

(2014) 08 MAD CK 0079**Madras High Court****Case No:** W.P. (MD) Nos. 1780 and 2000 of 2014 and M.P. (MD) Nos. 1-3 of 2014

Commissioner of C. Ex.

APPELLANT

Vs

B.V.V. Paper Industries Ltd.

RESPONDENT

Date of Decision: Aug. 7, 2014**Acts Referred:**

- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 13(2), 15

Citation: (2014) 309 ELT 679**Hon'ble Judges:** T.S. Sivagnanam, J**Bench:** Single Bench

Judgement

@JUDGMENTTAG-ORDER

T.S. Sivagnanam, J.

The petitioner in both the writ petitions is the Commissioner of Central Excise, Madurai. The petitioner seeks for issuance of a writ of mandamus, to forbear the second respondent from selling the properties owned by both the first respondent-company, without following due process of law. The petitioner stated that both the first respondent-company have defaulted in payment of Central Excise Duty to the tune of Rs. 44.07 lakhs and Rs. 31,89,282/- respectively and they are also liable to pay interest at the rate of 24% per annum. Therefore, it is stated that unless the property is properly valued and the notice is issued to the Official Liquidator, because the companies have been wound up, the second respondent viz., the Assets Care and Reconstruction Enterprise Limited cannot proceed with the action. Further, it is stated that the sale of the assets should be restrained and notices should be issued to the Official Liquidator and thereafter, permission to be granted to the second respondent to sell the properties.

2. In the counter affidavit filed by the second respondent it is submitted that both the first respondent-company have defaulted in making payment of the debt, along with the interest, to the IDBI, SASF, South Indian Bank Limited, Life Insurance

Corporation, etc. and both the first respondent secured interest credit facility by creating a first pari passu charge on all their movable and immovable properties. On account of the default committed by both the first respondent, the Bank and the financial institutions classified their debts as non-performing assets and IDBI transferred its non-performing assets along with underlying securities to the SASF, vide the Transfer Deed dated 30-9-2004. By reason of the transfer, SASF stepped into the shoes of IDBI and acquired absolute right, title and charge in the financial instruments and underlying securities created in favour of IDBI. By further deeds of assignment, the second respondent has become a secured creditor of the first respondent-company. Pursuant to the rights conferred on the second respondent, under the provisions of the SARFAESI Act, notice was issued under Section 13(2) to pay the amount along with interest thereon and the second respondent took possession of the mortgaged assets during May, 2011 and on account of the action taken in pursuance of circular, the proceedings pending before BIFR are automatically abated, as per Section 41 of the SARFAESI Act read with Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985.

3. It is further submitted that by way of abundant caution, the second respondent has withheld more than 3/4th value of the amount outstanding against financial assistance disbursed to the borrower of the secured creditors applied to the BIFR for a declaration that the reference made to it by the company had abated and that on 27-3-2012 the BIFR recorded the abatement, consequentially all proceedings before BIFR came to an end. According to the second respondent, the petitioner/Central Excise Department did not contest the matter nor challenged the proceedings subsequently. Further more, it is submitted that the company has not challenged the measures taken by the petitioner under the SARFAESI Act. That apart, the department has also not questioned the proceedings by approaching the Debts Recovery Tribunal. Further, it is submitted that the second respondent has sold the property by invoking the provisions of the SARFAESI Act, but the same could not be registered in the name of the purchasers on account of the order of injunction granted by this Court.

4. Heard the learned counsels for the parties and perused the materials available on record.

5. It is the settled legal position that dues payable to the Central Excise Department do not have any precedence over the right of a secured creditor. The secured creditor viz., the second respondent herein has come into the picture pursuant to various deeds of assignment executed in their favour. Therefore, the only remedy available to the petitioner/Central Excise Department is to approach the third respondent/Official Liquidator and place their claims before the Official Liquidator, so that the claim can be adjudicated and the Official Liquidator in turn can issue notice to the defaulters as well as to the second respondent and adjudicate the matter. In such circumstances, the petitioner cannot prevent the second

respondent, the secured creditor, from proceeding further.

6. Accordingly, the petitioner is directed to file claim petitions, before the Official Liquidator, which shall be adjudicated by the Official Liquidator, after issuing notice to the respondents 1 & 2 in W.P. (MD) No. 2000 of 2014. In so far, as W.P. (MD) No. 1780 of 2014 is concerned, it is stated that the second respondent is yet to move BIFR to declare the reference as abated and the matter is pending before the BIFR. In such circumstances, it is always open to the petitioner Department to move BIFR, by appropriate application, which will be adjudicated on merits. Both the writ petitions are accordingly disposed of. Consequently, connected miscellaneous petitions are closed. No costs.