

(2008) 02 BOM CK 0048

In the Bombay High Court

Case No : Writ Petition No. 4171 of 2007

Krishna Lifestyle Technologies Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 19(4)
Central Excise Rules, 1944 — Rule 230(2)
Central Excises and Salt Act, 1944 — Section 11
Central Sales Tax Act, 1956 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 64
Constitution of India, 1950 — Article 372, 372(1)
Contract Act, 1872 — Section 176
Customs Act, 1962 — Section 142
Finance Act, 2004 — Section 11
Income Tax Act, 1961 — Section 2(13)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(6), 35
State Financial Corporations Act, 1951 — Section 25, 29, 29(2)
Transfer of Property Act, 1882 — Section 100

Citation : (2008) 110 BOMLR 456 : (2008) 125 ECC 208 : (2008) 151 ECR 208 :
(2008) 229 ELT 173 : (2009) 16 STR 669

Hon'ble Judges : J.P. Devadhar, J;F.I. Rebello, J

Bench : Division Bench

Advocate : Pravin Samdani, Nikhil Pandhye, Anindita Raj Chaudhary and Paras
Kuhad and Associate, for the Appellant; P.S. Jetly, S.V. Bharucha and R.C. Master
for Respondent No. 1 and Ashish Kamat, Nikhil Rajani and V. Deshpande and Co.,
for the Respondent

Final Decision : Allowed

Judgement

F.I. Rebello, J.—Rule. By consent of the parties heard forthwith.

2. Respondent No. 4 is a secured creditor of certain immovable and movable assets of M/s. Rotex Textile Mills Ltd. now in liquidation, having advanced money to M/s. Rotex Textile Mills Ltd. As there was a default in payment of the dues,

Respondent No. 5 issued a public notice on 8th February, 2007, inviting bids for the immovable and movable assets secured in its favour as set out in the public notice. At the auction held on 10th March, 2007, Petitioner was declared as the highest bidder. Consequent thereto, Petitioner made full and final payment of the said consideration on 22nd March, 2007 and requested Respondent No. 4 to release the possession letter for the land and building, plant and machinery and the relevant original documents. Respondent No 5 as the Asset Recovery Management Services of Respondent No. 4 issued sale certificate for the immovable property and also sale certificate for the movables.

3. Respondent No. 2 by an Order of 27-11-2001 had made a demand of duty under Central Excise Act, 1944 and had also imposed penalty against M/s. Rotex Textiles Mills Ltd. There also appear to have been other demands against M/s. Rotex Textiles Mills Ltd. These various demands as on 31-5-2007 were to the tune of Rs. 62,69,660-79 with interest at applicable rates. The movables, namely, plant and machinery had been attached by serving an order of attachment dated 23-3-2005. This exercise was done pursuant to the provisions of Section 142(I)(C)(II) of the Customs Act, 1962 read with Customs (Attachment of Property of Defaulters for Recovery of Government), 1995.

The Petitioner on coming to know of the said attachment served a notice on Respondent No. 2 on 4th April, 2007 setting out that the attachment of plant and machinery was erroneous as they are the secured creditors and are entitled to have a priority of charge over Respondent No. 2. There has been also subsequent correspondence. Respondent No. 2 having failed to lift the order of attachment, the Petitioner has approached this Court for the relief of directing Respondent No. 2 to lift the attachment on the plant and machinery and other reliefs.

4. On behalf of Respondent Nos. 1 to 3 reply has been filed by K. K. Srivastav, Assistant Commissioner of Central Excise. The various orders in respect of the demand made on M/s. Rotex Textile Mills Ltd. have been set out. It is pointed out that as on 31- 5-2007 the total outstanding demand is of Rs. 62,69,660-79 with interest at applicable rates on the outstanding amount. As M/s. Rotex Textile Mills Ltd. had defaulted in payment of the demand, the plant and machinery had been attached for recovery of the dues. Petitioner as successor has to discharge the undisputed liability of M/s. Rotex Textile Mills Ltd. It is only on realization of those dues can the attachment be set aside. The Department had initiated action for recovery of the outstanding dues and the attachment was brought to the notice of Respondent No. 4 on 30-3-2007 and the Bank was repeatedly requested not to go ahead with sale of property as it had been attached. The Petitioner, has purchased the property along with the encumbrances in terms of the public notice, which included condition No. 2, which stated that the sale of property/assets is on "AS IS WHERE IS AND AS IS WHAT IS BASIS". The transfer of the secured assets of M/s. Rotex Textiles Mills Ltd. considering the Judgment of Macson Marbles Pvt. Ltd. Vs. Union of India (UOI), , it is submitted is voluntary and as a consequence the Petitioner is required to discharge the

liability of the outstanding Government dues, for release of the attachment of the immovable property, plant and machinery.

5. The issues which arise for consideration can be summed as under:

1. Do 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, 2005 (in short "SARFAESI Act")?

2. What is the effect of a prior attachment by revenue of the property of tax defaulter under the provisions of the Central Excise Act before it is sold by a secured creditor under the provisions of the SARFAESI Act.

3. Considering the proviso to Section 11 of The Central Excise Act, 1944, can a transfer be said to be a voluntary transfer by "the person" when the transfer takes place under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

4. Does the mere purchase of the immovable/movable assets of a tax defaulter amount to transfer or disposal of business or trade in whole or in part or result in effecting change in ownership thereof in such business or trade by any other person. consequence of which, such person is succeeded in such business or trade by any other person.

6. To answer the issues, it would be necessary to reproduce Section 11 along with the proviso which was inserted by the Finance Act No. 2 of 2004 to the Central Excise Act, 1944 and which reads as under:

11. Recovery of sums due to Government:- In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, including the amount required to be paid to the credit of the Central Government u/s 11D the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of revenue Act, 1963(54 of 1963) to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excise able goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence

of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.

7. In the course of our discussion, we would be concerned both with the section and the proviso for its true impart. The limited extent to which the main section will be considered is the power of attachment and sale. The section before the insertion of the proviso by the Finance Act, 2004, only permitted an Officer empowered, to recover any sums payable by attachment and sale of excisable goods belonging to such person and if the amount payable could not be recovered then to issue a certificate signed by him and forward it to the Collector of the District, who then could proceed to recover the amounts specified as if it were arrears of land revenue. The expression "excisable goods" is no longer *res integra*. We may only refer to what the Supreme Court said in *Triveni Engineering and Industries Ltd. and Another Vs. Commissioner of Central Excise and Another*, . The Court observed that if an article is a immovable property, it cannot be termed as "excisable goods" for purposes of the Act, as in an immovable property there is neither mobility nor marketability which are the twin tests as to whether the goods are marketable as understood in the excise law. Whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth and this has to be ascertained from the facts and circumstances of each case.

Yet another aspect which we have to consider is the effect of Section 35 of the SARFAESI Act which reads as under:

The provisions of this 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.

There is no such corresponding provision either under the Central Excise Act, 1944 or for that matter the Indian Customs Act, 1862. The effect of Section 35 would be that in respect of secured assets, the disposal of the secured asset would be in terms of the provisions of the SARFAESI Act. Though the sale would be under the provisions of SARFAESI Act, the proceeds thereof however will have to be distributed in the order of priority of the creditors.

8. We shall now consider the first contention. u/s 11, do the excise dues, have a priority over the claims of a secured creditor like Respondent No. 4. The Section as it originally stood permitted, recovery from amounts in the hands of revenue or by attachment and sale of excisable goods belonging to such person. If this

could not be done, then as arrears of land revenue pursuant to a certificate issued by the Collector. By virtue of the proviso introduced by the Finance Act, 2004, power was conferred on the Revenue Authorities to recover the dues by sale of the excisable goods, material, preparations, plant, machineries, vessels, utensils, implants and articles in custody of the person to whom the transfer as contemplated by the proviso is effected. Under the main section, the power is by sale of excisable goods and if the dues are not satisfied by issuing a recovery certificate for realisation through Collector as if it were arrears of land revenue. Would this power of sale, pursuant to the power conferred by the Section make the dues of the State the dues of a creditor who has priority of claim over secured creditors? We are not merely concerned with the issuance of a certificate subsequent to which the amounts can be recovered from the person in default as if it were an arrear of land revenue, but from the facts of the present case what really is under consideration are also the sale of movables including plant and machinery in the hands of the Petitioner which were under attachment pursuant to a sale conducted by a secured creditor. Ordinarily once a property is attached pursuant to a power conferred by legislation, the person owning the property cannot alienate such property and any alienation would be void against the person in whose favour the order of attachment was made considering the relevant provisions of a Statute. In the instant case, the sale is by the secured creditor exercising their rights under the SARFAESI Act. The law on the subject of priority of dues can be answered by referring to the Judgment of the Supreme Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, . The Judgment reiterates the law as already declared in a long line of judgments by the Supreme Court. The issue there, arose out of recovery of Sale Tax under the provisions of the Karnataka Land Revenue Act. Dealing with the issue of priority of debt, the Court observed that the principle of priority of Government debts is founded on the rule of necessity and of public policy. This principle flowed from the common law doctrine of priority of State debts. This common law doctrine the Court observed, has been recognized by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as "law in force" within the meaning of Article 372(1) of the Constitution. The basic justification for the claim for priority of State debts rests on the well recognized principle that the State is to raise money by taxation because unless the revenue is received by the State, it would not be able to function as a sovereign government at all. The law on the subject may be summed up as under:

1. There is a consensus of judicial opinion that the arrears of the State can claim priority over private debts;
2. The common law doctrine about the priority of crown debts which was recognized by the Indian High Courts 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 the 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 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 debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration. The Supreme Court then added as under:

5. The Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors;

6. 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 mortgage or pledgee of goods of secured creditors. 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.

Considering the provisions of Section 158 and Section 190(c) of the Karnataka Land Revenue Act, the Court held that the terminology of Section 158 and Section 190 results in giving primacy to monies recoverable under those provisions. In other words, the States' claim to recovery were held paramount even over secured creditors.

The law otherwise, as was declared in *Collector of Aurangabad and Another Vs. Central Bank of India and Another*, is that merely because tax arrears are to be recovered as arrears of land revenue does not make the dues, in that case sales tax dues, have priority over dues of secured creditors. The effect of the discussion would be that as between the debts of a secured creditor and even if the debts of revenue are recoverable as arrears of land revenue under the Land Revenue Act that does not give them priority over the debts of a secured creditor.

Even in respect of pawned goods, in *The Bank of Bihar Vs. The State of Bihar and Others*, the Supreme Court held that u/s 176 of the Contract Act, the pawnee has special property and lien on the goods and so long as his claim is not satisfied, no other creditor or pawnor has the right to take away the goods or its price. Even if there is seizure by the Government, the Government is bound to pay the due to the pawnee and the balance alone is available to other creditors. If the Government deprives the pawnee of the goods, Government is bound to reimburse such amount which he in the ordinary course would realize by sale of the goods on the pawnee making default in payment of debt. In that case the

pawned goods were seized and removed and sold by the Government and it was in that context the issue was answered.

9. Applying these tests and considering the language of Section 9 of C.S.T. Act and its proviso, merely because the excisable goods and other properties can be attached and sold and further recovery can be effected based on the certificate as arrears of Land Revenue, will that result in these dues having priority of claim over that of a secured creditor. In this case, we are not concerned with the issue of power of recovery of monies in the hands of empowered officer or by sale and attachment of excisable goods. We are concerned with the exercise of power of attachment and sale and the power under the proviso. Would the exercise of that power make Governmental dues have priority over that of a secured creditor.

From the judgment in Dena Bank (*supra*) it would follow that though the States dues have preference only over the dues of an ordinary creditor, not a secured creditor, considering Article 372, by subsequent legislation, it is open to the State to provide that its dues have priority of claims over the dues of even a secured creditors. See *State of Madhya Pradesh and Another Vs. State Bank of Indore and Others*, and *State Bank of Bikaner, Jaipur v. National Iron and Steel Rolling Corporation*.

Thus the excisable goods as set out in the main body of the Section and the other goods as set out in the proviso would have priority of claim, if there be a specific provisions giving priority to the state dues as in the case of M.P. Rajasthan or Karnataka laws. However, if the dues are to be recovered merely as arrears of land revenue based on a certificate issued, as held in *Bank of India* (*supra*), then those debts cannot have priority of claim over the dues of a secured creditor.

10. Having so held what is the effect of the provisions of the SARFAESI Act.

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.

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.

11. That brings us to the second question as to what is the effect of an order of

attachment. Admittedly, the Revenue had attached the property before it was put to sale. u/s 11 attachment could only be of excisable goods. The secured creditor admittedly had a charge in their favour before the property was attached. In that context, we may now consider some Judgments. In Narayan Ganesh Varde Vs. Fatma Daud Taraporwala and Another, this Court observed that an attachment does not create any interest in the property attached. It does not create any lien in favour of the attaching creditor. It only prevents alienation of the property on the part of the judgment-debtor so that if the judgment-debtor alienates the property then the alienation becomes void as against all claims enforceable under the attachment u/s 64, C. P. C. A Full Bench of the Madras High Court in Manickam Chettiar v. Income Tax Officer and Anr. quoted with approval its earlier Judgments and held that an attachment does not confer title. Hence, simply because the decree-holder in execution of his decree has attached judgment-debtors property that does not make him a secured creditor. In Union of India Vs. Somasundram Mills (P) Ltd. and Another, the Supreme Court held that where in respect of its dues, the State had already effected an attachment of the property and even though such property is sold in execution by private decree-holder before even after attachment by the State, the State would be entitled to recover the sale proceeds from such decree holder by filing a suit. In Zumberlal Chhotelal Agarwal and Anr. v. Sitaram and Ors. AIR 1937 Nagpur 80 a learned Single Judge held that though there may be attachment of property and sale the other creditors will also be entitled to their dues.

In Shreyas Papers Pvt. Ltd. (supra) the second question that was answered by the Supreme Court was in respect of the enforceability of the charge. The Court held that in the absence of the provisions of any law which dispense with the notice as contemplated u/s 100 of the Transfer of Property Act, 1882 and in the absence of a notice, a transferee to whom no notice was given would not be liable and such purchaser for a value without notice of the sales tax arrears would not be liable. The Court approved the Judgment in the The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussienbhai, . In other words a charge cannot be enforced against a bona fide purchaser for value, if no notice had been served.

From a consideration of the law, it would be clear that merely because there was an attachment of properties in the hands of the original debtor, that by itself would be of no consequence considering the express provisions of Section 35 of the SARFAESI Act. Attachment of properties other than excisable goods would be non-est as there is no power u/s 11. As the power was exercised before the sale to the Petitioner on 10.3.2007, the proviso on the facts of the case would not apply. It was therefore open to the creditors irrespective of the act of the Revenue Authorities who had proceeded to attach the properties to sell the same, considering they are secured creditors. We have earlier reproduced the section. We may note that it overrides anything inconsistent in any other law. In the instant case, the secured assets can only be sold in terms of the SARFAESI Act. In these circumstances, the attachment on 23.3.2005 would be of no legal

consequences. All proceeds from the sale can only be disposed of in terms of the provisions of the SARFAESI Act. Respondent No. as secured creditor would have priority of claim over the dues of the state as in the Central Excise Act, there is no provision "claiming first charge".

12. We now proceed to answer the third question as to whether the transfer effected by the secured creditor to the Petitioner can be said to be a transfer which is voluntary and not involuntary. The submission on behalf of the Petitioner herein is that the transfer must be a voluntary transfer by the person. In the instant case, the transfer was not voluntary but by a secured creditor and consequently it cannot be said that the transfer is consensual as there has been no transfer by the owner to the Petitioner. On the other hand, on behalf of the Revenue the submission is that this issue is no longer *res integra*, considering the Judgment of the Supreme Court in *Macson Marbles Pvt. Ltd. v. Union of India* (supra). In that case the assets of M/s. Diamond Marbles Pvt. Ltd. were sold in terms of Section 29 of the State Financial Corporation Act, 1951. There also the liability was in respect of excise dues. Section 11 was invoked.

The Appellant purchased the assets at the sale conducted by the Rajasthan Financial Corporation. It was contended that Rule 230(2) of the Central Excise Rule, 1944 would be attracted. The Court after examining the provisions of the Central Excise Act and Rule 230(2) of the Central excise Rules, held that it is a mode of recovery of dues from the assets owned by a predecessor and on the assets being sold could be recovered also from the successor. The arguments advanced on behalf of the Appellant was that as the sale had taken place under the State Act free of encumbrances and the transferors right or liabilities cannot be fastened on the transferee. The Court held that this argument does not hold good, considering the provisions of Section 29(2) of the State Financial Corporation Act, 1951. The sale effected results in transfer of property which shall vest in the successor all rights in the property transferred as if the transfer was made by the owner of the property. The sale made by the Corporation is deemed to be a sale made by the owner of the property. It was therefore held that this was a transfer by the owner of the property. The language of Section 13(6) of the SARFAESI Act would have had the same effect. Any transfer of a secured asset would be considered as a transfer made by the owner of such secured asset. In other words, it is the transfer by the owner. That being so, it would be clear that the argument advanced on behalf of the Petitioner herein that it is not a voluntary transfer by the person will have to be rejected. The ratio of *Macson Marbles Pvt. Ltd. v. Union of India* (supra) though under the State Financial Corporation Act will also have to be adopted in so far as Section 13(6) of the SARFAESI Act is concerned. We may only state at this stage, that Rule 230(2) of the Central Excise Rules has since been omitted. The law, however, on the subject would be that such a transfer is a transfer by the person in favour of the purchaser. The argument on behalf of the Petitioner on that count must be rejected.

13. With that, we come to the fourth question. On the reading of the proviso to Section 11, according to the Petitioner, the following three conditions must be cumulatively satisfied:

- (a) the person from whom duty is recoverable/due, transfers or otherwise disposes or effects any change in ownership;
- (b) of business or trade, either in whole or in part;
- (c) in consequence of which he is succeeded in such business or trade.

It is submitted that if the Revenue fails to prove any of the conditions then the proviso would not apply. Reliance is placed on the Judgment of the Supreme Court in *State of Karnataka and Another Vs. Shreyas Papers Pvt. Ltd. and Others*, . According to the learned Counsel, the Supreme Court has conclusively and authoritatively held that sale of assets would not amount to sale of business. Our attention is invited as to what would be meaning of the expression "succession" in the context it has attained a specific connotation and that must be accepted considering the Judgment of the Supreme Court in *Commissioner of Income Tax, Madras Vs. K.H. Chambers, Madras*, . The tests indicated are as under:

- (a) There should be a change of ownership;
- (b) The integrity of the business should remain -the whole business should remain devolve upon the successor;
- (c) The identity and continuity of the business should be substantially preserved the same business should be carried on by the person succeeding.

It is submitted that if the legislation uses the same expression as used by the Courts, then the expression used in the legislation should be understood in the same manner as interpreted by the Courts. Reliance is placed on *Banarasi Devi Vs. Income Tax Officer, Calcutta*, .

On behalf of the Revenue on the other hand, it is submitted that what Revenue has to establish is that a person who is in arrears, if such person, transfers or otherwise disposes of his business or trade in whole or in part or effects any change in ownership in consequence of which he is succeeded in any business or trade by any other person then the movables as set out therein can be sold and attached for the recovery of dues. It is therefore not necessary to dispose of the whole of the business. It is sufficient that if the transfer or disposal is whole or in part and to that extent it is submitted that the Judgment of the Supreme Court in *State of Karnataka v. Shreyas Papers Pvt. Ltd.* (supra) would not apply.

14. In order to answer the controversy, the Judgment in *Shreyas Papers Pvt. Ltd.* (supra) needs to be considered. In that case, there were two issues before the Supreme Court. (1) What would be the meaning of the expression "transfer of ownership of business" u/s 15 of the KST Act and (2) Enforceability of the Charge. The assets were sold by State Financial Corporation in exercise of its

powers u/s 25 of the State Corporation Act, 1951. The issue for consideration was whether the purchaser of assets of a concern, sold by a State Financial Corporation would be liable for arrears of sale tax of the concerned assets which has been transferred. Section 15 of the KST Act and the expression "transfer of ownership of business" were considered. Section 15 of the KST Act reads as under:

15(1) When the ownership of the business of a dealer liable to pay tax or penalty or any other amount under this Act, is transferred, the transferor and the transferee shall jointly and severally be liable to pay any tax or penalty or any other amount payable in respect of such business as remaining unpaid at the time of transfer, and for the purpose of recovery from the transferee such transferee shall be deemed to be the dealer liable to pay the tax or penalty or other amount under this Act.

The language used by the Section is the transfer of the ownership of the business. The Supreme Court after considering various provisions, noted that the consequences contemplated u/s 15 of the Act, would come into effect only if the ownership of the business is transferred. It was sought to be argued that the assets had been transferred from the business. This was not accepted by the Court and in that context the Court observed "business is an activity, directed with a certain purpose, more often towards producing income or profit. Ownership of assets is merely an incident rather than a characteristic of business. Hence, the mere transfer of one or more species of assets does not necessarily bring about the transfer of the "ownership of the business" for "ownership of a business" is much wider than mere ownership of discrete or individual assets. In fact, "ownership of business" is wider than the sum of the ownership of a business constituent asset. Above all, transfer of "ownership of business" requires that the business be sold as a going concern".

15. We may also consider some other Judgments and commentaries as to the expression "business". In Kanga and Palkhivalas Law and Practice of Income Tax, Eighth Edition, Volume I at page 459 considering Section 2(13) of the Income Tax Act, the learned authors have in the context of the expression "business" noted that the definition is wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. It connotes some real, substantive and with a set purpose. There is something organic about the whole which does not exist in its separate parts. Business may include activity of taking a market place or godowns. The proviso to Section 11 of the Central Excise Act not only speaks of transfer of business or trade, but uses the expression "in whole or in part". In other words, there need not be transfer of the whole of the ownership of business. It is sufficient if there is transfer or disposal of part of the business or any change in the ownership. The consequences must be that the person who purchases must succeed in such business or trade from the reason who was carrying on the business or trade. Would the ratio in Shreyas Papers Pvt. Ltd. (supra) conclude the issues as to the expression "transfer or disposal of business

in whole or in part"? Shreyas Papers Pvt. Ltd.(supra), has laid down the law in so far as Section 11 is concerned. However, the ratio would apply, namely that there must be transfer or disposal of the business in whole or in part. The transfer must be of the business or trade and not merely the assets. This follows, considering the subsequent language which uses the expression "in consequence of which he succeeded in such business or trade by any other person". In other words, it is only when the person wholly or partially succeeds to the business or trade pursuant to the transfer and when the Legislature has permitted, the State to recover from the assets including plant and machinery. As such there must be a transfer of the whole or part of the business and succeeding in such business or trade for the proviso to be attracted.

In Commissioner of Income Tax, Madras Vs. K.H. Chambers, Madras, the Court was considering the provisions of the Income Tax Act. The Court observed that there is no clear and exhaustive definition of the expression "succession" and consequently sought to place reliance on decided cases and text books which throw light on the matter. The Court then observed as under:

In order to constitute a succession there must be, broadly speaking, a taking over of the whole of the business concerned;.... But if a business is taken over as a whole, the fact that minor assets of the business are omitted from the transfer will not prevent there being a succession. The fact that the purchaser already has a similar business is not a material fact in establishing succession. The purchase of a business with a view to closing down would not appear to constitute succession.

The following observations are also material:

This is an authority for the position that if a business was taken over as a going concern the mere fact that some assets, which were not required by the successor for carrying on of the business, were not transferred to him would not make it any less a succession in law. It is not necessary to multiply decisions. Succession involves change of ownership; that is, the transferor goes out and the transferee comes in. It connotes that the whole business is transferred. It also implies that substantially the identity and the continuity of the business are preserved. If there is a transfer of a business, any arrangement between the transferor and the transferee in respect of some of the assets and liabilities not with a view to enable the transferor to run a part of the business transferred but to enable the transferee to run the business unhampered by the load of debts or for any other appropriate collateral purpose cannot detract from the totality of succession.

It would thus appear that whether there is whole or part transfer of business and succession thereto what has to be established is that identity and continuity of the business so transferred is preserved. The High Court of Rangoon in Commissioner of Income Tax v. N.N. Firm (1934) 2 ITR 85 was again considering the expression "Business". It held there where a business is split up and

thereafter another person carries on part of the business he does not succeed his predecessor in carrying on the business. Considering the language of our statute, in our opinion, that really would not apply.

In *Industrial Development and Investments Co. Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, this Court was considering as to what would constitute a succession to a business. The Court speaking through Chagla, C.J. observed that whether there is a succession to a business, two factors have got to be considered. One obviously is the identity of the two businesses. If the two businesses are not identical, no question of succession can arise and even if the two businesses are identical, another factor has also got to be taken into consideration and that is the factor of the continuity of the two businesses. In other words, the successor business must be the continuation of the original business. If the original business has come to an end or has been discontinued, then the subsequent business even though it may be identical with the first business, cannot be looked upon as its successor, because a successor should not only do the same business but also must continue the business to which it has succeeded. The Gujarat High Court in *Kalaria Oil Mills v. The State of Gujarat and Ors.* 1968 Sales Tax Cases 477 was again considering as to what is required to constitute succession in business u/s 19(4) of the Bombay Sales Tax Act, 1959. The Court noted that the goodwill of the business, the other assets and liabilities of the business and the tenancy rights of the premises where the Company was conducting its business were not transferred to the Petitioner. In those circumstances, held that there was only a sale of the machinery and not the sale of the whole business. We have already referred to the Judgment in *Shreyas Papers Pvt. Ltd.*(supra). The High Court there had found that mere transfer of land, building, plant and machinery by the State Financial Corporation would not make the purchaser a transferee. In *ORIENTAL FIRE and GENERAL INSURANCE CO. LTD. Vs. COMMISSIONER OF INCOME TAX (AND VICE VERSA)*, was pleased to hold that carrying on the business and its place has been taken by an entirely new entity to run in continuity and as a going concern of the same business. Substantial identity and continuity of the business must be preserved.

16. Succession therefore has a recognized connotation. The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person succeeded to the business. The business carried on by the transferee must be the same business and further it must be continuation of the original business either wholly or in part. It would thus be clear from the above, that these tests will have to be met, before it can be said that a person has succeeded to a business. This would require the facts to be investigated as to whether there has been transfer of the whole of the business or part of the business and succession to the original business by the transferee.

17. Our attention was also invited to the Judgment in *Municipal Corporation of Delhi Vs. Gurnam Kaur*, as to what can be said to be a binding precedent. The Court noted that Quotability as to law applies to the case, its ratio the only thing

binding on an authority is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The Court also quoted with approval, P.J. Fitzgerald, 12th edition as to the concept of sub silentio which reads thus:

A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.

From the above discussions, we are of the opinion that though assets were sold, sale of assets by itself would not be transfer of business in whole or in part. There must be material on record to show that the business has been transferred to the Petitioner and consequent thereto the Petitioner has succeeded in said business. Respondent Nos. 2 and 3 on the facts of this case have not proceeded under the proviso to Section 11 of the Central Excise Act.

18. The Petitioners have averred that they are engaged in the business of manufacturing/trading in cotton yarn, knitted fabric and garmenting. Petitioner have also set out that they were intending to start the work of establishing of new textile mechanism in the property purchased. They were also advised to carry out repair to the building. Though respondents have filed a reply, nowhere is it alleged that the business has been sold in whole or part or that the Petitioner has succeeded in the business. Consequently, considering the proviso in the absence of the Petitioner succeeding in the business or part of the business, the issue of the Petitioner being liable for the arrears of Central Excise dues will not arise. The Respondent otherwise did not have a priority of claim over the dues of Respondent No. 4. Considering that the Petition will have to be allowed.

Rule made absolute in terms of Prayer Clause (a). There shall be no order as to costs.