

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 11.05.2011
% Date of decision : 03.06.2011

+ WP (C) No.337/2011

IFCI Ltd. PETITIONER

Through : Mr.Dinkar Singh, Advocate

- V E R S U S -

COMMERCIAL TAXES OFFICER & ANR..... RESPONDENTS

Through : Mr.Arunav Patnaik and Mr.D.B.Ray,
Advocates for R-1.

Mr.Shahzad Khan, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE RAJIV SHAKDHER

Whether the Reporters of local papers
may be allowed to see the judgment? Yes

To be referred to Reporter or not? Yes

Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. The petitioner seeks to raise a question of law as to whether by virtue of the deeming provisions contained in Section 9(2) of the Central Sales Tax Act, 1956 ('the CST Act' for short), there is any first charge on the

property of the dealer. The petitioner being a financial institution holding a decree against the dealer claims absence of such first charge in view of there being no specific provision in the CST Act though the petitioner does not dispute such first charge in respect of the amount due under the Rajasthan Sales Tax Act, 1994 ('the RST Act' for short).

2. The petitioner is a public financial institution incorporated under the Companies Act, 1956 which had advanced loan facilities to M/s West Indian Gas Products Limited guaranteed by certain guarantors. The said entity also took loans from other banks and financial institutions, but failed to maintain financial discipline. The petitioner along with ICICI filed an OA before the DRT, Jaipur and in those proceedings a recovery certificate was issued for an amount of Rs.44,78,65,444/- on 20.12.2000. The said certificate was thereafter sought to be executed. It is during the pendency of the execution proceedings that the respondent, Commercial Taxes Officer, Special Circle, Udaipur filed an application dated 01.06.2004 before the Recovery Officer seeking right of first appropriation from the amounts released by sale of assets of the debtor towards discharge of statutory liability of Rs.60,86,172/- under the RST Act and

Rs.44,04,415/- under the CST Act totaling to Rs.1,08,73,587/- and interest due thereon.

3. Such a right of first appropriation insofar as the dues under the RST Act are concerned, was claimed on the basis of Section 50 of the RST Act, which reads as under:

“50. LIABILITY UNDER THIS ACT TO BE THE FIRST CHARGE.

Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and any other sum payable by a dealer or any other person under this Act, shall be the first charge on the property of such dealer or person.”

4. Similarly, the right of first appropriation insofar as the dues under the CST Act are concerned, was sought to be exercised in view of the provisions of Section 9(2) of the said Act, which reads as under:

“LEVY AND COLLECTION OF TAX AND PENALTIES

...

(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act as if the tax or interest or penalty payable by such a dealer under this Act is a tax or interest or penalty payable under general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State;

and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, charging or payment of interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly:

Provided that if in any State or part thereof there is no general sales tax law in force, the Central Government may, by rules made in this behalf make necessary provisions for all or any of the matters specified in this subsection."

5. The recovery officer, however, dismissed the application filed by the respondent against which an appeal was preferred by the respondent before the DRT, Jaipur. This appeal was allowed giving first appropriation right vide order dated 20.12.2000. Now the petitioner being aggrieved preferred an appeal before the DRAT. It is during the said proceedings that an affidavit is stated to have been filed by the respondent averring that the original demand under the RST Act was Rs.9,02,321/- and under the CST Act was RS.40,07,415/- totaling to Rs.49,09,736/-. The interest due thereon under the RST Act was quantified at Rs.15,30,062/- and under the CST Act, as

Rs.53,75,563/-, totaling to Rs.1,18,15,353/- inclusive of interest outstanding against the company.

6. The petitioner in the proceedings before the DRAT conceded the right of first appropriation insofar as the dues under the RST Act were concerned in view of the provisions of Section 50 of RST Act, but sought to raise the issue in view of what was claimed to be the absence of any provision for such appropriation under the CST Act. The petitioner claimed that the provisions of Section 9(2) of the CST Act could not give priority to the respondent over the claim of secured creditors. This plea was, however, not accepted by the DRAT in terms of the impugned order dated 04.11.2010. It is in view of this factual matrix that the question of law as referred to aforesaid arises for consideration.
7. The reasoning of the DRAT is predicated on a harmonious construction of the RST Act and the CST Act. The CST Act stipulates that tax is payable by a dealer under that Act as if it was a tax or interest or penalty payable under the general sales tax law of that State and for that purpose they may exercise all or any of the powers they have under the general sales tax law of that State. It was thus concluded that no distinction could be made between the State sales tax legislation and the CST insofar as recovery of tax is concerned. The DRAT thus observed that the Court

would give effect to the will of the legislature as discernible from the object and scheme of the enactment and the language employed therein. This is the sole discussion in the impugned judgment.

8. The submission of learned counsel for the petitioner before us was that in the absence of any specific provision in the CST Act, creating such priority of claim for the amount payable under that Act, the vested legal right of a secured creditor, who always has a priority of claim on a mortgaged debt, would prevail. The CST Act did not contain any specific provision akin to Section 50 of the RST Act and Section 9(2) of the CST Act was claimed to be not specific to create liability under the CST Act to be first charge on the property of the dealer. This sub-Section, it was submitted, merely contained provisions for levy & collection of tax and penalty and could not be read to be *pari materia* to provisions of Section 50 of the RST Act. It was the submission of learned counsel for the petitioner that Section 9(2) of the CST Act had a limited scope. It empowered the State authorities to have all the powers for purposes of assessment, re-assessment, collection and enforcement of payment of tax payable by the dealer under the CST Act. On the other hand, the RST Act contains specific provisions for assessment, re-assessment in Chapter (IV) while

Chapter (V) deals with tax liability, recovery and refund. Sections 52 and 53 of the RST Act fall in Chapter (V) which provides for general and special modes of recovery and enforcement of tax. Chapter (VI) empowers the State tax authorities to impose penalties and to institute prosecution against the dealer. It was, thus, submitted that the words 'assessment', 're-assessment', 'collection' and 'enforcement of tax' cannot be expanded to include within the ambit the effect of Section 50 of the RST Act which creates an established right of precedence in favour of the State sales tax authorities for the amount due under that Act.

9. Learned counsel for the petitioner referred to Section 52 of the RST Act, which reads as under:

"52 GENERAL MODES OF RECOVERY.

Without prejudice to other provisions in the Act, where any tax or other sum payable by a dealer or a person under this Act is not paid in accordance with the provisions of this Act or the rules made or notification issued thereunder, it shall be recoverable as an arrear of land revenue and the assessing authority or any other officer having jurisdiction for the time being over such dealer or person shall be empowered to recover such tax or other sum by attachment and sale of the movable or immovable property of such dealer or person and all the provisions of the Rajasthan Land Revenue Act, 1956 (Rajasthan Act No. 15 of 1956) read with the Rajasthan Land Revenue (Payments, Credits, Refunds and Recovery) Rules, 1958 shall mutatis mutandis apply."

10. The recovery of tax can, thus, take place by attachment and sale of moveable and immovable properties and the provisions of Rajasthan Land Revenue Act, 1956 and Rajasthan Land Revenue (Payments, Credits, Refunds and Recovery) Rules, 1958 apply *mutatis mutandis*. Learned counsel sought to refer to Section 256 of the Rajasthan Land Revenue Act, 1956 which deals with recovery of miscellaneous revenue and other monies. In M/s Builders Supply Corporation v. The Union of India and Ors.; AIR 1965 SC 1061, the Constitution Bench of the Supreme Court dealt with the Common Law Doctrine of priority of State debts. It was held that this Common Law Doctrine having been recognized by Indian High Courts prior to 1950, constitutes 'law in force' within the meaning of Article 372(1) of the Constitution of India and continues to be in force. Section 46 of the Income Tax Act, 1922 was held to merely provide for the recovery of arrears of tax due from an assessee as it were an arrear of land revenue and thus the provision was held not to convert arrears of tax into arrears of land revenue to indicate that after receiving the certificate from the Income Tax Office, the Collector has to proceed to recover the arrears as if the arrears were arrears of land revenue. This section did not displace the application of the doctrine of the

priority of Crown debts. Learned counsel also referred to the judgment of the Supreme Court in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and Ors.; (2000) 5 SCC 694, once again dealing with the doctrine of priority of State debt. It was held that Section 158(1) of the Karnataka Land Revenue Act, 1964 not only gives statutory recognition to the doctrine of the State's preferential right to recovery of debts, but extends its applicability even to private secured debts forming the subject-matter of mortgages, judgment-decrees, execution and attachment orders, etc. Section 190 of the Karnataka Land Revenue Act, 1964 r/w Section 13(3)(a) of the Karnataka Sales Tax Act, 1957 made the procedure for recovery of arrears of land revenue applicable to recovery of sale tax arrears. The priority or precedence of State debt in the form of sales tax was upheld in respect of the compromise amount between a financial institution and debtor. It was thus submitted that unless a specific provision is included, the principle of priority of Crown debt would not apply.

11. Learned counsel for the respondent on the other hand sought to emphasize the constitutional scheme and the subsequent enactment of CST Act in pursuance thereto.

12. In order to appreciate this plea, it would be appropriate to reproduce some of the provisions, Articles 269 and 286, incorporated in Part XII of the Constitution of India, which have been referred to by the learned counsel for the respondent.

“269. Taxes levied and collected by the Union but assigned to the States.

(1) Taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

Explanation-For the purposes of this clause, -

(a) The expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;

(b) The expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce;

(2) The net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the State within which that tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.

286. Restrictions as to imposition of tax on the sale or purchase of goods.

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-

(a) Outside the State; or

(b) In the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, -

(a) A tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) A tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366,

Be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

13. A reading of the aforesaid shows that Article 269 of the Constitution of India provides for taxes on the sales or purchase of goods to be levied by Government of India, but for the benefit of the States, to whom it is to be assigned, such taxes are not to form part of the Consolidated Fund of India and the

Parliament may by law formulate principles for determining inter-State trade or commerce. Simultaneously, Article 286 of the Constitution of India restricts imposition of tax on the sale or purchase of goods by any State in the process of inter-State trade or commerce and the law in this behalf formulating principles when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of Article 286 of the Constitution of India is vested in the Parliament in terms of clause (2) of the Constitution of India.

14. Thus, the constitutional provisions have the objective to ensure that individual States do not impose differential or competitive sales tax which would interfere with the inter-State trade and commerce and hinder the creation of a single economic unit across the country. It is, therefore, the Parliament which has been given the powers to define inter-State sale transactions and to levy taxes on them. In this regard, Entries 92A and 92B of the List I, which is the Union List, in Seventh Schedule to the Constitution of India, read as under:

“92A Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

92B. Taxes on the consignment of goods (whether the consignment is to the person

making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

15. The collection made by the Central Government is to be the revenue of the States. Thus, it was contended that though the imposition of the Central sales tax on inter-State sales is within the domain of Parliament, the revenue from Central sales tax is of the State within which the tax is leviable. The CST Act was, thus, enacted by the Parliament formulating principles for determining when a sale or purchase of goods take place in the course of inter-State trade or commerce or outside the State and to levy taxes on such sale and determine the distribution of revenue so collected. This is stated to be apparent even from the Preamble of the CST Act, which reads as under:

“An Act to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distributions of taxes on sales of goods in the course of inter-State trade or commerce and to declared certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which laws imposing taxes on the sale or purchase of such goods of special importance shall be subject.”

16. It was submitted that Section 3 of the CST Act defines inter-State trade or commerce while Section 4

of the CST Act deals with when a sale or purchase of goods is stated to take place outside a State. The constitutional mandate is further fulfilled by Section 9(3) of the CST Act which assigns the proceeds collected under that Act to the State. Section 9(3) of the CST Act reads as under:

“9. Levy and collection of tax and penalties:-

.....

(3) The proceeds in any financial year of any tax, including any interest or penalty including any penalty, levied and collected under this Act in any State (other than a Union Territory) on behalf of the Government of India shall be assigned to that State and shall be retained by it; and the proceeds attributable to Union Territories shall form part of the Consolidated Funds of India.”

17. Since the Central sales tax revenue collected within a State forms part of the revenue of the State, the actual collection has been left to the relevant State in view of Section 9(1) of the CST Act, which reads as under:

“9. Levy and collection of tax and penalties:-

(1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of section 3, shall be levied by the Government of India and the tax so levied shall be collected by the Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced.

Provided that, in the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and being also a sale which does not fall within sub-section (2) of section 6, the tax shall be levied and collected

- a) where such subsequent sale has been effected by a registered dealer, in the State from which the registered dealer obtained or, as the case may be, could have obtained, the form prescribed for the purposes of clause (a) of sub-section (4) of section 8 in connection with the purchase of such goods, and,
- b) where such subsequent sale has been effected by an unregistered dealer in the State from which such subsequent sale has been effected.”

18. It is in view of the aforesaid constitutional scheme read with the provisions of CST Act that Section 9(2) of the CST Act makes a deeming provision that the assessment and collection under the CST Act is to be taken as tax, interest or penalty payable under the general sales tax law of the State. For this purpose, all powers as exist under the general sales tax law of the State would be available for collection of the Central sales tax.

19. Learned counsel proceeded to thereafter explain the provisions of the RST Act where Section 3 deals with the incidence of tax and Section 3(6) of the CST Act provides that a dealer registered under the CST Act, who was not liable to get registration and pay tax under Section 3(1) of the RST Act, was nevertheless liable to get registration and pay tax in accordance with the provisions of the RST Act whatever may be the amount or extent of his turnover. Section 4(1) of the RST Act provides for both the State sales tax and the Central sales tax payable by a dealer under the

RST Act to be a single point in the series of sales by successive dealers. Section 50 of the RST Act gives the right of first charge to the tax to be collected under the RST Act. It was thus contended that the Central Sales Tax thus also becomes a tax under the RST Act and Section 50 of the RST Act is applicable to the collection of Central sales tax within the State of Rajasthan.

20. Learned counsel for the respondent referred to the judgment in Central Bank of India v. State of Kerala (2009) 4 SCC 94 where a similar provision in the Bombay and Kerala Sales Tax Acts were examined in the context of recovery of debts under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ('RDDBFI Act' for short). It was held that where a secured creditor seeks to recover debts under the RDDBFI Act, precedence has to be given to dues owed to a State when there is a statutory provision creating first charge in favour of the State over the property of the assessee. The RDDBFI Act being a subsequent enactment, the Parliament is presumed to be aware of the statutory provisions creating first charge for the State debts and there is nothing contrary contained in the DRT Act. The observations made in State Bank of Bikaner & Jaipur v. National Iron Steel Rolling Corporation and Ors; (1995) 2 SCC 19 were cited with

approval holding that when a first charge is created by operation of law over any property, that charge will have precedence over even an existing mortgage.

21. Learned counsel submitted that a majority judgment of the Constitution Bench in Khemka & Co. v. State of Maharashtra; (1975) 2 SCC 22, is to be understood to be laying down the ratio that the sales tax authorities had no authority to levy a penalty under the general sales tax law of a State for the collection of Central sales tax in the absence of clear statutory provisions in the CST Act. However, Section 50 of the RST Act creating a first charge for the Crown debt was not akin to a penalty or additional tax liability and the right of first charge only deals with a question of liability owed to a State to be paid in cases where there are multiple creditors. The recovery of dues by means of a first charge was thus contended to be distinct from a tax liability or penalty and was in the domain of collection and enforcement of payment of tax. Similarly, in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and Ors.'s case (supra), the Supreme Court held that where the principle of first charge has been provided in the Karnataka Land Revenue Act, 1964 and Karnataka Sales Tax Act, 1957 provide the sales tax dues to be collected as arrears of land revenue, the principles of first charge were held to be applicable for the dues.

Thus, this was so even without any explicit provision of first charge in the Karnataka Sales Tax Act, 1957.

22. We have considered the aforesaid submissions of learned counsel for the parties on the limited issue before us.

23. We may note at the inception that though a number of judgments have been cited, there is really no dispute about the principle that the Crown debt will have priority where specific provisions have been made in the State act dealing with the sales tax or even otherwise in statutes such as the land revenue act. This is not even the plea of the petitioner, who has agreed to accept the principle of Crown debt insofar as the liability vis-a-vis the State sales tax is concerned. What is sought to be disputed is only the liability towards the component of Central sales tax imposed under the CST Act on account of absence of any provision of such priority being specifically stipulated in the CST Act. We are in agreement with the submission of the learned counsel for the respondent that in order to appreciate whether such a liability under the CST Act would be treated as a first charge or not, the principles under which the sales tax is imposed in a State and under the CST Act taking into consideration the constitutional scheme has to be appreciated. It can really not be in doubt that Articles

269 and 286 of the Constitution of India make it abundantly clear that the origin of Central sales tax is the inter-State trade or commerce. It is with the object of facilitating a single economic unit across the country and to avoid any differential and competitive sales taxes that Central sales tax is imposed on inter State sale transactions. However, unlike other impositions of Central Government which may go to the Consolidated Fund of India, Central sales tax is peculiar in its nature as the benefit of the same goes only to the State even though such collection is under a Central Act and the relevant entries being 92A and 92B which are in Part I, which is the Central List, forming part of the Seventh Schedule to the Constitution of India. Thus, Central sales tax is meant to be appropriated for the benefit of State.

24. The matter does not rest at that as not only the proceeds of the tax are meant for the benefit of the State, the actual recovery also takes place by the State. It is in view thereof that Section 9(1) of the CST Act provides that even tax payable under the CST Act though levied by the Government of India would be collected by the State Government in accordance with provisions of Section 9(2) of the State Act from which the movement of goods commences. This provision is followed by Section 9(2) of the said Act (which is the

relevant provision for consideration in the present case) providing for assessment, re-assessment, collection and enforcement of payment of tax including interest or penalty payable by a dealer under the CST Act to be as if a tax, interest or penalty is payable under the general sales tax law of the State. Thus, for all ends and purposes, the mode of assessment, re-assessment, collection and enforcement of payment of tax mechanism provided under the State sales tax act would equally apply to the Central sales tax to be collected under the CST Act. Not only this, but also all or any of the powers as are exercisable under the general sales tax law of the State, are to be available for the recovery of the central sales tax.

25. On a query, we are informed that the principle of priority of Crown debt is incorporated in almost all the State sales tax acts. We had, in fact, put a specific query to learned counsel for the petitioner as to whether he was aware of any State sales tax act where such priority provision was not incorporated, but the learned counsel was not able to give any such example of a State act nor is such an example incorporated even in the subsequent written synopsis filed by the petitioner.

26. If the aforesaid scheme is appreciated in its true spirit and with the legislative enactment in mind (preamble to the CST Act itself stating that the Act was to formulate principles determining inter State trade or commerce and for levy and collection of taxes on sale of goods in the course of inter State trade or commerce), we have no doubt that not only assessment & re-assessment but also mode of recovery and the principle of priority of claim as incorporated under Section 50 of the RST Act would be available for collection of Central sales tax within the State of Rajasthan in view of the provisions of Section 9(2) of the CST Act. The judgments cited at the bar and referred to aforesaid, in fact, incorporate this general principle of not only Crown debt but the collection of Central sales tax for the benefit of State and thus the provisions of the State Act being available for such enforcement.

27. The Central Bank of India v. State of Kerala's case (supra), however, only refers to the priority of sales tax debt under the local sales tax act over a secured creditor. This aspect was reinforced in State Bank of Bikaner & Jaipur v. National Iron Steel Rolling Corporation and Ors's case (supra), once again giving precedence to a charge created by operation of law over a charge by way of an existing mortgage. The

judgments cited by learned counsel for the petitioner in M/s Builders Supply Corporation v. The Union of India and Ors.'s case (supra) and Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and Ors.'s case (supra) are also on the same lines. However, the question involved in the present case is whether such a charge by operation of law has been created under the CST Act. We have come to a conclusion that such a charge stands created if meaning is to be given to the words "collection" and "enforcement" found in various provisions, more specifically Sections 9(1) and 9(3) of CST Act read with the relevant provisions of Section 9(2) of the CST Act, coupled with the right of appropriation conferred in the States though the tax may be collected by the Central Government. Thus, the priority given under Section 50 of the RST Act to the recovery of local sales tax will apply with equal force to the recovery of Central sales tax qua inter-State trade or commerce.

28. In view of the aforesaid provisions, we find no merit in the writ petition, which is dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

June 03, 2011
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RAJIV SHAKDHER, J.