HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT PETITION Nos.10874 AND 20095 OF 2016

COMMON ORDER: (Per Hon'ble Sri Justice A. Shankar Narayana)

The auction purchaser in an e-auction sale conducted by the State Bank of Hyderabad, Balanagar Branch, Hyderabad, a nationalized bank (for short 'the Bank'), is petitioner in the former writ petition. He sought *mandamus* to declare the e-auction sale and issuance of sale certificate by the Bank in his favour as illegal, on the ground that subject property was an encumbered one and the said fact was not revealed by the Bank, and, therefore, made a consequential request to return the sale consideration with interest at 18% per annum.

2. The Bank, which is respondent No.4 in the former writ petition, filed the latter writ petition questioning the notice in Form - V, dated 30.11.2015, issued by the Deputy Commercial Tax Officer, Abids, Hyderabad - respondent No.2 as illegal with a consequential request to direct the Joint Sub-Registrar - 7, Sanjeeva Reddy Nagar, Hyderabad - respondent No.3, to register the sale document concerning the very same property without reference to the aforesaid notice of attachment.

3. Since the reliefs in both the writ petitions relate to one and the same subject property and the parties are common 'except to the extent that the writ petitioner in the former writ petition is respondent No.4 in the latter writ petition and the Bank - respondent No.4 is the writ petitioner in the latter writ petition,' seeking distinct reliefs, it is felt that it would be appropriate to dispose of both the writ petitions by the common order.

4. The facts needed for resolving the controversy in the writ petitions are that one M/s. Dilip Metal Industries availed cash credit facility with overall limit of Rs.1,50,00,000/- (Rupees one crore fifty lakhs only) in the year 2010, not only on hypothecation of goods but also by deposit of title deeds in respect of a 'Flat situated in First Floor in an extent of 1006 square feet including common area with proportionate undivided share to an extent of 28.67 square yards out of total land admeasuring 1160 square yards forming part of 'Delta Chambers' situated at Ameerpet, Hyderabad' (henceforth referred to as 'subject property'). The Bank initiated measures under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') for recovery of Rs.1,57,39,792/- against the principal borrower and guarantors. Possession notice under Section 13(4) of the

SARFAESI Act was issued on 01.07.2015. Thereafter, the subject property was put to auction on 29.09.2015.

5. Respondent No.4 (for brevity ‘auction purchaser’) in the latter writ petition, who is petitioner in the former writ petition, became successful bidder and on payment of entire sale price of Rs.34,15,000/-, the Bank issued sale certificate in his favour on 20.10.2015.

6. While the things stood thus, the Bank learnt through the auction purchaser that the Commercial Tax Department, in the first week of December, 2015, got affixed notice under Section 27 of the Telangana Revenue Recovery Act 1864 (for brevity ‘Recovery Act 1864’). The Bank, therefore, brought to the notice of the Commercial Tax Department about the sale held by it on 29.09.2015 and issue of sale certificate to the auction purchaser on 20.10.2015 and thereby protested the notice of attachment over the subject property stating that it was already sold under the provisions of special statute. The Bank has taken a specific plea that the provisions of Section 35 of the SARFAESI Act would prevail over Sections 26 and 27 of the A.P. Value Added Tax Act, 2005 (for short ‘APVAT Act’) and thereby requested to withdraw the notice in Form - V.

7. It is stated that the Bank has learnt that the Commercial Tax Department addressed a letter to

respondent No.3, registering authority, not to register the subject property which prompted the auction purchaser to file the former writ petition and, thus, according to the Bank, the auction purchaser was forcing it to recall the sale transaction which is impermissible under law as the sale attained finality under the SARFAESI Act even prior to issue of notice in Form - V, dated 30.11.2015. Hence, according to the Bank, the said notice is illegal and the alleged claim of the Commercial Tax Department cannot be termed as revenue arrears to be recovered under the Recovery Act 1864. Stating thus, the Bank attempted to justify filing of the former writ petition also, on the ground that it is under an obligation to protect the interest of the auction purchaser.

8. The Bank has extracted the relevant provisions of the APVAT Act and made certain other pleas in the direction of terming the transaction as *bona fide* transfer falling within the ambit of Section 27 of the APVAT Act, which details, in our view, are unnecessary to elaborate.

9. Turning to the justification for the relief sought by the auction purchaser, according to him, the Commercial Tax Department initiated proceedings by issue of Form - I, dated 19.05.2015, to
M/s. Dilip Metal Industries, the principal borrower, Form - IV on 22.06.2015 and notice of attachment of immovable property of principal borrower in Form - V on 30.11.2015.

The Bank, despite aware of all these proceedings, concealing the same declared the subject property as unencumbered property and sold it to him and, thus, the sale according to him, is tainted with illegality, and, therefore, sought to set aside the sale and return the sale proceeds with interest.

10. Heard Sri G. Kalyan Chakravarthy, learned counsel for the auction purchaser, M/s. E. Madan Mohan Rao, learned Standing Counsel for the Bank, and Sri Jukanti Anil Kumar, learned Special Standing Counsel for Commercial Taxes for the Commercial Tax Department - respondent No.2 in both the writ petitions.

11. The learned Standing Counsel for the Bank would submit that sale was effected and the sale certificate had already been issued to the auction purchaser on 20.10.2015, and, therefore, the notice of attachment, dated 30.11.2015, issued in respect of the subject property will not have any effect. He would submit that the provisions of
Section 35 of the SARFAESI Act will prevail over the provisions of Sections 26 and 27 of the APVAT Act, and, therefore, sought to grant the aforesaid reliefs.

12. The law is now well settled that the provisions of Sections 26 and 27 of the APVAT Act, in view of non obstante clause contained in Section 26 of the APVAT

Act, would create preferential charge over the charge or mortgage created on the subject property by the borrower in favour of the Bank. The said issue is squarely covered by a decision rendered by the Hon'ble Division Bench of this Court in

W.P. No.7412 of 2014 to which one of us (Sri Justice Ramesh Ranganathan) is a Member. It would suffice, if the relevant observations therein, which would best sum up the situation, are extracted instead of referring to the purport of Sections 26 and 27 of the APVAT Act following the law declared by the Hon'ble Supreme Court in **Central Bank of India v. State of Kerala**[1], thus:

> "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."

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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."

13. Now on facts, the material papers filed by the learned counsel for the Commercial Tax Department would reflect that the Commercial Tax Department issued arrears notice, dated 18.02.2015, to the dealer M/s Dilip Metal Industries demanding to pay an amount of Rs.1,66,58,210/- within seven (7) days. The demand for payment of amount outstanding in 'Form VAT 206' was issued on 24.03.2015 addressing it to the Manager of the

Bank and the dealer demanding the said amount. There is an endorsement made by the Chief Manager of the bank, dated 25.03.2015, stating that captioned account is an N.P.A. (Non Performing Asset) with them and no balance was available. The Commercial Tax Department also made yet another demand in 'Form Vat 206' on 02.04.2015 to the Manager of the Bank and the dealer demanding the said amount, where the Chief Manager of the Bank made an endorsement, dated 04.04.2015, thus:

> 'As stated earlier, the account is an NPA account and we have already initiated recovery proceedings for our dues. No balance is available in the account.'

14. On 19.05.2015, the Commercial Tax Department has issued Form - I under Recovery Act 1864. Form - IV demand prior to attachment of land under Section 25 of the APVAT Act was issued on 22.06.2015 and finally Form - V on 30.11.2015, notice of attachment under Section 27 of the Recovery Act 1864 was issued. The Bank has issued a notice, dated 18.12.2015, to the Commercial Tax Department stating that SARFAESI Act being a special legislation for sale of secured assets, the provisions of SARFAESI Act would prevail in respect of the secured assets and as already the sale certificate has been issued in favour of the auction purchaser and the

property stood transferred under the statute and Section 35 of the SARFAESI Act overrides all the other legislations as far as the sale of secured assets are concerned for recovery of the public debts, the attachments under Section 27 of the Recovery Act 1864 against the property already sold is contrary to law and without jurisdiction.

15. Thus, it is clear that the Bank became aware of initiation of proceedings by the Commercial Tax Department for recovery of the arrears by the dealer, way back on 25.03.2015 itself, which was much prior to the date of issuance of notice under Section 13(4) of the SARFAESI Act, which was issued on 01.07.2015 and a day just after issuance of notice under Section 13(2) of the Act which was on 24.03.2015.

16. Thus, the Commercial Tax Department or the State Government, as the case may be, would continue to have charge over the subject property and in view of the provisions of Section 26 of the APVAT Act, invariably, the State Government would have preferential charge over the subject property for recovery of the tax arrears and the charge or mortgage in favour of the Bank created by the principal borrower, thus, subject to the first charge statutorily created in favour of the State Government. Therefore, we find no merit in the latter writ petition i.e., W.P. No.20095 of 2016 filed by the Bank and, therefore,

the same, in our view, is liable to be dismissed.

17. Adverting to the relief claimed by the auction purchaser in the former writ petition, the sequence of events have been narrated in the preceding paragraph. The said events have been narrated with a purpose. That being, the Bank when issued e-auction sale notice under Rule 8(6) of the Rules, certainly, it was imperative on the Bank to mention the process initiated by the Commercial Tax Department in the e-auction sale notice in view of Clause (f) of the proviso to Rule 8(6) of the Rules. The proviso and clause (f) appended to Rule 8(6) of the Rules read thus:

> **"8. Sale of immovable secured assets:-**
>
> (1) xxx xxx xxx
> (2) xxx xxx xxx
> (3) xxx xxx xxx
> (4) xxx xxx xxx
> (5) xxx xxx xxx
>
> (6) The authroised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5) :
>
> Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor

> shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-
>
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) xxx xxx xxx
> (d) xxx xxx xxx
> (e) xxx xxx xxx
>
> (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property."

18. Thus, the vital fact of initiation of proceedings by the Commercial Tax Department were required to be mentioned in the public notice intended for conducting auction . Non incorporation of the said details in the e-auction sale notice occasioned the auction purchaser to complain against the Bank that it has concealed the notices and sold the subject property to him which is nothing but an infraction of clause (f) of proviso to Rule 8 (6) of the Rules.

19. We have already opined in the above that there is no merit in the requests of the Bank in the latter writ petition. Besides the same, in view of infraction of Clause

(f) of proviso appended to Rule 8(6) of the Rules committed by the Bank, certainly, the request of the auction purchaser in the former writ petition cannot be refused. Therefore, we set aside the e-auction sale conducted by the Bank on 29.09.2015 and the sale certificate issued on 30.10.2015 in respect of the subject property in favour of the auction purchaser.

20. With regard to the consequential relief sought for by the auction purchaser, when once the e-auction sale is set aside including the sale certificate, he is legitimately entitled to return of sale price and, therefore, the Bank is directed to return the sale consideration of Rs.34,15,000/- (Rupees thirty four lakhs fifteen thousand only) deposited by him, forthwith. Concerning the relief for grant of interest, the auction purchaser is at liberty to approach the Civil Court if he so chooses.

21. The result, therefore, is, W.P. No.10874 of 2016 is allowed in part and W.P. No.20095 of 2016 is dismissed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any pending stand disposed of.

RAMESH RANGANATHAN, ACJ

A. SHANKAR NARAYANA, J

August ________, 2016.

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[1] (2009) 4 SCC 94