

***PRIORITY TO SECURED CREDITORS IN THE REGIME OF SARFAESI
ACT, RDB ACT AND IBC***

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Abstract

Creation of assets is the basis of lending and such charged assets form part of ‘security interest’ created in favour of the lenders for the purpose of enforcement. Section 35 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) states that the provisions of the SARFAESI Act shall have overriding effect over other laws. Similarly, Section 34 of the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act) states that the provisions of the RDB Act shall have overriding effect over other laws. Statutory First charge has been embedded by virtue of various legislations in order to secure the Government dues. There is no such corresponding provision in the SARFAESI Act, RDB Act or the Insolvency and Bankruptcy Code, 2016 (IBC) by which creation of first charge in favour of Banks or Secured Creditors qua the property of the Borrower is available. However, priority to Secured Creditor over Governmental dues are provided under Section 26E of the SARFAESI Act and Section 31B of RDB Act and also superior class of priority ranking has been conferred to Secured Creditor in distribution of sale proceeds of liquidation asset as per Section 53 of the IBC. This article is an attempt to deal with the provisions of law relating to priority to the secured creditors under the three enactments, viz, SARFAESI, RDB and IBC and to place the judicial pronouncements on the subject.

Keywords: SARFAESI Act, RDB Act . IBC

Introduction.

Creation of assets is the basis of lending and such charged assets form part of ‘security interest’ created in favour of the lenders for the purpose of enforcement. Section 35 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) states that the provisions of the SARFAESI Act shall have overriding effect over other laws. Similarly, Section 34 of the Recovery of Debts and Bankruptcy Act, 1993 (RDB

Act) states that the provisions of the RDB Act shall have overriding effect over other laws. Statutory First charge has been embedded by virtue of various legislations in order to secure the Government dues. There is no such corresponding provision in the SARFAESI Act, RDB Act or the Insolvency and Bankruptcy Code, 2016 (IBC) by which creation of first charge in favour of Banks or Secured Creditors qua the property of the Borrower is available. However, priority to Secured Creditor over Governmental dues are provided under Section 26E of the SARFAESI Act and Section 31B of RDB Act and also superior class of priority ranking has been conferred to Secured Creditor in distribution of sale proceeds of liquidation asset as per Section 53 of the IBC. In the above backdrop, upon enforcement of the ‘security interest’¹ and consequent sale of the ‘secured asset’, questions arise as to who between a Secured Creditor and the taxing/revenue departments of the Central/State Governments, can legally claim priority for liquidation of their respective dues qua the borrower/dealer, especially in the context of pending SARFAESI action, DRT/NCLT proceedings, it is important to examine the priority of the secured debts of Banks against various Government/ Statutory claims. This article is an attempt to deal with the provisions of law relating to priority to the secured creditors under the three enactments, viz, SARFAESI, RDB and IBC and to place the judicial pronouncements on the subject.

‘Priority’ means precedence or going before (Black’s Law Dictionary). In the present context, it would mean the right to enforce a claim in preference to others. This principle of law is embodied under the legal maxim ‘*qui prior est tempore potior est jure*’, meaning, he who is earlier in time is stronger in law. It is a principle of natural justice that if rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law.

General law governing priority.

This doctrine of priority is also supported in law under Section 48 of Transfer of Property Act, 1882 providing that if there are successive transfers of the same property, the latter transfer is subject to the prior transfer.

Crown Debts

¹ 2(zf) SARFAESI ACT 2002

The common law doctrine of ‘priority of crown debt’ pertains to a common law principle that the debt due to the state or the king claims priority before all other creditors. The basic justification for the said principle is that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign government at all.

The Courts in India have recognized the common law doctrine of ‘*Priority of Crown Debt*’ through various judicial interpretations.

While recognizing the concept of priority of Crown debts over secured, their Lordships in the case of *Builders Supply Corporation Vs. Union of India*² have summed up the law as under: -

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.
2. The common law doctrine about priority of crown debts which was recognized by Indian High Courts prior to 1950 constitutes law in force within the meaning of Article 372 (1) and continues to be in force.
3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

Statutory First Charge under Central / State enactments

A debt which, by reason of the provisions of a statute, becomes a ‘first charge’ on the property will prevail over a Crown debt, which is an unsecured one.

In *State Bank of Bikaner & Jaipur Vs. National Iron & Steel Rolling Corporation and Others*³ Apex Court held that Section 11- AAAA of the Rajasthan Sales Tax Act creates a first charge on the property, thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. It was thus settled position that if a statute creates first

²(AIR 1965 SC 1061)

³1995 SCC (2) 19

charge, it will operate against the contractual charge created such as mortgage, hypothecation etc.

This principle has been repeatedly reaffirmed including, inter alia, in the decision of the Supreme Court reported in (*Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co.*)⁴

When Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came in force, it was contended that banks will have priority over the statutory first charge because of non-obstante clause contained in the Act.

However, in the judgment of the Apex Court in *Central Bank of India vs State Of Kerala & Ors*⁵, it was held that the RDB Act and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 doesnot provide for first charge in respect of secured debts due to Banks and hence the provisions of State Sales Tax Laws creating first charge will prevail over the dues recoverable from debtors.

Prioritizing the dues payable under SARFAESI Act and RDB Act

The decision in Central Bank of India (supra) holding, inter alia, that the RDB Act and the SARFAESI Act do not contain provisions giving priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations because Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State and also that if Parliament intended to give such priority then provisions similar to those contained in the Central legislations would have been incorporated in the RDB Act and the SARFAESI Act is presumed to have acted as a catalyst leading to the enactment of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, being Amendment Act No. XLIV of 2016 (hereafter “2016 Amending Act”, for short).

⁴(2000) 5 SCC 694

⁵2009 (4) SCC 94

By the said amendment, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was rechristened as Recovery of Debt and Bankruptcy Act and Section 31B- 'Priority to the Secured Creditors' was incorporated, with effect from 01-09-2016⁶.

“31B Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realize secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority.

Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”

By amendment to Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, section 26E was inserted which came in force with effect from 24.01.2020⁷.

“26-E. Priority to secured creditors. - Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of

⁶Inserted by Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, (w.e.f. 01.09.2016 vide N. No. S.O. 2831(E) dated 01.09.2016).

⁷Chapter- IVA Inserted by Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016. (w.e.f. 24.01.2020 vide N. No. S.O. 4619(E) dated 26.12.2019)

the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”

These amendments resulted in another slew of decisions by several High Courts wherein it was observed that the amendments have tilted the scales in favour of the secured creditors and being a pre-2016 Amendment decision, the *Central Bank of India* case (supra) is no longer relevant.

The details of the cases in which the High Courts have held priority of banks or financial secured creditors are as follows:

1 Full Bench decision of the Madras High Court in *Assistant Commissioner Vs. Indian Overseas Bank & Ors*⁸. dated 10th Nov. 2016.

2 *Axis Bank Limited vs State of Maharashtra*⁹ Writ Petition No 1796 of 2015 dt 7th March 2017.

3 *Bank of Baroda Vs. Commissioner of Sales Tax, M.P., Indore & Anr.* and by the High Court of Madhya Pradesh¹⁰ dt 31st Jan, 2018.

4 *Bank of Baroda Vs State Of Gujarat*¹¹

5 *Kalapur Commercial Co-Operative ... vs State of Gujarat*¹²

6 *ASREC (India) Limited vs State of Maharashtra* Writ Petition No. 1039 of 2017 dt 13th Dec 2019¹³;

7 *Cosmos Co-operative Bank Vs. State of Maharashtra and others*,¹⁴

8 *Medineutrina Pvt. Ltd. (Company) Through its director – Dilipkumar Versus District Industries Centre (D.I.C.), Udyog Bhavan, Nagpur & Others*¹⁵

⁸ AIR 2017 Madras 67

⁹ 2017 (3) AIR(Bom) R 305

¹⁰ (2018) 55 GST R 210 (MP)

¹¹ R/SPECIAL CIVIL APPLICATION NO. 12995 of 2018 dt 16th September 2019.

¹² R/SPECIAL CIVIL APPLICATION NO. 17891 OF 2018 DT 23RD September 2019

¹³ 2020 (2) BCR 243

¹⁴ 2019 SCC On-line Bom 9527

9.M/s Edelweiss Asset Reconstruction v. M/s Tax Recovery Officer, Income-Tax Department and Others¹⁶

It may be noted that, the Parliament used the word ‘priority over all other dues in payment of debt’ in the above amendments to obviate any confusion as to inter-se distribution of proceeds received from sale of properties of the borrower. If a secured asset has been disposed of by sale by taking recourse to the Security Interest (Enforcement) Rules, 2002, having regard to the non-obstante clauses in sections 31B and section 26E quoted above, the dues of the secured creditor shall have ‘priority’ over all other dues including all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

The judicial interpretation of the effect of using the word ‘priority’ in section 26E of the SARFAESI Act is that the rights accorded to ‘first charge’ holders by Central as well as State legislation having been known to the Parliament, in such a situation, what the Parliament intended by exercising its legislative power by introducing amendments in the SARFAESI Act, more particularly by incorporating section 26E therein, was to explicitly make the valuable right of the ‘first charge’ holder subordinate to the dues of a second creditor.

Recently, the Full Bench of the Bombay High Court in Jalgaon *Janta Sahakari Bank Ltd. v. Joint Commissioner of Sales Tax*¹⁷, decided on 30-08-2022, while deliberating upon the question went on to frame and answer inter alia, the following substantial questions of law on the issue.

1.Does a secured creditor have a prior right over the relevant department of the Government to appropriate the amount realized by the sale of a secured asset?

The Parliament used the word ‘priority over all other dues’ in the SARFAESI Act to obviate any confusion as to inter-se distribution of proceeds received from sale of properties of the

¹⁵ *Writ Petition No.7971 of 2019 18th February 2021*

¹⁶ *Writ Petition (L) No. 7964 OF 2021 decided on July 28, 2021.*

¹⁷ *2022 SCC Online Bom. 1767*

borrower/dealer. Bare perusal of the 2016 Amending Act would show that the dues of the Central/State Governments were in the specific contemplation of the Parliament while it amended the RDB Act and the SARFAESI Act, both of which make specific reference to debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority and ordains that the dues of a secured creditor will have 'priority', i.e., take precedence.

2. Despite Section 26-E in the SARFAESI Act or Section 31-B of the RDB Act being attracted in a given case, whether dues accruing to a department of the Government ought to be repaid first by reason of 'first charge' created over any property by operation of law, giving such dues precedence over the dues of a secured creditor.

It was stated the SARFAESI and RDB Act being Central legislations, will prevail over State legislations as per the principle enshrined in Art. 254 of the Constitution. "*Subject to compliance of the terms of Chapter IV-A, Section 26-E of the SARFAESI Act would thus override any provision in the MGST Act and the BST Act in case of a conflict with the SARFAESI Act*". "We have no hesitation to hold that the dues of a secured creditor (subject of course to CERSAI registration) and subject to proceedings under the IBC, would rank superior to the dues of the relevant department of the State Government".

First Charge Clause in the EPF Act

Section 11(2) of the EPF and MP Act contains a non-obstante clause laying down that if any amount is due from an employer whether in respect of the employees' contribution deducted from the wages of the employees or the employer's contribution, the same shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts.

Sub-section (2) of section 11 of the EPF and MP Act has two facets. First, it declares the amount due from the employer shall be deemed to be the 'first charge' on the assets of the establishment. Second, it also claims that notwithstanding anything contained in any other law for the time

being in force, such debt shall be paid in priority to all other debts. This double armor of power has always facilitated the recovery of provident fund arrears more effectively than the recovery of arrears in any other act.

In *Employees' Provident Fund Commissioner v. OL of Esskay Pharmaceuticals Limited*¹⁸, where there was a conflict between two central legislations viz., the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Companies Act, 1956, the Supreme Court observed that the EPF Act, being social legislation formulated for the welfare of the employees, will prevail over the inconsistent provisions on the priority of claims in the Companies Act, 1956, a subsequent legislation.

The observations of the Supreme Court in *Maharashtra State Cooperative Bank Limited vs Assistant Provident Fund Commissioner and others*¹⁹ shine sufficient light on the issue.

“We shall now consider the question whether the provision contained in Section 11(2) of the Act operates against other debts like mortgage, pledge, etc. Answer to this question is clearly discernible from the plain language of Section 11. The priority given to the dues of provident fund, etc. in Section 11 is not hedged with any limitation or condition. Rather, a bare reading of the section makes it clear that the amount due is required to be paid in priority to all other debts. Any doubt on the width and scope of Section 11 qua other debts is removed by the use of the expression “all other debts” in both the sub-sections. This would mean that the priority clause enshrined in Section 11 will operate against statutory as well as non-statutory and secured as well as unsecured debts including a mortgage or pledge. Sub-section (2) was designedly inserted in the Act for ensuring that the provident fund dues of the workers are not defeated by prior claims of secured or unsecured creditors. This is the reason why the legislature took care to declare that irrespective of time when a debt is created in respect of the assets of the establishment, the dues payable under the Act would always remain the first charge and shall be paid first out of the assets of the establishment notwithstanding anything contained in any other law for the time being in force. It is, therefore, reasonable to take the view that the statutory first

¹⁸ Hon'ble Supreme Court Civil Appeal NO. 9830 of 2011

¹⁹ Hon'ble Supreme Court Civil Appeal No. 6894 of 2009

charge created on the assets of the establishment by sub-section (2) of Section 11 and priority given to the payment of any amount due from an employer will operate against all types of debts.“

However, the above judgment is prior to the amendment brought out under SARFAESI Act.

The larger question is whether the non-obstante clause inserted in the SARFAESI Act and the RDB Act can have the effect of overriding the ‘first charge’ clause provided under Section 11(2) of the EPF and MP Act 1952.

In **Indian Overseas Bank v. Employees’ Provident Fund Organisation and others**²⁰, the Gujarat High Court held that the inclusion of Section 31-B in the RDB Act does not change the position insofar as the priority of claim under the provisions of the EPF Act is concerned. The mention of Government dues which would include revenues, taxes, cesses and rates due to the Central Government, State Government, or local authority would not take into its fold the first charge created by operation of law in the form of Section 11(2) of the EPF Act. The ratio of this decision was followed in the case of International Asset Reconstruction Company Private Ltd. v. Official Liquidator of Jupiter Cement India Ltd.

Thus, the dues payable by the defaulters under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 are not considered as ‘government dues.’ The priority available at present to the secured creditor under the amended provisions of Section 31-B of the Recovery of Debts Due to Banks and Financial Institutions Act were held to apply only to Government dues and not to statutory dues payable under the EPF and MP Act, 1952.

Further, in UCO Bank v. EPFO and Ors Gujarat High Court decided vide Judgment dated 30.09.2022²¹ held that the provisions of Section 11(2) of the EPF Act shall prevail over Section 26E of the SARFAESI Act in view of the dictum of law relied upon and considering the language of Section 11(2) of the EPF Act and the object behind the same for the benefit of the workers and considering the intention of the legislature.

²⁰ MANU/GJ/0576/2017

²¹ MANU/GJ/2537/2022

Hence, to sum up the legal position as emerges from statutory provisions, after the amendments in the Recovery of Debts and Bankruptcy Act, 1993 and Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 and judicial pronouncements is that the Secured Creditors being banks shall have priority over Government dues. However, in respect of EPF dues, the law is yet to be settled by a judgment of the Hon'ble Supreme Court.

The interplay between Banking Recovery Laws and the Insolvency Law on priority

The 'explanatory clause' to both Section 26-E of the SARFAESI Act and Section 31-B of the RDB Act, 1993 lays down that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 and in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of the I & B Code. Therefore, once the Corporate Resolution Insolvency Process is commenced, then the priority question gets shifted to the operational domain of the IBC.

Under the IBC, in case of default by debtors when Resolution Professional (RP) is appointed by Tribunal, claims are invited from creditors, financial and operational creditors. The statutory dues are classifiable as operational creditors. The Revenue authorities are obliged to file its claims before the RP. The bids will be invited from Resolution Applicant. If a plan is approved by Committee of Creditors, the same shall be put before the Tribunal and on approval of the plan, the creditors will be paid as per the plan approved.

As per judgment of Apex Court dated 13.04.2021, in the case of **Ghanshyam Mishra**²² all liabilities not provided in the Resolution Plan shall get extinguished in view of amendment in section 31 to the effect that it shall be binding, inter alia, on the Government. Hence, no further recovery beyond what is provided in Resolution Plan can be pursued. However, when the Resolution Plan fails for whatever reason or such plan is found to be not viable, the Debtor will be liquidated, and the priority of the Revenue is almost at bottom of all creditors and above unsecured creditors.

²² (2021) 9 SCC 657

Section 53(1) of the Code lays down the following order of priority in which the proceeds from the sale of the liquidation assets shall be distributed: 1. IRP costs and liquidation costs 2. Workmen's due for the period of twenty-four months preceding the liquidation commencement date and debts owed to a Secured Creditor 3. Wages and any unpaid dues owed to employees other than workmen 4. Financial debts owed to unsecured creditors 5. Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date 6. Any remaining debts and dues 7. Preference shareholders, if any 8. Equity shareholders or partners, as the case may be:

The order of priority for governmental dues of the period two years preceding the liquidation commencement date as provided under Serial No. 5 stated above. However, in the recent judgment delivered by Hon'ble Justice Indira Banerjee and Justice A S Bopanna in the case of *State Tax Officer (1) Vs. Rainbow Papers Limited*²³, while considering the question whether the provisions of the IBC and, in particular, Section 53 thereof, overrides Section 48 of the Gujarat Value Added Tax, 2003, hereinafter referred to as the "GVAT Act", which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty etc. under the said GVAT Act, the Hon'ble Supreme Court held that Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC.

The Court held that Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority. The State is a secured creditor under the GVAT Act. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.

²³ (MANU/SC/1109/2022)

“In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.”

If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.

It is gathered that a Review Petition also dismissed.

Priority of EPF dues in the context of IBC

The provisions contained in Section 36(4) and Section 155(2) of the IBC expressly provide for the exclusion of the assets owned by a third party but are held by the corporate debtor, from the meaning of ‘liquidation estate.’ It treats the “provident fund, pension fund, and gratuity funds” due to the workers as a ‘third-party’ asset in possession of the Corporate Debtor. These statutory dues are kept away from the clutches of the liquidation process and are excluded from the meaning of ‘liquidation assets’ or the ‘estate of the bankrupt,’ as the case may be.

The NCLAT, in the case of *Regional Provident Fund Commissioner-I, Ahmedabad vs Ramchandra D.Choudhary*²⁴ held that no provisions of the EPF & MP Act conflict with any of the provisions of the IB Code. On the other hand, in terms of Section 36(4)(iii), the ‘provident fund’ and the ‘gratuity fund’ are not the assets of the ‘Corporate Debtor,’ there being specific provisions, the application of Section 238 of the I & B Code does not arise. The NCLAT, New Delhi, therefore, directed the resolution professional to release the full amount of provident fund, including the interest thereon in terms of the provisions of the EPF & MP Act, 1952

²⁴ 2019 SCC ONLINE NCLAT 910

immediately, as these dues are not to be included as an asset of the corporate debtor. On a Civil Appeal filed by the Corporate Debtor, the Supreme Court affirmed the NCLAT order.

Easun Reyrolle judgment of NCLAT

The NCLAT in the judgment delivered on 23.09.2022 in the case of ***Parameshwara Udpa, RP of M/s Easun Reyrolle***²⁵ Ltd held that exclusion from the Liquidation Estate Assets as well as from Recovery in Liquidation, as stipulated in Section 36(4)(a)(iii) of I&B Code, 2016, applies in respect of sums due to any workman or employee from the Provident Fund, when the Corporate Debtor has maintained an Establishment fund in terms of Section 16-A of the Employees Provident Fund, Miscellaneous Provisions Act, 1952. If even wrongly and in violation of the laws of the land, the company fails to establish such 'Provident Fund', then 'Interim Resolution Professional/Resolution Professional/Liquidator' is not expected to provide for same, except under Section 53 of the I&B Code, 2016.

Thus, a judgment of the Hon'ble Supreme Court on a harmonious construction of the provisions contained in Section 11(2) of the EPF & MP Act, 1952, and those set out in other legislations including the SARFAESI Act, RDB Act and the I&B Code, 2016, is awaited.

Conclusion

The priority of the bank's dues where SARFAESI action is initiated or recovery proceedings are pending before DRT against various tax/revenue/statutory claims can be summarized as follows: If there is any provision in the relevant statute conferring first charge/priority to the statutory dues, then the prevalence of priority over Secured Creditor varies based on the underlying objects of the particular statute. Accordingly, the provident fund and workmen dues under the concerned benevolent statutes assumes priority over 26E and 31B of SARFAESI and RDB Acts respectively. The other Governmental dues wherein statutory first charge is embedded, will only rank subservient to the charge created in favour of the Secured Creditors by virtue of above provisions, in course of SARFAESI action and DRT sale. However, in view of the Judgment of Apex Court in State Tax Officer (1) Vs. Rainbow Papers Limited, the State Government

²⁵ *COMPANY APPEAL (AT)(CH)(INS) No. 231 2021*

Department has been termed as Secured Creditor as per the provisions of the Gujarat VAT Act and qualify for top order of priority under section 53 of the IBC of which rationalization given appears to be not in alignment with the true underlying spirit of the said legislation.