Before M.M. KUMAR & JASWANT SINGH, JJ.

PUNJAB NATIONAL BANK—*Petitioner*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

C.W.P. No. 4281 of 2009

15th October, 2009

Constitution of India, 1950—Art. 226—Haryana General Sales Tax Act, 1973—Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002-S.13(2)—Haryana Value Added Tax Act, 2003-S.26—Punjab Land Revenue Act, 1887-S.5—Bank mortgaging property in order to secure loan amount—Respondent 3 failing to pay loan amount—Bank initiating proceedings u/s 12(2) of 2002 Act to take possession of mortgaged property—Excise & Taxation department passing order of attachment and selling porperty for recovery of sales tax arrears—No recovery could be effected although order of assessment was passed—When bank proceeded with option available under section 13 of Securitization Act Excise Department issuing a warrant of attachment-Auction of attached property ordered to be held by the Commissioner exercising power u/s 5 of 1887 Act—Rights of bank to effect recovery became completed and perfected itself when there was no charge created on mortgaged property by respondents No. 1 and 2—Respondents No. 1 and 2 held not entitled by priority for recovery of its due over mortgage charges created by Bank in absence of any statutory provision in the HGST Act.

Held, that respondent Nos. 1 and 2 made assessment in respect of various assessment years under the HGST Act and created demand, there has been no provision in the HGST Act creating charge on account of non-payment of assessed/demanded amount under the HGST Act. Therefore, no recovery could be effected although the order of assessment was passed on 10th July, 1990. However, when the petitioner-bank proceeded with the option available under Section 13 of the Securitization Act, respondent Nos. 1 and 2 issued a warrant of attachment on 24th June, 2004 and auction of the attached property was ordered to be held by the Commissioner

exercising power under Section 5 of the Punjab Land Revenue Act, 1887 for 20th March, 2009. The rights of the bank to effect recovery became completed and perfected itself on 23rd March, 2004 and 28th October, 2004 when there was no charge created on the mortgaged proerty by respondents Nos. 1 and 2. Therefore, it cannot be held that respondents Nos. 1 and 2 are entitled to priority for recovery of its dues over the mortgage charges created by the petitioner-Bank in the absence of any statutory provision in the HGST Act. There was, thus, lacuna in HGST Act.

(Para 18)

Further held, that a perusal of Section 61 of the VAT Act shows that merely because HGST Act has been repealed, it was not to effect the provisions of the repealed Act or anything duly done suffered thereunder. The repeal was also not to affect any title, liability incurred under that Act nor it was to affect any act done. All arrears of tax and other amount due at the commencement of VAT Act could be recovered as if the same had accrued under the VAT Act. It is not disputed that there is no provision in the HGST Act coresponding to Section 26 of the VAT Act. Therefore, Section 26 of VAT Act cannot be read as part of HGST Act because Section 61 is aimed at asserting only those rights which have accrued under the HGST Act. There is no charge created on a property as has been created by Section 26 of VAT Act. Therefore, by no stretch of imagination, it could be assumed that the arrears of tax under the HGST Act could be recovered by creating a charge over the mortgaged property belonging to respondent No. 3, therefore, we are of the view that the argument advanced by the learned State counsel is wholly unwarranted and does not commend itself to us.

(Para 22)

R.S. Bhatia, Advocate, *for the petitioner.*

Sunil Nehra, AAG, Haryana, for respondent Nos. 1 & 2.

M.M KUMAR J.

(1) The petitioner-Bank has approached this Court with a prayer for quashing attachment order dated 4th June, 2008 passed by the Collector-cum-Deputy Excise and Taxation Commissioner, Kaithal, seeking to recover arrears of sales tax under the Haryana General Sales Tax Act, 1973 (for

brevity, 'the HGST Act') or Central Sales Tax Act, 1956, in respect of M/s Jiwan Rice and General Mill and M/s Jiwan Rice International (P), Ltd., Kaithal. A further direction has also been sought restraining respondent No. 2 to sell the property pursuant to attachement order, which is claimed to be mortgaged with the petitioner-Bank. The petitioner-Bank has claimed to be a secured creditor and a charge holder. Consequently, the relief of quashing order of sale of the mortgaged property dated 20th March, 2009 has also been sought. As an interim measure, the petitioner had also prayed for staying the auction fixed on 20th March, 2009.

(2) When the matter came up for motion hearing on 19th March, 2009, a Division Bench, while issuing notice of motion, directed that the auction may be held but the same may not be confirmed without specific order in that regard from this Court.

(3) For the disposal of the controversy raised it may first be necessary to notice skeleton facts. The petitioner-Bank sanctioned a loan of Rs. 330 crores to M/s Jiwan Rice and General Mills, Jind Road, Kaithal—Respondent No. 3. In order to secure repayment of the loan, the petitioner-Bank had, *inter alia*, mortgaged the immoveable property of respondent No. 3, situated at Kaithal, on 20th January, 1999. The detail of the property is *"Khewat No. 497 Kila No. 25/6 5L-19M, 15 7K-8M, 16 6K 16 M Kila No. 26/10 5K 11M 11 8K 0M 20 7K 15M total land 41 kanal 13 marla in the name of Raj kumar partner (1/2 share) Kaithal.*

(4) The aforesaid loan was not repaid by respondent No. 3 and an application for recovery of Rs. 3,12,65,884.95 paisa as on 12th April, 2004 was filed before the Debt Recovery Tribunal. The petitioner-Bank has also claimed its entitlement to recover further interest till final realization of its entire dues. Accordingly, the petitioner-Bank on 23rd February, 2004, being a secured creditor issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the Securitization Act'). On the failure of respondent No. 3 to pay the amount demanded through the notice issued under Section 13(2) of the Securitization Act, the petitioner-Bank decided to take possession of the property in terms of Section 13(4)(a) on 28th October, 2004. A notice to that effect was published at the instance of the petitioner-Bank in two Newspapers on 29th October, 2004.

(5) After the petitioner–Bank had taken possession it received a letter sent by Deputy Excise and Taxation Commissioner–respondent No. 2 informing the petitioner–Bank that respondent No. 3 is in arrears of Rs. 1,16,47,318.00 paisa and the said amount was recoverable as arrears of land revenue. Respondent No. 2 insisted that the aforesaid dues be incorporated in the auction notice as and when the property is auctioned (Annexure P-1). The petitioner–Bank sent a reply on 7th July, 2008 (Annexure P-2). Thereafter, respondent No. 2 passed an order of attachement of mortgaged property to which reference has already made in the preceding para. Accordingly, an entry to that effect was also made in the revenue record. The petitioner–Bank, therefore issued notice dated 10th October, 2008 for sale of the property (Annexure P-3). A copy of the notice as per statutory requirements was also served on respondent No. 3 and was got published in two Newspapers as per requirements. Accordingly, the auction was held on 9th June, 2008 and 12th September, 2008. Eventually tenders were floated on 21st November, 2008. The petitioner–Bank has claimed that no person came forwarded to purchase the property on account of the fact that the attachment orders passed by respondent No. 2 were in force, which was duly reflected in the revenue record. The officials of Excise and Sales Tax Department did not allow any person to bid for the property claiming that there was a charge of the Excise and Sale Tax Department on that property. The petitioner–Bank made an attempt to persuade respondent No. 2 by informing them that the bank had first and paramount charge over the property in question, which was mortgaged to the petitioner–Bank on 20th January, 2009 and therefore, respondent No. 2 did not have any prior charge on the aforesaid property. However, all in vain.

(6) On 5th March, 2009, respondent No. 2 issued an advertisement, which appeared in the Hindi Daily '*Punjab Kesri*' advertising the aforesaid mortgaged property for sale on 20th March, 2009 (Annexure P-4). The petitioner–Bank has claimed that a secured creditor like the petitioner–Bank has a prior charge over the property being mortgaged with it and respondent No. 1 and 2 were illegally claiming to have charge over the property.

(7) The stand of the respondents No. 1 and 2 in the joint written statement is that passing of order of attachment and selling the property for recovery of the sales tax arrears was strictly in accordance with law.

A detailed reference has been made to the assessment order framed in respect of M/s Jiwan Rice and General Mills, Kaithal and M/s Jiwan Rice International (P) Ltd., Kaithal. Accordingly, a demand was raised in respect of both the firms amounting to Rs. 1,16,471,318.00 paisa. The demand having not been met, the respondent have claimed that they were entitled to recover the same by sale of the property in question as the Government dues are automatically charged on such property. Accordingly, recovery proceedings were started under the provisions of Punjab Land Revenue Act, 1887 (as applicable to Haryana). It is during the course of recovery proceedings that property belonging to one Shri Raj Kumar Miglani (1/2 share) as intimated by revenue official who is a partner in the firm M/s Jiwan Rice and General Mills, Kaithal was attached. He had also business share in the firm M/s Jiwan Rice International (P) Ltd., Kaithal and warrant of attachment was issued on 24th April, 2004. The Excise and Taxation Commissioner, Haryana issued a letter dated 20th August, 2004 exercising the power of Commissioner under the Punjab Land Revenue Act, 1887, after obtaining permission for auction and sale of attached property under Section 5 of that Act and sanction was accorded for sale of property on 26th August, 2004. Accordinlgy, an open auction was held on 20th March, 2009, which could not be confirmed as per the interim order dated 19th March, 2009 passed by this Court.

(8) The other ground urged by respondents No. 1 and 2 is that there is specific provision under Section 26 of the Haryana Value Added Tax Act, 2003 (in brevity, 'the VAT Act'), stipulating that Tax which remains unpaid under the aforesaid Act after the last date specified for payment is to be the first charge on the property of the defaulter. It could be recovered from the defaulter as if it was arrears of land revenue. In that regard reliance has also been placed on Section 61 of the VAT Act, which is repeal and saving clause. On the basis of the aforesaid provision, the petitioner has claimed that arrears under the HGST Act could be recovered as first charge in pursuance to power conferred by repealing and saving Section 61 of the above said Act.

(9) The respondents have placed reliance on the judgment of the Supreme Court rendered in the case of **Dena Bank** *versus* **Bhikhabhai Prabhudas Parekh & Co., (1)** which has been followed by a Division

(1) (2000) 5 S.C.C. 694

Bench of this Court in the case of **Union of India** *versus* **Punjab Financial Corporation** (CWP No. 3413 of 2005, decided on 4th December, 2006). Upon the aforesaid basis, respondent No. 2 has claimed that attachement and sale of property of the defaulter like respondent No. 3 for recovery of sales tax arrears is fully justified being strictly in accordance with law and their action deserved to be upheld. The factual position with regard to advancement of loan and its non-payment by respondent No. 3 to the petitioner–Bank has been denied want of knowledge.

(10) In their separate written statement, respondent No. 3 has raised a preliminary objection that filing of reply would not be possible since the entire record of respondent No. 3 has been seized by the petitioner –Bank while taking possession of the property under the Securitization Act. They have also alleged that respondent No. 3 used to dispose of paddy and rice after purchasing it from outside the State of Haryana as consignment sale against declaration Form 'F' and other documents. It is claimed that there is no arrears of sales tax payable by respondent No. 2. However, it is considered that respondent had earlier issued notices for recovery of some dues in respect of the assessment years 1988-89, 1993-94, 1998-99, 1999-2000 & 2002-03. The property which was already mortgaged to the petitioner –Bank belonging to respondent No. 3 was attached by respondent No. 2. The Excise and Sales Tax Department has raised its demand over Rs. 1.16 crores *ex parte* without any notice or hearing to respondent No. 3. However, the receipt of loan has not been disputed but it is claimed that the demand raised by the petitioner –Bank is on higher side. The matter is claimed to be *sub judice* before the Debt Recovery Tribunal-I, Chandigarh. Respondent No. 3 further claimed that it is not liable to pay the amount as alleged in para-3.

(11) Mr. R.S. Bhatia, learned counsel for the petitioner has argued that there is no provision in the HGST Act granting priority to the dues of the State over the mortgaged debt of the property based on a decree passed by the Court. According to the learned counsel in the absence of any such provision in the HGST Act, respondents No. 1 and 2 cannot claim any charge superior to the charge of a secured creditor like the petitioner –Bank. He has also placed reliance on a judgment of Hon'ble Supreme Court in **Dena Bank's** case *(supra)*.

(12) Learned counsel for the petitioner –Bank has vehemently argued that the stand taken by the respondent in the written statement is based on Section 26 read with Section 61 of the VAT Act is absolutely unsustainable because there was no corresponding provision in the HGST Act, which could be equated to Section 26 of the VAT Act, therefore, the saving clause could preserve only those rights which had accrued but it cannot create any new rights. In that regard he has placed reliance on the observations made in paras 20 to 23 of the judgment in **Dena Bank's case** *(supra)* and argued that Section 61 of the VAT Act cannot be construed to have created any new right concerning creation of first charge on the mortgaged property with the petitioner–Bank. In the absence of any such provision the dues of the Bank emanating from the mortgaged debt would get priority as the petitioner–Bank is a secured creditor within the meaning of the Securitization Act. He has also placed firm reliance on the observations made in paras 15 to 21 of the judgment of the Supreme Court in **Dena Bank's case** *(supra)*.

(13) Mr. Sunil Nehra, AAG Haryana has however, argued that on proper construction of Section 26 read with Section 61 of the VAT Act provision for charge on the property of respondent No. 3 is culled out and it cannot be argued that there was no provision creating any charge of the State on account of its dues on the property of respondent No. 3. Placing reliance on the judgment of Supreme Court in **Dena Bank's case** *(supra)*. he has argued that State's dues are required to be given priority over the private debts.

(14) Having heard learned counsel for the parties and perusing the statutory provisions along with the pleadings, we are of the view that this petition deserves to succeed. The judgment of Supreme Court in **Dena Bank's case** *(supra)* lays down a principle of law that Crown's preferential right to recover its dues over other creditors is confined to ordinary or unsecured creditors. The aforesaid principle has been reiterated by Hon'ble the Supreme Court in an earlier judgment rendered in the case of **Bank of Bihar** *versus* **State of Bihar, (2).** It has been held that the rights of a pawnee, who has parted with money in favour of pawnor on the security of the goods cannot be extinguished and even by lawful seizer of goods by making money available to other creditors of pawnor without the claim

(2) (1972) 3 S.C.C. 196

of the Pawnee being first fully satisfied. The observation made by their Lordships in para 10 of **Dena Bank's case** *(supra)* may be quoted in *extenso*, which are as under :—

> "However, the Crowns preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crowns right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at confliet, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In **Giles** versus **Grover** 1832 131 ER 563 it has been held that the Crown has no precedence over a pledgee of goods. In **Bank of Bihar** versus **State of Bihar and Ors.** AIR 1971 SC 1210. the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.I.I. Seventh Edition, p. 386). It seems a Government debt in India is not entitled to precedence over a prior secured debt."

(15) The rationale for the aforesaid view is discernible from the observation made by Hon'ble the Supreme Court in para 17 of the judgment rendered in the case of **Lallan Prasad** *versus* **Rahmat Ali, (3).** Referring to the provisions of Sections 172 to 176 of the Contract Act, their Lordships' have observed as under :—

> "17. There is no difference between the common law of England and the law with regard to pledge as codified in Section 172 to

(3) AIR 1967 S.C. 1322

176 of the Contract Act. Under Section 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pleaded as security for payment of a debt and under Section 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security, and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right under Section 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner....."

(16) Placing reliance on the aforesaid paragraph as well as on various judgments including the judgments rendered in the case of **Bank of Bihar** *(supra)* and **Dena Bank** *(supra)*, it has been concluded in para 17 of a recent judgment rendered in the case of **Central Bank of India** *versus* **Siriguppa Sugars & Chemicals Ltd., (4)** as under :—

"17. Thus, going by the principles governing the matter, propounded by this Court there cannot be any doubt that the rights of the appellant–Bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursal to the cane growers and to the employees. There is no dispute that the sugar was pledged with the appellant bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant–bank. In view of the fact that the goods were

(4) (2007) 8 S.C.C. 353

validly pawned to the appellant bank, the rights of the appellant–bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods."

(17) In a recent judgment rendered in the case of **Central Bank of India** *versus* **State of Kerala, (5)** it has been laid down that priorities of statutory first charge under the Central legislation on the one hand and the State legislation on the other would not be subservient to the dues of the financial institution even though statutory first charge has not been created in their favour. However, no detailed discussion in respect of the aforesaid judgment would be necessary because in the facts of the present case it is evident that under the HGST Act no charge by the State has been created on the property and assets of respondent No. 3. Therefore, in the absence of any provision creating charge for recovery of the Sales Tax by the State, the mortgage charge created by the petitioner–Bank would acquire precedence.

(18) Respondent Nos. 1 and 2 made assessment in respect of various assessment years like 1988-89, 1993-94, 1998-99, 1999-2000 and 2002-03 under the HGST Act and created demand, there has been no provision in the HGST Act creating charge on account of non-payment of assessed/demanded amout under the HGST Act. Therefore, no recovery could be effected although the order of assessment was passed on 10th July, 1990. However, when the petitioner–bank proceeded with the option available under Section 13 of the Securitization Act, the respondent Nos. 1 and 2 issued a warrant of attachment on 24th June, 2004 and auction of the attached property was ordered to be held by the Commissioner exercising power under Section 5 of the Punjab Land Revenue Act, 1887 for 20th March, 2009. The rights of the bank to effect recovery became completed and perfected itself on 23rd March, 2004 and 28th October, 2004 when there was no charge created on the mortgaged property by respondents No. 1 and 2. Therefore, it cannot be held that the respondents

(5) (2009) 4 S.C.C. 94

No. 1 and 2 are entitled to priority for recovery of its dues over the mortgage charges created by the petitioner–Bank in the absence of any statutory provision in the HGST Act. There was, thus, lacuna in HGST Act.

(19) The reliance of the respondents No. 1 and 2 on Section 26 read with Section 61 of the VAT Act is wholly misplaced. Section 26 of the VAT Act is extracted below for ready reference :

> *"Section 26. "Any amount due under this Act including the tax admitted to be due according to the returns filed which remains unpaid after the last date specified for payment shall be the first charge on the property of the defaulter and shall be recoverable from him as if the same were arrears of land revenue."*

(20) A perusal of the aforesaid section shows that any amount due under the VAT Act including the tax admitted to be due as before returns which has remained unpaid after the last date specified for payment has to be considered first charge on the property of the defaulter which could be recovered as arrears of loan revenue. The VAT Act has repealed the HGST Act. The liability of respondent No. 3 to pay tax has arisen only under the HGST Act. There were no dues of tax payable under the VAT Act.

(21) The reliance of the State of Haryana on Section 61 of the VAT Act is also wholly unwarranted. The aforesaid section reads as under :

> *"1. The Haryana General Sales Tax Act, 1973(20 of 1973), is hereby repealed :—*
>
> *Provided that such repeal shall not—*
>
> *(a) affect the previous operation of the Act so repealed or anything duly done or suffered thereunder; or*
>
> *(b) affect any right, title, privilege, obligation or liability acquired, accrued or incurred under the said Act; or*
>
> *(c) affect any act done or any action taken (including any appointment, notification, notice, order, rule, form, regulation, certificate) in the exercise of any power conferred by or under the said act;*

and any such act done or any action taken in the exercise of the powers conferred by or under the said act shall be deemed to have been done or taken in the exercise of the powers conferred by or under the said act as if this Act were in force on the date on which such Act was done or action taken; and all arrears of tax and other amount due at the commencement of this Act may be recovered as if the same had accrued under this Act."

Sub Section (2)....."

(22) A perusal of the aforesaid provision shows that merely because HGST Act has been repealed, it was not to affect the provisions of the repealed Act or anything duly done or suffered thereunder. The repeal was also not to affect any title, liability incurred under that Act nor it was to affect any act done. All arrears of tax and other amount due at the commencement of VAT Act could be recovered as if the same had accrued under the VAT Act. It is not disputed that there is no provision in the HGST Act corresponding to Section 26 of the VAT Act. Therefore, Section 26 of VAT Act cannot be read as part of HGST Act because Section 61 is aimed at asserting only those rights which have accrued under the HGST Act. There is no charge created on a property as has been created by Section 26 of VAT Act. Therefore, by no stretch of imagination, it could be assumed that the arrears of tax under the HGST Act could be recovered by creating a charge over the mortgaged property belonging to respondent No. 3, therefore, we are of the view that the argument advanced by the learned State counsel is wholly unwarranted and does not commend itself to us.

(23) For the reasons aforementioned, this petition succeeds and order dated 4th June, 2008 (Annexure P-1) attaching the mortgaged property in question is quashed. The sale notice and the auction if any held on 20th March, 2009 are also quashed. Respondents No. 1 and 2 shall refrain from selling the mortgaged property in question. Taking into account the peculiar facts and circumstances of the case, the parties are left to bear upon their own costs.

R.N.R.