IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2019

CORAM:

THE HONOURABLE Dr.JUSTICE ANITA SUMANTH

W.P.No.21704 of 2011
and
M.P.No.1 of 2011

M/s.Amman Granites,
Rep. by its Managing Partner
M.Ramasamy,
M.G.Colony,
Harur - 636 903, Tamil Nadu. ... Petitioner

Vs.

1. The Commissioner of Central Excise,
(Customs Policy Section),
No.1, Foulks Compound,
Anaimedu, Salem 636 001.

2. Assistant Commissioner of Central Excise,
Salem - I Division,
II Cross Veerapandiyar Nagar,
Salem-4. ... Respondents

Prayer:

Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the Order of the 2nd respondent made in Proceedings C.No.VIII/48/04/2010 Cus.Pol. dated 03.03.2011 and quash the same and consequently direct the respondents to grant permission to the petitioner in terms of the petitioner's application dated 15.12.2010.

For Petitioner : Mr.C.Vigneswaran

For Respondents: Mr.V.Sundareswaran
Senior Panel Counsel



O R D E R

The petitioner is a Partnership firm. There was an Advertisement/Tender notification issued by the State Bank of India for sale by auction, of the property located at Survey Nos.29/3 and 30/1 comprising Factory land ad measuring 3.66.5 Hectares in patta No.94 and Survey Nos.26/1, 26/2, 26/3, 28/2, 28/3B, 29/1, 29/2 and 31 comprising of vacant lands and measuring 25.08 acres in Lingampuram Village, Harur Taluk, Dharmapuri District, on 05.09.2010 ('property in question'). The petitioner participated in the auction on 11.10.2010 and was the successful bidder. Two sale certificates dated 18.10.2010 had been issued to the petitioner after remittance of the entire sale consideration of Rs.2,25,00,000/-.

2. On 25.11.2010, an application had been made to the Development Commissioner, MEPZ, Special Economic Zone & HEOUs in Tamil Nadu and Pondicherry, requesting permission for an additional location for storage and manufacturing activities. This was granted on 14.12.2010 upon the imposition of certain conditions. Thereafter, the petitioner sent a letter to the Assistant Commissioner, Central Excise on 15.12.2010 requesting permission to operate as a 100% Export Oriented Unit, in a portion of the property in question. The petitioner had intended to expand its business and thus sought permission to utilise an additional adjoining plant for increasing production capacity. The 2nd respondent, vide the impugned letter dated 03.03.2011, replied to the petitioners' application informing it that the previous owner of the property had arrears of central excise duty of Rs.8,03,000/- and penalty of Rs.16,06,000/- with interest as per order in original dated 13.03.2008. According to the Central Excise Department the aforesaid demand has become final. The provisions of Section 11 of the Central Excise Act, 1944 ('Act') were invoked to state that any person who acquires the properties of a Central Excise license holder would be liable to pay arrears of central excise, if any, of the erstwhile license holder. The request of the petitioner was thus rejected.

3. The petitioner replied on 18.10.2010 reiterating that the property in question had been purchased free of all encumbrances. Despite letter dated 18.03.2011, no further action was taken by the 2nd respondent to grant permission as sought for additional storage and hence the present writ petition challenging impugned order dated 03.03.2011.

4. No counter has been filed in this case and Mr.V.Sundareswaran, learned counsel appearing for the Revenue specifically states that he does not wish to file a counter and will restrict himself to oral submissions only.

5. He places reliance on the provisions of Section 11 of the Act as well as the judgment of the Supreme Court in the case of Macson Marbles Pvt. Ltd. vs. Union of India (158) E.L.T. 424).

6. I have carefully considered the rival contentions raised by the parties.

7. The provision of Section 11 of Central Excise Act read as follows:

'SECTION 11. Recovery of sums due to Government.- In respect of duty and any other sums of any kind payable to the Central Governmentunder 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 under Section 11D, the officerempowered 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 be 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 if 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 theownership 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 beattached 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 ofrecovering such duty or other sums recoverable or due from such predecessor at the time of suchtransfer or otherwise disposal or change.'

8. Section 11 has been enacted to provide for machinery for recovery of all sums that are due to the Government. The proviso thereto states that such amounts may be recovered from the successor to a business. The intention of the proviso is very clear to my mind, indicating that recovery of sums due to the Government can only be effected in cases where the entire business is taken over by a successor of the assessee who was in default. In the present case it is not disputed that the petitioner is not a successor to the business of the defaulter, but only a purchaser of the property that was auctioned by State Bank of India, a financial creditor of the erstwhile assessee. In the factual and legal matrix as noted by me above, the impugned order has no legs to stand and reliance of the revenue upon the provisions of Section 11 is misconceived.

9. The Supreme Court in the case of Rana Girders Limited vs. Union of India and others (2013 10 SCC 746), considered a case where an auction sale has been held as per Section 29 of the State Financial Corporations Act, 1951 in respect of property that had been attached by the Central Excise Department for arrears. In the context of facts that are very similar to the case on hand, the Court states at para-21 after considering the judgments of the Supreme Court in the case of Mascon Marbles Pvt. Ltd. (supra) as relied on by the respondent and the case of Union of India vs. SICOM, [(2009) 2 SCC 121], as follows:

> '21.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 the Central Excise Act is concerned, there was no such specific provision as noticed in SICOM as well. The 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 insofar as present case is concerned. Accordingly, we thus, hold that insofar 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.'

10. The revenue also relies on the provisions of Section 11E that, according to it, stipulate that a liability under the Central Excise Act shall be recovered as a first charge upon the property of a defaulting assessee. The provisions read as follows:

> '11E.Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002), be the first charge on the property of the assessee or the person, as the case may be].'

11. This provision has been inserted vide Finance Act 2011 with effect from 08.04.2011. The Sale Certificate in the present case is dated 18.10.2010, prior to insertion of Section 11E. Thus the protection of Section 11E is not available to the revenue in the present case. At this juncture, I may also refer to the provisions of Section 26E of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 which read as follows:

> '26-E. Priority to secured creditors.- Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over lal other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.
>
> Explanation.- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.'

12.The provisions of Section 26E state that the charge created by a secured creditor shall, notwithstanding anything contained in any other law for the time being in force, which phrase would include the Central Excise Act as well, after the registration of security interest, be accorded primary priority in payment. In the present case, there is nothing available on record and in fact, no averment to the effect that the Central Excise department has even created a charge upon the property in question.

13.In the light of the discussion above, the impugned communication dated 03.03.2011 is set aside and this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Commissioner of Central Excise,
   (Customs Policy Section),
   No.1, Foulks Compound,
   Anaimedu, Salem 636 001.

2. The Assistant Commissioner of Central Excise,
   Salem - I Division,
   II Cross Veerapandiyar Nagar,
   Salem-4.

+1cc to Mr.R.Parthiban, Advocate, S.R.No.81014
+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.81289

W.P.No.21704 of 2011
and
M.P.No.1 of 2011

MP(CO)
CS/06/01/2020