

[2015] 64 taxmann.com 20 (Allahabad)

HIGH COURT OF ALLAHABAD

Jaiprakash Associates Ltd.

v.

Union of India*

TARUN AGARWALA AND SURYA PRAKASH KESARWANI, JJ.

CIVIL MISC. WRIT PETITION NO. 1305 OF 2010

AUGUST 17, 2015

Yashwant Varma, Prashant Mishra and Raghav Nayar *for the Appellant.* **Anurag Misra, Ashish Agrawal, Ashok Mehta and R.C. Shukla** *for the Respondent.*

JUDGMENT

Tarun Agarwala, J. - U.P. State Cement Corporation Limited was incorporated as a company under the Companies Act, 1956. The said company carried on commercial operations till 1998 where it is suffered heavy losses and, upon erosion of its net worth, fell within the ambit of the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. The BIFR declared this company as a sick industrial company in 1992 and, subsequently, recommended its winding up. Upon receipt of the recommendation from the BIFR, the High Court passed an order dated 08.12.1999 for winding up the Corporation and appointed the Official Liquidator attached to the High Court to act as the Liquidator of the said Corporation.

2. The Official Liquidator issued an advertisement in August, 2005 for sale of the cement plant and other assets of the Corporation. Based on this advertisement, the petitioner gave his bid of Rs. 459.00 crores, which was found to be the highest and was accepted. The petitioner, accordingly, paid a sum of Rs. 459.00 crores to the Official Liquidator.

3. The Central Excise Department issued the impugned notice dated 26.08.2010 contending that central excise dues amounting to Rs. 15.97 crores was due and payable by the erstwhile corporation and since the petitioner has purchased a running business of the Corporation, the liability of the Corporation towards the central excise dues has to be cleared by the petitioner and, accordingly, directed the petitioner to deposit the arrears within a month.

4. The petitioner, being aggrieved by the issuance of the notice, has filed the present writ petition contending that it had only purchased the assets of the Corporation pursuant to the winding up order of the Corporation and that the petitioner cannot be saddled with the past liability of the Corporation. The petitioner further contended that there was no stipulation in the advertisement that the liability of the Corporation would fall upon the petitioner.

5. The Central Excise Department has filed a counter affidavit and contended that the petitioner has taken over the running business of the Corporation by purchasing the Corporation and its assets and that the arrears of the central excise dues can be recovered from the petitioner under Section 11 of the Central Excise Act (hereinafter referred to as the Act).

6. The Official Liquidator has also filed a counter affidavit contending that the assets of the Corporation were sold pursuant to the winding up of the Corporation by an order of the High Court. It was further

stated that the Central Excise Department filed a fresh claim application on 27.12.2006, which was decided by the Claim Committee on 29.12.2006 against which the Central Excise Department has filed a Company Appeal under Rule 164 of the Company (Court) Rules, 1959 before the Company Judge, which is pending consideration. It was also contended that the claim of the Central Excise Department towards excise dues would be considered in accordance with the provisions of Sections 529, 529A and 530 of the Companies Act.

7. We have heard Sri Navin Sinha, the learned Senior Counsel along with Sri Raghav Nayar for the petitioner, Sri R.C. Shukla for the Central Excise Department and Sri Ashok Mehta along with Sri Ashish Agrawal for the Official Liquidator.

8. The Central Excise Department has relied upon Section 11 of the Act. For facility, the said provision is extracted hereunder:

"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 under Section 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 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 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 the time of such transfer or otherwise disposal or change."

9. The proviso to the aforesaid section indicates that where a person from whom duty or a sum of any kind is recoverable or due, and transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, the excise dues could be recovered from the successor.

10. In our view the said proviso will not be applicable in the present case. The proviso contemplates that where a person transfers or disposes of his business, which results in change of ownership, in that scenario, the successor would be liable. In the instant case, the Corporation has not transferred or disposed of its business or trade. The Corporation has been wound up by an order of the Court and its assets have been sold off. A running business has not been sold. It has come on record that production

activity is not being carried out since 1997. The Counter Affidavit of the Central Excise Department is silent as to how they have asserted that a running business of the Corporation has been purchased by the petitioner. In the absence of any proof of this nature coupled with the fact the Official Liquidator issued an advertisement for sale of the assets of the Corporation after a winding up order was passed by the High Court, we are of the opinion that the past dues of the Central Excise Department cannot be recovered from the petitioner under Section 11 of the Act.

11. We also find that a similar notice was issued by the Central Excise Department demanding duty of finished goods lying in stock, which was received by the petitioner from the Official Liquidator pursuant to their highest bid being accepted. The Commissioner, Central Excise Department after considering the matter passed an order dated 28.07.2011 holding that the petitioner was not the manufacturer of goods and, therefore, was not liable to pay central excise duty quite apart from the fact that the petitioner had purchased the property in auction, which was free from all encumbrances and, consequently, dropped the proceedings.

12. In the light of the aforesaid, since the petitioner had only purchased the assets of the Corporation in pursuance of the winding up order passed by the High Court and had not taken over a running business of the Corporation, the liability of past central excise dues payable by the Corporation cannot be fastened nor recovered from the petitioner. Consequently, for the reasons stated aforesaid, the impugned notice dated 26.08.2010 cannot be sustained and is quashed. The writ petition is allowed.