

(2008) 08 AP CK 0029
In the Andhra Pradesh High Court
Case No : OSA No. 1 of 2005

Superintendent of Central Excise and Customs, Kurnool
Range-I

APPELLANT

Vs

Sri Vishnupriya Industries Ltd. (in Liqn.) and Others

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Companies Act, 1956 — Section 391, 428, 446, 449, 455
Customs Act, 1962 — Section 142, 28B, 59, 61, 64
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 11AAAA, 13(2)
Transfer of Property Act, 1882 — Section 48

Citation : AIR 2009 AP 32 : (2008) 6 ALD 209 : (2009) 6 ALT 97 : (2009) 147
CompCas 172 : (2009) 3 CompLJ 172 : (2010) 97 SCL 27

Hon'ble Judges : L. Narasimha Reddy, J;G.V. Seethapathy, J;B. Prakash Rao, J

Bench : Full Bench

Advocate : A. Rajashehar Reddy, Asst. Solicitor General, for the Appellant; M.
Anil Kumar, Official Liquidator for Respondent No. 1 and P.V. Markandeyulu, for
the Respondent

Judgement

L. Narasimha Reddy, J.—In the event of a company being wound-up, in any of the three recognized modes, viz., by the Court, or voluntarily by a company itself, or subject to the supervision of the Court, preparation of list of assets and liabilities becomes essential. The Companies Act, 1956 (for short "the Act") recognizes certain priorities, in the matter of distribution of assets of a company, under winding-up. It is not uncommon that the assets of certain companies are burdened with liability of payment of tax of different kinds, excise duty, customs duty etc.

2. The question, as to whether the claim of a secured creditor has precedence over the right of the concerned Government department, to recover dues of tax, the customs duty in particular, arises for consideration in this appeal.

3. M/s. Sri Vishnupriya Industries Limited, the 1st respondent herein, was

incorporated under the Act, with an objective of undertaking manufacturing activity. It established a factory at Panyam in Kurnool District. To carry on its activity, it intended to import machinery and components, from foreign countries. Accordingly, it submitted an application to the Customs Department, to provide the facility of Private Bonded Customs Warehouse, under the Export Promotion Capital Goods (EPCG) Scheme. On a permission being accorded for this purpose, it imported machinery, packed in 128 wooden cases, in three different consignments from Italy, and the same was stored in the private customs godown. Under the Law in force, at the relevant point of time, the company was under obligation to pay customs duty to the tune of about Rs. 13.75 crores, and the goods were to have been cleared on payment of the said amount. Inasmuch as the 1st respondent did not get the imported goods cleared, even after the lapse of the stipulated period, the appellant initiated proceedings. Initially, a demand notice was issued. Thereafter, the amount payable towards customs duty, under the relevant provisions of the Customs Act, was determined. Sale of the imported goods was also attempted, to recover the dues, by conducting auction on 30.10.2002. Before the sale could take place, the winding-up of the company was ordered by this Court, on 1.12.2003 in Company Petition No. 168 of 2002, and an Official Liquidator was appointed.

4. The company, through Official Liquidator, the 1st respondent, filed CA No. 906 of 2004 u/s 468 of the Act, with a prayer to direct the appellant herein to handover the imported goods, which were detained under the provisions of the Customs Act, and lying in CMR Complex, Vishnupriya Nagar, Panyam. It was pleaded that, with the order of winding-up, all the assets of the company vest in the Official Liquidator, and inspite of demand, the appellant did not handover the goods. It was also pleaded that the detention of the goods, and various proceedings initiated by the appellant, are contrary to Sections 72 and 142 of the Customs Act. The appellant opposed the application, claiming that, the goods carry with them, the liability, to pay the customs duty, and till the same is paid, they cannot be cleared or delivered to the company, or for that matter, the Official Liquidator.

5. A learned Single Judge of this Court dealing with the company matters, allowed the CA No. 906 of 2004, through order dated 3.9.2004. It was held that the detention of the goods by the appellant and the proceedings initiated thereafter, are void ab initio, and that the Official Liquidator is entitled to take custody of all the assets of the company, including the goods in question, u/s 456 of the Act. The appellant preferred this OSA, under Clause 15 of the Letters Patent, read with Section 48 of the Act.

6. In the course of hearing of the appeal, the appellant relied upon a judgment of the Calcutta High Court in Collector of Customs Vs. Dytron (India) Ltd., , in support of their contention, that the right to recover customs duty, takes precedence over all other claims, vis-a-vis, the imported goods. On behalf of the Official Liquidator, as well as the secured creditors, respondents 2 to 8 herein,

reliance was placed upon the judgment of a Full Bench of the Madras High Court in UTI Bank Ltd. v. Deputy Commissioner of Central Excise (2007) 135 CC 329 (Mad.). The Division Bench of this Court felt that in view of the conflicting views expressed by two different High Courts, one of them, by a Full Bench, the question relating to priority of claims, in the context of winding-up, requires consideration by a Full Bench of this Court. Accordingly, this Bench was constituted.

7. Sri A. Rajashekar Reddy, learned Assistant Solicitor General, on behalf of the appellant, submits that the liability to pay the customs duty remains fastened with the imported goods, till they are cleared and the process of winding-up, irrespective of its mode, does not have the effect of wiping away the liability, to pay customs duty. He contends that when the company, before its liquidation, could not have secured the possession of the imported goods, except by paying the customs duty, the Official Liquidator, who virtually officiates the company, cannot stand on a better footing. He further submits that the view expressed by the Company Court, on the legality of the detention of the imported goods, or any consequential steps, is clearly outside its purview. He contends that the Customs Act and the Rules made thereunder, are self-contained Code, not only in the matter of imposition of customs duty, but also for adjudication of the claims, in relation thereto. Learned Assistant Solicitor General submits that the vesting of assets of a company, under liquidation, in an Official Liquidator, is subject to same incidence in law, and the Official Liquidator would be equally under obligation to discharge the legal obligations. He submits that the subject-matter of adjudication before the Madras High Court, was not in relation to customs duty, and the judgment relied upon by the respondents cannot be treated as a binding precedent, on the issue.

8. Sri M. Anil Kumar, learned Counsel for the Official Liquidator, and Sri P.V. Markandeyulu, learned Counsel for the Secured Creditors, on the other hand, submit that once the company Court orders winding-up of a Company, the Official Liquidator is not only conferred with the right, but is also placed under a duty, to take possession of the assets of the company, under liquidation. They claim that, admittedly, the imported goods are owned by the company, and they are liable to be treated as assets, in the hands of the Liquidator. They contend that in case the appellant wants to recover any dues of customs duty, they have to make an application before the Company Court, which, in turn, would process it, in the order of priority, stipulated under the Act. Learned Counsel submit that the Company Court had examined the matter from correct perspective, and no interference is warranted, with the order under appeal.

9. Counsel for both the parties, did not confine their arguments to the question referred to the Full Bench. They advanced comprehensive arguments and pleaded that the appeal itself be heard and disposed of.

10. The facts, that gave rise to the filing of appeal, and the question that arises for consideration, have been stated in the introductory paragraphs, within the

permissible limits of brevity. The principal area of controversy, is the priority or precedence, as between the claim of the appellant, to recover the customs duty; on the one hand, and the right of secured creditors, by themselves, or through the Official Liquidator, to assume possession of the goods, imported by the company; on the other hand. It is necessary to take note of certain provisions of law, which have a bearing on the issue.

11. Part VII of the Act prescribes the procedure to be followed, in the course of winding-up of the companies, and provides for the rights and obligations of the various individuals and agencies, in the process of winding-up. There would not be much of a problem, in case the assets of a company under winding-up, are in excess of, or sufficient to, meet its liabilities. Difficulty, however, arises only when they are inadequate. The basic liability in such cases, to arrange for the shortfall, is cast upon a category of persons, known as "contributories". This expression is defined u/s 428 of the Act, as under:

Section 428 : Definition of "contributory".- The term "contributory" means every person liable to contribute to the assets of a company in the event of its being woundup and includes the holder of any shares which are fully paid-up; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

12. The other provisions of Chapter-I of Part VII, broadly deal with the nature and extent of liability of a contributory, who can be an individual, or a body corporate.

13. Chapter-II of Part VII, which deals with the winding-up of a company, by Court, provides for various steps in the process, such as the circumstances under which, an application for winding-up can be made; the procedure for adjudication thereof, the powers of the Court and the consequences of an order of winding-up. Once the Company Court passes an order, directing winding-up, it becomes mandatory u/s 449 of the Act, to appoint an Official Liquidator. On being so appointed or nominated, an Official Liquidator is placed under obligation to submit a report to the Company u/s 455 of the Act. The important information that is required to be incorporated in the report is mentioned in Clauses (a), (b) and (c) of Sub-section (1) of Section 455, which reads as under:

Section 455: Report by Official Liquidator.- (1) In case where a winding-up order is made, the Official Liquidator shall, as soon as practicable after receipt of the statement to be submitted u/s 454 and not later than six months from the date of the order [or such extended period as may be allowed by the Court] or in a case where the Court orders that no statement need be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court:

(a) as to the amount of capital issued, subscribed, and paid-up and the estimated amount of assets and liabilities, giving separately, under the heading of assets, particulars of (i) cash and negotiable securities; (ii) debts due from

contributories; (iii) debts due to the company and securities, if any, available in respect thereof; (iv) movable and immovable properties belonging to the company; and (v) unpaid calls; and

(b) if the company has failed, as to the causes of the failure; and

(c) whether, in his opinion, further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

14. The Liquidator is conferred with adequate powers to discharge his functions, particularly in the matter of taking possession of the assets, etc. Section 467 of the Act places an obligation on the Liquidator to prepare the list of contributories, and application of assets. The provision reads as under:

Section 467: Settlement of list of contributories and application of assets.-(1) As soon as may be after making a winding-up order, the Court shall settle a list of contributories. With power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities:

Provided that, where it appears to the Court that it will not be necessary to make calls on, or adjust the rights of, contributories, the Court may dispense with the settlement of a list of contributories.

(2) In settling the list of contributories, the Court shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for, the debts of, others.

15. The 1st respondent filed application u/s 468, and it is apt to reproduce the provision:

Section 468: Delivery of property to Liquidator.-The Court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, (officer or other employee) of the company, to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the Liquidator, any money, property or books and papers (in his custody or under his control) to which the company is prima facie entitled.

16. Secured creditors are generally kept outside the winding-up proceedings. Their right to enforce the security remains undisturbed, on account of the winding-up of proceedings. Where, however, the intervention of the Court is sought, the leave of the Company Court becomes necessary for enforcing the security. (See M.K. Ranganathan and Another Vs. Government of Madras and Others,). Section 520 mandates that, in cases of voluntary winding-up, all costs, charges and expenses incurred in the process, shall be subject to the rights of secured creditors.

17. Another provision, which has an important bearing on the matter, is Section

530. It prescribes the order of priority, in the matter of application of the assets of the company. The list comprises of, (a) the revenues, taxes, due from the company, to the Central or State Government; (b) wages or salary payable to the employees, not exceeding Rs. 1,000/- per claimant; (c) holiday remuneration; (d) dues of E.S.I. contribution; (e) amounts payable towards the claims under Workmen's Compensation Act; (f) dues of Provident Fund, etc. Section 446 of the Act provides for stay of legal proceedings against the company under winding-up, and empowers the Company Court to determine the priorities. It reads as under:

Section 446 : Suit stayed on winding-up order.-(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 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.

(2) The Court which is winding-up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of:

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made u/s 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding-up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding-up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding-up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

18. In the Customs Act, Sections 72 and 142 are relevant. In the order under appeal, extensive discussion was undertaken, with reference to these provisions. They read as under:

Section 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 any 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.

Section 142 : Recovery of sums due to Government.-(1) (Where any sum payable by any person) under this Act (including the amount required to be paid to the credit of the Central Government u/s 28B) is not paid,:

(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or

(b) the Assistant Commissioner of Customs or Deputy Commissioner of Customs may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the Assistant Commissioner of Customs or Deputy Commissioner of Customs or such other officer of customs; or

(c) if the amount cannot be recovered from such person in the manner provided in Clause (a) or Clause (b):

(i) the Assistant Commissioner of Customs or Deputy Commissioner of Customs may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector or the district in which such person owns any property or resides or carries on his business and the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified thereunder as if it were an arrears of land revenue; or

(ii) the proper officer may, on an authorization by a Commissioner of Customs and in accordance with the rules made in this behalf, distain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said

amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person:

Provided that where the person (hereinafter referred to as predecessor) by whom any sum payable under this Act including the amount required to be paid to the credit of the Central Government under this Act including the amount required to be paid to the credit of the Central Government u/s 28B is not paid, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by the proper officer, after obtaining written approval from the Commissioner of Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.

(2) Where the terms of any bond or other instruments executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in Sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

19. Reverting to the facts of the case, the respondents herein, intended to proceed against the goods, that are in the custody of the appellant. The appellant, in short, pleads that unless the customs duty is paid, imported goods cannot be released to any one, including the actual importer. It is in this context, that difference of opinion between the judgment of a Division Bench of the Calcutta High Court in Dytron's case (supra), on the one hand, and the judgment rendered by a Full Bench of the Madras High Court in UTI Bank Ltd.'s case (supra) was noticed.

20. In a way, it can be said that the facts of the present case are nearer to those in Dytron's case (supra). As in the instant case, the company in that case went into liquidation. Certain chemicals imported by the company from a foreign company, but not cleared as yet by the Customs Department, were put to sale, by the Official Liquidator to discharge the liability towards secured creditors. The sale was, in fact, proceeded with and the auction-purchaser deposited the amount. At that stage, the Customs Department laid its claim. A conflict, naturally arose between the claims of the Customs Department, on the one hand, and the auction-purchaser, on the other. After discussing the relevant provisions of the Customs Act and the Companies Act, a Division Bench of the Calcutta High Court held as under:

The Customs Authorities are correct in their submission that until and unless

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

21. In UTI Bank's case (*supra*), what fell for consideration before the Madras High Court was the primacy of claims arising under the Central Excise Act, on the one hand, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Securitisation Act"), on the other. The debtor company was not under liquidation. An item of property, which was offered as security by the company for repayment of loan, was brought to sale under the relevant provisions of the Securitisation Act. The authorities of the Central Excise Department sought to proceed against the same property, to recover the dues of Central Excise. It was held that the claim made by the Central Excise Department has to give way to the proceedings under the Securitisation Act. Reference was made to Section 11-AAAA of the Securitisation Act, which conferred an overriding effect, to the provisions of that Act.

22. Firstly, what was sold, was not a manufactured item, which is subject to levy of excise duty. It was an item of immovable property, offered as security, for repayment of loan. Secondly, the provisions of the Customs Act did not fall for consideration in that case. Mention to the Customs Act was made, along with the Central Excise Act, in the process of summing up of the conclusions. The following paragraph of the said judgment would, make it clear:

We have already referred to the fact that since there was no response from the borrower company for the notice issued u/s 13(2) of the SARFAESI Act on April 17, 2004, after lapse of time as provided under the SARFAESI Act, the petitioner-bank took constructive possession of the secured assets on February 8, 2005, and physical possession of the same on March 29, 2005. While so, the first respondent, viz., Deputy Commissioner of Central Excise, Chennai, intimated the petitioner-bank in his letter dated March 28, 2005, that a sum of Rs. 41,17,246/- was due and payable to the Department of Central Excise and requested the petitioner-bank to hold the said money or property with it towards the amount due to the said department. The borrower company sold plot No. 54 and repaid a part of the amount due to the petitioner-bank and the only property now available as secured asset is the unit at plot No. 55. While the petitioner-bank claims that a legal right u/s 13(2) of the SARFAESI Act has been created in its

favour, the Central Excise Department, first respondent herein claims that it has a statutory first charge over the property. Now, we have to see whether the petitioner has got statutory first charge over the secured asset and in exercise of the statutory rights under the SARFAESI Act, took possession of the same or the first respondent has got priority over the property for its dues as per the provisions of the Customs Act and Central Excise Act.

23. From this, it is evident that reference to the Customs Act, in the last sentence of the paragraph was casual and not pertinent. Further, Section 142 of the Customs Act was extracted in that judgment, only to emphasize the similarity between the corresponding provisions of the Central Excise Act. Beyond that, there does not appear to be any occasion to make a reference to the Customs Act. Therefore, the judgment of the Full Bench can be said to be an authority limited to the resolution of conflict between the provisions of the Central Excise Act on the one hand and the Securitisation Act on the other. It is well settled principle of law that a judgment becomes a precedent, for what it actually decides and not as regards the occasional or casual observations made in it. The clear distinction between a ratio decidendi, on the one hand, and the obiter dicta, on the other, needs to be maintained.

24. Be that as it may, it becomes necessary to deal with the conflict between the provisions of the Customs Act on the one hand and the Companies Act on the other, since it arises for consideration in this case. It has already been pointed out that the liquidator is empowered to secure the possession of all the assets of the company and to compel the contributories to perform their duties.

25. The discussion, in this regard, must start with the purport of Section 468 of the Act, which was invoked by the 1st respondent. In clear terms, it empowers the Company Court to require the "contributory" to pay, deliver, surrender or transfer, any money, property, or books and papers in his custody, or control. The word "contributory" is defined u/s 428 of the Act and by no stretch of imagination, the "Customs Department" can be brought under the definition of "Contributory". Therefore, the application itself was untenable, vis-avis the appellant.

26. The provisions of the Act are wide enough to empower the Company Court, or the Official Liquidator to assume possession of the property of the company, from persons, or agencies, other than "contributories" also. For instance, if a company is entitled to recover debts from a person or agency, the Official Liquidator can step into the shoes of the company and take necessary steps for recovery of the debts. For all practical purposes, the Official Liquidator personifies the company and he can do everything, which the company, in its regular form, could have done.

27. In the context of identifying the goods or properties of the company, which in turn, can be handled by the Official Liquidator, imported goods, subject to levy of customs duty, stand on a different footing. An item of property, movable or

immovable, can be acquired through a contract. Goods are manufactured by a company by involving men and machinery. It gains ownership on such properties or goods, as the case may be. The mere fact that the company is under obligation to pay any taxes thereon, does not dilute its ownership.

28. Take for instance, a building is purchased, or an item of machinery is manufactured by the company; and the obligation to pay the arrears of municipal tax on the building, or excise duty on the manufactured goods, was not discharged. The ownership as well as the right to deal with the property, so acquired or manufactured, remains unaffected. They are capable of being offered as security. Whenever the concerned authorities proceed against the property or goods, for recovery of dues of tax or duty, the primacy accorded to the secured creditors becomes manifest. In case they are the subject-matter of security, the secured creditors remain outside the winding-up proceedings.

29. The imported goods, on the other hand, stand on a totally different footing. The importer, whether an individual, or a company would be entitled to take possession of the goods, only after clearing the customs duty. That is the reason why, even where the goods land in the country, they are shifted to customs godown, so that the delivery thereof can be effected, on clearance of customs duty. The importer cannot claim the delivery of such goods, unless he clears customs duty. When the company could not have got the possession of the goods, without payment of the customs duty, it is just unthinkable that a person, who represents it, can do so. The customs duty is more an incidence or consequence of import of the goods, than the liability of the importer to pay it. In a given case, though the goods may have been imported by A, in effect, they may belong to B. The dispute as to entitlement to get release of the goods becomes secondary, and the liability to pay the customs duty remains primary. It becomes highly doubtful, whether any imported goods, not yet cleared by the Customs Department, can be offered as the security to a creditor.

30. A Liquidator can take possession of only such property of the company, which the company itself could have obtained. The liquidation proceedings do not bring about any change as to the rights, in this regard. For example let it be assumed that a company purchased goods or raw material, at a different place, in the country, and entrusted them, to an agency, for transport, to their factory, on condition that the freight charges would be paid at the destination. The goods reached the office or godown of the transporter, at the place of destination and before the actual delivery was taken, the company went into liquidation. The Official Liquidator cannot compel the transporter to deliver the goods, without paying the freight charges. The only change, which the liquidation brings about, is that instead of the company or its representative, the Liquidator has to claim the goods, but subject to payment of freight charges. Though it may appear to be an over simplification of the issue, the matter does not seem to be substantially different.

31. The learned Counsel for the appellant had relied upon the judgment of the

Supreme Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, , wherein it was held that the arrears of sales tax due to the State would take precedence, over other claims. It is not evident that the company, in that case, was under liquidation. Though the crown arrears are given primacy, it is difficult to treat the said judgment as a direct precedent for the present case. In ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , the Supreme Court held that the transfers mentioned in Section 48 of the Transfer of Property Act would not get affected, by operation of the provisions of the Companies Act, in relation to liquidation. In Rajasthan Financial Corporation v. Official Liquidator (2005) 63 SCL 468 : 2006 AILD 192 (SC), it was held that if the proceedings before a Debt Recovery Tribunal or under the State Financial Corporation Act are not set in motion, against a company under liquidation, the creditors have to approach the Company Court for appropriate directions.

32. The principles enunciated in the judgments referred to above do cover, certain aspects of this case. It has already been pointed out that the liability to pay the customs duty on the goods imported by a company does not get wiped away, or altered, on the company being brought under liquidation, and the custody of imported goods can be secured, only by paying the customs duty, and in no other manner.

33. We have carefully gone through the judgment rendered by the learned Single Judge. Substantial part of it was devoted to examine whether the appellant herein has followed the procedure prescribed under the Customs Act, before the imported goods were brought to sale, for recovery of the customs duty. The following points were framed for consideration:

(1) Whether, in fact, there is demand made by the proper officer under Sub-section (1) of Section 72 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 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 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 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?

34. After making extensive reference to Sections 72 and 142 of the Customs Act, the learned Single Judge recorded a common finding on points 1, 2 and 3, which reads as under:

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(2) read with Section 142 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.

35. On point No. 4, it was held that the procedure prescribed u/s 142 of the Customs Act was not followed and therefore, the action taken u/s 72 was not valid. Point No. 5 was also answered in favour of the respondent, indicating that the Official Liquidator was entitled to take possession of the detained goods, without the obligation to pay the customs duty.

36. After examining the relevant provisions of law and on analyzing the arguments advanced on behalf of the parties, we are of the view that the Company Court had assumed to itself, the jurisdiction not conferred upon it, by the Companies Act. If the proceedings initiated by the appellant were defective in any manner or contrary to the provisions of the Customs Act, the aggrieved party was entitled to pursue its remedies before the appellate Forum constituted under that Act or in any other Forum. By no stretch of imagination, the Company Court can be said to have the jurisdiction to pronounce upon the legality, or otherwise of the proceedings arising under the Customs Act.

37. For the foregoing reasons, we allow the appeal, and set aside the order in Company Application No. 906 of 2004, dated 3.9.2004; holding that:

(a) the liability of a company to pay the customs duty on the imported goods shall remain unaffected by the proceedings of winding-up, initiated against such company; and

(b) the claim of a secured creditor against imported, but uncleared goods shall not have any precedence over the right of the Customs Department, to proceed against such goods, to recover the dues of customs duty.

There shall be no order as to costs.