(2006) 07 GUJ CK 0052

In the Gujarat High Court

Case No : Company Application No. 172 of 2005 in Company Petition No. 152 of 1995

Commissioner of Customs APPELLANT

Vs

O.L. of GIL Hospitals Ltd. and Others RESPONDENT

Date of Decision : 06-07-2006

Acts Referred:
Companies (Court) Rules, 1959 — Rule 11, 6, 9
Companies Act, 1956 — Section 446, 446(1), 446(2), 450(3), 456
Customs Act, 1962 — Section 126, 126(1)

Citation : (2008) 145 CompCas 217

Hon'ble Judges : A.S. Dave, J

Bench : Single Bench

Advocate : Mrugesh Jani, Saurabh G. Amin, for the Appellant; Utkarsh Jani, for Bharat Jani, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Dave, J.—Shri Saurabh Amin, learned advocate appearing for the applicant, Shri Mrugesh Jani, learned advocate appearing for the official liquidator and Shri Utkarsh Jani, learned advocate appearing for respondent No. 2. Respondents Nos. 3, 4 and 5 are served.

2. By this application, the applicant-Commissioner of Customs, Import and General, New Delhi, has prayed for taking out judges'' summons u/s 456 read with Section 457 of the Companies Act and Rule 6 read with Rules 9 and 11 of the Companies (Court) Rules, 1959, with a prayer clause that direction be issued to the official liquidator of GIL Hospitals Ltd. (in liquidation) to hand over the possession of 13 medical equipments as described at annexure "A" to the affidavit filed in support of the judges'' summons to the applicant since the property is vested in the Central Government with effect from October 30, 1999, by virtue of Section 126 of the Customs Act, 1962.

3. It is, inter alia, prayed that pending hearing and final disposal of this

application, a direction be issued to the respondent not to sell, transfer, assign or, in any manner, dispose of the above properties and further prayer to award appropriate damages to the applicant for having taken possession of the above property, unauthorisedly.

4. An affidavit filed in support of judges'' summons dated April 15, 2005, reveals that an order dated February 11, 2004, was passed in Company Petition No. 152 of 1995 by which M/s. GIL Hospitals Ltd. (now known as Mayo Hospital) came to be wound up and the official liquidator was directed to take charge of all the properties and assets of the said company.

5. It is averred that by virtue of the aforesaid order, the official liquidator has taken over all the assets of the company (in liquidation) including 13 medical equipments, which came to be vested in the Central Government with effect from October 30, 1999, by virtue of the order passed by the Commissioner of Customs, Air Cargo, New Delhi.

6. It is the case of the applicant that the company in liquidation-M/s. GIL Hospitals Ltd. had imported 13 medical equipments, described at annexure "A" to the application, in the year 1992 valued at the sum of Rs. 9,20,60,513 and the company had also availed custom duty benefit of Rs. 3,98,20,933 as per the exemption under Notification No. 64 of 1988 issued by the Customs Department on March 1, 1988 and had cleared the goods duty free. Since the company did not fulfil the condition of treating at least 40 per cent. of outdoor patients free of charge and, therefore, in view of the breach of condition, a show-cause notice came to be issued on January 27, 1998 and after considering all other aspects, finally the order dated October 30, 1999, came to be passed by which goods at annexure "A" to the application were declared liable for confiscation and ultimately, came to be confiscated.

7. It is the case of the applicant that by virtue of Section 126(1) of the Customs Act, when the goods are confiscated, the same vest in the Central Government. Thus, the officer adjudging confiscation shall take and hold possession of the confiscated goods. Even the option given to the company for redemption on payment of redemption fine was also not availed and the order dated October 30, 1999, which came to be challenged before the CEGAT, also failed and appeal came to be dismissed by order dated May 31, 2001, as per annexure "C" to the application.

8. It is stated that subsequently, the applicant came to know about appointment of provisional liquidator by this Court, who had taken over charge of the assets of the company, including the 13 medical equipments and, therefore, the applicant addressed a letter on January 22, 2002, that 13 medical equipments are already confiscated by the applicant and possession of the same be handed over to the Central Government.

9. As stated earlier, the official liquidator was directed to take over all the assets by virtue of the order of winding up dated February 11, 2004. An advertisement

also came to be published on December 27, 2004, inviting offers for purchase of assets of the company (in liquidation) including the medical equipments. Therefore, the applicant is constrained to file this application with the prayers mentioned in earlier paragraph.

10. Pursuant to the notice issued by this Court, the official liquidator has filed his report on January 6, 2006 and it is submitted that Company Petition No. 152 of 1995 filed against GIL Hospitals came to be admitted and advertised as per the order dated November 17, 1998, passed by this Court and by an order dated February 16, 1999, this Court had appointed the official liquidator as provisional liquidator of the company with directions to prepare inventory of all the assets and properties of the company and to take charge thereof. Since the company was managing the hospital and it was in a working condition, this Court thought it fit to direct the official liquidator to hand over possession of the hospital to the managing director of the company, as an agent of the official liquidator, with a liberty to the managing director to work out a viable and proper scheme and submit a proposal, to revive the company, to the court. In view of the above order, after taking over possession of the assets and properties of the company and after preparing inventory thereof, the official liquidator handed over possession of the hospital to the managing director of the company as an agent of the official liquidator. Thus, by virtue of appointment as a provisional liquidator as per order dated February 16, 1999, possession of the assets and properties including 13 medical equipments was taken over by the official liquidator. However, no proposal or suitable scheme came to be proposed by the managing director of the company and possession of the assets was taken back by the official liquidator on May 31, 2002 and thereafter, when the final winding up order of the company came to be passed on February 11, 2004, the official liquidator was already in possession of the assets including 13 medical equipments since February 16, 1999.

11. It is further contended that once the provisional liquidator is appointed u/s 450(3) of the Companies Act, 1956, the provisional liquidator can exercise all the powers available to him u/s 457 of the Companies Act and by virtue of Section 456(1) of the Companies Act, 1956, all the assets and properties of the company remain in the custody, possession and control of the official liquidator. Thus, on appointment of the official liquidator as provisional liquidator on February 16, 1999, the official liquidator has become custodian of the assets and properties and thereafter any order passed by the customs authority will have no bearing. In the present case, the order of confiscation came to be passed by the custom authority on October 30, 1999, i.e., after the appointment of official liquidator as provisional liquidator on February 16, 1999 and particularly, in view of the provisions of Section 446 of the Companies Act, 1956, that no permission or leave was sought by the applicant of the company court, the order of confiscation is a nullity and the official liquidator is empowered to sell the assets and properties of the company in liquidation. It is submitted that at the most, the applicant can lodge its monetary claim in Form No. 66 prescribed under the

Companies (Court) Rules, 1959 and otherwise also, as per the letter dated January 22, 2002, addressed by the authority to the official liquidator, claim is preferred as per Section 530 of the Companies Act and it can be decided accordingly.

12. In a rejoinder submitted to the report of the official liquidator, the applicant has submitted that Section 446 of the Companies Act, 1956, is not applicable in the present case since the second part of Sub-section (1) of Section 446 applies to suits or other legal proceedings pending on the date of winding up orders and it bars continuation of the same even without the permission of the court after the winding up order is passed. Therefore, according to the applicant, Section 446(1) does not prohibit continuation of pending proceedings for which any permission of the company court is required. It is further contended that it was the duty of the provisional liquidator and his agent to appear in the adjudicatory proceedings pending before the customs authority, in view of the show-cause notice dated January 27, 1998, issued upon the company. Another contention raised in the said rejoinder is with regard to provisions of Section 457 and it is submitted that the official liquidator can only sell those properties which belong to the company and by virtue of Section 126 of the Customs Act, 13 medical equipments came to be vested in the Central Government. By virtue of order dated October 30, 1999, the Central Government has become owner and, therefore, the case of the applicant deserves consideration and the same may be allowed.

13. I have heard learned advocates appearing for the respective parties. Learned advocate Shri Mrugesh Jani appearing for the official liquidator has submitted, on the basis of the official liquidator''s report, that no permission is sought by the applicant as required under Sub-section (1) of Section 446 of the Companies Act and when the provisional liquidator was already appointed by this Court on February 16, 1999, the order of confiscation passed on October 30, 1999, later in time, is void and will have no effect and consequence on the exercise of powers by the official liquidator in his capacity as a provisional liquidator. It is further submitted that it is well-established by the decision of the apex court reported in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, that the claim of a secured creditor will prevail over crown debts. The learned advocate has also referred to provisions of Sections 529, 529A and 530 of the Companies Act, 1956 and submitted that Revenue can claim its dues only u/s 530 and not otherwise.

14. Shri Utkarsh Jani, learned advocate appearing for one of the secured creditors has relied on the decision of the Madras High Court in the case of ICICI Bank Ltd. v. Official Liquidator, High Court, Madras [2005] 124 Comp Cas 550 : [2005] 3 BC 286 , reiterating the provisions of law laid down by the apex court about claim of secured creditors prevailing over crown debts. He has further relied on in the case of Sri Vishnupriya Industries Ltd. Vs. Superintendent of Central Excise and Customs and Others, and submitted that the Revenue has to prove its claim before the official liquidator by placing necessary material in

support of its claim. In the above case, he has submitted that the goods were detained by the authority for recovery of Government dues and the learned judge held that upon passing of order of winding up, assets of the company stand vested in the official liquidator and he alone is entitled to deal with the effects and actionable claims to which the company is or appears to be entitled.

15. Shri Saurabh Amin, learned advocate appearing for the applicant has submitted that it was not necessary for the applicant to seek leave of the company court, as required under Sub-section (1) of Section 446 of the Companies Act, 1956, in view of specific language of second part of Sub-section (1) that on the date of order of winding up, i.e., February 11, 2004, no legal proceedings were pending since the order of confiscation was already passed on October 30, 1999. He has further submitted that the official liquidator can take possession of such properties only which are in existence on the date on which the order for winding up of the company is passed. In support of his argument, he has relied on the decision of the Kerala High Court in the case of A.M. Padmakshi v. Sudarsan Chits (India) Ltd. [1987] 62 Comp Cas 637, where it is held that when no winding up order is passed and the provisional liquidator is appointed, no permission under Sub-section (1) of Section 446 is necessary.

16. Shri Amin, learned advocate appearing for the applicant has submitted that since the applicant had no knowledge about the appointment of provisional liquidator on earlier occasion, no application was filed before this Court and even in the adjudicatory proceedings issued by the customs authority neither the provisional liquidator nor his agent has apprised the fact of pendency of winding up proceedings before the company court. He has further submitted that even the appeal preferred before the CEGAT against the order dated October 30, 1999, by the managing director of the company in liquidation has failed and, therefore, the goods, namely, 13 medical equipments confiscated by the applicant, are required to be handed over by the official liquidator.

17. Lastly, Shri Amin, learned advocate for the applicant has submitted that by virtue of provisions of Section 126 of the Customs Act, 1962, the properties vest in the Central Government once the order of confiscation is passed and in the present case, on October 30, 1999, the order of confiscation was already passed and thus, the property, particularly, 13 medical equipments have vested in the Central Government and the order may be passed, as prayed for.

18. Having heard learned Counsel appearing for the parties and on perusal of the record of the case, it is revealed that the provisional liquidator was appointed by this Court on February 16, 1999 and all the assets and properties, including 13 medical equipments, came into custody of the provisional liquidator. However, at the behest of the company court, managing director was allowed to continue to run the hospital as an agent of the provisional liquidator so that if financially viable, a scheme can be proposed to the court so that the company can be revived. Finally, the winding up order came to be passed on February 11, 2004, and various sections come into operation on passing of the winding up order and

the official liquidator becomes custodian of the properties and assets of the company ordered to be wound up. If the facts are examined, as projected by the applicant, it is clear that when the provisional liquidator was appointed on February 16, 1999, adjudicatory proceedings were pending before the authority and, therefore, when the advertisement was published in the newspaper, the applicant was duty bound to oppose the same. The plea of no knowledge of winding up proceedings and appointment of provisional liquidator is quite belated. On appointment as a provisional liquidator, by virtue of Section 456(1) of the Companies Act, 1956, all assets and properties of the company in liquidation comes into the custody of the provisional liquidator. In the present case, all powers were available to the provisional liquidator from February 16, 1999, when the court directed the official liquidator to act as provisional liquidator. So far as claim of the applicant is concerned, the same is nothing but a crown debt and it can be decided, after lodging a claim u/s 530 of the Companies Act. It appears from the record that the customs authority-the applicant herein has already preferred a claim on January 22, 2002, u/s 530 of the Companies Act, 1956 and the official liquidator was requested to take cognizance of the claim of the Department in terms of the above section for recovery of duty demand of Rs. 4 crores. The above fact is reflected in paragraph 5 of the letter dated January 22, 2002, produced at annexure "D" to the application.

19. Thus, it is clear that the Department has already forwarded its claim u/s 530 of the Companies Act and the prayers made in the present application are an afterthought. A perusal of the record and particularly, the order dated February 11, 2004, by which the company was ordered to be wound up produced at annexure "E" to the petition, reveal that the order of admission of company petition was made on November 17, 1998 and advertisement came to be published immediately. The show-cause notice issued by the applicant-authority is dated January 27, 1998 and, thus, it was made known to all concerned about admission of the winding up petition No. 152 of 1995 alongwith other company petitions where GIL Hospitals Ltd. was the company against which the proceedings were initiated. Thus, ignorance about pendency of the winding up proceedings, as claimed by the applicant, cannot be accepted.

20. The learned advocate appearing for the applicant has referred to provisions of Section 446 of the Companies Act, 1956 and Sub-section (1) of Section 446 read as under:

(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

21. Relying on the wordings of the above sub-section, the learned advocate has submitted that leave of the court is to be obtained only when the proceedings are

pending on the date of winding up order and not otherwise. According to him, in the present case, winding up order came to be passed on February 11, 2004, while the order of customs authority was much prior to that, i.e., on October 30, 1999. Thus, there was no necessity for the applicant to seek leave of this Court. The above submissions of learned advocate do not appeal inasmuch as conjoint reading of Sub-section (1) of Section 446 envisage that when the provisional liquidator is appointed by the court, the same shall not be proceeded with. The disjunctive "or" following the sentence "the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced" is in continuity and in the present case, the provisional liquidator was already appointed on February 16, 1999 and he has performed his duties as a liquidator and taken over the assets and properties including 13 medical equipments of the company in liquidation and, therefore, the only remedy to the applicant-Department is to lodge its claim before the official liquidator, as required u/s 530 of the Companies Act, 1956. Even Sub-section (2) of Section 446 enumerates power of the court to be exercised in different circumstances, by which it can be safely interpreted that leave of the court is necessary. So far as the question with regard to consequences that might follow, if the leave is not obtained, as envisaged under Sub-section (1) of Section 446 is concerned, no plea is raised and, therefore, the same is not required to be dealt with.

22. It is otherwise also clear that as per Sub-section (3) of Section 450 of the Companies Act, 1956, wherever the provisional liquidator is appointed by the court, and if the powers are not limited or restricted by the concerned court, such provisional liquidator shall have same powers as a liquidator and powers of the liquidator enumerated in Section 457 are very wide and even Section 456 also clearly states that where a provisional liquidator has been appointed, the custody of the property and assets and other actionable claims to which the company is entitled, can be taken up by the provisional liquidator. Sub-section (2) of Section 456 is about all the property and assets of the company which shall be deemed to be in the custody of the court from the date of the order for the winding up of the company. Thus, the custody taken over by the official liquidator in the capacity of the provisional liquidator right from February 16, 1999, has continued to remain with him till the date of order of winding up, i.e., February 11, 2004 and thereafter, continued to remain in the custody of the liquidator. It is, therefore, more than clear that the 13 medical equipments claimed by the applicant, at no point of time, remained in the custody of the Department or no claim was put forth till the winding up order came to be passed except the letter dated January 22, 2002, addressed by the authority to the official liquidator where it is mentioned in paragraph 5 that the claim of the applicant can be registered u/s 530 of the Companies Act, 1956.

23. Thus, the contentions of Shri Amin raised in support of the affidavit-in-rejoinder filed by the Department-applicant do not support the case of the applicant and the same requires to be rejected.

24. So far as the decision of the High Court of Kerala relied on by the learned advocate in the case of Sudarsan Chits (India) Ltd. [1987] 62 Comp Cas 637, the learned judge has acceded to the proposition that the official liquidator is the only person who can raise a plea that the absence of leave u/s 446(1) of the Act is fatal for continuation of any proceedings. Thus, in the present case, the plea is raised by the official liquidator and also by the secured creditors that the claim of the Revenue has to give way to the secured creditors and the claim can be entertained only u/s 530 of the Act. Even the decision of the Punjab and Haryana High Court reported in Punjab National Bank v. Punjab Finance P. Ltd. [1973] 43 Comp Cas 350, where, no provisional liquidator was appointed, it was held that no leave under Sub-section (1) of Section 446 is required. Even in the above case also, the learned judge has held that once a provisional liquidator is appointed or the winding up order is passed, the proceedings then pending in any other court shall be stayed till the leave of the company court is obtained.

25. Taking overall view of the above legal positions and the factual aspects reflected on perusal of the records, which include affidavit-in-reply and the report of the official liquidator and the submissions of learned Counsel appearing for the parties, I do not find any substance in the plea raised by the learned advocate for the applicant.

26. The contentions raised by Shri Amin, learned advocate appearing for the applicant-authority about priority of the claim of the customs dues is no more res integra, in view of the decision of the apex court reported in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, where the apex court, in paragraph 10, has observed as under:

However, the Crown''s preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown''s right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover [1832] 131 ER 563 , it has been held that the Crown has no precedence over a pledgee of goods. In The Bank of Bihar Vs. The State of Bihar and Others, , the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T. L. L., 7th edition., page 386)-''It seems a Government debt in India is not entitled to precedence over a prior secured debt''.

27. In view of the above, the claim of the applicant that on passing the order of confiscation of 13 medical equipments, the same vests in the Central Government by virtue of Section 126 of the Customs Act, 1962, cannot be accepted and action of the official liquidator in taking custody, possession and control of the assets and properties including the above 13 medical equipments is held to be valid and legal.

The application of the applicant stands rejected. No order as to costs.