National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (INSOLVENCY) No. 1048-1049 of 2019
(Arising out of Orders dated 30th August, 2019 & 03rd September, 2019 passed by National Company Law Tribunal, Kolkata Bench, CA(IB) No.- 891/KB/2019 in CP(IB) No. 513/KB/2018).

IN THE MATTER OF:

MSC Meditteranean Shipping Company S.A.
Chemin Rieu, 12-14,1208,
Geneva Switzerland **...Appellant**

Versus

1. CA Kannan Tiruvengadam,
RP of BRG Iron & Steel Co. Pvt. Ltd.
IBBI/IPA-001/IP-POO253/2017-18/10842
Netaji Subhash Villa
18, Karunamoyee Ghat Road (Tollygaunge Area),
Flat 3C, Kolkata-700082, West Bengal, India. **...Respondent No. 1**

2. Deputy Commissioner, Special Disposal Cell (Port), Custom
Custom House, 15/1, Strand Road,
Kolkata-700001 **...Respondent No. 2**

Appellant:	**Ms. Sreenita Ghosh, Mr. Krishnaraj Thaker and Mr. Gautam Singh, Advocates.**
Respondents:	**Mr. Rishav Banerjee, Mr. Saptarshi Mandal, Mr. Abjijeet Sinha and Mr. Shaunak Mitra, Advocates for RP/R-1.**
	Mr. Nitya Sharma, (Customs Dept.), Advocate for R-2.
	Mr. Avik, (Liquidator).

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 200 of 2020

(Arising out of Order dated 19th November, 2019 passed by National Company Law Tribunal, Kolkata Bench, in CP(IB) No. 513/KB/2018, CA(IB) No. 1255/KB/2019, CA(IB) No. 1326/KB/2019 and CA(IB) No. 1476/KB/2019).

IN THE MATTER OF:

Assistant Commissioner of Customs,
Special Disposal Cell (Port)
Customs House, 3rd Floor,
15/1 Strand Road,
Kolkata – 700001 **...Appellant**

Versus

1. CA Kanan Tiruvengadam,
R.P. of BRG Iron and Steel Co. Pvt. Ltd.
Netaji Subhash Villa
18, Karunamoyee Ghat Road (Tollygaunge Area)
Flat 3C, Kolkata,
West Bengal – 700082 **...Respondent No. 1**

2. BRG Iron & Steel Co. Pvt. Ltd.
Godrej Waterside, Suit – 402, 403, 404,
Plot – 5, Block – DP, Sector – V, Salt Lake City,
Kolkata – 700091 **...Respondent No. 2**

3. MSC Meditteranean Shipping Company S.A.
Chemin Rieu,
12-14, 1208,
Geneva, Switzerland **...Respondent No. 3**

Appellant:	**Mr. Nitya Sharma, (Standing Counsel) (CBIC), Advocate.**
Respondents:	**Mr. Rishav Banerjee, Mr. Saptarshi Mandal, Mr. Abhijeet Sinha and Mr. Shaunak Mitra, Advocates for R.P./R-1.** **Ms. Sreenita Ghosh and Mr. Krishnaraj Thaker, Advocates for R-3.** **Mr. Avik, (Liquidator).**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Orders dated 30.08.2019 and 03.09.2019, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) in CA(IB) No. 891/KB/2019 and in CP(IB) No. 513/KB/2018. MSC Meditteranean Shipping Company S.A. (hereinafter referred to as the **"MSC Shipping"**) preferred *Company Appeal (AT) (Insolvency) No. 1048-1049 of 2019.* Dissatisfied with the Impugned Order dated 19.11.2019 passed by the Learned Adjudicating Authority, Assistant Commissioner of Customs Special Disposal Cell (Port), Kolkata (hereinafter referred to as the **'Customs Dept.'**) preferred *Company Appeal (AT) (Insolvency) No. 200 of 2020.* Since, all the three Appeals deal with common facts, they are being disposed off by this Common Order.

2. The facts, in brief, are that 'MSC Shipping', in the business of carriage of goods by sea, provides marine containers in which goods are stored and transported. M/s. BRG Iron and Steel Company Pvt. Ltd. (hereinafter referred to as the **'Corporate Debtor'**) is engaged in the manufacture of articles made out of recycled steel. Between February 2012 and June 2012 a large number of containers containing Alloy and Melting Scrap were delivered by 'MSC Shipping' at Haldia Port to the 'Corporate Debtor' and its group Companies. The said containers were carried under several Bills of Lading. It is stated that between April and June 2012, 'MSC Shipping' delivered the containers and gave notice of arrival of the containers to the 'Corporate Debtor' and its group Companies and called upon them to take

delivery of the containers upon payment of the shipping charges and against the surrender of the respective Bills of Lading. It is stated that despite several notices, 256 numbers of containers remained unclaimed at the Container Freight Station. On 18.05.2015 and 20.05.2015, letters were addressed to the 'Corporate Debtor' to collect the cargo but there was no response.

3. While so, 'MSC Shipping' filed CS No. 168 of 2016 before the Hon'ble Calcutta High Court namely *MSC Meditteranean Shipping Company S.A. and Anr. Vs. BRG Iron and Steel Company Ltd. and Ors.*, seeking *inter alia,* de-stuffing of the containers, sale of the goods, return of containers and payment of dues. The 'Corporate Debtor' was undergoing proceedings under SICA Act and the Hon'ble High Court on 16.09.2016 *inter alia* directed that the container should be de-stuffed and the goods be sold. On 19.07.2018, the 'Corporate Debtor' sought sale of the cargo and Hon'ble High Court passed an Order dated 26.09.2018 allowing the prayer of the 'Corporate Debtor' to bid for the goods in the Auction. The goods de-stuffed from the said 256 containers were sold on 26.04.2019 with notice to the Resolution Professional and sale proceeds were invested by the Customs in an interest bearing account in compliance with the Order of the Hon'ble High Court of Kolkata.

4. While so, the CIRP proceedings against the 'Corporate Debtor' commenced on 05.03.2019. On 01.07.2019, the Resolution Professional filed CA(IB) 891/KB/2019 for restraining the 'Customs Dept.' from selling the goods de-stuffed from the 256 containers. On 02.07.2019, the 'Corporate

Debtor' sought direction from the Learned Adjudicating Authority for restraining the 'Customs Dept.' from selling the goods on the ground that the property belonged to the 'Corporate Debtor'. On 08.07.2019, the Resolution Professional preferred *Company Appeal (AT) (Insolvency) No. 391 of 2019* against the Order of the Learned Adjudicating Authority dated 02.07.2019. It is stated that 'MSC Shipping' had also appeared before this Tribunal on that date and thereafter preferred CA No. 1126/KB/2019 before the Adjudicating Authority, dated 11.07.2019 for impleadment in the proceedings. It is stated that despite a direction from the Learned Adjudicating Authority for the said Application to be listed and the direction for the IRP to file the Reply to the Application, the same was not listed as on 26.08.2019 and 'MSC Shipping' issued a letter to the Registry seeking listing of the said Intervention Application.

5. Vide Impugned Order dated 30.08.2019, the second Application was filed by the Resolution Professional i.e. CA(IB) No. 891/KB/2019 was disposed off *inter alia* by directing the 'Customs Dept.' to make over the sale proceeds of Rs. 10,60,10,000/- to the Resolution Professional. It is stated that the Application preferred by 'MSC Shipping' i.e. CA 1126/KB/2019 was listed on 03.09.2019 alongwith the primary Application of the Resolution Professional and was disposed off as infructuous on the ground that the Application preferred by the Resolution Professional i.e. CA(IB) 575/KB/2019 was dismissed as withdrawn.

6. For better understanding of the case, the Impugned Orders dated 30.08.2019 and 03.09.2019 are being reproduced as hereunder:-

'9. In view of the aforesaid facts and circumstances and the arguments advanced, we are of the view that after the initiation of CIRP and declaration of moratorium, the Customs Authority/ Respondent could not have auctioned the goods stuffed in the 256 containers. But, since the goods have been sold by auction and taken away by the bona-fide buyers, there is no use pursuing the buyers and thus it would be in the interest of the Corporate Debtor that the sale proceeds of Rs. 10,60,10,000/- are directed to be deposited with the Resolution Professional, along with the remaining 667 containers still lying with the Customs.'

'10. We have heard the Learned Counsels on both sides and perused the record. We, therefore pass the following orders: -

> *'i) The Customs Authorities shall remit/pay the amount of Rs. 10,60,10,000/- (Rupees Ten Crore Sixty Lacs Ten Thousand Only) as the sale proceeds in their possession within two weeks of the date of receipt of this order, to the Resolution Professional/ Corporate Debtor's account either by way of Demand draft or through e-payment facility in the Bank directly, to be provided by the Resolution Professional to the Respondent, immediately'…*
>
> *'iii) The Customs Authorities, and all other applicants including M/s. MSC Mediterranean Shipping Company etc. shall have the right to submit their respective claims with the Resolution Professional and they shall be treated as Operational Creditors and would be entitled to the amounts ultimately decided to be paid to them on implementation of the Resolution Plan'….*

O R D E R

Dated:03.09.2019

Ld. Sr. Counsel for the Resolution Professional (RP) appears. Ld. Counsel for the applicant in CA(IB) No. 1126/KB/2019 appears.

Ld. Sr. Counsel appearing for the RP submits that he may be permitted to withdraw the CA (IB) No.

> *575/KB/2019 for the reasons that the prayers have become infructuous. Permissions is granted. CA(IB) No. 575/KB/2019 is disposed of as withdrawn.*
>
> ***CA (IB) No. 1126/ KB/ 2019** is an application filed by MSC Agency (India) Pvt. Ltd. for impleading as a party in CA(IB) No. 575/KB/2019. CA (IB) No. 575/KB/2019 is withdrawn vide order of this Bench on today. Therefore, question of impleading the applicant in a non-existing application doesn't arise. We have taken note of the objections of the above intervening applicant while passing orders in the application **CA(IB)No. 891/KB/2019** (vide order dated 30/08/2019). It is made clear in the said order that if M/s. MSC Mediterranean Shipping Co. SA has any claim, they can submit the same before the RP. Because of the aforesaid order in CA 575 of 2019, this application is not maintainable.*
>
> *CA(IB) No. 1126/KB/2019 is disposed of accordingly.*
>
> *For filing further Progress report list it on **01/10/2019."***
>
> *(Emphasis Supplied)*

7. It is also relevant to reproduce the directions issued by the Adjudicating Authority in the Impugned Order dated 19.11.2019, aggrieved by which, the 'Customs Dept.' also preferred an Appeal:-

> *"Ld. Sr. Counsel for the Resolution Professional (RP) appears. Ld. Counsel for the Custom Authorities appears.*
>
> *Ld. Sr. Counsel for RP submits that CoC is considering the Resolution Plan, which is under process and needs further time to file Final Progress Report. However, no Progress Report is filed on today.*
>
> *CA (IB) No. 1255/KB/2019 is an application filed by the Dy. Commissioner of Customs, Special Disposal Cell for recalling the order dated 30/08/2019 praying for certain reliefs, and pressed for granting relief (e). Upon hearing the arguments advanced on the side of the applicant as well as Ld. Sr. Counsel for the RP,*

and on perusal of the affidavit and documents, we are not convinced, as to the reasons for recalling the order, which have been heard at length. However, in the said order, we observed that the applicant has not preferred any claim before the RP for want of bringing the copy of claim form before us at the time of hearing. But, that is not a reason for recalling the order decided on merits.

From the evidence led in the said application, it is brought to our notice that vide letter dated 18/07/2019 Form- B has already been submitted before the Resolution Professional in the said circumstances, we are inclined to issue directions to the RP to re-consider the claim as per the provisions of the Code and Regulations by giving opportunity to the application to be heard, before acceptance or rejection and communicate the decisions accordingly. Ld. Counsel for the applicant also sought directions upon the RP for payment of current duty liable to be paid by the Corporate Debtor for continuing the operation of the Corporate Debtor company as a going concern. RP is at liberty to consider any demand on the side of the applicant in respect of the duty if any due and payable by the corporate debtor as per the provisions of the Code and Regulations.

With the above said observation, the C.A. is disposed of.

It is also submitted by the Ld. Counsel for the RP that despite directions dated 30/08/2019, Customs Authorities have not released the goods. We hereby direct the Custom Authorities/ applicant herein to release the goods to the Corporate Debtor forthwith preferably on or before 27/11/2019, failing which, a penalty of Rs. 1,00,000/- (Rupees One Lakh only) shall be imposed for non-compliance of the order dated 30/08/2019, on the defaulting officer responsible for not releasing the goods.

List the matter on 28/11/2019 for further consideration."

(Emphasis Supplied)

Submissions of the Learned Counsel appearing for 'MSC Shipping':

8. Learned Counsel submitted as follows:-

- That the 'Corporate Debtor' and its group Companies were declared as 'Notified Parties' in the Bills of Lading and despite having delivered the subject 256 containers from various foreign ports to Haldia, India, none approached 'MSC Shipping' to take delivery of the containers upon surrender of the Bills of Lading.
- 'MSC Shipping' filed CS No. 168 of 2016 in the Hon'ble High Court of Kolkata against the 'Corporate Debtor' for payment of container, demurrage charges, return of the containers after de-stuffing cargo sale of the de-stuffed cargo and receipt of the proceeds thereof. Learned Counsel argued that as per Clauses 17 and 20.3 of the Bills of Lading, 'MSC Shipping' has lien on the cargo for demurrage charges and other dues.
- Pursuant to the Order dated 21.09.2017 passed by the Hon'ble High Court of Kolkata, the cargo was de-stuffed and the empty containers returned to 'MSC Shipping'. The 'Corporate Debtor' filed GA 1852 of 2018 praying *inter alia* for sale of the de-stuffed cargo upon valuation by an independent valuer, which Application, was allowed by the Hon'ble High Court vide a Order dated 26.09.2018 and the 'Customs Dept.' was directed to auction the cargo and hold the sale proceeds subject to further Orders. Accordingly, the 'Customs Dept.' sold the cargo by Public Auction in accordance with the provisions of the Customs Act, 1962 for Rs. 10,60,10,000/- on 26.04.2019. It is argued

that 'MSC Shipping' is entitled to receive the sale proceeds as they have lien over the cargo.

- Learned Counsel vehemently contended that the Adjudicating Authority, without hearing them and in violation of the 'Principles of Natural Justice' passed the Impugned Orders. The 'Corporate Debtor' did not implead 'MSC Shipping' knowing fully well that it was an interested and a necessary party. On 02.07.2019, a direction was given by Adjudicating Authority to 'MSC Shipping' to file their Reply. The 'Corporate Debtor' appealed the Order dated 02.07.2019 which was disposed off by this Tribunal vide Order dated 08.07.2019. An impleadment Application was preferred by 'MSC Shipping' before the Adjudicating Authority. The Counsel appeared on 15.07.2019 and on 08.08.2019 when CA(IB) No. 575/KB/2019 and the subsequent CA(IB) No. 891/KB/2019 preferred by the 'Corporate Debtor' seeking direction to the 'Customs Dept.' to make over the Auction sale proceeds to them were taken up. Though there were a specific request that the Application preferred by 'MSC Shipping' should be heard prior to the disposal of both the aforenoted CAs, the Learned Adjudicating Authority, on 26.08.2019 observed that the impleadment was defective and would be listed upon the removal of the facts, but it is the contention of the Learned Counsel appearing for 'MSC Shipping' that they have never received any 'Notice' for removal of defects although an Application was filed on 11.07.2019. The Adjudicating Authority concluded the hearing in their absence and reserved the Judgement.

On 26.08.2018, the Learned Advocate appearing for 'MSC Shipping' visited the Registry and was informed that the said Application was misplaced. The same was brought to the notice of the Learned Adjudicating Authority. But the final Order in CA(IB) 891/KB/2019 was pronounced on 30.08.2019 directing the 'Customs Dept.' to make over the sale proceeds to the 'Corporate Debtor'.

- Vide a letter dated 30.08.2019, the Advocate appearing for 'MSC Shipping' once again enquired about the listing of the Application. The said Application was listed on 03.09.2019 alongwith the primary Application preferred by the Resolution Applicant and the Adjudicating Authority disposed off the Application preferred by 'MSC Shipping' on the ground that it has become infructuous as the Resolution Professional withdrew their Application. It is vehemently contended by the Learned Counsel that the Impugned Orders are liable to be set aside as they were passed without affording an effective hearing to the Applicants/'MSC Shipping'.
- Learned Counsel strenuously argued that the Bill for Lading establishes the title of the owner of the goods and in the instant case the 'Corporate Debtor' has not disclosed a single Bill of Lading in support of their case. A consignee/endorsee named in the Bill of Lading is the owner of the cargo. These goods do not belong to the 'Corporate Debtor' which is evident from GA 1852 of 2018 filed by the Corporate Debtor before the Hon'ble High Court of Kolkata seeking permission to participate in the Public Auction thereof. The Resolution

Professional is fully aware of the facts and impleaded in CS No. 168 of 2016 to suppress this fact from the Adjudicating Authority.

- The 'Corporate Debtor' has relinquished its interest by its positive act of seeking sale of the cargo in GA 1852 of 2018 filed by the Hon'ble High Court in May, 2018 which is much prior to the CIRP Admission Order dated 05.03.2019.
- The Order for sale by the Hon'ble High Court dated 26.09.2018 and hence the 'Corporate Debtor' does not have any title in the Auction cargo. Learned Counsel further submitted that the ratio relied upon by both the Respondents in ***'Commissioner of Customs (Preventive) West Bengal' Vs. 'Ram Swarup Industries Ltd. and Ors.' Company Appeal (AT) (Insolvency) No. 563 of 2018*** is not applicable to the facts of this case as the 'Corporate Debtor' has not filed a single Bill of Entry in respect of the cargo carried in the 256 containers, but in the case of ***'Commissioner of Customs (Preventive) West Bengal' Vs. 'Ram Swarup Industries Ltd. and Ors.'*** the 'Corporate Debtor' has filed the Bill of Entry under Section 48 of the Customs Act, 1962, claiming the ownership of the goods and made part payment of the Customs Duty.

9. **Submissions of the Learned Counsel appearing for the 'Customs Dept.':**

- Learned Counsel appearing for the 'Customs Dept.' submitted that it is relevant to consider the provisions of the Customs Act, 1962, which prescribes the manner and mechanism in which goods imported into

India are cleared by the Customs Authority. The Learned Counsel also drew our attention to the process outlined under Section 48 of the Customs Act, 1962.

- Pursuant to the observations made by the Hon'ble High Court of Kolkata directing that the containers be de-stuffed and the goods be sold, the Hon'ble High Court has also directed that the 'Customs Dept.' be permitted to retain the cost of conducting the process, first out of the sale proceeds and then to adjust the Customs Duty payable in respect of the said goods. The said Order was confirmed by Order dated 21.09.2017, aggrieved by which, the 'Corporate Debtor' preferred an Appeal before the Hon'ble Division Bench of High Court of Kolkata. Vide Order dated 27.10.2017, the Appeal preferred by the 'Corporate Debtor' was dismissed and the Order dated 21.09.2017 was upheld.
- Vide Order dated 26.09.2018, the Hon'ble High Court of Kolkata has permitted the 'Corporate Debtor' to participate in the said Auction. Subsequently, the 'Customs Dept.' addressed letters dated 18.10.2017 and 26.10.2017 and sought for the participation of the 'Corporate Debtor'.
- The goods de-stuffed were finally sold on 26.04.2019 by e-Auction, giving notice to the 'Corporate Debtor', for on amount of Rs. 10,60,10,000/-. In compliance with the direction passed by the Hon'ble High Court the bid amount was kept in a Fixed Deposit Account with SBI.

- On 05.03.2019 NCLT/Adjudicating Authority Kolkata Bench, initiated CIRP and a Moratorium under Section 14 of the IBC Code was imposed. The Resolution Professional preferred CA(IB) 891/KB/2019 and CA(IB) 575/KB/2019 praying for restraining the 'Customs Dept.' from selling the goods de-stuffed from the 256 containers, when in fact, the 'Corporate Debtor' did not have any right, title or interest of any nature whatsoever in the same.
- Vide Order dated 30.08.2019, the second Application filed by the 'Corporate Debtor' was disposed off *inter alia* by directing the 'Customs Dept.' to make over the sale proceeds and handover the custody of remaining 667 containers to the Resolution Professional representing the 'Corporate Debtor'.
- Learned Counsel strenuously contended that the Adjudicating Authority has failed to appreciate the provisions of the Customs Act 1962, ignoring the demands of Custom Duty amounting to Rs. 78,84,54,741/- raised by the 'Customs Dept.' as against the 'Corporate Debtor'. A pre-deposit sum of Rs. 24,11,11,782/- was paid by the 'Corporate Debtor' and the rest of the charges remain unpaid. Orders dated 03.11.2016 and 02.06.2016 demanding an amount of Rs. 102,31,88,263/- was appealed by the 'Corporate Debtor' before the Commissioner of Customs (Appeals), which was dismissed for non-deposit of pre-deposits as per Section 129(E) of the Act vide Order dated 04.07.2017. The claim of the outstanding Custom Dues as against the 'Corporate Debtor' was filed by the Additional

Commissioner of Customs (EMOC Port) before the Resolution Professional on 27.03.2019.

- The Adjudicating Authority committed an error and employing the provision of Section 238 of the Code, did not consider the provisions of Section 48 of the Customs Act, 1962, that 'MSC Shipping' has no legal right in the subject goods; that goods upon entry into the Custom Frontier of India have to be cleared in accordance with the procedure under the Act; that the 'Corporate Debtor' never claimed any right, title or interest and the 'Shipping agency' had only a possessory lien on the goods and cannot claim the Auction sale proceeds and contended that the Adjudicating Authority has committed a gross error in penalizing the 'Custom Dept.'.

Submissions of the Learned Counsel appearing for erstwhile Resolution Professional:

10. Learned Counsel appearing for the Resolution Professional submitted as follows:-

- That the present Appeal is ex-facie barred by Limitation, as the Order assailed is of Orders dated 30.08.2019 and instant Appeal is filed on June 2020; that the Limitation period should be calculated from the date of the Order impugned and not the Order dated 19.11.2019 as the Adjudicating Authority is not vested with any powers or review, which is not an inherent power and thus cannot be invoked.
- The goods in question belonged to the 'Corporate Debtor' as it has already paid for the goods and the sellers of the goods have never

made any complaint with respect to non-payment of account of such goods; that the 'Customs Dept.' is entitled to file its claim in its capacity as an 'Operational Creditor'.

- That subsequent to the Liquidation Order dated 03.02.2020, the 'Customs Dept.' shall have to await the outcome of the Liquidation Process and comply with the distribution process which is decided in accordance with Section 53 of the IBC.
- As soon as the IRP came to know that certain goods belonging to the 'Corporate Debtor' was detained by the 'Customs Dept.' for clearing the statutory dues, addressed a letter dated 11.03.2019 informing the authority about the initiation of CIRP with respect to the 'Corporate Debtor' but further on 14.03.2019, much to their surprise, received a letter from the 'Customs Dept.' informing the 'Corporate Debtor' that the goods detained by them have been put up for auction on 26.03.2019, despite having complete knowledge of the fact that Moratorium was declared under Section 14 of the IBC on 05.03.2019 itself.
- In order to stop the 'Customs Dept.' from going ahead, the IRP preferred an Application before the Adjudicating Authority being CA(IB) No. 575/KB/2019 on 24.04.2019 praying for stopping the 'Customs Dept.', from auctioning the goods belonging to the 'Corporate Debtor' and Notice was issued in the said Application. Ignoring the intimation by IRP, the Dept. illegally auctioned the goods contained in

the 256 containers on 26.04.2019 after the initiation of CIRP on 05.03.2019 which is against the objective and spirit of the Code.

- Learned Counsel submitted that the value of the goods contained in the balance 667 containers lying in the illegal custody of the Authority is getting eroded with each passing day. The raw material stored in the 667 containers which has been directed to be returned to the 'Corporate Debtor' by the Adjudicating Authority, can be used by the 'Corporate Debtor' as it is still a going concern employing 1800 people. Adjudicating Authority disposed off the Application preferred by the IRP namely CA(IB) 891/KB/2019 in the recent Order dated 30.08.2019, wherein the 'Customs Dept.' was directed to make payment to the 'Corporate Debtor', the amount generated by the illegal Auction sale and further permitted the relation of the remaining goods contained in the 667 containers to the Corporate Debtor.
- The Learned Counsel relied on the ratio of this Tribunal in ***'Commissioner of Customs (Preventive) West Bengal' (Supra)*** wherein it was observed that when the Customs Authority had failed to Auction the goods belonging to the 'Corporate Debtor', prior to the initiation of CIRP, the authority could not have proceeded to Auction the goods during the Moratorium period which is in violation of Section 14 of the IBC.
- Learned Counsel sought for dismissal of the Appeals preferred by both the parties and submitted that the amount 10,60,10,000/- rightfully belonged to the 'Corporate Debtor'.

11. **Assessment:**

i. Whether the Adjudicating Authority was justified in directing the amount to be made over to the 'Corporate Debtor', in the light of 'Claims' made by 'MSC Shipping' and the 'Customs Dept.'.

At the outset, for the reasons cited in the Application for condonation of delay, we condone the delay. Though we find force in the contention of Learned Counsel for 'MSC Shipping' that his Application CA No. 1126/KB/2019 was lying in defects and was not listed despite the Counsel representing 'MSC Shipping' had appeared before the Adjudicating Authority on 08.08.2019 and requested for listing the same with the Application filed by the Resolution Professional i.e. CA(IB) No. 891/KB/2019 and in the light of the fact that the Adjudicating Authority had directed the Resolution Professional *to file its Reply to the Application preferred by 'MSC Shipping', the Adjudicating Authority had first disposed off CA(IB) 891/KB/2019 directing Customs to make over the Auction sale proceeds of Rs. 10,60,10,000/- Resolution Professional on 30.08.2019 and thereafter on 03.09.2019 Application CA No. 1126/KB/2019 was listed alongwith the primary Application preferred by RP i.e. 575/KB/2019 and was disposed off as infructuous as RP has withdrawn its Application,* we are of the view that since considerable time has lapsed subsequent to the directions given by the Hon'ble High Court of Kolkata and the auction having taken place, we do not find it a fit case to set the clock back and remand the matter back to the Adjudicating Authority. In the interest of justice and keeping in view that an urgent Application was filed before the High Court of Kolkata way back in

2016 itself seeking to de-stuff the containers as the goods would be deteriorated and 5 years has lapsed, since, to balance equities, we are of the considered view that remanding the matter back to the Adjudicating Authority would only defeat the scope and spirit of IBC which is a time bound process.

12. To ascertain whether the 'Corporate Debtor' can claim the sale proceeds of the goods of 256 containers, in the present facts and circumstances of the case, it is necessary to reproduce Section 14 of the Code and Section18(1)(f)(g) of the I&B Code which deal with Moratorium, the duties of IRP, the terms and conditions enumerated in the Bills of Lading, Section 48 of the Customs Act, 1962 and the relevant portions of the Orders of Hon'ble High Court of Kolkata:-

> *"20. Section 14 of the 'I&B Code' relates to 'Moratorium' and reads as follows: "14. Moratorium.—(1) Subject to provisions of subsections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*
>
> > *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
> >
> > *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
> >
> > *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property*

> *including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

"18. Section 18 (1) (f) & (g) of the 'I&B Code' reads as follows:

"18. Duties of interim resolution professional.—
The interim resolution professional shall perform the following duties, namely:—
xxx xxx xxx
(f) <u>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,</u> 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;*

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this subsection, 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."*

13. As can be seen from Section 14 of the IBC Code, the plain language of the Section is that on the commencement of the CIRP, Moratorium shall be declared for prohibiting any action to recover any security interest created by the 'Corporate Debtor' in respect of 'its property'. 'Its property' denotes the property owned by the 'Corporate Debtor', simply meaning that, the

property not owned by the 'Corporate Debtor' does not fall within the ambit of the 'Moratorium'.

14. Learned Counsel for 'MSC Shipping' drew our attention to Section 2(4) of the Sale of Goods Act, 1930, is reproduced as hereunder:-

> ***"2. Definitions****- In this Act, unless there is anything repugnant in the subject or context,-*
>
> *'…(4) "document of title to goods" includes a bill of lading, dockwarrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, [multimodal transport document] warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;…'*
>
> *(Emphasis Supplied)*

15. The Indian Bill of Lading Act, 1856 specifies in Section 1 *'that every consignee of goods named in the Bill of Lading; and every endorsee of a Bill of Lading to whom the property in the goods therein mention shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and we subject to the same liabilities in respect of such goods as if the contract contained in the Bill of Lading had been made with himself'.* This Section specifies that title to goods carried by sea is vested with the consignee/endorsee of Bill of Lading.

16. Learned Counsel for the 'MSC Shipping' also placed reliance on the Judgement of the Hon'ble Supreme Court in ***(2001) 5 SCC 345 in 'Shipping Corporation of India Ltd.' Vs. 'C.L. Jain Woolen Mills and Ors.',*** in which it is observed as follows:-

> *"….It may however be necessary to examine some of the provisions of the Bills of Lading Act as well as the Contract Act, since the claim of both Shipping Corporation and Container Corporation, charging demurrage for the space occupied for the goods, not being released, - is on account of the contract between them. Under the Indian Bills of Lading Act, 1956, every consignee of goods, named in a Bill of Lading and every endorsee of a Bill of Lading, is vested with absolute right over the goods. The Bill of Lading is a well-known mercantile document of title, which is transferred in the business world by endorsement passing to the endorsee, the title of the goods covered by such Bill of Lading. Clause (18) provides for payment of demurrage charges in case of non-clearance of goods within the free time available."*
>
> *(Emphasis Supplied)*

17. At this juncture, it is relevant to note that the 'MSC Shipping' filed Form B on 04.06.2019 as an 'Operational Creditor' *prior* to the filing of this Appeal. Additionally, its Agency 'MSC Agency' (India) Pvt. Ltd. also filed Form B on 04.06.2019 as an 'Operational Creditor' before the Resolution Professional. It is significant to mention that both 'MSC Shipping' and its Agency have clearly specified in item 7 'details of how & when Debt occurred' that the claimants provide marine containers and are engaged in the business of carriage of goods by sea. Briefly put, it is stated therein that *'in all the 15 Bills of Lading, the 'Corporate Debtor' and its sister concern 'Bhuvee Profiles' were declared as Consignee and/or Notified Party'.* As the *consignee/and endorsee* and/or holder of the goods being the receiver of the goods are bound by the terms & conditions of the said Bills of Lading. Therefore, admittedly being the consignee of the goods, the 'Corporate Debtor' has a 'right' vested in him over the goods. The goods were

undisputably purchased by the 'Corporate Debtor'. The letters of Credit establish that the 'Corporate Debtor' is the purchaser of the goods. The seller has not preferred any claim against the 'Corporate Debtor'. Simply put, only because the 'Corporate Debtor', a consignee, has a right and title over the goods purchased, 'MSC Shipping' is seeking payment of dues from them.

18. Further, the claim of 'MSC Shipping' is based on the container detention & handling charges only and can at best be treated as an 'Operational Creditor'. The Judgement of ***'Central Board of Trustees' Vs. 'Indore Composite Pvt. Ltd.' (2018) 8 SCC 443*** is not applicable to the facts of this case as 'MSC Shipping' themselves state that the 'Corporate Debtor' is the consignee of the goods in their Form B and at the same time contended that 'Corporate Debtor' has no right or title over the goods.

19. In fact, the Judgement of ***'Shipping Corporation of India' (Supra)*** relied upon by the Learned Counsel for 'MSC Shipping' only reiterates that the consignee has right & title over the goods. We find force in the contention of the Learned Counsel for the Liquidator that 'Corporate Debtor' has also obtained insurance coverage for the goods in question for opening the letter of credit. Merely because the Bills of Lading (Annexure A-2) show the 'Corporate Debtor' as the Notified Party, viewed from any angle, it cannot be construed that 'Corporate Debtor' is not the purchaser of the goods and does not have a right or title over the goods. The letters dated 18.05.2015 & 20.05.2015 addressed by 'MSC Shipping' to the 'Corporate Debtor' & Bhuvee Profiles evidence that the goods belong to the 'Corporate Debtor'. In layman's

language, the said correspondence refers to the 'goods' as 'your cargo' and demands payment of dues only on that basis. We hold that the goods belong to the 'Corporate Debtor' for the following reasons:-

a. the goods were purchased by 'Corporate Debtor' through Letters of Credit.
b. the seller never made any claim for any amounts due.
c. the correspondence between the parties demanding the amounts due is based on the ground that the goods belonged to the 'Corporate Debtor'.
d. the 'Bills of Lading' specify the name of the 'Corporate Debtor' as the Notified Party and 'MSC Shipping' has in its capacity as 'Operational Creditor' in Form B stated that the 'Corporate Debtor' was the 'Consignee'. The ratio of the Judgement in ***'Shipping Corporation of India' (Supra)*** relied upon by the Counsel in support of his case regarding title of goods, it is specified that Bill of Lading is an important mercantile document of title which is transferred in the business world by endorsement to the endorsee. The 'Corporate Debtor' is the consignee/endorsee and has the right & title of the goods.
e. 'MSC Shipping' & MSC Agency have filed Form B as 'Operational Creditors' before the Resolution Professional on 04.06.2019 *prior* to filing of the Appeal on 01.10.2019.

20. Having held so, we observe that *'Its Property'* specified under Section 14 of IBC, refers to the property of the 'Corporate Debtor' and in the instant

case, Moratorium has application on the subject property as it is owned by the 'Corporate Debtor' and the Resolution Professional under Section 18(1)(f) & (g) of the Code has the right to take control and custody of the asset.

21. Now we address ourselves to whether Adjudicating Authority was justified to making over the Auction proceeds to the 'Corporate Debtor'?

22. At the outset we find it relevant to reproduce the observations of the Hon'ble High Court of Kolkata in CS 168 of 2016, dated 19.07.2018, wherein it has observed as follows:-

GA 1852 of 2018
CS 168 of 2016

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Dated: 19.07.2018

"Several orders have been passed in this matter pursuant to which the goods were de-stuffed by the Customs and all 256 containers returned to the plaintiff. The Customs has also made a valuation of the goods lying in the space provided by the container and freight station and has produced a valuation report. The disputes at present centre around the failure to sell the goods which have already been de-stuffed from the containers. Substantial claims have been made by the Customs (defendant no. 2) and the container and freight station (defendant no. 3) on account of detention and demurrage charges.

The initial objection raised by Mr. Abhrajit Mitra, senior counsel appearing for the first defendant was that no notice had been given to the defendant no. 1 when the containers were de-stuffed by the Customs. The present objection is that the defendant no. 1 has not been given proper inspection of the goods lying with the defendant no. 3. It may be mentioned that the instant application was listed on account of the urgency shown by counsel appearing for the *defendant no. 1 that the concerned goods are lying exposed after being de-stuffed and will deteriorate unless sold expeditiously.*

Mr. K. Thakker, counsel appearing for the plaintiff relies on several orders passed by this Court by which both the defendant no. 1 as well as the Customs authorities were directed to de-stuff the containers in accordance with the procedure provided under the Customs Act, 1962 and under relevant notifications issued by the Customs. <u>By an order dated 16th September, 2016 a direction was given for de-stuffing the containers and it was observed that the containers are valuable properties of the plaintiffs. It appears from the said order that the parties had proposed before this Court that the containers would be de-stuffed under the supervision of the Customs authorities and the goods would then be sold by public auction after giving reasonable notice to the first defendant. The next order was passed on 4th October, 2016 by which the first defendant was given liberty to re-export the containers with the imported cargo within a period of four weeks from the date of the order upon payment of the demurrage charges, rent of the container yard, container detention charges and other dues of the plaintiffs. The order records that the first defendant had agreed to the directions given in this order. The third order was passed on 21st September, 2017 wherein the Customs Authority were directed to de-stuff the cargo and the plaintiff was given liberty to take delivery of the empty containers. By the said order, the Customs Authorities were also directed to de-stuff and sell the goods upon notice to the defendants.</u>

An appeal carried by the defendant no. 1 from the aforesaid order to the Division Bench was dismissed on 27th October, 2017 where it was noted that the defendant no. 1 had used the custom duties and banker's charges as an excuse to thwart return of the containers to the plaintiff. The last order was passed on 30th April, 2018 where the Court expressed disappointment at the Customs not having taken any steps for de-stuffing the containers in terms of the earlier orders passed by this Court and observed that the cost of de-stuffing of the containers and sale of *the goods would be treated as first charge on the proceeds of the sale.*

Since all 256 containers have been de-stuffed pursuant to orders of Court and the Customs has recently done a valuation of the same, the only issue which remains to be determined now is the steps required to be taken for protecting the claims of the plaintiff on account of detention and demurrage as well as the claims of the Customs and the container and freight station. The prayer for appointment of an independent valuer is not relevant any more since a valuation has already been done by the Customs and Counsel have submitted that the goods should be sold on the basis of such valuation without any further delay. Selling the goods is of utmost importance since counsel for the defendant no. 1 has urged that the goods have been lying in the open for a considerable period of time and a deterioration in quality would affect their sale value. The contentions of Mr. Mitra and Mr. Chayan Gupta, on behalf of the defendant no. 1 with regard to notice not being given to the defendant no. 1 at the time of de-stuffing and the delay on the part of the Customs in doing the needful in this regard need not be considered since the immediate concern is to provide for a way forward for the immediate sale of the goods.

Counsel appearing for the plaintiff as well as the Customs authorities suggest that the goods be sold by public auction in the manner provided in the Customs circular no. 11/2012 dated 12th April, 2012. Under the said circular, the mode of sale has been provided in the following manner:-

> *"4. Sale through e-auction/auction cum tender in respect of confiscated/seized goods of all types and confiscated/seized consumer goods exceeding value of Rs. Five lakhs in single lot, may be disposed through e-auction or auction-cum-tender, since it offers enhanced transparency and accountability for quick disposal of goods. In such e-auction or auction-cum-tender process, all persons including NCCF, KB, other CG employee's consumer cooperatives, Multi-State/State cooperatives*

> *or National/State level Cooperative Federations can also participate. If the NCCF/KB/other Consumer Cooperative societies are found to be successful bidder, then the goods may be sold to them with the eligible rebate/discount as prescribed, subject to fulfilment of other conditions of e-auction/auction-cum-tender. Instructions for use of E-auction or auction-cum-tender have already been prescribed vide Board's Circular No. 50/2005. Customs dated 1.12.2005 and No. 12/2006. Customs dated 20.2.2006".*

There cannot possibly be any objection to sale by public auction as all interested parties would be able to bid for the goods ensuring that the goods fetch the highest price. Needless to say, the defendant no. 1 will also have an opportunity to participate in such auction and offer the price suggested by counsel in Court for the goods in question. The procedure for sale of goods in the given circumstances has also been provided for under Section 150 of The Customs Act, 1962 which also provides for the manner in which the proceeds of such sale shall be applied. The carrier's lien, as provided for in Clauses 17 and 20.3 of the contract of carriage recorded in the 15 Bills of Lading can be taken into consideration at the appropriate stage. Clause 3.1 of the Circular No. 12/2006 dated 20th February, 2006 of the Customs is particularly relevant. Under this clause, the disposal of seized, confiscated and "time-expired" goods shall take place simultaneously through public auction and sealed tender.

In view of the above, the defendant no. 2 is directed to hold the public auction within a week from date upon notice to all concerned parties including the defendant no. 1. The mode and manner of such public auction shall be in compliance with the relevant Customs circulars as stated above. If the Customs intends to follow any additional procedure for the sale to be made more effective or expedient, it shall give notice of such proposed/intended procedures to all concerned parties including the defendant no. 1 at least three days before the sale is conducted by public auction. Notice of the auction shall be given to *the parties immediately upon communication of this order. The Customs shall take requisite steps for completing the auction within a day so that the conditions of the goods remain unchanged.*

The defendant no. 2/ Customs Authorities will file a report containing relevant particulars of the public auction and the mode of applying the sale proceeds thereof within a fortnight of the public auction. The report will be made available to all the concerned parties before this Court. As submitted by Mr. Kankani for the plaintiff, the Report may be taken into consideration at the time of hearing of this suit.

GA No. 1852 of 2018 is disposed of with the above directions."

(Emphasis Supplied)

23. Now we address ourselves to the contention of Learned Counsel for the 'Customs Dept.' that Section 48 of the Customs Act, 1962 is applicable to the facts of this case. To understand the obligations of the importer to file the Bills of Entry before the Customs Authority and pay the import duty for taking delivery of the goods, Sections 46 and 47 of Customs Act, 1962, need to seen:-

"46. Entry of goods on importation.—*(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting [electronically] [on the customs automated system] to the proper officer a Bill of Entry for home consumption or warehousing 6 [in such form and manner as may be prescribed]:*

[Provided that the [Principal Commissioner of Customs or Commissioner of Customs] may, in cases cases where it is not feasible to make entry by presenting electronically [on the customs automated system], allow an entry to be presented in any other manner:

Provided further that] if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full *information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.*

(2) Save as otherwise permitted by the proper officer, a Bill of Entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

[(3) The importer shall present the Bill of Entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

Provided that a Bill of Entry may be presented [at any time not exceeding thirty days prior to] the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided further that where the Bill of Entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the Bill of Entry as may be prescribed.]

*(4) The importer while presenting a Bill of Entry shall *** make and subscribe to a declaration as to the truth of the contents of such Bill of Entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, 1 [and such other documents relating to the imported goods as may be prescribed].*

[(4A) The importer who presents a Bill of Entry shall ensure the following, namely:—

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and
(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a Bill of Entry for home consumption for a Bill of Entry for warehousing or vice versa.

47. Clearance of goods for home consumption.— *[(1)] Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:*

[Provided that such order may also be made electronically through the customs automated system system on the basis or risk evaluation through appropriate selection criteria:
Provided further that] the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.]

[(2) [The importer shall pay the import duty—

(a) on the date of presentation of the Bill of Entry in the case of self assessment; or
(b) within one day (excluding holidays) from the date on which the Bill of Entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or
(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf, and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent. but not exceeding thirty-six per cent. per

annum, as may be fixed by the Central Government, by notification in the Official Gazette.]

[Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that] where the Bill of Entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 (55 of 1991) and the importer has not paid such duty before such commencement, the date of return of such Bill of Entry to him shall be deemed to be the date of such commencement for the purpose of this section:] [Provided also that] if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.]

48. Procedure in case of goods not cleared, warehoused, or transhipped within 3 [thirty days] after unloading.—*If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped 4 [within 5 [thirty days]] from the date of the unloading thereof thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof:*

Provided that —
(a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;
(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation.— In this section, ―arms‖ and ―ammunition‖ have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959).”

24. From the aforesaid provision, it is clear that in case of non-clearance of the goods within 30 days or within extended period or if the title of any imported goods is relinquished after notice to the importer and with the permission of the proper officer, the goods can be sold by the Custom Authority. Section 48 of the Customs Act, 1962 relates to sale of goods in the custody of the Customs in the manner prescribed therein.

25. The Resolution Professional preferred an Application CA(IB) 575/KB/2019 in CP(IB) No. 513/KB/2018 on 24.04.2019 seeking to restrain the 'Customs Dept.' from auctioning the goods belonging to the 'Corporate Debtor' in which Application/Notice was issued on 25.04.2019. It is an admitted fact that the goods contained in 256 containers were auctioned on 26.04.2019 subsequent to the initiation of the CIRP on 05.03.2019. To reiterate, though the Hon'ble High Court of Kolkata has permitted the auction of the goods by the Customs Authority following due procedure provided in the Customs Act, 1962, and the Order is dated 19.07.2018, the Customs Authorities did not auction the goods till Moratorium under Section 14 of the IBC was imposed on 05.03.2019. Subsequent to the Notice issued on 25.04.2019, by the Adjudicating Authority, on 26.04.2019 the goods were finally auctioned, <u>after the initiation of the CIRP and during the Moratorium period.</u> It is stated that the goods contained in the balance 667 containers continue to remain in the custody of the 'Customs Dept.'. Vide Order dated 03.02.2020, by the Adjudicating Authority, 'Corporate Debtor' has gone into liquidation and is being run as a going concern. We do not find force in the contention of the Learned Counsel appearing for the 'Customs Dept.' that

Section 48 of the Customs Act, 1962, is applicable to the facts of this case. This Tribunal in ***'Commissioner of Customs (Preventive) West Bengal' Vs. 'Ram Swarup Industries Ltd. and Ors.' Company Appeal (AT) (Insolvency) No. 563 of 2018*** has dealt with Section 48 of the Customs Act, 1962, in similar circumstances where the goods were auctioned during the Moratorium period, held that the assets of the 'Corporate Debtor', during the Moratorium period, cannot be alienated, transferred or sold to the third party. In the instant case also the Order of Moratorium was passed by the Adjudicating Authority on 05.03.2019. Immediately thereafter it was not open to the 'Customs Dept.' to conduct the auction on 26.04.2019 though the goods were lying with them for more than 2 years and there was a direction by the Hon'ble High Court Kolkata prior to the CIRP period. Having failed to auction the goods prior to the CIRP period, the 'Customs Dept.' cannot now, subsequent to the imposition of Moratorium, proceed to auction the goods. Having done so, the sale proceeds of the so conducted auction cannot be made over to the 'Customs Dept.'. It is relevant to mention that a Review Application has been filed before the Adjudicating Authority on 30.08.2019 which was dismissed vide Order dated 19.11.2019 and the Customs Authority was directed to make payment to the 'Corporate Debtor'.

26. The Hon'ble Supreme Court in ***'Mr. Anand Rao Korada Resolution Professional' Vs. M/s. 'Varsha Fabrics (P) Ltd. & Ors.' Civil Appeal Nos. 8800-8801 of 2019*** observed as follows:-

> *'4.13 The Appellant – Resolution Professional filed the present Civil Appeals to challenge the Interim Orders dated 14.08.2019 and 05.09.2019 passed by the*

Odisha High Court in W.P. (Civil) No. 7939/2011 on the ground that since the CIRP against Respondent No. 4 had commenced, the proceedings before the High Court in W.P. (Civil) No. 7939/2011 ought to be stayed.

5. We have heard the learned Counsel appearing for the Appellant – Resolution Professional, Respondent Nos. 1 to 3, and Respondent No. 8 – HINDALCO.

6. The IBC was published in the Gazette of India on 28.05.2016. It was framed as a complete code to consolidate and amend the laws relating to insolvency resolution of corporate entities, partnership firms, and individuals in a time-bound manner, for maximisation of the value of the assets of such persons, and balance the interest of all the stakeholders. The Corporate Insolvency Resolution Process ("CIRP") could be initiated when a corporate debtor commits a default, either by a financial creditor, or an operational creditor, or the corporate debtor itself.

Section 12 of the IBC provides a time-frame to complete the CIRP.

As per Section 13 of the IBC, the Adjudicating Authority i.e. the National Company Law Tribunal ("NCLT") shall declare a moratorium for the purposes referred to in Section 14 of the IBC.

Section 14 provides that on the insolvency commencement date, the Adjudicating Authority shall by order, declare a moratorium prohibiting the institution of suits, or continuation of pending suits or "proceedings" against the corporate debtor, including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or any other authority. Section 14 reads as follows :

***"14. Moratorium.** .....*

7. Section 238 gives an overriding effect to the IBC over all other laws. The provisions of the IBC vest exclusive jurisdiction on the NCLT and the NCLAT to deal with all issues pertaining to the insolvency *process of a corporate debtor, and the mode and manner of disposal of its assets. Section 238 reads as follows :*

> ***"238. Provisions of this Code to override other laws. –***
> *The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

8. Section 231 of the IBC bars the jurisdiction of civil courts in respect of any matter in which the Adjudicating Authority i.e. the NCLT or the NCLAT is empowered by the Code to pass any Order. Section 231 is set out hereinbelow for ready reference:

> ***"231. Bar of jurisdiction. –***
> *No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority or the Board is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority or the Board under this Code."*

9. 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.

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.*
>
> *<u>If the assets of the Respondent No. 4 – Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders.</u>*
>
> *As a consequence, we set aside the impugned Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court, as parallel proceedings with respect to the main issue cannot take place in the High Court. The sale or liquidation of the assets of Respondent No. 4 will now be governed by the provisions of the IBC.'*
>
> *(Emphasis Supplied)*

27. *In the aforenoted Judgement, the Hon'ble Supreme Court has clearly laid down that the provisions of IBC vest exclusive jurisdiction on the NCLT and NCLAT to deal with all issues pertaining to the Insolvency Process of a 'Corporate Debtor' and the mode and manner of disposal of its assets.* It has been observed that if the assets of the 'Corporate Debtor' are alienated during the pendency of the proceedings under IBC, it would seriously jeopardize the interest of all the stakeholders. This ratio is squarely applicable to the facts of this case.

28. For all the aforentoted reasons, *Company Appeal (AT) (Insolvency) No. 1048-1049 of 2019* is dismissed. *Company Appeal (AT) (Insolvency) No. 200 of 2020* preferred by the 'Customs Dept.' is partly allowed as we set aside the penalty imposed by the Adjudicating Authority of Rs. 1 Lakh per day and confirm the direction of the Adjudicating Authority that the 'Customs Dept.' shall have the right to submit their Claim with the Liquidator and would be

treated as 'Operational Creditor'. In the interest of Justice, we hope and trust that the balance goods in the 667 containers is acted upon at the earliest, if not already done, to necessitate smooth functioning of the 'Corporate Debtor' as a going concern. No Order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
10th August, 2021

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