

(1998) 08 AP CK 0105

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10792 of 1994

Sitani Textiles and Fabrics (P) Ltd

APPELLANT

Vs

Asst. Collector of Customs and Central Excise, Hyderabad
and Another

RESPONDENT

Date of Decision : 10-08-1998

Acts Referred:

Central Excise Rules, 1944 — Rule 230(2)

Central Excises and Salt Act, 1944 — Section 11

State Financial Corporations Act, 1951 — Section 29, 29(1), 46

Citation : (1998) 5 ALD 637 : (1998) 5 ALT 249 : (1999) 98 CompCas 165 :
(1999) 106 ELT 296

Hon'ble Judges : T. Ranga Rao, J; S.V. Maruthi, J

Bench : Division Bench

Advocate : M/s. Y. Ratnakar and Duba V. Nagarjuna Babu, for the Appellant; Mr. B. Adinarayana Rao, SC for Central Government and Mr. C.V. Mohan Reddy, SC for APIDC, for the Respondent

Judgement

S.V. Maruthi

1. This writ petition is filed for a Writ of Mandamus declaring the order of the 1st respondent dated 21-2-1994 as illegal, arbitrary and unjust.

2. The facts in brief are as follows:

One M/s. Dakshin Fabrics Ltd., has taken a loan from A.P. Industrial Development Corporation, a financial institution. Since there was default in payment of loan the unit of Dakshin Fabrics Ltd., was brought to sale u/s 29 of the State Financial Corporation Act, 1951 on 4-2-1992. The petitioner participated in the auction and became the highest bidder and the sale was knocked down in his favour on 30-3-1992. The A.P. Industrial Development Corporation confirmed the sale in favour of the petitioner for Rs.76.00 lakhs and had issued proceedings to the said effect. On 31-3-1992 the petitioner paid Rs.15.20 lakhs being 20% of the sale price. The petitioner was effecting repairs to the plant and machinery after

taking possession of the same. On 21-2-1994, the 1st respondent Assistant Collector of Customs and Central Excise issued notice to the petitioner under Rule 230(2) of Central Excise Rules, 1944 requiring the petitioner to pay a sum of Rs.4,40,159.23 ps. in terms of adjudication order No.4 of 90, dated 9-3-1990 which was payable by M/s. Dakshin Fabrics Ltd. Again on 13-6-1994 the Superintendent of Central Excise detained the plant and machinery of M/s. Dakshin Fabrics Ltd., on the ground that it has to pay a sum of Rs.8,27,792.19 ps. in terms of adjudication order Nos.4 of 90, dated 9-3-1990 and 79 of 90, dated 11-11-1990. Aggrieved by the orders of adjudication and also the order of demand dated 21-2-1994 and 13-6-1994 the present writ petition is filed.

3. The Central Excise authorities have also written a letter to A.P. Industrial Development Corporation not to handover the unit to the petitioner on the ground that M/s. Dakshin Fabrics Ltd. has to pay a sum of Rs.3,76,50,083.85 ps. in terms of adjudication order No.50 of 96.

4. The 2nd respondent M/s. A.P. Industrial Development Corporation has filed a counter affidavit stating that u/s 29 of the State Financial Corporation Act, the 2nd respondent Corporation has a statutory right to transfer by way of sale and realise the property hypothecated by the Company in case of default in repayment of loan advanced to it by the Corporation. The entire property of M/s. Dakshin Fabrics comprises of land, plant, machinery, assets and the goods manufactured have been mortgaged to the Corporation as security for the repayment of loan. Since the Company committed default in payment of loan the Corporation sold the mortgaged property u/s 29 of the State Financial Corporation Act to Mr. Sithani on as is where is basis. The petitioner Company has not paid the entire sale consideration as per conditions of sale agreement.

5. u/s 11 of Central Excises and Salt Act the Central Government may recover the central excise dues from any person by attachment and sale of excisable goods belonging to such person as if it were an arrears of land revenue from the said person. Since M/s. Dakshin Fabrics was stated to be the defaulter of excise levy the 1st respondent can recover the same by attachment and sale of excisable goods of Dakshin Fabrics. Since the unit has been sold to the petitioner Company M/s. Dakshin Fabrics ceases to be its owner. Hence the 1st respondent has no power to attach the goods of the petitioner Company. Rule 230 of Central Excise Rules of 1944 empowering the attachment of excisable goods in possession of person succeeding the original owner exceeds the scope of Section 11 of Central Excise Act. Further Section 11 of the Central Excise Act contemplates attachment and sale of excisable goods only. Whereas Rule 230 empowers the authorities to see the plant, machinery and other assets of the Company. The rule is therefore ultra vires of Section 11 and cannot be relied upon.

. 6. The 1st respondent-Assistant Collector of Customs filed a counter affidavit contending that M/s. Dakshin Fabrics is due in Central Excise duty in heavy amounts and in order to realise the said amount proceedings were initiated

under Rule 230. of the rules which enables the Central Excise authorities to realise the Central Excise dues by sale of the plant and machinery if it is in the hands of the transferee. Therefore, the Central Excise authorities have issued the impugned proceedings namely demand and detention as they are empowered to do so under Rule 230(2) of the Central Excise Rules.

7. The main argument of the learned Counsel for the petitioner is that Rule 230 of the Central Excise Rules has no application to statutory transfers. Section 46-B of the State Financial Corporation Act prevails over the provisions of the Central Excises and Salt Act. In support of this contention he relied on Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, . The learned Counsel contended that since the plant, machinery and land of M/s. Dakshin Fabrics Ltd., was mortgaged to the Industrial Development Bank, the Industrial Development Bank is a secured creditor. Therefore, the excise dues will not prevail over the dues of the Industrial Development Corporation.

8. The Counsel for the Respondents Mr. B. Adinarayana Rao contended that under Rule 230(2) the excise authorities are entitled to proceed against not only excisable goods but also the plant and machinery in the hands of the transferee and therefore the demand notice and the detention order are valid and legal.

9. The Counsel appearing for the 2nd respondent contended in view of the mortgage, the Industrial Development Bank becomes the secured creditor and therefore the excise dues will not prevail over the secured debtor.

10. From the facts narrated above, it is clear that the land, plant and machinery belonging to M/s.Dakshin Fabrics Ltd., is due in excise duty to the excise department. The question therefore is whether the excise authorities can proceed against the land, plant and machinery in the hands of the transferee. As pointed out in the earlier paragraphs, the property is brought to sale u/s 29 of the State Financial Corporations Act, 1951. u/s 46-B of the State Financial Corporations Act, it is provided that the provisions of the state Financial Corporations Act, 1951 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.

11. Section 29 of the State Financial Corporations Act, 1951 reads as follows: .

"Rights of Financial Corporation in case of default :--(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof (or in meeting its obligations in relation to any guarantee given by the Corporation) or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the (right to transfer by way of lease or sale) and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1) shall vest in the transferee all rights in or to the property transferred (as if the transfer) had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part" of the security held by it as it had with respect to the original goods."

12. The Financial Corporation in case of default in repayment of any loan or advance or any instalment or failure to comply with the terms of the agreement by the industrial concern shall have a right to takeover the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. Therefore, u/s 29 the Financial Corporation has the right to realise the dues from the defaulting Company by sale of the property mortgaged to it.

13. From the facts narrated in the earlier paragraphs the undisputed fact is that the property itself is the subject matter of sale and which is purchased by the petitioner in auction was mortgaged to the Industrial Development Corporation. Therefore, the Industrial Development Corporation, if there is default by the industrial concern is entitled to recover the dues by bringing the property to sale u/s 29 of the Act and realise the dues from the sale proceeds. On the facts of the present case in exercise of the said power, the Industrial Development Corporation brought the properties to sale and the petitioner purchased the same in the auction. The petitioner purchased the property for Rs.76.00 lakhs out of which he deposited Rs.15.20 lakhs while the 1st respondent proposes to recover the excise dues from the land, plant and machinery under Rule 230(2) of the Central Excise Rules. Since the property is mortgaged to the Industrial Development Bank of India, it is a secured creditor in other words, the property was given as security for the loan advanced by the Industrial Development Bank. Under the Central Excise Act no charge is created on the plant, machinery and land for the excise dues. Further, the mortgage in favour of the Industrial Development Bank is prior to the date on which the excise dues were determined by the 1st respondent. The question therefore is whether the 1st respondent can realise the central excise dues from out of the sale proceeds of the plant and machinery sold by the 2nd respondent. In our view, the 1st respondent cannot realise the central excise dues from out of the sale proceeds of the plant and machinery sold by the 2nd respondent in exercise of the power conferred u/s 29(1) of the State Financial Corporations Act, 1951 for the realisation of the dues to it from the defaulting industrial concerns. The reason being that the State Financial Corporation is a secured creditor.

14. In this context, we may refer to the judgment of the Supreme Court in the *The Bank of Bihar Vs. The State of Bihar and Others*, . It is necessary to refer to the facts in brief. The plaintiff is the Bank of Bihar. One of the methods of making

advances followed by the plaintiff bank was that the constituents pledged their merchandise on a cash credit system with the Bank and took advances on the pledged goods. The Bank held the goods as security for the advances made and the constituents either provided the Bank with godown or the bank kept the pledged goods in godowns of its own and charged rents from the constituents. The defendant No.2 entered into a cash credit system agreement with the plaintiffs Arrah Branch, the arrangement being that the sugar would be pledged under the cash credit system. On December, 16, 1946 the advance made to defendant No.2 stood at Rs.3,20,486.20 and the bank held 6239 bags of different varieties of sugar as security. These bags were kept in godowns provided by defendant No.2. The key of the lock of each godown was in the custody of the bank. The defendant No.1 the Rationing Officer and the District Magistrate, Patna issued an order of seizure and got the locks of the godown opened out and forcibly and illegally removed 1818 bags of sugar. No payment was made to the plaintiff bank. Therefore, the plaintiff bank filed a suit for recovery of the cost of 1818 bags of sugar or for the return of the bags of sugar on the ground that the seizure and removal of sugar is illegal. The suit was resisted by the defendant on the ground that the seizure and removal of the sugar is on account of the sugar cess that is due by the 2nd respondent and therefore in exercise of the power under the Public Payments Recovery Act, they are entitled to remove the sugar bags from the godown. On the facts and in the circumstances of the case, the question that was considered by the Supreme Court was whether the sugar seized by the Government in possession of the bank as a pledgee at the time of the seizure and have the rights of the Bank as such pledgee been determined by the seizure in question. It was held rejecting the contention of the Cane Commissioner who seized the sugar bags that the Cane Commissioner have a right of priority over the other creditors of the defendant No.2 in particular secured creditors, "It was held that the pawnee has special property and a Hen which is not of ordinary nature 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. After the goods had been seized by the Government it was bound to pay the amount due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawnor. But by a mere act of lawful seizure the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff for such amount which the plaintiff in ordinary course would have realised by sale of the goods pledged with it on the pawnor making default in payment of debt."

15. It was further held that the "plaintiffs right as a pawnee could not be extinguished by the seizure of the goods in its possession in-as-much-as the pledge of the goods was not meant to replace the liability under the cash credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor. The Cane Commissioner who was an

unsecured creditor could not have any higher rights than the pawner and was entitled only to the surplus money after satisfaction of the plaintiff's dues." The judgment in Bank of Bihar's case (supra) was followed by this Court in State v. Andhra Bank Limited & others, AIR 1998 A.P. 18.

16. The facts in brief are:

The Andhra Bank Ltd., filed a suit for a declaration that the plaintiff is entitled to certain sums in the alternative for a money decree against some of the defendants. The 3rd defendant is the Sivakami Reserve Area Cane Producers and Suppliers and the 4th defendant is the Sivakami Sugars Ltd. The Andhra Bank provided certain credit facilities to the 4th defendant Sivakami Sugars and allowed open cash credit to the extent of Rs.5,00,000/-and a promissory note for the same was executed by the 4th defendant. Similarly, the other stock in other godowns was also pledged to the plaintiff bank. While so, the Tahsildar, attached the stocks of sugar in godown No.1 hypothecated to the plaintiff bank for recovery of a sum of Rs.5,20,682.96 said to be due towards sugar cane purchase tax to the State under the provisions of the A.P. Sugar Cane (Regulation of Supply and Purchase) Act. There were some proceedings in the Court and pursuant to the directions issued by the Court, the hypothecated stock in godown No. 1 was sold and the proceeds realised were deposited. The Andhra Bank claimed preferential right-first charge and lien to recover the suit amount due to it under open cash credit loan from the 4th defendant and the defendant Nos.1 and 2 being simple money creditors are entitled to any surplus that may be left over. The suit was decreed holding that the plaintiff bank is entitled for priority in respect of the sale price in sugar. On appeal, this Court following the judgment of the Supreme Court in Bank of "Bihar"s case (supra) held as follows:

"In the case before us, though it is not a pledge, yet the transaction being a hypothecation, the hypothecatee, viz, the bank, has a lien on the goods which are held by way of security and the bank has a preferential claim as a secured creditor even against the Government's demand of taxes."

17. In other words, in the case of secured debt, the rights of secured creditor prevails over the excise dues of the excise department. The secured creditor will have preferential claim even against the demand of central excise duty by the Government.

18. At this stage, we may also refer to the judgment of the learned single Judge in Satyam Vs. Krishna Murthy and Others, , wherein it was held that:

"Having regard to the strong line of authority 1 hold that the sale in the instant case for recovery of arrears of Income Tax subsequent to the mortgage did not have the effect of superseding the rights of the mortgagee nor giving him any priority over the rights of the mortgagee."

19. Similar is the view expressed in Indian Bank v. State of Andhra Pradesh & others, 1993 STC 548, wherein the learned single Judge of this Court held as

follows;

"While land revenue and public revenue are secured debts for recovery of which there lies a charge on the land and buildings upon it, other amounts recoverable as arrears of land revenue, are not secured debts. Sales tax arrears of a defaulting dealer are not a secured debt. Therefore, the Sales Tax Department does not have a prior claim on the proceeds of sale of properties hypothecated to the bank, a secured creditor, which are brought to sale in a suit instituted by the secured creditor."

20. The learned Judge has referred Satyam's case (supra).

21. From the above it follows: That in the case of a pledge, pawnee has special property and lien which is not of an ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawner has any right to take away goods or its price. The right of a pawnee could not be extinguished by the subsequent attachment/ seizure of the goods under any other law. It gives the Pawnee a primary right to sell the goods in satisfaction of the liability of the pawner. An unsecured creditor could not have any higher rights than the pawner and was entitled only to the surplus money after satisfaction of the secured creditor's dues.

22. The above principle applies to hypothecation as well, as the hypothecatee has a lien on the goods which are held by way or security and the hypothecatee has a preferential claim as a secured creditor even against the Government's demands of taxes.

23. In our view the above principles apply to the case of mortgage. A mortgage is a transfer of an interest in immovable property. The owner of the bundle of rights transfers some of those rights to the mortgager and the remainder of them still with him. The transfer of interest under mortgage is less than ownership which continues with the mortgagor. The characteristic of a mortgage is that it transfers an interest in immovable property. Therefore, the mortgagee has an interest which is less than ownership and therefore a mortgagee has a preferential right over other unsecured creditors.

24. In view of a transfer of an interest in immovable property the mortgagee has a special interest in the property and so long as his claim is not satisfied no other creditor of the mortgagor has a right to take away the property or its price.

25. We approve the view expressed in *Satyam v. Krishna Murthy & others*, (supra) and the Judgment in *Indian Bank v. State of Andhra Pradesh* (supra).

26. It follows from the above, that the Government cannot claim preferential right for recovery of its excise duty as no charge lies on the property for recovery of the duty. In other words, excise duty is not a secured debt, as for recovery of which no charge lies on the property.

27. We therefore are of the view that the Industrial Development Corporation

being a secured creditor has preferential claim even against demand of central excise duty of the Government.

28. The next question that is for consideration is whether the provisions of State Financial Corporation Act, 1951 will prevail over the Central Excises and Salt Act, 1944. The contention of the learned Counsel for the petitioner as we have already referred to is that the provisions of the State Financial Corporations Act, 1951 will prevail. In this context, we may refer to the Judgment of the Supreme Court in Maharashtra Tubes Limited's case (supra). The learned Judges were considering the provisions of the State Financial Corporations Act, 1951 vis-a-vis the Sick Industrial Companies (Special Provisions) Act, 1985 in the said case. It was held that 1951 Act and 1985 Act are special statutes each having different objectives, the emphasis in the case of the former being on giving financial assistance to entrepreneurs for setting up industries while in the case of the later it being to revive or rehabilitate industries which have on account of economic or other related reasons gone sick.

29. It was also held that both the acts are special acts and that in the case of industrial undertakings the provisions contained in 1985 Act would ordinarily prevail and govern over 1951 Act.

30. In the present case, the State Financial Corporations Act, 1951 is a special enactment whereas the Central Excise and Salt Act is a general enactment. However, in view of Section 46-B, the State Financial Corporation Act prevails over the other enactments.

31. It follows from the above that the demand notice dated 21-2-1994 issued to the petitioners demanding Rs.4,40,159.23ps. and the detention order dated 13-6-1994 detaining the goods for the demand of excise dues of Rs.8,27,792.19 ps cannot be sustained. The writ petition is therefore allowed. No costs.

32. It appears that during the pendency of the writ petition, the petitioner furnished security in a sum of Rs.4,40,000/- and deposited title deeds. The 1st respondent is directed to return the same.