

**SOOKNA S. K. & ANOR v THE DIRECTOR-GENERAL, MAURITIUS REVENUE
AUTHORITY & ORS**

2023 SCJ 300

Serial No.: 914/2022

In Chambers

THE SUPREME COURT OF MAURITIUS

In the matter of:-

- 1. Soodesh Kumar Sookna**
- 2. Nive Co. Ltd**

Applicants

v

- 1. The Director-General, Mauritius Revenue Authority**
- 2. The Conservator of Mortgages**

Respondents

In the presence of:-

The Gambling Regulatory Authority

Co-Respondent

JUDGMENT

This is an application made under **section 71 (1)(c) of the Courts Act** for a summons to issue calling upon the respondents and co-respondent to show cause why an order should not be made directing the second respondent to erase from her books, registers, files and records the privilege inscribed in IV 2832 No.63 burdening the assets of the first applicant, more particularly the plot of land of the extent of 484.35 square metres at Belle Vue, in the district of Black River, morefully described in the deed transcribed in TV 7076 No.14.

The first applicant is the sole director of the second applicant which is in the business of operating coin-operated amusement machines. It is contended by the first respondent following an inspection that it carried out at the first applicant's base of operation that the latter had been operating limited payout machines, in respect of which he was liable to pay gaming tax. The first applicant's tax liability was assessed by the first respondent and a Notice of Assessment claiming a total of Rs 5,625,000 was issued on 30 October 2013. A privilege was inscribed burdening all the assets of the first applicant on 2 April 2014 after he failed to pay the sum being claimed as tax.

The application is being resisted by the first respondent while the second respondent and the co-respondent are abiding by my decision. The applicants and the first respondent have each filed two affidavits. Counsel for the applicants has further filed a chronology of events which purports to list in tabular form the sequence of events with regard to assessments raised and the privilege inscribed, based on the affidavits on record. There was no objection to that document being filed.

It appears from the affidavits and this undisputed chronology of events that –

- (a) on 20 November 2013, a letter enclosing a Notice of Assessment dated 30 October 2013 claiming Rs 5,625,000 as gaming tax due for period January 2013 to September 2013 was issued by the first respondent to the first applicant;
- (b) on 25 November 2013, the first applicant objected to the assessment raised without paying 30% of the tax assessed;
- (c) on 28 November 2013, the first respondent reminded the first applicant that he had failed to pay 30% of the tax assessed and requested him to pay that sum, failing which his objections shall be deemed to have lapsed;
- (d) on 11 December 2013, the first respondent issued to the first applicant a notice informing him that, since he had failed to pay 30% of the tax assessed, his objection was deemed to have lapsed and he had to pay Rs 5,715,000 on or before 7 January 2014 and if aggrieved, he could make written representations to the Assessment Review Committee ("ARC");
- (e) the first applicant has made representations to the ARC against the tax assessment;

- (f) on 2 April 2014, the first respondent informed the first applicant of an inscription of privilege to be taken on all his properties in respect of the gaming tax (**Doc 19**);
- (g) on 22 April 2014, the first respondent called upon the first applicant to pay the sum due by 8 May 2014, failing which enforcement action to recover taxes due would be initiated;
- (h) on 28 March 2016, the first respondent informed the first applicant that his grounds of objection had been considered, that the assessment was being maintained and that the sum of Rs 6,930,000, inclusive of interest, was payable by 25 April 2016;
- (i) on 14 April 2016, the first applicant again made representations to the ARC;
- (j) on 2 December 2021, the first applicant requested the first respondent to erase the inscription of privilege; and
- (k) on 7 December 2021, the first respondent replied, by referring to **section 21L(1) of the Mauritius Revenue Authority Act**, that it will not erase the inscription until the tax is paid in full.

Now it appears from **Doc 19** appended to the applicants' first affidavit that, on 2 April 2014, one Ms Nazroo, on behalf of the Director-General of the first respondent, informed the first applicant as follows –

“You are hereby notified that in accordance with the Gaming Act, I have deposited with the Conservator of Mortgages two memoranda of an inscription of privilege to be taken on all your immovable properties in respect of Gaming Tax amounting to Rs 5,715,000.”

Appended to that letter is a certified copy of the Memorandum of Inscription which shows that the said privilege was to be inscribed *“under section 43 of the Gaming Act”*.

Although the applicants averred in their affidavits that the first applicant does not owe any tax to the first respondent and that the first respondent was wrong to have raised an assessment on the applicants for allegedly operating limited payout machines, all legal advisers agreed at the hearing that the issue before me is whether the objection raised by the first respondent is serious or *prima facie* has some substance and is not frivolous nor vexatious (see

section 71 (1)(c) and (2) of the Courts Act; MCB Ltd v Sibartie & Ors [1980 MR 155] and Terraces de Martello Ltée (In Receivership) v Mauritius Revenue Authority [2020 SCJ 142]).

It was further agreed that the issue as to whether the assessment was rightly raised by the first respondent can only be determined by the ARC (see **sections 19 and 20 of the Mauritius Revenue Authority Act**) and not by the Judge in Chambers. It is a matter of concern however that Case ARC/VAT/54-16 has, apparently, been pending before the ARC since 2016 and that the impugned inscription of privilege burdening the property of the first applicant was made as far back as in 2014.

I have carefully considered the affidavits on record, the submissions of the learned Counsel and the authorities cited by them.

The objection of the first respondent rests mainly on the fact that the inscription of privilege on the first applicant's property was made in accordance with law following an assessment raised by the first respondent under **section 119 of the Gambling Regulatory Authority Act**. Since the first applicant has not paid the tax due, he has a debt in respect of which a privilege may be inscribed under **section 21L of the Mauritius Revenue Authority Act**.

Now a privilege is a preferential right given to a creditor who is thus "*privileged*" vis-à-vis other creditors (see **Titre Dix-huitième, Chapitres Premier et Deuxième of the Code Civil Mauricien**). A privilege inscribed on immovable property is governed by **Titre Dix-huitième, Chapitre Deuxième, Section Troisième of the Code Civil Mauricien**.

The relevant provisions of the Code Civil Mauricien read as follows –

**“TITRE DIX-HUITIÈME
DES PRIVILÈGES, DES HYPOTHÈQUES ET DES SÛRETÉS FIXES OU
FLOTTANTES**

(.....).

**CHAPITRE DEUXIÈME
DES PRIVILÈGES**

2143. *Le privilège est un droit que la qualité de la créance donne à un créancier d'être préféré aux autres créanciers, même hypothécaires.*

2146. *Les privilèges peuvent être sur les meubles ou sur les immeubles.*

SECTION TROISIÈME

DES PRIVILÈGES GÉNÉRAUX SUR LES IMMEUBLES

2152. *Les créances privilégiées sur la généralité des immeubles sont –*

1° les rémunérations de toute nature dues aux salariés et aux apprentis pour les cent-vingt derniers jours de travail, y compris les indemnités de licenciement et de congés payés, déduction faite des acomptes déjà perçus;

2° les frais de justice;

3° sous réserve des dispositions de l'article 2149, les créances de l'Etat, du Trésor Public, du fisc, de l'administration des douanes et des collectivités publiques ou des institutions publiques à raison –

- des impôts, contributions, droits ou taxes, de toute nature, tant directs qu'indirects;

des prélèvements ou cotisations de sécurité sociale dus en application du National Pensions Act;

- des amendes pénales, et des frais de recouvrement de celles-ci;

4° les rémunérations de toute nature dues aux salariés et aux apprentis pour les six derniers mois de travail, déduction faite des acomptes déjà reçus et des sommes perçues en application des dispositions du 1° ci-dessus.”

(the underlining is mine).

The following provisions of the Code Civil Mauricien provide more particularly for the inscription of the privilege with the second respondent –

“COMMENT SE CONSERVENT LES PRIVILÈGES

2154. *Entre les créanciers, les privilèges ne produisent d'effet à l'égard des immeubles qu'autant qu'ils sont rendus publics par une inscription à la conservation des hypothèques, de la manière déterminée par les articles suivants et par l'article 2196.*

2155. *Sont exceptées de la formalité de l'inscription les créances énumérées à l'article 2152.*

CHAPITRE QUATRIÈME

DU MODE DE L'INSCRIPTION DES PRIVILÈGES ET HYPOTHÈQUES

2196. *Sont inscrits au bureau des hypothèques, dans les formes et selon les modalités prescrites par la loi –*

1 les privilèges sur les immeubles, sous réserve, des privilèges généraux visés à l'article 2152;

2 *les hypothèques légales, judiciaires ou conventionnelles.*

L'inscription ne peut avoir lieu que pour une somme et sur des immeubles déterminés.

En toute hypothèse, les immeubles sur lesquels l'inscription est requise doivent être individuellement désignés.

2196-1. *Les inscriptions se font au bureau du conservateur des hypothèques. Elles ne produisent aucun effet si elles sont prises dans le délai pendant lequel les actes faits avant l'ouverture des faillites sont déclarés nuls.*

Il en est de même entre les créanciers d'une succession si l'inscription n'a été faite par l'un d'eux que depuis l'ouverture, et dans le cas où la succession n'est acceptée que par bénéfice d'inventaire.

CHAPITRE CINQUIÈME

DE LA RADIATION ET RÉDUCTION DES INSCRIPTIONS

2197. *Les inscriptions sont rayées du consentement des parties intéressées et ayant capacité à cet effet, ou en vertu d'un jugement en dernier ressort ou passé en force de chose jugée."*

(the underlining is mine).

Pursuant to **Article 2152 of the Code Civil Mauricien**, "*les créances...du fisc*" on account of unpaid tax, including gaming tax, are, subject to **Article 2149 of the Code**, des "*créances privilégiées sur la généralité des immeubles*" akin to the French "*privilège du trésor public*". Such *créances* need not be inscribed (see **Article 2155** above).

In addition to the above general provisions on "*privilège*" in the Code Civil Mauricien, the legislator made more specific provision in various Revenue enactments for the procedure for inscription of the privilege in favour of Government in respect of tax payable which constitutes the operative debt (see now **section 21L of the Mauritius Revenue Authority Act** which was introduced – and the former **section 130 of the Gambling Regulatory Authority Act, section 141 of the Income Tax Act** and **section 45 of the Value Added Tax Act**, which were repealed – by the **Finance (Miscellaneous Provisions) Act 2018**).

Section 21M of the Mauritius Revenue Authority Act, like the other Revenue enactments before, also provides for circumstances in which the privilege for recovery of tax under the Code Civil Mauricien operates without need for inscription.

Now the first respondent had elected in this case to have the privilege inscribed and caused the inscription to be made by the second respondent under **section 43 of the Gaming Act** (see **Doc 19**). However, as rightly highlighted by learned Counsel for the applicants, the **Gaming Act** had already been repealed by the time the privilege was inscribed on 2 April 2014.

Indeed the **Gaming Act** was repealed on 6 December 2007 by the **Gambling Regulatory Authority Act** (see [\[Act No. 9 of 2007\]](#)), which contained a counterpart provision providing for an inscribed privilege (see **section 130 of the Gambling Regulatory Authority Act**) which has, as stated above, been replaced in 2018 by **section 21L of the Mauritius Revenue Authority Act**. **Section 21L** is cast in almost identical terms as **section 43 of the Gaming Act**, save for the prescribed form of the memorandum of inscription¹.

I have given careful consideration to whether the inscription may still be held to be valid despite the repeal of the Gaming Act. I am of the view however that the savings provisions at **section 167(2)(b) of the Gambling Regulatory Authority Act** would find no application in that case as they would only serve to preserve acts which had been lawfully made under the repealed Act before its repeal and before the commencement of the repealing Act. Nor would **section 17 of the Interpretation and General Clauses Act** be of any avail to the first respondent as, in the present case the Gaming Act had already been repealed long before the privilege was inscribed on 2 April 2014.

Further **Article 2197-3 of the Code Civil Mauricien** provides for the erasure of an inscription which is not founded in law –

“La radiation doit être ordonnée par le Juge en Chambre lorsque l’inscription a été faite sans être fondé ni sur la loi, ni sur un titre, ou lorsqu’elle l’a été en vertu d’un titre soit irrégulier, soit éteint, ou soldé, ou lorsque les droits de privilège ou d’hypothèque sont effacés par les voies légales.”

(the underlining is mine).

I have no alternative in the circumstances other than to find that the objection raised by the first respondent is not serious and lacks substance as the inscription of privilege made on 2 April 2014 under the repealed Gaming Act by the second respondent was not made under the

¹ The Gaming Act provided for the memorandum to be in the form set out in the Fourth Schedule to the Value Added Tax Regulations 1998.

authority of a valid law and is therefore null and void. I order the second respondent to erase the said inscription from her books and registers forthwith.

It is for the first respondent to consider whether it may cause a privilege to be inscribed in respect of any pending debt and tax liability of the respondents in accordance with **section 21L of the Mauritius Revenue Authority Act** or otherwise rely on the privilege created by operation of the law in respect of “*créances... du fisc*” under **Articles 2152 and 2155 of the Code Civil Mauricien**.

For the sake of completeness I would add that I find untenable the main argument of Counsel for the applicants to the effect that the inscription of privilege ought to be erased merely because there is an appeal pending before the ARC and the debt cannot be said to be “*certain*”. There is no requirement that the liability of the debtor be finally settled before any inscription of privilege may be made to secure payment of the tax due to Government. The judgment of **AAPCA (Mauritius) Ltd (In Receivership) & Anor v Mauritius Revenue Authority** [[2018 SCJ 302](#)], which was fairly cited by Counsel for the applicants, if anything, buttresses the first respondent’s contention that a privilege may be inscribed pending final determination of the tax liability and the inscription erased if the tax liability is eventually discharged.

With costs against the respondents.

I certify as to Counsel.

A.D. Narain
Judge

25 July 2023

For Applicants : **Mr J. Gujadhur, SA**
Mr Y. Nazroo together with Mr D. Mannikum,
of Counsel

- For Respondent No. 1** : **Ms S. Angad, Principal State Attorney
Mr M. Beeharry, then Principal State Counsel**
- For Respondent No. 2** : **Mrs B. G. Oogorah, Senior State Attorney
Ms B. Z. A. Aubeeluck, State Counsel**
- For Co-Respondent** : **Mrs A. Ragavoodoo, Attorney at Law
Mr R. Yerrigadoo together with Ms R. Soukhee,
of Counsel**