

Judgment reserved on 02.08.2011

Judgment delivered on 25.11.2011

**WRIT TAX NO. 383 OF 2005**

M/s Rana Girders Ltd through its Director Zakir Ali Rana

Vs.

Union of India and others

**Hon'ble Sunil Ambwani, J.**

**Hon'ble Pankaj Mithal, J.**

1. We have heard Shri Subham Agrawal for the petitioner. Shri S.P. Kesarwani, Additional Chief Standing Counsel appears for the State respondents.

2. M/s P.J. Steels Pvt. Limited, Meerut Road, Muzaffarnagar set up an industrial unit with the financial assistance of U.P. Financial Corporation (UPFC). On the defaults committed by the company in repayment, the industrial unit was taken over by the UPFC under Section 29 of the State Financial Corporation Act and was put to sale. M/s Sarju Steels Pvt. Limited purchased the unit and took over physical possession from UPFC. The land & building was transferred by UPFC to M/s Sarju Steels Pvt. Ltd by a transfer deed dated 8.3.2002. By a separate deed the plant and machinery of the unit was transferred to the purchaser on 14.3.2002. The land & building as well as plant & machinery were transferred by UPFC free from all encumbrances and liability.

3. By a special resolution dated 16.2.2002 the Board of Directors of M/s Sarju Steels Pvt. Limited changed the name of the company to M/s Rana Girders (P) Limited-the petitioner. The Registrar of Companies, Kanpur issued a certificate of incorporation, to the company, consequent upon change of its name on 28.3.2002 under Section 23 (1) of the Companies Act, 1956. M/s Rana Girders (P) Limited was registered under the Central Excise (No.2) Rules, 2001, bearing registration No. AACCR0898QXN001.

4. On 25.8.2004 the petitioner-company received a notice from

the office of Assistant Commissioner, Customs & Central Excise, Division II, Muzaffarnagar regarding certain dues of its predecessor namely M/s P.J. Steels (P) Ltd for which adjudication orders dated 29.8.2002, 22.11.2002 and 22.7.2003 were passed. The Assistant Commissioner also drew attention of the petitioner to a judgement of Supreme Court in **Macson Marbles (P) Limited vs. Union of India 2003 (1) 58 ELT 424**, in which it was held that the Central Excise duty is recoverable from the auction purchaser unit in terms of the then Rule 230 (2) of the Central Excise Rules, 1944. The Assistant Commissioner referred to the incorporation of the Rules in Section 11, of the Central Excise Act w.e.f. 10.9.2004 as amended by the Finance Act No. 2 of 2004. The Central Excise department sought to recover an amount of Rs. 50, 84, 009/-, as adjudicated in the three cases against M/s P.J. Steels (P) Limited.

5. By a notice dated 21.9.2004 the Superintendent of Central Excise, with reference to the dues against M/s P.J. Steels (P) Limited Muzaffarnagar, requested to the petitioner in terms of Rule 230 of the Central Excise Rules, 1944, to pay Rs. 1, 00, 72, 442/- (Rs. 50, 84, 009/- as excise duty and Rs. 49, 88, 433/- as penalty) against the three adjudication orders referred to in the notice as follows:-

Adj. Order No. & Date	Amount of Duty	Confirmed Penalty	Demand R.F.	P. Penalty
1. 28/Commr/MRT/02 dt. 29.8.02	4298571	4298571	-	1000000
2.16/Jt. Commr/2003 dt. 22.7.03	669862	669862	-	-
3. 82/Off/136/01/02 dt. 22.11.02	115576	20000	-	-

6. The petitioner by its letter dated 6.12.2004 submitted a reply against the recovery of dues stating that it had purchased the industrial unit in an auction from UPFC in March, 2002 free from all encumbrances. At the time of purchase of the unit there was no provision in the Central Excise Act relating to recovery of arrears of the erstwhile manufacturer from the buyer of the unit. At the time of

purchase from UPFC there was no liability against the defaulting unit, of any central excise demand. The provisions of Section 11 of the Central Excise Act, 1944, relating to recovery of predecessor's dues from the successor came into force from 10.9.2004 and as such the petitioner is not liable to pay any demand and penalty raised against M/s P.J. Steels (P) Limited.

7. On 21.2.2005 the Superintendent of Customs and Central Excise Range Jansath Road Div.-II, Muzaffarnagar sent a letter to the petitioner to recover the arrears of central excise duty against M/s P.J. Steels (P) Ltd in the light of amendment in Section 11 of the Central Excise Act, 1944. He informed that since the duty has not been paid, he will be visiting the factory on 22.2.2005 for detention/attachment of the excisable goods worth equivalent to the dues pending against M/s P.J. Steels (P) Ltd. It is stated in paragraph-26 of the writ petition that on 17.2.2005 the Superintendent of Central Excise visited the unit of the petitioner and detained 500 MT of M.S. Girders for recovery of Rs. 1, 00, 72, 442/- plus interest.

8. It is submitted by learned counsel for the petitioner that though a request was made on 6.12.2004 for providing copies of the adjudication orders, the copies of the orders were provided to the petitioner by communication dated 21.2.2005.

9. In paragraph-31 of the writ petition it is stated that respondent no. 4 accompanied with respondent no. 3 visited the factory of the petitioner for detention/attachment of M.S. Girders weighing 678 MT (3800 pieces) valued at Rs. 1, 32, 21, 000/- under Section 11 of the Central Excise Act, 1944, and ordered by his letter dated 24.2.2005 in exercise of powers under Section 11 of the Central Excise Act, 1944 read with Section 142 (1) (b) of the Customs Act, 1962 and Section 35-N of the Central Excise Act, 1944 that the goods detained vide detention memo dated 22.2.2005. The order enclosed the Superdnama dated 25.2.2005 with details of particulars

of attached goods namely M.S. Girders, 3800 pcs./678 MT valued at Rs. 1, 32, 21, 000/- and the detention memo. The panchnama dated 22.5.2005 of the detained goods was also enclosed along with the description of the goods.

10. Notices were issued in this writ petition on 10.3.2005, and interim orders were passed. After service of notices and exchange of affidavits the case was ripe for hearing on 29.8.2005. The hearing was adjourned repeatedly on the request of learned counsels appearing for the petitioner. The order sheet of the case shows that the case was passed over on the illness slip of learned counsel of the petitioner on 26.9.2006. It went out of the list for about four years and re-appeared on 11.1.2010, when it was again passed over. After four more adjournments on the illness slips and adjournments of learned counsel for petitioner, the Court directed on 23.7.2010 that the case be listed peremptorily in the next cause list. Once again on 11.8.2010, 2.11.2010, 29.11.2010, 6.12.2010, 16.12.2010, 3.1.2011, 11.1.2011, 19.1.2011, 27.1.2011 and 2.2.2011 the case was passed over on the request of counsel of petitioner. Finally after about 13, adjournments learned counsel for petitioner agreed to argue the case. We should not have given these dates, but sometimes when the Courts are unable to decide the cases on account of repeated illness, adjournments and pass overs, it is necessary to remind the counsels that the Court does not exist for them; it is they who have to assist the Court in deciding the cases.

11. It is submitted by Shri Subham Agrawal that the petitioner is a bonafide purchaser and was not aware of any central excise dues pending against M/s P.J. Steels (P) Ltd at the time when the land and building, and plant and machinery was purchased in March, 2002. The second proviso to Section 11 of the Central Excise Act was not into existence at that time. It came into force w.e.f. 10.9.2004. He submits that Rule 230 (2) of the Central Excise Rules, 1944 cannot

be invoked in the present case, since at the time of purchase of the land & building and plant & machinery the new Central Excise Rules, 2002 had come into force on 1.3.2002. Since March, 2002 to September, 2004 there was no provision in the Central Excise Act, 1944, or the Rules by which the Central Excise dues could be recovered from the subsequent purchaser.

12. It is submitted that the attachment can be made only where the transfer, disposal or change in the ownership is effected by the owner of the unit; whereas in the present case the sale of land & building and plant & machinery was made by UPFC and not by M/s P.J. Steels (P) Ltd. Further the attachment could be made only for the purposes of recovery of such duty, which is due from the purchaser at the time of transfer. In the present case no attachment order was passed against M/s P.J. Steels (P) Ltd till the assets were purchased by the petitioner. The adjudication orders were made on 29.8.2002, 22.11.2002 and 22.7.2003, whereas the land & building was purchased on 8.3.2022, and plant and machinery on 14.3.2002.

13. Shri Subham Agrawal further submits that the second proviso to Section 11 of the Central Excise Act, 1944, is applicable only when there is voluntary act of transfer of the purchaser to evade the liability. It is not applicable when there is a coercive recovery by the mortgager by way of auction sale. In the instant case under Section 29 (2) of the State Financial Corporation Act, the plant & machinery was transferred by UPFC to the petitioner, as the owner and not by the erstwhile defaulting unit. Under Section 29 (5), the UPFC shall be deemed to be the owner of M/s P.J. Steels (P) Ltd for the purposes of suits against M/s P.J. Steels (P) Ltd. The recovery, if any, could be made from UPFC and not from the petitioner, who is a bonafide auction purchaser, in an auction for value.

14. Shri Subham Agrawal has relied upon **M.A. & Company vs. Assistant Commissioner (Judicial) Sales Tax, Farrukhabad and**

**another (1964) 15 STC 487 (All)** to submit that the tax becomes payable when the liability to pay the taxes arises. There is a distinction between the expressions 'tax payable' and 'tax due'. The tax is due when it becomes debt, owed to the taxing State after it is determined by assessment and is quantified, and a notice of demand is issued. He has also relied upon judgment in **Luxmi Oil Vanaspati Pvt. Ltd. vs. Commissioner, Central Excise 2010 UPTC 1327 (All)** in which it was held that when a bonafide purchaser in good faith has not purchased the business of the previous owner and had no knowledge of the central excise dues, Rule 230 (2) of the Central Excise Act is not applicable. He submits that the ratio in **Macson Marbles Private Limited v. Union of India, AIR 2004 SC 4927**, is not applicable to the present case. The Rule 230 (2) of Central Excise Rules, does not create any charge. Even otherwise the charge stands on or lower pedestal than a deed of mortgage. In the absence of any provision creating a charge on the assets, in favour of the central excise department, the claim of secured creditor would prevail over the crown debts. The UPFC rightly exercised its preferential rights in acquiring the property and transferring it to the petitioner. The debt of UPFC had a priority being a secured debt by virtue of a deed of mortgage over the dues of Central Excise Department.

15. Shri Subham Agrawal submits that in **Agrawal Metal Works vs. Deputy Commissioner, Jaipur 2011 (263) ELT 397 (Del)** the original owner of the plot owed certain amounts to the financial institutions. The plant along with machinery was auctioned by UPFC. It was sold by auction. The Court held that the central excise liability was of the original owner of the plant and thus subsequent purchaser cannot be fastened with that liability in absence of specific clause claiming "first charge for the purchaser" in the Central Excise Act, 1944. It was held that Rule 230 of the Central Excise Rules,

1944 (incorporated in second proviso to Section 11 w.e.f. 10.9.2004) was not applicable to the case.

16. Shri S.P. Kesarwani submits that the central excise department was entitled to recover the central excise dues against M/s P.J. Steels (P) Ltd. The dues against M/s P.J. Steels (P) Ltd are recoverable against the petitioner, and as such the order dated 21.2.2005 was issued. A detention memo dated 22.2.2005 was drawn at the factory premises whereby Girders weighing 678 M.T. (2800 pieces) valued at Rs. 1, 32, 21, 000/- (approximately) were detained under Section 11 of the Central Excise Act. Thereafter by order dated 24.2.2005 in exercise of powers under Section 11 of the Central Excise Act, 1944 read with Section 142 (1) (b) of the Customs Act, 1962 and Section 35N of the Central Excise Act, 1944, the goods were detained vide detention memo dated 22.2.2005, and were ordered to be attached for auction. Clause (9) of the sale deed of the assets executed by the UPFC in favour of the petitioner provides as follows:-

“9. That all the liabilities in respect of rates, rents, taxes and dues of Municipality and other local authorities etc. in respect of the said property, shall be payable by the vendee.”

17. The provisions of Section 11 were brought into force by Finance Act 2004. Prior to Finance Bill, 2001, when the new Central Excise Rules, 2011 were brought into force, similar provisions existed under Rule 230 of the Central Excise Rules, 1944. Section 38A of the Central Excise Act, 1944 as modified vide Finance Bill, 2011 clearly provided that any action taken or anything done or omitted under any Rule, notification or order made under Central Excise Act, are declared to be valid by the following Section 132 of the Finance Act, 2001. At the time of taking over possession of the plant, and machinery etc. of M/s P.J. Steels by the petitioner, the provisions of Rule 230, were applicable by virtue of Section 38A of the Act and thus the sums recoverable from M/s P.J. Steels were



realisable from M/s Rana Girders-the petitioner.

18. Shri Kesarwani submits that in **M/s Macson Marbles (P) Ltd.** (supra) the Supreme Court has held that in case of transfer of business even by way of auction by a financial institution, the successor is liable for payment of dues in terms of Rule 230 of the Central Excise Rules, 1944. The recovery proceedings do not violate to the provisions of Section 11 of the Act.

19. In the present case we find from the Order-in-Original (Adjudication Order) dated 29.8.2002 that on noticing the shortages in the stocks of finished goods (viz M.S. Girders and M.S. Waste & scrap) and the raw material viz M.S. Ingots a show cause notice was issued to M/s P.J. Steels (P) Ltd as well as Shri Rakesh Kumar Singhal, the Director of the firm on 19.11.2001 for imposing Central Excise duty amounting to Rs. 21, 81, 883/- under Section 11A of the Act; the Cenvat credit amounting to Rs. 21, 16, 688/- on this quantity of M.S. Ingots not to be disallowed and was to be recovered under Rule 57-AH of the Rules. The interest and penalty was levied under Rule 209-A of the Central Excise Rules, 1944. M/s P.J. Steels submitted its reply on 12.2.2002 and was given personal hearing on 19.8.2002 and 27.8.2002. The adjudication order passed by the Commissioner, Central Excise, Meerut, confirmed the demand of central excise duty disallowing the Cenvat credit detailed as above. The order also imposed penalty of Rs. 42, 98, 571/- on M/s P.J. Steels (P) Ltd and personal penalty of Rs. 10 lacs on its director Shri Rakesh Kumar Singhal. The adjudication order dated 22.11.2002 imposed a duty of Rs. 1, 15, 576/- and penalty of Rs.20,000/- and the adjudication order dated 22.7.2003 passed in pursuance to the show cause notice of the Preventing Officer of the Central Excise Commissionerate, Meerut dated 12.9.2001 detecting a shortage of 347.439 M.T. of M.S. Girders valued at Rs. 41, 86, 640/- involving Central Excise duty amounting to Rs. 6, 69, 862/-



for which a show cause notice was issued on 9.9.2002.

20. By the order in appeal dated 30.4.2004, the adjudication order in original dated 22.7.2003 was confirmed. The Central Excise Appeal No. E/22-23/03-B arising out of order in original dated 29.8.2002 filed by M/s P.J. Steels (Pvt) Ltd was dismissed on 30.4.2003 for non-compliance of the deposit of Rs. 10 lacs in terms of Section 35F of the Central Excise Act. The Central Excise Appeal No. E/4116/03-MB/SM arising out of order in appeal dated 5.9.2003 was also dismissed on 25.4.2004 for non-deposit of Rs. 50 lacs and thus for non-compliance of provisions of Section 35F of the Central Excise Act.

21. Rule 230 of the Central Excise Rules, 1944 provides:-

“(1) When the duty leviable on any goods is owing from or by any person carrying on trade or business, whether as a producer, manufacturer or as dealer in such goods, all excisable goods, and all materials and preparations, from which any such goods are made, and all plant, machinery, vessels, utensils, implements and articles for making or manufacturing or producing any such goods, or preparing any materials, or by which the trade or business is carried on, in the custody or possession of the person carrying on such trade or business, or in the custody or possession of any agent or other person in trust for or for the use of the person carrying on such trade or business, may be detained for the purpose of exacting such duty; and any officer duly authorised by general or special order of the Central Board of Excise and Customs or the Commissioner may detain such goods, materials, preparations, plant, machinery, vessels, utensils and articles until such duties or any sums recoverable in lieu thereof are paid or recovered.

(2) Where any such person transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or trade or part thereof by any other person or persons, all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles in the custody or possession of the person or persons succeeding may also be detained for the purpose of exacting duty due from the producer, manufacturer or dealer up to the time of such transfer, disposal or change, whether such duty has been assessed before such transfer, disposal or change, but has remained unpaid, or is assessed thereafter.”

22. Section 11A of the Central Excise Act, 1944 as inserted of Section 80 of the Finance (No. 2) Act, 2004 w.e.f. 10.9.2004 reads 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 Government under any of the provisions of this Act or of the rules made thereunder 85 [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.”

23. Section 11E proposed to be inserted by the Finance Bill, 2011

(8 of 2011), provides that 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, Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, be the first charge on the property of the assessee or the person, as the case may be.

24. In **Macson Marbles Pvt Ltd** (supra) an industrial unit run by M/s Diamond Marbles Pvt Ltd was brought to sale in terms of Section 29 of the State Financial Corporation Act, 1951 by Rajasthan Financial Corporation. The Macson Marbles Pvt Ltd-the appellant participated in auction. Its bid was accepted after which it took possession of the unit on 28.8.1987. On 4.12.1987, the Additional Collector of Central Excise adjudicated in a proceeding arising out of show cause notice issued under Section 11A of the Central Excise Act in relation to certain goods which were removed between 13.8.1986 and 23.8.1986. The excise duty and penalty was levied and demanded. Pursuant to the adjudication order a letter was sent by the Central Excise Department demanding the central excise dues and penalty. Macson Marbles Pvt. Ltd denied its liability to pay and filed a writ petition. The amount, however, was paid when the recovery proceedings were initiated. The High Court disagreed with the submissions that the appellant having taken over the unit from the Registrar of the Financial Corporation had no liability to pay the excise dues, and that Rule 230 (2) had no application to the case. The Supreme Court held that the judgment in **Isha Marbles v. Bihar State Electricity Board and another (1995) 2 SCC 648** cannot be applied as under Section 24 of the Electricity Act, there is no charge over the property in question when the premises come to

be owned or purchased by the auction purchaser. He cannot be called upon to clear the past arrears when such purchaser seeks supply of electric energy. It was held that the liability of the Central Excise dues arises under the Central Excise Act and Rule 230 (2) of the Central Excise Rules. The Rule clearly indicates that it is a mode of recovery of the excise dues from the assets owned by a predecessor and on his liabilities being assessed, the dues could be recovered even from the successor. It was held in paragraphs 5 and 8 as follows:-

“5. In this case the liability arises under the Central Excise Act and Rule 230(2) of the Central Excise Rules. The said Rule clearly indicates that it is a mode of recovery of the excise dues from the assets owned by a predecessor and on his liabilities being assessed could be recovered even from the successor.

8. The Department having initiated the proceedings under Section 11A of this Act adjudicated liability of respondent No. 4 and held that respondent No. 4 is also liable to pay penalty in a sum of Rs. 3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisturbed. The appeal is disposed of accordingly.”

25. In this case the show cause notices were issued to the purchaser of M/s P.J. Steels (P) Ltd on 13.7.2001, 19.11.2001 and 9.9.2002 respectively in pursuance to which the adjudication orders came to be passed on 29.8.2002, 22.11.2002 and 22.7.2003. The UPFC executed the sale deed of the land and building on 8.3.2002 and of plant and machinery dated 14.3.2002, stipulating in clause-8 (sale deed dated 8.3.2002 of land and building), and clauses-4 and 5 (agreement dated 14.3.2002 of plant and machinery) as follows:

“(sale deed dated 8.3.2002 of land and building)

8. All the statutory liabilities arising out of the said property shall be borne by the vendee and vendor shall not be held responsible for the same.

(agreement dated 14.3.2002 of plant and machinery)

4. That all the statutory liabilities arising out of the plant and machinery of the industrial unit shall be borne by the purchaser and corporation shall not be held responsible for the same.

5. That the sale of assets is on “AS IS WHEREIS”

26. Clause-9 of the sale deed dated 8.3.2002 and clause-15 of the agreement dated 14.3.2002, also stipulate that all liabilities in respect of rates, rents, taxes and dues of Municipality and other local authorities etc. in respect of the said property, shall be payable by the vendee. In clause-15 of the agreement dated 14.3.2002 it was provided that the liabilities will include both present and future liability.

27. In the present case we are dealing with excise dues and penalty. The excise duty may be classified and include within it the classification of tax but that the incidence of excise duty is on the point of manufacture and not on the point of sale. The ratio of the judgment in **M.A. & Co. vs. Assistant Commissioner (Judicial), Sales Tax, Farrukhabad and another 1964 (XV) STC 487** relating to compensation fee and sales tax, to fall due when the tax becomes a debt owed to the taxing State when it has been determined by the assessment and quantified, and a notice of demand has been issued, does not apply to the present case.

28. In **Luxmi Oil Vanaspati Pvt Ltd vs. Commissioner Central Excise 2010 UPTC 1327 (Alld)** this Court held that the purchasers or its directors are not liable to pay excise dues of previous owners of the unit on the ground that the business of the previous owner was not purchased but only land and building was purchased. The Court held that excise dues are sovereign dues and as such stand priority

over all other dues. Relying upon **M/s Isha Marbles v. Bihar State Electricity Board and another** (supra) and **State of Karnataka v. Shreyash Papers Private Limited and others JT 2006 (1) SC 180** it was held that in case of sale of property under Section 29 of the State Financial Corporation Act, the purchaser for value without notice of the arrears of sales tax of the defaulting earlier company cannot be held responsible for payment of the same when the property had fallen to his hands, free of charge. It was held that Rule 230 (2) authorises detention of all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles, in the custody or possession of the person or persons carrying on such trade of business or from person succeeding the business or trade or part thereof for such time till the dues are paid or recovered but the Rule does not in any way create a charge over any of the goods enumerated in the rule. A charge is defined under Section 100 of Transfer of Property Act. The charge creates a right of payment out of the specified property, and is distinct from mortgage where transfer of property or interest takes place. The charge stands on a lower pedestal than a deed of mortgage. The rule does not talk of charge and by implication it cannot be said that if any duty leviable on any goods or owing to any person in custody or possession of business is not paid, then a charge would be created over those goods. The word 'detained' cannot be interpreted to mean that it creates a 'charge' on the goods in respect of the amount of the arrears of excise dues. The only power given in this rule is to detain the goods which are in custody or possession of the person carrying on such trade or business. There is no other provision under the Central Excise Act or the Rules which envisages to create any charge over the assets of a unit to enable the realization of the excise duty on top priority. The petitioner having not succeeded to the erstwhile owners in business or trade and having acquired the

property, without any charge independent of the business or trade of previous owners is not a person in custody or possession of the property as successor of the previous owners against whom there was a demand of excise duty. The Court thus held that the debt of UPFC had a priority being a secured creditor by virtue of a deed of mortgage over the dues of the Central Excise, which had no charge over the property in the absence of any provision creating any charge over it. The Court held in paragraphs 16 and 17 as follows and quashed the notice:-

“16. In view of the above, the debt of UPFC had a priority being a secured creditor by virtue of a deed of mortgage over the dues of the Central Excise which had no 'charge' over the property in the absence of any provision creating any 'charge' over it. Thus, UPFC rightly invoked its preferential claim and transferred the property.

17. The Central Excise having no 'charge' over the property has no right to recover such dues from subsequent purchasers, who happens to be bonafide purchasers.”

29. In **Union of India and others vs. Sicom Limited and another (2009) 2 SCC 121** the Supreme Court held that considering the statutory right of the Financial Corporation under the State Financial Corporation Act, 1951 and the non obstante clause occurring therein it had a preferential claim in relation to its secured debts. In **Sicom Limited** (supra) the Central Government expressed its intention to attach and seize the property for recovery of certain sums of money in the form of Central Excise dues from the property mortgaged to financial corporation. The Supreme Court held that rights of the Crown to recover the debt would prevail over the right of the subject. Crown debt means the debts due to the State or the King. Such creditors, however, must be held to mean unsecured creditors. The principle of Crown debt pertains to the common law principle. When Parliament or a State Legislature makes an



enactment, the same would prevail over the common law and thus, the common law principles, which existed on the date of coming into force of the Constitution of India, must yield to a statutory provision. A debt, which is secured or which by reason of the provisions of a statute becomes the first charge over the property must be held to prevail over the Crown debt which is an unsecured one.

30. In paragraphs 16 and 23 of the judgment the Supreme Court further held that the right of a State Financial Corporation under the State Financial Corporation Act, 1951, is a statutory one. The said Act contains a non obstante clause in Section 46-B of the Act. The non-obstante clause not only prevails over the contract, but also other laws. If a company had subsisting interest despite the lawful seizure there could not be a doubt whatsoever that a charge/mortgage over the immovable property will have the same consequence.

31. In **Agrawal Metal Works vs. Deputy Commissioner, Jaipur 2011 (263) ELT 397 (Del)** the High Court held that the central excise duty liability was of the original owner of plot of land. The subsequent purchaser from auction purchaser could not be fastened with the liability in absence of specific clause claiming first charge over the purchaser in the Central Excise Act, 1944. Rule 230 of the erstwhile Central Excise Rules, 1944, now incorporated in the proviso to Section 11 w.e.f. 10.9.2004 will not be applicable. The Court distinguished **Macson Marbles** (supra) on the reasoning that what was decided in that case was that only in those cases where the buyer had purchased the entire unit, he would be so liable, whereas in the case to be decided by the Delhi High Court, the appellant had purchased only the plot and not the entire unit. The Delhi High Court relied upon **T.C. Spinners Pvt. Limited v. Union of India 2009 (243) E.L.T. 31 (P & H)** in which it was held that generally, the Government dues have priority over ordinary debts, unless there

is specific provision in the statute claiming first charge over the property. There is no specific provision in the Central Excise Act claiming first charge and thus the claim of the Central excise duty cannot have precedence over the claim of the secured creditors.

32. We are relieved of the obligation to consider the effect of the deletion of Rule 230, and the absence of any provision from the date of deletion to the date of incorporation of proviso to Section 11 w.e.f. 10.9.2004, as we find that there is a clear and unequivocal stipulation in the deed of sale dated 8.3.2002, of the land and building in paragraph-8 and in the agreement of sale of plant and machinery dated 14.3.2002 in paragraph-4 that all the statutory liabilities arises out of the said property (land and building) and in the agreement dated 14.3.2002, for plant and machinery shall be born by the purchaser, and that the Corporation shall not be held responsible for the same. It thus cannot be denied that the central excise dues and penalty are the statutory liabilities, which had purchased the land & building and plant & machinery of M/s P.J. Steels (P) Ltd agreed to pay all statutory liabilities. The show cause notices for payment of excise duty and penalty, were given prior to the purchase of the land and building and plant and machinery by the petitioner. The excise duty is on the manufacture and not on sale. The adjudication officer only confirms the show cause notice, which in turns relate back to the payment of excise duty on the date when goods were manufactured. The penalty, however, has a different status and is imposed only after its goods have been clandestinely removed for evasion of excise duty and after giving an opportunity of hearing to the person against whom it is proposed to be levied.

33. Though the proviso to Section 11 was inserted by Section 80 of the Finance (No.2) Act, 2004 w.e.f. 10.9.2004, and sought to incorporate the machinery provision for recovery of sums due to government under the Act earlier incorporated in Rule 230 (2), it is

only an enabling provision for recovery of sums due to the government by which the Central Excise department is permitted to attach and sell all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person, so succeeding to the business or trade in whole or in part and effect in the change of ownership in consequence to which he succeeds in such business or trade of any other person. In the present case even if it may be taken that there is no charge on the property on the plant and machinery, of the excise duty, for which show cause notices were given prior to the sale of the UPFC, the petitioner as a purchaser under the terms of the agreement dated 14.3.2002, of the plant and machinery had agreed to bear all statutory liabilities arising out of plant and machinery of the industrial unit.

34. The facts of this case are distinguishable from the facts of the case in **M/s Luxmi Oil Vanaspati Pvt Ltd.** (supra) in which the property was transferred free from all charges and encumbrances. The observations made in **Luxmi Oil Vanaspati Pvt. Limit** that the debt of UPFC had a priority being a secured creditor by virtue of a deed of mortgage over the dues of central excise is not applicable to the present case inasmuch as UPFC had taken over the property and had sold the plant and machinery subject to the charge of the government dues over the assets at the time of selling land and building and plant and machinery. The petitioner as a purchaser had taken over upon itself under the deeds of transfer, to pay the dues.

35. As discussed above, whereas the excisable duty becomes due and payable at the time of manufacture of the goods, the penalty in the present case was imposed by adjudicating orders dated 29.8.2002, and 22.7.2003, after the sale deed dated 8.3.2002 of land and building and the agreement of plant and machinery dated 14.3.2002 were executed. Hence it cannot be said that the penalty

was imposed and was due and payable on the date when the land and building, and plant and machinery was purchased by the petitioner. We are further of the opinion that the penalty as a quasi criminal liability, was leviable on M/s P.J. Steels (P) Ltd represented through its Board of Directors, and personally on Shri Rakesh Kumar Singhal-the director of the company. The penalty, therefore, having been levied and imposed after the purchase of land & building and plant & machinery installed in the unit which earlier belonged to M/s P.J. Steels Ltd, Muzaffarnagar, is not payable by the petitioner, and is not covered under the stipulation in the sale deed and agreement as statutory liability nor it arose out of plant and machinery of the industrial unit.

36. The writ petition is **partly allowed** to the extent that the petitioner shall not be liable to pay penalties imposed upon M/s P.J. Steels Ltd and its Director under the impugned orders. The Central Excise Department will, however, be entitled to recover the central excise dues from the detained goods, or by sale of plant and machinery of the company. There shall be no orders as to costs.

Dt.25.11.2011

RKP/