

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

**CWP No. 8502 of 2023**

**Decided on: 15.12.2023**

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State Bank of India

...Petitioner

Versus

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State of H. P. & Ors.

...Respondents

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**Coram:**

**Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.**

**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, Sr. Addl. A.G. with Ms. Sharmila Patial and Mr. Navlesh Verma, Addl. A.G. for respondents No. 1, 2 and 4.  
Mr. Devi Singh, Advocate, vice Ms. Vandana Kuthiala, Advocate, for respondent No. 3.

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**Tarlok Singh Chauhan, Judge (Oral)**

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. One M/s Arvind Casting Pvt. Ltd. (for short the 'Unit') had availed various financial assistance/loan facilities from the petitioner-Bank. Thereafter, in February, 2013, the Unit mortgaged its property comprised in Khata Khatoni No. 404/533, Khasra No. 1118 & 1119, Kita 2, measuring 02-34-64 Hectares,

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

situated at Mohal They, Tehsil Haroli, District Una, Himachal Pradesh with the petitioner-Bank.

3. After the mortgage of the property, lien of the petitioner-Bank as per Section 26 D was entered in the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI), dated 06.03.2013 (Annexure P-2).

4. Shortly, thereafter in the year, 2014, the loan account of the Unit came to be classified as Non Performing Assets (NPA) and consequently recovery proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest 2002 (for short, SARFAESI Act) came to be initiated against it.

5. On 30.07.2014, notices under Section 13(2) and 13(4) of the SARFAESI Act were issued to the Unit and vide communication dated 02.01.2015, District Magistrate, granted assistance to the Bank under Section 14 of the SARFAESI Act paving way to take physical possession of the secured assets of the Unit, which was then taken over on 17.07.2015.

6. Just about a week prior thereto, the Excise and Taxation Department got entered a Rapat No. 459, dated 09.07.2015 in the revenue documents over the said secured assets of the petitioner-Bank i.e. the property as mentioned above. To similar effect Rapat No. 173 dated 05.02.2018 was

entered by the Income Tax Department. The petitioner-Bank vide its letter dated 17.04.2023, requested the respondents to remove lien over the secured assets of the petitioner-Bank, but despite repeated request, the lien was not removed, constraining the petitioner to file the instant petition for the grant of following substantive relief:-

(a) That issuance of writ, direction to respondents to remove Rapat No. 459, dated 09.07.2015, entered by Excise and Taxation department in revenue documents & Rapat No. 173, dated 05.02.2018 by respondent No. 3 over secured assets i.e. property comprise in Khata Khatoni No. 404/533, Khasra No. 1118 & 1119, Kita 2, measuring 02-34-64 Hectares, situated at Mohal They, Tehsil Haroli, District Una, Himachal Pradesh 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.

7. Respondents No. 1 and 2 i.e. State of Himachal Pradesh through Secretary State Taxes and Excise and Commissioner State Taxes & Excise Department have filed their joint reply, wherein it has been averred that the Unit was registered under the Himachal Pradesh Value Added Tax Act, 2005 and Central Sales Tax Act, 1956 and a sum of Rs.21,37,47,875/- is recoverable from the Unit by the replying respondents. The Unit was called upon to pay the amount through several notices, but it failed to appear before the

Assessing Authority. The Unit was assessed on ex-parte basis under both the aforesaid Acts by the appropriate Assessing Authority for the years 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 by creating an additional demand to the tune of Rs.21,37,47,875/-. When the Unit failed to pay the amount, then vide order dated 10.06.2015, the amount of an arrear was declared as arrear of land revenue to be recoverable under H.P. Land Revenue Act, 1954 by the Assistant Excise & Taxation Commissioner-cum-Collector (LRA), Una. Thereafter, the Red Entry to this effect was also made by the concerned Revenue Authorities on 17.07.2015 over the aforesaid land.

8. Lastly, it is averred that the respondents-State is claiming first charge over the property by operation of law as provided under Section 26 of the HPVAT Act, whereas the petitioner-Bank is denying the claim in the property by virtue of mortgage. It is averred that the charge is wider than mortgage in as much as Section 100 of the Transfer of Property Act, deals with charges on an immovable property, which can be created by either of the parties or by operation of law over the property. Therefore, when first charge is created by operation of law over a property, the charge will have precedence over an existing mortgage as the charge operates on the entire property.

9. Respondent No. 4 i.e. Deputy Commissioner-cum-District Magistrate, Una, in its separate reply, has averred that as per report received from the Tehsildar, Haroli, Rapat No. 459 dated 09.07.2015 had been entered in the relevant revenue record at the instance of the Excise and Taxation Department with bonafide intention by the revenue department, just to safeguard the revenue of the State Government in larger public interest. Similar Rapat No. 173, dated 05.02.2018, had also been entered in the revenue record at the instance of Income Tax Department by the revenue department with bonafide belief.

10. It would be evident from the replies filed by the respondents that they have nowhere disputed the lien of the State Bank of India as per Section 26 D noted and entered in the CERSAI (Annexure P-2), dated 06.03.2013, which clearly establishes the fact that the petitioner-Bank is not only a secured creditor but has created the first charge over the property in question as far as back in the year, 2013. Whereas the charge of respondents No. 1 and 2 had been created and reflected in revenue record vide rapat No. 459, dated 09.07.2015 and that of respondent No. 3 only vide Rapat No. 173, dated 05.02.2018.

11. Therefore, once the petitioner is a secured creditor and has moreover created the first charge over the property, then obviously, it has the first right to realise its dues and this

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

12. 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 disbursement 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 provi-

sions 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 de hors the provisions of SARFAESI Act and the mandate of law, referred to above, are illegal and unsustainable."**

13. In view of the settled legal position, this Court is left with no other option, but to allow the instant petition by directing respondents to remove the red entry qua the property in question made in the revenue record i.e. Rapat No. 459, dated 09.07.2015 and Rapat No. 173, dated 05.02.2018 forthwith. Ordered accordingly.

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

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

**15<sup>th</sup> December, 2023**  
(sanjeev)

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