

(2012) 04 AP CK 0014

Andhra Pradesh High Court

Case No: Writ Petition No. 10662 of 2012

Kumar Metallurgical Corporation
Limited

APPELLANT

Vs

Deputy Commercial Tax Officer,
Nalgonda and Another

RESPONDENT

Date of Decision: April 16, 2012

Acts Referred:

- Andhra Pradesh Revenue Recovery Act, 1864 - Section 27
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(2), 13(4), 14
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 15(1), 22, 22(1), 25

Citation: (2013) 57 VST 179

Hon'ble Judges: V.V.S. Rao, J; G. Krishna Mohan Reddy, J

Bench: Division Bench

Advocate: Ch. Pushyam Kiran, for the Appellant; B. Venkatadri, Special Standing Counsel for Commercial Taxes, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V.V.S. Rao, J.

The instant writ petition is filed challenging the notice of attachment issued u/s 27 of the A.P. Revenue Recovery Act, 1864 ("the RR Act") as illegal, arbitrary and contrary to the provisions of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). A consequential direction to set aside the impugned order is also sought. The petitioner's case appears to be long. Its attempts to move various legal fora and courts seem to be unending. All this, without any doubt, appears to prevent the bankers, financial institutions and the Government from recovering contractual/statutory dues payable by the petitioner towards liabilities. We will, for

the purpose of this order, make this long story short to complete the formality of summation of pleadings.

2. The petitioner availed of millions of rupees in loans from ICICI bank and IDBI in 1990 hypothecating movable assets and immovable properties (security interest). In 2003-04 they sought a reference under the SICA to the Board for Industrial and Financial Reconstruction (BIFR). Due to this ICICI bank's original application before the Debts Recovery Tribunal (DRT), Hyderabad being O.A. No. 945 of 2005 got stayed by force of section 22 of the SICA. Asset Reconstruction Company of India Limited (for short, ARCIL) obtained security interest and initiated action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the SARFAESI Act" or "the Act") raising demand for Rs. 78,25,00,864 as of September, 2004. ARCIL also approached the District Magistrate u/s 14 of the SARFAESI Act for taking possession and an order was passed on January 20, 2005. The petitioner assailed the recovery proceedings by ARCIL before the DRT, Hyderabad by filing S.A. No. 15 of 2005. In view of section 22 of the SICA, DRT allowed the appeal against which ARCIL filed appeals before the Debts Recovery Appellate Tribunal (DRAT), Chennai. On February 10, 2005 DRAT passed orders staying the order of DRT. The petitioner then filed W.P. Nos. 6831 and 6832 of 2005 before this court. They were allowed and remanded directing the DRAT to consider the matter de novo.

3. While the petitioner was busy agitating against the proceedings under the SARFAESI Act before the DRT, DRAT and this court, the BIFR passed order on July 22, 2005 to the effect that the reference pending before them shall stand abated in terms of the third proviso to section 15(1) of the SICA. The petitioner assailed this order in W.P. No. 5471 of 2010. By order dated March 10, 2010 made in W.P. M.P. No. 7032 of 2010 this court suspended the order. The petitioner statedly sent half-a-dozen letters contending that petitioner's registration as sick unit stands restored in view of the interim order of this court. Be that as it is, the first respondent issued the impugned notice of attachment informing that as the petitioner has not paid and did not show sufficient cause for non-payment of Rs. 3,41,23,585 being the arrears of sales tax under the Andhra Pradesh General Sales Tax Act, 1957 (the APGST Act), Central Sales Tax Act, 1956 (the CST Act) and the Andhra Pradesh Value Added Tax Act, 2005 (VAT Act), the landed property situated at Vattimarathi village of Chityala Mandal in Nalgonda District belonging to the petitioner is placed under attachment. The petitioner was given 30 days time to pay the arrears due with interest failing which the attached property would be sold as per law. Three months thereafter the petitioner filed the instant writ petition.

4. The counsel for the petitioner would submit that section 22 of the SICA bars any recovery proceedings including recovery of sales tax arrears by the first respondent; the consent of BIFR was not taken before issuing the impugned notice of attachment; and that the first respondent acted arbitrarily in invoking section 27 of

the RR Act. The counsel referred to [Tata Davy Ltd. Vs. State of Orissa and Others](#), AIR 1998 SC 2928, [Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others](#), and [Raheja Universal Limited Vs. NRC Limited and Others](#), .

5. The Special Counsel for Commercial Taxes would submit that section 22 of the SICA only bars initiation of proceedings for recovery of sales tax arrears which form part of the scheme approved by SICA, and that as the proceedings before BIFR abated there cannot be any prohibition for issuing notice of attachment. Nextly he would contend that the arrears of sales tax, CST and VAT claimed in the notice of attachment do not form part of any scheme under implementation and therefore the writ petition is misconceived. Lastly he would submit that u/s 16C of the APGST Act, tax due to the Government shall have the first charge on the property of the dealer and the said provision overrides other laws in force. He placed reliance on [Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others](#), [Central Bank of India Vs. State of Kerala and Others](#), and [Andhra Pradesh State Financial Corporation and Others Vs. Government of Andhra Pradesh and Others](#),

6. The only question seriously pressed by the petitioner is bar of recovery proceedings u/s 22 of the SICA. The submission in our considered opinion is misconceived and cannot be countenanced for the following reasons.

7. Section 16C of the APGST Act has non obstante clause. It creates first charge on the property of the dealer in favour of the Government which can claim priority in recovery of debts. Section 38C of the Bombay Sales Tax Act and section 26B of the Kerala General Sales Tax Act also provided similar first charge in favour of the Government in the recovery of sales tax arrears. The provisions were unsuccessfully challenged before the respective High Courts which upheld the provisions. In [Central Bank of India Vs. State of Kerala and Others](#), Comp Cas 497 (SC): [2009] 4 SCC 94, the Supreme Court considered the appeals by special leave. Whether these provisions creating first charge on the property of the dealer liable to pay sales tax, etc., are inconsistent with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act); and the bank dues have primacy; and whether Central legislations have primacy over the State legislations. These two questions were considered by a three-Judge Bench. The view taken by the Kerala High Court was upheld by the Supreme Court. It was observed that the primacy of State's first charge over the dues of banks, financial institutions and secured creditors is valid and that RDB Act and SARFAESI Act do not create first charge in favour of banks.

8. In [Andhra Pradesh State Financial Corporation and Others Vs. Government of Andhra Pradesh and Others](#), this court considered vires of section 16C of the APGST Act. Following [Central Bank of India Vs. State of Kerala and Others](#), , it was held that

section 16C is "legislatively competent and impeccable". In some of the writ petitions decided by the Division Bench the action of the Department of Commercial Taxes in resorting to RR Act was also the subject-matter. The action was approved upholding the notice of attachment issued under the RR Act. Therefore the impugned notice of attachment cannot be faulted in this case.

9. Whether section 22 of the SICA bars revenue proceedings ? As noticed supra, BIFR passed orders on July 27, 2005 recording the reference as abated. The said order reads as under:

M/s. Kumar's Metallurgical Corporation Ltd. (hereafter referred to as "the company") has filed above-mentioned references u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter referred to as, "the Act").

2. While the Board is yet to consider this matter for determining the sickness of the company, it has now been intimated by the Asset Reconstruction Company (India) Limited (ARCIL) vide their letter dated January 24, 2005 that upon failure of the company to comply with the notice issued by them u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), they have taken over the possession of the movable and immovable assets of the company on January 22, 2005 u/s 13(4) of the SARFAESI.

3. Keeping in view the above position, the Board cannot proceed further in the matter under the Act and the reference of the company pending before the Board shall stand abated in terms of the third proviso to section 15(1) of the amended Act.

4. Let a copy of this order be sent to all concerned.

10. In view of the above, it is very doubtful whether the reference stands restored before the BIFR in view of the interim orders of this court in W.P.M. P., without there being formal proceedings by the BIFR to restore the reference. Indeed in paragraph 20 of the affidavit accompanying the writ petition the petitioner admits that the BIFR does not have the power of review and, therefore, unless and until BIFR restores the reference, in obedience to the orders of this court, the petitioner unilaterally cannot contend that the proceedings under the SICA are pending. Secondly section 22 of the SICA does not in any way bar the proceedings for recovery of sales tax arrears. This is well settled. In [Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others](#), the Supreme Court held thus (page 333 in 105 STC):

...The petitioner (assessee) itself could have collected sales tax for the said years only after the scheme was sanctioned. The tax so collected really belongs to the State. But, the amount is not remitted to the State. If the bar or embargo u/s 22(1) of the Act is held to cover such amounts collected by the assessee, which really belong to the State, and enables it to retain the same, till the implementation is over or the appeal u/s 25 of the Act is disposed of, it will result in a state of affairs enabling the assessee to retain the amounts due to the State for no reason and indefinitely; the

Revenue will have to obtain consent of the Board or as the appellate authority even for realising the legitimate amounts due to it and withheld by the assessee, unreasonably. There may be similar instances where the petitioner/assessee collects amounts due to the Revenue or others and is yet enabled to keep it back with itself unreasonably for a long time if the immunity u/s 22(1) of the Act operates absolutely. According to the Revenue the bar u/s 22(1) of the Act should not lead to such an undesirable state of affairs; and so the section should be understood or read down to act as a bar or embargo only for such of those pre-package dues reckoned or included in the scheme sanctioned. On the other hand, counsel for the first respondent (petitioner of the writ petition) company asserted that the embargo u/s 22(1) of the Act is absolute and cannot be diluted or whittled down. All that is required by section 22(1) of the Act is that in cases where an inquiry is pending or scheme is under preparation or consideration or a sanctioned scheme is under implementation or an appeal is pending, no proceedings, as stated in section 22 of the Act for execution, distress or the like, shall be proceeded with except with the consent of the Board or as the appellate authority. What is contemplated by section 22(1) of the Act is only a previous consent of the Board for the proceedings to be initiated against a sick company. It is not an absolute bar.

11. The counsel vehemently contends that the view in [Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others](#), was clarified in [Tata Davy Ltd. Vs. State of Orissa and Others](#), and [Raheja Universal Limited Vs. NRC Limited and Others](#), . We have perused these two decisions wherein [Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others](#), was referred with approval. Though it was distinguished, the principle remains intact. We are, therefore, not inclined to accept the submission of the counsel for the petitioner. In the result, for the above reasons, the writ petition, as also the miscellaneous petition, shall stand dismissed without any order as to costs.