

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

IA No. 1300/MB/C-I/2020

**In
C.P (IB) No.1267 /MB/C-I/2017**

An application under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016

Filed by

Mr. Manish Kumar Baldeva

Liquidator

...Applicant

Versus

Sales Tax Officer

C-04, Ground Floor, Vikrikar Bhavan,
Nagpur-440001, Maharashtra.

...Respondent

In the matter of

Punjab National Bank

...Financial Creditor

Versus

Linkson International Limited.

... Corporate Debtor

Order Pronounced on: 10.02.2023

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Ayush J Rajani, PCA
For the Respondent : Mr. Amar Mishra, Advocate

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The present Application is filed seeking the following reliefs:
 - i. Direction to the Respondent to release the attachments on all three properties so as to enable the Applicant to continue the auction/private sale of the assets in terms of the provisions of the Code.

Backdrop of facts

2. The present company petition was filed by Financial Creditor, Punjab National Bank under the provisions of Section 7 of the Insolvency and Bankruptcy Code 2016 (**the "Code"**). This Tribunal vide an Order dated 06.10.2017 admitted the Petition and appointed the Applicant herein as Interim Resolution Professional (hereinafter referred to as "IRP") by the said order. Thereafter, vide Order dated 20.07.2018 in terms of provisions of section 33 of the Code, Liquidation was initiated and the present applicant was appointed as the Liquidator.

Submissions made by the Applicant

3. The Applicant submits that it is only during the process of liquidation that the Applicant was made aware about the attachment by the Respondent i.e. Sales Tax Department on three of the properties of the Corporate Debtor.
4. The Applicant submits that it is imperative that the Sales Tax Department i.e. Respondent herein releases the said attachments so as to enable the interested bidders to offer better value and proceed with the auction of the properties of the Corporate Debtor.
5. The Applicant also submits that one of the parties i.e. Tapadia Polysters has shown interest in taking over one of the assets of the Corporate Debtor i.e. plot no.: D-30, D-31, D-32 and D-33 situated in Butibori Industrial Area, Nagpur and has filed a request letter with the Applicant dated 15 July 2020 that the said attachment be released by the Respondent.
6. The Applicant submits that property being Plot No. B-117, MIDC, Butibori Industrial Area, Nagpur which is sold to Supreme Bituchem India Private Limited on 11.10.2021. Further, it is stated that MIDC is not transferring assets in the name of successful bidders owing to sales tax attachment.

7. It is submitted that there is one more property being Office at Poonam Plaza, 4th Floor, Civil Lines, Nagpur.
8. The Applicant also submits that the claim of the Sales Tax Department for an amount of Rs. 101.87 crores has already been admitted by the Applicant under the liquidation process.
9. Hence this Application under the provisions of Section 36(3) read with Section 60(5) and 238 for seeking order directing the Respondent to release the attachment so that the assets of the Corporate Debtor may be liquidated due to the outstanding demand towards the pre-CIRP dues. Copy of the said attachment orders dated 02 February 2017 with regard to two properties and a letter from sales tax department intimating that the sale of the third property (office at Poonam Plaza) which was sold under auction stands cancelled are attached herewith as "Annexure 3".
10. The Applicant submits that it is settled position of law that the "crown debts" i.e. statutory dues are preceded by the dues of the secured financial creditors in terms of the provisions of section 53 of the Code. It is also settled that provisions of section 238 of the Code supersede any other law contrary to the provisions of the Code.
11. The Applicant further submits that the Applicant is empowered to take control of all the assets owned by the Corporate Debtor under section 36

of the Code and in the present case by "attaching" the assets of the Corporate Debtor by the Respondents, the Applicant has been prevented from performing his duties under the Code.

12. The Applicant submits that he also made attempts in explaining the situation and requesting the Respondent to release the attachment, no response has been received by the Respondent as yet. Copy of emails dated 23 June 2020 and a follow-up reminder on 01 July 2020 is annexed herewith as "Annexure 5".

13. The Applicant in support of its submissions has placed reliance on the following Judgements:

i. Pr. Commissioner of Income Tax vs Monnet Ispat and Energy Limited
[SLP No. 6483/2018/ 2018 SCC Online SC 984]

ii. Mr. Mahendra Khandewal vs Assistant Commissioner of Sales Tax,
Commercial Tax Department, Hyderabad, Telangana.[CP(IB) 543 of
2018]

Submissions made by the Respondent

14. The Respondent has given the tabular chart of the total dues payable by the Corporate Debtor at para 3 page 2 of the Petition.

15. The Assessment Orders for the period of 2006-2007 to 2014-2015 shows that the dues payable by the Corporate Debtor even prior in date to the

enactment of the Code. The Department had lodged the claim with the RP on 24.10.2017, 07.11.2017 and 12.09.2018. The Claims are placed as Exhibit C (Colly)

16. The Respondent states that the assets of the Corporate Debtor were attached on 28.5.2015 and further at that point of time there was no pendency of any proceedings and further the same was not challenged either by Corporate Debtor and or by the Liquidator. The attachment notices and the attachment itself were done much prior to the initiation of present liquidation proceedings approximately 2 years ago. The attachment notice dated 28.5.2015 issued by Respondent State Department under Maharashtra Land Revenue Code is annexed at Exhibit 'D' at page No. 131 of the affidavit in reply.
17. The Respondent states that the Corporate Debtor has committed fraud upon the Respondent Department and the outstanding dues are to the tune of Rs.91,40,00,000/- at the time of issuance of the first notice of the demand under the Maharashtra Land Revenue Code 1966 dated 06.05.2015.
18. The Respondent State Department has followed the due procedure of law and procedures before attaching the properties of the Corporate Debtor and the same has not been challenged. The Respondent

Department has filed the claim on time.

19. The Respondent State Department states that the Liquidator has no power and or any authority to file the present application so as to decide the outstanding dues of the Corporate Debtor payable to the Respondent Tax Department to the tune of INR 101,86,65,062/- as per the claim submitted by the Respondent Department at page 129 of the affidavit in reply of the State Department. The Respondent State Department states that the IBC-Code 2016 does not specifically prohibit the statutory authority to recover its due from the Corporate Debtor from the property already attached by such authority the power and duty of the liquidator under section 35 of the Code does not anywhere give any power to extinguish the dues of their statutory department i.e. Respondent Department in the present case.
20. The Respondent State department states that it is pertinent to note that none of the assessment notice, demand notice and attachment has been challenged by the Corporate Debtor and or Liquidator. The Respondent State Department states that the Code cannot be used as a tool to evade taxes. The Applicant has not disputed the claims by filing any proceedings before the competent forum under any act including GST Act, 2016.

21. The Respondent has relied on the following Judgments

- i. *M/s Embassy Property Development Private Limited vs State of Karnataka and Ors.*
- ii. *State Tax Officer vs Rainbow Papers Limited [Civil Appeal No. 1661 of 2020 with Civil Appeal No. 2568 of 2020]*
- iii. *Bijoy Prabhakaran Pulipra vs State Tax Officer, SGST Department, Kerela*
NCLAT

Findings

22. We have perused the records and heard the Ld. Counsel for the parties.
23. The present Application has been filed by the Applicant/Liquidator for release of properties attached by the Sales Tax department as the Corporate Debtor failed to pay the tax dues.
24. The Respondent Sales Tax Department has filed its claim to the tune of Rs. 101.87 crores and the same has already been admitted by the Applicant.
25. The Respondent has relied on the Judgment of the Hon'ble Apex Court in *M/s. Embassy Property Development Pvt. Ltd. V/s. State of Karnataka and Ors* wherein it was held as under:

“The only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction

of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5).

Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal 40 (7j-rL before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression

"operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). The moment the dues to the Government are crystalised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT."

26. Further, the Hon'ble NCLAT in *Bijoy Prabhakaran Pulipra vs State Tax Officer, SGST Department, Kerela Company Appeal (AT) (CH) (Ins) No. 42 of 2021*. has held as under:

20.3 It is pertinent to mention that all the assessment orders were passed before the declaration of Moratorium. Therefore, it has attained finality in the absence of any challenge against the assessment orders before the Appellate Authority as provided under the statutes.

20.4 It is also important to mention that the GST amount is an amount of tax levied under the assessment order as per the Goods and Service Act, 2017. It cannot be edited or reduced by the Resolution Professional himself. Even if the IRP/Resolution Professional was aggrieved by the said Order, they should have filed the Appeal under Section 107 of the CGST/SGST Act, 2017, read with Rule 108 of the GST Rules 2017. Any revision of assessment orders also cannot be made under the pretext

of Section 238 of IBC. Section 238 of Insolvency and Bankruptcy Code cannot be read as conferring any appellate or adjudicatory jurisdiction in respect of issues arising under other statutes.

20.10 Undisputedly, the IRP/RP has revised the admitted claim of the Respondent based on the circumstances stated above. The above exercise of revision of the GST assessment order was beyond the jurisdiction of the IRP/RP. It is pertinent to mention that the IRP/RP was not having the adjudicatory power given by the GST Act. Regulation 14 of the CIRP Regulations only authorises the IRP/RP to exercise power where the claim is not precise due to any contingency or other reasons.

20.11 It is pertinent to mention that Hon'ble Supreme Court in Embassy Property Developers Private Limited¹ has held that Section 60 (5)(c) of the Insolvency and Bankruptcy Code, 2016 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to Insolvency Resolution. But the decision taken by the Government or Statutory Authority in relation to the matter which is in the realm of public law, cannot be brought within the fold of the phrase "arising out of or in relation to the Insolvency Resolution" appearing in Section 60 (5) (c) of the Code.

21. However, in the instant case, the Adjudicating Authority has rightly

considered the statutory provision and suggested filing an Appeal before the appropriate forum. But at the same time, the Resolution professionals, considering the CoC as an authority in law, had exercised the powers of GST authorities. Therefore, the said act of the Resolution Professional is without jurisdiction and not sustainable in law.”

27. At this juncture, it is useful to refer to the Judgment of the Hon’ble Supreme Court in *State Tax Officer vs Rainbow Papers Limited [Civil Appeal No. 1661 of 2020 with Civil Appeal No. 2568 of 2020]* has held that as under:

“52. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan.

53. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.

54. In our considered view, the Committee of Creditors, which might

include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

55. In our considered view, the NCLAT clearly erred in its observation that Section 53 of the IBC over-rides Section 48 of the GVAT Act. Section 53 of the IBC begins with a non-obstante clause which reads :- “Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority.....”

56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman’s dues for a period of 24 months preceding the liquidation commencement date.

57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest

could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.”

28. The Hon'ble Apex Court in Rainbow (supra) has held that the State through Sales Tax Department is deemed to be a secured creditor as security interest is created by way of attachment of property by the Respondent.
29. It is undisputed that the properties of the Corporate Debtor were attached by the Sales Tax Department i.e. Respondent herein vide its Attachment Orders 28.05.2015. As on the date of the said Attachment Order there was no restriction on attachment. CIRP was initiated against the Corporate Debtor on 06.10.2017, the time gap between the Attachment Order and initiation of CIRP is two years. Hence, the Order of Attachment had attained finality as the same was not challenged by Corporate Debtor or by the IRP at the relevant time, before the Appropriate Authority.
30. Therefore, the assets shall not form part of the Liquidation estate and the treatment accorded to the Sales Tax Department i.e. the Respondent herein will be that of secured creditor under Section 53 (1)(e)(ii) of the Code.

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MUMBAI BENCH-I

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31. In the above backdrop, the instant application is **IA No. 1300 of 2020 in CP (IB) No. 1267 of 2017 is Rejected.**

Sd/-

**SHYAM BABU GAUTAM
MEMBER (TECHNICAL)**

10.02.2023

Priyal

Sd/-

**JUSTICE P. N. DESHMUKH
MEMBER (JUDICIAL)**