
(2012) 10 BOM CK 0153
In the Bombay High Court
Case No : Writ Petition No. 1936 of 2012

Aditya Birla Nuvo Ltd. and Another	Vs	APPELLANT
Union of India and Others		RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Companies Act, 1956 — Section 529A
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 142, 142(1), 142A

Citation : (2013) 2 ABR 1112 : (2013) 1 ALLMR 146 : (2012) 114 BOMLR 3667 : (2013) 1 MhLj 881

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Virendra Tulzapurkar, with Mr. J.P. Sen, Mr. D.J. Kakalia, Ms. Bhavna Singh and Mr. Dhishan Kukreja instructed by Mulla and Mulla and CBC, for the Appellant; Y.R. Mishra instructed by Mr. S.D. Bhosale for Respondents 1 to 6, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—The First Petitioner, Aditya Birla Nuvo Limited, is stated to have merged with a company by the name of Birla Global Finance Limited pursuant to a scheme of amalgamation dated 27 January 2006 sanctioned by this Court. The case of the Petitioners is that on 18 June 1997 a leave and licence agreement was entered into between the Seventh Respondent, Exon Securities (India) Limited, and the predecessor-in-interest of the First Petitioner in respect of a residential flat being flat No. 1 on the 7th floor, B Wing of a building known as Lloyds Garden, Prabhadevi, Mumbai. The licence agreement was for an initial term of 11 months commencing on 1 July 1997 and ending on 31 May 1998 on a monthly licence fee of Rs. 15,000/- in respect of the premises and Rs. 2,000/- for two car parking spaces. A refundable security deposit was, according to the Petitioners, paid on the execution of the licence. Under clause 4 of the licence agreement the deposit was to be refunded by the licensor to the licensee upon the expiry or sooner determination of the agreement, after deducting amounts due and payable by the licensee and upon the licensee

handing over to the licensor quiet, vacant and peaceful possession of the premises. In the event of the licensor failing to refund the security deposit, the deposit was to carry interest at 18% per annum from the date on which the licensee was in a position to handover vacant possession until actual receipt of the security deposit. Until then, the licensee was entitled to continue use of the premises without being liable to pay any compensation until the security deposit was refunded together with interest. Admittedly, the alleged licence agreement was not renewed after the expiry of the original term on 17 May 1998.

2. The premises of the residential flat were attached on 19 June 1998 by the Customs Authorities for the recovery of amounts due and payable under Rule 5 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules 1995. According to the Customs Authorities a person by the name of Naval Kishore Bangard had fraudulently claimed a duty drawback of an amount approximately of Rs. 50 Crores without actually exporting any goods and had received the drawback in the name of his concerns or those of his family viz. M/s. Om Traders, M/s. Prime Agricom and M/s. Tropical Exotics. N.K. Bangard was one of the two partners of Om Traders, while his wife was stated to be the sole proprietor of Prime Agricom and Tropical Exotics. According to the Customs Authorities, during the course of the investigation N.K. Bangard, in a statement u/s 108 of the Customs Act 1962 confirmed that he was actually managing the three firms and that he had committed a fraud by submitting forged drawback documents in the total sum of Rs. 50.14 Crores. On 10 November 1997 show cause-cum-demand notices were issued under Rule 16 of the Customs and Central Excise Duties (Drawback) Rules, 1995 by the Drawback Department, Air Cargo Complex demanding the amount together with interest. According to the Customs Authorities, during the course of personal hearing of the case against Om Traders and Prime Agricom, N.K. Bangard admitted that he had claimed and received drawback payments by way of forged declarations and documents submitted from time to time in the name of his firm. Besides these statements, which have been made on affidavit in the reply filed by the Respondents, it has been stated that N.K. Bangard and his wife voluntarily surrendered various movable and immovable properties including the flat in question towards the recovery of the dues. An order of adjudication was passed on 27 December 1997 confirming a demand of duty drawback amounting to Rs. 16.61 Crores and Rs. 17.39 Crores against Om Traders and Prime Agricom together with interest. On the basis of the adjudication, an order and notice of attachment came to be issued on 19 June 1998 whereby the residential flat was attached.

3. The Petitioners have stated that they received a copy of the order of attachment dated 19 June 1998. The order of attachment states that flat No. 7/1 was in the name of the Seventh Respondent and that N.K. Bangard and his wife Sangeeta Bangard are the two directors of the Seventh Respondent. By a letter dated 17 July 1998, the predecessor-in-interest of the First Petitioner informed the Assistant Commissioner of Customs of the flat having been taken on leave

and licence from the Seventh Respondent and it was stated therein that it would be in order for the company to continue making the licence payments as nonpayment would jeopardize both its occupation and the security deposit. On 24 July 1998 the Commissioner of Customs addressed a communication to Birla Global Finance Limited calling upon it to pay the monthly compensation / parking charges to the Assistant Commissioner of Customs and to send a copy of the leave and licence agreement at the earliest. On 5 August 1998, the Seventh Respondent was informed that payment would be made of the licence fee to the Assistant Commissioner of Customs. On 11 March 1999 the Assistant Commissioner of Customs addressed a communication stating that the premises have been attached on 19 June 1998 and calling upon the predecessor-in-interest of the First Petitioner to vacate the premises by 30 April 1999. On 25 March 1999 the Petitioners by their reply stated that they have furnished a security deposit of Rs. 30 lacs and since the flat had been attached, they would seek an assurance of a refund of the security deposit. In the meantime, it was stated that the licence fees have been continued to be paid to the Customs Department. On 12 April 1999 the Assistant Commissioner of Customs called upon Birla Global Finance to vacate the premises forthwith in response to which a communication was addressed on 16 April 1999 adverting to the licence agreement and the payment of the security deposit in the amount of Rs. 30 lacs.

4. A writ petition under Article 226 of the Constitution was filed by the Petitioners being Writ Petition 1759 of 1999 seeking to challenge the notices issued by the Assistant Commissioner of Customs on 11 March 1999 and 12 April 1999 requiring the Petitioners to handover vacant possession. The Petition was disposed of by a Division Bench of this Court by an order dated 22 September 1999, in the following terms :

learned counsel for the respondents makes a statement that the petitioners will be dispossessed from the property only after following due process of law. The above statement is accepted. In view of the above, this writ petition is not pressed. Writ petition is disposed of accordingly.

5. On 16 August 2005 the Assistant Commissioner of Customs once again called upon Birla Global Finance Limited to vacate the premises within 48 hours. The Petitioners addressed a communication dated 18 August 2005 stating that they were ready and willing to handover vacant possession, "against refund of their security deposit as provided under the leave and licence agreement ". A further notice was addressed on 30 August 2005 and on 23 October 2007 the Petitioners were called for a personal hearing. The personal hearing was stated to be adjourned on 7 December 2007. On 29 October 2010 the Joint Commissioner of Customs intimated to the Petitioners that the premises were being considered for auction with the security deposit of the Petitioners as an encumbrance. The Petitioners were informed that the deposit amount would be delivered by the highest bidder in terms of the sale agreement. The Petitioners were also called upon to furnish evidence of the deposit made. By a letter dated 6 December

2010, the Petitioners furnished through their advocates a photocopy of a receipt evidencing the payment of the deposit in the amount of Rs. 30 lacs. By another communication dated 29 November 2010 the Joint Commissioner of Customs informed the Petitioners' advocates that since the amount was paid by the Petitioners to the Seventh Respondent, their claim for interest on deposit would lie against the Seventh Respondent and not the government. By a letter dated 19 January 2011 the Petitioners responded to the communication. On 29 January 2011 the Joint Commissioner of Customs informed the Petitioners that it was intended to advertise only the deposit amount as an encumbrance while issuing the auction notice. By their advocate's letter dated 21 February 2011 the Petitioners claimed that they were entitled to the payment of not only the security deposit of Rs. 30 lacs but also interest thereon in terms of the agreement. On 5 August 2011 a communication was addressed to the Petitioners stating that the premises had vested in the Government of India. The Petitioners were called upon to furnish a copy of the lease deed, particulars of payment towards licence fees and other documents. The Petitioners have claimed that on 23 June 2011 they received a copy of a letter from Deputy Commissioner of Customs (Exhibit X) where the department reiterated that only the deposit would be advertised as an encumbrance while issuing the auction notice. Thereafter correspondence has been exchanged between the Petitioners and the Customs Authorities. The Petitioners have reiterated their entitlement to the refund of the security deposit of Rs. 30 lacs together with interest. On the other hand, the Customs Authorities have called upon the Petitioners to vacate the premises on the basis that the flat was to be auctioned. In the month of May 2012 the pay orders furnished by the Petitioners for the payment of monthly compensation and parking charges for the month of April 2012 were returned. On 10 August 2012, the Deputy Commissioner of Customs issued an order and called upon the Petitioners to vacate the flat. Eventually an auction notice was issued on 6 September 2012 for the sale of the residential flat. The Petitioners were informed on 3 September 2012 of the auction and were called upon to vacate the flat. The auction notice (Exhibit LL) states that the department had made its best efforts to ascertain the quantum of the outstanding amount in respect of the properties offered for auction but, it shall be the responsibility of every bidder to ascertain facts and to bear any outstanding amount that may come to light at any time. The grievance of the Petitioners is that though the department had made a specific commitment atleast in respect of the security deposit, the auction notice is completely silent in regard thereto.

6. On behalf of the Petitioners, it has been urged by the learned Senior Counsel that :

i) The order of attachment dated 19 June 1998 is a nullity and without jurisdiction. It has been urged that the flat admittedly belongs to the Seventh Respondent which is a company incorporated under the Companies Act 1956. The Seventh Respondent, it has been submitted, was admittedly not a defaulter and the flat could not hence be attached or sold in realization of the dues of N.K.

Bangard and his family concerns. It was urged that even if N.K. Bangard and his wife were the two directors of the Petitioners, the residential flat belongs to a private limited company which has a distinct corporate personality of its own and cannot be attached or sold;

ii) The Petitioners, it is urged, are entitled to use and occupy the residential flat in terms of the licence agreement dated 18 June 1997 until the security deposit is refunded together with interest. Reliance in that regard is placed on the judgment of a Division Bench of this Court in *Sumikin Bussan (Hong Kong) International Limited Vs. Manharlal Trikamdas Mody and ING Bank, N.V., .;*

iii) The Petitioners are admittedly in occupation of the residential flat and have continued to remain in settled use and occupation at any rate since prior to the date on which the flat was attached. The Customs Authorities have accepted licence fee from the Petitioners until May 2012. A solemn statement was made before the Court in the earlier writ petition on 22 September 1999 that the Petitioners would not be dispossessed without due process of law. Due process of law would not be met by the Assistant Commissioner of Customs passing an order calling upon the Petitioners to vacate the residential flat. In the circumstances, the occupation of the Petitioners in respect of the flat would have to be protected.

7. On the other hand, it has been urged on behalf of the Respondents that

i) The original leave and licence agreement is admittedly not forthcoming. Though the Customs Authorities have repeatedly called upon the Petitioners to produce the leave and licence agreement, the original has not been produced, though clause 21 of the purported deed of licence specifies that the licensee was to retain the original. The genuineness and authenticity of the document is seriously in doubt;

ii) There are several other contemporaneous circumstances which cast grave doubt on the authenticity of the alleged deed of licence. These including the fact that the typed copy of the document which was produced along with the petition contains a reference to the payment of the security deposit being made on 18 January 1997, which would be much prior to the execution of the licence on 18 June 1997. Similarly, the receipt which was produced earlier is of 18 January 1997. However, the photocopy of the licence deed which has been produced in a subsequent affidavit reflects that the payment has been made on 18 June 1997 and even the cheque number does not tally. The bank statement which has been produced is not a certified extract;

iii) The residential flat in the present case though in the name of the Seventh Respondent was surrendered by N.K. Bangard voluntarily during the course of the adjudication proceedings, and he had admitted during the course of his statement u/s 108 that he had fraudulently obtained a duty drawback from the customs department without exporting any goods;

iv) Even though the residential flat is in the name of the Seventh Respondent, N.K. Bangard and his wife were the only two directors of the private limited company and it is open to the Revenue to lift the corporate veil.

The rival submissions now fall for consideration.

8. Section 142 of the Customs Act 1962 provides for the recovery of sums due to government under the Act. Under Clauses (a) and (b) of sub-section (1) of Section 142, two modalities are provided for the recovery of amounts due and payable. Under clause (c) of sub-section (1) of Section 142, it has been stipulated that if the amount cannot be recovered in the manner provided in clauses (a) and (b), the Assistant Commissioner of Customs or Deputy Commissioner may prepare a certificate and forward it to the Collector for recovery as if it were an arrear of land revenue. Sub-clause (ii) of clause (c) of Section 142(1) provides as follows :

(ii) the proper officer may, on an authorisation by Commissioner of Customs and in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person.

Under the aforesaid provision on an authorisation by the Commissioner, the proper officer is empowered in accordance with the rules made in that behalf to distrain any movable or immovable property belonging to or under the control of such person. The expression "such person " necessarily refers to the person by whom any sum is due and payable to the Central Government. If the amount remains unpaid for a period of thirty days, the proper officer is empowered to cause the property to be sold. The proceeds of the sale can be utilized to satisfy the amount payable, while the surplus, if any, is to be returned to such person. u/ s 142A 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 shall constitute a first charge on the property of the assessee. The only exception is as otherwise provided in Section 529-A of the Companies Act, 1956, the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

9. In pursuance of the powers conferred by Section 142, the Central Government has framed the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules 1995. Rule 3 provides for the issuance of a certificate where government dues are not paid by any defaulter. Under Rule 4, on receipt of a certificate a notice is required to be served on the defaulter calling upon him

to pay the amount specified in the certificate within seven days. Rule 5 stipulates that if the amount mentioned in the notice is not paid within seven days, the proper officer may proceed to realise the amount by attachment and sale of the defaulter's property. Rule 15 provides for the sale of the property. Rule 17 provides for the proclamation of the sale and Rule 18 for the contents of the proclamation. Under Rule 23 it has been specified that where any property is sold in terms of the Rules, there shall vest in the purchaser the right, title and interest of the defaulter at the time of the sale even though the property itself be specified. Under Rule 23(2) where immovable property is sold in terms of the Rules and the sale has become absolute, the purchaser's right, title and interest shall be deemed to have vested in him from the time when the property is sold and not from the time when the sale becomes absolute. Rule 27 provides for the disposal of the sale proceeds. The sale proceeds are required to be first utilized for meeting the costs of sale; the balance has to be utilized for the satisfaction of the amount mentioned in the certificate issued under Rule 3, while the balance if any can be utilized for the recovery of any other government dues payable by the defaulter. Any surplus, that remains, is to be paid to the defaulter.

10. Significantly neither the provisions of Section 142 of the Customs Act 1962 nor the provisions of the Rules framed thereunder provide for the vesting of the property without encumbrance. There is no provision under which any encumbrance in respect of the property is to get divested. On the contrary, it is evident from Rule 23(1) that what is vested in the purchaser is the right, title and interest of the defaulter in the property.

11. The bone of contention in the present case is in regard to the authenticity of the leave and licence agreement which is sought to be challenged by the Customs Authorities. In the petition as it was originally filed, a typed copy of the leave and licence agreement was annexed at Exhibit A to the petition. Clause 21 of the leave and licence agreement stipulates that the agreement shall be executed in duplicate and the original shall be retained with the licensee while the duplicate would be with the licensor. During the course of the hearing of these proceedings, it has been admitted by the learned Senior Counsel appearing on behalf of the Petitioners that the Petitioners do not have an original of the licence agreement. The receipt clause that is mentioned in the typed copy of the agreement at Exhibit A to the petition states that an amount of Rs. 30 lacs was paid by cheque No. 023928 dated 18 January 1997 drawn on Citibank. Apart from this, the photocopy of the receipt which was produced by the Petitioners' advocate on 6 December 2010 (Exhibit S) shows a payment of the security deposit by the same cheque dated 18 January 1997 (cheque No. 023928 drawn on Citibank). However, in a subsequent affidavit that has been filed in these proceedings on 1 October 2012 a photocopy of the leave and licence agreement has been produced. The receipt clause contained in the agreement refers to a payment of Rs. 30 lacs by a cheque dated 18 June 1997 bearing No. 723928 drawn on Citibank. The Petitioners have also relied upon a payment voucher, a photocopy of the cheque and a bank statement (which however is not certified).

Counsel appearing on behalf of the Revenue has in these circumstances submitted that it would be inappropriate for this Court in the exercise of its jurisdiction under Article 226 of the Constitution to accept the authenticity of the alleged leave and licence agreement. Apart from the discrepancies which have been adverted to earlier, it has been submitted that the photocopy of the agreement which is produced on the record does not contain any reference on the stamp paper to the name of the vendor or the date of the stamping.

12. In our view, it would not be appropriate for this Court in the exercise of its jurisdiction under Article 226 of the Constitution to enquire into a wholly disputed question in regard to the authenticity of the purported leave and licence agreement, a copy of which was initially produced at Exhibit A to the Petition and a photocopy of which has been produced at Exhibit A to the subsequent affidavit dated 1 October 2012. The discrepancies to which a reference has been made earlier only indicate to the Court that in a matter which involves a dispute in regard to the authenticity of the document, it would not be appropriate for this Court under Article 226 to determine whether the document which is produced on the record is in fact genuine.

13. But having said this, it is also to our mind evident that the Petitioners are admittedly in use and occupation of the residential flat in question. As the material on the record would indicate, the use and occupation of the Petitioners has been to the knowledge of the Customs Authorities right atleast from July 1998. The Petitioners have paid monthly compensation and licence fees in respect of the flat to the Customs Authorities from August 1998 until March 2012 after which the authorities have declined to accept payment. As the record would indicate, in a series of letters, the officers of the Customs Department had indicated to the Petitioners that while advertising the auction of the residential flat, they would include the security deposit of Rs. 30 lacs which the Petitioners had claimed to have paid to the Seventh Respondent, which would be treated as an encumbrance. When the earlier writ petition came up before this Court on 22 September 1999, a Division Bench of this Court recorded the statement of the Union of India and the Customs Authorities that the Petitioners would be dispossessed from the property only after following due process of law. The record does not indicate that due process of law has been followed by the Customs Authorities. Merely addressing letters to the Petitioners to vacate the premises would not constitute due process of law. In view of the fact that the Petitioners are in use and occupation of the residential flat, it will be necessary for the Court to direct that they shall not be deprived of the use and occupation of the flat unless and until the Customs Authorities take recourse to due process of law. The Deputy Commissioner of Customs has not exercised any statutory power which enables him to pass an order of eviction.

14. In the view which we have taken, it has not been necessary for the Court to consider the legitimacy of the attachment notice that was levied by the Customs Authorities. We decline to undertake that exercise at the behest of the

Petitioners. Above all, it is a matter of some significance that the Seventh Respondent as the owner of the residential flat has consciously refrained from challenging the attachment notice that was levied by the Customs Authorities. We are, therefore, not inclined to entertain that challenge at the behest of the Petitioners, particularly when the licence agreement upon which the Petitioners rely is a wholly disputed document. In the circumstances, we dispose of this Petition by quashing and setting aside the order dated 10 August 2012 passed by the Deputy Commissioner of Customs calling upon the Petitioners to vacate the premises. While doing so, we grant liberty to the Respondents to seek possession of the premises by taking recourse to due process of law. We also clarify that this order shall not interdict the sale of the residential flat by the Customs Authorities, subject to what has been stated earlier. Rule is made absolute in the aforesaid terms.

There shall be no order as to costs.