

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2608 OF 2014

1. M/s. National Steel and Agro Industries Ltd.	}	
621, Tulsiani Chambers, Nariman Point, Mumbai – 400 021	}	
	}	
2. Shri. P. Srikrishna	}	
Managing Director,	}	
M/s. National Steel and Agro Industries Ltd.	}	
621, Tulsiani Chambers, Nariman Point, Mumbai – 400 021	}	Petitioners
versus		
1. State of Maharashtra	}	
Mantralaya, Mumbai 400 032	}	
2. Sales Tax Officer (Recovery)	}	
C-008, Room No. 724, 7 th floor,	}	
Konkan Bhawan, Navi Mumbai.	}	
3. M/s. Asset Reconstruction Co. (India) Ltd.,	}	
17 th floor, Express Tower,	}	
Nariman Point, Mumbai 400 021	}	
4. M/s. Alexcon Foam Cast Ltd.	}	
C/o. Orient Transport Co.	}	
7/10, Botawalla Bldg., 3 rd floor	}	
Horniman Circle, Fort,	}	
Mumbai – 400 001	}	Respondents

Mr. P. C. Joshi with Mr. Piyush N. Shah for the
Petitioners.

Mr. Advait M. Sethna-Special Counsel with
Ms. Anjali Helekar-AGP for State and Mr. Raju
Thakkar for Respondent Nos. 1 and 2.

Mr. Venkatesh Dhond-Senior Advocate with
Ms. Tasneem Zariwala i/b. M/s. Vidhi Partners
for Respondent No. 3.

**CORAM :- S. C. DHARMADHIKARI &
N.W.SAMBRE, JJ.**
DATED :- FEBRUARY 12, 2015

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

Rule.

2) Respondent Nos. 1 to 3 waive service. Respondent No. 4
absent, though served.

3) By consent, Rule made returnable forthwith and heard
finally.

4) By this Writ Petition, under Article 226 of the Constitution
of India, the Petitioners challenge an order of attachment dated 24th
December, 2013 and further pray that the same be set aside.

5) The factual background in which this relief is claimed is
that the 1st Petitioner is a company incorporated under the Indian
Companies Act, 1956 and the second Petitioner is its Managing Director.
Respondent No. 1 is the State of Maharashtra through the
Commissioner of Sales Tax and his associate officers who are exercising
powers under the Bombay Sales Tax Act, 1959 ("BST Act" for short). In

exercise of the powers that are delegated to him, the second Respondent is seeking to enforce the attachment levied on the immovable properties, which shall be more particularly described in the following paragraphs.

6) The Respondent No. 3 is a company incorporated and registered under the Indian Companies Act, 1956, having its office at the address mentioned in the cause title.

7) The fourth Respondent carried on business as manufacturer of Aluminum castings. During the course of such business, it obtained financial assistance from financial institutions and banks. These were secured creditors. For securing the debt, the Respondent No. 4 had created an interest in favour of these financial institutions and within the meaning of this term (secured interest) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'). The Petitioners point out that the 4th Respondent carried on business for some years and thereafter, the factory was shut down. By the report of the consultant, who was appointed at the behest of these financial institutions, it was reported that the factory of Respondent No. 4 had ceased to carry on any manufacturing activities since 2000-01. The properties and assets were valued and thereafter, it has been pointed out as to how the debt of

these financial institutions came to be assigned and taken over by Respondent No. 3. In pursuance of such rights, the 3rd Respondent initiated measures under the SARFAESI Act and particularly section 13 thereof. Thereafter, the immovable properties and which have been more particularly described in a public notice were put up for sale. That immovable properties are a piece and parcel of land situated at village Ajivali, Khopoli, District Raigad. More particularly described in Form No. 4 of the order of attachment dated 24th December, 2013 as survey Nos. 52, 53, 54, 55, 58, 58/1B, 58/1C, 62/2 situated at Mauje Ajivali village, Pen-Khopoli Road, Taluka – Khalapur, District – Raigad (hereinafter referred to as the immovable properties). The Petitioners have pointed out as to how an offer was made by them and there were negotiations held, pursuant to which, the Petitioners' offer was accepted. The Petitioners offer being accepted, the sale was concluded in their favour and for an agreed consideration. There were two sale certificates separately issued for movable (plant and machinery etc.) and immovable properties acknowledging receipt and handing over delivery and possession of the same. The Petitioners state that in the sale certificates, it was mentioned that the sale is on "as is where is" and "as is what is" basis and with all known and unknown encumbrances (except the encumbrances and liabilities to the secured creditors in respect of the financial facilities including interest thereon as against

the schedule properties). It was mentioned that any other liability in respect of the secured assets and payable in law/attachable to the secured assets shall be the responsibility of the Petitioners. The sale certificate in respect of the immovable properties was thereafter registered on 31st January, 2008 with the Sub-Registrar, Karjat on payment of prescribed registration charges. The record of rights also came to be amended and in terms of the sales certificate.

8) The Petitioners were desirous of putting up a unit at the immovable properties so purchased, but there was an attachment levied on the same by the 2nd Respondent on 11th March, 2013. The attachment was levied because the 4th Respondent had defaulted in payment of Sales Tax for the period 1996-97 to 2001-02. The attachment order was issued in the name of 4th Respondent, without noticing that the properties were already transferred in favour of the Petitioners in 2011 itself.

9) In such circumstances, the Petitioners addressed a communication/letter, through their Chartered Accountant, bringing to the notice of the Sales Tax authorities that the properties have been purchased and acquired by the Petitioners and in the circumstances aforestated and narrated. In the light of this communication from the Chartered Accountant dated 17th May, 2013, the 2nd Respondent

directed the Tahsildar to remove the attachment. Annexures 'F', 'G' and 'H' are the relevant documents.

10) Thereafter on 16th July, 2013, 2nd Respondent intimated the Petitioners that the dues of this 4th Respondent are recoverable in view of the sale certificate and on the assumption that the properties have been acquired on "as is where is" and "as is what is" basis. The Petitioners claim that such communication was based on total misconception of the law. The law does not envisage any such recovery proceedings as are contemplated against the Petitioners. In these circumstances, the Petitioners objected to the earlier attachment or to the proposed attachment.

11) The Petitioners' case is that without in any manner waiting for the Petitioners to either appear or produce the relevant documents, the 2nd Respondent rushed to communicate to their bankers that the Petitioners are in default and in the sum of Rs.4,18,30,890/- being the dues or taxes payable under the BST Act as well as the Central Sales Tax Act, 1956 ("CST Act" for short). The Petitioners complained that there was a communication addressed on 6th September, 2013 Annexure 'K' and which was replied extensively by the Petitioners pointing out that they cannot be held liable for any dues of the erstwhile owner. Its business not being taken over by the Petitioners, they cannot be termed

as successors in interest. Similarly, the dues of the Sales Tax Department are not the dues against the property and in these circumstances, there was no power to attach the properties.

12) The Petitioners' grievance is that despite this legal position, summons was issued for the appearance of the Petitioners in the office of 2nd Respondent. On 12th November, 2013, in pursuance to this summons, the Petitioner attended his office, but the Respondent Nos. 3 and 4 were absent, therefore, another hearing in the office of the 2nd Respondent was scheduled on 7th December, 2013. On that date, the parties concluded their oral submissions and time was given to handover written submissions by 31st December, 2013. Without in any manner waiting till this date, an attachment was levied on the properties and in terms of Annexure 'N' on 24th December, 2013.

13) Mr. Joshi, learned Counsel appearing for the Petitioners would submit that this Court should not relegate the Petitioners to any other remedy in law. That remedy may include appearance before the 2nd Respondent and a fresh opportunity to satisfy him on the legality and validity of the attachment. Mr. Joshi would submit that there are no disputed questions of fact. On the admitted facts, a pure question of law arises, "whether any power vests in the 2nd Respondent or the authorities under the BST Act to levy any attachment on the Petitioners'

movable and immovable properties?” If that power is not to be found in the scheme of the BST Act, then, the attachment order is *ex-facie* bad in law and deserves to be set aside. Mr. Joshi thereafter elaborated his submissions by inviting our attention to the public notice issued by 3rd Respondent after it exercised its powers under the SARFAESI Act. The possession of the properties was taken over by the 3rd Respondent. In terms of the powers conferred in the 3rd Respondent by virtue of the SARFAESI Act, it became entitled to sell all the properties. That is how the sale had been announced and offers were invited for purchasing the immovable properties. That sale was concluded. The borrower Respondent No. 4 never questioned the sale. In such circumstances, by virtue of the sale certificate and its registration, the Petitioners have become owners of the immovable properties and equally the movables. After nearly two years and more of this ownership, the attachment has been levied. That attachment proceeds on the footings that the properties continue to be of the defaulter Respondent No. 4. However, once the above factual position was brought to the notice of the authorities, initially, the attachment was raised. If the authorities under the BST Act were satisfied that the immovable and movable properties do not belong to the borrower and therefore could not have been attached nor the Petitioners can be termed as successors in interest of the borrower/defaulters, then, there is no reason to again attach the

properties. In that regard, our attention is invited to the contents of Annexure 'H' at page 94 of the paper book which is the letter dated 27th June, 2013. That records as to how the Petitioners have become owners of the properties and prior to the initiation of the recovery proceedings under the BST Act. If that is the understanding of the law of the Sales Tax Authorities and emerging from their communication, then, there was no warrant in re-attaching the immovable properties. Mr. Joshi would submit that even if the sale certificate and the contents thereof are perused, the same would not in any manner denote that the Petitioners have any existing liability or have taken over any prior liability of Respondent No. 4. The sale certificate with the clauses and which have been relied upon would denote that the secured assets are being sold with all known and unknown encumbrances. However, the encumbrances have never been spelt out. The dues of the Sales Tax Authorities were not known to the Petitioners. It was not that with the knowledge thereof that the immovable properties have been acquired. Hence, no reliance could have been placed on these certificates or the contents thereof. Once in law there is no provision which would enable the authorities to levy the attachment, then, it is bad in law and must be set aside.

14) Mr. Joshi brought to our notice the legal provisions.

Sections 19, 38 and 38C of the BST Act have been brought to our notice in that behalf. Our attention is invited to the copy of the written submissions, which were placed before the Sales Tax Officer. Our attention has also been invited to an obvious error, according to Mr.Joshi, in the communication from the Sales Tax Department. Mr.Joshi would submit that now this error is admitted and namely that the Petitioners are not the same unit nor are they the same entity as Respondent No. 4. They have not taken over the business of Respondent No. 4. They are not the successors in interest in any manner of Respondent No. 4. In these circumstances, the attachment is bad in law.

15) Reliance is placed upon the Judgments of the Hon'ble Supreme Court in the case of *state of Karnataka and Anr. Vs. Shreyas Papers Pvt. Ltd. And Others* reported in **(2006) Vol. 144 STC 331**. Our attention is also invited to the Judgment of a Division Bench of this Court in the case of *Krishna Lifestyle technologies Ltd. Vs. Union of India* reported in **2008 (229) ELT 173**. Our attention is then invited to the Judgment of the Hon'ble Supreme Court in the case of *Rana Girders Ltd. Vs. Union of India* reported in **2013 (295) ELT 12 (SC)**. For these reasons, it is submitted that the Writ Petition be allowed.

16) On the other hand, the contesting Respondents and

particularly Respondent Nos. 1 and 2 would submit that the attachment was justified. Mr. Sethna, learned Special Counsel appearing for Respondent Nos. 1 and 2 submits that the definition of the term “capital asset” as appearing in section 2(14) of the Income Tax Act, 1961 is a relevant definition. The Petitioners have acquired a capital asset. The definition of the term “business” as appearing in section 2(5A) of the BST Act includes a capital asset. If it is an integral part of the business and acquired by the Petitioners, then, the business is also deemed to have been acquired. That apart, if the clauses in the sale certificate are perused, they would denote as to how the properties have been acquired with encumbrances. It is not that the properties vest in the 3rd Respondent free from all encumbrances. If it vests with the encumbrances and they continue, then, it is not open for the Petitioners to resist the attachment. Our attention has been invited to sections 38(4), 38(5), 38B and 38C of the BST Act. If the recovery proceedings are to enable the recovery of Sales Tax dues as arrears of land revenue, then, all the powers of the revenue officers vest in the Sales Tax officers. They can proceed to attach the immovable properties. In these circumstances, there is no merit in the Writ Petition. Mr. Sethna relied upon the fact that once the Sales Tax dues are in arrears and they were always payable, then, there is a charge on the properties of the dealer or any other person, within the meaning of section 38C of the BST Act.

That would enable the Petitioners to go after the properties of the Respondent No. 4 and recover the Sales Tax dues. This dues attaches to the properties and therefore, so long as the Petitioners establish and prove that they had no knowledge of the charge which is statutory in character, they cannot challenge the attachment. Once the correspondence with the 3rd Respondent and carried on by the Petitioners themselves is brought on record, that indicates as to how the Petitioners had knowledge of the dues of the Sales Tax authorities. In such circumstances, the Writ Petition be dismissed.

17) Reliance is placed by Mr. Sethna on the Judgment of three Judge Bench of the Hon'ble Supreme Court in the case of *Central Bank of India vs. State of Kerala and Ors.* reported in **(2009) 21 VAT and STC 505 (SC)**. Reliance is also placed upon the Judgment of this Court in the case of *Thane Janta Sahakari Bank Ltd. Vs. Commissioner of Sales Tax and Ors.* **(2006) 148 STC 32**. Mr. Sethna would submit that the Special Leave Petition against this Judgment has now been dismissed by the Hon'ble Supreme Court.

18) Mr. Dhond, learned Senior Counsel appeared for Respondent No. 3. He was through out urging that this Court must take note of the admitted facts and circumstances. Earlier, the stand of Respondent No. 3 is that the sale certificate refers to the liabilities of the

financial institutions and those are admitted by the Petitioners and Respondent No. 4. They cannot be disputed and the sale cannot be challenged on that ground. The arguments of the Petitioners therefore are restricted to other taxes and dues, including statutory. After appreciating them, this Court may pass appropriate orders. Later on, however, this stand was changed. The Respondent No. 4 was carrying out manufacturing activities from the immovable properties. It had obtained finance from various banks and institutions and against the subject properties. After it ceased to carry out the manufacturing activities, the two secured creditors, who had to recover considerable sums from this entity, assigned their debts to Respondent No. 3. The secured creditors are State Bank of India (SBI) and Industrial Credit and Investment Corporation of India (ICICI). On 10th November, 2004 the 3rd Respondent issued a notice under section 13(2) of the SARFAESI Act. The valuation report was obtained and thereafter, a public notice was issued notifying the takeover and the intent to bring the properties to sale. There was a new valuation report obtained in January, 2008. Respondent No. 3 received a offer from the Petitioner No. 1 to purchase the properties and that was not unconditional. There were discussions held and when properties were agreed to be acquired with all the statutory liabilities that price was brought down and by a good 4 to 5 crores. If that is how the Petitioners acquired the immovable properties

at Rs.9.2 crores and it has been indicated in the document conveying the title that outstanding statutory dues, taxes including Excise dues, Sales Tax are payable by the Petitioners, then, the Petitioners cannot escape the liability. They had a knowledge of the charge. The correspondence in that regard is relied upon.

19) Strangely, we find that Mr. Dhond was more vehement in opposing the Writ Petition than even the Sales Tax Department. The arguments and which ought to have emanated from the Sales Tax Department, were placed for our consideration by Mr. Dhond. He would submit that the statute being clear and its mandate being not to allow the parties like the Petitioners to escape the recovery that the Petitioners must be called upon to deposit the sum, in respect of which the attachment was levied and not be allowed to go scott free. In these circumstances, he also prayed for dismissal of the Writ Petition.

20) With the assistance of all the Counsel, we have perused the Writ Petition and all the Annexures thereto. We have perused the affidavit in reply filed by Respondent Nos. 1 and 2 with all its Annexures and a rejoinder affidavit placed on file by the Petitioners. Initially Mr. Sethna sought time to place a sur-rejoinder, but once we found that there is no dispute about the facts a sur-rejoinder would be unnecessary that we did not grant his request for adjournment.

Thereafter, parties have proceeded and addressed us on the above legal issues.

21) The Annexures to the Writ Petition would indicate as to how the Petitioners have been fair in bringing on record the valuation report of fixed assets. The valuation report, copy of which has been annexed as Annexure 'A', notifies the value of the immovable properties. The valuation report then indicates the method of valuation. It then indicates the type of valuation. It indicates the distress and desperate value. The valuation report, which is dated 10th January, 2008, does not mention any reference to proceedings which were stated to be initiated and taken up before the Board for Industrial and Finance Reconstruction (BIFR). That is under the the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

22) The SARFAESI Act is an Act which enables regulation of securitisation and reconstruction of financial assets and enforcement of security interest or matters incidental thereto. The term 'debt' is defined in section 2(ha). The term 'property' is defined under section 2(t) and the term 'security interest' is defined under section 2(zf). That means, right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes a mortgage, charge, hypothecation, assignment other than those specified in section

31. The term 'secured asset' means the property on which the security interest is created and the word 'secured debt' means a debt which is secured by any security interest. The term 'secured creditor' is defined in section 2(zd). The words and expressions used and not defined in the SARFAESI Act, but defined in the Transfer of Property Act, 1882 or the Securities and Exchange Board of India Act, 1992 (SEBI) shall have the meaning respectively assigned to them in those Acts. Section 13 of the SARFAESI Act provides for enforcement of security interest and the measures by which the enforcement is permissible including upon failure of the borrower to discharge the liability in full within the period specified under section 13(2), taking possession of the security assets of the borrower including the right to transfer by way of lease, assignment, sale for realising the secured assets. Sub-section (6) of section 13 is relied upon to contend that any transfer of secured assets after taking possession or taking over of Management under sub-section (4), by the secured creditor or by the Manager on behalf of the secured creditors, shall vest in the transferee all rights in, or in relation to the secured asset transferred as if the transfer had been made by the owner of such secured asset. The possession of the immovable and movable properties of the Respondent No. 4, which are secured assets has been taken over by Respondent No. 3 pursuant to the assigning of the debt in its favour and the powers which it exercised are in terms of this SARFESI Act.

That is how the possession notice at Annexure 'B' and the public notice for sale would have to be read. It is only upon such takeover and the right to transfer by way of *inter alia* sale that the sale of the properties was announced. True it is, as has been placed before us by Respondent Nos.1 and 2, that the sale in favour of the Petitioners was preceded by certain negotiations.

23) Respondent Nos. 1 and 2 rely upon the assessment orders passed against Respondent No. 4 under the BST Act and CST Act for assessment period 1st April, 1996 to 31st March, 1997 and demand notices issued under the two Acts. The various assessment orders and the details thereof are enumerated in para 5 of the affidavit in reply and it is then contended that the outstanding Sales Tax dues were informed by the Director of Industries to the BIFR and they were to the tune of Rs.4,18,30,890/-. They were part of the draft rehabilitation scheme. It is to recover these dues that the notices of attachment have been issued. True it is that the offers were received by Respondent No. 3 and details of which have been furnished in para 6 of this affidavit in reply. The reliance therefore is placed on section 2(5A) of BST Act. That section reads as under:

“2(5A) “business” includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, or profit and whether or not any gain or profit accrues from such trade, commerce,

manufacture, adventure or concern; and any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern; and any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern;

Explanation – For the purpose of this clause,

(i) the activities of raising of man-made forests or rearing of seedlings or plants shall be deemed to be business.

(ii) any transaction of sale or purchase of capital assets pertaining to such trade, commerce, manufacture, adventure or concern shall be deemed to be business and expression “capital assets” shall have the same meaning as assigned to it in the Income Tax Act, 1961

(iii) purchases of any goods, the price of which is debited to the business shall be deemed to be the purchases effected in the course of business;

(iv) sales of any goods the proceeds of which are credited to the business shall be deemed to be the sales effected in the course of business.”

24) A perusal thereof would reveal as to how the incident of tax falls and on the transactions which are undertaken by a dealer. The term ‘dealer’ is defined in section 2(11) to mean any person, who, whether for commission, remuneration or otherwise carries on business of buying or selling goods in the State, and includes the Central Government, or any State government which carries on such business, and also any society, club or other association of persons which buys goods from or sells goods to its members. The term business has therefore been defined in a inclusive manner. It includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or

concern; and any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern; and any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern. That is why the Explanation says that any transaction of sale or purchase of capital assets pertaining to such trade, commerce, manufacture, adventure or concern shall be deemed to be business and expression 'capital assets' shall have the same meaning as assigned to it in the Income Tax Act, 1961. Therefore, even a transaction of sale or purchase of capital assets pertaining to the trade, commerce, manufacture, adventure or concern shall be deemed to be business. That is to bring in the activities and which could be of sale or purchase of capital assets pertaining to trade, commerce, manufacture, adventure or concern within the meaning of section 2(5A).

25) With this background, if the further facts are noted and as set out in the affidavit in reply as well of Respondent Nos. 1 and 2, they indicate that the sale to the Petitioners, according to these Respondents, is with all encumbrances (known and unknown except the above facilities) of secured creditors. Then clause 2 of Exhibit 3 to the affidavit in reply is relied upon and also of the document creating title in favour of the Petitioners to indicate that all liabilities, dues of

authorities and departments, statutory or otherwise, any other dues, if any, in respect of the scheduled property and if payable in law/attachable to the schedule property/sale proceeds by reason of the proposed sale of the scheduled property, shall be the sole responsibility of and to the account of the purchaser. Similar terms are to be found in the sale certificate as well.

26) Then reliance is placed on section 19 of the BST, which reads as under:-

“S. 19. Special provision regarding liability to pay tax in certain cases. -

(1) Where a dealer, liable to pay tax under this Act, dies then, -

(a) if the business carried on by the dealer is continued after his death by his legal representative or any other person, such legal representative or other person shall be liable to pay the tax including any penalty and interest due from such dealer under this Act or under any earlier law, in the like manner and to the same extent as the deceased dealer, and

(b) if the business carried on by the dealer is discontinued whether before or after his death, his legal representative shall be liable to pay out of the estate of the deceased, in the like manner and to the same extent as the deceased dealer would have been liable to pay if he had not died, the tax including any penalty and interest due from such dealer under this Act, or under any earlier law,

whether such tax including any penalty and interest has been assessed before his death but has remained unpaid, or is assessed after his death.

Explanation – In this sub-section, the expression “legal representative” has the meaning assigned to it in clause (11) of section 2 of the Code of Civil Procedure, 1908 (V of 1908).

(2) Where a dealer, liable to pay tax under this Act, is a Hindu undivided family and the joint family property is partitioned

amongst the various members or group of members, then each member or group of members shall be jointly and severally liable to pay the tax (including any penalty and interest) due from the dealer under this Act or under any earlier law, up to the time of the partition, whether such tax (including any penalty and interest) has been assessed before partition but has remained unpaid, or is assessed after partition.

(3) Where a dealer, liable to pay tax under this Act, is a firm, and the firm is dissolved, then every person who was a partner shall be jointly and severally liable to pay to the extent to which he is liable under section 18, the tax (including any penalty and interest) due from the firm under this Act or under any earlier law up to the time of dissolution, whether such tax (including any penalty and interest) has been assessed before such dissolution but has remained unpaid, or is assessed after dissolution.

(4) Where a dealer, liable to pay tax under this Act, transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding shall jointly and severally be liable to pay the tax (including any penalty and interest) due from the dealer under this Act or under any earlier law, up to the time of such transfer, disposal or change, whether such tax (including any penalty and interest) has been assessed before such transfer, disposal or change but has remained unpaid, or is assessed thereafter.

(5) Where the dealer, liable to pay tax under this Act -

(a) is a guardian of a ward on whose behalf the business is carried on by the guardian, or

(b) are trustees who carry on the business under a trust for a beneficiary, then, if the guardianship or trust is terminated, the ward or, as the case may be, the beneficiary shall be liable to pay the tax (including any penalty and interest) due, from the dealer up to the time of the termination of the guardianship or trust whether such tax (including any penalty and interest) has been assessed before the termination of the guardianship or trust, but has remained unpaid, or is assessed thereafter.

(6) Where a dealer, liable to pay tax under this Act, is succeeded in the business by any person in the manner described in clause (a) of sub-section (1) or in sub-section (4), then, such person shall, notwithstanding anything contained in section 3, be liable to pay tax on the sales or purchases of goods made by him on and after the date of such succession, and shall (unless he already holds

a certificate of registration) within sixty days thereof apply for registration:

Provided that, where such person resells any goods purchased by the dealer while carrying on business before such succession, he shall be entitled to such deductions in respect thereof as are permissible under sections 7, 8 or 9, as the case may be, had the resale been effected by the dealer himself.”

27) A bare perusal of this section and particularly sub-section (4), which is heavily relied upon would indicate that whether a dealer who is liable to pay tax under the BST Act transfers or otherwise disposes of his business in whole or in part or effects any change in the ownership thereof in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding shall jointly and severally be liable to pay the tax (including any penalty and interest) due from the dealer under this Act or under any earlier law, up to the time of such transfer, disposal or change, whether such tax (including any penalty and interest) has been assessed before such transfer, disposal or change but has remained unpaid, or is assessed thereafter.

28) The entire affidavit in reply does not indicate that there is any transfer or disposal of the business of the dealer, namely Respondent No. 4 in whole or in part or there is any change in the ownership of Respondent No. 4. There is merit in the contention of Mr.Joshi that the Petitioners cannot be termed as successors in interest and therefore liable to pay tax jointly and severally. Rather there is

something indicated in favour of the Petitioners, inasmuch as when the Petitioners brought to the notice of the authorities that they have acquired title in respect of the immovable properties consequent upon the sale by Respondent No. 3 in their favour, promptly, the authorities noticed their error and mistake. They noticed that the recovery proceedings have not been initiated prior to the sale being notified and rather they have been initiated subsequent to the transfer or sale in favour of the Petitioners. Therefore, they raised and vacated the attachment. Neither of the documents and emanating from the Sales Tax authorities, copies of which have been annexed to the Writ Petition, denote that they proceeded on the footing that the Petitioners are successors in interest of the business of Respondent No. 4. If that is how they have proceeded, then, section 19(4) cannot be of any assistance to them.

29) We find that Mr. Joshi's reliance on the Judgment in the case of *Shreyas Papers Pvt. Ltd.* (supra) is well placed.

30) Somewhat similar question fell for consideration of the Hon'ble Supreme Court. There was a company and in the State of Karnataka. The Karnataka State Industrial Investment and Development Corporation had extended financial assistance to this company, which defaulted in repayment of the loan granted to it.

Therefore, the Corporation, which was a State Financial Corporation within the meaning of State Financial Corporations Act, 1951, initiated somewhat identical measures as are initiated by Respondent No. 3 to this Petition but in terms of section 29(1) of the State Financial Corporations Act, 1951. They took over the assets of the defaulter, advertised sale thereof and that is how after rounds of negotiations, the Respondent before the Hon'ble Supreme Court, whose offer was on record, came to be notified as a auction purchaser. True it is that in the clause which was brought to the notice of the Hon'ble Supreme Court, the auction purchaser had not taken over any liability of the defaulting unit, but, what one finds is that the Sales Tax Department proceeded against the auction purchaser and through the Corporation. A notice under the Karnataks Sales Tax Act, 1957 came to be issued and fearing that the auction purchaser would be proceeded against on the foundation that it had acquired the business and therefore was jointly responsible and liable for payment of arrears of Sales Tax of the defaulting company that the auction purchaser brought a Writ Petition in the High Court of Karnataka being Writ Petition No.32428 of 1993. That Writ Petition came to be allowed. That is how the State of Karnataka approached the Hon'ble Supreme Court. It relied upon *inter alia*, namely, the same provision as is to be found in section 19(4) of the BST Act, which is section 15 of the Karnataka Sales Tax Act, 1957 and

dealing with the rival contentions, the Hon'ble Supreme Court, on a perusal of the enactment, held thus:-

“11. A careful reading of section 15(1) of the KST Act shows that the consequences contemplated therein, namely, foisting of the liabilities of the defaulting transferor onto the transferee, would come into effect only if the “ownership of the business” is transferred. Although, Mr. Hegde strenuously urged that “business” could not be separated from the assets of the business, we are unable to accept this contention. Business is an activity, directed with a certain purpose, more often towards producing income or profit. Ownership of assets is merely an incident rather than a characteristic of business. Hence, the mere transfer of one or more species of assets does not necessarily bring about the transfer of the “ownership of the business” for “ownership of a business” is much wider than mere ownership of discrete or individual assets. In fact, “ownership of business” is wider than the sum of the ownership of a business constituent assets. Above all, transfer of “ownership of business” requires that the business be sold as a going concern. In our view, therefore, section 15(1) is intended to operate only when there is complete transfer of “ownership of business” so as to render the transferee as a successor-in-interest of the transferor. Only in such an eventuality does section 15(1) make the transferee liable for the transferor's sales tax liabilities.

12. Mr. Hegde referred to two judgments of the Karnataka High Court both of which, unfortunately, take an erroneous view of the matter. In *Karnataka State Industrial Investment and Development Corporation Ltd. v. Assistant Commissioner of Commercial Taxes, Bangalore* (2001) 121 STC 520 (Kar), the High Court held that when section 29 of the SFC Act was read with section 15 of the KST Act, the transferee would be jointly liable with the State Finance Corporation concerned. As we have already held, section 15 operates only in a situation where the ownership of the business is transferred. The learned single Judge, however, did not notice this point. Similarly, we are unable to accept the correctness of the judgment in *Alpha Silicones v. Assistant Commercial Tax Officer (Recovery), Gulbarga* (1990) 77 STC 68 (Kar) as it held that even the mere transfer of assets would amount to transfer of ownership of the business. We overrule these two judgments to the extent that they conflict with the views expressed therein.

13. In the present case, since it is not a matter of dispute that there was only the transfer of individual assets of the defaulting

company, rather than the defaulting company being sold as a going concern, in the light of our expressed views, section 15 of the KST Act is not attracted. The first limb of Mr. Hegde's arguments must, therefore, fail.”

31) Then, there was an argument and which we will note hereinafter. The argument was as is placed before us by Mr. Sethna and Mr. Dhond that section 38C of the BST Act enacts a statutory charge. The two provisions which have been relied upon are sections 38B and 38C of the BST Act. These provisions follow section 37 which talks of imposition of penalties for contravening certain provisions. Then, by section 38, the manner of payment of tax is indicated. By section 38 sub-section (5), it is enumerated that any tax, penalty, interest or sum forfeited, which remains unpaid after the service of notice under sub-section (4) or any installment not duly paid, shall be recoverable as arrears of land revenue. Sections 38B and 38C read as under:-

“38B. - Special powers of Sales Tax authorities for recovery of tax as arrears of land revenue. -

(1) For the purpose of effecting recovery of the amount of tax, penalty interest and amount forfeited, due and recoverable from any dealer or other person by or under the provisions of this Act, as arrears of land revenue -

(i) the Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Commissioner under the Maharashtra Land Revenue Code, 1966, (Mah. XLI of 1966);

(ii) the Additional Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Additional Commissioner under the said Code;

(iii) the Deputy Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Collector under the said Code;

(iv) the Senior Assistant Commissioner and the Assistant Commissioner of Sales Tax shall have and exercise all the powers

(except the powers of arrest and confinement of a defaulter in a civil jail), and perform all the duties of the Assistant or Deputy Collector under the said Code;

(v) the Sales Tax Officer shall have and perform all the powers (except the power of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform all the duties of the Tahsildar under the said Code.

(2) Every notice issued or order passed in exercise of the powers conferred by sub-section (1) shall, for the purposes of sections 54, 55, 56, 57, 61 and 62 be deemed to be notice issued or an order passed under the said Act.

S. 38C. Liability under this Act to be first charge. -

Notwithstanding anything contained in any contract to the contrary but subject to any provision regarding first charge in any Central Act for the time being in force, any amount of tax, penalty, interest or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or, as the case may be, person.”

32) A bare perusal of these provisions would indicate as to how special powers of Sales Tax Authorities for recovery of tax as arrears of land revenue are created and conferred in the officers of the Sales Tax Department. For the purposes of the Maharashtra Land Revenue Code, 1966 such of the officers who have been named in the clauses of sub-section (1) of section 38B would be the Revenue Officers. They are conferred with similar powers.

33) There is no dispute about this and therefore Mr. Joshi rightly did not challenge the competence or authority of the 2nd Respondent in resorting to this special provision. It is the legality and authority of the action thereunder which is in issue before us. Section 38C states that the liability under the Act to be first charge,

notwithstanding anything contained in any contract to the contrary but subject to any provision regarding first charge in any Central Act for the time being in force, any amount of tax, penalty, interest or any other sum payable by a dealer or any other person under this Act shall be first charge on the property of the dealer or as the case may be, person.

34) In the facts and circumstances of the present case, neither Mr. Sethna nor Mr. Dhond submitted that the Petitioners can be termed as dealers. They cannot be termed as any other person as well and by virtue of what we have held regarding applicability of section 19(4) of the BST Act to the facts and circumstances of this case. Therefore, the first charge on the property of the dealer or as the case may be the person is what is enacted by this provision. If the property is and was capable of being followed even in the hands of the Petitioners, we do not see any reason as to why Respondent Nos. 1 and 2 acceded to the Petitioners' request and raised the attachment initially levied. Their own statement states that realizing that the recovery measures have not been initiated prior to the sale being notified or the title in favour of the Petitioners being transferred that the attachment cannot be levied any longer. They realised that the property has changed hands and the Petitioners have become owners thereof. However, on obtaining the documents and from Respondent No. 3, particularly copies of the

correspondence between the Petitioners and Respondent No. 3 that Respondent Nos. 1 and 2 decided to re-levy the attachment. That is on a complete different footing and namely that the liabilities of Respondent No. 4 have been taken over by the Petitioners and they are aware of the same. We have indicated as to how beyond the clauses of the sale certificate or deed or document in favour of the Petitioners, there is absolutely no material to attribute any knowledge of the charge created on the property by the Sales Tax Department. In the circumstances, we do not see how Respondent Nos. 1 and 2 and equally Respondent No. 3 vehemently supporting them can rely upon section 38C of the BST Act.

35) In these circumstances, we do not see how we can accept the contention of Mr. Dhond and on enforceability of the charge. Mr.Dhond would submit that the Petitioners cannot derive any assistance from the Judgment of the Hon'ble Supreme Court in the case of *Shreyas Papers Pvt. Ltd.* (supra). The second limb of the argument before the Hon'ble Supreme Court was that there was a statutory charge on the property of the defaulting company and that continues on the properties even if the same changes hands or there is a transfer thereof. That is how the Hon'ble Supreme Court referred to section 100 of the Transfer of Property Act, 1982 and relied upon definition of the term

‘charge’ appearing therein. It is in these circumstances that the Hon’ble Supreme Court concluded in paras 16, 17 and 18 as under:-

“16. As the section itself unambiguously indicates, a charge may not be enforced against a transferee if s/he has had no notice of the same, unless by law, the requirement of such notice has been waived. This position has long been accepted by this Court in *Dattatreya Shanker Mote v. Anand Chintaman Datari* (1974) 2 SCC 799, and in *Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenbhai* AIR 1971 SC 1201 (hereinafter “Ahmedabad Municipal Corporation”). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case.

17. *Ahmedabad Municipal Corporation* was a case where a person was in arrears of property tax, due under the Bombay Provincial Municipal Corporation Act, 1949. Consequently, the Municipal Corporation created a charge over the property of the defaulter. However, the property was sold in execution of a mortgage decree. When the Municipal Corporation purported to exercise their charge over the property, the purchaser in court auction filed a suit for a declaration that he was the owner of the property and that the arrears of municipal taxes due by the transferor were not recoverable from him by proceeding against the property purchased in auction. In the appeal before this Court, the Municipal Corporation's main argument was that where the local law provided for the creation of a charge against a property for which municipal taxes were due, transferees of such properties were imputed with constructive knowledge of any charge created against the properties that they had purchased. This argument was, however, rejected. This Court held that while constructive notice was sufficient to satisfy the requirement of notice in the proviso to section 100 of the TP Act, whether the transferee had constructive notice of the charge had to be determined on the facts and circumstances of the case. In other words, this Court held that there could be no fixed presumption as to the transferee having constructive notice of the charge against the property. In fact, the principle laid down in *Ahmedabad Municipal Corporation* has been correctly applied in a sales tax case similar to the present case.

18. In the present case, firstly, no provision of law has been cited before us that exempts the requirement of notice of the charge for its enforcement against a transferee who had no notice of the same. It remains to be seen, therefore, if in the facts of the

present case, the first respondent had notice – actual or constructive – of the charge. At the outset, in the advertisement/notice dated March 17, 1992 issued by the Corporation, mention is only made of the sale of the defaulting company's assets and there is no indication, whatsoever, of any sales tax arrears. Further, the bid offer made on behalf of the first respondent on June 5, 1992 specifically excludes any statutory liabilities, including sales tax. This offer was accepted by the Corporation on July 15, 1992. Even at that stage, there was no mention of any sales tax arrears. The sale of the assets took place pursuant to the agreement dated August 12, 1992 in which a specific clause was inserted that the first respondent would be liable to pay all property taxes, other taxes, electricity bills, water taxes and rents from the date of the agreement (*i.e. August 12, 1992*). For the first time, by letter dated January 8, 1993 of the second appellant to the Mandal Panchayath, Aloor Taluk, the issue of sales tax dues of the defaulting company was brought to the surface. This is further borne out by the correspondence between the first respondent and the Corporation. Thus, it is evident that the first respondent had no actual notice of the charge prior to the transfer. As to whether the first respondent had constructive notice of the charge, no substantive argument on this issue was made, either before the High Court or at any rate before us. Hence, we cannot hold that the first appellant had constructive notice of the charge.”

36) we are of the opinion that in the light of the uncontroverted factual material before us, Mr. Joshi can equally place reliance on these paragraphs in the Hon'ble Supreme Court Judgment. We do not see how the Petitioners can be attributed any knowledge of the charge actual or constructive, as is now urged before us by Mr.Dhond.

37) The other provisions and which have been relied upon cannot carry the case of the Respondent Nos. 1 and 2 any further. Finally, we are of the opinion that equally well placed and apposite is

the reliance by Mr. Joshi on the Hon'ble Supreme Court Judgment in the case of *Rana Girders Ltd.* (supra). There as well, the facts are that the Uttar Pradesh Financial Corporation (UPFC) took over possession of the defaulting unit and notified a public auction. The auction purchaser Rana Griders Ltd. Submitted a bid, which was the highest and therefore could be accepted. A sale deed was executed in its favour and conveying the ownership of the land and building, plant and machinery. Once it became the owner, it was surprised to note that there was Excise duty, which had fallen due and in arrears from the erstwhile unit. The auction purchaser/owner was pressed to discharge this liability and on the footing that it is successor in interest of land and building and plant and machinery of the borrower. That demand was resisted and what is material for our purpose is that while the legal proceedings were before the Hon'ble Allahabad High Court by way of a Writ Petition, in which the auction purchaser lost, similar clause or stipulation, as is to be found in the sale certificate in the present case was relied upon. It had been clearly stated in the sale certificate that all the statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible. Thereafter, the Hon'ble Supreme Court noted as to how the Allahabad High Court proceeded and by relying upon its own Judgment, it dismissed the Writ Petition. The rival contentions and the reliance placed upon the Judgments of the Hon'ble

Supreme Court has been noted in para 13 and with same vehemence, the submissions were canvassed before the Hon'ble Supreme Court, which is to be found in para 14. The terms and conditions of the sale deed and the relevant provisions of the Central Excise Act, 1944 and Rules fell for determination of the Hon'ble Supreme Court. The Hon'ble Supreme Court's attention was invited to the Judgment in the case of *Shreyas Papers Pvt. Ltd.* (supra) and that is clear from para 16 equally a provision as is to be found in the SARFAESI Act and section 34 thereof particularly was relied upon. That act has been given an overriding effect. The overriding effect is in the following terms:-

“34. Civil Court not to have jurisdiction. - No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

38) The Hon'ble Supreme Court considered these arguments and eventually held as under:-

“.....

17. Learned counsel for the respondents, heavily relied on the judgment of this Court in *M/s. Macson* (supra), reference to which is also made in the notice dated 25-2-1984 that was served upon the appellant by the Excise Department. He submitted that in that case this Court had held that even the successor in interest is liable to discharge the liability of the Excise Department. We may, however, note that this case was considered and specifically distinguished in *SICOM Ltd.* (supra). In that case, considering the statutory right of the Financial Corporation under the State Financial Corporation Act, 1951 and the non-obstante clause

occurring therein, it was categorically held that State Financial Corporation shall have a preferential claim in relation to its secured debts. This position is explained in paragraphs 16 and 23 of the said judgment in the following manner:

“16. If a company had a subsisting interest despite a lawful seizure, there cannot be any doubt whatsoever that a charge/mortgage over immovable property will have the same consequence.

XXXXXXXXXXXXXX

23. Furthermore, the right of a State Financial Corporation is a statutory one. The Act contains a non-obstante clause in Section 46-B of the Act which reads as under:

46-B. Effect of Act on other laws. - The provisions of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.”

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

19. For this principle, the Court referred to its earlier judgment in *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. & Ors.* (2000) 5 SCC 694 explaining the doctrine of priority to Crown Debts, thus:

“What is common law doctrine of priority or precedence of Crown debts/Halsbury, dealing with general rights of

the Crown in relation to property, states that where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "detur digniori (Laws of England, 4th Edn., Vol. 8, para 1076, at p. 666). Herbert Broom States:

"Quando jus domini regis et subditi concurrunt jus regis praegerri debat. - Where the title of the kind and the tile of a subject concur, the king's title must be preferred. In this case detur digniori is the rule where the titles of the kind and of a subject concur, the kind takes the whole..... where the king's title and that of a subject concur, or are in conflict, the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred." (Legal Maxims; 10th Edn., pp. 35-36)

This Common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as "law in force" within the meaning of Article 372(1) of Constitution."

It was, furthermore observed:

"However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledge of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the king commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles v. Grover* it has been held that the Crown has no precedence over a pledge of goods. In *Bank of Bihar v. State of Bihar* the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawner on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawner without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in *Law of Mortgage* (TLL, 7th Edn., p. 386) - "it seems a government debt in India is not entitled to precedence over a prior secured debt".

20. Coming to the liability of the successor in interest, the Court clarified the legal position enunciated in *M/s. Macson* by observing that such a liability can be fastened on that person who had purchased the entire unit as an ongoing concern and not a person who had purchased land and building or the machinery of the erstwhile concern. This distinction is brought out and explained in paragraph 24 and 25 and it would be useful for us to reproduce herein below:

“Reliance has also been placed by Ms. Rao on *Macson Marbles Pvt. Ltd.* (supra) wherein the dues under Central Excise Act was held to be recoverable from an auction purchaser, stating:

“We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of the same any conflict arises this aspect need not be examined. In this case, no such conflict arises between the corporation and the Excise Department. Hence it is necessary to examine this aspect of the matter.

The Department having initiated the proceedings under Section 11A of this Act adjudicated liability of respondent No. 4 and held that respondent No. 4 is also liable to pay penalty in a sum of Rs.3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisputed. The appeal is disposed of accordingly.”

The decision, therefore, was rendered in the facts of that case. The issue with which we are directly concerned did not arise for consideration therein. The Court also did not notice the binding precedent of *Dena Bank* as also other decisions referred to hereinbefore.”

21. A harmonious reading of the judgments in *Macson* and *SICOM* would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming “first charge for the purchaser”. As far as Central Excise Act is concerned, there was no such specific provision as

noticed in *SICOM* as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10-9-2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable insofar as present case is concerned. Accordingly, we thus, hold that insofar as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department.

22. With this, we now revert to the first issue, namely interpretation of the clause in the Sale Deed for land and building and similar clause in Agreement of Sale for machinery on the basis of which appellant is held to be liable to pay the dues. These clauses have already been incorporated in the earlier portion of our judgment.

23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the Sale Deed/Agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that “all these statutory liabilities arising out of the land shall be borne by purchaser in the sale deed” and “all these statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible in the Agreement of Sale.” As per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the Sale Deed as well as in the Agreement for purchase of plant and machinery talks of statutory liabilities “arising out of the land” or statutory liabilities “arising out of the said properties” (i.e. the machinery). Thus, it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of cess relating to property etc. Likewise, statutory liability arising out of the plant and machinery could be the sales tax etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the High Court.”

39) The Hon'ble Supreme Court pointed out that statutory liabilities arising out of the land and building could be in the form of property, tax or other type of tax relating to property. Likewise, statutory liability could be the Sales Tax payable on the machinery. The Central Excise dues were not relatable to either and therefore, does not follow the property. Even in this case, the nature of the tax being indicated, we do not find any basis for deviating from the law laid down by the Hon'ble Supreme Court. Rather, we are of the opinion that the above decisions of the Hon'ble Supreme Court are binding on us. We cannot depart from the same on the specious plea that section 38C of the BST Act enacts a statutory charge. Thus, the unit of Respondent No. 4 is not taken over as a going concern by the Petitioner No. 1 before us. It is not aware of the statutory charge either. Thurdly, it has not taken over the business of the Respondent No. 4 and hence is not a successor-in-interest either. Unless, all this is established and proved there is no way the attachment on the properties of the Petitioners can be levied. Rather, it was rightly vacated either.

40) In the light of this clear position, we are not in a position to accept Mr. Dhond's argument that allowing the Writ Petition would mean that the Petitioners can wriggle out of the obligation voluntarily incurred by them. The argument runs thus:-

The Petitioners have, in terms of a contract of sale, negotiated for sale of the immovable properties. That sale is concluded in terms of a sale certificate. The clauses and recitals in the agreement and sale certificate denote that the Petitioners have voluntarily and willingly accepted the liability to pay taxes. Allowing this Writ Petition would mean that they are permitted to wriggle out of this solemn contract.

41) We are unable to share the anxiety of Mr. Dhond. True it is that the jurisdiction under Article 226 of the Constitution of India is not to be exercised so as to permit a party so as to wriggle out binding contract and obligation thereunder, if incurred voluntarily. However, in the present case, we do not find how the general stipulation in the agreement and sale certificate would enable the authorities to levy attachment and on the properties, which are no longer belonging to the dealer. The Petitioners are not the defaulters nor they are successor in interest. In these circumstances, the attempt to foist the liability of the defaulting dealer on the Petitioners and proceed against their properties is in issue before us. The legality and validity of the attachment order dated 24th December, 2013 is the question before us. That cannot be answered by relying on a general stipulation or clause in a contract or sale deed. It is a pure legal question and that is how even the Sales Tax Authorities approach it.

42) As a result of the above discussion, this Writ Petition succeeds. Rule is made absolute in terms of prarer clauses (a) and (b) of the Writ Petition. The attachment order impugned in this Writ Petition is quashed and aside. However, our order and direction does not mean that Respondent Nos.1 and 2 cannot proceed against the borrower/defaulters Respondent No.4. Pertinently, the Petitioners have brought on record the fact that the borrowers are still carrying on business. The Respondent No. 4 has a place of business and the details thereof are furnished by the Petitioners on oath. Once they are in business and have not closed down the same, as apprehended by Respondent Nos. 1 and 2, but only their unit at the village in District Rigad, then, our order and direction in this Writ Petition shall not prevent Respondent Nos. 1 and 2 from proceeding against the dealer, namely, Respondent No. 4 and recovering their outstanding dues in accordance with law. All contentions and even in that regard so also the remedies are kept open. With this clarification, the Writ Petition is allowed.

43) At this stage, Mr. Sethna prays for stay of this order. That request is opposed by Mr. Joshi and Mr. Shah appearing for the Petitioners. After hearing the learned Counsel on this point, we are unable to accede to the request of Mr. Sethna and particularly after

having found that the attachment was wholly illegal and invalid. If that was not permissible in law, then, we cannot continue it. The request in that behalf is refused. However, in order to enable Respondent Nos. 1 and 2 to take recourse to other remedies available in law and equally to challenge this Judgment in higher Court, we direct that without prejudice to the rights and contentions of parties, for a period of 8 weeks from today, the Petitioners shall not sell or transfer the immovable properties, which are subject matter of the possession notice and the sale certificate in their favour, in any manner whatsoever, nor part with possession thereof. We clarify that grant of such an order shall not be construed as any relief in favour of the Respondent Nos. 1 and 2 nor any Court or authority would be bound by this order so as to continue this prohibition beyond the period of 8 weeks. However, it would be open for Respondent Nos. 1 and 2 to pray before the higher Court that this order having been passed, it may be continued. That request and prayer in that behalf so also all contentions of the parties are kept open.

(N.W.SAMBRE, J.)

(S.C.DHARMADHIKARI, J.)