2019 SCeJ 3012

HIGH COURT OF GUJARAT AT AHMEDABAD

Before : Justice J.B.Pardiwala and Justice A.C. Rao, JJ.

KALUPUR COMMERCIAL CO-OPERATIVE BANK LTD.

Versus

STATE OF GUJARAT

R/SPECIAL CIVIL APPLICATION NO. 17891 of 2018

23/09/2019

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(i) Recovery of Debts and Bankruptcy Act, 1993, Section 31B – SARFAESI Act, Section 37 – First priority over the secured assets shall be of the Bank and not of the State Government by virtue of Section 48 of the Gujarat VAT Act, 2003. [para 54]

(ii) Non-obstante clause – 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] [Para 22]

(iii) Recovery of Debts and Bankruptcy Act, 1993, Section 31B – SARFAESI Act, Section 37 – 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 – RDB S. 31–B, SARFAESI S. 37 [Para 33]

Held,

We are 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). [Para 34]

Futher held,

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.

There is one another important argument of Mr. Sheth which is quite appealing and we are at one with Mr. Sheth on the same. Indisputably, the Bank put forward its claim over the secured assets of the Bank for the first time on 01.10.2016 and that too by way of provisional attachment of the properties under Section 45 of the VAT Act, keeping in mind the dues that may be determined in future. It is not in dispute that there were no crystallized dues as on 01.10.2016 and, therefore, there was no question of there being any charge under Section 48 of the VAT Act which could only be in respect of the actual dues. It is also not in dispute that prior to the dues being crystallized in the case of the defaulting dealer, the Bank had already taken over the possession of the properties of the dealer, and by that time, Section 31B of the RDB Act had already been enforced by the Central Government. It is preposterous to suggest that the charge over the property under Section 48 of the State Act would come into force from the assessment of the earlier financial years and what is relevant in the present case is that the dues and resultantly the charge under Section 48 of the VAT Act came into existence after the implementation of Section 31B of the RDB Act. [Para 50]

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. [Para 51]

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 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. We may also refer to Section 47 of the VAT Act. Section 47 of the VAT Act is with respect to transfer of property by the dealer to defraud the Revenue. [Para 52]

"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." Bank of Baroda, Through its Assistant General Manager Prem Narayan Sharma v. State of Gujarat., Special Civil Application No.12995 of 2018, decided on 16.09.2019, Gujarat

(iv) Recovery of Debts and Bankruptcy Act, 1993, Section 31B – 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 – RDB S. 31–B. [Para 36]

J.B.PARDIWALA, J.

1. By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs;

"(A) This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in nature of mandamus or any other appropriate writ, order or direction quashing and setting aside impugned attachment notice dated 22.1.2018 (annexed at Annexure-A) and impugned communication dated 19.4.2018 (annexed at Annexure-B) issued by the learned Respondent No.2.

(B) This Hon'ble Court may be pleased to declare that the Petitioners have first charge over the properties mortgaged from M/s. M.M. Traders under Section 26E of the SARFAESI Act which would override the charge of the learned Respondents under Section 48 of the VAT Act.

(C) This Hon'ble Court may be pleased to hold that the learned Respondents can claim right only over the excess sale proceeds, if any, from sale of mortgaged properties by the Petitioners after adjusting the sale proceeds towards the secured dues of the Petitioners.

(D) This Hon'ble Court may be pleased to hold that the learned Respondents cannot proceed against purchasers of properties sold under the SARFAESI Act.

(E) Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to prohibit the learned Respondent authorities from taking any further steps in relation to the properties mortgaged by the Petitioners from M/s. M.M. Traders.

(F) Ex parte ad interim relief in terms of prayer E may kindly be granted.

(G) Such other relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioners shall forever pray."

2. The writ applicant No.1 is a Multi-State Cooperative Scheduled Bank, whereas the writ applicant No.2 is the Chief Manager and the Authorized Officer of the Bank.

3. The case of the writ applicants, in their own words, as pleaded in the writ application, is as under;

1. By way of this petition under Article 226 of the Constitution of India the Petitioners pray for writ of mandamus quashing and setting aside attachment notice dated 22.1.2018 issued by the learned Respondent No. 2 in relating to tax dues of M/s M.M. Traders under the Gujarat Value added Tax Act, 2003 (herein after referred to as "the Vat Act") affixed at the mortgaged properties in September 2018 and the letter dated 19.4.2018 claiming first charge over the properties mortgaged with the Petitioners. The Petitioners pray for a writ declaring that the Petitioners under the SARFAESI Act have first charge over the properties which overrides the charge of the learned Commercial Tax Authorities under the Vat Act. Copies of the impugned attachment notices dated 22.1.2018 and the letter dated 19.4.2018 are attached herewith and marked as Annexure A and Annexure B respectively.

2. The relevant facts giving rise to the present petition are briefly stated herein below:

The 1st Petitioner is a Multi-State Scheduled Bank having place of business at "Kalupur Bhavan", Near Income Tax Circle, Ashram Road, Ahmedabad 380014. The 2nd Petitioner is Director of the 1st Petitioner and his rights and interest are directly affected by the impugned attachment notices and letter issued under the Vat Act. The 1st Respondent is the State of Gujarat. The 2nd Respondent is an officer of the State of Gujarat entrusted with the task of collecting tax under the Vat Act and thereby being a State within the meaning of Article 12 of the Constitution is amenable to the writ jurisdiction of this Hon. Court.

The Petitioners are engaged in banking business. The Petitioners had given loan/credit facilities of Rs.60 Crores to M/s M.M. Traders (hereinafter referred to as "the borrower") for which immovable properties located at the following addresses were taken as security by way of mortgage:

(a) Residential Flat No.A/702, 7th Floor, Tulip Citadel, Manekbaug, Ahmedabad

(b) Commercial Office No. 303-304, Lalita Complex, Near Jain Temple, Rasala Marg, Ahmedabad.

(c) Residential Bungalow No. 30, Golden Tulip, Behind Shreyas Foundation, Bhudarpura Char Rasta, Shreyas Cross Road, Ahmedabad.

Copy of renewal letter 9.10.2013 regarding the loan/credit facilities is annexed herewith and marked as Annexure C.

4. Mortgage deed was entered into with the borrower in respect of the immovable properties offered as security for the purpose of securing the loans/credit facilities. The secured interest in the properties was duly registered by the Petitioners with the Central registry under the SARAFAESI Act. Copy of challans showing registration of secured interest are annexed and marked as Annexure D.

5. The borrower thereafter committed defaults in terms of the conditions of the loan/credit facilities and hence the Petitioners initiated action for recovery of outstanding amount of Rs.7,87,49,127/- plus interest in terms of the provision of the Securitization and Reconstruction of Financial Assets Act, 2002 (hereinafter referred to as "the SARAFAESI Act"). Copy of notice dated 26.2.2015 sent to the borrower is annexed herewith and marked as Annexure E.

6. The Petitioners sent another notice on 27.4.2015 for taking over possession of the securities under Section 13(4) of the SARAFABI Act for default committed by the borrower. Copy of the notice dated 27.4.2015 sent to the borrower is annexed herewith and marked as Annexure F.

7. The Petitioners point out that there was litigation on the issue as to whether cooperative banks were governed by the provisions of the SARAFAESI Act or not. The SARAFAESI Act was amended on 15.1.2013 to include multi-state co-operatwe bank and validity of such provision was upheld by this Hon. Court in the case of Special Civil Application No.1012 of 2014.

8. Thereafter the borrower had filed Special Civil Application No. 10642 of 2015 before this Hon' Court wherein multiple grounds were raised. This Hon. Court by order dated 4.9.2015 held that while the Petitioners were liable to release the assets taken into possession prior to the amendment, the Petitioners were entitled to initiate fresh proceedings in terms of the amended provisions of the SARAFAESI Act. Copy of order of this Hon. Court dated 4.9.2015 is annexed herewith and marked as Annexure G.

9. The Petitioners therefore returned possession of the assets of the borrower seized earlier. Fresh notice was issued under the SARAFAESI Act on 3.3.2016 for recovery of outstanding dues. Copy of notice dated 3.3.2016 issued under Section 13(2) of the SARAFAESI Act is annexed herewith and marked as Annexure H.

10. Another notice for taking over possession of the assets of the borrower was issued on 20.6.2016 under Section 13(4) of the SARAFAESI Act. Copy of the notice dated 20.6.2016

issued to the borrower under Section 13(4) of the SARAFAESI Act is annexed herewith and marked as Annexure I.

11. The Petitioners thereafter filed application before the learned Chief Metropolitan Magistrate under Section 14 of the SARAFAESI Act. The learned Magistrate allowed the application by order dated 16.11.2017 whereby the Court commissioner was appointed and ordered to take possession of the secured assets and forward the same to the Petitioners. Copy of the order dated 16.11.2017 passed by the learned Chief Metropolitan Magistrate is annexed herewith and marked as Annexure J.

12. Thereafter the possession of the assets was taken over by the learned Court Commissioner and handed over to the Petitioners on 21.1.2018. The Petitioners duly gave possession notice in newspapers. Copies of the advertisements for possession notice are collectively annexed herewith and marked as Annexure K.

13. In the meantime it appears that the borrower had possible future dues under the Vat Act for which purpose the learned Commercial Tax authorities imposed provisional attachment on the properties which were already mortgaged with the Petitioners. Intimation of such attachment was sent to the revenue department with request for entering charge on the property. Copy of letter dated 1.10.2016 sent by the learned Commercial Tax authorities to the revenue department is annexed herewith and marked as Annexure L.

14. The learned Officer of the Vat department thereafter addressed a letter to the Petitioners on 18.3.2017 contending that they had first charge over the properties of the borrower on the basis of Section 48 of the Vat Act. It was further alleged that the Petitioners were not covered by the provisions of the SARAFAESI Act. Copy of letter dated 18.3.2017 received by the Petitioners is annexed herewith and marked as Annexure M.

15. The Petitioners immediately responded by letter dated 21.3.2017 wherein it was pointed out that it had been held by this Hon. Court that the Petitioners being Multi-State Scheduled Bank were covered by the provisions of the SARAFAESI Act. It was further pointed out that the Petitioners had first charge over the property by virtue of Section 26E of the SARAFAESI Act which would have an overriding effect over Section 48 of the Vat Act. Copy of reply dated 21.3.2017 given by the Petitioners to the Vat authorities is annexed herewith and marked as Annexure N.

16. Thereafter on 24.10.2017 a garnishee notice was issued by the learned Vat authorities to the Petitioners for the dues of the borrower. Copy of garnishee notice dated 24.10.2017 received by the Petitioners is annexed herewith and marked as Annexure O.

17. The learned Respondent authorities thereafter removed the proclamation of first charge over the property affixed on the mortgaged properties by the Petitioners and affixed the impugned notice dated 22.1.2018 (annexed at Annexure A) over the properties claiming first charge over the properties.

18. In the meantime the Petitioners started auction proceedings for sale of one of the

mortgaged assets located at Commercial Office No.303-304, Lalita Complex, Near Jain Temple, Rasala Marg, Ahmedabad. Copy of public auction notice dated 18.4.2018 is annexed herewith and marked as Annexure P.

19. Thereafter impugned letter (annexed at Annexure B) was received by the Petitioners on 19.4.2018 reiterating that the dues under the Vat Act had priority over the dues of the Petitioners by virtue of Section 48 of the Vat Act.

20. The Petitioners responded by letter dated 23.4.2018 again reiterating that Multi-State Scheduled banks such as the Petitioners were specifically covered by the provisions of the SARAFAESI Act and that their dues had priority over Vat dues because of Section 26E of the SARAFAESI Act. Copy of letter dated 23.4.2018 submitted by the Petitioners to the Vat authorities is annexed herewith and marked as Annexure Q.

21. Since no response was received from the Vat department the Petitioners proceeded to sell one of the mortgaged properties. The petitioners may point out that offers received in response to the public auction notice were below the reserve price and therefore the Petitioners proceeded to sell the property through private agreement after giving due notice under the SARAFAESI Act. The offices were sold for a sum totaling for approximately Rs 1.21 crores which were appropriated by the Petitioners towards the outstanding dues of the borrower.

22. The Petitioners thereafter received a letter on 25.5.2018 from the Vat department inquiring about the auction sale as well as asking for details of the buyer of the property. Copy of letter dated 25.5.2018 received by the Petitioners is annexed herewith and marked as Annexure R.

23. Reminder in this regard was given by the Vat department on 20.8.2018. Copy of reminder dated 20.8.2018 received by the Petitioners is annexed herewith and marked as Annexure S.

24. The Petitioners responded by letter dated 29.8.2018 informing the learned Vat authority that the sale of property was conducted in exercise of powers conferred by the SARAFAESI Act and that even after adjustment of sale proceeds towards the outstanding dues of the borrower, huge loan amount still remained outstanding. Copy of letter dated 29.8.2018 submitted by the Petitioners to the learned Vat authority is annexed herewith and marked as Annexure T.

25. The learned Vat authorities however again wrote a letter to the Petitioners on 6.9.2018 requiring the Petitioners to give details about the purchaser of the property. Copy of letter dated 6.9.2018 received by the Petitioners is annexed herewith and marked as Annexure U.

26. The learned Vat authorities are refusing to give. up the claim of first charge over the properties mortgaged with the Petitioners based on Section 48 of the Vat Act despite there being clear overriding provision contained in Section 26E of the SARAFAESI Act. The learned Vat authorities also want to recover the tax dues from purchaser of property already sold by the Petitioners under the SARAFAESI Act.

27. In the respectful submission of the Petitioners the action of the learned Vat authorities of claiming first charge over the properties of the borrower for alleged tax dues under the Vat Act by virtue of the impugned attachment notice read with impugned letter dated 19.4.2018 is wholly without jurisdiction and illegal. Section 26E of the SARAFAESI Act unequivocally gives priority to charge of secured dues of lending banks such as the Petitioners over any other charge including charge under taxing statutes.

28. Section 26E of the SARAFAESI Act reads as under:

"26E. Notwithstanding anything contained in any other law for the time being in force, after 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."

29. The Vat department has staked claim over the properties for the first time only on 1.10.2016 and, that too by way of provisional attachment .for possible future dues of the defaulting dealer. By such time the Petitioners had already registered the security interest in terms of the provisions of the SARAFAESI Act. The Petitioners therefore clearly have first charge over the property and the action of the learned Respondents in claiming first charge over the properties and attaching the properties for such purpose is wholly without jurisdiction, bad and illegal.

30. It is respectfully submitted that the learned Respondent authorities can claim right only over the excess sale proceeds, if any, from sale of mortgaged properties by the Petitioners after adjusting the sale proceeds towards the secured dues of the Petitioners. The learned Respondent authorities cannot go after the purchasers of the properties for enforcement of the charge since if the purchasers are held to be liable for the secondary charge then this would deflate the sale value of the properties when sold by the Petitioners under the SARAFAESI Act thus effectively encroaching over the statutory first charge of the Petitioners. The action of the learned Respondents in claiming charge over the property even after it is sold in accordance with the provisions of the SARAFAESI Act is also therefore wholly without jurisdiction, bad and illegal."

4. Thus, the issue that falls for our consideration is with regard to the first priority of the Bank over the dues vis-a-vis the sales tax dues which the State Government wants to recover from the assets of the defaulter. In other words, the case of the writ applicants is that the Bank has the first charge over the properties mortgaged by M/s. M.M. Traders by virtue of Section 26E of the SARFAESI Act. According to the writ applicants, Section 26E of the SARFAESI Act would override the charge of the State Government under Section 48 of the Act.

5. Submission on behalf of the writ applicants:

5.1 Mr. Uchit Sheth, the learned counsel appearing for the Bank submitted that Section 31B has been inserted in the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter 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-

obstante 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. In the light of such provision the dues of the Petitioner clearly have priority over the alleged tax dues of the defaulter under the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the VAT Act") and hence the impugned attachment by the VAT Department on the properties of the defaulter is wholly without jurisdiction and illegal.

5.2 Mr. Sheth submitted that although Section 48 of the VAT Act has a non-obstante clause, yet it is well settled that in case of two conflicting provisions having non-obstante clause the provision enacted later in point of time will prevail. For such proposition, Mr. Sheth seeks to place reliance upon the judgment of the Supreme Court in the case of Kumaon Motor Owners' Union Ltd vs. State of Uttar Pradesh, AIR 1966 SC 785 as well as the judgment of the Supreme Court in the case of A.P. State Financial Corporation vs. Official Liquidator, AIR 2000 SC 2642.

5.3 Mr. Sheth submitted that 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. In such circumstances, the Bank has the priority over the secured assets of the defaulter over the alleged dues of the defaulter under the VAT Act.

5.4 Mr. Sheth submitted that in case of conflict between the law enacted by the Parliament and the law enacted by the State legislature, the Parliamentary law will prevail. He referred to Article 246 of the Constitution of India which is the source of power for both Parliament and the State legislature. While Article 246(1) of the Constitution of India gives exclusive power to the Parliament to make laws with respect to any matters enumerated in List 1 in the Seventh Schedule, the power of the State legislature as flowing from Article 246(2) is expressly "subject to" clause (1). Moreover, it is provided in Article 254 of the Constitution that in case of inconsistency between the laws made by the Parliament and the laws made by the State legislature, it is the law made by the Parliament which shall prevail. Therefore also Section 31B of the RDB Act will prevail over Section 48 of the VAT Act. Mr. Sheth seeks to rely upon the decision of the Supreme Court in the case of Government of A.P. vs. J.B. Educational Society & Anr., AIR 2005 SC 2014.

5.5 He further submitted that 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(Ia) 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 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 of they proceed under the RDB Act

while they will not have such priority if they proceed under the SARFAESI Act will lead to an absurdity and in fact frustrate the object of the SARFAESI Act which is to enable fast recovery to secured creditors.

5.6 He also submitted that 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 implementation of the new provision i.e. 01.09.2016. He seeks to rely upon the decision of the Supreme Court in the case of State of Madhya Pradesh vs. State Bank of Indore, (2001) 126 STC 1 (SC).

5.7 He also seeks to rely on the decision of the Supreme Court in the case of State Bank of Bikaner & Jaipur vs. National Iron & Steal Rolling Corporation & Ors., (1995) 96 STC 612 (SC).

5.8 Mr. Sheth submitted that indisputably, for the first time, the authorities under the VAT Act claimed charge over the secured assets on 01.10.2016, and that too, by way of provisional attachment under Section 45 of the VAT Act keeping in mind the dues that may be determined in future. According to Mr. Sheth, there were no crystallized dues as on 01.10.2016 and, therefore, there was no question of there being any charge under Section 48 of the VAT Act which could only be in respect of the actual dues. Mr. Sheth pointed out that before the dues could be crystallized under the VAT Act the Bank had already taken over the possession of the properties of the dealer, and by that time, Section 31B of the RDB Act had already been enforced by the Central Government. According to Mr. Sheth, whether Section 31B of the RDB Act will give priority over the subsisting charge under the VAT Act as on 01.09.2016, i.e., the date on which Section 31B of the RDB Act came into force.

5.9 Mr. Sheth, in support of his aforesaid submission, has placed strong reliance on a Full Bench decision of the Madras High Court in the case of The Assistant Commissioner (CT) vs. The Indian Overseas Bank, Writ Petition No.2675 of 2011 decided on 10.11.2016.

5.10 In the last, Mr. Sheth submitted that the respondents cannot proceed against the purchasers of the properties in satisfaction of the charge. In other words, according to Mr. Sheth, the respondents cannot chase the purchasers of the properties for enforcement of the charge since if the purchasers are held to be liable for the secondary charge, then the same would deflate the sale value of the properties when put to auction by the Bank, thereby directly encroaching over the statutory first charge of the Bank.

5.11 In such circumstance, referred to above, Mr. Sheth prays that there being merit in this writ application, the same be allowed and the reliefs, as prayed for, be granted.

6. Submissions on behalf of the respondents;

6.1 Ms. Mehta, the learned AGP appearing for the respondents, while vehemently opposing this writ application, submitted that 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. She submitted that, therefore,, Section 26E of the SARFAESI Act would not have any applicability in the case on hand and that the State Government would have the first charge over the property of M/s. M.M. Traders in view of Section 48 of the GVAT Act, 2003. Ms. Mehta also submitted that Section 26E, which the writ applicants are relying upon, is falling within Section 18 of the Amendment Act No.44 of 2016 which has not given effect to which is evident from the appointed dates prescribed by the Government, bringing the Amendment Act No.44 of 2016 into effect. Ms. Mehta submitted that 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. The details of the same are as under :

6.2 Ms. Mehta further submitted that, even otherwise, Section 26(E) had not come into force at the relevant point of time and it has no retrospective applicability. She also submitted that assuming for the moment that the same had come into force, still the charge of the State Government cannot be nullified.

6.3 Ms. Mehta further submitted that the dues of the State Government could be said to have accrued from the year 2012 onwards and prior to 2016. She submitted that where the Statute (VAT Act) creates a first charge over the property of a dealer, the said charge shall have the precedence over the other existing mortgages. Ms. Mehta submitted that the word ‘charge’ is wider than a mortgage, and, therefore, would cover within its ambit, a mortgage too. She submitted that the said aspect of a statutory first charge having the precedence over a mortgage has been considered 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.

6.4 Ms. Mehta further submitted that the Supreme Court, in the case of E.P.F. Commissioner v. O.L. of Esskay Pharma, reported in (2011)5 GLR 3739, upon considering the SARFAESI Act, 2002 vis-a-vis the E.P.E. Act has held that if there is a specific provision in the State enactment creating first charge if the Parliament has not made any such provisions in its own enactments, then the first charge created by the State legislation on the property of the dealer cannot be destroyed or diluted by implication or inference, notwithstanding the fact that banks fall in the category of secured creditors.

6.5 Ms. Mehta submitted that 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 of the State debts as a rule of necessity and public policy. The basic justification for the claim of priority of the State debts rest 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.

6.6 She also submitted that the SARFAESI Act, 2003 falls within the subject

‘banking’ in the Schedule 7 List I Entry 45 read with Entry 95 by virtue of Article 246 of the Constitution of India.

6.7 Ms. Mehta also submitted that 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 should look into 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 the subjects in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the subjects in the Union List. It is further held by the 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.

6.8 Ms. Mehta further submitted that the aspect of conflict between the Central Legislation vis-a-vis the State legislation and the non-obstante clause in the State legislation by way of first charge and 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 held that the sales tax dues shall prevail over any other charge being the charge created under the provisions of the Kerala General Sales Tax Act being the statutory first charge. The Supreme Court while dealing with the aspect of legislative competence and repugnancy has held that the question of repugnancy between the 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 and, therefore, there is no question of repugnancy between the State enactment and the Central legislation.

6.9 Ms. Mehta also submitted that this High Court, in the Special Civil Application No.3372 of 2012, decided on 23.7.2012 had held that the first charge over the property shall be of the department/government under Section 48 of the GVAT Act, 2003.

6.10 In support of the aforesaid submissions, Ms. Mehta 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;

(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;

In such circumstances, referred to above, 6.11 Ms. Mehta prays that there being no merit in this writ application, the same may be rejected and the amount fetched in the auction conducted by the writ applicant Bank may be directed to be transferred to the State Government.

ANALYSIS

7. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our 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.

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

9. The Value Added Tax Act, 2003, came into force from 1 st 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 :

"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."

10, 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 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.”

11. 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 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).”

12. 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.

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.”

13. The statement of objects and reasons for the two enactments read as under:

“THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (Act No.54 of 2002)

STATEMENT OF OBJECTS AND REASONS The financial sector has been one of the key drivers in India’s efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the

securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisition and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable the banks and financial institutions to realize long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for –

(a) Registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India;

(b) facilitating securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities

(c) Facilitating easy transferability of financial assets by the securitisation company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of a debenture;

(d) Empowering securitisation companies or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers;

(e) Facilitating reconstruction of financial assets acquired by exercising powers of enforcement of securities or change of management or other powers which are proposed to be conferred on the banks and financial institutions;

(f) Declaration of any securitisation company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of section 4A of the Companies Act, 1956;

(g) Defining ‘security interest’ as any type of security including mortgage and change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(h) Empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or takeover management in the event of default, i.e., classification of the borrower’s account as non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time;

(i) The rights of a secured creditor to be exercised by one or more of its officers authorized in this behalf in accordance with the rules made by the Central Government;

(j) An appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;

(k) Setting up or causing to be set up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitisation, asset reconstruction and creation of security interest;

(l) Application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities;

(m) Non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding rupees one lakh and cases where eighty per cent, of the loans are repaid by the borrower.

The Bill seeks to achieve the above objects."

14. We may also quote the statement of objects and reasons specified in The Recovery of Debts Due to Banks & Financial Institutions Act, 1993 The same read thus;

"THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS

ACT, 1993 STATEMENT OF OBJECTS AND REASONS Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the banks and financial institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial System headed by Shri M. Narasimham has considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realized without delay. In 1981, a Committee under the Chairmanship of Shri T. Tiwari had examined the legal and other difficulties faced by the banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfill a long- felt need, but also will be an important step in the implementation of the Report of Narasimham Committee. Whereas on 30th September, 1990 more than fifteen lakhs of cases filed by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs.5622 crores in dues of Public Sector Banks and about Rs.391 crores of dues of the financial institutions. The locking up of such huge amount of public money in litigation prevents proper utilization and recycling of the funds for the development of the country. The Bill seeks to provide for the establishment of Tribunal and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. Notes on clauses explain in detail the provisions of the Bill.

ACT 51 OF 1993 The Recovery of Debts Due to Banks and Financial Institutions Bill having been passed by both the Houses of Parliament received the assent of the President on 27th August 1993. It came on the Statute Book as THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993 (51 of 1993):)"

15. 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. Section 48 of the VAT Act creates first charge on the property. The issue as regards the claim of priority of the secured creditor vis-a-vis the first charge of the property under the State Legislation was considered by the Supreme Court in the case of Central Bank of India vs. State of Kerala & ors, reported in (2009) 4 SCC 94. The Supreme Court, in the said decision took the view that if the State Act creates first charge on the property, then the secured creditors cannot have the claim against the statutory provision. The Supreme Court also took into consideration Section 100 of the Transfer of Property Act, 1882 The relevant paras of the judgment in the case of Central Bank of India (supra) are quoted hereunder for ready reference.

"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 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 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 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 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. “

16. Indisputably, the judgment of the Apex Court in the case of Central Bank of India (supra) was prior to the amendment in the Act, 2002 and 1993 respectively. However, what is important are the observations of the Supreme Court as contained in para-126 of this decision quoted above. The Supreme Court observed that while enacting the DRT Act, the Parliament was aware of the law laid down by the Supreme Court, wherein priority of the State dues was recognized. If the Parliament intended to create the first charge in favour of the 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 the series of judicial pronouncements, the 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. The Supreme Court proceeded to observe that the fact of the matter was that no such provision had been incorporated in either of those 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.

17. In our prima facie opinion, such observations probably might have weighed with the Parliament which ultimately might have led to the introduction of Section 31B in the RDB Act, 1993 and 26E in the SARFAESI Act, 2002.

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’.

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 overriding effect to certain provision over some contrary provision that may be found either in the same 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 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 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 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 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 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 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.

(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 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 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 (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:

"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 :

"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 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 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 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. We are conscious of the fact that in the case on hand there is no conflict between two special statutes enacted by the Parliament. The conflict is with the State Act and the Central Act. We are 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. In other words, what necessitated the introduction of the two provisions in the two enactments and what object the two provisions would subserve.

31. We may, 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 :-

Sr. 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.”

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. We are 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).

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 would operate over all charges that may be in force. The following observations made in para 5 of the said judgment are relevant:

"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 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.

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.

We are 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 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 realize 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, 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:-

"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 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 subsection (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 15 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 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 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.

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 29th October 2018).

42. The Division Bench was dealing with Section 37 of the Maharashtra Value Added Tax Act, 2002 (for short, 'the MVAT Act'). We have noticed that there is a vast difference between Section 37 of the MVAT, 2002 Act and Section 48 of the GVAT Act, 2003. Section 37 of the MVAT Act, 2002 is much more comprehensive compared to Section 37 of the GVAT Act, 2003. Section 37 of the MVAT Act, 2002 reads as under;

" 37. Liability under this Act to be the first charge:- Notwithstanding anything contained in any contract to the contrary but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer or, as the case may be, person.

[(2)(2) The first charge as mentioned in sub-section (1) shall be deemed to have been created on the expiry of the period specified in sub-section (4) of section 32, for the payment of tax, penalty, interest, sum forfeited, fine or any other amount."

43. Thus, Section 37 of the MVAT Act, 2002, although starts with a non-obstance clause "notwithstanding anything contained in any contract to the contrary", yet it clarifies that the same shall be subject to any provision regarding creation of the first charge in any Central Act, any amount of tax, penalty, interest, sum forfeited or any other sum payable by a dealer or any other person under the Act shall be the first charge on the property of the dealer. Clause (2) proceeds to explain the term "first charge". The first charge is deemed to have been created on the expiry of the period specified in sub- section (4) of Section 32, for the payment of tax, penalty, interest, sum forfeited, fine or any other amount. This is further suggestive of the fact that the first charge would be deemed to be created only after the tax, penalty, interest is determined in the assessment proceedings. Section 48 of the GVAT Act, 2003 is quite general and substantially differs from Section 37 of the MVAT Act, 2002, although both the provisions are with regard to first charge on the property of the dealer.

44. 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 v. State of Maharashtra and Ors. Decided 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 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."

45. 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 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 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."

46. 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 (2000)5 SCC 694 , (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 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 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 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 Salestax 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."

47. 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 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.

48. 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 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.

49. 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 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.

50. There is one another important argument of Mr. Sheth which is quite appealing and we are at one with Mr. Sheth on the same. Indisputably, the Bank put forward its claim over the secured assets of the Bank for the first time on 01.10.2016 and that too by way of provisional attachment of the properties under Section 45 of the VAT Act, keeping in mind the dues that may be determined in future. It is not in dispute that there were no

crystallized dues as on 01.10.2016 and, therefore, there was no question of there being any charge under Section 48 of the VAT Act which could only be in respect of the actual dues. It is also not in dispute that prior to the dues being crystallized in the case of the defaulting dealer, the Bank had already taken over the possession of the properties of the dealer, and by that time, Section 31B of the RDB Act had already been enforced by the Central Government. It is preposterous to suggest that the charge over the property under Section 48 of the State Act would come into force from the assessment of the earlier financial years and what is relevant in the present case is that the dues and resultantly the charge under Section 48 of the VAT Act came into existence after the implementation of Section 31B of the RDB Act.

51. 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.

52. 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 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. We may also refer to Section 47 of the VAT Act. Section 47 of the VAT Act is with respect to transfer of property by the 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 we are 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.

53. One of us, J.B. Pardiwala, J., sitting as a Single Judge, had the occasion to consider this issue in the case of Bank of Baroda, Through its Assistant General Manager Prem Narayan Sharma vs. State of Gujarat & Ors., Special Civil Application No.12995 of 2018, decided on 16.09.2019. We may quote the relevant observations made in the said judgment.

“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."

54. In view of the aforesaid discussion, We have no hesitation in coming to the conclusion that the first priority over the secured assets shall be of the Bank and not of the State Government by virtue of Section 48 of the VAT Act, 2003.

55. In the result, this writ application succeeds and is hereby allowed. The impugned attachment notice dated 22.01.2018 (Annexure-A) and the impugned communication dated 19.04.2018 (Annexure-B) issued by the respondent No.2 is hereby quashed and set aside. It is hereby declared that the Bank has the first charge over the properties mortgaged from M/s. M. M. Traders by virtue of Section 26E of the SARFAESI Act.

56. It is further clarified that the excess, if any, shall be adjusted towards the dues of the State under the VAT Act. It is further declared that the respondents cannot proceed against the purchasers of the properties sold under the SARFAESI Act.

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