

HIGH COURT OF GUJARAT (D.B.)**SANDEEP TEXTURISERS PVT LTD & ANR***Versus***STATE OF GUJARAT & ORS****Date of Decision:** 08 November 2012**Citation:** 2012 LawSuit(Guj) 1134**Hon'ble Judges:** [Bhaskar Bhattacharya](#), [J B Pardiwala](#)**Eq. Citations:** 2013 1 GLH 430**Case Type:** Letters Patent Appeal; Special Civil Application; Civil Application**Case No:** 792 of 2012; 6176 of 2012; 6016 of 2012**Subject:** Civil, Constitution, Property**Acts Referred:**[Constitution Of India Art 226](#), [Art 12](#)[Transfer Of Property Act, 1882 Sec 100](#)[Bombay Land Revenue Code, 1879 Sec 150](#), [Sec 155](#), [Sec 152](#), [Sec 135\(d\)](#), [Sec 135\(b\)](#), [Sec 135\(c\)](#)[Bombay Stamp Act, 1958 Art 6](#), [Sec 46](#)**Final Decision:** Application disposed**Advocates:** [Ishan Mihir Patel](#), [Krina Calla](#), [Nanavati Associates](#), [Nandish Chudgar](#)**Cases Cited in (+):** 3**Bhaskar Bhattacharya, C.J.**

[1] This Letters Patent Appeal is at the instance of unsuccessful writ-petitioners and is directed against an order dated 1st May 2012 passed by a learned Single Judge of this Court in Special Civil Application No. 6176 of 2012 by which His Lordship dismissed the writ-petition summarily on the ground of existence of alternative remedy.

[2] The facts leading to the filing of this Letters Patent Appeal may be summed up thus:-

2.1 A mortgage deed was executed between the respondents No. 5 and 6 on the one hand and the respondent No.7 on the other. The said deed was executed for securing the financial assistance given by the respondents No. 5 and 6 to the respondent No.7. According to law, all duties including stamp duty etc. for execution and registration of the mortgage-deed were to be borne by the respondent No.7.

2.2 Subsequently, the mortgage dues of the respondent No. 6 were settled and the respondent No.6 released its mortgage-interest on the property in question. However, so far as the mortgage dues of the respondent No.5 were concerned, the respondent No.7 made default in payment of the dues and thus, the mortgage-interest continued between the respondent No.5 and the respondent No.7.

2.3 Subsequently, the respondent No.5 initiated proceedings against the respondent No.7 for realization under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [the Securitisation Act] and took over the possession of the property in question of the respondent No. 7 and pursuant to auction notification given by the respondent No.5, the petitioners made an offer, and the same being the highest, was accepted by the respondent No.5.

2.4 On 29th December 2006, on payment of the sale price by the petitioner No.1, a Sale Certificate was executed by the respondent No.5 and thus, on execution of such Sale Certificate, the ownership rights of the respondent No.7 vested in the petitioners. The ownership rights of the property in question thus stood transferred to the petitioners free from all encumbrances.

2.5 After the aforesaid auction purchase, while the petitioners were in peaceful possession of the property in question, they were surprised to receive a notice dated 8th December 2009 under section 135.D of the Bombay Land Revenue Code, 1879 from the respondent No.4 stating that an encumbrance has been registered on the property in question of the petitioner No.1. It was also stated in the notice that the encumbrance is for deficit stamp duty plus penalty on mortgage deed which, as stated earlier, was executed by the respondent No.7 in favour of the respondents No. 5 and 6.

2.6 In the said notice, the respondent No.4 also stated that the encumbrance has been fastened to the property in question in pursuance of direction of the respondent No.3 through an inter-departmental letter dated 23rd October 2009.

2.7 The petitioners demanded a copy of the inter-departmental letter dated 23rd October 2009 by an application under the Right to Information Act, 2005 and found

that the said inter-departmental letter was, in fact, a notice under section 152 of the Bombay Land Revenue Code. The same as addressed to the respondent No.7 and a copy was marked to the respondent No.4 directing him to fasten an encumbrance by registering an encumbrance on the petitioners' property.

2.8 The petitioners discovered that the proceeding has been initiated under the Bombay Land Revenue Code for recovery of deficit stamp duty plus penalty against the petitioners' property in question and the notice was under section 152 of the Bombay Land Revenue Code, which is a notice of demand as contemplated under section 150 of the said Code.

2.9 The petitioners also came to know that while the notice of demand under section 150 of the Bombay Land Revenue Code was issued to the respondent No.7, the respondent-authorities had wrongly proceeded against the petitioners' property in question and hence wrongly addressed the notice under section 135D of the Bombay Land Revenue Code for registering encumbrance over the petitioners' property in question.

2.10 On 24th December 2009, the petitioner No.1 informed the respondent No.5 about the receipt of the said notice under section 135D of the Code and the registration of the encumbrance of the unpaid stamp duty plus penalty thereon amounting to Rs.8,11,000/- on the petitioners' property in question and requested the respondent No.5 to resolve the issue concerning deficit stamp duty.

2.11 On receipt of the petitioners' letter, the respondent No. 5 informed the respondent No. 7, vide letter dated 9th January 2010, about the petitioners' abovesaid letter and requested to take necessary action. Ultimately, the respondent No.5, vide letter dated 29th March 2010, informed the petitioners that the deficit stamp duty has to be paid by the respondent No. 7. The respondent No.5 further stated that it was not its responsibility to pay the deficit stamp duty.

2.12 The petitioners, therefore, filed the aforesaid writ-petition thereby praying for the following relief:

"(a). admit and allow this petition;

(b). declare that stamp duty plus penalty thereon is liable to be paid by the defaulter/s as a "personal debt" owed to the government and hold the respondent nos. 5 and/or 6 and/or 7 liable to pay the same;

(c) . declare that the petitioners are not liable to pay the stamp-duty plus penalty thereon;

- (d) . issue a writ of prohibition forbidding and not continuing with the proceedings for recovery of the amount of deficit stamp-duty plus penalty thereon to the respondent authorities from the property-in-question of the petitioners;
- (e). issue a writ of certiorari or any other appropriate writ, direction or order to quash the proceedings that have already been taken by the respondent authorities, including the registration of encumbrance over the petitioner's property;
- (f). grant relief, in terms of the paragraph 9(d) of the present petition, pending the disposal/adjudication of the same;
- (g). grant the cost of this litigation and of incidental and ancillary works/tasks, including the making of various RTI applications and issuing various notices to the concerned respondents, to the petitioners; and
- (h). pass any other writ, order or direction or any other relief as may be deemed necessary to render justice to the petitioners."

2.13 As indicated earlier, the learned Single Judge, by the order impugned herein, dismissed the writ-petition on the ground of existence of alternative remedy with the observation that the petitioners have not taken out any other remedy including approaching the Revenue authorities challenging the said entry in any manner.

[3] After the admission of this appeal, this Court was prima facie convinced that existence of alternative remedy in the facts of this case did not stand in the way of the appellants in moving this Court under Article 226 of the Constitution of India and by order dated 24th September 2012, we directed the State-respondent to file affidavit against the main Special Civil Application, and consequently, the State-respondent has filed such affidavit, and we have decided to hear out this appeal on merits.

[4] After hearing the learned counsel for the parties and after going through the aforesaid materials on record, we find that the questions that fall for determination in this appeal are, first, whether the learned Single Judge was justified in refusing to entertain the writ-application on the ground of existence of alternative remedy, and, secondly, whether unpaid stamp duty payable under the Stamp Act creates a charge on the property in question by operation of law, and if not, whether such deficit stamp duty can be recovered from the subsequent purchaser when before such purchase, no valid order of attachment was obtained by the State-respondents over the property in question.

[5] It is now settled law that existence of alternative remedy is one of the factors to be taken into consideration while entertaining a writ-application but if there is no

disputed question of fact and a question of jurisdiction has been raised by the writ-petitioners regarding authority of a 'State' within the meaning of Article 12 of the Constitution to exercise a particular right, the writ-Court should entertain such writ-application without asking the petitioners to go through the detailed procedure prescribed under the Statute.

[6] In the case before us, we find that the only question is when there is no law creating a charge over the property of a defaulter in the matter of stamp duty, whether the State-Revenue Authorities can at all proceed against the subsequent purchaser and whether in the record of right, the fact of deficit stamp duty can be recorded.

[7] In order to appreciate the aforesaid question, it will be profitable to refer to section 46, 53.A and Article 6 appearing in Schedule-I, Stamp Duty on instruments of the Bombay Stamp Act which are quoted below:

46. Recovery of duties, penalties and interest :

[1] Where any person required to pay any amount of duty, penalty or other sums under this Act does not pay the same within the time prescribed for its payment, he shall be liable to pay simple interest at the rate of fifteen percent per annum on such amount or on any less amount thereof for the period for which such amount remains unpaid.

[2] All duties, penalties, interest and other sums required to be paid under this Act may be recovered by the Collector by distress and sale of the movable or immovable property of the persons from whom the same are due, or as an arrears of land revenue.

53A. Revision of Collector's decision under Sections 32, 32A, 39 and 41:

[1] Notwithstanding anything contained in sub-section [3] of Section 32, sub-section [3] of section 32-A, sub-section [2] of section 39 and sub-section [2] of section 41, when through mistake or otherwise any instrument is charged with less duty than leviable thereon, or is held not chargeable with duty, by the Collector, the Chief Controlling Revenue Authority may, within a period of six years from the date of certificate of the Collector under Sections 32, 32A, 39 or 41, as the case may be, require the concerned party to produce before him the instrument and, after giving a reasonable opportunity of being heard to the party, examine such instrument whether any duty is chargeable or any duty is less levied thereon and pass an order for recovery of the deficit duty, if any, from the concerned party. An endorsement shall be made on the instrument after payment of such deficit duty.

[2] On failure to produce the original instrument by the party, the Chief Controlling Revenue Authority shall proceed under this section on the basis of the true copy or an abstract of the instrument filed with the Collector and such true copy or abstract shall be deemed to be the original instrument for the purposes of this section.

[8] Similarly, Section 135-B, 135-C, 135-D, 150 and 155 the of the Bombay Land Revenue Code, 1879 are also relevant, which are also quoted below:-

"135-B. The record of rights.-

(1). A record of rights shall be maintained in every village and such record shall include the following particulars:-

(a). the names of all persons other than tenants who are holders, occupants, owners or mortgages of the land or assignees of the rent or revenue thereof;

(b). the nature and extent of the respective interests of such persons and the conditions or liabilities (if any) attaching thereto;

(c). the rent or revenue (if any) payable by or to any of such persons;

(d). such other particulars as the State Government may prescribe by rules made in this behalf.

(2). Provided that the said particulars shall be entered in the record of rights with respect to perpetual tenancies, and also with respect to tenancies of any other classes to which the State Government may, by notification in the Official Gazette, direct that the provisions of this section shall apply in any local area or generally.

135-C. Acquisition of rights to be reported.-

Any person acquiring by succession, survivorship, inheritance, partition, purchase, mortgage, gift, lease or otherwise, any right as holder, occupant, owner, mortgagee, landlord or tenant of the land, or assignee of the rent or revenue thereof shall report in writing his acquisition of such right to the village accountant within three months from the date of such acquisition, and the said village accountant shall at once give a written acknowledgment of the receipt of such report to the person making it:

Provided that where the person acquiring the right is a minor or otherwise disqualified, his guardian or other person having charge of his property shall make the report to the village accountant:

Provided further that any person acquiring a right by virtue of a registered document shall be exempted from the obligation to report to the village accountant.

Explanation 1.- The rights mentioned above include a mortgage without possession, but do not include an easement or a charge not amounting to a mortgage of the kind specified in section 100 of the Transfer of Property Act, 1882 (IV of 1882).

Explanation II.- A person in whose favour a mortgage is discharged or extinguished or lease determines, acquires a right within the meaning of this Section.

135.D Register of mutations and register of disputed cases.-

(1). The village accountant shall enter in a register or mutations every report made to him under section 135C or any intimation of acquisition or transfer of any right of the kind mentioned in section 135C received from the Mamlatdar or a Court of Law.

(2). Whenever a village accountant makes an entry in the register of mutations, he shall at the same time post up a complete copy of the entry in a conspicuous place in the chavdi, and shall give written intimation to all persons appearing from the record of rights or register of mutations to be interested in the mutation, and to any other person whom he has reason to believe to be interested therein.

(3). Should any objection to any entry made under sub-section (1) in the register of mutations be made or in writing to the village accountant, it shall be the duty of the village accountant to enter the particulars of the objection in a register of disputed cases and to give a written acknowledgment of the receipt of such objection to the person making it.

(4). Orders disposing of objections entered in the register of disputed cases shall be recorded in the register of mutations by such officers and in such manner as may be prescribed by rules made by the State Government in this behalf.

(5). The transfer of entries from the register of mutations to the record of rights shall be effected subject to such rules as may be made by the State Government in this behalf: provided that an entry in the register of mutations shall not be transferred to the record of rights until such entry has been duly certified.

(6). Entries in register of mutations how to be certified.-

Entries in the register of mutations shall be tested and if found correct or after correction, as the case may be, shall be certified by a revenue officer of rank not

lower than that of a Mamlatdars' first Karkun.

(7). Tenancies.- The provisions of this section shall apply in respect of perpetual tenancies and also in respect of any tenancies mentioned in a notification under sub-section (2) of section 135-B, but the provisions of this section shall not apply in respect of other tenancies, which shall be entered in a register of tenancies, in such manner and under such procedure as the State Government may prescribe by rules made in this behalf.

150. Process for recovery of arrears.

An arrear of land revenue may be recovered by the following processes-

- (a). by serving a written notice of demand on the defaulter under section 152;
- (b). by forfeiture of the occupancy or alienate holding in respect of which the arrear is due under section 153;
- (c). by distraint and sale of the defaulter's movable property under section 154;
- (d). by sale of the defaulter's immovable property under section 1;
- (e). by arrest and imprisonment of the defaulter under sections 157 and 158.
- (f). in the case of alienated holding consisting of entire villages, or shares of villages, by attachment of the said villages or shares of villages under sections 159 to 163.

155. Sale of defaulter's immovable property.-

The Collector may also cause the right, title and interest of the defaulter in any immovable property other than the land on which the arrears is due to be sold.

[9] As provided in Section 135B of the Bombay Land Revenue Code, a record of right shall include the names of all persons other than tenants who are holders, occupants, owners or mortgagees of the land or assignees or rent thereof, the nature and extent of the respective interests of such persons and the conditions or liabilities attached thereto, the rent or revenue payable by or to any of such persons and such other particulars as the State Government may prescribe by rules made in this behalf.

[10] In the rule prescribed under the said Act, there is no provision to record deficit stamp duty in respect of a past transaction payable by any of the persons referred to above. Therefore, the State-Revenue authorities had no right to incorporate the amount of dues payable in respect of deficit stamp duty under the Bombay Stamp Act

or penalty there upon in the record of rights. In the case before us, such entry has been made even at a stage when the original owner who committed default had already transferred his interest by operation of the Securitisation Act.

[11] In the circumstances, we find that for recovery of the unpaid amount of stamp duty payable under the Bombay Stamp Act, the Revenue authorities under the Bombay Land Revenue Code cannot record such fact in the record of rights. Even after going through the provisions of the Bombay Stamp Act, it appears that in case of default of unpaid stamp duty, it is the liability of the defaulter alone and that can be recovered by proceeding against the defaulter and not the subsequent purchaser from the defaulter. Such default is a personal liability and the same can be recovered by proceeding against the property of the defaulter but not against the property of a third-party who was not a party to such transaction.

[12] Mrs. Calla, lastly relied upon the circular No. VSL-102006-1985-L-1 dated 1st February 2007 showing some instructions given to the officers of the concerned departments of the State Government for taking steps for realization of the dues. In the case before us, the property was purchased by the appellant in the year 2006 before issue of the Circular. Moreover, the said Circular does not authorize the State Government to attach the land of a purchaser from a defaulter for realization of the dues recoverable from the defaulter. Therefore, the said Circular does not help Mrs. Calla's client in any way.

[13] We, thus, find in the case before us that it is well established that the State-respondent could not have recorded the fact of deficit stamp duty and penalty payable under the Bombay Stamp Act in the record of right, and, at the same time, could not issue any notice for recovery of the amount against the subsequent purchaser when no step for attachment of the land of the defaulter has been taken before sale of such land by the defaulter.

[14] We, therefore, find that it was a fit case where the learned Single Judge should have entertained the writ-application as a pure question of jurisdiction was involved on the basis of admitted facts and the Revenue Authorities, in the case before us, had no jurisdiction to proceed against the property of a third-party when the property was not validly attached before sale of such property in favour of the third-party.

[15] We, however, make it clear that this order will not stand in the way of the State-respondent in recovering the amount from the respondent No.7 in accordance with law.

[16] We, therefore, set aside the order impugned and allow the writ-petition in terms of the prayer made therein. In the facts and circumstances, there will, however, be no order as to costs.

[17] Since the main appeal itself is allowed, the connected Civil Application has become infructuous and is disposed of accordingly.

