

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 563 of 2018

(Arising out of Order dated 3rd July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) No. 116/KB/2018 in CP (IB) No. 349/KB/2017)

IN THE MATTER OF:

**Commissioner of Customs, (Preventive)
West Bengal**

...Appellant

Vs.

Ram Swarup Industries Ltd. & Ors.

...Respondents

Present: For Appellant: - Mr. Bhuvesh Satija, Standing Counsel for Commission of Customs and Mr. Sachin Yadav, Advocates.

For Respondents:- Mr. Sayare Basu Malik, Mr. Akshay Bajpai, Mr. Vaibhavnit and Mr. Prateek Gupta, Advocates for R-3.

Mr. Sarwar Raza, Ms. Ishita Sharma, Mr. S. Ahmad, Mr. S. Saghiruddin Kashif Raza (CS), Advocates for R-4.

Mr. Sanyam Saxena, Ms. Mukta Dutta, Mr. Mahfooz Nazki and Mr. Ashish Prasad, Advocates for R-1 & 2.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by 'Commissioner of Customs, (Preventive) West Bengal' against the order dated 3rd July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in I.A. No. 116 of 2018 in C.P. No. (IB)-

349(KB)/2017 in allowing Mr. Nilesh Sharma (Respondent No. 2) to remove machineries in question.

2. The brief facts of the present case are as follows:

In the year 2009, 'Ramsarup Industries Ltd.'- ('Corporate Debtor') had imported two consignments of machineries from Italy by claiming benefit of EPCG scheme under FTP 2004-2009, which arrived at ICD Durgapur on 13th April, 2009 and 27th April, 2009 respectively. The assessment of goods were confirmed by the Assistant Commissioner of Customs, ICD Durgapur vide O-I-O No. 05/ICD-DGP/2010 dated 12th April, 2010 and the Respondent was directed to pay the Customs Duty of Rs.1,39,89,366.00 with applicable interest.

On 26th May, 2011 and 14th January, 2012, 1st Respondent made a payment of Rs. 11,00,000/- towards the duty assessed by the Appellant. In the year 2014, a Writ Petition No. 24579 (W) of 2014 was filed by the 'Corporate Debtor' against the departmental action initiated for disposal of uncleared imported cargo which was dismissed by the Hon'ble High Court of Calcutta vide order dated 10th September, 2014 for non-prosecution. In the year 2016, the Appellant by way of e-auction attempted thrice to auction the goods imported by the 1st Respondent on 7th March, 2016, 17th August, 2016 and 4th October, 2016 but the same could not be fructified on

account of non-participation of any buyers. The Appellant granted three months' time vide letter dated 16th February, 2017 sought by 1st Respondent to clear the cargo from the custody of the customs authorities after paying the duties. The Appellant vide letter dated 30th August, 2017 reinitiated the process for disposal of the said uncleared cargo by way of auction for the fourth time.

The Adjudicating Authority vide its order dated 8th January, 2018 allowed the application under Section 10 of the 'I&B Code' filed by 1st Respondent for 'Corporate Insolvency Resolution Process' and declared 'Moratorium' under Section 14 of the 'I&B Code'. In pursuance of letter dated 30th August, 2017 the custodian, i.e. 3rd Respondent conducted an e-auction dated 19th January, 2018, wherein 4th Respondent had proposed the winning bid. On 20th January, 2018, the Appellant received the copy of the letter dated 16th January, 2018 sent by 1st Respondent and letter dated 17th January, 2018 sent by 2nd Respondent conveying the order of Adjudicating Authority dated 8th January, 2018. On 3rd July, 2018, 2nd Respondent filed an application under section 14 of the 'I&B Code' praying for issuing directions to the Appellant not to proceed with e-auction of machineries of 1st Respondent and not to deal with the assets of 1st Respondent. The Adjudicating Authority vide the impugned order allowed the application filed by

2nd Respondent under section 14 of the 'I&B Code'.

3. It is submitted by learned counsel for the Appellant that the impugned order does not refer the provisions of Section 18(1) (f), whereby the 'Interim Resolution Professional' is empowered to take control and custody of any asset over which the 'Corporate Debtor' has ownership rights as recorded in its balance sheet. Therefore, the 'Interim Resolution Professional' can exercise control only over items which are (a) asset of the 'Corporate Debtor'; (b) there exist ownership rights and (c) recorded in the balance sheet.

4. It is further submitted that in the present case, 1st & 2nd Respondents have made no assertion in their pleadings before this Appellate Tribunal that the machinery, in question, in fact belongs to 1st Respondent 'asset' and were recorded so in the balance sheet.

5. According to counsel for the Appellant, the extent of 'Interim Resolution Professional's' power of control are co-terminus with the 'Corporate Debtor's' ownership rights and in the present case, the 'Corporate Debtor', i.e. 1st Respondent has never acquired complete ownership of the imported goods. It is submitted that the 1st & 2nd Respondents cannot allege that the imported goods were 'assets' of the 'Corporate Debtor', when customs duty leviable is yet to be discharged and the said goods are yet to be cleared for home consumption.

6. Reliance has been placed on the decision of the Hon'ble Calcutta

High Court in ***“Collector of Customs v. Dytron (India) Ltd. MANU/WB/0334/1998”*** rendered in similar factual scenario of a liquidator disposing off uncleared imported goods under the Companies Act, 1956. In the said situation, it was also held that unless and until statutory duties are paid, the imported goods would not form part of ‘assets’ available for distribution by the company.

7. It is submitted that the ‘Corporate Debtor’s’ ownership rights in the imported goods have been relinquished by operation of law contained in Section 48 of the ‘Customs Act, 1962’.

8. It is also submitted that Section 48 of the ‘Customs Act, 1962’ allows Customs authorities to dispose unclaimed, uncleared, non-duty paid imported goods after providing the importer with thirty-day notice.

9. It is further submitted by learned counsel for the Appellant that the Appellant had duly complied with the provisions of Section 48 of the ‘Customs Act, 1962’ and after the expiry of the statutory period the importer’s interest, i.e. 1st Respondent, in the imported good was confined to a remainder interest as provided in Section 150 of the ‘Customs Act, 1962’.

10. Learned counsel for the Appellant submitted that the impugned order’s reliance on Section 238 of the ‘I&B Code’ is unsustainable.

11. According to the 'Resolution Professional, the 'Corporate Insolvency Resolution Process' of the 1st Respondent was initiated *vide* Order Dated 8th January, 2018 by the Adjudicating Authority. Admittedly, the Appellant / 3rd Respondent issued the e-auction notice on 15th January, 2018, fixing date of auction of the goods on 19th January, 2018. Thereafter, *vide* letter dated 16th January, 2018, the Managing Director of the 1st Respondent informed the Appellant/ 3rd Respondent that the 'Corporate Insolvency Resolution Process' has been initiated with regard to 1st Respondent and that 'Moratorium' under Section 14 of 'I&B Code' suspending / barring all proceeding relating to 1st Respondent has come into force. Subsequently, 2nd Respondent being an 'Interim Resolution Professional' of 1st Respondent *vide* letter dated 17th January, 2018 informed the Appellant / 3rd Respondent regarding the 'Corporate Insolvency Resolution Process' initiated with regard to the 1st Respondent and the 'Moratorium' imposed under Section 14 of 'I&B Code' in relation to the proceedings pending against 1st Respondent. It is pertinent to mention here that the contention of the Appellant with regard to receiving the information pertaining to 'Corporate Insolvency Resolution Process' on 20th January, 2018, posted for the auction of the goods on 19th January, 2018, has already been dealt with and dismissed by the Adjudicating Authority, on the basis that documentary evidence clearly shows that the Appellant / 3rd Respondent was intimated about the initiation of 'Corporate Insolvency Resolution Process' proceedings and the 'Moratorium' *vide* a letter by

the Managing Director of the 1st Respondent on 16th January, 2018 itself and the same was hand-delivered to the Appellant on 16th January, 2018 itself. Further, it is pertinent to mention here that 3rd Respondent has itself admitted that it was aware of the initiation of 'Corporate Insolvency Resolution Process' on 19th January, 2018, prior to the auction of the goods.

12. It is submitted by counsel for the 'Resolution Professional' that Section 238 of the 'I&B Code' specifically provides that the 'I&B Code' will override all other laws in case of any inconsistency, and accordingly Section 14 of the 'I&B Code' which provides for suspension / bar on all proceedings with regard to 'Corporate Debtor' post initiation of 'Corporate Insolvency Resolution Process' will be applicable to the present case.

13. It is further submitted that the goods under challenge were imported by the 'Corporate Debtor' / 1st Respondent and the invoices of the 'Corporate Debtor' / 1st Respondent have not been challenged, therefore clearly establishing the ownership of 'Corporate Debtor' to the said goods.

14. It is also submitted that the seizure of the goods by Appellant does not in any way transfer the title/ ownership of the goods to Respondent, who, in accordance with law, was required to release the goods to the 'Corporate Debtor' on payment of customs duty.

15. From the submissions made by the Appellant and the record, it is clear that the 'Corporate Debtor' had imported the two consignments i.e. the machineries, in question, from Italy in the year 2009 which arrived at ICD Durgapur on 13th April, 2009 and 27th April, 2009 respectively. Thereby, it is clear that the machineries, in question, belonged to the 'Corporate Debtor' (1st Respondent).

16. Section 48 of the 'Customs Act, 1962' relates to procedure in case of goods not cleared within the prescribed period, which reads as follows:

“48. Procedure in case of goods not cleared, warehoused or transhipped within thirty days after unloading.— *If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof: Provided that—*

(a) animals, perishable goods and hazardous

goods, may, with the permission of the proper officer, be sold at any time;

(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation.— In this section, “arms” and “ammunition” have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959).”

From the aforesaid provision, it is clear that in case of non-clearance of the goods within 30 days or within extended period or if the title of any imported goods is relinquished after notice to the importer and with the permission of the proper officer, the goods can be sold by the Custom Authority.

17. In the present case, the goods are in the custody of the Custom Authority, but the ownership remains with the ‘Corporate Debtor’, no step having taken for sale of goods in terms of Section 48 of the ‘Customs Act, 1962’.

18. Section 18 (1) (f) & (g) of the ‘I&B Code’ reads as follows:

“18. Duties of interim resolution professional.—

The interim resolution professional shall perform the

following duties, namely:—

xxx

xxx

xxx

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of

ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this subsection, the term “assets” shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”

19. As we have seen that the ownership rights of the machineries, in question, is of the ‘Corporate Debtor’ and not of a third party, *explanation* below Section 18 (1) (f) & (g) is not applicable. Therefore, the ‘Resolution Professional’ has right to take control and custody of any asset, though the Customs Authority is in possession of the

same for the present.

20. Section 14 of the 'I&B Code' relates to 'Moratorium' and reads as follows:

“14. Moratorium.—(1) *Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an

order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

21. From the aforesaid provisions, it is clear that during the period of ‘Moratorium’, the assets of the ‘Corporate Debtor’ cannot be alienated, transferred or sold to a third party.

22. Section 48 of the ‘Customs Act, 1962’ relates to sale of goods in the custody of the Customs (machinery in question), in the manner as prescribed therein. The order of ‘Moratorium’ having passed by the Adjudicating Authority on 8th January, 2018, immediately thereafter it was not open to the Appellant, Commissioner of Customs or its authorities to issue an e-auction notice on 15th January, 2018, fixing date of auction of the goods on 19th January, 2018.

23. The aforesaid action on the part of the Appellant, officers of the Customs show that after their knowledge of the order of ‘Moratorium’ they intended to sell the machinery, in question, though it was lying with the Customs Authority since 13th April, 2009 / 27th April, 2009.

24. In view of the aforesaid findings, no interference is called for against the impugned order dated 3rd July, 2018 passed by the Adjudicating Authority prohibiting the Customs Authority from selling the assets of

the 'Corporate Debtor'.

25. In absence of any merit, the appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
20th June, 2019
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