

SUPREME COURT OF INDIA

Rana Girders Ltd.

Vs.

Union of India

C.A.No.6802 of 2013

(Anil R.Dave and A.K.Sikri JJ.)

16.08.2013

JUDGMENT

A.K.SIKRI, J.

1. Leave granted.

2. One M/s. P.J. Steels Pvt. Ltd. (borrower) had taken loans/financial accommodation from the Uttar Pradesh Financial Corporation (UPFC). Because of the consistent default on the part of the said borrower in re-paying the loans, the UPFC took possession of the land and building of the borrower which were mortgaged/kept as security with the UPFC. This action was taken under Section 29 of the State Financial Corporation Act. After taking physical possession of the unit, the UPFC held public auction on pursuant to advertisement which was issued on 8th January 2002. In the said public auction conducted by UPFC, the appellant herein (appellant which was known as M/s. Sarju Steels Pvt.Ltd. at that time and has now converted into a Public Limited Company known as M/s. Rana Girders Pvt. Ltd. Dated 20th March 2002 was the highest and thus, successful bidder in respect of land and building as well as plant and machinery. Sale Deed dated 8.3.2002 was executed in favour of the appellant qua the land and building. Likewise, Agreement dated 14.3.2002 was executed in favour of the appellant conveying the ownership of the plant and machinery.

3. With the aforesaid Sale Deed and Agreement, the appellant has become the owner, both of the land and building and also plant and machinery. The borrower has not questioned the validity of the said auction which has attained finality. It

appears that the borrower had also to discharge the liability qua excise duty which had amounted to Rs.1,00,72,442/-. To recover that amount, the Commissioner of Customs and Central Excise, Meerut-I (respondent No.2 herein) is now pressing the appellant to discharge this liability as purchaser and successor- in-interest of the land and building plus plant and machinery of the borrower. The appellant is resisting the demand with the posture that since the aforesaid properties have been purchased by the appellant in an open auction from the UPFC, free from all encumbrances, it is not the liability of the purchaser to make payment of the dues of excise department.

4. Therefore, the issue which has arisen for our consideration in this appeal is as to whether excise department can recover the amount in question from the appellant. This issue has cropped up in the following factual background:

5. As already pointed out above, after taking possession of the unit of the borrower under Section 29 of the State Financial Corporation Act, the UPFC issued an advertisement dated 8.1.2002 in the newspapers for public auction of the said properties. By the said advertisement, offers for sale of land and building consisting of land area 13390 sq. meter and covered area of 2429 sq. meter, plant and machinery and other fixed assets of the borrower were invited on (“as is where is basis”). This public notice also stipulated certain terms and conditions on which offer were invited. First condition thereof, which is relevant for our purpose, is reproduced below:

“All the statutory liabilities arising out of land shall be borne by purchaser (except electricity dues). Other terms and conditions of sale may be sent at the office.”

6. The appellant turned out to be the successful bidder whose bid in the sum of Rs.43 Lakh for land and building being highest was accepted by the UPFC. Sale Deed dated 8th March 2002 was executed. In this Sale Deed it was specifically mentioned that the property is free from all encumbrances by stating that “the vendor herein confirms that the property purchased through the sale deed in favour of vendee is free from all charges and encumbrances.....” The appellant had paid a sum of Rs.21.50 Lakh at the time of registration of the Sale Deed and balance amount of Rs.21.50 lakh was to be paid by the appellant to the UPFC which was payable together with interest at the rate of 16% P.A. in instalments as specified in the Schedule to the said Sale Deed. There is no dispute that this balance

consideration has been paid by the appellant to the UPFC. Another condition in the Sale Deed, which was also mentioned in the public notice was that:

“All the statutory liabilities arising out of said properties shall be borne by the vendee and vendor shall not be held responsible.”

7. The appellant also purchased plant and machinery in the said auction for a total consideration of Rs.1 Crore 93 Lakh for which Agreement dated 15th March 2002 was executed by the parties. This Agreement also contained both the clauses, similar to the clauses in the Sale Deed, namely, the said plant and machinery was free from all encumbrances and that all the statutory liabilities arising out of the plant and machinery of the industrial unit were to be borne by the purchaser i.e. the appellant.

8. At that time, some demands of dues on account of Central Excise payable to respondent No.2 were pending. It appears that the borrower had filed two appeals against the Order-in-Original dated 29.8.2002 in this behalf. These two appeals were dismissed by the CESTAT on 30th April 2003 on account of non-compliance of the pre-deposit amount directed in its stay order dated 18th March 2003. Some penalties were also imposed by the adjudicating authority, under the Central Excise Act which were appealed again by the borrower. That appeal was also dismissed on 30th April 2003 and 25th May 2004 thereby confirming the demand of Customs and Excise.

9. After the conclusion of the aforesaid legal proceedings between the respondent No.2 and the borrower, following amount became due on account of duty and penalty payable by the borrower to the respondent No.2:

Adj.Order No.& Amount of confirmed demands

Date Duty (In Rs.) Penalty (In Rs) R.F. Penalty

28/Commr/MRT/0 4298571 4298571 ---- 1000000

2/dated 29.8.02

16/Jt. 669862 669862 ---- -----

Commr/2003/

Dated 22.7.2003

82/Off/136/01/02 115576 20000 ----

Dated 22.11.02

10. Since the appellant had purchased the land and building as well as plant and machinery of the borrower in the auction conducted by the UPFC, the respondent No.2 issued notice dated 25.8.2004 to the appellant stating that the amount in question had now become the liability of the appellant and demanded the aforesaid payment. It was mentioned in the notice that this amount was payable by the appellant in view of the law laid down by this Court in the case of M/s. Macson Marbles Pvt. Ltd. Vs. Union of India²⁰⁰³ (158) ELT 424 SC.

11. The appellant herein initially requested the Excise Department to provide the copies of the adjudication orders relating to the three cases mentioned in the notice. Thereafter, vide reply dated 7.12.2004, the appellant disputed the liability stating that the amount was not recoverable from it in terms of the provisions of Section 11 of the Central Excise Act as it had purchased the aforesaid properties in auction from UPFC “free from all encumbrances”. The Central Excise Department, however, insisted that it had become the liability of the appellant and sent further communication demanding payment failing with the threat that on failure in making payments the properties would be attached.

12. At this juncture, the appellant filed the Writ Petition in the High Court of Judicature at Allahabad, questioning the validity of the demands raised by the Revenue. After hearing the matter, vide the impugned judgment dated 1st December 2011, the High Court has been pleased to hold that in view of the covenants in the Sale Deed and Agreement it is the liability of the appellant to pay the excise duty. It is this order which is the subject matter of present appeal.

13. A perusal of the order of the High Court would demonstrate that the Excise Department had contested the petition filed by the petitioner herein on the ground that the appellant being the successor- in-interest which had purchased the land and building as well as plant and machinery, was liable to make the payment having regard to the judgment of this Court in M/s. Macson case. The appellant, on the

other hand, had argued that since the appellant had not purchased the entire unit of the principal borrower the judgment of M/s. Macson case was not applicable. On the contrary it is the law laid down in Union of India vs. SICOM Ltd. 2009 (2) SCC 121, ratio whereof was attracted. It was argued that the M/s. Macson case was specifically distinguished by this Court in SICOM Ltd. holding that the ratio of M/s. Macson case would be applicable only in transfer of “ownership of business” i.e. when there is a sale of business as an ongoing concern and not in case of mere transfer of its specified assets. Significantly, the High Court took note of this distinction by referring to various other judgments as well on the lines of SICOM Ltd. of this Court as well as some High Courts. However, leaving the discussion on this aspect inconclusive, the High Court chose to rest its decision on an altogether different foundation, namely stipulation in the Sale Deed dated 8.3.2002 to the effect that the statutory liabilities arising out of the property shall be borne by the vendee (i.e. the appellant). These clauses Sale Deed pertaining to land and building and Agreement of Sale qua plant and machinery have already been noted above. According to the High Court, these covenants provided clear and unambiguous stipulation as per which the appellants agreed to discharge the statutory liabilities and since the excise dues were statutory in nature, it had become the liability of the appellant to pay the same. However, in so far as penalty is concerned, it is held that such a burden cannot be fastened on to the appellant as it is in the nature of quasi-criminal liability which was leviable only on the defaulter viz. the borrower. The writ petition is thus, partly allowed.

14. Before us, it was strenuously argued by the learned counsel for the Revenue that since the excise duty is a statutory liability such a duty has to be paid by the person who purchased the property of borrower in default even when sold in auction under section 29 of the State Financial Corporation Act. He further argued that in any case the High Court was right in holding that by virtue of the stipulations in the Sale Deed as well as in the Agreement of Sale, so far as the appellant is concerned, it was liable to discharge the excise liability. In the circumstances, two questions arise for consideration namely (1) on the interpretation of stipulation contained in the Sale Deed of the land and building and Agreement of Sale of plant and machinery, whether the appellant had agreed to discharge the dues payable to the excise department by the borrower. (2) Whether such a liability arises in law (de-hors the stipulation in Sale Deed /Agreement of Sale) having regard to the legal provisions contained in the Excise Act and State Financial Corporation Act?

15. We shall discuss the second question in the first instance. As noted above, in so far as second question is concerned, though the High Court has discussed the position in law in detail but has refrained from giving its final opinion on this question.

16. Whether UPFC would have priority being a secured creditor by virtue of Deed of Mortgage or the Central Excise in respect of its dues having regard to the Rule 230(2) of the Central Excise Rules, came up for consideration before this Court in State of Karnataka & Anr. Vs. Shreyash Papers (P) Ltd. & Ors. JT 2006 (1) SC 180. Dealing with the provisions of Rule 230 of the Excise Rules, the Court held that this provision authorises detention of all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles, in the custody or possession of the person or persons carrying on such trade or business or from person succeeding the business or trade or part thereof for such time till dues are paid or recovered. However, the rule does not in any way create a charge over any of the goods enumerated therein. After explaining the term “charge” as defined in Section 100 of Transfer of Property Act, it was held that charge would be different from the word “detained”. As Rule 230 only empowers detention and there was no other provision under the Central Excise Act or the Rules which envisages to create any charge over the assets of a unit to enable the realization of the Central Excise Duty on top priority. The Court held that UPFC had a priority being a secured creditor on the one hand and Central Excise having no “charge” over the property. The Court specifically took note of the fact that the petitioner in that case was not the successor of the erstwhile owner in business or trade and having acquired the property without any charge independent of business or trade of the previous owner, was not a person in custody or possession of the property as a successor of the previous owner against whom there was a demand of excise duty.

17. Learned counsel for the respondents, heavily relied on the judgment of this Court in M/s. Macson (supra), reference to which is also made in the notice dated 25.02.1984 that was served upon the appellant by the Excise Department. He submitted that in that case this Court had held that even the successor in interest is liable to discharge the liability of the Excise Department. We may, however, note that this case was considered and specifically distinguished in SICOM Ltd. (supra). In that case, considering the statutory right of the Financial Corporation under the State Financial Corporation Act, 1951 and the non-obstante clause occurring therein, it was categorically held that State Financial Corporation shall have a

preferential claim in relation to its secured debts. This position is explained in paragraphs 16 and 23 of the said judgment in the following manner:

“16. If a company had a subsisting interest despite a lawful seizure, there cannot be any doubt whatsoever that a charge/mortgage over immovable property will have the same consequence.

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23. Furthermore, the right of a State Financial Corporation is a statutory one. The Act contains a non obstante clause in Section 46-B of the Act which reads as under:

“46-B. Effect of Act on other laws.—The provisions of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern.”

18. In so far as dues of the Government in the form of tax or excise etc. are concerned, the Court was of the opinion that rights of the Crown to recover the dues would prevail over the right of the subject. Crown debt means the debts due to the State or the King. Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt pertains to the common law principle. When Parliament or State Legislature makes an enactment, the same would prevail over the common law and thus the common law principles which existed on the date of coming into force of the Constitution of India, must yield to a statutory provision. A debt, which is secured or which by reason of the provisions of a statute becomes the first charge over the property must be held to prevail over the Crown debt which is an unsecured one. On this reasoning, the debt payable to secured creditor like the Financial Corporation was prioritised vis-a- vis the Central Excise Dues.

19. For this principle, the Court referred to its earlier judgment in *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. & Ors.* (2000) 5 SCC 694 explaining the doctrine of priority to Crown Debts, thus:

“What is the common law doctrine of priority or precedence of Crown debts/ Halsbury, dealing with general rights of the Crown in relation to property, states that where the Crown’s right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being “*detur digniori* (Laws of England, 4th Edn.,Vol.8, para 1076, at p.666).Herbert Broom states:

“*Quando jus domini regis et subditi concurrunt jus regis praegerri debat.* – Where the title of the kind and the tile of a subject concur, the king’s title must be preferred. In this case *detur digniori* is the rule.where the titles of the kind and of a subject concur, the kind takes the whole.where the king’s title and that of a subject concur, or are in conflict, the king’s title is to be preferred.”(Legal maxims; 10th Edn.,pp.35-36)

This Common law doctrine of priority of State’s debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as “law in force” within the meaning of Article 372(1) of Constitution.”

It was, furthermore, observed :

“However,, the Crown’s preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledge of goods or a secured creditor. It is only in cases where the Crown’s right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the king commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already.In *Giles v.Grover* it has been held that the Crown has no precedence over a pledge of goods. In *Bnk of Bihar v. State of Bihar* the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawner on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully

satisfied. Rashbehary Ghose states in Law of Mortgage (TLL, 7th Edn., p.386) – “it seems a government debt in India is not entitled to precedence over a prior secured debt.”

20. Coming to the liability of the successor in interest, the Court clarified the legal position enunciated in *M/s. Macson* by observing that such a liability can be fastened on that person who had purchased the entire unit as an ongoing concern and not a person who had purchased land and building or the machinery of the erstwhile concern. This distinction is brought out and explained in paragraph 24 and 25 and it would be useful for us to reproduce herein below:

“Reliance has also been placed by Ms. Rao on *Macson Marbles Pvt. Ltd.* (supra) wherein the dues under Central Excise Act was held to be recoverable from an auction purchaser, stating:

We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of the same any conflict arises this aspect need not be examined. In this case, no such conflict arises between the corporation and the Excise Department. Hence it is unnecessary to examine this aspect of the matter.

The Department having initiated the proceedings under Section 11A of this Act adjudicated liability of respondent No.4 and held that respondent No.4 is also liable to pay penalty in a sum of Rs.3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisputed. The appeal is disposed of accordingly.”

The decision, therefore, was rendered in the facts of that case. The issue with which we are directly concerned did not arise for consideration therein. The Court also did not notice the binding precedent of *Dena Bank* as also other decisions referred to hereinbefore.”

21. A harmonious reading of the judgments in Macson and SICOM would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming “first charge for the purchaser”. As far as Central Excise Act is concerned, there was no such specific provision as noticed in SICOM as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department.

22. With this, we now revert to the first issue, namely interpretation of the clause in the Sale Deed for land and building and similar clause in Agreement of Sale for machinery on the basis of which appellant is held to be liable to pay the dues. These clauses have already been incorporated in the earlier portion of our judgment.

23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the Sale Deed/Agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that “all these statutory liabilities arising out of the land shall be borne by purchaser in the sale deed” and “all these statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible in the Agreement of Sale.” As per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the Sale Deed as well as in the Agreement for purchase of plant and machinery talks of statutory liabilities “arising out of the land” or statutory liabilities “arising out of the said properties” (i.e. the machinery). Thus, it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of cess relating to property etc. Likewise, statutory

liability arising out of the plant and machinery could be the sales tax etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the High Court.

24. We thus conclude that the judgment of the High Court is unsustainable in law. Accordingly, the appeal is allowed and the impugned judgment of the High Court is set aside. As a consequence the notice of the Excise Department calling upon the appellant to pay the dues of the erstwhile owner of the unit in question also stands quashed. The appellant shall also be entitled to cost of this appeal.