

(2005) 03 GUJ CK 0055

In the Gujarat High Court

Case No : Special Civil Application No. 15232 of 2004

Sweta Gupta

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-03-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 230(2)
Central Excises and Salt Act, 1944 — Section 11, 11D
Constitution of India, 1950 — Article 226, 245, 246
State Financial Corporations Act, 1951 — Section 29(2)

Citation : (2005) 03 GUJ CK 0055

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : K.S. Nanavati, for Nanavati Associates, for the Appellant; Jitendra Malkan, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—The petitioner challenges action of respondent Nos. 2 to 4 as being illegal, without any authority of law and unwarranted of facts. In the petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs :

"(A) To issue a writ of certiorari or any other appropriate writ, order direction declaring the proviso added by Finance (No. 2) Act 2004 (Act No. 23 of 2004 effective from 10.9.2004 as ultra vires the power of the parliament under Entry 84 of List 1 to the Schedule 7 of the Constitution and Articles 245 and 246 and other allied provisions of the Constitution of India and to issue a writ of prohibition restraining respondent and all other respondents from giving any legal effect to the same;

(B) A writ of certiorari or any appropriate writ, direction or order may please be issued to the respondent quashing and setting aside the notice/letter dated 5.10.2004 and 19.11.2004 of respondent No. 3 and 4;

(C) Pending hearing and final disposal, the implementation and enforcement of the said notices dated 5.10.2004 and 19.11.2004 of the respondent Nos. 3 and 4 including to take any step or measures in pursuant thereof with respect to the said plot of the petitioner may please be stayed;

(D) Ad interim injunction in terms of para 21(C) may please be granted;

(E) Ex-parte ad interim relief in terms of para 21(C) may please be granted."

2. Mr. K.S. Nanavati, learned Senior Advocate appearing on behalf of the petitioner has withdrawn the challenge raised vide prayer clause 21(A) and hence the matter is now required to be decided only on the limited ground as to whether letter dated 5th October,2004 (Annexure-E) and notice of demand dated 19th November,2004 (Annexure-F) could have been issued by respondent Nos. 4 and 3 respectively.

3. A brief resume of the facts. It appears that one M/s. Divya Prints Pvt. Ltd. (Divya) was allotted and in possession of plot of land bearing No. 268/3, Road No. 2, GIDC Industrial Estate, Sachin, District Surat. The Regional Manager, GIDC, Surat, passed order on 29th February,2000 directing to take back possession from Divya of plot No. 268/3 under the Gujarat Public Premises (Eviction of Unauthorised Occupants) Act,1972. In pursuance of the said letter GIDC took over possession on 4th January,2001.

4. The petitioner applied to GIDC on 15th December,2003 seeking allotment of plot in Sachin Industrial Estate. On 1st May, 2004 GIDC forwarded offer-cum-allotment letter to the petitioner. Thereafter, on 12th May,2004 the petitioner made payment of the sum demanded by four different cheques as called upon by GIDC. Upon the payment having been received by GIDC an agreement in the nature of licence was entered into between GIDC, as licensor and the petitioner as licensee on 13th May,2004. Thereafter, on 20th May,2004 GIDC called upon the petitioner to take possession of the plot in question and accordingly possession was handed over by GIDC and taken over by the petitioner on 28th May,2004 and in pursuance thereof possession receipt signed by Deputy Executive Engineer, Surat was issued to the petitioner.

5. It appears that on 31st August,2004 respondent No. 4 wrote to the Regional Manager, GIDC not to dispose of or transfer the property belonging to M/s.Divya Prints Private Limited unless no objection certificate was issued by the office of respondent No. 4. In response Regional Manager, GIDC wrote on 23rd September,2004 informing respondent No. 4 that the plot in question has already been allotted in the name of the petitioner. Hence, on 5th October,2004 respondent No. 4 wrote to the petitioner directing the petitioner to pay the outstanding dues in the name of Divya viz. a total sum of confirmed demand amounting to Rs.1,39,82,848 (Duty Rs.69,82,280/- + penalty Rs.69,33,068/- + Fine Rs.67,500/-) within ten days of the receipt of the said letter (Annexure-E). The said letter was followed up by notice of demand to defaulter dated 19th November,2004 issued by respondent No. 3. In the said notice it is stated by

respondent No. 3 that the plot in question has been purchased by petitioner from GIDC and in terms of the amended provision of Section 11 of the Central Excise Act, 1944(the Act) and as supported by the Hon''ble Supreme Court judgment in the case of Macson Marbles Pvt. Ltd. Vs. Union of India (UOI), the amount outstanding against Divya was recoverable from the petitioner. Accordingly the petitioner was called upon to make the payment within seven days from the date of receipt of the notice. The petitioner wrote to respondent No. 4 on 25th October,2004 explaining the facts and contending that the petitioner was in no way concerned with outstanding dues of Divya and hence a request was made to close the issue.

6. Mr. K.S. Nanavati submitted that provisions of Section 11 of the Act were not attracted; that the petitioner had not purchased any property from Divya; the decision in case of Macson Marbles Pvt. Ltd.(supra) was not applicable on the facts of the case. He therefore, urged that the impugned notice of demand and the letter were bad in law and were required to be quashed and set aside.

7. Mr. Jitendra Malkan, appearing on behalf respondents referred to the affidavit-in-reply dated 12th January,2005 made by respondent No. 2 to contend that the petition was misconceived and was required to be summarily rejected. Inviting attention to paragraph No. 18 of the offer-cum-allotment letter dated 1st May,2004 issued by GIDC to the petitioner it was contended that as per the said paragraph the petitioner was made aware by GIDC that GEB dues and Municipal Tax for the use of the property are payable and the petitioner shall have to clear the dues of both GEB and Municipal Corporation. Therefore, according to him the principle of "Buyer Beware" was applicable and the petitioner ought to have made appropriate inquiries before taking possession of the property from GIDC. That the petitioner was put on guard by the aforesaid paragraph of the offer-cum-allotment letter and hence the petitioner should not be heard to say that it was an innocent and bonafide purchaser without knowledge. That if the petitioner had made proper inquiries, the petitioner would have come to know that there were outstanding dues to be recovered by the Central Excise Department from Divya, and the petitioner having failed to make such inquiries, cannot now be permitted to deny the liability attached with the property. He therefore vehemently and repeatedly urged that the petitioner cannot be absolved of its liability to make payment of outstanding dues of Divya to the Central Excise Department. That the ratio of Supreme Court decision in case of Macson Marbles Pvt. Ltd. (supra) would squarely apply and the department was entitled to effect recovery of excise duty from the petitioner in light of provision of Section 11 of the Act.

8. There is no dispute as to the facts. At the cost of repetition , it is necessary to note that GIDC is the owner of the plot in question ; it had allotted the plot to Divya in past; recovered possession from Divya by invoking provisions of Gujarat Public Premises (Eviction of Unauthorised Occupants) Act,1972 from Divya; and thereafter reallotted plot in question to the petitioner under a licence agreement. Therefore, at no stage, the ownership of the plot in question had passed from

GIDC to Divya.

9. In light of the aforesaid factual scenario whether provision of Section 11 of the Act can apply to the facts of the case requires to be examined. The said provision reads as under :

"11. Recovery of sums due to Government.- In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, [including the amount required to be paid to the credit of the Central Government u/s 11D] the officer empowered by the [Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector , on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

[Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part , or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.]".

10. On a plain reading of the provision as can be seen the main provision is in two parts. The first part pertains to making recovery of duty and any other sum payable to the Central Government from a person owing any money to the person from whom such sums may be recoverable or due which may be in his hands or under disposal of or control of the person owing such monies to the defaulter; the second part states recovery may also be effected by attachment and sale of excisable goods belonging to the defaulter; and lastly recovery can also be effected as if the amounts specified in the recovery certificates were arrears of land revenue. But the main thrust of the provision is effecting recovery from the defaulter or a person owing monies payable to the defaulter. Admittedly, in the present case the petitioner does not owe any monies payable to Divya, nor is it possible to term the petitioner as a defaulter. In fact the entire case of the

department is built on the proviso to the main provision.

11. The proviso has been inserted by Finance Act, 2004 with effect from 10th September, 2004. Under the proviso the person from whom duty or any other sum is recoverable by the Central Government has been referred to as "predecessor". Therefore, in a case where the predecessor transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, and in consequence of such action he is succeeded in such business or trade by any other person, then, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold for the purpose of recovering such duty or other sums recoverable or due from such predecessor. Therefore, first question that will have to be answered is whether Divya is predecessor of the petitioner. The second question that would arise is whether there is any transfer or disposal of business or trade or any change in ownership of the business or trade. The answer to both the questions will have to be in the negative.

12. As noted hereinbefore, Divya can in no circumstance be termed to be a predecessor of the petitioner. Divya has neither transferred or disposed of its business or trade, either wholly or partly, nor has Divya effected any change in the ownership of its business or trade so as to result in the petitioner succeeding Divya in such business or trade. GIDC, as owner of plot in question has let out the plot on the terms and conditions specified in the agreement as licensor entitling the petitioner to use the plot in question without any ownership rights being transferred in favour of the licensee i.e. the petitioner. Divya has not transferred the plot in question. Divya could not have transferred the plot in question, not being the owner thereof and not being in possession. In these circumstances, even the Proviso to Section 11 of the Act cannot come to the assistance of revenue, as on a plain reading, and in the backdrop of the facts of the case it is not applicable to the facts of the case.

13. In the affidavit-in-reply dated 12th January, 2005 the case of the respondent is that the plot in question was in the name of Divya as far as the record of the office of respondent No. 3 is concerned; that the question was not whether the transaction was of lease or sale but whether dues recoverable from the predecessor can be recovered from the successor; and the question was of transferring the property belonging to the predecessor and not as to who is the transferor i.e. whether GIDC or State Financial Corporation.

14. Merely because Divya has shown its address in the office record of the respondents as per the location of the plot in question that by itself is not sufficient for the purpose of applying either provision of Section 11 or proviso thereunder. Similarly so far as the second reason is concerned if provisions of Section 11 of the Act are applicable viz. the requisite condition postulated by the provision stands fulfilled it would empower the respondent to effect recovery from the successor, but the question whether Divya is or is not predecessor of

the petitioner has not been answered by the respondent authorities. As already seen hereinbefore, it is not possible to term the petitioner as successor of Divya. And lastly the stand of the revenue that who is the transferor of the property is not material is an incorrect reading of the provision. The Proviso to Section 11 of the Act specifically requires that the person who is the defaulter is termed as predecessor and only in case the predecessor transfers the business or trade or ownership thereof then the provision of the proviso is attracted.

15. The decision of the Apex Court in case of Macson Marbles Pvt. Ltd. also cannot carry the case of the revenue any further considering the fact that in the case before the Apex Court by virtue of Provision of Section 29(2) of the State Financial Corporation Act, 1951 the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation can be brought to sale and such a sale if resulted in transfer of property shall vest in the successor all rights in the property transferred as if the transfer has been made by the owner of the property. In the present case, it is not even the say of the respondent authority that the property in question was either pledged, mortgaged, hypothecated or assigned to GIDC. In fact Divya could not have done it not being the owner of the property. Therefore, if Divya could not have alienated the property in any manner whatsoever, it could not have transferred the property in question to the petitioner.

16. It is also necessary to take note of additional contention raised on behalf of the petitioner as to why the aforesaid judgment in case of Macson Marbles Pvt. Ltd. would not apply to the facts of the case. In the said decision the Apex Court was called upon to decide the controversy between the parties in light of Rule 230(2) of the erstwhile Central Excise Rules, 1944. The petitioner appears to be prima facie correct in contending that the said rules were superseded by Notification No. 9 of 2001 whereunder Central Excise Rules, 2001 came into effect from 1st March, 2001, while Section 11 of the Act was amended by inserting the proviso to the said section only with effect from 10th September, 2004. Therefore, between 1st March, 2001 and 10th September, 2004 neither Rule 230 was on statute book, nor was the Proviso to Section 11 of the Act in force. However, in the facts and circumstances of the case it is not necessary to finally render any opinion and hence the said issue is kept open to be decided in an appropriate case.

17. Therefore, it is not possible to uphold the action of respondent authority in calling upon the petitioner to discharge liabilities of Divya for the reasons stated hereinbefore. It is necessary to take note of the fact that no evidence has been placed on record to show that Divya has transferred its business or trade or ownership thereof in favour of the petitioner. The impugned letter dated 5th October, 2004 and notice of demand dated 19th November, 2004 issued by respondent No. 4 and 3 respectively are hereby quashed and set aside.

18. The petition is accordingly allowed. Rule made absolute. There shall be no order as to costs.