

## A charge created over property by operation of law is distinct from attachment of the property – Gujarat HC

11 April 2022



## Summary

The Gujarat High Court (HC) has held that there is a fine distinction between attachment of property and charge created over the property by operation of law. The HC observed that the applicant misconceived the charge over property as an attachment of property. Attachment of property does not confer any title on the government or creditor. Further, a charge creates no interest in or over a specific immovable property, rather it is a security for payment of money. Thus, the HC held that a charge by operation of law is created upon passing of the assessment order in the present case and that is not attachment of property of the applicant.

### Facts of the case

- The applicant<sup>1</sup> had incurred VAT liability by virtue of an assessment order passed by the competent authority.
- The appellate authority has stayed the recovery proceedings upon condition of pre-deposit. Thus, the applicant contended before the court that the charge created over his property should no longer remain in operation.
- The petitioner submitted that there is no provision in the GVAT Act<sup>2</sup> which permits attachment of a property after passing of the final assessment order and appeal pending before the first appellate authority.

### Gujarat HC observations and ruling<sup>3</sup>:

- **Misconception on the part of applicant:** During the course of submissions, the applicant was confused between an attachment of property and charge created over the

property. The petitioner misunderstood that the property had been attached.

- **Applicability of provision:** Section 44 of the GVAT Act provides for special mode of recovery whereas section 45 provides for provisional attachment and Section 46 confers special power to recover tax as land arrears. None of these provisions is applicable in the present case.
- **Effect of attachment of property:** The HC placed reliance on several judgements<sup>4</sup> wherein it was held that attachment of property does not confer any title to the creditors. Attachment creates no charge or lien upon the attached property. It merely prevents and avoids private alienations.
- **Charge over the Immovable property:** In a former judgment<sup>5</sup>, it was held that a charge<sup>6</sup> is only a security for the payment of money and does not create any interest in or over an immovable property. A charge is a right to receive money. The provision<sup>7</sup> prescribes two

<sup>1</sup> Shree Radhekrushna Ginning And Pressing Pvt. Ltd.

<sup>2</sup> The Gujarat Value Added Tax Act, 2003

<sup>3</sup> R/Special Civil Application No. 5413 of 2022

<sup>4</sup> Privy Council in Moti Lal v. Karrabuldin (1897) I.L.R. 25 Cal. 179, p.c.; Frederick Peacock v. Madan Gopal (1902) I.L.R. 29 Cal. 428

<sup>5</sup> Dattatreya Shanker Mote vs. Anand Chintaman Datar and others (1974) 2 SCC 799

<sup>6</sup> Section 48 of GVAT Act, 2003

<sup>7</sup> Section 100 of the Transfer of Property Act, 1882

types of charges on immovable property, i.e., charges by act of parties and those by operation of law.

- **“Operation of law” is more extensive:** The words “by operation of law” are more extensive than the words “by law”. A charge created by operation of law includes a charge directly created by the provisions of an Act as well as other charges created indirectly as a legal consequence of certain conditions.
- **Creation of charge by operation of law:** A charge by operation of law was created in favour of the state on the day when the assessment order was passed. An entry in revenue records has been made to make everyone aware. Thus, there is no attachment of property in this case.

### Our comments

By citing various decisions, the Gujarat high court explained the effect of attachment and charge over property in the present ruling.

Since there is a fine distinction between the attachment and charge over property, hence there should not be any confusion between both the concepts.

The present ruling shall be helpful for the taxpayers to understand the difference between attachment and charge over property and shall set precedence in the similar matters.

Further, it is to be noted that provisions of provisional attachment under GST<sup>8</sup> are wider and harsh in comparison to the Gujarat VAT<sup>9</sup> laws. Under GVAT laws, any property belonging to the dealer can be provisionally attached however under GST, it can be done belonging to taxable person as well as any person who retains the benefit of specified transaction mentioned under the laws. Also, under GVAT, provisional attachment of property was allowed however under GST, bank account has been specifically included under the provisions along with the property.

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<sup>8</sup> Section 83 of the CGST Act, 2017

<sup>9</sup> Section 45 of GVAT Act, 2003

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