

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

+ WRIT PETITION No.38142 of 2016

% Date: 12-04-2017

Between:

The Andhra Pradesh Industrial Development Corporation Ltd.,
Parishrama Bhavan, Basheerbagh,
Hyderabad – 500040, rep. by its
Managing Director

... Petitioners

Vs.

1. The State Bank of India, rep. by its Chief Manager, Parishram Bhavan,
Basheerbagh, Hyderabad – 500 004.
2. The Commercial Tax Officer, Alcot Gardens Circle, Rajahmundry, East
Godavari District, State of Andhra Pradesh

... Respondents

! Counsel for Petitioner : Mr. P.V. Ravindra Kumar

^ Counsel for Respondent No.2 : Mr. S. Suri Babu
Special Standing Counsel for CT (A.P)

< GI ST:

> HEAD NOTE:

? Cases referred

1. (2010) Vol. 51 APSTJ 117 = AIR 2001 AP 270

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

Delivered on :12-04-2017

Coram :

Honourable Mr. Justice V.RAMASUBRAMANIAN
and
Honourable Ms. Justice J.UMA DEVI

W.P.No.38142 of 2016

The Andhra Pradesh Industrial Development Corporation Ltd.,
Parishrama Bhavan, Basheerbagh,
Hyderabad – 500040, rep. by its
Managing Director

.... Petitioner

Vs.

3. The State Bank of India, rep. by its Chief Manager, Parishram
Bhavan, Basheerbagh, Hyderabad – 500 004.
4. The Commercial Tax Officer, Alcot Gardens Circle, Rajahmundry,
East Godavari District, State of Andhra Pradesh

.... Respondents

For the Petitioner

: Mr. P.V. Ravindra Kumar

For the Respondent No.2

: Mr. S. Suri Babu,
Special Standing Counsel for CT (A.P)

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND

HON'BLE MS. JUSTICE J. UMA DEVI

W.P.No.38142 of 2016

ORDER: (per V. Ramasubramanian, J.)

The Andhra Pradesh Industrial Development Corporation Limited, which is a Corporation wholly owned by the State of Andhra Pradesh, has come up with the present writ petition challenging the action of the Commercial Tax Officer, who is the second respondent herein, in attaching the current account of the petitioner in the State Bank of India, which is the 1st respondent herein.

2. Heard Mr. P.V. Ravindra Kumar, learned counsel for the petitioner and Mr. S. Suri Babu, learned Special Standing Counsel for Commercial Taxes (A.P.).

3. It appears that a Company by name Amruth Starch (P) Ltd., was a dealer under the Andhra Pradesh General Sales Tax Act, 1957 and Central Sales Tax Act, 1956. The dealer committed default in payment of tax to the total tune of Rs.10,51,175/- in respect of the assessment years 1995-96, 1996-97 and 1997-98. The dealer was also a defaulter, in respect of the financial facilities extended to them by the petitioner herein jointly with the Andhra Pradesh State Financial Corporation. Therefore, by invoking the powers under sections 29 and 30 of the State Financial Corporations Act, the petitioner herein brought the properties of the dealer to sale by public auction and realized part of their dues. But in the meantime, by Amendment Act No.9/1999, which came into effect from 06.04.1999, Section 16C was inserted in the A.P. General Sales Tax Act, 1957, creating a first charge on the property of a dealer, if any amount of tax, penalty, interest and any other sum was payable by such dealer. The

creation of such charge under Section 16C was notwithstanding anything to the contrary contained in any law for the time being in force.

4. Challenging the *vires* of Section 16C, a batch of writ petitions came to be filed on the file of this Court. One such writ petition was by the A.P. State Financial Corporation in W.P.No.21865 of 1999. While admitting the writ petition, a Bench of this Court is said to have passed an interim order on 11.11.1999 permitting the State Financial Corporation to proceed with the sale of the properties of the borrower, which were offered as securities for the due repayment of the loan. There was a further direction in the said interim order that out of the sale proceeds realized by the State Financial Corporation, an amount equivalent to the sales tax dues should be kept in an interest yielding deposit. Depending upon the result of the writ petition, the deposited amount was directed to be disbursed or dealt with. The interim order passed on 11.11.1999 in W.P.No.21865 of 1999 filed by the A.P. State Financial Corporation reads as follows:

“Pending further orders, the petitioner can proceed to sell the properties offered as security for the repayment of the loan due to the petitioner. Out of the sale proceeds realized by the petitioner-corporation an amount equivalent to the sales tax dues in respect of which the sales tax Department has issued notice shall be kept in an interest yielding deposit and a separate account shall be maintained for the amounts so deposited. Depending on the result of the writ petition, the deposited amount with interest shall be disbursed or dealt with.”

5. Eventually by a common judgment dated 28.04.2010, reported in Andhra Pradesh State Financial Corporation v. Government of Andhra Pradesh¹, a Bench of this Court upheld the validity of Section 16C of the Act. In other words, W.P.No.21865 of 1999 filed by the A.P. State Financial Corporation was dismissed. As we have pointed out

¹ (2010) Vol. 51 APSTJ 117 = AIR 2001 AP 270

earlier, the defaulting dealer Amruth Starch (P) Limited had borrowed huge monies both from the A.P. State Financial Corporation and from the petitioner in the present writ petition, viz., A.P. Industrial Development Corporation Limited. All the properties of the dealer had already been mortgaged in favour of A.P. State Financial Corporation and A.P. Industrial Development Corporation Limited, much before the insertion of Section 16C in the A.P. GST Act, 1957. It was only on account of this fact that A.P. State Financial Corporation filed W.P.No.21865 of 1999 challenging the *vires* of Section 16C of the A.P. GST Act, 1957. But it should also be pointed out that despite the fact that both A.P. State Financial Corporation and the petitioner herein jointly held a mortgage over the properties of the defaulting dealer, the petitioner in the present writ petition did not approach the High Court either challenging Section 16C of the A.P. GST Act, 1957 or for any other relief. It was only A.P. State Financial Corporation, which approached this Court challenging the *vires* of Section 16C.

6. It appears that after the dismissal of the writ petition filed by A.P. State Financial Corporation, the petitioner herein issued notice for the sale of the properties of the defaulter, by initiating proceedings under Sections 29 and 30 of the State Financial Corporations Act. The properties were eventually sold in an auction conducted in August, 2003. It appears that out of the total dues payable by the defaulting dealer to the tune of Rs.833.72 lakhs to the petitioner herein as well as to the A.P. State Financial Corporation, only an amount of about Rs.144 lakhs was recovered. After such recovery, the Commercial Tax Officer sought to attach the account of the petitioner for recovering the dues of the

defaulting dealer, forcing the petitioner to come up with the present writ petition.

7. Before proceeding further, we should also bring on record one fact, viz., that as against the judgment of this Court in *Andhra Pradesh State Financial Corporation v. Government of Andhra Pradesh*, a Special Leave Petition has been filed. The Supreme Court appears to have ordered notice, but did not grant any interim order.

8. Keeping the above factual background in mind, if we come back to the case of the petitioner, it is seen that the petitioner challenges the action of the 2nd respondent-Commercial Tax Officer on the short ground that Section 29(1) of the A.P. VAT Act, 2005 invoked by the 2nd respondent for attaching the current account of the petitioner, has no application to the facts on hand. Under Section 29(1) of the A.P. VAT Act, 2005, a power is conferred upon the Commissioner or any other authority to require any person who holds any money for or on account of the defaulter, to pay such amount directly to the Commissioner or the other authority for the purpose of discharging the dues payable by the defaulting dealer to the Commercial Tax authorities. Section 29 of the A.P. VAT Act, 2005 reads as follows

“Section 29: Recovery of tax from third parties: (1) The Commissioner or any other authority prescribed may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the dealer at his last address known to such authority) require any person from whom money is due or may become due to the defaulter, or any person who holds or may subsequently hold money for, or on account of the defaulter, to pay to such authority, either forthwith if the money has become due or is so held, within the time specified in the notice but not before the money becomes due or is held, so much of the money as is sufficient to pay the amount due by the defaulter in respect of arrears of tax, interest, penalty or the whole of the money when it is equal to or less than that amount.

Provided that in case of banks, the amount due to the defaulting dealer includes the amounts payable to the dealers by virtue of the overdraft facility.

(2) The authority prescribed may, at any time, or from time to time, amend or revoke any such notice or extend the time of making any payment in pursuance of the notice.

(3) Any person making any payment in compliance with a notice under this section shall be deemed to have made the payment under the authority of the defaulter and the receipt of the authority prescribed shall constitute a good and sufficient discharge of the liability of such person to the extent of the amount referred to in the receipt.

(4) Any person discharging any liability to the defaulter after receipt of the notice referred to in this section, shall be personally liable to the authority prescribed to the extent of the liability discharged or to the extent of the liability of the defaulter for the amount due under the Act, whichever is less.

(5) Where any person to whom a notice under this section is sent proves to the satisfaction of the authority prescribed that the sum demanded or any part thereof is not due by him to the defaulter or that he does not hold any money for or on account of the dealer, then nothing contained in this Section shall be deemed to require such person to pay the sum demanded or any part thereof, to the authority prescribed.

(6) Where any person to whom a notice under sub-section(1) is sent, fails to pay to the authority prescribed the sum demanded or any part thereof as required in the said notice, such sum shall be recoverable from such person as if it were an arrear of land revenue due from him.

(7) The provisions of this section shall be without prejudice to any action that may be taken for the recovery of the money due from the defaulter."

9. The contention of the petitioner is that for invoking Section 29(1) of the A.P. VAT Act, 2005, the 2nd respondent should satisfy one pre-requisite condition, viz., that the petitioner is holding any money for or on account of the defaulter. The petitioner is not holding any money either for or on account of the defaulter. The amount recoverable from the defaulter jointly by the petitioner and the A.P. State Financial Corporation was more than Rs.833.72 lakhs and that by the sale of the properties they were able to recover only about Rs.144 lakhs. The amount recovered through sale, does not belong to the defaulting dealer. Therefore, the petitioner contends that the 2nd respondent cannot invoke Section 29(1), as the money lying with the petitioner-Corporation does not belong to the defaulter.

10. In simple terms, the contention of the petitioner is that a garnishee order can be passed only in respect of the money payable to the defaulter. The proceeds of the sale of the properties of the defaulter, after having been appropriated towards the dues of the defaulter to the petitioner-Corporation, cannot be treated as the amounts intended for or on account of the defaulter. Therefore, the petitioner contends that the impugned action is completely without jurisdiction.

11. In response to the above contention, it is submitted by Mr. S. Suri Babu, learned Special Standing Counsel that it is not even open to the petitioner to come with a challenge to the action of the 2nd respondent, in view of the fact that the A.P. State Financial Corporation, which approached this Court in W.P.No.21865 of 1999, was bound by the interim order passed by this Court. Therefore, the proceeds of sale of the properties of the defaulting dealer are only held in trust by the petitioner. It is also the further submission of the learned Special Standing Counsel that since a statutory charge was created under Section 16C with effect from 06.04.1999, the claim of the Commercial Taxes Department assumed priority over the mortgage, especially since the mortgage was sought to be enforced only in 2003, after the insertion of Section 16C.

12. However, it is contended by Mr. P.V. Ravindra Kumar, learned counsel for the petitioner that the petitioner was not a party to the writ petition in W.P.No.21865 of 1999 filed by the A.P. State Financial Corporation and that therefore the petitioner was not bound by any order suffered by the State Financial Corporation. Drawing our attention to the sale notices, it is contended by Mr. Ravindra Kumar, learned counsel for the petitioner that the properties of the borrower were brought to sale independently by the petitioner issuing advertisements in their own name,

inviting offers, conducting the auction and thereafter executing the sale deed.

13. We have carefully considered the above submissions. It is true that the advertisement for the sale of the properties were issued only by the A.P. Industrial Development Corporation Limited, which is the petitioner herein. It is also true that the petitioner was not a party to the writ petition filed by the A.P. State Finance Corporation. But it is on record that pursuant to the auction conducted by the writ petitioner, a sale deed was executed on 29.01.2004. This sale deed was jointly executed by the petitioner herein and the A.P. State Finance Corporation. Therefore today the petitioner cannot totally wash their hands off as though they had nothing to do with the writ petition filed by the A.P. State Financial Corporation. In any case, the sale proceeds have gone into the coffers of the petitioner as well as the A.P. State Financial Corporation. A person, who secured an interim order from a Court, should certainly honour its decision after the case is finally disposed of. Therefore, we do not think that the petitioner can escape the liability on this score.

14. Coming to the contention regarding Section 29(1), it is true that the same is in the nature of a garnishee order. By the plain language of Section 29(1) of the A.P. VAT Act, 2005, the amount lying in the hands of the petitioner cannot be attached, as the amount does not represent the money payable by the petitioner to the defaulting dealer. It is also not the amount that the petitioner is holding for the benefit of the defaulting dealer. As a matter of fact, Section 29(1) of the A.P. VAT Act, 2005 is similar to Section 17(1) of the A.P. GST Act, 1957.

15. But the issue cannot be looked at merely from the point of view of Section 29(1) of the A.P. VAT Act, 2005 or Section 17(1) of the A.P.

GST Act, 1957. The issue has to be looked at from the point of view as to how a charge created on a property would operate.

16. There is no dispute about the fact that by virtue of Section 16C of the A.P. GST Act, 1957 a first charge was created on 06.04.1999 on the property by the dealer. This was notwithstanding anything to the contrary contained in any law for the time being in force. In other words, by a statutory prescription, the 2nd respondent who was till then in the position of an unsecured creditor, suddenly became a secured creditor and also jumped the queue and became the first person in the queue. Hence on the date of which the petitioner sold the properties of the dealer in the year 2003, the Commercial Taxes Department had precedence over the claim of the petitioner-mortgagee.

17. Once this is clear, any sale that a mortgagee conducted either by virtue of the power conferred by the statute under Sections 29 and 30 of the State Financial Corporations Act or otherwise, will be taken not to have wiped out the charge on the property. But *a property, which is under mortgage or charge, cannot be sold more than once for the recovery of the dues under every mortgage or charge. Once a property is sold by a mortgagee (if validly made), it must be taken as though a tangible immoveable property has been converted in form, into cash. Therefore, the charge that will get attached to the property will get attached to the cash equivalent of the property.* If the effect of the charge under Section 16C is understood in this fashion, it will be clear that the Commercial Taxes Department has a charge over the sale proceeds of those properties now lying in the hands of the petitioner herein. Therefore, the Department has a right to recover the dues from the petitioner, not by treating the

petitioner as a garnishee, who owes money to the defaulting dealer, but by addressing its attachment to the sale proceeds. It is well settled that quoting a wrong provision of law will not take away the substantial right of a party. Therefore, if the reliance placed by the 2nd respondent on Section 29(1) is overlooked, it will be clear that the Commercial Taxes Department has a right to lay its hands on the sale proceeds of the property over which a first charge was created by the statute. Therefore, the present action of the 2nd respondent has to be understood, not as a garnishee order under Section 29(1) of the A.P. VAT Act, 2005, but as the enforcement of the charge under Section 16C of the A.P. GST Act, 1957. If so viewed, the petitioner cannot escape the liability. It would have been a different matter, if the sale of the property had taken place before 06.04.1999, the date on which Section 16C was inserted.

19. The argument of the learned counsel for the petitioner that the charge created under Section 16C, w.e.f., 06.04.1999 cannot relate back to the dues in respect of the assessment years 1995-96, 1996-97 and 1997-98, cannot be accepted. Section 16C uses the expression “any amount of tax, penalty, interest and any other sum, if any, payable by a dealer or any other person under the Act”. Section 16C has no connection to any assessment year. Section 16C has an express link only with the amount of tax payable. Therefore the argument that Section 16C cannot create a charge on the old dues is contrary to the express provisions of the statute. Therefore, we are of the considered view that the petitioner cannot escape the liability.

20. It is next contended by Mr. Ravindra Kumar, learned counsel for the petitioner that insofar as the petitioner is concerned they are not even aware of actual facts relating to the passing of the orders of

assessment. It is his contention that certain questions such as the question whether show cause notices were issued to the assessee, whether opportunities were given and whether proper orders of assessment were passed and served on the assessee, are all questions to which the 2nd respondent should first address himself to. Since the petitioner is not in a position to ascertain these facts, the imposition of a burden upon the petitioner with respect to a liability, whose truth and validity is beyond the capacity of the petitioner to ascertain, is unfair.

21. But we cannot sustain the above argument. When the assessee has not questioned the orders of assessment and when a co-mortgagee of the petitioner came to Court in 1999 itself challenging the action of the 2nd respondent, without questioning the determination of liability, it is not open to the petitioner to raise all these issues. We cannot treat the writ petitioner as completely ignorant of what had transpired from 1999 till 2004, especially when the sale deed in favour of the auction purchaser was jointly executed by the petitioner along with the co-mortgagee, viz., A.P. State Finance Corporation. Therefore, the petitioner cannot raise any argument relating to the truth and validity of the orders of assessment.

22. That takes us to the last question as to the extent which the 2nd respondent can enforce the charge, on the sale proceeds of the properties of the defaulting dealer now available with the petitioner. This question is of significance, in view of the fact that to begin with the claim made by the 2nd respondent upon the petitioner was only to the extent of Rs.10,51,175/-. This is seen from a letter written by the 2nd respondent to the petitioner in D.989/2001, dated 28.02.2002. Even Form No.IV issued on 10.07.2002 under Section 25, demanding payment of the amount before ordering attachment, was only for the said amount of

Rs.10,51,175/-. But today, the 2nd respondent has claimed an amount of more than Rs.40 lakhs, on the ground that interest has accumulated with the aforesaid amount. In other words, the 2nd respondent has calculated interest at the rate statutorily prescribed under Section 16 of the A.P. GST Act, 1957. Therefore, the question that arises for consideration is whether the 2nd respondent is entitled to recover, from the sale proceeds now available with the petitioner, the total amount of tax together with interest and penalty as payable under A.P. GST Act, 1957 or not.

23. In our considered view, the 2nd respondent is not entitled to recover interest and penalty, at the rates specified in the A.P. GST Act, 1957 for the simple reason that even according to the 2nd respondent there was an interim order passed by this Court on 11.11.1999 permitting the State Finance Corporation to proceed with the sale, but to keep an amount equivalent to the sales tax dues, in an interest yielding deposit. Therefore, if the State Finance Corporation, joining hands with the petitioner, had sold the property pursuant to the interim order dated 11.11.1999, they would have kept only the aforesaid amount of Rs.10,51,175/- in an interest yielding deposit in a bank. It is this amount to which the 2nd respondent can lay their hands on. Therefore, we are of the considered view that putting the petitioner to the same condition as imposed upon the State Finance Corporation, would mitigate the loss for both the sides. After all the petitioner as well as the 2nd respondent should not have fought a litigation of this nature. The petitioner is a Corporation, wholly owned and controlled by the State of Andhra Pradesh. The creator cannot fight with the creation. Assuming that the 2nd respondent recovers the tax due from the defaulting dealer together with interest and penalty, the same would only cause a dent in the financial status of the petitioner.

Ultimately, it is the State Government, which has to go to the rescue of a Corporation created by it.

24. Therefore, we are of the considered view that directing the petitioner to pay to the Commercial Taxes Department, a sum equivalent to Rs.10,51,175/- together with interest at the rate of 6% p.a. from the date of the sale, viz., 29-1-2004 up to the date of payment, would meet the ends of justice.

25. Hence, the writ petition is disposed of directing the petitioner to pay to the Commercial Taxes Department a sum of Rs.10,51,175/- together with interest at 6% p.a., from the date of the sale namely 29-1-2004, up to the date of payment. Upon such payment, the charge that the 2nd respondent had on the sale proceeds of the properties of the defaulting dealer will stand automatically removed. The petitioner is granted four weeks time to make payment of the aforesaid amount. The order of attachment passed by the 2nd respondent against the Bank Account of the petitioner shall stand removed with immediate effect. As a sequel, the miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

V. RAMASUBRAMANIAN, J

J. UMA DEVI, J

12th April, 2017
Js.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE MS. JUSTICE J. UMA DEVI

W.P.No.38142 of 2016
(Per VRSJ)



12th April, 2017

Js.