

(2019) 09 CAL CK 0005

In the Calcutta High Court

Case No : Tender Of Mand Appl (MAT) No. 291 Of 2019, Civil Application (CAN)
No. 2254 Of 2019

Corporation Bank & Another

APPELLANT

Vs

Dr. Jayesh Kumar Jha

RESPONDENT

Date of Decision : 03-09-2019

Acts Referred:

Kolkata Municipal Corporation Act, 1980 — Section 232
Transfer of Property Act, 1882 — Section 55(1)(g), 100
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security
Interest Act, 2002 — Section 13(4), 17(1)
Security Interest (Enforcement) Rules, 2002 — Rule 8, 8(6)(a), 8(6)(f), 8(7)(a), 9,
9(7), 9(8), 9(9), 9(10)
Constitution Of India, 1950 — Article 12, 226

Citation : (2020) 1 BC 14 (DB) (Cal.)

Hon'ble Judges : Thottathil B. Radhakrishnan, CJ; Bibek Chaudhuri, J

Bench : Division Bench

Advocate : Probal Kr. Mukherjee, Sailesh Mishra, Kallol Basu, Bratin Kr. Dey, S.
Sarkar

Final Decision : Dismissed

Judgement

Bibek Chaudhuri, J

1. The Corporation Bank and its officers have assailed the judgment and order dated 18th January, 2019 passed by the learned Single Judge in the WP No.29398(W) of 2017.

2. The writ petitioner, respondent herein, successfully participated in E-auction for sell of an immovable property undertaken by the appellant No.1 Bank through its officers under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter SARFAESI Act). On receipt of consideration price fixed by auction, the appellant/bank issued sell certificate in favour of the respondent in respect of the said property in question. The said sale was free from all encumbrances. Subsequent to his purchase, the

respondent was charged for payment of property tax and maintenance tax in respect of the said property for the period prior to his auction purchase payable to the Kolkata Municipal Corporation. Contending, inter alia, that he was not liable to any of such tax or charge levied for the period prior to his sale, the respondent moved this Court with a prayer for issuance of a writ of mandamus directing and/or commending the respondent authorities to set aside and/or rescind and/or cancel and/or recall the letter dated 26th October, 2017 wherein and whereunder the appellant/bank communicated to him that the bank was not liable to any outstanding dues towards the property tax or maintenance charges claimed by the corporation with further writ of mandamus directing the bank authorities to reimburse the amount of Rs.2,72,745/- paid by the petitioner towards outstanding property to the Kolkata Municipal Corporation with interest coupled with a writ of certiorari and other consequential reliefs.

3. The learned Single Judge disposed of the said writ application vide order dated 18th January, 2019 quashing the written communication issued by the appellant bank in favour of the respondent. Consequently, the appellant/bank was held liable to reimburse the sum which the respondent paid in favour of Kolkata Municipal Corporation towards property tax.

4. The learned Judge in the trial court whilst coming to such conclusion, made the following observations:-

"The sale certificate issued by the bank is in accordance with the Security Interest (Enforcement) Rules, 2002. The relevant portion of the sale certificate states that the sale was free from all encumbrances known to the secured creditor. The correspondence produced on record established that, the bank was aware of the arrears on account of maintenance charges in respect of the property concerned prior to the sale. The bank claims that, it was not aware of the property tax due. As noted above, had the bank acted diligently as a prudent person, it would have known that property taxes were due. Moreover, the petitioner did not enjoy the benefit of the property prior to the date of sale. The bank is, therefore, liable to bear the property tax dues for the period up to the date of the sale"

"The point of maintainability raised is without substances. The purchaser of an immovable property is before the writ court for the failure of an instrumentality with the meaning of Article 12 of the Constitution of India. The writ the petition is maintainable.

5. Mr. Probal Kr. Mukherjee, learned Senior Counsel on behalf of the appellants at the outset submits that the writ petition seeking the reimbursement of the money paid to liquidate outstanding property tax to the Kolkata Municipal Corporation is in the nature of a money claim and hence in the given circumstances, the writ court ought not to have directed payment of money by reimbursement, more so when there is no statutory duty on the part of the appellant, corporation bank to liquidate such outstanding Municipal Taxes prior to

effecting sell in exercise of its power under the SARFAESI Act 2002.

6. Mr. Mukherjee next refers to a report of the Hon'ble Supreme Court in *Godavari Sugar Mills Limited vs. State of Maharashtra and Others* reported in (2011) 2 SCC 439. Paragraph 8 of the above report is relevant for our purpose:-

"8. The observations in *Suganmal*, (AIR 1965 SC 1740), related to a claim for refund of tax and have to be understood with reference to the nature of claim made therein. The decision in *Suganmal* has been explained and distinguished in several subsequent cases, including in *U.P. Pollution Control Board v. Kanoria Industrial Ltd* [(2001) 2 SCC 549] and *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* [(2004) 3 SCC 553]. The legal position becomes clear when the decision in *Suganmal* read with the other decisions of this Court on the issue, referred to below:

(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers. (Vide *Burmah Construction Co. v. State of Orissa*.)

(ii) If a right has been infringed-whether a fundamental right or a statutory right-and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law. (Vide *State of M.P v. Bhailal Bhai*.)

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money. (Vide *Suganmal v. State of M.P.*)

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment, etc. While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition. (Vide *Salonah Tea Co. Ltd. v. Supdt. of Taxes*)

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. (Vide U.P Pollution Control Board v. Kanoria Industrial Ltd.)

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. (Sanjana M. Wig (Ms) v. Hindustan Petroleum Corpn. Ltd.)

We are therefore of the view that reliance upon Suganmal was misplaced, to hold that the writ petition filed by the appellant was not maintainable."

7. Thus, Mr. Mukherjee he contends that a writ petition under Article 226 of the Constitution of India may generally be maintained where the petitioner can demonstrate that there is a breach of statutory duty on the part of the said respondents or its agencies or that any action or inaction of the respondents as a functionary of 'State' within the meaning of the Article 12 of the Constitution of India is amenable to infraction of any constitutional or fundamental right of the petitioner.

8. It is urged by Mr. Mukherjee that the genesis of a writ petition under Article 226 is the interplay between a statutory or constitutional 'right' and 'duty' and its imperative for a writ petitioner to contend and aver with reference to the law inforce, that the respondent has failed to perform a legal obligation thereby affecting the right of the petitioner.

9. In the instant case the appellant/bank took physical possession of stressed asset on 21st January, 2017 and issued an advertisement for E-auction sale notice on 24th February, 2017 proclaiming a reverse price of Rs.130 lakhs for the apartment against a debt due of Rs.19059442/- as on 20th October, 2014 with further interest and recoverable charges. In the E-auction sale notice, it is mentioned that the sale would be conducted on "as is where is" and "as is what is basis" of the terms and conditions stated. Clause E of the terms is as follows:-

"..... However, the intending bidders should make their own independent enquiries regarding the encumbrances, title of the property put on auction and claims/rights/dues affecting the property, prior to submitting their bid..."

10. Having regard to the notice which unequivocally proclaimed that the sale was conducted on "as is where is" and "as is what is basis" and Clause E of the terms

and conditions, the principle of "caveat emptor" applied and the writ petitioner was rather under obligation under Clause E to "make independent enquiries regarding the encumbrances... and claims/rights/dues affecting the property...".

11. It is further contended by Mr. Mukherjee, learned Senior Counsel on behalf of the appellant/bank that even if the amount of outstanding charges and taxes levied by Kolkata Municipal Corporation in respect of the subject property, were known and disclosed in terms of Rule 8(6)(a) of the Security Interest (Enforcement) Rules, 2002 then again, the purchaser was liable to make payment of such amount in terms of Rule 9(7) to Rule 9(10) of the said rules.

12. Thus even under the said rules, the appellant/bank exercising its power under SARFAESI Act is entitled to receive the amount for liquidation of the encumbrances from the purchaser in terms of Rule 9(7) and Rule 9(8) of the said Rules, 2002.

13. The concerned Rules imposes an obligation upon the purchaser to "deposit money for the purpose of discharge of the encumbrance" and hence the writ petitioner cannot claim that the bank is supposed to liquidate the outstanding municipal dues which is termed as 'encumbrance' by the writ petitioner. The relevant Rule 8(6)(a) and Rules 9(7) to Rule 9(10) of the said rules 2002 are as under:-

"8(6). The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-

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

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property."

"9(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the

contingencies or further cost, expenses and interest as may be determined by him:

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

9(8) On such deposit of money for discharge of the encumbrances, the authorised officer [shall] issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

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

9(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

14. Mr. Mukherjee next submits that the outstanding municipal dues were unknown to the bank and accordingly Rule 8(6)(a) is not attracted and the appellant bank as a secured creditor, had no legal obligation to publish along with the public notice inviting sale of the immovable secured asset, "the details of the encumbrances known to the secured creditor".

15. To sum up, it is contended on behalf of the appellant/bank that the writ petition ought to have failed since it only seeking relief of reimbursement of money since for payment of outstanding municipal rates and taxes and hence contrary to the ratio led down by the Hon'ble Supreme Court in Godavari Sugar Mills Limited (supra).

16. Secondly, even assuming that outstanding municipal dues is an 'encumbrance' as contended by the writ petitioner and required under Rule 8(6) (a) of the said Rules to be notified in the sale notice, yet in view of Rules 9(7) to Rule 9(10), the purchaser is to make deposit and payment for discharge of the encumbrances and accordingly even statute requires the purchaser to make payment for discharge of the encumbrances.

17. Thirdly, Clause 'E' of the terms conditions contained in public notice dated 24th February, 2017 requires the intending bidders to make their own independent enquiries regarding encumbrances and claims/dues affecting the property prior to submitting their bid which essentially presupposes a contractual obligation the intending bidders and/or the purchaser to be aware of the encumbrances, claims and dues affecting the property to be factorized in their bid submission.

18. Fourthly, the Section 232 of the Kolkata Municipal Corporation Act also do not

imposes any statutory liability upon the seller being the secured creditor/appellant/bank herein to make payment of outstanding municipal rates and taxes.

19. Mr. Kallol Basu, learned Advocate for the writ petitioner/respondent, on the other hand, submits by referring to a judgment in the case of *Jayan Kuttichakku vs. Common Man Chitties & Loans (P) Ltd.* reported in 2006 SCC online Kerala 615 that the municipal dues is an encumbrance by referring to paragraph 3 and 4 of the said report.

20. Mr. Basu also refers to Section 55(1)(g) of the Transfer of Property Act to argue that it is the responsibility of the seller to pay public charges and rents and discharge all encumbrances. Thus, according to Mr. Basu the appellant/bank ought to have ascertained the outstanding dues and charges in the form of 'encumbrances' before fixing the sell price in auction. In other words, it is the duty of the secured creditor to issue sale certificate and deliver possession of the stressed asset in favour of the purchaser free from all encumbrances. The bank, having been failed to include tax and charges payable by the creditor for the period prior to auction sell, cannot wash off its hands claiming, inter alia, that it is not liable to pay such taxes or that the appellant bank is under no obligation to reimburse the said sum which the respondent had to pay before mutation of his name in the record of the Kolkata Municipal Corporation. In view of the such circumstances, according to Mr. Basu, there is no scope to interfere with the impugned order passed in WP No.29398(W) of 2017.

21. Referring to the provision of Section 232 of the Kolkata Municipal Corporation Act, 1980, Mr. Basu contends that the municipal rates and taxes is charged on the property sold which is required to be discharged by the seller. It is the specific case of the writ petitioner, that in the absence of any indication of the known encumbrance, being the outstanding municipal dues in respect of the property sought to be auctioned, there was a suppression affecting the right of the purchaser since the bank is under obligation as a seller to disclose of known encumbrances under Rule 8(6)(a) of the said Rules, 2002. In the absence of such disclosure of outstanding municipal rates and taxes in the notice inviting the bid, it is the duty of the seller to make payment of the outstanding municipal taxes as an encumbrance.

22. On the question as to whether the respondent is entitled to reimbursement of tax and maintenance charges imposed upon him by the Kolkata Municipal Corporation and the appellant/bank is obliged to make reimbursement of such amount, Mr. Basu refers to a report of the High Court of Madras in the case of *S. Shanmuganathan vs. The Authorized Officer, Indian Overseas Bank, Asset Recovery Management Branch* reported in AIR 2017 Mad 228. Factual background of the said report is that the petitioner purchased a secured asset from the bank through auction but he was not delivered with vacant possession of the property even after a period of nine years. The writ petitioner invoked the constitutional writ jurisdiction for recovery of the sale price with interest. The Madras High Court on due consideration of various provisions of the SARFAESI

Act and the said rules, 2002 allowed the writ petition directing the bank and its officers to refund the sell price with interest.

23. In *Smt. Rekha Sahu vs. UCO Bank and others* reported in (2013) SCC Online AII 13203 similar question came up for consideration before the Division Bench, Allahabad High Court, ((Lucknow Bench)). The Court duly considered various precedents and statutory provisions contained in the SARFAESI Act as well as the said rules and held as under:-

"For the reasons aforesaid, it is clear that the secured creditor does not enjoy the immunity in respect of his action if it is not bona fide. Chief Manager level officer is chosen because with rich experience and maturity of mind he will be able to take action with due care and caution in view of stringent nature of the provisions of the Act. But in the instant case, the Authorized Officer, who was the Chief Manager level Officer of the reputed bank of our country, prior to publishing the auction notice, did not take care of the encumbrances occurred in the property in question and not mentioned the said encumbrances in the property in the public notice. Furthermore, when the petitioner being bona fide auction purchaser raised the voice rather informed the Authorized Officer about the said facts did not adhere its request and flatly refused to his responsibility. In these backgrounds, the petitioner filed the instant writ petition in the year 2010 and since then, he fought for his legitimate right. Even otherwise, petitioner after paying the entire bid amount did not enjoy the property in question on the ground that electricity dues and municipality tax dues have not been paid by the previous owner. Therefore, we think it appropriate to impose cost upon the officers, who have participated in the auction proceedings."

24. Mr. Basu also refers to the following decisions in support of his contention. *V.Sambandan vs. The Punjab National Bank and Another* reported in 2017 SCC Online Mad 4570 and *Business India Builders and Developers Ltd. vs. Union Bank of India and Ors.* reported in AIR 2007 Ker 114.

25. The SARFAESI Act, 2002 is enacted to provide a speedy and summary remedy for recovery of thousand of crores which are due to the Bank. It enables the bank and Financial Institution to realise long-term assets, manage problems of liquidity, asset liability mis-match and to improve recovery of debt by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by re-construction. The Bank/Financial Institution is entitled to take actual possession of the secured assets from the borrower or from any other person in terms of Section 13(4) of the SARFAESI Act. Any transfer of secured assets after taking possession of the same by the Bank shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Section 17(1) of the Act provides for appeal remedy to the aggrieved parties of any of the measures resorted to by the Bank under Section 13(4) of SARFAESI Act. If the party dispossessed is not in accordance with the provision of the Act, then the Debts Recovery Tribunal is empowered to put the clock back by restoring the status quo

ante. These are the broad guidelines under which the secured assets are enforced/realised and the Bank/Financial Institution are able to recover its money against the secured assets in shortest time frame.

26. Security Interest (Enforcement) Rules, 2002 suffer an amendment by the Security Interest (Enforcement) Amendment Rules, 2018. Under the amended provisions of Rule 8(7)(a) the notice of sale shall contain the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor. (emphasis supplied by us).

27. According to the appellant/bank, the outstanding municipal dues were unknown to it and therefore, Rule 8(6)(a) is not attracted and the appellant/bank as a secured creditor, had no legal obligation to publish along with public notice inviting sale of immovable secured asset the details of encumbrances not known to the secured creditor.

28. The learned trial judge while arriving at his decision relied on the precedents in AI Champdani Industries Limited (Supra) which held that auction purchaser has no liability for payment of pre-sale municipal tax dues. It was held by the Hon'ble Supreme Court that law imposes no obligation upon the purchaser to enquire into the liabilities other than those which would impede value of property. Since advertisement for auction made no specific stipulation that public dues were to be paid by the purchaser, seller himself is required to pay pre-sale dues under Section 55 (1) (g) and 100 of the Transfer of Property Act.

29. In the aforesaid decision, the Hon'ble Supreme Court traced out the meaning of the word 'encumbrance' in relation to "immovable property" Paragraph 13 of the said report is quoted below:-

"13.We may however notice some dictionary meanings of the said word as reliance thereupon has been placed by Mr. Sibaji Sen. In Stroud's Judicial Dictionary of Words and Phrases 5th Edition Encumbrance is defined as:

"being, 'a claim, lien, or liability, attached to property'; and this definition is wide enough to cover the plaintiff's claim," which was, as assignee for value of a reversionary interest, against a person coming in under a subsequent title".

In Supreme Court on Words and Phrases it is stated that

"the word 'encumbrance' means a burden or charge upon property or a claim or lien upon an estate or on the land."

In Advanced Law Lexicon, Encumbrance is defined as:

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

In Black's Law Dictionary Encumbrance is defined as:

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

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

30. In *Abdul Karim Khan and others vs. Managing Committee Charter High School* : Air 1936 AII 879, the term 'encumbrance' was defined to mean a burden or charge upon property or a claim or lien upon state or on the land. It means a legal liability on property. Thus, it constitutes a burden on the title which diminishes the value of the land. The word encumbrance in relation to land acquisition means an interest in respect of which compensation has been made or could have been claimed. It includes like a lease or a mortgage, securities, servitors and trust etc.

31. In *Jayan Kuttichakku (supra)*, one of us (the Hon'ble Chief Justice), while adorned the Bench of Kerala High Court, had the occasion to deliver on the scope of the term 'encumbrance' of 'incumbrance'. Paragraph 4 of the judgment is relevant for our purpose:-

"4. "Encumbrance" and "incumbrance" are the same. That term is not defined in the T.P Act. Encumbrance is a legal claim on an estate (see Chambers's Twentieth Century Dictionary). Where the statute under consideration did not define the term "incumbrance", the Apex Court in *National Textile Corporation v. State of Maharashtra*, (1977) 3 SCC 4, referred to Wharton's Law lexicon to notice "incumbrance" as a claim, lien or liability, attached to property. This is the sense in which the term is ordinarily used. An incumbrance, in this sense, has to be a liability "attached to property"; it must be a burden or liability that runs with the land. It was held by the Supreme Court in *State of H.P v. Tarsem Singh*, ((2001) 8 SCC 104) that the word "encumbrance" means a burden or charge upon property or a claim or lien upon an estate or on the land and that the word "encumber" means burden of legal liability on property. Therefore, a charge created in terms of S. 100 of the T.P Act is an encumbrance. May be that, going by the second paragraph of S. 100, it cannot be enforced against the charged property, while in the hands of a transferee for consideration and without notice of the charge."

32. Thus, there cannot be any doubt that municipal tax is a charge within the meaning of section 100 of the Transfer of Property Act. Section 232 of the Kolkata Municipal Act, 1980 states that the property tax on lands and buildings to be first charge on premises. Section 232 runs as under :-

"232. The [property tax] on lands and buildings to be first charge on premises:-

The [property tax] on lands and buildings due from any person shall, subject to the prior payment of land revenue (if any) due to the Government thereupon, be

a first charge upon the land or the building belonging to such person and upon the movable property (if any) found within or upon such land or building."

33. Under the factual background and statutory provisions enumerated hereinabove the question that falls for consideration in the instant appeal is as to whether an authorized officer is under obligation to disclose pre-sale tax dues on secured asset as an encumbrance in the notice under the proviso to Rule 8(6) (a) and (f), or, the authorized enjoys a statutory immunity under rule 9(7) of the said Rules and the auction purchaser may be allowed to deposit with him the money required to discharge any such encumbrance.

34. Section 35 of the SARFAESI Act states:-

"The provision of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any of the law for the time being in force or any instrument having effect by virtue of any such law."

Therefore, sale of any secured asset shall be conducted in terms of the provisions of the SARFAESI Act and Rules made thereunder without reference to the Transfer of Property Act.

35. Rule 8(6)(a) of the said Rules imposes an obligation upon the authorized officer to disclose by a public notice the description of the immovable property to be sold including details of the encumbrances known to the secured creditor, when the secured asset is decided to be sold by either inviting tenders or by holding public auction. Under clause (f) of sub-rule (6) of Rule 8, the authorized officer is also bound to disclose any other thing which he considers material for a purchaser to know in order to judge the nature and value of the property.

36. Learned Senior Counsel for the appellant vehemently argues that the appellant-Bank or its officers cannot be fastened with the obligation for alleged nondisclosure of pre-sale municipal tax dues as encumbrance while issuing notice under section 8(6) of the said Rules as the sale was conducted "as is where is" and "as is what is" basis; secondly, property tax dues were not known to the authorized officer; thirdly, even if such encumbrance was disclosed, the purchaser would have been directed to deposit such amount for discharging such encumbrance; and, fourthly, Clause E of the terms of E-auction sale notice imposed equal obligation upon the purchaser to make independent enquiries regarding encumbrances and title of the secured asset. Therefore, after completion of sale process and delivery of possession of the secured asset in favour of the respondent, he cannot claim refund of pre-sale municipal tax dues from the Bank.

37. In *V. Sambandan* (supra), the auction purchaser participated in an auction sale of secured asset after depositing earnest money in favour of the Bank. But at the time of auction sale, the Bank did not produce title deeds and after documents for inspection by the purchaser. The purchaser, being apprehensive as to whether the Bank would be able to deliver possession of the auctioned

property, without encumbrance and free from any future litigation, demanded return of earnest money. On refusal to return such money in favour of the intending purchaser contending, inter alia, that the said amount was forfeited, the appellant invoked the constitutional writ jurisdiction of the Madras High Court praying for refund of money by issuing a writ of mandamus against the Bank. The writ court declined to issue mandamus dismissed the writ petition. In appeal, the Division Bench of the Madras High Court placing reliance on the decision of the Hon'ble Supreme Court in the case of Transcore vs. Union of India reported in (2008) 1 SCC 125, held that Rule 8 of the said Rules, 2002, deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. It was further held that the authorized officer being under obligation to disclose details of the encumbrances known to the secured creditor in the public notice, must show his due diligence. He cannot avoid his responsibility by saying that any such undisclosed encumbrance was not known to him.

38. In Haryana Financial Corporation vs. Rajesh Gupta reported in (2010) 1 SCC 655, the Hon'ble Supreme Court distinguished the powers of secured creditor and the official liquidator in selling the property and held that an official liquidator does not hold any guarantee or warrantee in respect of the property sold. Under the SARFAESI Act, the secured creditor or the authorized officer on its behalf exercises the right of an owner selling the property. Thus, the Hon'ble Supreme Court held that the principles laid down in the case of Union Bank of India vs. Official Liquidator and Ors reported in (1994) 1 SCC 575 is not applicable in case of sale of secured asset under the SARFAESI Act.

39. Learned Senior Counsel for the appellants tries to impress upon us referring to the provisions contained in Rule 9(7) of the said Rules that even if pre-sale municipal tax dues was disclosed by the authorized officer as an encumbrance, the purchaser was under obligation to deposit with him the money required to discharge such encumbrance. Therefore, when sale certificate was issued and vacant possession of the secured immovable property was handed over to the respondent, the Bank has no statutory liability to refund pre-sale municipal tax dues which was actually paid by the respondent/purchaser before mutation.

40. We have minutely considered the provisions of the SARFAESI Act and the Rules thereunder. We have already held that Rules 8 and 9 deal with the stage anterior to the issuance of sale certificate and delivery of possession. Rule 9(8) casts a duty upon the authorized officer to deliver the property to the purchaser free from encumbrances requiring the purchaser to deposit money for discharging the encumbrances. The ignorance of the second creditor regarding the encumbrance on the property is no longer a good and acceptable defence in view of the statutory provisions and various precedents by the Hon'ble Supreme Court and different High Courts on the subject SARFAESI Act and the Rules have replaced the rule of caveat emptor by caveat venditor and when a property is put to sale, the Bank is under statutory obligation to sell the secured asset with clear title free from any encumbrance.

41. In the instant case, it is not disputed that the appellant-Bank did not disclose pre-sale property tax dues which is a charge on the land or building in respect of the secured asset. Therefore, the appellant-Bank has failed to discharge its statutory obligation and after completion of sale and delivery of possession the auction purchaser-respondent cannot be fastened with the liability to discharge such encumbrances. This is more so because the Bank or its authorized officer failed to disclose the encumbrance to the purchaser and claim money for discharge of such encumbrance under Rule 9(7) of the said Rules, 2007.

42. In view of the above discussion, we do not find any merit in the instant appeal and the same is accordingly dismissed on contest, however without cost.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

I agree.