$~17

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 9214/2017 & CM No.37663/2017

AU SMALL FINANCE BANK LIMITED FORMERLY KNOWN AS AU FINANCIERS (INDIA) LTD. ..... Petitioner

Through: Mr N. Swaminathan, Mr K. S. Lather and Mr Ashok Kumar Singh, Advocates.

versus

GOVT. OF NCT DELHI & ORS ..... Respondents

Through: Ms Jyoti Taneja, Advocate for R-1 & 2.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 25.10.2017

1. The petitioner has filed the present petition, *inter alia*, praying as under:-

> "(I) Writ of MANDAMUS or any other Writ, Order or Direction in the like nature commanding the Respondent No. 1 & 2 to release vehicle No. DL-4C-AS-8291;
>
> (II) In alternate direct the Respondent No. 2 to decide application of Petitioner and clarify that nothing in law prevents to release the vehicle to a /banker of the vehicle in whose favor there is a hypothecation:
>
> (III) Strike down section 59 of the Act as ultra-vires the Constitution as it also contemplates confiscation of hypothecated vehicle without reference to interest & claim of Banker

(IV) Strike down Rule 132 of Delhi Excise Rules, 2010 in its entirety."

2. Insofar as the prayer nos. (III) & (IV) are concerned, the petitioner had withdrawn the said prayers before the Division Bench of this Court on 17.10.2017 and, therefore, the said prayers are not required to be considered.

3. The learned counsel for the petitioner has restricted his present petition to the alternative prayer - that is, prayer (II) - seeking a direction to respondent no.2 to decide its application for release of the vehicle in favour of the petitioner. The learned counsel for the respondents can have no objection for the petitioner's application to be decided in accordance with law. However, the principal controversy remains whether the Deputy Commissioner has the right to confiscate the vehicle which is financed by a bank and is hypothecated to it.

4. Briefly stated, the relevant facts of the case are that the petitioner is a bank and was approached by respondent no. 3 for financial assistance to purchase a vehicle. The petitioner states that it sanctioned a loan of ₹3,80,000/- and a Loan Agreement dated 15.01.2015 was also executed between the petitioner and respondent no.3. The petitioner subsequently lent financial assistance to respondent no.3 for purchase of a vehicle (a car - Maruti Ritz bearing registration no. DL 4C AS 8291).

5. It is alleged that the vehicle hypothecated to the petitioner was used in an offence punishable under Section 33 of the Delhi Excise Act, 2009. A FIR to the aforesaid effect was also registered on 06.02.2015. The petitioner has filed an application under section 451 Cr PC for release of the vehicle on *superdari*, however, the same has not been considered as yet.

6. The principal ground urged by the petitioner in the present petition is that the petitioner is a secured creditor and, therefore, the action of the respondent in confiscating the vehicle in question (vehicle no. DL 4C AS 8291) under provisions of Section 58/59 of the Delhi Excise Act, 2009 (hereinafter 'the Act') is arbitrary and unreasonable. The learned counsel for the petitioner submits that the petitioner cannot be deprived of its security interest in the vehicle for an alleged offence committed by respondent no. 3 or his agent. He submitted that in terms of Section 58 of the Act only the assets of the offender can be confiscated. He has also relied on the decision of the Supreme Court in ***The Bank of Bihar v. The State of Bihar & Ors.*: *(1972) 3 SCC 196,*** wherein the Supreme Court had held that the pawnee has special property and a lien on the goods and so long as his claim is not satisfied, no other creditor of the pawnor has any right to take away the goods or its price.

7. The learned counsel for the respondent countered the submissions made on behalf of the petitioner and has referred to the decision of the Supreme Court in ***State (NCT of Delhi) v. Narender: (2014) 13SCC 100*** in support of her contention that the provisions of Section 59 of the Act would have an overriding effect.

8. Section 58, 59 and 61 of the Delhi Excise Act, 2009 are set out below:-

> "**58. Certain things liable to confiscation**.- Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation, namely-
>
> (a) any intoxicant, material, still, utensil, implement, apparatus in respect of or by means of which such

offence has been committed;

(b) any intoxicant unlawfully imported, transported, manufactured, sold or brought along with or in addition to, any intoxicant, liable to confiscation under clause (a);

(c) any receptacle, package, or covering in which anything liable to confiscation under clause (a) or clause (b), is found, and the other contents, if any, of such receptacle, package, or covering;

(d) any animal, vehicle, vessel, or other conveyance used for carrying the same.

59. Confiscation by Deputy Commissioner in certain cases.- (1) Notwithstanding anything contained in this Act or any other law for the time being in force, where anything liable for confiscation under section 58 is seized or detained under the provisions of this Act, the officer seizing and detaining such property shall, without any unreasonable delay, produce the said seized property before the Deputy Commissioner.

(2) On production of the said seized property under subsection (1), the Deputy Commissioner if satisfied that an offence under this Act has been committed may, whether or not prosecution is instituted for the commission of such an offence, order confiscation of such property, otherwise he may order its return to the rightful owner.

(3) While making an order of confiscation under sub-section (2), the Deputy Commissioner may also order that such of the properties to which the order of confiscation relates, which in his opinion cannot be preserved or are not fit for human consumption, be destroyed. Whenever any confiscated article has to be destroyed in conformity with these provisions, it shall be destroyed in the presence of the excise officer not below the rank of an inspector.

(4) Where the Deputy Commissioner, after passing an order of confiscation under subsection (2), is of the opinion that it is expedient in the public interest so to do, he may order the confiscated property or any part thereof to be sold by public

> auction or dispose it of otherwise.
>
> (5) When an order for confiscation of any property has been passed under section 59 and such order has become final in respect of the whole or any portion of such property, such property or portion thereof, as the case may be, shall vest in the Government free from all encumbrances.
>
> (6) The Deputy Commissioner shall submit a report of all particulars of confiscation to the Excise Commissioner within one month of such confiscation.
>
> (7) Any intoxicant, mahua flowers or molasses and any other property if confiscated in a case compounded under section 57 of the Act or in respect of which an offence has been committed and the offender is not known or cannot be found, shall be disposed of in the manner as prescribed.
>
> xxxx xxxx xxxx xxxx
>
> **61. Bar of jurisdiction in confiscation**.- Whenever any intoxicant, material, still, utensil, implement, apparatus or any receptacle, package, vessel, animal, cart, or other conveyance used in committing any offence, is seized or detained under this Act, no court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, have jurisdiction to make any order with regard to such property."

9. It is apparent from the opening words of Section 59(1) of the Act that it contains a non obstante clause and the provisions of the said Section will have the effect notwithstanding anything contained in the Act as well as in any other law for the time being in force. This aspect has also been considered by the Supreme Court in ***State (NCT of Delhi) v. Narender*** *(supra)*, wherein the Supreme Court had noticed the earlier decision in the case of ***State of Karnataka v. K. A. Kunchindammed: 2002 9SCC 90*** and held that the provisions of CrPC which empowered the Metropolitan

Magistrate to release the vehicle in connection with the evidence under the Delhi Excise Act was not applicable and would have to yield to the provisions of Section 59 of the Act. Paragraph 13 of the said judgment is set out below:-

> "13. In our opinion, the general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof under Section 452 of the Code or that of Section 457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal."

10. In view of the above, even though, the petitioner has a security interest in the property in question and is entitled to enforce the said right, the said right would be subject to the provisions of Section 58 and 59 of the Act, which by virtue of the non obstante provision, have an overriding effect.

11. The decision in the case of ***The Bank of Bihar v. The State of Bihar & Ors*** *(supra)* is not applicable in the facts of the present case. In that case goods that were pledged to and were in custody of the plaintiff bank were seized from the plaintiff bank for recovery of arrears of cess. The Cane Commissioner had initiated proceedings for recovery of the cess under the Public Demands Recovery Act. Admittedly, the Cane Commissioner was in a position of an unsecured creditor and therefore, the Supreme Court held that the Cane Commissioner could not have a higher right than the plaintiff

bank. In the present case, the non obstante provision in Section 59 provides an overriding right to the Dy. Commissioner to confiscate a vehicle which is used in committing an offence under the Act.

12. Having stated the above, the petitioner's application is pending before the concerned authority and it cannot be disputed that it requires consideration. In view of the above, the present petition is disposed of by directing respondent no.2 to decide the petitioner's application in accordance with law, within a period of six weeks from today.

13. No order as to costs.

14. Order *dasti*.

VIBHU BAKHRU, J

OCTOBER 25, 2017
MK