

(2015) 04 GUJ CK 0110

In the Gujarat High Court

Case No : Special Civil Application No. 7210 of 2015

Vishwanath Realtor and Others

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Value Added Tax Act, 2003 — Section 34(8A), 44, 45, 45(1)

Citation : (2015) 04 GUJ CK 0110

Hon'ble Judges : M.R. Shah, J;S.H. Vora, J

Bench : Division Bench

Advocate : S.N. Soparkar, Senior Advocate and Uchit N. Sheth, for the Appellant; Chintan Dave, AGP, Advocates for the Respondent

Judgement

M.R. Shah, J.

1. Rule. Shri Chintan Dave, learned A.G.P. waives service of notice of Rule on behalf of the respondents.

2. In the facts and circumstances of the case and with the consent of the learned advocates appearing for the respective parties, the present petition is taken up for final hearing today.

3. By way of this petition under Article 226 of the Constitution of India, the petitioners have prayed for an appropriate writ, order or direction for quashing and setting aside the impugned order dated 15.04.2015 provisionally attaching the bank accounts of the petitioners.

3.1. The petitioners have further prayed for an appropriate writ, order or direction for quashing and setting aside the garnishee notice dated 15.04.2015 issued under Section 44 of the Gujarat Value Added Tax, 2003 (hereinafter referred to as the "V.A.T. Act") for making the recovery from the bank account of the petitioners.

3.2. The petitioners have further prayed for an appropriate writ, order or direction for release of the personal bank accounts of the 1st petitioner which have not even been referred to in the provisional attachment order.

4. It is the case on behalf of the petitioners that the 1st petitioner is a proprietorship firm engaged in the business of building construction and the 2nd petitioner is a proprietor of the 1st petitioner. That the proprietorship firm is duly registered under the V.A.T. Act and it duly files returns and pays tax under the V.A.T. Act and sale of the goods made in the course of execution of the works contract.

4.1. It appears that the search proceedings were conducted by the officers of the Commercial Tax Department on 13.04.2015 at the office, construction sites and residence of the petitioners.

4.2. It is the case on behalf of the petitioners that no incriminating evidence or unaccounted cash was found during the course of the search proceedings. It is the case on behalf of the petitioners that upon inquiry, the petitioners informed that in the past, the 2nd petitioner was a partner in the partnership firm by the names of "Kapila Developers", "Kapila Infrastructure", "Vishwanath Developer" and "Vishwanath Infrastructure". According to the petitioners, since the respective projects of "Kapila Developers" and "Kapila Infrastructure" were already over, the partnership firms have been dissolved on 07.07.2008 and 19.08.2008 respectively. According to the petitioners, the firm "Vishwanath Developer" had only acted as consultant for construction projects and it was not involved in any construction activity. According to the petitioners, the construction project in the case of "Vishwanath Infrastructure" was over in the year 2009-2010 but since there are some outstanding payments, the firm is yet to be dissolved. According to the petitioners, the petitioners thereafter, produced accounting records from the accounting year 2009-2010 till date. That, when the Assessing Officer required the petitioners to produce records for the years 2007-2008 and 2008-2009, the petitioners informed the concerned officer that they have required to maintain books of accounts and records only for a period of 6 years and, therefore, the records of the earlier years were not available with them. The Assessing Officer further proceeded to calculate liability of the old firms under the V.A.T. Act on presumptive basis. According to the Assessing Officer, the cumulative liability of the old firms under the V.A.T. Act comes to Rs. 4.50 crores. It is the case on behalf of the petitioners that though the liability of the petitioners was determined in an arbitrary manner, the petitioners offered immovable property of Rs. 5 crores as security in order to avoid dispute till completion of the assessment proceedings on 15.04.2015. That, despite offering the immovable property of Rs. 5 crores as security against the alleged liability under the V.A.T. Act of Rs. 4.5 crores, the impugned order dated 15.04.2015 came to be passed for provisionally attaching such immovable property. The notice was issued to the petitioners in Form 401 calling for information and records. The notice was also issued for issue based assessment under Section

34(8A) of the V.A.T. Act and for imposition of the penalty in Form 309.

4.3. It is the case on behalf of the petitioners that even though the Revenue of the State was fully secured by attachment of the immovable property, the respondent-authority had proceeded to provisionally attach the bank account of the 1st petitioner under Section 45(1) of the V.A.T. Act. The concerned officer has also issued garnishee notice under Section 44 of the V.A.T. Act directing the bank to make payment from the bank account of the 1st petitioner. That, by order dated 17.04.2015, the concerned respondent-authority had also attached the personal bank account of the petitioner No. 2, though in the provisional attachment order, there is no reference to the personal bank account of the petitioner No. 2.

4.4. Feeling aggrieved and dissatisfied with the impugned orders of provisional attachment under Section 45(1) of the V.A.T. Act; attaching the bank accounts of the petitioner No. 1; issuing the garnishee notice with the respect to the bank accounts of the petitioner No. 1 and attaching the personal bank account of the petitioner No. 2, the petitioners have preferred the present Special Civil Application under Article 226 of the Constitution of India.

5. Shri S.N. Soparkar, learned Senior Counsel appearing with Shri Uchit Sheth, learned advocate for the petitioners has vehemently submitted that the learned Commercial Tax Officer has materially erred in provisionally attaching the bank accounts of the petitioners under Section 45(1) of the V.A.T. Act.

5.1. It is submitted that, as such, during the pendency of the assessment proceedings, the petitioners offered immovable property of Rs. 5 crores as security in order to avoid dispute till completion of the assessment proceedings and in fact, the immovable property worth Rs. 5 crores is already attached by the Assessing Officer. It is submitted that even as per the calculation of the department, cumulative liability of all the partnership firms in which, the 2nd petitioner was a partner, would be Rs. 4.5 crores. It is submitted that, therefore, the Revenue is/was thus sufficiently secured by attachment of the immovable property. It is submitted that, therefore, the impugned order dated 15.04.2015 provisionally attaching the bank accounts of the petitioners and garnishee notice dated 15.04.2015 issued under Section 44 of the V.A.T. Act for making recovery from the bank accounts of the petitioners are absolutely illegal and most arbitrary.

5.2. Shri Soparkar, learned Senior Counsel appearing on behalf of the petitioners has vehemently submitted that in the present case, the liability of the petitioners under the V.A.T. Act is yet to be adjudicated and/or crystallized and as on today, no order of assessment has been passed against the petitioners determining the liability of the petitioners. It is submitted that still, considering the fact that the cumulative liability might be Rs. 4.5 crores, the petitioners voluntarily offered the immovable property worth Rs. 5 crores as security and consequently, the order of attachment with respect to the immovable property worth Rs. 5 crores has

been passed. It is submitted that, therefore, as such, the Revenue has been fully protected, therefore, the attachment of the bank accounts of the petitioners is not warranted and/or not justified.

5.3. It is submitted that even otherwise considering Section 45(1) of the V.A.T. Act, where during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may by order in writing attach provisionally any property belonging to the dealer in such manner as may be prescribed. It is submitted that, therefore, only on formation of the opinion by the Commissioner that such a provisional attachment is necessary to protect the interest of the Government Revenue, in that case only provisional attachment order can be passed. It is submitted that in a given case, on the basis of some reliable information or the past conduct of the dealer, it is found by the Commissioner that the concerned dealer against whom, the assessment or reassessment proceedings, as the case may be, are pending, is likely to sale the property so as to see that the Revenue subsequently may not be able to recover any amount of tax, interest and/or penalty due and payable and the interest of the Revenue is likely to be affected and/or defeated and in that case, on forming an opinion that it is necessary so to do, the Commissioner may by order in writing, attach provisionally any property belonging to the dealer in such manner as may be prescribed. It is submitted that however, for the aforesaid purpose, there must be a tangible material of objective facts with the Commissioner.

5.4. It is submitted by Shri Soparkar, learned Senior Counsel appearing for the petitioners that mere pendency of any assessment or reassessment proceedings is not enough to pass the order of provisional attachment under Section 45(1) of the V.A.T. Act.

5.5. It is submitted that in the present case, as such, the petitioners themselves offered the immovable property worth Rs. 5 crores as security and, in fact, the immovable property worth Rs. 5 crores against the alleged liability of the petitioners of Rs. 4.5. crores was already under attachment and, therefore, the impugned order of provisional attachment of the bank accounts of the petitioners including the personal bank account of the petitioner No. 2, is/are absolutely illegal, most arbitrary and perverse.

5.6. It is submitted that accordingly even the garnishee notice served upon the bank for recovery of the amount lying in the bank accounts of the petitioners issued under Section 44 of the V.A.T. Act, also cannot be sustained as the same is arbitrary and perverse and consequently, the same also deserves to be quashed and set aside.

5.7. It is further submitted by Shri Soparkar, learned Senior Counsel appearing for the petitioners that even otherwise, the impugned garnishee notice issued under Section 44 of the V.A.T. Act is absolutely illegal and most arbitrary. It is

submitted that in the present case, the assessment proceedings are yet pending adjudication. It is submitted that as on today, no order has been passed against the petitioners with respect to any tax liability and/or interest and penalty under the V.A.T. Act. It is submitted that, therefore, the petitioners cannot be said to be in arrears of tax, penalty or interest under the V.A.T. Act. It is submitted that, therefore, so long as the petitioners cannot be said to be in arrears of tax, penalty or interest under the V.A.T. Act, there is no question of any garnishee notice/order under Section 44 of the V.A.T. Act. It is submitted that, therefore, also the impugned garnishee notice calling upon the concerned banks to pay the amount lying in the bank accounts of the petitioners is absolutely illegal, most arbitrary and perverse and even contrary to Section 44 of the V.A.T. Act.

5.8. Shri Soparkar, learned Senior Counsel appearing on behalf of the petitioners has placed on record an undertaking that the immovable property which is provisionally attached by orders at Annexure-J is free from any encumbrances/ mortgage and that the said property-132/FF/101, 101, Vishwanath, Opp.Sammundar-2, Azad Society, Ambavadi, Ahmedabad shall neither be transferred nor will any encumbrances be created on the property during the pendency of the assessment proceedings under the V.A.T. Act initiated by the notice dated 14.04.2015. The undertaking is directed to be taken on record.

5.9. Making the above submissions, it is requested to allow the present petition and quash and set aside the impugned order of provisional attachment of the bank accounts of the petitioners and garnishee notice and consequently allow the present petition with exemplary cost.

6. In response to the notice issued by this Court, Shri Chintan Dave, learned A.G.P. has appeared on behalf of the respondents. He has fairly conceded that in view of the security furnished by the petitioners of the immovable property worth Rs. 5 crores and the provisional attachment order dated 14.04.2015 to provisionally attach the immovable property of the petitioners worth Rs. 5 crores, the impugned order of provisional attachment of the bank accounts of the petitioners including the personal bank account of the petitioner No. 2 and even the impugned garnishee notice are not warranted and not justified. He has fairly conceded that as such, by provisional attachment of the immovable property worth Rs. 5 crores which, as such, was as security by the petitioners, the interest of the Revenue has been fully secured/protected as the liability of the petitioners under the V.A.T. Act would be approximately Rs. 4.5. crores. Therefore, as such, Shri Dave, learned A.G.P. appearing on behalf of the respondents is not in a position to defend the action of the respondents in passing the impugned orders of provisional attachment of the bank accounts of the petitioners including the personal bank account of the petitioner No. 2 and even the impugned garnishee notice.

7. Heard the learned advocates appearing on behalf of the respective parties at length.

8. At the outset, it is required to be noted that by way of this petition under Article 226 of the Constitution of India, the petitioners have prayed for an appropriate writ, order or direction to quash and set aside the impugned orders of provisional attachment of the bank accounts of the petitioners as well as the personal bank account of the petitioner No. 2 and also to quash and set aside the impugned garnishee notice with respect to bank accounts of the petitioners.

8.1. At the outset, it is required to be noted that as such, the assessment proceedings are yet pending. Therefore, the liability of the petitioners under the V.A.T. Act is yet to be adjudicated upon and/or crystallized. It is not in dispute that at the most, on completion of the assessment proceedings, the liability of the petitioners would be approximately Rs. 4.5 crores. During the pendency of the assessment proceedings, the petitioners themselves offered the immovable property worth Rs. 5 crores as security and as such, by order dated 14.04.2015, the immovable property worth Rs. 5 crores i.e. property No. 132/FF/101, 101, Vishwanath, Opp.Sammundar-2, Azad Society, Ambavadi, Ahmedabad is ordered to be provisionally attached. The said order of provisional attachment of the immovable property is passed under Section 45 of the V.A.T. Act which is not under challenge. Therefore, as such, the interest of the Revenue is fully protected by the provisional attachment of the immovable property worth Rs. 5 crores against the liability under the V.A.T. Act of the petitioners of approximately Rs. 4.5 crores. Despite the above, the respondent No. 2 has passed the impugned orders of provisional attachment of the bank accounts of the petitioners and even the personal bank account of the petitioner No. 2. Not only that, even the garnishee notice has been issued upon the respondent No. 3-Punjab National Bank with respect to the bank accounts of the petitioners and the respondent No. 3-Punjab National Bank is directed to pay to the Government, the amount lying in the bank accounts of the petitioners. At this stage, it is required to be noted that the garnishee notice is issued under Section 44 of the V.A.T. Act. Therefore, when by order of provisional attachment of the immovable property worth Rs. 5 crores during the pendency of the assessment proceedings has already been passed, the interest of the Revenue has been already fully protected. Therefore, as such, there was no reason at all for the respondent No. 2 to pass the impugned provisional attachment orders to attach the bank accounts of the petitioners and even the personal bank account of the petitioner No. 2.

8.2. The order of provisional attachment has been passed under Section 45 of the V.A.T. Act. Section 45 of the V.A.T. Act reads as under:-

"45. (1) Where during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may by order in writing attach provisionally any property belonging to the dealer in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry

of a period of one year from the date of the order made under sub-section (1)."

8.3. Section 45 of the V.A.T. Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer. However, such satisfaction must be on some tangible material on objective facts with the Commissioner. In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any order is passed against the dealer under the V.A.T. Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under Section 45 of the V.A.T. Act.

8.4. In the present case, as observed hereinabove, it is not in dispute that as such, against the estimated liability of the petitioners under the V.A.T. Act of Rs. 4.5 crores, the immovable property worth Rs. 5 crores is already under attachment. Under the circumstances, the interest of the Government Revenue has been fully protected. Therefore, thereafter, there was no reason whatsoever for the respondent No. 2 to pass the order under Section 45 of the V.A.T. Act of provisional attachment of the bank accounts of the petitioners including the personal bank account of the petitioner No. 2. Such an exercise of powers is absolutely illegal and most arbitrary which cannot be sustained. There is no justification pointed out to exercise powers under Section 45 of the V.A.T. Act and passing the order of provisional attachment of the bank accounts of the petitioners including personal bank account of the petitioner No. 2. There is no formation of opinion by the Commissioner that for the purpose of protecting the interest of the Government Revenue, the impugned order of provisional attachment of the bank account of the petitioners including the personal bank account of the pet No. 2 has been passed.

8.5. Under the circumstances, the impugned order of provisional attachment of the bank accounts of the petitioners including the personal bank account of the petitioner No. 2 cannot be sustained and the same deserves to be quashed and set aside.

9. Now, so far as the challenge to the impugned garnishee notice served upon

the respondent No. 3-Punjab National Bank with respect to the bank account of the petitioners is concerned, the same is also absolutely illegal and most arbitrary and even contrary to the provisions of Section 44 of the V.A.T. Act. It appears that the garnishee notice has been issued in exercise of the powers under Section 44 of the V.A.T. Act. Section 44 of the V.A.T. Act reads as under:-

"44. (1) Notwithstanding anything contained in any law or contract to the contrary, the Commissioner may, at any time or from time to time, by notice in writing, a copy of which shall be forwarded to the dealer at his last known address, require,--

(a) any person from whom any amount of monies is due, or may become due, to a dealer on whom notice has been served under sub-section (1), or (b) any person who holds or may subsequently hold monies for or on account of such dealer, to pay to the Commissioner, either forthwith upon the monies becoming due or being held or within the time specified in the notice (but not before the monies becomes due or is held as aforesaid) so much of the monies as is sufficient to pay the amount due by the dealer in respect of the arrears of tax, penalty or interest under this Act, or the whole of the money when it is equal to or less than that amount.

Explanation.-- For the purposes of this subsection, the amount of monies due to a dealer from, or monies held for or on account of a dealer by any person, shall be calculated by the Commissioner after deducting therefrom such claims, if any, lawfully subsisting, as may have fallen due for payment by such dealer to such person.

(2) The Commissioner may amend or revoke any such notice or extended the time for making any payment in pursuance of the notice.

(3) Any person making any payment in compliance with a notice under this section shall be deemed to have made the payment under the authority of the dealer, and the receipt thereof by the Commissioner shall continue a good and sufficient discharge of the liability of such person to the extent of the amount specified in the receipt.

(4) Any person discharging any liability to the dealer after receipt of the notice referred to in this section, shall be personally liable to the Commissioner to the extent of the liability discharged or to the extent of the liability of the dealer for tax, penalty and interest, whichever is less.

(5) Where a person to whom a notice under this section is sent objects to it by a statement in writing that the sum demanded or any part thereof is not due or payable to the dealer or that he does not hold any monies for or on account of the dealer, the Commissioner shall hold an inquiry and after giving to such person or dealer a reasonable opportunity of being heard, make such order as he thinks fit.

(6) Any amount of monies which the aforesaid person is required to pay to the

Commissioner, or for which he is personally liable to the Commissioner under this section shall, if it remains unpaid, be recoverable as an arrears of land revenue.

(7) The Commissioner may apply to the court in whose custody there is monies belonging to the dealer for payment of the amount of such monies towards the outstanding amount of tax, interest and penalty payable by the dealer."

10. As observed hereinabove, as such, the assessment proceedings are still pending. As on today, there is no order passed against the petitioners under the V.A.T. Act and there is no tax liability and/or any further liability under the V.A.T. Act against the petitioners. On fair reading of Section 44 of the V.A.T. Act, garnishee order/notice can be issued under Section 44 of the V.A.T. Act with respect to any amount due by which, the dealer is in arrears of tax, penalty or interest under the V.A.T. Act. Under the circumstances, the impugned garnishee notice is absolutely illegal and most arbitrary which deserves to be quashed and set aside.

11. In view of the above and for the reasons stated above, the impugned order of provisional attachment of the bank accounts of the petitioner including the personal bank account of the petitioner No. 2 and the impugned garnishee notice served upon the respondent No. 3-Punjab National Bank and the banker of the petitioners are absolutely illegal and most arbitrary. In the present case, the exercise of powers by the respondent No. 2 under Sections 45 and 44 of the V.A.T. Act is nothing but an abuse of powers by the respondent No. 2 and undue harassment to the petitioners. Under the circumstances, this is a fit case to impose exemplary cost upon the respondent No. 2 while allowing the present petition and quashing and setting aside the impugned orders.

12. In view of the above and for the reasons stated above, the present petition succeeds. The impugned orders dated 15.04.2015 provisionally attaching the bank accounts of the petitioners including the personal bank account of the petitioner No. 2 as well as the impugned garnishee notice dated 15.04.2015 are hereby quashed and set aside. However, the provisional attachment order with respect to the immovable property worth Rs. 5 crores i.e. property No. 132/FF/101, 101, Vishwanath, Opp.Sammundar-2, Azad Society, Ambavadi, Ahmedabad as per order dated 14.04.2015 shall continue and the petitioner No. 2 to abide by the undertaking filed before this Court.

13. With the above, the present petition is allowed. Rule is made absolute to the aforesaid extent with token exemplary cost quantified at Rs. 5,000/- to be deposited with the Registry of this Court within a period of two weeks from today. On such deposit, the Registry is directed to pay the said amount to the petitioner No. 2 by A/c. Payee cheque forthwith.