

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO.9565 of 2023
 With
 R/SPECIAL CIVIL APPLICATION NO.10059 of 2023
 With
 R/SPECIAL CIVIL APPLICATION NO.13188 of 2023
 With
 R/SPECIAL CIVIL APPLICATION NO.12848 of 2023

FOR APPROVAL AND SIGNATURE :

HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Sd/-

1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2.	To be referred to the Reporter or not ?	YES
3.	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO

MADHAVIBEN JITENDRABHAI RUPARELIYA

Versus

STATE OF GUJARAT

Appearance :

Special Civil Application No.9565 of 2023

MR MONAL S CHAGLANI for the Petitioners.

MR JAY TRIVEDI, AGP for the Respondent Nos.1,2,3,5

NOTICE SERVED BY DS for the Respondent No.4.

Special Civil Application No.10059 of 2023

MR PATHIK M ACHARYA for the Petitioners.
MR JAY TRIVEDI, AGP for the Respondent Nos.1,2,3

Special Civil Application No.13188 of 2023

MR PATHIK M ACHARYA for the Petitioners.
MR JAY TRIVEDI, AGP for the Respondent Nos.1,2
MR CZ SANKHLA for the Respondent No.3.

Special Civil Application No.12848 of 2023

MR ANMOL A MEHTA for the Petitioners
MR JAY TRIVEDI, AGP for the Respondent Nos.1,2,3,5
MR BHASKAR SHARMA for the Respondent No.4.

=====

CORAM:HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Date : 04/01/2024
COMMON CAV JUDGMENT

1. In this set of petitions, though the prayers in each petitions are some what different, the core issue is related to who will have first charge over the property in question i.e. Secured Creditor or the State / Central Government (Crowns debt) on account of non-payment of dues of Sales Tax department and, therefore, all the matters were heard together and are now being decided together.

2. On 9.10.2023, this Court had passed the following order :-

"1. Heard learned advocate Mr. Ajay Mehta with learned advocate Mr. Anmol Mehta, learned advocate Mr. Pathik Acharya and learned advocate Mr. Monal Chaglani for the respective petitioners in each of the petitions. Learned AGP Mr. Jay Trivedi for the State and learned advocate Mr. Sankhala in Special Civil Application No. 13188 of 2023 for the Bank of Baroda. Learned advocate Mr. Bhaskar

Sharma for the respondent No.4 in Special Civil Application No. 12848 of 2023. In rest of the petitions, though the respondents banks were served, on one appears. However, the matter was taken up finally as there was no prayer made against the bank and the prayer as can be seen from the prayer clause is against the State.

2. Rule. Learned respective advocates appearing for the State as well as for the bank as stated above waive service of rule.

3. The matter was heard extensively for final hearing. Arguments are concluded. Judgment reserved for orders."

3. All the petitioners in each of these petitions are the successful auction purchasers or their successors who have purchased the property by way of auction from the Bank or are subsequent purchasers from the auction purchaser and essentially, their grievance is about the fact that name in the revenue record are not mutated and are denied and, therefore, all these set of petitions are preferred with different prayers which are worded differently, but for the same purpose. Therefore, SCA No.12848 of 2023 is treated as lead petition and facts are stated from the said petition.

3. The prayers made in Special Civil Application No.12848 of 2023 reads as under :-

"(A) to quash and set aside order dated 21.11.2022 (Annexure-A) passed below Entry No.7154 and order dated 18.02.2011 (Annexure-B) below Entry No.4752 passed by Respondent No.2 - Mamlatdar;

(B) to direct the Respondent Nos.1 and 2 to mutate the name of Petitioner No.1 - SKMPL in the revenue records for the land bearing new Survey/Block No.109, Bhagya Laxmi Estate, Village : Rakanpur, Taluka : Kalol, District : Gandhinagar - 382 721 having Unique Property Identification Number : 10601033001090000 together with the construction standing thereon;

(C) to direct the Respondent Nos.1 and 2 to annul the charge of Respondent No.3 - Department on land bearing new Survey/Block No.109, Bhagya Laxmi Estate, Village : Rakanpur, Taluka : Kalol, District : Gandhinagar - 382 721 having Unique Property Identification Number : 10601033001090000 together with the construction standing thereon;

(D) to direct that pending hearing and final disposal of the present Special Civil Application, Respondent No.3 - Department be restrained from initiating any coercive action/recovery including issuance any notice against the Petitioners towards the Sales tax charge as registered with Respondent

Nos.1 and 2;

(E) to direct that pending the hearing and final disposal of the present Special Civil Application, Respondent No.2 be restrained from making any entries in the revenue records against the title and interest of petitioner No.1 - SKMPL for land bearing new Survey/Block No.109, Bhagya Laxmi Estate, Village : Rakanpur, Taluka : Kalol, District : Gandhinagar - 382 721 having Unique Property Identification Number : 10601033001090000;"

3.1 The factual matrix of the case are that the dispute pertains to a land bearing Block No.496 (old Revenue Survey No.388/1, 401 and 414) situated at village Rakanpur, Tal. Kalol, Dist. Gandhinagar admeasuring 17,401 Sq. Mts. paiki Sub-plot Nos.5 and 6 admeasuring 1343.50 Sq. Mts. The aforesaid land was originally owned by Shakarabhai Jesingbhai Patel and seven others. The said was a non-agricultural land for which N.A. order was passed in the year 1993 and the land was thereafter sub-divided for industrial purpose by Shakarabhai J. Patel and other co-owners. The petition is concerned with parcel of land bearing Sub-plot No.5, admeasuring 1343 Sq. Mts. in Block No.496 paiki as well as Sub-plot No.6.

3.2 On 17.3.1994, Shakarabhai J. Patel and other co-owners of the land sold the land bearing Block No.496 paiki Sub-plot No.5 (part) admeasuring 671.75 Sq. Mts. to M/s. Pramukh Pharmaceuticals for which Entry No.1753 was mutated. Similarly, on the same day, land bearing Block No.496 paiki Sub-plot No.6

admeasuring 671.75 Sq. Mts. was sold to Akshar Steel Feb Industries for which revenue Entry No.1754 was mutated on 26.8.1994.

3.3 Both M/s. Pramukh Pharmaceuticals as well as Akshar Steel Feb Industries sold their respective lands bearing Sub-plot Nos.5 and 6 to M/s. Helios Enprint Limited in the year 1996.

3.4 On 6.8.1997, revised N.A. permission for Block No.496 paiki Sub-plot Nos.5 and 6 admeasuring 1343.50 Sq. Mts. was granted by the Deputy Development Officer, Kalol.

3.5 In the year 2000, Helios availed various financial facilities from respondent No.4 Bank by mortgaging the aforesaid subject property and charge was created on the land to the tune of Rs.70 Lacs in favour of respondent No.4 and the same was recorded in the revenue record for which Entry No.2624 was mutated.

3.6 It is the case of the petitioner all throughout as canvassed in the petition as well as in the written submissions that actually, both the parcels of land i.e. Block No.496 paiki Sub-plot Nos.5/1 and 5/2 and Sub-plot No.6 was owned by M/s. Dolplast Machinery and the same had never belonged to Helios. However, considering the prayer made in the petition, which is in respect of a revenue entry with respect to sub-plot Nos.5 and 6, as well as considering the fact that in this petition, there is no prayer against Dolplast, which is not even party, the aforesaid facts are stated just to state the petitioner's version, though the same has no bearing in respect of the controversy before this Court.

3.7 In the year 2002 - 03, upon Helios having defaulted on repayment of loan and was declared a non-performing asset, the respondent No.4 Bank initiated the proceedings under SARFAESI Act by filing Original Application No.264 of 2003 before the Debts Recovery Tribunal, Ahmedabad.

3.8 As Helios also did not make any payment towards the liability of Sales Tax - the respondent No.3 department, a charge over the subject land was registered on 15.9.2006. According to the petitioner, the aforesaid charge was registered by the Sales Tax department after a period of six years and six months after the charge of respondent No.4 Bank was registered as back as in the year 2000.

3.9 On 12.10.2007, pursuant to a public auction conducted by respondent No.4 Bank in respect of the subject land, respondent No.5 - Minaxiben who happens to be wife of petitioner No.2 and Director of petitioner No.1 Company participated in the bidding and as she was the highest bidder, the Bank issued a certificate of sale in her favour in respect of movable and immovable property lying inside the property. Subsequently on 2.5.2008, registered Sale Deed was executed by the Bank in favour of respondent No.5 - Meenaxiben for which Entry No.1146 was mutated mentioning that the Bank through its authorized signatory had sold the subject land in favour of respondent No.5 - Minaxiben.

3.10 The respondent No.5 - Minaxiben on 5.1.2011 applied before the Mamlatdar to mutate her name in the revenue record on the basis of registered Sale Deed executed in her favour. On

18.2.2011, Mamlatdar rejected the said application with an endorsement that the seller's name does not tally. Thereafter, respondent No.5 - Minaxiben sold the subject land to petitioner No.1 who was represented through petitioner No.2 by way of registered Sale Deed. On 31.5.2022, the respondent No.4 Bank issued No Objection Certificate for entering the name of the petitioner in the revenue record. Therefore, the petitioner No.1 once again approached Mamlatdar for mutation of its name in the revenue record. However, Mamlatdar, Kalol on 21.11.2022 passed an order rejecting the application of the petitioner on two grounds i.e. that seller's name does not tally as per village Form No.7/12 and that over the land in question, there is already a charge registered in favour of respondent No.3 department.

3.11 Upon rejection of petitioner's application for mutation of its name in the revenue record vide order dated 22.11.2022, the petitioner has preferred Special Civil Application No.12848 of 2023.

4. Similarly, Special Civil Application No.9565 of 2023 is preferred against the communication dated 21.3.2023 of Mamlatdar, Manavadar whereby Mamlatdar informed the petitioner that the petitioner's application for mutating her name in the revenue record cannot be accepted as there is a charge over the land of the petitioner in favour of Sales Tax Officer, Junagadh.

4.1. Whereas the claim of the petitioner is that the petitioner has purchased the property bearing Survey No.159/1 and 161 of Manavadar village by way of auction conducted by the Debts Recovery Tribunal as the original owner of the Bank, namely,

M/s. Yogeshwar Industries failed to repay the cash credit facility availed by him in respect of respondent No.4 Bank. Therefore, he is seeking his name be mutated in respect of property in question in the revenue records as the petitioner of Special Civil Application No.9565 of 2023 is a bonafide purchaser who has purchased the property through auction under SARFAESI Act.

5. Special Civil Application No.10059 of 2023 is preferred seeking a declaration that the respondent No.4 Bank in that petition being Canara Bank is having the first charge over the property in question as the charge of respondent No.4 Bank would override the charge of respondent No.2 as per Section 26 (e) of SARFAESI Act over charge in favour of respondent No.2 under Section 48 of VAT Act. In that petition, the petitioner had purchased a property situated at Survey No.1221/2 (part) admeasuring 3750 Sq. Yd. situated at Mouje Saji, Tal. Kalol, Dist. Surendranagar as the owner of the property failed to repay the advance facility availed from Canara Bank and, therefore, pursuant to the proceedings under the SARFAESI Act, the property was put to public auction and the petitioner being a bonafide purchaser has successfully purchased the property in question and, therefore, he is seeking aforesaid direction.

6. Similarly, in Special Civil Application No.13188 of 2023, the petitioner has prayed to quash and set aside the attachment of property and has prayed for a direction that the charge recorded in the revenue record in favour of Sales Tax department Khambhat be quashed. The said petition was preferred in respect of three lands purchased by the petitioner by participating in public auction, details of which are as under :-

7. It is pertinent to note that in respect of each of these petitions, Sale Certificate has been issued in favour of the respective successful auction purchaser.

8. Learned advocates Mr. Ajay R. Mehta assisted by Mr. Anmol Mehta, Mr. Monal S. Chaglani and Mr. Pathik Acharya appearing for the petitioners in respective petitions have made the following submissions :-

8.1 It is a well settled doctrine that the respective Banks which are Secured Creditors and are having charge over the subject property, their charge over the property would prevail over the Unsecured Creditor i.e. Sales Tax Department (Crown's Debt) and hence, the claim of Secured Creditor would prevail over the claim of Unsecured Creditor. According to the petitioner, in view of Section 26 E of the SARFAESI Act, this is the settled proposition of law and, therefore, all these petitions are covered by the aforesaid proposition of law.

8.2 That in case of **Surendrabhai & Company and another v. State of Gujarat and others, 1985 GLH (U.J.) 53**, this Court has held that the State cannot claim any right of preference in respect of its unsecured claim or a secured debt and to the extent of Section 137 of the Gujarat Land Revenue Code is declared to be void.

That this view was again confirmed by this Court in the case of **Dahod Urban Cooperative Bank v. State of Gujarat in Special Civil Application No.3585 of 2008**. Therefore, in view

of this settled legal position, the petitioners have purchased the property in question by way of public auction as a bonafide purchaser from a Secured Creditor, the refusal of the respondents to mutate the name of the petitioners in the revenue entry in revenue record is contrary to law and hence, illegal.

8.3 That each of the petitioners are bonafide purchasers of the property in question and they have purchased the property by way of auction conducted under the provisions of law and more particularly, pursuant to the proceedings before the Debts Recovery Tribunal and, therefore, after having invested huge amount and after having succeeded in getting the Sales certificate, denial to mutate the name of the petitioners in the revenue records would amount to penalizing the petitioners.

8.4 From the catena of decisions of the Hon'ble Supreme Court as well as this Court taking a view that the charge in favour of Secured Creditor would precede over the Unsecured Creditors (State in the instant case) and, therefore, the stand taken by the State Government is contrary to the settled proposition of law.

8.5 That the common law of England or principles of equity and good conscience would not allow Crowns Debt to have priority over the recovery of debts over the mortgagee or pledgee of goods or secured creditors and the aforesaid proposition of law is followed by the Hon'ble Supreme Court in the case of **Bank of Bihar v. State of Bihar, 1972 (3) SCC 196, Dena Bank v. Bhikhabhai Prabhudas Parekh & Company, 2000 (5) SCC 694** and **Punjab National Bank v. Union of India, 2022 (7) SCC 260.**

8.6 That Sales Tax Department can always recover their dues from the defaulter through alternative forum and means, if any available, as per law, but the petitioners being bonafide purchasers cannot be permitted to be penalized.

8.7 Learned advocates appearing for the petitioners relied upon the following decisions :-

(i) Punjab National Bank v. Union Bank of India and others, (2022) 7 SCC 260.

(ii) Dena Bank v. Bhikhabhai Prabhudas Parekh & Company and others, (2000) 5 SCC 694.

(iii) M/s. Mahadev Cotton Industries v. Department of Central Sales Tax, 2023 (0) AIJEL - HC 245523.

(iii) Bank of Baroda through its Assistant General Manager Prem Narayan Sharma v. State of Gujarat and others, 2019 LawSuit (Guj.) 572.

(iv) Amidhara Developers Private Limited v. State of Gujarat and others, 2015 Law Suit (Guj.) 1945.

(v) Unreported decision of Bombay High Court in the case of Ronak Industries v. Assistant Commissioner Central Excise & Customs, Daman and others, Writ Petition (L) No.1747 of 2023 delivered on 28.6.2023.

(vi) Unreported decision of this Court in the case of M/s. Mani Laxmi Metal and Alloys Private Limited v. State of Gujarat, Special Civil Application No.6283 of 2022 delivered on 8.4.2022.

(vii) Unreported decision of this Court in the case of Odhavjibhai Mohanbhai Gadhiya v. State of Gujarat and others, Special Civil Application No.9394 of 2021 delivered on 30.9.2022.

(viii) Unreported decision of this Court in the case of Vinod Realities Private Limited v. State of Gujarat and others, Special Civil Application No.7807 of 2011 delivered on 25.8.2011.

By making the above submissions, learned advocates appearing for the petitioners prayed to grant the reliefs prayed for in the petitions.

9. Mr. Jay Trivedi, learned Assistant Government Pleader appearing for the respondent - State has made following submissions :-

9.1 That the petitioners are not entitled for the discretionary relief because whether the Bank has the “first charge” or not cannot be decided in the petition at the instance of the present petitioner i.e. auction purchaser. That the petitioners cannot maintain the petition especially when, the erstwhile owner namely Minaxi Manishbhai Hansoti has never challenged the attachment order passed by the Sales Tax Department. That the petitioner cannot be said to be to be “auction purchaser” but a “subsequent purchaser”. That admittedly, the charge over the property was made by the Sales Tax authorities on 15.09.2006, and

since the present petition is filed after the lapse of 17 years, the petitioners are not entitled for the discretionary reliefs as prayed in the petition on the ground of delay.

9.2 That under Section 13(7) of the SARFAESI Act, 2002, it is the statutory duty of the Bank to discharge the dues of the secured creditor and the residue of the money so received be paid to the person/department against whom there is valid outstanding amount. He further submitted that under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, it is the statutory obligation of the Authorised Officer of the Bank to include the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditors. As per Rule 9(7) of the Rules, 2002, it is by virtue of the statutory mandate, where the immovable property is sold which is subject to any encumbrances, than the Authorised Officer has to allow the purchaser to deposit the money required to discharge the encumbrances and any interest due thereon together the additional amount that is sufficient to meet with the contingences of the further cost, expenses and interest as may be determined by the Authorised Officer before finalizing the sale in favour of the auction purchaser.

9.3 That this Court would interpret the provision of the Act and Rules harmoniously, while keeping in mind the intention of the legislature i.e. in respect to the Rules so framed with respect to the providing details of the encumbrances of the State Authorities. Conjoint reading of the Section 13(7) read with Rule 8(6) and Rule 9(7), makes it abundantly clear that, statutory duty is casted upon the Authorised Officer to give details of the encumbrances created under the statute and so also to recover the outstanding the money

from the auction purchaser before finalizing the sale as Rule 9 of the Rules, 2002.

9.4 That admittedly the auction was held on “*as is where is whatever there is basis*” and therefore the right of the authorities with respect to the charge does not go away.

9.5 In support of his submissions, he relied upon the decision of the Bombay High Court in the case of **Medineutrina Pvt. Ltd versus District Industries Centre, Nagpur and Ors reported in AIR 2021 Bom 35**, more particularly para 31, 32, 36 to 40, 42 and 44, by which the Hon’ble Division Bench of the Bombay High Court gives broader principles as far as the inter play between Section 13(7), Rule 8(7) and 9(7) of the Rules, 2002 are concerned. The Hon’ble Division Bench of the Bombay High Court has also laid down the proposition of law that, 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 the auction purchaser receives the property free from all encumbrances. That the auction purchaser takes with him its lock, stock and barrel while purchasing the auction property.

9.6 That the judgment of the Hon’ble Division Bench was challenged by the Bank before Hon’ble Supreme Court being Civil Appeal No. 6350 of 2021, whereby the Hon’ble Supreme Court vide its order dated 07.10.2021, has directed the Bank to set apart the amount from the sales proceeds received in respect of the subject property of the owner and that amount be made over the Sales Tax Department subject to the outcome of the petition. The Hon’ble Supreme Court vide its order dated 18.11.2021 has dismissed the

petition of the Bank, by observing that it was not open for the petitioner – Bank to resile from the liability to discharge the same in connection with the first charge of the State.

9.7 That the Hon'ble Full Bench of the Bombay High Court, in the case of **Jalgaon Janta Sahakari Bank Ltd. versus Joint Commissioner of Sales Tax reported in 2022 SCC Online Bom 1767** has in para 44 framed the question of law and in respect to the liability of the auction purchaser the Hon'ble Bombay High Court has framed the question in para 44(g) (Page No. 34 of the judgment). The Hon'ble Court has decided the question in para 155 to 161.

9.8 Learned AGP relied on the decision of the Hon'ble Supreme Court in the case of **Union of India and others v. N. Murugesan and others, (2022) 2 SCC 25** wherein the Hon'ble Supreme Court has explained the doctrine of delay, laches and acquiescence and submitted that the charge was created in favour of Sales Tax department long back and after long delay, such charge could not have been challenged by way of present petitions. He, therefore, prayed for dismissal of these petitions.

10. In the rejoinder, learned advocates appearing for the petitioners submitted that the decisions relied upon by learned Assistant Government Pleader cannot be considered in the facts of the case for the reason that the petitioners before this Court are the bonafide purchasers and the decisions relied upon by them are in respect of right of the bonafide auction purchasers in view of Section 26E of the SARFAESI Act. They further submitted that

order dated 18.11.2021 of the Hon'ble Supreme Court dismissing the petition of the Bank in Civil Appeal No.6350 of 2021 in case of Kotak Mahindra Bank Limited v. District Industries Centre (D.I.C.) and others, would not be applicable in the facts of the present case for the reason that there, it was the Bank which had preferred the appeal before the Hon'ble Supreme Court. They further submitted that the decision of the Full Bench of Bombay High Court in the case of Jalgaon Janta Sahakari Bank Limited and another v. Joint Commissioner of Sales Tax Nodal 9, Mumbai also cannot be relied upon as there are judicial pronouncement of the Hon'ble Supreme Court as well as this Court on the issue on hand available as the same canvasses correct proposition of law considering the facts of the case.

11. I have heard learned advocates appearing for the respective parties and perused the record as well as the decisions relied upon by the advocates for the parties. What is undisputed fact in each of the petitions is that all the petitioners herein are bonafide purchasers of various properties which were put to auction upon default in repayment of loan committed by their predecessors in title. Therefore, under the proceedings under the SARFAESI Act, the properties were put to auction pursuant to a charge which was created in favour of the respective Bank and the petitioners having been the successful bidder, had paid the bid amount and purchased the property as successful bidder.

12. Each of the petitioners were issued Sale Certificate by the respective Bank in whose favour the property was mortgaged and charge was created and thereafter the petitioners have applied for mutation of petitioner's name in the revenue record. In some

cases, the petitioners are subsequent purchasers. The fact remains that the predecessor of the petitioners had purchased the property as a bonafide auction purchaser.

13. Therefore, when each of the properties were purchased pursuant to an auction carried out pursuant to the orders passed by DRT, the aforesaid auction was held to recover the dues of Secured Creditors i.e. respective Banks under an order passed by DRT in the relevant proceedings before DRT. Therefore, being the Secured Creditor, the Banks were enjoying priority in terms of Section 26 E of the SARFAESI Act, which 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."

14. In light of this, decisions of the Hon'ble Supreme Court as well as this Court are required to be considered.

15. Learned advocates appearing for the respective petitioners cited number of judgments, but since they are on same point, instead of discussing every judgment, I may consider few latest decisions of the Hon'ble Supreme Court as well as this Court.

16. In the case of **Vinod Realities Private Limited v. State of Gujarat (Supra)**, this Court observed in paragraph 13 as under :-

"13. The Supreme Court while deliberating the issue in Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co., reported in (2000) 5 SCC 694, noticed that the principle of priority of government debts is founded on the rule of necessity and of public policy and observed as follows :-

"8. The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognized principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasizes the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues (see Builder Supply Corpn., AIR 1965 SC 1061). In the same case the Constitution Bench has noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts and that this rule of common law amounts to law

in force in the territory of British India at the relevant time within the meaning of Article 372(1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is founded, the priority would be available only to such debts as are incurred by the subjects of the Crown by reference to the State's sovereign power of compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to commercial transactions. Having received the available judicial pronouncements their Lordships have summed up the law as under :

1. There is consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.
2. The common law doctrine about priority of Crown debts which was recognized by Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372(1) and continues to be in force.
3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.
4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in

relation to commercial activities which may be undertaken by the State for achieving socio-economic good. In other words, where the welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration.

10. 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) 131 ER 563, it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar vs. State of Bihar*, (1972) 3 SCC 196, the principle has been recognized 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 (TLL, 7th Edn., p. 386) - "It seems a government debt in India is not entitled to precedence over a prior secured debt."

10. Priority or precedence of Crown debts under the Central Excise Act vis-à-vis secured debts under the State Financial Corporations Act, 1951 fell for consideration before the Supreme Court in Union of India vs. Sicom Ltd., reported in (2009) 2 SCC 121. In the said case, the Supreme Court while held that 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, observed as follows :-

"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.”

17. In case of **Odhavjibhai Mohanbhai Gadhiya v. State of Gujarat (Supra)**, this Court observed in paragraphs 5.1 to 5.3

as under :-

"5.1 The settled position of law is that the VAT and sales tax dues has no precedence over the dues of the bank for recovery of which the bank exercise powers under the SARFAESI Act. The bank was secured creditor. Section 26 E of the SARFAESI Act provides for priority of secured creditor, stating that notwithstanding anything contained in any other law, after the registration of security interest, the debts due to unsecured creditor shall be paid in priority of all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority. In respect of finance given by the bank to the original owner of the property, security interest was created by mortgaging the property. The debt becoming due to the bank was a secured debt. The charge sought to be created by the sales tax authorities in no way could discount the a priori rights of the bank to recover its dues as the bank was secured creditor.

5.2 The dues in the nature of sales tax or VAT payable by the original owner cannot claim priority over the dues of the secured creditor. The principle that the state debt or crown debt has no prior claim or the dues payable to the secured creditor is no longer res integra. In Bank of Bihar vs. State of Bihar [(1972) 3 SCC 196], the supreme court laid down certain well known principles which were followed by the supreme

court in its own judgment in Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. [(2000) 5 SCC 694]. The law laid down is that the preferential right of the Crown to recover the debt over the creditors is limited to the class of unsecured creditors. The common law of England or the principles of equity and good conscience would not allow the Crown to have preferential right for recovery of debt over the mortgagee or pledgee of goods or secured creditors. The law was further settled by the Supreme Court in Punjab National Bank Vs. Union of India [(2022) 7 SCC 260] on this score.

5.3 In view of above position of law, in other words, the charge in respect of the property in question created for sales tax dues is of no avail and has no efficacy in law. The property in question was sold by the bank which was a secured creditor, to enforce its secured debt under the SARFAESI Act, of which the petitioners were successful auction purchaser. They were issued sale certificate which was registered to finally become absolute owner of the property. In exercising their capacity as owners, they executed further sale deed dated 15.2.2021 which was registered with the office of Sub-Registrar at No.1169 on 16.2.2021, however the Sub-Registrar refused to return the sale registered sale deed in view of the order of the respondent No.5 Sales Tax Authority on the ground that it had created charge over the properties for the sales tax dues."

18. Recently, Hon'ble Supreme Court in the case of **Punjab National Bank v. Union of India and others (Supra)**, observed in paragraphs 46 to 50 as under :-

"46. This Court in *Dena Bank v. Bhikhabhai Prabhu Dass Parikh and another*, [(2000) 5 SCC 694], wherein the question raised was whether the recovery of sales tax dues (amounting to Crown debt) shall have precedence over the right of the bank to proceed against the property of the borrowers mortgaged in favour of the bank, observed as under :-

"10. However, the Crown's preferential right of 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 of recovery of its debts over a mortgagee or pledgee of goods or a Secured Creditor." (emphasis supplied)

47. Further, in *Central Bank of India Vs. Siriguppa Sugars & Chemicals Ltd. & Ors.* [(2007) 8 SCC 353], while adjudicating a similar matter, this Court has held as under :-

"18. Thus, going by the principles governing the matter, propounded by this Court there cannot be any doubt that the rights of the appellant - bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursement to the cane growers and to the employees. There is no dispute that the sugar was pledged with the appellant bank for securing a loan of the first respondent and the loan had not been repaid. The

goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant - bank. In view of the fact that the goods were validly pawned to the appellant bank, the rights of the appellant - bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods." (emphasis supplied)

48. The Bombay High Court in Krishna Lifestyle Technologies Ltd. Vs. Union of India & Ors. [2008 SCC Online Bombay 137], wherein the issue for consideration was "whether tax dues recoverable under the provisions of The Central Excise Act, 1944 have priority of claim over the claim of secured creditors under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" held that :-

"19. Considering the language of Section 35 and the decided case law, in our opinion it would be of no effect, as the provisions of SARFAESI Act override the provisions of the Central Sales Tax Act and as such the priority given to a secured creditor would override Crown dues or the State dues.

20. In so far as the SARFAESI Act is concerned a Full Bench of the Madras High Court in UTI Bank Ltd. v. Deputy Commissioner of C. Excise, Chennai - II has examined the issue in depth. The Court was pleased to hold that tax dues under the Customs Act and Central Excise Act, do not have priority of claim over the dues of a secured creditor as there is no specific provision either in the Central Excise Act or the Customs Act giving those dues first charge, and that the claims of the secured creditors will prevail over the claims of the State. Considering the law declared by the Apex Court in the matter of priority of state debts as already discussed and the provision of Section 35 of SARFAESI Act we are in respectful agreement with the view taken by the Madras High Court." (emphasis supplied)

49. An SLP (No. 12462/2008) against the above judgement of the Bombay High Court stands dismissed by this Court on 17.07.2009 by relying upon the judgement in the matter of Union of India vs SICOM Ltd. & Anr. Reported in [(2009) 2 SCC 121], wherein the question involved was “Whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of the State Financial Corporation Act, 1951” and this Court held as under :-

“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 Aiyer (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. (emphasis supplied).

50. In view of the above, we are of the firm opinion that the arguments of the learned counsel for the Appellant, on the second issue, hold merit. Evidently, prior to insertion of Section 11E in the Central Excise Act, 1944 w.e.f. 08.04.2011, there was no provision in the Act of 1944 inter alia, providing for First Charge on the property of the Assessee or any person under the Act of 1944. Therefore, in the event like in the present case, where the land, building, plant machinery, etc. have been mortgaged/hypothecated to a secured creditor, having regard to the provisions

contained in Section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, the Secured Creditor will have a First Charge on the Secured Assets. Moreover, Section 35 of the SARFAESI Act, 2002 inter alia, provides that the provisions of the SARFAESI Act, shall have overriding effect on all other laws. It is further pertinent to note that even the provisions contained in Section 11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002."

19. In **M/s. Mahadev Cotton Industries v. Department of Central Sales Tax (Supra)**, the Division Bench of this Court observed in paragraph 11.3 as under :-

"11.3 In the instant case, it is an undisputed fact that respondent No.5 - Bank is a secured creditor. Therefore, the Bank has valid first charge over the property in question by way of mortgage and has first right to sell the same in view of priority under Section 26E of the Act and recovered its dues from it. The petitioner is a bona fide purchaser, purchased the property in question from the e-auction held by the bank and paid full and total sale consideration to the bank and the bank has issued sale certificate in favour of the petitioner. Considering the law laid down by this Court as well as by the Hon'ble Apex Court and also keeping in mind the provisions of Section 26E of the SARFAESI Act, the debts due to financial institution / Bank - a secured creditor shall be paid in priority over

other debts/taxes payable to the State Government. The petitioner has no concern with the dues of the State Authorities which is of the erstwhile owner. The petitioner has paid full and final sale consideration to respondent No.5 - Bank and if the State Authorities have dispute qua their dues, they can avail appropriate legal remedy before appropriate forum against the appropriate person/s. Any of the respondent has no right to disturb the right, title and interest of the petitioner qua the property in question. Under these circumstances, the petitioner cannot be left in lurch. The petitioner therefore is required to be protected. Moreover, now it is well settled legal position that the mortgagor bank has priority to recover the dues against any charges of the State Government or Central Government, irrespective of the fact otherwise."

20. The above referred judgments takes a categorical view that the charge of the Secured Creditor will precede over the charge of an Unsecured Creditor (Crowns Date). In the instant case, the submission of learned AGP Mr. Trivedi that the State and its authorities have rightly rejected the application for mutation of entry of the petitioners in respect of the property in question cannot be accepted. Further, as far as the submission of delay is concerned, the same also cannot be accepted for the reason that the petitioners are the bonafide purchasers of the property in question by way of auction or from successful auction purchaser and they have invested huge amount in the property, they have acquired the title of the property by way of Sale Certificate, they

are the holder of the title in respect of property in question as on today. Reflection of their names in the revenue record by way of mutation entry is merely a consequential action based upon their title over the property in question. When their title is unquestionable, as the respective Banks have issued Sales Certificate in favour of petitioners, the petitions cannot be thrown away on the ground of alleged delay.

21. Further, as far as the reliance upon the decision of the Hon'ble Supreme Court in the case of Kotak Mahindra Bank v. District Industries Centre (D.I.C.) and others (Supra), considering the fact that the said appeal was filed by the Bank, whereas all the present petitions are preferred by the bonafide purchasers of the property in question who have purchased the properties by way of auction on account of the charge created over the property by the Bank and, therefore, rights of bonafide purchasers, though would flow from the rights of the Bank, such rights of the bonafide purchaser are required to be seen from a different angle than the rights of a Bank as the Bank itself has received the money from the petitioners. Thereafter, the Banks issued Sale Certificate and, therefore, the present set of petitions are required to be decided on the basis of decisions cited by the petitioners wherein the bonafide purchaser had preferred petitions seeking direction to mutate their names in the revenue records or to quash the charge or to declare that the Secured Creditor will have first charge over the property as against State Government (Crowns Date) and, therefore, decision of the Hon'ble Supreme Court in the case of Kotak Mahindra Bank is in different context and, therefore, the same would not be applicable in the facts of the case.

22. Resultantly, all these petitions succeed and are allowed. The respondent authorities are directed to mutate the names of each of the petitioners in the revenue record by quashing and setting aside any attachment / charge over the property in question by the State or its authorities as there was a first charge of the respondent Bank in each of the petitions. Rule is made absolute to the above extent. There shall be no order as to costs.

Sd/-
(NIRZAR S. DESAI,J)

SAVARIYA