

NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI

Company Appeal (AT) (Insolvency) No.1482 of 2019

[Arising out of Order dated 25th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) No. 713/KB/2018 and CP (IB) No. 446/KB/2017]

IN THE MATTER OF:

Concast Steel and Power Limited,

(In Liquidation), Through the Liquidator

Mr. Kshitiz Chhawchharia

21, Hemant Basu Sarani, 5th Floor,

Room No. 511 and 512 Centre Point,

Kolkata – 700001, West Bengal

Email : LQ.Concast@in.gt.com; Kshitiz@bccoinindia.com

...Appellant

(Corporate Debtor through Liquidator)

Versus

MSTC Limited,

A Government of India Enterprise

Registered Office at 225 C, AJC Bose Road,

Kolkata – 700020

Email Id: cosec@mstcindia.co

...Respondent

(Original Applicant)

Present:

**For Appellant: Mr. Arun Kathpalia, Sr. Advocate with
Mr. R. Sudhinder, Ms. Ekta Bhasin,
Ms. Pooja Chakrabarti, Mr. Prithwish Roy and
Ms. Dikshaa Gupta, Advocates**

**For Respondent: Mr. Abhijeet Sinha, Mr. Saikat Sarkar and
Ms. Pallavi Pratap (Caveator), Advocates for R-1.**

J U D G M E N T
(5th July, 2021)

A.I.S. Cheema, J.

1. The Appellant Corporate Debtor ‘Concast Steel and Power Limited’ (CSPL in short) has filed this Appeal through Liquidator against the Impugned Order

dated 25th October, 2019 passed by Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in CA (IB) No. 713/KB/2018 and CP (IB) No. 446/KB/2017. By the Impugned Order, the Adjudicating Authority allowed the Application filed by the Respondent MSTC Limited (MSTC in short). MSTC had supplied goods to the Corporate Debtor and made a claim of Rs. 300.17 Crores which claim was accepted during Corporate Insolvency Resolution Process (CIRP in short). As MSTC was not treated as secured creditor in spite of a pledge agreement, MSTC filed the Application to Adjudicating Authority and by the Impugned Order, the Adjudicating Authority treated MSTC as Operational Creditor who was a secured creditor. Thus, the Appeal.

Case of the Appellant- in short

2. The Appeal claims and it is argued for the Appellant that M/s. Concast Bengal Industries Limited (CBIL in short), a Group Company of the Corporate Debtor- 'Concast Steel and Power Limited' entered into agreement with MSTC vide agreement dated 01st April, 2013. As per the agreement, CBIL was to purchase material from MSTC which material was to be procured by MSTC and which was to be stored in factory premises of CBIL. MSTC had responsibility to manage the material by appointing supervising agent. It is stated that pursuant to such agreement a tripartite agreement dated 14th August, 2013 was entered into between CBIL and Ferro Scrape Nigam Limited (FSNL in short). CBIL was to provide warehouse for storage and FSNL a subsidiary of MSTC was to be custodian of the materials. Appeal claims that by Order of

Hon'ble High Court of Calcutta dated 26th November, 2015 CBIL was merged with the Corporate Debtor- 'Concast Steel and Power Limited' w.e.f. 01.04.2013 (Appeal Para 7(h)).

3. According to the Appeal, CIRP started against the Corporate Debtor on 07th November, 2017 and in the first meeting the Appellant claims to have been appointed as Resolution Professional (RP in short) on 22nd December, 2017. Appeal refers to (Annexure B-Page 56) Agreement dated 29th June, 2012 between MSTC and CBIL. Tripartite Agreement dated 14th August, 2013 is also referred with regard to MSTC, M/s. Ferro Scrape Nigam Limited and CBIL. Copy of the agreement is at Page 71 of the Appeal. According to the Appellant CBIL had entered into the agreement dated 29th June, 2012 with MSTC, engaged in the business, inter alia, of Indigenous and International Import and Sale of Coal, Coke LAM Coke, Steel items etc. and the activities which included procurement of such raw material on terms mutually agreed. The Liquidator claims that as per the agreement, the material procured by MSTC shall be purchased and stored in the designated place of factory premises of CBIL and MSTC being the facilitator was to manage the material which would be supervised by an accredited supervising agent as agreed between the parties. Appellant claims that the supervising agent was the custodian of the material which was pledged to MSTC and the material was to be released from time to time to CBIL on cash and carry basis after receipt of authorization from MSTC (See Appeal Paragraph 7 (e)). Referring to the tripartite agreement (Annexure C), the Appeal claims that CBIL was to provide storage of the billets and other

materials purchased by MSTC for supply in its warehousing facility located at Mouza – Moshiya, Village – Gourandihi, P.O. – Bonkati, Bankura in West Bengal. Ferro Scrape Nigam Limited (FSNL in short) was to be custodian. Subsequently the agreement was extended for period till entire pledged material is redeemed and lifted by CBIL.

Steps of IRP/ RP on initiation of CIRP

4. The Appellant further claims that after CIRP was initiated, the IRP Mr. Sanjay Agarwal had noted that the Company had total stock of 1943 MT of MS Billets and 16789 MT of Coal on the date of commencement of CIRP across all its warehousing facilities. The Appellant relied on Annexure E Page 99 at Page 100 which is “Statement of Stock and Book Debts as on 07.11.2017” maintained by the Director of Corporate Debtor. The Appeal refers to MSTC writing letter addressed to the Appellant on 22.3.2018 (Annexure G - Page 155) seeking assessment of stocks pledged to MSTC and requested a joint inspection. According to the Appellant, he did not receive any notice from MSTC and MSTC had sent e-mail to employee of Corporate Debtor seeking assessment of the stock. Appellant claims that on 05th April, 2018 he had sent e-mail to MSTC (Annexure H- Page 158) seeking scheduled time/date for conducting assessment but he received reply that the assessment was already done on 29th March, 2018 by an external agency empanelled by MSTC. The Appeal is referring to exchange of correspondence and the Resolution Professional conveying necessity for joint inspection. It is claimed that on 19.04.2018 joint inspection could not take place due to obstruction from

labour union and the same was done only on 3rd May, 2018. The Appeal claims that at the time of such inspection, stock report was different than from the earlier report got done by MSTC. MSTC claimed that the stock had been consumed in unauthorized manner amounting to criminal offence.

5. Appeal Para 7(x) and (y) show Appellant was aware that GEOCHEM is an international inspection and testing company and Liquidator himself filed Application CA(IB) No. 435/KB/2018 taking up issue with the Adjudicating Authority which asked Serious Fraud Investigating Officer (SFIO in short) to investigate. According to the Appeal, Resolution Professional visited warehouse in Orissa on 04th April, 2018 and the figures were conveyed to MSTC and a joint inspection was sought on 09th May, 2018. However, MSTC stated in the e-mail on 09.05.2018 that the goods pledged were in excess than what is shown in the report Appellant was pointing out. MSTC asked the Resolution Professional to ensure protection of stocks. Thus the Appeal claims that the stocks claimed by MSTC could not be reconciled with the records available with the Appellant.

Case of the Respondent- in short

6. Against the above, MSTC has in its Reply-Affidavit vide Diary No. 19903 claimed, and it is argued for MSTC that in the tripartite agreement FSNL was appointed by the Parties as the custodian of the pledged stock of the materials which were kept inside the plants/place which was provided by the Corporate Debtor for warehousing the materials which were pledged to MSTC. The arrangement was to protect interest of MSTC in the said materials. The

Corporate Debtor was to utilize the materials on cash and carry basis. The goods were stored in the factory premises of the Corporate Debtor at Bankura in West Bengal and also at Jharsuguda in Orissa. From 2017 onwards, the Corporate Debtor was failing and neglecting to pay the outstanding dues. There was outstanding of Rs. 285.01 Crores (Including interest when letter dated 16.09.2017 was sent). When CIRP was initiated MSTC filed Form B of Rs. 300.71 Crores which claim was admitted by the IRP. The MSTC however was not treated as secured creditor in spite of the documents. The Appellant admitted entire claim of the MSTC of Rs. 300.71 Crores but refused to accept MSTC as secured creditor. According to the MSTC with prior intimation to the Appellant inspection was carried out through 3rd Party regarding the procured material secured at Bankura Factory on 29.03.2018. The Appellant however refused to accept the inspection report/findings which showed that the quantities of 63124.094 MT Steam Coal and 40489.085 MT Steel Billets were available lying in the Bankura Factory. The Appellant denied accepting the report on the basis that his authorized representative was not there. Respondent claimed that Respondent again requested for independent inspection which was scheduled on 09th April, 2018. But it could not take place due to labour problem. According to the Respondent, the quantities indicated in e-mail dated 24.04.2018 by the Resolution Professional were much less than the quantity of materials inspected and found available on 29.03.2018. It is claimed that in the inspection of stocks of Bankura, Corporate Debtor was represented by one Mr. Raj Kundu and representatives of MSTC as well as the

FSNL. In the rescheduled inspection on 03.05.2018 it was found that the quantity of Steam Coal had reduced by 22,700 MT and that the entire stock of 40000 of MT Steel Billets was missing and wrongfully removed from Bankura Factory, without making payments to the Respondent. According to the Respondent, the inspection on both dates of 29th March, 2018 and 03rd May, 2018 was done by the same inspection agency GEO CHEM and thus variance in report was ruled out. Thus, the Respondent claims that it is a secured creditor and the pledged stocks lying in the factory premises of the Corporate Debtor have been illegally/unlawfully removed for which complaint was lodged against the Corporate Debtor, its Directors, men and agents for huge pilferage of the pledged stocks.

7. It further appears from the defence of MSTC that report came to be filed with Police and even charge-sheet has been filed in the above context against Mr. Sanjay Kumar Surekha. One Mr. Arjun Kumar Santhalia and Mr. S. Gubna are shown as suspect. Copy of the document is filed vide Diary No. 25848.

8. In the Reply-Affidavit which has been filed by Respondent and arguments submitted, Respondents claim that in the Reply-Affidavit filed by the Resolution Professional before the Adjudicating Authority (Annexure AA-Page 390) at Page 398 Paragraph 7 (g) the position was admitted that as on 07.11.2017 the Company had total stock of 1943 MT of MS Billets and 16789 MT of Coal. It is argued for Respondent that as per the tripartite agreement clause 5.2 the Corporate Debtor pledged or caused to be pledged the materials

procured by MSTC and the acceptance on account of CSPL the Corporate Debtor/CSPL undertook to pay for lifting the material on cash and carry basis against written authorization to be released in favour of MSTC. In addition to such condition, the Corporate Debtor was required to provide post-dated cheques towards consideration in favour of MSTC. The Document shows that Respondent/MSTC was secured creditor. Respondent claimed that Respondent had given intimation on 24th March, 2018 for inspection on 29th March, 2018 and the same was conducted by M/s. GEM CHEM an independent assessment agency which showed quantity of 63124.9 MT of Steam Coal and 40489.085 MT of Steel Billets. Till March, 2018 such stock was available. Respondent claims that in the meeting on 08th May, 2018 the Appellant handed over copy of email dated 24th April, 2018 which was allegedly sent and it was claimed that quantities available at various locations were actually less than found in the inspection held on 29th March, 2018. Respondent claims that the stock was either stolen and / or unlawfully consumed by the Corporate Debtor without intimating the Respondent. The goods and stocks which were lying at Bankura and Orissa factories, till Corporate Debtor paid for the same, were to be treated as pledged material under the Agreement. The Learned Counsel for Respondent relied on Section 77(4) of the Companies Act, 2013 to submit that even if Charge had not been registered the same will not prejudice any contract or obligation for repayment of the money secured by a charge. Even, otherwise the duty to register charge was of the Corporate Debtor and Corporate Debtor

cannot take advantage of its own wrong. The Respondent is supporting the Impugned Order as passed by the Adjudicating Authority.

The Impugned Order

9. Impugned Order (Annexure-A, Page 50) shows Adjudicating Authority, after referring to the rival cases of the parties, found and held as under:-

“6. It is not in dispute that the applicant has supplied goods. The amount of claim is also not in dispute. There is an agreement between the applicant and the corporate debtor dated 6/4/2013 which governs commercial relationship between them. Clause 5 of the said agreement governs the mode of sale of goods to corporate debtor by the applicant. As per Clause 8 the quantity is to be lifted on cash and carry basis.

7. Clause 5.2 of the Agreement has specifically provides that corporate debtor shall pledge or caused to be pledged the materials to be procured by MSTC at its cost and expenses on account of CSPL, in favour of MSTC and CSPL undertakes to pay for lifting the material upon redemption thereto on cash and carry basis against written authorisation to be issued by MSTC to release such materials by the custodian. In addition to such condition, the corporate debtor is required to provide Post Date Cheque (PDC), letter of undertaking etc. in this factual background the question which is required to be seen is that whether an operational creditor can be a secured creditor and if so, whether in the present case, the applicant can be considered as secured creditor?

8. To answer this question, we reproduce the following sections as under:-

3(10)- “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

3(27)- “property” includes money, goods, actionable claims, land and every description of property situated in India or outside India and

every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;

3(30)- “secured creditor” means a creditor in favour of whom security interest is created;

3(31)- “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.:

3(33)- “transaction” includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

9. From the definition of creditor, it is apparent that any person to whom a debt is owed is a creditor which includes both an operational creditor and a secured creditor. A creditor becomes a secured creditor in favour of whom security interest is created. Thus, if a security interest is created or exists in favour of an operational creditor then such operational creditor would be considered as secured creditor.

10. Having said so, now we have to see whether in the present case any security interest has been created in favour of the applicant. As per Sec.3(33) security interest is created or provided in respect of a property by a transaction. “Property” as per Sec.3(27) includes goods, and “transaction” as per Sec.3(33) includes an agreement in writing for the transfer of goods from or to the corporate debtor. The definition of security interest as given in Sec.3(31) is wide enough to include pledge as creation or provision of right, title or interest or a claim of the applicant in the goods so pledged. Admittedly, there is an agreement in writing between the applicant and the respondent which, as per Clause 5.2 briefly narrated above, provides for creation of pledge in favour of the applicant till the payment of goods supplied to corporate debtor is made.

11. Thus, in our considered view, appellant has security interest in respect of pledged goods supplied. In this view of the matter, we do not find any merit in the contention of the RP, not to recognize the applicant as secured creditor. We, further find that the case before the Hon'ble NCLT, Chennai Bench was in regard to financial assets and financial transaction i.e. overdraft against fixed deposit of corporate debtor which is not the case here. Hence, this case does not come to the help of the RP.

12. Further, the charge under Sec.77 of the Companies Act, 2013 is created on the property of the corporate debtor as a security to the creditor and in the present case, the claim of the operational creditor is based upon the fact that the goods sold which remains unpaid is its property, hence, for this reason also the said decision is not applicable. Accordingly, we accept the application and direct the RP to recognize the applicant as a secured creditor and to do the needful thereafter as per law. Thus, this application CA (IB) No. 713/KB/2018 stands disposed of in terms indicated above.”

Arguments for Appellant- in short

10. Learned Senior Counsel for the Appellant, after referring to above has argued that the Impugned Order is contrary to Section 77 of the Companies Act, 2013. According to the Learned Counsel, Section 3(31) is read along with Section 77(3) of the Companies Act, 2013 if the charge has not been duly registered with the Registrar of Companies, the same cannot be taken into account by the Liquidator. Section 77 of the Companies Act, 2013 amendment was carried out by Act 31 of 2016 w.e.f. 15.11.2016 so as to cover the Liquidator under IBC also. As there was no charge registered in favour of MSTC, the claim of MSTC could not be said to be a secured creditor.

11. It is further argued by Learned Counsel for the Appellant that the Respondent- MSTC is claiming to be owner in respect of the goods sold and the Corporate Debtor having purportedly pledged such goods in favour of the Respondent. Such claim was admitted as unsecured. It is claimed that such stand of the Respondent was self-destructive. It is further argued that the stocks purported to be pledged do not exist. The Respondent has filed an FIR in relation to purportedly missing goods. The Respondent has made allegations of discrepancies between an alleged inspection carried out on 29.03.2018 which according to Appellant is without the presence of the Resolution Professional and the joint inspection conducted on 03.05.2018. Such allegations are untenable.

12. The Learned Senior Counsel for the Appellant has further submitted that under a tripartite agreement dated 14.08.2013 (Annexure-C, Page 17) between Corporate Debtor, MSTC and FSNL, FSNL was appointed by MSTC and became the custodian of all goods purchased through MSTC. FSNL was entrusted with receiving the goods, custody of the goods, release of the goods as also all records in relation to receipt and release thereof. The CIRP was initiated on 07.11.2017 and IRP Mr. Sanjay Agarwal took stock of the goods and had a stock statement as on 07.11.2017. In November 2017 and as per the stock statement there were MS BILLETS: 1843.538 MT; COAL: 16364.605 MT. It is stated that the IRP appointed 'M/s. RBSA' as valuers to value the stock in December, 2017. In the Information Memorandum prepared by the IRP, stock statement as above reflected which was not challenged. The present Liquidator

Mr. Kshitiz Chawcharia was earlier appointed as Resolution Professional on 04.01.2018. 'M/s. RBSA' gives valuation report on the stock, which is in consonance with the stock statement prepared as on 07.11.2017. A joint inspection was done on 03.05.2018 and the Written Submissions (Diary No.26245) submitted by the Appellant claim stock statement prepared by Mr. Sanjay Agarwal with regard to stock as on 07.11.2017 matches with the joint inspection done on 03.05.2018. The Written Submissions stated that in the joint inspection, MS BILLETS were found 'NIL' and COAL was found to be 40420.36MT. According to the Appellant, the stock inspection got done by MSTC on 29.03.2018 was unreliable as the Resolution Professional was not present who was busy being March year ending. According to Appellant, the erstwhile management has informed that the stock had been consumed prior to the commencement of CIRP and FIR filed does not make any allegation against FSNL or the Resolution Professional. The persons named in the FIR are erstwhile management of the Corporate Debtor or persons who had ceased to be Director in 2010 and 2017. It is argued that if the stocks have not been consumed but removed unauthorisedly by a third party, the same should be treated as constructively delivered to the pledgee. According to the Appellant, the Adjudicating Authority erred in treating the MSTC as secured creditor.

Arguments of Respondent – in Short

13. Against this, Respondent- MSTC has argued that MSTC had entered into agreements with the Corporate Debtor and 'Concast Bengal Industries Limited' (CBIL) for procurement and supply of various materials such as Steam Coal,

LAM Coke, Iron Ore etc. which were to be used for the business of Corporate Debtor. It is stated that w.e.f. 1st April, 2013, CBIL merged with the Corporate Debtor. The Respondent stated that the agreements between CBIL and MSTC are also, therefore, referred as agreements between Corporate Debtor and MSTC. (In documents – reference to CIBIL should be referred as Corporate Debtor– CSPL)

14. The Respondent claims that the Respondent had lodged a claim for a total amount of Rs.302.58 Crores which was revised to Rs.300.70 Crores. However, the Resolution Professional did not accept MSTC as secured creditor. Respondent refers to the agreements between the Corporate Debtor and MSTC dated 6th April, 2013 (Appeal Page 269) and 3rd February, 2014 (Appeal Page 280) where *inter alia* it was provided that (a) MSTC was to procure the Goods on behalf of the Corporate Debtor; (b) the sale of such Goods was to be on “cash and carry” basis; (c) the delivery of the Goods was to be made to Corporate Debtor on proper authorization of MSTC; (d) Tripartite Agreement was to be entered into MSTC, Corporate Debtor and ‘Ferro Scrap Nigam Ltd.’ (FSNL); (e) Goods were to be pledged in favour of MSTC until payment for the Goods was made (Page 272); and (f) in order to ensure that the “movement” of Goods did not take place until full payment was made, for the “protection of financial interest of MSTC” (Page 272), several other modes of security were agreed between MSTC and the Corporate Debtor.

15. Respondent has further argued that Tripartite Agreements in respect of the plants of the Corporate Debtor in Orissa and West Bengal were entered

into. There are two separate agreements dated 26th July, 2013 (Page 201) and 14th August, 2013 (Page 71). It is stated that 16 'Memorandum of Pledge' (Pages 301 to 332) were executed. The Memorandum was to operate for a period of 90 days from the date of shipment of the Goods and for such period of 90 days, amounts mentioned in the 'Memorandum of Pledge' was to be treated as advance by MSTC to Corporate Debtor. According to the Respondent, the intention behind this was that no movement or use of the Goods could take place without payment to MSTC and the arrangement of pledge was to operate for a period of 90 days from shipment. MSTC claims that when CIRP started, the Interim Resolution Professional prepared a statement of stock and book debt as on the CIRP commencement date (as at Page 100). However, there was nothing on the record to show that the Interim Resolution Professional carried out any physical verification of the stocks. When IRP accepted claim of MSTC but did not treat it as secured creditor MSTC sent letter (Page 347) to the Interim Resolution Professional on 15th December, 2017 asking the Interim Resolution Professional to correct the description of "security interest". MSTC made it clear that it was a secured creditor of the Goods. The Resolution Professional's appointment was confirmed on 04.01.2018 (Page 392). Before this date itself Respondent had filed claim with Interim Resolution Professional for Rs.302.58 Crores on 5th December, 2017 (Page 334) and at the request of the Interim Resolution Professional, MSTC subsequently revised the claim to Rs. 300.70 Crores (Page 340). In spite of request of Respondent, the list of creditors did not reflect that MSTC was having security interest and

Respondent wrote to the Resolution Professional on 12th March, 2018 (Page 354). Respondent had requested the Resolution Professional to take control of both the plants of the Corporate Debtor and requested to take proper care so that there is no deterioration in the value of the Goods. MSTC claims that it has produced a table indicating the status of the Goods between April, 2017 and February, 2020 (Diary No.213404, Page-1). The Respondent states that the Resolution Professional did not file any document to show that any physical verification of the quantities or stocks was undertaken by the Resolution Professional/ Liquidator at any time even after taking charge from the Interim Resolution Professional. There was considerable depletion of the quantity of stocks and, therefore, MSTC has also initiated criminal proceedings and a charge sheet has been filed.

16. The Respondent further claims that it is not correct on the part of the Appellant to claim that during the physical verification carried out by MSTC in March, 2018 there was no authorized representative of the Resolution Professional. According to Respondent, the Physical Stock Assessment and Quality Report issued by 'Geo Chem' (First Report) refers to a joint statement of inspection which was attended to by the representative of the Corporate Debtor (Page 169). When the Resolution Professional wrote letter dated 24th April, 2018 after the above First Report, it was not claimed that the authorized personnel of the Resolution Professional were not present. The stand taken by the Resolution Professional was that Mr. Raj Kundu was not authorized to sign the joint stock statement on behalf of the Corporate Debtor. The Respondent

has referred to the said letter of Resolution Professional at Page 170 from the Appeal and the Resolution Professional refused to accept the First Report submitted by 'Geo Chem' and advised to carry out joint inspection in presence of Resolution Professional's authorized person. The Respondent claims that when the joint inspection dated 14th May, 2018 could take place, even that was conducted by the same entity 'Geo Chem' and the Second Report shows that the entire stock of Steel Billets had gone missing. The Second Report is referred at Page 368. According to the Respondent, at the time of second inspection dated 3rd May, 2018, only 22,701 MT Steam Coal was found to be there.

17. The Respondent has further submitted that the Liquidator himself had raised the stand before the Adjudicating Authority which resulted in the Adjudicating Authority directing investigation by the SFIO (Page 409). Thus, it is claimed that the Resolution Professional (now Liquidator) has been taking contrary stands. The Resolution Professional, as agent of the Corporate Debtor, who took over when CIRP was started, remains responsible to reimburse MSTC for the losses incurred. The Respondent further claimed that even if there was non-registration, the creation of security is matter of record. In facts of the matter, non-registration of charge in respect of Goods which have been found missing, would be irrelevant. Even otherwise, the onus of registering charge is on the Corporate Debtor/ Liquidator under Section 17(1) of the Companies Act, 2013 and the Company cannot take advantage of its own wrong. Section 77(3) and Section 77(4) must be read harmoniously. It is argued that when CIRP was started and Interim Resolution Professional/ Resolution Professional took over,

it cannot be stated that FSNL continued to be the custodian of the Goods which were admittedly on the premises of the Corporate Debtor and the place where control was of the Resolution Professional/ Interim Resolution Professional. The Respondent wants the Appeal to be dismissed.

18. Before discussing the rival cases put up by the parties, relevant portions from Agreements may be referred. Annexure B (Page 56) Agreement between CBIL (now read Corporate Debtor) and MSTC dated 29.06.2012 relevant portions read as under:-

“10.1.1 However, if CBIL is unable to furnish L/C for the value of material sold, then the High Seas Sale will be made against PDCs for maximum 90 (ninety) days for the value of entire cargo and the entire cargo shall move to the designated stockyard/ plot within CBIL’s works for exclusive storage of cargo pledged to MSTC under the supervision of CWC/FSNL/Supervising Agency appointed by CBIL with prior consent from MSTC, the costs of which shall be borne by CBIL. The said designated stockyard shall be duly demarcated by appropriate boundary mark and highlighting that it is MSTC’s bonded warehouse, to the satisfaction of CWC/FSNL/Supervising Agency. CWC/FSNL/Supervising Agency and MSTC shall sign a tripartite agreement whereby CWC/FSNL/Supervising Agency would deliver the goods to CBIL only against written release instruction from MSTC. CBIL will appoint CWC/FSNL/Supervising Agency with consent of MSTC as the custodian of the pledged material who will also responsible for delivery of material to CBIL only against written instruction by MSTC for the purpose. Specific authorization for release of material will be issued by MSTC to CWC/FSNL/Supervising Agency for the quantity for which payment is realized by MSTC from CBIL and credited to MSTC’s account. The tripartite agreement shall, inter alia, include the following terms:-

- a) The entire tonnage as per B/L quantity shall be pledged by CBIL to MSTC and the same shall be stored with CWC/FSNL/Supervising Agency if agreed to by MSTC for safe custody and eventual delivery against Authorization Letter issued by MSTC.*

b) *MSTC Ltd. as holder of lien on the goods shall have free and unfettered access, without any prior notice, to the warehouse during all reasonable hours including the right of ingress and egress to and from the warehouse by MSTC, its men, agents, officials, transporters, goods vehicles officials of Customs, Excise, Sales tax, for storing, de-storing, removing the goods in or from the warehouse without any hindrance or obstacles.*

Part of Clause 10.3 reads as follows:-

“10.3 In case of pledged cargo or Ex-Dock Sale or Ex-Stockyard Sale where CBIL proposes to lift materials by making payments in installments, CBIL shall lift the materials as per the following schedule assuming a supplier’s credit of 90 (ninety) days from the B/L date and shipment period of 20 (twenty) days, failing which MSTC will have right to sell on behalf of CBIL at the risk and cost of CBIL or to claim balance dues from CBIL immediately thereafter.”

19. The Tripartite Agreement dated 14th August, 2013 (Annexure-C, Page-70

@ 72) relevant part may be reproduced:-

“M/s. CONCAST BENGAL INDUSTRIES LIMITED, Mouza Mosliya, Junebedi Bankura, West Bengal, having its Registered Office at 21, Hemanta Basu Sarani, 1st Floor, Kolkata- 700001 hereinafter referred to as “CBIL” (which expression unless repugnant to the context includes its successors and assigns).

*And whereas, by a separate Agreement on 29.06.12 and subsequent Addendums executed by and between MSTC and CBIL, MSTC has agreed to procure Iron Ore, Iron Ore Pellets, Steam Coal, Scrap, Dolomite, Billets & other material from source that may be mutually agreed upon between CBIL and MSTC from time to time and sell the same on terms and conditions as per the said agreement and **CBIL has agreed to keep such materials under pledge with MSTC in a designated stockyard within 5 days upon arrival of cargo** at discharge port. If cargo is to be shipped by Rail/ Road, it should be directly deposited in the*

designated warehouse/ stockyard immediately upon arrival, CBIL shall not do transit warehousing of the material unless it is specifically agreed by MSTC.

And whereas, FSNL is appointed by MSTC and FSNL shall act as a custodian of pledged stock to protect interest of MSTC.

Now this tripartite agreement witnesseth as follows:

- 1. It is greed that for the purpose of storage of Billets & other material purchased by MSTC for supply to CBIL from time to time in terms of the agreement made between them under agreement dated 29.06.12 and subsequent Addendums, **CBIL shall provide well developed space to MSTC for warehousing at CBIL premises located at Mouza Mosliya, Junebedia, Bankura, West Bengal.***
- 2. MSTC shall use the said warehouse/stockyard as Licensee for a period of One year from 14-August-2013 or till the pledged goods are fully lifted, whichever is later and shall pay token sum of Rs.10/- per month (Rupees ten per month only) as consolidated license fee to CBIL.*
- 3. CBIL shall handover the warehouse/stockyard to MSTC. An office equipped with required infrastructure such as electricity, toilet, telephone, access to fax/ e-mail etc. **will have to be provided free of cost to FSNL and the running cost of these facilities will also be borne by CBIL.** MSTC and/or FSNL and/or their nominated representative shall have unfettered access to the warehouse/stockyard.....”*

Clause 6 reads as under:-

“6. FSNL shall engage their own Security round the clock at the designated warehouse/ stockyard handed over to it by MSTC.”

Clause 11 reads as under:-

“11. Deliveries of the material shall be allowed by FSNL to CBIL only against Authorization Letter issued by MSTC to FSNL. Such delivery shall be made by FSNL to CBIL from

9.00 A.M. to 5.00 P.M. and weekly/ restricted holidays are applicable”

(Emphasis supplied)

20. To understand the relationship and transactions, various arrangements (details of which are in the documents) need to be read with “Memorandum of Pledge” (at Pages 301 to 332). The Corporate Debtor executed these documents in favour of MSTC. These are of different dates, for different quantities but otherwise similarly worded. Portion of one may be reproduced from Pages 301 & 302 of Appeal. It reads:

*“The articles/ goods specified in the Schedule written herein below which we the undersigned M/s **Concast Steel & Power Ltd**, a Company registered under the Companies Act 1956, having our Registered Office at 21 Hemant Basu Sarani, 5th Floor, Kolkata- 700001, the pledger, have with you, to be held as a security for the repayment to you within 90th days from the day of arrival of shipment at factory premises of the sum of **Rs.7,94,68,200.00 (Rupees Seven Crore Ninety Four Lakh Sixty Eight Thousand and Two Hundred Only)** which you have advanced to us, together with interest. And we hereby authorize and empower you, in the event of non payment thereof within that period, to sell the same or cause the same to be sold at any time in any way you may think proper at our risk and on our account and out of the proceeds of such sale, after paying all costs, charges and expenses of any incidental to the same to retain, appropriate the said sum of **Rs. 7,94,68,200.00 (Rupees Seven Crore Ninety Four Lakh Sixty Eight Thousand and Two Hundred Only)** and interest and to pay the balance if any to us. You would not be liable for any loss or damage of or to the said article/ goods unless caused by your own willful negligence. In case of any shortfall we shall remain responsible to pay for the same to you with interest at the aforesaid rate.*

The powers hereby conferred on you are irrevocable and shall be exercisable by you, your successors and assigns.

The Schedule above referred to

A Total Quantity of 3180 MT (+/-10%) OF Steel Billet transported by Road under RTGS dtd. 13th December, 2016 from Hoogly to Jhansuguda, Odisha.”

21. What appears from above is that goods procured by MSTC for consumption of Corporate Debtor, stored at the premises of Corporate Debtor, under custody of FSNL for MSTC, which were to be issued to Corporate Debtor on cash and carry basis was in practical execution modified accepting Memorandum of Pledge treating Corporate Debtor as Pledger delivering goods by way of arrival of shipment at its factory premises for payment of amounts mentioned in the Memorandum which was to be treated as advance by MSTC to Corporate Debtor. MSTC thus claims existence of pledge and goods at site to be of MSTC and to be secured.

22. Having heard Counsel for both sides and having gone through the records what is apparent is that CIRP started on 7th November, 2017. One Mr. Sanjay Kumar Agarwal was earlier appointed as Interim Resolution Professional. MSTC filed claim with the Interim Resolution Professional. The Interim Resolution Professional vide letter dated 6th January, 2018 (Appeal Page 339) wrote to MSTC that they have filed claim calculating outstanding as on 31st November, 2017 but should file claim as on 7th November, 2017, which was the date of commencement of CIRP. He asked MSTC to rectify the claim. MSTC filed revised claim.

23. There is letter dated 15th December, 2017 (Page 347) in which MSTC informed the Interim Resolution Professional regarding its amount of claim and also informed that the MSTC was Secured Operational Creditor as security interest has been created by way of pledge over goods which were procured by the Corporate Debtor at the cost and expenses and which were to be lifted on cash and carry basis by the Corporate Debtor and that MSTC is still unpaid for unlifted balance and thus, it was Secured Operational Creditor.

24. The case of the MSTC is that MSTC was consistently making such claim but the Interim Resolution Professional or the Resolution Professional (now Liquidator) whose name was approved by the Committee of Creditors on 22nd December, 2017 and approved by the Adjudicating Authority on 4th January, 2018, both did not carry out actual physical verification of the stocks. It is pointed out that the Interim Resolution Professional merely relied on the records of the Corporate Debtor and prepared statement with regard to the stocks, as on 7th November, 2017, copy of which is at Page 100 of the Appeal Paper Book. The Appeal (Para 7 (j)) claims that the Interim Resolution Professional noted amongst other things that the Company had total stock of 1943 MT of MS Billets and 16789 MT of Coal as on the date of commencement of CIRP i.e. 7th November, 2017 across all its warehousing facilities at different plant sites. MSTC has referred to letter dated 12th March, 2018 (Appeal Page 354) which was written to the Resolution Professional (now Liquidator) referring to the claim which had been filed and adding that the claim was backed by goods securetarised by way of pledge in favour of MSTC and that the

goods were lying at Jharsuguda plant and Bankura Plant which was now under the control of the Resolution Professional. MSTC pointed out that the physical care and custody of goods was important and MSTC is in dark regarding utilisation of pledged goods which was lying at Bankura plant which was in operation. MSTC pointed out the current market price of the pledged goods which was more than 30% than the book value, outstanding amount of Rs.302.58 Crores and proposed to the Resolution Professional that if the material pledged is used instead of fresh procurements there would be substantial savings and payment can be adjusted against its claim.

25. There is another letter of MSTC dated 22nd March, 2018 (Page 356 of the Appeal) which annexed details of stock lying at the two plants and their value pointed out to the Resolution Professional that its officials had meeting with the Resolution Professional and he had given to understand that he would allow consumption of MSTC material after assessment of stocks is over which was not done. MSTC pointed out that they would be having stock assessment by an outside agency empanelled by them by end of the month i.e. March, 2018. There is e-mail (Appeal Page 361) from MSTC dated 24th March, 2018 addressed to sureshagarwal5@yahoo.com and in the same page there is e-mail addressed to “IP Concast” dated 27th March, 2018. The document at Page 361 of the Appeal shows that MSTC has informed regarding the volumetric assessment at Concast Steel and Power, Bankura Plant scheduled on 29th March, 2018. The document shows that although MSTC had agreements (as referred in earlier part of this judgment) whereby its representative was on the

premises of the Corporate Debtor for taking care of the goods which MSTC claims to be pledged, after the CIRP started, the access was not there, as e-mail dated 24th March, 2018 shows MSTC asking for gate passes for itself, Inspection Agency and FSNL to facilitate assessment.

26. It appears from the record that the assessment of the stocks was carried out through 'Geo Chem' on 29th March, 2018. MSTC has referred to Report dated 9th April, 2018 (Appeal Page 165) with regard to inspection carried out at the Bankura unit of the Corporate Debtor, on 29th March, 2018. The Physical Stocks Statement and Quality Report mentioned that the Applicant was MSTC and custodian was the Corporate Debtor. The place was Bankura factory yard of Corporate Debtor. Report has annexed to it "Joint Statement of Inspection" (Appeal Page 169) which is dated 29th March, 2018 and the Report found 63124.094 MT of Steam Coal and 40489.085 MT of Steel Billets at the site. The 'Joint Statement of Inspection' dated 29.03.2018 (First Inspection Report- in short) has been signed by official of 'Geo Chem Laboratories Pvt. Ltd.'; MSTC; Representative of FSNL and Representative of the Corporate Debtor unit at Bankura. Such Report dated 09.04.2018 with First Inspection Report was sent by MSTC to the Resolution Professional vide letter dated 17th April, 2018 (Annexure J). At page 170 of the Appeal, there is e-mail from "IP Concast" dated 24th April, 2018 from Resolution Professional sent to MSTC referring to the letter dated 17th April, 2018 and contents of the report and it was added that Mr. Raj Kundu, CSPL (i.e. Corporate Debtor) plant staff was not authorised by the Resolution Professional to sign and that the verification

process and signing of stock was carried out in absence of Resolution Professional and authorised person of Resolution Professional. The Resolution Professional thus refused to accept the Report and which had led to effort of Joint Inspection dated 19.04.2018 which could not happen due to obstruction by Union leaders. Now he expressed urgency for Joint Inspection.

27. It appears that again inspection was carried out. The Second Report is dated 14th May, 2018 (Appeal Page 368) relating to the 'Joint Statement of Inspection' done on 3rd May, 2018 (Second Inspection Report- in short). The document of actual Joint Statement of Inspection is at Page 370 of the Appeal. The Second Inspection Report shows that at such time at the site very few billets approximately 1506 MT were lying in the billets yard and the Steam Coal now found was 40420.236 MT at the same site.

The Resolution Professional later on prepared list of Creditors updated as on 8th June, 2018 (Page 345). Claim of MSTC was admitted to the extent of Rs.3,007,092,993/- but still with regard to "security interest" it was mentioned that "verification under process".

28. Before us there are these two Inspection Reports done on 29th March, 2018 (First Report) and the other done on 3rd May, 2018 (Second Report). The Appellant (Resolution Professional/ Liquidator) wants the First Inspection Report to be ignored on their reasoning that it was not carried out in the presence of the authorised representative. Fact remains that the inspection was carried out in the presence of official of Corporate Debtor who was at the

concerned premises and after there is record to show that MSTC had informed regarding the assessment to be carried out and had even sought gate passes.

29. Section 18(1) (f) of the IBC and *Explanation* reads as under:-

“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*

xxx

xxx

xxx

Explanation. – For the purposes of this section, 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.”*

30. Section 17(1) of the IBC shows that from the time the Interim Resolution Professional gets appointed, management of the Corporate Debtor vests in the

Interim Resolution Professional. Subsequently, the same is taken over by Resolution Professional. Section 25(1) and (2)(a) reads as under:-

“25. Duties of resolution professional. - (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

31. It is quite clear from the above provisions that when Interim Resolution Professional gets appointed, the management of the Corporate Debtor vests in the Interim Resolution Professional. The above provisions point out duty on the part of the Interim Resolution Professional/ Resolution Professional to take immediate custody and control of all the assets of the Corporate Debtor, including the business records of the Corporate Debtor. When it is duty to take immediate custody and control of all “assets” of the Corporate Debtor and at the same time not to include “assets” owned by a third party which is in possession of Corporate Debtor a responsibility to physically take, segregate and account for is spelt out.

32. Facts in the present matter point out that the Interim Resolution Professional took note of the records and on said basis calculated the stocks. However, there is no material shown that before the second Inspection dated 12th May, 2018 was done, at any time the Interim Resolution Professional and the Resolution Professional did actually go and take or cause to be taken

physical verification of the stocks. When the provisions require taking control and custody of the assets, it would be necessary for the Interim Resolution Professional/ Resolution Professional to show steps taken on such count. Without doing this, when MSTC was constantly mentioning in its letters that it was Secured Creditor with goods pledged to it lying on the premises of the Corporate Debtor, nothing was done and when the assessment was carried out on 29th March, 2018, fault is being found with the official of the Corporate Debtor signing the Joint Statement of Inspection. We discard such effort on the part of the Appellant. The Appeal shows that the Appellant (Resolution Professional-now Liquidator) is conscious that 'Geo Chem' is an agency empanelled with MSTC which is an International Inspection and Testing Company. The Resolution Professional did not have any reason to question the action of 'Geo Chem' in the first Inspection Report. Grievance was not about the taking place of Inspection. It was only with regard to Authority of official of Corporate Debtor to sign the document. In fact, the Second Inspection/ Verification dated 3rd May, 2018 was also got done through 'Geo Chem'. With such facts, we are not ready to discard the First Inspection Report dated 29th March, 2018 on the lame excuse that the official of the Corporate Debtor was not authorised to sign the Joint Statement of Inspection.

33. From the above, it is clear that although the records of the Corporate Debtor of which the Interim Resolution Professional took note showed lower stocks (even lower than the Second Inspection Report) and were unreliable, the First Inspection Report dated 29th March, 2018 showed that there were much

higher quantities of Steam Coal and MT Steel Billets. By the time the Second Inspection could happen on 3rd May, 2018, MT Steel Billets was almost not there and MT Steam Coal had drastically reduced. When under the provisions of law and even facts of the matter the Interim Resolution Professional and then Resolution Professional had taken over the management of the Corporate Debtor, it was their responsibility to get assessment done on their own (with or without MSTC joining) and to take stock and also control. This not having been done, in our view, the responsibility on the part of the Interim Resolution Professional/ Resolution Professional (now Liquidator) cannot be avoided. Fact remains that even the Resolution Professional did move the Adjudicating Authority so as to secure direction through SFIO which direction appears to have been later on modified to get investigation done through local police. Charge sheet now is pending.

34. From the above discussions, the matter zeros down to the position that MSTC had in view of the agreements as referred above and arrangements with the Corporate Debtor to store the goods which appear to have been imported, on the premises of the Corporate Debtor but FSNL was to be the custodian. The access of FSNL and MSTC appears to have got lost when CIRP started and Interim Resolution Professional/ Resolution Professional came into management. First Inspection Report read with Second Inspection Report show Substantial goods have been lost/missing/ consumed (or whatever) for which MSTC cannot be blamed.

35. Section 18 shows that the Interim Resolution Professional was to take control and custody of the assets over which the Corporate Debtor has ownership rights and which may be in possession of the Corporate Debtor. The explanation shows if the Corporate Debtor is in the possession of the assets owned by a third party which are in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment, such assets are not to be included while taking control and custody. However, if the Corporate Debtor is in possession of such assets, it would be responsibility of the Interim Resolution Professional/ Resolution Professional who has taken over the management, to return the goods. If the goods get used to keep Corporate Debtor a going concern the value would have to become part of CIRP costs. Thus, if the Appellant claims that the goods were of the Corporate Debtor the taking over of control and custody would have to be shown. If the Appellant claims that the goods were not of the ownership of the Corporate Debtor (and inspection Report shows presence of the goods), there is no material to show that the same were returned to the owner.

36. MSTC has shown the presence of goods on 29th March, 2018 which drastically vanished by the time stocks assessment was done on 3rd May, 2018. In the facts of the matter, considering the agreements pointed out by MSTC, we do not find fault with the Adjudicating Authority drawing conclusion that MSTC deserves to be treated as Secured Operational Creditor. Counsel for Appellant has relied on Judgment of this Tribunal in the matter of ***“Volkswagen Finance Private Limited vs. Shree Balaji Printopack Pvt.***

Ltd.”- [Company Appeal (AT) (Insolvency) No. 2 of 2020 dated 19th October, 2020] and referred to Section 77(3) of the Companies Act read with Section 3(31) of the IBC to argue that no “charge” created by a Company shall be taken into account by the Liquidator unless it is duly registered with RoC. Counsel for Respondent MSTC has countered that even if one is to refer to Section 77(3) of the Companies Act, if Section 77(4) is seen it provides that “Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge. It is thus argued that the various “Memorandum of Pledge” on record cannot be wished away nor the obligation to pay amounts mentioned therein, in the facts of the matter where goods of MSTC in custody of Corporate Debtor after CIRP started have substantially vanished for which MSTC cannot be blamed.

37. Section 3(31) of IBC which deals with definition of “Security Interest” apart from being inclusive definition does not merely deal with “charge” but also agreements or arrangements securing payment or performance of any obligation of any person. To recall Explanation below Section 18 would require, as discussed earlier segregating assets owned by a third party in possession of Corporate Debtor, including Bailment and thus naturally accounting for it. In the facts of present matter, at present we are not revisiting interpretation of law on this dispute of “charge” for further reasons as below.

38. The Appellant wants to claim that pledge should not be recognised. In the facts of the matter where goods of MSTC have disappeared drastically from

custody of Corporate Debtor under management of IRP/ RP, if the Agreements (as on record) between parties are seen, the goods- (Steam Coal and Steel Billets which reduced between the First Inspection Report and Second Inspection Report) was of the ownership of MSTC. Same must be deemed to have been consumed at the Bankura Unit which was functional during CIRP. The value of the same should in that case have to step up the ladder under Section 53 of IBC as CIRP costs. However, this not having been claimed by MSTC, we decline to interfere in the Impugned order, which placed MSTC on a lower rung, considering the facts.

39. For the above reasons, we do not find that there is substance in the Appeal. The Appeal is dismissed. No order as to costs.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

New Delhi
Anjali