(2011) 12 GUJ CK 0046

In the Gujarat High Court

Case No : Special Civil Application No. 4343 of 2009

Burhankhan Khalidkhan Pathan APPELLANT

Vs

Sales Tax Officer (II) and Others RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 41, 41(4), 47, 65
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)

Citation : (2012) 53 VST 163

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Ashish H. Shah, for the Appellant; Maithili Mehta, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Sonia Gokani, J.—Present petition is preferred invoking the writ jurisdiction of this court for the facts to be mentioned briefly hereinafter. The property in question bearing Plot No. 49/1 situated at Kakrej, Taluka Kalol, District, Gandhinagar, belonged to the company M/s. Swet Zinc Limited (earlier known as Swet Metals Pvt. Ltd.) was carrying on the dealership registered with the office of the Sales Tax Officer. The dealer was enjoying sales tax incentive benefits in the form of deferment of tax, whereby he was allowed to collect tax retaining the same with him for a specific period and then pay the same to the Government, during the specified period in equal instalments. The said dealer is averred to have committed a default in paying tax in instalments. The amount, therefore, sought to be recovered by the sales tax authorities stood at Rs. 8,14,106 with running interest.

2. M/s. Swet Zinc Limited sold its aforementioned property to one Smt. Minaben Parikh by way of a registered sale deed executed and registered on April 30, 2007 for the consideration of Rs. 45,00,000 and entry was mutated being

numbered as No. 2708 and subsequently amended by No. 2887 on May 8, 2007. In the said property admeasuring 7,823 sq. meters, there are sheds admeasuring 750 sq. meters.

3. The present petitioner purchased part of the land admeasuring 4,812 sq. meters from Smt. Minaben Parikh by a registered sale deed on August 31, 2007 for the sale consideration of Rs. 40,00,000 and an entry was mutated for the said transfer being the entry No. 5497 on registration.

4. It is averred by the petitioner that prior to the execution of the sale deed, an advertisement was published in the newspaper, on July 24, 2007 in Gujarati daily "Gujarat Samachar" to ensure a clear title. No objections were raised or received from any quarter and consequently, the property was registered in the name of the present petitioner. Previously, Minaben Parikh had executed an affidavit and undertaking specifying that all the rights and liabilities were transferred after marketable title and no previous liability exists. It is also further averred in the petition that for and on behalf of M/s. Swet Zinc Limited, the directors Shailesh Shah and Krishnavadan Desai had executed an undertaking with regard to marketable title of the said property.

5. After execution of the sale deed and the mutation of the entry in the joint name of the present petitioner, entry No. 2155 was mutated in the record of rights dated August 11, 2008 as per the order of the Assistant Sales Tax Officer dated July 23, 2008, wherein outstanding sales tax dues of Rs. 8,00,000 together with the interest was recorded with further recording that though nonce under sections 152 and 200 of the Land Revenue Code was issued, sales tax dues were not paid.

6. Subsequent to the said entry, notice u/s 135D of the Land Revenue Code was issued to the present petitioner for the first time on August 28, 2008, which was replied to on December 17, 2008. It is averred in the petition further that dues are the liabilities of M/s. Swet Zinc Limited for the assessment year 2000-01 and the original order of assessment was passed u/s 41 read with section 47 of the Sales Tax Act in the year 2005 against which an appeal was preferred by the party concerned challenging the said order of assessment- The impugned notice of August 28, 2008 issued was pursuant to the ex parte order of assessment u/s 41(4) of the Sales Tax Act. The petitioners insisted that they are the bona fide purchasers value without notice.

7. All the facts averred hereinbefore nowhere mention of any outstanding dues of Sales Tax Department on the said property and the entry mutated in the revenue record is also subsequent to the registered sale deed effected in the name of the present petitioner and his brother. Accordingly, this petition is preferred, inter alia, urging to issue a writ of mandamus for quashing the order of attachment dated July 23, 2008 u/s 155 of the Bombay Land Revenue Code as also for a declaration that the issuance of notice u/s 135D without holding any inquiry is, therefore, illegal and void with farther direction to delete entry No. 2155

recorded in the Revenue record subsequent to the registration of sale deeds in favour of the present petitioner.

8. In the affidavit-in-reply filed by the Department, respondent No. 1, has stated that it has acted in the legitimate interest of the State, which is its bounden duty. It is also said that the erstwhile original owner M/s. Swet Zinc Limited, after retaining the tax, did not pay the same in instalments as was required of it to do and, therefore, the said piece of land bearing Survey No. 49/1 was attached on July 18, 2003 by the then Sales Tax Officer and Sales Tax Officer (3) and Sales Tax Recovery Mamlatdar, Kalol. The amount to be recovered is Rs. 8,14,106 with running interest. It is also further contended that the order of attachment was sent to Talati of Khatraj Gram Panchayat, Taluka Kalol on July 18, 2003 itself and to the Mamlatdar, Kalol with a request to effect necessary entry in the relevant revenue/property records pertaining to the said attachment, which was received by the Mamlatdar Office, Kalol on August 2, 2003.

9. It is further contended that as the said dues of assessment year 2000-01 were not paid, the said piece of land bearing Survey No. 49/1 was attached on July 23, 2008 once again by respondent No. 1 and a copy of second attachment order duly acknowledged by Talati-cum-Mantri, Khatraj Gram Panchayat on August 1, 2008 and Sub-Registrar, Kalol on August 4, 2008 are placed on record. It is also contended in the affidavit-in-reply that the petitioner has not stated as to whether he got a "title clearance certificate" or not, assuming without admitting that he got it since no one raised objections to the newspaper advertisement, the reason for such a thing to happen was on account of the fact that the offices of the Talati of the Khatraj Gram Panchayat, Taluka Kalol and also of the Mamlatdar, Kalol, have not effected any entries in their records pertaining to the first attachment dated July 18, 2003. It is further contended that it is only because of this fact that the petitioner could get transferred the land in question in his name in absence of any entry. As regards the execution of kabulatnama by Shri Krishnavadan Desai on his own behalf also as power of attorney holder of Shailesh Jayantilal Shah, it is vehemently contended that they were issued notices on April 27, 2000, May 21, 2001 and July 7, 2003 before passing the first attachment order on July 18, 2003. Therefore, undertaking (Kabulatnama) declaring that the property was free from any encumbrance and it was a marketable property with a clear title is ex facie a false statement made. It is also further contended that till the copy of the petition is received by respondent No. 1 he was unaware of any transfer by the erstwhile owners and, therefore, notice u/s 135(d) could not have been issued by the respondent to the present petitioner. It is also emphasized that both the persons Shri Krishnavadan Desai and Shri Shailesh Jayantilal Shah have suppressed the facts and by suppressing the material facts, properties have changed hands.

10. In the rejoinder affidavit filed by the petitioner, it is stated that the director of Swet Zinc had deposited with the State Bank of India a sum of Rs. 11,07,086 and an appeal was preferred in 2005 and on September 14, 2005 Rs. 80,000

were deposited as pre-deposit amount before the sales tax authority and this appeal was allowed refunding a sum of Rs. 1,29,517 to the original owner. So far as the assessment of the tax liability for the year 2000-01 is concerned, notice dated April 8, 2005 was issued wherein a sum of Rs. 18,93,613 was assessed over sales tax liability. Adding the penalty, total amount of claim came to Rs. 19,05,597 out of which Rs. 11,03,948 was paid in advance and the outstanding stood at Rs. 8,01,649. Therefore, it is averred that though for the alleged tax liability attachment effected cannot be sustained legally as in appeal, the party had got the refund. It is also further stated that the fact that the Swet Zinc Limited had taken a loan from State Bank of India, Gandhidham Railway Station Branch and the property in question was mortgaged with the State Bank of India, in lieu of the said loan of Rs. 209 lakhs, the amount could not be deposited or repaid to the bank as it had initiated actions for selling the land, factory building and the machinery. Notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 was issued and the fact that the land was sold being plot No. 49/1 admeasuring about 10,164 sq. yards and the entire property was purchased by Smt. Meena Parikh on April 30, 2007 by way of registered sale deed as mentioned hereinbefore, out of which 4,812 sq. meters was sold to the present petitioner. It is, therefore, contended that the order passed by the Sales Tax Officer issuing notice u/s 152 on July 30, 2008 was much after the property was sold by the State Bank of India to Smt. Meena Parikh and the part of the land thereafter was sold to the present petitioner and, therefore, the question of any attachment being effected by the sales tax authority would not arise as prior to the notice u/s 152 of the Sales Tax Act as the sale had already been concluded.

11. It is emphatically pointed out that as far as attachments in connection with property dues are concerned, the dues of sales tax authority or the Government dues have no priority as the State Bank of India was the mortgagee and the bank had exercised powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the property was sold by the bank in the open market. The sale tax dues cannot have priority over the secured dues of the bank, more particularly, in absence of any specific provision under the law and the considerations which were raised by the bank were transferred to the bank. As neither the ownership nor the title of the property remained with M/s. Swet Zinc Limited, for any dues of the Sales Tax Department, therefore, the question of attachment would not arise. It is also further emphasized that the attachment order passed on July 18, 2003 was though sent to Talati-cum-Mantri, Khetraj, as contended, no entry had been effected in the Revenue records pertaining to the said attachment and, therefore, unless the property was under the attachment and the entry was mutated, it cannot affect the transfer made by the purchaser value without notice. Moreover, the State Bank of India having a prior claim than that of the sales tax authority, former gets the clear title and the Department get no primacy over such secured debt.

12. Furthermore, an affidavit has also been filed wherein it is pointed out that the Deputy. Commissioner of Commercial Tax (Appeals), by an order of assessment passed on March 31, 2005 for the assessment year 2000-01 in the matter of M/s. Swet Zinc, Limited, passed an order on August 4, 2009 and the said order gets merged into the order passed in appeal preferred by the original assessee and, therefore, the impugned order of attachment dated July 23, 2008 would not stand.. A copy of the order passed by the Deputy Commissioner of Commercial Tax is suggestive of the refund of Rs. 94,188.

13. This court has heard at length learned counsel for the petitioner, who has vehemently and strenuously argued on the lines of the averments made in the petition.

14. It is urged that as the Sales Tax Department cannot have any priorities of its dues over the secured dues of the bank and as the properties have been sold in the open market by the bank in lieu of its dues from the erstwhile owner M/s. Swet Zinc Limited, title of the present owners cannot be affected. Also on the count that mutation of the entry admittedly of the second attachment is subsequent to the change of hands of the property by way of a registered sale deed in favour of the present petitioner, therefore also, it does not affect the title. When the order of August 4, 2009 of Deputy Commissioner of Commercial Tax is suggestive of refund of Rs. 94,188, the claim of the Sales Tax Department does not stand to remain.

15. The learned Assistant Government Pleader Ms. Maithili Mehta has vehemently argued in support of the contentions raised in the affidavit-in-reply although she admitted that even though the first attachment had been communicated to the office of the Talati-cum-Mantri, Khatrej Gram Panchayat and Mamlatdar, Kalol on August 2, 2003, the second time attachment order was needed to be passed on July 23, 2008. She agreed that for the reasons best known to the authority concerned, no entry was mutated despite specific direction from the Sales Tax Department while communicating order of August 2, 2003. Vide order dated August 4, 2009, it is admitted that the refund of Rs. 94,188 in the favour of the erstwhile Director of M/s. Swet Zinc Limited is passed.

16. In light of the facts and circumstances mentioned hereinabove, for the reasons to be discussed hereinafter, present petition deserves to be allowed.

17. Taking the last ground first of allowing the appeal preferred by the original assessee, M/s. Swet Zinc Limited, for the year 2000-01, it emerges from the record that the said appeal has attained finality by an order dated August 4, 2009 passed by the Deputy Commissioner (Appeals III). This order has been passed u/s 65 of the Gujarat Sales Tax Act and after detailed analysis of the figures, the refund of Rs. 94,188 is finalized giving relief of Rs. 8,95,837 to the erstwhile assessee.

18. The erstwhile owner was enjoying the sales tax incentive benefits in the form of deferment of tax whereby he was allowed to collect tax, retain it for a specific

period and was required to pay back in equal instalments, which he did not do and thereby committed a default. This had resulted into attachment of his land bearing Survey No. 49/1 and the dues stood at Rs. 8,14,106 with panning interest. He has been given relief of Rs. 8,95,837 and out of the total amount paid of Rs. 11,03,948 he has been refunded Rs. 94,188.

19. In other words, the very basis which had led to passing of the order of first attachment crumbles and with that edifice having shaken, nothing remains in the petition. It is also not the say of respondent No. 1 that once this order of the attachment in favour of the original assessee is passed, there is any sales tax dues recoverable from the erstwhile owner and, therefore, on that count alone the petition deserves to be allowed.

20. At the same time, taking second ground raised at this stage, admittedly the order of the first attachment was passed by the sales tax authority on July 18, 2003 and the said order was sent to the Talati-cum-Mantri of Khetraj Gram Panchayat and Mamlatdar, Kalol with a request to effect necessary entry in the relevant revenue record. Inward entry of this communication was made for this very purpose in the offices of the Talati and Mamlatdar on August 2, 2003. This order unequivocally is suggestive of the fact that though the notices have been served duly to M/s. Swet Zinc Limited u/s 152 and section 200 of the Land Revenue Code after calculating total dues of Rs. 8,14,106 with interest and penalty, it had failed to pay the same and thereby discharge its liability to pay the sales tax dues differed. Resultantly, there was a need to auction the said property and hence this outstanding dues, which arose in the form of charge was to be mutated in the Revenue record. What gets revealed from the record is that till the order of the second attachment dated July 23, 2008 was sent, no entry was mutated by the office of Mamlatdar despite specific request in the form of direction through the communication dated July 18, 2003. There is no explanation as to why despite a specific order of attachment and intimation to both these offices, no entry has been mutated, and corresponding vigilance is also absent on the part of the office of the sales tax authority to ensure that its order had been duly effected and executed. This non-action and non-performance on the part of the concerned authorities and lack of due care on the part of the sales tax authorities to ensure the execution of its order of attachment, by way of mutation of the entry in the revenue record led to the transfer of the property without the dues of the sales tax authority being noticed and registered. There could be no dispute that the actions initiated by respondent No. 1 was necessary for protecting and safeguarding the legitimate tax revenue of the State. What is incomprehensible is the fact that this large amount of tax, which was due from the original assessee for which three notices were already issued and yet taxes were not recovered. In such circumstances, no reason is forthcoming as to why the entry of attachment, has not been mutated. Even while attaching the same for the second time in the year 2008 no attempt appears to have been made on the part of the authorities to verity as to at what level the fault lied, which resulted into the property twice having changed the

hands without any charge of sales tax authority having been mentioned.

21. We would like to observe here that not only the scrupulous execution of the orders of sales tax authority attaching the property needs to be done by mutating entry in the revenue record at the relevant time but also apt vigilance be observed on the part of the sales tax authority to ensure that the intimation once having been sent to the concerned revenue authority, is duly taken note of and executed by it and revenue authority is also to report back, failing failure of the recovery of the Government dues is almost inevitable. Possibilities also cannot be ruled out of collusion so as to frustrate recovery. Consequently, the Government dues are neither recorded nor recovered allowing the property to change hands. Not only notice of attachment eventually fails in such circumstances but, this would encourage unscrupulous practices for defeating the tax collection.

22. Coming to the first issue, in the instant case, admittedly, till the second attachment order was made on July 23, 2008, there was no entry in the revenue record and, therefore, the present petitioner cannot be expected to record any outstanding dues and particularly with both erstwhile owners Smt. Meena Parikh and Shri Krishnavadan Desai for himself and as a attorney holder of Mr. Shailesh Jayantilal Shah when had executed Kabulatnama of the property being marketable with clear title, the second attachment cannot affect his title with all protections that have been taken prior to his executing the registered sale deed and mutating his entry in the revenue record.

23. Taking first issue, as rightly pointed out by the learned advocate for the petitioner, purchase of the property was by Smt. Meena Parikh, who had purchased it from the State Bank of India, which had sold it after invoking notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the total area of the land is 7,000 sq. meters and the area of the land purchased by the present petitioner was 4,812 sq. meters on August 31, 2007 by an entry No. 4497 effected in the Revenue record. Admittedly, prior to the purchase, there was no objection raised against that and as rightly pointed that sales tax dues cannot claim priority over the secured, dues of the bank. The bank after exercising its powers had sold the same by way of an auction.

24. It is pertinent to mention that this court in Special Civil Application No. 3786 of 2010 and connected petitions decided by the Division Bench in the case of Tax Recovery Officer Vs. Industrial Finance Corporation of India and Another, followed the decision of this court in the case of Kotak Mahindra Bank Ltd. Vs. District Magistrate and Another, . wherein the Division Bench was concerned with the dues of the Central Excise Department vis-a-vis the debts of the secured creditor being financial institution, which was exercising power under SARFAESI Act. The Division Bench held therein that unsecured Crown debt has no priority over secured debt of a secured creditor by holding thus:

30. In the present case, there is nothing on record to suggest that under the Central Excise Act or the Rules framed thereunder priority of charge over the secured debt has been created. No such law has been brought on record to suggest that the Central Government has any first charge or priority over the secured or unsecured debt. Similar contention was raised on behalf of the Central Government referring to certain provisions of the Central Excise Act, 1944 in the case of Union of India (UOI) and Others Vs. SICOM Ltd. and Another, and the Supreme Court rejected such claim. The Madras High Court also while dealing with the provisions of the Central Excise Act, also rejected the claim of the Excise and Customs Department of the Central Government to have priority over the secured or unsecured debt. In that view of such authoritative pronouncements of the Supreme Court and the decision of the Full Bench of the Madras High Court, we hold that the Excise and Customs Department of the Central Government cannot claim any priority over the secured debt of a secured creditor-Kotak Mahindra Bank as created under the Securitization Act.

25. It will not be out of place to mention at this stage that the Division Bench of this court in the case of Baroda City Co-Operative Bank Ltd. Vs. State of Gujarat and Others, , considered the judgments of other courts and those of the Supreme Court on the question of tax dues of State vis-a-vis the unsecured debt of private parties and held in the following manner (page 365 in 39 VST):

16. From the judgments referred to above, it will be evident that--

(a) The arrears of tax due to the State can claim priority over the unsecured debt.

(b) If first charge by way of priority is not claimed under the statute, the said doctrine is not applicable.

(c) Normally, the doctrine of first charge/priority of State will prevail over the private debt which is an unsecured debt.

(d) In normal course, the doctrine of first charge/priority cannot prevail over secured debts, but if first charge of the State is over the secured debts, both debts being equal, the State can claim priority even over the secured debts, and

(e) The secured debts under the Securitization Act or debt under the R.D.D.B. Act has no first charge, and thereby, cannot compete with first charge/priority claim of the State if made under the statute.

26. In the light of the decision above, it can be held that dues of the Sales Tax Department cannot have primacy over the secured debt of banks. The petitioner was fully secured by the Kabulatnama given in his favour by both Smt. Meena Parikh and the directors of the erstwhile company. In such situation, it can be held that the purchaser has purchased the property for value without notice from the auction held by secured creditor-financial institution. It cannot be affected by any subsequent attachment nor by way of any earlier deed on the part of the erstwhile owners and, therefore, on both these counts also the court is of the opinion that the title of the present petitioner cannot be affected. And therefore,

any notice issued in relation to the land purchased by the present petitioner by way of a registered sale deed on and by an entry mutated cannot be effected and the same requires to be protected by way of an order in this petition. In the wake of the order dated August 4, 2009, in appeal u/s 65 of the Sales Tax Act, though has put an end to the liability of the erstwhile owner, even if there are any dues remaining to be recovered from the owner from the remaining portion of the land, out of the total admeasuring 4812 sq. meters executed in favour of the present petitioner by way of a registered sale dated August 31, 2007 by an entry No. 5417, the Sales Tax Department can initiate actions against erstwhile owners or the subsequent transfer Shri Meena Parikh but that in any manner cannot affect the title of the present petitioner in the light of the discussion held hereinabove.

27. In the aforementioned premise, this petition succeeds; The first order of attachment dated July 18, 2003 and the second order of attachment dated August 23, 2008 recorded vide entry No. 2155 are quashed. The petitioner being the bona fide purchaser value without notice Sales Tax Department shall not proceed with the sale of the property in question. Petition thus stands allowed with consequential reliefs. Rule to the extent above is made absolute. Costs to follow the cause.