute to the aforesaid extent.

(J. B. PARDIWALA, J.) After the judgment is pronounced, Mr.B.T.Rao, the learned counsel appearing for the writ-applicant Bank, brought to my notice an order passed by a Coordinate Bench dated 23rd August 2018. Mr.Rao invited the attention of this Court, more particularly, paragraphs 10, 11 and 12 of the order, which read as follows :

> "10. Heard both the learned advocates appearing for the respective parties and considering the difference in the amount of fixing upset price and considering the fact that price of sale consideration at the time when the property was purchased in the year 2015 since has been taken as a benchmark, and therefore, apprehension of the bank is that unless the public notice issued by the State is stayed, higher upset price is bound to fail the auction. Therefore, while issuing C/SCA/12995/2018 CAVJUDGMENT notice to the State and permitting them to file detailed affidavit-reply, the public notice issued on 20.08.2018 for the purpose of auction of the very property is stayed. The amount fetched by the bank in the public auction shall be maintained in the separate account and the detailed report shall be furnished to the court on the next returnable date.
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> 11. If, on the scheduled date, the attempt on the part of the bank fails, 2nd auction after 21 days shall be made, if any, following the procedure, of course, on intimation and with prior permission of this court.
>
> 12. All the issues with regard to entitlement of the parties as secured creditors are kept open and this interim relief will not in any manner affect the statutory entitlement of the parties."

It appears that this Court had clarified, or rather, directed that the amount fetched by the Bank in the public auction shall be maintained in a separate account and the detailed report shall be furnished to the court on the next returnable date.

Since the writ-applicant Bank has succeeded, it shall be open for the Bank now to appropriate the amount to their own account and adjust the same with the accounts of the debtors. To put it in other words, the amount shall no longer now be kept in the separate account and it is open for the Bank now to utilize the same in its own way according to the rules and regulations.

(J. B. PARDIWALA, J.) /MOINUDDIN