

(2023) 07 BOM CK 0037
In the Bombay High Court
Case No : Writ Petition No. 4365 Of 2023

Shailesh K. Bothra And Others

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 12-07-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Maharashtra Realisation Of Land Revenue Rules, 1967 — Rule 11, 11(2)
Security Interest (Enforcement) Rules, 2002 — Rule 8, 8(6)(a), 8(6)(f), 8(7)(a), 8(7)(f), 9, 9(10), 9(6), 9(7), 9(9), 9(10)
Securitisaton And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13, 13(2), 13(4), 13(6), 14, 20, 20(4), 24, 25, 26, 26B, 26B(2), 26C, 26D, 26E, 27, 29, 37, 60, 85
Maharashtra Value Added Tax Act, 2022 — Section 32, 32(5), 33, 34, 34(1)(I), 37, 37(1), 38, 178, 181, 182, 185, 267
Recovery Of Debt And Bankruptcy Act, 1993 — Section 31B
Maharashtra Land Revenue Code, 1966 — Section 11(2)
Central Sales Tax Act, 1956 — Section 9(2)
Bombay Sales Tax, 1956 — Section 38B(1)(v)
Transfer Of Property Act, 1882 — Section 100

Citation : (2023) 07 BOM CK 0037

Hon'ble Judges : G. S. Kulkarni, J; Jitendra Jain, J

Bench : Single Bench

Advocate : G.S.Godbole, Parag Tilak, Shivani Samel, V.A. Sonpal, Shruti D. Vyas

Final Decision : Dismissed

Judgement

G. S. Kulkarni. J

1. The judgment has been divided into the following sections to facilitate analysis:

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A] Challenge and Question for determination:-

1. This petition under Article 226 of the Constitution of India, quite peculiarly is filed by three petitioners. Petitioner nos. 1 and 2 are auction purchasers in an auction held by petitioner no. 3- a non-banking financial institution under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act").

2. The question which falls for determination in the present proceedings is whether petitioner nos. 1 and 2 who are auction purchasers in a securitization auction held by petitioner no.3, are liable to discharge the sales tax dues, for the recovery of which, the property as purchased by them, was attached by the Sales Tax Department prior to the auction; and/or whether petitioner nos. 1 and 2 have purchased an encumbered property ?

B] Facts:-

3. The facts are required to be noted in some detail:- One Taurus Auto Dealers Pvt. Ltd. had borrowed an amount of Rs.7,71,00,000/- from petitioner no. 3. Also, there were borrowings by the Directors of the said Company namely Shri Rajiv Shambhunath Malviya and Mrs. Samata Rajiv Malviya and its associate concern M/s. International Tyres (for short "borrowers"). The Loan Agreements

were dated 25 February, 2010, 29 July, 2010, 30 June, 2011, 29 February, 2012 and 13 May, 2013.

4. An equitable mortgage by deposit of title deeds of an immovable property with an intent to create security for the due repayment of the loans was created by the directors of the company, in respect of the property described as " All that piece and parcel of the Sub Plot No.55, Final Plot No.425, bearing C.T.S. No.91, S.No. 542 admeasuring about 760 sq.mtrs at Village Gultekadi, Taluka Haveli, Dist.Pune - 411 037, within the city limits of Pune Municipal Corporation (for short "the said property").

5. The borrowers defaulted in repayment of the loans. Consequently, petitioner no. 3 issued a notice under section 13(2) of the SARFAESI Act calling upon the borrowers and its directors to make payment of an amount of Rs.6,37,57,162/- within 60 days from the receipt of the said notice, failing which petitioner no. 3 being the secured creditor, shall exercise powers conferred on it under section 13 of the SARFAESI Act for enforcing the security interest in the secured assets, namely, by sale of the said property .

6. The borrowers, however, persisted in their default by not honouring the demand notice. Consequently, on 14 March, 2017, the authorized officer of petitioner no. 3 published a possession notice in the local news paper, whereby formal possession of the subject property was taken over by the authorized officer.

7. It appears that the respondents, namely the Sales Tax Department of the Government of Maharashtra, through its Deputy Commissioner issued an "Attachment Order" dated 11 August, 2017 exercising powers under Section 34 of the Maharashtra Value Added Tax Act, 2002 (for short "MVAT Act") whereby the said property as mortgaged with petitioner no. 3, was sought to be attached to recover sales tax dues of Rs.10,31,38,003/- of the borrower/dealer M/s. Taurus Auto Dealers Pvt. Ltd. The sales tax dues pertained to the period 1 June, 2014 to 31 March, 2015.

8. Thereafter, petitioner no. 3 applied to the learned District Magistrate, Pune seeking orders to enable petitioner no. 3 to take physical possession of the property. The learned District Magistrate passed an order dated 22 December, 2017 under section 14 of SARFAESI Act under which physical possession of the said property was taken over by petitioner no. 3.

9. In so far as the sales tax dues of the dealer were concerned, the Deputy Commissioner of Sales Tax issued a demand notice dated 14 March 2018 to petitioner no. 3, inter alia recording that there is a lien on the property for recovery of the sales tax dues. Petitioner no. 3 was accordingly directed not to transfer the said property, as the same would be in violation of Section 38 of the MVAT Act. In such notice, the Deputy Commissioner recorded that the borrower/dealer had not paid the sales tax dues despite follow up, and various notices issued by the Sales Tax Department, hence, a recovery action as per the

provisions of Maharashtra Land Revenue Code, 1966 (for short "MLRC") was already initiated against the borrowers. It was stated that the said property was already attached and the order of attachment in Form IV dated 11 August, 2017 was issued. The notice also recorded that section 37 of the MVAT Act was being applied, which ordained that liability under MVAT Act, shall be the first charge over the property of the dealer/borrower.

10. Being aggrieved by the said notice dated 14 March, 2018 of the Deputy Commissioner, petitioner no. 3 approached this Court by filing Writ Petition No. 4860 of 2019. In such Writ Petition, petitioner no. 3 inter alia contended that being a secured creditor, the dues of petitioner no.3 as recoverable from the borrower would rank above the dues of the State Government under the MVAT Act and/or the first charge on the said property would be that of petitioner no. 3 and for such reason, the notice dated 14 March, 2018 issued by the Deputy Commissioner of Sales Tax was illegal. Petitioner no. 3 prayed for the following reliefs in the said writ petition :-

"a) That Honorable High Court may please be directed to the Tahsildar Pune City to take possession of the said property.

b) That Honourable High Court may please be declared the letter/notice dated 14.03,2018 issued by the Respondent.No.6 is null and void.

c) That during the pendency of the present Petition, the petitioner may please be stayed and Respondent No.6 may please be restrained from taking the possession of the said property."

11. The said petition was disposed of by a Division Bench of this Court by an order dated 10 January, 2020, whereby the notice of the Deputy Commissioner of Sales Tax dated 14 March, 2018 was quashed and set aside observing that the issue was covered by a decision of the Division Bench in the case of ASREC (India) Ltd. vs. State of Maharashtra & Ors. Writ Petition No. 1039 of 2017 decided on 13 December, 2019. The said order passed by the Division Bench reads thus:-

"1. The Petitioner is the secured creditor and has received a letter dated 14,03.2018 issued by the Deputy Commissioner of Sales Tax informing that on account of sales tax dues there is a lien on the property in favour of the State Government.

2. This Bench has resolved the issue as per the Judgment dated 13 December, 2019 passed in Writ Petition 1039 of 2017 *pari passu*. It was held that the dues of a secured debtor rank above the dues of the State Government under the Maharashtra Sales Tax or a Value Added Tax.

3. Thus, the Petition is disposed of quashing the letter dated 14.03.2018.

4. Needless to state that if there is any surplus amount available after the sale of the secured asset, the same shall be transmitted by the Petitioner to Sales Tax

Department, State of Maharashtra.”

12. It may be observed that in ASREC’s case (supra), a Division bench of this Court considering the provisions of Section 37 of MVAT Act vis-a-vis the applicability of Section 31B of the Recovery of Debt and Bankruptcy Act, 1993 (for short “RDB Act”) and Section 26-B to Section 26-E of the SARFAESI Act, observed that by virtue of the provisions of the Central Act (SARFAESI Act), any priority or charge created in favour of any party, shall prevail, so as have the first charge of the secured creditor. This for the reason that Section 37 of the MVAT Act when commences with a non-obstante clause, it recognizes, that the same shall be subject to any provision regarding creation of the first charge under any Central Act. The Court observed that similar was the position under Section 31B of the RDB Act, which was introduced by an amendment in the year 2016, with effect from 2 September, 2016, by virtue of which priority was accorded to secured creditors with respect to the secured assets. The Division Bench also rejected a contention as urged on behalf of the Sales Tax Department, that Chapter IVA inserted in the SARFAESI Act comprising Sections 26-B to 26-E warrants record to be made in the Central Register by Central Registry creating a security interest and unless such security interest is recorded in the Central Register, the priority of interest contemplated by Section 26E would not be applicable. The Division bench rejecting such contention observed that such contention would be opposed to what has been held by the Court as also different High Courts, that if any Central Statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of the State for recovery of the tax due under the MVAT Act. In rejecting such contention, the Court observed thus:

“20. The only contention which needs to be noted which was made by learned counsel for Respondent Nos. 1 and 2 which was not made before the four learned Benches of the four High Courts in their opinions above noted, is that Chapter IVA which was inserted in SARFAESI 2002 comprising Sections 26B to 26E warrants a record to be made in the Central Register by the Central Registry creating a security interest. As per learned Counsel as per Sub-section (2) of Section 26B which is a part of Chapter IVA a secured creditor has to ensure that the security interest is recorded in the record of the Central Registry. The argument therefore was that unless this is done, the priority of interest contemplated by Section 26E would not be applicable.

21. The argument is without any substance because the law declared in the four opinions above referred to is that if any Central Statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a State for a tax due under the Value Added Tax of the State. But we note the fact that the security interest has been entered in the record of the Central Registry.”

13. Now coming to the facts of the present case, the petitioners have contended that despite the order dated 10 January, 2020 passed by the Division Bench on

petitioner no. 3's writ petition, the Deputy Commissioner again issued a notice dated 17 February, 2020 to petitioner no. 3 intimating of a charge on another property of the borrowers, which was stated to be attached under the provisions of Section 32 of MVAT Act. However, according to the petitioners, such notice which was in the nature of a garnishee notice, the Sales Tax Department had sought to lay its hands on any money which may become due to petitioner no. 3, by disposal of assets/property of the borrower. Petitioner no. 3 replied to the said notice of the Deputy Commissioner inter alia recording that such notice was bad and illegal on the ground that the same was contrary to the order dated 10 January, 2020 passed by this Court in Writ Petition No. 4860 of 2019 filed by petitioner no. 3, wherein this Court had held that petitioner no. 3's right to proceed against the secured assets takes precedence over the recovery of sales tax dues. Petitioner no. 3 also recorded that it had every right to sell and dispose off the secured assets and appropriate the net sale proceeds and such transaction will be in accordance with the provisions of the SARFAESI Act and not in contravention of the MVAT Act.

14. It appears that petitioner no. 3 on the backdrop of the orders dated 10 January 2020 passed on its writ petition, proceeded to issue an auction proclamation dated 11 February, 2021, as per the provisions of the SARFAESI Act for recovery of an outstanding amount of Rs.12,64,12,240.47 due and payable by the borrowers. Such proclamation came to be published in the local newspaper on 13 February 2021. In the said proclamation, petitioner No.3 specifically set out the known encumbrances namely encumbrances of Assistant Deputy Commissioner of Sales Tax for Rs.10,31,38,003/- and the encumbrances of Parshwanath Nagri Sahkari Patsanstha Ltd. Karad for Rs.1,75,00,000/- and the unpaid charges towards electricity, maintenance, tax etc., if any, as applicable.

15. Petitioner nos. 1 and 2 responded to the said offer of petitioner no. 3 sometime in the first week of March, 2021. On 2 March, 2021, petitioner no. 3 issued a "Successful bid confirmation letter" to petitioner nos. 1 and 2 informing them that it was decided by petitioner no. 3 to accept the offer of petitioner nos. 1 and 2. It was informed that the sale of the said property to petitioner nos. 1 and 2 was on "as is where is basis", "as is what is basis" and "whatever is there is basis" and subject to the scheduled payment of the total purchase price of Rs.6,71,00,000/-. It would be necessary to note the contents of the said letter, which read thus:

"Dear Sir,

With reference to the above, we are pleased to inform you that Cholamandalam Investment and Finance Company Limited has decided to accept the offer, subject to your strict compliance to the terms & conditions of the tender specified in the Tender form and Public Notice issued in the matter and terms & conditions mentioned hereunder.

The Sale of the Schedule property (details of which is mentioned hereunder) to you is on "as is where is basis, "as is what is basis" and "Whatever is there is basis" and subject to the scheduled payment of the purchase price as mentioned hereunder:

Reserve Price of the Secured Asst	Rs.6,10,00,000/-
EMD Received (10% of Reserve Price)	Rs.61,00,000/-
Sale/Purchase Price Rs.7,00,00,000/-	
Amount Received during Bid opening Date	
Amount to be Paid by the Bidder on or before 03/03/2021	Rs.1,14,00,000/-
Remaining & Final Amount to be Paid by the Bidder (Compulsory within 15 Days of the Bid Opening Date)	Rs.5,25,00,000/-

Terms and conditions:

- * Please note that on your failure to pay the balance amount or any part thereof as aforesaid, Cholamandalam Investment and Finance Company Limited shall be at all liberty to forfeit the amount paid by you and or charge interest, claim damages from you for the default.
- * The existing liabilities, if any, and the liabilities which may arise in future in respect of the dues of all the concerned authorities for transfer of the schedule property in question shall be payable by you.
- * You shall execute necessary document/s as may be advised or necessary for transfer of the schedule property in your name and shall bear the expenses thereof.
- * All the formalities under this offer shall be completed within 15 days from the date of receipt of this letter failing which the offer shall stand withdrawn and the Cholamandalam Investment and Finance Company Limited shall be at full liberty to forfeit the Earnest Money Deposit and any other amount paid by you.
- * The movable, household goods etc. inside the construction standing thereon are not offered for sale or available.

As regards completion of the legal formalities for transfer of the schedule property in our name and execution of documents for the same, you are requested to contact us after you have made complete payments of the above mentioned amounts to Cholamandalam Investment and Finance Company Limited.

Kindly acknowledge the receipt of this Letter."

(emphasis supplied)

16. In or about 5 March, 2021, as per the terms and conditions of the auction sale, petitioner nos. 1 and 2 paid an amount of Rs. 1,75,00,000/- (25% of bid amount) to petitioner no. 3. Thereafter in or about 1 April, 2021, petitioner nos. 1 and 2 deposited the agreed amount of Rs. 7 crores with petitioner no. 3. In pursuance thereto, on 30 March, 2021, a "Sale Certificate" was executed by petitioner no. 3 in favour of petitioner nos. 1 and 2, which was duly registered with the Joint Sub-Registrar Haveli-I. Also the possession of the said property was handed over to petitioner nos. 1 and 2.

17. The Deputy Commissioner again issued a notice dated 9 April, 2021 to petitioner no. 3 under Form 318, being a notice under sub-section (1) of section 33 of the MVAT Act inter alia informing that an amount of Rs.14,89,862/- was due from the borrowers towards the Value Added Tax dues and that petitioner no. 3 was called upon to pay any money which may become due from petitioner no. 3 to the borrowers or which petitioner no. 3 may subsequently hold for or on account of said borrowers. Thus, such notice was in the nature of garnishee notice. Responding to such notice, petitioner no. 3 addressed the letter dated 19 April, 2021 that there was no surplus amount left with them which was held in account of the borrowers and hence, petitioner no.3 requested to withdraw such charge from the property in question.

18. Thereafter, the Deputy Commissioner issued a notice dated 26 July, 2021 to petitioner nos. 1 and 2 inter alia calling upon petitioner nos. 1 and 2, being the purchasers of the said property which was attached by the Sales Tax Department, to deposit MVAT dues of the borrower (M/s. Taurus Auto dealers Pvt. Ltd.). It was recorded that the borrower had failed to pay the arrears of sales tax dues, hence recovery proceedings were already initiated and a claim was lodged with the Competent Authority in respect of the property in question as per the provisions of MVAT Act and the Maharashtra Land Revenue Code (for short, "MLRC"). It was recorded that the possession of the property in the hands of petitioner nos. 1 and 2 was illegal, as the Sales Tax Department had already taken over the possession vide Form No. 4 of the MLRC on 11 August, 2017. It was recorded that no objection was raised by petitioner no. 3 when the charge/ encumbrance was noted on the CTS. It was recorded that petitioner no. 3 had proceeded to recover its dues by auctioning the said property, and petitioner nos. 1 and 2 having purchased the same, and although had registered the Sales Certificate dated 1 April, 2021, nonetheless, the charge of the Sales Tax Department subsisted on the said property as petitioner no. 3 had auctioned the property subject to the charge of the Sales Tax Department of Rs.10.31 crores, as the property was auctioned on "as is where is basis", "as is what is basis" and "whatever there is basis" as set out in the auction notice. It was further recorded that petitioner nos. 1 and 2 have purchased an encumbered property and for such reason, petitioner nos. 1 and 2 would be responsible to clear all the pending MVAT dues, which was also a condition of sale as declared by petitioner no. 3 in

the auction notice. The relevant contents of the said letter of the Deputy Commissioner of Sales Tax are required to be noted, which reads thus:

"But it is observed from the auction proclamation notice by Cholamandalam published in News paper dt. 11/02/2021, that the Cholamandalam Investment and Finance Company Ltd has mentioned the encumbrance of Sales Tax Department of Rs.10,31,38,003/-(where as the current dues are of Rs.157797893/-) on the said above mentioned property and also clearly mentioned that the property is being sold by them on "As is Where is Basis", "Whatever is There is Basis" and further it is also mentioned that the bidder is responsible and obliged to exercise full due diligence in all respects including inspection of the property, title of the property, encumbrances if any on the said property etc. Consequently, the buyer of the property has purchased the property with encumbrances and is now responsible to clear all the pending MVAT and CST dues which is precondition as declared by Financier Cholamandalam Investment and Finance Company Ltd. This is because Chola knew that the said property is attached by Sales Tax Department for the dues payable by the dealer Taurus Autodealers Pvt. Ltd. More over property is sold by Cholamandalam with the charge of MVAT liabilities attached to the property & it clearly transpires that the responsibility to clear the dues is with the successful bidder.

From above conditions and riders for auction as mentioned by Cholamandalam it clearly proves that the purchaser and the seller of the said property were fully aware that there is a statutory charge on the property created by Sales Tax/VAT Department & there is a huge liability payable by the buyer of the said property as per VAT Department's record. Thus even after knowing this the purchaser has gone ahead and completed the sale transaction. Thus buyer has accepted the VAT liability attached to the said property Hence now it is the responsibility of the purchaser to clear the statutory liability on the property.

Hence now there is no alternative left for the buyer but to clear the VAT dues otherwise the Auction conditions itself become unfulfilled thereby making the entire sale transaction as Void Department is in opinion that this Auction is illegal and the whole process of Cholamandalam Investment and Finance Company Ltd becomes void ab initio.

You are hereby directed to deposit amount of Rs.15,77,91,893/-immediately within 15 days of receipt of this notice or latest by 20/08/2021 and produce the duly certified chalans countersigned by Chartered Accountant to this office on or before 24/08/2021. The period wise dues / liability can be obtained from this office.

Thus from above, it is crystal clear beyond doubt that the purchaser has knowingly and willingly purchased the above-mentioned property with all encumbrances attached to the said property. Hence it is the duty of the purchaser to take cognizance of the fact that any transaction between them has to be with the full understanding and liability acceptance forthwith Purchaser is

legally duty bound to clear the said dues attached to the said property.

In view of all above facts and deliberations this office is directing you to pay the MVAT Dues pending against the said property within 15 days from the receipt of this letter. Failing which, appropriate action will be taken against you.

Now therefore, you are directed not to do any acts such as demolish, sell, lease, construct or modify in any way the present condition of the property, failing which you will be liable for appropriate legal action/prosecution which please note.

Your prompt payment in this regard will be highly appreciated."

19. Petitioner nos. 1 and 2 responded to the above letter of the Deputy Commissioner of Sales Tax by their letter dated 5 August 2021 inter alia setting out in detail that the contentions of the Sales Tax department were not untenable. They referred to the order dated 10 January, 2020 passed by this Court in the writ petition filed by petitioner no. 3, stating that by virtue of the said order they have purchased the said property free from all the encumbrances. Accordingly, the Deputy Commissioner was called upon to withdraw the notice dated 26 July, 2021 as also the City Survey Officer, Pune as also other authorities in that regard be informed by the Sales Tax Department that there is no charge of the Sales Tax Department on the said property.

20. The Deputy Commissioner, however, responded to the said reply of petitioner nos. 1 and 2 by his letter dated 18 August, 2021 stating that the petitioner's request cannot be accepted for the reasons as contained in the Deputy Commissioner's earlier notice addressed to petitioner nos. 1 and 2.

21. It appears that the Deputy Commissioner also addressed letter dated 28 November, 2021 to the City Survey Officer informing of the dues payable by the borrower and instructing the said authority to record a charge of the Sales Tax Department on the property in question.

22. In the above circumstances, the petitioners have moved this Court by filing Contempt Petition contending that the action on the part of the Sales Tax Department to attach the property was in complete breach of the order dated 10 January, 2020 passed by this Court in Writ Petition No. 4860 of 2019.

23. It is on the above backdrop, the present petition has been filed by the petitioners praying for the following reliefs:

"a) This Hon'ble Court may be pleased to issue a writ of mandamus or any other writ, order, direction in the nature of writ of mandamus thereby issuing appropriate direction to the Respondents to forthwith withdraw and/or cancel the Notice of Recovery dated 16.3.2021 bearing No. DCST/LTU- I/E-610/Taurus Auto Dealers/Recovery/B-1481 annexed as Exhibit "L", Demand Notice dated 09.04.2021 bearing no. DCST/LTU E-601/F-318/Recovery Notice/B-384, annexed as Exhibit "O" & Demand Notice dated 26.07.2021 bearing No. DCST/PUN-VAT-

E-610/Taurus/Recovery/2021 -22/B-142, annexed as Exhibit "R" & reply letter dated 18.08.2021, annexed as Exhibit "T" to this Petition;

b) This Hon'ble Court may be pleased to issue a writ of certiorari or any other writ, order, direction in the nature of writ of certiorari thereby, quashing and setting aside the Notice of Recovery dated 16.3.2021 bearing No. DCST/LTU-I/ E-610/Taurus Auto Dealers/ Recovery/B-1481 annexed as Exhibit "L", Demand Notice dated 09.04.2021 bearing no. DCST/LTU E-601/F-318/Recovery Notice/ B-384, annexed as Exhibit "O" & Demand Notice dated 26.07.2021 bearing No. DCST/PUN-VAT- E- 610/Taurus/Recovery/2021 -22/B-142, annexed as Exhibit "R" & reply letter dated 18.08.2021, annexed as Exhibit "T" to this Petition issued by the respondent no. 3 herein.

c) This Hon'ble Court may be pleased to issue a writ of certiorari or any other writ, order, direction in the nature of writ of certiorari thereby, quashing and setting aside the Attachment Order dated 11.08.2017 passed by the Respondent No.3 bearing No. DCST/LTU/E-601/RECOVERY/ 27080000389V / C / B- 204 PUNE, being Exhibit "C" to this Petition in respect of land bearing CTS No. 91/59, Final Plot No. 425/59, TMV Colony, Village Gultekdi, Taluka Haveli, District: Pune-411-037 admeasuring 7600 Sq. ft. with the entire bungalow standing thereon and allied construction;

d) This Hon'ble Court may be pleased to hold and declare that the Attachment Order dated 11.08.2017 passed by the Respondent No.3 bearing No. DCST /LTU/ E- 601/RECOVERY/27080000389V/C/B-204 PUNE, being Exhibit "C" to this Petition in respect of land bearing CTS No. 91/59, Final Plot No. 425/59, TMV Colony, Village Gultekdi, Taluka Haveli, District: Pune-411-037 admeasuring 7600 Sq. ft. with the entire bungalow standing thereon and allied construction is null and void against the Petitioners in view of the same being not issued and proclaimed as per provisions of Section 192 of the Maharashtra Land Revenue Code, 1966 r/w. rule 11(2) of the Maharashtra Realisation of Land Revenue Rules, 1967;

e) This Hon'ble Court may be pleased to declare that in view of the Judgment & Order dated 10.01.2020, annexed as Exhibit "H" to the Petition passed in Writ Petition No.4860 of 2019, the subsequent demand notices issued by the Respondent No.3 are null and void, non-binding on the Petitioners and the Respondents be further directed to forthwith withdraw and/or remove any encumbrance and/or any other letter or communication indicating charge in respect of the subject land i.e. land bearing CTS No. 91/59, Final Plot No. 425/59, TMV Colony, Village Gultekdi, Taluka Haveli, District: Pune-411-037 admeasuring 7600 Sq. ft. with the entire bungalow standing thereon and allied construction, filed before any authority;"

C] Reply affidavit on behalf of the State Government:-

24. A reply affidavit has been filed on behalf of the respondents of Shri Rajendra Daulatrao Adsul, Joint Commissioner of State Tax LTU-1, Pune inter alia

contending that petitioner nos.1 and 2 are not disputing that they were aware of the charge of the Sales Tax Department on the said property. It is contended that they were also aware of the orders dated 10 January, 2020 passed by this Court in Writ Petition No. 4860 of 2019 filed by petitioner no.3, which dealt with a notice dated 14 March, 2018 issued by the Deputy Commissioner informing petitioner no.3 in regard to the sales tax dues and the lien on the property in favour of the State Government. It is thus contended that petitioner nos. 1 and 2 were aware on the Sales Tax Department's assertions of its charge on the property as recorded in the letter dated 14 March 2018 addressed to petitioner no. 3, and that substantial amounts towards payment of sales tax were outstanding from the dealer (borrower), whose property was subject matter of purchase by petitioner nos.1 and 2. In so far as the order dated 10 January, 2020 passed by this Court is concerned, it is contended that by such order, the letter dated 14 March, 2015 of the Deputy Superintendent of the Sales Tax, as addressed to petitioner no. 3 was quashed, under which the Sales Tax Department had asserted first charge on the said property. It is contended that however, the attachment dated 11 August, 2017 was not quashed, hence the attachment of the said property for the recovery of the sales tax dues had subsisted. It is next contended that in fact, this Court had directed petitioner no.3 to pay to the Sales Tax Department, any surplus amounts after sale of the property and consequent thereto, the Deputy Commissioner of Sales Tax had demanded the said amounts from petitioner no.3, by his letter dated 16 March, 2021. It is next contended that issuance of the notices to the petitioners was in accordance with law, as also, the order of attachment dated 11 August, 2017 was in accordance with law and in consonance with Sections 32, 34 and 37 of the MVAT Act, and fully within the powers of the respondents to recover the sales tax dues, hence, the recovery as initiated cannot be said to be without jurisdiction or illegal.

25. The reply affidavit further states that the assertion in the letter dated 17 February, 2020 addressed by the Deputy Commissioner to petitioner no.3 was post the order passed by this Court on 10 January, 2020, so as to positively make known to petitioner no.3 that there were dues of the sales tax department, against the dealer (borrower), so as to enable petitioner no.3 to disclose encumbrances to prospective purchasers, as required under Rules 8(6) (a) and (f), 9(7), 9(9) and 9(10) of the Security Interest (Enforcement) Rules, 2002, to be notified as 'known encumbrances'. It is stated that this was also to enable petitioner no.3 to remit any sums, if at all, payable to the dealer at any time, with a caveat that nothing in the said notice required petitioner no.3 to pay any amounts to respondents, as such intimation was in the nature of garnishee proceedings as per the provisions of Section 33 of the MVAT Act. It is further contended that even the auction notice issued by petitioner no.3 categorically referred that the property was being sold on "as is where is basis", "as is what basis".

26. In so far as the petitioners' reliance on the order dated 10 January, 2020

passed by this Court in Writ Petition No. 4860 of 2019 was concerned, it is contended that by such order this Court had merely quashed the restraint of the Deputy Commissioner of Sales Tax issued to petitioner no.3 not to sell the assets of the dealer on account of the sales tax dues pending. It is contended that the High Court did not quash the attachment order dated 11 August, 2017. It is next contended that before the auction sale of the said property on 2 March, 2021, on 18 February, 2021, the Nagpur Bench of this Court had delivered a judgment in the case of Medineutrina Pvt. Ltd. vs. District Industries Centre (D.I.C.) & Ors. Writ Petition No. 7971 of 2019 decided on 18.02.2021 in which this Court inter-alia held that the person who purchases property in auction with a notice that the sale is "as is where is basis, as is what basis", such person is required to undertake due diligence and make enquiries for ascertaining encumbrances on the property, such purchaser accordingly is liable to pay the sales tax dues; also the charge on the property so attached runs on the property and is not extinguished if the sale takes place and that the purchaser cannot get sale certificate without payment of sales tax dues. It is stated that the SLP filed by Medineutrina Pvt. Ltd. was dismissed by the Supreme Court by an order dated 18 November, 2021 passed on SLP (C) No. 10919 of 2021. It is next contended that by virtue of Section 26-E of SARFAESI Act, the dues payable under the said Act are not wiped out and the auction purchaser would hold the property subject to the charge of the State Government to recover the sales tax dues. It is thus contended that petitioner nos.1 and 2 have taken the decision to purchase subject property despite knowing the outstanding dues of the Sales Tax Department.

27. It is next contended that the Full Bench of this Court in the case of Jalgaon Janta Sahakari Bank Ltd. & Anr. Vs. Joint Commissioner of Sales Tax Nodal 9, Mumbai, & Anr. Writ Petition No. 2935 of 2018 decided on 30 August, 2022 has held that although the secured creditor would have the first charge over the government dues, however when the property of the defaulters of sales tax is sold on "as is where basis, as is what basis", the auction purchaser is liable to pay the dues of the State Government as the charge of the State Government on the property would continue to operate. It is contended that for such reasons, the recovery proceedings taken by respondents against petitioner nos.1 and 3 are sustainable in law and hence the reliefs as prayed for in the petition, cannot be granted. It is hence contended that the petition be dismissed.

D] Submissions on behalf of the Petitioners :-

28. Mr. Godbole, learned senior counsel for the petitioners has made the following submissions:-

(i) It is submitted that the issue regarding priority of charges of the secured creditor under the SARFAESI Act vis-a-vis provisions of the MVAT Act under Sections 37, 38 thereof stood concluded in view of the orders passed by the Division Bench of this Court dated 10 January, 2020 in Writ Petition No.4860 of 2019 filed by petitioner no.3.

(ii) In view of the said orders passed by the Division Bench, it was no longer open to respondents/Sales Tax Department to claim any dues against the property purchased by petitioner nos.1 and 2 in auction undertaken under the SARFAESI Act. The issue has attained finality in view of the order dated 10 January, 2020. It is submitted that overruling of the observations of the Division Bench in paragraph 21 of the judgment in ASREC's case (supra), by the Full Bench in its decision in Jalgaon Janta Sahakari Bank Ltd. (supra) in no manner takes away or dilutes the legal effect and consequences of the orders of the Division Bench in disposing of petitioner no.3's Writ Petition No. 4860/2019.

(iii) It is next contended that even the decision of the Full Bench in Jalgaon District Sahakari Bank (supra) mandates that unless the charge is registered with CERSAI after 2020, it is only then the State can have a prior charge. In case of an attachment prior to 24 January, 2020, the State has to show that the attachment and proclamation is made as per the provisions of the Maharashtra Realization of Land Revenue Rules, 1967 (for short, "MLR Rules"). In the present case, both, attachment and proclamation are not as per the MLR Rules and hence, are invalid.

It is submitted that by virtue of the order dated 10 January, 2020 passed in Writ Petition No. 4860 of 2019 filed by petitioner no.3, this Court had clearly directed that petitioner no.3, being a Secured Creditor, would be entitled to proceed with the sale of secured asset; and only if a surplus remains after the sale of secured asset, the same would be transmitted to the Sales Tax Department. It is hence submitted that such order passed by the Division Bench having attained finality, and after sale of the property by petitioner no. 3 to petitioner nos. 1 and 2, no surplus amount being left with petitioner no. 3, the property had ceased to be the property of the defaulter, hence, the respondent-State cannot claim any further encumbrances or charge on the property.

(iv) It is submitted that once the defaulter's property is auctioned by the secured creditor, the said property will no longer remain as the property of the defaulter, the State, therefore, cannot make any claim against the property. The priority does not mean that if the property is auctioned at the maximum value then it will again be re-auctioned with the second creditor in line. It is submitted that such proposition as canvassed by the respondents will create an anomalous situation where the property will continuously get re-auctioned and there will not be any end to the said position.

(v) It is next submitted that the respondents' contention that even after the auction of the subject property, the State Government's charge on the property would nonetheless remain under Sections 37 and 38 of the MVAT Act and the purchaser, who acquires the property under such auction, if he is aware of the charge of the State, he would still be liable to pay and discharge the liability towards the dues of the State Government, is a misconceived proposition. In this context, it is submitted that firstly, the provisions of the SARFAESI Act overrides the provisions of the MVAT Act, as also Section 37 of the MVAT Act clearly

stipulates that it is subject to any provisions regarding creation of first charge under any Central Act; secondly, the provisions of the MVAT Act nowhere indicates that except for the defaulter/dealer, any other person, as in the present case, the person who has purchased auctioned property, is liable to pay the arrears of the State VAT Department. Thus, the respondents' contention that even after the auction of the property based on the provisions of Section 37, the State is entitled to issue a Demand Notice to the successful auction purchaser is untenable.

(vi) It is next submitted that the reliance of the respondents on the decision of the Division Bench in the case of Medineutrina Pvt. Ltd.(supra) is misconceived and is not applicable to the the auction proceedings as held in the present case. The principles in the said judgment cannot be said to be retrospectively applicable. It is, therefore, submitted that the Sales Tax Department cannot assert any charge on the said property, sold by petitioner no.3 in favour of petitioner nos.1 and 2.

E] Submissions on behalf of the Respondent State/Sales Tax Department:-

29. Mr. Sonpal, learned Assistant Government Pleader has made the following submissions:-

The petitioners are not entitled to any relief. Although petitioner nos. 1 and 2 have purchased the said property from the secured creditor (petitioner no. 3), as per the auction notice, the sale itself was on "as is where is basis, or as is what is basis and whatever there is basis". The auction notice also put the bidders to caution that the bidder is obliged to exercise full due diligence in all respects, including to inspect each of the details of the property and that he would also acknowledge full knowledge of terms and conditions that governed the auction. It is submitted that the auction notice also put the bidders to a notice that the Authorized Officer conducting the auction would not be held responsible for any charge, lien, property tax or any other dues to the Government or local body or any other authority in respect of the property under sale. Further the auction notice clearly disclosed encumbrance on the property of the Assistant Commissioner of Sales Tax of an amount of Rs.10,31,38,003/-. It is next submitted that also in the bid confirmation letter dated 03 March, 2021 issued to petitioner nos.1 and 2, petitioner no.3 reiterated that the existing liabilities, if any, and the liabilities which may arise in future in respect of the dues of all concerned authorities for transfer of the schedule property were payable by the auction purchasers. It is submitted that the sale certificate reiterates that the bungalow with construction thereon is sold on 'as is where is basis', 'as is what is basis' and 'as is whatever is basis'. It is hence submitted that petitioner nos.1 and 2 were fully aware and were put to notice that they were purchasing the property with all encumbrances. Further petitioner no. 3 in putting the said property for auction, had taken all precautions that for a complete discharge of the said property from the lien/ charge of the State Government, all the pending dues were required to be paid by them (purchasers) by providing for the

appropriate disclosures, as required by the Security Interest (Enforcement) Rules, 2002. Hence, for such reason, petitioner no. 1 and 2 cannot contend that they are not liable for discharge of the liabilities.

30. It is next submitted that the above proposition is supported by the decision of the Division Bench of Nagpur Bench in the case of *Medineutrina Pvt. Ltd. vs. District Industries Centre (D.I.C.) & Ors.* (supra). It is submitted that the said decision although upholds the priority of the secured creditor to receive sale proceeds from sale of secured assets over the Government dues, however, the decision also holds that the purchaser is liable to pay the dues of the Government, if the property is purchased on "as is where is basis" and "whatever there is basis". It is submitted that the Court has specifically held that although the bank has priority to receive the sale proceeds, it does not have the effect of wiping out the dues payable under any Central/State/Local Act, where first charge has been created as under the MVAT Act. It is submitted that the Court has held that the charge on the property runs with the property and when the purchase of the property is on "as is where is basis" and "what is there is basis", it would mean that the property was being taken by the auction purchasers with all its rights, obligations and liabilities. It is submitted that as to what has been held by the Division Bench in the case of *Medineutrina Pvt. Ltd.* (supra) is also the view of the Full Bench of this Court in the case of *Jalgaon District Sahakari Bank* (supra).

31. It is submitted that in any event there is an admission on the part of petitioner nos.1 and 2 that they were having actual notice of sales tax encumbrances, for such reason also petitioner nos. 1 and 2 cannot escape the consequences of having purchased an encumbered property and back out from discharging the sale tax liabilities. It is next submitted that the Full Bench has also held that if the State is claiming priority over banks prior to 24 January, 2020, it must have attachment in accordance with the MLRC Rules. If attachment is prior to 24 January, 2020 as in the present case the attachment is dated 11 August, 2017, as made under the MLRC Rules, the State will retain priority. It is thus submitted that the contention of the petitioners that the State has not followed proper procedure in attaching the property cannot be countenanced in absence of any material to the contrary.

32. It is next submitted that this Court in its order dated 10 January, 2020 passed on Writ Petition No.4860 of 2019 filed by petitioner no. 3 had merely held that petitioner no.3 had priority to appropriate the sale proceeds recognizing its first charge as the secured creditor. It is submitted that at that point of time, the judgment of the Full Bench was not available, which clearly holds that the purchasers (petitioner nos. 1 and 2) would nonetheless be liable to discharge the sales tax dues.

33. It is next submitted that a prayer to quash the attachment order cannot be granted as the attachment order is as per the jurisdiction and the provisions of Section 32(5) of the MVAT Act read with Sections 181, 182 and 185 of the MLRC

Rules and there is no material to show any illegality in the attachment, which was done in accordance with law. It is thus submitted that the petition be dismissed.

F] Reasons and Conclusion:-

34. On the above backdrop, we have heard learned Counsel for the parties. We have perused the pleadings and the record.

35. This is a case where the respondents / Sales Tax Department is asserting an attachment of the property in question as auctioned by petitioner no. 3 in favour of petitioner Nos.1 and 2, inter alia contending that the attachment as made by the Sales Tax Department dated 11 August 2017, is legal and valid for recovery of an amount of Rs.10,31,38,003/- as set out in the said attachment notice. Thus the question is whether the Sales Tax Department is correct in asserting that it has a charge on the property in question as purchased by petitioner Nos. 1 and 2 from petitioner No. 3.

36. As to what would be the authority, power and jurisdiction of the Sales Tax Department to recover the sales tax dues under the MVAT Act can be ascertained from the relevant provisions in that regard which are Section 32, 34, 37 and 38 of the MVAT Act, 2002 which read thus:-

"32. Payment of tax, etc.- (1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.

2) A registered dealer furnishing returns as required by section 20 shall pay into the Government treasury, in such manner and at such intervals as may be prescribed, the amount of tax due from him for the period covered by a return which he is required to file along with the amount of interest and any other sum payable by him.

(3) A registered dealer furnishing a revised return in accordance with sub-section (4) of section 20, when the revised return shows that a larger amount of tax than, the tax already paid, is payable, shall first pay into the Government treasury the extra amount of tax.

(4) (a) (i) The amount of tax due where the return or revised return has been furnished without full payment thereof shall be paid forthwith.

(ii) the amount of tax which it becomes necessary to pay on account of the reduction in set-off because of any contingency specified in the rules, shall be paid at the time prescribed for making payment of tax for the period in which such contingency occurs.

(b) (i) The amount of tax due as per any order passed under any provision of this Act, for any period, less any sum already paid in respect of the said period; and

(ii) the amount of interest or penalty or both, if any, levied under any provision

of this Act; and

(iii) the sum, if any, forfeited and the amount of fine, if any, imposed under the Act or rules; and

(iv) the amount of tax, penalty and interest demanded in the context of excess availment of incentives or availment of incentives not due; and

(v) any other amount due under this Act, shall be paid by the person or dealer or the person liable therefor into the Government treasury within thirty days from the date of service of the notice issued by the Commissioner in respect thereof:

Provided that, the Commissioner may, in respect of any particular dealer or person, and for reasons to be recorded in writing, allow him to pay the tax, penalty, interest or the sum forfeited, by instalments but the grant of instalment to pay tax shall be without prejudice to the other provisions of this Act including levy of penalty, or interest, or both.

(5) Any tax, penalty, interest, fine or sum forfeited, which remains unpaid after the service of notice under sub-section (4), or any instalment not duly paid or any amount due or payable under this Act, shall be recoverable as an arrears of land revenue.

(6) Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract, where any sum collected by a person by way of tax in contravention of section 60, is forfeited under section 29 and is recovered from him, such payment or recovery shall discharge him of the liability to refund the sum to the person from whom it was so collected. A refund of such sum or any part thereof can be claimed from the Commissioner by the person from whom it was realised by way of tax, provided such person has not resold the goods within a period of two years from the date of purchase and an application in writing in the prescribed form is made to the Commissioner, within two years from the date of the order of forfeiture. For this purpose, the Commissioner may send an intimation in the prescribed form to such of the said purchasers whose names and addresses are available in the records of the person who has collected any sum in contravention of section 60. On receipt of such application, the Commissioner shall hold such inquiry as he deems fit, and if the applicant proves to the satisfaction of the Commissioner that the goods are not resold by him as aforesaid and if the Commissioner is satisfied that the claim is valid and admissible and that the amount so claimed as refund was actually paid in Government treasury or recovered and no set-off or refund in respect of that amount was granted, he shall refund the sum or any part thereof, which is found due to the person concerned.

(7) (i) There shall be established a Fund to be called "the Maharashtra Consumer Protection and Guidance Fund" (hereinafter, in this section, referred to as "the Fund"). From the amounts forfeited and recovered except for the amounts refunded as aforesaid to the purchasers and except for the amounts in respect of

which a set-off or refund is granted, the remaining amount shall, after deducting the expenses of collection and recovery as determined by the State Government, under appropriation duly made by law in this behalf, be entered into, and transferred to, that Fund.

(ii) No sum from the Fund shall be paid or applied for any purpose other than the one specified in clause (iii).

(iii) The Fund shall be administered in the prescribed manner; and the amount in the Fund shall be utilised for meeting the expenses of any activities related to consumer protection and guidance as the State Government may direct, and for giving grant in the prescribed manner to any voluntary consumer organisation, society, association, body or institution engaged in providing for the better protection of the interests of the consumers and having such qualifications as may be prescribed.

(8) (a) Any dealer or person may apply to the Commissioner in the prescribed form for a clearance certificate and thereupon the Commissioner may, on the basis of the record, issue a certificate in the prescribed form within a period of fifteen days from the date of receipt of the application, in so far as he may, stating therein, the periods for which the returns have been filed or, as the case may be, have not been filed, assessments have been made, the status of pending proceedings, if any, and the amounts payable by the applicants, if any.

(b) The Commissioner may, every year on the basis of the record, issue to every registered dealer a certificate regarding the amounts payable by him, as on the 1st April of that year, stating therein the periods for which returns have not been filed, the period-wise outstanding amounts of tax, penalty, interest and sum forfeited payable by the dealer including the amounts for which the due date of payment is not yet over, the amounts, the recovery of which has been stayed and the amounts under instalment. The certificate shall in so far as it may be issued immediately after the 1st of April every year.

(c) Nothing in the certificates issued under this sub-section shall be a bar on the Commissioner to initiate or continue any proceedings including recovery proceedings, if it is subsequently found that the certificates were issued on the basis of incomplete or erroneous information.

Section 34. Special powers of Sales Tax authorities for recovery of tax as arrears of land revenue:-

(1) For the purpose of effecting recovery of the amount of tax, penalty interest, amount forfeited or any other sum, due and recoverable from any dealer or other person by or under the provisions of this Act, as arrears of land revenue-

(i) the Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Commissioner under the Maharashtra Land Revenue Code, 1966 ;

(ii) the Additional Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Additional Commissioner under the said Code;

(iii) the Joint Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Collector under the said Code;

(iv) the Senior Deputy Commissioner and the Deputy Commissioner of Sales Tax shall have and exercise all the powers (except the powers of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform, all the duties of the Assistant or Deputy Collector under the said Code;

(v) the Assistant Commissioner and the Sales Tax Officer shall have and exercise all the powers (except the power of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform all the duties of the Tahsildar under the said Code.

(2) Every notice issued or order passed in exercise of the powers conferred by sub-section (1) shall, for the purposes of sections 24, 25, 26, 27 and 85 be deemed to be a notice issued or an order passed under the said Act.

.....

Section 37 Liability under this Act to be the first charge.

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

Section 38. Transfer to defraud revenue void. - (1) Where, during the pendency of any proceedings under this Act or after the completion thereof, [the Commissioner has reason to believe that the liability of the dealer to pay tax or any other sum payable under this Act, is likely to be in excess of rupees twenty-five thousand and the dealer], creates a charge on, or parts with the possession by any mode of transfer whatsoever, including sale, mortgage, gift or exchange of any of the assets of his business valued at rupees ten thousand or more in favour of any other person with intent to defraud revenue, then, notwithstanding anything contained in any Act or contract to the contrary such charge or transfer shall be void as against any claim in respect of any tax or other sum payable by the dealer as a result of the completion of such proceedings or otherwise:

Provided that, such change or transfer shall not be void if made for adequate consideration and without notice of the pendency of the proceeding or of the liability to pay any sum on completion of any proceedings.

(2) Where any person liable to pay tax or other sum payable under this Act has, during the pendency of any proceeding under this Act or after completion thereof, created a charge on or parted with possession by any mode of transfer

including sale, mortgage, gift or exchange of any of his assets in favour of any other person and the Commissioner is of the opinion that such charge of transfer becomes void under subsection (1), then the Commissioner shall issue a notice and hold enquiry and decide whether the charge or transfer became void under sub-section (1).

(3) If, after holding such enquiry the Commissioner is satisfied that the charge or transfer is void, he shall make an order declaring such charge or transfer to be void for the purposes of this Act.

Explanation. - In this section, "assets" includes land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee."

37. Also, as the auction in question has been undertaken by petitioner no. 3 under the Security Interest (Enforcement) Rules, 2002 the relevant provisions in that regard are also required to be noted which read thus :-

Rule 8. Sale of immovable secured assets.—

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:— (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or (b) by inviting tenders from the public; (c) by holding public auction; or (d) by private treaty.

(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.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the web-site of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

Rule 9. Time of sale, issues of sale certificate and delivery of possession, etc.—

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor: Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9: Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of

the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules.

(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.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer may 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) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

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

.....

APPENDIX V

(See rule 9(6))

SALE CERTIFICATE

(For Immovable Property)

Whereas

The undersigned being the authorised officer of the (name of the Institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) and in exercise of the powers conferred under section 13 read with rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 sold on behalf of the (name of the secured creditor/institution) in favour of (purchaser), the

immovable property shown in the Schedule below secured in favour of the (name of the secured creditor) by (the names of the borrowers) towards the financial facility..... (description) offered by (secured creditor). The undersigned acknowledge the receipt of Rs. (Rupees.....), the sale price in full and handed over the delivery and possession of the schedule property. The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned.

DESCRIPTION OF THE MOVABLE PROPERTY

All that part and parcel of the property consisting of Flat No..... / Plot No..... in Survey No..... / City or Town Survey No...../ Khasra No..... Within the registration Sub-District and District Bounded:

On the North by

On the South by

On the East by

On the West by

List of encumbrances

1.

2.

Date: sd/-

Place: Authorised Officers

(Name of the Institution)"

(emphasis supplied)

38. In the context of the attachment of the said property by the Sales Tax Department, Section 178 and 267 of the MLRC as also Rule 11 of the Maharashtra Realisation of Land Revenue Rules, 1967 are also relevant, which read thus:

"Section 178 – When notice of demand may issue

(1) A notice of demand may be issued on or after the day following that on which the arrear accrues.

(2) The Commissioner may from time to time make orders of the issue of such notices, and with the sanction of the State Government shall fix the costs recoverable from the defaulter as an arrear of revenue and direct by what officer such notices shall be issued.

Section 267 – Notice of demand may be served after arrears due

(1) If any land revenue is not paid, at or within, the time when it becomes payable the Collector may, on or after the day following that on which the arrears accrue due, cause a notice of demand to be served on the superior holder or on the person in possession, or on both.

(2) Every person to whom any such notice is issued shall be chargeable in respect thereof with a fee not exceeding two rupees calculated according to the rates specified in this behalf in the table in Schedule F.

Provided that, in no case shall the fee chargeable for any notice exceed the amount of the land revenue in respect of which the said notice is issued.

(3) If the superior holder or person in possession as the case may be, shall, for the space of twenty days after service of written notice of demand of payment, fail to discharge the revenue due, it shall be lawful for the Collector to levy the same by

(a) attachment and sale of the defaulter's movable property: or

(b) attachment and sale of such portion of the land on which the revenue is due as may be required to satisfy the demand; or

(c) attachment and sale of the right, title and interest of the defaulter in any other immovable property.

Such sales shall be by public auction and shall not take place until at least fifteen days after notice thereof shall have been published in the Official Gazette.

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Maharashtra Realisation of Land Revenue Rules, 1967

Rule 11. Attachment of immovable property:

(1) The attachment of immovable property under Section 181, 182 and 185 shall be effected by an order to be issued by the Collector in Form 4 prohibiting the defaulter from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed by the Tahsildar or Naib-Tahsildar at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and also on the notice board of the office of the Talathi.

(3) The order shall take effect as against purchasers for value in good faith from

the date when a copy thereof is affixed on the property and against all other transferees from the defaulter from the date on which such order is made.”

39. Thus, under Section 34(1)(i) of the MVAT Act the Commissioner of Sales Tax is empowered to exercise all powers and perform all the duties of the Commissioner under the Maharashtra Land Revenue Code, for the purpose of effecting recovery of amount of tax, penalty, interest, amount forfeited or any other similar dues or recoverable from dealer or other person or under the provisions of the Act as arrears of land Revenue. Section 37 provides for liability under the MVAT Act to be the first charge which begins with a non-obstante clause and ordains that notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under the Act, shall be the first charge on the property of the dealer or, as the case may be, such person. Thus, Section 37 of the MVAT Act clearly provides that for the liability under the MVAT Act, to be the first charge, is itself, subject to any provision regarding creation of first charge in any Central Act for the time being in force. This pre-supposes that when under a Central enactment there is a provision creating first charge, then in such case, the Sales Tax Department for the purpose of Section 37 shall not have the first charge.

40. Rule 11 of the Maharashtra Realisation of Land Revenue Rules, 1967 provides for the manner of attachment of immovable property which provides that the order shall take effect as against purchasers for value in good faith and against all other transferees from the defaulter from the date the said order is made as provided in sub-rule (3).

41. On a perusal of the order of attachment of the said property dated 11 August, 2017, it is seen that the attachment is made in pursuance of the demand notice issued under Section 178 read with Section 267 of the Maharashtra Land Revenue Code, 1966 read with Section 34 of the MVAT Act and referring to Rule 11 of the Maharashtra Realisation of Land Revenue Rules, 1967 as noted above.

42. The attachment is for recovery of an amount of Rs.10,31,38,003/- being the sales tax dues payable by the dealers/borrowers – M/s.Taurus Autodeal Pvt. Ltd.. The attachment notice was never challenged by the said dealers and its directors. For such reason in the hands of petitioner no. 3, the property stood as a property as attached by the Sales tax department, however, subject to the first charge of petitioner no. 3 to realise its dues as a secured creditor. A copy of the said attachment notice was also forwarded to the City Survey Office, Pune, and the Talathi, Haveli, Pune, with the following common remarks :-

“ With request to inform this office about the present ownership of the above property in the Land record available in your office. He is further requested to withhold any sale or Transfer of the above property and make necessary entries in land record and forward the Copy thereof to this office.”

43. It is not in dispute, as also clear from the petitioners' own showing that the attachment of the said property by the Sales Tax Department dated 11 August 2017, made under the provisions of Sections 178 and 267 of the MLRC read with Section 34 of MVAT Act read with Section 38B(1)(v) of the Bombay Sales Tax, 1956 and Section 9(2) of the Central Sales Tax Act, 1956 and Rule 11 of the Maharashtra Realization of Land Revenue Rule, 1967, at all material times has subsisted. As noted earlier, it was not challenged even by the dealers whose liability was to clear the sales tax dues, nor was any challenge mounted to the attachment by petitioner no.3, who had merely assailed the letter of the respondents dated 14 March 2018 in regard to the respondents asserting first charge on the said property in the capacity as secured creditors.

44. It may be observed that confronted with such clog on the rights of petitioner no.3 as created by the respondents by issuing a letter dated 14 March 2018 asserting first charge, petitioner No. 3 and merely to realize its security interest and/or the recoveries against the borrower, petitioner No.3 approached this Court by filing Writ Petition No.4860 of 2019 on which an order dated 10 January 2020 came to be passed, as noted by us hereinabove in paragraph 11 above. The grievance of petitioner no. 3 in the said writ petition was to the effect that the Deputy Commissioner was legally not correct to assert that petitioner no.3 did not have the first charge on the property, while claiming unpaid sales tax dues of the dealer, in asserting that there was a charge on the said property. It is in such context, following its earlier decision in ASREC's case (supra) the Division Bench allowed the said writ petition, thereby, setting aside the letter of the Deputy Commissioner of Sales Tax dated 14 March 2018 with a further observation that if there is any surplus amount available after the sale of the secured asset, the same shall be transmitted by the petitioner to Sales Tax Department, State of Maharashtra. This was implicit of the Court recognizing the immediate charge of the Sales tax department.

45. Thus, the consequence of the order dated 10 January 2020 passed by the Division Bench on petitioner No.3's writ petition, was not of setting aside the attachment of the said property by the Sales Tax Department dated 11 August 2017, but merely recognizing petitioner No.3's entitlement to have the first charge on the said property, being a secured creditor, by applying the provisions of Section 31-B of the Recovery of Debt and Bankruptcy Act, 1993 and interpreting the provisions of Section 37 of the MVAT Act, which recognized the liability under the MVAT Act, to be the first charge, however, subject to any provision of the first charge in any Central Act for the time being in force, and by applying the law as held in the decision of the Division Bench in ASREC 's case (supra).

46. It is on the above premise petitioner No.3 only for its own benefit, being clothed by the orders dated 10 January 2020 passed by this Court in the said writ petition, proceeded to issue a public notice dated 13 February 2021 inviting bids, to auction the said property of the borrowers, so as to recover the amount

as defaulted by the borrowers, by a public notice dated 13 February 2021 issued in the local newspapers. A perusal of the notice indicates significant disclosures, firstly it categorically discloses that there is an attachment of the Sales Tax Department on the property for an amount of Rs.10,31,38,003/- as also the charge of one Parshwanath Nagari Sahakari Patsanstha, Karad of Rs.1,75,00,000/-; secondly and most significantly, that the auction is being conducted under the Security Interest (Enforcement) Rules, 2002, by referring to Rule 8 and 9 of the said Rules; and thirdly, that the said property is being sold on "as is where is basis", "as is what is basis" and "whatever is there is basis"; and lastly that the authorised officer would not be responsible inter alia in regard to any fees, mortgage, property tax and/or any other Government and /or any other liability of local bodies in relation to the said property.

47. Thus, on such clear notice that there was a charge/attachment of the Sales Tax Department on the property for an amount of Rs.10,31,38,003/-, petitioner Nos.1 and 2 participated in the auction and purchased the said property at an amount of Rs.7 crores. The "successful bid confirmation letter" dated 2 March 2021 as issued by petitioner No.3 to petitioner Nos. 1 and 2, categorically records that petitioner no.3 accepted the offer of petitioner Nos.1 and 2 strictly accepting the terms and conditions of the auction. It also records that the sale of the property to petitioner Nos.1 and 2 was on "as is where is basis", "as is what is basis" and "whatever is there is basis". It also recorded that the existing liability, if any, and the liability which may arise in future in respect of the dues of all the concerned authorities for transfer of the scheduled property concerned, shall be payable by petitioner Nos.1 and 2. It is on such clear terms and conditions, not only in the tender / auction notice, but also, in the bid confirmation letter dated 2 March 2021, petitioner Nos.1 and 2 purchased the said property.

48. It is significant that petitioner Nos.1 and 2 were also clearly put to notice that the auction was being conducted by petitioner no. 3 as per the Security Interest (Enforcement) Rules, 2002, under which sub-rule (6) of Rule 9 provides for a certificate of sale of the immovable property to be issued in favour of the purchaser (petitioner nos.1 and 2) in the form as prescribed in Appendix V of the said Rule. Sub-rule 10 of Rule 9 also provides that a "certificate of sale" issued under sub-rule (6) shall specifically mention whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not. In the context of such statutory requirements, it is noticed from the sale certificate annexed at Exhibit N (page 126 of the petition) that the sale certificate was issued by petitioner No.3 not in the Form-Appendix V and complying with the specific requirements of sub-rule (6) and sub-rule (1) of Rule 9, inasmuch as, the sale certificate does not indicate that the property has been sold free from encumbrances when it records the following in paragraphs 3, 4, 5, 10, 11 and 12 and the "Note" below the sale certificate.

"3. That, Deputy Commissioner of Sales tax issued notice to Secured Creditor in

regard to encumbrance on said property therefore Secured Creditor challenged letter dated 14/03/2018 before Hon'ble Bombay High Court through Writ Petition No.4860 of 2019, Wherein Hon'ble Bombay High Court passed an order as "Needless to state that if there is. any surplus amount available after the sale of the secured asset, the same shall be transmitted by the petitioner to sates tax Department, State of Maharashtra." As on 10/02/2021 current outstanding on secured asset is 85,12,64,12,240.47/- (Rupees Twelve Crores Sixty Four lakhs Twelve Thousand Tvi/o.Hundred Forty and Forty Seven paisa) and current sale price is less than the current outstanding. Hence no surplus amount remains with the Secured Creditor and hence the Secured Creditor is not liable to transmit any amount to the Sales Tax Department, State of Maharashtra and other creditors if any.

4. That the encumbrance of Parshwanath Nagari Sahakari Patsanstha Maryadit, Karad is levied on the said property Svide order dated 13/12/2019 passed by Hon'ble Maharashtra State Cooperative Appellate Court, Mumbai, Bench Pune, at Pune in AO 47 of 2019 wherein said that "The Disputant Society may get some share out of sale proceeds after adjustment of dues of other preferential creditors".

5. As on 10/02/2021 date the current outstanding on secured asset is Rs.12,64,12,240.47/- (Rupees Twelve Crores Sixty Four Lakhs Twelve Thousand Two Hundred Forty and Forty Seven ipaisa only) and current sale price is less than the current outstanding. Hence no surplus amount remains with the Secured Creditor and hence the Secured Creditor is not liable to transmit to any other party including, but not limited jto the Sates Tax Department of the State of Maharashtra, Parshwanath Nagari Sahakari Patasanstha Maryadit, Karad and any other, if the case may be.

.....

10. That the Said Bungalow with the construction thereon is sold on 'as is where is' basis, 'as is.what is basis' and 'as is whatever is basis'.

11. That the Auction Purchaser/s have satisfied themselves from all aspect. Now the Auction Purchaser/s will no longer have.any claim in future on this regard with the Secured Creditor neither that claim shall stand In front of law.

12. That after taking the possession of the said property, the Auction Purchaser/s will not be entitled to claim any type of damages regarding the construction quality and material, and the Auction Purchaser/s have seen all the documents/ paper related to Property and the Auction Purchaser/s is fully satisfied regarding the document. And the Auction Purchaser/s will not claim and not raise any dispute in future regarding the construction, map & design etc.

Note: It is put on record that as per section 26E SARFAESI Act, 2002 the rights of the secured creditors to realize their dues by selling the above secured asset shall have priority and shall be paid in priority over all other debts and

governments dues including revenue, taxes, cesses and rate due to central government, state government or local authority, therefore the sale consideration as paid by the highest bidders would be first credited in the loan account of Secured Creditor and if there remains any surplus amount then only that can be paid to any other/second charge holders by the Secured Creditor itself.”

(emphasis supplied)

49. It is hence crystal clear that there is nothing in the sale certificate to indicate that petitioner Nos.1 and 2 have purchased the said property from petitioner No.3 free from encumbrances, which is a specific requirement of “Appendix V” as extracted above. In fact, it is definite from what has been observed by us above that petitioner No. 3 had taken all the precautions to secure its own interest, to recover the amounts payable by the borrowers, by sale / auction of the said property, hence, certainly petitioner Nos.1 and 2 have not purchased the said property free from any charge or encumbrance of the Sales tax department.

50. From the foregoing discussion, it is more than clear that at all material times, that is with effect from 11 August, 2017, there was a charge and/or an encumbrance on the property of the Sales Tax Department and further petitioner nos. 1 and 2 had purchased the property along with such charge/ encumbrance. The word ‘encumbrance’ would mean a burden or charge upon property or a claim or lien upon an estate or on the land. It also means a burden of legal liability on property. When there is an encumbrance on a land, it constitutes burden on the title which diminishes the value of the land. (See Abdul Karim Khan & Ors. vs Managing Committee, George High School AIR 1936 All 879 .)

51. It may be observed that once the question arises as to whether there is a charge on a property and in the present case a charge which has arisen by operation of law, Section 100 of the Transfer of Property Act, 1882 (for short, “TP Act”) would become relevant in the context of the legal status of such property. Section 100 of the TP Act reads thus:-

“100. Charges.—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained 1[which apply to a simple mortgage shall, so far as may be, apply to such charge]. Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, 2[and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge].”

52. On a plain reading of Section 100 of the TP Act two types of charges are indicated; firstly a charge created by act of parties and the charge arising by operation of law. In J.K. (Bombay) (P) Ltd. Vs. New Kaiser-I-Hind Spg. & Wvg.

Co. Ltd. & Ors. AIR 1970 SC 1041, it was observed that in the case of a charge there was no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property. It is also well settled that the purchaser of the property at the auction sale takes the property subject to all defects of title and the doctrine of Caveat Emptor (purchaser beware) applies to such a purchaser, as held by the Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussienbhai(1971) 1 SCC 754.

53. Applying Section 100 of the TP Act to the facts of the present case, legal consequences emanate, firstly that by operation of the provisions of Section 37 of the MVAT Act there was undoubtedly a charge on the said property, when the property stood in the hands of petitioner No.3 being the secured creditor. The charge of petitioner no. 3 as the secured creditor was the first charge and not that of the Sales Tax Department, as held by the Division Bench, interpreting Section 37 of the MVAT Act, in the order dated 10 January 2020 passed on the writ petition filed by respondent no.3. The consequence of such order did not bring about any legal effect that the charge on the said property in any manner stood extinguished. The charge of the Sales Tax Department subsisted and continued, which also was acknowledged by petitioner Nos.1 and 2 when they were put to notice in setting out the terms and conditions of the auction in the public notice dated 13 February 2021 issued by petitioner No.3, which we have already noted hereinabove. Secondly, except for a preference in relation to the charge, as determined in the order dated 10 January 2020 passed by this Court, the charge of the State Government continued to operate and subsisted qua the purchase of the said property by petitioner Nos.1 and 2, of which they had abundant notice, even applying the second part of Section 100 of the TP Act. Thus, certainly, this is not a case in which there was no enforceability of a charge on the said property of the Sales Tax Department, even when it changed hands, by petitioner no.3 selling the same to petitioner Nos.1 and 2. Also in terms of Section 100 of the Act petitioner no.1 and 2 are not the persons without notice of the charge.

54. As held by the decision of the Full Bench of Allahabad High Court in Umrao Singh vs Kacheru Singh And Ors. AIR 1939 ALL 415 as followed in the decision in Krishna Mohan Vs. Bal Krishna Chaturvedi (deceased by LRs) AIR 2001 ALL 334 , sale certificate is a title deed of the auction purchaser. A perusal of the sale certificate as issued by petitioner No.3 in favour of petitioner Nos. 1 and 2 also clearly indicates that the property has been sold by petitioner no. 3, informing the auction purchasers (petitioner Nos.1 and 2) of the charge of the Sales Tax Department, the same was also reflected in the sale certificate as noted above. Thus, looked from any angle, petitioner nos. 1 and 2 had constructive notice of the charge of the Sales Tax department, and with open eyes of such encumbrance petitioner nos. 1 and 2 purchased the said property.

55. This apart even otherwise when the property was purchased by petitioner

Nos.1 and 2 on as is where is basis", "as is what is basis" and "whatever is there is basis", the case of the respondents would certainly be supported by the observations of the Division Bench of this Court in the case *Medineutrina Pvt. Ltd. vs. District Industries Centre (D.I.C.) & Ors.* (supra) wherein the Division Bench has observed that when the purchase of the property was on "as is where is and what is there is" basis, it would mean that the purchaser is purchasing such property with all its obligations and liabilities whatsoever on the said property, which would include all dues, impositions, restrictions as may be imposed. The Court also observed that after acquiring such property, the purchaser cannot be permitted to quibble out of it, on lack of any notice or disowning the liabilities. This for the reason that the auction purchaser had an option to insist that he would purchase the property which is not encumbered or which is free of any charge. The relevant observations of the Division Bench read thus:-

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

38. The property, which is a security interest, under Section 13 (6) of the SARFAESI Act, consequent to the transfer of the secured asset after taking possession thereof, either physical or symbolic, by the secured creditor, vests in the transferee with all rights in the property transferred, as if the transfer had been made by the owner. The issue regarding the knowledge of the encumbrances known to the secured creditor, thus assumes significance. In so far as encumbrances on account of statutory/Government/ Municipal/ Revenue dues are concerned, the responsibility of obtaining the details thereof is of the secured creditor. The knowledge of these encumbrances can easily be solicited, obtained from the authorities by the secured creditor. Thus, the secured creditor is clearly possessed of the wherewithal, to obtain the information about encumbrances of the above nature. This is necessary for the secured creditor, for the reason that these encumbrances, have to be mentioned in the notice of sale under Rule 8 (7) (a) of the Security Interest (Enforcement) Rules, 2002 [for short, SI (E), Rules, 2002" hereinafter]. So also, Rule 8 (7) (f) of the SI (E), Rules, 2002 requires the sale notice to contain all the other terms and conditions

which the authorised officer considers it necessary for a bidder/purchaser to know the nature and value of the property, which would obviously include information about any charge, lien or other imposition upon the property. Thus, information and details regarding any encumbrances upon the property which is the security interest, which are easily obtainable from the statutory authorities, ought to be so obtained by the secured creditor as well as the authorised officer, which then needs to be entered in the notice of sale under Rule 8 (7) (a) of the SI (E), Rules, 2002, which would result in bringing the information about any encumbrance to the knowledge of the prospective bidders. In absence of any such information, an auction purchaser may in the facts of the given case, raise a claim that the purchase by him was without notice of any such encumbrance and any charge found subsequent to the confirmation of the auction, shall on that count, be not enforceable against the auction purchaser, which may lead to litigation.

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

.....

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

56. Thus, Mr. Godbole's contention that once the defaulter's (borrower's) property was auctioned by a secured creditor (petitioner No.3), the property will no longer remain as a property of the defaulter, is totally untenable, in view of the fact that the attachment as also the charge on the property did not extinguish merely for the reason that the secured creditor exercised its first charge to recover the dues payable to it by the borrower. Despite such sale, the sales tax dues, subject matter of attachment, were not satisfied and had remained outstanding. Thus, the legal character of the property, being an encumbered property and that it continued to be an encumbered property under the valid attachment/charge of the Government, subsisted even in the hands of

the purchasers. We do not agree with Mr. Godbole that this would create anomalous situation inasmuch as it was always open to the purchaser (petitioner Nos. 1 and 2) not to purchase the property when they were put to notice that it was encumbered, however, with eyes open petitioner Nos. 1 and 2 purchased the property, which had a charge of the Sales Tax Department.

57. Further in *Jalgaon Janta Sahakari Bank Ltd. & Anr. Vs. Joint Commissioner of Sales Tax Nodal 9, Mumbai, & Anr.* (supra) the Full Bench of this Court inter alia was considering the provisions of SARFAESI Act, the Recovery of Debts and Bankruptcy Act, 1993, and as to whether a secured creditor would have prior right over a relevant department of the Government under the MVAT Act, Bombay Sales Tax, 1959, the Maharashtra Goods and Services Tax Act, 2017, and to appropriate the amount realised on sale of secured asset. There were other questions which fell for consideration of the Court as set out in paragraph 44 of the decision, in regard to priority of payment of dues to a secured creditor for enforcing its security interest. However, one of the questions relevant to the controversy in the present proceedings was question (g) which reads thus:-

“(g) Whether an auction purchaser of a secured asset would be liable to pay the dues of the department in order to obtain a clear and marketable title to the property having purchased the same on “as is where is and whatever there is basis”?”

58. In answering the said question the Full Bench considering the provisions of Rule 8 of the Security Interest (Enforcement) Rules, 2002 read with the provisions of Section 13(4) of the SARFAESI Act and the decision of the Supreme Court in *AI Champdany Industries Limited vs. The Official Liquidator & Anr.* (2009) 4 SCC 486, held that in terms of the provisions of the SARFAESI Act read with 2011 Rules, the secured creditor is expected to know the encumbrances. It was observed that once a statutory mechanism noting the encumbrances in respect of the immovable property being put up for sale by auction not being available before 24 January 2020, the authorized officers were found to play it safe by inserting the “as is where is, whatever there is basis” clause in the sale advertisement. The Court observed that once such clause is inserted in the advertisement and the prospective purchaser, upon bidding in the auction emerges as the highest bidder, normally such purchaser cannot insist upon issuance of sale certificate without clearing the liability of meeting other dues in relation to such property, and this is because he participates in the auction and bids, with his eyes open, that the sale would be on “as is where is, whatever there is basis”, and that the prospective purchaser cannot wriggle out of the consequences and claim that the other dues are not payable by him, if he cannot disprove constructive notice of the charge created on the property put up for auction sale. The observations of the Full Bench in such context are required to be noted which read thus:-

“160. Till 24th January 2020, it may not have been possible for a secured creditor to know precisely all encumbrances in respect of the immovable

property. With the insertion of section 26B in the SARFAESI Act read with the 2021 Rules, a secured creditor is expected to know some of such encumbrances if at all compliance of section 26B is resorted to by the Central Government, any State Government or a local authority, to whom money is owed by the defaulter being an owner of the property. Such a statutory mechanism for knowing the encumbrances in respect of the immovable property being put up for sale by auction not being available before 24 th January 2020, the authorized officers were found to play it safe by inserting the "as is where is, whatever there is basis" clause in the sale advertisement. Once such clause is inserted in the advertisement and the prospective purchaser upon bidding in the auction emerges as the highest bidder, normally such purchaser cannot insist upon issuance of sale certificate without clearing the liability of meeting other dues in relation to such property. This is because he participates in the auction and bids, with his eyes open, that the sale would be on "as is where is, whatever there is basis". Having so participated, the prospective purchaser cannot wriggle out of the consequences and claim that the other dues are not payable by him if he cannot disprove constructive notice of the charge created on the property put up for auction sale. If indeed the department of the Government fails to act in terms of section 26B of the SARFAESI Act read with the 2021 Rules, consequences are bound to follow which have to be accepted by such department.

161. We, therefore, answer this question by observing that notwithstanding the duty of the authorized officer to indicate in the sale advertisement inviting bids the encumbrance(s) attached to the immovable property, i.e., the secured asset, as known to the secured creditor, if at all any detail in regard to such encumbrance(s) is not indicated but the sale is expressly made on "as is where is, whatever there is basis", the transferee shall be duty bound to deposit money for discharge of the encumbrance(s) provided, of course, that such liability may be overcome if he is in a position to disprove the claim of the department that he had no constructive notice of the charge, far less actual notice."

(emphasis supplied)

59. In the aforesaid circumstances, we are not inclined to accept the submissions as urged by Mr.Godbole that the orders passed by the Division Bench of this Court dated 10 January 2020 in Writ Petition No.4860 of 2019 created any indefeasible rights in petitioner No.3 to sell the property free from encumbrances. Also Mr.Godbole's contention that petitioner Nos.1 and 2 have purchased the property free from encumbrances or without any charge of the sales tax department, cannot be accepted.

60. In so far as Mr.Godbole's contention referring to paragraph 21 of the decision in ASREC's case (supra), namely, that as in the present case, the sales tax department did not register its charge with the Central Registry and hence the charge / attachment cannot be recognized, as held by the Division Bench, also is not well founded. As noted in paragraph 20 of the decision of the Division Bench in ASREC's case (supra), the contention as urged on behalf of the respondent

therein was to the effect that by virtue of insertion of Chapter IVA in the SARFAESI Act, comprising Section 26-B to 26-E, it was necessary that a record be made in the Central Register by the Central Registry of the creation of a security interest, as per sub-section (2) of Section 26-B. The Division Bench in paragraphs 20 of the said decision had noted the contention as urged on behalf of the respondent that Chapter IVA which was inserted in SARFAESI 2002 comprising Sections 26-B to 26-E warranted a record to be made in the Central Register by the Central Registry creating a security interest. It was contended that as per sub-section (2) of Section 26-B which is a part of Chapter IVA a secured creditor has to ensure that the security interest is recorded in the record of the Central Registry. The contention therefore was that unless this was done, the priority of interest contemplated by Section 26-E would not be applicable. The Division Bench, however, in paragraph 21 observed that the said argument was without any substance because the law declared in the four opinions of the High Courts as referred to by the Division Bench, had held, that if any Central Statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a State for a tax due under the Value Added Tax of the State.

61. The observations of the Division Bench in paragraphs 20 and 21 in ASREC's case would not assist the petitioners for more than one reason. Firstly, the said observations of the Division Bench have been held to be not the correct position in law, in the decision of the Full Bench in *Jalgaon Janta Sahakari Bank Ltd.* (supra). The Full Bench examined the correctness of the observations of the Division Bench as made in paragraph 21 in ASREC's case (supra). In such context, the Full Bench framed the following question [question (e)] which reads thus:-

"e. Whether the priority of interest contemplated by section 26E of the SARFAESI Act could be claimed by a secured creditor without registration of the security interest with the Central Registry? Depending on the answer to this question, whether correct proposition of law has been laid down (extracted infra) in paragraph 21 of the Division Bench decision reported in 2020(2) Bom. C. R. 243 (OS) (ASREC (India) Limited Vs. State of Maharashtra and Ors.) and in paragraph 35 of the Division Bench decision, reported in 2021(2) Mh.LJ 721 (State Bank of India vs. the State of Maharashtra and ors.)?"

62. In answering the said question, the Full Bench observed that on the face of the express provisions of Section 26-D and 26-E of the SARFAESI Act and in the absence of any discussion on the object of Chapter IV-A by the Division Bench in ASREC's case (supra), the law as declared in paragraph 21 in ASREC (India) Ltd.'s case was contrary to the statutory mandate, hence, paragraph 21 of such decision did not represent the correct position in law. The Full Bench thus held that the view expressed by the Division Bench to such extent was not the correct exposition of law and to that extent, the Full Bench overruled paragraph 21 of ASREC's judgment.

63. Mr. Godbole has next contended that the Sales Tax Department was required to register the charge with the Central Registry as per the provisions of sub-section (4) of Section 26-B of the SARFAESI Act and as the same was not complied, the State Government cannot assert any charge in respect of the suit property. It may be observed that this issue was also one of the questions for consideration before the Full Bench in *Jalgaon Janta Sahakari Bank Ltd. (supra)* in which the Full Bench has framed the question (f) which reads thus:-

"f. When, and if at all, can it be said that the statutory first charge under the State legislation, viz. the BST Act, the MVAT Act and the MGST Act, as the case may be, stands displaced having regard to introduction of Chapter IV-A of the SARFAESI Act from 24th January 2020?"

64. Analyzing the provisions of the SARFAESI Act as also the MVAT Act, the Full Bench has held that the attachment orders issued post 24 January 2020 if not filed with the Central Registry, any department of the Government to whom a person owes money on account of unpaid tax has to wait till the secured creditor by sale of the immovable property being the secured asset mops up its secured dues. Insofar as the attachment orders which were issued prior to coming into force the 2011 Rules as amended, the Court observed that insofar as recovery as initiated under the MLRC is concerned, not only the provisions contained therein but also the provisions contained in the 1967 Rules were required to be complied with, and the proclamation has to be made in the required form and must be as specified in the 1967 Rules. It was observed that these are the requirements as the transferee needs to have actual and constructive notice of such charge. The observations of the Full Bench in the context of the procedure under the 1967 Rules to be followed, reads thus:-

"154..... ... If there has been an attachment and a proclamation thereof has been made according to law prior to 24th January 2020 or 1st September 2016, i.e. the dates on which Chapter IV-A of the SARFAESI Act and Section 31B of the RDDB Act, respectively, were enforced, the department may claim that its dues be paid first notwithstanding the secured dues of the secured creditors; but in the absence of an order of attachment being made public in a manner known to law, i.e. by a proclamation, once Chapter IV-A of the SARFAESI Act or section 31B, as the case may be, has been enforced, the dues of the secured creditor surely would have 'priority'. In other words, if the immovable property of the defaulter is shown to have been attached in accordance with law prior to Chapter IV-A of the SARFAESI Act, or for that matter section 31B of the RDDB Act, being enforced, and such attachment is followed by a proclamation according to law, the 'priority' accorded by section 26E of the former and section 31B of the latter would not get attracted."

65. Thus, Mr. Godbole's contention that unless the charge was registered with the CERSAI after 24 January 2020, it is only then the State could enforce its charge, would be required to be rejected. In fact, such submission of Mr. Godbole militates against the position petitioner No.3 had taken before this Court in the

proceedings of Writ Petition No.4860 of 2019 on which the Division Bench has passed an order on 10 January 2020 allowing the petition. Petitioner No.3 cannot take a contrary position. In any event, it is not open for petitioner No.3 to raise such contention inasmuch as petitioner No.3 clearly recognized the valid charge of the Sales Tax Department in respect of the property in question, as seen not only from the proceedings of the said writ petition filed by petitioner No.3 before this Court but also from the terms and conditions of the auction which was undertaken by petitioner No.3 in selling the property to petitioner Nos.1 and 2. In any case such contention would not in any manner lead this court to conclude that the charge of the Sales Tax Department would get extinguished. It would be too far fetched to reach such conclusion as canvassed by Mr. Godbole.

66. The foregoing discussion would lead us to conclude that this is a clear case in which the Sales Tax Department had a charge on the said property as purchased by petitioner Nos.1 and 2, in view of attachment order dated 11 August 2017, which has remained to be valid and subsisting. Further the position in law is also clear that after the recognition of the first charge of petitioner No.3 as a secured creditor, the charge of the Sales Tax Department to recover the sales tax dues would be valid and subsisting, which would empower the Sales Tax Department to enforce the same.

67. Resultantly, the petition lacks merit. It is accordingly rejected. No costs.