
(1994) 03 MAD CK 0059

In the Madras High Court

Case No : W.A. No. 204 of 1994 and Writ Petition No. 20170 of 1993

Tamilnadu Chromates Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-03-1994

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 18, 19

State Financial Corporations Act, 1951 — Section 29, 31

Citation : (1994) 72 ELT 834

Hon'ble Judges : K.A. Swami, C.J.;Somasundaram, J

Bench : Division Bench

Advocate : Shri G. Ramaswami, for the Appellant; Shri K. Jayachandran, ACGSC, for the Respondent

Judgement

K.A. Swami, C.J.—The petitioner is the appellant. The appeal is preferred against the order dated 21st December, 1993 passed by the

learned single Judge on W.M.P. 31506 of 1993 filed in W.P. 20170 of 1993. When the writ appeal came up for consideration, we considered it

necessary to hear the writ petition, therefore the writ petition was directed to be posted along with this writ appeal. Accordingly, Writ Petition

20170 of 1993 is also posted for hearing along with this appeal. We have heard both sides. As the decision in the writ petition will also dispose of

the writ appeal, we first consider the writ petition.

2. The petitioner/appellant has sought for question the order No. G. IV/16/104/92 Policy, dated 27-10-1993 passed by the third respondent and

to direct respondents 1 to 3 to forbear from insisting payment of the central excise duty by the petitioner company or taking any proceedings for

recovering the same during the operation of the scheme framed by the Board for

Industrial and Financial Reconstruction (hereinafter referred to as B.I.F.R.) in case No. 16/90, dated 3-6- 1993 and to pass such orders as are deemed necessary in the facts and circumstances of the case. It manufactures sodium bi-chromate, yellow sodium sulphate and basic chromate sulphate. These chemicals are used in the manufacture of paper, paints and in leather tanning. The petitioner has been declared as a sick industry by the B.I.F.R. on 12- 2-1991 u/s 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the Act). It made a representation on 1-9-1992 before the Assistant Collector of Central Excise for grant of excise loan. That application was forwarded to the to the Collector by the Assistant Collector on 23-9-1992. On 3-6-1993, the B.I.F.R. In Case No. 16/90 passed an order framing a scheme for the petitioner company. Pursuant to that, on 27-10-1993, the petitioner company addressed another letter to the 3rd respondent, Assistant Collector of Central Excise, seeking permission to remove the goods, without payment of central excise duty. It is not in dispute that the chemicals manufactured by the petitioner are subject to excise duty. They cannot be removed from the petitioner's factory in the course of sale, without payment of excise duty. The 3rd respondent by the order dated 27-10-1993 bearing number C. No. IV/16/104/92 Policy has informed the petitioner that there is no provision in the Central Excise Rules to remove the goods, without payment of excise duty on the ground that the petitioner is a sick industry, therefore the 3rd respondent has informed the petitioner that the request made for removing the goods without payment of excise duty cannot at all be granted.

3. The contention of the petitioner is that as the petitioner company has been declared as sick industry as per the provisions of the Act, the excise duty cannot be demanded having regard to the provisions contained in Section 22(1) of the Act as long as the industry continues to be a sick industry and the scheme framed for it is in operation.

4. On the contrary, it is the contention of the respondents that it is no doubt true that the petitioner company is declared to be a sick industry and there is a scheme framed under the provisions of the Act and that scheme is also in operation, but, nevertheless, the payment of excise duty for removal of the goods does not fall within the scope of Section 22 of the Act,

hence it is not at all open to the petitioner company to remove the excisable goods from the factory for the purpose of sale without paying the excise duty.

5. Section 3 of the Central Excises and Salt Act, 1944 specifically provides that there shall be levied and collected in such manner as may be

prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in

or imported by land into, any part of India as and at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. Rule 9(1) of the

Central Excise Rules (hereinafter referred to as the Rules) specifically provides the time and manner of payment of duty. It provides that no

excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which

may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place,

until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in the Rules or as the Collector may require

and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form. Of course, the

proviso to sub-rule (1) of Rule 9 empowers the Central Government by Notification to enable the goods, subject to excise duty, to be removed

without payment or on part payment of the duty leviable thereon under Rule 49. There is no Notification issued by the Central Government

enabling removal of the goods without payment or part payment of duty leviable. Rule 49 of the Rules deals with duty chargeable only on removal

of goods from the factory premises or from an approved place of storage. Sub-rule (1) of Rule 49 provides that payment of duty shall not be

required in respect of excisable goods made in a factory until they are about to be issued out of the place or premises specified under Rule 9 or are

about to be removed from a store-room or other place of storage approved by the Collector under Rule 47. It may be relevant to notice that Rule

9 of the Rules provides for removal of goods from the places mentioned therein in such manner as is prescribed in the Rules. Accordingly, Rule 49

prescribes the manner in which the goods are to be removed outside the place of manufacture.

5.1 Thus, a reading of Section 3 of the Central Excises and Salt Act, 1944 with Rules 9 and 49 of the Rules, makes it clear that the goods leviable

to excise duty cannot be removed, unless the excise duty is paid and the same can be removed in the manner prescribed under Rule 49. The

exceptions provided in Rules 9 and 49 are not relied upon by either of the parties, inasmuch as they are not attracted to the case on hand,

therefore we do not consider it necessary to advert to all the provisions contained in Rules 9 and 49. Only the relevant portions of the Rules are

referred to by us.

6. In this situation, learned counsel for the petitioner was driven to the necessity of pinning faith on Section 22 of the Act. For our purpose, sub-

section (1) of Section 22 is relevant, which reads thus :-

22. Suspension of legal proceedings contracts, etc. - (1) Where in respect of an industrial company, an inquiry under Sec. 16 is pending or any

scheme referred to under Sec. 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under

Sec. 25 relating to an industrial company is pending then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other

law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law,

no proceedings for the winding up of the industrial company or for execution, distress, or the like against any of the properties of the industrial

company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the Board or, as

the case may be, the Appellate Authority.

Stress is laid on the words, for execution, distress or the like against any of the properties of the industrial company. It is contended that as the

industry is a sick industry and arrears due from the sick industry cannot at all be claimed as per the scheme framed by the B.I.F.R., the insistence

on payment of excise duty for removing the goods would amount to nothing but a distress or the like, because the petitioner company is not at all in

a position to pay anything.

6.1 The words ""or the like"", ""execution"" and ""distress"" occurring in Section 22(1) of the Act have been considered by the Supreme Court in

Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of

Maharashtra Ltd. and Another, . That was a case, in which in respect of a sick industry, a proceeding under Sections 29 and 31 of the State Financial Corporations Act, 1951 during the pendency of an inquiry u/s 16 of the Act, was taken out. Such a proceeding was held to have been converted by Section 22(1) of the Act. While considering the question as to whether the proceedings u/s 29 of the State Financial Corporations Act, 1951 fell within the mischief of Section 22(1) of the Act, the Supreme Court considered the scope of Section 22(1). The relevant portions of the judgment are as follows :-

Section 22(1) shorn of the irrelevant part provides that where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in any other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for appointment of a Receiver in respect thereof shall lie or be proceeded with further, except with the consent of the BIFR or, as the case may be, the appellate authority. The purpose and object of this provision is clearly to await the outcome of the reference made to the BIFR for the revival and rehabilitation of the sick industrial company. The words "or the like" which follow the words "execution" and "distress" are clearly intended to convey that the properties of the sick industrial company shall not be made the subject-matter of coercive action of similar quality and characteristic till the BIFR finally disposes of the reference made u/s 15 of the said enactment. The legislature has advisedly used an omnibus expression "the like" as it could not have conceived of all possible coercive measures that may be taken against a sick undertaking. The action contemplated by Section 29 of the 1951 Act is undoubtedly a coercive measure directed at the take over of the management and property of the industrial concern and confers a further right on the Financial Corporation to transfer by way of lease or sale the properties of the said concern and any such transfer effected by the Financial Corporation would vest in the transferee all rights in or to the transferred property as if the transfer was made by the owner of the property. So also under the said provision the Financial Corporation will 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. It is, therefore, obvious on a plain reading of Section 29 of the 1951 Act that it permits coercive action against the defaulting industrial concern of the type which would be taken in execution of distress proceedings; the only difference being that in the latter case the concerned party would have to use the forum prescribed by law for the purpose of securing attachment and sale of property of the defaulting industrial concern whereas in the case of a Financial Corporation that right is conferred on the creditor corporation itself which is permitted to take over the management and possession of the properties and deal with them as if it were the owner of the properties. If the Corporation is permitted to resort to the provisions of Section 29 of the 1951 Act while proceedings under Sections 15 to 19 of the 1985 Act are pending it will render the entire process nugatory. In such a situation, the law merely expects the corporation and for that matter any other creditor to obtain the consent of the BIFR or, as the case may be, the appellate authority to proceed against the industrial concern. The law has not left them without a remedy. We are, therefore, of the opinion that the word "proceedings" in Section 22(1) cannot be given a narrow or restricted meaning to limit the same to legal proceedings. Such a narrow meaning would run counter to the scheme of the law and frustrate the very object and purpose of Section 22(1) of the 1985 Act.

7. In the other decision in *The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others*, , the question considered was as to whether the Panchayat could recover the amount due to it from out of the properties of the sick industrial company, without the consent of the Board. It has been held that without the consent of the B.I.F.R., the arrears due to the Panchayat cannot be recovered. The relevant portion of the judgment is as follows :-

Section 22(1) provides that in case the enquiry under S. 16 is pending or any scheme referred to under S. 17 is under preparation or consideration by the Board or any appeal under S. 25 is pending then certain proceedings against the sick industrial company are to be suspended or presumed to be suspended. The nature of the proceedings which are automatically suspended are : (1) Winding up of the industrial company; (2) Proceedings for execution, distress or the like against the properties of sick

industrial company and (3) Proceedings for the appointment of Receiver. The proceedings in respect of these matters could, however, be continued against the sick industrial company with the consent or approval of the Board or of the Appellate Authority as the case may be.

Thus, we have to see in the instant case, whether insistence on payment of excise duty by the respondents for removing the goods manufactured by the sick industrial company in the course of sale would amount to distress or of like nature. The excise duty payable for removing the goods is not an arrear. It is one of the contentions of the petitioner that it does amount to arrears, because the goods cannot be removed without payment of excise duty, in as much as, no sooner the goods are manufactured, the excise duty becomes due, hence at the time of removing the goods, excise duty payable must be considered to be in arrears. The contention overlooks the provisions contained in Section 3 of the Central Excises and Salt Act, 1944 and Rules 9 and 49 of the Rules framed thereunder. Duty becomes payable only when the manufactured goods, subject to excise duty, are removed. Of course, the provisions contained in Sec. 3 of the Central Excises and Salt Act, 1944 as well as Rules 9 and 49 of the Rules thereof do provide for removal of goods, without payment of excise duty under certain circumstances for certain purposes. In this case, we need not refer to those aspects, because it is not the case of the petitioner that the case falls under those provisions. The petitioner removes the goods pursuant to the sale under the despatch invoice. It is not disputed before us that excise duty payable is included in the amount mentioned in the invoice, for which the goods are sold. That being so, the petitioner company while removing the goods for delivery towards the sale, passes on the excise duty payable to the purchaser and recovers it. As such we do not see any justification for the petitioner company to claim that the requirement as to complying with the provisions of Sec. 3 of the Central Excises and Salt Act, 1944 and the Rules framed thereunder would amount to distress or of like nature. On the contrary, it is a part of the sale transaction of the petitioner company, and in the course of that transaction, it recovers the excise duty payable. Hence, we are of the view that in the light of the interpretation placed on Section 22(1) of the Act in the aforesaid two decisions of the Supreme Court and in view of the facts and

circumstances of the case, it is not possible to hold that the demand for payment of excise duty for removing the goods for despatch to the purchaser amounts to distress or the like. Consequently, Section 22(1) of the Act is not attracted. As held in *The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others*, certain proceedings against sick industrial company are presumed to be suspended such as (i) winding up of the industrial company, (ii) proceedings for execution, distress or the like against the properties of sick industrial company and (iii) proceedings for appointment of Receiver and proceedings of the nature taken u/s 29 of the State Financial Corporations Act. In the present case, there is no scope whatsoever to hold that payment of excise duty for removing the goods for supply to the purchaser amounts to distressing the goods or coercing the petitioner company to pay the excise duty, as the excise duty is collected by the sick industry from the purchaser while supplying the goods. Further compliance with the provisions contained in Sec. 3 of the Central Excises and Salt Act and the Rules framed thereunder is necessary as the operation of the same has not been either suspended, and the proceedings of the nature are not also deemed to have been suspended by reason of the provisions contained in Section 22(1) of the Act.

8. There is also no provision contained in the Act that the excise duty collected on the excisable goods manufactured by the sick industry should be set apart for rehabilitation of the industry. If at all the Parliament intended to suspend the levy and collection of excise duty, the same could have been provided in specific words. Hence, looked at from any point of view, it is not possible to agree with the contention of the petitioner and hold that insistence on payment of excise duty for the removal of goods for sale by the sick industry amounts to distress or of like nature. However, we may observe that it is open to the petitioner company to approach the Central Government under the second proviso to Rule 9 of the Rules read with sub-rule (3) of Rule 49 of the Rules for issuing a Notification in terms thereof.

9. For the reasons stated above, the writ petition fails and the same is dismissed. Consequently, the writ appeal does not survive. It is, accordingly, dismissed. However, there will be no order as to costs.