A.F.R.

Court No. - 3

Case :- WRIT TAX No. - 690 of 2015

Petitioner :- M/S Gem Aromatics Private Limited
Respondent :- State Of U.P. And 6 Others
Counsel for Petitioner :- Madan Lal Srivastava
Counsel for Respondent :- C.S.C,Akhilesh Tripathi,C.B.Tripathi,S.K. Kakkar

Hon'ble Naheed Ara Moonis,J.
Hon'ble Saumitra Dayal Singh,J.

1. Heard Sri Navin Sinha, learned Senior Counsel assisted by Sri Madan Lal Srivastava, Sri Apoorv Hajela, learned Standing Counsel for the revenue and Sri Sumit Kumar Kakkar, learned counsel for the respondent- Bank.

2. Present writ petition has been filed, effectively to restrain the respondent-State authorities from adopting coercive measures against the property purchased by the petitioner company, under a registered sale-deed dated 16.07.2014. Thereby, Plot Nos.126/1, 10 and 126M situate at Village-Gathauna, Pargana Ujhani, District - Badaun (hereinafter referred to as 'the property-in-dispute') were purchased by the petitioner, from another company - M/s Kanha Vanaspati Ltd.- respondent no.7 (hereinafter referred to as 'assessee-in-default'). Relief has also been sought against the citation dated 26.05.2015, seeking those recoveries from the petitioner.

3. Undisputedly, the ‘assessee-in-default’ was assessed to tax for the A.Ys. 1992-93 (U.P. and Central), 1993-94 (Central), 2006-07 (Central) and 2006-07 (Entry Tax), under the provisions of U.P. Trade Tax Act, 1948, Central Sales Tax Act, 1956 and The U.P. Entry Tax Act. It was further faced with other demands of tax etc. raised against it for the A.Ys. 1994-95 to 2000-01. Those arrears of tax were stated to be Rs.17,64,83,574/-, in the impugned recovery citation dated 26.05.2015.

4. Though the revenue authorities deny, yet, upon exchange of affidavits, it appears, the 'assessee-in-default' owed dues to the State Bank of India, against loan facility availed by it. According to the petitioner, amongst others, the 'property-in-dispute' had been mortgaged by the 'assessee-in-default', to the State Bank of India. Thus, a first charge existed over the same which was duly registered with the Registrar of Companies, Kanpur. In this regard, a Certificate dated 06.08.2014, issued by the Registrar of Companies (Annexure 7 to the writ petition) certifying satisfaction of charge no. 80067412 dated 08.11.2005 for Rs. 32,89,00,000 in full has been placed on record. It is undisputed. The petitioner has brought on record copy of letter dated 15.07.2014 issued by the State Bank of India, acknowledging lifting its charge on the 'property-in-dispute', upon satisfaction of its dues under the One Time Settlement (OTS in short). Also, the State Bank of India has filed a copy of its letter dated 10.05.2015 written to the petitioner acknowledging the prior existence of its charge in favour of that bank and of that charge agreed to be lifted from over the 'property-in-dispute', upon payment of Rs. 2.61 crores.

5. In such facts, the petitioner claims, pursuant to the OTS entered between the 'assessee-in-default' and the State Bank of India, Rs. 2.61 crores were paid by it directly to that bank, towards the entire consideration for the 'property-in-dispute'. Upon that deposit made, the charge (over it) was lifted on 15.07.2014. Only thereafter, the 'property-in-dispute' could be and it was sold by means of the registered sale-deed dated 16.07.2014, a copy of which is also on record. Later, the petitioner learnt about the attachment of the 'property-in-dispute', first made in the year 2015. By means of a Supplementary Affidavit filed to the writ petition, a copy of the Khatauni has been attached which document is admitted to the State. It recites, the fact of the attachment order made on 18.06.2015 - over the

‘property-in-dispute’ i.e., after the sale-deed came to be registered.

6. Relying on Section 34 of U.P Trade Tax Act, 1948 (hereinafter referred to as the 'Act, 1948'), it has been first submitted by Sri Sinha, the first charge over the ‘property-in-dispute’ was created in the year 2005, in favour of the State Bank of India. Undisputedly, it is a ‘banking company’ as defined under the Banking Regulation Act, 1949 (hereinafter referred to as the Banking Act). Therefore, by virtue of Section 34(2) of the Act, nothing contained in Section 34(1) of the Act, would apply to the transaction in question. Consequently, the sale-deed dated 16.07.2014 was wholly valid and the petitioner cannot be deprived of its property on account of outstanding tax dues, of the ‘assessee-in-default’. Alternatively, it has been submitted, even if Section 34(1) of the Act was applicable, no fraud was committed by the petitioner. In that regard, it is submitted, the respondent bank was a secured creditor of the ‘assessee-in-default’ and undisputedly, full, and fair consideration had been paid; no rights had been reserved in favour of the transferor and the parties to the sale deed were unrelated. Even then, if at all, the only remedy available to the revenue authority was to institute a proper suit proceeding as in any case such a transaction would remain voidable and it is not *void ab initio*. No suit proceeding having been instituted within limitation, the revenue authorities cannot resist the absolute right and title of the petitioner over the ‘property-in-dispute’.

7. Reliance has been placed on two decisions of the Privy Council in **Musahar Sahu and another vs Hakim Lal and another** reported in **AIR 1915 PC 115** and **Ma Pwa May and another vs S.R.M.M.A. Chettyar Firm** reported in **AIR 1929 PC 279**. That principle of law was applied and followed by the Supreme Court in **Chogmal Bhandari vs Deputy Commissioner Tax Officer** reported in **(1976) 3 SSC 749** and in **Union of India vs**

Rajeshwari and Co. and others reported in **(1986) 3 SCC 426**. Still later, this principle was applied by the Supreme Court in **Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. and others** reported in **(2000) 5 SCC 694**. As to the remedy, if at all being suit proceedings, reliance has been placed on **Chogmal Bhandari (Supra)**.

8. In short, it has been submitted, in absence of any contrary statutory provision creating preferential right in favour of the Crown/State, the secured creditor stands in preference over the Crown/State dues. A valid charge was created over the 'property-in-dispute', in favour of the State Bank of India, a 'banking company' within the meaning of that term under Section 34(2) of the Act, 1948. It came to be lifted to allow the execution of the sale-deed in favour of the petitioner, after satisfaction of that charge. Nothing contained in Section 34(1) of the Act, 1948 may apply to override that sale- deed. Alternatively, it has been submitted, no fraud was committed. Therefore, resort may not be had to the provisions of Section 34(1) of the Act. In any case, the remedy if any, would be to institute a suit proceeding and seek a declaration, before resorting to coercive measures against the petitioner.

9. Responding to the above, the learned Standing Counsel has vehemently urged, the first relief sought in the writ petition is wholly inadequate, since the attachment order dated 18.06.2015 has neither been placed on record nor it has been specifically challenged. At the same time, the learned Standing Counsel does not dispute the existence of the attachment order dated 18.06.2015. It is also not the case of the revenue that there was any other attachment order made, prior to the first charge created over the 'property-in-dispute', in favour of the State Bank of India.

10. Relying on the contents of the counter affidavit, it has been next submitted - various demands of tax and other dues (under

the taxation enactments), were in existence against the ‘assessee-in-default’, since long, from A.Y. 1992-93 onward. These dues were in the knowledge of the petitioner. Though the petitioner asserts, it first acquired that knowledge in the year 2015, at the same time, it is the own case of the petitioner that its registration application filed under the Act had been rejected, in the year 2015 itself i.e., prior to be attachment order. That rejection order was passed, for reason of pre-existing tax dues against the ‘assessee-in-default’.

11. Last, reliance has been placed on the recital contained in the sale-deed dated 16.07.2014; the letter issued by the Bank dated 15.7.2014 (annexed to the writ petition) and letter dated 01.10.2015. Relying on the same, the learned Standing Counsel has vehemently urged - on 15.07.2014 itself the State Bank of India lifted its charge over the ‘property-in-dispute’. Thus, no charge existed on 16.07.2014 when the sale-deed was executed by the ‘assessee-in-default’. There is a complete absence of any recital in that sale-deed of any existing charge in favour of the State Bank of India. Also, with equal vehemence, it has been stressed, the sale-deed dated 16.7.2014 was neither executed in favour of nor, it has been executed by the State Bank of India. Instead, it has been executed by the ‘assessee-in-default’, itself. Hence, the sale-deed dated 16.07.2014 is not protected under Section 34(2) of the Act.

12. Next, relying on a decision of a co-ordinate Bench of this Court in the case of **Reflex Industries and another vs. State of U.P. and others** reported in **2004 (4) ACC 3471**, it has been submitted, in similar circumstances, such a transaction was found to fraudulent and therefore *void ab initio*. Therefore, there is no requirement of law to compel the revenue authorities to first institute a suit proceeding and to then seek recovery from the ‘property-in-dispute’, only upon a decree in that suit.

13. Relying on Rule 285 of U.P Z. A & L.R Rules, 1952, it has

been submitted, there exists a preferential right in favour of the revenue authorities, over the 'property-in-dispute'. Last, a plea of alternative remedy has been raised. It has been submitted, if at all, objections should have been raised by the petitioner before the Collector/Commissioner under the provisions of U.P.Z.A & L.R, Rules, 1952, before approaching this Court.

14. Having heard the learned counsel for the parties and perused the record, we observe, it is too late in the day to accept the plea of alternative remedy. The writ petition had been filed in the year 2015. The revenue and the State Bank of India are represented. They have filed pleadings. The matter is ripe for final hearing. An interim order is also operating in favour of the petitioner. Further, the issue raised is purely legal and it does not arise on disputed facts. Therefore, the objection raised and pressed at this stage by the learned Standing Counsel, on that count, is rejected.

15. Again, no reliance may be placed on Rule 285N of U.P.Z.A. & L.R., Rules, 1952. It would apply only if the sale of the 'property-in-dispute' had been confirmed under that enactment. Here, admittedly, the 'property-in-dispute' was first attached by the respondent authorities, almost a year after its purchase by the petitioner. Also, no auction ever took place. Clearly, Rule 285 N of the U.P. Z.A. & L.R., Rules is inapplicable to the present facts.

16. As to the main issue of applicability of Section 34 of the Act, 1948, it would be fruitful to our discussion to extract that provision, in entirety. It reads as below.

> *"34(1) Transfer to defraud revenue void.-(1) Where, during the pendency of any proceedings under this Act, any person liable to pay any tax or other dues creates a charge on, or transfers any [movable or immovable] property belonging to him in favour of any other person with the intention of defrauding any such tax or other dues, such charge or transfer shall be void as against any claim in respect of any tax or other dues payable by such person as a result of the completion of the said proceedings:*
>
> *Provided that nothing in this section shall impair the rights of a*

transferee in good faith and for consideration.

(2) Nothing in sub-section (1) shall apply to a charge or transfer in favour of a banking company as defined in the Banking Regulation Act, 1949, or any other financial institution specified by the State Government by notification in this behalf.

17. Undisputedly, the State Bank of India is a 'banking company' defined under the Banking Act. Therefore, it became open to it to raise a plea based on Section 34(2) of the Act. A plain reading of that provision brings out the existence of a *non obstante* clause created by the legislature. Thus, nothing contained in Section 34(1) of the Act, 1948 shall apply to (i) a charge created in favour of the State Bank of India or (ii) transfer made 'in favour' of the State Bank of India.

18. Undisputedly, on 15.07.2014, State Bank of India wrote to the 'assessee-in-default', as below:

"SAMB/CL-II/693

DT: 15/07/2014

M/S Kanha Vanaspati Ltd.
126, Ayodhya Nagar,
Ujhani, Distt. Budaun (U.P.)

Dear Sirs,

STRESSED ASSETS MANAGEMENT BRANCH
M/S KANHA VANASPATI LTD.

We advise that the Bank has released the property of M/s. Kanha Vanaspati Ltd. situated at Khasra No.8, 9, 10 & 126, Gram Gathona, Ujhani, District Budaun (U.P.), which was mortgaged to the Bank, on receipt of payment as per terms of approved OTS entered between the Bank and the above company. Henceforth the Bank will not have any charge over the said land."

19. Again, on 01.10.2015, the State Bank of India wrote to the petitioner, as under.

"SAMB-ND/CL-II/2015-16/885 *Date: October 01, 2015*

The Authorised Signatory
Gem Aromatic Pvt. Ltd.
A/410, Kailash Complex, Park Site
Vikhroli-Powai Link road, Vikroli(W)

Dear Sir,

M/s KANHA VANASPATI LIMITED

With reference to your letter dated September 14, 2015, we reply in seriatim as follows:
The immovable property i.e. land at Khasra No.8, 9, 10 & 126, Gram Gathona, Ujhani, Distt. Budaun (U.P.) charged to our Bank, was sold to you by M/s Kanha Vanaspati Limited for a consideration of Rs. 2.61 crores.

In this connection, we have not confirmed at any point of time that there was any charge encumbrance or attachment or coercive proceedings on the said property as alleged in your letter except our charge which is evident form our letter no.SAMB/CL-II/594 dated 27.06.2014 addressed to yourselves. It had been specifically confirmed to you that the charge over the land at Khasra no.8, 9, 10 & 126, Gram Gathona, Ujhani, Distt. Budaun(U.P.) will be released and the original title deeds and possession of the property will be handed over to you on receipt of Rs.2.61 crores (Rs. Two crores sixty-one lacs only) as per under noted schedule of payment.
1. Rs.11.00 lacs vide cheque no.723031 dated 27.06.2014 as up front payment.
2. Rs. 250.00 lacs through RTGS by 15.07.2014(+/- 5 days).

We would also like to bring to your notice that the MOU dated 27.06.2014 entered between M/s Gem Aromatics Pvt. Ltd. Mumbai (Buyer) and M/s Kanha Vanaspati Ltd. (seller) states that the seller has agreed to sell the said plot/ property for a total consideration of Rs.2.61 crores and the buyer agrees to buy the same and further states that the buyer will be idemnified for any statutory or other liabilities including any defective title found if any at a later date by the seller. It is encumberance upon M/s Kanha Vanaspati Ltd.(seller) to discharge such statutory or other liabilites on the said property and to disclose details any encumbrances or statutory liabilities etc.
We reiterate once again that nowhere at any point of time, have we ever represented that there is no charge, liability, encumbrance, and proceedings over the property except our charge. Therefore, the allegations made by you are baseless and we are not responsible for any kind of loss referred by you."

20. Reading the above letters along with the Certificate issued by the Registrar of Companies, Kanpur, dated 06.08.2014, it is clear, a charge was created (on 08.11.2005), in favour of the State Bank of India, over the 'property-in-dispute' i.e., the land bearing Khasra Nos. 8, 9, 10 & 126, Gram Gathona, Ujhani, Distt. Budaun(U.P.). That was done almost nine years before the impugned sale-deed was executed on 16.07.2014, in favour of the petitioner. There is no evidence that the petitioner was in the picture at that stage. Also, the existence of that charge (in the first place), is undisputed by the revenue authorities. Clearly, that

charge on the ‘property-in-dispute’ was created ‘in favour’ of the State Bank of India.

21. Further, the impugned sale-deed dated 16.07.2014 was executed in pursuance of the One Time Settlement (OTS in short), reached between the ‘assessee-in-default’ and the State Bank of India. Towards that settlement reached, the amount of Rs. 2.61 crore was paid by the petitioner to the State Bank of India, prior to execution of that sale-deed, under the apparently consequential Memorandum of Understanding (MOU in short) dated 27.06.2014 executed between the petitioner and the ‘assessee-in-default’/respondent no. 7. Thus, Rs. 11,00,000/- (on 26.06.2014) and Rs. 2,50,00,000/- (on or before 15.07.2014), were paid by the petitioner to the State Bank of India, under that MOU. These facts emerge from the recital made in the letters dated 15.07.2014 and 01.10.2015 written by the State Bank of India. They are wholly corroborated by the recital made in the impugned sale-deed dated 16.07.2014, and upon being duly evidenced by the representatives of the State Bank of India and the banker of the present petitioner. Both bankers signed that deed as marginal witnesses. There is nothing on record to doubt the due issuance or execution of such documents, in the manner narrated above. Clearly, the ‘property-in-dispute’ was under the charge created in favour of the State Bank of India, till before the execution of the sale-deed dated 16.07.2014.

22. In face of the aforesaid charge (over the ‘property-in-dispute’), created ‘in favour’ of the State Bank of India on 08.11.2005, it survives for consideration whether despite that charge being satisfied on 15.07.2014, it insulated the transfer of the ‘property-in-dispute’ made in favour of the petitioner, on 16.07.2014, from the recoveries being sought by the revenue authorities. Section 34(2) of the Act insulates a 'charge' or 'transfer' made ‘in favour of’ a ‘banking company’, as defined

under the Banking Act. Hence, spoken in the literal sense, that transfer may not appear to be directly protected under sub-section (2) of section 34.

23. Interestingly, the meaning of the word "charged' (used in Articles 291 and 112(2) of the Constitution of India), came up for consideration in the context of the challenge raised to the Presidential Orders de-recognising the erstwhile Rulers of the former Indian States, in **Madhav Rao Jivaji Rao Scindia v. Union of India,** reported in **(1971) 1 SCC 85**. While dealing with that question, the majority view of the nine-Judge Constitution bench of the Supreme Court, took note of the meaning attached to the word 'charged', under the general law relating to transfer of property. It was thus observed:

> ***"122.*** *In support of his contention that by using the expression "charged" in Articles 291 and 112(2) it is only intended to enact that the expenditure is not subject to the vote of the Parliament and that no priority in payment in respect of expenditure is declared, and in any event the expression "charged" creates no obligation enforceable at the instance of the person for whose benefit it is charged, the Attorney-General invited our attention to different provisions of the Constitution in each of which there is both a charge on the Consolidated Fund of an item of expenditure and an express direction for payment of the prescribed sum, and contended that Article 291 which merely recognizes the obligations of the Union Government to abide by the pre-existing covenants, creates no obligation for payment of the Privy Purse to the Rulers. He urged that the word "charge" in the Constitution in dealing with State financial procedure has the meaning it has in accountancy practiced it merely specifies the source from which payment is to be made and does not create a right in the Ruler or any enforceable obligation against the Union. Under the general law relating to transfer of property, a charge does not give rise to a right in rem : the right is however more than a mere personal obligation, for it is a jus ad rem a right to payment out of property specified : Govind Chandra Pal v. Dwarka Nath Pal [ILR 35 Cal 837, 843] ; Raja Sri Shiva Prasad v. Beni Madhab [ILR 1 Pat 387] . A charge gives a right to payment out of a specific fund or property, and a right to prior payment; but it does not create a right in rem in the fund or the property. A charge therefore gives rise to a right to receive payment, out of a specified fund or property in preference over others. In the*

absence of a clear indication to the contrary, it would be difficult to hold that the expression "charged" used in the contest of financial matters of the State, has a different meaning. Our Constitution-makers borrowed the concept of a Consolidated Fund from the British system. That has also been adopted in the Constitutions of Canada, Australia, South Africa and other Commonwealth Countries. Certain Acts in the United Kingdom and elsewhere prescribe a sequence of priorities in payment of different heads of expenditure charged on the Consolidated Fund; Section I Consolidated Funds Act, 1816; Section 1 The House of Commons (Speaker) Act, 1832; Sections 103, 104 and 105 of the British North America Act, 1867; Sections 117, 119 Constitution of the Union of South Africa, 1909; Sections 81 and 82 of the Australian Constitution 1900".

(emphasis supplied)

24. Pertinent to our discussion, the 'charge' created in favour of the State Bank of India clearly gave rise to a right to the State Bank of India to receive payment, out of the specified property i.e., the 'property-in-dispute', in preference over others. Section 34(1) seeks to create a part exception to that well established rule under the 'general law', in certain circumstances, in favour of the Crown/state dues. At the same time, Section 34(2) of the Act, overrides Section 34(1) of the Act and thus completely negates the exception and makes that pre-existing preferential right absolute. That effect arises in law, by virtue of the 'charge' created in favour of a 'banking company' as defined under the Banking Act.

25. Thus, it cannot be disputed - had the 'charge' created over the 'property-in-dispute', continued to exist till date, the respondent revenue authorities would continue to stand restrained from proceeding against the 'property-in-dispute', for recovery of their dues. Also, that direct consequence of section 34(2) of the Act would have been caused, if the State Bank of India had obtained the sale-deed of the 'property-in-dispute', in its favour, either pursuant to that charge or otherwise, to recover its dues. It is so because, Section 34(2) of the Act completely

negates Section 34(1) of the Act by use of the words - “Nothing in sub-section (1) shall apply”. That overriding effect may be avoided, only if the revenue were to contend, either that the charge was never created, or it was not created in favour of a ‘banking company’ as defined under The Banking Act. Clearly, that is not the case here.

26. Undoubtedly, a non obstante clause appearing in sub-Section (2) of Section 34 of the Act, is a legislative device employed to give an overriding effect to that provision of law, over section 34(1) of the Act. In **Union of India v. G.M. Kokil, 1984 Supp SCC 196**, the Supreme Court while dealing with a similar clause appearing under the Factories Act, reasoned and held as under:

> ***“11.*** *Section 70, so far as is relevant, says “the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory”. It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions 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. Thus the non obstante clause in Section 70, namely, “notwithstanding anything contained in that Act” must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the Act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the non obstante clause the Act is applicable even to employees in the factory who might not be ‘workers’ under Section 2(1), the same non obstante clause will keep away the applicability of exemption provisions qua all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the non obstante clause Section 64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under Section 59 of that Act read with Section 70 of the Bombay Shops and Establishments Act, 1948”.*
>
> *(emphasis supplied)*

27. Therefore, to accept the objection raised by Shri. Hajela - that the protective gaze of section 34(2) of the Act did not extend to the sale-deed dated 16.07.2014 executed by the ‘assessee-in-default’ (in favour of the petitioner), may lead to unintended, anomalous, inconvenient, and even absurd results, in law. If

accepted, a secured creditor may hold safe a secured asset till eternity, both against the debtor and the world at large, and no other creditor may attach it, till all dues of that secured creditor were satisfied. However, that secured creditor may never be enabled to negotiate a sale of such secured asset, to recover its dues, without first obtaining a prior transfer, in its favour.

28. Thus, in absence of any statutory intervention made, if the submission raised by the learned Standing Counsel is accepted, it would introduce an unreasonable restriction on the free play of section 34(2) of the Act. It would, without any legislative intent or purpose shown to exist, dictate a material alteration of the rights of the parties and force a change in the mode and way, a 'banking company' under the Banking Act may conduct itself *viz a viz* its secured assets. Though the debt of the State Bank of India may remain a secured debt against its charge existing on the 'property-in-dispute' and it may remain entitled to recover its dues upon sale of the 'property-in-dispute', to the exclusion of the Crown/state dues, however, that sale may be obtained only in its own name.

29. There is absolutely no warrant to allow for such an anomalous, uncertain, and therefore undesirable and even absurd result to arise. Plainly, there is nothing in the language of the Act, to allow for such a restrictive condition to be read into the words 'in favour of' prefixed to the words 'banking company' appearing in section 34(2) of the Act. That narrow meaning (as discussed above) would lead to results that are wholly absurd and may defeat the very object of enactment of Section 34(2) of the Act.

30. The Act created indefeasible right in the State Bank of India, by virtue of its status as a 'banking company' as defined under the Banking Act, occasioned by its charge over the 'property-in-dispute'. That indefeasible right cannot be lost or

diluted, merely because in the process of recovering its dues, that bank chose to negotiate or allow a third-party sale of the 'property-in-dispute', in favour of the petitioner, instead of first obtaining title in it. Therefore, we hold, the words 'in favour' appearing in section 34(2) of the Act must be read to refer, indicate, and include all transfers made to the sole benefit of the 'banking company' (as defined under the Banking Act), towards discharge of its/their outstanding dues, against charge existing over the "property-in-dispute".

31. The charge over the 'property-in-dispute' being in existence, in favour of the 'banking company' as defined under the Banking Act, the words 'in favour' need not be read literally - to mandate only such transfer as may have been made to that 'banking company' itself. The words "transfer in favour of banking company" appearing in Section 34(2) of the Act are wide enough to include within their plain ambit, a transaction of this nature whereby instead of first obtaining of transfer of the 'property-in-dispute', in its own name, the State Bank of India allowed that charged property to be sold to the petitioner, for the same purpose, for its benefit namely, to recover its dues from the 'assessee-in-default'. It is inconsequential that the pre-existing charge over the 'property-in-dispute' was satisfied on 15.07.2014 or that the State Bank of India did not first obtain title in it.

32. We are supported in our approach by the decision of the Supreme Court in ***Tirath Singh v. Bachittar Singh*, AIR 1955 SC 830**. In that case a question arose if the words "all persons" appearing in section 99(1)(ii) of the Representation of Peoples Act, 1951, would include a person against whom charge of corrupt practice may have been proved, for the purpose of issue of a fresh notice preceding the order of the Election Tribunal as to corrupt practice committed at an election. Read literally, such notice was contented to be mandatory. However, that interpretation was rejected, and the requirement to issue a fresh

notice was restricted to refer to any person other than one against whom proceeding had already been conducted. It was reasoned and held:

> *"6. The object of giving notice to a person under the proviso is obviously to give him an opportunity to be heard before a finding is given under Section 99(1)(a)(i) that he has committed a corrupt or illegal practice. This clearly appears from clause (b) of the proviso, which enacts that the person to whom notice is to be given should have an opportunity of cross-examining witnesses who had been examined before and given evidence against him, of calling his own evidence and of being heard. This is in accordance with the rule of natural justice which requires that no one should be condemned without being given an opportunity to be heard. The reason of the rule, therefore, requires that notice should be given to persons who had had no previous opportunity in respect of the matters mentioned in sub-clause (b) to the proviso. Such, for example, would be witnesses and possibly agents of the parties, as observed in Nyalchand Virachand v. Election Tribunal [8 Election Law Reports 417, 421] though it is not necessary to decide that point, but it cannot refer to parties to the petition who have had every opportunity of taking part in the trial and presenting their case. Where an election petition is founded on a charge of corrupt practice on the part of the candidate, that becomes the subject-matter of enquiry in the petition itself. If at the trial the Tribunal came to the conclusion that the charge had been proved, then it has to hold under Section 100(2)(b) that the election is void, and pass an order to that effect under Section 98(d). Section 99(1) enacts that the finding of corrupt practice under Section 99(1)(a)(i) or naming a person under Section 99(1)(a)(ii) should be at the time of making an order under Section 98. If the contention of the appellant is to be accepted, then the result will be that even though there was a full trial of the charges set out in the petition, if the Tribunal is disposed to hold them proved it has first to give notice of the finding which it proposes to give, to the parties, and hold a fresh trial of the very matters that had been already tried. That is an extraordinary result, for which it is difficult to discover any reason or justification. It was argued by the learned Attorney-General that the giving to a party to a proceeding a second opportunity to be heard was not unknown to law, and he cited the instance of an accused in a warrant case being given a further opportunity to recall and cross-examine prosecution witnesses after charge is framed, and of a civil servant being given an opportunity under Article 311 to show cause against the action proposed to be taken against him. In a warrant case, the accused is not bound to cross-examine the prosecution witnesses before charge is framed,*

and in the case of civil servants, the decision that they are entitled to a second opportunity was based on the peculiar language of Sections 240(2) and (3) of the Government of India Act, 1935, and Article 311 of the Constitution. They are exceptional cases, and do not furnish any safe or useful guidance in the interpretation of Section 99".

(emphasis supplied)

33. Again, in **D. Saibaba v. Bar Council of India, (2003) 6 SCC 186** a question arose, if the words "sixty days from the date of that order" appearing in Section 48-AA of the Advocates Act, 1961 require computation of that time, from the date on which such order was passed or from the date when that order was served on the person aggrieved. Departing from the obvious grammatical meaning of the words, the Supreme Court reasoned and held:

"16. *Placing such a construction, as we propose to, on the provision of Section 48-AA is permitted by well-settled principles of interpretation. Justice G.P. Singh states in Principles of Statutory Interpretation (8th Edn., 2001):*

"It may look somewhat paradoxical that plain meaning rule is not plain and requires some explanation. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed." (p. 45)

The rule of literal interpretation is also not to be read literally. Such flexibility to the rule has to be attributed as is attributable to the English language itself.

17. *The learned author states again:*

"In selecting out of different interpretations 'the court will adopt that which is just, reasonable and sensible rather than that which is none of those things', as it may be presumed 'that the legislature should have used the word in that interpretation which least offends our sense of justice'." (p. 113, ibid)

"The courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must

be so construed as to make it effective and operative 'on the principle expressed in the maxim: ut res magis valeat quam pereat'." (p. 36, ibid)

"If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results." (pp. 112-13, ibid)

18. *Reading word for word and assigning a literal meaning to Section 48-AA would lead to absurdity, futility and to such consequences as Parliament could have never intended. The provision has an ambiguity and is capable of being read in more ways than one. We must, therefore, assign the provision a meaning — and so read it — as would give life to an otherwise lifeless letter and enable the power of review conferred thereby being meaningfully availed and effectively exercised".*

34. As discussed above, in the facts of the present case, there is absolutely no doubt that the transfer of the 'property-in-dispute' took place for the sole benefit of a 'banking company' as defined under the Banking Act. Therefore, that transaction was covered within the meaning of the words - "in favour of the banking company". In such undisputed facts, the *non-obstante* clause pre-fixed to sub-Section (2) of Section 34 of the Act, wholly insulates the sale-deed dated 16.07.2014. In fact, it takes that sale-deed out of the reach and gaze of sub-Section (1) of Section 34 of the Act.

35. That piercing gaze of sub-section (1) of Section 34 of the Act would ever remain confined to tear apart the protective shield of an otherwise valid sale-deed, if it seeks to protect a transaction conducted to defraud the revenue, involving a creditor, other than a 'banking company' as defined under the Banking Act.

36. Resultantly, by virtue of Section 34(1) of the Act, a partial

exception arises to the general principle in law, that exists to the benefit of all secured creditors *viz a viz* Crown/revenue dues. This principle was clearly laid down in **Musahar Sahu (supra)** as under:

> *"As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles C.B. in Inre Moroney(1), where he says: "The right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. Now, it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, 'although the effect of it or even the interest of the debtor in making it, may be 'to defeat an expected execution of another creditor, is not a fraud within the 'Statute, because notwithstanding such an act, the entire property remains 'available for the creditors or some or one of them, and as the Statute gives no 'right to rateable distribution, the right of the creditors by such act is not 'invaded or affected.'*
>
> *The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes, property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid [Middleton v. Pollock (2 Ch. Div., 108)]. (1) So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff, who also was a creditor, was a loser by payment being made to this preferred creditor-there being in the case no question of bankruptcy."*

37. That principle was followed in **Ma Pwa May (Supra).** It was specifically applied by the Supreme Court in **Union of India vs Rajeswari and Co. (supra)** in the context of Section 53 of Transfer of Property Act. Therein the Supreme Court observed as below:

> *"9. It seems clear that it is open to a debtor to prefer one or more creditors over the others in the payment of his debts, and so long as he retains no benefit in the property the mere circumstance that some creditors stand paid while others remain unpaid does not attract the provisions of section 53 of the Transfer of Property Act. It is not disputed that the debts satisfied by payment of the sale proceeds are genuine. A faint attempt was made to show that some of the debts discharged were owed to persons who were also Directors of the Company. There is no findings by the High Court in support of that contention. It was also urged that the consideration which passed for the sale of the assets was inadequate and that the*

assets had been undervalued. Here again there is no finding to support the submission. The questions raised are questions of fact, and this Court will not permit such questions to be raised unless there is material evidence which has been ignored by the High Court or the finding reached by the Court is perverse.

10. A point was sought to be made by learned counsel for the appellant that the transfer of the assets was effected in favour of Rajeswari & Co. which was not one of the creditors. It has been found by the High Court that the sale was effected for the purpose of discharging the debts payable by the Company. Once it is also found that the consideration was not inadequate it is immaterial, as the High Court has observed, that the transfer was effected in favour of a person who was not a creditor. It has been clearly found that the sale proceeds were employed for paying off the creditors of the Company."

38. Besides the above, in **The Bank of Bihar vs The State of Bihar and others** reported in **(1972) 3 SCC 196,** in the context of right of a pawnee *viz a viz* the sovereign's right over the pawned goods, it was held:

"6. In our judgment the High Court is in error in considering that the rights of the Pawnee who had parted with money in favour of the pawnor on the security of the goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawnor without the claim of the Pawnee being fully satisfied. The Pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawner. But by a mere act of lawful seizure the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff for such amount which the plaintiff in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt.

7. The approach of the trial court was unexceptionable. The plaintiff's right as a Pawnee could not be extinguished by the seizure of the goods in its possession inasmuch as the pledge of the goods was not meant to replace the liability under the cash credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor. The Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the plaintiff's dues.

39. That principle was again applied in **Dena Bank (supra).** It was held as below:

"10. However, 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 of 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. In Giles v. Grover 1832 131 ER 563 it has been held that the Crown has no precedence over a pledgee of goods. In Bank of Bihar v. State of Bihar & Ors. AIR 1971 SC 1210, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L., Seventh Edition, p.386) It seems a Government debt in India is not entitled to precedence over a prior secured debt."

40. The above noted principle has been consistently applied by the Supreme Court in **M/s Rana Girders Ltd. Vs Union of India** reported in (**2013) 10 SCC 746** wherein it was observed:

"18. In so far dues of the Government in the form of tax or excise etc. are concerned, the Court was of the opinion that rights of the Crown to recover the dues would prevail over the right of the subject. Crown debt means the debts due to the State or the King. Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt pertains to the common law principle. When Parliament or State Legislature makes an enactment, the same would prevail over the common law and thus the common law principles which existed on the date of coming into force of the Constitution of India, must yield to a statutory provision. A debt, which is secured or which by reason of the provisions of a statute becomes the first charge over the property must be held to prevail over the Crown debt which is an unsecured one. On this reasoning, the debt payable to secured creditor like the Financial Corporation was prioritised vis-a- vis the Central Excise Dues."

41. Again, in **Principal Commissioner Of Income Tax Vs Monnet Ispat And Energy Ltd.** reported in **2018 (18) SCC 786** the same principle was applied in the context of dues of Income Tax. The only exception drawn in certain other decisions is where the Crown/state dues had been specifically given a preferential right, by statutory intervention.

42. As discussed above, Section 34 (1) of the Act makes a part exception to the above noted principle, in cases involving a

charge created in favour of a creditor who is not a 'banking company' under the Banking Act. In those cases, alone, the revenue may be permitted to overlook any charge created or transfer made in favour of such a creditor, if that was done to defraud the revenue. Even then, Section 34(1) does not seek to completely override the otherwise pre-existing preferential right in favour of a secured creditor. It only draws an exception to that principle, in specified circumstance - of fraud being committed.

43. To complete our discussion, in any case, if Section 34(1) of the Act was to be invoked there would have to exist a *prima facie* case of fraud made out against the petitioner. In that case the remedy may not lie with the revenue authorities themselves, by way of first and only choice. A regular suit proceeding may always be instituted to seek a declaration in that regard, as was opined by Supreme Court in **Chogmal Bhandari (supra).** Though that law was laid down in the context of Section 54 of the Transfer of Property Act, at the same time, those provisions being similar (in material parts) to Section 34 of the Act, that ratio is wholly applicable. In that decision, it was held as below:

> *"10. In the special and peculiar facts of the present case which have been catalogued above, in our opinion, this is not a fit case In which the sales tax authorities can be allowed to hold that the deed of trust executed by the settlors was hit by section 53 of the Transfer of Property Act. It may be noted that under section 53 of the Transfer of Property Act if a transfer is made with intent to defeat or delay the creditors it is not void but only voidable. If the transfer is voidable, then the ' sales tax authorities cannot ignore or disregard it but have to get it set aside through a properly constituted suit after impleading necessary parties and praying for the desired relief. In Chutterput Singh & ors. v. Maharaj Bahadoor and others, (2) the Privy Council observed as follows:*
>
> *"No issue was stated in this suit whether the transfers were or were not liable to be set aside at the instance of Dhunput under section 53 of the Transfer for Property Act, and no decree has been made for setting them aside. Such an (1) [1974] 2 S.C.R. 655. (2) L.R. 32 I.A. 1.*
>
> *7-L522SCI/76 issue could be raised and such a decree could be made only in a suit properly constituted either as to parties or other wise."*
>
> *To the same effect is the later decision of the Privy Council in Safer Hasan and others v. Farid-Ud-Din and others,(l) where Lord Thankerton made the following observations:*

> *"Further, under section 53 the wakfnama would only be voidable at the option of the "person so defrauded or delayed"... Until so voided the deed remains valid."*

44. At the same time, in a case of fraud established on admitted/undisputed facts, the principle - fraud vitiates everything may be invoked to claim such a sale-deed to be *void ab initio* and the plea of nullity may be set-up, outside the suit remedies as well. However, such is not the case here.

45. The decision of the co-ordinate Bench of this Court in the **Reflex Industries and another (supra)** is wholly distinguishable. It was not a case arising under section 34 of the Act. It was also not a case of involving liquidation of debts of a secured creditor or a 'banking company' under the Banking Act. Rather, it was a case of sale made to defraud the revenue as stood established on undisputed facts. The Court lifted the corporate veil and found the sale-deed set up by the petitioner (in that case), to be *void ab initio*. Neither such facts exist in this case, nor that ratio may arise, in the context of section 34 of the Act.

46. As to the objection with respect to the relief, we find, the petitioner has sought a writ of Mandamus, to restrain the respondents from making any recovery from the personal assets of the petitioner. The exact wording of the prayer clause apart, in effect that prayer is duly supported by pleadings and material on record. In absence of any doubt as to the rights of the parties that stand established on the strength of undisputed facts noted above, it would be hyper technical to deny relief to the petitioner. The substance and the essence of the prayer made is clear. It arises on a clear cause of action admittedly existing, in the shape of the attachment order enforced by the State respondents. Also, all material facts giving rise to the cause of action and for our decision are undisputed.

47. In such undisputed facts and in the position of law discussed above, the writ Court cannot be seen to be diffident or

stingy in granting the consequential relief. A writ Court ensures obedience to the rule of law. In that process, relief may flow to the petitioner as a natural outcome of the exercise. Once, the facts are clear and the crease or doubt in law stands cleared, relief must flow unhindered, upon application of that law to the clear facts of the case. It may not be obstructed on mere technicalities – such as the objection to the exact wording of the prayer clause.

48. Consequently, the respondents are restrained from proceeding against the personal assets of the petitioner or the 'property-in-dispute', so however, they may remain at liberty to recover their dues from respondent no. 7 and its properties, in accordance with law.

49. The writ petition is **allowed**. No order as to costs.

Order Date :- 7.10.2021
A.Kr.