

(2006) 05 P&H CK 0062
In the Punjab And Haryana At Chandigarh

The Customs Superintendent, Central Excise	APPELLANT
Vs	
Punjab Wireless System Ltd. and Another	RESPONDENT

Date of Decision : 18-05-2006

Acts Referred:

COMPANIES ACT, 1956 — Section 142, 235, 237, 441, 456
Customs Act, 1962 — Section 142, 64, 67, 71
Employees Compensation Act, 1923 — Section 14

Citation : (2007) 4 PLR 4

Hon'ble Judges : J.S. Narang, J;Arvind Kumar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

J.S. Narang, J.—M/s Punjab Wireless System Limited was ordered to be wound up pursuant to a company petition filed before the Hon"ble Company Judge. The said petition was registered as C.P. No. 226 of 1999 and was decided on February 1, 2001. A company application No. 705 of 1999, had been filed in the aforesaid company petition for appointing the Official Liquidator attached to this Court as the provisional Liquidator of M/s Punjab Wireless System Limited (hereinafter referred to as "the company in liquidation"). The Provisional Liquidator was appointed vide order dated 27.7.2000, and he had been directed to take charge of the assets and affairs of the company forthwith,

2. The company in liquidation had placed an order for importing 10564 Pagers from Hong Kong and South Korea. The aforesaid goods were received by the Custom"s Authority at New Delhi on July 10, 1998, the goods were not released on account of non payment of "customs duty". The goods have been lying with the Central Warehousing Corporation (hereinafter referred to as "the CWC") at Mohali since July 1998. A communication dated 22.12.2000 was received by the Liquidator of the company in liquidation indicating that goods worth Rs. 4,46,70,935/- have been lying in the warehouse since July 1998. A sum of Rs. 3,60,784/- was shown as outstanding on account of damage/rentals against the

company in liquidation and it had been requested that the payment thereof be made accordingly.

3. The Liquidator addressed a communication dated January 22, 2001 to the Customs Superintendent, Central Excise Range-III, Mohali-respondent No. 2, requesting that the assets of the company, as per the provisions of law-since the company had been ordered to be wound up, had vested in the winding up Court and that he having been appointed as the Liquidator, is obligated to take charge of the assets of the company. Copies of the bill of entry of warehouse in respect of some of the goods were retrieved from the record and the same have been appended as Annexures P3 to P13 accordingly.

4. The Liquidator filed C.P. No. 86 of 2001, indicating the aforesaid status in regard to the assets of the company, with a prayer that the C.W.C. and Customs Superintendent Central Excise, Range-III, Mohali, be directed to hand over the possession of the property accordingly.

5. Notice of the same was issued to the said respondents. Written statement on behalf of the respondents has been filed. The claim of the Liquidator has been contested. The stand of respondent No. 1 is that pursuant to Section 71 of the Customs Act, 1962, no warehoused goods can be taken out of a warehouse except on clearance for home consumption re-exportation or for removal to another warehouse or as otherwise provided by the aforesaid Act. It has also been pleaded that the government revenue of the department amounting to Rs. 11,22,32,475/- on account of "customs duty" is outstanding against the company in liquidation apart from other charges such as interest, rent, penalties if any to be imposed by the department at the time of taking decision in the matter.

6. The respective claims of the parties had been considered by the Hon"ble Company Judge and the petition has been allowed vide order dated March 4, 2005, with a direction to the respondents to hand over the property and assets of the company which is in liquidation. It has also been directed that the official Liquidator shall strictly abide by its own undertaking given in the petition as contained in para 7 "in the order".

7. Dissatisfied with the aforesaid order, separate appeals have been filed by both the respondents, one has been registered as C.A. No. 1 of 2006 and the another one has been registered as C.A. No. 14 of 2005. It may be noticed that prior to the filing of the aforesaid appeal a review petition had been filed by the appellant, which, was dismissed by order dated 9.9.2005, passed by the Hon"ble Company Judge. The plea of the Customs Superintendent is that Customs Act, 1962, is a subsequent special legislation dealing, inter alia, the consignment has been detailed by the Customs Department for non payment of customs duty. Therefore, under the provisions of the Act, the goods so detained can only be dealt with in the manner provided and prescribed under the Customs Act. Thus, the goods can be released only on payment of customs duty along with warehouse charges. The dues so recoverable can be recovered by way of selling

wholly or part of the warehoused goods. The owner i.e. the Liquidator, in the present case, has only a right to inspect and preserve the detained goods as per Section 64 of the Customs Act. It is also the stand mat as per Section 71 of the Customs Act, the warehoused goods cannot be removed from the warehouse except on clearance as provided under the Customs Act. It is also the plea that Section 530 of the companies Act, 1956 (hereinafter referred to as "the Act") is the preference order of government dues which are due from the company in liquidation. Reliance has been placed upon the judgment of the apex Court rendered Allahabad Bank Vs. Canara Bank and Another, , in support of the contention that in case of conflict between the two special laws, the later one has to prevail in terms of the principle generalia specialis non derogant. It is the contention that this aspect has not been taken into consideration by Hon"ble the Company Judge.

8. Thus no direction could have been issued in favour of the Liquidator for taking possession of the goods from the Customs Department as also the C.W.C. Since the recoveries, which are to be made permissible statutorily be the Customs Department and the C.W.C., could not be equated with the unsecured creditors of the company in liquidation. This would render the provisions of the Customs Act, nugatory. It is also the contention that pursuant to Section 142 of the Customs Act, the Customs Department is well within its powers to attach and dispose of the goods for recovery of its dues. Thus, the goods in custody of the Customs Department, imported by the company in liquidation, are to be termed as the property of the Customs Department. The import has to take place as yet as the goods have not been cleared from the Customs/C.W.C. In support of the contention reliance has been placed upon the judgment of the Hon"ble Supreme Court rendered Union of India and others Vs. Apar Private Ltd. and Others, . Thus, the appeal deserves to be allowed and the order dated 4.3.2005, passed by the Hon"ble Company Judge deserves to be set aside and that the petition of the Liquidator deserves to be dismissed.

9. Similarly, the C.W.C. respondent No. 1 has challenged the order passed by the Hon"ble Company Judge. More or less the pleas taken by the Customs Department have been reiterated.

10. Learned Counsel for the appellant has argued that the import of the goods cannot be said to be complete in all respects and shall remain subject to the rigor of the provisions of the Customs Act. The owner has the limited right as envisage u/s 64 of the Customs Act i.e. with the sanction of the proper officer and upon payment of prescribed fee, the owner is entitled to inspect the goods; separate damaged or deteriorated goods from the rest; sort the goods and change their containers for the purpose of preservation, sale, export or disposal of the goods; deal with the goods and the containers in such manner as they may be necessary to prevent loss or deterioration or damage to the goods; show the goods for sale; or take sample of goods without entry for home consumption and if the proper officer so permits without payment of duty on such samples.

Further, pursuant to Section 67 of the Customs Act, the goods can be removed from one warehouse to be housed in another warehouse. Emphasis has also been made upon Section 71 of the Act which reads as under:

71. Goods not to be taken out of warehouse except as provided by this Act:

No warehoused goods shall be taken out of a warehouse except on clearance for home consumption or re-exportation, or for removal to another warehouse, or as otherwise provided by this Act.

11. Thus, it is amply clear that the goods would remain under the control of the customs Department till the customs duty has been recovered. The power to recover the dues has been provided u/s 142 of the Act, which reads as under:

142. Recovery of sums due to government.

(1) Where any duty (demanded from any person or any amount of drawback to be recovered from any person) or any penalty payable by any person under this Act 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 Collector 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 Collector 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) the Assistant Collector of Customs may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of 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 recovery from the said person the amount specified thereunder, as if it were an arrears of land revenue.

(2) Where the terms of any bond or other instrument executed under this Act 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.

12. The contention is that for recovery of the dues, the goods under the control of the Customs Department can be sold for appropriating such dues.

13. On the other hand, learned Counsel for the Liquidator has argued that the ownership of the goods has not been disputed by the appellant. It has never ever been the claim of the appellants that the ownership of the goods had come and vested in the Customs Department. The right to recover by way of selling the

goods belonging to the owner is also not disputed, but by virtue of the passing of the winding up order of the company the assets having vested in the Court. The Customs Department would not be entitled to invoke the power u/s 142 of the Act nor has the superior power to control the custody of the goods. No doubt for recovery of the dues the claim has to be determined vis-a-vis the rights of the claimants provided under the Companies Act, 1956. It is the settled law that winding up order would date back from the date of presenting of the petition. It is also the admitted case that the goods had not been sold or had been ordered to be attached for sale thereof for the purpose of recovery of the dues of the Customs Department as also the C.W.C. Thus, by no stretch of imagination, they could be preferred over the secured creditors. In any case, the dues being government dues, shall be determinable by the Official Liquidator on submission of their claim pursuant to the provisions of the Companies Act.

14. It has also been contended that the C.W.C. also did not initiate any proceedings for the purpose of recovery of their dues as none have been pointed out nor have been relied upon, it has been further contended that the Customs Department did not initiate any proceedings for passing any order of attachment of the goods with a purpose to sell the same for the recovery of the customs duty. The fact of the matter is that the assets of the company remained described as the ownership of the company in liquidation. It is nowhere the case of the Customs Department or the C.W.S. that the sale price of the goods in question had not been paid and, therefore, the ownership never stood transmitted to the company in liquidation. It has been contended that dehors this once the agreement had ensued between the importer (company in liquidation) and the exporter, the rights between the parties would be determinable pursuant to the terms of the agreement. Once the goods have been received at the port and the same are in custody of the Customs Department being housed with C.W.C., they shall be holding the custody as a trustee for and on behalf of the company in liquidation. It is a separate matter the goods can be subjected to a charge or recovery of the dues payable to the Customs Department as also the C.W.C. but till then the procedure and the process is initiated, the ownership shall continue to be that of the company in liquidation i.e. Importer. Admittedly, the winding up petition as presented on 23.9.1999/24.9.1999 and that the winding up order was passed on 1.2.2001, vide which the Official Liquidator attached to this having been appointed the Liquidator, had been directed to take over the assets, the statutory books and the records of the company forthwith. On that date the goods were in exclusive ownership of the company in liquidation. Thus, the Hon'ble Company Judge, after having accepted the contentions of the respondent-Liquidator, has ordered the delivery of the goods to the Liquidator. The provisions relied-upon and referred to by the Customs Department are not applicable to vis-a-vis the goods in question. The provisions spelt out the rights and the powers of the Customs Department but nowhere it is the stand of the Customs Department that any proceedings had been initiated pursuant thereto. Section 64 of the Customs Act specifically refers the owner's

right to deal with the warehoused goods meaning thereby the ownership stands un-effected. It is a different matter that the goods cannot be allowed to be taken out of the custody of the Customs Department through the C.W.C. where the goods have been housed without the payment of the customs duty ancillary" charges accordingly. This power would not be over and above the custody of the Court after passing of the winding up order. In view of this, the appeal deserves to be dismissed and the order dated 4.3.2005, of the Hon"ble Company Judge deserves to be upheld.

15. We have heard learned Counsel for the parties and have also perused the paper books and we have also gone through the order passed by the Hon"ble Company Judge, which has been impugned before us.

16. We are of the considered opinion that the Hon"ble Company Judge has come to the correct conclusion while giving directions to the Customs Department for delivering the custody of the property and assets of the company to the liquidator of the company. It is absolutely clear that the Liquidator holds the custody of the property of the Company in liquidation for and on behalf of the winding up court and, therefore, equally responsible for the protection thereof. This property/assets of the company in liquidation have to be dealt with in accordance with law till the company is finally dissolved. It may be noticed that so far as the commencement of the winding up of the company is concerned, it shall be deemed to have commenced at the time of presentation of the petition as has been envisaged u/s 441(2) of the Act. So far as the custody of the company"s property is concerned, it has been specifically provided that as and when the provisional Liquidator is appointed, he shall take into his custody or under his control all the property, effects and actionable claim to which the company appears or is entitled to. So far as the custody of the property is concerned it has been specifically provided u/s 456(2) of the Act that all the property and effects of the company shall be deemed to be in the custody of the Court (Tribunal), as has been sought to be substituted by way of the Companies (Second Amendment) Act, 2002, from the date of the order for the winding of Company. For reference the aforesaid provision is reproduced under:

Section 456. Custody of company"s property. - (1) 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 claims to which the company is or appears to be entitled.

(1-A) xx xx xx xx xx xx (1-B) xx xx xx xx xx xx (2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.

17. The winding up petition was presented on 23.9.1999/24.9.1999 and that the winding up order was on 1.2.2001. During this period no right had been exercised by the Customs Department or by C.W.C. for recovery of the dues. It is

obvious that the custody of the said property came and vested in the Court, which was further directed to be taken possession of by the Liquidator of the company in liquidation.

18. So far preferential payments are concerned, the same have been clearly dealt with by the legislature by providing Section 529A and Section 530 of the Act, which reads as under:

529A. Overriding preferential payment: Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company.

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under Clause C of the proviso to Sub-section (1) of Section 529 *pari passu* with such dues, be paid in priority to all other debts.

(2) The debts payable under Clause (a) and Clause (b) of Sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

530. Preferential payments: (1) in a winding up subject to the provisions of Section 529A, there shall be paid in priority to all other debts:

(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in Clause (c) of Sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in Sub-section (2):

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect, the winding up order or resolution;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons under the Employees' State Insurance Act, 1948 (34 of 1948), or any other law for the time being in force.

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with

insurers as mentioned in Section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(g) the expenses of any investigation held in pursuance of Section 235 or 237, in so far as they are payable by the company.

(2) The sum to which priority is to be given under : Clause (b) of Sub-section (1), shall not, in the case of any one claimant exceed such sum as may be notified by the Central Government in the Official Gazette.

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923), is a weekly payment, the amount due in respect thereof shall, for the purposes of Clause (e) of Sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4) Where any payment has been made to any employee of a company,-

(i) on account of wages or salary; or

(ii) to him, or in the case of his death, to any other person in his right, on account of accrued holiday remuneration:

out of the money advanced by some person for that purpose, the person by whom the money was advanced shall, in winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall-

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of debts to which priority is given Clause (d) of Sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

In the event of a landlord or any other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effect so distrained on, or the proceeds of the sale thereof.

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

xx xx xx xx xx xx.

19. The perusal of the aforesaid would show that the workmen's dues and debts due to the secured creditors to the extent such debts rank, under Clause (c) of the proviso to Sub-section (1) of Section 529, *pari passu* that such dues shall be paid in priority to all other debts. It has been directed that the aforesaid dues shall be paid in full, unless the assets are insufficient to meet them; in each case they shall abate in equal proportions. So far as other dues are concerned like revenues, taxes, cesses and rates due from the; company to the Central or State Government or to a local authority at the relevant date as defined in Clause (c) of Sub-section (8) of Section 530, and having become due and payable within 12 months next before that date shall be paid in priority to all other debts. It is obvious that the dues payable to the Customs Department as well as the C.W.C. have to be dealt with in accordance with Section 530 of the Act. It is nowhere the case or can be understood that the dues of the revenue are to be equated with unsecured creditors. The preferential payments in this regard have been categorically dealt with u/s 530 of the Act and they have to be dealt with accordingly. The Liquidator is obliged to deal with the claims of creditors which includes, secured, preferential and unsecured creditors. The claims have to be dealt with under Rules 147 to 179 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules"), wherein the right of appeal has also been provided to the creditor if not satisfied with the orders passed by the Liquidator. The list of creditors is to be settled pursuant to Rule 174 of the Company (Court) Rules, 1959.

20. The citations quoted by the learned Counsel for the appellants need not be noticed as the same are not applicable to the facts which have emerged in the instant petition and the appeal. The applicability of the decisions rendered by the Hon"ble Supreme Court would arise only when the claim of the appellants are settled by the Liquidator and the payment has to be made accordingly. Before us, the only question is as to whether the liquidator is entitled to take the custody of the property of the company in liquidation.

21. In view of the aforesaid discussion, we are of the considered opinion that the Hon"ble Company Judge has given absolutely correct directions of the respondent-appellants vis-a-vis the property and assets of the company in liquidation. This power is in continuation of the statutory power conferred upon

the liquidator by virtue of Section 468 of the Act for brevity the same may be referred to, which read as under:

Section 468 Delivery of Property to Liquidator.- The Tribunal 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, bank agent, officer or other employee of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Tribunal directs, to the Liquidator, any money, property in books and paper in his custody or under his control to which the company is prima facie entitled.

We find no infirmity in the order dated 4.3.2005, passed by the Hon''ble Company Judge and the same is affirmed.

Resultantly, both the appeals are dismissed.