

(2013) 08 DEL CK 0014
In the Delhi High Court
Case No : CO. App. 58 of 2013

Union of India

APPELLANT

Vs

Yuil Measures (India) Limited and Others

RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Companies Act, 1956 — Section 529A
Customs Act, 1962 — Section 126

Citation : (2013) 08 DEL CK 0014

Hon'ble Judges : Reva Khetrapal, J;Pratibha Rani, J

Bench : Division Bench

Advocate : Satish Aggarwala, for the Appellant; Mayank Goel, for the Respondent

Judgement

Reva Khetrapal, J.

CM No. 12925/2013

Exemption granted subject to all just exceptions.

Application stands disposed of.

CM No. 12923/2013

This is an application praying for condonation of 69 days" delay in filing the appeal. Delay condoned.

Application stands disposed of.

CO. APP. 58/2013 and CM No. 12924/2013 (stay)

1. This appeal is directed against the order dated 26th April, 2013 passed by the learned Company Judge in CA Nos. 910/2008 and 1297/2008. The first application (CA No. 910/2008) was filed by the Appellant (Customs Department) seeking the setting aside of the auction sale of the capital goods and raw materials belonging to M/s. Yuil Measures (India) Limited (hereinafter referred to

as "YMIL") pursuant to the order dated 7th December, 2006 passed by the learned Company Judge. The second application (CA No. 1297/2008) was filed by the auction purchaser, Mr. Vilas Gupta for permission to further sell the plant and machinery of YMIL purchased by him in the auction sale to enable him to generate capital for his company. The facts leading to the filing of the aforesaid two applications are that by an order dated 12th October, 2004, YMIL was ordered to be wound up by the learned Company Judge after noting that the BIFR in its order dated 30th October, 2000 had held YMIL to be a sick industrial company that was not likely to become viable in future. The Court appointed the Official Liquidator as the Liquidator of YMIL who invited bids for the sale of the assets of YMIL after the Noida Special Economic Zone (NSEZ) had given its no objection to the sale of the assets of the company. The bid of the auction purchaser Mr. Vilas Gupta for an amount of Rs. 1,35,50,000/- was accepted by the Court on 7th December, 2006 after noting that it was the highest bid and was more than the reserve price of Rs. 1,24,27,200/-. The Official Liquidator and the representative of IFCI also represented before the Court that the bid may be accepted. The auction purchaser was accordingly directed to deposit 25% of the bid amount with the Official Liquidator within 7 days and the balance 75% of the bid amount was to be deposited within 60 days. The auction purchaser i.e. Mr. Vilas Gupta was further directed to employ security outside the property. However, possession of the property was not delivered to the auction purchaser, which, it was noted by the Court, would be given only after full payment was made by the auction purchaser. The Official Liquidator was thereafter directed to publish citations in the newspapers "Amar Ujala" and "Dainik Jagran" inviting claims from the workers.

2. On 18th January, 2007, the Official Liquidator informed the Court that the auction purchaser had deposited the entire amount. At this juncture, while the claims of the workmen and the creditors were being processed, the Customs Department filed CA No. 910/2008 on 15th July, 2008. It was submitted in the said application that vide an order dated 4.11.1997, the Commissioner of Customs, ICD, Tuglakabad, New Delhi had held that capital goods and raw material valued at Rs. 3,63,62,019/- and Rs. 36,84,288/- respectively which had been imported by YMIL were liable to be confiscated u/s 126 of the Customs Act, 1962 subject to redemption on payment of fine. Since the amount was not paid, the capital goods and raw material were in fact confiscated. It was also ordered that Customs and Excise Duty amounting to Rs. 2,09,54,801/- be paid by YMIL, failing which interest would be charged in addition to duty. Penalty of Rs. 10 lacs was also imposed on YMIL. YMIL failed to deposit the duty for the redemption of the goods and instead filed an appeal before the Central Excise and Gold Appellate Tribunal, New Delhi (CEGAT). The CEGAT vide its order dated 18th June, 1999 upheld the order of the Commissioner of Customs.

3. As noted hereinabove, the BIFR had recommended the winding up of YMIL and on the recommendation of the BIFR, the learned Company Judge ordered the winding up of the company on 30th October, 2000 and appointed the Official

Liquidator as the Liquidator of YMIL. The Official Liquidator after obtaining a report of the valuation of the assets of YMIL, under the directions of the Court sold the capital goods and raw material of YMIL by way of auction sale, which was confirmed by the Court on 7th December, 2006 noting that the sale was made at the highest bid of Rs. 1,35,50,000/-. In terms of the subsequent order of the Court dated 18th January, 2007, possession of the capital goods and raw material was secured by the Official Liquidator from the Development Commissioner and then handed over by the representative of the Official Liquidator to the auction purchaser who had deposited the full amount on 7.2.2007 and possession memo with regard to the handing over was also obtained, which is on record.

4. Being aggrieved by the auction sale and its confirmation by order dated 7.12.2006 and by the handing over of the goods to the auction purchaser vide possession memo dated 7.2.2007, the Appellant/Customs Department filed an application on 15.7.2008 or thereabout for quashing/setting aside the sale of auctioned capital goods and raw material and for restoration of the goods to the Customs Department. The said application was dismissed by the learned Company Judge vide impugned order dated April 26, 2013, which order has given rise to the present appeal. We have heard the respective contentions of Mr. Satish Aggarwala, the learned senior counsel for the Appellant and the Official Liquidator of YMIL.

5. At the outset, we note that the essential facts are not in dispute. The confiscation of capital goods and raw material by the Appellant/Customs Department undisputedly took place sometime in 1997. The Respondent Company YMIL was ordered to be wound up by the Court on the recommendation of the BIFR on 30th October, 2000. The auction of the plant and machinery of the YMIL took place on "as is where is basis", which was confirmed by the Court on 7th December, 2006. The Customs Department submitted its claims to the Official Liquidator followed by submission of proof of debt on 14th January, 13th July, 3rd September and 10th October, 2007. On 15th November, 2007, the Official Liquidator admitted the claim of the Customs Department as a preferential creditor to the extent of Rs. 2,19,55,000/- payable towards customs and central excise duty in addition to penalty of Rs. 10 lacs. The Customs Department raised grievance that the Official Liquidator had overlooked the claim of interest on the duty amount of Rs. 4,73,15,816/-. On 21st January, 2013, the claim of the Customs Department as a preferential creditor was admitted by the Official Liquidator as reflected in the status report filed by the Official Liquidator for the sum of Rs. 5,12,93,822/-, subject to verification from the records of the company. Further, as noticed by the Court in its order dated 21st January, 2013, there was no dispute to the fact that the Customs Department was to get its pro rata share of the funds of the company which would be disbursed by the Court through the Official Liquidator in the manner prescribed by the Companies Act.

6. The Customs Department, however, filed an application (CA No. 1016/2008)

for the first time seeking quashing/setting aside of the sale confirmed by the Court on 7th February, 2007. Reply was filed to this application by the auction purchaser pointing out that he had paid Rs. 1,07,85,962.25 for the building and Rs. 27,64,037.75 for the plant and machinery of YMIL; that he was a bonafide purchaser of the plant and machinery, which in any event was of no use to him and had only scrap value. It was stated by him in para 10 of the reply that neither any inventory was prepared by the Official Liquidator at the time of handing over the possession of the plant and machinery nor any inventory was given by the office of the Official Liquidator. In para 12 of his said reply, the auction purchaser made a specific averment that he had written to the Deputy Commissioner of Customs, NSEZ on 2nd September, 2008 for permission to dispose of the plant and machinery, but no response to his said letter was given by the Deputy Commissioner. In paragraph 15 of his reply, the auction purchaser stated that he was ready and willing to return the plant and machinery if he was returned the sum of Rs. 27,64,037.75. He also filed an application, being CA No. 1257/2008 on 22nd November, 2005 praying inter alia for confirmation of the sale in his favour.

7. By an order dated 28th July, 2009, the Court required the Customs Department to file an affidavit "setting down all the relevant facts identifying goods and machinery, etc." claimed by it. Pursuant to the said order, the Customs Department sometime in July, 2010 filed an affidavit enclosing an annexure setting out 7 items of "capital goods" and six items of "raw materials", four of which were described as "glass" and last two as "Mercury" and "Top Ring". Since it could not be discerned from the same whether the capital goods confiscated tallied with the plant and machinery sold to the auction purchaser on "as it is where it is basis", the Court directed the Customs Department to produce the inventory of the goods confiscated and on 9th January, 2012 the following order was passed:-

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

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

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

the secured creditors to pay the auctioned price of Rs. 27,64,037.75 to the Customs Department. The Customs Department is directed to inform this Court about its stand within two weeks.

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

List on 27th February 2012.

Order dasti under signatures of Court Master to all parties.

Co. Pet. No. 1016 of 2008

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

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

8. The Deputy Commissioner of Customs, NSEZ on 24th February, 2012 thereupon filed affidavit stating that the documents sought by the Court were not readily traceable as the same were very old and efforts were being made to trace out the same. On 31st August, 2012, another affidavit was filed enclosing copies of some of the Bills of Exchanges but stating therein that copy of the inventory of goods at the time of confiscation was not available in the relevant file. Paragraph 4 of the said affidavit is significant, which reads as under:-

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

9. In the aforesaid factual scenario, the learned Company Judge noted that in the absence of the inventory of the goods of YMIL, which was drawn up at the time confiscation of the goods in 1997 and which was critical for considering the plea of the Customs Department for cancellation of the auction sale, there was nothing to verify that the goods which had been sold by auction sale in 2007 were in fact the very goods that were confiscated by the Customs Department in 1997. What had been produced by the Customs Department were Bills of Exchange and Packing List dated 1990 and 1991 recording "capital goods" and "raw materials". In the absence of any inventory prepared by the Customs Department at the time of confiscation in 1997, it was not possible to verify whether the "capital goods" described in the Bills of Exchange and Packing List nearly six years earlier to the confiscation were the ones that were in fact confiscated. Another reason and in our opinion a very cogent one, which was given by the learned Company Judge, was that in the absence of any mark on said "capital goods" to indicate that they had been confiscated by the Customs

Department, it was not possible to conclude that they were the "plant and machinery" which were sold to and handed over to the auction purchaser in February, 2007. The learned Company Judge concluded and we think rightly so that the laxity of the Customs Department and its failure to mark the goods confiscated by it rendered the goods incapable of identification. We may note at this juncture that one of the secured creditors, namely, IDBI also urged before the Company Court that Customs Department's prayer was highly belated and should not be entertained at this stage when the auction sale had already been confirmed by the Company Court and the proceeds of the dues of the auction sale distributed amongst the workmen and secured creditors pro rata in accordance with Section 529A of the Act.

10. We have given the matter our anxious consideration and see no reason to differ from the view taken by the learned Company Judge. The Customs Department has been not only extremely lax but appallingly negligent in the matter. It is more than evident that no inventory was drawn up by the Customs Department at the time when the goods were confiscated way back in the year 1997. The goods were not even marked for the purpose of identification at the time of confiscation. Then again, having confiscated the goods the Customs Department sat on the fence and watched the auction sale take place. The application for setting aside of the auction sale was eventually filed by it in the year 2008, i.e., eleven years after it had confiscated the goods in question. There being nothing with the Official Liquidator to indicate that the goods were confiscated by the Customs Department, the Department sought to rely upon the Bills of Exchange dated 1990 and 1991 prepared six years earlier to the confiscation, which in no way are indicative of the goods confiscated by the Department. In such circumstances, the Company Judge in our opinion rightly concluded that it was not possible to speculate at this stage that the goods sold to the auction purchaser in 2007 were in fact the very goods that were confiscated by the Customs Department in 1997. The Customs Department not only failed to inform the Official Liquidator that goods had been confiscated by it, but also could not place on record any material to identify the goods confiscated by it 11 years ago. Suffice it to state that at this stage when the workmen and secured creditors have been paid pro rata by the Official Liquidator from out of the proceeds of the auction sale, it is not possible to turn back the clock and entertain the prayer of the Customs Department to cancel the auction sale and return the auctioned goods to the Customs Department (which in any case are incapable of identification). 12. The result is that the appeal must fail. The appeal is accordingly dismissed but in the circumstances without any order as to costs.