

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20-07-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

Writ Petition No. 737 of 2013

M/s. Neycer India Limited
New No.33, Old No.24/A,
Ranjith Road, Kotturpuram
Chennai - 600 085

represented by its
Director & Authorised Signatory
B.S. Shylender

... Petitioner

Versus

1. The Appellate Authority for Industrial
and Financial Reconstruction
10th Floor, Jeevan Prakash Building
Kasturba Gandhi Marg
New Delhi - 1

2. The Commissioner of Central Excise
Division No.1, Vallal Nagar
Mangakuppam
Cuddalore - 607 001

3. Board for Industrial & Financial Reconstruction
Government of India
Ministry of Finance
Jawahar Vyapar Bhavan - 1
Tolestoy Marg
New Delhi

.. Respondents

Writ Petition filed under Article 226 of The Constitution of India praying for issuing a Writ of Certiorari to quash the impugned order dated 24.08.2012 in Appeal No.89 of 2009 passed by the Appellate Authority against BIFR's order

For Petitioner	:	Mr. R. Bharanidharan
For Respondents	:	Mr. A.P. Srinivas for RR1 and 2

ORDER

R. SUBBIAH, J

The petitioner has come forward with this writ petition questioning the validity and/or correctness of the order dated 24.08.2012 passed by the first respondent. By the said order dated 24.08.2012, the first respondent allowed the appeal filed by the Commissioner of Central Excise, Cuddalore by setting aside the order dated 06.10.2008 passed by the third respondent herein in Case No. 29/1992.

2. For the purpose of determining the disputes involved in this writ petition, certain facts, which are absolutely germane and necessary, are delineated hereunder.

3. The writ petitioner was a company engaged in the business of manufacturing floor tiles and sanitary ware products. The petitioner had set up two manufacturing facilities, one at Vadalur for manufacturing sanitary ware products and the other at Pondicherry for production of floor tiles. While the sanitary ware operations have been profitable, the tiles division has not been performing satisfactorily due to a variety of reasons, as a result, during the course of their business, the petitioner company has become indebted and eventually a reference was made to the Board for Industrial and Financial Reconstruction" (in short BIFR) under Section 15 (1) of The Sick Industrial Companies (Special Provisions) Act, 1985 (in short SICA). The reference was registered by BIFR as case No. 29 of 1992 and the petitioner company was declared as a sick industry as contemplated under Section 18 of The Sick Industrial Companies on 16.11.1994 and a scheme was sanctioned on 16.11.1994 (SS-94). For the purpose of giving effect to the scheme for rehabilitation, M/s. ICICI Bank was appointed as the Operating Agency. Since the scheme formulated for rehabilitating the petitioner company failed, BIFR, by an order dated 05.02.2002, directed the petitioner company to submit a fresh revival proposal failing which the Operating Agency appointed under the scheme would be entitled to issue a notice for change of management. Aggrieved by the same, the petitioner company has filed an appeal before the Appellate Authority for Industrial and Financial Reconstruction (in short AAIFR) in Appeal No. 43 of 2002. The appellate authority, by order dated 11.02.2003, allowed the appeal and set aside the order dated 05.02.2002 of BIFR and sanctioned a revival scheme (SS-03) for rehabilitation of the petitioner company with a stipulation that BIFR would monitor the implementation of the scheme (SS-03) and BIFR would also be at liberty to take all the necessary steps for implementation of the scheme (SS-03). For such purpose,

AAIFR appointed M/s. ICICI Bank as Monitoring Agency to monitor the progress of the implementation of the scheme (SS-03). Thereafter, the petitioner company sought for certain modifications and amendments in the scheme (SS-03), but it was not considered by BIFR. Simultaneously, the petitioner company has also filed WP No. 18003 of 2004 for a Mandamus to sanction the revised scheme by this Court. By order dated 18.08.2004, this Court. While disposing of WP No. 18003 of 2004, issued certain direction which are as follows:-

"4.The only rider that he would seek to the modified scheme is, with regard to the first clause, in the one time settlement, which fixes the time frame for payment of the balance OTS amount. As per the scheme, it shall be paid within one month of sanction of the modified rehabilitation scheme by AIFR or on or before June 20, 2004, whichever is earlier. Since the modified rehabilitation scheme will come into effect from today, time for payment will be on or before 30.11.2004 or on the date on which the petitioner parts with the sanitary ware division.

Under the revised scheme, the assets including intangibles specified in the MoU dated 20.01.2004 would vest in the joint venture company and the petitioner and Duravit would be entitled to modify the commercial terms between themselves subject to their securing the consent of the secured lenders of the petitioner.

It is also made clear that the liabilities of the petitioner/company shall be retained by the petitioner/company and the assets of the sanitary wares division alone are transferred to the joint venture company.

The payment will have to be made on or before 30.11.2004 or on the date on which the petitioner parts with the sanitary wares division to the Joint Venture Company, whichever is earlier.

With the above directions, the writ petition is ordered accordingly...."

4. During the pendency of the appeal on 28.02.2007, it was brought to the notice of the Appellate Authority that the Monitoring Agency (ICICI Bank) had acquired the assets of the tiles division of the petitioner company situated at Pondicherry by invoking the provisions contained under Section 13 (4) of the Securities and Financial Reconstruction (in short SARFAESI) Act inasmuch as the petitioner company was unable to pay the dues to three lenders namely IDBI Bank, ICICI Bank and Life Insurance Corporation of India. At the same time, it was brought to the notice of the appellate authority that the petitioner's other division namely Sanitaryware Division was continuing the

operation, albeit with a low capacity utilisation. In such circumstances, BIFR directed the Monitoring Agency to submit a report indicating the details of the creditors to whom the petitioner company is liable to pay the amount. Subsequently, as directed by BIFR, the Monitoring Agency has submitted a letter dated 24.05.2007 indicating the details of outstanding amount as on 03.02.2007 and forwarded the copies of the same to the creditors namely IDBI Bank and Bank of India with a request to express their willingness to acquire the assets of the petitioner's company under Section 13 (4) of the SARFAESI Act for settlement/payment of their outstanding dues. At this stage, the petitioner company in their letter dated 13.08.2007 brought to the notice of the Board stating that M/s. Vig Projects Pvt Ltd., (VPPL) had settled/purchased the entire debts of the sick company's three term lenders M/s. IDBC, LIC and Bank of India and the petitioner company is continuing the operation of it's sanitary ware division by availing term loan and working capital facilities from Bank of India. It was further stated in the letter that on settlement of the dues to ICICI Bank as well as because of settlement of payment of dues of the companies three term vendors by M/s. VPPL, ICICI bank has given back the assets of the Tiles Division to the petitioner company. Further, the petitioner company had requested BIFR to grant permission for sale of assets of the company's Tiles Division at Pondicherry which turned out to be surplus/redundant consequent to the closure of operations of the company's Tiles Division and to permit the petitioner to utilise the sale proceeds received thereof for revival of the companies other division namely Sanitary ware Division, including re-payment of debts to M/s. VPPL who settled the debts of the company's all three term lenders. In the said letter, the petitioner company also undertook to comply with the guideline/instructions that may be specified by BIFR for sale of company's surplus/redundant assets. Further, M/s. VPPL, which purchased the entire debts of the company's three term lenders has also given their consent, vide their letter dated 29.08.2007, to expeditiously dispose of the surplus/redundant assets of the company's tiles division. On consideration of the letters of the petitioner company dated 13.08.2007 and the letter dated 29.08.2007 of M/s. VPPL, BIFR issued certain directions vide order dated 07.09.2007. Subsequently, a meeting was convened on 01.10.2007 in which BIFR has issued further guidelines/instructions.

5. At this stage, certain complaints/representation were received by BIFR in regard to sale of assets of the tiles division of the petitioner company wherein it was stated that the tender document for sale of assets of the tiles division of the company was not issued to them. Therefore, on 12.12.2007, BIFR directed the company to offer their view in regard to the complaints received. In the meantime, the complainants have

filed Writ Petition No. 36585 and 36586 of 2007 before this Court and they were dismissed on 07.12.2007. Thereafter, on 25.02.2008, BIFR issued certain other directions permitting sale of the assets in favour of the highest bidder. Further, the Excise department was directed to vacate their charges in respect of the assets of the petitioner company's Tiles Division although Excise Department was permitted to hold charges in respect of the assets of the Sanitary Division to secure their dues. BIFR also permitted the company to pay the statutory dues and workers dues from the No Lien Deposit of Rs.1071 lacs subject to verification of dues by the Operating Agency namely Bank of India. While so, BIFR received a modified revival scheme from the Monitoring Agency vide their letter dated 27.02.2008. The petitioner company has also written a letter dated 24.03.2008 informing BIFR that Excise Department has not vacated the charges in respect of the assets of the Tiles Division and therefore, the sale in favour of the highest bidder could not be executed. Therefore, BIFR, in exercise of power conferred under Section 32 (1) of SICA, passed an order dated 28.05.2008 directing Central Excise Department to vacate charges in respect of the company's tiles Division and inspite of the same, the Excise Department continued to hold charges on the assets of Sanitary ware division of the petitioner company. Therefore, BIFR directed the Monitoring Agency - Bank of India to set aside an amount of Rs.15 million from the sale of proceeds of the assets of the Tiles Division towards the outstanding of the Central Excise Department until the sanction of the modified scheme by the Board for companies revival. The petitioner company was also permitted to utilise the balance amount of the sale proceeds for repayment of statutory dues and workers dues.

6. When the facts are so as stated above, on 17.06.2008, BIFR circulated the Modified Draft Rehabilitation Scheme (MDRS) for revival of the petitioner company's sanitary ware division. Thereafter, in the meeting held on 06.10.2008, BIFR received certain objections for the revival scheme by M/s. GMB Ceramics Limited (GMBCL), Central Excise Department and the Commercial Tax Department. The objection of the Central Excise Department was to the effect that the petitioner company owes to the Central Excise Department a sum of Rs.411 lacs however in the MDRS it was shown as Rs.124 lacs and therefore, they sought for a direction to the petitioner company to pay the entire dues. It was further contended that as per the Central Excise Department, Cuddalore, the total amount of Rs.3,96,96,138/- includes interest and unconfirmed demands. On such demand made by the Central Excise Department, the petitioner company sought for waiver of demurrage of Rs.70,000/- per day demanded by the Central Excise Department and also requested that the sum of Rs.150 lakh earmarked for Excise Loan be released for

implementation of the revival scheme. Taking note of the above, BIFR passed an order dated 06.10.2008, directing the petitioner company to reconcile the Central Excise dues with the Central Excise Department, Cuddalore and if the principle dues payable is more than Rs.124 lacs as indicated in the scheme, the increased amount should be paid to the department. Accordingly, the dues were reconciled and the principal amount of duty payable was confirmed to be Rs.5,88,628/- in respect of the tiles division and Rs.1,24,46,617/- in respect of the sanitary ware division, which was also confirmed by the Central Excise Department in their rejoinder vide para Nos. 4 and 8. Challenging this order dated 06.10.2008, Central Excise Department has filed an appeal No.89 of 2009 before AAIFR. The appeal was allowed by the AAIFR by the order dated 28.09.2012 holding that it will be unfair to direct the Central Excise Department to sacrifice it's dues in the garb of revival of the petitioner company, especially when the company has collected excise duty from their customers and utilised the amount so collected for some other purpose. Accordingly, AAIFR set aside the order dated 06.10.2008 of BIFR and allowed the appeal. Aggrieved by the same, the petitioner company has come forward with this writ petition.

7. The learned counsel for the petitioner would vehemently contend that the second respondent, in the rejoinder filed before the first respondent in Para No.4 and 8 clearly stated that the total duty payable was confirmed to be Rs.5,89,628/- in respect of the tiles Division and Rs.1,24,46,617/- in respect of the sanitary ware division. The objection raised by the second respondent with respect to the scheme formulated for rehabilitation of the petitioner company is only with regard to waiver of the Central Excise duty for certain points and there was no objection with respect to waiver of penalty and interest under the scheme. Thus, the second respondent had consented for waiver of penalty and interest without raising any specific objections before the first respondent. However, the first respondent, while allowing the appeal filed by the second respondent, has held that notwithstanding such consent given by the second respondent, first respondent has directed the petitioner to pay the excise duty levy. Further, the first respondent, without any material evidence, has concluded that the excise duty had been collected by the petitioner from its customers and therefore, they are bound to repay the same to the second respondent. Thus, in effect, the first respondent proceeded as though the dues payable by the petitioner to the second respondent will have priority over other dues.

8. The learned counsel for the petitioner would further contend that the petitioner company was declared as a Sick Industry on 16.11.1994 as contemplated under Section 18 of SICA

and with a view to rehabilitate the petitioner company, several schemes were formulated and the scheme contemplates exemption of interest and penalty payable by the petitioner company towards excise duty. In this context, the learned counsel for the petitioner relied on the decision of the Division Bench of the Allahabad High Court in the case of (J.K. Cotton Spinning & Weaving Mills Co., Ltd., vs. Union of India and others) reported in 2017 (345) ELT 27 (All) wherein it was held that when the rehabilitation scheme contained an express waiver from payment of interest, penalty etc., and to accept payment of excise duty finally payable in pending cases over a period of two years, the petitioner having already deposited 50% of the amount, the liability of the company towards payment of excise duty had been duly discharged and the company was not liable to pay penalty or interest in terms of the specific provisions of the rehabilitation scheme. By relying upon the above decision, it was contended that the scheme formulated for rehabilitation of the petitioner company contemplates clauses for waiver of interest and penalty, while so, the first respondent ought not to have allowed the appeal filed by the second respondent on the ground that the petitioner company had already collected the excise duty from its customers and therefore, they are liable to pay the same. In any event, the order passed by the first respondent had virtually negated the scheme framed by the BIFR for revival of the company and it is contrary to the object with which the SICA has been framed. Therefore, the learned counsel for the petitioner prayed for allowing the writ petition.

9. By way of reply, the learned counsel for the second respondent would vehemently oppose the writ petition by contending that as per the provisions of Rule 8 (1) of the Central Excise Rules, 2002, the duty on the goods removed from the factory or warehouse during the relevant month has to be paid before 5th of the following month and for the month of March, the duty shall be paid by 31st March. In terms of sub-rule (3) of Rule 8 of Central Excise Rules, 2002, if the assessee fails to pay the duty in time, he shall be liable to pay the outstanding amount with interest at the rate specified by the Central Government vide notification under Section 11AB of the Act on the outstanding amount. There is no provision under the Central Excise Act or Rules made thereunder for waiver of interest. Central Excise duty being an indirect tax is not borne by the assessee but it is being passed on to their customers. The duty payable on the manufactured goods are charged in the invoices and collected from their customers like distributors, dealers etc., Therefore, the petitioner company collected the tax but utilised the tax amount collected from the customers for some other purpose. In such circumstances, the petitioner cannot be permitted to retain the amount collected from their customers towards excise duty under the garb of being

declared as a Sick Industrial Company and is in the process of rehabilitation. For realising the amount payable by the petitioner company, certain goods were detained by the second respondent whose value is only Rs.177 lakhs, however, the duty amount payable by the petitioner company upto November 2008 works out to Rs.2,12,85,856/- together with interest payable till 30.11.2008 being Rs.1,30,32,670/-. Therefore, release of detained goods, either partially or fully cannot be complied with, as has been claimed by the petitioner company. Further, BIFR granted a concession to the petitioner company to pay the principle amount due in 12 equal quarterly instalments meaning thereby the payment has to be made in three years. When the arrears amount has been pending since June 2003, such a proposal made by the BIFR had adversely affected the interest of the second respondent. In such circumstances, the request of the petitioner company to waive the interest payable and to release the detained goods has been rightly rejected by the first respondent at the instance of the second respondent. The first respondent has passed a detailed order and allowed the appeal filed by the second respondent and therefore, the learned counsel prayed for dismissing the writ petition.

10. The learned counsel for the second respondent also relied on the decision of the Honourable Supreme Court in the case of (Voltas Limited vs. State of Andhra Pradesh) reported in (2004) 11 Supreme Court Cases 569 wherein in Para No.16 and 23, it was held as follows:-

"16. It was submitted that this authority shows that a liberal interpretation has to be given and that the assessee should not be made liable for interest amounts. In our view, the authority is against the appellants. This authority shows that the tax becomes due on the date the returns are filed. In J.K. Synthetics case, 1994 4 SCC 276, the assessee had paid the tax which the assessee thought was payable. In this case, the appellants were not exempted from paying tax. All that happened was that payment of tax was deferred. Thus, the appellants collected tax from the customers but were not paying the same over to the Government. The concession of deferral did not mean that the payment had not become due. Payment became due with the filing of the returns. The deferral was granted as payment had become due. The appellants knew that it was due but due to the concession granted under the scheme, they were not paying the same.

23. Thus, in our view, there being no express waiver of interest, the statutory provision must prevail. We thus do not find any infirmity in the order of the High Court."

11. Based on the aforesaid decisions, it was contended by the learned counsel for the second respondent that several opportunities have been given to the petitioner company for revival but the schemes formulated have been failed. In such circumstances, in the guise of securing the interest of the petitioner company, the second respondent cannot be deprived of their legitimate tax dues. The tax dues are pending for more than a decade and therefore, at this stage, this Court need not interfere with the order passed by the first respondent particularly when there is no provision for waiver of interest under the Central Excise Act, 1944 and interest is statutorily leviable under Section 11-A, while so, waiver of interest as claimed by the petitioner cannot be countenanced.

12. We have heard the counsel for both sides and perused the materials placed. The petitioner is a registered company having its registered office in Chennai, Tamil Nadu. The petitioner company was carrying manufacturing activities in two plants, one at Vadalur for Sanitary ware products and the other at Pondicherry for production of floor tiles. While the Sanitary ware operations have been profitable, its tiles division has not been performing satisfactorily due to varied reasons. While so, based on the audited balance sheet as on 31.03.1992, a reference was made to BIFR under Section 15 (1) of SICA and it was registered as Case No. 29 of 1992. During the course of hearing of the case on 30.09.1992, BIFR arrived at a subjective satisfaction that the petitioner company has become sick and eventually declared it as a sick industry as contemplated under Section 3 (1) (o) of SICA. Admittedly a scheme was formulated for revival of the petitioner company by appointing M/s. ICICI Bank as Operating Agency on 16.11.1994 but the scheme failed and it was reported on 29.01.2001 inasmuch as the petitioner company could not meet their one time settlement commitments made to the creditors. In fact, BIFR passed an order on 05.02.2002 directing the petitioner to submit a fresh rehabilitation proposal together with deposit of Rs.500 lacs in a no-lien account before 7th March 2002 which was subjected to challenge in the appeal preferred by the petitioner company successfully before AAIFR as the appellate authority allowed the petitioner's appeal, set aside the order of BIFR and directed BIFR to sanction a revised scheme for revival of the petitioner company. Admittedly, even the revised rehabilitation scheme could not be implemented due to varied reasons of delay in completion of 'due diligence' by the intending purchasers or investors and for other reasons. In such circumstances, the promoters of the company have started negotiation with various parties for investment and ultimately, the petitioner company entered into an understanding with M/s. Viz Projects Pvt Ltd (VPPL) a company engaged in the business of Assets Reconstruction and they have come forward to assist the

petitioner company in their rehabilitation process. The said VPPL also helped the petitioner to company to pay the dues to some of the creditors.

13. As far as the present writ petition is concerned, the second respondent herein is one of the creditors and who claim payment of excise duty by the petitioner. According to the second respondent, towards payment of excise duty, they have detained some goods of the petitioner valuing about Rs.177 lakhs, however, the duty amount payable by the petitioner company upto November 2008 itself amounts to Rs.2,12,85,856/- apart from payment of interest till 30.11.2008 which hovers at Rs.1,30,32,670/-. Therefore, the second respondent objected to the modified draft rehabilitation scheme formulated for revival of the petitioner company. Notwithstanding such objections raised by the second respondent, BIFR, in the order dated 06.10.2008, had permitted the petitioner company to pay the principal amount of excise duty in equal 12 quarterly instalments. Opposing such concession given by BIFR in the order dated 06.10.2008, the second respondent has filed an appeal mainly contending that there is no provision under the Central Excise Act and Rules for waiver of interest. The Central Excise duty is finally passed on to the customers and the amount paid towards duty by the customers is retained by the petitioner without being remitted to the excise department. Evidently, the duty amount collected by the petitioner has been utilised by them for some other purpose thereby prejudicing the department of their legitimate tax dues.

14. Countering the appeal filed by the second respondent before the first respondent, the petitioner company would contend that with a view to rehabilitate the petitioner company, certain concessions have been given by BIFR and if those concessions are not allowed to continue, it would adversely affect the revival process of the petitioner company. With the available resources and value of assets, it is not possible for the petitioner company to settle the debts of all the creditors and therefore, unless the revival scheme is implemented with conditions which are possible of implementation, the object with which the rehabilitation scheme has been formulated itself will be defeated. It was further contended that the petitioner company had already paid the entire principal amount of Rs.5,89,628/- in respect of tiles division and Rs.93.49 lacs out of Rs.124.46 lacs in respect of Sanitary division and the balance of Rs.30.97 lacs alone is payable in three quarterly instalments. The revival scheme sanctioned has been substantially implemented and at this stage, if any interference is caused, it will derail the entire process of rehabilitation.

15. Having considered the claim of the petitioner and the

second respondent, the first respondent passed an order dated 28.09.2012, which is impugned in this writ petition, which reads as follows:-

"16. In so far as 10 (1) (1) (e) is concerned, it has been stipulated that the CED should agree to receive payment of past principal outstanding amount of excise dues (current/arrears) in 12 equal quarterly instalments from the date of the sanction of the proposed scheme by the BIFR and to waive interest and penalty charged/proposed to be charged by the Department and in 10 (1) (1) (f) it has been prescribed to quash the levy of penalty and interest on account of delayed remittances. We find that the company has already paid the entire principal duty of Rs.5.89 lakh in respect of Tiles Division and has also paid Rs.93.49 lakh against the principal duty of Rs.124.46 lakh. However, CED has confirmed in para 4 of their rejoinder dated 10.08.2010 in this appeal that the total excise duty payable by the respondent is 5.89 lakh. As regards the sanitary ware division, the dues, excluding interest is Rs.1,24,46,617/-. Since there is no reluctance on the part of the company to pay the principal, we direct that the company should pay, after due reconciliation, principal amount within a month from the issue of this order as according to the company, they had already paid Rs.93.43 lakh against the principal duty of Rs.124.46 lakh in respect of the sanitary ware division. The MSRS had stipulated that the payment of past principal outstanding amount of excise duty both current arrears were to be made in 12 equal quarterly instalments from the date of the sanction of the proposed scheme. Since the BIFR had sanctioned the scheme on 06.10.2008, 12 quarterly instalments are long over. It is presumed that by this time, the company must have paid the dues as stipulated. We are, therefore, directing that if some amount has remained unpaid so far, the company must pay within a month and clear the entire principal amount due.

17. As regards waiver of interest, penalty charged/proposed to be charged by the Department stipulated in the sanctioned scheme 10 (1) (1), we are of the opinion that interest is payable by the company and need not be waived off. The principle is well accepted that "where the tax payer has not paid the taxes when it has become due, he keeps the amount of public exchequer for his own use and he becomes liable to compensate the State for such use of money for the duration of use." This principle has been invoked in the judgment of the Honourable Rajasthan High Court in

the case of Lucid Colloids Ltd., vs. UOI (2006) (200) (ELT) Raj. W3 are of the opinion that since the company has collected the duty from the customers and by not paying the duty to the CED, it has kept the amount belonging to the public exchequer, the interest should not be waived off.

18. As regards penalty charged or proposed to be charged by the department, we cannot justify this because the amount should have been quantified and it was to be examined whether revival of the company was adversely affected if such quantified amount was waived off. Without such quantification, it would be unfair to deprive the public exchequer of its revenue. If the stipulation is a dispensable relief and not affecting the revival of the company, we should prevent this avoidable injustice to public exchequer. Therefore, we do not agree that the penalty charged or proposed to be charged by the department should be waived."

16. It is evident from the order passed by the first respondent, which is impugned in this writ petition, that the petitioner company had the wherewithal to pay a major portion of the principal amount towards Excise Duty, which they have collected from their customers long back. In fact the petitioner company had paid major portion of the principal amount towards excise duty and only a sum of Rs.31.03 lakhs remains to be paid. It is also evident that even though the principal amount was permitted to be paid in 12 quarterly instalments, the petitioner did not pay the amount in time and the period within which the amount has to be paid had expired long back.

17. It is to be noted that the petitioner company was declared as a sick industry on 16.11.1994. Admittedly, in terms of the provisions of SICA, several rehabilitation measures were initiated to rehabilitate the petitioner company, but they failed. As regards the second respondent herein, they are making claim for payment of excise duty with interest. Admittedly, the petitioner collected excise duty from their customers during the course of their business. The fact that the petitioner collected excise duty is not denied. At the same time, the petitioner did not remit it to the credit of Excise Department. Therefore, the presumption would be that the petitioner had retained the duty collected from their customers and utilised it for their own purpose. We feel that the long drawn process of rehabilitation to rehabilitate the petitioner company, however, should not be at the cost of the creditors who were waiting for a long time for settlement of their legitimate dues or such rehabilitation process should not frustrate the

creditors or make them fall within the scope and ambit of sick industry.

18. The object with which SICA was enacted is to put the rehabilitation process, to rehabilitate a sick industrial company in the fast track mode to expeditiously settle the creditors. It would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. The process for rehabilitation must not be time consuming as it would prejudice the creditors of the company. A scheme for rehabilitation has to be drawn and genuine attempts have to be made to rehabilitate the sick industry within a reasonable time and it should not be at the cost of the creditors of the company and to make them to drive from pillar to post to get their legitimate dues recovered from the sick industry. In the present case, admittedly, the petitioner company was declared as a sick industry. Now, more than two decades have lapsed from the date on which the petitioner company was declared as a sick industry. After declaring the petitioner company as a sick industry, several rehabilitative measures were drawn, schemes were put in place and creditors have held consultative process to explore the possibility of rehabilitation so as to get their dues settled at the earliest. However, several attempts made to rehabilitate the petitioner company has failed. While so, at this stage, we are of the view that the order passed by the first respondent, which is impugned in this writ petition, need not be interfered with. This is more so as the instant writ petition arise out of an appeal filed by the Central Excise Department claiming their statutory and legitimate dues. The contention of the petitioner that they are not liable to pay the excise duty amount with interest does not augur well especially when the petitioner company had collected excise duty, withheld it and utilised them for running their industry at the cost of the Excise Department. Further, the contention of the second respondent that there is no provisions under the Central Excise Act to waive interest payable by the assessee deserves only to be accepted, Even though the draft rehabilitation scheme formulated on 06.10.2008 provides for waiver of interest or penalty, we are of the view that such a clause incorporated in the waiver scheme will not bind the Central Excise Department especially when the Central Excise Act does not provide for waiver of interest for the customs duty payable. Such a clause can at best be applicable to other creditors or financial institutions and not for the Central Excise Department. Therefore, we are of the view that under the garb of rehabilitating the petitioner company, the second respondent cannot be deprived of their statutory dues which are pending for a very long time. In such circumstances, we see no reason to interfere with the order passed by the first respondent. In this context, we are fortified by the decision

relied on by the counsel for the second respondent rendered by the Division Bench of the Andhra Pradesh High Court in the case of (Andhra Cements Limited vs. Commissioner of C.Excise & S.T., Guntur) reported in (2017) (350) E.L.T. 537 (A.P.) wherein in para No.31, it was held as follows:-

"31. Therefore, neither the order of the AAIFR nor Section 32 of the Act is of any assistance to the petitioner for successfully challenging the impugned Order-in-Original. As a matter of fact, the petitioner does not appear to deserve any sympathy, as can be seen from the long litigation and they have fought over a period of 30 years 1988. As we have pointed out in the narration of facts, the petitioner originally filed a Writ petition on the file of the Delhi High Court in C.W.P. No. 1653 of 1989 claiming the benefit of the notifications. Though they succeeded before the learned single Judge, the Department went on appeal in L.P.A. No. 25 of 1990. Even during the pendency of the appeal before the Division Bench, the petitioner moved a Civil Court in Hyderabad in O.S. No. 589 of 1990 seeking an injunction order restraining the Department from demanding any excise duty on the clearances effected by them, until the amount of refund that they became entitled as per the order of the learned single Judge of the Delhi High Court got adjusted. The petitioner also got an interim order of injunction from the Civil Court. It was only at around the same time in the year 1990 that the petitioner filed a reference under Section 15 (1) of the Act before the BIFR in Case No. 22 of 1990.

Therefore, the petitioner has to be seen as a person who gained advantage from a Civil Court by way of an interim order and by the time the interim order got vacated, the petitioner secured protection under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. This protection was enjoyed by the petitioner from the year 1980 till the year 2008 when the modified scheme was sanctioned. It must be remembered that the scheme first sanctioned failed due to the inability of the company to get revived and BIFR recommended winding up. But by repeatedly litigating, the petitioner survived.

32. In any case, a person who gained advantage by an interim order of the Court cannot, subsequently, turn around and seek umbrage under Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985. De hors the above, the Delhi High Court and AAIFR granted liberty to the Department to examine the question of waiver of interest and penalty. This has

been done by the first respondent with specific reference to the mandate of Section 11AA of the Central Excise Act, 1944. Therefore, there are no merits in the writ petition and hence, it is dismissed. The miscellaneous petitions pending if any, in this writ petition shall stand closed. There shall be no order as to costs."

19. The above decision rendered by the Division Bench of the Andhra Pradesh High Court would squarely apply to the facts of the present case. In the present case also, the petitioner company was given several opportunities to rehabilitate by formulating many schemes from the year 1994 thereby the protection conferred under the Scheme was extended to the petitioner company for several years. However, the petitioner company could not utilise those rehabilitative measures and to improve the business operation to settle the creditors. In any event, in the present case, the petitioner company had settled a major portion of the payment towards Excise Duty levy made by the Central Excise Department and only the balance amount stood payable by the petitioner company. Further, the amount payable by the petitioner is a statutory payment payable to the Central Excise Department, which cannot be exempted. In any event, at this length of time, this Court is of the view that the first respondent has considered the claim made by the petitioner and rightly rejected it by assigning reasons, which needs no interference by this Court.

20. In the result, the writ petition fails and it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CO)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

rsh

To

1. The Appellate Authority for Industrial
and Financial Reconstruction
10th Floor, Jeevan Prakash Building
Kasturba Gandhi Marg
New Delhi - 1

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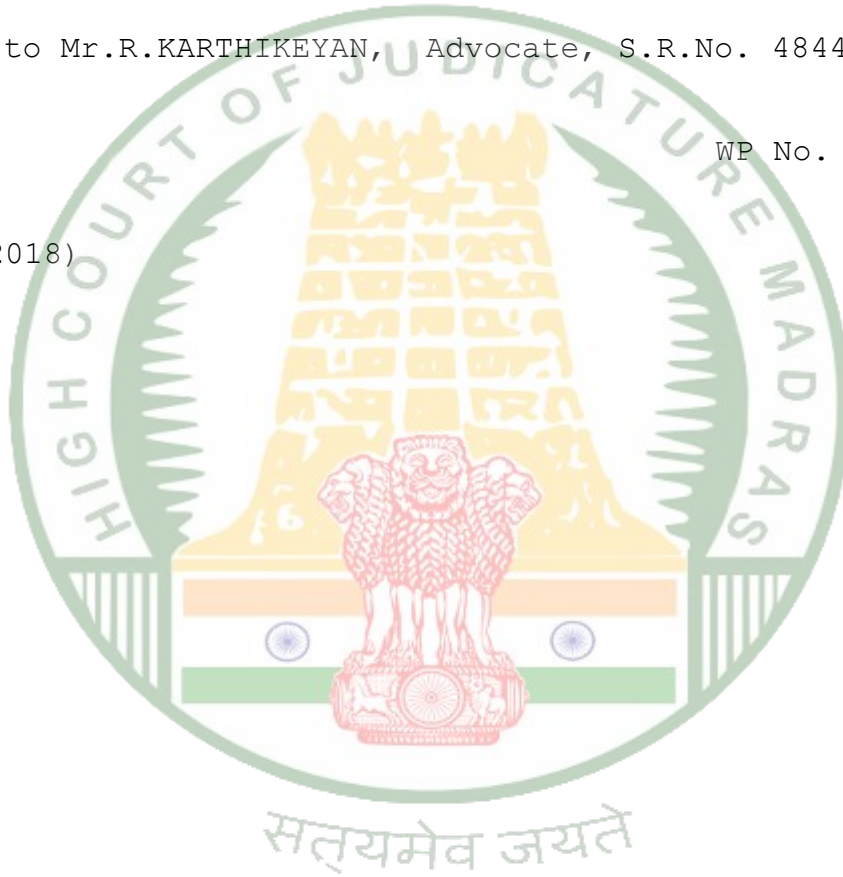
2. The Commissioner of Central Excise
Division No.1, Vallal Nagar
Mangakuppam
Cuddalore - 607 001

3. Board for Industrial & Financial Reconstruction
Government of India
Ministry of Finance
Jawahar Vyapar Bhavan - 1
Tolestroy Marg
New Delhi

+1cc to Mr.R.KARTHIKEYAN, Advocate, S.R.No. 48444

Order in
WP No. 737 of 2013

KGK (CO)
TR(09/08/2018)



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