

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.7971/2019

PETITIONER : Medineutrina Pvt. Ltd. (Company)
Through its Director -
Mr. Dilipkumar s/o Gulabchand Bora
Age About 52 yrs., Occ. Business
R/o Plot No.20, Near KDK College,
Shri Nagar, Nandanwan, Nagpur.

...VERSUS...

RESPONDENTS :

1. District Industries Centre (D.I.C.),
Udyog Bhavan, Nagpur.
2. Assistant Commissioner, Sales Tax,
Range NAG-VAT-D-003,
Range NAG-VAT-D-009,
Civil Lines, Nagpur.
3. Punjab National Bank, Gandhibagh
Branch, Gandhibagh, Nagpur.
Through its Branch Manager.

Mr. Ritesh R. Dawda, Advocate for petitioner
Ms N.P. Mehta, AGP for respondent nos.1 and 2
Mr. M.Y. Wadodkar, Advocate for respondent no.3

CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE, JJ.

Judgment reserved on : 08/01/2021
Judgment pronounced on : 18/02/2021

J U D G M E N T (PER : AVINASH G. GHAROTE, J.)

1. Heard. Rule. Rule made returnable forthwith.
2. The present petition raises a challenge to the action on the part of respondent no.1/ District Industries Centre in refusing to transfer the property in its record, in favour of the petitioner, unless the liability of the respondent no.2/Sales Tax Department, claiming earlier dues against M/s. Wood Stock Holdings, a Company which was owning the immovable property, attached and auctioned by the respondent no.3/Bank, under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, “the SARFAESI Act” hereinafter) is made by the petitioner, who is the auction purchaser. Further relief is claimed against the respondent no.3/Bank to issue No Objection Certificate (NOC) and issuance of a fresh sale certificate, free from all encumbrances in favour of the petitioner.
3. The factual matrix of the matter and contentions of the petitioner, are as under :-
 - (A) M/s. Wood Stock Holdings the owner of plot no.206, MIDC, Butibori, Pahi, Tah. Hingna, Distt. Nagpur along with

the factory building constructed thereupon having a total built up area of 908.988 sq. meters had availed loan from the respondent no.3, on account of non-payment of which action under the SARFAESI Act was initiated by the respondent no.3/Bank, resulting in attachment of the above immovable property, which was put to auction.

(B) On 14/3/2017, the petitioner being the highest bidder to the tune of Rs.71,25,000/-, his offer was accepted.

(C) On 29/3/2017, the respondent no.3/Bank issued a sale certificate in favour of the petitioner. The symbolic possession of the above said immovable property was also handed over to the petitioner on 29/3/2017 by the respondent no.3/Bank.

(D) On 12/1/2018, the petitioner applied to the respondent no.1/District Industries Center (DIC) for issuance of NOC to get the said property transferred in its name.

(E) On 6/2/2018 the DIC/respondent no.1 informed the petitioner that for the purpose of transfer of the said immovable property, in its record, it will have to take NOC from the respondent no.2/Sales Tax Department as there were arrears of sales tax dues upon M/s. Wood Stock Holdings and also certain other documents,

as listed in the communication dated 6/2/2018, were also directed to be submitted.

(F) A communication dated 3/3/2015, is also placed on record by the petitioner, which is addressed by the respondent no.2/Sales Tax Department to the respondent no.1/DIC stating that M/s Wood Stock Holdings was in arrears of sales tax dues for the period from 1/4/2010 to 31/3/2011 for Rs.7,17,130/- which was not recovered and since it was learnt that the dealer was in process of disposal of the plot at MIDC, the respondent no.1/DIC was requested to obtain NOC from the Sales Tax Department before approving the transfer of the business.

(G) It is contended that by operation of Section 26 -E of the SARFAESI Act, the property stood transferred to the petitioner free from encumbrances and any charge which may be claimed by the respondent no.2 on account of arrears of sales tax under Section 37 of the Maharashtra Value Added Tax Act, 2002 (for short, MVAT Act, 2002 hereinafter), would be subservient to the provisions of Section 26-E of the SARFAESI Act, due to which the action on part of the respondent nos.1 and 2 of not issuing the NOC for transfer of the land in favour of the petitioner, on account of the so called dues

claimed by the respondent no.2, was clearly not in consonance with law and therefore illegal.

(H) It is further contended that no notice whatsoever of any charge was given to the petitioner by the respondent nos.2 and 3 and therefore, the petitioner in absence thereof was not liable for payment of any dues of the respondent no.2 as the charge was not enforceable against the petitioner, who was an auction purchaser, without any notice of the charge.

(I) The provisions of the SARFAESI Act and the Rules made thereunder, make it obligatory upon the respondent no.3/Bank to have found out the encumbrances upon the said property, and made them known to the petitioner, so that a conscious decision could be taken to have the property or not.

(J) Since the property was sold on “As is where is and what is there is basis”, there was no question of the petitioner being liable for anything than payment of the purchase price.

(K) Reliance is placed on :-

(i) State of Karnataka and another Vs. Shreyas Papers (P) Ltd. And others, (2006) 1 SCC 615.

(ii) *AI Champdany Industries Limited Vs. Official Liquidator and another, (2009) 4 SCC 486.*

(iii) *Punjab Urban Planning and Development Authority and others Vs. Raghu Nath Gupta and others, (2012) 8 SCC 197.*

(iv) *Axis Bank Limited Vs. State of Maharashtra through the Office of the Assistant Commissioner of Sales Tax Investigation, Thane (West) 400 601 and another.*

(v) *Punjab National Bank Vs. Maa Banbhor Steel Industry Private Limited and others, W.P. No.11018 of 2018 dated 29/10/2018 by a Division Bench of the Bombay High Court.*

(vi) *The Corporation Bank and another Vs. Dr. Jayesh Kumar Zha in M.A.T. 291 of 2019 with C.A.N. 2254 of 2019, dated 3/9/2019 by the learned Division Bench of the Calcutta High Court.*

4. The respondent no.1 has not filed any submissions, however reliance has been placed on *Central Bank of India Vs. State of Kerala and others, Civil Appeal No.95 of 2005, decided on 27/2/2009.*

5. The reply and contentions of the respondent no.2 are as under :-

(a) statutory charge was created on the property.

(b) the said property, was already attached by the Sales Tax Department on 21/9/2015 under Rule 11 of the Maharashtra Land Revenue Code, 1966 and the attachment order was duly served upon Mr. Rahul Dalmia, the Managing Partner of M/s. Wood Stock.

(c) the said property after its attachment was given on Suprutnama to the partner of M/s. Wood Stock on the next day of the attachment i.e. on 22/9/2015 (Annexure R-1).

(d) the Sales Tax Department had an earlier charge upon the property for arrears of tax not paid, which was created before amendment in Section 26-E of the SARFAESI Act, which has come into force on 1/9/2016 by insertion of Chapter-IV-A in the SARFAESI Act and therefore the priority as mentioned in Section 26-E of the SARFAESI Act would not have any retrospective application.

(e) It was contended that the respondent no.3/Bank was aware of the sale tax dues, due to which reason, the sale was

not free from encumbrances but was on “As is where is and whatever there is basis”, which was reflected from the sale certificate issued in favour of the petitioner, in view of which the petition was liable to be dismissed.

6. The respondent no.3/Bank has contended that it was not aware about any claim by the Sales Tax Department and therefore non-disclosure of something of which the Bank itself was unaware of, could not be laid at the doorstep of the Bank. Reliance was further placed on Section 26-E of the SARFAESI Act to oppose the claim by the respondent no.2. Reliance is placed on ***Mahendra Mahato and another Vs. The Central Bank of India, W.P. No.38111(W) of 2013, decided on 29/8/214*** by a learned Single Judge of the Calcutta High Court.

7. We have heard the learned Counsels for the parties at length. In our considered opinion, the issue about priority of dues, *inter se* between the respondent nos.2 and 3, is no longer *res integra* but is covered by the judgment of the Full bench of the Madras High Court in ***The Assistant Commissioner (CT) Vs. The Indian Overseas***

Bank and another, in W.P. No.2675/2011 and connected matters decided on 10/11/2016, where the question framed about priority of charge as follows :-

“a) As to whether the Financial Institution, which is a Secured Creditor, or the Department of the Government concerned, would have the 'Priority of Charge' over the Mortgaged property in question, with regard to the tax and other dues ?.”

has been answered as under :

“We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31-B in the Principal Act, which reads as under :

“31-B. 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."

2. There is, thus, no doubt that the rights of a Secured Creditor to realise secured debts due and payable by sale of assets over which Security Interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This Section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

3. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

4. The aforesaid would, thus, answer Question (a) in favour of the Financial Institution, which is a Secured Creditor having the benefit of the Mortgaged property."

and the judgments of the Bombay High Court in the case of :

(a) ***Cosmos Co-operative Bank Vs. State of Maharashtra and others,***
2019 SCC OnLine Bom 9527, which holds as under :

“1. On 1st September, 2016 the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFESI Act) was amended by a Central Legislation vide Act No. 44 of 2016. Section 26E was inserted in the statute book. It 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 (31 of 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.”

2. The Maharashtra Value Added Tax Act, 2002 which came into force on 1st April, 2005. Vide Section 37 it was stipulated as under:—

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

3. Suffice it to state that Section 26E of the SARFESI Act has a non obstante clause and so does Section 37 of the Maharashtra Value Added Tax Act, 2002, but

notwithstanding the non obstante clause in Section 37 it is subject to any provision regarding creation of first charge in any Central Act. Meaning thereby, harmoniously read, a secured creditor would have a first charge over an asset and the charge created in favour of the State of Maharashtra under Section 37 of the Maharashtra Value Added Tax Act, 2002 would be subject to the first charge created by the Central Legislation which in the instant case would be SARFESI Act, 2002.

4. Thus, we hold that the Petitioner, Co-operative Bank, would have the first lien over the sale proceeds realised by selling the secured assets. If there is any surplus, the same would be credited to the account of the State of Maharashtra.”

and (b) ***State Bank of India / The State of Maharashtra and others***, W.P. (ST.) No.92816/2020, decided on 17/12/2020, which not only takes into consideration the judgment of the Hon'ble Apex Court in the case of ***Central Bank of India / State of Kerala and others (2009) 4 SCC 94***, but also several other judgments by various High Courts on the question under consideration and answer the same as under :

“39. In view of the above and being in respectful agreement with the views expressed in the cases cited above, we hold that the mortgage of the secured creditor

viz. the Petitioner Bank gets prior charge over the charge of the Respondents for tax/VAT dues.”

We are in respectful agreement with the above views.

8. We would however like to add a few more reasons as to why the provisions of Section 26-E of the SARFAESI Act, will prevail over those as contained in Section 37(1) of MVAT Act, 2002.

9. It cannot be disputed that the SARFAESI Act has been enacted by the Parliament under List-I Entry 45, and is a Central Act, as against which, the MVAT Act, 2002 has been enacted by the State Legislature under List-II Entry 54. For the purposes of ready reference these provisions are reproduced as under :

<i>MVAT ACT, 2002</i>	<i>“SARFAESI ACT, 2002</i>
<i>37. Liability under this Act to be the first charge.</i>	<i>Section 26-E. Priority to secured creditors. -</i>
<i><u>(1) Notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of</u></i>	<i><u>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</u></i>

<i>tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under this Act, <u>shall be the first charge on the property of the dealer or, as the case may be, person.</u></i> <i>(2) The first charge as mentioned in sub-section (1) shall be deemed to have been created on the expiry of the period specified in sub-section (4) of section 32, for the payment of tax, penalty, interest, sum forfeited, fine or any other amount.</i>	<i><u>revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.</u></i> <i>Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.”</i>
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10. The MVAT Act, 2002 deals with the levy and collection of Tax on the sale or purchase of certain goods in the State of Maharashtra. The relevant provisions of the MVAT Act 2002, would demonstrate that Tax, as contemplated, is payable on the turnover of sales and purchases, of goods, by a dealer, registered under the MVAT Act 2002. 'Goods' as defined in Section 2(12) are all movables; 'Sale' as defined in Section 2 (24) means the sale of

goods; 'dealer' as defined in Section 2(8) means any person who buys or sells goods. 'Capital asset', as defined in Section 2(5) for the purposes of the present petition, means property of any kind held by the Dealer, except jewellery held for personal use or property not connected with the business. Section 3 lays down the incidence and levy of tax. Section 32 provides for the payment of tax. Section 33 (6) provides that in case any tax, in spite of exercise of the modes of recovery as stipulated under the MVAT Act, 2002 remains unpaid the same shall be recoverable as arrears of land revenue and Section 34 confers powers under the Maharashtra Land Revenue Code, 1966 upon the Commissioner of Sales Tax. The attachment as provided in Section 35 is of money due or payable to the dealer or person from whom tax is recoverable. Thus the entire scheme of the MVAT Act, 2002, including the mode of recovery deals with movable property, except Section 33(6).

11. Section 37 (1) of the MVAT Act, 2002, creates a liability under the Act to be the first charge. It is to be seen as to whether this liability as first charge is an absolute liability. Though Section 37 (1) contains a *non-obstante* clause, the language used

therein is material. A perusal of the language as used in Section 37 (1) of the MVAT Act, 2002, would demonstrate that the *non-obstante* clause which is “notwithstanding anything contained in any contract to the contrary” speaks of a contract and is not in respect of any law enacted by the Parliament or the Legislature of a State. A contract as is obvious, is a bilateral agreement between two parties to do something, on terms and conditions as agreed to, between them. The purpose and effect of a *non-obstante* clause is to override the effects of any other legal provisions contrary to the one, in relation to which it is used. A *non-obstante* clause, when it is used, not in relation to or in context of any law, but in relation to or in context of any contract, will obviously not have the effect of overriding any law contained in any other Statute. In ***Union of India and another Vs. G.M. Gokil and others, 1984 (Supp) SCC 196***, in respect of a *non-obstante* clause it has been held as under :-

“It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions”.

12. As against this, the language of Section 26-E of the SARFAESI Act is clear and speaks of “notwithstanding anything contained in any other law for the time being in force”. Thus, as against the *non-obstante* clause in Section 37 (1) of MVAT Act 2002, which gives an overriding effect to the liability to pay any amount of tax, penalty, interest, sum forfeited, fine or any other sum payable by a dealer or any other person under the MVAT Act, 2002, over “any contract to the contrary”, Section 26-E of SARFAESI Act gives an overriding effect to the claim for the debts due to any secured creditor, over “any other law for the time being in force”. The distinction created by the user of the expression “any contract to the contrary”, in Section 37 (1) of MVAT Act, 2002 and “any other law for the time being in force”, in Section 26-E of the SARFAESI Act is telling. A contract can never be equated with a law. A 'contract' as stated above, stems from the volition of the parties and is subject to the laws as applicable in that regard, as against which a 'law' has a statutory force being enacted by the exercise of the power vested in the Union or the State under the Constitution of India, and has a binding force, over all, those who are subject thereto, and the question of any volition of the parties in that regard does not arise.

Thus, the user of the above phrases, to our mind, creates a categorical divide and distinction, in the fields in which the two provisions, in so far as they create a charge and a priority, operate.

13. That apart, Section 37(1) MVAT Act, 2002, uses the phrase “but subject to any provision regarding creation of first charge in any Central Act for the time being in force”, meaning thereby that any charge as created by virtue of Section 37 of the MVAT Act, 2002, is subservient to any first charge created by any Central Statute.

14. The SARFAESI Act, is obviously a Central Statute, and therefore any priority of claim for debts due to a secured creditor, which is created by any provision, as contained therein (Section 26-E in this case), will prevail over any First Charge, which may have been created by Section 37 (1) of the MVAT Act, 2002, in view of the language used in Section 26-E of the SARFAESI Act which states that such a claim by a 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”. The priority created by virtue of Section 26-E of the SARFAESI Act, also takes precedence over any crown debt, which is due or payable to the Central Government, State Government or local authority. Thus, creation of any priority for any debts due, to the secured creditor, under Section 26-E of SARFAESI Act would prevail over any charge created for payment of a liability, on account of tax etc., which is due or payable to the State Government under the provisions of the MVAT Act, 2002.

15. Though it is contended that Section 26-E of the SARFAESI Act, has been brought into force w.e.f. 1/9/2016, however, the language of Section 37 (1) of the MVAT Act, 2002, to the effect, “but subject to any provision regarding creation of first charge in any Central Act for the time being in force” would thus make it clear that the charge for any dues under the MVAT Act, 2002, has to give way to the claim for dues/debts by a secured creditor under the SARFAESI Act and the dictum in *The Indian Overseas Bank* (supra) that the law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending, would also govern the field.

16. Even if it is contended that the provisions as contained in Section 26-E of the SARFAESI Act, is inconsistent with that of Section 37 of the MVAT Act 2002, and both of them contain a *non-obstante* clause, even then the later law, which in this case is Section 26-E of the SARFAESI Act, will prevail, as indicated in ***Solidaire India Ltd. Vs. Fairgrowth Financial Services Ltd. and others***, (2001) 3 SCC 71 as under :-

“9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] ; Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750 : (1977) 2 SCR 421] ; Allahabad Bank v. Canara Bank [(2000) 4 SCC 406] and Ram Narain v. Simla Banking & Industrial Co. Ltd. [AIR 1956 SC 614 : 1956 SCR 603].

10. We may notice that the Special Court had in another case dealt with a similar contention. In *Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd.* [(1997) 89 Comp Cas 547 (Special Court)] it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion

that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ratio of the said decision is as follows:

“Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.

The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, provides in Section 13, that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies Act from the ambit of the said Act, the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.

Under Section 3 of the 1992 Act, all property of notified persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the Custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are

assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. Under Section 22 of the 1985 Act, recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the appellate authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under Section 11(2) of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985.

It is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985, is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction whilst considering a scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by

the Special Court. The Special Court can, if it is convinced, grant time or instalments.

There can, therefore, be no stay of any proceedings for recovery against a sick company so far as the Special Court under the 1992 Act is concerned.”

11. We are in agreement with the aforesaid decision of the case, more so when we find that whenever the legislature wishes to do so it makes appropriate provisions in the Act in that behalf. -----.”

Solidaire India Ltd. (supra) has been followed in ***Sharat Babu Digumarti v. Govt. (NCT of Delhi), (2017) 2 SCC 18.***

17. The above position is reiterated by the Hon'ble Apex Court in ***S. Vanitha Vs. Deputy Commissioner, Bengaluru Urban District and Others, 2020 SCC Online SC 1023***, while considering the effect of *non-obstante* clauses in two Statutes, as under :-

“35.----- Principles of statutory interpretation dictate that in the event of two special acts containing non obstante clauses, the later law shall typically prevail. In the present case, as we have seen, the Senior Citizen's Act 2007 contains a non obstante clause. However, in the event of a conflict between special acts, the dominant purpose of both statutes would have to be analyzed to ascertain

which one should prevail over the other. The primary effort of the interpreter must be to harmonize, not excise.”

(emphasis supplied)

18. In the instant case, the provisions of Section 31-B of the Recovery of Debts and Bankruptcy Act, 1993 (for short, “the RDB Act, 1993” hereinafter) and those of Section 26-E of the SARFAESI Act, both give priority to the rights of the secured creditor, to realise secured debts, due and payable to them by sale of assets in which security interest is created, over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local bodies, which position, in fact also stands recognised and accepted under the MVAT Act 2002, by user of the expression “but subject to any provision regarding creation of first charge in any Central Act for the time being in force”, as used in Section 37(1) therein and therefore the priority as created by Section 26-E of the SARFAESI Act, will prevail over the first charge as created by Section 37(1) of the MVAT Act, 2002.

19. **Axis Bank** (supra), upon which reliance has been placed by the petitioner was a case in which the Court was not considering

the controversy regarding the priority as contemplated by Section 37 (1) of the MVAT, 2002 vis-a-vis Section 26-E of the SARFAESI Act, but was considering the position in view of Section 529-A of the Companies Act vis-a-vis Section 35 of the SARFAESI Act and in view of the express provisions as contained in Section 529-A of the Companies Act, under which priority is given to the dues of the secured creditor (which the petitioner therein was) and of the workers, over statutory charge claimed by the State, held that the Bank had a priority claim over the statutory dues claimed by the Sales Tax department. Section 26-E of the SARFAESI Act, was not under consideration of the Court in ***Axis Bank*** (supra), though it was referred to in para 22 thereof.

20. ***Maa Banbhor Steel Industry*** (supra) was a case in which the sale certificate as issued in favour of the respondent no.2, by the petitioner/Bank, was declined to be registered by the Registrar on the premise that there was an endorsement of attachment on the property on account of Sales Tax Dues. Relying upon the Full Bench Judgment of the Madras High Court in ***The Assistant Commissioner (CT) Vs. The Indian Overseas Bank*** (Writ

Petition No.2675/2011) the Court held that it was of the *prima facie* view that Section 26-E of the SARFAESI Act has overriding effect over Section 37 of the MVAT Act, which supports the position as stated above.

21. That takes us to the next contention of Mr. Dawda, learned Counsel for the petitioner, that the petitioner had no notice of the Charge created in favour of the respondent no.2, and in absence of such a notice, the charge was not enforceable upon the petitioner. Section 100 of the Transfer of Property Act (T.P. Act, hereinafter for short), is pressed into service, in support of this contention. Reliance is also placed upon Section 55 of the T.P. Act to contend that a charge being an encumbrance, notice of the same ought to have been given to the petitioner, in absence of which the petitioner cannot be held liable for any dues of the respondent no.2.

22. A “Charge”, under the general law is defined in Section 100 of the Transfer of Property Act, 1882 (T.P. Act hereinafter for short) as under :-

*“Section 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”

(emphasis supplied)

23. The expression “charge” came up for consideration before the Hon'ble Apex Court in ***Shreyas Papers*** (supra), where dilating upon the subject, in view of the provisions of Section 100 of the T.P. Act, vis-a-vis the charge created under the Karnataka Sales Tax Act, it was held as under :-

“20. As the section itself unambiguously indicates, a charge may not be enforced against a transferee if she/he has had no notice of the same, unless by law, the requirement of such notice has been waived. This position

has long been accepted by this Court in Dattatreya Shanker Mote v. Anand Chintaman Datar [(1974) 2 SCC 799, 811 (para 18)] and in Ahmedabad Municipal Corpn. of the City of Ahmedabad v. Haji Abdulgafur Haji Hussienbhai [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] (hereinafter "Ahmedabad Municipal Corpn."). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case.

21. *Ahmedabad Municipal Corpn. [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] was a case where a person was in arrears of property tax, due under the Bombay Provincial Municipal Corporation Act, 1949. Consequently, the Municipal Corporation created a charge over the property of the defaulter. However, the property was sold in execution of a mortgage decree. When the Municipal Corporation purported to exercise their charge over the property, the purchaser in court-auction filed a suit for a declaration that he was the owner of the property and that the arrears of municipal taxes due by the transferor were not recoverable from him by proceeding against the property purchased in the auction. In the appeal before this Court, the Municipal Corporation's main argument was that where the local law provided for the creation of a charge against a property for which municipal taxes were due, transferees of such properties were imputed with constructive knowledge of any charge created against the properties that they had purchased. This argument was, however, rejected. This Court held that while constructive notice was sufficient to satisfy the requirement of notice in the proviso to Section 100 of the TP Act, whether the transferee had constructive notice of the charge had to be determined on the facts and circumstances of the case. [Ibid., at SCC pp. 765-66 (para 12) : AIR pp. 1207-08(para 8)] In other words, this Court held that there could be no fixed presumption as to the transferee having constructive notice of the charge against the property. In fact, the principle laid down in Ahmedabad Municipal Corpn. [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] has been correctly applied in a sales tax case similar to the*

present case. [CTO v. R.K. Steels, (1998) 108 STC 161 (Mad)]

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

Thus for a 'Charge' as defined in Section 100 of the T.P. Act, to become effective, it is necessary that the transferee, ought to have had prior notice of such "Çharge", be it either express, implied or constructive or the prior existence of such "Çharge", is shown to have been within the knowledge of the transferee.

24. Section 55 of the Transfer of Property Act which spells out the rights and liabilities of buyer and seller, in respect of the liability of the seller, states as under :-

"55. Rights and liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:-

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property [or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing”.

Section 55 of the T.P. Act, thus creates an obligation upon every seller to disclose to the buyer any material defect in the property or his title, of which he is aware of and which the buyer could not, with ordinary care discover and to pay all public charges and discharge all encumbrances on the property then existing. Thus, even under the general law of the land, the obligation upon the seller is to disclose all material defects and encumbrances to the buyer and to transfer the property free of encumbrances. What is material to note is that an omission to make such disclosures as are mentioned in Section 55 (1) (a) and 55 (5) (a) of the T.P. Act has

been declared to be fraudulent, as a bare reading of the last two lines of Section 55 of the T.P. Act would reveal.

25. In respect of a 'Charge', created upon immovable property on account of non-payment of Municipal Taxes, in ***AI Champdany Industries Limited*** (supra) relied upon by Mr. Dawda, learned Counsel for the petitioner, the Hon'ble Apex Court, while considering the issue of its enforcement and what is meant by an encumbrance, had held as under :-

“12. The terms and conditions of the sale must be read as a whole. It must be given a purposive meaning. The word “encumbrance” in relation to the word “immovable property” carries a distinct meaning. It ordinarily cannot be assigned a general and/or dictionary meaning.

13. We may, however, notice some dictionary meanings of the said word as reliance thereupon has been placed by Mr Sibaji Sen. In Stroud's Judicial Dictionary of Words and Phrases, 5th Edn., encumbrance is defined as: “being, ‘a claim, lien, or liability, attached to property’; and this definition is wide enough to cover the plaintiff's claim, which was, as assignee for value of a reversionary interest, against a person coming in under a subsequent title”.

In Supreme Court on Words and Phrases it is stated that

“the word ‘encumbrance’ means a burden or charge upon property or a claim or lien upon an estate or on the land”.

In Advanced Law Lexicon, encumbrance is defined as:

“An infringement of another's right or intrusion on another's property.”

In Black's Law Dictionary encumbrance is defined as:

“Any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee....”

Encumbrance, therefore, must be capable of being found out either on inspection of the land or the office of the Registrar or a statutory authority. A charge, burden or any other thing which impairs the use of the land or depreciates in its value may be a mortgage or a deed of trust or a lien or an easement. Encumbrance, thus, must be a charge on the property. It must run with the property. If by reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance.

14. If the property tax was merely a statutory dues without creating any encumbrance on the property which had cast a duty upon all the auction-purchasers to make an investigation, it would mean that they must try to find out all the liabilities of the company in liquidation in their entirety.

15. The respondent municipality was an unsecured creditor. In that capacity it cannot stand on a higher footing than an ordinary unsecured creditor who is required to stand in queue with all others similarly situated for the purpose of realisation of their dues from the sale proceeds.”

Considering the specific language defining 'Charge', in Section 100 of the Transfer of Property Act, relying upon *The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussenhbai (1971) 1 SCC 757*, it was held that :-

“18. -----. There cannot, thus, be any doubt or dispute that a provision of law must expressly provide for an

enforcement of a charge against the property in the hands of the transferee for value without notice to the charge and not merely create a charge.”

In the context of the obligation of seller as contained in Section 55 (1) (g) of the T. P. Act, it is held as under :

“22. Section 55 refers to a contract only. Unless there is a contract to the contrary, the rights and obligations of the parties to a sale would be as indicated in Section 55. Such a contract to the contrary must be express and not implied, as a result whereof the meaning of the term encumbrance would be expanded.”

and considering that the advertisement in that case, did not specify that all the public charges had to be paid and the Municipal Corporation was indisputably not a preferential creditor and its dues would not even otherwise come within the purview of the crown debt, which also could be discharged only after the secured creditors stand discharged, the claim of the Municipality for its tax was rejected.

26. It is correct that in the instant case, there is nothing on record, to show that any charge created on the property and that the same stood attached by the respondent no.2, was brought to the notice of the petitioner. In fact, the reply on part of the respondent

no.3/Bank indicates that the respondent no.3/Bank itself was not aware of any charge upon the said property, or that it stood attached, as claimed by the respondent no.2. Thus, the petitioner as an auction purchaser, could not have had any notice of any such charge or attachment, in view of the language of Section 100 of the T. P. Act, and the charge would thus be unenforceable as against the petitioner, on this count.

27. The above would be a correct position, if we were faced with a situation where a charge was created by virtue of Section 100 of the T.P. Act; by a written document between parties *inter se* or by a statutory provision contained in any Central/State/Local law, in terms of which the charge was not on the property. There is always a difference between a charge created by contract and a statutory charge created by the provisions of a statute on the property, be it a Central/State/local law. A statutory debt/charge is also different from a Crown debt, and prevails upon a Crown debt, as has been held in *Union of India and others Vs. SICOM Limited and another*, (2009) 2 SCC 121, in the following words :-

“9. Generally, the rights of the Crown to recover the debt would prevail over the right of a subject. Crown debt means the “debts due to the State or the King; debts which a prerogative entitles the Crown to claim priority for before all other creditors”. [See Advanced Law Lexicon by P Ramanatha Aiyar (3rd Edn.), p. 1147.] Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.

10. It is trite that when Parliament or a State Legislature makes an enactment, the same would prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore providing that the statutory dues shall be the first charge over the

properties of the taxpayer. This aspect of the matter has been considered by this Court in a series of judgments.”

(emphasis supplied)

28. The language of Section 37(1) of the MVAT Act 2002, has to be viewed in that contextual background. Section 37(1) of the MVAT Act, 2002, creates a 'First Charge on the property of the dealer', or as the case may be, person, for any amount of tax, penalty, interest, sum forfeited, fine or any other sum payable under the MVAT Act 2002. Though the dues of the Bank as a secured creditor, in light of the language of Section 26-E of the SARFAESI Act, which has now been brought into force w.e.f. 1/9/2016, will have priority, that does not have the effect of wiping out the dues payable under any Central/State/Local Act, where, for the recovery of such dues, a first charge has been created on the property by such statute, which in the case of the MVAT Act, 2002, has been so created. It goes without saying that when a statutory charge is created on the property, the same would go with the property and would follow the property, in whosoever's hands the property goes.

29. Thus the notice of such a statutory charge on the property, is always presumed in law, to one and all and none can claim ignorance of the same. In *AI Champandy Industries Limited* (supra) itself the Hon'ble Apex Court has made a distinction between an encumbrance as it is understood in the general parlance and an encumbrance which is a charge on the property and runs with the property and has held that if by reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance.

30. As Section 37(1) of the MVAT Act, 2002, creates a charge on the property, a successful auction purchaser, thus would hold the property, upon which a statutory charge has been created, subject to such charge and the property would thus continue to be liable for any statutory charges created upon it, even in the hands of such auction purchaser, though for non disclosure of such charge by the secured creditor, the auction purchaser may sue the secured creditor and have such redress, as may be permissible in law. This is moreso for the reason that the priority given in Section 26-E of the SARFAESI Act, to the Banks, which is a secured creditor, would only

mean that it is first in que for recovery of its debts by sale of the property, which is a security interest, the other creditors being relegated to second place and so on, in the order of their preference as per law and contract, if any, as the case may be. Thus the dues under Section 37(1) of the MVAT Act, 2002, being a statutory charge on the property, would also be recoverable by sale of the property, and that puts a liability upon the auction purchaser, who, in case he wants an encumbrance free title, will have to clear such dues.

31. The next contention is that since the property was purchased in auction on “as is where is and what is there is” basis, the petitioner was not liable to pay anything else than the purchase price. The sale certificate issued in favour of the petitioner, as placed on record, dated 29/3/2017, contains the following endorsements :-

“The sale of the schedule property was made free from all encumbrances known to the secured creditor listed below (list I) on deposit of money demanded by the undersigned.

The sale of the schedule property was made without freeing from encumbrances listed below (list II).

List 1 :

*List of encumbrances Freed from Encumbrances
Deposit made/amount Adjusted.*

*Information Not Available. "AS IS WHERE IS AND
WHATEVER THERE IS
BASIS".*

List II :

*List of encumbrances not Freed from and subject
to which sale made*

*Information Not Available. "AS IS WHERE IS AND
WHATEVER THERE IS
BASIS".*

List-I and List-II in the sale certificate states that the respondent no.3/Bank had no information available in respect of any encumbrance or a charge, for that matter, of the respondent no.2, due to which, the petitioner having any knowledge or notice of any such encumbrance, did not arise at all.

32. The position in this regard, was considered in ***Dr. Jayesh Kumar Jha*** (supra), relied upon by Mr. Dawda, learned Counsel for the petitioner, where, though the provisions of Section 26-E of the SARFAESI Act, were not under consideration, however, the issue of dues in respect of Municipal rates and taxes, was under

consideration. The sale in that case was also conducted on “as is where is” and “as is what is basis”. The Court considered the obligation of the Authorised Officer under Rule 8(7)(a) & (f), 9(7), 9(9) and 9(10) of the Security Interest (Enforcement) Rules, 2002, the meaning of the word 'encumbrance', the duty of the seller to disclose details of encumbrance known to the creditor and transferring the property free from any encumbrances and held that on account of such non-disclosure of pre-sale property tax dues which was a charge on the land and building on the secured asset, it had failed to discharge its statutory obligation and after completion of sale and delivery of possession the auction purchaser could not be fastened with the liability to discharge such encumbrances.

33. In *Punjab Urban Planning and Development Authority* (supra) relied upon by Mr. Dawda, learned Counsel for the petitioner, the issue was regarding allotment of commercial plots by auction on “as is where is” basis, where the allegation was that the Punjab Urban Planning and Development Authority (PUDA), could not claim interest, penal interest, as well as penalty on account of the delayed payment of installments, for the reason that there was

delay on its part in providing the basic amenities like parking, lights, roads, water, sewerage etc. in time. Refuting the above contention, it was held that since the commercial plots were allotted on “as is where is”, basis, the allottees would have ascertained the facilities available at the time of auction and having accepted the commercial plots on “as is where is” basis they could not be heard to contend that since the basic amenities were not provided, the allottees were not liable to pay interest, penal interest on account of delayed payment of installments, on the principle of estoppel.

34. ***Mahendra Mahato*** (supra) relied upon by Mr. Wadodkar, learned Counsel for the respondent no.3/Bank, was a case in which the sale was on 'As is where is & As is what is basis', which was mentioned in the sale certificate as issued to the auction purchaser, who consequent to the same, having requested the Bank to provide vacant possession, which request was not acceded to, had filed a writ petition seeking a direction for delivery of physical and vacant possession. The petition was contested by the Bank, on the plea that the sale was on 'As is where is & As is what is basis' and therefore if the auction purchaser was obstructed in his attempt to

take physical possession, it was his responsibility to have the occupants removed. The Court in this background held that the fact that the property was not in possession of the Bank and was occupied was a fact which was easily discernible from a bare inspection of the property, which the petitioner must have done before offering his bid and therefore was bound by the terms of the auction, in terms of which he had purchased the property on an 'As is where is & As is what is basis' knowing fully the exact nature of occupation of the secured asset and its advantages and disadvantages, and thus could not be permitted to wriggle out of the confirmed bid.

35. We feel that the rulings in *Punjab Urban Planning and Development Authority* (supra) and *Mahendra Mahato* (supra) are more apt in the facts of the present matter, though the *Dr. Jayesh Kumar Jha* (supra) also spells out the need for the respondent no.3/ Bank, to make a proper enquiry as to the encumbrances, which we will consider hereinafter.

36. Thus the purchase of the property on 'as is where is and what is there is ' basis, would mean that the property was being had by the auction purchaser, with all its rights, obligations and liabilities, whatsoever they may be, which would include, all dues, impositions, restrictions as may have been imposed upon the same and consequent to acquiring title to the property, cannot be permitted to quibble out of it, on the alleged plea of not being noticed about any such liability/imposition. In case the auction purchaser, did not want to have the property, with its liabilities, he ought to have insisted on having the same free of all encumbrances, altogether, before bidding for the same. That apart, it is equally a duty of the auction purchaser, before bidding for the same, to make inquiries about the impositions upon the property, so that he can have it free of any encumbrances. After acquiring title to the property, the auction purchaser cannot be heard to say that he will have the rights associated with the property and not the liabilities. He takes it lock, stock and barrel, with everything.

37. Section 13 (6) of the SARFAESI Act reads as under :-

*“Section 13. **Enforcement of security interest.** -*

(1).....

(2).....

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

Rules 8 (7) (a) and (f), Rule 9 (7) (9) and (10) of the Security Interest (Enforcement) Rules, 2002 read as under :-

*“Rule 8. **Sale of immovable secured assets.***

(7) Every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the web-site of the secured creditor, which shall include -

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b).....

(c)....

(f) any other terms and conditions, which the authorized officer considers it necessary for a purchaser to know the nature and value of the property.

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

(1).....

(2)....

(7) *Where the immovable property sold is subject to any encumbrances, the authorised 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.*

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale.

(8)....

(9) *The authorised 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.*

Thus the obligation to deliver the property to the auction purchaser free from encumbrances known to the secured creditor includes the responsibility to make reasonable enquiries about the encumbrances and liabilities and to include such liabilities in the notice inviting the bids, or if that is not done, in the reserve price, fixed for sale of the security interest, so that the encumbrances can be taken care of. This is also spelt out from Rule 9(7) and (8) of the Security Interest (Enforcement) Rules, 2002,

38. The property, which is a security interest, under Section 13 (6) of the SARFAESI Act, consequent to the transfer of the secured asset after taking possession thereof, either physical or symbolic, by the secured creditor, vests in the transferee with all rights in the property transferred, as if the transfer had been made by the owner. The issue regarding the knowledge of the encumbrances known to the secured creditor, thus assumes significance. In so far as encumbrances on account of statutory/ Government/Municipal/Revenue dues are concerned, the responsibility of obtaining the details thereof is of the secured

creditor. The knowledge of these encumbrances can easily be solicited, obtained from the authorities by the secured creditor. Thus, the secured creditor is clearly possessed of the wherewithal, to obtain the information about encumbrances of the above nature. This is necessary for the secured creditor, for the reason that these encumbrances, have to be mentioned in the notice of sale under Rule 8 (7) (a) of the Security Interest (Enforcement) Rules, 2002 [for short, SI (E), Rules, 2002” hereinafter]. So also, Rule 8 (7) (f) of the SI (E), Rules, 2002 requires the sale notice to contain all the other terms and conditions which the authorised officer considers it necessary for a bidder/purchaser to know the nature and value of the property, which would obviously include information about any charge, lien or other imposition upon the property. Thus, information and details regarding any encumbrances upon the property which is the security interest, which are easily obtainable from the statutory authorities, ought to be so obtained by the secured creditor as well as the authorised officer, which then needs to be entered in the notice of sale under Rule 8 (7) (a) of the SI (E), Rules, 2002, which would result in bringing the information about any encumbrance to the knowledge of the prospective bidders. In

absence of any such information, an auction purchaser may in the facts of the given case, raise a claim that the purchase by him was without notice of any such encumbrance and any charge found subsequent to the confirmation of the auction, shall on that count, be not enforceable against the auction purchaser, which may lead to litigation.

39. An anomalous position would arise, when the Bank as a secured creditor, sells the property and appropriates the entire consideration thereof for its own debts, leaving the authorities which have a statutory charge on the property for dues under the statute, in a lurch, who then would be left with no choice than to explore other means to recover their dues. If there are other properties available, of the company/person, so far so good. If not, then the statutory authorities are left with an unrealised claim for their dues. It is due to the above reason that the position has to be reconciled, so that, as far as possible, the debts of the Bank as a secured creditor, as well as, those of the other statutory authorities which have a charge upon the property, for their dues, are realised.

40. A lot many cases and litigation arises due to the auction notice not containing the requisite details about the dues on and the situation of, the property put to auction. When the property is sold on 'as is where is' and 'as is what is' basis, though it would also be for the bidder, to make reasonable enquiries about the encumbrances/dues upon the property put to auction, including the status as to availability of vacant possession, however, the mere mention of 'as is where is' and 'as is what is', basis or any such phrase, should not absolve the secured creditor of its obligation to make proper enquiries about other dues/encumbrances upon the property, to obtain information about which, the secured creditor has the means and wherewithal and to disclose in the auction notice about such dues and also the situation about the possession of the property, so that the bidder is consciously made aware of all the pros and cons about the property, including the encumbrances/dues/possessory status and thereafter cannot be heard to raise a plea of not having been informed, afterwards. After all the money in the coffers of the Bank as a secured creditor is public money, as is the money, due and payable under the Central/State/Local statutes to the authorities. There is no reason

why, the secured creditor and other statutory authorities, who have a charge upon the property for recovery of their dues, cannot act in tandem, so that the interest of one and all, and dues receivable by each one of them are realised. This is imminently possible in this digital world, where information is readily available. Though information about statutory dues, may not be, at times, easily available to a bidder, however the same is easily accessible to a secured creditor. It needs to be kept in mind that the secured creditor and the authorities under various statutes which have dues payable to them from the sale of the same property, are not competitors or at loggerheads, but are instrumentalities of either the Statutes or are controlled by Statutes. Thus they should not function as competitors, but as facilitators and protectors of each others interests, which viewed with a birds eye, are in fact one. This is supported from the provisions of section 13(7) of the SARFAESI Act, which reads as under:-

“Section 13 (7)- Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or

any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.”

(emphasis supplied)

The provisions of Section 13(7) of the SARFAESI Act, thus also provide for the manner in which the money received by the secured creditor, by sale of the security interest, is to be applied, the residue after discharge of the debts of the secured creditor, has to be held in trust and paid to the person entitled thereto in accordance with his rights and interests, which in this case, would be the dues under the MVAT Act, 2002. It would thus be proper for the secured creditor, to ensure that all encumbrances, be known before hand; the amount to be received by auction of the property, should be sufficient to cover the costs, charges and expenses and discharge of the dues of the secured creditor and also discharge of the encumbrances upon the property.

41. The secured creditor under the SARFAESI Act, therefore must in all cases ensure :

(a) that the property offered as a security interest is free from any encumbrance whatsoever, at the time when it is so offered initially, to avail financial credit by the owner/s;

(b) in all such cases, a title verification certificate, by a lawyer, at the penalty of cancellation of his license to practice, in case such certificate is found to be false, should be a must, which certificate should also contain a statement that the lawyer has also verified the suits filing register of the Court, within whose jurisdiction, the property is situated to ascertain, whether the same is the subject matter of any litigation and an affidavit from the borrowers that it is not so;

(c) in all such cases, a valuation certificate, by a government approved, at the penalty of cancellation of his licence, in case such certificate is found to be false, should be a must;

(d) immediately upon creation of security interest in its favour for payment of its dues, the bank must inform all the Central/State/Local Authorities regarding creation of such security interest, including the Sub-Registrar of documents and City Survey

office concerned;

(e) the bank/secured creditor, should before any property is attached and auctioned :

(i) enquire with the Central/State/Local authorities regarding any dues on the property sought to be auctioned and in case such dues are found, to mention the same in the public notice to be published inviting bids, so that the bidder, is made aware of the liability and encumbrance, which the property carries with it.

(ii) where the secured creditor, has taken symbolic possession and is not in physical possession of the property, the public notice must indicate the nature of such possession and if the Secured creditor is unable to secure actual possession, the reason for not getting such possession (whether there is a tenant/licensee/family member/encroacher etc in occupation of the property, so that the bidder, is consciously made aware of the situation in which the property is and makes a conscious offer/bid.

(iii) Where the secured creditor, is aware of Statutory dues the payment of which is a charge upon the property, the

same could be included in the reserve price, for sale of the property or got deposited from the bidder separately, so that the encumbrance could be cleared, by the secured creditor.

(iv) where the secured creditor is aware of encumbrance, the value for discharging such encumbrance, either can be included in the reserve price or got deposited from the bidder, so that the encumbrance could be cleared, by the secured creditor.

The secured creditor, as a creation of a Statute, is meant for the benefit and interest of the citizens and is not expected to play hide and seek, in its dealings, but has to act fairly and is under an obligation in law, to make a full and candid disclosure as to the dues and encumbrances in respect of the property put to auction and the status as to possession of the property, for which it has to make reasonable enquiries, which should be demonstrable from the record. The secured creditor cannot be heard to say that it was for the bidder to obtain such information, for the reason, that being a lender, it is already holding the documents of the borrower, which confer upon it a right to obtain such information.

42. What we have stated above, is nothing new, but the statutory obligation of the secured creditor, as the owner of the property under Section 13(6) & (7) of the SARFAESI Act, read with Rules 8 (7) (a) and (f), Rules 9 (7) (9) and (10) of the SI (E) Rules, 2002 with a liability to transfer a clear and marketable title, as the seller.

43. Mr. Dawda, learned Counsel for the petitioner, further invites our attention to the judgment of the Hon'ble Apex Court in the case of *The Maharashtra State Co-operative Bank Ltd. / Babulal lade & ors. 2020(2) SCC 310*, to contend that the respondent no.3/ Bank, would be liable to pay the dues of the respondent no.2, from and out of the sale proceeds, of the auction. The contention is misconceived, for the reason that in *Babulal Lade* (supra) the direction for the Bank to pay the employees dues, as per the recovery certificate issued by the Industrial Court, out of the sale proceeds from the auctioned property, was due to the stipulation as contained in the letter dated 8/3/2010, under which the Bank had undertaken the responsibility for employees dues and not otherwise. There is no such undertaking by the respondent no.3, in the present

matter.

44. Thus even in the present case, the dues as claimed by the respondent no.2, being a charge on the property, under Section 37(1) of MVAT Act, 2002, and the property having stood attached by the respondent no.2, before the auction, the petitioner, would be liable to pay the same to the respondent no.2, in order to obtain a clear and marketable title to the property, having purchased the same on 'As is where is and whatever there is basis'. In case the petitioner discharges the aforesaid dues of the respondent no.2, it would then be entitled to a no dues certificate from the respondent no.2.

45. In view of the above discussion, we, find that the petitioner is not entitled to the reliefs as claimed in the petition. The writ petition is therefore dismissed.

Rule is discharged. In the circumstances, there shall be no order as to costs.

Copy of this judgment be sent to Reserve Bank of India, Main Building, P.O. Box 901, Shahid Bhagat Singh Road, Mumbai

and Indian Banks' Association, 6th Floor, World Trade Centre, Centre 1 Building, World Trade Centre Complex, Cuffe Parade, Mumbai, for information and necessary action/circulation, if deemed fit.

(AVINASH G. GHAROTE, J.)

(SUNIL B. SHUKRE, J.)

Wadkar