IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-II, CHENNAI

IA(IBC)/566(CHE)/2021
in
MA/604/2018 in CP/612/IB/2017

(filed under Section 60(5) & 35 of Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of National Company Law Tribunal Rules, 2016)

In the matter of
IA(IBC)/566(CHE)/2021

MR.P. ESWARAMOORTHY,
Liquidator of
Senthil Papers and Boards Private Limited.

... *Applicant*

Vs.

THE ASSISTANT COMMISSIONER OF CUSTOMS

... *Respondent*

In the matter of
MA/604/2018

MR.P. ESWARAMOORTHY
Resolution Professional of
Senthil Papers and Boards Private Limited

...*Applicant*

In the matter of

SBI STRESSED ASSETS MANAGEMENT BRANCH

... *Financial Creditor*

SENTHIL PAPER BOARD PVT LTD.

... *Corporate Debtor*

Order pronounced on **30th *November* 2022**

CORAM:

Dr.DEEPTI MUKESH MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

Memo of Parties

MR.P. ESWARAMOORTHY,
Liquidator of
Senthil Papers and Boards Private Limited,
44/1, 5th Street, Ramalinga Jothi Nagar,
Near Corporation Office,
Nanjundapuram Road,
Ramanathapuram,
Coimbatore - 641 045.

... Applicant

-VS-

THE ASSISTANT COMMISSIONER OF CUSTOMS,
Office of the Assistant Commissioner of Customs,
Custom House, Inland Container Depot (ICD),
1663/2B, Harbour Express Bypass Road,
Tuticorin 628 006.

... Respondent

Present

For Applicant: Mr.B.Dhanraj, Advocate
For Respondent: No Representation

ORDER

Per: Dr. DEEPTI MUKESH MEMBER (JUDICIAL)

This IA(IBC)/566(CHE)/2021 was filed by Liquidator of Corporate Debtor viz., Senthil Papers and Boards Private Limited, under Section 60(5) & 35 of Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016, seeking to set aside the Respondent's order dated 12.03.2021 issued against the Corporate Debtor under Section 28, 28AA, 114AB and 142(1) of the Customs Act, 1962 including any actions of the Respondent consequent to the said order.

2. It was averred in the application that the CIRP in respect of the Corporate Debtor was initiated by this Tribunal on 14.11.2017 and the liquidation order of the Corporate Debtor was passed on 14.02.2019 wherein, the Applicant was appointed as the Liquidator.

3. It was submitted by the Applicant that the Corporate Debtor had imported 14 Used Paper Board Machinery (UPB Machinery) in the following manner

No. of UPB Machinery	License No. and date	License Expiry date	Export Obligation Period (EOP) till
11	323001664 dated 19.04.2011	18.04.2017	18.04.2019
3	3230016724 dated 06.05.2011	06.05.2017	05.05.2019

and availed of duty exemption under Export Promotion Capital Goods (EPCG) Scheme.

4. Since the Export Obligation Period (EOP) for the above licenses expired the Respondent issued notices dated 14.12.2019 to the Applicant to confirm whether the EOP was extended or not. In turn, the Respondent vide common reply dated 16.12.2019, intimated the Respondent about the initiation of CIRP and Liquidation of the Corporate Debtor.

5. Despite the above, during the liquidation process of the Corporate Debtor, the Respondent has issued show cause notice

dated 16.06.2020 and 18.06.2020 demanding the Corporate Debtor to pay Rs.1,75,62,809/- and Rs.1,15,94,473/- along with interest as per Section 28AA of the Customs Act, 1962. In response, vide letter dated 27.06.2020 the Applicant informed the Respondent about the Liquidation process and moratorium in operation against the Corporate Debtor along with relevant provisions of IBC, 2016.

6. However, without considering the explanation of the Applicant, the Respondent passed an order dated 12.03.2021 directing the Corporate Debtor to pay the amount specified therein along with interest as per the Customs Act, 1962. A copy of the order is annexed in the application.

7. It was argued by the Applicant that IBC, 2016 has an overriding effect over Customs Act, 162 and the above act of the Respondent is a sheer violation of Section 14 and 33(5) of IBC, 2016. In support of his arguments, the Applicant relied on the following precedents of the Hon'ble Supreme Court,

1. ***Sundaresh Bhatt, Liquidator of ABG Shipyard vs. Central Board of Indirect Taxes*** *wherein it was held that "Proceedings by Customs Authorities after initiation of CIRP or Liquidation is in violation to Section 14 and 33(5) of IBC, 2016 except to the limited jurisdiction to assess/determine the quantum of customs duty and other levies.*

2. ***Solidaire India Ltd., vs. Fairgrowth Financial Services P Ltd.***, *wherein it was observed that if two special*

statutes contain a non-obstante clause the latest statute will prevail.

8. As submitted and from the records, it is noted that private notice has been sent to the Respondent and a corresponding Affidavit of service was filed on 23.08.2021, further on 31.03.2022 none appeared for the respondent nor reply was filed. Hence, the Respondent was set *ex-parte* by this Tribunal vide order dated 29.04.2022. Till now no application is filed to set aside the said order and the Respondent has not entered an appearance even in the final hearing.

9. Before analysing the facts, it is necessary to refer to the relevant provision of IBC, 2016,

> *"**Section 33:** Initiation of liquidation. (5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:*

And Regulation 12(1) & (2) of IBBI (Liquidation Process) Regulation 2016, provides as follows

> *"**Regulation 12.** (1) The liquidator shall make a public announcement in Form B of Schedule II within five days from his appointment.*
>
> *(2) The public announcement shall-*
>
> *(a) call upon stakeholders to submit their claims or update their claims submitted during the corporate insolvency resolution process, **as on the liquidation commencement date**; and*

Pl/-

*b) provide the last date for submission or updation of claims, which **shall be thirty days from the liquidation commencement date.**"*

10. In the present case it can be seen that the Liquidation of the Corporate Debtor was commenced on 14.02.2019. The show cause notices were issued on 16.06.2020 and 18.06.2020. In the reply letters dated 27.06.2020 to the show cause notices, the Applicant had clearly communicated to the Respondent that the Corporate Debtor is in Liquidation and no claim was filed by the Respondent before the Liquidator, despite the public announcement of Liquidation and a specific letter by Ld. Liquidator. It is seen from the factual part of the order dated 12.03.2021 passed by the Respondent against the Corporate Debtor it was recorded as follows,

availing concessional rate of duty under customs notification no. 102/2009 dt. 11.09.2009. With reference to the above query M/s SPBPL replied that their company (M/s SPBPL) had availed the term loan of Rs. 199 Crores under Consortium basis from 3 Banks namely Tamilnadu Mercantile Bank, State Bank of India, Indian Overseas Bank and subsequently their account become NPA (Non Performing Assets) from March 2017 onwards and an Interim Resolution Professional (IRP) had been appointed and their company is functioning under the management of IRP. And it has been reported by the liquidator that all the claims to the company had been finalised and filed before the Hon'ble NCLT on 25.04.2019.

02. Therefore Show Cause Notices F.No. 166/2011-EPCG-ICD dated 16.06.2020 and Show Cause Notice F.No.167/2011-EPCG-ICD dated 18.06.2020 were issued to M/s Saradha Papers And Boards Pvt Limited. A copy of said notices were sent to the licence holder's known address available in the licence. The licence holders were offered with an opportunity of personal hearing for the EPCG Licence No. 3230016644/17.04.2011 on 24.09.2020, and for the EPCG Licence No. 3230016724/06.05.2011 on 18.11.2020 and the intimation letters were sent to the licence holder's known address available in the licences.

The above document manifests that the Respondent had passed an order dated 12.03.2021 against the Corporate Debtor after knowing well that the Corporate Debtor is in the liquidation process.

11. But in the operative part of the said order, the following directions were ordered.

ORDER

I order, M/s. Saradha Papers And Boards Pvt Limited (Now Known as Senthil Papers and Boards Pvt Ltd., Coimbatore), to pay the total amount of Rs. 2,89,29,513/- (for the EPCG Licence No. 3230016644/19.04.2011 an amount of Rs. 1,73,35,040/-, and for the EPCG Licence No. 3230016724/06.05.2011 an amount of Rs. 1,15,94,473/-) along with the interest of 15% per annum from the date of clearance of capital goods imported to the date of payment under Section 28 and 28AA of Customs Act, 1962. If they fail to pay the amount due, the same shall be recovered under sub section (1) of Section 142 of the Customs Act, 1962, in terms of bond/LUT executed by them with the Government, under CBEC Circular Board's Circular No.58/2004 Cus dated 21.10.2004.

I also impose a penalty of Rs. 3,18,24,000/- and interest payable thereon (for the EPCG Licence No. 3230016644/19.04.2011 Rs.1,90,70,000/- and for the EPCG Licence No. 3230016724/06.05.2011 Rs. 1,27,54,000/- being the Bond Value) on M/s Saradha Papers And Boards Pvt Limited, (Now Known as Senthil Papers and Boards Pvt Ltd., Coimbatore), under section 114 AB of Customs Act, 1962.

This order is passed without prejudice to any other action or proceedings which may be initiated against the notices under the Customs act, 1962 or any other law for the time being in force.

12/03/2021

(S.SIVAPRAKASAM)
ASSISTANT COMMISSIONER OF CUSTOMS

Reading the above shows that in the event of failure of paying the amount mentioned in the order, recovery proceedings under Section 142(1) of the Customs Act, 1962 will be proceeded against the Corporate Debtor, also with a specific mention in the order in the last para as: "*without prejudice to any other action or proceedings which may be initiated against the notices under the Customs Act, 1962 or any other law for time being in force.*" At this point, it is important to refer to Section 142(1) of the Customs Act, 1962 which stipulates as follows,

> ***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 under section 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 1 [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 1 [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 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 recover from such person the amount specified there under as if it were an arrear of land revenue; or*

(ii) the proper officer may, on an authorisation by 3 [Principal Commissioner of Customs or Commissioner of Customs] and in accordance with the rules made in this behalf, distrain 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 section 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 [Principal Commissioner of Customs or 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.]

(d) (i) the proper officer may, by a notice in writing, require any other person from whom money is due to such person or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held, or at or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom the notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to

produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before the payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in case the person to whom a notice under this section has been issued, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Chapter shall follow.]

Referring to the above provision, it is clarified that the actual recovery proceedings against the assets of the Corporate Debtor would begin only from the invocation of Section 142(1) of the Customs Act, 1962 against the Corporate Debtor, which is prohibited by Section 33(5) of IBC, 2016.

12. The Hon'ble Supreme Court in the case of ***Sundaresh Bhatt, Liquidator of ABG Shipyard vs. Central Board of Indirect Taxes*** held as follows,

"44. Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, ***the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context****.*

45. From the above discussion, we hold that the respondent could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC.

46. There is another aspect of this case that needs to be highlighted to portray the inconsistency of the Customs Act vis-a-vis the IBC during the moratorium period. In the present case, the demand notice dated 11.07.2019 was *issued by the respondent under Section 72 of the Customs Act, in clear breach of the moratorium imposed under Section 33(5) of the IBC. Issuing a notice under Section 72 of the Customs Act for non-payment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor under Section 35(1)(b) of 1BC.*

Xxxx xxxx xxxx

54. On the basis of the above discussions, following are our conclusions:

i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has ***a limited jurisdiction to assess /determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act****.*

ii) After such assessment, the respondent authority has to ***submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority****.*

iii) In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC.

..."

Viewing the present case in the light of the above observation makes us understand that the respondent authority only has a limited jurisdiction to assess /determine the quantum of customs duty and other levies but does not have the power to initiate recovery of dues by means of sale/confiscation, as provided Section 142(1) the Customs Act, 1962. Also, Section 238 of IBC, 2016 further strengthens the views taken by us.

13. Hence, the order of Respondent dated 12.03.2021 passed during the liquidation of the Corporate Debtor will create a hindrance in the liquidation process of the Corporate Debtor also with the invocation of Section 142(1) of the Customs Act, 1962. However, to secure the assets of the Corporate Debtor and for an uninterrupted liquidation process, it is necessary to prevent the Respondent from proceeding further under Section 142(1) of the Customs Act, 1962, which is the very purpose of the IBC, 2016.

14. Thus, the Respondent is restrained from initiating any recovery proceeding against the assets of the Corporate Debtor with respect to its order dated 12.03.2020 and also restraining further initiation of any execution of said order. Respondent is at liberty to may file a claim before the Liquidator, which will be dealt with as per law.

15. Accordingly, this application IA(IBC)/566(CHE)/2021 is **disposed of.**

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

Dr.DEEPTI MUKESH
MEMBER (TECHNICAL)

Gopishankar. D