vIN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.01.2025

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

W.P.No.21496 of 2008
and
M.P.No.1 of 2008

Oriental Bank of Commerce,
Overseas Branch,
represented by its Chief Manager,
A.Srinivas Sharma,
Padma Complex, 467, Mount Road,
Chennai – 600 035. .. Petitioner

Vs

1.The Commercial Tax Officer,
Moore Market (North) Assessment Circle,
191, NSC Bose Road,
Chennai – 600 001.

2.The Manager,
Reserve Bank of India,
Fort St. George,
Chennai – 600 001.

3.Aashapuri Industries,
represented by its Proprietor,
Mr.Sundar Singh,
32, Elakaldappan Street,
Chennai – 600 003. .. Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records on the files of the First Respondent herein in his Ref.No.1915/2002 dated 13.09.2004 and quash the same and forbear the First Respondent herein from resorting to recovery proceedings under Section 26 of the Tamil Nadu General Sales Tax Act, 1959 in so far as it relates to arrears of sales tax of the Third Respondent herein due to the First Respondent herein.

For Petitioner : Ms.S.Vishnupriya
for M/s. N.Inbarajan

For Respondents : Mr.Haja Nazirudeen
Additional Advocate General
assisted by
Mr.G.Nanmaran,
Special Government Pleader (for R1)

Mr.T.Poornam (for R2)

Ms.S.G.Gopika
for M/s. McGan Law Firm (for R3)

ORDER

(Order of the Court was made by Dr. ANITA SUMANTH.,J)

The petitioner is a banking company and a Government of India undertaking. It had sanctioned credit facilities to one Aashapuri Industries/R3 towards packing credit and FDBP/FUDBP, vide sanction letter dated 22.03.2002.

2.Overdraft (OD) facility of Rs.57 lakhs was also extended on 01.08.2002 as against Fixed Deposit of Rs.60 lakhs. The OD limit stood enhanced from Rs.57 lakhs to Rs.69 lakhs as against enhanced fixed deposit coverage of Rs.85 lakhs (approx). At the time of extension of packing credit facility, the petitioner had marked a lien in respect of the fixed deposits offered as collateral.

3.While so, it appears that R3 defaulted in payment of sales tax demands in respect of the periods 1996-97 to 2001-02. Thus, the Commercial Taxes Department (‘R1’/‘Department’) had issued communication dated 13.09.2024 accompanied by a statutory notice in Form B-6 of the Tamil Nadu General Sales Tax Act, 1959 ('Act'/'TNGST Act') seeking recovery of the arrears.

4.The bank, in its capacity as a garnishee, had responded to the notice and furnished the details of the fixed deposits held by it with lien. The bank also complied in part, in that, while retaining a sum of Rs.67,91,953/- towards packing credit, it paid over a sum of Rs.15,76,630/- to the Department, ensuring that the lien exercised by it stood achieved to the extent of packing credit facilities granted to R3.

5.The department continued to pursue the B-6 notice in respect of the balance of the demand, paving the way for the bank to approach this Court by way of the present writ petition. The stand of the bank is that it is the bank that holds priority of charge in respect of the fixed deposit, and thus, it should not be called upon to remit anything over and above the sum of Rs.15,76,630/- already remitted by it.

6.We have heard the detailed submissions of Ms.Vishnupriya for Mr.N.Inbarajan, for the petitioner, Mr.Haja Nazirudeen, learned Additional Advocate General for Mr.G.Nanmaran, learned Special Government Pleader for R1. The Reserve Bank of India/R2 is represented by Mr.T.Poornam and Ms.S.G.Gopika, for McGan Law Firm appears for R3.

7.The submissions of learned counsel for the petitioner are to the effect that the petitioner bank holds priority of charge insofar as the lien on the Fixed Deposits has been registered as early as on 19.07.2002, enhanced on 01.08.2002.

8.With the marking of the lien as early as in July and August, 2002, the right of first charge is available to the bank. She would rely on the judgements of the Supreme Court in *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation and Others* [(1995) 96 STC

612 (SC)] and this Court in *Tamilnad Mercantile Bank Ltd. v. Commercial Tax Officer, South Avani Moola Veethi Circle, Madurai* [(2009) 23 VST 151 (Mad)], for the proposition that, while deciding the priority of charge between crown debts and other secured creditors, it is the debt was created anterior in point of time that must be honoured.

9.Learned Additional Advocate General was requested to confirm the dates of assessment orders passed under the Sales Tax Act in order to enable the Court to obtain clarity on the factual position as to, which lien/demand had been marked/raised at the earlier point in time.

10.The following tabulation has been circulated by learned Additional Advocate General indicating the dates of orders with the assessment periods mentioned alongside:

ASHAPURI INDUSTRIES

Year	***Date of order***
2001-02	30/04/2003
2000-01	30/04/2003
1999-2000	30/04/2003
1998-99	30/04/2003
1997-98	30/04/2003
1996-97	10/5/2004

11. Learned AAG is also aggrieved by the fact that the fixed deposits were foreclosed by the petitioner bank immediately on receipt of the B-6 notices. This haste, according to him, establishes the fact that the petitioner has not either been fair or acted bonafide, in honouring the statutory demand under the impugned B-6 notice.

12. The dates of creation of lien and passing of the orders are not in dispute. In fact, it is the learned AAG who has furnished the date of the sales tax assessments to the Court. On a comparison of the dates of creation of lien (19.07.2002 and 01.08.2002) and the orders of assessment (30.05.2003 and 10.05.2004), it is clear that it is the lien that is anterior. It hence the lien that that would take precedence.

13. Section 24 of the TNGST Act reads as follows:

> *'**Section 24. Payment and recovery of tax**:- (1) Save as otherwise provided for in sub-section (2) of section 13, the tax assessed or has become payable under this Act from a dealer or person and any other amount due from him under this Act shall be paid in such manner and in such installments, if any and within such time as may be specified in the notice of assessment, not being less than twenty one days from the date of service of the notice. The tax under sub-section (2) of section 13 shall be paid without any notice of demand. In default of such payment the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax or interest under this Act.*

Sec. 24(2) *Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall, subject to the claim of the Government in respect of land revenue and the claim of the Land Development Bank in regard to the property mortgaged to it under section 28(2) of the Tamil Nadu Co-operative Land Development Banks Act, 1934 (Tamil Nadu Act X of 1934), have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered:-*

(a) as land revenue, or

(b) on application to any Magistrate by such Magistrate as if it were a fine imposed by him:

Provided that no proceedings for such recovery shall be taken or continued as long as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under Sections 31, 31-A, 33, 35, 36, 37 or 38.'

14.While Section 24(1) of the Act states that the tax assessed or payable from a dealer shall become a demand immediately on intimation by a notice of assessment and within 21 days from the date of service thereof, and in addition become a charge on the property of such person or persons, section 24(2) states that upon service of such a demand, the Commercial Taxes Department shall have priority with respect to all other claims against the property of the said dealer or person.

15.Section 24(2) of the Act further sets out the procedure to be followed for collection of such secured demand. There are a slew of precedents, including the decisions cited by the learned counsel to the effect that Section 24, and the charge and the priority set out therein, would commence only on and from the date when such charge was created. We now proceed to advert to the cases cited.

16.In *State Bank of Bikaner and Jaipur* (supra), the appellant had accepted cash credit facilities and secured the facilities by a mortgage of the factory premises of the borrower. On defaults in repayment by the borrower, a suit was filed seeking recovery of the outstandings and realization of mortgage security under Order 34 Rule 4 of the Code of Civil Procedure.

17. Pending Suit, a rival claim was raised by the Commercial Tax Officer, Bharatpur relying on a prior claim in respect of the sales tax dues from the borrower. The sales tax officer argued that by virtue of the prior charge that the Commercial Taxes Department held, it was entitled to realize the sales tax arrears by sale of the mortgaged property.

18. The claim of the Commercial Taxes Officer rested on the provisions of Section 11AAAA of the Rajasthan Sales Tax Act, 1954, in terms of which, notwithstanding anything to the contrary contained in any law for the time being in force, in respect of the outstandings of tax,

penalty, interest or any other sum, such outstandings, constituted a first charge on the property of the defaulting assessee.

19. The Court considered the interplay of Section 11AAAA of the Rajasthan Sales Tax Act on an existing mortage and the discussion runs as follows:

> *It is, therefore, necessary to consider the effect of Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 on an existing mortgage in respect of the property of the dealer or the person liable to pay sales tax or other sums under the Rajasthan Sales Tax Act, 1954. Section 100 of the Transfer of Property Act deals with Charges on an immovable property which can be created either by an act of parties or by operation of law. It provides that where immovable property of one person is made security for the payment of money to a mortgage, a charge is created on the property and all the provisions in the Transfer of property Act which apply to a simple mortgage shall, so far may be, apply to such charge. A mortgage on the other hand, is defined under Section 58 of the Transfer of property Act as a transfer of an interest In specific immovable property for the purpose of securing the payment of money advanced or to be advanced as set out therein. The distinction between a mortgage and a charge was considered by this Court in the case of Dattatreya Shanker Mote and others v. Anand Chintaman Datar and others (1 974 2 SCC799). The Court has observed (at pages 806-807) that a charge is a wider term as it includes also a mortgage, in that, every mortgage is a charge, but every charge is not a mortgage. The Court has then considered the application of the second part of Section 100 of the Transfer of Property Act which inter alia deals with a charge not being enforceable against a bona fide transferee of the property for value without notice of the charge. It has held that the phrase "transferee of*

property" refers to the transferee of entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage.

20. While considering the priority of charge, ie., whether the statutory first charge would hold priority over an existing prior mortgage, the Court held that where a mortgage had been created in respect of a property and interest in that property had been carved out in favour of the mortgagee, the redemption of the property by the mortgagor would only stand settled on payment of the mortgage dues. This principle operates notwithstanding that the title to the property remained with the mortgagor.

21. The Supreme Court thus holds that when a statutory first charge is created on the property of the dealer, the property subjected to the first charge continues to be the property of the dealer. The interest of the mortgagee was not excluded from the first charge. The first charge which is created under Section 11AAAA of the Rajasthan Sales Tax Act will operate on the property as a whole.

22. Referring to the observations made in *Fisher and Lightwood's Law of Mortgage (10th edition at page 33)* discussing statutory mortgages, and the judgment of the English Court of Appeals in *Westminister City Council v. Haymarket Publishing Ltd.* ((981) 2 All ER 555), the Court concluded that the statutory first charge created by operation of the

Rajasthan Sales Tax Act would operate on the entirety of the property including the interest of the mortgagee.

23. In *Dattatreya Shanker Mote V. Anand Chintaman Datar* ((1974) 2 SCC 799), the Supreme Court observed while comparing a charge and a mortgage, that a charge is wider as it also includes a mortgage. Put differently, every mortgage is a charge but every charge is not a mortgage. The Supreme Court thus concluded that where a first charge is created by operation of law over a property, such charge would have precedence over an existing mortgage.

24. In *TamilNad Mercantile Bank Ltd.* (supra), the judgment in *State Bank of Bikaner and Jaipur* (supra) was cited by the Commercial Taxes Department but to no avail as the Court concluded adverse to the Department on a comparison of the provisions of Section 11AAAA of the Rajasthan Sales Tax Act and Section 24 of the TNGST Act. The distinction made by the Court flows from the absence of the word '*first*' in Section 24(2) of the TNGST Act.

25. Hence, in cases of rival claims between prior mortgages and subsequent statutory charges, by operation of Section 24 of the TNGST Act, the statutory charge is not a *'first charge'* as contra distinguished by a

charge created under Section 11AAAA of the Rajasthan Sales Tax Act. Hence, it is the prior mortgage that must prevail.

26.In the present case, the dates of creation of charge are 30.04.2003 in respect of the periods 1997-98 to 2001-02 and 10.05.2004 in respect of the period 1996-97. Clearly, the department has missed the bus and cannot now seek to impinge on the priority marked by the bank. In such view of the matter, the impugned B-6 notice has no legs to stand.

27.Coming to the submission in regard to pre-closure, we see no legal relevance of the same in deciding this matter. It is true that the bank had proceeded to pre-close the fixed deposits towards the outstandings of packing credit even prior to the dates of maturity of the fixed deposits. However, this could be viewed as the act of a prudent bank wishing to secure its interest in alignment with the lien created by it and nothing more. Hence, this argument does not advance the case of the Commercial Taxes Department.

28.Learned Additional Advocate General then draws attention to Section 24A of the Act. However, we are of the considered view that Section 24A which deals with transfers to defraud the revenue would have no application to the facts and circumstances of the present case. It would have been an entirely different matter had the lien of the bank been marked after the dates of assessment. However, the factual matrix establishes clearly that the orders of assessment have been passed only post the creation of lien by the bank.

29. Incidentally, in the counter filed by the R1 on 20.01.2009, there is no reference to Section 24A at all and hence this argument is nothing but an afterthought.

30.In fine, the impugned notice is quashed and this writ petition is allowed. No costs. Connected miscellaneous petition is closed. Needless to say, if the assessee/R3 has any other assets which may be liquidated, it is always open to the Commercial Taxes Department to proceed against those assets, strictly in accordance with law.

[A.S.M., J] **[G.A.M., J]**
20.01.2025

Index: Yes
Speaking Order
Neutral Citation: Yes
vs

To

1.The Commercial Tax Officer,
Moore Market (North) Assessment Circle,
191, NSC Bose Road,
Chennai – 600 001.

2.The Manager,
Reserve Bank of India,
Fort St.George,
Chennai – 600 001.

DR. ANITA SUMANTH.,J.
and
G. ARUL MURUGAN.,J.

vs

W.P.No.21496 of 2008
and
M.P.No.1 of 2008

20.01.2025