

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 5413 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

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

SHREE RADHEKRUSHNA GINNING AND PRESSING PVT. LTD.
 THROUGH DIRECTOR YASH PARESHBHAJI KHACHAR
 Versus
 STATE OF GUJARAT

Appearance:

MR. APURVA N MEHTA(7202) for the Petitioner(s) No. 1
 MR UTKARSH SHARMA, AGP - ADVANCE COPY SERVED TO
 GOVERNMENT PLEADER/PP for the Respondent(s) No. 1
 DS AFF.NOT FILED (N) for the Respondent(s) No. 1,2,3

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 29/03/2022

ORAL JUDGMENT

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

1 By this writ application under Article 226 of the Constitution of

India, the writ applicant has prayed for the following reliefs:

“(A) Your Lordships may be pleased to admit and allow the present petition.

“(B) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order and direction and further be pleased to quash and set aside the impugned order dated 13.08.2020 passed by the Ld. Respondent No.2.

“(C) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order and direction and further be pleased to direct the Ld. Respondent No.2 to release the charge on the property of the petitioner, being Revenue Survye No.252/2, Plot No.01, village : Gomta, Taluka : Gondal, District : Rajkot.

“(D) Such other and further relief/s as may be deemed just and proper in the facts and circumstances of the present case may kindly be granted.”

2 It appears from the materials on record that the writ applicant has incurred a liability of Rs.1,68,10,098/- towards the VAT under the provisions of the GVAT Act, 2003. Such liability came to be incurred by virtue of an assessment passed by the competent authority order dated 23rd March 2020.

3 The assessment order dated 23rd March 2020 is now a subject matter of challenge before the first appellate authority. The appeal has been admitted by the first appellate authority and the further proceedings towards the recovery have been stayed on the condition of pre-deposit of Rs.7 Lakh. The writ applicant is here before this Court redressing the grievance that since the first appellate authority has stayed the recovery, the charge which has been created over the property owned by the writ applicant in the form of land and factory building situated at the revenue survey No.252/2, paiki - 1, village : Gomta, Taluka : Gondal, should now be released. In other words, the

charge which has been created in the revenue record should no longer remain in operation.

4 We have heard Mr. Apurva N. Mehta, the learned counsel appearing for the writ applicant and Mr. Utkarsh Sharma, the learned A.G.P. appearing for the State respondents.

5 Mr. Mehta would submit that the apprehension on the part of the department that in the absence of any charge, the writ applicant may dispose of the land and factory building is absolutely misconceived and not well-founded as Section 48 of the GVAT Act takes care of the situation. We are not impressed with such a submission.

6 At one point of time, Mr. Mehta, the learned counsel, during the course of his submissions, got confused between an attachment of property and charge created over the property. Mr. Mehta would also submit that the action on the part of the respondent No.2 is nothing, but amounts to attachment of the property pending the appeal before the first appellate authority. Mr. Mehta would submit that the same is not permissible in law as there is no provision in the GVAT Act which permits attachment of a property after the final assessment order is passed and the first appeal is pending before the first appellate authority.

7 There appears to be a serious misconception on the part of the writ applicant that its property referred to above has been attached. The argument is that there cannot be any attachment of property since against the assessment order, there is an appeal pending and the appellant authority has stayed the recovery.

8 Section 44 of the GVAT Act provides for a special mode of recovery. This provision has no application to the facts of the present case. Section 45 is with respect to the provisional attachment. Even this provision has no application to the facts of the present case as the assessment order has already been passed. Section 46 confer special powers to the Tax Authorities for recovery of tax as arrears of land revenue. We have not reached even to this stage. Section 48 creates a charge by operation of law. Section 48 reads thus:

“48. Tax to be first charge on property. - Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person or account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person.”

9 The plain reading of the aforesaid section would indicate that it starts with a *non-obstante* clause. Section 48 clarifies that if any amount is payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government, the same shall be a first charge on the property of such dealer or as the case may be, such person. It appears that in the case on hand, the State Tax Officer- (3), Unit – 94, Gondal addressed a letter dated 13th August 2020 to the Talati-cum-Mantri of village : Gomta, Taluka : Gondal, which reads thus:

“No.:RVEA-3/U-94/GONDAL/2020-21/Ja.2154/55 DATE.13/8/2020

*To,
The Talati Mantri
At Gomta, Ta. Gondal.*

Subject:-To provide information of property/making entry of encumbrance.

Name of the dealer firm:- Shri Radhekrishna Ginning & Pressing

Pvt.Ltd., At Gomta, Ta. Gondal

Tin No.24092703943 PAN No.-AARCS1948P

With due respect it is to state that the government has to recover Rs.1,68,10,098/- + interest under the assessment of Sales Tax/VAT Act of 2015/16 with the dealer shown in the subject above. Information of the person/Company/Firm holding the interest/position in it under your domain is as below.

<i>Sr. No.</i>	<i>Name</i>	<i>Constitution</i>	<i>Address</i>	<i>Remarks</i>
1.	<i>Shri Radhekrihna Ginning & Pressing Pvt. Ltd. at.-Gomta, Ta.Gondal</i>	<i>Pvt. Ltd.</i>	<i>R.S.No.252/2 Paiki 1 At.-Gomta, Ta.-Gondal</i>	
	<i>Dir.- 1. Chhaganbhai and others.</i>	<i>Dilipbhai Sakhiya</i>		

You are instructed to provide that information of the above properties owned by the aforesaid persons/Firm/Company to this office and in case it is found that the above the property is owned by the dealer then make an entry of the charge with respect to the government dues/debts along with the evidence and provide to this office at the earliest.

*Sd/-illegible
State Tax Officer-(3)
Unit-94, Gondal.”*

10 In response to the aforesaid, the Talati-cum-Mantri has mutated an entry in the village form No.2 that the owner of Radhakrishna Ginning and Pressing Private Limited Company – Shri Dilipbhai Chhaganbhai Shakhiya has incurred tax liability. In such circumstances, for the purpose of recovering the said amount, the first charge over the

property owned by the company shall be that of the Government.

11 The aforesaid charge may be a bit uncomfortable to the writ applicant as it appears that the bank from whom the writ applicant has obtained overdraft facility is creating some problems. It is for the writ applicant to sort it out with the bank. Today, there is no good reason for this Court to interfere in the matter.

12 We take this opportunity to explain the effect of attachment and also the effect of charge. In **Mulla's Civil Procedure Code, 8th Edn.**, the law as applicable in India is thus summarised (p. 187):

“Attachment creates no charge or lien upon the attached property. It merely prevents and avoids private alienations; it does not confer any title on the attaching creditors. There is nothing in any of the provisions of the Code which in terms makes the attaching creditor a secured creditor or creates any charge or Hen in his favour over the property attached. But an attaching creditor acquires, by virtue of the attachment, a right to have the attached property kept in custodia legis for the satisfaction of his debt, and an unlawful interference with that right constitutes an actionable wrong.”

13 The Privy Council in **Moti Lal v. Karrabuldin (1897) I.L.R. 25 Cal. 179**, p.c. where Lord Hobhouse stated (p. 185):

“Attachment, however, only prevents alienation, it does not confer title.”

14 Similarly, in the Calcutta Full Bench case of **Frederick Peacock v. Madan Gopal (1902) I.L.R. 29 Cal. 428**, F.B. Sir Francis Maclean, in delivering the judgment of the Full Bench, says (p. 431):

“I think, therefore, it must be taken that the attaching creditor here did not obtain by his attachment any charge or lien upon the attached property, and if so, no question as to the Official Assignee only taking the property of the insolvent subject to any equities affecting it, can arise.”

And Mr. Justice Ghose says (p. 483):

“I am clearly of opinion that the attaching creditor did not acquire any title or charge upon the property by reason of the attachment in question.”

15 A charge on the other hand under Section 48 of the GVAAT Act creates no interest in or over a specific immovable property, but is only a security for the payment of money. (See : **Dattatreya Shanker Mote vs. Anand Chintaman Datar and others (1974) 2 SCC 799**).

16 The concept of charge emanates from Section 100 of the Transfer of Property Act. Section 100 of the Transfer of Property Act, 1882 defines “charge” as follows:

“100. Charges.- Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

17 The above-mentioned Section clearly indicates the following types of charges :

- 1) Charges created by act of parties; and
- 2) Charges arising by operation of law.

18 The words “by operation of law” are more extensive than the words “by law” and a charge created by operation of law includes a charge directly created by the provisions of an Act (like Section 48 of the GVAT Act) as well as other charges created indirectly as a legal consequence of certain conditions. The expression “operation of law” only means working of the law.

19 A charge, as we have already seen, is a right to receive a certain sum of money. If a dealer registered under the GVAT Act incurs any liability towards payment of tax, then the State has a right to receive a certain sum of money as crystallized in the form of liability. This recovery of the money from the property can be by attaching the assets of the defaulting dealer, and thereafter, putting those to auction. This type of recovery would be governed by the provisions of Section 46 of the GVAT Act.

20 In the case on hand, it could be said that the day the assessment order came to be passed determining the liability of the writ applicant under the provisions of the GVAT Act, a charge over the immovable assets of the writ applicant could be said to have been created in favour of the State by operation of law, as envisaged under Section 48 of the GVAT Act. Today, the recovery might have been stayed by the first appellate authority, but, tomorrow, if the first appeal as well as the

second appeal that may be filed by the writ applicant is dismissed, then the next step in the process would be the recovery of the requisite amount. What could be said to have been done as on date is just to make one and all aware that by operation of law, as envisaged under Section 48 of the GVAT Act, there is a charge of the State Government over the immovable properties owned by the writ applicant, as described above. How would all come to know about the same. It is for this reason that an entry is ordinarily made in the revenue records.

21 We would like to clarify that what has been done by the Talati-cum-Mantri does not amount to attachment of the property. There is no attachment. We reiterate that there is a fine distinction between attachment of property and a charge over the property by operation of law.

22 In the result, this writ application fails and is hereby rejected.

(J. B. PARDIWALA, J)

**THE HIGH COURT
OF GUJARAT**

(NISHA M. THAKORE, J)

CHANDRESH

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