(2013) 05 DEL CK 0214

In the Delhi High Court

Case No : Co. Petition No. 222 of 1999

In Re: International Ceramics Ltd.

Date of Decision : 30-05-2013

Acts Referred:
Penal Code, 1860 (IPC) — Section 120B, 323, 34, 379, 380

Citation : (2013) 05 DEL CK 0214

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Mayank Goel, for the Official Liquidator, Mr. Yashpal Rangi, for S.P. Jind Haryana, Mr. Mayank Kumar, for Keshav Security Services Ltd., Ms. Indrani Mukherjee, for IARC, Mr. Rahul Tyagi, for Phoenix ARC, Mr. Sanjay Bhatt and Mr. Abhishek Anand, for IDBI and IFCI, for the Appellant;

Judgement

Muralidhar, J.

Co. Appl. No. 220 of 2012 [In the matter of Keshav Security Services (P) Ltd.]

1. This is an application by the Official Liquidator (''OL'') for a direction to Keshav Security Services (P) Limited (''KSSPL'') to deposit an amount of Rs. 99,15,440 with the OL towards missing items as valued by M/s. Chadha & Associates. The background to the application is that International Ceramics Limited (''ICL''), was ordered to be wound up by this Court on 8th March 2001 and the OL was appointed as its Provisional Liquidator (''PL''). ICL was finally wound up an order dated 17th September 2004. The OL was appointed as its Liquidator. KSSPL filed Company Application No. 1334 of 2008 for payment of its bills for providing security services at the factory premises of ICL situated at 25 KM, Rohtak, Jind Road, Haryana for a period of five years, i.e., from August 2003 to August 2008. In the said application, the Court passed the following order on 27th August 2009:

Co. Appl. No. 1334 of 2008 in C.P. No. 222 of 1999

This is an application moved by M/s. Keshav Security Services Pvt. Ltd. for payment in respect of security services provided at the factory premises for the company in liquidation situated at 25 KM, Rohtak, Jind Road, Haryana.

Arguments heard.

Since this is a claim pertaining to a period of more than five years, i.e., from August, 2003 to August, 2008, the Official Liquidator is directed to ascertain the full particulars of the services stated to have been provided by the Applicant, after determining the number of staff deployed from time to time and their proper identification. The Official Liquidator may also verify the requisite details of the ESI provident fund etc. in this regard. At the same time, Mr. I.C. Singhal, ex-Managing Director of the company, who is present in Court, states that he has some objections to the release of any amount to the Applicant. Let all objections that he may have be filed by him before the Official Liquidator. The Official Liquidator shall thereafter consider all aspects of the matter and file a consolidated report on this aspect within four weeks. Let the Official Liquidator also prepare a full inventory of the plant and machinery situated at the above premises, while assessing the quality of the security services stated to have been provided by the Applicant.

The Official Liquidator may also have the assets available at the site checked against the inventory prepared earlier by the valuer. He may also take the assistance of the ex-Managing Director for verifying this inventory. For this purpose, the Official Liquidator is permitted to de-seal the property and to reseal it again after completion of the inventory.

Let the inventory be prepared on 16th September 2009 at 11.30 am.

Since the matter of payment will now be considered after the report is filed in this regard by the Official Liquidator, as directed above, no useful purpose will be served by continuing with this application.

The application is disposed of in the above terms.

2. Consequent upon the above order, the OL addressed a letter to KSSPL on 6th October 2009 enquiring about the missing items from the aforementioned factory site. In response thereto, KSSPL informed the OL by its letter dated 17th November 2009 that upon deputing their persons alongwith photographer to visit and verify the position regarding existing plants, machineries and equipments at the factory premises, it was found that the equipments, plants and machineries stated to be missing from the site in the Minutes dated 16th September 2009 were very much existing and available. The photographs of the visit by the KSSPL security persons to the site were also enclosed with the letter.

3. On 1st December 2009 the OL filed a report bearing No. 325 of 2009 regarding compliance with the directions issued by the Court on 27th August 2009. It was stated that the OL had deputed a team on 16th September 2009 to visit the factory premises. It was found that the seal of the OL placed earlier at the time of taking over possession of the assets of the company on 4th December 2003 was missing. Since all the doors and windows in the premises

were found broken, the factory premises could not be locked and sealed. The security guards of KSSPL neither produced any identity cards nor any attendance register for verification. Despite a letter addressed to KSSPL by the OL on 27th November 2009 no information regarding security staff deployed at the factory premises of ICL was furnished. The team deputed by the OL found the following items at the factory site which were verified by Mr. I.C. Singhal, a former Director:

1. Glaze Preparation Department

(i) Blungers (Concrete on steel pillar)

(ii) Glaze tank

2. Glabe Fixing and Storage Department

(i) Kiln & Consumable Ceramic Roller (Incomplete)

(ii) Roller Kiln Glaze FAB

3. Utility Services

(i) Oil storage and one tank and supply system underground (CC Steels)

(ii) Vertical dryer and accessories.

4. The OL''s team confirmed that the following items were missing from the factory site:

A. Weighing Department

(i) Weighing scale

B. Ship Preparation Department

(i) Drum mill including accessories (steel)

(ii) Slurry sieves

(iii) Ship house platform (fully damaged)

C. Spray Drying Unit

(i) Dryer unit

(ii) Take off conveyor on steel from

D. Pressing & Drying Department

(i) Hydranlic Press

E. Glaze Storage Department

(i) Car system (steel) incomplete

(ii) Rail tracks Scrap-worn out

(iii) L.P. Storage steel tank.

5. A copy of the minutes, photographs and CD were enclosed with the report of the OL. It was stated that even the items shown in para No. 6 of the report of valuation dated 27th April 2009 prepared by M/s. R.P. Gupta & Associates, Valuer were found missing. The OL pointed out that the valuation report dated 23rd February 2004 as well as the valuation report dated 27th April 2009 by M/s. R.P. Gupta & Associates had the same items of assets of the company. Consequently, it was inferred that the removal of assets as reported by Mr. I.C. Singhal during the time of the visit by the OL officials on 16th September 2009 had occurred after the report dated 27th April 2009 was prepared. It was stated that on 5th October 2009 the OL wrote to the Station House Officer (''SHO''), Superintendent of Police (''SP'') as well as Senior Superintendent of Police (''SSP'') of Jind. A letter was also sent to KSSPL on 6th October 2009 for providing information regarding theft. The OL also issued a reminder to SHO, SP and SSP on 1st December 2009.

6. On 17th November 2009 KSSPL wrote to the OL maintaining that the plant, machinery and equipments reported missing were, in fact, available. In Report No. 325 of 2009 the OL sought directions that the bills of KSSPL should not be paid till such time investigation regarding the missing assets was not concluded. On perusal of the said report this Court passed the following order on 3rd December 2009:

Let the Official Liquidator file a further report dealing with the letter dated 17th November 2009 received from M/s. Keshav Security Services Pvt. Ltd. as well as the photographs annexed to that letter, which, according to the security agency, reflect the missing machines. The Official Liquidator may also take the help of Mr. R.P. Gupta & Associates to further verify the missing items and the valuation thereof. Let the fresh report be filed before the next date.

List on 18th February 2010.

7. Since M/s. R.P. Gupta & Associates expressed his disinclination to undertake the further task, the OL by a letter dated 1st February 2010 called upon M/s. Chadha & Associates to undertake the valuation by visiting the factory premises of ICL. A further letter was issued on 3rd February 2010 to KSSPL, Mr. B.L. Chadha, valuer, the SHO, Police Station Julana, District Jind (Haryana), Mr. I.C. Singhal, ex-director and secured creditors, i.e., IFCI, ICICI, IDBI, Central Bank of India (''CBI''), State Bank of India (''SBI'') to be present during the site visit. The aforementioned persons along with the officials of the OL visited the factory site on 6th February 2010. Inter alia the minutes of the site visit recorded that the two Liquidation Assistants (LAs) attached to the OL visited the factory site and met 16 persons including the guards, two former directors, Mr. I.C. Singhal and Mr. S.K. Goyal, Mr. Ramphal, Inspector, Police Station, Julana. The minutes further recorded as under:

After that we found that factory was open condition no seal was lying there in the main gate of the premises. We start the proceeding at about 12.00 am. Sh. B.L. Chadha has carried out the inspection of the missing items and verifying in items as per valuation report of Shri R.P. Gupta, valuer. After carried out the inspection by valuer in presence of above said persons and informed the report in this regard will be sent to the Official Liquidator''s office within two weeks.

8. M/s. Chadha & Associates submitted a report to the OL on 15th February 2010. It was stated in the covering letter, as under:

At site it was observed that there is no seal to this premises and quite a big number of window panes are broken and people have easy access to the premises as on site. There are no sign boards inside and outside the factory with respect to the name of the factory.

Further it is observed that people and families are staying in the premises and they claim to be related to the owners of the land.

Further, it is observed that the entire premises are fully deserted and whatever machines are lying at site they are in-complete as the parts motors and other movable items which can be easily removed have already been removed and stolen and in fact two incomplete machines namely Hydraulic Press, Vertical dryer, inclusive of its accessories are lying, these may be because of heavy utilities are required to remove which is a cumbersome process to take it otherwise these machines would have already been stolen.

I may mentioned that in this machine also some of the small motors, copper tubings, conveyor fitments, have been removed. It''s quite apparent from our report attached that quite a big number of items which were mentioned in Mr. R.P. Gupta report dated 16th April 2009 have already been removed.

Blungers in glass preparation department on steel pillars are 8 in all along with blungers where in the earlier report dated 16th April 2009 it is mentioned 7.

Glazed tanks as per site are 9 whereas as per report earlier it is 6.

We also visited the administration block and item founds in the form of drawing board, scientific instruments oven etc in damage condition were found.

In fact there is no security worth the name and in fact the so called land owners are in occupation.

9. The OL held a meeting on 19th February 2010 with Mr. B.L. Chadha. Valuer and KSSPL. Mr. Chadha was requested to examine the photographs as given by KSSPL and compare them with those enclosed with his report of missing/ removed items. Mr. Chadha submitted a further report on 23rd February 2010. It was now stated as under:

The photographs as furnished by Keshav Security at our office were compared with the once submitted along with our report and thoroughly scrutinized.

It was conveyed to Major Sharma that the machinery shown in photographs and produced by him have already been taken care of in our valuation report except one photograph of Churners with the machine whereas our photographs shows only the machine.

10. Since the report dated 23rd February 2010 was not very clear Mr. Chadha was asked to furnish list of missing items along with the values. By a letter dated 19th March 2010 Mr. Chadha submitted a list of missing items along with their values. The list of such items read as under:

11. In the above circumstances, the OL submitted Report No. 115 of 2010 in which the order passed by the Court on 31st January 2012 converting the report into an application. The said order reads as under:

Report No. 115 of 2010 in Co. Pet. No. 222 of 1999

Since substantive prayers have been made in the present report, Registry of this Court is directed to treat the present report as an application.

Let the present report be numbered as company Application.

Since in the reply affidavit filed by M/s. Keshav Security Services Pvt. Ltd. certain allegations have been made against the former directors of the company in liquidation, let a copy of the report as well as reply affidavit and the rejoinder filed by the Official Liquidator be handed over to the ex directors so that they can file a reply affidavit.

List the matter for consideration on 26th March 2012.

12. A reply to the OL''s Report No. 115 of 2010 was filed by Mr. I.C. Singhal, ex-Director of the company in which it was inter alia stated that security at the factory premises had been provided by KSSPL from December 2003 onwards. It was confirmed that the plant and machinery mentioned in the inventory of M/s. R.P. Gupta & Associates was missing as mentioned in the report of M/s. Chadha & Associates. It is pointed out that at no point of time KSSPL raised any objection about any missing inventory in the list prepared M/s. R.P. Gupta & Associates. Further at no point of time KSSPL wrote to the OL stating that no inventory of plant and machinery was provided to KSSPL. It was stated that "it baffling that after more than 9 years, M/s. Keshav Securities Private Limited are now questioning the acts of then valuer and are also accusing the officials of Official Liquidator. It is submitted that during all these years, no application was filed M/s. Keshav Securities Private Limited alleging that no inventory took place or that it was not provided with any inventory list."

13. In para VI of the reply it was stated that since 1995-96 the ex-Directors of the ICL had not been allowed to enter the factory premises by Mr. Surat Singh Malik who had taken possession of factory premises pursuant to the order dated 8th December 1994 of the learned Senior Sub-Judge, Jind. Pursuant to the investigation carried out on the complaint filed by the OL, it was found that "Mr. Surant Singh Malik and the security guards of M/s. Keshav Securities Private

Limited were involved in the theft." The concerned persons were arrested and released on bail. The ex-Director submitted that KSSPL was responsible for the theft of the plant and machinery.

14. At the hearing, i.e., on 5th September 2011 learned counsel for the OL informed the Court of the further theft of plant and machinery. He informed the Court that the security guards of KSSPL had been forcibly evicted by Mr. Surat Singh Malik from the Jind premises of the company and the OL had no longer in the possession of the said premises. The Court then required SP, Jind, Haryana and Mr. Surat Singh Malik to remain present in Court on the next date of hearing. On the next date, i.e., 29th September 2011 while the Court noted that Mr. Ashok Kumar, SP, Jind, Haryana, Mr. Surat Singh Malik as well as Mr. D.K. Sharma, Managing Director of KSSPL were personally present in Court, SP Jind was directed to ensure that adequate police would deploy and possession of the said 15.3 acres of land stated to be forcibly occupied by Mr. Surat Singh Malik was directed to be restored to the OL.

15. At the hearing of 5th October 2011 the Court took note of status report by way of affidavit dated 1st October 2011. It was stated therein inter alia that an FIR No. 153 dated 29th September 2011 had been registered at Police Station Julana under Sections 379, 447, 323, 34 IPC arising out of a complaint against ICL dated 27th April 2011 some unsocial elements had entered into the factory premises and manhandled the security guards deployed by KSSPL as a result of which all the security guards ran away. It was however noted that no oral or written complaint from the KSSPL itself had been received in the office of the OL or at the Police Station Julana. Mention was made of an earlier FIR No. 306 dated 4th December 2009 under Sections 454 and 380 IPC.

16. A status report was filed by the SP, Jind (Haryana) in this Court on 3rd October 2011 indicating the status of the investigation. On 5th October 2011 the Court again directed the valuer to evaluate the two plots of ICL and submit a fresh report along with a status report by 31st January 2012. The OL with the next report enclosed a copy of the report of valuation submitted by M/s. Accurate Surveyors (P) Ltd. The report also referred to a letter dated 23rd January 2012 received from SP, Jind stating the Section 120-B IPC had been inserted in FIR No. 306 dated 4th December 2009 under Sections 457, 380 IPC registered at Police Station Julana. It was stated that in the said case Mr. Devinder Kumar, Manager of KSSPL had been arrested on 20th December 2011. Mr. Surat Singh Malik was arrested in FIR No. 153 dated 29th September 2011 and FIR No. 306 dated 4th December 2009.

17. It may be mentioned that on 23rd January 2012 SP Jind filed a status report mentioning the above arrests and that the investigation was still pending. On 31st January 2012 the Court noted the above facts. The valuation report was subsequently received by the Court and opened at the hearing on 26th March 2012. On 4th July 2012 the following order was passed:

Status report of the Official Liquidator is on record. The valuation given by the Government Valuer, Subhash Chander of the property of the company located at Jind Road, Village Pauli, District Jind, Haryana has been estimated at Rs. 9,25,00,000. The learned counsel for the secured creditors, i.e., IDBI states that this valuation is on the lower side; he seeks permission of this Court to place an independent valuation on record. Let the needful be done within a period of three weeks from today with an advance copy to the counsel for the Official Liquidator and to the ex-management as well.

Learned counsel for the IDBI and IFCI has pointed out that in terms of the meeting which had been held in the office of the Official Liquidator on 22nd March 2012, the secured creditors had agreed to pay to the contractor Subhash Chander, the amount to be spent by him on fencing of the aforenoted immovable property of the company (in liquidation); further submission being that 80% of the amount has been paid to the Contractor and he will commence the fencing work within one week.

Let the status report to the said effect be filed and a copy thereof shall be furnished to the counsel for the Official Liquidator.

18. As regards Company Application No. 220 of 2012, the Court noted that none was present on behalf of KSSPL and accordingly, adjourned the case to 10th October 2012. On the subsequent date, the Court noted that the report had been filed by IDBI through its Valuer, Mr. S.K. Ahuja, who has estimated the value of the property at Jind, Haryana at Rs. 642.12 lakhs which was Rs. 282.88 lakhs less when as compared to the value as per the valuation report submitted by M/s. Accurate Surveyors (P) Ltd., i.e., Rs. 925 lakhs. Accordingly, the valuation report of M/s. Accurate Surveyors (P) Ltd. was accepted and the OL was permitted to proceed with the sale of the property.

19. On 5th November 2012 the Court noted that the debt of Standard Chartered Bank (''SCB'') had since been assigned to the International Asset Reconstruction Company Pvt. Ltd. (''IARC''). IARC was impleaded in place of SCB.

20. Mr. Mayank Kumar, learned counsel for the KSSPL referred to the reply filed on 22nd February 2011 and submitted that the assets of ICL had been "regularly plundered by the management with the help of locals." The valuation of finished goods were got done by CBI through the valuer, S.K. Ahuja & Associates in 2003 who valued it at Rs. 1,59,07,125. It was alleged that the OL did not take timely steps to safeguard the interests of ICL and the theft of the assets of ICL was going on without any hindrance. While it is not disputed that the OL took the possession of the factory premises on 4th December 2003, it is alleged that M/s. R.P. Gupta & Associates completed the work in a short span of two hours from 3.30 pm onwards. It is claimed by KSSPL that the factory was spread over an area of 17 acres and all gates and windows were opened (stolen away)/broken, therefore, the factory could not be sealed. KSSPL claimed to have written a letter on 27th April 2004 about the condition of the factory site. No such letter was

enclosed. It was also stated by learned counsel for the OL that payments of the security expenses could not made. KSSPL had also written "scores of letters for payment of security charges and removal of security personnel." It is admitted that "one Mr. Surat Singh Malik uses the main gate to have access to his agricultural lands."

21. It is contended by KSSPL that the valuation report submitted by M/s. Chadha & Associates showing the distress sale value as 20% was not justified. It is alleged that the former directors influenced the inventory prepared by the valuer on 6th February 2010. It is contended that the machinery was scrap and was lying in five feet deep water for more than a year and the valuation was made on the replacement cost. It is reiterated on physical verification at site even at the time of takeover in 2003, signs of removal of machinery were detected. It is maintained that as far as KSSPL was concerned there has been no theft as such no report of theft was reported by the security agency. It is alleged that the payment about theft is an afterthought of ex-management to stop payments to the security agency.

22. The above submissions have been countered by Mr. Mayank Goel, learned counsel for the OL. It is pointed out that at the time of deployment of the security guards the representative of the KSSPL had inspected the entire premises along with secured creditors of the company. It is further pointed out that valuation done by M/s. S.K. Ahuja & Associates was only tiles and boxes but not of the land and machinery, land and building. A reference is made to the report of M/s. R.P. Gupta & Associates on 27th April 2009 in which the value of the assets of the company was placed at Rs. 1,22,54,640. It is submitted that KSSPL was aware of the fact of theft since 2003 why did it choose to intimate the OL only on 27th January 2004.

23. There are three issues to be considered by the Court. The first is whether in fact a considerable part of the plant and machinery and equipment found at site in 2003 when possession was taken over by the OL and KSSPL was engaged to provide security services have since gone missing? The second is the explanation for the items found missing from the factory premises and who should be held responsible for it. The third is, if KSSPL is held liable, the amount that it should be asked to pay and if not whether its bills as submitted should be paid by the OL.

24. There is no dispute about the fact that the possession of the factory premises was taken by the OL on 4th December 2003. Even if it is assumed that some of the plant and machinery and equipment had already taken away by then, there was an inventory taken of what remained in the premises as on that date. The two valuation reports dated 23rd February 2004 and 27th April 2009 of M/s. R.P. Gupta & Associates showed that many of the assets of ICL found at the time of takeover of the premises by the OL in 2003 had gone missing. The subsequent reports of both the OL as well as M/s. Chadha & Associates not only confirmed this but showed that even items that were noted in the report of M/s. R.P. Gupta

& Associates had gone missing. In other words, the pilfering of assets continued unabated during the time that KSSPL was in charge of the security of the premises. Although KSSPL was in denial at every stage, the reports referred to have unmistakably shown that indeed a considerable part of the plant and machinery and equipment found at site in 2003 when possession was taken over by the OL have since gone missing.

25. As regards the second issue, since the responsibility for the security of the assets was that of KSSPL, it has to be held answerable. Significantly, the inventory at each stage was taken in the presence of KSSPL. It cannot possibly question their correctness at this stage. Despite numerous opportunities afforded to it, KSSPL has been unable to come up with any satisfactory explanation for how and why the assets went missing. It is indeed surprising that KSSPL never made any complaint to the police about any theft of equipment or of plant and machinery. A copy of the letter dated 27th April 2004 written by KSSPL to the OL is not placed on record. The minutes prepared on 10th December 2004 do not throw much light on the inventory of assets on that date. The letters written by KSSPL to the OL do not mention about any assets having gone missing. They repeatedly ask for payment of the outstanding bills and for being relieved of the task of providing security. The explanation offered by KSSPL that whatever theft took place of the plant and machinery and equipment had at the instance of the former directors taken place prior 2003 is belied by the successive reports of M/s. R.P. Gupta & Associates, the OL and M/s. Chadha & Associates. Merely because some of the equipments were found incomplete even in 2003 does not explain how many of the items were found missing when inventories were taken at different stages thereafter. The main task of any security agency is to ensure that the assets of the company in liquidation are not pilfered. The very purpose of deploying KSSPL in 2003 at the factory premises has been defeated by the wanton neglect of its duties by KSSPL. This is a case of grave dereliction of duty and gross negligence on the part of KSSPL.

26. In view of the above conclusion, the question of the OL having to settle any of the bills of KSSPL simply does not arise. The next question that arises is the amount that KSSPL should be asked to pay for the assets of ICL that have gone missing since they took over the responsibility of providing security at the factory premises. The value of the missing assets as determined by M/s. Chadha & Associates is Rs. 99,15,440. Accounting for the fact that in 2003 some of the items were incomplete, and that they must have depreciated in value over the years, the Court considers it appropriate to direct KSSPL to pay to the OL in the account of ICL a sum of Rs. 70 lakhs within a period of eight weeks failing which the said amount will be paid by KSSPL with simple interest at 12% per annum for the period of delay. If KSSPL fails to pay the amount as directed it will be open to the OL to take further steps to recover it in accordance with law. With the above directions, the application is disposed of.