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**LAWS(GJH) 2012 10 36**

**HIGH COURT OF GUJARAT**

Coram :- BHASKAR BHATTACHARYA, J. B. PARDIWALA, JJ.

Decided on 2012 October 11

LETTERS PATENT APPEAL No. 1167 of 2012

**BAJRANG OIL MILLS**

VERSUS

**RAJKOT DISTRICT COOPERATIVE BANK LTD**

**Advocates:**

HARSHIT S. TOLIA, BHAVIN S. RAIYANI, NAVIN PAHWA, PRATIK THAKKAR, THAKKAR

**[ - ] Referred Judgments (1)**

[GUSTADJI DHANJISHA BUHARIWALA VS. NEVIL BAMANSHA BUHARIWALA](#) [2011 2 GLH 147] [REFERRED TO]

**[ - ] Cited At (1)**

[VIJAY HATHISING SHAH VS. GITABEN PARSHOTTAMDAS MUKHI](#) [LAWS(GJH)-2011-7-120][REFERRED TO]

**[ - ] Referred Acts:**

[CODE OF CIVIL PROCEDURE, 1908](#) , [OR. 21R. 97](#) , [OR. 21R. 98](#) , [OR. 21R. 99](#)  
[CONSTITUTION OF INDIA](#) , [ART. 226](#) , [ART. 227](#)  
[GUJARAT CO-OPERATIVE SOCIETIES ACT, 1961](#)  
[SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002](#)

**Citations:**

GLR 2012 5 4478, LAWS(GJH) 2012 10 36,

**Expert View:**

**A. This Letters Patent Appeal is at the instance of writ-petitioners and is directed against an order dated 19th June 2012 passed by a learned Single Judge of this Court by which His Lordship entertained the writ-application by issuing a Rule and further granted interim relief in terms of paragraph 15(B) of the writ-petition on condition that the writ petitioners should deposit the awarded amount along**

**with interest and costs with the Registry of this Court within a period of three months from that date, with a further condition that in default of deposit of the said amount within the period mentioned above, the interim order would stand vacated automatically, and it would be open to the respondent-Bank to initiate appropriate proceedings in accordance with law\_\_ .**

- B. 1, has, at the outset, raised a preliminary objection as to the maintainability of the present appeal on the ground that in the writ-application, the appellants having challenged the order passed by the Tribunal, the proceedings was really one under Article 227 of the Constitution of India, and thus, against an interlocutory order passed by the learned Single Judge in the said writ-application under Article 227 of the Constitution of India, no Letters Patent Appeal lies under clause 15 of the Letters Patent\_\_ . In the facts of the present case, the learned Single Judge should have passed an order of status quo as regards the nature, character and existing position of the property till the disposal of the writ-application instead of passing a direction upon the appellant to deposit the entire awarded amount when prima facie the involvement of the appellant with the Bank has not been established and the appellants cannot be said to be the representative of the respondent No\_\_ .**
- C. Tolia, therefore, prays for stay of operation of the order impugned in the Special Civil Application only to the extent that in execution of the said order for recovery of the money, the rights of the appellants in the plot in question should not be jeopardized in any way\_\_ In the case before us, it appears that the grievance of the appellants is that as the appellants were not parties to any transaction with the District Bank, in execution of the award passed under the Gujarat Co-Operative Societies Act against the award-debtor or the guarantor of such debtor, the land held by the appellants cannot be touched or taken possession of\_\_**
- D. We make it clear that our observations are prima facie on the basis of materials on record and will not be binding upon the learned Single Judge when the writ-application will be decided on merits on filing of affidavits by the respective parties. -- In view of the above order passed in the appeal, connected Civil Application has become infructuous and stands disposed of accordingly.**

## **JUDGMENT / ORDER**

1. This Letters Patent Appeal is at the instance of writ-petitioners and is directed against an order dated 19th June 2012 passed by a learned Single Judge of this Court by which His Lordship entertained the writ-application by issuing a Rule and further granted interim relief in terms of paragraph 15(B) of the writ-petition on condition that the writ petitioners should deposit the awarded amount along with interest and costs with the Registry of this Court within a period of three months from that date, with a further condition that in default of deposit of the said amount within the period mentioned above, the interim order would stand vacated automatically, and it would be open to the respondent-Bank to initiate appropriate proceedings in accordance with law.

2. Being dissatisfied, the writ-petitioners have come up with the present Letters Patent Appeal.

3. The facts giving rise to the filing of the Special Civil Application No. 17639 of 2011, out of which the present appeal arises, may be summed up thus:

3.1 The petitioners are partners of a partnership firm carrying on its business activities at plot No. 63, GIDC-II at Jamwadi, Gondal. The plot has been leased out to the petitioners by the GIDC.

3.2 On 5th March 1998, the plot was leased out by the GIDC to the respondent No.3, who assigned his rights in the said plot and with the permission of the GIDC, entered into a supplementary agreement and deed of assignment. On 11th March 1998, the GIDC passed an order granting permission for transfer of the plot to one Y.M. Bharmal. Thereafter, on 11th September 2003, the GIDC passed an order granting permission for transfer of the plot to the petitioners and accordingly, on 16th December 2003, a registered lease deed was executed between the GIDC and the petitioners for a period of 99 years.

3.3 On 24th December 2003, in order to create a charge on the lease-hold interest, the GIDC granted permission to the petitioner as required to be taken for creating charge over the plot. A charge was, thus, created and a loan was sanctioned by Gondal Nagrik Sahakari Bank Limited [the Gondal Bank, hereafter].

3.4 On 1st August 2005, the GIDC wrote a letter to the respondent No.1 Bank informing that no previous permission was taken by the respondent No.3 for creating charge nor any lease deed was entered into by the GIDC with the respondent No.3.

3.5 On 5th August 2005, the petitioners received a copy of notice addressed by the Rajkot District Co-Operative Bank, the respondent No.1 [the District Bank, hereafter] to the Gondal Bank for recovery of dues out of the said plot.

3.6 On 5th October 2005, the petitioners gave a reply pointing out that the plot is owned by the petitioners and also sought for certain documents.

3.7 Subsequently, on 19th October 2005, the District Bank wrote a reply but did not give any documents and informed that an order has been passed by the respondent No.4, [The Board of Nominee, Rajkot], on 30th October 2004 and that further action would be taken under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [the Securitization Act, for short]. Along with the reply, the petitioners, for the first time, received a copy of the operative part of the order dated 30th October 2004.

3.8 Apprehending legal action by the District Bank, the petitioners filed Special Civil Application No. 23200 of 2005 before this Court and in the said petition, a reply was filed by the GIDC pointing out the manner in which the plot was transferred to Y.N. Bharmal and thereafter to the petitioners and that no prior permission was ever taken for creating any charge by the respondent No.3, Babubhai Ranchhodbhai Raiyani, at any point of time. In the said petition, the respondent No.3 also filed an affidavit pointing out

that the plot was never mortgaged by him nor did he stand as a guarantor in respect of the loan transaction entered into between the District Bank and the respondent No.2, Ramdev Ice Factory.

3.9 On 24th March 2006, as the District Bank made a statement to the effect that it is not desirous to proceed under the Securitization Act, an order was passed by this Court in the said SCA No. 23200 of 2005 recording the said statement and observing that the petition did not survive and in case any action was taken in accordance with the law under the Gujarat Co-Operative Societies Act, 1962 in respect of the property in question, both the parties would be at liberty to raise all the contentions as available in law.

3.10 On 5th August 2006, on an advice given, the petitioners challenged the order dated 30th October 2004 to the extent of the direction given regarding the plot held by the petitioners by filing an appeal before the the respondent No.5, the Gujarat State Co-Operative Tribunal [the Tribunal, hereafter] along with an application seeking permission to grant leave to appeal as well as an application seeking condonation of delay. The District Bank opposed the appeal as well as the applications for leave and condonation of delay, and ultimately, on 29th April 2009, the Tribunal dismissed the application for grant of leave to appeal as well as the application for condonation of delay.

3.11 Being dissatisfied with the order dated 29th April 2009 passed by the Tribunal, the petitioners filed Special Civil Application No. 8200 of 2009 before this Court, and this Court, on 25th January 2010, granted leave to appeal and condoned the delay in filing the appeal before the Tribunal. In view of the said order passed by this Court, the appeal was numbered as Appeal No. 150 of 2011 before the Tribunal.

3.12 However, on 1st October 2011, the Tribunal dismissed the appeal and confirmed the order dated 30th October 2004 passed by the Board of Nominees.

3.13 Being dissatisfied with the order passed by the Tribunal dismissing the appeal, the petitioners filed Special Civil Application No. 17639 of 2011, from which the present appeal arises. As indicated earlier, in the said writ-application, the learned Single Judge has passed an interim order, which is the subject matter of this appeal.

4. Mr. Pahwa, the learned advocate appearing on behalf of the District Bank, the respondent No.1, has, at the outset, raised a preliminary objection as to the maintainability of the present appeal on the ground that in the writ-application, the appellants having challenged the order passed by the Tribunal, the proceedings was really one under Article 227 of the Constitution of India, and thus, against an interlocutory order passed by the learned Single Judge in the said writ-application under Article 227 of the Constitution of India, no Letters Patent Appeal lies under clause 15 of the Letters Patent.

5. Mr. Tolia, the learned advocate appearing on behalf of the appellants, has, on the other hand, opposed the aforesaid preliminary objection raised by Mr. Pahwa and has contended that Special Civil Application No. 17639 of 2011 was really one for issue of certiorari and thus, the provision contained in Article 226 of the Constitution of India was invoked. Mr. Tolia further points out that as his client has also made the authorities which passed the orders as party-respondents, i.e. the Board of

Nominees and the Tribunal, Mr. Pahwa cannot take the benefit of the decision of the Division Bench of this Court in the case of GUSTADJI DHANJISHA BUHARIWALA & ANR. v. NEVIL BAMANSHA BUHARIWALA & ORS., 2011 2 GLH 147. Mr. Tolia, thus, prays for over-ruling the preliminary objection raised by Mr. Pahwa and for allowing the appeal.

5.1 On merits, Mr. Tolia contends that his client was never party to any mortgage with the respondent No.1-District Bank and thus a mortgage created by a previous lessee prior to creation of interest in favour of his client by the GIDC cannot bind his client. Mr. Tolia contends that even in the original mortgage between the previous lessee of the plot and the District Bank, the lessor of the land was not a party, and thus, such mortgage cannot bind the subsequent lessee of a lease created by the lessor after termination of the previous lease. According to Mr. Tolia, in such circumstances, the Tribunal ought to have modified the award by pointing out that in execution of the money award against a third-party, the land in question over which the appellants have lease-hold interest, cannot be touched as neither the appellants nor the lessor of the land were parties to the transaction with the District Bank. Mr. Tolia, therefore, prays for stay of operation of the order impugned in the Special Civil Application only to the extent that in execution of the said order for recovery of the money, the rights of the appellants in the plot in question should not be jeopardized in any way.

6. Mr. Pahwa, the learned advocate appearing on behalf of the respondent, has, on the other hand, opposed the aforesaid contention and tried to convince us that by virtue of the provisions contained in the statute, viz. the Gujarat Co-Operative Societies Act, a charge is created upon the land when the previous lessee took loan from the Bank for the purpose of paying the purchase-money to the GIDC. According to Mr. Pahwa, such being the position, his client is entitled to proceed against the land in question for realization of the dues. Mr. Pahwa, therefore, prays for dismissal of the appeal.

7. First, we propose to consider the question as to whether this Letters Patent Appeal is maintainable against the order passed by the learned Single Judge.

8. There is no dispute that no Letters Patent Appeal is maintainable against an order passed by a learned Single Judge, either interim or the final, if the proceeding is one under Article 227 of the Constitution of India. On the other hand, if the proceeding is one under Article 226 of the Constitution of India, an appeal is maintainable. Therefore, we propose to consider whether Special Civil Application No. 17639 of 2011 is really one under Article 226 or 227 of the Constitution of India.

9. There is no dispute that in the cause title, the writ-application has been described as one under Article 226 and 227 of the Constitution of India, and the Board of Nominees as well as the Tribunal are joined as party-respondents No.4 and 5 respectively. The prayer made by the writ-petitioners in paragraph 15 of the writ-application is quoted below:

"15. In the premises as aforesaid, the petitioners pray that:

"A. Your Lordships may be pleased to issue a writ of certiorari or any other appropriate writ or order or direction to quash and set aside the judgment and order dated 01/10/2011 passed by respondent No.5 in Appeal No. 150 of 2011 and allow the Appeal No. 150 of 2011 filed by the petitioners before respondent No.5;

B. Pending the hearing and final disposal of the petitioner, Your Lordships may be pleased to restrain the respondent No.1 from executing the order dated 30/1-/2004 passed by respondent No.4 in Lavad Case No. 689 of 1998 in respect of property situated at Plot No. 63, Jamwadi, GIDC-II, Gondal.

C. Ex-parte ad-interim relief in terms of Prayer-C above may kindly be granted;

D. xxx xxx xxx

E. xxx xxx xxx"

**10.** It is settled law that for deciding the real nature of an application, mere caption or reference of statutory provision at the cause title or apparent prayers made therein are not the decisive factors but the Court should consider the petition in substance by reading the same as a whole and find out the exact nature of jurisdiction sought to be invoked.

**11.** In the case before us, it appears that the grievance of the appellants is that as the appellants were not parties to any transaction with the District Bank, in execution of the award passed under the Gujarat Co-Operative Societies Act against the award-debtor or the guarantor of such debtor, the land held by the appellants cannot be touched or taken possession of. In other words, according to the appellants, they do not dispute the money-award passed by the Board of Nominees and confirmed by the Tribunal, but their grievance is as regards the execution of such money-award against the property over which a lessee's right has been created by a third-party to the proceedings. We have already pointed out that admittedly, the GIDC as the lessor and owner of the property, was not party to the proceedings and at the same time, the original debtor of the Bank was, at one point of time, a lessee in respect of the selfsame property whose interest has admittedly been terminated by the GIDC and the appellants have taken fresh lease from the GIDC.

**12.** We do not for a moment dispute the proposition of law that a mortgage can be created by a lessee in respect of the lessee's interest in a property but the law is equally settled that if in such a mortgage the lessor is not a party, the lessor is not bound by it and that mortgage can be enforced only during the subsistence of the lease of the mortgagor, and the moment the lease will come to an end, the mortgagee will have no right over the land in question. In other words, the mortgagee cannot acquire more right than that possessed by the mortgagor.

**13.** In the case before us, admittedly, at the time of initiation of the proceedings under the Gujarat Co-operative Societies Act, the debtor's leasehold right had already come to an end. Therefore, in execution of the award passed against the debtor or guarantor, the land over which a subsequent lessee has acquired lessee's interest cannot be touched as the lessor was not party to the mortgage.

**14.** Thus, the appellants, as third-party to the proceedings, are challenging the threatened execution of the award passed by the Board of Nominees and confirmed by the Tribunal alleging that those two authorities, which are "State" within the meaning of Article 12 of the Constitution of India, are trying to invade the rights of the appellants in the property. Thus, in substance, it is an application under Article 226 of the Constitution challenging the illegal action of the "State". The position would have been, however, different if the appellants tried to impugn the money award granted by the Board of Nominees and confirmed by the Tribunal on merit. In such circumstances, it was not open to the award-debtor or his representative to challenge the legality of

the award confirmed by the Tribunal under Article 226 of the Constitution of India, but the same could be challenged only under Article 227 of the Constitution of India. In the case before us, it is apparent that the Tribunal, in the appeal preferred by the appellant, has decided the question of executability of the award against the appellants and that can be challenged only by way of a petition under Article 226 of the Constitution of India. It may not be out of place to mention here that in the Gujarat Co-Operative Societies Act, although a provision is there that an award passed by a Nominee or a Tribunal shall be executed in the same manner as a decree of the Civil Court, yet, in the said Act there is no provision for adjudication of a third-party's right in the process of execution as provided in Order 21 Rules 97, 98 and 99 of the Civil Procedure Code. Therefore, the appellants have no remedy under the said statute asserting that he is not a representative of the judgment-debtor. A Registrar or his nominee is not vested with the power to decide such question as Section 96 of the Co-Op Societies Act deals with the question where a Co-operative Society and its past members or their legal representatives are involved.

**15.** We, therefore, find that in the writ-petition, the appellants have really prayed for exercise of jurisdiction under Article 226 of the Constitution of India, and the present Letters Patent Appeal is, therefore, maintainable.

**16.** In view of our aforesaid discussion, we find that the appellants have made out a strong prima facie case to have an injunction restraining the Bank from executing the award by taking possession of the land in question. At the same time, we also restrain the appellants from transferring, alienating or encumbering the property in question till disposal of the writ-application. In the facts of the present case, the learned Single Judge should have passed an order of status quo as regards the nature, character and existing position of the property till the disposal of the writ-application instead of passing a direction upon the appellant to deposit the entire awarded amount when prima facie the involvement of the appellant with the Bank has not been established and the appellants cannot be said to be the representative of the respondent No.3.

**17.** We, thus, set aside the order dated 19th June 2012 passed by the learned Single Judge in Special Civil Application No. 17639 of 2011 and instead of that, pass an order of status quo as indicated earlier till the disposal of the writ-application. We make it clear that our observations are prima facie on the basis of materials on record and will not be binding upon the learned Single Judge when the writ-application will be decided on merits on filing of affidavits by the respective parties. At this stage, we have restricted our scrutiny to the submissions made in the writ-petition itself and are prima facie convinced on the basis of such material alone.

**18.** The appeal is allowed accordingly. In view of the above order passed in the appeal, connected Civil Application has become infructuous and stands disposed of accordingly.

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