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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 15.01.2015

\+ **W.P.(C) 4412/2014, C.M. NO.8829/2014**

UNION OF INDIA ..... Petitioner

Through : Sh. Satish Aggarwal, Advocate.

versus

M/S. CHL LIMITED & ORS. ..... Respondents

Through : Sh. Ravi Kant Chadha, Sr. Advocate with Ms. Mansi Chadha, Advocate, for Respondent No.1.

Sh. Prashanto Chandra Sen and Ms. Anushruti, Advocate, for Respondent No.4.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The present petition preferred by the Union of India (UOI) through the Customs Department seeks to question an order of the Debts Recovery Appellate Tribunal (DRAT) dated 01.04.2014 in Appeal No.403/2010. It was urged that the decision of the DRAT, leaving it to the concerned adjudicating authority to decide whether or not the third respondent (hereafter referred to as “the auction purchaser”) is under a contractual duty or liability to pay the customs dues, is erroneous.

2. The brief facts are that the second respondent – M/s. Paam Pharmaceuticals (Delhi) Ltd. was granted letter of approval for manufacturing and export of pharmaceutical products. The Customs Department alleged evasion of Customs Duty and initiated proceedings which crystallized in an adjudication order dated 06.09.2002. The dues were to the tune of ₹1,77,91,061/-. Apparently, the said second respondent also defaulted upon its contractual liabilities with banks which led to recovery proceedings before the DRT. These resulted in a decree against said borrower/second respondent. The sale of the second respondent's assets was ordered by the Recovery Officer (RO) under the *Recovery of Debts due to Banks and Financial Institutions Act, 1993* on 14.02.2008. In the course of the proceedings, the third respondent was successful as bidder and declared as auction purchaser. At that stage, the Customs Department had apparently issued an attachment notice. It sought to dispute the entitlement of the secured creditor bank, contending that it had an overriding claim over the property as well as the proceeds of the sale. The order dated 21.09.2010, ruled inter alia that the Customs Department could not be considered a secured creditor so far as the claim of primacy over and above the rights of the decree holders is concerned.

3. The Customs Department was not aggrieved by this order. The auction purchaser, however, impugned a portion of the said order, particularly the direction in para 42(iv), granting liberty to Customs Department to recover its amount in accordance with law under the Customs Act. The auction purchaser also challenged the order of the DRT which upset the finding of the RO that the auction purchaser was not under

contractual obligation to pay customs duty, and granted consequential liberty to the former to pay the dues in accordance with the Customs Act. By the impugned order, the DRAT, after considering the submissions of the parties, substantively upheld the findings of the DRT *vis-a-vis* the lack of primacy of the Customs Department's claims. The DRAT allowed the auction purchaser's appeal, taking note of the prior attachment made by the Customs authorities – and also recording the finding that such attachment notice was never served in the first instance either on the auction purchaser or borrower, in the following terms:

> *"It has clearly been enunciated by the High Court that mere attachment of the property in the hands of original debtor would of no consequences considering the express provisions of section 35 of the SARFAESI Act. The Court has held that it will be open for the creditors irrespective of the attachment of the property to sell the same considering they are secured creditors. As per the Court, it overrides anything inconsistent-in any other law. It is also held that the secured assets can only be sold in terms of the SARFAESI Act and in these circumstances the attachment would be of no consequences. Finding also is that all proceeds from the sale can only be disposed of in terms of the provisions of the SARFAESI Act and the secured creditors would have priority of claim over the dues of the State as in the Central Excise Act there being no provisions in the Act to claim first charge. Nothing is pointed before me that the provisions contained in the Customs Act has created first charge-over any property on account of the order of attachment. It is, therefore, not possible to sustain that part of the judgment whereby liability has been fastened on to the appellant to pay the Custom dues."*

4. Learned counsel for the Customs Department urges that even though the findings concerning inability of the revenue to recover dues on account of its not being secured creditor having become final, nevertheless, the impugned order is erroneous. He argued firstly that the auction notice dated 20.08.2007 pursuant to which the third respondent had purchased the property, clearly revealed the extent of dues payable to the Customs Department which were in excess of ₹2 crores and that such dues could potentially be recovered from the auction purchaser. Secondly, he relied on the previous decision of this Court in *M/s. Singapore Tong Teik (P) Ltd. v. Ms. Digiflex India Ltd.* C.A. No.930-931/2004 (decided on 28.07.2005) to say that despite lack of primacy of revenue over the claim towards secured creditor, it could nevertheless recover amounts from the subsequent or auction purchaser as the case may be in the present instance. Learned counsel also points out that in that decision, the Division Bench had relied upon the previous decision in *Karam Chand Appliance Limited v. Bharat Carpet Ltd.* 1994 49 DRJ 637.

5. Learned counsel for the auction purchaser argues that the reliance placed by the Customs Department upon the attachment notice said to have been issued previous to the RO's order is of no consequence. He points to the findings recorded in page 54 of the paper book by the DRAT that such attachment notice was never served on the borrower or auction purchaser. It was next and more importantly argued that in the absence of a statutory charge over the property, subsisting after its disposal, either in the Customs Act or any other law in force, the revenue could not lay claim over immovable property. Learned counsel distinguished decision in *Singapore*

Tong (supra) by stating that the reliance placed upon Section 76 F of the Customs Act is insubstantial in view of the fact that the said provision stands deleted with effect from 11.05.2007. Therefore, that machinery of recovery or claim was not available when the auction was conducted in the present case.

6. It was also argued that the Customs authorities have not relied upon any substantive provision to base their contention that despite transfer of property they would yet have overriding charge over the subject of such auction. Having failed in their primary claim to be secured creditor, they cannot now achieve indirectly what the law does not permit them to do directly.

7. It is evident from the above discussion that the Customs Department is not aggrieved by the ruling of the DRT that it could not be treated as secured creditor to lay claim over immovable property. That to our mind seals its fate on the substantial arguments sought to be urged in this case. Having conceded that they cannot be treated as secured creditor in the light of the law in *UOI v. SICOM Ltd. and Anr.* 2009 (2) SCC 121, a position which remains undisputed today, the Customs Department cannot assert indirectly what it could not achieve in the first instance. To recapitulate, the Customs Department sought to argue before the RO that it had an overriding claim to realize its dues from the immovable property. That argument failed. Having suffered such an order, it cannot now – in the absence of a statutory provision, directing a charge or an encumbrance in its favour, fall back merely upon a representation held out in the auction notice.

8.As far as the reliance on *Singapore Tong (supra)* is concerned, the provision under Section 76F no longer exists. It did not exist even on the date of the auction. That apart, even Section 76F facially applies only in the case of the goods - which is subject matter of Customs Department. This is evident from the provision which is to the following effect:

> ***"Levy of duties of customs. - 76F.*** *Subject to the conditions as may be specified in the rules made in this behalf, —*
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> *(a) any goods admitted to a special economic zone from the domestic tariff area shall be chargeable to export duties at such rates as are leviable on such goods when exported;*
>
> *(b) any goods removed from a special economic zone for home consumption shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975 (51 of 1975), where applicable, as leviable on such goods when imported; and*
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> *(c) the rate of duty and tariff valuation, if any, applicable to goods admitted to, or removed from, a special economic zone shall be the rate and tariff valuation in force as on the date of such admission or removal, as the case may be, and where such date is not ascertainable, on the date of payment of the duty."*

9. In *Karamchand Appliance (supra)*, it is noticed that besides relying upon company winding up proceedings, that Division Bench did not deal with the instance of a statutory authority or a claim for overriding primacy of the revenue in the circumstances that we are called upon to decide. Here again, the judgment of the Supreme Court in *State of Karnataka v. Shreyas Papers Pvt. Ltd.* 2006 (1) SCC 615 is relevant. It was held in that case that unless there is a positive indication in the law which attaches the liability

upon the purchaser of the immovable property, there cannot be a presumption that the amounts can be recovered from him. In the present instance, there is no indication in the Customs Act that the property of a defaulter which is put to auction can still be claimed by the Customs Department after title passes to the auction purchaser once it is held that it has no primacy for its dues.

10. For the above reasons, we are of the opinion that there is no merit in the proceedings. The writ petition is consequently dismissed along with the pending application.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

JANUARY 15, 2015