IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 2113 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

==========

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, 1950 or any order made thereunder ?	No
5	Whether it is to be circulated to the civil judge ?	No

==========

CANARA BANK ASHRAM ROAD....Petitioner(s)
Versus
COLLECTOR OF STAMPS & 3....Respondent(s)

==========

Appearance:
MR KI SHAH, ADVOCATE for the Petitioner(s) No. 1
MR KAMAL TRIVEDI, ADVOCATE GENERAL for the Respondent(s) No. 1 - 3
MR AS ASTHAVADI, ADVOCATE for the Respondent(s) No. 4

==========

CORAM: **HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA**
and

HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 03/07/2013

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

1. By this Application under Article 226 of the Constitution of India, the petitioner, a nationalized bank, seeks to challenge a Circular dated 30th April 2011 passed by the respondent no.3, the Superintendent of Stamps, Gandhinagar, and the order dated 21st November 2011 passed by the Collector of Stamps, Mehsana, by which the Collector ordered recovery of the deficit stamp duty from the petitioner bank to the tune of Rs.7,46,620/- and a penalty of Rs.5,000/- in exercise of powers under Section 39, Clause (1), Sub-clause (b) of the Gujarat Stamp Act, 1958.

2. The facts giving rise to the filing of the present Application may be summarized as under:

2.1 The petitioner is a nationalized bank. A company named M/s.Dairyden Limited had availed of financial facilities from the petitioner bank to the tune of Rs.11.55 Crore some time in the year 2003. At the time of availing of the financial facilities M/s.Dairyden Limited created a mortgage in favour of the petitioner bank by deposit of title deeds in respect of the land bearing N.A. Plot No.18-25 situated in Lucky Industrial Estate, Mouje-Kadi, Taluka-Kadi, District-Mehsana, being part of the Survey No.418 and another piece of land

forming part of the N.A. land bearing Survey No.435 admeasuring 17925.99 sq.mtrs. with superstructure thereon. It appears from the materials on record that M/s.Dairyden Limited defaulted in repayment of the credit facility availed of and accordingly the account of M/s.Dairyden Limited was classified as a Non Performing Asset in light of the guidelines issued by the Reserve Bank of India.

2.2 After the account was classified as NPA, the petitioner bank thought fit to proceed against M/s.Dairyden Limited under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002**.** It appears that a notice under Section 13, Clause (2) of the SARFAESI Act was served upon M/s.Dairyden Limited and pursuant to the same the symbolic possession of the secured asset was taken over by the petitioner bank under Section 13, Clause (4) of the Act in the year 2007.

2.3 It appears that, thereafter, the petitioner bank filed an application with the District Magistrate, Mehsana, under Section 14 of the SARFAESI Act praying that police protection may be granted for the purpose of taking over the actual possession of the secured asset from M/s.Dairyden Limited. The said application was registered as MSC/Case-10/2009 and the District Magistrate, Mehsana, *vide* order dated 17th August 2009 directed the Mamlatdar and the Executive Magistrate, Kadi, to take over the actual possession of the secured asset and hand over the same to the petitioner bank within a period

of 30 days.

2.4 Pursuant to the order passed by the District Magistrate, Mehsana, referred to above, the physical possession of the secured asset was taken over by the petitioner bank on 18th December 2009. It appears from the materials on record that the possession was taken over in presence of the panchas by drawing a panchnama.

2.5 The petitioner bank thereafter placed the property in question for auction. In the auction proceedings conducted by the bank, the respondent no.4, M/s. Palco Recycle Industries Limited was declared as the highest bidder and accordingly a 'Sale Certificate' was issued by the petitioner bank in favour of the respondent no.4. This was followed by the execution of a Sale Deed, which was duly registered on 14th December 2010. In support of said sale, the necessary stamp duty was paid by M/s.Palco Recycle Industries Limited.

2.6 The authorities under the Gujarat Stamp Act, 1958 took the view that since no stamp duty was paid by the petitioner bank in support of the first transaction whereunder the petitioner bank acquired the possession of the mortgaged property in question from the debtor M/s.Dairyden Limited, the petitioner bank was liable to pay the deficit stamp duty of Rs.18,68,000/- and, accordingly, issued notices dated 14th September 2011 and 7th October 2011. The petitioner bank submitted its reply dated 1st November 2011 explaining that the action of taking possession pursuant to the

provisions under the SARFAESI Act would not constitute a "conveyance" as defined under Section 2, Clause (g) of the Act of 1958 or Article 20 of the Act of 1958. The petitioner bank defended the action of the authorities by submitting before the Collector that the panchnama drawn at the time of taking over of the actual possession of a secured asset on the strength of an order passed by the District Magistrate, Mehsana, under Section 14 of the SARFAESI Act will not fall within the definition of the term "instrument" as defined under Section 2, Clause (i) of the Act of 1958. However, the Collector overruled the objections raised by the petitioner bank and took the view *vide* order dated 21st November 2011 that the petitioner bank was liable to pay the deficit stamp duty to the tune of Rs.7,51,620/- and penalty together with the interest amount. It also appears on plain reading of the order passed by the Collector that a Circular dated 30th April 2011 issued by the office of the Inspector of Registration, Gandhinagar, was relied upon, which states that if the bank takes over the possession of the secured asset from a defaulter under the provisions of the SARFAESI Act then such an act of taking over of the possession under a panchnama creates a right in favour of bank to put such property to auction and such a transaction will amount to transfer of the property and, therefore, stamp duty should be recovered accordingly on such a transaction.

2.7 The petitioner being dissatisfied with the order passed by the Collector, Mehsana, has come up with this petition.

3. **STANCE OF THE RESPONDENT NO.3.**

3.1 The Circular dated 30th April 2011 as well as the order dated 21st November 2011 passed by the Collector, Stamp Valuation Cell, are absolutely legal and proper and the same are not liable to be quashed and set aside. The Circular dated 30th April 2011 is not *ultra vires* the provisions of the Act. The Act is purely a fiscal statute and its sole object is to increase the revenue and, therefore, all its provisions must be construed as having in view of the protection of the revenue. M/s.Dairyden Limited-the debtor had mortgaged the property in question with the petitioner bank in respect of which the requisite stamp duty was paid by M/s.Dairyden Limited. However, on failure on the part of the debtor in repaying the loan amount the petitioner bank took over the possession of the property under the SARFAESI Act. The orders dated 17th August 2009 and 17th November 2009 passed by the District Magistrate as well as the panchnama dated 18th December 2009 are all instrumental in transferring the physical possession of the property in question from M/s.Dairyden Limited to the petitioner bank.

3.2 It is by the said transaction of transfer of possession of the property in question, as reflected from the panchnama that a right could be said to have been created or transferred with reference to the property in question in favour of the petitioner bank.

3.3 In that view of the matter, the document i.e. panchnama dated 18th December 2009 by which the right is created or purported to be created or transferred in favour of the petitioner bank to proceed ahead with the auction could be termed as an "instrument" within the meaning of Section 2, Clause (i) of the Act.

3.4 Such an instrument within the meaning of Section 2, Clause (i) of the Act is squarely covered by the definition of the term "conveyance" as defined under Section 2, Clause (g) of the Act.

3.5 Such a Conveyance would be covered under Article 20, Clause (a) of Schedule I to the Act, which attracts stamp duty. The respondent no.1 has taken into consideration all the aspects of the matter and has rightly come to the conclusion that the petitioner bank is liable to make good the payment of deficit stamp duty with reference to panchnama dated 18th December 2009. Section 5 of the Stamp Act, 1958 was rightly relied upon by the Collector on the premise that the petitioner bank succeeded in obtaining the physical possession of the property in question by virtue of the provisions of the SARFAESI Act for which no document was required to be executed, which could have attracted the stamp duty, and that as a part of the very transaction the property in question came to be handed over to the highest bidder i.e. the respondent no.4 herein as

a result of the auction sale for which a single instrument i.e. a sale deed had been executed and registered and on which the requisite stamp duty is to be paid. It is, in such circumstances, that the provisions of Section 5 were pressed into service by the Collector.

3.6 Even independent of Section 5 of the Act, the panchnama dated 18th December 2009 is nothing but a "document" which would fall within the definition of the term "instrument" as defined under Section 2, Clause (i) of the Act, which, in turn, includes the definition of the term "conveyance" as evident under Section 2, Clause (g) of the Act.

4. SUBMISSIONS ON BEHALF OF THE PETITIONER

4.1 Mr.Viswas Shah, the learned counsel appearing for the petitioner bank very vehemently submitted that the impugned order passed by the Collector is wholly without jurisdiction. The provisions of the Gujarat Stamp Act, 1958 are not applicable in the facts of the case as there is no instrument of transfer between the borrower and the petitioner bank and with the aid of Section 14 of the SARFAESI Act, only the possession of the secured asset of the ownership of the mortgagor comes to the bank.

4.2 According to Mr.Shah, there is no transfer within the meaning of "conveyance" as defined under the Stamp Act. Mr.Shah submitted

that the circular issued by the respondent no.3 is also without authority of law and is *ultra vires* the Constitution of India, more particularly, Articles 14, 19 and 21 of the Constitution of India. According to Mr.Shah, under the scheme of the Act of 1958 there is no provision empowering the respondent no.3 to issue the Circular dated 30th April 2011.

4.3 Mr.Shah, in such circumstances, prays that the Circular as well as the impugned order passed by the Collector be quashed and set aside.

5. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.3

5.1 Mr.Kamal Trivedi, the learned Advocate General appearing for the State Government very vehemently submitted that no error not to speak of any error of law could be said to have been committed by the Collector in passing the impugned order relying on the Circular dated 30th April 2011 passed by the respondent no.3. According to Mr.Trivedi, this petition should not be entertained solely on the ground of availability of efficacious alternative remedy in the form of an appeal under Section 53, Clause (1) of the Gujarat Stamp Act, 1958 before the Chief Controlling Revenue Authority.

5.2 Mr.Trivedi further submitted that the Gujarat Stamp Act, 1958 is purely a fiscal statute and its sole object is to increase the revenue

and, therefore, all its provisions must be construed as having in view of the protection of the revenue. According to Mr.Trivedi, the panchnama dated 18th December 2009 on the strength of which the possession of the secured asset was taken over by the bank created a right in favour of the bank to put such a secured asset to auction.

5.3 Mr.Trivedi, in such circumstances, prays that there being no merit in this petition the same may be rejected.

6. Having heard the learned counsel for the respective parties and having gone through the materials on record, the only question that falls for our consideration is whether the authority committed any error in passing the order impugned relying on the Circular dated 30th April 2011 passed by the respondent no.3.

7. Before adverting to the rival submissions made on either side, it will be profitable for better adjudication of the controversy to look into few relevant provisions of the Gujarat Stamp Act, 1958 as well as the SARFAESI Act, 2002.

7.1 Section 2, Clause (g) of the Act defines the term “conveyance” as under:

> “Section 2 (g)
> ***“Conveyance”*** *includes,-*
> *(I) a conveyance on sale,*
> *(ii) every instrument,*

(iii) every decree or final order of any civil court;

(iv) every order made by the High Court under Section 394 of the Companies Act, 1956 in respect of reconstruction or amalgamation of companies, or]

(v) any writing or letter of allotment in respect of the premises, given to its members or allottee by a co-operative society registered or deemed to have been registered under the Gujarat Co-operative Societies Act, 1961 or ***[a corporation or an association formed and registered under the Bombay Non-Trading Corporation Act, 1959]*** *or the Gujarat Ownership Flat Act, 1973, as the case may be,]*

by which property, whether movable or immovable, or any estate or interest in any property, is transferred to, or vested in, any other person, ***inter-vivos****, and which is not otherwise specifically, provided for by Schedule-I.*

Explanation I *For the purpose of this clause, an instrument whereby a co-owner of any property transfers his interest to another co-owner of the property and which is not an instrument of partition shall be deemed to be an instrument by which property is transferred* ***inter-vivos;]****"*

7.2 Section 2, Clause (i) which defines the term "instrument" reads as under:

"(i) ***"instrument"*** *includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;*

[Explanation.- The term "document" also includes any electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000]"

7.3 Section 5 of the Act deals with instruments relating to several distinct matters reads as under:

"5. ***Instruments relating to several distinct matters:***

Any instrument comprising or relating to several distinct matters ***[or distinct transactions]*** *shall be chargeable with the aggregate amount of the duties with which separate instrument, each comprising or relating to one of such matters* ***[or distinct transactions]*** *would be chargeable under this Act."*

7.4 Article 20, Clause (1) of Schedule I to the Act is set out hereunder:

	Description of Instrument	Proper stamp-duty	Kinds of Stamp to be used
20	(a) CONVEYANCE- not being a transfer charged or exempted under Article No.56 relating to immovable property.	Three rupees and fifty paise for every Rs.100 or part thereof of the amount of the consideration for such conveyance or, as the case may be, the market value of the property which is the subject matter of such conveyance	For Art. 20 (a) to (c) (1) Non-judicial stamped paper; or (2) Special Adhesive Stamp. or

		whichever is greater.	

7.5 The provisions contained in Section 13 of the Securitization Act are also required to be considered, which are quoted below:

"13. Enforcement of security interest.- (1). Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2). Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3). The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A). If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he

shall communicate within one week of receipt of such representation or objection the reasons for nonacceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

(4). In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a). take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c). appoint any person (hereafter referred to as the manager),

to manage the secured assets the possession of which has been taken over by the secured creditor;

(d). require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5). Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors 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.

(7). Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and

interests.

(8). If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9). In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.-For the purposes of this sub-section,-
(a). "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;
(b). "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10). Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having

jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11). Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clause (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12). The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

8. Since Mr.Trivedi, the learned Advocate General has raised a preliminary objection with regard to the maintainability of this petition on the ground of alternative remedy, we deem fit to deal with such submission at the very outset.

9. It is true that power of the High Court to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and cannot be curtailed by other provision of the Constitution of India or a Statute but the High Courts have imposed upon themselves certain restrictions on the exercise of such power. One of such restrictions is

that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction under Article 226 of the Constitution of India. But again, this rule of exclusion of writ jurisdiction on account of availability of an alternative remedy does not operate as an absolute bar to entertain a writ petition but is a rule of discretion to be exercised depending on the facts of each case. On this aspect, the following observations by the Constitution Bench of the Supreme Court in ***A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani and another***, reported in **AIR 1961 SC**, which still holds the field, are quite apposite :

> *"The passages in the judgment of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus preeminently one of the discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."*

10. In Harbanslal Sahnia and another v/s. Indian Oil Corporation

Limited and others, reported in (2003) 2 SCC 107, enumerating the contingencies in which the High Court could exercise its writ jurisdiction in spite of availability of the alternative remedy, the Supreme Court observed thus:

> *"...that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."*

11. In the present case, we are of the opinion that, for the reasons which we shall record herein after, the order impugned as well as the Circular dated 30th April 2011 are wholly without jurisdiction and thus, the objection raised by the learned Advocate General as regards availability of alternative remedy deserves to be overruled.

12. The stance of the State Government has really baffled us. We fail to understand as to how a panchnama drawn at the time of taking over of the physical possession of the secured asset pursuant to the order passed by the District Magistrate under Section 14 of the SARFAESI Act could be termed as an instrument creating any right or liability in favour of the bank so as to bring it within the ambit of "conveyance" as defined under Section 2, Clause (g) of the Act of

1958. The authorities seem to be labouring under a serious misconception of law that a secured creditor can take over the possession of the secured assets only if there is an order passed by the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, under Section 14 of the SARFAESI Act. Section 14 is a provision which provides that if the secured creditor wants to seek the help of the local police in taking over of the physical possession of the secured asset, anticipating obstruction at the end of such debtor, then in such circumstances, the secured creditor may seek help of the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, but in a given case, the bank may not deem fit to avail of the provision of Section 14 of the SARFAESI Act and on their own also could take over the physical possession of the secured asset. In such circumstances, it is absolutely unreasonable on the part of the authorities to assert that a panchnama drawn at the time of taking over of the possession creates a right in favour of the secured creditor and since it creates a right it is only thereafter that such assets could be put by the secured creditor to auction.

13. We have, in so many words, made the position of law very clear in the case of **Canara Bank v. Palco Recycle Industries Limited** reported in **AIR 2013 Gujarat 50** that a conjoint reading of all the sub-sections of Section 13 indicates that after taking possession of the assets in terms of Section 13, Clause (4) of the Securitization Act, the secured creditor gets a right to sell the property for realization of

its dues as if the sale has been made by the secured creditor himself. We have also taken the view that Sub-section (8) of the said Section clearly indicates that if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor and no further steps shall be taken by him for transfer or sale of that secured asset.

14. Therefore, even after taking possession, if before sale of the property, a debtor pays the amount as mentioned in Sub-section (8) to the secured creditor, in that event no further steps should be taken by the secured creditor and the debtor will be entitled to get back the possession.

15. In the said case, we rejected the contention of the learned counsel appearing for the petitioner bank that on taking possession of the property, the title of the debtor extinguishes and would vest in the secured creditor. We clarified in so many words that the secured creditor, on taking possession, merely gets a right to sell the property on behalf of the debtor and any sale made by the secured creditor should be deemed to be a sale made by the debtor himself. We rejected the contention of the learned counsel appearing for the petitioner in the said case that on taking possession the title vests in the secured creditor and the right of the debtor would extinguish

automatically taking into consideration the fact that if that be so that on tendering of the amount due in terms of Sub-section (8), a fresh deed would be required to be made by the secured creditor in favour of the debtor for re-conferring the title.

16. Sub-section (6) of Section 13 of the Act 2002 clearly states that the assets transferred by the secured creditor after taking possession should be treated to be a transfer made by the owner.

17. We are of the view that the entire exercise undertaken by the respondent authorities is contrary to law. It is also wellknown that one and the only proper test in interpreting a Section in a taxing statute would be that the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. Imposition of tax is a constitutional function. A taxing or a fiscal statute demands strict construction. It must never be stretched against a tax bill so long natural meaning for the charging section is adhered to and when the law is certain then a strange meaning thereto should not be given. It is also well settled rule of construction of a charging Section that before taxing a person it must be shown that he falls within the ambit thereof by clear words used as no one can be taxed by implication. It is further well settled that a transaction in a fiscal legislation cannot be taxed only on any doctrine of “the substance of the matter” as distinguished from its legal signification, for a subject is not liable to tax on supposed “spirit of

the law" or "by inference or by analogy", as sought to be suggested by learned Advocate General. The taxing authorities cannot ignore the legal character of the transaction and tax it on the basis of what may be called "substance of the matter". One must find the true nature of the transaction [see Commissioner of Central Excise, Pondicheri v. Acer India Limited (2004) 8 SCC 173]. We have no hesitation in holding that the action of the respondent authorities is contrary to the Constitutional mandate as provided under Article 265 of the Constitution of India. Article 265 reads as under:

> *"265. Tax not to be imposed save by authority of law:- No tax shall be levied or collected by authority of law."*

18. The very mandate of Article 265 of the Constitution of India is that there can be no levy or collection of tax without authority of law. That of course is a fundamental thing which cannot be allowed to be infringed.

19. Our final conclusions in the matter are as under:

(A) The Circular dated 30th April 2011, Annexure-F to this petition, issued by the respondent no.3 is held to be *ultra vires* the provisions of the Gujarat Stamp Act, 1985 and Article 265 of the Constitution of India.

(B) The impugned order dated 21st November 2011 passed by the respondent no.1 is declared to be illegal and is accordingly set aside.

(C) The order passed by the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, under Section 14 of the SARFAESI Act 2001 could not be termed as an "instrument" as defined under Section 2, Clause (i) of the Gujarat Stamp Act, 1958 creating any right or liability in favour of the secured creditor so as to bring it within the sweep of the definition of "conveyance" as defined in Section 2, Clause (g) of the Act, 1958. In the same manner, the panchnama drawn at the time of taking over of the physical possession of the secured asset pursuant to the order passed by the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, in exercise of powers under Section 14 of the Act 2002 would also not create any special right in favour of the secured creditor so as to bring such a panchnama within the sweep of the definition of the term "instrument" as defined under Section 2, Clause (i) of the Act.

20. In the result, the petition succeeds and is hereby allowed. In the facts and circumstances of the case, there shall be no order as to costs.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

FURTHER ORDER

After the order is pronounced, Mr.Asthavadi, the learned advocate appearing for the respondent no.4, the purchaser of the secured asset, submits that in view of the pronouncement his client should be refunded the amount of Rs.7,51,620/- paid by him to the authorities towards the stamp duty. In view of our order, the amount which has been deposited by the respondent no.4 shall be refunded within four weeks from today.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

*malek