(1998) 11 CAL CK 0021

In the Calcutta High Court

Case No : A.P.O. 373 of 1995, C.A. No. 217 of 1995 and C.P. No. 510 of 1989

Collector of Customs APPELLANT

Vs

Dytron (India) Ltd. RESPONDENT

Date of Decision : 05-11-1998

Acts Referred:
Companies Act, 1956 — Section 529, 529A, 530
Customs Act, 1962 — Section 111, 2(26), 47, 61, 61(2)

Citation : (1999) 108 ELT 342

Hon'ble Judges : Ruma Pal, J;Basudev Panigrahi, J

Bench : Division Bench

Advocate : Asim Kumar Banerjee, for the Appellant;I.P. Mukherjee, for the Respondent

Judgement

Ruma Pal, J.—The question which arises in this appeal relates to the right of the Customs Authorities to claim payment of duty and other charges in respect of goods imported by a company which has subsequently gone into liquidation.

2. The company in question is Dytron (India) Limited (hereinafter referred to as the ''company''). The application for winding up of the company was filed by East West Construction and Builders Private Limited in 1998 (O.P No. 510 of 1988). Subsequent thereto the company went into liquidation and the Official Liquidator took possession of the assets of the company. The company had, prior to its liquidation, imported certain chemicals. The chemicals were stored with the Bengal Bonded warehouse without payment of Duty. The Official Liquidator took inspection of the chemicals pursuant to an order of Court. The chemicals were valued. Valuation Report was submitted. On 7th February, 1995 and 8th February, 1995 the Official Liquidator issued advertisements for sale of the chemicals describing them as the assets of the company. The terms and conditions of the sale provided that the chemicals were being sold on ''as is where is basis''. The offers were to be accompanied with 20 per cent of the bid amount. The successful bidder was to deposit the balance purchase price within a

period of 90 days from the date of sale by the Court. Upon failure to make payment of the balance price the earnest money was to stand forfeited and the chemicals sold at the risk and cost of the defaulting bidder.

3. The Subhyog Chemical Industries Limited (hereafter referred to as purchaser) was declared as the highest bidder for the chemicals at a price of Rs. 64.25 lakh. Its offer was accepted by order dated 6th April, 1995 and it was directed to make payment of the balance consideration money within the time as prescribed by the Sale Notice and/or the terms and conditions of sale. It was made clear by the order dated 6-4-1995 that delivery was to be given only after the payment of the entire balance purchase price. A sum of Rs. 12.20 lakh had been paid till that date.

4. The purchaser, however, did not make payment of the balance amount and prayed for time to make payment of the same by instalments. By order dated 28-4-1995 the purchase was given liberty to deposit the balance purchase price in three instalments. It was again made clear by the said order that the delivery would be only after payment of the entire consideration money.

5. By 23rd June, 1995 the purchaser had paid a sum of Rs. 26 lakh. It was directed to pay a further sum of Rs. 4 lakh in course of the day. The purchaser prayed that out of 826 barrels of phenol, 275 barrels of phenol should be delivered to the purchaser in part. As the purchaser had undertaken to Court that he would pay the entire balance purchase price within the time stipulated i.e. 6th July, 1995, the Official Liquidator did not oppose part delivery of 275 barrels of phenol to the petitioner. The purchaser had taken delivery of these barrels.

6. By 5th July, 1995 the purchaser had paid Rs. 35 lakh. It prayed before the Company Court for delivery of the balance 551 barrels of phenol. The Official Liquidator was directed to allow a further delivery of 551 barrels of phenol. The purchaser undertook to pay the balance within 13th July, 1995. However, no further payment has been made by the purchaser.

7. The Customs authorities and the Bengal Bonded Warehouse approached the Court and prayed that they should not be directed to deliver the goods to the purchaser until and unless their claims on account of Customs Duty, warehousing charges etc. were realised. The Court however, by order dated 28th June, 1995 merely directed the Official Liquidator to retain the sale proceeds in a separate account until further orders and directed the Customs Authorities and the Bengal Bonded Warehouse to deliver the goods in terms of the orders of this Court. As far as the claimants were concerned it was directed that the Customs authorities and the Bengal Bonded Warehouse could approach the Court for appropriate direction. The Customs authorities and Bengal Bonded Warehouse were directed to render "every possible assistance in the matter of delivery of the goods."

8. According to the Customs Authorities to avoid proceeding in contempt, delivery of the goods was given as directed by the Courts orders dated 23rd

June, 1995 and 28th June, 1995. The Customs Authorities have preferred this appeal from orders dated 28th April, 1995, 23rd June, 1995, 28th June, 1995 and 5th July, 1995 on September 1995. An order was passed on 28th September, 1995 by the Appeal Court directing the Official Liquidator to retain the sale proceeds of the assets of the company in liquidation until further orders of this Court. The stay application was disposed of on 8th January, 1996 by directing the Official Liquidator to set apart the amount received by it from the purchaser in a separate account. After deducting the amount paid by the purchaser, the balance amount realised by the Official Liquidator from the sale of the other assets of the company was directed to be distributed amongst the creditors of the company.

9. In the meanwhile the purchaser had made an application before the learned Single Judge for cancellation of the sale. The application has since been dismissed.

10. Before us it was contended by the Customs Authorities that by virtue of the provisions of the Customs Act, 1962 the goods could not have been removed from the warehouse at all without payment of the import duty and the interest accumulated thereon. It is said that any such removal was in centravention of law. It is further stated that the customs had a statutory right to confiscate the goods and to sell the same for realisation of duty and interest and other charges which right has been taken away from the Customs Authorities by the orders under appeal. It is. stated that until the duty was paid on the chemicals, the chemicals could riot be treated as part of the assets of the company which was available for sale and disposal. Decisions of the Supreme Court have been relied upon in this context which will be referred to at an appropriate stage.

11. The learned Counsel on behalf of the Bank of India has stated that the claim of the customs authorities would have to be determined in terms of Section 529A and Section 530 of the Companies Act, 1956 which is a special statute dealing with priorities amongst creditors to the assets of the company. It is further stated that no copy of the assessment order had been made available to the Official Liquidator and that the claim of the Customs Authorities was lacking in material particulars. It is finally submitted that the amount of Duty claimed by the Customs Authorities should be paid by the purchaser, as the purchaser had in effect stepped into the shoes of the company and was, therefore, liable to make payment of the dues of the company in respect of the chemicals.

12. The purchasers has denied its liability to make payment of the Customs Duty in respect of the chemicals over and above the purchase price. Incidentally the purchaser took a preliminary objection by stating that no list of dates relevant to the question of limitation had been filed in terms of the undertaking given by the appellant to Court when the appeal was admitted without a certified copy.

13. The chemicals in question were imported by the company prior to 1988. They were stored in the warehouse belonging to Bengal Bonded Warehouse under Chapter 9 of the 1962 Act. Chapter 9 provides inter alia not only for the

permission for warhousing but also for payment of rent and warehouse charges, the owner''s right to deal with warehoused goods and also the clearance of warehoused goods for home consumption.

14. The last is covered by Section 68 which reads as follows :-

"The importer of any warehoused goods may clear them for home consumption if -

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer."

15. It is clear, therefore, from the wording of the Section that the goods cannot be cleared by reason of the statutory embargo on the payment of duty, interest, rent etc.

16. The provision contained in Section 68 is reinforced by Sections 71 and 72 of the 1962 Act. Section 71 provides that goods are not to be taken out of the warehouse except as provided by the Act. Section 72 provides :

"(1) In any of the following cases, that is to say, -

****

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted u/s 61 to remain in a warehouse;

****

the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods."

17. In default the Customs Authorities have the right to detain and sell the goods for realising their duties.

18. Section 111 which deals with confiscation of improperly imported goods specifically provides for the confiscation of goods by the customs Authorities, if inter alia dutiable goods are removed from Customs area of warehouse without the permission of the proper officer or contary to the terms of such permission [111(j)]. The power of confiscation includes the power of sale. In addition a violation of Section 111 may also render the importer liable for penalty.

19. The Supreme Court has clarified the matter authoritatively in the decision of N.K. Bapna v. Union of India and Ors. reported in (1992) 3 SCC p. 513 by stating

that where goods are sought to be removed clandestinely from the warehouse without permission of the Customs Authorities, it is open to the Customs Authorities either to confiscate the goods or to collect the duties payable thereon,

20. In this case the Customs Authorities have stated that it raised the claim against the company u/s 72(1) of the 1962 Act demanding duty and interest and issued a detention-cum-sale notice u/s 72(2). It is stated that the proceedings before the Company Court for sale of the chemicals had been done without any notice whatsoever to the Customs Authorities. It is also stated by the Customs Authorities that it had requested Official Liquidator to pay a sum of Rs. 27,05,628.00 towards the duties and interest leviable in respect of the 275 barrels of phenol cleared under the order dated 23rd June, 1995.

21. According to the Customs Authorities by virtue of the second order dated 28th June, 1995 by virtue of which 551 barrels were delivered to the purchasers. The Customs were entitled to a total amount of Rs. 41,53,244/- on account of the duty and interest under the 1962 Act.

22. A break-up of the calculations has been given by the Customs. Authorities. This break-up has not been disputed by the only other creditor who is opposing the application nor indeed by the Official Liquidator.

23. The Customs Authorities are correct in their submission that until and unless their duties and statutory dues are paid under the provisions noted above, the chemicals were not available legally for sale to the purchasers at all. That is to say the assets would form a part of the assets of the company available for distribution by virtue of liquidation subject to payment of the Customs Duties and interest etc. The provisions of Sections 529 and 530A of the Companies Act, 1956 apply to situations where the claim of creditors in respect of the sale proceeds of the assets of the Company sold in liquidation are to be determined. The Customs Authorities claim to the chemicals in question, in which the Customs Authorities had a statutory right of detention and confiscation, had to be met before the chemicals could be validly sold as assets of the company in liquidation. The claim of the Customs Authorities would, therefore, stand outside proceedings under Sections 529, 529A and 530 of the 1956 Act.

24. Regarding the claim of interest by the Customs Authorities, Section 61(2) of the Customs Act, 1962 provides that warehoused goods may be kept in the warehouse for one year without payment of duty. Thereafter if the goods continue to remain in the warehouse interest would be payable at such rate as is specified in Section 47 on the amount of duty on the warehoused goods for the period from the expiry of the period of one year till the date of the clearance of the goods from the warehouse. The claim for interest is also covered by the provisions of Sections 68 and 72. The calculation of interest has been made for the period only between the date of expiry of the bonding period and the date of delivery.

25. The final contention of the Bank of India that the amount of Duty should be

paid by the purchasers is incorrect. The duties etc. on the chemicals were payable by the importer. The word ''importer'' has been defined in Section 2(26) of the Customs Act.

"2(26)'' importer'', in relation to any goods and any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer."

26. In this case, the importer was the company and now by operation of law upon liquidation, is the official Liquidator. It cannot be said that the purchasers has stepped into the shoes of the company as far as the liability to make payment of duty is concerned. The sale was by the company or at least its representative in interest to a third party. The sale should have taken place after payment of duty by the company or its representative in interest. The payment of duty remained that of the company''s or that of the company''s representative or of the Officer Liquidator representing the company.

It is also of significance that neither the sale notice nor the terms and conditions of sale cast any obligation upon the purchaser to make payment of the duty on the goods. On the other hand, several orders which have been passed in favour of the purchaser have not only confirmed the sale in favour of the purchaser at the stated price but have also given the purchaser the right to remove the same upon payment of that price alone and of no further amount. This submission of the Bank of India is, accordingly, rejected.

27. The report of the Registrar, O.S., shows that although the requisitions were put in on time after leave was granted by the Court, no certified copy of the orders under appeal were issued because the number of the matter was not given in the requisitions.

28. If the requisitions were defective, it was incumbent upon the department to have pointed this out to the Advocate filing the same at the time of acceptance of the requisitions. The litigant cannot be foisted with the laches on the part of the department.

29. In any event, the appellant was not a party to the proceeding and sufficient particulars have been given in the requisitions, namely, the name of the Company, Cause Title, date of the order as well as the name of the Judge passing the order.

30. The explanation given for non-drawing up of the order and non-issuance of certified copy is unacceptable. Be that as it may, it is clear that the point of limitation, taken by the respondent purchaser, does not survive and is, accordingly, rejected.

31. In the circumstances, the appeal must be allowed. However, it must be stated that the appeal from the order dated 28th April, 1995 is misconceived as it did not directly affect the Customs Authorities. The orders dated 23rd June, 1995 and 28th June, 1995 have unfortunately been already given effect to.

Nevertheless, the Customs Authorities cannot be deprived of their rights merely because the sale of the warehoused goods has taken, place without payment of duty or their statutory claims. The learned Judge erred in not passing any order on 5th July, 1995 permitting the Customs Authorities at least to realise their statutory dues and thus regularize the sale ex post facto which was otherwise held in contravention of the clear provisions of statute.

32. The Official Liquidator will, accordingly, make over to the Customs Authorities the amount as claimed including the interest. As the amount with the Official Liquidator does not cover the entire dues of the Customs Authorities, the Customs Authorities will also be entitled to realise the balance claim from any further sums that the purchaser may pay on account of the sale of the chemicals. The creditors of the company will be entitled to the balance after the Customs Authorities'' demands on account of Duty and interest have been met. The Customs Authorities are at liberty to appropriate the sum of Rs. 35 lakh together with the interest accumulated thereon against their claims in protanto satisfaction of their dues and without prejudice to their right to claim the balance. The Official Liquidator shall make the said payment within a period of two weeks from date.

33. Prayer for stay of operation of this judgment and order is made on behalf of the Bank which is refused.

34. Let xerox copies of this judgment and order, duly countersigned by the Assistant Registrar of this Court be made available to the parties upon their undertaking to apply for and obtain certified copies thereof on payment of usual charges.

