(2008) 02 KAR CK 0064

In the Karnataka High Court

Case No : Writ Petition No''s. 1299 and 11371 of 2007

The Assistant Commissioner of Central Excise and Customs, Hubli Division	APPELLANT
Vs	
Nandi Rerolling Mills Private Limited, The Hirekerur Urban Co-operative Bank of Mysore and The Branch Manager, State Bank of Mysore The Assistant Commissioner of Central Excise, Hubli Division Vs The Hirekeruru Urban Co-operative Bank Ltd. and Nandi Rerolling Mills Pvt. Ltd.	RESPONDENT

Date of Decision : 06-02-2008

Acts Referred:
Central Excise Act, 1944 — Section 11
Karnataka Co-operative Societies Act, 1959 — Section 103

Citation : AIR 2008 Kar 70 : (2008) 126 ECC 112 : (2008) 152 ECR 112 : (2008) 226 ELT 325 : (2008) ILR (Kar) 2598 : (2008) 5 KarLJ 81 : (2008) 12 STR 671 : (2009) 19 STT 467

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : V.K. Naryana Swamy, in W.P. 1299/2007 and V.K. Narayana Swamy, in W.P. No. 11371/2007, for the Appellant; M.S. Haravi and S. Susheela, in W.P. 1299/2007 and M.S. Haravi, for Caveator/Respondent No. 1 in W.P. No. 11371/2007, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—The petitioner is the Central Excise and Customs Department, Hubli represented by its Assistant Commissioner of Central Excess, seeking to question the action of the second respondent in bringing to sale, the properties belonging to the first respondent in recovery of amounts due from the first respondent. The petitioner claims priority in such recovery.

2. The brief facts as are necessary for consideration of the present writ petition are, that the first respondent is an assessee within the jurisdiction of the petitioner. It transpires that the first respondent is due to the petitioner in a sum

of Rs. 7,83,23,235/- by way of central excise duty and penalty alongwith interest in terms of on Adjudication Order No. 2/2006, dated 1.3.2006. Pursuant to proceedings initiated for clandestine removal of the manufactured goods, it transpires that there was a Detention Order issued by the Authorised Officer as on 9.11.2006 for recovery of the said arrears and a Notice of Demand followed by a proclaimed Order of Attachment was issued on 9.1.2007 in respect of the properties of the first respondent, namely, its factory building and other buildings situate it plot No. 2D, 2E and 2F of Block No. 89. The further order of attachment has been proclaimed on the very date in respect of land situate in plot No. 1/14, Block No. 96A belonging to respondent No. 1(a), who is the Executive Director of the first respondent-Company, as well as in respect of land in Block No. 675, measuring about 3 acres and 27 guntas belonging to one of the directors of the Company.

3. It further transpires that when these adjudication proceedings were in progress, the second respondent (hereinafter referred to as the Co-op Bank) who had extended certain loans to the assesses-Company, on the mortgage of assets, had initiated proceedings against the assesses-Company and had taken possession of the same, by virtue of an attachment order pursuant to an Award by the Joint Registrar of Co-operative Societies as an Arbitrator in terms of Section 103 of the Karnataka Co-operative Societies Act, 1959. While other properties have been taken possession of by the third respondent namely, the State Bank of Mysore, (hereinafter referred to as ''SBM'' for brevity) Hubli, under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the ''SARFAESI Act'') in lieu of default in payment of the loan availed as per its Public Notice dated 5.10.2004, published in the News-paper on 17.10.2004. The Co-op. Bank had issued a Public Auction Sale Notice dated 26.11.2006, which has been published in a local Newspaper on 8.1.2007, proposing to hold auction sale of the properties belonging to the first respondent on 25.1.2007 and 31.1.2007. The petitioner apprehending that apart from the Co-op bank proceeding in terms of the above Public Notices, that the SBM was also likely to adopt similar measures, had preferred the above writ petition seeking to quash the said recovery proceedings before the Co-op bank, on the fooling that such action was contrary to the judgment of the Supreme Court in the case of Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, and farther reliefs against the proposed public auction pursuant to the notice raider the SARFAESI Act issued by SBM.

4. The petition coming on for Preliminary Hearing, this Court was pleased to issue notice to the respondents and ordered interim stay of Annexure-K by its order dated 24.1.2007, which was a Public Notice proposing to hold public auction of the properties. However, the Co-op bank published a tender notification by way of a hand bill dated 28.6.2007, fixing the date of auction of the properties belonging to the above said assessee on various dates, in the face of an interim order granted by this Court as aforesaid. The petitioner was hence, constrained to file the second writ petition in W.P.No. 11371/2007 also

challenging the said hand-bill on the very grounds that have been urged in the first petition. Hence, the two petitions are considered together on a pure question of law as to the priority of debts as between the petitioner and the respondents-Banks.

5. It is the contention of the Counsel for the petitioner that the amounts sought to be recovered by the petitioner being arrears of central excise duty and penalty, with interest thereon, the petitioner-department would have priority over other institutions and organisations, including the respondent-Banks in the matter of realising its does from assessee.

6. In this regard, the Counsel places reliance on the judgments of the Supreme Court in the case of Macson Marbles Pvt. Ltd. Vs. Union of India (UOI), . It is contended that the Co-op bank seeking to claim u/s 71 of the Karnataka Co-operative Societies Act, 1951 and attachment before judgment u/s 103 of the said Act, while SBM seeking to proceed under the provisions of the SARFAESI Act, are overriding the priority claim of the Central Excise Department. The said respondent-Banks an negating the demand of the petitioner which has been confirmed in all respects, in accordance with the provisions of the Central Excise Act and the Rules.

7. It is contended that by virtue of Section 11 of the Central Excise Act, 1944 read with Section 142 of the Customs Act, 1962, the petitioner-department is empowered to recover excise duty by way of attachment and sale of Immovable properties. It is contended that the respondent-Banks seeking to proceed under the provisions of the SARFAESI Act or the Karnataka Co-operative Societies Act, 1959, which are legislations enacted subsequent to the provisions of the Central Excise Act, 1944 and the Customs Act, 1962 and even on that count, the petitioner would be able to assert a preferential right or priority to recover the dues over the rights of the Banks.

8. The Counsel for the respondent-SBM would contend as follows:

That State Bank of Mysore is a nationalised Bank from whom the first respondent-Company has sought for financial assistance in a sum of Rs. 50 Lakh towards working capital and letter of credit of Rs. 50 Lakh. This was released in year 2003. The said Company had created a equitable mortgage by deposit of title deeds in respect of the subject properties. On default of payment, the Bank has initiated section under the provisions of the SARFAESI Act. In terms of the said Act, the constructive possession had been taken of the secured assets as on 5.12.2004 and the Bank has issued a notice of sale dated 11.1.2005 and has taken physical possession of the secured assets as on 8.2.2005 and steps have been taken to auction the secured assets.

9. The Counsel also would acknowledge that the Co-op bank, namely, Hirekerur Urban Co-operative Bank has a similar claim for recovery in respect of a loan of Rs. 6.50 Crore to the first respondent and of proceedings under the Karnataka Co-operative Societies Act, 1951 resulting in an Award and Attachment preceding

a public auction sale proposed. In the fight of these rival claims, the recovery proceedings have come to a stand-still. In any event, the Counsel would submit that the petitioner''s contention as to the petitioner having a priority over the assets belonging to the borrower-Company is incorrect.

10. The Counsel would point out that insofar as the claim of the petitioner is concerned, admittedly, there was an Adjudication Order on 1.3.2000, a Detention Order on 9.11.2006 and a Proclamation Order of Attachment on 9.1.2008 and a Notice of Warrant of Attachment has been issued on 9.1.2007. These admitted facts would indicate that all actions initiated by the petitions against the respondent-Company and its assets, are subsequent to the action imitated by SBM.

11. Similarly, insofar as the Co-operative Bank is concerned, in proceedings initiated under the Karnataka Co-operative Societies Act, 1951, there was an Attachment Order by the Arbitration Court on 3.9.2005, a public notice was published in the Newspapers on 17.10.2004, a Public Auction Sale Notice was published on 8.1.2007 and a public auction was prospered to be held on 25.1.2007 and 31.1.2007. These admitted events would also indicate that even the Co-operative Bank has initiated proceedings subsequent to the charge and proceedings that are initiated by SBM. The respondent- Bank being a secured creditor, who had no prior notice of any claim, either by the petitioner or by the Co-operative Bank, they are estopped in law from seeking to claim a right of priority over the assets of the first respondent-company.

12. The Counsel would contend that a mortgage having been crated in favour of the third respondent-Bank, the third respondent is a secured creditor on creation of such a right, the Bank would claim that u/s 35 of the SARFAESI Act, the power of SBM cannot be curtailed by the alleged preferential right of priority of the petitioner which is not supported by any statutory provision. The petitioner does not disclose or urge any such statutory provision which confers such a preferential priority over the secured assets. On the other hand, the third respondent-Bank having exercised its statutory right, under the provisions of the SARFAESI Act and the Bunk having taken possession of the secured assets in accordance with law, the claim of the petitioner that it could still exercise any right of priority, cannot be sustained. Especially, in the light of the circumstance that such a claim is made subsequent to the action initiated by the respondent-Bank, it is contended that the general power of recovery under the Customs Act, 1962 and the Central Excise Act, 1944 is subject to the proceedings under the SARFAESI Act and the SARFAESI Act being a special enactment, would be applicable irrespective of other enactments being enforced. The SARFAESI Act is a complete code providing for all contingencies for recovery of debts from a defaulter. When once the Act is invoked, others, such as the petitioner, would not have jurisdiction to proceed u/s 142 of the Customs Act, 1962. A statutory first charge is created in favour of the third respondent under the provisions of the SARFAESI Act and the same will prevail over all other subsequent changes.

13. The Crowns Preferential right of Recovery of Debts over other creditors is confined to ordinary and unsecured creditors only. The Crown will not have a preferential right to recover its debts over a secured creditor. The Counsel would emphasize that there is no provision for claiming a first change under the Central Excise Act the customs Act and hence, there is no legal basis for the petitioner to claim any such priority whereas the Bank as a secured creditor, is a position to do so.

14. The Counsel would place reliance on the following authorities in support of her case:

i) Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, ,

ii) Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, ,

iii) Karnataka State Industrial Investment and Development Corporation Limited Vs. The Secretary Government of India and Others, ,

iv) UTI Bank Limited v. The Deputy Commissioner of Central Excise, Chennai, a Full Bench decision of the High Court of Madras in Writ Petition No. 39536/2005,

v) Collector of Aurangabad and Another Vs. Central Bank of India and Another, ,

vi) The Bank of Bihar Vs. The State of Bihar and Others, ,

vii) Sitani Textiles and Fabrics Private Limited v. Collector of Customs and Central Excise 1998-ALT-5-249,

viii) Union of India (UOI) Vs. Metherukunju Moosakutty and Others, ,

ix) ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, .

15. He Counsel for the second respondent would also urge similar contentions while emphasizing the fact that on account of the said respondent not being a position to recover moneys, it has affected its business and its very functioning has come to a stand-still inviting action by the Reserve Bank of India u/s 35 of the Banking Regulation Act, 1949.

16. The question that arises for consideration in the present case hand, is whether the petitioner can claim a priority in seeking to recover dues as against the respondent-Company over the claims of the respondent-Banks. Insofar as the legal provisions, under which the petitioner claims to have a right to recover the amounts are concerned, are extracted hereunder for a ready reference:

The Central Excise Act, 1944

Section 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 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 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 time of such transfer or otherwise disposal or change.]

Section 12. Application of the Provisions of Act 8 of 1878 of Central Excise Duties:

The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the [Customs Act, 1962 (52 of 1962)] relating to the levy of and exemption from customs duties, drawback of duty, warehousing customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by Section 3.

The Customs Act, 1962

Section 142. Recovery of sums due to Government:

(1) [Where any sum payable by any persona] under this Act (including the amount required to be paid to the credit of the Central Government u/s 28B] is not paid-

(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or

(b) the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] or such other officer of customs; or

[(c) if the amount cannot be recovered from such person in the manner provided in Clause (a) of Clause (b)-

(i) the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the District in which such person owns any property or resides or carries on his business and the said Collector on receipt of such certificates shall proceed to recover from such person the amount specified thereunder as if it were an arrears of land revenue; or

(ii) the proper officer may, in an authorisation by a Commissioner of Customs and in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid, and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person:

[Provided that where the person (hereinafter referred to as predecessor), by whom any sum payable under this Act, including the amount required to be paid to the credit of the Central Government u/s 28B is not paid, transfers or otherwise disposes of his business or trade in whole or in port, 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 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 the proper officer, after obtaining written approval from the Commissioner of Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.]

(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in Sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

17. The provisions of the SARFAESI Act as are relevant in the respondent-State Bank of Mysore claiming that it has initiated proceedings and has taken possession prior to the action initiated by the petitioner is concerned, are also extracted below:

Chapter 1 of the SARFAESI Act

Definitions:

(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

(i) debenture trustee appointed by any bank or financial institution; or

(ii) [securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or]

(iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;

(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31;

Chapter 1 of the SARFAESI Act

13. Enforcement of Security Interest:

(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the barrower and the secured assets intended to be enforced by the secured creditor in the even of non-payment of secured debts by the borrower.

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(5) Any payment male by any person referred to in Clause (d) of Sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under Sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) When any action has been taken against a borrower under the provisions of Sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the does of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interest.

18. Insofar as the doctrine of priority or precedence of State debts are concerned, the law has been succinctly laid down by the Supreme Court in Dena Bank''s case supra, in holding that the principle of priority of Government debts is founded on the rule of necessary and of public policy. The basic justification for the claim for priority of State debts, rests on the well recognised principle that the State is entitled to raise money by taxation because, unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary government functions and in order to be able to discharge such functions, it must be in possession of necessary funds and this consideration emphasizes the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues. However, the State''s preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. It is only where the State''s right and that of the subject meet at the one and the same time, that the State is in general preferred. Where the right of the subject is complete and perfect, before that of the State commences, the rule does not apply, for there is no point of time at which the rights an at conflict nor can there be a question which of the two ought to prevail in a case where one, that of the subject has prevailed already. The Supreme Court in laying down thus, has followed its earlier decisions in Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of

Income Tax, West Bengal and Others, and in Bank of Bihar v. State of Bihar 1971 SC 1210.

19. It has further held with specific reference to the Karnataka Sales Tax Act, 1957 and the Karnataka Land Revenue Act, 1964 whereunder, Section 158 of the Karnataka Land Revenue Act, 1964 not only gives a statutory recognition to the doctrine of State''s priority for recovery of debts, but also extends its applicability over private debts forming the subject matter of mortgage, judgment, decree, execution, or attachment and the like and that the effect of Section 190 is to name the procedure for recovery of arrears of land revenue applicable for recovery of sales tax arrears and that Section 150 accords primacy to all moneys recoverable including the sales tax arrears.

20. Thus, from a reading of the provisions under which, the petitioner claims primacy over the debts due to it as against the respondent-Banks, it is clear that there is no specific provision either under the Central Excise Act or the Customs Act, to enable the Central Excise Department to claim a precedence over the claim of a secured creditor such as the respondent-Banks. On the other hand, under the provisions of the SARFAESI Act, the State Bank of Mysore having initiated proceedings thereunder, would clearly claim precedence insofar as enforcing its right is concerned. The precedence, vis-?-vis the State Bank of Mysore and the Hirekerur Urban Co-operative Bank is not the subject matter of this writ petition and is a matter to be resolved as between the said respondents as the same would involve question of fact which are purely matters concerning the said respondents. The question insofar as the petitioner is concerned, would clearly have to be answered against the petitioner.

21. The petition stand dismissed. The interim order granted earlier stands vacated.