

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 4905 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

M/S ALPESH GEMS
Versus
SURAT MUNICIPAL CORPORATION

Appearance:
MR. AADIT R SANJANWALA(9918) for the Petitioner(s) No. 1
MR CJ VIN(978) for the Respondent(s) No. 1
MR.VISHAL J DAVE(6515) for the Respondent(s) No. 2

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 18/04/2022

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 By this writ application under Article 226 of the Constitution of

India, the writ applicant has prayed for the following reliefs:

“(a) That the Hon’ble Court be pleased to issue a writ of mandamus and/or a writ in the nature of mandamus and/or any other appropriate writ, order or direction directing the Surat Municipal Corporation to demand/recover the property tax dues aggregating to Rs.19,87,171/- for the period prior to 26.02.2021 from the Liquidator of Kohinoor Diamonds Private Limited;

(b) That the Hon’ble Court may be pleased to issue a writ of mandamus and/or a writ in the nature of mandamus and/or any other appropriate writ, order or direction directing the Surat Municipal Corporation to lodge a claim with respondent No.2 for the property tax dues with respect to the subject property for the period prior to 26.02.2021 in accordance with law, if at all the said tax dues are to be recovered;

(c) That the Hon’ble Court may be pleased to issue a writ of mandamus and/or a writ in the nature of mandamus and/or any other appropriate writ, order or direction directing the Surat Municipal Corporation to issue bills for recovery of property tax with respect to the subject property for the period after 26.02.2021, if at all the said tax is to be levied;

(d) Pending the hearing and final disposal of this petition, the Hon’ble Court may be pleased to restrain the Surat Municipal Corporation from taking any coercive measures against the petitioner and/or the subject property with respect to the property tax dues aggregating to Rs.19,87,171/- for the period prior to 26.02.2021;

(e) Ad-interim relief in terms of prayer clause (c) hereinabove;

(f) Such other and further reliefs that the Hon’ble Court deems fit in the interest of justice.”

2 The facts giving rise to this writ application may be summarized as under:

3 The writ applicant is a partnership firm. The firm is engaged in the business of Diamonds. The subject matter of dispute is an immovable property in the form of 12 units admeasuring 12,996 sq. ft. situated at Ashoka Tower, Kesarba Market, Gotalwadi, Katargam, Surat. The subject property was earlier owned by the Kohinoor Diamonds Private Limited.

4 It appears that the Corporate Insolvency Resolution Process was initiated for the Kohinoor Diamonds by the National Law Tribunal, Ahmedabad Bench in the C. P. (IB) No.206/NCLT/AHM/2017. However, the resolution process was unsuccessful and vide order dated 13th November 2018, the company went into liquidation and the respondent No.2 herein was appointed as the Official Liquidator.

5 It also appears that the Liquidator vide his letter dated 18th September 2020 informed the Surat Municipal Corporation about the initiation of the liquidation process of the Kohinoor Diamonds.

6 In the process of liquidation, a public advertisement dated 1st February 2021 was issued for E-auction of the subject property at a base price of Rs.2,33,31,000/-. The writ applicant participated in the E-auction proceedings and was declared as a successful bidder. The writ applicant paid the entire sale consideration of Rs.2,35,31,000/- to the Liquidator. The writ applicant was put in possession of the subject property. A formal deed of the sale transaction is yet to be executed by the Official Liquidator in favour of the writ applicant.

7 It is the case of the Surat Municipal Corporation that it has to recover an amount of Rs.19,87,171/- from the Kohinoor Diamonds towards arrears of property tax. According to the Surat Municipal Corporation, it has the first right or precedence to recover this amount towards arrears of property tax from the immovable assets of the Kohinoor Diamonds. To put it in other words, the Surat Municipal Corporation has an objection as regards the proceedings undertaken by the Liquidator of putting the subject property to E-auction.

8 The writ applicant had to come before this Court with the present writ application as despite the fact that the writ applicant has purchased the subject property in the E-auction proceedings conducted by the Liquidator, the Surat Municipal Corporation thought fit not to issue any property tax bills to the writ applicant for the period after the auction proceedings. *Prima facie*, it appears that the writ applicant has an apprehension that since the Surat Municipal Corporation has thought fit not to issue the property tax bills in the name of the writ applicant, it has declined to recognize the writ applicant as the lawful owner of the subject property. The writ applicant clarified with the Surat Municipal Corporation that it is liable to pay property tax for the period after the auction proceedings and not for the liability which Kohinoor Diamonds incurred in the past i.e. before the liquidation proceedings.

9 We have heard Mr. Aadit R. Sanjanwala, the learned counsel appearing for the writ applicant, Mr. Chandresh Vin, the learned counsel appearing for the Surat Municipal Corporation and Mr. Vishal Dave, the learned counsel appearing for the respondent No.2 (Official Liquidator).

10 The short point that falls for our consideration is whether the Surat Municipal Corporation can claim any first charge or precedence over the subject property for the purpose of recovering the arrears towards the liability of property tax incurred by the Kohinoor Diamonds by virtue of Section 141 of the Gujarat Provincial Municipal Corporations Act, 1949 (for short, the GPMC Act”).

11 It is not in dispute that what is sought to be recovered by the Surat Municipal Corporation from the erstwhile Kohinoor Diamonds are the statutory dues towards the property tax.

12 As observed by the Supreme Court in the case of **AI Champday Industries Ltd vs. Official Liquidator and another** reported in (2009) 4 SCC 486, if the property tax was merely a statutory dues without creating any encumbrance on the property, then it is not obligatory on the part of the auction purchasers to make an investigation as regards the title etc. It would mean that auction purchasers need not find out all the liabilities of the company in liquidation in their entirety.

13 We cannot find any fault with the Official Liquidator in putting the subject property to E-auction. We also cannot find any fault with the writ applicant in participating in the auction proceedings. It is not in dispute that the writ applicant was the successful bidder. We quote the relevant observations made by the Supreme Court in the case of **AI Champday Industries Ltd (supra)** as under:

"12. The terms and conditions of the sale must be read as a whole. It must be given a purposive meaning. The word 'encumbrance' in relation to the word 'immovable property' carries a distinct meaning. It ordinarily cannot be assigned a general and/or dictionary meaning.

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

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

In Supreme Court on Words and Phrases it is stated that

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

In Advanced Law Lexicon Encumbrance is defined as:

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

In Black's Law Dictionary Encumbrance is defined as:

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

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

14. If the property tax was merely a statutory dues without creating any encumbrance on the property which had cast a duty upon all the auction purchasers to make an investigation, it would mean that he must try to find out all the liabilities of the company in liquidation in their entirety.

15. Respondent-Municipality was an unsecured creditor. In that capacity it cannot stand on a higher footing than an ordinary unsecured creditor who is required to stand in queue with all others similarly situated for the purpose of realization of their dues from the sale proceeds.

16. Companies Act or any other law does not impose any additional obligation upon the purchaser to make an enquiry with regard to the liabilities of the companies other than those which would impede its value.

*17. Reliance has been placed by Mr. Sen on a decision reported in **Ahmedabad Municipality Vs. Haji Abdul [AIR 1971 SC 1201]** wherein it was held :*

"12.....The plaintiff purchased the property in November, 1954 and in our opinion it could not have reasonably been expected by him that the receivers would not have paid to the municipal corporation, since 1949 the taxes and other dues which were charged on this property by statute. According to Section 61 of the Provincial Insolvency Act, 1920 the debts due to a local authority are given priority, being bracketed along with the debts due to the State."

14 In para 18 of the said judgement, the Supreme Court proceeded to

consider Section 141 of the Bombay Provincial Municipal Corporation Act (for short, "the BPMC Act"). Having regard to the language employed in Section 141 of the BPMC Act with which we are concerned the Supreme Court, ultimately, held that a provision of law must expressly provide for an enforcement of a charge against the property in the hands of the transferee for value without notice to the charge and not merely create a charge. We quote the observations made in paras 18 to 30 as under:

"18. We may notice that Section 141 of the Bombay Provincial Municipal Corporation Act provides that the property taxes to be a first charge on the premise for which they are assessed. It is in that view of the matter Section 100 of the Transfer of Property Act was found to be capable of being invoked therein, which reads as under :

"100.Charges - Where immovable 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 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, 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."

There cannot, thus, be any doubt or dispute that a provision of law must expressly provide for an enforcement of a charge against the property in the hands of the transferee for value without notice to the charge and not merely create a charge.

19. In Ahmedabad Municipality itself it was held :

"4. According to the submission it is not necessary for the saving provision to expressly provide for the enforceability of the charge against the property in the hands of a transferee for consideration without notice of the charge. This submission is

unacceptable because, as already observed, what is enacted in the second half of Section 100 of Transfer of Property Act is the general prohibition that no charge shall be enforced against any property in the hands of a transferee for consideration without notice of the charge and the exception to this general rule must be expressly provided by law. The real core of the saving provision of law must be not mere enforceability of the charge against the property charged but enforceability of the charge against the said property in the hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act is clearly not such a provision. The second contention accordingly fails and is repelled."

20. It was further more held :

"5....Reliance was next placed on a Full Bench decision of the Allahabad High Court in Nawal Kishore V. The Municipal Board, Agra, ILR (1943). All 453 = (AIR 1943 All 115 (FB)). According to this decision the question of constructive notice is a question of fact which falls to be determined on the evidence and circumstances of each case. But that Court felt that there was a principle on which question of constructive notice could rest, that principle being that all intending purchasers of the property in municipal areas where the property is subject to a municipal tax which has been made a charge on the property by statute have a constructive knowledge of the tax and of the possibility of some arrears being due with the result that it becomes their duty before acquiring the property to make enquiries as to the amount of tax which is due or which may be due and if they fail to make this enquiry such failure amounts to a wilful abstention or gross negligence within the meaning of Section 3 of the Transfer of Property Act and notice must be imputed to them."

21. Clause (g) of Sub-section (1) of Section 55 of the Transfer of Property Act whereupon reliance has been placed by Mr. Sen reads as under :

"55. Rights and liabilities of buyer and seller.- In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:-

(1) The seller is bound -

* * *

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all

encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing."

In terms of the aforementioned provisions, therefore, the seller is bound to pay all public charges due in respect of the property upto the date of sale, when a property is sold in auction.

22. Section 55 refers to a contract only. Unless there is a contract to the contrary, the rights and obligations of the parties to a sale would be as indicated in Section 55. Such a contract to the contrary must be express and not implied, as a result whereof the meaning of term encumbrance would be expanded.

23. The advertisement did not specify that all public charges have to be paid.

24. The Municipal Corporation indisputably is not a preferential creditor.

25. The Companies Act in relation to winding up of proceeding is otherwise a special law. While distributing the assets between the creditors and unsecured creditors, the provisions of Sections 529 and 530 must be complied with.

26. All claims against the companies were required to be filed before the liquidator until the property was sold as provided for under Section 457 of the Companies Act. In terms of Section 456 thereof once an order for winding up is made the liquidator has to take into custody the properties, effects and actionable claims to which the company is or appears to be entitled. Section 528 provides that all debts payable on a contingency and all claims against the company, present or future are admissible to proof against the company. Section 529 provides for the same rule as in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Section 530 provides for certain priorities to secured creditors and other unsecured creditors.

27. Once the property is sold, the assets of the company are required to be distributed to the creditors in order of preference. As the respondent-Municipality was not a secured creditor, the impugned Judgment cannot be sustained.

*28. Almost a similar question in regard to the dues of the electrical charges came up for consideration before this Court in **Isha Marbles Vs. Bihar State Electricity Board and Anr. [1995 (2) SCC 648]**. In that case sale of the assets of industrial undertaking took place in terms of the*

provisions of the State Financial Corporation Act, 1951. Having regard to the provisions of the Indian Electricity Act, 1910 a three Judge Bench of this Court held that a liability on the purchaser cannot be imposed which was not incurred by them stating :

"63. We are clearly of the opinion that there is great reason and justice in holding as above. Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness."

29. Dues of the Municipality would also not even otherwise come within the purview of the crown debt. Even a crown debt could be discharged only after the secured creditors stand discharged.

30. In Union of India & Ors. Vs. Sicom Ltd. & Anr. [2009 (1) SCALE 10], it is stated :

"9. Generally, the rights of the crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the king; debts which a prerogative entitles the Crown to claim priority for before all other creditors. [See Advanced Law Lexicon by P. Ramanatha Aiyer (3rd Edn.) p. 1147]. Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.

10. It is trite that when a Parliament or State Legislature makes an enactment, the same would prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, the Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore providing that the statutory dues shall be the first charge over the properties of the tax-payer. This aspect of the matter has been considered by this Court in a series of judgments."

15 A Coordinate Bench of this High Court had an occasion to consider **AI Champday Industries Ltd (supra)** in the case of **Gaurav Kanvarjuneja and others vs. Surat Municipal Corporation and others [Special Civil Application No.17334 of 2016 decided on 1st December 2016]**. Hon'ble Justice M. R. Shah (as His Lordship then was), speaking for the Bench, observed as under:

"[7.1] It is an admitted position that the petitioners have purchased the concerned properties /shops in a Bank auction conducted by respondent no.2 – Bank in exercise of powers under the provisions of the Securitization Act. It is also not in dispute that in the auction notice /public notice inviting offers there was no reference to any dues of respondent no.1 towards property tax concerned of the aforesaid properties / shops. The sale certificates are issued in favour of the respective petitioners as far back as on 05/03/2014. Nothing is on record that prior to the sale the petitioners were informed with respect to any dues of respondent no.1 towards the property tax. In light of the aforesaid undisputed facts, the aforesaid question is required to be considered.

[7.2] Identical question came to be considered by the Hon'ble Supreme Court in the case of AI Champdany Industries Ltd. (Supra). In the case before the Hon'ble Supreme Court the appellant purchased the property of the Company in liquidation in Court sale. There were pre sale tax dues. The properties were also having municipal tax dues. The properties were auctioned on "as-is-where-is and whatever-there-is" basis. Having found that the appellant-purchaser received the property for value without notice of dues, the question arose before the Hon'ble Supreme Court with respect to liability of such auction purchase for payment of dues. To the aforesaid, the Hon'ble Supreme Court has observed that law imposes no obligation upon the purchaser to enquire

into liabilities other than those which would impede value of property. The Hon'ble Supreme Court has also observed and held that though Section 141 of the Bombay Provincial Municipal Corporation Act provides for property tax dues to be first charged on property but made no express provision regarding its enforceability against transferee for value without notice of charge, the purchaser is not liable to pay the pre-sale tax dues and /or property tax.

[7.3] Identical question came to be considered by the Bombay High Court and the recent decision in the case of M/s. Sonoma Management Partners (Supra). In the case before the Bombay High Court petitioners purchased the property pursuant to the sale conducted by the Banks under the provisions of the Securitization Act and the Rules framed thereunder. The sales tax department sought to recover the sales tax dues of the defaulter Company from the subsequent purchaser who purchased the property pursuant to the sale conducted by the Banks under the provisions of the Securitization Act and Rules. The aforesaid came to be challenged by the subsequent purchasers and after considering the law on the point and other decisions the Division Bench of the Bombay High Court has held that the sales tax dues of the owner / Company cannot be recovered from the subsequent purchaser who have purchased the property in the Bank auction. While holding so the Division Bench of the Bombay High Court has observed in paragraph nos.10 to 14 as under:

10. We have heard the learned counsel at length and have perused the papers and proceedings in the Writ Petition along with the annexures thereto. We have also given our anxious consideration to the relevant provisions. The SARFAESI Act is an Act which enables regulation of Securitization and reconstruction of financial assets and enforcement of security interest or matters incidental thereto. The term 'debt' is defined in section 2(ha) and the term "security interest" is defined under Section 2(zf) to mean right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes a mortgage, charge, hypothecation, assignment other than those specified in Section 31. The term "secured asset" is also defined in Section 2(zc) to mean the property on which the security interest is created. In turn, the words "secured debt" is defined in Section 2(ze) to mean a debt which is secured by any security interest. The term "secured creditor" is also defined in Section 2(zd) and it is not in dispute that Respondent Nos.1 and 2 are the secured creditors as defined under the SARFAESI Act. Thereafter, Section 13 of the SARFAESI Act provides for enforcement of security interest and measures by which enforcement is permissible including upon failure of the borrower to discharge its liability in full of the secured creditor within the period specified under Section 13(2)

by taking possession of the secured assets and transferring the same either by way of lease, assignment and/or sale. Section 13(6) stipulates that any transfer of secured assets (after taking over the possession) by the secured creditor shall vest in the transferee all rights in, or in relation to the secured asset transferred as if the transfer had been made by the owner of such secured asset. Looking to all these provisions, what becomes clear is that a secured creditor (Respondent Nos.1 and 2 in the present case) to realise their dues, can sell the secured assets without intervention of the Court and subject to other stipulations set out in the SARFAESI Act. It is on the basis of exercising powers under the provisions of the SARFAESI Act that Respondent No.1 (as leader of the consortium with Respondent No.2) issued a possession notice as well as a sale notice in respect of the said property. It is pursuant to this sale notice that the Petitioners have purchased the said property from Respondent Nos.1 and 2.

11. What is important to note is that this entire purchase was done by the Petitioners before the alleged dues of the Sales Tax Authorities was brought to their notice. The chronology of events set out above clearly indicates that the Petitioners placed their bid for purchasing the said property on 1 September, 2010 along with their earnest money deposit. Thereafter, the sale was confirmed in favour of the Petitioners on 15 September, 2010, once the sale was confirmed the Petitioners on 22 September, 2010 paid the balance purchase price and thereafter a Sale Certificate was also issued in favour of the Petitioners on 23 September, 2010. Thereafter, a Deed of Conveyance was executed by Respondent No.1 in favour of the Petitioners in respect of the suit property and which was registered with the Registrar of Assurances on 10 March, 2011. It is, at the time of execution and registration of this Deed of Conveyance, that the Petitioners for the first time perused the 7/12 extract relating to the suit property and learnt that there was an encumbrance of the Sales Tax Department to the extent of Rs.18,38,709/-. As mentioned earlier, these dues of the Sales Tax, the Petitioners would have to pay / liquidate, if not already done so. As far as the dues of the Sales Tax to the extent of Rs.28 Crores are concerned, the same was brought to the notice of the Petitioners much thereafter. It is not even the case of the Sales Tax Department that the Petitioners had either informed or had constructive knowledge of their dues, save and except to the extent of Rs.18,38,709/-. This being the factual position, we find considerable force in the argument of Mr Dada that the Sales Tax dues (save and except to the extent of Rs.18,38,709/-) cannot be recovered by enforcing their alleged charge under Section 38C of the BST Act against the said property,

legitimately purchased by the Petitioners and without having any notice of the alleged dues of the Sales Tax Authorities.

12. What is also important to note is that, it is not even the case of Sales Tax Authorities that the Petitioners are a dealer within the meaning of provisions of the BST Act or that the Petitioners have taken over the business of the dealer who is the defaulter of the Sales Tax Authorities. In fact, on a careful perusal of Section 19(4) of the BST Act, it is clear that where a dealer who is liable to pay tax under the BST Act, transfers or otherwise disposes of his business in whole or in part or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding, shall jointly and severally be liable to pay the tax including any penalty and interest due from the dealer. This is admittedly not the case before us. The Petitioners are not the successor in business of the Defaulter Company. It has, in fact, merely purchased the said property which originally belonging to the Defaulter Company and which was mortgaged with Respondent Nos. 1 and 2. Since, the Defaulter Company did not pay its dues to Respondent Nos.1 and 2, they, exercising their rights under the provisions of the SARFAESI Act, sought to enforce their security interest and sell the secured asset (the said property) to the Petitioners. It is in these circumstances that the Petitioners have purchased the said property. They can by no stretch of the imagination be termed as a successor of the business of the Defaulter Company to enable the Sales Tax Authorities to recover their dues from the Petitioners by enforcing their alleged charge against the said property purchased by the Petitioners under the provisions of the SARFAESI Act.

13. In the view that we have taken, we are supported by a decision of the Supreme Court in the case of State of Karnataka & Anr Vs. Shreyas Papers Pvt. Ltd. On the issue of enforcement of charge, the Supreme Court at paragraphs 18 to 21 thereof (of the SCC report) opined thus:

“18. The next limb of Mr Hegde's arguments was that since Section 13(2)(i) of the KST Act creates a charge on the property of the defaulting company, the charge would continue on the properties, even if it changes hands by transfer. 19. While the expression “charge” is not defined by the KST Act, this concept is well known in property law and has been defined by Section 100 of the Transfer of Property Act, 1882 (hereinafter “the TP Act”). Here “charge” is defined as:

“100. Where immovable 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 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, 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.”
(emphasis supplied)

*20. As the section itself unambiguously indicates, a charge may not be enforced against a transferee if she/he has had no notice of the same, unless by law, the requirement of such notice has been waived. This position has long been accepted by this Court in *Dattatreya Shanker Mote v. Anand Chintaman Datar* [(1974) 2 SCC 799, 811 (para 18)] and in *Ahmedabad Municipal Corpn. of the City of Ahmedabad v. Haji Abdulgafur Haji Hussenhbai* [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202- 04(para 3)] (hereinafter “Ahmedabad Municipal Corpn.”). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case.*

21. Ahmedabad Municipal Corpn. [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] was a case where a person was in arrears of property tax, due under the Bombay Provincial Municipal Corporation Act, 1949. Consequently, the Municipal Corporation created a charge over the property of the defaulter. However, the property was sold in execution of a mortgage decree. When the Municipal Corporation purported to exercise their charge over the property, the purchaser in court auction filed a suit for a declaration that he was the owner of the property and that the arrears of municipal taxes due by the transferor were not recoverable from him by proceeding against the property purchased in the auction. In the appeal before this Court, the Municipal Corporation's main argument was that where the local law provided for the creation of a charge against a property for which municipal taxes were due, transferees of such properties were imputed with

constructive knowledge of any charge created against the properties that they had purchased. This argument was, however, rejected. This Court held that while constructive notice was sufficient to satisfy the requirement of notice in the proviso to Section 100 of the TP Act, whether the transferee had constructive notice of the charge had to be determined on the facts and circumstances of the case. [Ibid., at SCC pp. 765-66 (para 12) : AIR pp. 1207-08(para 8)] In other words, this Court held that there could be no fixed presumption as to the transferee having constructive notice of the charge against the property. In fact, the principle laid down in Ahmedabad Municipal Corpn. [(1971) 1 SCC 757, 759-61 (paras 3 & 4) : AIR 1971 SC 1201, 1202-04(para 3)] has been correctly applied in a sales tax case similar to the present case. [CTO v. R.K. Steels, (1998) 108 STC 161 (Mad)] (emphasis supplied)

14. In the facts of the present case and considering this authoritative pronouncement of the Supreme Court, we have no hesitation in holding that the Petitioners, having no knowledge (either actual or constructive) of the dues of the Sales Tax Authorities before they purchased the said property, the Sale Tax Authorities cannot recover their dues from the Petitioners by enforcing their charge against the said property.

[7.4] Applying the aforesaid decisions to the facts of the case on hand and considering the fact that the petitioners have purchased the shops in Bank auction conducted by the Bank under the provisions of the Securitization Act and Rules and prior to their purchase it was not brought to the notice of the petitioners – purchasers that there is any property tax due for the properties /shops and after their purchase, the same is recovered from the petitioners, the impugned action of respondent no.1 in recovering the property tax for the properties /shops for the period prior to the petitioners purchased the shops i.e. prior to 05/03/2014 cannot be sustained.

[8.0] In view of the above and for the reasons stated hereinabove, the present petition succeeds. The action of respondent no.1 in recovering the property tax for the aforesaid shops /properties, which the petitioners have purchased in bank auction for the period prior to 05/03/2014 is hereby quashed and set aside. Consequently, any amount recovered towards the property tax dues for the period prior to the petitioners purchased the properties /shops, the same may be refunded to the petitioners within a period of four weeks from today. However, it is observed that it will be open for respondent no.1-Corporation to recover the property tax dues for the period prior to 05/03/2014 from the erstwhile owner. Rule is made absolute

accordingly to the aforesaid extent. No order as to costs.”

16 The matter on hand can be examined from a different angle too. In the case of **AI Champday Industries Ltd (supra)** referred to above, we find reference of the decision of the Supreme Court in the case of **Ahmedabad Municipal Corporation vs. Haji Abdul Gafur Haji Hussenbhai** reported in (1971) 1 SCC 757. We must give some idea how this litigation originated and reached upto the Supreme Court.

17 In **Ahmedabad Municipal Corporation of the City of Ahmedabad (supra)**, the defaulter was in arrears of property tax due under the Bombay Provincial Municipal Corporation Act, and the property was brought to sale in execution of a mortgage decree. When the municipality purported to exercise their charge over the property, the purchaser, in the court auction, filed a suit for declaration that he was the owner of the property and, therefore, arrears of municipal taxes due by the transferor were not recoverable by attachment and sale of the property in the hands of the purchaser. A Division Bench of this High Court in the case of **Haji Abdul Gafuf Haji Hussenbhai vs. The Ahmedabad Municipal Corporation** reported in (1967) 8 GLR page 65 accepted the case of the purchaser, and decreed the suit, holding that the charge created in favour of the municipal corporation was not enforceable against the property. Before the Supreme Court it was contended that there was an express provision in Section 141(1) of the Bombay Provincial Municipal Corporation Act, 1949 for holding the present property to be liable for the recovery of municipal taxes, and, though the property was subject only to a charge not amounting to mortgage and did not involve transfer of interest in the property, the same could nevertheless be sold, for realizing the amount charged, even in the hands of a transferee for consideration without notice; Section

141 was an express saving provision as contemplated by Section 100 of the Transfer of Property Act; the saving provision, contemplated by Section 100 of the Transfer of Property Act, without using express words, could, in effect, provide that the property was liable to sale in enforcement of the charge; if this liability was fixed by a provision expressly dealing with the subject, then the charge would be enforceable against the property even in the hands of a transferee for consideration without notice of the charge; it was not necessary for the saving provision to expressly provide for the enforceability of the charge against the property in the hands of a transferee for consideration without notice of the charge; the plaintiff must be deemed to have constructive notice of the arrears of municipal taxes; as an auction purchaser, he must be held liable to pay these taxes; and the property purchased must also be held subject to this liability in his hands.

18 It is in the aforesaid context that the Supreme Court held that Section 141(1) of the Bombay Provincial Municipal Corporation Act merely created a charge in express language; this charge was subject to prior payment of land revenue due to the State Government on such building or land; the Section, apart from creating a statutory charge, did not further provide that this charge was enforceable against the property charged in the hands of a transferee for consideration without notice of the charge; what was enacted in the second half of Section 100 of the Transfer of Property Act was the general prohibition that no charge could be enforced against any property in the hands of a transferee for consideration without notice of the charge; the exception to this general rule must be expressly provided by law; the real core of the saving provision of the law must not be the mere enforceability of the charge against the property charged, but enforceability of the charge against the said property in the hands of a transferee for consideration without

notice of the charge; Section 141 was clearly not such a provision; according to Section 3 of the Transfer of Property Act, which is described as the interpretation clause, a person is said to have notice of a fact when he actually knows that fact or when, before wilful abstention from an enquiry or search which he ought to have made or gross negligence, he would have known it; there were three explanations to this definition dealing with three contingencies when a person acquiring immovable property is to be deemed to have notice of certain facts; the circumstances, which by a deeming fiction, impute notice to a party are based on his wilful abstention to enquire or search which a person ought to make or on his gross negligence; this presumption of notice is commonly known as constructive notice; though originating in equity, this presumption of notice is now a part of the statute and has to be interpreted as such; wilful abstention suggests conscious or deliberate abstention and gross negligence, and is indicative of a higher degree of neglect; negligence is, ordinarily, understood as an omission to take such reasonable care as, under the circumstances, is the duty of a person of ordinary prudence to take; in other words, it is an omission to do something which a reasonable man, guided by consideration which normally regulate the conduct of human affairs, would do or doing something which a normally prudent and reasonable man would not do; the question of wilful abstention or gross negligence and, therefore, of constructive notice considered from this point of view is generally a question of fact or at best a mixed question of fact and law depending primarily on the facts and circumstances of each case; except for cases directly falling within the three explanations, no inflexible rule can be laid down to serve as a straight-jacket covering all possible contingencies; the question is not whether the purchaser had the means of obtaining, and might with prudent caution have obtained, knowledge of the charge, but whether in not doing so he acted with wilful

abstention or gross negligence; and, being a question depending on the behaviour of a reasonably prudent man, the Courts have to consider it in the background of Indian conditions.

19 In **Deputy Tax Commercial Tax Officer vs. R. K. Steels Ltd. (1998) 108 STC 161 (Mad)**, a Division Bench of the Madras High Court held that the judgment of the Supreme Court, in **Ahmedabad Municipal Corporation (supra)**, was comprehensive in all respects, and should be taken note of while dealing with the cases of a transferee for value without constructive notice of sales tax arrears; the emphasis laid down by the Supreme Court, to avoid Section 100 of the Transfer of Property Act, was to have an express provision providing for the contrary; mere enforcement of a charge, resorting to the Revenue Recovery Act, was not an answer to Section 100 of the Transfer of Property Act; Section 24(2) of the Tamil Nadu General Sales Tax Act did not provide anything contrary to Section 100 of the Transfer of Property Act; and unless a provision was made in any statute, contrary to the rule of Section 100 of the Transfer of Property Act, a *bona fide* purchaser for consideration, without notice of the charge, was protected.

20 In **State of Karnataka vs. Shreyas Papers (P) Ltd. [(2006) 144 STC 331 (SC)]**, it was contended before the Supreme Court that, since Section 13(2)(i) of the Karnataka Sales Tax Act created a charge on the property of the defaulting company, the charge would continue on the properties even if it changes hands by transfer. It is in this context that the Supreme Court held:-

"..While the expression "charge" is not defined by the KST Act, this concept is well known in property law and has been defined by Section 100 of the Transfer of Property Act, 1882 (hereinafter "the TP Act") ... As the section itself unambiguously indicates, a charge may not be enforced against a transferee if s/he has had no notice of the same,

unless, by law, the requirement of such notice has been waived. This position has long been accepted by this Court in Dattatreya Shanker Mote v. Anand Chitaman Datar, and Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenhai (hereinafter "Ahmedabad Municipal Corporation"). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case. In these circumstances, we are of the view that the First Respondent was a purchaser for value without notice of the sales tax arrears of the Defaulting Company or the consequent charge on the property. This would, therefore, attract the principle laid down by this Court in Ahmedabad Municipal Corporation, which is also embodied in the proviso to Section 100 of the TP Act. Thus, the property in the hands of the First Respondent was free of the charge and it is not open to the appellants to enforce the liabilities of the Defaulting Company in this manner against the First Respondent.

The High Court, rightly in our view, held that the First Respondent before us was not liable for the tax arrears of the Defaulting Company. No issue as to the liability of the Corporation was raised or argued before, or decided by the High Court.

In the present case, firstly, no provision of law has been cited before us that exempts the requirement of notice of the charge for its enforcement against a transferee who had no notice of the same. It remains to be seen, therefore, if in the facts of the present case, the first respondent had notice actual or constructive of the charge. .

..Thus, it is evident that the first respondent had no actual notice of the charge prior to the transfer. As to whether the first respondent had constructive notice of the charge, no substantive argument on this issue was made, either before the High Court or at any rate before us. Hence, we cannot hold that the first respondent had constructive notice of the charge.

In these circumstances, we are of the view that the first respondent was a purchaser for value without notice of the sales tax arrears of the defaulting company or the consequent charge on the property. This would, therefore, attract the principle laid down by this Court in Ahmedabad Municipal Corpn. (supra) which is also embodied in the proviso to Section 100 of the TP Act. Thus, the property in the hands of the first respondent was free of the charge and it is not open to the appellants to enforce the liabilities of the defaulting company in this manner against the first respondent..." (emphasis supplied).

21 In **Rukmani vs. Deputy CTO (Mad) [(2013) 62 VST 369]**, the Madras High Court held that, as the proviso to Section 24-A of the

T.N.G.S.T. Act itself indicated, a charge may not be enforced against a transferee if he/she has had no notice of the same unless, by law, the requirement of such notice had been waived; the principle laid down, in **Ahmedabad Municipal Corporation (supra)**, had been applied in **Shreyas Papers P.Ltd (supra)**; though the respondent had contended that the petitioner ought to have obtained a 'No Objection' from the revenue, before purchasing the property, no provision had been quoted by the respondent in the counter affidavit; a purchaser, in the normal course, would only verify from the Registration Department as to whether the property to be purchased has any encumbrance; unless the charge is duly registered in the Registration Department, it would not be possible for any prospective buyer to know whether there is any charge over the property for arrears of tax or statutory dues to be paid to the Government or statutory body; no material had been produced before the Court to prove that the notice, demanding arrears of tax, had been served on the defaulter; no material had been placed before the Court to prove that steps had been taken, under the provisions of the Revenue Recovery Act, against the defaulter or the subsequent first purchaser from whom the petitioner had purchased the property six years after the date of finalisation of the assessment; there was no material to indicate that the petitioner had any constructive notice of the charge; there was no pleading to that effect and, rightly, no arguments had been advanced; and, therefore, the Court was of the view that the case on hand would squarely fall within the ambit of the judgment of the Apex Court in **Ahmedabad Municipal Corporation (supra)**.

22 At this stage, we may also refer to few provisions of the Insolvency and Bankruptcy Code, 2016 (for short, “the Code, 2016”). Section 14 provides for **Moratorium**. Section 14 reads thus:

“14. Moratorium.- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may

be specified.]

[(3) The provisions of sub-section (1) shall not apply to —

[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

23 We are concerned with sub-clause (b) of sub-section (1) of Section 14 of the Code, 2016. Thus, on the insolvency commencement date, the Adjudicating Authority would have to declare moratorium by an order prohibiting transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or interest therein.

24 Section 38 of the Code, 2016 provides for **consolidation of claims**. Section 38 of the Code, 2016 reads thus:

“38. Consolidation of claims.- (1) *The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.*

(2) A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility:

Provided that where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner as provided for the submission of claims for the operational creditor under sub-section (3).

(3) An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.

(4) A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt in the manner as provided in sub-section (2) and to the extent of his operational debt under sub-section (3).

(5) A creditor may withdraw or vary his claim under this section within fourteen days of its submission.”

25 In the last, we may look into Section 238 of the Code, 2016, which reads thus:

“238. Provisions of this Code to override other laws.- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

26 The only option now left with the Surat Municipal Corporation is to put forward its claim with the Liquidator as one of the creditors who has to recover a particular amount towards property tax from Kohinoor Diamonds.

27 In view of the aforesaid, we declare that the Surat Municipal Corporation cannot claim any first charge or precedence over the subject property by virtue of Section 141 of the BPMC Act. The auction proceedings have attained finality. The writ applicant as on date is the lawful owner of the subject property. The Surat Municipal Corporation may recover the property tax from the writ applicant from the date of purchase of the subject property in the E-auction proceedings. If the entries as regards the sale in the revenue record of rights have not been mutated, the revenue authority shall proceed to do so in favour of the

writ applicant.

28 We reserve the liberty in favour of the Surat Municipal Corporation to recover the requisite amount towards the property tax by taking up the issue with the Official Liquidator i.e. the respondent No.2 in accordance with the provisions of the Companies Act.

29 At this stage, Mr. Sanjanwala pointed out that the Official Liquidator has yet to execute the sale deed in favour of his client. The Official Liquidator shall now proceed to execute the sale deed in accordance with law.

30 With the aforesaid, this writ application stands disposed of.

(J. B. PARDIWALA, J)

CHANDRESH

(NISHA M. THAKORE, J)

THE HIGH COURT
OF GUJARAT

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