

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 409 of 2023

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Interlocutory Application No.1357 of 2023

(Arising out of Order dated 07.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Division Bench, Court-1 Bench in IA/765(AHM)2022 in C.P.(IB)/39(AHM)2021)

IN THE MATTER OF:

Pradeep Kumar Kabra,
RP of M/s. Cengres Tiles Limited,
301, 3rd Floor, Regus Business Centre,
New Citylight Road, Opp. State Bank of India,
Bharthana-Vesu, Surat-395007.

... Appellant

Vs

Assistant Commissioner,
CGST & Central Excise,
Kadi Division, Gandhinagar Commissionerate,
4th Floor, Janta Super Market,
Nr. Vepari Jin, Kalol, Gandhinagar - 382721

... Respondent

Present:

For Appellant: Mr. Ravi Raghunath, Advocate

**For Respondents: Ms. Anushree Narain, Standing Counsel with
Mayank Srivastava.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by Resolution Professional (“**RP**”) of Corporate Debtor M/s Cengres Tiles Limited challenging the order dated 07.02.2023 passed by the National Company Law Tribunal, Ahmedabad Bench Ahmedabad, rejecting IA/765(AHM)2022 filed by the RP, seeking a

direction to Assistant Commissioner of CGST & Central Excise to release the attachment of the tiles relating to the Corporate Debtor.

2. Brief facts of the case necessary to be noted for deciding the Appeal are:

- (i) M/s Cengres Tiles Limited – the Corporate Debtor has been engaged in the business of manufacturing of non-metallic minerals products including tiles. On 02.02.2018, the Respondent for the purpose of recovering central excise due for an amount of Rs.5,10,12,500/- attached the 81,620 boxes of vitrified tiles. The Panchanma was drawn on 02.02.2018, under which goods were put under ‘supurdagi’.
- (ii) On an Application filed by Axis Bank Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”), Corporate Insolvency Resolution Process (“CIRP”) was initiated against the Corporate Debtor vide order dated 04.03.2021 by the Adjudicating Authority. The Appellant was appointed as the RP in the Meeting of the Committee of Creditors (“**CoC**”) dated 23.05.2022.
- (iii) The Respondent had submitted its claim to the erstwhile Interim Resolution Professional (“**IRP**”) under Form B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) claiming a sum of Rs.39,62,94,872/-,

which also included the amount of Rs.5,10,12,500/- for recovering which excise duty, tiles were attached.

- (iv) The RP issued a letter dated 10.09.2022 to the Respondent requesting them to release the attached goods. The RP filed an IA/765(AHM)2022 before the Adjudicating Authority, wherein following prayers were made:

“[A] That this Hon'ble Adjudicating Authority may be pleased to allow the present application, in the interest of justice;

(B) That this Hon'ble Adjudicating Authority may be pleased to direct the opponent to forthwith release the goods (viz. vitrified tiles) seized by opponent as per Panchnama dated 02.02.2018 in favour of Corporate Debtor, in the interest of justice;

[C] That this Hon'ble Tribunal may be pleased to grant such other and further reliefs as may be deemed fit and proper by this Hon'ble Tribunal, in the interest of justice;”

- (v) The Adjudicating Authority issued notice to the Respondent in the Application. The Appellant issued a letter to Respondent informing that claim of Respondent has been admitted to the extent of Rs.11,76,90,942/-.

- (vi) The Adjudicating Authority heard IA/765(AHM)2022 and by order dated 07.02.2023 rejected the Application, observing that Adjudicating Authority has no jurisdiction to issue

direction to the State Authorities about the action, which are taken prior to the CIRP and RP to approach the proper Forum.

Aggrieved by the said order, this Appeal has been filed.

3. We have heard Shri Ravi Raghunath, learned Counsel appearing for the Appellant and Ms. Anushree Narain, Standing Counsel appearing for the Respondent.

4. The learned Counsel for the Appellant submits that Respondent Department has attached the vitrified tiles on 02.02.2018 to recover its excise dues. The Respondent has filed a claim in the CIRP of the Corporate Debtor as an Operational Creditor, which claim having been admitted, the Respondent has to stand in queue for payment of their dues as per 'waterfall mechanism' under Section 53 of the Code and mere attachment of the tiles, does not transfer the goods to the Respondent. Tiles still belongs to the Corporate Debtor, which has to be included in its asset for payment of dues to the creditors. It is submitted that Central Board of Excise of Customs issued Circular dated 10.03.2017 clarifying that during pendency of proceedings under Insolvency and Bankruptcy Code, recovery measures should not be resorted. It is submitted that the Appellant/ RP is duty bound to take control and custody of the assets of the Corporate Debtor, for which the Application was filed. The Financial Creditors have priority over the attached goods and the crown debts, rank below the secured creditors by virtue of Section 238 of the Code, Section 11E of the Central Excise Act, 1944 shall be overridden.

5. Learned Standing Counsel appearing for the Respondent, refuting the submission of learned Counsel for the Appellant submits that tiles were attached much before initiation of CIRP and the Respondent has first charge over the attached assets. It is submitted that Respondent has auctioned the goods, but the auction purchaser could not take possession of the goods and the Department has to refund the amount with interest to the auction purchaser due to objections raised by the State Bank of India and orders passed by the Debt Recovery Tribunal and High Court. The Respondent is a secured creditor and revised claim for an amount of Rs.39,86,04,041/- in Form-C was filed in the light of the judgment of the Hon'ble Supreme Court in **State Tax Officer vs. Rainbow Paper Limited, Civil Appeal No.1661/2020**, which has been rejected by the RP, against which the Application has already been filed by the Respondent on 15.04.2023 for its claim. The Adjudicating Authority has rightly rejected the IA/765(AHM)2022.

6. We have considered the submissions of learned Counsel for the parties and have perused the records.

7. The question which arise for consideration in the Appeal is as to whether RP was entitled for a direction from the Adjudicating Authority for release of the goods, which were under attachment of Respondent since 02.02.2018?

8. The copy of the Panchnama dated 02.02.2018 has been brought on record in the Appeal. The Panchnama indicates that outstanding

government dues are Rs.5,10,12,500/- and for recovery of which amount, the goods had been attached. The goods, vitrified tiles were attached and handed over to M/s Cengres Tiles Ltd. through its Authorised Signatory for safe custody for and on behalf of Cengres Tiles Ltd. Annexure-B of the Panchnama indicates that 81,620 boxes of vitrified tiles were attached. The RP has approached the Assistant Commissioner by a letter dated 10.09.2022, requesting release of the goods, which were seized on 02.02.2018 in favour of the Corporate Debtor. In the letter, the RP has stated that it is the duty of the IRP/RP to take control and custody of the assets that may or may not be in possession of the Corporate Debtor. The Adjudicating Authority by the impugned order has observed that Adjudicating Authority does not have jurisdiction to issue direction to State Authorities about the action, which are taken prior to CIRP.

9. The present is a case where assets belonging to Corporate Debtor were attached by Respondent for recovery of its dues. The Respondent has filed a reply to the Appeal, where it has been stated that Respondent has auctioned the attached tiles, but it has to refund the money received from the auction purchaser under the orders of High Court, which amount has been refunded to auction purchaser and the end result is that the attachment by the Respondent for recovery of its excise dues still continues. The attachment was for the purposes of recovering the excise dues. After commencement of the CIRP, by virtue of Section 14 of the Code, no action to recover against the Corporate Debtor by any of the creditors can be undertaken.

10. The learned Counsel for the Appellant has placed reliance on judgment of this Tribunal in **Assistant Commissioner Central Goods and Service Tax vs. Pravin Charan Dwary – (2021) SCC OnLine NCLAT 4790**. In the above case, an Appeal was filed by the Assistant Commissioner Central Goods and Service Tax, challenging the order passed by the Adjudicating Authority, by which order the Application filed by Appellant before the Adjudicating Authority seeking permission to auction the seized goods was rejected. In the above case also attachment was made on 31.01.2018, i.e. before initiation of CIRP, which started on 15.01.2019. Dismissing the Appeal in paragraph 5 to 8, this Tribunal held following:

“5. The order dated 15.01.2019 passed by the Adjudicating Authority which is part of the Appeal clearly indicates that ‘Moratorium’ was declared by the Adjudicating Authority by para 14 of the order.

6. The Adjudicating Authority did not commit any error in not allowing I.A. 463 of 2019 in view of pendency of CIRP. We may refer to the judgment of the Hon'ble Supreme Court in “Anand Rao Korada, Resolution Professional v. Varsha Fabrics Private Limited, (2020) 14 SCC 198”.

7. In the above case, Financial Creditor has filed an Application under Section 7 of the ‘I&B Code’ which was admitted on 04.06.2019 and Moratorium was declared. During the pendency of Moratorium in WP (C) No. 7939 of 2011, interim orders were passed by the Orissa High Court on 14.08.2019 and 05.09.2019. Appeal was filed in the Hon'ble Supreme Court challenging the interim

order passed by the Orissa High Court on the ground that since CIRP proceedings has commenced against Respondent No. 4, proceedings before the High Court ought to have been stayed. The Hon'ble Supreme Court after referring to Sections 14, 238 & 231 of the 'I&B Code', in Paragraphs 11 and 12 held as follows:—

“11. In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor - Respondent No. 4 herein, once the proceedings under the IBC had commenced, and an Order declaring moratorium was passed by the NCLT. The High Court passed the impugned Interim Orders dated 14.08.2019 and 05.09.2019 after the CIRP had commenced in this case.

12. The moratorium having been declared by the NCLT on 04.06.2019, the High Court was not justified in passing the Orders dated 14.08.2019 and 05.09.2019 for carrying out auction of the assets of the Respondent No. 4-Company i.e. the Corporate Debtor before the NCLT. The subject matter of the auction proceedings before the High Court is a vast chunk of land admeasuring about 330 acres, including Railway lines and buildings.”

8. *In view of the law laid down by the Hon'ble Supreme Court as above, we do not find any infirmity in the impugned order passed by the Adjudicating Authority rejecting I.A. 463 of 2019. Furthermore, the Appellant has already filed his claim on 04.06.2019 in Form-B. We do not find any good ground to entertain this Appeal. There is no merit in this Appeal. The Appeal is dismissed.”*

11. The above judgment of this Tribunal fully supports the submissions made by the learned Counsel for the Appellant.

12. The learned Counsel for the Appellant has also placed reliance on the judgment of the Hon'ble Supreme Court in ***Embassy Property Developments (P) Ltd. vs. State of Karnataka – (2020) 13 SCC 308***, in which case, the Hon'ble Supreme Court has held that any liability fastening upon the Corporate Debtor, under the statutes like income tax payable to the Government would come within the meaning of expression “operational debt” and the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the Code. Following was laid down in paragraph 38 of the judgment:

“38. It was argued by all the learned Senior Counsel on the side of the appellants that an Interim Resolution Professional is duty-bound under Section 20(1) to preserve the value of the property of the corporate debtor and that the word “property” is interpreted in Section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to property and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under Section 60(5) to entertain any claim by the corporate debtor.”

13. The Hon'ble Supreme Court while considering the jurisdiction of NCLT in Section 60, sub-section (5), sub-clause (c), laid down following:

“37.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 the 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 before the NCLT, instead of moving a statutory appeal under Section 260-A 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 crystallised 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.]”

14. The above judgment, the Hon’ble Supreme Court, clearly lays down that government dues, which has been crystallized under the statute like in the present case, excise duty, which were recoverable from the Corporate Debtor, which is still due and to be paid, needs to be adjudicated and paid in the manner prescribed in the Code.

15. The Respondent has also filed their claim in Form-B, which has been accepted by the RP and revised claim has also been filed by the Respondent in Form-C, relying on judgment of the Hon’ble Supreme Court in ***State Tax officer vs. Rainbow Paper Limited***, which revised claim has not been accepted by the RP and an Application filed by Respondent with regard to revised claim is pending consideration before the Adjudicating Authority. In the present Appeal, we are not required to answer any question regarding nature of the claim of the Respondent. Only question which needs to be answered is that whether the Adjudicating Authority required to direct the Respondent to release the attachment so that assets of the Corporate Debtor can be used for the benefits of the creditors. The learned Counsel for the Appellant has also referred to and relied on Circulars issued by Central Board of Excise and Customs dated 10.03.2017 and clarification issued by Central Board of Indirect Taxes and Customs dated 23.03.2020. In Circular dated 10.03.2017 in paragraph 20.1, following was stated:

“20.1 *Recovery during pendency before BIFR/IFCL/OL/DRT/Insolvency and Bankruptcy Code, 2016: When the cases are pending before BIFR/IFCL/OL/ appropriate authority under Insolvency and Bankruptcy Code, 2016 then in such cases recovery measures should not be resorted. In such cases public counsel should be advised to file affidavits for first charge under Section 11E of Central Excise Act, 1944 informing the quantum of confirmed demand to BIFR/IFCL/OL/DRT/Insolvency and Bankruptcy Code Authorities.”*

16. Further, the Circular dated 23.03.2020 by which Central Board of Indirect Taxes and Customs has issued certain clarification in respect of issues under GST law for companies under Insolvency and Bankruptcy Code, 2016. Clarification Item No.1 is relevant, which his to the following effect:

<i>Sl. No.</i>	<i>Issue</i>	<i>Clarification</i>
1.	<i>How are dues under GST for pre-CIRP period be dealt?</i>	<i>In accordance with the provisions of the IBC and various legal pronouncements on the issue, no coercive action can be taken against the corporate debtor with respect to the dues for period prior to insolvency commencement date. The dues of the period prior to the commencement of CIRP will be treated as ‘operational debt’ and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC. The tax officers shall seek the details of supplies made / received and total tax</i>

		<i>dues pending from the corporate debtor to file the claim before the NCLT. Moreover, section 14 of the IBC mandates the imposition of a moratorium period, wherein the institution of suits or continuation of pending suits or proceedings against the corporate debtor is prohibited</i>
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17. In view of the Circular issued by Central Board of Excise and Customs, the Department itself has understood that when CIRP has been initiated for recovering any amount, the claim has to be filed and no recovery can be made since moratorium has been imposed under the Code. The Respondent after imposition of moratorium with effect from 27.04.2022 could not have recovered its dues. The attachment of the goods of the Corporate Debtor were made before initiation of CIRP. The assets, which were attached were still the assets of the Corporate Debtor, which were in the 'supurdagi' of the Corporate Debtor. Respondent being unable to recover the amount from the attached assets, the RP has rightly filed the Application seeking a direction for release of the attachment, so that assets can be included in the assets of the Corporate Debtor for payment to the creditors.

18. In view of what has been stated above, we are of the view that the Adjudicating Authority has committed error in rejecting Application filed by RP, by holding that Adjudicating Authority has no jurisdiction to issue direction to the State Authority, when the IRP is duty bound to take custody and control of the assets belonging to the Corporate Debtor, Application

under Section 60, sub-section (5), sub-clause (c) was clearly maintainable and the Adjudicating Authority had ample jurisdiction to issue necessary direction.

19. In result, we allow the Appeal and set-aside the order dated 07.02.2023 passed by the Adjudicating Authority. We direct the Respondent to release the attachment in question. Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

4th July, 2023

Ashwani