STATE OF HIMACHAL PRADESH AND OTHERS

v.

M/S A. J. INFRASTRUCTURES PVT. LTD AND ANR.

(Civil Appeal No. 8980-8981/2012)

APRIL 28, 2023

[S. RAVINDRA BHAT AND DIPANKAR DATTA*, JJ.]

Himachal Pradesh General Sales Tax Act, 1968– s.16-B Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – s.35–Held: s.16-B of the HPGST Act is not ultra vires any provision of law – It is a perfectly valid piece of legislation and is not ultra vires the Constitution and/or the Banking Companies Act as erroneously held in the decision of the High Court impugned in CA No. 9212 of 2012– Further, in view of the decision in Central Bank of India case*, any observation in the decision impugned in CA No. 8980 of 2012 touching upon s.16-B of the HPGST Act vis-à-vis s.35 of the SARFAESI Act is of no effect–Himachal Pradesh Land Revenue Act, 1954.*

Himachal Pradesh General Sales Tax Act, 1968– s.16-B – "Tax to be first charge on property" – Himachal Pradesh Land Revenue Act, 1954 – Chapter VI– Held: s.16-B would be attracted only after determination of the liability and upon any sum becoming due and payable; and it is only thereafter that the charge, if any, would operate – In the present case, proceedings were not initiated upon notice to the defaulters and the sum they owed to the department had not been finally determined in accordance with law–Thus, question of the State resorting to the provisions contained in Chapter VI of the HPLR Act for recovering the dues, if at all, as arrears of land revenue did not arise–Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Practice and Procedure – Held: A decision on the constitutional validity of a provision should be invited not in vacuum but when the justice of the case demands such a decision – Decision on

* Author

an infructuous writ petition is inconsequential and can never be of any effect.

Code of Civil Procedure, 1908 – s.151 – Held: When the law provides a specific remedy, it is not open to a party to take recourse to s.151 – It preserves the inherent powers of the court to do justice in a case where the party has no other remedy under the CPC–Practice and Procedure.

Disposing of the appeals, the Court

HELD:

1.1 A law, which the State legislature had the competence to enact, has been outlawed by the High Court while hearing a writ petition which was rendered infructuous due to developments subsequent to its filing and prior to its disposal but such developments had not been brought to the notice of the High Court. For all intents and purposes, the High Court by its judgment and order dated 2nd January, 2008 decided an infructuous writ petition and, in the process, outlawed section 16-B of the HPGST Act when the same was not at all warranted. It was also a clear but inadvertent error on the part of this Court to dismiss only the special leave petition against PNB as infructuous; the appropriate course for this Court ought to have been to dismiss the writ petition of PNB itself as infructuous having regard to the clear stand taken by PNB in its aforesaid affidavit dated 30th September, 2010 that nothing survived for a decision on the writ petition on the date it was decided in view of release of the property from mortgage. In view of dismissal of the special leave petition qua PNB by the order dated 8th April, 2011, the judgment and order outlawing section 16-B of the HPGST Act can be examined.[Paras 29, 31 and 32]

A.R. Antulay vs. R.S. Nayak **(1988) 2 SCC 602 : [1988] 1 Suppl. SCR 1– referred to.**

1.2 Since the writ petition had been rendered infructuous on the date it was decided, it was not necessary for the High Court to pronounce on the validity of section 16-B. A decision on

the constitutional validity of a provision should be invited not in vacuum but when the justice of the case demands such a decision. Hence, it is held that the decision on an infructuous writ petition is inconsequential and can never be of any effect. The issue as to whether section 16-B of the HPGST Act is ultra vires any provision of law including the supreme law of the country is no longer *res integra.* What appears to be of significance in the light of the decision in Central Bank of India is that the findings in the judgments and orders disposing of the writ petitions impugned in two of the four civil appeals ~ the first dated 7th September, 2007 and the other dated 2nd January, 2008 ~ with regard to the scope, ambit and applicability of section 35 of the SARFAESI Act, more particularly the latter holding section 16-B of the HPGST Act as ultra vires the Constitution and the Banking Companies Act, loses its basis and can no longer be held to be legal and valid. Section 35 of the SARFAESI Act could not have been construed as conferring any right on a secured creditor to claim priority over dues of the State in the absence of a provision in that behalf which presently can now be claimed, subject to other conditions being fulfilled, in view of section 26E of the SARFAESI Act. Pertinently, the High Court while seized of the writ petition of PNB was not at all concerned with the SARFAESI Act as such. The matter had travelled to the High Court from proceedings under the DRT Act. There was, thus, no occasion for the High Court to pronounce on the validity of section 16-B of the HPGST Act based on what was held by its coordinate Bench in M/s A. J. Infrastructures Pvt. Ltd.. The High Court was therefore in clear error. Section 16-B of the HPGST Act is a perfectly valid piece of legislation and is not ultra vires the Constitution and/or the Banking Companies Act as erroneously held in the decision of the High Court dated 2nd January, 2008. Also, following the decision in Central Bank of India, any observation in the decision dated 7th September, 2007 touching upon section 16-B of the HPGST Act vis-à-vis section 35 of the SARFAESI Act is of no effect. [Paras35, 38-40]

Central Bank of India vs. State of Kerala **(2009) 4 SCC 94 : [2009] 3 SCR 735 – relied on.**

M/s A.J. Infrastructures Pvt. Ltd. vs. State of H.P. and others **CWP No. 306/2007 dated 7th September, 2007 – referred to.**

1.3 From the excerpt of the impugned judgment and order of the High Court dated 2nd January, 2008 it is clear that proceedings were not initiated upon notice to the defaulters and the sum they owed to the department had not been finally determined 28 in accordance with law. In view thereof, question of the State resorting to the provisions contained in Chapter VI of the HPLR Act for recovering the dues, if at all, as arrears of land revenue did not arise. The State and its department either overlooked or were ignorant of the requirement of law that section 16-B would be attracted only after determination of the liability and upon any sum becoming due and payable; and that, it is only thereafter that the charge, if any, would operate. No relevant documentary evidence having been placed before the High Court, when CWP 306 of 2007 was being heard, to indicate that necessary steps under the HPGST Act had been initiated by the State and its officers, the third issue has to be answered by holding that the State not having taken steps as required by law for realization of its dues, there was no determination of liability, a fortiori, question of taking recourse to the HPLR Act for recovery of dues as arrears of land revenue did not arise. Without such determination of liability, no red entry marks could have been inserted in the revenue records and the High Court was right in holding that the State ought not to have refused mutation. The appellants (State and its officers) are not entitled to any relief except the declaration that section 16-B of the HPGST Act is not ultra vires any provision of law. In view of section 16-B having been outlawed by the High Court on 2nd January, 2008, this declaration shall not enure to the benefit of the State in respect of cases that are old and have been closed but would be effective once again from this ay. [Paras 48, 49 and 51]

STATE OF HIMACHAL PRADESH AND OTHERS v. M/S A. J. INFRASTRUCTURES PVT. LTD AND ANR.

State Bank of Bikaner & Jaipur vs. National Iron & Steel Rolling Corporation and Ors. **(1995) 2 SCC 19 : [1994] 6 Suppl. SCR 566 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8980-8981 of 2012.

From the Judgment and Order dated 07.09.2007 of the High Court of Himachal Pradesh at Shimla in CWP No.306 of 2007 and CMP No.1160 of 2008.

With

Civil Appeal Nos. 9212-9213 of 2012.

Abhinav Mukerji, Bihu Sharma, Akshay C. Shrivastava, Ms. Pratishtha Vij, Varinder Kumar Sharma, Advs. for the Appellants.

A. Venayagam Balan, Sanjay Kapur, Ms. Megha Karnwal, Surya Prakash, Arjun Bhatia, Ms. Astha Gumber, Advs. for the Respondents.

The Judgment of the Court was delivered by

DIPANKAR DATTA, J.

Preface

1. A thin thread connects the two sets of civil appeals[1], which are at the instance of the State of Himachal Pradesh (for brevity, "the State", hereafter) and its officers. Since the provisions of law emerging for consideration are almost the same in terms, though in different fact situations, these appeals were heard one after the other and shall stand disposed of by this common judgment and order.

Civil Appeal Nos.8980-8981/2012

2. Civil Appeal No. 8980 of 2012 is directed against the judgment and order of the High Court dated 7th September, 2007 allowing a writ petition[2] presented before it by M/s. A.J. Infrastructures (Pvt.) Ltd., the first respondent, on 6th March, 2007. The operative portion of the order reads as follows:-

1 Civil Appeal Nos. 8980-8981/2012 and Civil Appeal Nos. 9212-9213/2012

2 CWP No. 306/2007

"For all the aforesaid reasons, the writ petition is allowed. Order rejecting petitioner's application for not mutating the entry in their name is quashed and set aside. The respondents no. 1 to 5 are directed to delete the adverse entry showing the sales tax dues of M/s Regent Rubber and M/s Eastman Rubber in relation to the property comprising in Khasra No. 254/2/1, Khatauni Nos. 7 Min, 14 Min, Measuring 3 Bighas 7 Bishwas, situated at Village Moginand, Kala-Amb, Tehsil Nahan, District Sirmour, HP and further respondent no. 3 is directed to mutate the property in the name of petitioner company. The petitioner shall be entitled to costs, which is quantified at Rs, 25,000/- from respondents no. 1 to 5."

3. Aggrieved by the judgment and order dated 7th September, 2007, the official respondents in the writ petition applied for a review[3]. By an order dated 29th October, 2009, the High Court proceeded to dispose of the application for review by, *inter alia*, the following order:-

"The present application of review has been filed after delay of more than one year without proper and satisfactory explanation. No sufficient material has been placed on record for reviewing the order dated 07-09-07, which may be brought within four corners and provisions of Order 47 Rule 1 CPC, as observed in foregoing decisions. Therefore, only for taking different view, the said order dated 07-09-09 cannot be reviewed. In these circumstances, the present application for reviewing the order dated 07-09-09 is dismissed on the ground of delay as well as on the merits."

The said order dated October 29, 2009 is challenged in C.A. No. 8981 of 2012.

4. The facts pleaded in the writ petition reveal that the first respondent had purchased the subject property (described in full in the operative part of the order dated 7th September, 2007, extracted above) in an auction conducted by the State Bank of Patiala (for brevity "State Bank", hereafter) on 18th January, 2005 in exercise of power conferred by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, "the SARFAESI Act", hereafter). The subject property was initially mortgaged on 11th October, 1999 with the Himachal Pradesh Financial Corporation (for brevity "HPFC", hereafter)

3 CMP No. 1160/2008

by M/s. Regent Rubber Private Limited (for brevity "Regent", hereafter). Due to breach committed by Regent, HPFC took over the property and sold it in an open auction to M/s Eastman Rubber (for brevity "Eastman", hereafter). The subject property was thereafter mortgaged by Eastman with the State Bank. However, Eastman too having committed default in liquidating its dues, the subject property was eventually put up for sale in an open auction on 18th January, 2005 under rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (for brevity "SARFAESI Rules", hereafter).

5. The first respondent emerged as the highest bidder in the auction by quoting a sum of Rs. 50,01,000/-.Within the stipulated time, the first respondent paid the entire bid amount whereupon in accordance with the provisions of rule 9(6) and (10) of the SARFAESI Rules, sale certificate dated 21st July, 2005 was issued to the following effect:-

"receipt of the sale price in full and handed over the delivery and possession of the scheduled property. The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned."

6. After issuance of the sale certificate, the State Bank by its letter dated 24th February, 2006 informed various authorities including the taxation department of the State of sale of the subject property to the first respondent. In due course of time, the first respondent obtained permission from the State vide order dated 17th August, 2006 and consequently was able to have the sale deed executed and registered on 6th September, 2006.

7. The first respondent having applied for mutation of the subject property in its name, an order of rejection thereof came to be passed on 22nd December, 2006 in the circumstances noted now. On 18th January, 2005, an *ex parte* assessment order under the provisions of the Himachal Pradesh General Sales Tax Act, 1968 (for brevity "HPGST Act", hereafter) was passed in relation to the assessment years 1998-1999, 1999-2000, 2000-2001 and 2001-2002 against Regent and Eastman amounting to Rs. 19,03,845/- and Rs.13,73,115/- respectively. Having regard to the date of the *ex parte* assessment order, it is quite but natural that when the first respondent offered its bid for purchasing the subject property in the auction ultimately conducted (on 18th January, 2005), any outstanding

liability of either Regent or Eastman could not and was not reflected in any official record. However, in view of this liability of Regent and Eastman, the application of the first respondent for mutation in respect of the subject property in its name stood rejected. Such order revealed that on the asking of the Excise and Taxation Officer, Nahan, District Sirmour, entries in red ink had been made by the Tehsildar, Nahan pertaining to demand of arrears of tax payable by Regent and Eastman under the provisions of the HPGST Act.

8. The order of rejection dated 22nd December, 2006 was assailed in the writ petition and orders were sought seeking (i) deletion of adverse entries regarding the sales tax liability of Regent and Eastman; (ii) direction upon the tehsildar to mutate the subject property, after quashing of the order dated 22nd December 2006;and (iii) declaring the action of the excise and taxation officeras illegal, unjust and without the authority of law.

9. Upon a contested hearing, a Division Bench of the High Court allowed the writ petition on terms noted above in paragraph 2 supra.

10. We consider it appropriate to reproduce certain other paragraphs from the impugned judgment dated 7th September, 2007, hereunder:-

"Undoubtedly, Section 16-B of the Tax Act also contains a non-obstante clause, which makes the amount of tax payable by a dealer to be a first charge on the property of the dealer. There is, thus, obviously a conflict between the provisions of the two statutes.

The powers are absolute and in view of the non obstante clause contained in Section 35 of the Act, would have an overriding effect over all inconsistent provisions contained in any other law. The Act being a special statute, enacted later in point in time and that too by the Central Government (sic, Parliament), in our view, would override the inconsistent provisions contained in the Tax Act. This is in the scheme of constitutional provisions also. Therefore, the Bank is well within its right to take over the property and sell the same notwithstanding the 1st charge of the State on the property of the dealer.

The issue needs to be examined from another perspective. Under the provisions of the Tax Act, the Assessing Authority is required to assess the amount of tax due from the dealer on the basis of returns filed. If the Assessing Authority is not satisfied that the returns furnished are

correct and complete or that no returns have been filed at all he shall serve a notice, give an opportunity of hearing and as the case may arise, adopt the best judgment method and assess the amount of tax due from the dealer. This is so provided under section 14 of the Tax Act. The amount so assessed is required to be paid by the assessee within the time stipulated in the notice to be issued by the Assessing Authority, failing which the amount due is recoverable as arrears of land revenue as provided for under section 16, which, however, in view of non obstante clause contained in section 16A comes into operation only after the dealer failed to pay the amount due when a notice in writing is issued to him. Now, in the present case no notice of demand, as stipulated under section 14(7) or section 16A has been issued to any of the dealers.The action of respondent no. 5 in asking respondents no. 3 and 4 and also the action of respondents no. 4 in acting upon the request of respondent no. 5 to make entries (in red ink) of arrears of tax due recoverable as land revenue in the revenue record is thus bad in law. For the very same reason, in spite of No Objection issued by the State for getting the sale deed executed is thus in gross violations of the provisions of the Tax Act.

Further the right of the respondent-State to have a first charge on the property of the dealer can be only if there is proper adjudication and determination of the amount due under the Tax Act and in the absence thereof, it cannot be said that the tax is due and payable by the dealer. Till such time, the same is done, there cannot be any crystallization of charge. The charge of the State is not a floating charge.

In the instant case the Bank had already exercised its right and taken possession of the property much prior to the assessment order dated 18-01-05 passed by the Assessing Authority. In fact before the said date the property itself had been advertised to be sold by public auction. No notice of demand was ever issued under Section 14 and 16A before action under section 16 of the Tax Act was taken. Assuming that the first charge stood created prior to the passing of the order of assessment, in our view the provisions of section 35 of the Act would override the inconsistent provisions of section 16B of the Tax Act leading to the only conclusion and that there is no prior charge on the property except for that of the Bank with whom the property was mortgaged. Thus, in our view, looking from all angles the action of the State cannot be upheld.

The creation of 1st charge or status of encumbrance of property was recorded for the 1st time on 11-07-06. The record of rights, i.e. revenue record did not reflect any status of encumbrance of the property or creation of 1st charge in spite of the fact that the respondents were duly informed about the auction and issuance of the sale certificate by the Bank in favour of the petitioner. It was only when the State was satisfied about the non-encumbrance that the permission to transfer the property in the name of the petitioner was accorded. In fact, based on the revenue record the Bank considered the property to be encumbered and accepted the same as a security. It took over the same and put it to auction as a secured asset which stands purchased by the petitioner as such."

(emphasis ours)

Civil Appeal Nos.9212-9213/2012

11. Punjab National Bank (for brevity "PNB", hereafter) sanctioned term loan to M/s Superrugs (India) Pvt. Ltd. (for brevity "borrower", hereafter) for manufacturing carpets. The loan that was provided by PNB to the borrower was secured by mortgage of its factory premises situated at Baddi Industrial Area, District Solan. Shri R. T. Tejpal and Shri Durga Dass stood as guarantors (for brevity "guarantors", hereafter). The loan account of the borrower became irregular. A recovery suit was instituted by PNB against the borrower and the guarantors for Rs. 42.29 lacs. Upon introduction of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for brevity "DRT Act", hereafter) and constitution of the Debts Recovery Tribunals, the suit was transferred to the Debts Recovery Tribunal, Jaipur (for brevity "DRT, Jaipur", hereafter). Consent decree was passed on 12th November, 1998 in favour of PNB and against the borrower and the guarantors. Part payment was made by the borrower towards satisfaction of the decree, but balance payment was not made resulting in PNB levying execution of the recovery certificate for an amount of Rs.2,65,97,162.50 before the DRT, Jaipur on14th May, 1999. Subsequently, the proceedings for execution were transferred to the Debts Recovery Tribunal, Chandigarh (for brevity "DRT, Chandigarh", hereafter) on 2nd January, 2000. During pendency of the proceedings, the Assistant Excise and Taxation Commissioner, District Solan (for brevity "Commissioner", hereafter), issued a notice in 'The Tribune' in its edition dated 12thFebruary, 2000 for auction of

the property that was mortgaged by the borrower. Auction was fixed for 3rd March, 2001 for recovery of arrears of sales tax amounting to Rs. 32,72,365/-, which was recoverable as arrears of land revenue under the Himachal Pradesh Land Revenue Act, 1954 (for brevity "HPLR Act", hereafter). PNB moved an application before the Recovery Officer attached to the DRT, Chandigarh for stay of auction whereupon the said recovery officer considering the law laid down by this Court in *State Bank of Bikaner & Jaipur vs. National Iron & Steel Rolling Corporation and Ors.*[4] concluded that the claim of PNB against the mortgaged property had become secondary in view of the auction initiated by the State for recovery of sales tax dues. This resulted in PNB invoking the jurisdiction of the High Court under Article 226 by filing a writ petition[5] against the State, the Commissioner, the Recovery Officer of the Debts Recovery Tribunal, Chandigarh, the borrower and the guarantors.

12. Prayer in the writ petition was for orders restraining sale by auction of the mortgaged property of the borrower at Baddi, District Solan for recovery of arrears of sales tax dues, and to strike down section 16-B of the HPGST Act as *ultra vires t*he provisions of the Constitution, the DRT Act, the Transfer of Property Act, 1872, the Contract Act, 1872 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (for brevity "Banking Companies Act", hereafter).

13. The State and the Commissioner contested the writ petition by contending that the borrower owed Rs. 32,72,365/ to the Government of Himachal Pradesh on account of arrears of sales tax which had been declared as arrears under the HPLR Act. It was further contented that the State is competent to recover the amount as it has a first charge on the property of the dealer under section 16-B of the HPGST Act read with section 73(3) of the Code of Civil Procedure (for brevity "the CPC", hereafter). It was further contented that it is wrong on the part of the PNB to contend that its debtis prior in point of time. Section 16-B of the HPGST Act had come into force with effect from 21st October, 1994 whereas the consent decree was passed in favour of PNB on 12th November, 1998. This being the position, the provisions of section 16-B of the HPGST Act would apply and that PNB was not entitled to any relief. Reference

4 (1995) 2 SCC 19

5 CWP No. 239 of 2001

was made to the decision of this Court in **State Bank of Bikaner and Jaipur** (supra) where this Court considered section 11-AAAA of the Rajasthan Sales Tax Act, 1954, which is *parimateria* with section 16-B of the HPGST Act, creating a first charge on the property of the dealer. In the light of the said decision, the contention of PNB that it had the prior right to recovery of the debt was claimed to be devoid of substance and, in fact, misconceived.

14. The writ petition of PNB come to be allowed by the High Court vide its judgment and order dated 2nd January, 2008. The judgment and order dated 7th September, 2007 rendered by the High Court on the writ petition[6] titled **M/s A.J. Infrastructures Pvt. Ltd. vs. State of H.P. and others**, being the judgment and order impugned in Civil Appeal No. 8980of 2012,was relied upon. Although while deciding **M/s A.J. Infrastructures Pvt. Ltd.** (supra) the High Court had not declared section 35 of the SARFAESI Act as *ultra vires*, the Division Bench of the High Court in *seisin* of the writ petition of PNB proceeded a step further and held section 16-B of the HPGST Act to be inconsistent with section 35 of the SARFAESI Act; and,then declared the said section as *ultra vires* the Constitution and the Banking Companies Act. The writ petition filed by PNB was, accordingly, allowed and it was held that PNB was entitled to sell the mortgaged property ofthe borrower in accordance with law.

15. The Division Bench of the High Court also recorded as follows :-

"In the present case, the mortgage was created in the year 1984 and the consent decree was passed on 12.11.1998 in favour of the petitioner bank and against respondents No. 4 to 6. There is nothing on record to show that any notice of demand was firstly issued under Sections 14 and 16 A before action under Section 16 of the Sales Tax Act was taken. The copies of the notice of demand issued and when it was issued have not been placed on record by respondents No. 1 & 2 except by pleading about their right to sell the property and recover the amount as arrears of land revenue in preference to the petitioner bank. Therefore, in view of the decision in Dena Bank's case it is clear that it only gives preferential right to the State to recover the sales tax in preference to unsecured creditors but once the property in question already stood

6 CWP No. 306/2007

mortgaged and they had proceeded prior in time, they can recover the amount in pursuance of the consent decree passed in their favour, the State has no preferential right to sell the property and, therefore, the petitioner bank is entitled to sell the mortgaged property and realize the arrears of amount due to them and State shall be entitled to recover the balance amount, if any, left with the bank or in the alternative, they are at liberty to proceed against respondents No. 4 to 6 for recovery of the amount by proceeding against them in accordance with law. The Division Bench in the above case has already taken the view that the provisions of Section 35 of the Act would override the inconsistent provisions of Section 16B of the Tax Act and as such, there provisions of the Sales Tax Act Section 16B as they are inconsistent with Section 35 of the Act are declared ultra vires of the Constitution."

(emphasis ours)

16. Dissatisfied with the judgment and order dated 2nd January 2008, the State and the Commissioner on 22nd May, 2008 filed an application[7] under section 151 of the CPC for *"rectification etc., of the judgment/order dated 2nd January, 2008"*. The prayer in such petition was for recall of the judgment and order dated 2nd January, 2008 in the interest of justice, equity and fair play so that the applicants are saved from enormous adverse consequences of such judgment and order.

17. The said application came to be considered by the same Division Bench (which had decided the writ petition) and stood dismissed, *inter alia*, by the following order dated 5th June, 2008:

"This application under Section 151 CPC has been purportedly (sic, filed) for rectification of our judgement dated 2.1.2008. However, in the prayer clause it has been prayed that the judgement dated 2nd January, 2008 may be recalled. It is clear that under the garb of this application the State is seeking review of the judgement.

We need not burden ourselves with the various grounds taken in the application. The perusal of the application shows that it is virtually a review petition but has been styled to be an application under Section 151 CPC. This cannot be permitted.

7 CMP No. 1205 of 2008

Various facts have now been pleaded in this application, which were neither pleaded nor argued when the writ petition was heard and decided. In an application under Section 151 CPC, the applicants cannot be permitted to rake up absolutely new pleas which were never taken or argued in the writ petition. In case the State is aggrieved by the judgment, it has the remedy of approaching the apex Court. There is no error apparent on the face of the record of the judgement. The application being without any merit and being totally misconceived, is rejected".

18. The judgment and order dated 2nd January, 2008 allowing the writ petition has been challenged in Civil Appeal No. 9212 of 2012 whereas the order of dismissal of the application under section 151 of the CPC is the subject matter of challenge in Civil Appeal No. 9213/2012.

Proceedings before this Court

19. Grant of relief claimed in the writ petitions and dismissal of the two applications of the State and its officers for review of the judgment and order/under section 151 of the CPC led the State and its officers to approach this Court with separate special leave petitions.

20. Certain orders passed in these proceedings need to be noted.

21. On the special leave petitions carried by the State from the judgment and order passed on PNB's writ petition and the order of dismissal of the State's application under section 151 of the CPC, an order was passed by this Court on 11th March, 2011 recording as follows:

"The respondent-Bank has filed an affidavit contending inter alia that they have recovered their dues and also released the property, which was under mortgage in favour of the borrower since they have liquidated the loan amount with interest. Counsel appearing for the State seeks for a week's time to enable him to obtain instructions.

He may obtain instructions accordingly.

Re-notify on 18.3.2011."

22. The next effective order dated 8th April, 2011 passed by this Court on the aforesaid special leave petitions recorded that:

"So far these petitions are concerned, in our considered opinion, these petitions have been rendered infructuous partly in view of the fact that bank, who is a contesting respondent no. 1 herein, has already

recovered its dues and thereafter released the property from its hypothecation. Hence, the name of respondent no. 1 is deleted from the array of respondents and the petitions as against respondent no. 1 stand dismissed.

These petitions also stand dismissed so far as respondent nos. 3 and 5 are concerned. Therefore, these petitions survive only against respondent nos. 2 and 4."

23. As a result of the above order, the special leave petitions stood dismissed against PNB (the first respondent), the borrower (the second respondent) and Shri Durga Dass (the fifth respondent) and survived *qua* the Recovery Officer, DRT, Chandigarh (the second respondent) and Shri R.T. Tejpal (the fourth respondent).

24. Practically, with the exit of PNB from the proceedings in view of the developments subsequent to filing of the special leave petitions resulting in dismissal of the special leave petitions *qua* PNB, it admits of no doubt that the issue *inter se* the relevant parties, i.e., the State and PNB, as to whether the High Court was justified in outlawing section 16-B of the HPGST Act,attained finality.

25. Notwithstanding such position, this Court on 7th December, 2012 granted special leave on both the petitions to appeal whereupon the appeals were placed before us for hearing and decision.

Issues

26. The legal issues arising for decision on these appeals are:

(i) Whether, in view of dismissal of the special leave petition *qua* PNB by the order dated 8th April, 2011, the judgment and order outlawing section 16-B of the HPGST Act can at all be examined?

(ii) Should the answer to the above question be in the affirmative, whether section 16-B of the HPGST Act should have been outlawed by the High Court on the ground that it is *ultra vires* the Constitution or the Banking Companies Act?

(iii) Whether having regard to the facts and circumstances triggering the writ petitions, the High Court was justified in returning the findings that the State's claim of first charge on the subject properties is not substantiated?

(iv) Whether dismissal of the review petition/application for recallinstituted by the State by the High Court suffers from any infirmity, legal or otherwise?

(v) To what relief, if any, are the appellants entitled?

Analysis and Reasons

27. Insofar as the first issue is concerned,we may notice the Constitution Bench decision in **A.R. Antulay vs. R.S. Nayak**[8]. It was held there that one of the well-known principles oflaw is that a decision made by a competent court of law should be taken as final subject to any decision of a superior court in further proceedings contemplated by the law of procedure. However, this Court being the apex court, a litigant cannot approach any higher forum but can only invoke its review jurisdiction to correct a patent error. The power to review is also inherent in this Court and if judicial satisfaction is reached that an order has been passed, which ought not to have been passed, and it is accepted that a mistake has been committed, it is not only appropriate but also the duty of this Court to rectify the mistake by exercising inherent powers. Mistake of the Court can be corrected by the Court itself without any fetters. This is based on the principle that an act of Court ought not to injure any party before it. To own up the mistake when judicial satisfaction is reached does not militate against the Court's status or authority; perhaps it would enhance both.

28. There can be no doubt that in normal circumstances this Court would not allow reopening of an issue that has attained finality and, that too, in the absence of party who has benefited by reason of such an order. However, this is not a normal case and we can unhesitatingly record our satisfaction of a gross error having crept in requiring correction.

29. A law, which the State legislature had the competence to enact, has been outlawed by the High Court while hearing a writ petition which was rendered infructuous due to developments subsequent to its filing and prior to its disposal but such developments had not been brought to the notice of the High Court.

30. During the pendency of these proceedings where challenge had been laid to the judgment and order dated 2nd January, 2008 of the High

8 (1988) 2 SCC 602

Court, PNB filed an affidavit dated 30th September, 2010, referred to in the order of this Court dated 8th April, 2011. A reading of the affidavit reveals that during the pendency of the writ petition (filed by PNB) before the High Court, the borrower had offered a compromise proposal which PNB had accepted. In terms thereof, the borrower paid to PNB an amount of Rs.36 lakh towards full and final settlement of the loan liability. Upon receipt of the compromise amount, the title deed of the mortgaged property was duly returned to the borrower. Pursuant thereto, PNB filed an application for withdrawing the execution case before the Recovery Officer, DRT, Chandigarh on 13th August, 2002 and the case, upon being disposed of as withdrawn, was consigned to the record room. It was further categorically averred in paragraph 3(g) of the said affidavit that *"the grievance of respondent no.1 raised in the writ petition filed before the Hon'ble High Court does not subsist any further and that the object of having filed the writ petition is already fulfilled and that the writ petition has been rendered infructuous"*. Ultimately, in paragraph 5, PNB submitted that*"it extends its unconditional apology for not bringing the aforesaid facts to the notice of Hon'ble High Court at the time of reserving the orders in writ petition on 27th November, 2007"* and that *"the aforesaid facts could not be brought to the notice of Hon'ble High Court due to inadvertence and the same was not deliberate or intentional"*.

31. Therefore, for all intents and purposes, the High Court by its judgment and order dated 2nd January, 2008 decided an infructuous writ petition and, in the process, outlawed section 16-Bof the HPGST Act when the same was not at all warranted.

32. In our considered opinion, it was also a clear but inadvertent error on the part of this Court to dismiss only the special leave petition against PNB as infructuous; the appropriate course for this Court ought to have been to dismiss the writ petition of PNB itself as infructuous having regard to the clear stand taken by PNB in its aforesaid affidavit dated 30th September, 2010 that nothing survived for a decision on the writ petition on the date it was decided in view of release of the property from mortgage.

33. We, accordingly, answer the first issue in the affirmative.

34. Moving on to the second issue, we are clear in our mind that the same ought to be answered in the negative.

35. The easy answer to the issue flows from what we have discussed above. Since the writ petition had been rendered infructuous on the date it was decided, it was not necessary for the High Court to pronounce on the validity of section 16-B. A decision on the constitutional validity of a provision should be invited not in vacuum but when the justice of the case demands such a decision. Hence, we hold that the decision on an infructuous writ petition is inconsequential and can never be of any effect. However, we do not wish to rest our decision only on this technical point. Having considered the relevant provisions of law as well as the decisions of this Court, rendered prior to and post the impugned judgment and order dated 2nd January, 2008, we are of the firm opinion that the issue as to whether section 16-B of the HPGST Act is *ultra vires* any provision of law including the supreme law of the country is no longer *res integra*.

36. Instead of burdening our judgment by referring to all decisions on the point, we consider it appropriate to refer to only one decision of this Court (dated 27th February, 2009)in **Central Bank of India vs. State of Kerala**[9] which, of course, came into existence after the decisions challenged in these civil appeals were rendered. This Court having considered the provisions of the DRT Act and the SARFAESI Act, as it then stood, vis-à-vis section 38-C of the Bombay Sales Tax Act, 1959 and section 26-B of the Kerala General Sales Tax Act, 1963, *inter alia*, held that:

"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 the Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38-C of the Bombay Act and Section 26-B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of the State's charge over other debts, which was recognised 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

9 (2009) 4 SCC 94

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 the Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. 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 529-A 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.

127. The definition of 'secured creditor' includes securitisation/ reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of 'securitisation company' and 'reconstruction company' in Sections 2(1)(za) and (v) shows that these companies may be private companies registered under the Companies Act, 1956 and having a certificate of registration from Reserve Bank under Section 3 of the Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

128. If the provisions of the DRT Act and the Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the

provisions contained therein cannot be read as creating first charge in favour of banks, etc.

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 14-A 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 (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to the 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 the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B 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."

(emphasis ours)

37. It is much after this decision in **Central Bank of India** (supra) that Parliament proceeded to amend the DRT Act and the SARFAESI Act by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016. Chapter IV-A was introduced in the SARFAESI Act, with effect from 24th January, 2020, containing, *inter alia*, section 26E which accorded priority in payment to a secured creditor over all other dues in enforcement of the security, subject to conditions specified elsewhere in the said chapter. Prior thereto, with effect from 1st September, 2016, section 31B was introduced in the DRT Act extending similar benefit of priority to a secured creditor. We need not dilate here on the amended provisions for obvious reasons.

38. What appears to be of significance in the light of the decision in **Central Bank of India** (supra) is that the findings in the judgments and orders

disposing of the writ petitions impugned in two of the four civil appeals ~ the first dated 7th September, 2007 and the other dated 2nd January, 2008 ~with regard to the scope, ambit and applicability of section 35 of the SARFAESI Act, more particularly the latter holding section 16-B of the HPGST Act as *ultra vires* the Constitution and the Banking Companies Act, loses its basis and can no longer be held to be legal and valid. Section 35 of the SARFAESI Act could not have been construed as conferring any right on a secured creditor to claim priority over dues of the State in the absence of a provision in that behalf which presently can now be claimed, subject to other conditions being fulfilled, in view of section 26E of the SARFAESI Act.

39. Pertinently, the High Court while seized of the writ petition of PNB was not at all concerned with the SARFAESI Act as such. The matter had travelled to the High Court from proceedings under the DRT Act. There was, thus, no occasion for the High Court to pronounce on the validity of section 16-B of the HPGST Act based on what was held by its coordinate Bench in **M/s A. J. Infrastructures Pvt. Ltd.** (supra). The High Court, in our considered view, was therefore in clear error.

40. In the light of the above, while answering the second issue we hold that section 16-B of the HPGST Act is a perfectly valid piece of legislation and is not *ultra vires* the Constitution and/or the Banking Companies Act as erroneously held in the decision of the High Court dated 2nd January, 2008. Also, following the decision in **Central Bank of India** (supra), we hold that any observation in the decision dated 7th September, 2007 touching upon section 16-B of the HPGST Act vis-à-vis section 35 of the SARFAESI Act is of no effect.

41. It is now time to consider the third issue.

42. As noted above, C.A. Nos. 9212-9213 of 2012 have been dismissed *qua* the writ petitioner, i.e., PNB. Having regard to such position, it would not be proper to delve deep into the question as to whether the State has the first charge over the property in question or not. This is particularly because PNB was not represented before us on the date judgment was reserved in view of the prior dismissal of the civil appeals and no application had been filed by the State to recall such order. We further do not consider it appropriate to reopen the proceedings against PNB, bearing in mind the circumstance that more than a decade has

lapsed since the order of this Court dated 8th April, 2011 was made. However, if the lis in the writ petition of PNB had subsisted, we would have ruled in its favour upon acceptance of the other reasons in the decision dated 7th September, 2007 which, in the extracted portion, has been highlighted by us above. We, therefore,would allow the matter to rest.

43. Before parting with C.A. Nos. 9212-9213 of 2012, we may observe that in view of the findings returned by the High Court on the question of absence of determination of liability, with which we have concurred, it was absolutely unnecessary for the High Court to outlaw section 16-B of the HPGST Act.

44. Insofar as C. A. Nos. 8980-8981 of 2012 is concerned, the third issue is very much alive and needs to be addressed.

45. The discussion must begin with a reading of the relevant provisions of the HPGST Act. Section 14 of the HPGST Act postulates assessment of tax. The cumulative effect of the several sub-sections of section 14 is that after returns are furnished by a dealer in respect of any period, the duty of the assessing authority is to assess the appropriate quantum of tax required to be paid by the dealer, in terms of the procedure laid down therein; and to initiate steps, also in terms of the laid down procedure, to recover any amount of unpaid tax, penalty or interest payable under the enactment. Section 16 envisages that any amount of tax, penalty or interest payable under the HPGST Act remaining unpaid after the due date shall be recoverable as arrears of land revenue. Section 16-A, starting with a non-obstante clause, confers power on the Commissioner or any officer other than the one excluded to initiate a special mode of recovery. Then follows section 16-B, which is to the following effect:-

"16-B. Tax to be first charge on property.- Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and penalty including interest, if any, payable by a dealer or any other person under this Act shall be a fust charge on the property of the dealer or such other person."

46. Having regard to the terms of section 16 of the HPGST Act noted above, the HPLR Act, to the extent the same provides for the procedure for recovery of dues as arrears of land revenue, needs to be briefly noticed.

47. Section 4(4) of the HPLR Act defines a defaulter as a person liable for arrears of land revenue and includes such person who are responsible as surety for the payment of the arrears. Section 23 provides for the mode of making proclamation issued by a Revenue Officer relating to any land and provides for the methods of proclamation. Chapter VI of the HPLR Act, is titled "Collection of Land Revenue". Section 74 sets out the process for recovery of the arrears while section 78 provides for attachment of thee state or holding. Section 75 ordains that a writ of demand may be issued by the Revenue Officer on or after the date on which the arrears of land revenue accrue. Section 75-A envisages that at any time after arrears of land revenue accrue, a Revenue Officer may issue a warrant directing an officer named therein to arrest the defaulter and bring him before the Revenue Officer and section 81 confers power of sale of estate or holding. Although, there is no express provision indicating the stage at which a defaulter can deny this liability, section 84 opens up a remedy to a person denying his liability before a Civil Court.

48. From the excerpt of the impugned judgment and order of the High Court dated 2nd January, 2008 underlined above, it is clear that proceedings were not initiated upon notice to the defaulters and the sum they owed to the department had not been finally determined in accordance with law. In view thereof, question of the State resorting to the provisions contained in Chapter VI of the HPLR Act for recovering the dues, if at all, as arrears of land revenue did not arise. The Excise Department, in its reply to CWP 306 of 2007, submitted that the *non-obstante* provision contained in section 16-B would prevail over any inconsistent provisions in other laws; it was further submitted that in the event of any conflict between any other statute and the HPGST, the latter would prevail. The department further urged that sales taxes dues would be higher in priority over any mortgage since the State would have a first charge. It was also submitted that the Tehsildar was requested, on multiple occasions, to make the required red entries in relation to the revenue records of the subject property, and not mutate/register the same at the behest of the first respondent.

49. While adopting such a stand, the State and its department either overlooked or were ignorant of the requirement of law that section 16-B would be attracted only after determination of the liability and

upon any sum becoming due and payable; and that, it is only thereafter that the charge, if any, would operate. We are of the opinion that no relevant documentary evidence having been placed before the High Court, when CWP 306 of 2007 was being heard, to indicate that necessary steps under the HPGST Act had been initiated by the State and its officers, the third issue has to be answered by holding that the State not having taken steps as required by law for realization of its dues, there was no determination of liability, a *fortiori,* question of taking recourse to the HPLR Act for recovery of dues as arrears of land revenue did not arise. Without such determination of liability, no red entry marks could have been inserted in the revenue records and the High Court was right in holding that the State ought not to have refused mutation.

50. The fourth issue need not detain us for too long. As it is, the civil appeals against PNB do not survive. *Qua* the other appeals, we are once again of the opinion that the High Court was justified in not entertaining the application for recall. It was not maintainable in law, since the writ petition was decided on merits in the presence of the State. A recall application under section 151 of the CPC,therefore, was not the proper remedy in the circumstances. When the law provides a specific remedy, it is not open to a party to take recourse to section 151. It preserves the inherent powers of the court to do justice in a case where the party has no other remedy under the CPC. Besides, even if the application for recall could have been regarded as one for review of the judgment and order dated 7th September, 2007, the same did not warrant to be entertained for the reasons assigned by the High Court.No error apparent on the face of the record was pointed out, which is the first ground for seeking a review. Documents were annexed to the application, which were in existence when the reply to CWP 306 of 2007 was filed by the State and no case had been set up that despite discharge of due diligence, such documentary evidence, which were in existence, could not be annexed to the said reply. Much indulgence is shown to the State Governments when they carry judgments/orders in time-barred appeals/revisions, having regard to the impersonal machinery being involved. However, undue indulgence cannot be shown to the State Governments either when they do not file a proper reply or when, despite there being a provision for review, such remedy is not pursued and a different one pursued presumably

to overcome the restrictions the provision for review imposes. We, therefore, answer this issue by holding that High Court was justified in rejecting the application for recall.

51. The fifth issue stands disposed of by holding that the appellants (State and its officers) are not entitled to any relief except the declaration that section 16-B of the HPGST Act is not *ultra vires* any provision of law. In view of section 16-B having been outlawed by the High Court on 2nd January, 2008, this declaration shall not enure to the benefit of the State in respect of cases that are old and have been closed but would be effective once again from this day.

52. Consequently, all the civil appeals stand disposed of on the aforesaid terms. Parties shall bear their own costs.

Headnotes prepared by: Divya Pandey (*Assisted by :* Roopanshi Virang, LCRA) *Result of the case:* Appeals disposed of.