

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

**IA 1080/KB/2020
In
CP(IB) 180/KB/2019**

In the matter of

An application under Section 60(5)(c) and 18(1)(f) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016.

And

In the matter of:

ATO(I) Limited, registered under the provisions of Companies Act, 1956 and having its registered address at 60C, Colootola Street, Kolkata 700073, West Bengal.

.... Financial Creditor

Versus

GANDHAMARDHAN SPONGE INDUSTRIES PVT LTD, registered under the Companies Act, 1956 and having its registered office at P-3, New CIT Road, 2nd Floor, Kolkata 700073, West Bengal.

... Corporate Debtor

And

In the matter of:

PRADEEP KUMAR GOENKA, Resolution Professional, having office at Bajrang Kunj, Room No. 412 & 413, 2B Grant Lane, 4th Floor, Kolkata 700012, West Bengal.

... Applicant

Versus

1, DIRECTORATE OF REVENUE INTELLIGENCE, BHUBANESWAR, Regional Unit, Plot No. 206, 206/474 Gajpati Nagar, P.O. Sainik School, Bhubaneshwar – 751 005.

2. **ASSISTANT COMMISSIONER OF CUSTOMS, EPCG (M.C.)**, Export having address at 4th Floor, Annexe Building, New Customs House, Ballard Estate, Mumbai 400001.

..... Respondents

Date of Hearing: 11/02/2021

Date of Pronouncement: 18/02/2021

Coram: Shri Rajasekhar V.K., Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances (via Video Conference):

Mr. Pranay Agarwal, Advocate	]
Ms. Ankita Baid, Advocate	] For Resolution Professional
Mr. Pradeep Kr. Goenka, RP	] Self
Mr. Amitabrata Roy	] For DR1

ORDER

Per Rajasekhar V.K., Member (J):

1. **I.A. No. 1080/KB/2020** is an application filed by the Resolution Professional of Gandhamardhan Sponge Industries Private Limited, seeking an order *directing the Respondents herein to release and handover the two crushing plants of the Corporate Debtor, lying at the premises of Bindals Sponge Industries Limited and seized by Respondent No. 1 herein.*
2. Respondent No. 1 is the Directorate of Revenue Intelligence, Bhubaneswar. Respondent No. 2 is the Assistant Commissioner of Customs, EPCG (M.C.), Export. The brief facts leading up to the present application are as follows:-

- a) The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP) vide an order dated 04.10.2019, and the applicant/RP herein was appointed as the Interim Resolution Professional (IRP). Thereafter his appointment was confirmed by the Committee of Creditors (CoC) as the Resolution Professional (RP). Pursuant to the public advertisement issued by the IRP, Respondent No. 2 (Assistant Commissioner of Customs, EPCG (M.C.) Export), filed its claim *vide* an e-mail dated 17.10.2019 claiming Rs.3,52,88,378/- (Rupees three crore fifty two lakh eighty eight thousand three hundred seventy eight only). Since this was not less than 10% of the total dues owed by the Corporate Debtor, Respondent No. 2 was also part of the CoC. It is the claim of the applicant/RP that Respondent No. 2 never attended any of the CoC meetings in spite of notices given to it.
- b) The claim of Respondent No. 2 is that in the year 2006 the Corporate Debtor had imported two Crushing Plants under the Export Promotion Capital Goods Scheme (EPCG) which are lying in the premises of Bindal Sponge Industries Limited, a Group Company of the Corporate Debtor. Due to non-fulfilment of the obligations and conditions under the EPCG Scheme, the two crushing plants in question were seized by Respondent No. 1 [Directorate of Revenue Intelligence, Bhubaneswar].
- c) On 19.12.2019 the applicant/RP requested the respondent herein to release the said crushing plants to the applicant/RP as part of his duties envisaged under section 18(1)(f) of the Code. The applicant/RP submits that respondent No. 1 did not reply to the mails nor did they take any steps to handover the two crushing plants to the applicant/RP till date. The applicant/RP was forced to file the present application under section 60(5)(c) of the Code seeking a direction to the respondent to release and hand over the two crushing plants to the RP to enable him to carry out his duties.

3. From the records it is noticed that copies of the application have been served on the respondent vide e-mail dated 12.10.2020 to the e-mail id of respondent no. 1 at dribbsr.od@gov.in and to respondent No. 2 at its e-mail id ncltexportmumbai@gmail.com. Thereafter court notice dated 31.12.2020 was delivered on respondent no.1 by speed post on 18.01.2021 and on respondent no. 2 on 18.01.2021. In response, while respondent no. 2 appeared and filed its reply, respondent no. 1 has chosen not to appear or file a reply in the matter.
4. Today, the matter was taken up for hearing in the presence of Mr. Pranay Agarwal, along with Ms. Ankita Baid, Ld. Counsel for the applicant/RP and Mr. Amitabrata Roy and Abhrajit Maity, Ld. Counsel for respondent no.1. Respondent no. 2 having chosen not to be present or file a reply, is hereby *set ex-parte*.
5. Ld. Counsel for the RP submitted that the RP had informed the respondent herein about the initiation of the Corporate Insolvency Resolution Process (CIRP) and to handover the assets to enable the RP to carry out his duties. Copies of the letters have been placed on record at Annexure 'F' (pages 77 to 82 of the application). A reminder e-mail dated 31.12.2019 has been placed on record at Annexure 'G' (page 83 of the application). There has been no response thereto from either of the respondents.
6. In the present application, respondent No. 1 in its reply has taken the stand that it had initiated a case against the Corporate Debtor for non-fulfilment of export obligations against the capital goods imported under the EPCG authorization dated 07.07.2006 and 15.11.2006, thus saving duty to the tune of Rs.1,41,02,965/- (Rupees One crore forty one lakh two thousand nine hundred sixty five only). The Corporate Debtor had contravened the conditions governing the EPCG authorisation. Therefore, following a joint verification made on 28.03.2018, and in terms of section 110(1) of the Customs Act, 1962, the said goods were seized. Consequently, a show cause notice was issued

on 28.12.2018 to the Corporate Debtor proposing for confiscation of the said goods in terms of section 110(o) of the Customs Act, 1962. The said show cause notice is pending for adjudication before the Commissioner of Customs, Mumbai.

7. Respondent no. 1 has also drawn attention to the provision of section 110A of the Customs Act, 1962, which provides for provisional release of goods to the owner thereof on taking from him in proper form with such security and conditions as the adjudicating authority may require. Therefore, respondent no. 1 has taken the stand that the applicant/RP herein should approach the Adjudicating Authority under the Customs Act, 1962 for release of the said goods.
8. Ld. Counsel for the applicant/RP has relied on the judgment of the Hon'ble Calcutta High Court **dated 29.01.2021 in WPA No. 977 of 2020** in the matter of **Kolkata Municipal Corporation and another vs. Union of India and others**. In that matter the Kolkata Municipal Corporation, in exercise of its authority under section 217 – 220 of the 1980 Act of the Kolkata Municipal Corporation Act, 1918 had distrained the property of the assessee in recovery of municipal Tax dues from an assessee. Subsequently, the assessee went into CIRP, prompting the Resolution Professional of that assessee to approach this Adjudicating Authority (NCLT) for handing over physical possession of the premises. It was argued there that the Kolkata Municipal Corporation is a statutory authority exercising powers under the 1980 Act, and therefore, the NCLT acting under the Insolvency and Bankruptcy Code (IBC) as Adjudicating Authority, cannot intercept an action taken by the Authority in exercise of its statutory powers.
9. The Hon'ble High Court considering the tests laid down by the Hon'ble Supreme Court in para nos. 37 & 40 of **Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and others**¹ held that “finalised claim” would come within the purview of (operational debt) under section (21) of the IBC. Hence the Resolution Professional has jurisdiction

¹ 2019 SCC OnLine SC 1542

to take custody and control of the same (para 47). It has also been categorically held in para 48 of the judgment that the parameters of powers of the NCLT as an Adjudicating Authority under section 60 of the IBC, is defined and circumscribed by the scope of section 18(1)(f)(vi) of the IBC and that such exercise of power would fall within the ambit of the expression “arising out of or in relation to the Insolvency Resolution” as envisaged in Section 60(5)(c) of the IBC.

10. We are in respectful agreement with the decision of the Hon’ble Calcutta High Court in Kolkata Municipal Corporation and another vs. Union of India and others.
11. This is a matter where the Respondents have already filed their claims for Rs. 3,52,88,378/-, with the RP and the same has been collated. There is no primacy for crown debts or statutory dues under the IBC. The respondents, therefore, shall have to stand in queue for realisation of amounts due. Therefore, there is no justification for continued physical custody and possession of the two crushing machines.
12. In any case, the moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 is in force and there cannot be any question of proceedings before the Adjudicating Authority under the Customs Act, 1962, continuing in the teeth of the moratorium declared by this Adjudicating Authority.
13. In these facts and circumstances, the authority having custody of the two crushing machines - (1) 150M TPH Track Mounted Crushing Plant Model METROTRACK – 1000SR, SI No. 100320DESR, Year – 06, imported from B.L. Pegson Ltd. U.K. vide Bill of Entry No.695479 dated 31.07.2006 and (2) Metrotrack Primary Crushing Plant SI.No. 960309DJ, Year – 06, Machine Type – METRO STD, imported from B.L. Pegson Ltd. U.K. vide Bill of Entry No. 732792 dated 22.12.2006, is, therefore, hereby directed to hand over the same to the applicant/RP herein, within a period of **fifteen days** from today. In so far as the dues owed by the Corporate Debtor to the respondents are concerned, since the same is already filed with and collated by the RP, there is nothing more to be

done at this stage of the CIRP, and the claim of the respondents can only be considered in accordance with the IBC provisions.

14. With these directions, **I.A. 1080/KB/2020 shall stand disposed of.**

15. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.

16. Urgent certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

Order dated 18th February, 2021.

vc