



**IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA**

**CWP No. 8481/2023**  
**Decided on : 24.11.2023**

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State Bank of India. ....Petitioner

Versus

State of Himachal Pradesh & Ors. ....Respondents

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**Coram:**  
***The Hon’ble Mr. Justice Tarlok Singh Chauhan, Judge.***  
***The Hon’ble Mr. Justice Satyen Vaidya, Judge.***

*Whether approved for reporting?*<sup>1</sup> No

For the Petitioner: Mr. Arvind Sharma., Advocate.  
For the Respondents: Mr. I. N. Mehta, Mr. Y.W. Chauhan  
Sr. Addl.A.Gs. with Ms. Sharmila Patial, Addl. A.G.

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**Justice Tarlok Singh Chauhan, Judge**

The moot question in this petition is as to whether the different departments of the State including Excise and Revenue will have priority over the secured creditors’ debt. However, before answering the question, certain bare minimal facts need to be noticed.

2 M/s Aradhna Wines had availed various financial assistance/loan facilities from the erstwhile State Bank of Patiala. One of its partners, Mr. Anil Dogra, had mortgaged his property by depositing original sale/title deeds with the State Bank of Patiala relating to property measuring 195-27 sq. mts.

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<sup>1</sup> Whether reporters of the local papers may be allowed to see the judgment? Yes.

comprised in Khata Khatauni No. 541/1277, Khasra No.655 & 656, situated at Up Mohal Galua, Mohalla Prem Nagar, Ward No.1, Tehsil and District Una, H.P. and charge thereupon was created and reflected in the revenue record vide rapat No. 598, dated 20.7.2008 and thereafter rapat No. 630, dated 3.8.2012.

3 Since the loanee had failed to repay the entire loan amount, its accounts were declared as Non Performing Assets (NPA) and recovery proceedings were initiated under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest 2002 (for short, SRFAESI Act).

4 In May-June-2016, notices under Sections 13(2) and 13(4) of the SRFAESI Act were issued, yet the loanee failed to repay the amount.

5 On 22.02.2017 vide Notification No. G.S.R. 159(E), the State Bank of Patiala was acquired by the State Bank of India (petitioner herein) under Section 35 of State Bank of India Act, 1955 on and with effect from 1.4.2017 with all the assets, liabilities, properties, employees etc. On 27.5.2017 respondent No.2-Excise Department entered its charge over the property in question vide rapat No. 484 dated 27.5.2017.

6 The petitioner-bank auctioned the property mortgaged with it and thereafter on 2.11.2022 issued a Sale

Certificate in favour of the successful bidder i.e proforma respondent No.4.

7 The petitioner-bank thereafter wrote various letters to the Excise Department to remove the aforesaid lien, but to no avail. Respondent No.3 also refused to register the Sale Certificate in favour of the successful bidder constraining the petitioner-Bank to file the instant petition for grant of following substantive reliefs:-

*(i) That issuance of writ, direction to respondents to remove Rapat No. 484 dated 27-05-2017 against property measuring 195-27 sq. mts. out of land comprised in Khata Khatauni No. 541/1277, Khasra Nos. 655 & 656, situate at Up Mohal Galua, Mohalla Prem Nagar, Ward No 1, Tehsil & Distt Una as the same is illegal and wrong, as said property is Secured Asset of petitioner bank and as per Section 26 E of The Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act 2002.*

*(ii) Respondents be directed to Register the sale certificate dated 02-11-2022 issued by petitioner bank in respect of public auction date 25-10-2022 issued by petitioner bank in favor of Performa respondent.*

*(iii) Respondent No 3 be directed to enter / attest mutation in respect of sale certificate dated 02-11-2022 issued by petitioner bank shown Performa respondent as absolute owner in possession of auctioned property free from all encumbrances.*

8 Respondent No.3- Deputy Commissioner has filed its reply, wherein the Department has acknowledged that the Excise Department had got entered rapat rapat No. 484 dated

27.5.2017 in the revenue record to safeguard the interest of the Excise Department.

9 As regards respondents No. 1 and 2, they have filed separate reply, wherein it has been averred that under Section 73 of Himachal Pradesh Excise Act, 2011, the excise revenue shall be the first charge on the property of the defaulter for the amounts due to the State Government and recoverable as arrears of land revenue. It is further averred that as per Rule 9 of the H.P Liquor Licence Rules 1986, a licence granted to a partnership firm becomes determinable by the dissolution of the partnership firm; subject to liability of the partners jointly and severally for any loss caused to the Government thereby and for the performance of all obligations to the Government incurred by the partnership firm. Likewise, as per condition No. 2.11 of the Excise Announcements for the year 2014-15, all the partners shall be jointly and severally liable to meet the liabilities accrued under the statute.

10 It is further averred that in order to meet the liability accrued under the statute for the year 2014-15, Anil Kumar Dogra had submitted five cheques, total amounting to Rs.3,68,52,921/- on account of payment of outstanding dues, licence fees etc., but when these cheques were sent for clearance to the petitioner-bank, the same were dishonored and

received back in the Bank on 23.2.2016 due to insufficient funds. Thereafter a complaint was filed before the before the Magistrate.

11 It has been reiterated that the charge by way of red entry was created in the revenue record vide rapat No. 484, dated 27.5.2017 and likewise certain other entries were made in revenue record.

12 We have heard the learned counsel for the parties and have gone through material placed on record.

13 Apparently, the petitioner-Bank is the secured creditor and has created the first charge over the property in question as far as back in the year 2008 and thereafter in 2012 as against the charge created by the Excise Department in the year 2017 and, therefore, has the first right to realize its dues.

14 The issue in question is no longer res integra in view of the authoritative judgment of the Hon'ble Supreme Court in **(2022) 7 Supreme Court Cases 260, titled as, 'Punjab National Bank Vs. Union of India & Ors.**

15 The legal position has thereafter been reiterated in a recent judgment of this Court in **CWP No. 4701/2023, titled as Mankind Life Sciences Private Limited vs. The State of**

**Himachal Pradesh & Anr., decided on 1.9.2023**, wherein it was held as under:-

**7(iii).** While dealing with the issue as to whether the dues of secured creditor under SARFAESI Act shall have priority over the dues of Central Excise Department has been answered by the Hon'ble Apex Court, in **Punjab National Bank vs. Union of India & Ors (2022) 7 SCC 260**, by recording a finding that secured creditor will have a first charge on secured assets and the provisions of SARFAESI Act shall have overriding effect on the provisions of Central Excise Act 1944 or on all other laws, in view of Section 35 of the SARFAESI Act, which reads as under:-

**42.** "Secondly, coming to the issue of priority of secured creditor's debt over that of the Excise Department, the High Court in the impugned judgment has held that "In view of the matter, the question of first charge or second charge over the properties would not arise." In this context, we are of the opinion that the High Court has misinterpreted the issue to state that the question of first charge or second charge over the properties, would not arise.

**46.** This Court, in *Dena Bank vs Bhikhabhai Prabhu Dass Parikh & Anr.* [(2000) 5 SCC 694], wherein the question raised was whether the recovery of sales tax dues (amounting to Crown debt) shall have precedence over the right of the bank to proceed against the property of the borrowers mortgaged in favour of the bank, observed as under:

"10. However, the Crown's preferential right of 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 of

recovery of its debts over a mortgagee or pledgee of goods or a Secured Creditor.”

**47.** Further, in *Central Bank of India Vs. Siriguppa Sugars & Chemicals Ltd. & Ors.* (2007) 8 SCC 353, while adjudicating a similar matter, this Court has held as under:

**“18. Thus, going by the principles governing the matter, propounded by this Court there cannot be any doubt that the rights of the appellant-bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursal to the cane growers and to the employees. There is no dispute that the sugar was pledged with the appellant bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant bank. In view of the fact that the goods were validly pawned to the appellant bank, the rights of the appellant bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods.”**

**49.** An SLP (No. 12462/2008) against the above judgment of the Bombay High Court stands dismissed by this Court on 17.07.2009 by relying upon the judgement in the matter of *Union of India vs SICOM Ltd. & Anr.* Reported in (2009) 2 SCC 121, wherein the question involved was “Whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of

the State Financial Corporation Act, 1951” and this Court held as under:-

“9. Generally, the rights of the crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the king; debts which a prerogative entitles the Crown to claim priority for before all other creditors. [See Advanced Law Lexicon by P. Ramanatha Aiyer (3rd Edn.) p. 1147]. Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.

**50.** In view of the above, we are of the firm opinion that the arguments of the learned counsel for the Appellant, on the second issue, hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the present case, where the land, building, plant machinery, etc. have been mortgaged/hypothecated to a secured creditor, having regard to the provisions contained in section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, **the Secured Creditor will have a First Charge on the Secured Assets. Moreover, section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, shall have**

**overriding effect on all other laws.** It is further pertinent to note that even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002.

**51.** Thus, as has been authoritatively established by the aforementioned cases in general and *Union of India vs SICOM Ltd. (supra)* in particular, the **provisions contained in the SARFAESI Act, 2002, even after insertion of Section 11 E in the Central Excise Act, 1944 w.e.f. 08.04.2011, will have an overriding effect on the provisions of the Act of 1944.**

**54.** To conclude, the Commissioner of Customs and Central Excise could not have invoked the powers under Rule 173Q (2) of the Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said Rule 173Q(2) was not in the Statute books, having been omitted by a notification dated 12.05.2000. **Secondly, the dues of the secured creditor, i.e. the Appellant bank, will have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act of 1944”.**

**(Underlining Ours)**

**7(iv). LEGAL POSITION: PRECEDENTS OF THIS HIGH COURT ON OVERRIDING EFFECT OF SARFAESI ACT:**

While deciding an issue regarding the overriding effect of Section 26-E (came into force w.e.f. 1.9.2016) of the SARFAESI Act vis-a-vis the provision of Section 26 of the HP VAT Act 2005, this Court held in **CWP No 1638 of 2017**, titled as **PNB Versus State of Himachal Pradesh and others**, decided on 19.05.2021, that the provisions of Section 26 E of the Act shall override the rights of others to recover the outstanding liability of taxes dues etc on

the mortgaged/charged property from the original owner etc. The relevant Paras are reproduced here-in-below :-

**“24.** This entire aspect has been dealt with at length by the Hon’ble High Court of Kerala while deciding an issue akin to the one involved in this petition in *State Bank of India Vs. State of Kerala and others*, WP (C) No. 28316 of 2016 and other connected matters, decided on 30th July, 2019, relevant portions of which judgment are quoted herein below in extensio:

“37. That so said, the next question that arises is whether Section 26E of the SARFAESI Act and Section 31B of the RDB Act create an overriding and first right in favour of the Banks/Financial Institutions to recover their dues, over and above the rights of the Revenue created through the KGST Act/KVAT Act. In fact, this enquiry has been rendered relatively easy for this Court because, in *Central Bank of India v. State of Kerala and Others* (2009) 4 SCC 94, the Hon’ble Supreme Court considered the right of the Banks/Financial Institutions as regards recovery of their dues prior to the afore two provisions being introduced in the SARFAESI Act and in the RDB Act. The conclusions of the Honble Supreme Court are unequivocally worded that, in the absence of these provisions in the respective Statutes, the Banks/Financial Institutions cannot claim any priority over the Revenues First Charge on the properties concerned for recovery of dues of Sales Tax/Value Added Tax. The disposition of the Hon’ble Court in this area is lucid and available in paragraphs 126, 129 and 130 of the said judgment, which requires to be read in full and is, therefore, reproduced as under:

"126. While enacting the DRT Act and the Securitization 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 States statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 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 Securitization 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 Securitization Act on the one hand and Section 38 of the Bombay Act and Section 26B of the Kerala Act on the other and the non obstante

clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be."

38. When one reads the afore opinion of the Honble Supreme Court, it is left without any doubt that, but for Section 26E of the SARFAESI Act and Section 31B of the RDB Act, such Statutes do not, in any manner, operate to create a better right for recovery in favour of the Banks/Financial Institutions over that of the Revenue. However, these provisions were brought in and incorporated in the respective Statutes after this judgment, clearly with the intend to override this lacuna. Therefore, the resultant question is whether these provisions would create a better right in favour of the Banks Financial Institutions, which is superior to that enjoyed by the Revenue under the KGST Act/KVAT Act.

39. The learned Additional Advocate General, as I have already seen above has built his entire arguments on the assertion that the statutory First Charge creates a right for the State over the properties and that such right can be extinguished only if the Revenue sells the property and in no other manner. However, as has already been held by me above, the First Charge claimed by the Revenue does not and cannot create any right over the property but only enables it to deal with the same as a simple mortgagee would be entitled to. Obviously, therefore, the contention of the Revenue built on a claim of right over properties fails, without any further requirement for expatiation; corollary, enjoining me to consider if the provisions of the KGST Act/KVAT Act would still grant to the Revenue the First Right to proceed against it for recovery of the tax arrears.

40. It is here that the specific provisions of Section 26E of the SARFAESI Act and Section 31B of the RDB Act become necessary for a detailed evaluation.

41. As has been extracted above, Section 26E of the SARFAESI Act provides that the debts due to any secured creditor shall be paid in priority over all other debts and all revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. Section 31B of the RDB Act takes this one step forward and elevates the right of the secured creditors to realise their debts, by sale of the secured assets, to enjoy priority and then re-affirms that such debts will be paid in priority over the revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. It is thus irrefragable and in fact, expressly conceded to by the learned Additional Advocate General that the Banks /Financial Institutions have the First Right to have their debts extinguished; but, as has been recorded above, the Revenue merely claims that they have right to sell the property first. This argument again is flawed because the First Charge creating no right over the property, the Revenue cannot claim a First Right to proceed against it either in the face of the provisions of the SARFESI Act or RDB Act with which we are dealing in this case. In fact, on a closer look and in the ultimate analysis, the concept of First Charge and debt being paid in priority are fraternal twin provisions which virtually means the same- both giving the holder such rights, the benefit of selling the property and recovering their dues before any other.

42. A further test of the afore proposition, if so necessary, is not different because the principles of priority in payment of dues in the context of the Companies Act have been considered by the Hon'ble Supreme Court in several judgments and

many of them have been cited by the learned counsel for the respondents Banks /Financial Institutions. I will briefly deal with a few of them solely to confirm that my view as afore do not suffer from error.

47. The above cited judgments certainly support my views as afore and it axiomatically becomes justified for me to hold that Section 26E of the SARFAESI Act and Section 31B of the RDB Act create a First Charge by way of a priority to the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any statutory First Charge in favour of the Revenue under the KGST Act/KVAT Act. It is so declared.

**25.** At this stage, it is necessary to quote the provisions of Section 38 of the Kerala Value Added Tax Act, 2003 (KVAT Act), which read as under:

26. "Tax payable to be first charge on the property.-

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

A perusal of the provisions of Section 38 of the KVAT Act and Section 26 of the HP VAT Act demonstrates that these provisions are almost *pari materia*. This Court concurs with the reasoning of the Hon'ble High Court of Kerala that after coming into force of Section 31B of the RDB Act read with Section 26E of the SARFAESI Act, the first charge is created by way of priority in favour of the Banks/ Financial Institutions to recover and satisfy their debts, notwithstanding any local statutory "first charge" in favour of the Revenue.

**26.** It is also necessary to take note of one fact that though Section 26E of the SARFAESI Act has come into

force from 24.01.2020, yet the same will not have any effect on the issue of the Banks/Financial Institutions having first charge on the property of the dealer, as the provisions of Section 31B of the RDB Act shall override the provisions of Section 26 of the HP VAT Act, 2005, especially in view of the observations contained in the judgment of Hon'ble Supreme Court in **Central Bank of India's case** (supra).

**36.** Therefore, this Court has no hesitation in holding that the petitioners being "Secured Creditors" have preference over the respondent-State with regard to the debts due from respondent No. 4. Accordingly, this writ petition is allowed by quashing Annexure P-10, dated 24.06.2017 and **by holding that the respondent Department cannot claim first charge over secured assets of the petitioners belonging to the private respondent-Company, as the petitioners have first charge over the secured assets in view of the provisions of the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993, as amended from time to time. It is further held that the provisions of Section 26 of the H.P. VAT Act, 2005 shall have to give way to the provisions of Section 26E of the SARFAESI Act 2002 and Section 31B RDB Act, 1993...."**

**7(v).** In addition to the above, this Court has decided a similar issue in the case of **State of H.P. & ors versus State Bank of India**, in **LPA No.156 of 2021**, decided on 12.04.2023. The relevant paras of the judgment read as under:

**"2.** Admittedly, the issue involved in the present appeals is as to whether the State (Excise Department) will have priority over the secured creditor's debt.

**3.** Learned counsel for the respondents have submitted that the issue involved in the present appeals is no longer res integra and has been settled by the Hon'ble Supreme Court in Civil Appeal No. 2196 of 2012, titled *Punjab National Bank vs.*

*Union of India and others, decided on 24th February, 2022.*

**4.** *The relevant portion of the order dated 24th February, 2022 reads as under:-*

*“37. Secondly, coming to the issue of priority of secured creditor’s debt over that of the Excise Department, the High court in the impugned judgment has held that “In view of the matter, the question of first charge of second charge over the properties would not arise.”*

*In this context, we are of the opinion that the High Court has misinterpreted the issue to state that the question of first charge or second charge over the properties, would not arise.*

*43. In view of the above, we are of the firm opinion that the arguments of the learned counsel for the Appellant, on the second issue, hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944, w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the present case, where the land building, plant machinery, etc have been mortgaged/hypothecated to a secured creditor, having regard to the provision contained in Section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI ACT, 2002, the Secured Creditor will have a First Charge on the Secured Assets. Moreover, Section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, shall have overriding effect on all other laws. It is further pertinent to note that even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002.*

*47. To conclude, the Commissioner of Customs and Central Excise could not have invoked the powers under Rule 173 Q(2) of the Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said Rule 173Q(2) was not in the Statute*

books, having been omitted by a notification dated 12.05.2000. Secondly, the dues of the secured creditor, i.e. the Appellant-bank, will have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act of 1944.

**5.** Learned Additional Advocate General has failed to controvert the factual aspect of the submissions made by learned counsel for the respondents.

**6.** Since the question involved in the present appeal is no longer *res integra* and has been settled by the Hon'ble Supreme Court in Punjab National Bank's case *supra*, all the Letters Patent Appeals are dismissed....”

**7(vi).** This Court in **CWP No 678 of 2023**, titled as **M/s Nugenix Pharma Pvt. Ltd. Versus Indian Bank and others**, decided on 05.07.2023, has directed the respondents to remove the red entry in the revenue records and to permit the petitioner-auction purchaser therein to exercise its rights on the property acquired by way of public auction for all intents and purposes. The relevant paras are reproduced here-in-below:-

“The moot question in this petition is as to whether the different departments of State including Excise & Revenue will have priority over the secured creditor's debt?

**2.** The issue in question is no longer *res-integra* in view of the authoritative judgment of the Hon'ble Supreme Court reported in (2022) 7 Supreme Court Cases 260, titled as, ‘Punjab National Bank Vs. Union of India & Ors.’ decided on 24.02.2022. It will be apt to reproduce the relevant paras of the judgment, which read as under:

“37. Coming to the issue of priority of secured creditor's debt over that of the Excise Department,

the High court in the impugned judgment has held that “In view of the matter, the question of first charge or second charge over the properties would not arise.” In this context, we are of the opinion that the High Court has misinterpreted the issue to state that the question of first charge or second charge over the properties, would not arise.

38-42. ....xxx...xxx...

43. In view of the above, we are of the firm opinion that the arguments of the learned counsel for the Appellant, on the second issue, hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944, w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the present case, where the land building, plant machinery, etc. have been mortgaged/ hypothecated to a secured creditor, having regard to the provision contained in Section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI ACT, 2002, the Secured Creditor will have a First Charge on the Secured Assets. Moreover, Section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, shall have overriding effect on all other laws. It is further pertinent to note that even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002.

44-46...xxx...xxx...

47. To conclude, the Commissioner of Customs and Central Excise could not have invoked the powers under Rule 173 Q(2) of the Central Excise Rules, 1944 on 26.03.2007 and 29.03.2007 for confiscation of land, buildings etc., when on such date, the said Rule 173Q(2) was not in the Statute books, having been omitted by a notification dated 12.05.2000. Secondly, the dues of the secured

creditor, i.e. the Appellant bank, will have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act of 1944....”

**3.** In view of the legal position, set out here-in-above, this Court is left with no other option, but to **allow this petition by directing respondents No.4 and 5 to attest mutation of sale deed dated 18.9.2021 (Annexure P-5) issued by the Indian Bank, in favour of the petitioners and further respondents No.4 and 5 are directed to enter the names of the petitioners as owner of the property in question in the revenue records having been purchased by them in an auction conducted by the Indian Bank under the provisions of SARFAESI Act and respondents No.2 to 5 are further directed to remove the red entries made in the revenue record/jamabandi of the property in question. Ordered accordingly.”**

**7(vii).** Recently, after taking note of the judgment passed by the Hon’ble Apex Court in (2003) 3 SCC 210, titled as *Kotak Mahindra Bank Ltd. Versus Girnar Corrugators Private Limited and Others*, and the judgment in the case of *Punjab National Bank vs. Union of India & Ors* (2022) 7 SCC 260, this Court has decided a similar issue in **CWP No.4751 of 2023**, titled as **Central Bank of India Versus State of Himachal Pradesh & Ors.**, decided on 16.08.2023 and the operative Para reads as under:-

**“4(vi).** It is worth mentioning that respondent No.2, Excise & Taxation Department cannot raise a priority claim over and above the Petitioner-Bank, when, as per Section 26E of SARFAESI Act introduced by amendment carried in

2016, the Petitioner-Bank has first charge over the properties being secured creditor in priority over all Other Debts, Revenues, Taxes, Cesses and Other Rates payable to the Central or State Government or Legal Authority and that too when, there is nothing on record to show (even by way of reply or by instructions) that the Respondent No.2 i.e. H.P. Excise and Taxation Department has resorted to assessment of liability; determination of liability and has issued notice of such determination /liability under the statute (i.e. under H.P. Vat Act or other corresponding statutes, if any). In absence of any assessment and the resultant determination of liability, the action of the Respondents in inserting red entry marks in Annexure P-4 and Annexure P-5, in revenue records and the **resultant action of Respondent No. 3, in refusing to register the Sale Certificate dated 15.01.2021, Annexure P-3, and to carry out the Mutation thereof, in favour of Respondent No. 6-Auction Purchaser, amounts to not only frustrating the statutory provisions of Section 26E of SARFAESI Act, enacted in the year 2016 but also amounts to curtailing or defeating the rights accruing to the Auction Purchaser-Respondent No.6 herein, under the SARFAESI Act and the dictum of law laid down by the Hon'ble Apex Court, in case of Punjab National Bank and Kotak Mahindra Bank (supra) and the judgment of the Coordinate Bench of this Court in LPA No. 156 of 2021 (supra), and, therefore, the impugned order(s) passed by the State Authorities in disallowing registration of Sale Certificate and the consequential mutation etc. being dehors the provisions of SARFAESI Act and the mandate of law, referred to above, are illegal and unsustainable."**

16 In view of the settled legal position, this Court is left with no other option, but to allow the instant petition by

directing respondents No. 1 and 2 to remove the red entry qua the property in question made in the revenue record i.e. rapat No. 484, dated 27.5.2017 forthwith. Ordered accordingly.

17 The instant petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

**(Tarlok Singh Chauhan)**  
**Judge**

**24.11.2023**  
*(pankaj)*

**(Satyen Vaidya)**  
**Judge**