

of the legislature to abrogate an Act by repealing it is absolute. In this case, by repeal, the respondent, who is a successor-in-interest of Shera, the vendee, stands to be benefited and the appellant has been injuriously affected. This cannot be helped as the right claimed by the appellant had not vested in him, being still in the process of completion.

Risaldar Major
Amar Singh
v.
R. L. Aggarwal
and others
Tek Chand, J.

For reasons stated above, I do not find any substance in the contentions raised on behalf of the appellant.

MAHAJAN. J.—I have read the judgment of My Lord the Chief Justice and also of my learned brother, Tek Chand, J. I have nothing to add and I agree with their reasoning and the conclusions.

Mahajan, J.

B. R. T.

CIVIL MISCELLANEOUS.

Before Tek Chand, J.

EXCISE AND TAXATION OFFICER,—Appellant.

versus

GAURI MAL BUTAIL TRUST,—Respondent.
Liquidation Miscellaneous No. 57 of 1959.

Debts—Debts due to the State—Whether entitled to priority over the debts due to citizens—Receiver—Position of vis-a-vis Judgment-Creditor—Punjab Urban Immovable Property Tax Act (XVII of 1940)—Section 16—Whether takes away the State's prerogative—Code of Civil Procedure (Act V of 1908)—Section 73—Object, scope and application of.

1959
Dec., 10th

Held, that after the enforcement of the Constitution the situation has not undergone any change as to the priority enjoyed by the State for the debts due to it. The Common Law doctrine, that if the debts due to the Crown

are of equal degree of the debts due to a private citizen, then the Crown must have priority against the private citizen, is a part of the law of this country. The preferential rights of the State in a democratic socialist republic are necessary and *raison d'etre* for such a privileged status given to the State in view of its functions and duties has to continue. The crown prerogative, though commencing as an attribute of monarchical government, has been accepted in democratic countries where the sovereignty vests in a republican government. The functions of the State, whether the form of government is based on a democratic and socialist pattern or it is a constitutional monarchy of the type in England, essentially are the same. The State has to govern and has to find funds for its socialistic programme and the facilities, which it is necessary for the State to have for collection of the taxes in order to meet its obligations, cannot be withheld from it by the Courts. The principle of royal prerogative as recognised in the British Constitution is not a rule peculiar to it. The exigencies of governance *ex necessitate rei* make its adoption equally imperative. Where the debts are of the same quality, the State must have priority over the competing claims of other creditors, because of the pre-eminent necessity of running the State machinery as an organised society and supreme public concern. The State will be impeded in performing its multifarious and onerous functions if in collecting its funds to maintain itself it were to be impeded and put at par with individual creditors.

Held, that a Receiver is not the agent of the judgment-creditor in execution of whose decree he is appointed. It is equally wrong to assume that the moneys realised by him belong to the judgment-creditor or that he becomes a secured creditor thereby. The realisations made by the Receiver are in *custodia curiae* and till they are paid to the decree-holder, the Court on receiving notice of a debt due to the State is bound to recognise its rights to priority in the matter of payment of its debts.

Held, that section 16 of the Punjab Urban Immovable Property Tax Act, 1940 has not, by providing machinery for the realisation of the tax, taken away the State's prerogative. Courts will not imply curtailment, abrogation or abridgment of a prerogative in the absence of express words or necessary implication. These provisions

merely provide a machinery and do not suggest that no other mode of realisation of the tax is permitted to the State. This section cannot have any bearing on the existence or abridgement of the State's right of priority in respect of the debts due to it. A statutory provision can no doubt cut down the prerogative of the Crown provided it does so in clear express words or by necessary implication.

Held, that Section 73 of the Code of Civil Procedure has no application to a case where the State claiming priority for payment of its debt has not obtained a decree, as that is a provision for distribution of assets between two or more decree-holders. The object of this provision is to place all decree-holders on an equal footing regardless of any priority in attachment or of the application for rateable distribution. The intention of the Code is to secure an equitable administration of the property by placing all the decree-holders on the same level and making the property rateably divisible among them. But before this can be done, it is necessary that the assets must be held by the Court, and the decrees obtained by the decree-holders, must be decrees for payment of moneys. Such decrees should be obtained against the same judgment-debtor; the claimant for distribution must have applied for execution to the Court by which the assets are held; and lastly such application should have been made before the receipt of assets by the Court.

Application on behalf of Excise and Taxation Officer, Simla, under Section 151 of the Civil Procedure Code, praying that property tax for the year 1958-59 and 1959-60 (half year) amounting to Rs. 979.68 NP. may be ordered to be paid out of the amount lying with this Hon'ble Court or the Receiver may be ordered to pay the amount.

Further praying that property tax which may become due subsequently till the said property is in the charge of Receiver be ordered to be paid in the like manner.

CHETAN DASS, ASSISTANT ADVOCATE-GENERAL for Petitioner.

A.L. BAHRI AND VIKRAM MAHAJAN, for Respondent.

JUDGMENT

Tek Chand, J.

TEK CHAND, J.—By my order, dated 11th of July, 1958, which was confirmed on 12th of September, 1958, in L.M. 90 of 1956, I had appointed Shri D.D. Dhawan, official Liquidator of the Simla Banking and Industrial Company, Limited, in liquidation, as Receiver to realise the assets of the judgment-debtor, Seth Badri Das Butail of Simla. On 25th of September, 1958, an application has been made (L.M. 37 of 1958) on behalf of the Trustees of Gauri Mal Butail, Trust Simla, decree-holders, stating that a decree had been granted in their favour for Rs. 46,056-10-9 from the Court of Senior Sub-Judge, Simla, on 9th of April, 1956. The decretal amount was to be paid by monthly instalments of Rs. 3,000, with this proviso that if any of the two instalments were not duly paid, the decree-holders would be entitled to recover the entire amount remaining due under the decree. In execution of this decree, the property Oakley Estate belonging to the judgment-debtor had been attached and the Senior Sub-Judge, Simla, appointed Shri M. S. Kochhar as Receiver to realise the assets of the judgment-debtor. It was prayed that as the decree had not been satisfied the assets of Seth Badri Das Butail, after realisation by Shri D. D. Dhawan, Receiver, may be rateably distributed among the petitioners, Trustees of Gauri Mal Butail Trust and the Banking Company in liquidation. Before this matter could be disposed of, an application was made by the Government Pleader, Punjab, on 19th of June, 1959 (L. M. 57 of 1959) on behalf of the Excise and Taxation Officer, Simla, under section 151 Civil Procedure Code. It was stated that the property tax under section 3(1) and rule 9(2) of the Punjab Urban Immovable Property Tax Act, 1940, and Rules, 1941, amounting to Rs. 653.12 nP. for the

year 1958-59 and Rs. 326.56 nP. for the first six months of 1959-60 had become due which had not been paid by the landlord so far. It was prayed that property tax amounting to Rs. 979.68 nP. for the year 1958-59 and for the half year 1959-60 be ordered to be paid out of the amount lying with this Court or the Receiver might be ordered to pay the amount.

Excise and
Taxation Officer
v.
Gauri Mal Butail
Trust
Tek Chand, J.

In this three-cornered contest the Official Receiver has not contested the claim of the Excise and Taxation Officer. The main contest now is between the decree-holders, i.e., the Trustees of Gauri Mal Butail Trust, and the Excise and Taxation Officer. The question in controversy is whether the claim of the State is preferential to that of the decree-holders, and can be enforced only on an application being made despite the fact that the State has not obtained any decree nor has taken any steps authorised by the statute for the realisation of its dues under the Punjab Urban Immovable Property Tax Act, 1940.

Section 73 of the Code of Civil Procedure has obviously no applicability to this case, as that is a provision for distribution of assets between two or more decree-holders. The object of this provision is to place all decree-holders on an equal footing regardless of any priority in attachment or of the application for rateable distribution. The intention of the Code is to secure an equitable administration of the property by placing all the decree-holders on the same level and making the property rateably divisible among them. But before this can be done, it is necessary that the assets must be held by the Court, and the decrees obtained by the decree-holders, must be decrees for payment of money. Such decrees should be obtained against the same judgment-debtor; the claimant for distribution must have applied for execution to the

Excise and Taxation Officer v. Gauri Mal Butail Trust
 Tek Chand, J.

Court by which the assets are held; and lastly such application should have been made before the receipt of assets by the Court. These essential conditions do not exist in this case as no decree has been obtained by the State and the application had not been made before the receipt of assets by the Court. If the claim of the State was to be determined only on the basis of section 73, Civil Procedure Code, I would have had no difficulty in disallowing it. But the State in this case is resting its claim on the general principle of law that it is entitled to precedence over all other claims, including decretal claims. Section 73(3), Civil Procedure Code, expressly provides that nothing in this section affects the rights of the Government. This sub-section was considered by Bhide, J. of Lahore High Court in *Oudh Commercial Bank Limited v. Secretary of State* (1), and he observed—

“I am unable to see that this sub-section confers any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the section, such as they might be and merely appears to have reference to the right of priority which can be ordinarily claimed in respect of debts to the Crown.”

The Crown's priority in respect of payment of the Crown debts arose from the special pre-eminence which the King had over and above all other persons in the right of his regal dignity. The royal prerogative signified a right or claim in preference to all others. By a long process spread

(1) A.I.R. 1935 Lah. 319

over centuries, the prerogative of the King of England had been gradually subjected to checks and restrictions and had been curbed in order to secure the liberties of free-men. The prerogative power of the Crown has, ever since the reign of King James the First, been progressively curtailed and diminished and its ambit has been steadily narrowed.

Excise and
Taxation Officer
v.
Gauri Mal Butail
Trust
Tek Chand, J.

According to Dicey, prerogative is the residue of the discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown. However the powers specially created by statute are not prerogative though powers do not cease to be prerogative simply because they have been declared by statute. The prerogative may be *pro tanto* merged in the statute and of course it can also be abridged or even superseded by statute containing express words to that effect, the reason being that the King as a party to the statute has consented to such a curtailment of his rights. Vide *Moore v. The Attorney-General for the Irish Free State* (1), *British Coal Corporation v. The King*, (2), *Attorney-General v. De Jeyser's Royal Hotel, Limited* (3), and *Re Azoff-Don Commercial Bank*, (4)

In regard to property, the law in England is that where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "*detur digniori*"—Let it be given to the more worthy,—vide *Halsbury's Laws of England*, Third Edition. Volume 7 Para 701.

(1) 1935 A.C. 484

(2) 1935 A.C. 500

(3) 1920 A.C. 508

(4) (1954) I.A.E. L.R. 947 (950, 951)

Excise and
Taxation Officer
v.

Gauri Mal Butail
Trust

Tek Chand, J.

In *re Hanley and Company* (1), James L.J.,
observed—

“Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown’s right prevails. Whether, therefore, the debt is treated as a debt of record, or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid.”

Though the prerogative right in its origin was an essential feature of monarchical form of Government, it has *ex necessitate rei* been adapted to republican forms of government, and the State has claimed and exercised prerogative right of preference in the payment of its claims, over private creditors, having no antecedent lien. The State may, however, divest itself of this right by waiver or it may be abrogated by the statute. The several States of the Union in America have asserted the prerogative right of the British Crown to priority in payment, out of the assets of an insolvent debtor, as against all persons not having antecedent liens. The line of reasoning adopted by Courts in America has been stated thus:—

“The weight of authority sustains the proposition that the several states of the Union, by their adoption of the common law, have succeeded to the prerogative right of the British Crown to priority in payment out of the assets of an insolvent debtor, as against all persons not having antecedent liens; in other words, the state is entitled to a preference over private creditors whose

(1) L.R. (1878)9 Ch. D. 469 (481)

claims stand on the same footing as those of the State. The existence and enforcement of this right of preference on the part of the State are necessary for the protection of the public revenue; the right is, therefore, one that is adapted to the circumstances, conditions, and necessities of the people, being essential to sustain the public burden and discharge the public debts".

Excise and
Taxation Officer
Gauri Mal Butail
Trust
Tek Chand, J.

In *Marshall v. New York* (1), Justice Brandeis delivering the opinion of United States Supreme Court observed—

"At common law the Crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due to it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in *custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. (page 382). * * *

The priority of the State extends to all property of the debtor within its borders, whether the debtor be a resident or a non-resident, and whether the property be in his possession or in *custodia legis*. The priority is, therefore, enforceable against the property in the

(1) 254 U.S. 380=65 L. Ed. 316

Excise and
Taxation Officer
v.
Gauri Mal Butail
Trust
—
Tek Chand, J.

hands of a receiver appointed by a Federal Court within the State. For the receiver appointed by a Federal Court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the State (page 385).”

Turning to the law in India, prior to the adoption of the Constitution the claim of the Government of India as the representative of the Crown to priority of its debts, was recognised by Courts. In *Soniram Rameshur v. Mary Pinto* (1), Leach J. expressed the view that the Secretary of State for India-in-Council representing the Crown, was entitled to priority in payment over unsecured creditors, and where there were funds in Court out of which payment could be made, the Court could order payment without prior attachment after, of course, giving notice of such an application to the interested party.

Similar views are expressed in *Secretary of State v. Bombay Landing and Shipping Company Limited* (2); *Ganpat Putaya v. Collector of Kanara* (3) *Gulzari Lal v. Collector of Bareilly* (4); *Ram Das v. Secretary of State* (5); *Gayanoda Bala Dasse v. Butto Kristo* (6), *Manickam Chettiar v. Income-Tax Officer, Madura* (7) and *Deputy Commissioner of Police, Madras v. Vedantam and another* (8).

-
- (1) A.I.R. 1934 Rang. 8
 (2) (1865) 5 Bom. H.C.O.C. 23
 (3) I.L.R. (1875) I Bom. 7
 (4) I.L.R. (1878) I All. 596
 (5) I.L.R. (1896) 18 All. 419
 (6) I.L.R. (1906) 33 Cal. 1040
 (7) A.I.R. 1938 Mad. 360 (F.B.)
 (8) A.I.R. 1936 Mad. 132

After the enforcement of the Constitution the situation has not undergone any change as to the priority enjoyed by the State for the debts due to it. The common law doctrine, that if the debts due to the Crown are of equal degree to the debts due to a private citizen, then the crown must have priority against the private citizen, is a part of the law of this country. The preferential rights of the State in a democratic socialist republic are necessary and *raison d' etre* for such a privileged status given to the State in view of its functions and duties has to continue. The Crown prerogative, though commencing as an attribute of monarchical government, has been accepted in democratic countries where the sovereignty vests in a republican government. The functions of the State, whether the form of government is based on a democratic and socialist pattern or it is a constitutional monarchy of the type in England, essentially are the same. The State has to govern and has to find funds for its socialistic programme and the facilities, which it is necessary for the State to have for collection of the taxes in order to meet its obligations, cannot be withheld from it by the Courts. The principle of royal prerogative as recognised in the British Constitution is not a rule peculiar to it. The exigencies of governance *ex necessitate rei* make its adoption equally imperative. Where the debts are of the same quality, the State has to have priority over the competing claims of other creditors, because of the pre-eminent necessity of running the State machinery as an organised society and supreme public concern. The State will be impeded in performing its multifarious and onerous functions if in collecting its funds to maintain itself it were to be impeded and put at par with individual creditors. Vide *Bank of India*

Excise and
Taxation Officer
v.
Gauri Mal Butail
Trust

Tek Chand, J.

Excise and Taxation Officer v. *John Bowman and others* (1), *Messrs. Builders Supply Corporation v. Union of India* (2), *Union Gauri Mal Butail of India v. Amar Nath* (3).
Trust

Tek Chand, J.

It was also argued on behalf of the decree-holders that a Receiver had been appointed at their instance and they could not be made to share with the State, the realisations, that have been made in the course of the execution of the decree by the Receiver. This view is not sound. There is ample authority for the proposition that a Receiver is not the agent of the judgment-creditor in execution of whose decree he is appointed. It is equally wrong to assume that moneys realised by him belong to the judgment-creditors. Reference in this connection may be made to a Full Bench decision of Madras High Court in *Nachiapa Chetty v. Subbier* (4), wherein at page 519 Wallace J. observed.—

“It is well-recognized law that an attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal “right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain.”

This view was again affirmed by another Full Bench of that Court in *Manickam Chettiar v. Income-tax Officer, Madura* (5). Leach C.J. said—

“Here, the Crown is entitled to the money in Court, there is no question about this, and asks the Court to pay it out. The

(1) A.I.R. 1955 Bom. 305
 (2) A.I.R. 1956 Cal. 26
 (3) I.L.R. 1958 Punj. 1040
 (4) A.I.R. 1923 Mad. 505
 (5) A.I.R. 1938 Mad. 360

right to payment being indisputable, justice requires that it should be paid out to the Crown and formal application for payment has been made. It seems to me that both right and convenience demand that the Court should exercise its inherent power. At one stage the learned advocate for the petitioner suggested that the attachment having taken place the petitioner was in the position of a secured creditor. This argument is not open to him in view of the decision of a Full Bench of this Court in *Krishnaswamy Mudaliar v. official Assignee of Madras* (1).'

Excise and
Taxation Officer
v.
Gauri Mal Butail
Trust
Tek Chand, J.

Money realised by a Receiver appointed at the instance of an attaching creditor does not make him a secured creditor. The realisations made by the Receiver are in *custodia curiae* and till they are paid to the decree-holder the Court on receiving notice of a debt due to the State is bound to recognise its right to priority in the matter of payment of its debts out of those moneys,—*vide Gayanoda Bala Dasse v. Butto Kristo* (2), and *Deputy Commissioner of Police, Madras v. Vedantam and another* (3).

The learned counsel for the decree-holders drew my attention to section 16 of the Punjab Urban Immovable Property Tax Act and said that this provision has, by providing machinery for the realisation of the tax, taken away the State's prerogative. Courts will not imply curtailment, abrogation or abridgment of a prerogative in the absence of express words or necessary implication. These provisions merely provide a

(1) I.L.R. 26 Mad. 673

(2) I.L.R. (1906) 33 Cal. 1040

(3) A.I.R. 1936 Mad. 132

Excise and Taxation Officer v. Gauri Mal Butail Trust
 Tek Chand, J.

machinery and do not suggest that no other mode of realisation of the tax is permitted to the State. This section cannot have any bearing on the existence or abridgment of the State's right of priority in respect of the debts due to it. Referring to a similar argument addressed to the Bench, Chakravartti, C. J. said—

“How the Public Demands Recovery Act, which is only a machinery Act for the realisation of debt of various kinds due to various kinds of creditors, can have any bearing on the existence or otherwise of the State's right of priority in respect of debts due to it, I find it impossible to see”.

A statutory provision can no doubt cut down the prerogative of the Crown provided it does so in clear express words or by necessary implication. *Vide Re Azoff-Don Commercial Bank* (1), and *Attorney General v. De Keyser's Royal Hotel Limited* (2).

The learned counsel for the decree-holders has placed reliance upon the case of *Than Mal v. The Income-tax Officer* (3). I find nothing in the judgment which can sustain his contention. It was held in that case that when the right of the Government or the State on the one hand, and the right of the subject on the other, in respect of payment of a debt of equal degree compete, the Government or the State's right prevails. In that case the Civil Judge had held that there was no valid attachment in the eyes of law, and that no priority could be extended to the Income-tax Department. Aggrieved by that order, the

(1) (1954) 1 A.E. L.R. 947(950)

(2) 1920 A.C. 508

(3) A.I.R. 1958 All. 636

Income-tax Department had preferred an appeal to the District Judge who not agreeing with the trial Court's finding, allowed the appeal and directed that the income-tax dues should have the first priority over the money held in the custody of the trial Court. While not questioning the principle upheld by the District Judge, the High Court allowed the petition of revision on the ground, that no appeal lay to the District Judge from the order of the Civil Judge and therefore, the order of the District Judge was without jurisdiction. The other matter disposed of in this judgment had no bearing on the facts of this case.

Excise and
Taxation Officer
v.
Gauri Mal Butail
Trust
Tek Chand, J.

Reliance has also been placed on a Single Bench decision reported in *Murli Tahilram v. T. Asomal and Company* (1), in which the claim of the State to the priority under the Bengal Public Demands Recovery Act was not recognised. Apart from the peculiar facts of that case, the reasoning of that decision was not accepted by a Division Bench of that High Court in *Messrs. Builders Supply Corporation v. Union of India* (2).

The result of the above discussion is that I allow the petition of the State (L.M. 57 of 1959). The amount of property tax for the year 1958-59 and 1959-60 (half year) amounting to Rs. 979.68 shall be paid out of the funds sent to this Court by the Receiver appointed by the Senior Sub-Judge, Simla. The balance will remain in this Court till the dispute between the rival claimants is finally disposed of.

B. R. T.

(1) A.I.R. 1955 Cal. 423

(2) A.I.R. 1956 Cal. 26