

A WAVE INDUSTRIES PVT. LTD.

v.

STATE OF U.P. & ORS.

(Civil Appeal No. 9272 of 2022)

B DECEMBER 15, 2022

**[K.M. JOSEPH AND HRISHIKESH ROY, JJ.]**

- Liability – Slump Sale Agreement dated 17.07.2010, followed by a sale deed, was entered into between U.P State Sugar Corporation Limited-Seller (UPSSCL) and Appellant-Purchaser for UPSSCL's loss making Amroha sugar mill – Dispute arose w.r.t outstanding liability of unpaid duty, penalty, and interest, if to be discharged by the seller or the purchaser – Subsisting dues arising out of transactions occurring on dates prior to the sale, if contingent or conditional liability or an accrued liability which may be computed or discharged at a subsequent date – Held: There is no dispute that the liability towards the duty in question for the Amroha unit are in respect of business transactions for the period anterior to the signing date of the Slump Sale Agreement – The business liability for the Amroha unit had arisen out of the operation of the unit during the period before the same was sold to the appellant, although the liability is to be quantified and discharged at a future date – When the liability is capable of being estimated with reasonable certainty, the liability is not to be treated as a contingent one and should be considered as a liability which may be discharged at a future date – Thus, the liability in question not being a contingent one, the same cannot be fastened on the purchaser who were not operating the unit, prior to the Slump Sale Agreement dated 17.7.2010 – Further, in clause 12.1 and 12.2 of the Agreement read with Clause 9 of the Sale Deed, the liability of the purchaser, for the operation and activities of the unit, arose only after the signing date – Thus, dues relating to the activities and operation of the unit upto 17.7.2010 (signing date), were the liabilities of the UPSSCL – Also, prior to 17.7.2010, the appellant was neither a dealer nor a manufacturer and therefore, had no tax or duty obligations to satisfy for the operation of the Amroha unit – Impugned order erroneously*

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*held that the liabilities for the transactions made prior to the sale agreement are to be borne by the purchaser, set aside.* A

#### **Disposing of the appeals, the Court**

**Held : 1.1** There is no dispute that the liability towards the duty in question for the Amroha unit are in respect of business transactions for the period anterior to the signing date of the Slump Sale Agreement. Moreover assessment orders and recovery citations have been issued by the taxing authorities in the name of the UPSSCL. The business liability for the Amroha unit had definitely arisen out of the operation of the unit during the period before the same was sold to the appellant, although the liability is to be quantified and discharged at a future date. When the liability is capable of being estimated with reasonable certainty, the liability is not to be treated as a contingent one and should be considered as a liability which may be discharged at a future date. Such being the position in law and the liability in question not being a contingent one, the same cannot be fastened on the purchaser who were not operating the unit, prior to the Slump Sale Agreement dated 17.7.2010. In clause 12.1 and 12.2 of the Slump Sale Agreement read with Clause 9 of the Sale Deed, the liability of the purchaser, for the operation and activities of the unit, arose only after the signing date. This would suggest that dues relating to the activities and operation of the unit in the period upto 17.7.2010 (signing date), were the liabilities of the UPSSCL while the dues relating to activities and operation of the unit for the period subsequent to 17.7.2010, were to be the responsibility of the purchaser. The liability of the purchaser for the dues relating to activities and operations of the unit for the period anterior to 17.7.2010, could not therefore have been fastened on the appellant in view of the clear provisions made in clause 9 of the Sale Deed read with Clause 12.1 and 12.2 of the Slump Sale Agreement as both are specific in nature. In the same context, the clause 2.6 which speaks of contingent liabilities and legal cases pending in respect of the unit, to be fastened on the purchaser and the seller being absolved of such liability, are generic conditions provided under clause 2.6 of the Slump Sale Agreement and this Court is not impressed by those. The reason being the contradictions in the specific conditions mentioned in

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- A the Slump Sale Agreement. In such circumstances, clause 9 of the sale deed being specific will govern the parties and will override anything contrary, contained in the Slump Sale Agreement. [Paras 15, 17 and 18][1138-E; 1139-B-G]
- 1.2 In view of the specific and detailed provisions with
- B regard to the distribution of liabilities in respect of the dues whereby duties in respect of the transactions upto the date of agreement are to be borne by the Seller i.e. UPSSCL and the buyer is made responsible only for dues in respect of post-sale transactions it is observed that the impugned order dated
- C 1.11.2017 has erroneously held that the liabilities for the transactions made prior to the sale agreement, are to be borne by the purchaser. That apart, prior to 17.7.2010, the appellant was neither a dealer nor a manufacturer and therefore, had no tax or duty obligations to satisfy for the operation of the Amroha unit. It is the UP State Sugar Corporation Limited which had
- D collected all the dues from their customer on behalf of the State Government and they are under an obligation to deposit the collected sum in the government treasury. In view of the foregoing, the liability in question, not being a contingent liability, cannot be fastened on the shoulders of the appellant. The impugned judgment is set aside. [Paras 19, 20][1139-G-H; 1140-A-B, D]

*Bharat Earth Movers v. Commissioner of Income Tax, Karnataka (2000) 6 SCC 645 : [2000] 2 Suppl. SCR 295 – relied on.*

- F Case Law Reference
- [2000] 2 Suppl. SCR 295      relied on      Para 16
- CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9272 of 2022.

- G From the Judgment and Order dated 01.11.2017 of the High Court of Judicature at Allahabad at Lucknow Bench in W. P. (M/B) No.20032 of 2016.

With

Civil Appeal Nos. 9273, 9274 and 9275 of 2022.

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T. Srinivasa Murthy, Senthil Jagadeesan, Anandh K., Ms. Nishita Jagetia, Advs. for the Appellant. A

Balbir Singh, ASG, Ardhendhumauli Kumar Prasad, AAG, Ms. Rukhmini Bobde, Syed Abdul Haseeb, Adit Khorana, Ms. Priyanka Das, Mukesh Kumar Maroria, Rohit K. Singh, Pritam Bishwas, Kislay Jha, Ms. Ruchi Gupta, Samarth Srivastava, Ms. Shreya Srivastava, Aman Singh Bhaduria, Ms. Ananya Sahu, Bhakti Vardhan Singh, Pradeep Misra, Deleep Dhyani, Manoj Kumar Sharma, Suraj Singh, B. Krishna Prasad, Advs. for the Respondents. B

The Judgment of the Court was delivered by

**HRISHIKESH ROY, J.** C

Leave granted.

2. Heard Mr. T. Srinivasa Murthy, the learned counsel appearing for the appellants. Also heard Mr. Balbir Singh, the learned Additional Solicitor General of India appearing for respondent-State. The U.P State Sugar Corporation (respondent no.2) for short “the UPSSCL”, is represented by Mr. Pradeep Misra, the learned counsel. D

3. For the sake of convenience, we will take the facts of SLP(C) No. 3525 of 2018, for the purpose of this judgment: -

The appellants were the writ petitioners before the High Court who were unsuccessful in their challenge to the order dated 7.6.2016 whereby the liability for payment of Rs.2,14,169/- duty, Rs. 2,41,169/- penalty, and Rs.1,40,459/- interest, amounting to Rs. 5,68,797/- is declared to be borne by M/s Wave Industries Pvt. Ltd. (Purchaser) and not by the Seller i.e. “UPSSCL”. E F

4. This appeal relates to the Amroha sugar mill which was one of the four loss making sugar mills owned and operated by the UPSSCL. For the unit at Amroha, a Slump Sale Agreement dated 17.7.2010 was entered into, followed by the sale deed dated 4.10.2010, between the UPSSCL and the appellant. G

5. The above arrangements were preceded by the advertisement dated 29.6.2009 in the newspaper proposing slump sale of the loss making sugar mills of UPSSCL. A pre-bid meeting was next held on 10.7.2009 with the prospective buyers where, inter alia, concern was raised on outstanding liabilities against the units on sale. The appellant submitted H

- A bid for Rs.13.94 crores for the Amroha Unit and as per Clause 12 of the Slump Sale Agreement dated 17.7.2010, all liabilities referred to in the said clause, accruing before the date of signing agreement were to be borne by the Seller and those of subsequent period, were to be borne by the Purchaser. The sale agreement was registered accordingly on 9.8.2010 and possession of the Amroha unit was taken over by the appellant on 17.8.2010 and since then the appellant has been managing the unit. Subsequent to the Slump Sale Agreement, formal sale deed was executed on 4.10.2010 and in Clause 9 thereof it was made clear that the seller shall be liable to bear all assessments, rents, rates, taxes, outgoing and impositions of whatsoever nature relating to the Unit upto
- B the signing date and thereafter these will be the liability of the purchaser. The dispute here relates to liability of unpaid duty, penalty, and interest. When recovery proceeding relating to the period prior to 17.7.2010 was initiated by the respective departments, the appellant filed a writ petition before the Lucknow Bench of the High Court of Allahabad and the said Writ Petition No.2587(M/B) of 2013 was disposed of by the High Court on 22.3.2013, with a direction to the State Government to afford hearing to the purchasers and decide their representation, with a speaking order.

6. The appellants representation was disposed of on 7.6.2016 by declaring that the purchaser is liable for the outstanding liabilities in respect of the sugar unit at Amroha upto 30.11.2011. The payable duty with penalty and interest was quantified at Rs.5,68,797/- and the issue to be decided in this appeal is whether those outstanding liabilities are to be discharged by the seller or the purchaser.

7. Before we proceed further it would be proper to take note of certain defined terms in the Slump Sale Agreement dated 17.7.2010:

F **“Certain Liabilities:**

Certain Liabilities shall mean such liabilities, debts and other obligations in respect of the Unit including contingent liabilities of Unit except Excluded Liabilities.

G **Current Liabilities:**

B. Statutory Dues

(vi) Income Tax

(vii) Sale Tax/VAT

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(viii) Entry Tax A

(ix) Others due including Purchase tax.

**Excluded Liabilities:**

“Excluded Liabilities shall mean Liabilities claimed till Signing Date which are being retained/settled by the Seller.” B

**Explanation:** For the purposes of this definition liabilities accrued but unclaimed shall not be settled or retained by the seller but the same shall stand transferred to the purchaser.

**Liabilities :** Liabilities shall mean all the liabilities on account of borrowings by the Company, and all other liabilities whether ascertained or uncertain, contingent and disputed, in relation to the Unit, any claims by or due to third parties, and labour, excise, sales tax claims etc. C

**Signing Date:**

Signing Date shall mean the date of signing of this Agreement. D

**Purchase Price:**

Purchase Price shall mean bid amount plus Net Working Capital Adjustment plus all other amount mentioned in clause3 of this Agreement. E

**Taxes:**

Taxes shall mean all and any statutory or other governmental levies, taxes charges, cess, penalties, rates, stamp duties and other dues pertaining or relating to the Sale of the Unit as contemplated herein, including but not limiting to sales tax, income tax, registration charges etc. F

**Bid Amount** Bid amount shall mean that sum of Rs. 17.01 Crores (Rupees Seventeen crores one lakh only) as mentioned by the purchaser in the Financial Proposal (RFP Application)” G

8. Clause 2.1 provided that the unit is being sold as a going concern on as is where is basis and all rights, title and interest of the seller in the unit together with all assets and liabilities except excluded liabilities are to be transferred by the seller and delivered to the purchaser. Clause 2.1 reads as under:-

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- A "2.1 In consideration of the Purchase Price to be paid by the Purchaser to the Seller in the manner set out herein and subject to the provisions of this Agreement, on the Closing Date, the Seller shall Transfer and deliver to the Purchaser and the Purchaser shall purchase, acquire and accept from the Seller, all right, title and interest of the Seller in and to the Unit, together with all Assets and Liabilities except Excluded Liabilities, as a going concern on an as is where is basis" collectively ("The Unit")"
- B 9. Clause 2.6 speaks of transfer of contingent liabilities and it provided that all contingent liabilities and legal cases shall be transferred by the seller to the purchaser and purchaser is solely liable in respect of such contingent liabilities from the signing date and the seller shall have no liabilities whatsoever in such respect. Clause 2.6 reads as under:-
- C "2.6 It is hereby further agreed between the parties that all contingent liabilities and legal cases pending in respect of the Unit, shall be transferred by the Seller to the Purchaser and the Purchaser is solely liable in respect of such contingent liabilities from the Signing Date and the Seller shall have no liabilities whatsoever in such respect.
- D 10. Clause 12 speaks of payment of taxes and stamp duty and it is stated that after signing date the purchaser shall be liable and responsible for all obligations or liabilities in respect of the operations and activities of the unit after the signing date. The following sub-clauses of Clause 12 being relevant are extracted :-
- E F "12.1 The purchaser shall save as herein expressly provided, bear, pay and discharge all assessments, rents, taxes, outgoing and impositions of whatsoever nature relating or pertaining to the operations and activities of the Unit pertaining to the period after the Signing Date. The Purchaser shall be liable and responsible for all obligations or liabilities arising from or in respect of the operations and activities of the Unit of the Seller after the Signing Date.
- G H 12.2 The purchaser shall bear, pay and discharge all liabilities, obligations, assessments, rents, rates, taxes, outgoings and impositions of whatsoever nature relating or pertaining to the operations and activities of the after the signing date.

**12.3** Save and except as herein otherwise provided, the Purchaser shall bear and pay the stamp duty, registration charges and sales tax or any other applicable tax, if any payable, on or in respect of the Transfer of the Unit. A

**12.4** Capital Gains Tax, if any payable in connection with the Transfer contemplated under this Agreement, shall be borne by the Seller." B

11. The sale deed was executed on 4.10.2010 for a total consideration of Rs. 13.94 crores and the agreement dated 17.7.2010 was made part of the sale deed. Clause 8(d) of the sale deed reads as under:- C

"8(d) All taxes, levies, cesses or any charges in respect to the Unit/Land, whether levied by a government authority, such as municipal or property tax that are due up to the date of Agreement ("Signing Date") have been paid in full by seller.

Further Clause 9 of the sale deed reads as under:- D

"9. The Seller shall be liable to bear all assessments, rents, rates, taxes outgoing and imposition of whatsoever nature relating or pertaining to the Unit up to the Signing Date and thereafter, the same shall be the liability of the Purchaser. E

12. In the speaking order dated 7.6.2016, the appellant's representation was rejected and the liability of duty, interest, and penalty, for the period prior to the date of purchase of the Amroha unit has been fastened on the appellant. The same is premised on clause 2.6 of the Slump Sale Agreement which stated that all contingent liabilities and legal cases pending in respect of the unit shall be transferred by the UPSSCL to the purchaser and the appellant as the purchaser shall be solely responsible in respect of the contingent liabilities on or after the signing date. F

13. While rejecting the challenge of the appellant to the speaking order dated 7.6.2016, the High Court relied on clause 2.1 of the agreement and adverted to the expression "except excluded liabilities in the said clause" and held that it means liabilities claimed till signing date which are retained or settled by the Seller and since tax liabilities are not shown to be part of the "excluded liabilities" and since clause 2.4 provides for transfer of all contingent liabilities and legal cases in respect of the unit, G H

- A to the purchaser, the recovery of such contingent liabilities after the signing date would only be from the purchaser and not from the seller. The appellant's challenge to the speaking order was thus negated and the writ petition came to be dismissed upholding the speaking order holding that the disputed liabilities are to be borne by the purchaser.
- B 14. The questions to be answered here are (1) whether the dues arising out of the operations and activities of the sugar unit prior to the date of acquisition is to be borne by the seller and whether subsisting dues arising out of transactions occurring on dates prior to the sale, can be characterized as contingent or conditional liability or is it an accrued liability which may be computed or discharged at a subsequent date; (2) Whether a purchaser of a sugar mill could be treated as a dealer or service provider as an entity liable for discharging dues even if they had not been acting as a dealer or service provider or otherwise as an entity on whom, liability could be fastened; (3) Whether the speaking order is vitiated, due to conflict of interest, a point which the impugned order D does not indicate was argued before the high court.
15. There is no dispute that the liability towards the duty in question for the Amroha unit are in respect of business transactions for the period anterior to the signing date of the Slump Sale Agreement. Moreover assessment orders and recovery citations have been issued by the taxing E authorities in the name of the UPSSCL. Therefore, can such liability for transactions prior to the Slump Sale Agreement dated 17.7.2010 be fastened on to the purchaser.
16. In *Bharat Earth Movers vs. Commissioner of Income Tax, Karnataka*<sup>1</sup>, on the issue of contingent liability, Justice R C Lahoti in his F opinion, which has stood the test of time, on behalf of the three Judge Bench stated the following:-
- G “4. The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date.
- H <sup>1</sup>(2000) 6 SCC 645

It does not make any difference if the future date on which A  
the liability shall have to be discharged is not certain.”

17. In the case in hand, the business liability for the Amroha unit had definitely arisen out of the operation of the unit during the period before the same was sold to the appellant, although the liability is to be quantified and discharged at a future date. When the liability is capable of being estimated with reasonable certainty, the liability is not to be treated as a contingent one and should be considered as a liability which may be discharged at a future date. Such being the position in law and the liability in question not being a contingent one, the same cannot in our view be fastened on the purchaser who were not operating the unit, prior to the Slump Sale Agreement dated 17.7.2010. C

18. Pertinently, in clause 12.1 and 12.2 of the Slump Sale Agreement read with Clause 9 of the Sale Deed, the liability of the purchaser, for the operation and activities of the unit, arose only after the signing date. This would suggest that dues relating to the activities and operation of the unit in the period upto 17.7.2010 (signing date), were the liabilities of the UPSSCL while the dues relating to activities and operation of the unit for the period subsequent to 17.7.2010, were to be the responsibility of the purchaser. The liability of the purchaser for the dues relating to activities and operations of the unit for the period anterior to 17.7.2010, could not therefore have been fastened on the appellant in view of the clear provisions made in clause 9 of the Sale Deed read with Clause 12.1 and 12.2 of the Slump Sale Agreement as both are specific in nature. In the same context, the clause 2.6 which speaks of contingent liabilities and legal cases pending in respect of the unit, to be fastened on the purchaser and the seller being absolved of such liability, are generic conditions provided under clause 2.6 of the Slump Sale Agreement and we are not impressed by those. The reason being the contradictions in the specific conditions mentioned in the Slump Sale Agreement. In such circumstances, clause 9 of the sale deed being specific in our opinion, will govern the parties and will override anything contrary, contained in the Slump Sale Agreement. G

19. Furthermore, in view of the specific and detailed provisions with regard to the distribution of liabilities in respect of the dues whereby duties in respect of the transactions upto the date of agreement are to be borne by the Seller i.e. UPSSCL and the buyer is made responsible only for dues in respect of post-sale transactions, we are unable to agree H

- A with the impugned order dated 1.11.2017 which erroneously in our view, held that the liabilities for the transactions made prior to the sale agreement, are to be borne by the purchaser.
  - 20. That apart, prior to 17.7.2010, the appellant was neither a dealer nor a manufacturer and therefore, had no tax or duty obligations
- B to satisfy for the operation of the Amroha unit. It is the UP State Sugar Corporation Limited which had collected all the dues from their customer on behalf of the State Government and they are under an obligation to deposit the collected sum in the government treasury. But for those transactions, for the period prior to 17.7.2010, the UPSSCL are trying to
- C usurp the collected sum and are trying to pass on the burden to the appellant who was neither the dealer nor they had anything to do with the operation of the unit prior to 17.7.2010. In such circumstances, the rejection of the representation of the appellant appears to be arbitrary and the speaking order could not therefore have been sustained by the High Court in the impugned judgment. In view of the foregoing, the
- D liability in question, not being a contingent liability, cannot be fastened on the shoulders of the appellant. The contrary view taken in the speaking order and in the impugned judgment are therefore found to be unsustainable. The appeal is accordingly allowed by setting aside the impugned judgment leaving the parties to bear their own cost.
- E 21. The appeals arising out of SLP (C) No. 4053 of 2018, SLP(C) No. 3537 of 2018 and SLP(C) No. 12724 of 2018 are also disposed of, in the above terms.

Divya Pandey and Anurag Bhaskar  
(Assisted by : Priyanshu Agarwal, LCRA)

Appeals disposed of.