

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 9394 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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

ODHAVJIBHAI MOHANBHAI GADHIYA
Versus
STATE OF GUJARAT

Appearance:

MR AR THACKER(888) for the Petitioner(s) No. 1,2,3,4,5,6,7,8
SHIVANG A THACKER(7424) for the Petitioner(s) No. 1,2,3,4,5,6,7,8
MR KRUTIK PARIKH, AGP for the Respondent(s) No. 1,2,3,4,5
MR ANIP A GANDHI(2268) for the Respondent(s) No. 10
MR VIRAT G POPAT(3710) for the Respondent(s) No. 7
MR VISHWAS K SHAH(5364) for the Respondent(s) No. 6,8,9

CORAM: HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 30/09/2022

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

In the facts and circumstances of the case and having

regard to the consent of learned advocates for the parties, the petition was taken for final consideration.

1.1 Rule returnable, forthwith. Learned advocates for the respondents waives service of rule on behalf of the respective respondents.

1.3 Heard learned advocate Mr.A.R.Thakkar for the petitioners, learned Assistant Government Pleader Mr.Krutik Parikh for respondent Nos.1 to 5, learned advocate Mr.Vishwas Shah for respondent Nos.6, 8 and 9, learned advocate Mr.Tirth Bhatt for learned advocate Mr.Virat Popat for respondent No.7 and learned advocate Mr.Anip Gandhi for respondent No.10.

2. By filing the present petition under Article 226 of the Constitution, the petitioner has prayed to set aside order dated 6.3.2021 passed by respondent No.3- the Sub Registrar, Jamnagar. The said order dated 6.3.2021 is in nature of communication addressed to the petitioner whereby respondent No.3 has kept pending document No.1169 dated 16.2.2021, refusing to release the same on the ground that on the subject matter land covered under the said document, there exists an encumbrance in the nature of government dues of unpaid sales tax as communicated by letter dated 14.10.2019 of Assistant Commissioner of State Tax- respondent No.5 herein. It was stated that the properties were under attachment under Section 45 of the Gujarat Value Added Tax Act, for non-payment of the tax by original owner of the properties named Pradipkumar Govindbhai Lakkad.

2.1 The document refused to be returned by the Sub Registrar was the sale deed executed in respect of Plot No.43 admeasuring 140 sq.mtrs. of survey No.1149/2, Jamnagar.

2.2 The aforementioned communication dated 14.10.2019 by respondent No.5 is also prayed to be set aside. The Assistant Commissioner of State Tax thereby intimated the authorities including respondent No.3 to register charge on the property as recovery of Value Added Tax and other taxes to the tune of Rs.2,18,36,751/- from M/s. Shrinathji Spintax Private Limited for which the properties of the Director of the firm- Pradipkumar Lakkad and the guarantor Govindbhai Lakkad were required to be attached.

2.3 Letters dated 13.7.2020 by respondent No.5 and order dated 3.4.2019 by respondent No.4 State Tax Officer are also prayed to be quashed. It was prayed to direct respondent Nos.4 and 5 to lift the charge over the property in question.

3. The case of the petitioners is that respondent No.6 herein- M/s. Galaxy Enterprise took loan facility from respondent No.10 Axis Bank in form of cash credit for 5 crores on 30.4.2011. Against the said loan open land bearing plot Nos.25 to 56 admeasuring 341 sq.mtrs of survey No.1149/2 at Jamnagar was mortgaged. Respondent Nos.7 to 9 stood as guarantor. The loan account was declared to be Non-Performing Asset, pursuant to which the Axis Bank filed proceedings on 24.6.2016 before the Debt Recovery Tribunal for recovery of dues.

3.1 The Axis bank also issued notice under Section 13(2) of the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the original borrower- respondent No.6. The notice was challenged by respondent Nos.6 to 9 by filing Securitization Application No.217 of 2016 before the Debt Recovery Tribunal. The tribunal did not grant any stay. The Axis Bank took possession of the properties on 28.6.2016. This action of the bank was again challenged before the tribunal but the tribunal did not grant stay against the bank proceedings for auction.

3.2 Two auction notices failed. In the third auction dated 17.7.2017, the petitioner were declared successful bidders. Sale certificate was issued on 31.8.2017 by the bank in favor of the petitioners. It appears that one Girish Gajipara at that time claimed to be the tenant on the land of the original borrower, who filed Special Civil Application No.16956 of 2017 before this court. By order dated 9.10.2017 bank was permitted to issue sale certificate by clarifying that auction purchasers- the petitioners with the tenant and the rights would be subject to outcome of petition.

3.3 As the proceedings before the Debt Recovery Tribunal were pending, respondent Nos.6 to 9 joined petitioner in the proceedings and challenge the auction conducted by the Axis Bank. Aforementioned Special Civil Application filed by the tenant came to be rejected by order dated 26.2.2019 of this court and petitioner- tenant was directed to avail the alternative remedy before the Debt Recovery Tribunal. Letters Patent Appeal by the tenant was also dismissed. The said tenant moved Securitization Application No.611 of 2019. In that proceedings

delay has not been condoned till date.

3.4 As the stay was vacated pursuant to dismissal of Special Civil Application No.16956 of 2017 as stated above, the Axis Bank executed registered sale certificate in favor of the petitioner on 28.2.2019. The petitioners were also handed over the possession. The petitioner started developing the land. Thirty- two plots came to be divided amongst the petitioners as per the share of each of the petitioners, and partition deed was also executed for the said thirty-two plots. Each of the petitioners became independent owners of four plots. The said so called tenant Girishbhai Gajipara objected to the entering the name of the petitioner as owners of the plot, however, Mamlatdar Jamnagar dismissed Case No.3 of 2019 by order dated 10.1.2020. The said order has been challenged before the Deputy Collector, which appeal is pending without grant of interim stay.

3.5 It was stated that even though respondent Nos.6 to 9 knew that the properties were sold in auction to the petitioners, they gave undertaking to the sales tax authorities - respondent Nos.4 and 5 herein. Claiming to be the owner of the properties and informing the sales tax department to create the charge over the properties. Respondent No.5 thereafter passed order dated 14.10.2019 directing to attach six plots in respect of dues of one M/s. Shrinathji Spintax Private Limited which was the firm of respondent No.7. Having come to know about that petitioners addressed letters to respondent Nos.4 and 5 authorities. It is the grievance of the petitioner that charge is not removed till today.

3.6 Petitioner No.1- Odhavjibhai Mohanbhai Gadhiya sold the plot No.23 of survey No.1149/2 which had come to his share by executing registered sale deed dated 16.2.2021 in favor of one Nitaben Nileshbhai Ramani and Kalpeshbhai Ramani. Respondent No.2- Sub-Registrar, Jamnagar informed the petitioners that since the property sold under the said registered sale deed was ordered to be attached by the sales tax authorities, the sale deed cannot be returned. The Sub-Registrar thus kept the sale deed with him pending.

3.7 The notices issued by the petitioners to the Sub-Registrar explaining the facts and requesting to return the sale deed, did not yield fruits.

4. Learned advocate for the petitioner submitted that the order passed by respondent Nos.4 and 5 was bad in law inasmuch as the petitioners became owners of the property. Sale certificate pursuant to auction purchased by the petitioners was issued and it was registered, it was submitted. It was submitted that therefore the sale deed dated 16.2.2021 executed by the petitioners was required to be registered and returned. It was submitted that since property was purchased in auction pursuant to which the sale certificate was also issued and the title of the petitioners was to be complete. Learned advocate for the petitioner relied on Section 26E of the Securitization Act, 2002 pursuant to which the bank had taken the action.

4.1 It was submitted that respondent Nos.4 and 5 were also aware about the auction conducted by Axis Bank. It was further submitted that the dues of the bank were secured debts under

the SERFAESI Act for recovery of the auction was held and the petitioner purchase the properties. Section 26E of the SERFAESI Act was relied on to further submit that the dues of the sales tax authorities would not take precedence. It was submitted that the sale was confirmed in favor of the petitioner pursuant to the auction. It was submitted by highlighting the conduct of the sales tax authorities that they acted in collusion. It was next submitted that respondent No.7 intentionally gave undertaking for liability of his mother and not himself. It was submitted that respondent Nos.4 and 5 sales tax authorities failed to verify the status of property.

4.2 Respondent No.7- original owner of the property filed affidavit-in-reply to raise various contentions including to submit that sale of the property was effected with all encumbrances and liabilities and that the sale certificate mentioned the said aspect. It was submitted that the even then the Mamlatdar passed order dated 10.1.2020 certifying the entry in favor of the petitioner, which recorded the dues of the sales tax- Value Added Tax. It was submitted that attachment of the sales tax department existed.

4.3 The petition was also contested by respondent No.5 Sales Tax Officer who in his affidavit-in-reply stated about outstanding dues of M/s. Shrinathji Spintax Private Limited for Rs.2,18,36,751/- whose Director was Pravinbhai Govindbhai Lakkad and that the notice dated 17.9.2018 was issued to him for making paying of the said dues. It was submitted that the said Director- respondent No.7 informed that the property may be attached towards outstanding dues and that he had no

objection for that. It was submitted that respondent No.7 expressed no objection about creation of charge over the property for the recovery of Value Added Tax and sales tax.

4.4 Affidavit-in-rejoinder was filed by the petitioner to highlight that auction under the SERFAESI Act was held after following procedure and that this court had issued direction to respondent No.10 Bank to issue sale certificate in favor of the petitioner- auction purchaser which order was passed by the court in the petition filed by Girishbhai Gajipara who claimed to be a lease holder and not by respondent No.7 who was also party in the said proceedings. It was stated that the Mamlatdar passed order in application No.3 of 2019 rejecting the prayer of the said so called tenant Gajipara to change mutation entry against which appeal before the Deputy Collector was preferred which was rejected by the Deputy Collector on 30.9.2021. In the said proceedings, the petitioner and respondent No.7 were parties. The appellate authority issued direction to respondent Nos.4 and 5- sales tax authorities and that the Deputy Collector rejected the submission made by respondent No.4. It was contended that the order of the Mamlatdar dated 10.1.2020 came to be merged with the order of Deputy Collector. The said order passed by Deputy Collector was not challenged by the said tenant Gajipara, it was contended.

5. In light of the above facts and the rival stand, the following undisputed aspects emerge.

(i) Respondent No.10 Axis Bank had held auction in exercise of powers derived from the provisions of SARFAESI Act to sell the property mortgaged with it, in order to recover its dues. Notice

under Section 13(2) was issued, possession was taken and the auction in accordance with law was conducted.

(ii) The petitioner was successful bidder who purchased the property.

(iii) Sale certificate dated 28.2.2019 in favor of the petitioner came to be issued. The sale certificate was registered.

(iv) Original owner- respondent No.7 conveyed to the sales tax authorities that he had no objection to register the charge in respect of the sales tax dues.

(v) No interest had survived for original owner after auction sale by the Bank and the petitioner becoming owner of the property.

(vi) The so called tenant claiming to be in occupation of the property failed in the litigation before this court. No stay was granted to him and the court permitted issuance of sale certificate in favor of the petitioner.

(vii) In the proceedings before the Mamlatdar, objecting to the mutation entry in favor of the petitioners, none of the contentions held merit. The Mamlatdar refused the prayer.

(viii) On the basis of the sale certificate No.1383, the name of the petitioners- the holder of the sale certificate was mutated in the revenue records subject to the outcome of the proceedings before the Debt Recovery Tribunal.

(ix) The petitioners sold the property in question which belonged to their share and ownership by executing sale deed dated 16.2.2021 which was presented for registration.

(x) The Sub-Registrar- respondent No.3 herein, refused to return the said sale document on the ground that the charge was created over the property for unpaid sales tax dues by the original owner.

5.1 The settled position of law is that the VAT and sales tax dues has no precedence over the dues of the bank for recovery of which the bank exercise powers under the SARFAESI Act. The bank was secured creditor. Section 26 E of the SARFAESI Act provides for priority of secured creditor, stating that notwithstanding anything contained in any other law, after the registration of security interest, the debts due to unsecured creditor shall be paid in priority of all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority. In respect of finance given by the bank to the original owner of the property, security interest was created by mortgaging the property. The debt becoming due to the bank was a secured debt. The charge sought to be created by the sales tax authorities in no way could discount the *a priori* rights of the bank to recover its dues as the bank was secured creditor.

5.2 The dues in the nature of sales tax or VAT payable by the original owner cannot claim priority over the dues of the secured creditor. The principle that the state debt or crown debt has no prior claim or the dues payable to the secured creditor is no

longer res integra. In **Bank of Bihar vs. State of Bihar [(1972) 3 SCC 196]**, the supreme court laid down certain well known principles which were followed by the supreme court in its own judgment in **Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. [(2000) 5 SCC 694]**. The law laid down is that the preferential right of the Crown to recover the debt over the creditors is limited to the class of unsecured creditors. The common law of England or the principles of equity and good conscience would not allow the Crown to have preferential right for recovery of debt over the mortgagee or pledgee of goods or secured creditors. The law was further settled by the Supreme Court in **Punjab National Bank Vs. Union of India [(2022) 7 SCC 260]** on this score.

5.3 In view of above position of law, in other words, the charge in respect of the property in question created for sales tax dues is of no avail and has no efficacy in law. The property in question was sold by the bank which was a secured creditor, to enforce its secured debt under the SARFAESI Act, of which the petitioners were successful auction purchaser. They were issued sale certificate which was registered to finally become absolute owner of the property. In exercising their capacity as owners, they executed further sale deed dated 15.2.2021 which was registered with the office of Sub-Registrar at No.1169 on 16.2.2021, however the Sub-Registrar refused to return the sale registered sale deed in view of the order of the respondent No.5 Sales Tax Authority on the ground that it had created charge over the properties for the sales tax dues.

6. Considering the facts involved and the propositions of law

highlighted, respondent No.3 Sub Registrar was wholly unjustified in passing order dated 6.3.2021 to keep the document No.1169 dated 16.2.2021 which was sale deed executed by the petitioners, keeping the same pending and not returning the same to the petitioners.

6.1 Since the petitioner had purchased in the auction sale conducted by the bank under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 the property travelled in favor of the petitioner free from any encumbrances, order of sales tax officer registering the charge over the property in relation to the sales tax and Value Added Tax payable by original owner of the property had no efficacy in law. The communication dated 14.10.2019 which was relied on by respondent No.3 in passing aforesaid order dated 6.3.2021 whereby the charge was created by sales tax authority could also not sustain.

6.2 As a result order dated 6.3.2021 passed by respondent No.3 Sub Registrar, Jamnagar as well as decision reflected in communication dated 14.10.2019 of the respondent No.5 of Assistant Commissioner of sales tax- Gondal, are liable to be set aside. They are hereby set aside.

7. The petition is allowed. Rule is made absolute.

(N.V.ANJARIA, J)

(BHARGAV D. KARIA, J)

Manshi