

(2011) 08 BOM CK 0051

In the Bombay High Court

Case No : Appeal From Order No. 106 of 2011 with Civil Application No. 7154 of 2011

Aurangabad Textile Mills

APPELLANT

Vs

Abdul Khaliq and Another

RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, 20
Land Acquisition Act, 1894 — Section 3(1), 3(2), 4, 4(1), 6
Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 15, 2
Registration Act, 1908 — Section 18
Sick Textile Undertakings (Nationalisation) Act, 1974 — Section 4, 4(2)
Transfer of Property Act, 1882 — Section 52

Citation : (2012) 1 ALLMR 85 : (2012) 1 MhLj 884

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Manish N. Navandar, for the Appellant; D.V. Soman and R.M. Sharma, for the Respondent

Judgement

S.S. Shinde, J.—This Appeal from Order is filed challenging the order dated 30-4-2011 passed by the District Judge-2, Aurangabad below Exhibit-10-D in Regular Civil Appeal No. 130 of 2011. When this matter was heard for admission on 21-6-2011, this Court was pleased to issue notice to the respondents and ad interim relief was granted in terms of prayer clause (C) of the Civil Application.

2. In pursuant to the notice issued to the respondents, the respondents have appeared through Counsel and they have also filed reply and also notes of arguments. With the consent of parties, Appeal from Order is taken up for final disposal..

3. Learned Counsel appearing for the appellant submits that, the order which was passed on an application filed by the respondents in M.A.R.J.I. No. 122 of 2007 came to an end, when M.A.R.J.I. No. 122 of 2007 came to be disposed of finally on 23-3-2011. Learned Counsel further submits that, the interim order

which was passed by the lower Appellate Court in M.A.R.J.I. No. 122 of 2007 was to remain in force till appearance of respondents. Respondent No. 1 appeared before the Court on 16-4-2011 and respondent No. 2 appeared on 21-4-2011, in M.A.R.J.I. No. 122 of 2007 and therefore, order of status quo and not to create third party rights ceased to operate from 21-4-2011. According to learned Counsel for the appellant, when the effect of interim order passed by the lower appellate Court on an application filed by the respondents came to an end on 23-3-2011 and subsequently order of status quo and not to create third party rights which was passed in M.A.R.J.I. No. 122 of 2007 ceased to operate from 21-4-2011, there was no question of confirming any interim orders by the lower Appellate Court on 30-4-2011, when said orders were not in force. Therefore, according to the learned Counsel for the appellant, when the order granting status quo and not to create third party rights itself was not in force/operation from 21-4-2011 there was no question of confirmation of said order on 30-4-2011 by the lower Appellate Court.

4. Learned Counsel appearing for the appellant further submitted that, the respondents made encroachment on the suit property which is owned by the appellant herein. Learned Counsel appearing for the appellant invited my attention to the Pages 38 to 41 of the compilation of this Appeal from Order and submitted that, the letter which was written by the Collector, Aurangabad to the Administrator, Municipal Corporation, Aurangabad and order passed in Revision by the revisional authority are set aside by this Court in Writ Petition No. 436 of 1988. The sum and substance of the arguments of the learned Counsel for the appellant is that, the status of the respondents on the suit property is encroachers and they have no any right to continue in the suit property.

Learned Counsel appearing for the appellant further invited my attention to the Writ Petition No. 436 of 1988 filed by the appellant herein which is placed at page 47 of the compilation of this Appeal from Order. It is further submitted that, on 1-10-2004 this Court allowed the Writ Petition No. 1100 of 1986 and Writ Petition No. 436 of 1988 and held that the land belongs to the Central Government and vests in the Central Government and N.T.C.

5. Learned Counsel for the appellant invited my attention to Para. Nos. 29, 30, 31, 34 and 36 of the judgment in Writ Petition No. 1100 of 1986 and Para. Nos.16 to 20 in Writ Petition No. 436 of 1988.

6. It is further submitted that, aggrieved by the judgment and order in Writ Petition No. 1100 of 1986 and Writ Petition No. 436 of 1988, State Government filed two Special Leave Petitions before the Hon"ble Supreme Court and said Special Leave Petitions came to be dismissed on 15-7-2005.

7. Learned Counsel for the appellant invited my attention to the Page 25 of the compilation and submitted that, on the basis of the judgments and orders of this Court in the aforesaid Writ Petitions, which came to be confirmed by the Supreme Court, entries in the name of the appellant were taken in Property

Register Card by the competent State Authorities.

8. It is further submitted that, the suit was filed by the appellant herein for removal of the encroachment and for possession. Learned Counsel invited my attention to Issue Nos. 4,10 and 13 framed by the trial Court in the said suit which are at Page 85 of the compilation of the Appeal from Order and submitted that, the defendants failed to prove that Mr. P. V. Joshi had title or authority to sell the land to them and that he executed agreement to sell and put them in possession of suit plot. It is further submitted that, so far possession of defendant Nos. 1 and 2 is concerned, issue No. 10 was specifically framed and said issue is answered in the negative. Learned Counsel further submitted that, the Court held that the Court has no jurisdiction to try the suit. Therefore, according to learned Counsel for the appellant, status of the respondents is encroachers, they have utterly failed to prove that Mr. P. V. Joshi had title or authority to sell the land to them and he had executed agreement to sell and put them in possession of suit plot.

Learned Counsel further invited my attention to Para 94 of the judgment in Special Civil Suit No. 11 of 1981 and submitted that, even the trial Court has observed that " as there is no dispute about the plaintiffs property to be the public premises having control of Central Government covering u/s 2(e) of the Act 1971. Therefore, the Court held that the Court has no jurisdiction u/s 15 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971." It is further submitted that, there was no application filed by the respondents for any interim relief. It is further submitted that, the order of status quo and not to create third party rights came to an end on 21-4-2011, since on said date respondent No. 2 appeared in the matter. Therefore, according to learned Counsel for the appellant, after 21-4-2011 there was no any application which was pending with prayer for interim relief or for continuation of the interim relief.

9. Learned Counsel for the appellant further invited my attention to the advertisement published by the appellant which is at Page41 and also notice given at Page45 about the pendency of the matters in respect of the property. According to learned Counsel for the appellant, the advertisement at Page41 of the compilation, makes it clear that the appellant wants to sell the said property on "AS IS WHERE IS" and "AS IS WHAT IS" basis. Learned Counsel further submitted that, by way of such advertisement, purchasers/buyers are made aware that the appellant wants to sell the said property "AS IS WHERE IS" and "AS IS WHAT IS" basis. At the cost of repetition, learned Counsel for appellant submitted that, the disclosure is made in the tender document itself that legal case in respect of the suit property is pending i.e. M.A.R.J.I. No. 122 of 2007 Aurangabad Textile Mills vs. Abdul Khaliq pending in City Civil Court, Aurangabad, further making it clear that the said appeal filed by Aurangabad Textile Mills is against the order passed by City Civil Court, Aurangabad in Civil Suit No. 11 of 1981 filed by Mills for eviction of unauthorized occupant. Therefore, according to learned Counsel for the appellant, it is not the case that the prospective

purchasers/buyers who are interested to purchase the property are not made aware about the pending litigation in respect of the suit property. It is further submitted that, the appellant being absolute owner of the property, he should not be restrained from selling the same.

10. Learned Counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in the case of Tamil Nadu Housing Board vs. A. Viswam (deceased) through L.R's., reported in 1997(1) B.C.J. 429 (SC). Relying on Head Note (C) and Para 12 of the said judgment, learned Counsel for the appellant would contend that, title of the suit property having been vested in the appellant, no one can lay any claim to the said property and nobody can claim injunction against the true owner of the property. Learned Counsel further invited my attention to the judgment of this Court in the case of Kachhi Properties Satara and Power of Attorney Salim Gaffar Kachhi Vs. Ganpatrao Shankarao Kadam, Uttam Dinkar Kada and Bhalerao Dinkar Kadam, and in particular Paras 22 and 30 of the said judgment and submitted that, rule of lis pendens itself is adequate u/s 52 of the Transfer of Property Act. The sum and substance of the arguments of the learned Counsel for the appellant is that, provision of section 52 of the Transfer of Property Act will take care of the situation and for that, any order of injunction in respect of the suit property, in the facts of this case are wholly unwarranted.

11. Learned Counsel for the appellant further invited my attention to para 15 in Appeal from Order at Page 8 and submitted that, the appellant Mill being owned by the Central Government, and the proceedings were initiated before the Board for Industrial and Financial Reconstruction i.e. B.I.F.R. The appellant Mill is covered under The Sick Textile Undertakings (Nationalization) Act of 1974.

12. At the cost of repetition, learned Counsel for the appellant further submitted that, the Property Register Card is issued in the name of the appellant on the basis of the judgment of this Court in Writ Petition Nos. 1100 of 1986 and 436 of 1988 and therefore, the judgment cited by the Counsel for the respondents that it is not conclusive proof of the ownership or title cannot be made applicable in the facts of this case. Learned Counsel further submitted that, the arguments advanced by the Counsel for the State when the above mentioned Writ Petitions were heard, that such land was given on "Kabala" to the respondents cannot be said to be the argument of the appellant or the Central Government. Learned Counsel further submitted that, the suit was filed in 1981, however, the same came to be decided in 2006. Though it is observed by the lower Appellate Court in the impugned order that the appeal can be disposed of within six months, however, on last four dates there is no any effective hearing in the said appeal. Therefore, according to learned Counsel for the appellant, when the appellant is true owner of the property and the status of the respondents is encroachers, in that case, why true owner should be deprived from selling the property, that too, by making aware to the prospective buyers/purchasers that, the case is pending in the Civil Court about the said property and if anybody wants to purchase, they

have to purchase the property on "AS IS WHERE IS" and "AS IS WHAT IS" basis".

13. On the other hand, learned Counsel for respondent No. 1 submitted that, the point which is dealt with and set at rest in the Writ Petitions is whether the State Government or Central Government is owner of the property. So far the ownership/title of the present appellant is concerned, issue was framed in that respect by the trial Court and said issue is answered against the appellant. Therefore, if the appellant is allowed to sell the property even without having any title, it will cause prejudice to the respondents' interest. "It is further submitted that, the issues which were framed in the civil suit are answered against the plaintiff-appellant. Title of the suit is not proved by the appellant. No notice of the sale was given to the respondents-defendants and further, the appellant has not taken permission as required u/s 52 of the Transfer of Property Act from the concerned Court for sale of the property and therefore, the lower Appellate Court has rightly passed interim order. It is further submitted that, since the appeal itself can be disposed of within six months by the lower Appellate Court, in that case, this Court may not interfere in the impugned judgment and order passed by the Appellate Court. It is further submitted that, record of rights would not confirm the title on the appellant. The Property Register Card itself is not conclusive proof of the title of the appellant. In support of this contention, learned Counsel for respondent No. 1 placed reliance on the judgment of the Hon'ble Supreme Court in the case of Suraj Bhan and others vs. Financial Commissioner and others, reported in 2007 ALL SCR 1754. It is further submitted that, title of the appellant itself is in question and therefore, the appellant has no right to sell immovable property i.e. suit property and therefore, pending the appeal of the appellant, they may not be allowed to proceed with the sale of the property. The appellant herein, who is the appellant even before the lower appellate Court, has not shown how the balance of convenience lies in its favour. According to learned Counsel for respondent No. 1, this Appeal from Order is devoid of any merits and same may be dismissed.. Learned Counsel for respondent No. 1 further submitted that, on 22-2-2011 the application at Exhibit-35 was filed by the respondents for stay to the further steps for sale of the property. The Court granted stay and same was confirmed on 3-3-2011. Therefore, according to learned Counsel for respondent No. 1, independent application was filed by the respondents praying relief against the appellant that they should not be allowed to sell the suit property. Learned Counsel further submitted that, respondent No. 1 appeared in M.A.R.J.I. No. 122 of 2007 on 15-4-2011 and respondent No. 2 appeared in the matter before the lower Appellate Court on 21-4-2011. Therefore, till that time, order of status quo and not to create third party rights was in operation. He further submitted that, Writ Petition No. 1947 of 2011 was filed by the appellant before this Court and this Court passed order in the said Writ Petition on 19-4-2011. Pursis are filed by the appellant before the lower Appellate Court, that the High Court has directed the said Court to decide finally the prayer for interim relief. It is further submitted that, since respondent No. 2 appeared before the lower Appellate Court on

21-4-2011, and therefore, order of status quo and not to create third party rights cease to operate on said date, would be taking to technical view. Learned Counsel invited my attention to Exhibit-35 i.e. application filed by the respondents in M.A.R.J.I. No. 122 of 2007 on 22-2-2011. It is further submitted that, another application was filed by the respondents for continuation of interim relief on 26-4-2011 and considering the averments in the said application, status quo order as well as not to create third party rights is confirmed by the impugned judgment and order on 30-4-2011.

14. Learned Counsel for respondent No. 1 placed reliance on the judgment of the Hon"ble Supreme Court in the case of Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, and submitted that, the appellant has not made out a case of irreparable loss and therefore, they may not be permitted to put the property for sale. It is further submitted that, this Court may not interfere with the impugned judgment and order since the appeal filed by the appellant is pending before the District Court.

15. Learned Counsel appearing for respondent No. 2, in addition to the submissions made by learned Counsel for respondent No. 1, submitted that the interim order granted by the Court below may be continued during the pendency of the appeal. Since the matter is pending before the lower Appellate Court about status of the property and also title of the appellant is not clear, therefore, this Court may not interfere at the stage when the appeal is pending. Learned Counsel for respondent No. 2 invited my attention to the judgment of the Hon"ble Supreme Court in the case of Dev Raj Dogra and others Vs. Gyan Chand Jain and others, and in particular Para 16 of the said judgment, and the judgment of this Court in the case of Murlidhar Vaidya and Another Vs. Nababbi Yousufkhan, deceased through legal heirs and Others, . Relying upon aforesaid judgments, Counsel for respondent No. 2 would contend that, without permission from the Court, the appellant should not be allowed to sell the property.

Learned Counsel appearing for respondent No. 2 further submitted that, while disposing of the Writ Petition No. 436 of 1988 in Para 18 this Court has observed that, the Special Civil Suits will be decided on their own merits and in accordance with law. The Civil Court will consider rival claims and pass appropriate orders in the Special Civil Suits in accordance with law.

16. I have heard learned Counsel appearing for the respective parties at length, perused the entire documents placed on record and reply filed by the respective respondents. At this stage, it would be appropriate to reproduce hereinbelow the contention of the appellant on Page VII Clause (V) of the compilation of Appeal from Order that "the appellant by way of alienation is not going to dispossess the respondents, as the appeal of the appellant is for recovery of possession and at the most the Tender is finalized and the property will be sold in auction, then the prospective purchaser will stand in the shoes of the appellant and he may prosecute the appeal. That, even section 52 of the Transfer of Property Act will adequately protect the so called possession of the respondents. (Emphasis

supplied).

At this stage, it is also relevant to mention that the appellant intent to sell the property on "AS IS WHERE IS" and "AS IS WHAT IS" basis. The appellant has also made prospective purchasers/buyers aware about the pending litigation in the Court in tender notice at Page 145. Relevant portion from the said tender notice reads thus :

Following legal case is pending in the Court in respect of this property. M.A.R.J.I. No. 122 of 2007, Aurangabad Textile Mills vs. Abdul Khaliq pending in City Civil Court, Aurangabad. This is appeal filed by Aurangabad Textile Mills against the order passed by City Civil Court, Aurangabad in Civil Suit No. 11/81 filed by Mills for eviction of unauthorized occupant.

DUE DILIGENCE TO BE CARRIED OUT BY THE BUYER;

Although the documents such as PR Cards/City Survey Maps/DP Plans, etc., are available with NTC or Mills, the tender should verify before submission of tender bid necessary information on their own from AMC/Urban Development Department and any other Government Departments, Authorities regarding Zoning Regulations, Land Area, Built up area, allowable FSI, Ground Coverage, and Landscaped Area and/or regarding any other issues as deemed necessary by the prospective Tenderers. The details of the existing encroachments have been provided.

Tenderers are required to verify the same on their own as the sale is on "as is where is" basis. Tenderers may carry out due diligence in respect of all the points including encroachment and Complaints/ disputes, if any, with regard to all the points mentioned above shall not be entertained at later stage.

Therefore, it is not the case that the appellant has not made aware to the prospective purchasers/buyers about the status of the property in pending case and its honest intention to sell the property "AS IS WHERE IS" and "AS IS WHAT IS" basis.

17. So far issues of ownership of the appellant and also status of the respondents are concerned, relevant paragraph Nos. 29 to 34 from the judgment of the Writ Petition No. 1100 of 1986 are reproduced hereinbelow.

29. In my view, therefore, assuming that the State Government had granted the land to the predecessor-in-title of petitioner herein and that the said lands are capable of being resumed for alleged breach and violation of terms and conditions of the same, the power of resumption conferred in the State Government cannot be exercised once the said Act has come into force. It is not disputed nor it can be disputed that the ownership and all right, title and interest in the properties of the textile undertaking namely Aurangabad Mills, Aurangabad up-till-now under the ownership of the Aurangabad Mills Limited has been taken over by the Central Government under the said Act. In other words, there is absolutely no dispute about the fact that the said Act applying to the Aurangabad

Mills. Once the said Act applies and it's a provision not challenged, then they apply with full force and rigour to the facts and circumstances of this case. Therefore, all proceedings of resumption of the lands in question ceased to have any legal sanction, the moment the undertaking vested in the Central Government. The fact of vesting is admitted. On the appointed day every sick textile undertaking and the right, title and interest of the owner in relation to every such sick textile undertaking stands transferred to and absolutely vests in the Central Government. The moment it vests in the Central Government by virtue of section 3(1), it also vests and stands transferred to in the NTC. The general effect of vesting is that properties and assets mentioned in section 4(1) by virtue of vesting in the Central Government, are freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting it.

30. It is not possible to uphold the contentions of learned AGP that general effect of vesting provided by section 3(1) will not mean that NTC is also freed and discharged from liabilities, obligations as well as encumbrances. If the contentions of Mr. Choudhary are accepted, then it would mean that section 3(2) is wholly redundant and nugatory. What vests in the Central Government vests immediately in the NTC. Therefore, the moment Government is freed and discharged necessarily the NTC must also be held to be so discharged and relieved. It is not disputed nor it could be disputed that a subsidiary Corporation of NTC must have the same advantage, privileges and rights as that of NTC. The very purpose of enabling the NTC to set up subsidiaries would mean that powers as well as duties, obligations and functions to be carried out under the said Act as well as the rights granted thereunder stand transferred to such subsidiary. The Central Government and NTC is one and the same entity for the purpose of Chapter II of the said Act. Hence all proceedings for resumption must come to an end after the appointed day.

31. There is no dispute about the fact that the grant in this case pertains to immovable property. It is thus an encumbrance affecting the immovable property. The moment said Act makes provisions for discharging and relieving from all encumbrances, then such encumbrances must necessarily perish and come to an end. The term "freed and discharged from all encumbrances" has been subject-matter of number of decisions. In *National Textile Corporation Vs. State of Maharashtra and Others*, this Court was considering an issue as to whether notification u/s 4(1) of Land Acquisition Act, 1894 for the purposes of acquiring immovable property of a textile undertaking can be enforced against a successor like NTC. Negating the challenge of NTC, this Court held that power to acquire immovable property by exercising right of compulsory acquisition is a sovereign power and is out of purview of the provisions of said Act. It is held that it cannot be said to be encumbrance affecting the property. However, as to what could be said to be encumbrance affecting the property, is decided in this judgment.

32. The decision of this Court has been affirmed by Hon"ble Supreme Court. While affirming it the Hon"ble Supreme Court has observed thus :

National Textile Corporation and Another Vs. State of Maharashtra and Others, ;" 4. Counsel for the appellant argues that sub-section (2) of section 4 is intended to vest the sick textile undertakings in the Central Government free from all fetters, and the notifications issued under the Land Acquisition Act which had the effect of freezing the price of the land were fetters falling in the category of "other encumbrances" mentioned in section 4(2) of the Sick Textile Act. The term "encumbrance" has not been defined in the Act, In Wharton's Law Lexicon encumbrance is described as being a claim lien or liability attached to property. This is the sense in which the term is ordinarily used and encumbrance in this sense, has to be a liability "attached to property". It must be a burden or liability that runs with the land as the High Court has held. But a notification issued by the Government under the Land Acquisition Act is not a burden or liability that it attached to the property. The sovereign right of the State to take proceedings for the acquisition of any land for public purpose is similar to its right to impose a tax on the land which is "paramount to the ownership over the land and outside it". (See The Collector of Bombay Vs. Nusserwanji Rattanji Mistri and Others, Page 305). Under sub- section (2) of section 4 of the Sick Textile Act all property which have vested in the Central Government u/s 3(1) shall be freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting it, and any attachment, injunction or decree or order of any court restricting the use of such property shall be deemed to have been withdrawn. Counsel for the respondent, State of Maharashtra submits that the term encumbrance should take colour from the different kinds of burden on the land specified in section 4(2) preceding the words "all other encumbrances". It is urged that encumbrance in the context means some burden or liability that is attached to the property, like mortgage, charge, lien etc. That this is so would also appear from what follows the words "all other encumbrances affecting it." Having said that the vesting will be free from trust, obligation, mortgage, charge, lien and all other encumbrances affecting it, sub-section (2) goes on to add that "any attachment, injunction or decree or order of any court restricting the the use of such property in any manner shall be deemed to have been withdrawn" upon vesting. If the appellant's construction of the provision were correct, and encumbrance mean of any kind of fetter, any attachment, injunction or decree or order restricting the use of the property would be included in "all other encumbrances" and it would have been quite unnecessary to mention them separately. This makes it clear that fetters on the property like attachment, injunction or decree or order of any Court restricting the use of the property which are deemed to have been withdrawn upon the property which are deemed to have been withdrawn upon the property vesting in the Central Government are not really encumbrances within the meaning of the word as used in subsection (2) of section 4. We therefore agree with the High Court that the notifications issued under sections 4 and 6 of the Land Acquisition Act are not

encumbrances and cannot be held to have become inoperative on the land in question vesting in the Central Government.

33. Admittedly, enforcement of right of resumption of an immovable property pursuant to grant made u/s 20 of the Code is not termed as nor can be termed as exercise of sovereign power. In any event, now the Supreme Court has clarified as to what could be termed as a "sovereign function or Act". In *N. Nagendra Rao and Co. Vs. State of Andhra Pradesh*, the Hon'ble Supreme Court has said following about sovereign function of State :

23. In the modern sense the distinction between sovereign or sovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under Constitution arises out of constitutional provision. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a Legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a Court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modern notions of sovereignty. One of the tests to determine if the Legislative or executive function is sovereign in nature is whether the State is answerable for such actions in Courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary Civil Court. No suit under CPC would lie in respect of it. The State is immune from being sued, as the jurisdiction of the Courts in such matter is impliedly barred.

24. But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and the place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and nongovernmental" is not sound. It is contrary

to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infact American States rather than to the stability of the doctrine theoretical foundation" or because of "logical and practical ground or that there could be no legal right as against the State which made the law gradually gave way to the movement from, State irresponsibility to State responsibility. In welfare State functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even material. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc, which are amongst the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rational for the proposition that even if the officer is liable the State cannot be sued. The liability of the officers personally was not doubted even in viscount Canterbury (supra). But the Crown was held immune or doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people the State cannot claim any immunity and if a suit is maintainable against the officer personality, then there is no reason to hold that it would not be maintainable against the State.

34. Therefore, it cannot be said that by any stretch of imagination that the State Government can go ahead and resume lands once it has lost all right, title and interest in it. The lands have vested free from all encumbrances in the Central Government and NTC. The effect of vesting is that obligations and liabilities attached to it are automatically discharged. The Central Government becoming absolute owner thereof, there is no question of the State Government having any right to resume the same. The right of resumption is thus wholly and completely lost. Therefore, after the appointed day, proceedings for resumption could not have been continued and all actions and orders thereafter must be held to be nullity and without any jurisdiction. The Assistant Collector had no authority, power and jurisdiction to adjudicate upon the issue of resumption of these lands. Therefore, all orders and directions made after the appointed date including the final order dated 12th September, 1980 cease to have any legal effect. As a

result, they will have to be quashed and set aside. In my view, no other conclusion is permissible considering the object and purpose of the said Act. An act of Parliament enacted for fulfilling the constitutional obligation must be construed in a manner so as to advance its purpose. The overriding effect given to the provisions of the said Act is with this intent only. The said Act prevails over the Code is an aspect not seriously debated before me. The reason is obvious. All State Governments must act in aid of the Centre and NTC for fulfilling the constitutional obligation. There is no conflict or collision in such cases. That such lands partake character of public premises and properties is also clear. Therefore, the right of Government to manage and administer them is ultimately for public good and in public interest. To term the Government as absolute owner like Private Individuals is a misnomer. Really, this is a case of one trustee taking over the obligations of another. Therefore, it is not necessary to decide whether the code is subservient or subordinate law and whether its provisions prevail or those of the said Act, in further details." (Emphasis supplied).

18. While disposing of the Writ Petition No. 436 of 1988 this Court in Para 16 observed thus :

16. In Writ Petition No. 1100 of 1986 I have delivered a judgment holding that the right, title and interest in all immovable properties belonging to the petitioner stands transferred to and vest in the Central Government as also National Textile Corporation. I have taken a view that vesting is absolute and complete. In terms of the statutory provisions, such vesting is free from all encumbrances. Petitioner stands relieved and discharged from all liabilities, claims, charges, liens, mortgages and other encumbrances affecting the immovable properties of the Mill. Consequently, it will not be open for the State Government to initiate any proceedings for resumption of land belonging to the Mill. The controversy in that petition pertains to an area adm. 66.333 sq. yards and 3 sq. ft. situate at Mill Corner, Aurangabad.

It is further observed in Para 7 that, once the wider question of law has been decided, the Civil Court is bound to abide by the same while considering the claim of the petitioner against respondents 8 to 10 herein. In Para 18, it is further observed that, the Special Civil Suits will be decided on their own merits and in accordance with law. Para 20 of the said judgment reads thus :

20. In the result, present writ petition is disposed of by following order :

- a) For the reasons mentioned in the judgment delivered in Writ Petition No. 1100 of 1986 the impugned orders Exhibits A to C are quashed and set aside.
- b) The claims in Special Civil Suit No. 11 of 1981 and Regular Civil Suit No. 850 of 1985 of petitioners as well as respondents 8 to 10 would be decided by the Civil Court on their merits and in accordance with law in the light of the observations and by this Court in the judgment in Writ Petition No. 1100 of 1986.
- c) The interim order passed in the petition and the undertakings and statements

as above to continue during pendency of abovementioned civil suite.

d) It is clarified that respondents 8 to 10 would not be entitled to claim any equities and in the event of their claims being unsuccessful, they would be bound by the consequences provided in law.

e) The contentions of petitioners and respondents 8 to 10 in the Civil Suit are not being adjudicated and decided in this petition and they are kept open for being considered by the Civil Court."

19. Bare perusal of Para 29 of the judgment in Writ Petition No. 1100 of 1986 reproduced hereinabove in the aforesaid Writ Petition, would make clear that there is no dispute about the fact that the Sick Textile Undertakings (Nationalization) Act, 1974 applying to the Aurangabad Mills. Once the said Act applies and its provisions not challenged, then said provisions apply with full force and rigour to the facts and circumstances of the case. Therefore, all proceedings of resumption of the land in question ceased to have any legal sanction, the moment the undertaking vested in the Central Government. The fact of vesting is admitted. On the appointed day every sick textile undertaking and the right, title and interest of the owner in relation to every such sick textile undertaking stands transferred to and absolutely vests in the Central Government. The moment it vests in the Central Government by virtue of section 3(1), it also vests and stands transferred to in the N.T.C. In Para 34 of the said judgment this Court held that, the lands have vested free from all encumbrances in the Central Government and NTC. The effect of vesting is that obligations and liabilities attached to it are automatically discharged.

20. Therefore, so far vesting of the suit property in appellant and ownership of the appellant is concerned, said is concluded by the authoritative pronouncement of this Court in Writ Petition No. 1100 of 1986 and Writ Petition No. 436 of 1988. The judgments in those Writ Petitions were challenged before the Hon"ble Supreme Court by the State Government, however, said challenge failed and Special Leave Petitions filed by the State Government are dismissed.

21. The suit filed by the appellant herein was for removal of the encroachment and for possession. Therefore, in my opinion, when there are judgments of this Court in Writ Petition Nos. 1100 of 1986 and 436 of 1988 holding that the suit property vests in the Central Government and ultimately in the appellant Textile Mills and further on the basis of the said judgment, authorities have issued property register card, therefore, there should not be any hindrance or hurdle in the way of the appellant to dispose suit property. True owner of the property should not be deprived from enjoying fruits of his property. The appellant has made aware all the prospective purchasers/buyers about pending litigation and also stated that the property is being sold on "AS IS WHERE IS" and "AS IS WHAT IS" basis".

23. Therefore, taking overall view of the matter, in my opinion, the appellant being true owner of the property should not be deprived from taking steps

pursuant to the advertisement dated 28-1-2011 and the tender notice. I find considerable force in the argument advanced by the learned Counsel for the appellant that section 52 of the Transfer of Property Act provides adequate protection to the parties from transfer pendente lite and therefore, the appellant being true owner should not be restrained from selling the property.

23. In the Special Civil Suit No. 11 of 1981, the issue Nos. 4 and 10 framed by the trial Court reads thus :

(4) Do the defendants prove that Mr. P. V. Joshi had title or authority to sell the land to them and that he executed agreement to sell and put them in possession of suit plot.

(10) Whether the defendant No. 1 and 2 are in lawful possession of the land admeasuring 100"x100" on the basis of the agreement?

24. Both the issues are answered against the respondents herein thereby Civil Court concluded that, the defendants failed to prove that Mr. P. V. Joshi had title or authority to sell the land to them and that he executed agreement to sell and put them in possession of suit plot. Further, it is held that the defendants i.e. present respondents are not in lawful possession of the land admeasuring 100"x100" on the basis of the agreement. Therefore, as on today, the status of the respondents is of mere encroachers. Therefore, on the instance of encroachers, the appellant who is real owner of the property should not be deprived from getting fruits of its own property.

25. While disposing of the Special Civil Suit No. 11 of 1981 the trial Court in Para94 held thus :

94. In case, plaintiff has treated the defendants to be encroacher at the suit property, then occupation of defendants on it amounts to unauthorised occupation at all coming in Category No. 1 as mentioned in above. As there is no dispute about the plaintiffs property to be the public premises having control of Central Government covering u/s 2(e) of the Act 1971. Therefore, the facts in the present case duly covers to hold that this court has no jurisdiction u/s 15 of the Public Premises (Eviction of Unauthorised Occupants) Act 1971. So, I answer to this issue in negative.

26. The Hon"ble Supreme Court in the case of Tamil Nadu Housing Board vs. A. Viswam (deceased) through L.R"s. reported in 1997(1) B.C.J. 429 (SC) (supra) in Para12 held thus :

12. Thus considered, the title of the land in Survey No. 140/4 having been vested in the appellant, to whomsoever it, belonged earlier, it stood divested from him/them and no one can lay any claim to the said acquired land once over and claim injunction on that basis. The injunction, therefore, cannot be issued against the true owner, namely, the Housing Board in whom the land ultimately stood vested and then stood transferred to Municipal Corporation. A trespasser cannot claim injunction against the owner nor can the Court to issue the same.

27. In *Kachhi Properties Satara and Power of Attorney Salim Gaffar Kachhi Vs. Ganpatrao Shankarao Kadam, Uttam Dinkar Kada and Bhalerao Dinkar Kadam*, this Court held as under :

30. To sum up :

(a) Section 52 of the TP Act provides adequate protection to the parties from transfers pendente lite and such transferees are neither required to be impleaded nor can claim impleadment. They cannot even resist execution proceedings.

(b) In Mumbai (as also elsewhere as and when amended provisions are made applicable) plaintiffs could (or rather ought to) have notices of their suits registered u/s 18 of the Indian Registration Act, in view of the amended provision of the TP Act and the Registration Act. They cannot seek to restrain adversary by an injunction by refusing to go in for registration of the lis.

(c) Rule 1 of Order XXXIX of the CPC enabling Court to grant temporary injunctions to restrain transfers pendente lite is only an enabling provision, recognizing the power in the Court to issue such injunction and does not imply that because there is power, it must be exercised. The provision could be invoked only if protection provided by section 52 of the TP Act is shown to be inadequate.

(d) In the face of protection provided by section 52 of the TP Act, courts should be cautious in examining the claims by plaintiffs of irreparable loss if injunction to restrain alienations is refused.

(e) In suits for specific performance/right to develop against the recorded/rightful owners, courts may consider if an injunction would cause greater inconvenience to a rightful owner by being deprived the right to deal with his property for the sake of a claim which is yet to mature into right and which metamorphosis rests in the discretion of the Court and is not certain.

(f) Courts may consider necessity of imposing suitable conditions to protect plaintiffs' interests short of granting injunction like seeking undertaking that no equities would be claimed, on account of sale/development of properties; effecting sales only after putting transferees to notice that their rights would be subject to suit., Interest of prospective purchasers would also be protected if plaintiffs in such cases register the lis, though it may be optional."

28. On careful scrutiny of the documents placed on record would make it clear that the interim order granted by the lower Appellate Court on an application below Exhibit 35 which was filed by the respondents, was in force till 21 -4-2011. The order of status quo and not to create third party right, which was passed in M.A.R.J.I. No. 122 of 2007 was to remain in force till the respondents appear in the matter. Admittedly, respondent No. 1 appeared in the matter on 16-4-2011 and respondent No. 2 appeared on 21-4-2011. Therefore, the order which was passed in M.A.R.J.I. No. 122 of 2007 was in force till 21-4-2011. Thereafter, from 22-4-2011 till the application was filed by the respondents on 26-4-2011 there was no any order which was in force/operation. Therefore, it is difficult to

understand, when both the orders on Exhibit 35 and order in M.A.R.J.I. No. 122 of 2007 ceased to operate and were not in force, and their effect and operation came to an end on 21-4-2011, how the lower Appellate Court has passed the orders confirming the order of temporary injunction granted by the Court in M.A.R.J.I. No. 122 of 2007, when M.A.R.J.I. No. 122 of 2007 itself was disposed of on 23-3-2011 and interim order passed therein was suppose to remain in force till respondents appear in appeal.

29. Therefore, viewed from any angle, the appellant being a true owner of the property should not be deprived from enjoying benefits of the said property. The appellant Unit is covered under the provisions of the Sick Textile Undertakings (Nationalization) Act, 1974.

Status of the respondents appears to be encroachers, and if they are encroachers, true owner like appellant should not be deprived from enjoying its own property. The possession of the respondents is admitted by the appellant and therefore, the statement made by the appellant on Page VII of the appeal memo which is already reproduced hereinabove, takes care of the interest of the respondents. In that view of the matter, the impugned judgment and order passed by the District Judge-2, Aurangabad on 30-4-2011 below Exhibit-10D in Regular Civil Appeal No. 130 of 2011 is quashed and set aside. Appeal from Order is allowed to the above extent. Civil Application stands disposed of in view of the disposal of the main appeal.