

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

Writ Petition Nos.14142 & 14534 of 2015

COMMON ORDER:

The jurisdiction of this Court has been invoked, questioning the notice dated 23.04.2015 whereby the petitioners were called upon (both the petitioners in W.P.Nos.14142 and 14534 of 2015) not to deliver, or otherwise dispose of, the plant and machinery without the order in writing of the Assistant Commissioner of Customs and Central Excise.

Facts, in brief, are that the immovable and movable assets of M/s. Bommidala Filaments Limited and M/s. Bommidala Purnaiah Tobacco Private Limited were subjected to auction by Exim Bank under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act"), and a public notice of sale was issued. M/s. Polisetty Somasundaram (petitioner in W.P.No.14534 of 2015), a partnership firm, purchased the land, buildings and plant and machinery, of the defaulting companies, in the auction. A sale certificate was issued in their favour on 05.07.2013. Thereafter, M/s.Polisetty Somasundaram sold the plant and machinery to M/s.Kohinoor Ropes Private Limited (petitioner in W.P.No.14142 of 2015) pursuant to an agreement dated 18.03.2015. When the plant and machinery were being transported to the State of Maharashtra, they were detained.

Both Sri K.R.Koteswara Rao and Sri Unnam Muralidhar Rao, learned counsel for the petitioners, have placed reliance on the judgment of the Supreme Court in ***Rana Girders Limited vs. Union of India***^[1] and ***Gopal Agarwal vs. The Commissioner of Customs and Central Excise, Hyderabad*** (judgment of the Division Bench in W.P.No.5340 of 2007 dated 29.12.2014) in support of their submission that it is only if the business of M/s. Bommidala Filaments Limited had been transferred to M/s.Polisetty Somasundaram would the proviso to Section 11 of the Central Excise Act, 1944 (for short "the Act") be attracted; the debt of secured creditors have priority over statutory dues such as central excise;

on the title, over the plant and machinery of M/s.Bommidala Filaments Limited, being transferred to M/s.Polisetty Somasundaram, by the sale certificate dated 05.07.2013, title over the goods had passed on to them; consequently, M/s.Bommidala Filaments was no longer the owner of the subject property; and the central excise liability of M/s.Bommidala Filaments Limited cannot be fastened on either of the petitioners, more so as the order of attachment was passed on 26.03.2015 nearly two years after M/s.Polisetty Somasundaram had purchased the subject plant and machinery in the auction sale conducted under the aegis of Export-Import Bank of India under the provisions of the SARFAESI Act, and a sale certificate was issued in their favour on 05.07.2013.

On the other hand, Sri Gopala Krishna Gokhale, learned Standing Counsel for the Central Excise Department, would submit that the auction notice requires the auction purchaser to ascertain whether there are central excise dues or not; it is evident, therefrom, that the property was transferred to the auction purchaser subject to payment of central excise dues; and as M/s.Polisetty Somasundaram had also purchased the lands and buildings of M/s.Bommidala Filaments Limited, they are liable to pay the central excise dues of M/s.Bommidala Filaments Limited as held by the Supreme Court in **Macson Marbles Private Limited vs. Union of India**^[2].

In **Macson Marbles Private Limited**², the Supreme Court observed:

“.....In this case the liability arises under the Central Excise Act and R.230(2) of the Central Excise Rules. The said Rule clearly indicates that it is a mode of recovery of the excise dues from the assets owned by a predecessor and on his liabilities being assessed could be recovered even from the successor.

The argument advanced by the appellant that sale having taken place under the State Act free of encumbrances and the transferor's rights or liabilities cannot be that of transferee does not hold good. S.29(2) of the State Act makes it clear that 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. When sale made by the corporation is deemed to be a sale made by the owner of the property, necessarily R.230(2) of the Central Excise Rules would be attracted.

We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of

the same any conflict arises this aspect need not be examined. In this case no such conflict arises between the corporation and the Excise Department. Hence it is unnecessary to examine this aspect of the matter.

The Department having initiated the proceedings under S.11A of this Act adjudicated liability of respondent No. 4 and held that respondent No. 4 is also liable to pay penalty in a sum of Rs. 3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisturbed. The appeal is disposed of accordingly...."

The judgment of the Supreme Court, in **Macson Marbles Private Limited²**, was considered in a later judgment of the Supreme Court in **Rana Girders Limited¹**; and it was held that, in **Macson Marbles Private Limited²**, the question which arose for consideration was of the entire unit of the principal borrower having been purchased in the auction. The Supreme Court, in **Rana Girders Limited¹**, further observed:

*".....A harmonious reading of the judgments in Macson and SICOM would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming "first charge for the purchaser". As far as Central Excise Act is concerned, there was no such specific provision as noticed in SICOM as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. **Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department....."** (emphasis supplied)*

Under the proviso to Section 11 of the Act where the person, (predecessor from whom the duty or any other sums of any kind, as specified in this section), 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 Principal Commissioner of Central Excise or 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.

In the present case, the business or trade of M/s.Bommidala Filaments Limited has not been transferred or otherwise disposed of. For failure of M/s.Bommidala Filaments Limited to pay the amounts due to them, Export-Import Bank of India had sold the secured assets, under the provisions of the SARFAESI Act, to M/s.Polisetty Somasundaram. Consequently, the proviso to Section 11 of the Act is not attracted. Even otherwise, the power under the proviso is to attach and, thereafter, sell the properties so attached. In the present case, consequent on the sale certificate issued in their favour, by way of the sale certificate dated 05.07.2013, title over the plant and machinery passed on to M/s.Polisetty Somasundaram and, thereafter, the Central Excise Department could not have attached these movable assets as they were no longer the property of M/s.Bommidala Filaments Limited.

In the present case, while the auction notice no doubt requires the auction purchaser to ascertain whether there are any central excise dues or not, the correspondence, to which our attention is drawn, shows that Export-Import Bank of India had informed central excise officials, by letter dated 10.07.2013, that despite repeated reminders and requests to take possession of the finished goods lying in the premises of M/s.Bommidala Filaments Limited, the Central Excise Department had failed to take possession; Exim Bank had sold the assets charged to them through auction to the successful bidder; they had already transferred the assets to the successful bidder; as the finished goods are not charged to Exim Bank and Exim Bank is not an agent of the Customs and Central Excise Department, they were not bound to take responsibility of keeping the goods in its custody; and the Central Excise Department could take possession of the finished goods immediately.

Sri Unnam Muralidhar Rao, learned counsel for the petitioner, would submit that the finished goods have been kept apart in a separate

room, and it is open to the Central Excise officials to take these finished goods from the premises. Reference is also made by the learned counsel to the letter addressed by M/s.Polisetty Somasundaram to the Assistant Commissioner of Central Excise on 10.10.2013 informing that, while taking delivery of the property, they found that some raw material of polythene ropes etc. were stored in the godown; and they were informed by Exim Bank that Andhra Bank had extended working capital loan to M/s.Bommidala Filaments, and the raw material was hypothecated to them. The Assistant Commissioner of Central Excise was requested to look into the matter and to see that the finished goods were removed from the premises.

It is evident that the impugned notices, calling upon M/s.Polisetty Somasundaram (the auction purchaser) and M/s.Kohinoor Ropes Private Limited, (which had purchased the plant and machinery from Polisetty Somasundaram) not to deliver or dispose of the plant and machinery, merely on the ground that these goods hitherto belong to M/s.Bommidala Filaments Limited who had defaulted in payment of central excise dues, fall foul of the law declared by the Supreme Court in ***Rana Girders Limited¹***. The impugned proceedings are, accordingly, set aside and the writ petitions are allowed. It is made clear that this order does not preclude the respondents from taking possession of the finished goods, from the premises of M/s.Polisetty Somasundaram, towards recovery of the Central Excise dues.

Miscellaneous petitions, if any, pending shall stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 14.12.2015.
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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
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[2] 2003(158) E.L.T.424 (SC)