

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**Civil Writ Petition No. 35417 of 2019 (O&M)
Date of Decision: 10.08.2020**

M/s. Kamla Engg. & Steel Industries, Ludhiana

..... Petitioner

Versus

Punjab National Bank, Ludhiana and others

..... Respondents

**CORAM: HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present: Mr. Aalok Jagga, Advocate
for the petitioner.

Mr. R.S. Bhatia, Advocate
for respondent No. 1 – Punjab National Bank.

Mr. Aman Sharma, Advocate
for respondent No. 3 – GLADA.

Mr. Anshuman Chopra, Advocate for CBEC.

Mr. Sunish Bindlish, Advocate
for respondent Nos. 4 & 5.

*[The aforesaid presence is being recorded through video conferencing
since the proceedings are being conducted in virtual court]*

JASWANT SINGH, J.

1. Present petition has been filed by petitioner, a partnership firm aggrieved against letter dated 15.10.2019 (**Annexure P-3**) issued by respondent No. 3 – Greater Ludhiana Area Development Authority (hereinafter referred as to “*GLADA*”), vide which it has expressed reluctance to transfer property bearing Plot No. BN-15 , MC No. B – XXX – 1845 , near HDFC Bank , Phase II , Focal Point , Ludhiana – 141010 (hereinafter referred to as “*secured asset*”) in favor of the petitioner. The secured asset was sold to the petitioner in an open auction conducted on 09.05.2019, by Debts Recovery Tribunal (DRT), in execution proceedings initiated by

Recovery Officer (RO) pursuant to Decree / Recovery Certificate (RC) obtained by Punjab National Bank (hereinafter referred to as “PNB” or “Secured Creditor”), *inter alia* on the ground that the erstwhile owner/borrower has to pay certain dues to the Central Excise Department. It has further prayed that direction may be issued to respondent No. 3 to transfer the property in favor of petitioner by holding that the petitioner / auction purchaser is not liable to pay the dues of the erstwhile owner/borrower to the Central Excise. Petitioner has also made an alternative prayer seeking refund of the auction money i.e. Rs. 6,00,10,000/- in case, if the aforesaid prayer is not to be granted.

FACTUAL BACKGROUND

2. The brief facts of the case are that, Punjab National Bank – Respondent No. 1 (hereinafter referred to as “Secured Creditor”) had initiated recovery proceedings against the borrower M/s AIP industries and its guarantors , by filing of Original Application (OA) No. 502/2012 under Section 19(1) of the Recovery of Debts And Bankruptcy Act, 1993 (hereinafter referred to as “Recovery Act,1993”) before the Debts Recovery Tribunal – III, Chandigarh claiming an amount of Rs. 9,19,77,453 alongwith future and *pendente lite* interest on the basis of mortgage of the secured asset effected in its favour. The said Original Application, was decreed in favour of the secured creditor-Punjab National Bank on 07.09.2014, and Recovery Certificate (RC) was issued under Section 19 (22) of the Act, 1993 vide which PNB was held entitled to recover the aforesaid amount from the defendants / borrowers in the OA.

3. Since the Judgment Debtors/Borrowers, did not satisfy the RC/Decree, execution proceedings were carried out before the Recovery Officer, DRT -III, Chandigarh in Recovery Certificate No. 1237 of 2017 under Section 29 of the Recovery of Debts and Bankruptcy Act, 1993 pursuant to which proceedings were required to be carried out against the defaulters in terms of Second Schedule to the Income Tax Act, 1961 (hereinafter referred to as "*Second Schedule*"). In terms of Rule 52 of the Second Schedule, the Recovery Officer (RO), issued Proclamation of Sale dated 29/03/2019 (**Annexure P-1**), vide which the secured assets/mortgaged property, bearing Plot No. BN-15 , MC No. B – XXX – 1845 , near HDFC Bank , Phase II , Focal Point , Ludhiana – 141010 (hereinafter referred to as "*secured asset*"), was put to sale by way of an open auction, on "as is where is basis" on 09.05.2019, with the Reserve Price of Rs. 6 Crore.

4. The petitioner participated in the auction and submitted its bid of Rs. 6,00,10,000/- to purchase the said property. After waiting for the stipulated period of 30 days, as provided under Rule 60-62 of the Second Schedule, when no objections for setting aside of the sale, were received from any quarters, the Recovery Officer DRT-III, Chandigarh, proceeded to confirm the sale under Rule 65 *ibid* and finally issued Certificate of Sale of immovable property on 25.07.2019 (**Annexure P-2**) in favor of the petitioner, pursuant to which the petitioner acquired title over the secured asset.

5. Thereafter, the petitioner seems to have approached respondent No. 3- GLADA, with an application dated 04.10.2019 submitted vide Diary No. 3921, requesting it for transfer of ownership of the secured asset in its

favour on the basis of sale certificate dated 25.07.2019 **(P-2)**. Respondent No. 3 vide its letter dated 15.10.2019 **(P-3)**, replied and stated that certain shortcomings have been noticed in the request submitted by the petitioner, which *inter alia* states that according to letter dated 31.12.2015, issued by Central Excise Department, an amount of Rs. 3139.70 lakh is outstanding and decision, with respect to the same may be intimated. Secondly, Urban Ceiling Officer, Ludhiana vide letter dated 28.09.1987, had restricted the transfer of the said property. The other requirements are of submission of certain documents on the part of the petitioner.

6. On 16.10.2019 **(Annexure P-4)**, petitioner replied and stated that the dues of Excise Department are outstanding and recoverable against the previous owner/borrower i.e. M/s AIP industries, with which the petitioner has no concern, as it has purchased the secured asset through an open e-auction conducted by the Debts Recovery Tribunal, Chandigarh. He further stated that as per Central Excise Act, 1944, as well as the provisions of the Recovery of Debts and Bankruptcy Act, 1993, the dues of the bank have prior charge over the dues of Central Excise and therefore the petitioner, having purchased the property from the secured creditor under the Act, 1993, was entitled to the transfer of the property in its favor.

7. Petitioner has also placed on record letter dated 06.12.2013 **(Annexure P-5)** and letter dated 31.12.2015 **(Annexure P-7)**, issued by Department of Central Excise - Respondent No. 4 addressed to GLADA - Respondent No. 3, from where it is apparent that the dues under the Central Excise/Service Tax are pending in respect of the borrower entity M/s AIP industries and not against the petitioner.

8. Having not received any further response from Respondent No. 3, petitioner has filed the present petition seeking quashing of letter dated 15.10.2019 **(P-3)** with a direction to Respondent No. 3 to transfer the said property/secured asset in favour of the petitioner, pursuant to sale certificate dated 25.07.2019 **(P-2)**.

ARGUMENTS

9. Sh. Aalok Jagga, learned counsel appearing for the petitioner has submitted oral as well as written submissions. He has argued that the transfer of property in question could not have been resisted by respondent No. 3, as he is an auction purchaser and has purchased the property for consideration, in execution proceedings, carried out pursuant to the Recovery Certificate issued by DRT Chandigarh in favour of secured creditor, under Section 19 (22) of the Recovery of Debts and Bankruptcy Act, 1993. He argues that, the petitioner derives its right from the secured creditor, which has priority of charge upon the secured asset and its dues have to be paid in priority over all other debts and government dues, including the revenue, taxes, cesses and rates due to the Central Government, State Government or local authority. He therefore submits that, respondent Nos. 4 & 5, cannot claim priority of charge upon the dues of the secured creditor and hence respondent No. 4 cannot resist the transfer. He further argues, that there is no charge created upon the property by the Central Excise and hence it cannot claim any right upon the property.

9.1 In support of his argument, he has relied upon section 31B of the Recovery of Debts and Bankruptcy Act, 1993, wherein priority to recover the secured debt has been specifically conferred upon the secured

creditor over and above the claim of Centre, State Government as also the Local Authority. He further places reliance upon Section 34 of the Act, 1993, to contend that the provisions of the this Act, 1993, shall have effect notwithstanding anything inconsistent therewith, contained in any other law for the time being in force. He further contends, that an amendment has been brought into Act, 1944 by virtue of Finance Act, 2011, by inserting Section 11E, wherein the Act, 1944 itself recognizes the dues payable to secured creditor to have priority over the dues of Central Excise. He further points out that a similar amendment has also been carried out in Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter referred to as “Act, 2002”) by the Amending Act, 2016 whereby Section 26E has been inserted which reinforces priority to the secured creditor to recover its dues from the secured assets over and above the Crowns Debt. The said provision has been notified by virtue of notification dated 26.12.2019 and the amendment has been brought in force from 24.1.2020.

9.2 He has further relied upon the judgment of Hon’ble Supreme Court in ***Union of India versus SICOM Ltd - 2009 (2) SCC 121; Rana Girders Limited versus Union of India - 2013 (10) SCC 746***; and ***Siddhi Sugar and Allied Industries Limited Versus State of Maharashtra bearing Writ Petition No. 14248 of 2018, decided on 26/04/2019*** by Division Bench of Bombay High Court to support his aforesaid argument.

10. Per contra, Sh. Sunish Bindlish, learned counsel for respondent Nos. 4 & 5 – Department of Central Excise, has submitted oral and as well as written submissions/arguments. On facts, he states that demand of Rs.

3139.70 Lakh was confirmed against M/s AIP Industries for taking inadmissible CENVAT Credit in contravention of CENVAT Credit Rules, 2004 and Central Excise Rules, 2002. Three Orders in Original dated 02.11.2010 , 03.12.2012 and 21.01.2013 for Rs. 1956.63 Lacs , Rs. 1178.07 lacs and Rs. 5 lacs were passed against the above mentioned assessee. He further states that assessee filed an appeal before Customs Excise and Service Tax Appellate Tribunal (CESTAT) on 30.05.11 against order dated 02.11.2010 which was dismissed vide order dated 12.08.2013 on account of non compliance of Section 35F of the Central Excise Act, 1944.

10.1 It is further submitted that Letters were written by Central Excise (Respondent No. 4) to Estate Officer GLADA, Ludhiana (Respondent No.3) on 06.12.2013, 19.11.2015, 31.12.201 and 02.09.2016 to provide the details of ownership of assesses' office address and details of any other property in the name of the assessee or its constituents. GLADA, Ludhiana vide letter dated 30.12.13 had informed that the property in question, is in the name of M/s Zodiac India. The GLADA office, Ludhiana did not inform the Central Excise, about the correct individual ownership of the property. In case, if correct information about the ownership of the subject property would have been provided, the Central Excise Department could have proceeded for the recovery of its dues under various provisions of the Central Excise Act, 1944 and Customs Act, 1962 by resorting to Section 11 of the Central Excise Act, 1944 and thereafter if dues remain unrecovered, proceedings under Section 142 of the Customs Act, 1962 would have been carried out. Further, vide Notification dated 04.05.1963, Section 142(1)(c)(ii) of the Customs Act 1962, has been made applicable to similar

matters in Central Excise, thereby empowering Central Excise Officers to attach and sell movable and/or immovable properties of any person who has failed to pay any sum due to the Government.

10.2 He further argues that no doubt, in terms of Section 11E of the Central Excise Act, 1944, the dues sought to be recovered by the secured creditor under the Recovery Act, 1993, have been saved from the First Charge of the Central Excise, but the dues recoverable from the erstwhile owner/borrower/assessee, were crystallized prior to the amendment under all the three enactments i.e. Central Excise Act, 1944, The Recovery Act, 1993 and Securitisation Act, 2002 and hence would be governed by the un-amended position of law, and therefore Central Excise would have priority to recover from the secured asset over and above the right of secured creditor. He further argues, that the Department could not have challenged the sale by filing objections under Rule 60 of the Second Schedule to Income Tax Act, 1961 as applicable to proceedings before Recovery Officer, on account of requirement of making pre-deposit. He further argues that petitioner should have been aware of the claim of Respondent No. 4. He further states, there are similar matters pending consideration and hence, the adjudication of the present writ petition should be deferred. By concluding the arguments, it was contended that the claim of the petitioner lacks merit and requires rejection.

11 Sh. R.S. Bhatia, learned counsel appearing for respondent No. 1-PNB (secured creditor) has supported the case of the petitioner and contended that it is the secured creditor, which has priority of charge upon the secured asset and the Recovery Officer had rightly put the property to

auction, in the execution proceedings carried out under the Act, 1993 pursuant to Recovery Certificate issued by DRT in its favor and consequently, respondent No. 3 could not have refused to transfer the property in favour of the petitioner on account of dues being claimed by respondent Nos. 4 & 5 which are actually the dues recoverable from the erstwhile owner.

ISSUES INVOLVED

12 Having heard the rival arguments, as advanced by the respective counsels for the parties, and with their able assistance scrutinized the record, we find the following issues would arise for determination:-

- i. Whether the dues of the secured creditor are to be paid in priority, by sale of secured assets specifically charged to it, vis-a-vis the arrears of outstanding dues under the Central Excise Act, 1944?
- ii. Whether the petitioner being successful auction purchaser, pursuant to an auction conducted by DRT under Recovery Act, 1993 would be liable to pay the dues being claimed by Central Excise originally payable by the erstwhile owner/assessee/borrower?
- Iii. Whether respondent No. 3 could have refused the transfer of the property in question in the name of the petitioner?

ISSUE No. 1

13 Before advertng to the facts of the case, we find that it would be appropriate to first examine the scope of the relevant provisions in brief

as contained in the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as “*Recovery Act, 1993*”), Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “*Securitisation Act, 2002*”) and Central Excise Act, 1944.

14 The Recovery Act, 1993, was enacted with the object and reason that the Banks and Financial Institution, were experiencing considerable difficulties in recovering loans and enforcement of securities charged with them. There had been sizable dispute and litigation, where the banks, were claiming priority of charge and their entitlement to recover their secured debt from the secured assets, duly mortgaged to them vis-a-vis claims of Government Departments/Crown’s Debt. Acting in tune with the object of the Act, 1993 , the Legislature had finally set the controversy at rest by inserting **Section 31B** in the Recovery Act, 1993 by enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2016 (hereinafter referred to as “*Amendment Act, 2016*”) and the said provision **came into force on 01/09/2016**. Section 31B and Section 34, of the Recovery Act, 1993 read as under:-

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

Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings

are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.]

34. Act to have overriding effect. - (1) *Save as provided under subsection (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.*

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the [Unit Trust of India Act, 1963 (52 of 1963)], the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), [the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).]

[Emphasis supplied]

A bare perusal of the above, would leave no manner of doubt that apart from the fact, that Section 31B starts with the non-obstante clause, it gives priority to the secured creditors to realise their secured debts by sale of assets over which security interest is created and the same shall be paid in priority over all other debts and Government dues. Still further, Section 34 of the Recovery Act, 1993, from its inception provides the overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

15 Even the Securitisation Act, 2002 witnessed an amendment with the **insertion of Section 26E**, by way of Section 18 of the Amending Act, 2016. The same was notified vide **notification dated 26.12.2019** issued by Ministry of Finance, Government of India, whereby it **appointed 24.01.2020** as the date on which Section 17-19 of the Amendment Act, 2002

was brought into force. Section 26E of the Securitisation Act, 2002 reads as under :-

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

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

[Emphasis supplied]

Thus, the same principle of priority of right of the secured creditor to recover its dues from the sale of secured asset, was introduced under the Securitisation Act, 2002, akin to Section 31B of the Recovery Act, 1993. Further, Section 35 of the Securitisation Act, 2002, from its inception provides overriding effect, which reads as under:-

35. The provisions of this Act to override other laws. - The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

16 Now coming to the Central Excise Act, 1944, it would be interesting to note that even before the Recovery Act, 1993 and Securitisation Act, 2002 were amended, it was the Act, 1944 which witnessed an amendment by virtue of Finance Act, 2011, whereby **Section 11E** was inserted into the Act, 1944, **which came into force on 08.04.2011**, thereby it recognized and saved the prior right of the secured creditor to recover their dues from the secured asset. Section 11E , reads as under :-

*11E. Liability under Act to be first charge. - Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, **save as otherwise provided in section 529A of the Companies Act, 1956, (1 of 1956) the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) [The Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016]** be the first charge on the property of the assessee or the person, as the case may be.*

[Emphasis supplied]

It is thus clear, that the Central Excise Act, 1944 itself recognized the prior right of the creditor to recover its dues from the secured asset under the Recovery Act, 1993 and Securitisation Act, 2002, much prior to the amendment under these two enactments took place. With the coming into effect Insolvency and Bankruptcy Code, 2016 vide notification dated 28.05.2016 issued by Government of India, an amendment was effected in Section 11E of the Act, 1944 by inserting the words Insolvency and Bankruptcy Code, 2016 alongwith Recovery Act, 1993 and Securitisation Act, 2002, and this is how, the above reproduced provision exists as of now.

17. The undisputed legal position which emerges is that a conjoint reading of the relevant provisions of all the three enactments, i.e. Recovery Act, 1993 , Securitisation Act, 2002 and Central Excise, 1944 would show that the **secured creditor shall have a prior right of recovery from the sale of the secured assets, over and above the right of Central Excise.**

18. Now reverting back to the facts, the first argument of the Ld. Counsel for Central Excise, is that the recoverable dues were crystallized in

their favour prior to the aforesaid amendments and the said amendments brought under the Central Excise Act, 1944, Recovery Act, 1993 and Securitisation Act, 2002 are prospective in nature and hence would not apply to claims crystallized prior in time, even though pending to be recovered. Consequently, un-amended provisions should be considered by virtue of which Central Excise, shall have priority of right to recover from the secured asset, over and above the right of the secured creditor, and the therefore the petitioner cannot place reliance upon the amendments to build up its case.

We are afraid, this argument is untenable on both facts and law. While examining this contention on facts, we find that it has been pleaded by Central Excise, that the first Order in Original against the assessee/borrower was passed on 02.11.2010, but it remained a subject matter of appeal which was filed on 03.05.2011 before CESTAT and finally was dismissed on 12.08.2013 on account of non compliance of the mandatory condition of pre-deposit under Section 35F of the Act, 1944. Thus, before the order could attain finality, the Act, 1944 got amended with the introduction of Section 11E on 08.04.2011. The remaining two Orders in Original have been passed on 03.12.12 and 21.01.2013, which are otherwise, after the amendment / insertion of Section 11E in the Act, 1944. In other words, by the time the first order was finalized and the second and third orders were passed, the amendment by way of insertion of Section 11E in the Central Excise Act, 1944 was already in place and hence, even on factual aspect, the contention that the amendment was subsequent and hence not applicable, cannot be accepted. Therefore, Central Excise is not on a

firm footing when it contends that dues payable to them had been crystallized prior to the amendments under the respective enactments, more particularly under the Act, 1944. The argument, thus fails.

19. In spite of the aforesaid findings, we still deem it appropriate to test the aforesaid argument in law. An identical issue came up before the Full Bench of Orissa High Court in ***Sarthak Builders Pvt. Ltd v. Orissa Rural Development Corporation Limited 2014 AIR (Orissa) 83***, wherein the question referred for consideration was whether provisions of Securitization Act, 2002 can be invoked with reference to the loan transaction entered into prior to coming into force of the said Act? It was argued that vide notification issued by Ministry of Finance, it extended the provisions of Securitisation Act, 2002 to Orissa Rural Housing Development Corporation Limited with effect 10.11.2003, by including it, in the definition of 'Financial Institution' under Section 2(m) of Securitisation Act, 2002 and thus since on the date of loan transaction it was not the 'secured creditor' so as to invoke Section 13 of the Securitisation Act, 2002 it would not be competent to realize its dues by resorting to the provisions of the said Act, 2002. Disagreeing with this contention, it was held in paras 19-21, as under :-

“19. We are of view that a notification under Section 2(m) in respect of a financial institution brings such institution at par with statutory institutions covered by Section 2(m) prior to such notifications. From the date such notification is issued, remedies under the Act become available even if loan was advanced earlier.

20. Applying the above established propositions to the present context, it is clear that the statute intends to remedy a situation where recovery of loans of specified financial institutions were held up and are intended to be speedily recovered, without reference to

procedure of the Court, by way of Securitization, by a substituted procedure and forum. Such statute applies to pre existing rights and may not be held to be retrospective so as to be hit by presumption of prospectivity. Moreover, presumption in respect of a procedural statute is that such statute is retrospective and can apply to existing cause of action even if it has reference to past transactions. Present context is very similar to the situation in Dwarka Nath Bhargava and also covered by principles of law laid down in other judgments extracted above.

21. Accordingly, we answer the question in the affirmative and hold that the provisions of the SARFAESI Act apply to existing debts even if loan was advanced earlier. Similarly, as soon as by a notification of Central Government, a financial institution is notified for purposes of Section 2(m), the machinery of the Act becomes available to recover any outstanding and legally recoverable debt even if such loan was advanced earlier. The view taken in Subash Chandra Panda is overruled. We express our agreement with the view taken in Unique Engineering Works and Pradeep Kumar Gupta. The matter may now be listed before the Division Bench for being dealt with on merits.”

[Emphasis supplied]

20. The aforesaid judgment was then considered and approved by the Hon’ble Supreme Court in **M.D. Frozen Foods Exports Pvt. Ltd. v. Hero Fincorp Ltd 2017 (16) SCC 741**, and relevant extract of the judgment i.e. paras No 38 to 41 , reads as under:-

“38. The Full Bench of the Orissa High Court in *Sarthak Builders Pvt. Ltd. v. Orissa Rural Development Corporation Limited* (supra) has, in fact, succinctly sets out this aspect. No doubt, till the respondent was not a 'financial institution' within the meaning of Section 2(1)(m)(iv) of the SARFAESI Act, it was not a 'secured creditor' as defined under Section 2(1)(zd) of the SARFAESI Act and, thus, could not invoke the provisions of the SARFAESI Act. However, the right to proceed under the SARFAESI Act accrued once the Notification was issued. The Full Bench referred to a

*Division Bench judgment of the Uttarakhand High Court in **Unique Engineering Works v. Union of India, II 2004) BC 241 (DB)** which dealt with the issue of retrospectivity and retroactivity. In case of retroactivity, the Parliament takes note of the existing conditions and promulgates the remedial measures to rectify those conditions. In fact the SARFAESI Act, in our view, was to remedy such a position and provide a measure against secured interests. The scheme of the SARFAESI Act, is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance was covered under Section 2(f) of the said Act as a 'borrower'. Not only this expression, the definition clauses dealing with 'debt securities', 'financial assistance', 'financial assets', etc., clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements irrespective of the fact whether the lender was a notified 'financial institution' on the date of the execution of the agreement with the borrower or not. The scheme of the SARFAESI Act sets out an expeditious, procedural methodology, enabling the bank to take possession of the property for non-payment of dues, without intervention of the court. The mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it is substantive in character or has created an altogether new right. To accept the argument of the appellants would imply that they have an inherent right to delay the enforcement against the security interest.*

39. *The catena of judgments referred to by learned senior counsel for the appellants on substantive law not being retrospective in operation, unless expressly stated so in the Act would, thus, have no application to the matter in issue, in view of what we have observed aforesaid. On the other hand, as observed by Buckley, L.J. in **West v. Gwynne, 1911 2 Ch 1 at pp. 11, 12**, retrospective operation is one matter and interference with existing rights is another. In that context, it was ruled that the provisions of the Conveyancing of Law and Property Act, 1892 were held applicable to leases containing a covenant, condition or agreement against assigning, under-letting or parting with possession or disposing of land or property leased without license or consent to all leases whether executed before or*

*after the commencement of the Act. Such a construction was held not to make the Act retrospective in operation but merely effected the future existing rights under all leases whether executed before or after the date of that Act. (Discussed in **Trimbak Damodhar Raipurkar v. Assaram Hiranman Patil & Ors.**, 1962 Supp (1) SCR 700).*

40. *In a similar vein, are the observations made in the case of **In re Athlumney. Ex parte Wilson**, [1898] 2 Q.B. 547, where the question posed before the Queen's Division Bench was whether Section 23 of the Bankruptcy Act, 1890 was retrospective in its operation. In the aforementioned context, Wright, J., speaking for the Bench, illuminatingly opined:*

"Perhaps no rule of construction is more firmly established than this-that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only... it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them...It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception..."

(Emphasis supplied)

41. *Similarly, the date on which a debt is declared as an NPA would again have no impact. **We are, thus, of the view that the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent in terms of the parameters contended by learned senior counsel for the respondent and enlisted at serial Nos. i to iv in para 18.**"*

[Emphasis supplied]

It is thus apparent that the Hon'ble Supreme Court, while dealing with the amendment brought under Section 2(1)(m)(iv) of the Securitisation Act, 2002 held that since the Securitisation Act, 2002 is a procedural Act, **therefore the amendment brought into the said Act,**

would be atleast retroactive in nature and the amendments would apply to the live and existing debts in *present* which are yet to be recovered. [See *Jay Mahakali Rolling Mills v. Union of India and others, 2007 (12) SCC 198* and *M/s. Shanti Conductors (P) Ltd. v. Assam State Electricity Board, 2019 SCC Online SC 68*]. Recovery of claims and debts is a continuous and ongoing process and continues to remain in operation till the time the debt or the claims are fully recovered.

21. The same principle of retroactive operation, as is applicable to amendments brought under Securitisation Act, 2002 , would be applicable to the amendments brought under the Recovery Act, 1993 as well, as both these Acts, i.e. Recovery Act, 1993 and Securitisation Act, 2002 are complimentary to each other. This is evident from Section 37 of the Securitisation Act, 2002 which reads as under :-

37. Application of other laws not barred. - *The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.*

[Emphasis supplied]

The same view, regarding both the enactments being complimentary to each other, has been taken by the Hon'ble Supreme Court in *Transcore V/s Union of India 2008 (1) SCC 125*. The said view of then considered and reiterated by the Hon'ble Supreme Court in *Mathew Varghese v. M. Amritha Kumar 2014(5) SCC 610* and the relevant para of the judgment reads as under:-

*“42. A close reading of Section 37 shows that the provisions of the SARFAESI Act or the rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. **Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, SARFAESI Act and RDDB Act, would be complementary to each other.** In this context reliance can be placed upon the decision in **Transcore v. Union of India and Anr. reported in, (2008) 1 SCC 125.** In paragraph 64 it is stated as under after referring to Section 37 of the SARFAESI Act.*

*“...According to American Jurisprudence, 2d, Vol. 25, p.652, if in truth there is only one remedy, then the doctrine of election does not apply. **In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply.** Even according to Snell's Principles of Equity (31st Edn., p.119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.”*

(Emphasis supplied)

Further, in **United Bank of India v. Abhijit Tea Co. Pvt. Ltd 2000(7) SCC 357 and Nahar Industrial Enterprises Ltd v. Hong Kong & Shanghai Banking Corporation 2009(8) SCC 646**, Recovery Act, 1993 has been noticed to be a procedural Act, since, it precisely lays down, the manner and procedure of recovery of debts due to Banks and Financial Institutions. Since both Recovery Act, 1993 and Securitisation Act, 1993 are procedural in nature and complimentary to each other, therefore, the ratio of law, as noticed in the para 20 hereinabove, with regard to the applicability of principle of retroactive operation of the provisions of the Securitisation

Act, 2002 would apply with equal force to the amendment under the Recovery Act, 1993 as well, and the above judgments would apply with equal force, to the amendment brought under the Recovery Act, 1993 as well.

In view of above, we have no hesitation in concluding that the argument of the Central Excise, that the demands of Central Excise having been made / confirmed earlier than the aforesaid amendments under the aforesaid enactments which would have prospective operation in nature, and thus the demands under the Central Excise Act, 1944 would have precedence, is misplaced and hence is rejected.

22. There is yet another reason, why the defense of Central Excise, claiming right upon the secured asset, must fail. It is the conceded case of Central Excise that the property in question i.e. the secured asset, had never been attached in any manner, much less in the manner and procedure provided under Section 11 of the Central Excise Act, 1944. Section 11 of the Act, 1944 reads as under :

11. Recovery of sums due to Government. - In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, [including the amount required to be paid to the credit of the Central Government under section 11-D] the officer empowered by the [Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if

the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue:

[Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.]

[Emphasis Supplied]

Section 11 of the Act, 1944 enables, the Empowered Officer under the Act, 1944 to offset amounts due by attaching and sale of the excisable goods belonging to the assessee. If the entire dues are not recovered, the Central Excise can then issue a Certificate to the Collector, who shall then proceed against the borrower / assessee to recover the said remaining/said dues as if the same were arrears of land revenue in terms of Chapter VI – Collection of Land Revenue under the Punjab Land Revenue Act, 1887. Further, a reading of the proviso would show that only in case of sale or transfer of business or trade , the amounts recoverable under the

Central Excise Act, 1944 , can be recovered by attachment and sale of moveable property , specified therein, in custody and possession of the transferee, and not from the immoveable property i.e. the land and building.

It is thus, apparent that power of Central Excise to attach is only limited to excisable goods and/or moveable properties of the assessee and not the immoveable property, for which it would have to issue a Certificate to the Collector who would then proceed to recover the dues as arrears of land revenue, in terms of Section 67 of the Punjab Land Revenue Act, 1887, which procedure would then attract attachment. Section 67 of the Act, 1887 reads as under :-

67. Processes for recovery of arrears. - Subject to the other provisions of this Act, an arrear of land-revenue may be recovered by any one or more of the following processes, namely :-

(a) by service of writ of demand on the defaulter ;

(b) by arrest and detention of his person ;

(c) by distress and sale of his movable property and uncut or ungathered crops;

(d) by transfer of the holding in respect of which the arrear is due;

(e) by attachment of the estate or holding in respect of which the arrear is due;

(f) by annulment of the assessment of that estate or holding;

(g) by sale of that estate or holding;

(h) by proceedings against other immovable property of the defaulter.

22.1 As per the conceded stand taken by the Central Excise, no such Certificate has been issued to the Collector concerned, certifying the arrears to be recovered as arrears of Land Revenue. Hence, there is no question of attachment of the property in question. Thus, the letter of Central Excise dated 31.12.2015 (P-7) addressed to GLADA – Respondent No. 3 cannot even be assumed as attachment in terms of the aforesaid provisions of the Act, 1944 read with Act, 1887. Further, it is the case of Central Excise, that

they had been writing letters to GLADA to ascertain about the details of the property of the assessee but they could not get the precise information and hence admittedly property in question was never got attached by Central Excise. It is further their case, that in case, they would have come to know about the property in question, they would have proceeded to get it attached under the Act, 1944 read with Section 67 of the Punjab Land Revenue Act, 1887. In other words, even according to Central Excise, the property in question / secured asset was never attached.

22.2 Still further, for the Central Excise to assert/enforce a right upon the secured asset, it ought to have had a charge upon the same. Section 100 of the Transfer of Property Act, 1882 (hereinafter referred to as “TP Act, 1882”) defines “Charge” as under :-

100. Charges. - *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.]***

The aforesaid provision provides two modes for creation of a charge *qua* immovable property. It could either be by an act of parties or by operation of law. The first mode of creation of charge, is by the act of parties and would include getting the property of the assessee attached in

terms of what is provided for, under Section 11 of the Central Excise Act, 1944 read with Section 67 of the Punjab Land Revenue Act, 1887 as explained in the previous paragraph. The second mode relates to creation of charge by operation of law itself. This would be in a situation where the statute itself provides for a charge to have been recognised over the property of the assessee in terms of the provisions of the enactment itself. In the present case, as can be seen from the provisions of the Central Excise Act, 1944 , there is no such charge created by the statute over the immovable property of the assessee. **Therefore, the charge ought to have been created by the Respondent – Central Excise by the first mode provided under Section 100 of the Act, 1882 i.e. the act of the parties, by proceeding to issue a certificate to the Collector to enable him to proceed for attachment of property of the assessee, being one of the mode of recovery, which concededly has not been done by the Respondent – Central Excise.**

22.3 It is well settled that, it is only when a charge is created by act of parties or exists by operation of law, upon the property, that question of priority arises to be determined. In the present case, the property in question had never been attached nor a charge was created by the Central Excise. Further, there is no provision which provides for creation of charge upon immovable property of assessee by operation of law. Therefore, Central Excise had no charge upon the property in question. Consequently, it had no locus to thwart/negate the entitlement of the secured creditor to sell the secured asset or deny the auction purchaser to enjoy natural fruits of the sale, upon which mortgage has been created in favour of secured creditor by

creation of mortgage in terms of Section 58 of the Transfer of Property Act, 1882, which mortgage has been upheld by DRT on issuance of Recovery Certificate. Even GLADA-Respondent No. 3, in its impugned letter dated 15.10.2019 **(P-3)** does not speak about any attachment of Central Excise upon the property in question and merely states that there are dues of Central Excise against the petitioner, which is factually incorrect as can be seen from the stand of Central Excise, which is claiming these dues from the erstwhile owner/borrower/assessee and not from the petitioner. It is thus, an erroneous notion on the part of Respondent No. 3, which is under an impression that these dues pertain to petitioner. **In view of above, on account to conspicuous absence of charge or attachment upon the secured asset in favour of Central Excise in the manner so provided under the Act, 1944, it could not even have claimed priority of charge vis-à-vis the claim of the secured creditor.**

23. In view of the aforesaid findings, the answer to Issue No.1 is answered in **AFFIRMATIVE**, and it is held, that the dues of the secured creditor are to be paid in priority by sale of secured assets specifically charged to it vis-a-vis the arrears of outstanding dues under the Central Excise Act, 1944.

ISSUE NO. 2

24. The next issue is whether the petitioner being successful auction purchaser, pursuant to an auction conducted by DRT under Recovery Act, 1993 would be liable to pay the dues of the erstwhile owner/assessee/defaulters-borrower?

Sh. Aalok Jagga, learned counsel for the petitioner has urged

and accordingly noticed, that there is a lot of litigation, arising from a situation where the secured creditors are either not able to sell the property owing to rival claims/charges on the property or if eventually sold are not able to achieve the market value of the secured asset due to such encumbrances. Further, large number of cases arise, where after purchasing the assets, the auction purchasers also face lot of difficulties as firstly, there is lot of uncertainty of the sudden claims of previous owner/s which might be foisted on the auction purchaser and secondly, uncertainty also exists over the dues which are payable and those which are not payable. In either of the cases, be it the secured creditor or the auction purchaser, they are forced to contest avoidable litigation to clear such charges being claimed on the property. He further argues that an auction purchaser invests money for purchasing the property to use it for a contemplated purpose. On account of such charges being claimed, it is a common sight to notice (like in the instant case), that such auction purchasers get involved in various litigations and during all this period it is not able to use the property for its designated purpose. Due to this delay which arises on account of contesting the various claims of its previous owner which is sought to be recovered from the property purchased by the auction purchaser, the interest payable to bank for loans availed by Auction Purchaser, keeps on mounting and the entire financial planning gets upset, leading to disastrous consequence (including their accounts being declared NPA) for an auction purchaser. Even the learned counsel for the Revenue has contended in his written submission that here is lot litigation pending on different issues of such nature.

It is in these aforesaid circumstances, that the counsels have

urged that issues incidental and ancillary may also be considered and decided while examining the controversy raised in backdrop of the facts of the present case.

25. Since we have noticed the difficulties being faced by the secured creditors and auction purchasers, we accept the submission of learned counsel for the parties, and deem it appropriate to examine the larger issue involved in such type of cases. Before proceeding further, we must add a caveat that though there may be issues and claims of varied nature, which cannot be exhaustively illustrated, but few of them can be examined herein. Apart from the controversy which has arisen on account of dues being claimed by Central Excise, we deem it appropriate to deal with other incidental issues as well, to bring out more clarity with respect to the rights of the parties, to the extent possible. It can be seen that, broadly following would be the nature of encumbrances / charges, which would be faced by the secured creditor or the auction purchaser, upon purchase of the secured asset in an auction conducted by or on behalf of the secured creditor:-

A. Charges being claimed by various third parties, including Government and Semi-Government entities upon the property (secured asset) by enforcing their claim/s, of the dues recoverable from the erstwhile owner/borrower of the property.

B. Dues which emanate out of utilization of the property (secured asset) itself by the erstwhile occupier / owner / borrower, that are sought to be recovered from the auction purchaser.

POINT-A

26. Before dealing with the broader issues, let's first examine the issue involved in the case in hand. On examination of Issue No. 1, it is clear

that the secured creditor has the prior right of recovery from the secured asset, as opposed to the claim of Central Excise. The requirement of determination of the present issue arises, when the secured asset is sold and purchased by the auction purchaser, like in the present case, it faces resistance from the revenue authorities in transferring the property in its favour on account of various claims which are now sought to be enforced against the auction purchaser. Having held that the secured creditor has a prior right of recovery in Issue No. 1, could the said claims be still enforced against the auction purchaser, is the issue to be examined.

26.1. Hon'ble Supreme Court in ***Union of India v. SICOM Limited*** reported as ***2009(2) SCC 121*** , dealt with a similar issue and the relevant paras i.e. para 27-32, of the said judgment read as under:-

“27. A bare perusal of the aforementioned provision clearly goes to show that the right to recover must start with the sale of excisable goods. It is only when the dues of the Central Excise Department are not satisfied by sale of such excisable goods, proceedings may be initiated to recover the dues as land revenue.

28. We may notice that a Division Bench of Orissa High Court in ***Suburban Ply & Panels Pvt. Ltd. v. Assistant Commissioner of Central Excise & Customs, BBSR [2002 (144) ELT 257 (Ori)]***, despite noticing *Dena Bank (supra)* as also other decisions, relying on Section 11 of the Central Excise Act and Rule 230(2) of the Central Excise Rules held as under :

"The rule is prima facie wide in its operation. There is no challenge to the validity of the rule in this proceeding. Going by Sub-Rule (2) of Rule 230, it appears to us that a change in ownership of the undertaking would not in any manner effect the obligation of the person liable to pay excise duty and authority concerned has the right to proceed against the successor in business or transferee even though the duty is assessed subsequently but the liability had arisen before such transfer. In other words, the right is given to the department to proceed against the Undertaking or its products or machinery even though it may be in the hands of the transferee. On a plain reading of the rule, it appears to us

that if the defaulter had sold the Undertaking, the transferee would be liable for the excise duty that remained outstanding as on the date of transfer in its favour."

29. The High Court, with utmost respect, proceeded on a wrong premise that only in terms of sub-section (4) of Section 29, proceeds of the sale will be held in trust by the Financial Corporation and appropriated towards the discharge of the debt due to it after first applying the proceeds in payment of cost charges and expenses incurred and the balance to be paid to the person entitled and having regard to the doctrine of Crown debt, the auction purchaser must satisfy it.

30. The Orissa High Court failed to notice the binding precedent of this Court in Dena Bank in its proper perspective. We are concerned here with the respective rights of a secured creditor and unsecured creditor over a property. If the finding of the Orissa High Court is correct, there was no necessity for the State Legislatures or the Parliament to amend laws incorporating provisions to create first charge over the properties of the debtor. The High Court failed to notice Article 372 of the Constitution as also the well settled principles of law that a statutory provision shall prevail over the Crown debt.

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

"Section 46B--Effect of Act on other laws--The provision 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."

32. The non-obstante clause shall not only prevail over the contract but also other laws. [See **Periyar & Pareekanni Rubber Ltd. v. State of Kerala (2008 (4) SCALE 125)**]"

[Emphasis supplied]

It was thus held, that since Section 46B of the State Financial Corporations Act, 1951 had a *non obstante* clause, the dues of the secured

creditor were to be paid in priority to the dues being claimed by Central Excise. Likewise, both Recovery Act, 1993 and Securitization Act, 2002 contain such *non obstante* clause i.e. Section 31B read with Section 34 (overriding effect) of the Recovery Act, 1993 and Section 26E read with Section 35 (overriding effect) of the Securitization Act, 2002, and hence, the ratio of law as laid down in the above case would apply to the present case, not only with equal force, but on better footing in view of *non obstante* clause being further fortified by the overriding effect of the twin enactments.

26.2. The aforesaid decision was then considered and followed by the Hon'ble Supreme Court in *M/s. Rana Girders Ltd. v. Union of India reported as 2013 (10) SCC 746*, wherein the sale notice was issued by the secured creditor with the stipulation that all the statutory liabilities arising out of the land shall be borne by purchaser. It was in this backdrop that, the Hon'ble Court held in para 23 to 24 as under:-

"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.***

24. We thus conclude that the judgment of the High Court is unsustainable in law. Accordingly, the appeal is allowed and the impugned judgment of the High Court is set aside. As a consequence the notice of the Excise Department calling upon the appellant to pay the dues of the erstwhile owner of the unit in question also stands quashed. The appellant shall also be entitled to cost of this appeal.”

[Emphasis supplied]

In the aforesaid case, Hon’ble Supreme Court upheld the prior right of recovery in favor of the secured creditor on account of *non obstante* clause in the State Financial Corporation Act, 1951. As a necessary corollary, it was held that the auction purchaser who had purchased the property from the secured creditor in an auction under the Act, 1951 would not be liable to pay for the dues of the Central Excise not being statutory dues arising out land and building or plant and machinery of the of the erstwhile borrower/assessee. It further noticed that it is only the

assets which have been purchased by the auction purchaser in the auction conducted by the secured creditor and not the entire business undertaking as a whole and hence, the purchaser on this ground also would not be liable for the dues of Central Excise and likewise dues of the erstwhile owner.

26.3 The aforesaid judgment has been recently considered by a Division Bench of Bombay High Court in the case of ***Siddhi Sugar and Allied Industries Ltd. v. State of Maharashtra – 2020 (1) DRTC 36*** , and the relevant paras being para No. 10, 12 to 15 , reads as under:-

*“10. Excise dues is not a liability arising out of land, building or machinery. The excise duty is payable on manufacture of excisable goods. The excise department cannot claim priority charge over the respondent No. 6/bank. The reliance placed by the respondent Nos. 2 to 4/department in a case of ***M/s Rana Girders Ltd. v. Union of India and others*** would not be of any avail to the respondent Nos. 2 to 4. On the contrary the said judgment would go against the respondents. In the said judgment the Apex Court observed that, it is only in those cases where the buyer has purchased the entire defaulting unit, entire business itself, it would be his responsibility 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 from the purchaser.*

11. xxxxxx

xxxxx

12. Section 11E of the Central Excise Act provides that the duty payable by an assessee under the Central Excise Act or the Rules made thereunder shall, save as otherwise provided under the Securitization Act 2002 and the other acts detailed therein be the first charge on the property of the assessee or the person as the case may be. **Section 11E of the Central Excise Act will have to be read subject to the provisions of the Securitization Act. Section 35 of the Securitization Act provides that the provisions of the Securitization Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or**

any instrument having effect by virtue of any such law. We are not referring to Section 26E of the Securitization Act. Said provision was not in force, at the time the auction had taken place and the petitioner had purchased the property. However, without aid of Section 26E of the Securitization Act, it can be safely concluded that the secured creditor/bank shall have a priority claim over the claim of the excise department.

13. The respondent Nos. 2 to 4 have also placed reliance on Section 37 of the Securitization Act. The said provision also does not inure to the benefit of respondent Nos. 2 to 4. Section 37 of the Securitization Act says that the provisions of the said Act shall be in addition to and not in derogation of the acts enumerated therein. The Central Excise Act does not find place in Section 37 of the Securitization Act.

14. Moreover, at the time the movable and immovable assets of the respondent No. 5 were put to auction by the respondent No. 6 and the petitioner purchased the same in auction till then, the respondent Nos. 2 to 4/Excise Department had not attached any of the movable or immovable property of the respondent No. 5. No charge was created over the assets of the respondent No. 5 of the excise dues. The Central Excise dues were also not crystalized as on the date the property was put to auction and purchased by the petitioner. The order of recovery was passed by the Central Excise Department in the year 2012 that is after the sale of the assets of the respondent No. 5. For the aforesaid reasons we hold that the respondent Nos. 2 to 4 cannot demand the payment of excise dues of the respondent No. 5/Karkhana from the petitioner on the ground that the petitioner is purchaser of the movable and immovable assets of the respondent No. 5 in auction at the behest of the respondent No. 6/secured creditor under the provisions of the Securitization Act.

15. In the light of the above, the impugned communications are quashed and set aside. In case the respondent Nos. 2 to 4 have recovered amount from the petitioner towards excise dues of the respondent No. 5, the same shall be refunded to the petitioner within a period of three (03) months from today.”

[Emphasis supplied]

A perusal of the above would reveal, that while reiterating the law laid down by the Hon'ble Supreme Court in *Rana Girders Ltd. supra* it was held that, the charge of the Central Excise had yet not been created on the date when the secured asset was put to auction, which was then purchased by the petitioner therein, due to which Central Excise could not have claimed any right upon the property in question. Further, the Court also examined the interplay between Section 11E of Central Excise Act, 1944, Section 26E (though the said provision was not notified on the date of said judgment, as it has been subsequently notified vide notification dated 26.12.2019 with the appointed date as 24.01.2020, as has been dealt with in para 15 of the present judgment) and Section 37 of the Securitisation Act, 2002 and held that the purchaser of the secured asset was not liable to clear the dues being claimed by Central Excise from the erstwhile owner/borrower. It was also noticed, that the petitioner therein, had not taken over the entire business but had only purchased the immoveable property in an auction and hence was not liable to clear the liabilities created on the business/assets by the erstwhile owner/borrower, which is similar to the situation in the present case. The said judgment therefore, also completely supports the case of the petitioner herein.

26.4 There is another reason why the claim of Central Excise would not be sustainable against the petitioner. In view of the second part of Section 100 of the Transfer of Property Act, 1882 *ibid*, which while defining charge, states that “.....**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**” except if

saved by the provisions of the statute under which the claim is sought to recovered from auction purchaser. Thus, even assuming there would have been a charge in favor of Central Excise (concededly, there is no transferable charge over immovable property under the Central Excise Act , 1944 in the present case), it would still have to be seen that whether the petitioner / auction purchaser, to whom the property has been transferred for consideration had the notice of charge or not. This is because the second part of Section 100 of the TP Act, 1882 creates an exception to the first part of the provision, in as much as, it is states that even if there is a charge, still it would not be enforceable in case, if the transfer of the property has taken place, without notice of charge upon the transferee who has purchased the property with consideration. **It is therefore imperative, that in order to have an enforceable charge U/s 100 of the TP Act, 1882, upon the property both the ingredients, ought to have been satisfied i.e. Firstly, there ought to be a charge and Secondly, there must be a notice of the same to the transferee,** in such manner and mode, from where the transferee could reasonably attain knowledge (like revenue record etc.) of the existence of the said charge. Since in the present case, concededly Central Excise did not create any charge upon the property under Section 100 of the TP Act, 1882 question of determination of priority of charge vis-à-vis the secured creditor does not arise. It is only when Central Excise, would have created a charge and would have undertaken such act through which notice of charge would have been evident (like recording of lien in revenue record), could only then, the question of claim of priority in favor of Central Excise vis-à-vis secured creditor could have been raised by the

Central Excise.

The aforesaid finding finds support from the judgment of Hon'ble Supreme Court in *State of Karnataka V/s Shreyas Papers Pvt. Ltd.* **2006(1) SCC 615** and the relevant paras No. 17 and 18 reads as under:-

“17. As the section itself unambiguously indicates, a charge may not be enforced against a transferee if s/he (sic) 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 Chitaman Datar, (1974) 2 SCC 799 at p. 811 and in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenhbai, AIR 1971 Supreme Court 1201 at pp. 1202-1204 (Paragraph 3). (hereinafter "Ahmedabad Municipal Corporation"). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case.

18. 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. 87 Ibid, at pp. 1207-1208 (Paragraph 8). Deputy Commercial Tax Officer, Thudiyalur Assessment Circle, Coimbatore and Anr. v. R. K. Steels, (1998) 108 STC 161 (Mad).”

[Emphasis supplied]

The aforesaid view was then followed by a Division Bench of Bombay High Court in ***Krishna Lifestyle Techonolgies Ltd V/s Union of India 2008 (ELT 173 (BOM)***. It was thus, held that to claim a charge to be an enforceable charge, it would be mandatory to show by the authority concerned claiming such charge, that the transferee of the property had the notice of the charge. In case, it fails to do so, the result would be that such charge would not attain the status of an enforceable charge *qua* the transferee / Auction Purchaser and thus cannot be claimed from him. We would hasten to add, **that even if the Auction Purchaser would have had the notice of such charge, the enforceability of such charge *qua* the Auction Purchaser would still have to be tested on the touchstone of the priority of charge in view of the principles culled out**, in the backdrop of the amendment i.e. Section 11 E of the Central Excise, 1944 as well Section 31B of the Recovery Act, 1993 and Section 26E of Securitisation Act, 2020 as discussed in preceding paras No. 14 to 17 as also in the subsequent para No. 26.6 of the judgment.

26.5 In the instant case, concededly, since the Central Excise had never proceeded to create a charge, in terms of the first part of Section 100 of the Act, 1882, hence question of notice of charge, to the petitioner/subsequent transferee does not arise. **It is therefore held, that the petitioner, is a transferee for consideration without notice of previous claim of Central Excise, and therefore, on this ground also it is held the petitioner would not be liable to pay the dues of the erstwhile owner, to the Central Excise.**

26.6 To clarify even assuming that such charge would have been created by the Central Excise in terms of Section 100 of the TP Act, 1882 even then it would not have been treated to have priority over the secured creditor for the detailed reasons, as explained in the earlier parts of this judgment. We may add, that pursuant to the creation of charge in terms of Section 100 of the TP Act, 1882 by the Central Excise, it only enables itself to be entitled to raise a claim against the secured asset, though its claim for priority would still be determined in view of Section 31B Recovery Act, 1993 and Section 26E Securitisation Act, 2002 i.e. the enactments invoked by the secured creditor to recover its debts. As stated before in para No. 14 to 17 and 26.1, both these enactments i.e. Recovery Act, 1993 and Securitisation Act, 2002 not only have a non obstante clause in the provisions providing for prior right of recovery in favor of the secured creditor but also provides for overriding effect of the provisions of these twin enactments of whatever is found to be inconsistent thereto. **Therefore, the secured creditor and for that matter, even the auction purchaser, would not be adversely effected with the prior charge of the Central**

Excise.

26.7 Apart from above, we find that in many cases the Authorities concerned, after creating a charge, do not proceed further towards recovery. Thus, in a given case, it would also need examination regarding the enforceability of such charge on the touchstone of principles of Limitation, as well. A Division Bench of this Court in ***Municipal Committee v. Jaswant Rai ; 1990 CCC 636*** in para No. 23 held as under:-

“23. Thus, in our considered view the answer to the question is that the period of limitation for issuance of bill for the amount as well as the demand notice would be three years and it is only after the respondents have failed to meet the demand that the arrears would become the arrears of tax on the property and would be a charge on the property. When the arrears become a charge on the property, the limitation gets enlarged and the recovery could be made within twelve years. Similarly for recovering any taxes which may include even the house tax from movable property would be three years from the time it fell due as the limitation would be governed by Article 113 of the Limitation Act.”

[Emphasis supplied]

A similar view has been taken by a Division Bench of Gujarat High Court in ***Prakhar Estates Pvt. Ltd. V/s Union of India 2016 (336) ELT 495 (Guj)*** Thus, in a given case, it would also need to be seen whether such arrears of dues, claims, charges, liens etc. being claimed by such entities like Department of Electricity, Municipal Bodies, authorities under the Taxing statutes etc. would be within the period limitation or not, in order to test its enforceability. Since, in the present case, the said issue has not arisen for consideration, we therefore refrain from commenting any further on this aspect, but leave this issue open to be considered in an appropriate

case.

26.8 In view of above, since the auction purchaser has purchased the property / secured asset from the secured creditor, which has sold the property in exercise of its prior statutory right to recover, as also on the ground that the petitioner is transferee of the property in question , with consideration and without notice of claim of Respondent-Central Excise, **we hold that the petitioner / auction purchaser would not be liable to clear the liability recoverable from the erstwhile owner/borrower/assessee**, to the Central Excise. However, the Respondent – Central Excise, shall be free to recover the said dues by proceeding against the assessee, in accordance with law.

26.9. The above principle however, in our considered opinion, would be subject to an exception carved out, by virtue of Rule 9(7) to Rule 9(10) of the Security Interest (Enforcement) Rules, 2002 [hereinafter referred to as “*Rules, 2002*”] framed by the Central Government in exercise of powers under Section 38 of the Securitisation Act, 2002. Rule 9(7) to Rule 9(10) of the Rules , 2002 read as under :-

“9. Time of sale, issue of sale certificate and delivery of possession, etc.

(1) to (5) xxxx

xxxxx

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorized officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorized officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such

additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

(8) On such deposit of money for discharge of the encumbrances, the authorized officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.”

A perusal of the above, would reveal that the said Rules, provide for a situation where the Authorised Officer of Secured Creditor in its discretion decides to sell the property subject to any encumbrances which are specifically mentioned in the sale notice. Rule 9(7), deals with a situation where the secured creditor in exercise of its discretion decides to sell the secured asset subject to encumbrances. In that eventuality, it would have to specifically include such encumbrances in the sale notice which may required to be quantified by the secured creditor so that the auction purchaser is aware of the amount required to discharge the liability. It is on deposit of the said amount that the sale certificate shall be issued certifying that the property has been sold free from encumbrances known to the creditor. **Thus, when such an encumbrance is stipulated in the sale notice in terms of Rule 9(7) of the Rules, 2002, then the auction purchaser, in that eventuality would have to bear such encumbrance and the principle of priority of charge or claim would then, not be applicable.** This is because, the offer to sale itself is subject to the condition

of bearing the stipulated encumbrance by the auction purchaser, and if the latter accepts the offer, it would be bound by such terms of the sale notice.

Having discussed the position under the Securitisation Act, 2002 , we find that there is a similar mechanism under the Recovery Act, 1993 as well. After the issuance of the Recovery Certificate by the Tribunal under Section 19(22) of the Recovery Act, 1993, the Recovery Officer shall proceed in terms of Second and Third Schedule of Income Tax Act, 1961 in view of Section 29 of the Recovery Act, 1993 to execute the Recovery Certificate. As per Rule 53 of the Second Schedule to Income Tax Act, 1961, Proclamation of Sale is to be drawn up by the Recovery Officer which would *inter-alia* include details of property, its Reserve Price, amount of debt and any other thing, which the Recovery Officer, considers it material for a purchaser to know, in order to judge the nature and value of the property. Rule 53, reads as under:

“ 53. Contents of proclamation. - A proclamation of sale of immovable property shall be drawn up after notice to the defaulter, and shall state the time and place of sale, and shall specify, as fairly and accurately as possible, - (a) the property to be sold; (b) the revenue, if any, assessed upon the property or any part thereof; (c) the amount for the recovery of which the sale is ordered; [*] [(cc) the reserve price, if any, below which the property may not be sold; and] (d) any other thing which the Tax Recovery Officer considers it material for a purchaser to know, in order to judge the nature and value of the property.

[Emphasis supplied]

Thus, in case, if the property is decided to be sold with encumbrances, Rule 53, would enable the Recovery Officer, to include such

encumbrances as it may deem fit and in that eventuality the purchaser would be liable to clear such mentioned encumbrances. However, in case if no such encumbrances are mentioned in the **SALE NOTICE**, the claims and charges upon the property shall be governed by the principles of priority of charge/encumbrance as have been laid down in the present case.

27. After having discussed the issue in hand, the stage is now set to examine the ancillary issues i.e. the other encumbrances which the secured creditor or the auction purchaser would deal with pertaining to the secured asset. In so far as, encumbrances depicted in Point (A) are concerned, these are claimed by way of act of attachment being effected upon the secured asset, either pursuant to dues being claimed under various enactments, or through the process of recovery where attachment orders are passed by the courts/authorities, on the application of the claimants or by operation of law. These encumbrances shall include, dues which are claimed, by third party entities like Central Excise, Government dues, Semi Government , dues of private individuals seeking attachment on the property of the defaulter / borrower etc. It would thus be fruitful to discuss these claims broadly by their respective classification.

27.1 In so far as dues pertaining to Government are concerned, they are predominantly the taxation dues arising out of various taxing statutes. With the amendment brought in the Recovery Act, 1993 and the Securitisation Act, 2002 with the insertion of Section 31B and Section 26E respectively, prior right has been conferred upon the secured creditor to recover their dues vis-à-vis the dues payable to Centre or State Government or even local authorities. As has been discussed in the previous paras, if the

sale is conducted by the secured creditor and the secured asset, subject matter of sale, is charged with the dues of Government (not being dues emanating out of utilization of property as discussed in para 29 of the judgment), including the dues under the taxing statutes, it would not be the liability of the auction purchaser to pay the same in view the prior right secured in favor of the secured creditor by way of Section 31B of the Recovery Act, 1993 and Section 26E of the Securitisation Act, 2002 and their overriding effect of anything which inconsistent with the provisions of these twin Acts. **It is to be noticed that the rights of the auction purchaser, on purchasing the secured asset, are virtually derivative rights from the secured creditor.** Thus, if the auction purchaser has purchased the property from the secured creditor, it is the secured creditor which has exercised its right of priority to sell the secured asset to recover and appropriate its dues and **hence the auction purchaser cannot be called upon to pay the dues of the previous owner / borrower.**

27.2 In so far as dues of Semi Government and / or Government Agencies are concerned, it is commonly seen that the properties of the defaulters/borrowers are got attached, for recovery of their dues. For the purpose of illustration, it could be dues being claimed by various state procurement agencies, which allot paddy for purposes of milling of rice to various rice shellers pursuant to a milling agreement. If these millers default in supply of the contractual rice out of the allotted paddy or commit breach of milling agreement, it is commonly seen that these agencies proceed to attach the property of the defaulter miller/borrower to secure recovery of their dues and claims, either under Section 9 or Section 17 of the Arbitration

and Conciliation Act, 1996 or during execution of the award against the defaulter miller/borrower. Incidentally, it is noticed that such millers have also availed credit facilities from Bank / Financial Institution and have already mortgaged the same property which has been attached by the agencies, and such credit facilities later on account of default committed by the miller are declared NPA by the banks. While the banks proceed to sell the mortgaged property to recover the secured debts, it is noticed that due to attachments orders obtained by the agencies upon the secured asset/s, it does not get adequate buyers because of the encumbrance of attachment. If at all, it is able to sell it, the auction purchaser faces difficulty in getting the property transferred in its favor. Such attachments upon the property, which are obtained by the agencies or such other similarly placed entities, from the courts or arbitral tribunals are all unsecured attachments. **Such unsecured debts/claims cannot have precedence over the secured debts by virtue of prior mortgage rights of having been created in favor of the secured creditor by the owner/mortgagor and consequently cannot be treated as an encumbrance either for the secured creditor or for the auction purchaser.** The auction purchaser who has purchased such property from the secured creditor cannot be put to any disadvantageous position because of the such third party attachments. [needless to say we are talking about mortgage as mentioned in para 27.5]

27.3 It would be useful to refer to the judgment of Hon'ble Supreme Court in ***Dena Bank V/s Bhikhabhai Prabhudas Parekh 2000 (5) SCC 694***, which dealt with an identical issue, though dealing with a situation which existed prior to the amendment under the Recovery Act, 1993 and

Securitisation Act, 2002 with the insertion of Section 31B and 26E respectively, and held in para 9 held as under:-

“ 9. 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 pledgee 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, 1832 All England Reporter 563** it has been held that the Crown has no precedence over a pledgee of goods. In **Bank of Bihar v. State of Bihar and others, AIR 1971 Supreme Court 1210**, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L., Seventh Edition, p. 386) - **'It seems a Government debt in India is not entitled to precedence over a prior secured debt.'** ”

[Emphasis supplied]

Thus, it is apparent that such attachments are unsecured claims over the property and such unsecured claims even by the Government or Semi Government agencies, would not have preference over the dues of the secured creditor which are to be recovered from sale of mortgaged/secured

assets in whose favor prior mortgage rights have been created by the owner/borrower. The aforesaid judgment was then considered by the Hon'ble Supreme Court in ***Central Bank of India V/s State of Kerala 2009 (4) SCC 94*** and in para No. 33, it was held that the *non obstante* clause contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitization Act, the provisions contained in those Acts cannot override other legislations. Still further in para 48 of the judgment it was further held that that the DRT Act and Securitisation Act do not create first charge in favour of Banks, financial institutions and other secured creditors and the provisions contained in Section 38C of the Bombay Act and Section 26B of the Kerala Act are not inconsistent with the provisions of the DRT Act and Securitisation Act, 2002 so as to attract *non obstante* clauses contained in Section 34(1) of the DRT Act or Section 35 of the Securitisation Act, 2002. The aforesaid judgment was also considered and followed by a Division Bench Judgment of this Court, in which one of us [Jaswant Singh, J.] was a member titled as ***Punjab National Bank V/s State of Haryana***, bearing CWP No. 4281 of 2009 decided on 15.10.2009, against which SLP (Civil) No. 21132 of 2010 has been dismissed by the Hon'ble Supreme Court on 19.07.2010, in which it was reiterated that the dues of the secured creditor are to be paid in priority to the unsecured crown's debt.

27.4 At the time when the aforesaid judgments were passed, there was no prior right reserved in favor of the secured creditors either under the Recovery Act, 1993 or Securitisation Act, 2002 . It was later in 2016 when the aforesaid twin Acts, were amended with the introduction of Section 31B and 26E respectively, that the first charge came to be reserved in favor of the secured creditors. In any case, with the introduction of Section 31B under the Recovery Act, 1993 and Section 26E under the Securitisation Act, 2002, it is now clear and apparent that the legislature intended to give first preference / priority to the dues of the secured creditor and hence provided first and prior right of recovery, over and above the right of other claimants, in favor of the secured creditors exercising their right of recovery under the Recovery Act, 1993 and Securitisation Act, 2002. The said intent cannot be left mid-way to restrict the benefit only to the secured creditor but definitely would travel to the auction purchaser as well, who derives the title to the property through an auction conducted by or on behalf of the secured creditor.

27.5 Apart from above, Section 48 of the TP Act, 1882 would also protect the rights of the secured creditor in whose favor prior mortgage is sought to be disturbed by a subsequent attachment order. Section 48 of the Act, 1882 reads as under :-

48. Priority of rights created by transfer. - Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

[Emphasis supplied]

The aforesaid provision clearly lays down that where two rights have been created upon the same immovable property at different times and they cannot co-exist together, then a right created prior in time, would have preference over a right created later point in time. **We are examining a situation where the property is already mortgaged and thereafter it has been subsequently attached by a private claimant claiming dues from the borrower. In that eventuality Section 48 of the Act, 1882 would protect the right of the secured creditor and the also the subsequent rights created in favor of the auction purchaser purchasing the property from such secured creditor.**

27.6 In so far as dues claimed by private individuals against the borrower are concerned, it is seen that the properties of the borrowers are got attached by the plaintiffs through the Civil Court, either before judgment in terms of Order 38 Rule 5 CPC or after passing of the decree in terms of Order 21 Rule 54 CPC and seek enforcement of their right upon the property to satisfy the claim in the suit, which are otherwise secured assets mortgaged with the bank prior to the passing of the attachment order. Such attachment cannot withstand the prior mortgage in favor the secured creditor effected by the borrower / owner of the property in view of the law laid down in ***Dena Bank's case (supra)***. The dues of the bank secured by mortgage would be a secured debt and the secured creditor would have prior right to recover from the mortgaged property vis-à-vis an unsecured debt. Similarly, an auction purchaser purchasing such property from the secured creditor would not be liable for the dues being claimed by such plaintiff nor can he interject right of enjoyment of the property purchased by the auction

purchaser, merely on the basis of an attachment order for an unsecured debt. **Even Section 48 of the TP Act, 1882 supra would also protect the right of the secured creditor in whose favor prior mortgage rights exist and the consequent right of the auction purchaser from such attachments upon the secured asset.**

27.7 There have been cases where the property of the borrower, who is absconding has been attached by the Court under Section 83 of the Code of Criminal Procedure. Such property if it is a secured asset by creation of mortgage prior to the passing of such attachment order under Section 83 CrPC, would give prior right to the secured creditor to recover its dues notwithstanding the attachment effected by the Court under Section 83 of the Cr.P.C. This is for the reason, that firstly the right upon the property has been created in favor of the secured creditor prior point in time i.e. before passing of the attachment order under Section 83 Cr.P.C. and hence principles of Section 48 of the Act, 1882 would apply. Secondly, attachment is an unsecured claim which cannot prevail over the secured claim for the reasons explained in the previous paras especially in view of the judgment of Hon'ble Supreme Court in ***Dena Bank's case (supra)***. Thirdly, because of the prior right of recovery reserved in favor of the secured creditors under the Recovery Act, 1993 and Securitisation Act, 2002 which have an overriding effect over anything which is inconsistent to the provisions of these twin Acts. Fourthly, it is the secured creditor which has advanced loan against the creation of security and hence, it is a transaction of creation of security against advancing of consideration from the creditor to the debtor, thereby specifically securing the asset for repayment of the dues. **Hence, the**

rights of secured creditor would not be adversely effected by such later attachments by the court nor shall adversely effect the right and title of the auction purchaser purchasing the secured asset from such secured creditor.

27.8 We, therefore, conclude the discussion on Point A, by laying down the above principles which would provide guidance to the parties and to minimize the disputes involving the secured assets on its enforcement by the secured creditor.

POINT-B

28. In so far as, the second kind of encumbrances are concerned, as depicted in Point (B), by their very nature are quite distinct from the ones discussed in Point (A), as they emanate and arise out of the utilization of property / secured asset itself hence remain attached to the property. Such dues would automatically get transferred to the auction purchaser who purchases the secured asset from the secured creditor on “as is where is basis” which is a common condition invariably incorporated in all sale notices issued by the financial creditors, as informed to us. To name a few, such dues shall include previous pending installments towards land cost due and payable to the allotting agency, Internal and External Development Charges payable to Development Authority, Electricity dues, Water and Sewerage dues etc. These are the dues, which the auction purchaser, would inherit on purchase of the property through the auction conducted by or on behalf of the secured creditor.

28.1 We have been told that the most common claim is that of the Electricity Department against the auction purchaser towards unpaid bills of

supply / use of electricity by the previous occupier/owner of the secured asset. Hence, it requires to be dealt with specifically. It is to be noticed that it is consequent upon purchase of property in a public auction conducted by or on behalf of a secured creditor, that the auction purchaser realizes that previous electricity dues, consumed by the erstwhile owner has not been cleared due to which, re-connection or fresh electricity connection is denied. The Electricity Department, raises a demand and a condition, of clearance of previous dues, before the subsequent purchaser could claim a connection or a restoration thereof, which leads to an issue as to whether the auction purchaser would be liable to clear the dues of the electricity consumed by the previous owner/occupier of the property.

The said issue would not detain us any longer, in view of the recent decision of the Hon'ble Supreme Court in ***Telangana State Southern Power Distribution Company Limited v. M/s. Srighdaa Beverages –2020 SCC Online (SC) 478*** , Hon'ble Supreme Court held that the auction purchaser would be liable to clear the electricity dues, utilized by the erstwhile owner/consumer. The relevant paras of the judgment read as under:-

“3. The aforesaid auction notice shows that the unit was being sold on "as is where is, what is there is and without any recourse basis", as per Rules 8 & 9 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the `said Rules'). The aforesaid clauses of the E-auction sale notice show that the total outstanding dues were much larger, but the reserve price fixed was lower, and the actual sale consideration of the successful auctioneer was Rs. 9,18,65,000, which is approximately Rs. 10 lakh more than the minimum reserve price. Clause 24 reproduced aforesaid makes it clear that when the reference is to

a sale on "as is where is, what is there is and without any recourse basis", the same is "in all respects and subject to statutory dues". This clause was further subject to another Clause 26, where the Authorised Officer carrying out the auction absolved himself of the liability for any charge, lien, encumbrance, property tax dues, electricity dues, etc. The purpose is to emphasise that a holistic reading of all these clauses left little in doubt that the auction notice provided for a reserve price, with a bid being made about Rs. 10 lakh over and above that, and certain nature of charges, lien, encumbrances, including electricity dues were clearly beyond the sale consideration paid.

- 4. We may next turn to the sale deed dated 29.9.2017 executed in pursuance of the auction, which provided for the sale "made free from all encumbrances known to the Secured Creditor." An indemnity was provided by the vendor to the respondent against "any loss arising out of any defect in the title, including recovery of statutory liabilities taxes, as also litigation expenses arising out of such defects in title." This indemnity was, thus, confined to aspects mentioned in this clause, but relatable to defects in title, and not to other liabilities like electricity dues.*
- 5. The problem for the respondent arose when he applied to appellant No.1 seeking sanction of a 500 KVA connection required for running the bottling plant. This request was denied on the ground that there were previous electricity dues to the tune of L50,47,715, as on 26.10.2017. Appellant No.1 asserted its right to recover this amount even from the new purchaser (i.e. respondent), based on a reading of Clauses 5.9.6 and 8.4 of the General Terms and Conditions of Supply of Distribution & Retail Supply Licensees in AP (for short 'General Terms & Conditions of Supply'), which clauses are reproduced hereinunder:*

"5.9.6 Dismantlement of Service Line after Termination of Agreement: *On the termination of the LT or HT Agreement, the company is entitled to dismantle the service line and remove the materials, Meter, cut out etc. After termination of the Agreement, the consumer shall be treated as a fresh applicant for the purpose of giving supply to the same*

premises when applied for by him provided there are no dues against the previous service connection."

.. . . .

"8.4 Transfer of Service Connection

The seller of the property should clear all the dues to the Company before selling such property. If the seller did not clear the dues as mentioned above, the Company may refuse to supply electricity to the premises through the already existing connection or refuse to give a new connection to the premises till all dues to the Company are cleared."

6. We may also take note of the fact that the aforesaid dues partake the character of statutory dues under the Electricity Act, 2003 read with the General Terms & Conditions of Supply.

Xxxxxx

xxxxxx

15. We have gone into the aforesaid judgments as it was urged before us that there is some ambiguity on the aspect of liability of dues of the past owners who had obtained the connection. There have been some differences in facts but, in our view, there is a clear judicial thinking which emerges, which needs to be emphasized:

A. That electricity dues, where they are statutory in character under the Electricity Act and as per the terms & conditions of supply, cannot be waived in view of the provisions of the Act itself more specifically Section 56 of the Electricity Act, 2003 (in pari materia with Section 24 of the Electricity Act, 1910), and cannot partake the character of dues of purely contractual nature.

B. Where, as in cases of the E-auction notice in question, the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the purchaser and the sale is on "AS IS WHERE IS, WHATEVER THERE IS AND WITHOUT RECOURSE BASIS", there can be no doubt that the liability to pay electricity dues exists on the respondent (purchaser).

C. The debate over connection or reconnection would not exist in cases like the present one where both aspects are covered as per clause 8.4 of the General Terms & Conditions of Supply.

16. In view of the aforesaid legal position, which has emerged, we are of the view that the impugned orders cannot be sustained

and are accordingly set aside while opining that appellant No.1 would be well within its right to demand the arrears due of the last owner, from the respondent-purchaser.”

[Emphasis supplied]

It thus apparent, that dues of the electricity department would attain the character of statutory dues / liability and would not be treated to be mere contractual in nature.[refer to ***Hyderabad Vanaspathi Ltd. v. A.P. State Electricity Board & Ors. (1998) 4 SCC 470***]. Further, since the electricity dues, have arisen from the utilization of the secured asset itself and hence becomes an inseparable part from the property as without electricity there cannot be any meaningful utilisation of the property. **Hence, if there are electricity dues pending and payable, the said liability cannot be avoided by the auction purchaser and would have to clear such dues before seeking a fresh or reconnection of the electricity connection.**

Still further, when the property is being sold on “as is where is basis”, it would be a sufficient indication to the prospective buyer to make reasonable inquiry about, such charges, which arise from the utilization of the property itself, in tune with the principle of caveat emptor or buyer beware, which principle would equally apply to court sales as well. [refer to judgment of Hon’ble Supreme Court titled as ***Govindammal (Dead) By Lrs. v. Vaidiyanathan 2018 SCC Online (SC) 2117***]. Needless to mention, that in case if such charges are paid by the auction purchaser, he would be at liberty to recover the same, from its erstwhile owner/occupier in, accordance with law.

28.2. As regards, other dues are concerned including transferable and recoverable statutory dues, pending installments due and payable to the allotting agency, Internal and External Development Charges payable to Development Authority, Extension fee/non-construction charges, Water and Sewerage dues etc., which are directly emanating out of the usage of the property in question, would also be payable by the auction purchaser, where the properties are being sold on “as is where is basis”. This is because, these are the charges which are arising out of the utilization of the property itself and are not claims arising out of attachment being foisted or enforced upon the property. **These are services or utilities attached to the property and provide meaningful utilization of the property and because of their such nature, the dues emanating therefrom, shall form part of dues attached to the property and would be liable to be paid by the purchaser.**

An illustration would further clarify the above position. For example, a property has been allotted by the allotting agency or a builder, to an allottee and the purchase consideration is to be paid, in 4 equal annual installments. The allottee, obtains a credit facility to pay off the first installment to the allotting agency but the defaults in making the payment of the remaining. The bank puts the property to sale on “as is where is basis”. On purchase of the property from the bank, the auction purchaser cannot be permitted to claim that since he has purchased the property from the secured creditor, which has a priority of charge, therefore he would not pay the remaining amount to the allotting agency.

Similarly, when a property is sold by the secured creditor and there are pending dues of Internal or External Development Charges or of

like nature, it would be the duty of the auction purchaser to clear the said dues, even though they arose during the period when ownership of the secured asset vested with the erstwhile owner/borrower. The above findings are also based on the principle that no one can transfer a better title than what he himself has. **If title is suffering from pending installments or dues, required to complete or perfect the title, the said encumbrance shall be transferred to the purchaser, even though having purchased the secured asset from the secured creditor.**

28.3. Thus, to conclude the discussion on Point (B), it is apparent that, it is necessary to differentiate such claims arising out of enforcement of charge/attachment vis-à-vis those which are arising out of the very utilization of the property itself. In so far as the former is concerned, the same would have to be tested on the touchstone of the principle of priority of charge, as per the principles culled out in the previous paragraphs, as these are claims which are sought to be imposed upon the property either by operation of law or by the act of parties. In case of latter, since these are practically utilization charges, which are not foisted upon the property but are virtually a part and parcel of the property itself and arise out of meaningful utilization of the property without which the property cannot be used for the purpose and manner it is meant for, the same gets transferred with the transfer of the property and hence become liability of the auction purchaser.

29. In view of above, since the dispute in the present case, would be governed by the findings given by us in para 26, we answer Issue No. 2 in **NEGATIVE** and hold that petitioner being successful auction purchaser,

pursuant to an auction conducted by DRT under Recovery Act, 1993 would **NOT** be liable to pay the dues being claimed by Central Excise originally payable by the erstwhile owner/assessee/borrower.

ISSUE NO. 3

30. The next and the last issue which arises for consideration is whether Respondent No. 3-GLADA could have refused the transfer of the property in question in the name of petitioner. A perusal of the writ petition would reveal that petitioner submitted request letter dated 04.10.2019 , vide diary No 3921 to Respondent No. 3, pursuant to which, it issued the impugned letter dated 15.10.2019 (**P-3**) , vide which transfer of property is sought to be resisted by Respondent No. 3 predominantly on **five grounds**. The **first** one being, that Urban Ceiling Officer Ludhiana vide letter dated 1275 dated 28.09.1987, has restricted the transfer of the property in question, and the decision in that regard is sought to be intimated to it. Petitioner has replied to the same, vide letter dated 16.10.2019 (**P-4**), stating that Urban Ceiling Law , is not applicable to the property in question. Since, Urban Land (Ceiling and Regulation) Act, 1976, was repealed by the Parliament by passing Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act No. 15 of 1999), therefore, the same cannot be an objection to resist the transfer of the property in favor of petitioner.

31. The **second** reason, is that Central Excise vide its letter dated 31.12.2015 has claimed outstanding recoverable against the previous owners. In view of findings given by us, in Issue No. 1 and 2, and since it has been held, that such dues cannot be claimed from the petitioner, even this ground would not sustain to resist transfer of the property.

32. The **third** reason, is that the certified copy of the partnership deed of M/s Zodiac India, be provided by the petitioner. Petitioner in its reply dated 16.10.2019 (**P-4**) has stated that it is an auction purchaser and is not in possession of the said partnership deed. Suffice it to say, that the petitioner has purchased the property in an open auction conducted by DRT and is reasonably not expected to have a certified copy of the partnership deed of the previous owner or the original allottee. It would be unreasonable to resist transfer for a document, which the petitioner legally would not be in possession of. Therefore, even this ground would not sustain to resist transfer of the property.

33. The **fourth** reason is, that the petitioner should provide original copy of the sale certificate issued by DRT, to which the petitioner has replied that the same has been supplied with, and hence, this issue does not exist for consideration any longer.

34. The **fifth** and the last issue raised is that the certified copy of the sale deed registered after issuance of the sale certificate by DRT, Chandigarh has not been supplied. The petitioner in his reply (**P-4**) has stated that since it has purchased the property in an e-auction conducted by DRT, therefore registration is not required. Mr. Jagga, learned counsel for petitioner relies upon Section 17(2)(xii) of the Registration Act, 1908 to contend, that a certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer, would not attract compulsory registration. From the record, it is apparent, that the said issue has yet not been decided by respondent No. 3.

We thus, **direct** respondent No. 3-GLADA, that in case if it insists on compulsory registration inspite of the aforesaid statutory provision , to decide the issue, after giving an opportunity of hearing to the petitioner and passing a speaking and reasoned order within four (04) weeks from the receipt of certified copy of the order, failing which the competent authority, shall be liable for proceedings for contempt under the Contempt of Courts Act, 1971.

35. In view of above, the present writ **petition** is hereby **allowed**, subject to the decision of the Respondent no. 3-GLADA in preceding para No. 34, the property in question shall be transferred in favor of petitioner without any further delay.

36. Before parting with the order, we acknowledge and appreciate the sincere and dedicated assistance rendered to the Court, by Sh. Aalok Jagga and Sh. Sunish Bindlish, Advocates, to decide not only the issues involved in the present petition, but other vital issues incidental thereto.

No costs.

(JASWANT SINGH)
JUDGE

August 10, 2020
'dk kamra'

(ASHOK KUMAR VERMA)
JUDGE

Whether Speaking / reasoned	:	Yes
Whether Reportable	:	Yes