

(2002) 02 OHC CK 0038
In the Orissa High Court
Case No : O.J.C. No. 12712 of 1999

Suburban Ply and Panel Pvt. Ltd.

APPELLANT

Vs

Assistant Commissioner, Central Excise and Customs,
Bhubaneswar Division and Others

RESPONDENT

Date of Decision : 28-02-2002

Acts Referred:

Central Excise Rules, 1944 — Rule 230(2)
Central Excises and Salt Act, 1944 — Section 11
State Financial Corporations Act, 1951 — Section 29

Citation : (2002) 93 CLT 460 : (2002) 83 ECC 378 : (2002) 144 ELT 257 :
(2002) 1 OLR 558

Hon'ble Judges : P.K. Balasubramanyan, C.J.;A.S. Naidu, J

Bench : Division Bench

Advocate : M.R. Mohanty and G.K. Nayak, for the Appellant; S. Rath and Senior Standing Counsel (Central), for the Respondent

Final Decision : Dismissed

Judgement

Balasubramanyan, C.J.—By order dated 9.9.1999, the Assistant Commissioner, Central Excise and Customs, Bhubaneswar Division attached an amount of Rs. 2,45,635/- u/s 11 of the Central Excise Act read with Rule 230(2) of the Central Excise Rules on the basis that the said amount was due towards duty from M/s Orissa Ply and Panels Ltd. In terms of the order of adjudication dated 22.11.1997. The Orissa Ply and Panels Ltd, had mortgaged the Undertaking to the Orissa State Financial Corporation (hereinafter referred to as "Financial Corporation"). The Financial Corporation in exercise of its power u/s 29 of the State Financial Corporation Act, 1951, took over the Industrial Unit with all its assets in terms of Section 29(1) of that Act and subsequently sold the Undertaking as envisaged by that Section. The writ petitioner, a Private Limited Company purchased the fixed assets of the defaulting Company, in the sale by the Financial Corporation. On the attachment being effected, the petitioner approached this Court with this writ petition praying for the issue of writ of

certiorari to quash the order of attachment dated 9.9.1999 under Annexure-1 and for other incidental reliefs. According to the petitioner-Company, it was incorporated on 18.12.1998 and the dues for which the attachment was effected, was incurred even prior to its incorporation, that the transfer in favour of the petitioner in terms of Section 29 of the State Financial Corporations Act, 1951 enabled it to take the stand that it was not liable for any of the prior dues of the defaulter-company, that in view of Section 468 of the State Financial Corporations Act, the provisions of Section 11 of the Central Excise Act or Rule 230(2) of the Central Excise Rules, cannot prevail and going by the relevant provisions of the State Financial Corporations Act, the petitioner-company had no liability for the excise duty alleged to be outstanding from the defaulter. The petitioner, therefore, submits that even if the claim for Central Excise Duty outstanding against the defaulter could be enforced, it could be enforced only against the defaulter and not against the transferee from the Financial Corporation, when the Financial Corporation has sold the Undertaking in exercise of its power u/s 29 of the Act. It is also contended that the defaulting-company was still in existence and the petitioner only purchased some of the machineries and assets belonging to it and it was for the Central Excise Authorities to proceed against the defaulting-company.

2. Learned counsel for the Central Excise Authorities contended that Section 11. of the Excise Act read with Rule 230(2) of the Excise Rules, enabled the Excise Authorities to recover the amounts by proceeding against the movables and machineries in the hands of the writ petitioner as transferee from the original defaulter and that there was nothing in the State Financial Corporations Act which stood in the way of the Excise Authorities enforcing the liability as it has sought to do in the case on hand. Learned Standing Counsel for the Financial Corporation submitted that when the Financial Corporation takes over an Undertaking u/s 29(1) of the State Financial Corporations Act and thereafter deals with it, the liability of the defaulter does not attach itself either to the Financial Corporation or to the subsequent transferee and hence the attempt to recover the duty was not legal or justified. It was also contended that the Financial Corporation was a prior mortgagee and the subsequent claim by the Central Excise Department cannot prevail over the prior mortgage when in enforcement of its mortgage it had brought the property to sale for the discharge of the debt due to the mortgagee.

3. In a case where a charge is created by Statute (for the Sales Tax dues of the defaulter) even though subsequent in point of time to the mortgage in favour of the Financial Corporation, the Supreme Court has held in *State Bank of Bikanir-Jaipur v. National Iron and Steel Rolling Corporation* 96 STC 612, that a charge provided by the Statute, would cover within its ambit a mortgage also and therefore, when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage. It was thus held that the claim of the Sales Tax Department to be paid their dues from the proceeds of the sale of the property of the defaulter took priority over the claim

of the mortgagee bank. In *Isha Marbles Vs. Bihar State Electricity Board and Another*, with reference to the Electricity (Supply) Act, and the State Financial Corporations Act, the Supreme Court held that the State Electricity Board cannot insist on a Purchaser from the Financial Corporation paying the charges kept in arrears by the defaulter undertaking and which was outstanding at the time of the take over by the Financial Corporation u/s 29 of the Act and make it a condition for the grant of a fresh connection applied for by the purchaser. But in that Judgment, their Lordship also stated that a sale by the Financial Corporation in terms of Section 29 of the Act in enforcement of the mortgage, cannot affect the right of the Board to recover its dues. Ultimately, it was held that the Board was not entitled to disconnect the supply to the purchaser, but by reason of an amendment of the Bihar & Orissa Public Demands and Recovery Act, electricity dues could be recovered by the Board by bringing the property of the consumer concerned to sale, in Certificate Proceedings. What was actually laid down was that the subsequent purchaser would not be liable to meet the liability of the previous consumer in order to secure a connection for himself. With respect, what is discernible is that even though the Electricity Board cannot insist on clearing of the dues of the defaulter for granting a fresh connection to the purchaser, the sale by the Financial Corporation would not put an end to the obligation to pay the electricity charges incurred, by the defaulter and the property could be proceeded against under the concerned law referred to in the judgment. In *Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others*, the Supreme Court held that the doctrine of priority or precedence of crown debt was based on rule of necessity and was of public policy and the law was valid though it was a pre-constitutional law in force and that the principle of priority of Crown's debt, would enable the State to recover the sales tax dues under the Karnataka Sales Tax Act. Their Lordships held that, that right would prevail over the rights of the mortgagee-bank in terms of the relevant provisions of the Karnataka Sales Tax Act. The decision of the Supreme Court in *State Bank of Bikaner-Jaipur v. National Iron and Steel Rolling Corporation*, 96 STC 612 was followed by the Rajasthan High Court in *Rajasthan State Industrial Development and Investment Corporation Ltd. (RIICO) Vs. State of Rajasthan and Others*, in the context of the State Financial Corporations Act and the relevant provisions in that behalf. We have considered this aspect in some detail in our recent decision in *State Financial Corporation v. Commissioner of Commercial Taxes, Orissa and Ors.* (OJC No. 7796 of 1993). Therein, we held that the Sales Tax Authorities could recover the dues of the defaulter from the State Financial Corporation when the Financial Corporation had sold the Undertaking and converted the security into money.

4. We shall now refer to the relevant provisions of the Central Excise Act and the Central Excise Rules. Section 11 provides that the amount due can be recovered by the Collector on receipt of a certificate in that behalf by proceeding to recover the same from the person from which it is due as if it were an arrear of land revenue. it may be noted that no first charge or even a charge as such is created

by the Section. Rule 230 of the Central Excise Rules deals with goods, plants and machinery chargeable with duty and not paid. Sub-rule (1) provides that the duty leviable on any goods owing from or by any person carrying on trade or business, could be recovered from plant, machinery and all movables belonging to that person, whether it be in the custody or possession of the person carrying on the trade or business, or in the custody or possession of any agent or other person in trust or for the use of the person carrying on such trade or business by detaining them for the purpose of exacting such duty. We are here concerned with Rule 230(2) of the Rules. It may be proper to quote that rule here :

"Rule 230(2) of the Central Excise Rules

Where any such person transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or trade or part thereof by any other person or persons, all excisable goods, materials, preparations, plants, machinery, vessels, utensils, implements and articles in the custody or possession of the person or persons succeeding may also be detained for the purpose of exacting duty due from the producer, manufacturer or dealer upto the time of such transfer, disposal or change, whether such duty has been assessed before such transfer, disposal or change, but has remained unpaid, or is assessed thereafter."

The rule is prima facie wide in its operation. There is no challenge to the validity of the rule in this proceeding. Going by Sub-rule (2) of Rule 230, it appears to us that a change in ownership of the undertaking would not in any manner affect the obligation of the person liable to pay excise duty and the authority concerned has the right to proceed against the successor in business or transferee even though the duty is assessed subsequently but the liability had arisen before such transfer. In other words, the right is given to the department to proceed against the undertaking or its products or machinery even though it may be in the hands of the transferee. On a plain reading of the rule, it appears to us that if the defaulter had sold the undertaking, the transferee would be liable for the excise duty that remained outstanding as on the date of transfer in its favour.

5. Section 29(2) of the Financial Corporations Act clearly suggests that the transfer by the Financial Corporation, must be deemed to be transfer by the Financial Corporation on behalf of the mortgager and it would be as if the transfer had been made by the owner of the property. The vesting of all rights of the transferor on the transferee is no free of all encumbrances. When all rights vest, the obligations that follow the property also attach to the rights, Sub-section (4) of Section 29 indicates that the proceeds of the sale will be held in trust by the Financial Corporation and appropriated towards the discharge of the debt due to it, after first applying the proceeds in payment of costs charges and expenses incurred. The balance if any left is to be paid to the person entitled thereto. It is here, that the priority of crown debt intervenes. According to us, nothing turns on the fact that the transfer of the undertaking was not by the

original manufacturer or the owner himself but the same was at the instance of the Financial Corporation in terms of the State Financial Corporations Act. Going by the ratio of the decisions above referred to, we are of the view that the assignee-petitioner cannot resist the claim for recovery of the debts by the department.

6. Learned counsel for the writ petitioner brought to our notice the decision of the High Court of Andhra Pradesh in *Sitani Textiles and Fabrics (P) Ltd Vs. Asst. Collector of Customs and Central Excise, Hyderabad and Another*, Therein, a Division Bench of Andhra Pradesh High Court held that State Financial Corporations Act, 1951 was a special enactment and it prevailed over Rule 230(2) of the Central Excise Rules and hence the order of detention in purported exercise of that power, of the plant and machinery of a defaulting assessee sold by the financial institution to another party in auction, was not sustainable. Their Lordships essentially relied on the decision of the Supreme Court in *The Bank of Bihar Vs. The State of Bihar and Others*, . Their Lordships held that 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 mortgagee and the remainder is still with him. The transfer of interest under the 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. It was further held that in view of a transfer of an interest in immovable property, the mortgagee had a special interest to the property and so long as his claim was not satisfied, no other creditor of the mortgagor had a right to take away the property or its price. With respect, we may point out that the Andhra Pradesh High Court has not considered the decision of the Supreme Court in *State Bank of Bikanir-Jaipur v. National Iron and Steel Rolling Corporation* (96 STC 612) or the decision on Crown debts having precedence over a mortgage debt, though prior in point of time, in *Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others*, The ordinary rule of mortgagee having a preferential claim over the other creditors may not apply since the Statute itself creates an obligation that follows the property or when the debt outstanding is a Crown debt which under general principles of law, has precedence over even the debt due to a mortgagee prior in point of time. The other decisions referred to in that judgment, have also not referred to the decisions of the Supreme Court as indicated above.

7. The debt payable under the Central Excise Act and assessed as outstanding, is a debt due to the State (Union of India) and consequently, it is a Crown debt which has precedence over the mortgage debt which can be recovered by the Financial Corporation by proceeding u/s 29 of the Financial Corporations Act. Since Rule 230(2) of the Excise Rules read with Section 11 of the Excise Act entitles the department to recover the amount from the manufacturing unit or the manufacturer or whoever be in possession, the right of the department to proceed against the unit in the hands of the writ petitioner has to be recognised.

Thus, on a consideration of all the relevant aspects, we are of the view that the petitioner cannot succeed in its challenge to the demand made by the Excise Department or the mode of recovery sought to be followed by the Excise Department.

8. In the light of the discussion as above, the petitioner is not entitled to any relief in this writ petition. Hence the writ petition is dismissed, but in the circumstances, we direct the parties to suffer their respective costs.

A.S. Naidu, J.

I agree.