

(2004) 09 AP CK 0034

In the Andhra Pradesh High Court

Case No : Company Application No. 906 of 2004 in Company Petition No. 168 of 2002

Sri Vishnupriya Industries Ltd.

APPELLANT

Vs

Superintendent of Central Excise and Customs and Others

RESPONDENT

Date of Decision : 03-09-2004

Acts Referred:

Companies Act, 1956 — Section 456(1)
Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 — Rule 10, 9
Customs Act, 1962 — Section 142, 142(1), 59(2), 72, 72(1)

Citation : (2005) 1 ALT 470 : (2005) 184 ELT 227 : (2005) 60 SCL 311

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : M. Anil Kumar, for the Appellant; A. Raja Sekhar Reddy, S.C., for the Respondent

Final Decision : Allowed

Judgement

N.V. Ramana, J.—The Official Liquidator, representing M/s. Sri Vishnupriya Industries Limited, the company in liquidation, has filed this application u/s 468 of the Companies Act, 1956 (hereinafter referred to as "the Companies Act") read with Rules 9 and 11 (b) of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules") praying the Court to direct respondent No. 1, namely the Superintendent of Central Excise and Customs, Kurnool, to handover possession of the assets seized lying at CMR Complex, Vishnupriya Nagar, Opp: Railway Station, Panyam, Kurnool District to him, under proper inventory, in the presence of the secured creditors.

BRIEF FACTS OF THE CASE:

2. This Court by order dated 1-12-2003, while ordering winding up of the applicant-company, appointed the Official Liquidator attached to this Court as Liquidator and directed him to take possession of the assets of the company. In

pursuance of the said order, on 11-2-2004, the Official Liquidator deputed his officers to take possession of the assets of the company in liquidation, who reported that the machinery stored in 128 wooden cases is under seizure and custody of the Central Excise and Customs Department. Pursuant thereto, he addressed a letter dated 23-2-2004 to the authorities of the Central Excise and Customs Department, Kurnool, to furnish him the details relating to the seizure proceedings. Complaining that the respondents failed to furnish the details, he filed the present application, seeking a direction to the respondent to furnish him the details relating to the alleged seizure and custody of the machinery in question and to handover possession of the machinery to him on the grounds to be recorded infra.

3. Before proceeding to make a note of the rival submissions and contentions, it is appropriate to record the events that preceded the seizure of machinery by the Central Excise and Customs Department, and they run thus:

4. M/s. Sri Vishnupriya Industries Limited (hereinafter referred to as "the company") made an application to the respondents for grant of Customs Private Bonded Warehouse at Panyam. On 18-6-1998, respondent No. 1, granted Customs Bonded Warehouse licence bearing No. 1/98 to the company under the provisions of Section 9 of the Customs Act, 1962 (hereinafter referred to as "the Customs Act"). During 1998-99, the company imported machinery and other components, packed in 128 wooden cases, weighing 11,76,110 Kgs. in three consignments under the Export Promotion Capital Goods Scheme and warehoused the said consignments in the Private Bonded Warehouse (factory premises of the company)-1st consignment of 36 wooden cases under B.E. No. 29334 was warehoused on 17-7-1998, 2nd consignment of 45 wooden cases under B.E. No. 51569 was warehoused on 9-10-1998 and the 3rd consignment of 47 wooden cases under B.E. No. 68456 was warehoused on 17-9-1999, by executing three bonds as required u/s 59(2) of the Customs Act.

5. The Company neither installed the imported machinery nor cleared the same from the Private Bonded Warehouse even after expiry of the extended period of warehousing. Therefore, respondent No. 1 issued two notices to the company - one on 17-2-2000 in respect of 36 wooden cases and another on 10-4-2000 in respect of 45 wooden cases, to show cause as to why, a sum of Rs. 3,37,22,191/- and Rs. 10,48,29,017/- respectively, should not be levied. Thereafter, upon considering the explanation submitted by the company, respondent No. 1 vide Orders-in-Original Nos. 1/2000 (Customs) dated 15-9-2000 and 2/2000 (Customs) dated 10-10-2000 confirmed the customs duty levied. When the company did not pay the confirmed demanded duty levied, respondent No. 1 purportedly in exercise of powers u/s 72(2) of the Customs Act read with Section 142 thereof, passed detention order on 19-12-2000 for sale of 81 warehoused wooden cases, for recovery of the customs duty due to them, which according to respondent No. 1 was served on the authorized signatory of the company on 8-1-2001. Thereafter, after lapse of more than one year;

respondent No. 1 issued proceedings dated 7-1-2002 requiring the company to pay the customs duty arrears in respect of the three consignments within ten days, failing which appropriate action would be initiated as per law. This proceedings, according to respondent No. 1, was served on the company on 10-1-2002. Subsequently, on the basis of the instructions dated 22-2-2002 issued by the Deputy Commissioner, respondent No. 1, on 27-2-2002 once again passed order of detention, purportedly exercising powers u/s 72(2) of the Customs Act, for detention and sale of the warehoused wooden cases for recovery of customs duty of Rs. 22,20,38,112/-. When the company did not pay the demanded duty due, the wooden cases warehoused by it were seized under two different panchanamas-one containing 81 wooden cases and the other containing 47 wooden cases on 14-3-2002, and steps for auctioning the machinery were initiated. Therefore, respondent No. 1 vide O.C. No. 402/2002, dated 17-6-2002 informed the company that if they fail to pay the customs duty due, he would be compelled to proceed ahead with the auction of the detained machinery for recovery of the customs duty and interest thereon. Even after receipt of the said letter, when the company failed to pay the customs duty, respondent No. 1 proposed to conduct auction of the detained wooden cases for sale, and accordingly conducted the first auction on 30-10-2002 and the second auction on 30-12-2002, through the authorized Government Auctioner. That is how the respondents claim that the machinery in question came to be under their detention and custody.

6. The sum and substance of the rival submissions and contentions, as reflected in the reports of the Official Liquidator and the counter of the Central Excise and Customs Department and as submitted by the counsel appearances on their behalf, may be stated, and they run thus:

SUBMISSIONS OF THE OFFICIAL LIQUIDATOR

(1) The Official Liquidator submits that once an order of winding up of a company is passed, u/s 456 of the Companies Act, the Official Liquidator shall take control or custody of all the property, effects and actionable claim to which the company is or appears to be entitled, and since the machinery of the company, alleged to be under seizure and custody of the respondents, have not been sold as on the date of passing of winding up order against the company, the properties should be handed over to him for dealing and taking steps in accordance with the provisions of the Companies Act.

(2) He submits that the respondents have violated the provisions of Section 72 of the Customs Act. In that no demand notice as contemplated u/s 72(1) of the Customs Act was made by the proper officer, and the proceedings dated 7-1-2002, which the respondents claim to be demand notice, is merely a letter calling upon the company to pay the dues within ten days of receipt of the said letter. The said letter merely, refers to the duty due and orders-in-original passed in respect of 1st and 2nd consignments, and there is no order-in-original passed in respect of the 3rd consignment. Even if the said proceeding is treated as a

demand notice, yet the same cannot be sustained for the reason, it neither discloses the details of the machinery, nor the duty demanded for the period, nor the interest claimed on the due duty etc., nor the future course of action that may be taken if the duty is not paid, and further it does not speak of detention/attachment/seizure of the machinery. In support of his contention that a demand notice which does not reflect the details basing upon which duty has been arrived at is non est in the eye of law, and any action taken in pursuance of such notice, is liable to be declared null and void, the Official Liquidator placed reliance on the judgment of the apex Court in M.A. Jackson Vs. Collector of Customs, .

(3) He submits that if the amount allegedly demanded u/s 72(1) (a) to (d) of the Customs Act is not paid by the company, the proper officer is empowered to cause to detain and sell the goods, only after notice to the owner of the goods. Inasmuch as no notice whatsoever calling upon the owner to explain as to why the machinery should not be caused to be detained and sold, has been issued to the owner of the goods, the Assistant Commissioner of Central Excise could not have passed, and at any rate two orders of detention one on 19-12-2000 u/s 72(2) read with Section 142 of the Customs Act, in relation to the 1st and 2nd consignments of 81 wooden cases, and another on 27-2-2002 u/s 72(2) of the Act, in relation to the 1st, 2nd and 3rd consignments of 128 wooden cases and, without there being any show cause notice nor order-in-original in relation to the 3rd consignment, and proceeded in pursuance thereof to put the machinery to public auction, and therefore, the alleged orders of detention, ab initio are void, and non-est in the eye of law.

(4) He submits that in the Orders-in-Original dated 15-9-2000 and 10-10-2000 passed by the Assistant Commissioner of Central Excise, it is stated that in case of default in payment of duty demanded within one week, the goods will be liable for detention and sale u/s 72(1) read with Section 142(1) of the Customs Act. And though the company failed to pay the duty demanded within seven days, he did not take any steps, as cautioned thereunder.

(5) The Assistant Commissioner of Central Excise having resolved to initiate steps u/s 72(1) read with Section 142(1) of the Customs Act, was bound to follow the CEBC Circulars issued in exercise of power u/s 142(1) of the Customs Act governing the procedure for sale of the detained goods, and he cannot be allowed to contend that CEBC Circulars are not applicable to the case on hand.

(6) He submits that the respondents pursuant to the alleged orders of detention without passing any order of attachment against the machinery alleged to be under seizure and custody, as is required under the provisions of paragraphs 6 and 7 of the CEBC Circular, could not have put the machinery to auction for sale, and by doing so, they have violated the provisions of CEBC Circular, pertaining to attachment and sale of defaulters property for recovery of the dues, and as such, no sale proceedings should be allowed to be conducted by the respondents in pursuance of the alleged orders of detention, and more so when upon an order of winding up being passed against a company, properties stand vested in the

Court. In support of his contention that interpretation given in CEBC Circulars should be given precedence over other interpretations, and the Circulars issued by CEBC are binding on the authorities, and the authorities cannot be allowed to contend that the CEBC Circulars are not applicable, the Official Liquidator placed reliance on the judgment of the apex Court in Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries, .

(7) He submits that there are discrepancies in the values of the machinery put to sale, in that the aggregate value of 81 wooden cases is Rs. 30,28,42,541/-, whereas the sale notice mentions that 128 wooden cases are put to sale, whose value is shown as Rs. 48.30 lakhs. When as per Condition No. 2 of the Warehouse Licence granted to the company, the machinery to be held at any time in the warehouse shall be such that the duty leviable thereon does not exceed Rs. 4,00,00,000/-, it is not known how the 2nd consignment of 45 wooden cases imported by the company and warehoused on 9-10-1998, whose value is Rs. 22,35,16,017/- and involves a duty of Rs. 10,48,29,017/-, was allowed to be warehoused by the company whose duty is for higher than what is allowed by the Warehouse Licence.

(8) He submits that as per the provisions of Rule 272 of the Rules, any sale of the properties of the company in liquidation shall only be subject to sanction and confirmation by this Court, and inasmuch as the sale of the machinery alleged to be under seizure and custody of the respondents has not been effected, the company having gone into liquidation, the respondents have no right whatsoever to sell the machinery, which vests in the custody of the Official Liquidator.

(9) He submits that the since the company went into liquidation, the sale and confirmation of sale of the machinery, alleged to have been seized by the respondents, shall only be done by the Official Liquidator with prior sanction of this Court, and the proceeds realized through sale of the machinery, shall be paid to the respondents, only when they prove their claim before the Official Liquidator.

(10) He thus prayed that the machinery, alleged to be under seizure and custody of the respondents be directed to be handed over to him for taking necessary action in accordance with the provisions of the Companies Act.

Submissions of The Central Government

7. Refuting the submissions of the Official Liquidator, the learned Senior Standing Counsel for Central Government appearing on behalf of the respondents submitted as follows:

(1) He submits that on the application made by the company, a Private Customs Banded Warehouse licence vide Licence No. 1 of 1998 was granted by the respondents on 18-6-1998, for a period of one year, which was later extended. On the strength of the said licence, the company during 1998-99 under the Export Promotion Capital Goods Scheme imported 128 wooden cases of

machinery and warehoused them in Private Bonded Warehouse. As the company neither installed the machinery nor cleared the same from the Private Bonded Warehouse, the Assistant Commissioner issued two notices one on 17-2-2000 in respect of 36 wooden cases, and another on 10-4-2000 in respect of 45 wooden cases, to show cause why Rs. 3,27,22,191/- and Rs. 10,48,29,017/- towards customs duty shall not be levied.

(2) He submitted that thereafter, the respondents upon considering the explanation of the company, confirmed the leviable duty in Orders in Original passed on 15-9-2000 and 10-10-2000. Thereafter, the respondents having regard to the provisions of Section 72(2) of the Customs Act, detained 81 wooden cases of machinery for sale vide detention order dated 19-12-2000 passed by the Assistant Commissioner, for recovery of the dues. Again a demand notice on 7-1-2002 demand notice to the company was issued. Thereafter, under instructions dated 22-2-2002 of the Deputy Commissioner, the Assistant Commissioner vide orders dated 27-2-2002 passed detention orders, for detention and sale of 81 and 47 wooden cases. Accordingly, they were detained for sale, under two different panchanamas on 14-3-2002. The said orders attained finality. Consequent thereupon, the Superintendent of Central Excise, vide letter dated 17-6-2002 informed the company that if the duty along with interest thereon is not paid, they will put the machinery to auction.

(3) He denied the contention of the Official Liquidator, that there was no demand, as required under subsection (1) of Section 72(1) of the Customs Act, before passing order of detention u/s 72(2) of the Customs Act. According to him, no notice is required to be given to the owner of the goods before passing order of detention. He submitted that since the company failed to pay the excise duty in terms of the bonds executed by them, wherein they undertook that they shall on or before the date or dates specified in the notices of the demand pay to the proper officer of Central Excise, all duties, rent and charges claimable whether by way of customs duties etc., the respondents passed the detention order dated 27-2-2002 u/s 72(2) of the Customs Act, and no exception can be taken thereto.

(4) He submitted that since the duty leviable on the company have been confirmed in the orders-in-original dated 15-9-2000 and 10-10-2000 and the order of detention has been passed on 19-12-2000 and 27-2-2002 as required in terms of Section 72(1) of the Customs Act, no order of attachment of the machinery in terms of the CEBC Circular dated 15-12-1997, is required to be passed before the machinery is put to public auction, for the said CEBC Circular, issued in terms of Section 142(1) of the Customs Act, deals with and is applicable only to cases relating to recovery of duties pertaining to smuggling, evasion and other offences and not in relation to warehoused goods, and in any event, he denied that the orders of detention, have been passed u/s 142(1) of the Customs Act, and therefore, the applicability of the guidelines issued in CBEC Circular does not arise.

(5) He further submitted that the reserve price of the seized machinery having

been fixed at Rs. 86,63,63,185/-, the task of putting the machinery to public auction was entrusted to M/s. Moosa and Company, who upon issuing auction notifications, conducted public auction twice, one on 30-10-2002 and another on 30-12-2003, and as the price offered in the said public auctions for the machinery put to auction, was very low and was nowhere near the minimum upset price, the respondents have decided to put the machinery to public auction once again, and the third public auction would be conducted in the near future.

(6) He submitted that since the detention orders have been passed and two public auctions conducted prior to this Court passing orders ordering winding up of the company, and the detained machinery having become the property of the State pursuant to the orders of detention, they alone are entitled to sell the properties and appropriate the proceeds realized through such sale for satisfying their duty dues payable by the company, and the respondents cannot be insisted upon to prove their claim before the Official Liquidator, and more so when duties payable to the sovereign prevail over all other dues, including financial institutions. He, thus prayed that the application be dismissed.

POINTS IN ISSUE

8. In the light of the rival arguments advanced, the following questions do crop up for consideration by this Court in this application. They are-

(1) Whether, in fact, there is demand made by the proper officer under Sub-section (1) of Section 72(1) of the Customs Act, and if so, whether the proceedings dated 7-1-2002 is a demand made by the proper officer or is merely a letter?

(2) Whether, the proper officer before proceeding to cause to be detained and sold the goods warehoused, under Sub-section (2) of Section 72(1) of the Customs Act, is required to issue notice to the owner of the goods?

(3) Whether the orders of detention passed without complying the provisions of Section 72(1) of the Customs Act, would render the proceedings ab initio void and non-est in the eye of law?

(4) Whether in the sale of the machinery allegedly detained, the respondents are required to follow the procedure contemplated u/s 72(2) read with Section 142(1) of the Customs Act and the guidelines in the CBEC Circular issued thereunder, or are required to merely follow the procedure contemplated u/s 72(2) of the Customs Act and?

(5) Whether upon an order of winding up being passed u/s 456 of the Companies Act, the properties of the company vest in the Official Liquidator, and whether he is entitled to take delivery of the allegedly detained goods from the respondents since the sale of the goods has not been effected, and whether the respondents in respect of their claim of duty dues, are required to prove their claim before the Official Liquidator?

9. Before proceeding to answer the aforementioned five points one by one, to wit, the sequence of the events that preceded the present application, may be noted. Admittedly, the company obtained Warehousing Licence by executing a bond u/s 59 of the Customs Act. In pursuance of the said licence, the company imported 128 wooden cases of machinery in three deferent consignments-the 1st consignment of 36 wooden cases under B.E. No. 29334 warehoused on 17-7-1998, the 2nd consignment of 45 wooden cases under B.E. No. 51569 warehoused on 9-10-1998 and the 3rd consignment of 47 wooden cases under B.E. No. 68456 warehoused on 17-9-1999. Admittedly, the company, even after the extended period of licence, failed to install nor clear the machinery from the warehouse. In those circumstances, respondent No. 1 issued two notices to the company, one dated 17-2-2000 and the other dated 10-4-2000 for 36 and 45 wooden cases calling upon to explain why a sum of Rs. 3,27,22,191/- and Rs. 10,48,29,017/- respectively should not be levied. There was no show cause notice issued seeking to levy duty in respect of the 3rd consignment of 47 wooden cases. Thereafter, the Assistant Commissioner of Central Excise, upon considering the explanation submitted by the company, passed orders-in-original dated 15-9-2000 and 10-10-2000 confirming the duty to be levied demanded in the show cause notices dated 17-2-2000 and 10-4-2000 in respect of 36 and 45 cases. Both the orders-in-original are similar in nature, save the figures and number of wooden cases. There is no order-in-original passed in respect of the 3rd consignment of 47 wooden cases. A reference to the contents of the order of one of the orders-in-original may be reproduced, which reads thus:

(i) I confirm the demand duty amounting to Rs. 3,27,22,191/- on 36 cases of goods imported as determined u/s 15 of the Customs Act, 1962 as raised in the show cause notice dt. 17-2-2000.

(ii) I demand interest @ 20% on the above duty for the period starting from the date of expiry of six months from the date of warehousing till the date of clearance of goods on payment of duty as required u/s 61(2) of the Customs Act, 1962 read with Section 47 of the Act *ibid*.

(iii) I order that if the assessee fails to pay the duty and the interest as specified in (i) and (ii) above, within one week of receipt of this order, such sufficient portion of the impugned goods will be liable for detention and sale u/s 72(1) of the Customs Act, 1962 read with Section 142(1) of the Customs Act, 1962 so as to recover the amounts due from them.

10. Though in the aforesaid orders-in-original, it was ordered that if the duty and interest as specified in (i) and (ii) is not paid within one week, the impugned goods would be liable for detention and sale u/s 72(1) read with Section 142(1) of the Customs Act, to recover the amounts due from them, the respondents have not taken any steps till 19-12-2000, when the Assistant Commissioner of Central Excise, passed an order styled as "detention order", purporting to be u/s 72(1) read with Section 142(1) of the Customs Act. The said order reads:

M/s. Sri Vishnupriya Industries Ltd., Panyam Village were demanded Rs. 3,27,22,191/- and Rs. 10,48,29,017/- with interest @ 20% vide Orders-in-Original Nos. 1/2000-Cus dated 15-9-2000 and 2/2000-Cus dated 10-10-2000 respectively. The said orders were served on them on 20-9-2000 and 13-10-2000 respectively. But till date, they have failed to pay the duty and interest as demanded.

I therefore, order for detention of 81 cases of warehoused goods of M/s. Sri Vishnupriya Industries Ltd., Panyam Village, as mentioned in the above Orders-in-Original, under subsection (2) of Section 71 of the Customs Act, 1962 read with Section 142(1) of the Customs Act, 1962 for the purpose of sale of such sufficient portion of the impugned goods so as to recover the amounts due from them.

11. Before passing this detention order, it may be noticed that there was no demand made by the proper officer as required under Sub-section (1) of Section 72(1) of the Customs Act. The Assistant Commissioner of Central Excise instead of making demand, has straightaway passed the aforesaid detention order, u/s 72(1) of the Customs Act, without notice to the owner of the goods. However, after lapse of one year, he issued proceedings dated 7-1-2002, requiring the company to pay the duty of Rs. 3,27,22,191/-, Rs. 10,48,29,017/- and Rs. 8,44,86,904/- involved in respect of the 1st, 2nd and 3rd consignments, within ten days of its receipt. It is required to notice that neither any show cause notice nor order-in-original was passed in respect of the 3rd consignment. However, without there being any show cause notice issued nor order-in-original passed nor there being any demand made by the proper officer to the owner of the goods in respect of 3rd consignment, he passed another order of detention on 27-2-2002 on the instructions issued by the Deputy Commissioner in his letter dated 22-2-2002, for all the three consignments, purportedly u/s 72(1) of the Customs Act. The said order reads:

M/s. Sri Vishnupriya Industries Ltd., Panyam Village, (SVIL) were demanded duty of Rs. 22,20,38,112/- {Rupees twenty-two crores twenty lakhs thirty eight thousand one hundred and twelve only) along with interest vide this office letter C. No. VIII/16/1/ 2000-Arrears, dated 07-01-2002 issued as required under Sub-section (1) of Section 72(1) of the Customs Act, 1962. They have acknowledged the receipt of the said letter on 10-01-2002. Till date, they have failed to pay the duty and interest. I therefore, order for detention of the goods warehoused by M/s. SVIL at the warehouse at Panyam, under Sub-section (2) of Section 72(1) of the Customs Act, 1962 for the purpose of sale of the impugned goods so as to recover the amounts due from them.

12. Pursuant to the above said order of detention, the respondents on 14-3-2002 appear to have seized 128 boxes of machinery under two panchanamas - one panchanama comprising of 1st and 2nd consignments and the other panchnama comprising the 3rd consignment. Thereafter, the Superintendent of Central Excise, addressed letter to the company, informing that if the duty amount

demanded along with interest is not paid immediately, they will be compelled to go ahead with auction of the machinery detained for recovery of duty and interest. Inasmuch, as there was no demand notice issued u/s 72(1) of the Customs Act, by the proper officer, the consequential proceedings u/s 72(1) of the Customs Act, and the steps taken by the respondents for sale of the warehoused goods, detained and seized, get vitiated, and more so when there was no notice issued to the owner of the goods, u/s 72(1) of the Customs Act, before seeking to detain and sell the goods,

In re Point Nos. 1, 2 and 3:

13. Point Nos. 1, 2 and 3 are intertwined and interconnected, and as such, they are answered under one heading. In order to consider the question whether or not, there is proper demand made by the proper officer under Sub-section (1) of Section 72(1) of the Customs Act, to the owner of the goods to pay the amount demanded thereunder, and in the event of the owner of the goods not paying the amount demanded thereunder, whether or not the proper officer under subsection (2) of Section 72(1) of the Customs Act, before causing to detain and sell the warehoused goods, is required to give notice to the owner of the goods, it would be appropriate to examine the provisions of Section 72(1) of the Customs Act. Section 72(1) of one Customs Act reads thus:

72. Goods improperly removed from warehouse, etc.- (1) In any of the following cases, that is to say-

(a) Where any warehoused goods are removed from a warehouse in contravention of Section 71;

(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;

(c) where any warehoused goods have been taken u/s 64 as samples without payment of duty;

(d) where any goods in respect of which a bond has been executed u/s 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer;

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.

(2) If any owner fails to pay amount demanded under Sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select.

14. A plain reading of the aforementioned Section, would make it clear that in

respect of cases mentioned in clauses (a) to (d) of Sub-section (1), namely where any warehoused goods are removed from a warehouse in contravention of Section 71 or 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 or where any warehoused goods have been taken u/s 64 as samples without payment of duty or where any goods in respect of which a bond has been executed u/s 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer, the proper officer may demand, and the owner of such goods shall forthwith pay, the amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods, and if any owner fails to pay the amount demanded under Sub-section (1), under sub-section(2), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select.

15. The intendment of Section 72(1) of the Customs Act is that before an order causing to detain and sell the goods warehoused for violation of any of the provisions of Section 72(1) (a) to (d) of the Customs Act is passed, there should be a demand made by the proper officer to the owner of the goods, and if the owner of such goods, fails to pay forthwith, the amount of duty chargeable on account of such goods together with all penalties, rent and other charges payable in respect of such goods, then the proper officer under Sub-section (2) of Section 72 of the Customs Act, after notice to the owner of the goods, and without prejudice to any other remedy, cause to be detained for sale, such sufficient portion of his goods, in the warehouse, as he may select. So, it is clear that before an order causing to detain and sell the goods u/s 72(2) of the Customs Act is passed, there should be a demand made under Sub-section (1) of Section 72(1) of the Customs Act. Therefore, unless and until the provisions of Sub-section (1) of Section 72(1) of the Customs Act is complied with, the question of invocation of the provisions of Sub-section (2) of Section 72(1) of the Customs Act, for causing goods to be detained and sold and that too without notice to the owner of the goods, does not arise.

16. In the instant case, it is the contention of the respondents that the proceedings dated 7-1-2002 issued by the Assistant Commissioner of Central Excise requiring the company to pay the dues mentioned therein, is in fact, a demand made by the proper officer u/s 72(1) of the Customs Act, and while the Official Liquidator contends that the same is merely a letter addressed by the respondents to the company. To consider whether the proceedings dated 7-1-2002, is in fact, a demand made by the proper officer or is merely a letter addressed by the respondents to the company, a reference to the contents of the proceedings dated 7-1-2002 would be appropriate, and it reads thus:

Gentlemen,

Sub: Customs-Recovery of arrears from M/s. Sri Vishnupriya Industries Ltd., (SVIL), Panyam.

The following amount along with interest as applicable, are pending recovery from you for the importation of capital goods without payment of customs duty:

Sl. No. B/E No. Order-in-Original No./Date Duty involved 1. 29334 1/2000, dt: 15-09-2000 Rs. 2,27,22,191/- 2. 51569 2/2000, dt: 10-10-2000 Rs. 10,48,29,017/- 3. 68456 Rs. 8,44,86,904/-

The above dues may be paid along with interest within 10 days of receipt of this letter failing which appropriate action will be initiated as per law.

Yours faithfully, Sd/- Assistant Commissioner

17. A reading of the above proceedings dated 7-1-2002, would make it obviously clear that the same is in the form of a letter addressed by the Assistant Commissioner of Central Excise to the company, informing them that the amounts mentioned therein along with interest as applicable are pending recovery for the capital goods imported without paying customs duty, and that if the dues along with interest are not paid within ten days of its receipt, appropriate action will be initiated as per law. Here, it is required to notice that under Sub-section (1) of Section 72(1) of the Customs Act, the proper officer shall make demand to the owner of the goods, who 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. The proceedings dated 7-1-2002, which according to the respondents is a demand notice u/s 72(1) of the Customs Act, neither mentions the provision under which it has been issued nor reflects the future course of action that is to be followed if the amounts mentioned therein are not paid within ten days. The proper officer, in the said proceedings, merely referred to B/E No., order-in-original No./ date and duty involved, and what are the amounts that are payable by the owner of the goods, as referred to in Sub-section (1) of Section 72(1) of the Customs Act, are not reflected in the said proceedings. In the absence of details of the amounts to be recovered, as mentioned in Sub-section (1) of Section 72(1) of the Customs Act, from the company towards customs duty, mentioned in the proceedings dated 7-1-2002, and having regard to the salutation and closing of the proceedings and the format and manner in which it has been issued, it can by no stretch of imagination be said to be a demand made u/s 72(1) of Customs Act, but is merely a letter addressed by the Assistant Commissioner of Central Excise to the company requiring them to pay the amounts mentioned therein within ten days. Therefore, technically speaking, there is no proper demand made by the proper officer under Sub-section (1) of Section 72(1) of the Customs Act, which enables him to pass an order for causing to detain and sell the goods.

18. Be that as it may, even if the proceedings dated 7-1-2002 is presumed to be a valid demand made by the proper officer under Sub-section (1) of Section

72(1) of the Customs Act, the fact remains that for the purpose of invoking the provisions of Sub-section (2) of Section 72(1) of the Customs Act, before causing to be detained and sold the goods warehoused, the proper officer has to give notice to the owner of the goods, which has not been done so. It is required to be noted that, in the instant case, there is neither proper demand made under subsection (1) of Section 72(1) of the Customs Act nor any notice issued by the proper officer to the owner of the goods under Sub-section (2) of Section 72 of the Customs Act, before passing the order dated 27-2-2002, causing to be detained and sold the warehoused goods. Further, the detention order in respect of the 3rd consignment came to be passed without any show cause notice, order-in-original, demand made, and notice to the owner of the goods. On that ground also, the alleged detention order dated 27-2-2002 cannot be sustained. Therefore, it has to be held that the order of detention dated 27-2-2002 passed by the Assistant Commissioner of Central Excise is non est in the eye of law and ab initio void, and therefore, cannot be acted upon. This apart, the earlier order of detention dated 19-12-2000 passed by the Assistant Commissioner of Central Excise u/s 72(1) read with Section 142(1) of the Customs Act, in respect of 1st and 2nd consignments is also required to be declared as null and void and non-est in the eye of law for the reason that there was neither any demand notice nor any notice issued to the owner of the goods before passing the detention order for sale. As such, any steps taken in pursuance of the said orders, including seizure under panchanams and the subsequent proceedings of sale, get vitiated.

In re Point No. 4:

19. In view of my findings on point Nos. 1, 2 and 3, that there is no proper demand made under Sub-section (1) of Section 72(1) of the Customs Act nor is there any notice issued to the owner of the goods under subsection (2) of Section 72(1) of the Customs Act, and as such, the entire detention orders, are ah initio void and non-est in the eye of law, the necessity of answering point No. 4 does not arise, for the reason that the question whether the procedure contemplated u/s 72(1) read with Section 142 of the Customs Act and the instructions issued by the Board of CBEC in their Circular No. 365/81/97-CX, dated 15-12-1997 or the procedure u/s 72(1)) of the Customs Act alone, for detention and sale of the warehoused goods for realizing their dues, would have been necessary if point Nos. 1, 2 and 3 were answered positively in favour of the respondents.

20. However, having regard to the submissions made, it would suffice to note that Section 72(1) of the Customs Act merely states that the proper officer may, without prejudice to any other remedy, cause to detain and sell, the warehoused goods, after notice to the owner of the goods. It does not prescribe the procedure to be followed in the sale of the detained goods. While Section 142(1) of the Customs Act deals with recovery of sums due to Government. It provides the procedure and manner in which the dues have to be recovered, and what are the steps to be taken by the officers concerned, in the event the dues are not

recoverable. It is required to notice that u/s 142(1) of the Customs Act, the Board of CBEC issued Circular, providing the procedure and manner in which the sale of moveable/ immovable properties for recovery of dues, has to be effected, and they inter alia, include attachment in terms of Rules 9 and 10 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 and serving of attachment order on the owner of the goods, and they should be in appropriate forms. In the absence of any procedure provided for sale of the detained goods u/s 72(2) of the Customs Act, it has to be held that once the goods are detained for sale u/s 72(2) of the Customs Act, they have to follow the procedure contemplated u/s 142(1) of the Customs Act and the CBEC Circulars governing thereof. This apart, in the instant case, it may be noticed that the respondents while granting Warehousing Licence u/s 59(2) of the Customs Act, got executed a bond on 28-8-1989, wherein it is inter alia, agreed that any amount due under the bond may be recovered in the manner laid down in subsection (1) of Section 142(1) of the Customs Act without prejudice to any other mode of recovery. The respondents having taken a bond from the company at the time of issuing Warehousing Licence that the amount due thereunder may be recovered in terms of the procedure laid down in Sub-section (1) of Section 142(1) of the Customs Act, now cannot contend that for recovery of the dues, they need not follow the procedure contemplated u/s 142(1) of the Customs Act, which deals with recovery of sums due to Government, or the guidelines issued thereunder by the Board for CBEC in their Circular dt. 15-12-1997, with respect to sale of movable/immovable properties by Central Excise Officers for recovery of Central Excise dues, and that mere compliance of the provisions u/s 72(2) of the Customs Act, is sufficient for selling the detained goods.

In re Point No. 5:

21. Though the respondents pursuant to the orders of detention, which were held to be ab initio void and non-est in the eye of law, conducted auction of the detained goods, the fact remains as on 1-12-2003, when this Court passed the order of winding up against the company, no sale was effected. It is required to be noticed that u/s 456 of the Companies Act where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property, effects and actionable claim to which the company is or appears to be entitled. Inasmuch as no sale of the goods has been effected, having regard to the provisions of 456 of the Companies Act, the assets of the company, on an order of winding up being passed, stand vested in the Official Liquidator, and the Official Liquidator alone is entailed to deal with the effects and actionable claims to which the company is or appears to be entitled to, and therefore, the respondents cannot contend that the goods having been detained by them, they alone are entitled to sell and realize their dues. Further, inasmuch as the Official Liquidator becomes the custodian of the properties of a company when once an order of winding up is passed, and functions under the directions

of the Company Court, any person making any claim against the company, has to prove his claim before the Official Liquidator by placing necessary material in support of his case, and the respondents cannot be an exception, and even they have to prove their claim of dues before the Official Liquidator.

22. In the above view of the matter, the application is allowed. The respondents are directed to handover possession of 128 wooden cases of machinery to the Official Liquidator, seized by them under the panchanamas for sale, to enable him to take appropriate steps in accordance with the provisions of Section 456(1) of the Companies Act, and all consequential steps, as may be directed by this Court from time to time.