THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

Writ Petition No.7412 of 2014

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

The proceedings under challenge in this writ petition is the notice dated 29.01.2014 issued by the 1st respondent under Section 58 of the A.P. Value Added Tax Act, 2005 (for short "the APVAT Act") informing the petitioner that, if the amount demanded of Rs.5,37,493/- was not paid by way of Demand Draft/Bankers Cheque, they would be compelled to take further action under Section 58 of the APVAT Act.

Facts, to the extent necessary, are that the petitioner, a nationalised bank, extended a loan facility of Rs.1.00 crore towards the working capital requirements of M/s.Vishnu Priya Rice Working Company, a partnership firm. The loan facility was secured by way of a personal guarantee of Smt.S.Pushpavathi, and also by way of mortgage of collateral security, by deposit of title deeds, of the property belonging to the guarantor who was, none other than the mother of all the partners of the partnership firm. On the ground that the borrower had defaulted in repayment of the loan the petitioner, as a secured creditor, initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act"), and auctioned the property by public auction on 03.05.2012 for a consideration of Rs.62,50,000/- and Rs.57,45,000/- i.e for a total sum of Rs.1,19,95,000/-. A sale certificate was issued to the successful bidder and the sale proceeds were appropriated towards the dues payable by the borrower to the petitioner-Bank.

Before the demand notice could be issued under the provisions of the SARFAESI Act, the guarantor Smt. S.Pushpavathi died, and the property devolved, by succession, on the partners of the firm to whom the petitioner had extended the working capital loan. The 1st respondent issued notice dated 29.01.2014, both under the APVAT Act and the A.P. General Sales Tax Act, 1957 (for short "the APGST Act"), calling upon the petitioner to pay Rs.5,37,493/- representing the arrears of sales tax, due for the period 2002-03 to 2011-12, to the 1st respondent. Aggrieved thereby, the petitioner has invoked the jurisdiction of this Court.

Sri Ambadipudi Satyanarayana, learned counsel for the petitioner, would submit that, unlike cases where the property belongs to the borrower, in the present case the property which was subjected to sale, for recovery of the dues of the petitioner-Bank, belonged to the guarantor; while Section 16C of the APGST Act, and Section 26 of the APVAT Act, gives priority to the State Government for recovery of tax arrears, Section 17A of the APGST Act and Section 27 of the APVAT Act are an exception thereto; as long as the charge created in favour of the Bank is a valid charge, and has not been created with an intention to defraud the Revenue, it is the Bank which would have priority for repayment of its debt; while construing provisions, similar to Section 16C of the APGST Act and Section 26 of the APVAT Act, the Supreme Court, in ***Central Bank of India vs. State of Kerala***[1], had held that the State Government had priority over the assets, on which a charge is created, for recovery of their dues; the provisions of Section 26B of the Kerala General Sales Tax Act, 1963 (for short "the KGST Act") was alone considered by the Supreme Court in ***Central Bank of India***[1]; even otherwise, there is a distinction between Section 26A of the KGST Act on the one hand and Section 17A of the APGST Act and Section 27 of the APVAT Act on the other; unlike Section 26A of the KGST Act, the aforesaid provisions of the APGST Act and the APVAT Act, exclude from its ambit charges created not with the intention to defraud any tax or any other sum payable; the petitioner has produced proof before the 1st respondent to show that the charge created by Smt. S.Pushpavathi in their favour was not with the intention to defraud tax; and in the light of the law declared by the Division Bench of this Court, in ***Damera Ramakrishna vs. Commercial Tax Officer***[2], the impugned notice issued by the 1st respondent is illegal and necessitates being set aside.

Section 26 of the APVAT Act is in *pari materia* with Section 16C of the APGST Act and provides that, notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, including deferred tax which is treated as a loan extended by the Government to the dealer, penalty, interest and any other sum payable by a VAT dealer under the Act, shall be the first charge on the property of the VAT dealer. Section 27(1) of the APVAT Act stipulates that, where during the pendency of any proceedings under the Act or after completion thereof, any VAT dealer creates a charge on, or parts with the possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever, any of his assets in favour of any other person, such charge or transfer shall be void unless he proves that such charge or transfer was not with the intention to defraud any tax or any other sum payable.

A Division Bench of this Court, in ***Damera Ramakrishna***[2], held that, where the transfer of property by way of sale is *bona fide*, Section 17A of the APGST Act protected such transactions; onus, in the first instance, was on the Department to prove that there was a fraud and the transaction was made only to defeat the rights of the Department to recover the tax; in case the Department was able to prove it, then the onus would shift to the petitioner to show that they were not parties to the fraud played by the assessee against the Department; and the said provision protects *bona fide* purchasers of the property.

The Division Bench judgment, in ***Damera Ramakrishna***[2], was considered by a later Division Bench in ***State Bank of India vs. Deputy Commercial Tax Officer***[3] wherein it was held that the question, which was considered in ***Damera Ramakrishna***[2], related to burden of proof under Section 17A of the APGST Act, and not the question whether Section 17A of the APGST Act operated as an exception to Section 16C of the APGST Act. Relying on the judgment of the Supreme Court, in ***Central Bank of India***[1], the Division Bench, in ***State Bank of India***[3], held the Government had the first charge over the property of the borrower/dealer, and were entitled to priority over the said property for realisation of their tax dues.

Sri Ambatipudi Satyanarayana, learned counsel for the petitioner, is justified in his submission that the words **"unless he proves that such charge or transfer was not with the intention to defraud any tax or any sum payable**", used both in Section 27 of the APVAT Act and Section 17A of the APGST Act, are not to be found in Section 26A of the KGST Act, and that Section 26A of the KGST Act was not brought to the notice of the Supreme Court in ***Central Bank of India***[1]. That, in our opinion, is of no consequence and the judgment of the Supreme Court in ***Central Bank of India***[1], and the Division Bench of this Court in ***State Bank of India***[3], would nonetheless constitute precedents binding on this Court. All that Section 27(1) of the APVAT Act, and Section 16C of the APGST Act, provide for is that a fraudulent charge is void. Even if a charge is not void, it would only remain a valid charge on the property. Consequently, both the petitioner-Bank and the State Government would continue to have charge over the property and, in view of Section 26 of the APVAT Act and Section 17A of the APGST Act, it is the State Government which would have first charge over the property for recovery of the tax arrears. Any charge, which the petitioner-Bank may have over the property, will evidently be subject to the first charge statutorily created in favour of the State Government.

We must also bear in mind that Section 26 of the APVAT Act and Section 17A of the APGST Act start with a non obstante clause and stipulate that, notwithstanding anything to the contrary contained in any law for the time being in force, the provisions of Section 26 of the APVAT Act and Section 17A of the APGST Act are attracted. The non obstante clause uses the words "***notwithstanding anything to the contrary contained in any law for the time being in force"***. Consequently the word "law", as used in the non obstante clause, would include the provisions of the APGST Act and the APVAT Act as well. As a result, notwithstanding Section 27 of the APVAT Act and Section 16C of the APGST Act, the provisions of Section 26 of the APVAT Act and Section 17A of the APGST Act would prevail. The State Government would, therefore, have first charge over the property, and be entitled to priority over the charged assets for recovery of its tax dues.

It is wholly unnecessary for us to examine whether the judgment of the Supreme Court in ***Central Bank of India***[1] would apply to the case of a guarantor also, as it is fairly stated by Sri Ambatipudi Satyanarayana, learned counsel for the petitioner, that, even before a notice was issued by the petitioner-bank under Section 13(2) of the SARFAESI Act, the guarantor Smt. S.Pushpavathi died; the property devolved, by succession, on the partners of the partnership firm; and by the date, on which action was initiated by the Bank for recovery of its dues, the property belonged to the partners of the firm. As the liability of the partners of a firm is joint and several, the 1st respondent was justified in claiming that, for recovery of its tax dues, it had first charge over the subject property in terms of Section 26 of the APVAT Act and 17A of the APGST Act.

The law declared by the Supreme Court in ***Central Bank of India***[1] is binding on this Court under Article 141 of the Constitution of India and it would be wholly inappropriate for us to distinguish the said judgment on the specious plea that provisions, similar to Section 27(1) of the APVAT Act and Section 17A of the APGST Act, were not considered therein. Both these provisions, and the judgment of the

Supreme Court in ***Central Bank of India***[1], were considered by a Division Bench of this Court in ***State Bank of India***[3], and the view which we have now taken accords with the law declared by the Division Bench of this Court in ***State Bank of India***[3].

Viewed from any angle, the impugned notice, issued under Section 58 of the APVAT Act, does not necessitate interference in proceedings under Article 226 of the Constitution of India. The Writ Petition fails and is, accordingly, dismissed. The miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

SURESH KUMAR KAIT, J

Date: 18.04.2016
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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

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[1] (2009) 4 SCC 94

[2] 2005(1) ALT 293 (D.B.)

[3] 2014(3) ALD 283 (DB)