

(2013) 04 DEL CK 0454
In the Delhi High Court
Case No : Co. Petition 183 of 2001
In Re: Yuil Measures India Ltd.

Date of Decision : 26-04-2013

Acts Referred:

Customs Act, 1962 — Section 126
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20(1)

Citation : (2013) 4 AD 499 : (2013) 178 CompCas 522 : (2013) 3 CompLJ 108

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

Bench : Single Bench

Advocate : Satish Aggarwala with Ms. Khushboo Garg, for Customs/ Applicant in CA No. 910 of 2008, Mr. Rajeev Kumar, in CA No. 1297 of 2008, Mr. Sangram Patnaik, for IDBI and Mr. Mayank Goel, for Official Liquidator, for the Appellant;

Judgement

S. Muralidhar, J.

CA Nos. 910 of 2008 & 1297 of 2008

1. CA No. 910 of 2008 has been filed by the Customs Department seeking the setting aside of the auction sale of the capital goods and raw materials belonging to Yuil Measures India Limited ("YMIL") (the company in liquidation) pursuant to the order dated 7th December 2006 passed by this Court. The Applicant also seeks the setting aside of the possession memo dated 7th February 2007 by which possession of the auctioned goods was given to the auction purchaser Mr. Vilas Gupta. CA No. 1297 of 2008 has been filed by Mr. Vilas Gupta, the auction purchaser, for permission to further sell the plant and machinery of YMIL that was purchased by him in the auction sale so that he can generate capital for his company.

2. The background facts are that on 12th October 2004 this Court ordered YMIL to be wound up after noting that by an order dated 30th October 2000 the Board for Industrial and Financial Reconstruction ("BIFR") had held YMIL to be a sick industrial company that was not likely to become viable in future. The BIFR held that it was in public interest that YMIL should be wound up u/s 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1995. This Court appointed the

Official Liquidator ("OL") as the Liquidator of YMIL.

3. After a report of valuation of the assets of YMIL was made available and after noting that there was no objection on behalf of the Noida Special Economic Zone ("NSEZ") to the sale of its assets, bids were invited by the OL. In the order dated 16th November 2006 it was noticed that two bids had been received one of which was by Mr. Vilas Gupta. He was permitted to inspect the premises. The order dated 24th November 2006 noted that Mr. Vilas Gupta was ready and willing to offer Rs. 1,35,50,000 for the assets of YMIL.

4. On 7th December 2006, the following order was passed:

1. Learned counsel appearing for M/s. Hanung Dyes and Textiles Ltd. states that his client is withdrawing his offer for Rs. 1.34 crores. EMD given by the second highest bidder will be returned to them during the course of the day.

2. Mr. Vilas Gupta has given bid for Rs. 1,35,50,000. The reserve price is Rs. 1,24,27,200. The highest bid is more than the reserve price. Learned counsel appearing for IDBI states that the bid may be accepted as it is more than the reserve price. Representative of IFCI also states that the bid may be accepted as it is more than the reserve price. The O.L. states that the bid may be accepted.

3. In these circumstances, bid given by Mr. Vilas Gupta for Rs. 1,35,50,000 is accepted. 25% of the bid amount (including EMD) will be deposited with the O.L. within seven days and the balance 75% of the bid amount will be deposited within 60 days.

4. The auction purchaser will not be liable to pay the electricity dues, telephone charges and dues of NSEZ for the period prior to the date of auction.

5. The auction purchaser is at liberty to pay the entire bid amount earlier. After entire payment is made, possession of the property will be given to the auction purchaser.

6. Auction purchaser will be entitled to employ security outside the property. However, possession of the property as already stated above will be given only after full payment is made.

7. The O.L. will publish citations in the newspapers "Amar Ujala" and "Dainik Jagran" inviting claims from the workers. Needful will be done within four weeks from today.

List on 1st February 2007.

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5. On 18th January 2007, the OL informed the Court that Mr. Vilas Gupta had deposited the full amount.

6. Even while the claims of workers and creditors were being processed by the OL, the Customs Department filed CA No. 910 of 2008 on 15th July 2008. After a

show cause notice was issued to YMIL, an order was passed by the Commissioner of Customs on 4th November 1997 holding that capital goods valued at Rs. 3,63,62,019 and raw materials valued at Rs. 36,84,288 which had been imported by YMIL were liable for confiscation subject to redemption on payment of fine. Since the said amount was not paid, the capital goods and raw materials stood confiscated absolutely and in terms of Section 126 of the Customs Act 1962 the ownership thereof vested in the Central Government. YMIL was also directed to pay Rs. 2,09,54,801 towards customs and excise duty failing which interest would also be charged apart from the penalty of Rs. 10 lakhs. By an order dated 18th June 1999 the Central Excise and Gold Appellate Tribunal, New Delhi upheld the order of the Commissioner of Customs. It is submitted by the Customs Department that despite the capital goods and raw materials of YMIL vesting in the Central Government, the OL sold them by way of auction sale which was confirmed by the Court on 7th December 2006 by accepting the highest bid of Rs. 1,35,50,000. Pursuant to the above order, possession of the goods in question was given by the OL to the auction purchaser Mr. Vilas Gupta on 7th February 2007.

7. The Customs Department submitted its claims to the OL followed by submission of proof of debt on 14th January, 13th July, 3rd September and 10th October 2007. On 15th November 2007 the Deputy OL admitted the Applicant's claim to the extent of Rs. 2,19,55,000 towards customs and central excise duty in addition to penalty of Rs. 10 lakhs. The Applicant Customs Department submits that the Deputy OL overlooked the claim for interest on the duty amounting to Rs. 4,73,15,816.

8. The Customs Department filed C.A. No. 1016 of 2008 seeking stay of the auction sale of the assets of YMIL. Mr. Vilas Gupta, the auction purchaser filed a reply on 21st November 2008 in which he stated that he paid initially a sum of Rs. 21,44,780 on 9th December 2008 being the 25% of the bid amount (excluding the EMD). He also paid to the OL a sum of Rs. 1,01,62,500 being the balance 75% of the bid amount. The OL handed over to him the physical possession of the land and building, plant and machinery and movable assets on 7th February 2007 on "as is where is and whatever there is basis". It was further stated in para 10 as under:

It is pertinent to mention that neither any inventory was prepared at the time of handing over the possession of the plant and machinery nor any inventory was given by the Office of the Ld. Official Liquidator.

9. Mr. Vilas Gupta pointed out in his reply that he had paid Rs. 1,07,85,962.25 for the building and Rs. 27,64,037.75 for the plant and machinery of YMIL. He asserted that he was a bonafide purchaser of the plant and machinery which in any event was of no use to him and had only scrap value. It was stated by Mr. Vilas Gupta in para 12 of his reply that he wrote to the Deputy Commissioner of Customs, NSEZ on 2nd September 2008 for permission to dispose of the plant and machinery. A copy of the said letter was enclosed. It is stated that the

Deputy Commissioner of Customs did not respond to the said letter. In para 15 of his reply Mr. Vilas Gupta stated that he was ready and willing to return the plant and machinery if he is returned the amount of Rs. 27,64,037.75. Mr. Vilas Gupta also filed CA No. 1257 of 2008 on 22nd November 2005 praying inter alia for confirmation of the sale in his favour and in the alternative for a direction to the OL to refund him the sum of Rs. 27,64,037.75.

10. The fact of payment of the sums by Mr. Vilas Gupta and his being given possession of the assets of YMIL including the plant and machinery is not in dispute. Repeated reference has been made by Mr. Satish Aggarwala, learned Senior Standing counsel for the Customs Department to an affidavit filed by it in July 2010 pursuant to the order dated 28th July 2009 by which the Court required it to file an affidavit "setting down all the relevant facts identifying the goods and machinery etc." claimed by it. Enclosed with the affidavit of July 2010 was an Annexure containing a table titled "Details of CG & RM unused/unutilised". The said table set out under the column titled "Description", 7 items of "capital goods". In another column, the details of the corresponding bills of entry (B/E No.) were indicated. The column titled "Quantity" was left blank. The last two columns gave the "value" and the "duty invoice". There were six items of "raw materials". Four were described as "glass" and last two as "Mercury" and "Top Ring". The B/E No., the quantities as well as the value and duty invoices were mentioned. Some of the packing lists and invoices dated 1990 and 1991 have also been enclosed. The confiscation of the capital goods and raw materials is supposed to have taken place sometime in 1997. However, it cannot be discerned from the above documents, whether the capital goods confiscated tally with the "plant and machinery" sold to the auction purchaser on "as is where is basis". In the circumstances, the Court directed the Customs Department to produce the inventory of the goods confiscated.

11. On 9th January 2012 the following order was passed by this Court:

The Customs Department is directed to file an affidavit enclosing photocopies of the Bills of Exchange mentioned in annexure to Show Cause Notice dated 17th July 1996 issued by the Customs Department to the company in liquidation as well as an inventory of the goods that must have been prepared by the Customs Department when the goods were allegedly confiscated. The Customs Department is also directed to place on record detail of the goods that were handed over by them to the Official Liquidator subsequent to confirmation of auction by this Court. A possession memo, if any, prepared jointly by the Customs Department and Official Liquidator shall be placed on record.

It is the Official Liquidator's case that the capital goods and raw material belonging to the company in liquidation have been sold in an auction conducted by this Court for a sum of Rs. 27,64,037.75.

In the event the capital goods and raw material tally with the goods confiscated by the Customs Department, this Court would be inclined to either return the

aforesaid capital goods and raw material to the Customs Department or direct the secured creditors to pay the auctioned price of Rs. 27,64,037.75 to the Customs Department. The Customs Department is directed to inform this Court about its stand within two weeks.

This Court may also indicate that in the event the auction conducted by this Court is set aside or the secured creditors are directed to refund the amount to the Customs Departments, this Court would be inclined to impose costs on the Customs Department as it did not intimate the Court prior to the confirmation of the auction that goods had been confiscated by it.

List on 27th February 2012.

Order dasti under signatures of Court Master to all parties.

Co. Pet. No. 1016 of 2008

Present application has been filed by the Customs Department for stay of auction.

Admittedly, present application has become infructuous. Accordingly, the application is dismissed.

12. After grant of two opportunities, an affidavit was filed by Mr. Sharad Srivastava, Deputy Commissioner of Customs, NSEZ on 24th February 2012 in which it was stated that "the documents sought by the Hon"ble Court are not readily traceable as the same was very old and the records and documents were maintained manually at that time. However, efforts are being made with the concerned section and the same will be provided as soon as possible." Subsequently on 31st August 2012 another affidavit was filed enclosing copies of some of the B/Es. In paras 3 to 6 of the said affidavit, it was stated as under:

As regards copy of inventory of the goods, at the time of confiscation, the same is not available in the relevant file. However, the demand was worked out on the basis of records available with the Customs, namely Bills of Entry etc. as reflected in the Annexure to the show cause notice. The order of confiscation was passed vide Order-in-Original No. 44/97 dated 4th November 1997.

4. As regards the details of the goods stated to have been handed over by them to the Official Liquidator subsequent to confirmation of auction, it is submitted that no goods were handed over by the department of Customs to the Official Liquidator subsequent to confirmation of auction by this Hon"ble Court.

5. It is respectfully submitted that details of the goods stated to have been handed over by them to the Official Liquidator should also be available with the Official Liquidator.

6. As regards the possession memo, "prepared jointly by the Custom Department and Official Liquidator" it is respectfully submitted that there is no such possession memo. A copy of possession memo dated 7th February 2007 between Official Liquidator and auction purchaser is Annexure 13.

13. On 12th October 2012 the following order was passed by the Court:

Report No. 593 of 2012 in Co. Pet. No. 183 of 2001

Status report of the Official Liquidator is disposed of noting the submission that fund position of the company as on 28th September 2012 is Rs. 21,97,638.50. The claim of the Custom Department has been admitted for Rs. 2,19,55,000 as a preferential creditor and Rs. 58,47,485 as an ordinary creditor. Learned counsel for the Custom Department has placed on record an admission of claim made by the Official Liquidator dated 9th January 2012; copy of which has been handed over to the learned counsel for the Official Liquidator; submission being that in this communication the Official Liquidator has admitted the claim of the Custom Department at Rs. 5,12,93,822. This discrepancy should be answered by the Official Liquidator in the fresh status report to be filed by him. Counsel for the Custom Department will also take final instructions in terms of the earlier orders of this Court.

Co. Pet. No. 183 of 2001

Renotify for 21st January 2013.

14. Consequent to the above order, a fresh status report was filed by the OL and the following order was passed on 21st January 2013:

Status Report No. 59 of 2013

1. A copy of status report No. 59 of 2013 of the Official Liquidator ("OL") has been handed over to Mr. Satish Aggarwala, learned counsel for the Customs Department. It is, inter alia, stated in the report that the claim of the Deputy Commissioner, Customs, Noida Special Economic Zone, Noida is admitted for a sum of Rs. 5,12,93,822 as preferential creditor, subject to verification from the originals and the company records. The fund position as on 31st December 2012 of the Respondent Company in liquidation is Rs. 21,97,708.

2. The status report of the OL is taken on record.

3. List for arguments on 26th April 2013.

15. Mr. Satish Aggarwala, learned counsel for the Customs Department, submitted that since the goods that were sold to the auction purchaser belonged to the Customs Department, the sale should be cancelled and the goods returned to the Customs Department. He submitted that the sale by auction of the goods belonging to the Central Government was illegal and no prior intimation was given to the Customs Department. It is submitted that the sale of the goods and its confirmation was carried out by concealment of material facts. Reliance is placed on the decisions in Union of India Vs. Somasundram Mills (P) Ltd. and Another, , United Bank of India Vs. Official Liquidator and Others, Collector of Customs Vs. Dytron (India) Ltd., (Cal), M/s. Jainsons Exports India Vs. Binatone Electronics Ltd. and another, and the decision dated 28th July 2005 in CA Nos. 930-93 of 2004 in Co. Pet No. 381 of 1999/1998 (Singapore Tong Tek P Ltd. v.

Digiflex India Ltd.).

16. Counsel for the auction purchaser on the other hand submitted that in the absence of the inventory of the goods confiscated, it would be difficult for the Court to conclude that the goods sold to the auction purchaser were in fact those confiscated by the Customs Department. The present value of the plant and machinery had further depreciated and it was of no use to even the auction purchaser. He had set up an arc welding unit and needed the money from the further sale of the purchased plant and machinery for that purpose. He submitted that there was no response from the Deputy Commissioner of Customs to the letter dated 2nd September 2008 of the auction purchaser seeking permission for such sale. In the written submissions filed 4th December 2009 the auction purchaser states that when the goods were handed over to the auction purchaser by the office of the OL on 7th February 2007, "there was nothing at the factory premises to indicate that the goods were confiscated by the Customs Department." It is submitted that in any event "today it is not possible to segregate the goods which were confiscated from which actually belonged to the company in liquidation."

17. Counsel for one of the secured creditors, IDBI, has supported the stand of the auction purchaser. It is submitted by him that the Customs Department's prayer is belated and should not be entertained at a stage when from the auction sale proceeds the dues of the workmen and secured creditors has been paid pro rata strictly in terms of Section 529A of the Act. Moreover, there was nothing produced by the Customs Department to show that the "plant and machinery" sold to the auction purchaser was no different from the "capital goods and raw materials" confiscated by it nearly ten years earlier.

18. The above submissions have been considered. The proceedings that took place before the Court from time to time reveal that the Customs Department was unable to produce before the Court any inventory of the goods of YMIL which was drawn up at the time of confiscation in 1997. This is critical for considering the plea of the Customs Department for cancellation of the auction sale and return of the plant and machinery that was sold to the auction purchaser. What has been produced are B/Es and packing lists dated 1990 and 1991 regarding "capital goods" and "raw materials". In the absence of any inventory prepared by the Customs Department at the time of confiscation in 1997 it is not possible to verify whether the "capital goods" described in the B/Es and packing lists nearly six years earlier to the confiscation, were the ones that were in fact confiscated. Secondly, in the absence of any mark on such "capital goods" to indicate that they have been confiscated by the Customs Department, it is not possible to conclude that they were the "plant and machinery" which were sold to and handed over to the auction purchaser in February 2007. In other words, there is nothing to verify that the goods which have been sold by auction sale in 2007 were in fact the very goods that were confiscated by the Customs Department in 1997.

19. In the cases cited by Mr. Aggarwala there was no doubt as to the identity of the goods confiscated by the Customs Department. There was also no doubt that those were the very goods sold to the auction purchaser. In the present case, it is not possible to speculate at this stage why the Customs Department failed to take steps to clearly segregate/isolate and distinctly mark the goods seized so that the OL could clearly identify them. The laxity of the Customs Department has led to a situation where the auction purchaser was only given to understand in the auction notice that "plant and machinery" and building of YMIL were on offer for sale. The time period between the date of import of the goods i.e. 1990/1991, their subsequent seizure in 1997 and their sale ultimately in 2006 ensured that the goods suffered depreciation. Their present value is nowhere near the import value. For some reasons the Customs Department was not vigilant in ensuring that the OL was kept informed that the goods had been confiscated by it. Also, from the auction proceeds, the dues of the workmen and secured creditors have been paid pro rata by the OL. In the circumstances, at this stage it is impractical to require the auction purchaser to return the goods and for the money paid by him to be returned to him.

20. The claim of the Customs Department as a preferential creditor has been admitted by the OL to the extent indicated in the status report as noticed by the Court on 21st January 2013. The Customs Department will get its pro rata share of the funds of the company which will be disbursed to it by the OL without delay.

21. For the aforementioned reasons, this Court is not inclined to entertain the prayer of the Customs Department for cancellation of the auction sale and return of the auction goods to the Customs Department. Consequently, CA No. 910 of 2008 is dismissed.

22. Correspondingly, CA No. 1297 of 2008 filed by the auction purchaser is allowed. The auction purchaser is permitted to further sell the plant and machinery purchased by him in the auction sale and hand over possession thereof to the purchaser.

Company Petition No. 183 of 2001

23. The OL will now take steps to make pro rata payments to the Customs Department and other creditors in accordance with law and file a fresh status report by the next date of hearing. List on 26th July 2013.