(1997) 01 RAJ CK 0026

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1534 of 1996

Macson Marbles Private Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 09-01-1997

Acts Referred:

Central Excise Rules, 1944 — Rule 230(2)
Central Excises and Salt Act, 1944 — Section 35
Constitution of India, 1950 — Article 226
State Financial Corporations Act, 1951 — Section 29

Citation : (2000) 68 ECC 270 : (2000) 115 ELT 317

Hon'ble Judges : M.G. Mukherjee, C.J;Bhagwati Prasad, J

Bench : Division Bench

Advocate : Vineet Kothari, for the Appellant; Vineet Kumar Mathur and R.P. Dave, for the Respondent

Final Decision : Dismissed

Judgement

Bhagwati Prasad, J.—This writ petition raises a question whether the Petitioner-firm is liable to be saddled with the liability of excise duty which were due against M/s. Diamond Marbles Pvt. Ltd. - the predecessor-in-title of the petitioner-firm.

2. M/s. Diamond Marbles Pvt. Ltd. established a unit with the assistance of the Corporation at Rajnagar, District Rajaamand. Having gone into default, the unit was taken over by the Corporation u/s 29 of the State Financial Corporation Act, 1951 (hereinafter the Act of 1951). Having taken possession of the facilities of M/s. Diamond Marbles Pvt. Ltd., the Corporation held an auction and in this auction petitioner''s bid was accepted and an agreement was executed between the Corporation and the petitioner-firm that the facilities of M/s. Diamond Marbles Pvt. Ltd. shall stand transferred to the petitioner-firm subject to condition that it will clear the liabilities of R.S.E.B. and P.H.E.D. and the dues of RIICO will be cleared by the Corporation. The agreement Ex. 1 makes a stipulation that the properties have been agreed to be sold free from all encumbrances except the

charges of the Corporation and the RIICO. The agreement also takes note of the fact that the premises were sold on ''as is where is'' basis.

3. The argument of the learned counsel for the petitioner on the strength of Annx. 1 is that the liability of excise duty, which were due against the predecessor-in-title, to the tune of Rs. 4,07,291.71 (Rs. 1,06,291.71 excise duty plus Rs. 3,01,000/- penalty), cannot be realised from the petitioner by proceeding against the premises transferred to the petitioner.

4. A reply has been filed on behalf of Union of India and the Superintendent, Central Excise, wherein it has been contended that an alternative remedy of appeal is available u/s 35 of the Central Excises & Salt Act, 1944 to the petitioner and without exhausting that remedy the Petitioner could not have come before this court. It has also been contended on behalf of the Department that Rule 230(2) of the Central Excise Rules, 1944 (hereinafter referred to as ''the Rules'') makes a clear provision that successor-in-interest is also liable for the excise duty.

5. The Corporation has been impleaded as a party to the writ petition but has not made any written submission. However, counsel for the Corporation made oral submissions that this excise duty cannot be recovered from the petitioner-firm.

6. In the rejoinder filed by the petitioner-firm, it has been contended that Rule 230(2) of the Rules cannot be pressed into service because it was not a case of transfer from erstwhile owner to present one and it is not a transfer in that fashion. The facility was taken by the petitioner from the Corporation which has exercised its statutory powers under the State Financial Corporation Act of 1951 - a Central Act. The agreement between the Corporation and the petitioner makes petitioner liable to those charges which were due to R.S.E.B. and P.H.E.D. only. No other liability was agreed to be undertaken by the petitioner.

7. We have heard learned Counsel for the parties and have perused the record. The petitioner-firm took the facility under an agreement with the Corporation. The ownership of the factory remained with the Corporation now and even when it was styled as M/s. Diamond Marbles Pvt. Ltd. The only difference which has taken place is that earlier M/s. Diamond Marbles Pvt. Ltd. was operating the facility and now the petitioner is operating the facility. Ever since the facility came into existence the premises were really owned by the Corporation and the petitioner and M/s. Diamond Marbles Pvt. Ltd. were only operating it as deemed owners under an agreement. The liability of central excise takes precedence and under Rule 230(2) of the Rules, the transfer does not affect the liability and therefore, as far as the dues of excise duty are concerned they are liable to be realized from the facility which incurred that liability.

8. Learned Counsel for the petitioner further relied upon a decision reported in Isha Marbles Vs. Bihar State Electricity Board and Another, and on the strength of this decision raised a contention that the charges which are due from the erstwhile owner cannot be realised from the subsequent purchaser. This

contention does not appeal to us. The charges due had a different colour than excise duty. Charges may be for consumption of electricity etc. but a duty is a tax. Recovery of tax is always considered on a different footing then recovery of charges. Therefore, ratio of the case relied upon by the learned Counsel for the appellant would, be of the (sic) consequences and assistance to him.

9. The contract between the parties cannot be construed to exclude the operation of taxing statute. Further, what has been provided in the agreement is charges to be paid by the petitioner and the Corporation. Charges cannote payment for service rendered. A phrase free from all encumbrances is used in conjunction with the term ''charges''. In any case, a statutory, liability cannot be expected to be done away with by an inter-party agreement. Transaction of Corporation taking the facility of M/s. Diamond Marbles u/s 29 of the State Financial Corporation Act cannot do away with the liability of tax from the plant and machinery. Thus, the element of tax due remains un-affected by the act of taking over and subsequent transfer to the petitioner.

10. Now since the facility has changed hands without intervention of M/s. Diamond Marbles Pvt. Ltd., can the petitioner be saddled with the liability. Obviously Annx. 1 was an agreement between the Petitioner and the Corporation and it gives no notice to the petitioner that it has to bear such burdens which have not been incorporated into this agreement. On the first feed it appears that the agreement to sale Ex.1 is all persuasive but on a deeper probe it is clear that this document entered into between the petitioner and the Corporation cannot do away with the liability of excise duty. In terms of Rule 230(2) of the Rules - apart from excisable goods, material and preparations, plant, machinery, vessels, utensils, implements and articles in the custody of possession of the person or persons succeeding the interest are liable to excise duty and the Department was entitled to confiscate them. That being the position, the plants and machinery can be proceeded against. However, the petitioner may agitate this between itself and the Corporation as to who is to bear the burden ultimately. They may have to be passed on to the predecessor-in-title M/s. Diamond Marbles Pvt. Ltd. However, the petitioner may agitate this between itself and the Corporation as to who is to bear the burden ultimately. They may have to be passed on to the predecessor-in-title M/s. Diamond Marbles Pvt. Ltd. However, to answer that question interpretation of agreement Ex. 1 needs to be done which cannot be done in proceedings under Article 226 of the Constitution. That being the position, there is no merit in the writ petition and the same is hereby dismissed summarily.