

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2220 OF 2017

Bhaurao Chavan Sahakari Sakhar
Karkhana Ltd.,
Laxmi Nagar, Degaon-Yelegaon,
Tq. Ardhapur, District Nanded
through its Secretary,
Mr. Gajanan Balwantrao Sabnis,
Age : 44 years, Occu. Service,
R/o as above

PETITIONER

VERSUS

1. The State of Maharashtra,
through its Secretary,
Finance Department,
Mantralaya, Mumbai
2. Assistant Sales Tax Commissioner,
Vikrikar Bhavan, Opp. Railway Station,
Nanded, District Nanded
3. Maharashtra State Cooperative Bank Ltd.
Pay Office, Nanded,
180, Vasant Nagar,
Nanded – 431 605
through its Joint Manager
4. Hutatma Jayantrao Patil Sahakari
Sakhar Karkhana Ltd.,
Surya Nagar, Hadsani,
Tq. Hadgaon, District Nanded,
through its
Chairman/Managing Director

RESPONDENTS

Mr. P.M. Shah, Senior Advocate instructed by and with
Mr. N.B. Suryawanshi, Advocate for the Petitioner
Mr. S.G. Karlekar, A.G.P. for the respondent/State
Mr. D.M. Shinde, Advocate for respondent No. 4

**CORAM : S.C. DHARMADHIKARI AND
SANGITRAO S. PATIL, JJ.**

**JUDGMENT RESERVED ON : 20th JULY, 2017
JUDGMENT PRONOUNCED ON : 1st AUGUST, 2017**

JUDGMENT (PER : SANGITRAO S. PATIL, J.) :

Rule, returnable forthwith. With the consent of the learned counsel for the parties and the learned A.G.P., heard finally.

2. The petitioner has challenged the communications dated 29th November, 2016 and 23rd January, 2017, issued by respondent No. 2 seeking recovery of sugarcane purchase tax and arrears of sales tax, amounting to Rs.7,04,10,624/-, from the petitioner, which were liable to be recovered from respondent No. 4.

3. The petitioner is a Sugar Factory, registered under the Maharashtra Cooperative Societies Act, 1960 ("MCS Act", for short) and is engaged in the business of manufacturing sugar by crushing sugarcane. Respondent No. 4 also is a Sugar Factory registered under the provisions of the MCS Act. It was engaged in the same business. Respondent No. 1 is the State of Maharashtra represented through its Secretary, Finance Department,

respondent No. 2 is the Assistant Sales Tax Commissioner, while respondent No. 3 is the Maharashtra Cooperative Bank Ltd.

4. The factual matrix of the matter is that respondent No. 4, while carrying on the business of manufacturing of sugar by crushing sugarcane, obtained financial assistance from respondent No. 3 Bank, which is a secured creditor. Respondent No. 4 had mortgaged its immovable property with respondent No. 3 and created an interest in favour of respondent No. 3 within the meaning of the term "secured interest" under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act", for short). Respondent No. 4 stopped its business of manufacturing sugar. Respondent No. 4 committed default in repaying the loan that was obtained from respondent No.3. Therefore, by invoking the powers under the SARFAESI Act, respondent No. 3 took possession of the movable and immovable properties of respondent No. 4 on 1st March, 2011. Respondent No. 3 called upon respondent No.4 to clear off the outstanding dues. However, respondent No.4 failed to do so. Respondent No.3 then issued and published a tender notice on 16th

January, 2012 for sale of movable and immovable properties of respondent No.4 for recovery of the loan amount with interest. The reserved price was fixed for sale of the properties of respondent at Rs. 45.29 crores. These properties include the machinery as well as the lands and building (hereinafter referred to as "the secured assets") of respondent No. 4. As per the terms of the tender notice, respondent No. 3 had offered to sell the secured assets on "AS IS WHERE IS, AS IS WHAT IS AND WHATEVER THERE IS" basis, which was without any warranty, guarantee, assurance, undertaking or representation of any kind whatsoever. The Authorised Officer of respondent No.3 had clarified in clause 3 of the tender notice that he did not take or assume any responsibility for any shortfall of the movable or immovable assets for procuring any permission, etc. or for any dues, statutory or otherwise, of any authority established by law and such dues, if any, would have to be borne/paid by the purchaser. The last date of submission of bids was 14th February, 2012. The date and time of opening the bids was 11.00 a.m. on 16th February, 2012.

5. The petitioner being interested in purchasing

the secured assets of respondent No. 4, submitted its offer on 14th February, 2012 to purchase the same for Rs. 48.51 crores. The petitioner being the highest bidder, its offer was accepted and the sale was concluded in its favour. The sale certificate was duly registered in accordance with law on 27th November, 2012. The actual physical possession of the secured assets of respondent No. 4 was given to the petitioner by respondent No. 3 on 22nd November, 2012.

6. Respondent No. 2 had addressed a communication dated 6th March, 2012 to respondent No. 3 stating therein that the amount of Rs. 7,04,10,624/- was due and payable from respondent No. 4 towards sugarcane purchase tax, Bombay sales tax and Central sales tax and asking respondent No. 3 to treat this amount as the first charge on the sale-proceeds of the secured assets of respondent No. 4 proposed to be sold out and recover the same. Respondent No. 3 replied that communication on 2nd February, 2013 and denied its liability to recover any amount from the sale-proceeds of the secured assets of respondent No. 4. Respondent No. 3 further informed respondent No. 2 that the secured assets of respondent No. 4 were seized under the provisions of the SARFAESI

Act and sold out to the petitioner for Rs. 48.51 crores. Thereafter, respondent No. 2 issued the impugned communications to the petitioner for recovery of the dues outstanding against respondent No. 4 to the tune of Rs.7,04,10,624/- towards sugarcane purchase tax and arrears of State Sales Tax and Central sales tax.

7. The learned Senior Counsel for the petitioner submits that the petitioner has purchased the secured assets of respondent No.4 and not the business interest. Respondent No. 4 had already stopped its business of manufacturing sugar by crushing sugarcane. The petitioner did not purchase running business of respondent No. 4. The amount due and payable from respondent No. 4 towards sugarcane purchase tax and arrears of State sales tax and Central sales tax, which are not the dues against the secured assets, but against the business of respondent No.4, cannot be recovered from the petitioner. The learned Senior Counsel further submits that the above referred dues outstanding against respondent No. 4 were not made known to the petitioner when the petitioner placed the bid for purchase of the secured assets respondent No.4 on 14th February, 2012 or even when the sale certificate was registered on 21th

November, 2012. The charge of respondent No. 4 for the said dues was not reflected in the Record of Rights of the lands of respondent No. 4. The petitioner was not having even a constructive notice of the said charge. The petitioner is a bonafide purchaser of the secured assets for valuable consideration, without notice of any dues payable from respondent No.4 to respondent No.2 on account of sugarcane purchase tax or arrears of sales tax. Consequently, respondent No. 2 cannot recover the said amount from the petitioner.

8. The Joint Commissioner, State Tax, Nanded Division, Nanded filed affidavit-in-reply on behalf of respondent Nos.1 and 2. Based on the averments made in the said affidavit-in-reply, the learned A.G.P. submits that as per the terms of the public notice, issued by respondent No. 3 for auction sale of the secured assets of respondent No. 4, it was made clear that the purchaser would be liable to pay statutory dues outstanding against respondent No. 4. Respondent No.2 had intimated respondent No. 3 about the amount to be recovered from the sale-proceeds of the secured assets of respondent No. 4 towards sugarcane purchase tax and arrears of Bombay sales tax and Central sales tax vide

letter dated 6th March, 2012. Respondent No. 2 further informed the Talathi and the Circle Officer of Sajja Hadsani, Taluka Hadgaon, District Nanded vide communication dated 21st February, 2012 to record charge/lien in the Record of Rights of the secured assets of respondent No.4 for the above mentioned dues. Accordingly, Mutation Entry No. 1747 was effected and the charge was shown in the 7/12 extracts of the lands of respondent No. 4. The learned A.G.P. submits that the entries in the Record of Rights of the lands of respondent No. 4 in respect of the charge for the amount of Rs. 7,04,10,624/- would amount to constructive notice to all the parties including the petitioner, who placed bids in the auction sale of the secured assets. Therefore, the petitioner cannot evade payment of the said charges to respondent No.2. The learned A.G.P. further submits that after getting the sale certificate dated 27th November, 2012, the petitioner started its business of manufacturing sugar in the immediate next crushing season of 2013-14. Therefore, the petitioner would be considered as the transferee of business interest of respondent No. 4 and would be under an obligation to clear the outstanding statutory dues payable by respondent No. 4 to respondent No. 2. On

these grounds, he submits that the Writ Petition may be dismissed.

9. As stated above, the notice for sale of the secured assets of respondent No. 4 was published in "Daily Sakal" newspaper on 16th January, 2012. The last date for submission of bids was 14th February, 2012. The date of opening bids was 16th February, 2012. Since the petitioner was the highest bidder, its bid was accepted on 16th February, 2012. The tender notice and tender document show that the Authorised Officer himself was empowered to accept the bids and was not required to obtain approval from any other Authority prior to accepting the highest bid. Thus, the auction sale practically was concluded on 16th February, 2012 itself when the bid of the petitioner was accepted unconditionally.

10. Respondent No. 2 seems to have moved the Talathi and Circle Officer for placing the charge of the dues outstanding against respondent NO. 4 towards the sugarcane purchase tax and arrears of sales tax amounting to Rs. 7,04,10,624/- for the first time vide letter dated 21st February, 2012 (Exh-R1). Mutation Entry No. 1747 showing charge of respondent No. 2

against the secured lands was certified by the Circle Officer on 15th August, 2012. After certification of that Mutation Entry, the charge of respondent No.4 came to be shown in the 7/12 extracts of the lands of respondent No.4. The sale certificate was registered on 21st November, 2012. The 7/12 extracts of the lands - subject matter of the sale were annexed to the sale certificate. The charge of respondent No. 2 was not shown in the said 7/12 extracts. In the circumstances, the petitioner cannot be attributed with the knowledge or notice, either actual or constructive, of the charge of respondent No. 2 in respect of the amount due and payable from respondent No. 4 towards sugarcane purchase tax and arrears of sales tax when it placed the bid for purchase of the secured assets on 16th February, 2012.

11. The learned Senior Counsel for the petitioner cited the judgment in the case of ***Sherwood Resorts Pvt. Ltd. and another Vs. State of Maharashtra and others*** 2015 SCC OnLine Bom. 5065. In that case, an attachment order dated 29th April, 2013 (actually signed on 2nd May, 2013), was passed by the Sales Tax Authorities against the immovable property purchased by the petitioners pursuant to an auction sale conducted by

SICOM, secured creditor, under the provisions of the SARFAESI Act.

12. It was the case of the petitioners that they purchased the immovable property belonging to M/s Iccon Oil and Specialities Ltd. (for short called as "Iccon Oil Ltd.") for valuable consideration without any notice of the alleged charge of the Sales Tax Authorities. The sale notice was issued on 25th august, 2012 under the SARFAESI Act, inviting offers in respect of the secured assets on an "As is where is" and "As is what is" basis. The petitioners being desirous of purchasing the said secured assets, placed bid in the public auction held on 10th September, 2012. The offer of the petitioners came to be accepted by SICOM. SICOM confirmed receipt of the entire sale consideration on 1st April, 2013 and requested the petitioners to proceed with the execution of the sale certificate. It was the case of the petitioners that prior to purchasing the secured assets, they undertook a complete title due diligence and obtained 7/12 extract in respect of the secured assets which recorded the name of Iccon Oil Ltd. as the owner. In the said 7/12 extract, no charge of the Sales Tax Authorities was reflected at that time. Considering

that 7/12 extract, the petitioners decided to bid for the secured assets. When the petitioners could not obtain registration of the sale certificate on account of the excessive stamp duty demanded by the Registering Authority, the petitioners again applied for and obtained the latest 7/12 extract dated 9th January, 2014 in respect of the secured assets. At that time, they were shocked and surprised to know that in that 7/12 extract, there was an additional entry showing charge of Rs.2,77,72,073/- of the Sales Tax Authorities.

13. The petitioners therein contended that they had bonafide purchased the secured assets by paying full consideration to SICOM on 21st March, 2013, without knowledge of the alleged encumbrance of the Sales Tax Authorities. Therefore, they challenged the legality and validity of the attachment order dated 29th April, 2013, issued by the Sales Tax Authorities.

14. Considering the facts and circumstances of the case as well as the rival contentions of the learned counsel for the contesting parties, it was observed in paragraph No. 23 of the judgment that when the sale notice was published on 25th August, 2012, inviting offers in respect of the secured assets, the Sales Tax

Authorities did not object to the sale of the secured assets on the ground that they had a claim against Iccon Oil Ltd. It was further observed that the petitioners had obtained the 7/12 extract issued on 15th May, 2012 prior to bidding for the secured property. It did not reflect charge of the Sales Tax Authorities. Therefore, the petitioners bonafide believed that the charge of the Sales Tax Authorities, which was not reflected in the 7/12 extract, was not there against the secured assets and placed bid for the secured assets which was accepted by SICOM on 15th March, 2013. The petitioners made full payment of the sale consideration on 21st March, 2013.

15. In the above background, in paragraph No. 28 of the judgment, this Court referred to a decision of the Hon'ble the Apex Court in the case of **State of Karnataka Vs. Shreyas Paper Mills Ltd. (2006) 1 SCC 615** and more particularly, paragraph Nos. 18 to 21 thereof on the issue of enforcement of charge, which read as under:-

"18. The next limb of Mr Hegde's arguments was that since Section 13(2)(i) of the KST Act creates a charge on the property of the defaulting company, the charge would continue

on the properties, even if it changes hands by transfer.

19. While the expression "charge" is not defined by the KST Act, this concept is well known in property law and has been defined by Section 100 of the Transfer of Property Act, 1882 (hereinafter "the TP Act"). Here "charge" is defined as:

"100. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

20. As the section itself unambiguously indicates, a charge may not be enforced against a transferee if she/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 Datar [(1974) 2 SCC 799, 811 (para 18)] and in Ahmedabad Municipal Corpn. of the City of Ahmedabad v. Haji Abdulgafur Haji Hussenbhai [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] (hereinafter "Ahmedabad Municipal Corpn."). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case.

21. Ahmedabad Municipal Corpn. [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] 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 the 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. [Ibid., at SCC pp. 765-66 (para 12) : AIR pp. 1207-08(para 8)] 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 Corpn. [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] has been correctly applied in a sales tax case similar to the present case. [CTO v. R.K. Steels, (1998) 108 STC 161 (Mad)].

16. In the case at hand, the facts are almost similar. The notice for auction of the secured assets of respondent No. 4 under the provisions of SARFAESI Act was published by respondent No. 3 in "Daily Sakal" newspaper on 16th January, 2012. Respondent NO. 2 or any other Sales Tax Authority did not object to the proposed auction of the secured assets of respondent No. 4. It is the specific case of the petitioner that it obtained

7/12 extracts of the lands - subject matter of the auction sale prior to placing bid in the auction. In the said 7/12 extracts, the charge of Sales Tax Authorities was not reflected. The said 7/12 extracts are the part and parcel of the sale certificate dated 21st November, 2012.

17. It is stated by the petitioner that the Sales Tax Officer had informed respondent No. 3 vide letter dated 6th March, 2012 that there were dues to the tune of Rs.7,04,10,624/- payable from respondent NO. 4 towards sugarcane purchase tax, Bombay sales tax and Central sales tax and asking respondent No. 3 to recover the same on priority basis treating them as a first charge over the sale-proceeds of the property of respondent No. 4. It is the specific case of the petitioner that respondent No. 3 did not inform about the said dues to the petitioner and further respondent No. 3 deliberately replied the letter dated 6th March, 2012 belatedly on 1st/2nd February, 2013. As stated above, the last date for submission of bids was 14th February, 2012 and the date of opening thereof was 16th February, 2012. It is, thus, clear that when the auction notice was published and the bids were opened,

there was no communication by the Sales Tax Authorities made with even respondent NO. 3 about the dues pending against respondent No. 4. Therefore, the communication dated 6th March, 2012 made by the Sales Tax Officer to respondent NO. 3 would not be of any help to respondent No. 2 to show that the petitioner was made aware about the dues standing against respondent No. 4 prior to placing of the bid for purchase of the secured assets of respondent No. 4. Had the said dues been brought to the notice of the petitioner, the petitioner certainly would have thought twice to place the bid for purchasing the secured assets of respondent No. 4 for Rs. 48.51 crores. The petitioner certainly would have considered the bare value of the secured assets to be purchased and the other known charges/encumbrances attached to it. Perhaps, the petitioner would not have placed the bid for Rs. 48.51 crores and reduced it to the extent of the dues of respondent No. 2 payable from respondent No. 4. In the circumstances, it would be clear that the petitioner bonafide proposed to purchase the secured assets of respondent No.4 for valuable consideration without knowledge or notice, either actual or constructive, about the charge of the Sales Tax Authorities. Consequently, in view of the judgment in

the case of ***Sherwood Resorts Pvt. Ltd. and another*** (supra), respondent No. 2 cannot enforce the charge for Rs.7,04,10,624/- as claimed in the impugned communications dated 29th November, 2016 and 23rd January, 2017, against the secured assets purchased by the petitioner from respondent No. 3.

18. There is no dispute that the Sugar Factory of respondent No. 2 was not functioning when the secured assets were offered to be sold by respondent No. 3 by auction as per the public notice dated 16th January, 2012. Respondent No. 3 had taken possession of the secured assets of respondent No. 4 on 1st March, 2011 itself. In the letter dated 21st February, 2012, addressed by respondent No.2 to the Talathi/Circle Officer, Sajja Hadsani, Taluka Hadgaon, there is specific mention about defunct status of the Sugar Factory of respondent No.4. The letter dated 6th March, 2012 addressed by respondent No.2 to respondent No.3 also contains a positive statement that the Sugar Factory of respondent No.4 is defunct. The Sugar Factory of respondent No. 4 was in possession of respondent No. 3 from 1st March, 2011 onwards. Admittedly, respondent No.3 had no licence to run Sugar Factory. It is not the

case of any of the respondents that it was being run by respondent No.3 for manufacturing sugar until issuance of public notice for auction sale on 16th January, 2012 and even thereafter till it was given in possession of the petitioner on 22nd November, 2012. If the petitioner makes such defunct factory functional and starts manufacturing sugar under its own licence, it cannot be said that the petitioner purchased the business interest of respondent no. 4. It is, thus, clear that the petitioner has not purchased and succeeded the business interest of respondent NO. 4.

19. The learned Senior Counsel for the petitioner cited the judgment in the case of ***National Steel and Agro Industries Limited, Mumbai Vs. State of Maharashtra and others 2015 DJLS (Bom) 88***, to which one of us (S.C. Dharmadhikari, J.) was a party, wherein, almost under the similar circumstances, it has been held that the dues of the sales tax are not the dues against the property, but against the business. The transfer of ownership of business requires that the business should be sold as an ongoing concern so as to render the transferee as a successor in business interest of the transferor. Only in such an eventuality, the transferee

would be liable for the transferor's sales tax liabilities. In the present case, respondent No. 3 did not transfer the business of respondent No. 4 either in whole or in part to the petitioner. Consequently, the petitioner cannot be held liable to pay the sugarcane purchase tax and arrears of sales tax due from respondent No.4.

20. In the case of ***Sherwood Resorts Pvt. Ltd. and another*** (supra), the sale certificate was not registered. Even then, this Court held that the Sales Tax Authorities cannot enforce their charge against the secured assets purchased by the petitioners therein. In the present case, the sale certificate has already been registered on 21st November, 2012. Not only that, the 7/12 extracts produced by respondent No. 2 with his affidavit-in-reply show that the name of the petitioner has been mutated in the Record of Rights of the lands purchased by it in the auction sale vide Mutation Entry No. 1769. Moreover, the petitioner has obtained loan from the Union Bank of India, Branch at Nanded by creating mortgage on the said lands. Thus, the case of the petitioner is on a better footing than that of the petitioners in the case of ***Sherwood Resorts Pvt. Ltd.***

and another (supra).

21. The case of ***M/s Sonoma Management Partners Pvt.Ltd. And others Vs. bank of Maharashtra and others*** 2016 SCC OnLine Bom 9649, cited on behalf of the petitioner, also is on the same lines as that of the above referred judgments.

22. For the above mentioned reasons, we hold that respondent NO. 2 cannot recover the dues payable from respondent No. 4 by enforcing any charge against the secured assets purchased by the petitioner in the auction. The impugned communications are liable to be set aside and accordingly, set aside. However, we make it clear that our order does not mean that respondent No. 2 cannot proceed against respondent No. 4 - defaulter factory. We further clarify that we have not entered into the controversy regarding the priority since it was not an issue before us. The issue of priority between the Sales Tax Authorities and respondent No. 3 shall be decided in appropriate proceedings before the appropriate forum in accordance with law.

23. The Writ Petition is allowed. The Rule is accordingly made absolute in the aforesaid terms. However, in the circumstances of the case, we direct the parties to bear their own costs.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

Sd/-
[**S.C. DHARMADHIKARI**]
JUDGE

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