



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 1335 OF 2009

M/s Runwal Constructions, ...Petitioner
A Partnership Firm,
duly registered under the Indian Partnership
Act 1932
having its office at Runwal Chambers,
1st Road, Chembur, Mumbai – 400 071.

Versus

1) Union of India

2) The Office of the Assistant Commissioner
of Central Excise, Mulund Division,
Mumbai III,
Commissionerate ...Respondents

3) M/s. Bluemoon Engineers Limited
a Company incorporated under the provisions
of Indian Companies Act 1956
(formerly known as HMP Engineering)
Limited and having its registered office
at 5A, Chowringhee Lane 1st Floor,
Flat No. 1A, Kolkata 700 016.

Mr. Vikram Nankani, Sr. Adv. a/w Mr. Saket Mone and Mr. Subit
Chakrabarti i/by Vidhii Partners - Advocate for the Petitioner
Mr. Sham Walve a/w Ram Ochani - Advocate for the Respondents

**CORAM : SUNIL P. DESHMUKH &
ABHAY AHUJA, JJ.**

**RESERVED ON : 18th MARCH, 2021
PRONOUNCED ON : 22nd APRIL, 2021.**

JUDGMENT (Per Abhay Ahuja, J.)

1 By this petition filed under Article 226 of the Constitution of India, 1950, the Petitioner is challenging notices dated 29th / 30th January, 2008, 17th October, 2008 and 14th May, 2009 by which the Respondent No. 2 purports to prohibit and/or restrain Petitioner from transferring or charging the property situated at Mulund, Mumbai for alleged non-payment of Excise duty by Respondent No. 3.

2 Petitioner has filed the petition for following principal relief:

a) Issue Writ of Certiorari and/or any other appropriate writ, order or direction in the nature of Certiorari calling for the papers and proceedings relating to the impugned notices dated 29th / 30th January, 2008, 17th October, 2008 and 14th May, 2009 Exhibits "G", "I" and "K" hereto and after examining the legality and validity thereof, this Hon'ble Court be pleased to quash and set aside the same.

3 Petitioner, is a Partnership firm registered under the Indian Partnership Act, 1932 and carries on business of construction and development. 2nd Respondent is the office of the Assistant Commissioner of Central Excise having claim of Excise duty dues against Respondent No. 3 viz. M/s. Bluemoon Engineers Limited (earlier known as "HMP Engineering Ltd.") and is now claiming the same from the Petitioner.

4 It appears that certain property admeasuring 24,280.94 square meters situated at Mulund, Mumbai (the “said property”) belonging to company known as M/s. HMP Engineering Ltd., (name was subsequently changed to Blue Moon Engineers Ltd. i. e. Respondent No.3) had been mortgaged to Indian Bank (for short “the Bank”) as security for certain facilities provided by the Bank to Respondent No. 3 -Company. In exercise of its rights as a mortgagee, the Bank intended to sell said property to recover its dues from Respondent No. 3.

5 At an auction conducted by the Debt Recovery Tribunal (for short “DRT”), Kolkata, Petitioner’s offer was accepted. Petitioner was declared successful bidder. The same was confirmed by the DRT by an order of confirmation of sale dated 14.09.2004 and vide Certificate of Sale of immovable property dated 05.11.2004, it was certified that by aforesaid order of the DRT, Petitioner was declared purchaser of the property for a consideration of Rs. 12 crores paid by the Petitioner.

6 The certificate of the Sale dated 05.11.2004 was stamped and subsequently registered with the office of Sub-Registrar of Assurances, Kurla – 2 on 05.01.2005.

7 Petitioner submits that pursuant to the purchase, it has also issued a public notice dated 31.03.2005 inviting claims in respect of said property.

8 By letter dated 7th April, 2005 addressed to Petitioner's Advocate, Respondent No. 2 informed that there was an amount of more than Rs. 1.75 crores payable by Respondent No. 3-Company to the Respondent No. 2 as and by way of Excise Duty and therefore the Petitioner could not claim any title to the property unless said Excise duty claim was settled.

9 Thereafter, Petitioner received a notice dated 29th / 30th January, 2008 from the Assistant Commissioner directing Petitioner to pay an amount of Rs. 1,41,40,767.59 and penalty of Rs. 33,93,609/- to the 2nd Respondent stating that Petitioner had purchased the property with all statutory liabilities.

10 It is submitted that at the time of the purchase, Petitioner was unaware of the Excise duty payable by Respondent No. 3 - Company and is not liable to pay any Excise duty and/or alleged arrears of Respondent No. 3 claimed by Respondent No. 2 from Petitioner. It is with this background, after receiving the notice dated 29th/ 30th January, 2008, Petitioner by letter dated 31.01.2008, immediately informed Respondent No. 2 that the property was acquired at an auction held by the DRT, Kolkata and the same was acquired only with workers liability which had already been paid/ settled; that Petitioner had nothing to do with the payment of any Excise duty or arrears thereof which is the liability of Respondent No. 3.

11 Petitioner submits that the Petitioner has pursuant to request from 2nd Respondent forwarded copies of the order of Sale

confirmation of the DRT as well as Certificate of sale to the 2nd Respondent, but despite the same, the Respondent No. 2 has issued notices dated 17th October, 2008 as well as 14th May 2009 making demand of Excise duty dues payable by Respondent No. 3 failing which, steps would be taken to realize the Excise duty dues under the Customs Property Adjustment Rules and also prohibiting/restraining the Petitioner from transferring or charging the property. Said notices as well have been replied to by the Petitioner.

12 It is submitted that after the purchase, Petitioner has started developing the property. Petitioner's project on said property consist of 5 buildings, containing 504 flats and with respect to 292 flats, it has entered into agreement/arrangements of sale with several flat purchasers who have availed of bank loans by mortgaging the flats to various banks / financial institutions.

13 It is further submitted that by virtue of order of confirmation of sale and certificate of sale of said property, Petitioner became owner of the said Property and all the rights, title and interest in the property stood vested in the Petitioner on and from 14.09.2004 as the property has been transferred in the name of the Petitioner and has also paid the property tax in its name.

14 It is submitted on behalf of the Petitioner that liability to pay excise duty arises from manufacture of excisable products by the manufacturer; Petitioner is not manufacturer of excisable products, hence, Petitioner cannot be termed and/or construed as an "Assessee"

under the Central Excise Act, 1944 (the “Excise Act”). It was submitted that though Petitioner purchased the property with the liability to pay the workers and “*other existing liability*”, the words “*other existing liability*” cannot be construed as the liability to pay excise duty also. The words “*other existing liability*” can be the liabilities pertaining to the extent of property only viz, i. e. Municipal tax, electricity and water charges, land revenue etc.

15 Petitioner is aggrieved that despite the property being vested, the Central Excise duty dues admittedly being due from the 3rd Respondent and not from the Petitioner, are sought to be recovered from the Petitioner by resorting to attachment of / putting restraint on dealing with said property (which does not belong to Respondent No.3, having been purchased in an auction by the Petitioner) purporting to invoke a provision under the Central Excise Act. The attachment/ restraint is illegal, unlawful, and liable to be removed forthwith. And despite Petitioner’s replies, clarifying the above position, Respondent No.2 has issued the impugned notices having serious civil consequences. It is in these circumstances, that Petitioner has approached this Court.

16 Learned Senior Counsel for the Petitioner, Mr. Vikram Nankani submits the single issue which arises in this petition is about that of priority of Secured debt V/s Crown debt/State dues/tax dues as Petitioner has stepped into the shoes of the Bank having purchased the property from a secured creditor. He submits that by virtue of decision of the Supreme Court in the case of ***Rana Girders Vs. Union***

of India & Ors, (2013) 10 SCC 746 and the Bombay High Court decisions in the case of *Siddhi Sugar & Allied Industries, Latur Vs. State of Maharashtra & Ors. (2019) (6) Mh. L. J. 333 – Gharkul Industries Pvt. Ltd., & Another v/s. Superintendent, Central Excise Range & Others (2009) 247 ELT-3* as well as the recent decision of this Court in the case of *State Bank of India through its Chief Manager, Mr. Jagdish Mohan Nakade Vs. State of Maharashtra, (2020) SCC Online Bom 4190*, the law is well settled that a secured creditor has priority over the charge of tax/VAT dues. He submits that since Petitioner has purchased the property which was mortgaged to the seller bank, Petitioner would also get the same treatment as a secured creditor and therefore, his right could not be interfered with by the Excise Department for recovery of excise duty dues of the borrower -Respondent No.3.

17 It is also submitted on behalf of Petitioner that section 11 of the Excise Act or the proviso to section 11 do not apply in the present case as the petitioner has not succeeded to the business or trade of the Respondent No. 3 borrower in whole or in part. However, even assuming while denying the applicability of section 11, it is submitted that as per the proviso to section 11, Petitioner is not a successor in business of the borrower and assuming the section would be applicable yet the proviso would exclude the petitioner. In this context Petitioner relies upon the decision of this court in the case of *Gharkul Industries Private Limited (supra)*, where this court has held that petitioner had purchased property belonging to a company in liquidation pursuant to a public auction as purchaser of assets and not purchaser as successor of business, the proviso to

section 11 of the Central Excise Act is not attracted.

18 He would also submit that in view of the decision in the case of *Rana Girders (supra)* as well as *Siddhi Sugar (supra)*, since Petitioner has only purchased the land/said property of 3rd Respondent and not the business, the Excise department cannot claim arrears of respondent No. 3 from Petitioner. He submits that, it would have been another story if Petitioner had purchased the 3rd Respondent's business or taken over the business, which is when Petitioner could have been made liable as successor in interest, which is not the case here.

19 *Per contra*, Mr. Sham Walve, learned Standing Counsel for the Revenue relies upon the affidavit in reply and refers to the order of confirmation of sale of immovable property dated 14.09.2004, whereby it is recorded that Petitioner has purchased the said property alongwith the workers liability and other existing liabilities of the owner of said property and therefore, in view of the clear language of the order of the confirmation of the sale, there is no doubt that Petitioner was liable for excise duty dues of the Revenue department. He further submits that Certificate of Sale of the immovable property dated 05.11.2004 declaring Petitioner as the purchaser also no where states that the said property was sold free from encumbrances.

20 He draws our attention to order sheet 30 (Exhibit B to the petition) in respect of order dated 3rd September, 2004 in

TA/7/2004 passed by the DRT, Kolkata to submit that Petitioner is also bound by said order and is required to settle not only the workers dues, but also statutory dues of the Government and other departments. He refers to paragraph 4(j) of the agreed terms and conditions in the order, which is quoted as under:

“4:-

(j):- The company should ensure settlement of the issues raised by workers union, statutory dues of the Government and other Departments as well as other parties to ensure timely sale of assets and appropriation of the proceeds and produce necessary evidence to the Bank in settlement of such issues/claims. It is clarified that the applicant bank shall in no way be responsible nor shall it be open for any of the parties to Claim any precedence over the compromise dues to the Bank. The defendants and guarantors shall indemnify the applicant bank against any such eventuality.”

21 Referring to said order on page 25, he submits that the intending purchaser (viz. Petitioner) had come forward with an amount of Rs. 13 crores to be split up respectively into 12 crores as the price for the Mulund property and the balance Rs. 1 crore for the release of the Victory House property, Kolkata; he submits that the application had been made in accordance with Clause No. (a) of the terms and conditions as stipulated in paragraph 4 cited in the order. He quotes paragraph 4(a) of the sanctioned terms and conditions is quoted as under :

“The defendants shall pay Rs. 1300 lacs to the applicant bank on or before 30th September 2004

by sale of land of Mulund unit and against/before release of Victory house property. Nine Quarterly installments of Rs.50.00 lakhs each commencing from the quarter ending 31.12.2004 to Quarter Ending 31.12.2006. First of such installment will fall due for payment on 31.12.2004 and the same should be paid on or before that date. Subsequent installments will likewise fall due for payment on 31st March, 30th June, 30th September and 31st December etc. and should be paid by the defendants before the due date.”

22 He submits that under this order, Petitioner also handed over the demand drafts for the afore mentioned amount after which it received possession alongwith the title deeds of the property.

23 He submits that if there is priority of secured debt over excise duty dues and since Petitioner has purchased all the security that was owned by borrowers, there is no way the State could recover its taxes as there is no property left with the borrower company which can be sold to recover the taxes and therefore that liability has to be borne by the purchaser of the property which was earlier owned by the company and mortgaged to the bank.

24 Mr Sham Valve, learned Counsel for Respondents revenue at this stage seeks to draw our attention to a recent decision of Nagpur bench of this court in the case of ***Medineutrina Private limited versus District Industries Centre (DIC) and others*** dated 18 February 2021 to submit that as in the facts of this case in that case as well there was an issue with respect to the charge of VAT arrears of

the borrower and recovery of the same from the auction purchaser. The auction purchaser had challenged the requirement by the DIC to obtain No Objection Certificate (NOC) from the sales tax Department with respect to the arrear of sales tax /VAT dues from the borrower before approving the transfer to Petitioner therein submitting that the auction purchase was pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and in view of the clear language of section 26E of the SARFAESI Act, section 37 of the Maharashtra Value Added Tax Act, 2002 (“MVAT Act”) would be subservient to the provisions of section 25 E of the SARFAESI Act due to which the action on the part of the DIC as well as the sales tax authorities of not issuing the NOC for transfer of the land in favour of Petitioner on account of the so-called dues was illegal. He submits that after considering the law on the subject, though the Nagpur bench agreed that mortgage of a secured creditor gets priority of charge over the charge for tax /VAT dues, but when such mortgaged property is put to auction, then the bank is required to deliver the same free from encumbrances as per the SARFAESI Act and the Security Interest (Enforcement) Rules, 2002 and for that it would be the duty of the secured creditor to ensure that all encumbrances, be known before hand; the amount to be received by auction of the property, should be sufficient to cover the costs, charges and expenses and discharge of the dues of the secured creditor and also discharge of the encumbrances upon the property including the arrears of VAT/sales tax dues. He submits that holding that the dues of the Sales tax Department therein were charge on the property u/s 37(1) of MVAT Act and property having stood attached by the Sales tax department

before the auction, petitioner would be liable to pay the same to 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*”. Only when Petitioner discharges the dues it would then be entitled to a no dues certificate (NOC) from the sales tax department. Also in that case it was claimed that there was no notice to the auction purchaser of the charge by the tax department, but the bench has held that notice of such statutory charge is always presumed in law to one and all and none can claim ignorance of the same. Mr. Valve submits that the facts in the case at hand are no different except that in the present case there are excise duty dues and the auction was pursuant to the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (“RDB Act”) and therefore the ratio in the case of *Medineutrina (supra)* would apply to the facts of this case. In that view of the matter, he submits that no relief can be granted to the Petitioner until payment of the excise duty dues.

25 In response to aforesaid contentions, a brief note has been submitted on the judgment in the case of *Medineutrina (supra)* on behalf of Petitioner stating that said judgment is clearly distinguishable on facts and thus would not be applicable to the case of the petitioner at hand. For the sake of convenience the relevant paragraphs A, B and C of the written submissions are reproduced as under:

“A:- The said judgment dealt with a case under the Maharashtra Value Added Tax Act, 2002 (“MVAT Act”) vis-a-vis the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (“SARFAESI Act”). Their Lordships (Sunil B. Shurke and Avinash G. Gharote, JJ) in

the said Judgment held that the SARFAESI Act, being a central statute, any priority of claim for debts due to a secured creditor bank which is created by Section 26E of the said Act , will prevail over any first charge which may be created by Section 37(1) of the MVAT Act, which is state legislation, in view of the language used in Section 26E of the SARFAESI Act. It was further held that the priority created by virtue of Section 26E of the SARFAESI Act also takes precedence over any “crown debt” due to the the central government, state government or local authority. However, in a subsequent discussion as regards the liability of a successful action purchaser, their Lordships held that successful auction purchaser would be liable to pay the sales tax dues of the erstwhile owner of the auctioned property to the Sales Tax Department (Respondent No.2 therein) to get free, clear and marketable title of the said property, having purchased the same on an “as is where is and whatever is” basis.

B:- The controversy involved in the present matter is respect of a demand raised by the Central Excise Department under the provisions of the Central Excise Act, 1944 (“Excise Act”) vis-a-vis the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (“RDDB Act”). It is submitted that at the relevant point of time when the Central Excise Department had raised a demand against the property that was successfully purchased by the Petitioner in the DRT Auction for the outstanding central excise dues of the erstwhile owners, i.e. M/s. Bluemoon Engineers Pvt. Ltd., there existed no such section creating a “first priority charge” for the dues arising therefrom existed under the Excise Act. The Legislature, for the first time introduced Section 11E of the Excise Act (w.e.f. 1st April, 2011), which creates a “first charge” for the liabilities under the said Act. However, an express exception has been carved out under the said Section which saves “first priority charges” created under the RDDB Act or the SARFAESI Act. The aforesaid Sections and a similar claim of the Central Excise Department came up for discussion before the Aurangaband Bench of the Hon’ble Bombay High Court in Siddhi Sugar and Allied Industries Ltd., 2019 (6) Mh.L.J., wherein the Court held that even without the aid of Section 26E of the Excise Act, it can be safely concluded that a secured creditor/ Bank would

have a priority over the claim of the Central Excise Department. In the present matter, admittedly, the claim of the Bank against the erstwhile owners was under the RDDB Act, and thus, the claims of the Bank will have precedence over the claims of the Central Excise Department.

C:- In any event, the issue of a subsequent auction purchaser being liable to pay the central excise dues of the erstwhile owner has been decided by the Hon'ble Supreme Court in India in Rana Griders v/s. Union of India (2013) 10 SCC 746 (followed in Siddhi Sugar supra) in categorical and unequivocal terms (at paragraphs 20 and 21) states that if a subsequent auction purchaser on an purchased the "land", "plant" or "machinery" even if a property is purchased on an "as is where is basis" and with the stipulation that it is being purchased "with all existing statutory liabilities", such auction purchaser would only be liable to pay statutory dues and taxes in relation to and arising out of the "land", "plant" or "machinery". Central excise dues not being relatable to "land", "plant" and/or "machinery", the auction purchaser cannot be held liable to pay the same, unless and until such auction purchaser entire has purchased the entire defaulting unit and/or its business as a going concern."

26 We have heard learned Counsel for the parties and with their able assistance have perused the papers, proceedings as well as the decisions cited during the course of arguments.

27 Facts are not in dispute in the present case. The Supreme Court on almost identical facts in the case of *Rana Girders (supra)* has had the occasion to consider this issue. In that case, the borrower had taken loans/financial accommodation from Uttar Pradesh Financial Corporation (UPFC) and because of the consistent default on the part of the borrower in repaying the loans under Section 29 of the State Financial Corporations Act, UPFC took possession of the

land and building of the borrower which was mortgaged/kept as security with UPFC. Thereafter, physical possession of the unit was taken and UPFC held a public auction in which M/s Sarju Steels (P) Ltd. (later on converted into public limited company known as Rana Girders Ltd.,) was declared as successful bidder of land and building as well as plant and machinery. Accordingly, by the sale deed the land and building was transferred to the Rana Girders and by another agreement, ownership of the plant and machinery was also conveyed. As such Rana Girders became owner of the both land and building as well as plant and machinery.

28 In that case the borrower had also to discharge liability of the excise duty of Rs.1,00,72,442/- and to recover the said amount, concerned Commissioner was seeking to do so from Rana Girders as successor-in-interest of the land, building, plant and machinery. Rana Girders resisted the demand submitting that the property had been purchased in an open auction and free from all encumbrances and it was not the liability of the purchaser to make payment of the dues of the excise duty department. The issue that arose was whether Excise Department could recover the excise duty from Rana Girders which was the purchaser in auction on “*as is were is basis*” with a condition in the public notice of the auction which stipulated that all the statutory liabilities arising out of land would be borne by the purchaser except electricity dues. Also, there was a condition in the sale deed as well as in public notice which stipulated that all the statutory liability arising out of the properties shall be borne by the vendee and the seller would not be responsible. The Supreme Court formulated two questions for its consideration which

are set out in paragraph 14 of said decision:-

“14:- In the circumstances, two questions arise for consideration namely:-

(1) On the interpretation of stipulation contained in the Sale Deed of the land and building and Agreement of Sale of plant and machinery, whether the appellant had agreed to discharge the dues payable to the Excise department by the borrower.

(2) Whether such a liability arises in law (dehors the stipulation in Sale deed /Agreement of Sale) having regard to the legal provisions contained in the Excise Act and State Financial Corporation Act?

Answering the questions, the Supreme Court referring to its own decisions in the case of State of Karnataka v/s. Shreyas Papers (P) Ltd., Macson Marbles (P) Ltd., v/s. Union of India, Union of India v/s. SICOM Ltd., Dena Bank v/s. Bhikabhai P. Parekh & Co., held thus :

“15. We shall discuss the second question in the first instance. As noted above, in so far as second question is concerned, though the High Court has discussed the position in law in detail but has refrained from giving its final opinion on this question.

16. Whether UPFC would have priority being a secured creditor by virtue of Deed of Mortgage or the Central Excise in respect of its dues having regard to the Rule 230(2) of the Central Excise Rules, came up for consideration before this Court in State of Karnataka & Anr. Vs. Shreyas Papers (P) Ltd. & Ors. JT 2006 (1) SC 180. Dealing with the provisions of Rule 230 of the Excise Rules, the Court held that this provision authorizes detention of all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles, in the custody or possession of the person or persons carrying on such trade or business or from person

succeeding the business or trade or part thereof for such time till dues are paid or recovered. However, the rule does not in any way create a charge over any of the goods enumerated therein. After explaining the term charge as defined in Section 100 of Transfer of Property Act, it was held that charge would be different from the word detained. As Rule 230 only empowers detention and there was no other provision under the Central Excise Act or the Rules which envisages to create any charge over the assets of a unit to enable the realization of the Central Excise Duty on top priority. The Court held that UPFC had a priority being a secured creditor on the one hand and Central Excise having no charge over the property. The Court specifically took note of the fact that the petitioner in that case was not the successor of the erstwhile owner in business or trade and having acquired the property without any charge independent of business or trade of the previous owner, was not a person in custody or possession of the property as a successor of the previous owner against whom there was a demand of excise duty.

17. *Learned counsel for the respondents, heavily relied on the judgment of this Court in M/s. Macson Marbles (P) Ltd. Vs. Union of India (2008) 15 SCC 481, reference to which is also made in the notice dated 25.02.1984 that was served upon the appellant by the Excise Department. He submitted that in that case this Court had held that even the successor in interest is liable to discharge the liability of the Excise Department. We may, however, note that this case was considered and specifically distinguished in Union of India Vs. SICOM Ltd. (2009) 2 SCC 121. In that case, considering the statutory right of the Financial Corporation under the State Financial Corporation Act, 1951 and the non-obstante clause occurring therein, it was categorically held that State Financial Corporation shall have a preferential claim in relation to its secured debts. This position is explained in paragraphs 16 and 23 of the said judgment in the following manner:*

16. If a company had a subsisting interest despite a lawful seizure, there cannot be any

doubt whatsoever that a charge/mortgage over immovable property will have the same consequence.

23. Furthermore, the right of a State Financial Corporation is a statutory one. The Act contains a non obstante clause in Section 46-B of the Act which reads as under:

*'46-B. Effect of Act on other laws--
The provisions of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.*

18. In so far as dues of the Government in the form of tax or excise etc. are concerned, the Court in SICOM case was of the opinion that rights of the Crown to recover the dues would prevail over the right of the subject. The Crown debt means the debts due to the State or the King. Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt pertains to the common law principle. When Parliament or the State Legislature makes an enactment, the same would prevail over the common law and thus the common law principles which existed on the date of coming into force of the Constitution of India, must yield to a statutory provision. A debt, which is secured or which by reason of the provisions of a statute becomes the first charge over the property must be held to prevail over the Crown debt which is an unsecured one. On this reasoning, the debt

payable to secured creditor like the Financial Corporation was prioritized vis-a- vis the Central Excise Dues.

19. For this principle, the Court referred to its earlier judgment in *Dena Bank Vs. Bhikhabhai Prabhudas Parekh & Co. & Ors.* (2000) 5 SCC 694 explaining the doctrine of priority to Crown Debts, thus:

“13.’7. What is the common law doctrine of priority or precedence of Crown debts? Halsbury, dealing with general rights of the Crown in relation to property, states that where the Crowns right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being detur digniori (Laws of England, 4th Edn.,Vol.8, para 1076, at p.666).Herbert Broom states:

“Quando jus domini regis et subditi concurrunt jus regis praeferri debet -- Where the title of the king and the tile of a subject concur, the King’s title must be preferred. In this case detur digniori is the rule.where the titles of the King and of a subject concur, the King takes the whole.where the King’s title and that of a subject concur, or are in conflict, the King’s title is to be preferred.(Legal maxims, 10th Edn.,pp.35-36).

This Common law doctrine of priority of State’s debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as law in force within the meaning of Article 372(1) of Constitution.

It was, furthermore, observed :

‘10. However,, the Crown’s preferential right

*to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledge of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the king commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles Vs. Grover* (1832) 9 Bing 128: 131 ER 563 it has been held that the Crown has no precedence over a pledge of goods. In *Bank of Bihar Vs. State of Bihar* (1972) 3 SCC 196, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in *Law of Mortgage* (TLL, 7th Edn., p.386) it seems a government debt in India is not entitled to precedence over a prior secured debt.*

20. *Coming to the liability of the successor in interest, the Court clarified the legal position enunciated in *M/s. Macson* by observing that such a liability can be fastened on that person who had purchased the entire unit as an ongoing concern and not a person who had purchased*

land and building or the machinery of the erstwhile concern. This distinction is brought out and explained in paragraph 19 and it would be useful for us to reproduce herein below:

'19. Reliance has also been placed by Ms.Rao on Macson Marbles Pvt.Ltd. wherein the dues under Central Excise Act were held to be recoverable from an auction purchaser, stating:

'10. We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of the same any conflict arises this aspect need not be examined. In this case, no such conflict arises between the corporation and the Excise Department. Hence it is unnecessary to examine this aspect of the matter.

11. The Department having initiated the proceedings under Section 11A of this Act adjudicated liability of respondent No.4 and held that respondent No.4 is also liable to pay penalty in a sum of Rs.3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisputed. The appeal is disposed of accordingly.

The decision, therefore, was rendered in the facts of that case. The issue with which we are directly concerned did not arise for consideration therein. The Court also did not notice the binding precedent of Dena Bank Vs. Bhikhabhai Prabhudas Paresh & Co. (2000) 5 SCC 694 as also other decisions referred to hereinbefore.

21. A harmonious reading of the judgments in Macson and SICOM would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming first charge for the purchaser. As far as Central Excise Act is concerned, there was no such specific provision as noticed in SICOM as well. The proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department.

23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the Sale Deed/Agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that all these statutory liabilities arising out of the land shall be borne by purchaser in the sale deed and all the statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible in the Agreement of Sale. As per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the Sale Deed as well as in the Agreement for purchase of plant and machinery talks of statutory liabilities arising out of the land or statutory liabilities arising out of the said properties (i.e. the machinery). Thus, it is only that

statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of cess relating to property etc. Likewise, statutory liability arising out of the plant and machinery could be the sales tax etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the High Court.

29 Following extract from the case of *Gharkul Industries Private Limited (supra)* would be pertinent to be referred to, which contains section 11 of the Excise Act along with its proviso:-

*“ **11. Recovery of sums due to Government.**—In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, 1[including the amount required to be paid to the credit of the Central Government under section 11D] the officer empowered by the 2[Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to levy such duty or require the payment of such sums may deduct or require any other Central Excise Officer or a proper officer referred to in section 142 of the Customs Act, 1962 (52 of 1962) to deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may be in the hands or under disposal or control of such other officer, or may recover the amount by attachment and sale of excisable goods belonging to*

such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue]:

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.]

30 Paragraphs 13, 14, 23 and 28 of the decision of this Court in the case of *Gharkul Industries P. Ltd., (supra)* are pertinent and are quoted as under:-

“13:- Admittedly, the liability of the Excise duty of the Company in Liquidation is to the tune of Rs.1,96,99,848/-. Respondent 1 is relying on section 11 of the Central Excise Act, 1944. This section states the manner in which the sums due to the Central Government can be recovered under the Central Excise Act, 1944. This section, inter alia, states that in respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of the Central Excise Act, 1944, the empowered officer may deduct the said amount so payable from any money owing to the person from whom

such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person. Proviso to section 11 is of relevance to the present petition. It reads as under:-

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, Customs, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or charge.”

14:- The proviso enables the empowered officer to attach and sell, after obtaining permission from the Commissioner of Central Excise, excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the successors of the person from whom Excise dues are recoverable. The proviso contemplates a situation where a person from Excise dues are recoverable transfers or otherwise disposes of his business or trade or effects a change in the ownership thereof. In such a situation, the proviso enables the empowered officer to attach and sell, after obtaining permission from the Commissioner of Central Excise, all excisable goods, materials, etc in the custody or possession of the person to whom the business or trade is transferred or in whose favour a change in the ownership is effected for the purpose of recovering outstanding dues of the Excise Department as on the date of such transfer or disposal.

23:- We also feel that Mr. Dhond's alternative submission deserves to be accepted. The proviso to section 11 refers to transfer or disposal of business or trade in whole or in part. It does not refer to the transfer or disposal of mere assets. It is

not the case of the petitioners that they have purchased the business or trade of the Company in Liquidation. Neither respondent no.2 nor the Excise Department in its affidavit has stated so. Learned Company Judge in his order dated 5/12/2003 has stated that other financial institutions have communicated their consent to the sale of the assets of the Company in Liquidation. He has observed that the quality and the value of the assets of the Company in Liquidation is deteriorating. It is, therefore, clear that the land, plant and machinery being the assets of the Company in Liquidation were brought to sell.

28:- Primarily, considering the fact that proviso to section 11 of the Central Excise Act, 1944 is not attracted to the present case and taking an overall view of the matter, in our opinion, the petitioners prayers deserve to be granted. Hence, we pass the following order:-

ORDER

(i) It is declared that the sale of the said property to the petitioners duly sanctioned by this Court by its order dated 23/12/2005 in Company Application No.866 of 2005 in Company Petition No. 163 of 1998 is not subject to proviso to section 11 of the Central Excise Act, 1944.

(ii) Upon the petitioners depositing the entire sale proceeds as directed by this Court, respondent no.3 i.e. the official Liquidator shall take necessary steps as directed by this Court by its order dated 5/12/2003 in Company Application (L) No.282 of 2003 and order dated 23/12/2005 in Company Application No.866 of 2005 in Company Petition No..163 of 1998.

(iii) Needless to say that the Excise Department can also file its claim before respondent 3. If such a claim is filed, respondent 3 shall adjudicate it in accordance with law. The petition is disposed of in the aforesaid terms.”

31 Considering the aforesaid findings of this court in the case of *Gharkul Industries Private Limited (supra)*, we are of the view that since in the present case as well there is only purchase of land by

Petitioner in the auction conducted by DRT, Kolkata and not transfer or disposal of business or trade in whole or in part but only a transfer or disposal of mere landed asset, the proviso to section 11 of the Excise Act would not be attracted.

32 The above discussion leads to that a secured creditor has priority over crown debts/excise dues. Going forward, this is a case where petitioner has purchased land in an auction conducted pursuant to proceedings under the RDDB Act by the Debt Recovery Tribunal Kolkata of the property belonging to the Respondent No. 3 company. Petitioner is not a successor of the business of the erstwhile owner in business or trade viz: of Respondent No.3, having acquired the property without any charge independent of business or trade of the previous owner, nor the Petitioner is in custody or possession of the said property as a successor of the previous owner against whom there was a demand of excise duty. This is also not a case where the entire unit, i. e. the entire business itself was purchased by the Petitioner. It is not that Petitioner has purchased or taken over the borrower's business or is its successor in business carrying on the borrower's or 3rd Respondent's manufacturing business but has only purchased the said land. Excise duty liability can be fastened only on that person who had purchased the entire unit as a going concern and not on a person who had purchased land and building or machinery of the erstwhile concern. It is only in such cases that the buyer would be responsible to discharge the liability of Central Excise. Otherwise the purchaser cannot be fastened on the liability relating to the dues of the government unless there is a specific statutory provision to that effect.

33 Petitioner is an auction purchaser of the said property and has not acquired the business of the Respondent No.3- borrower. True also that the said purchase as per the order of Confirmation of Sale is subject to worker's liability and other existing liabilities of the owners of the said property. Admittedly, the worker's dues have been settled. Excise dues are not dues which arise out of land or building. Such liabilities could be in the form of property tax, municipal tax, other types of cess relating to property etc. but cannot mean excise duty dues, which arise out of manufacture. In our view, therefore, the language in the confirmation of the Sale is with reference to the liabilities relating to the said property and not with reference to the business of the Respondent No.3- borrower; we therefore hold that since Petitioner has not purchased the entire unit with business, it is not liable for the dues of the Excise Department. The arguments of the learned Counsel for the Revenue also do not impress us.

34 In view of the above discussion, where we have found that in view of the decision of the Supreme Court in the case of *Rana Girders (supra)*, Petitioner would not be liable to excise duty dues of Respondent No.3- borrower, having purchased only the land and not the entire business of the borrower in the public auction, the decision of the Nagpur bench in the case of *Medineutrina (supra)* would not whelm the present case as the said decision has not considered the case of

Rana Girders (supra). We also do not consider it necessary to deal with the case of *Siddhi sugar (supra)*, inasmuch as that was case after the insertion of section 11-E to the Central Excise Act, (w.e.f 01.04.2011) whereas the present matter as also the case of *Rana Girders (supra)*, pertain to a period prior to 1 April 2011 i.e. prior to the insertion of section 11-E.

35 As far as the reliance of the learned Counsel for the Petitioner on the decision of this Court in the case of *State Bank of India v/s. State of Maharashtra (supra)* is concerned, there appears to be no doubt about the conclusion in the said decision 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 thereunder. That the mortgage of the secured creditor will get prior charge over the revenue.

36 Apropos the above discussion, and the ratio laid down by the Supreme Court in the case of *Rana Girders (supra)* as well as being in respectful agreement with the decision of this Court in the case of *Gharkul Industries (supra)*, we are inclined to allow the Writ Petition in terms of prayer clause (a):-

(a) Issue Writ of Certiorari and/or any other appropriate writ, order or direction in the nature of Certiorari calling for the papers and proceedings relating to the impugned notices dated 29th / 30th January, 2008, 17th October, 2008 and 14th May, 2009 Exhibits "G", "I" and "K" hereto and after examining the legality and validity thereof, this Hon'ble Court be pleased to quash and set aside the same.

37 Thus, the impugned notices dated 29th / 30th January, 2008, 17th October, 2008 and 14th May, 2009 relating to excise duty dues are quashed and set aside and its recovery by the department, if any, from Petitioner be refunded preferably within a period of four weeks from the date of receipt of this order.

(ABHAY AHUJA, J.)

(SUNIL. P. DESHMUKH, J.)