



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 26715 of 2022

FOR APPROVAL AND SIGNATURE:

**HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR.JUSTICE D.N.RAY**

Approved for Reporting	Yes	No

EKTABEN HARDIKBHAI MASHRU

Versus

AUTHORIZED OFFICER, STATE BANK OF INDIA & ORS.

Appearance:

HARSHADA K DARJI(7537) for the Petitioner(s) No. 1
MS.SHRUNJAL SHAH, AGP for the Respondent(s) No. 2
MR BIJU A NAIR(5703) for the Respondent(s) No. 1
NOTICE SERVED for the Respondent(s) No. 3,4

**CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR.JUSTICE D.N.RAY**

Date : 07/03/2025

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE D.N.RAY)

1. Heard learned advocate Ms.Harshada K. Darji for the Petitioner, learned advocate Mr. Biju A. Nair for the Respondent No.1, and learned Assistant Government Pleader Ms. Shrunjal Shah for the Respondent No.2.

2. Rule returnable forthwith. Learned advocate Mr.Biju A.Nair



waives service of notice of rule for the Respondent No.1 and learned Assistant Government Pleader Ms. Shrunjal Shah waives service of notice of rule for the Respondent No.2. With the consent of learned advocates for the respective parties, the matter is taken up for hearing, as the issue involved is very short.

3. The petition has been filed under Article 226 of the Constitution of India with the following prayers :-

“A. Your Lordship be pleased to issue a writ of mandamus or a writ in the nature of prohibition or certiorari or mandamus or any reference to the encumbrances, if any, which are contradictory to the provisions of section 26E of the SARFAESI Act.

B. The Respondent No. 1 has no power such conditional sale certificate, when there is no rule of law which empowers the Respondent No. 1 to issue the Sale Certificate by mentioning the encumbrances of any Government authorities.

B (1). Your lordship be pleased to issue a writ of mandamus or a writ in the nature of prohibition or certiorari or mandamus or any other appropriate writ, order or direction be given to the Respondent No. 2 to remove the provisional attachment order dated 18.05.2015 as well as the final attachment order dated 09.08.2016, whereby the charge was created on the property being Commercial property at survey no. 316/8p, Sr. No. 294, Opp. Rajdhani Hotel, Mahuva Road, Badhada, Ta. Savarkundla, Dist. Amreli, as the said property is not of the main borrower, the Respondent No. 3 herein and also that the so-called charge of the Respondent No. 2 was subsequent and



subservient to the charge of the Respondent No. 1 Bank.

C. No basis has been given in the impugned order which can justify the issuance of the conditional sale certificate by the Respondent No.1. The impugned action is totally fallacious and unsustainable in the eyes of law.

D. The action of the Respondent No. 1 is even otherwise contrary to law and suffers from the vice of complete non-application of mind.

E. The Petitioner submits that the action of the Respondent no. 1, which is completely illegal and unconstitutional, has caused huge prejudice and immeasurable consequences, pecuniary and otherwise, to the Petitioner.

F. The action of the Respondent No. 1 is even otherwise contrary to law and suffers from the vice of complete non-application of mind.”

4. The brief facts of the case are as follows:

4.1 The Respondent No. 1 granted financial assistance to the Respondent No. 3 who failed to repay the same within the prescribed time, as a result of which, the account of the Respondent No. 3 was classified as a Non Performing Asset (NPA). The Respondent No. 1 initiated steps for recovery of its outstanding amount under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI Act).



4.2 The Respondent No.1 published an auction notice on 20.06.2022 for holding the e-auction on 25.07.2022 of the subject property. Accordingly to the Petitioner, sale certificate dated 24.08.2022 the auction took place on 25.07.2022, and the Petitioner was declared the highest bidder.

4.3 The Petitioner, pursuant to such auction, deposited the entire sale consideration of Rs.23,10,000/-, and the Sale Certificate was issued by the Respondent No. 2. According to the Petitioner the sale certificate dated 24.08.2022 reflects the encumbrances of Commercial Tax Office on TIN No.24132000144 of the Respondent No. 3 for Rs.34,02,518/-.

4.4 The Petitioner sent a letter to the Respondent No. 1, requesting the removal of the said encumbrance. As the Respondent No. 1 did not respond to the said letter, the Petitioner has filed the present petition, challenging the conditional share certificate dated 24.08.2022, praying for removal of the said attachment.



4.5 The Respondent No. 2 served a copy of the Additional Affidavit in reply dated 21.11.2024, wherein the details of the attachment orders and notices are placed on the record. In the said attachment notices, the Respondent No. 2 has stated the provisional attachment order dated 18.05.2015 as well as the final attachment order dated 09.08.2016, whereby the charge was created on the property of the main borrower.

4.6 The Petitioner alleged that the property of the subject matter does not belong to Respondent No. 3 and hence, the charge over the property purchased by the Petitioner is not the subject matter of charge of the Respondent No. 2. The Petitioner further alleged that the charge of the Respondent No, 2 was subsequent and subservient to the charge of the Respondent No. 1.

5. Learned advocate Ms.Harshada K.Darji for the Petitioner submitted that the Respondent No.1 has failed to comply with the provisions of Section 26E of the SARFAESI Act and also ignored the judgment of the Hon'ble Apex Court in the case of **Central**



Bank of India Vs. State of Kerala & others reported in (2009) 4 SCC 94, in the case of Central Government has amended SARFAESI Act, 2002 by introducing Chapter-IV-A by amending Act, 44 of 2016 dated 01.01.2016, by which the Central Government has introduced concept of Registration by Secured Creditors and other Creditors.

5.1 She has further submitted that the impugned action is a colourable exercise of power and amounts to depriving the Petitioner of its right to seek the clear rights under the Sale Certificate, without there being any other appropriate writ, order or direction given to the Respondent No.1 Bank to remove encumbrances of commercial tax office of Rs.34,02,518/- from the sale certificate dated 24.08.2022, issued by the Respondent No.1 to the Petitioner.

5.2 Ms.Darji further submitted that she has moved a draft amendment by which it was contended that the property in question belongs to a guarantor and therefore, should fall outside the purview of the attachment in respect of crown debts.



6. Ms. Shrunjal T.Shah, learned Assistant Government Pleader does not controvert the aforesaid position.

7. **DISCUSSION & FINDINGS:-**

7.1 As it is evident from the additional affidavit filed by the competent officer of the Respondent-Bank, particularly paragraph No. 4 of the said affidavit dated 17.10.2024, that though the claim of the Respondent No.2 is against one M/s.Rameshwar Cotton Industries (Tin No. 24132000144), which is a partnership firm. The subject matter of the present petition, namely property No.3 in the auction notice dated 21.06.2022, the relevant subject matter property of the present Special Civil Application situated in Survey No.316/8, Village Badhada, Mahuwa Road, Taluka Savarkundla, Dist. Amreli was owned by one Mrs. Sangitaben Hareshbhai Mashru, who was not at all a partner in the aforesaid partnership firm. But, she stood as a third party guarantor/mortgagor to the credit facilities sanctioned by the Respondent No.1 Bank to M/s. Rameshwar Cotton Industries.

7.2 From the sale deed dated 15.12.2005 at Page Nos. 56 to 64 of



the paper book, it will be evident from page No.57 that the property in question is the same property which is shown as property No.3 in the auction notice. It is also evident that the purchaser is one Sangitaben Hareshkumar Mashru. It is also a matter of record which is undisputed by the parties that the said purchaser namely Sangitaben Hareshkumar Mashru was not a partner of M/s. Rameshwar Cotton Industries. In fact, the public auction notice at Page 46A of the paper book categorically refers to “Name of Title holder” of property No.3 to be “Sangitaben Hareshkumar Mashru” and not M/s.Rameshwar Cotton Industries, which is only shown as title holder of property No.1. Therefore, the aforesaid property being property No.3 in the auction notice has been wrongly attached as a property of M/s. Rameshwar Cotton Industries or any of its partners, whereas, in reality it was a self own property, a third party – guarantor.

7.3 Further it will be seen that the CERSAI Registration in respect of the charge by the Bank is dated 11.04.2008. Whereas, the date of issuance of notice under Section 135D of the Bombay Land Revenue



Code, 1879 is 03.06.2015 and the date of attachment of the State Tax Authority is dated 13.08.2019. Therefore, evidently the Bank has prior charge over the property and following the law declared by this Court in **Kalupur Commercial Co-operative Bank Ltd. Vs. State of Gujarat** reported in **AIR ONLINE 2019 GUJ 418**, it has to be held that the property in question, being property No.3 in the auction notice dated 20.06.2022 does not bear any charge for the crown debts, after the same has been purchased in the auction by the Petitioner.

In Kalupur (Supra) this Court had categorically held as under:-

“47. Thus, the dictum of law as laid by the Supreme Court in the aforesaid decision is that the State's preferential right to the recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Supreme Court took the view that the Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for the recovery of its debts over a mortgagee or pledgee of the goods or a secured creditor. It is true that ultimately the bank was not granted any relief, but the same was not granted in the peculiar facts of the case. Otherwise, the principle of law as explained is very clear. In no uncertain terms, the Supreme Court held that the appellant, i.e. the bank, was right in submitting that on the date on which the State of Karnataka proceeded to attach and sell the property of the partners of the firm mortgaged with the bank, it could not have appropriated the sale proceeds to the sales-tax arrears payable by the firm, thereby defeating the bank's security. In taking such view, the Supreme Court relied on its earlier decision in the case of CST vs. Radhakishan, (1979) 43 STC 4 : AIR 1979 SC 1588.



48. In the case of *Stock Exchange, Bombay v. V.S.Kandalgaonkar*, reported in (2014)51 taxmann.com 246 (SC), it was held by the Bombay High Court that, "By virtue of lien on securities under rule 43 of Bombay Stock Exchange Rules, BSE being secured creditor of defaulting member would have priority over dues of Income - tax department." While dealing with the tax recovery under Section 226 of the Income- tax Act, 1961, read with Sections 8 and 9 of the Securities Contracts (Regulation) Act, 1956, it was held by the Apex Court that collection and recovery of tax has to be based on proper appreciation of facts of the case. While deciding Other modes of recovery (Priority over debts), the Apex Court duly considered the power of Central Government to direct rules to be made or to make rules and observed that a membership card is only a personal permission from Stock Exchange to exercise rights and privileges that may be given subject to Rules, Bye-Laws and Regulations of Exchange and moment a member is declared a defaulter, his right of nomination shall cease and vest in Exchange because even personal privilege given is at that point taken away from defaulting member. It therefore held that by virtue of rule 43 of Bombay Stock Exchange Rules security provided by a member shall be a first and paramount lien for any sum due to Stock Exchange. Thus, Bombay Stock Exchange being secured creditor would have priority over Govt. dues and if a member of BSE was declared a defaulter, Income-tax department would not have priority over all debts owned by defaulter member. The first thing to be noticed is that the *Income Tax Act* does not provide for any paramountancy of dues by way of income tax. This is why the Court in the case of *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* [2005] 5 SCC 694 (para 19) held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in *Giles v. Grover* (1832) (131) English Reports 563 in which it has been held that the Crown has no precedence over a pledgee of goods. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, in *Collector of Aurangabad v. Central Bank of*



India [1967] 3 SCR 855 after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore "law in force" in the territory of India before the Constitution and was continued by [Article 372](#) of the Constitution (at page 861, 862). In the present case, as has been noted above, the lien possessed by the Stock Exchange makes it a secured creditor. That being the case, it is clear that whether the lien under Rule 43 is a statutory lien or is a lien arising out of agreement does not make much of a difference as the Stock Exchange, being a secured creditor, would have priority over Government dues.

49. The two decisions [referred to above](#), one of the Supreme Court and another of the Bombay High Court, as such may not be helpful to the Bank because the principal issue in the case on hand is with regard to the statutory charge which is created by the State enactment. The Bombay High Court was dealing with a matter under the [Income Tax Act](#) and under the [Income Tax Act](#), there is no provision analogous to [Section 48](#) of the VAT Act which creates a statutory charge.

50. There is one another important argument of Mr. Sheth which is quite appealing and we are at one with Mr. Sheth on the same. Indisputably, the Bank put forward its claim over the secured assets of the Bank for the first time on 01.10.2016 and that too by way of provisional attachment of the properties under [Section 45](#) of the VAT Act, keeping in mind the dues that may be determined in future. It is not in dispute that there were no crystallized dues as on 01.10.2016 and, therefore, there was no question of there being any charge under [Section 48](#) of the VAT Act which could only be in respect of the actual dues. It is also not in dispute that prior to the dues being crystallized in the case of the defaulting dealer, the Bank had already taken over the possession of the properties of the dealer, and by that time, Section 31B of the RDB Act had already been enforced by the Central Government. It is preposterous to suggest that the charge over the property under Section 48 of the State Act would come into force from the assessment of the earlier



financial years and what is relevant in the present case is that the dues and resultantly the charge under [Section 48](#) of the VAT Act came into existence after the implementation of Section 31B of the RDB Act.

51. [Section 48](#) of the VAT Act would come into play only when the liability is finally assessed and the amount becomes due and payable. It is only thereafter if there is any charge, the same would operate. The authority under the [VAT Act](#) passed the assessment order later in point of time.

52. The language of [Section 48](#) of the VAT Act is plain and simple and the phrase 'any amount payable by a dealer or any other person on account of tax, interest or penalty' therein assumes significance. The amount could be said to be payable by a dealer on account of tax, interest or penalty once the same is assessed in the assessment proceedings and the amount is determined accordingly by the authority concerned. Without any assessment proceedings, the amount cannot be determined, and if the amount is yet to be determined, then prior to such determination there cannot be any application of [Section 48](#) of the VAT Act. We may also refer to [Section 47](#) of the VAT Act. [Section 47](#) of the VAT Act is with respect to transfer of property by the dealer to defraud the Revenue. According to [Section 47](#), if a dealer creates a charge over his property by way of sale, mortgage, exchange or any other mode of transfer after the tax has become due, then such transfer would be a void transfer. The reason why we are referring to [Section 47](#) is that the phrase therein 'after any tax has become due from him' assumes significance. The same is suggestive of the fact that before the assessment proceedings, or, to put it in other words, before a particular amount is determined and becomes due to be payable if there is any transfer of property of the dealer, such transfer would not be a void transfer. Therefore, the condition precedent is that the tax should become due and such tax which has become due shall be payable by a dealer. Once this part is over, then [Section 48](#) of the VAT Act would come into play.

53. One of us, J.B. Pardiwala, J., sitting as a Single Judge, had the occasion to consider this issue in the case of *Bank of Baroda, Through its Assistant General Manager Prem Narayan Sharma vs.*



State of Gujarat & Ors., Special Civil Application No.12995 of 2018, decided on 16.09.2019. We may quote the relevant observations made in the said judgment.

"It is preposterous to suggest in the case on hand that as the assessment year was 2012-13, [Section 48](#) could be said to apply from 2012-13 itself. Even in the absence of [Section 26E](#) of the SARFAESI Act or [Section 31B](#) of the RDB Act, [Section 48](#) of the VAT Act would come into play only after the determination of the tax, interest or penalty liable to be paid to the Government. Only thereafter it could be said that the Government shall have the first charge on the property of the dealer."

54. In view of the aforesaid discussion, We have no hesitation in coming to the conclusion that the first priority over the secured assets shall be of the Bank and not of the State Government by virtue of [Section 48](#) of the VAT Act, 2003.

8. The ratio of the aforesaid decision applies on all fours to the case at hand. Resultantly, the petition succeeds and the provisional attachment order dated 18.05.2015 as well as the final attachment order dated 09.08.2016, whereby the charge was created on the property being Commercial property at survey no. 316/8p, Sr. No. 294, Opp. Rajdhani Hotel, Mahuva Road, Badhada, Ta. Savarkundla, Dist. Amreli is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(D.N.RAY,J)

BINA SHAH