

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II**

**IA No.1001 of 2023
in CP (IB) No.296/7/HDB/2018**

**[Under Section 35(1)(N) r/w Sections 35(1)(B) and
(D) of the Insolvency and Bankruptcy Code, 2016]**

IN THE MATTER OF:

ICICI Bank Ltd

... Financial Creditor

Versus

Lanco Babandh Power Limited

...Corporate Debtor

AND IN THE MATTER OF:

Sanjay Gupta

Liquidator – M/s. Lanco Babandh Power Limited

Having Office at: E-6A, Kailash Colony,

New Delhi-110048

...Applicant

Versus

1. Sri. B. Ratna Sekhar Rao
Traffic Manager, Traffic Department
Visakhapatnam Port Trust
Visakhapatnam – 530 003
2. Shri. K. Rama Mahano Rao, Chairman
Visakhapatnam Port Trust
Visakhapatnam – 530 003
3. M/s. VPL Integral CFS Private Limited
335/1, Kanithi BC Gate Road,
Gajuwaka, Visakhapatnam – 530 046
4. Custom House, Visakhapatnam
Department of Revenue
Ministry of Finance, Government of India,
Custom House, Port Area, Visakhapatnam,
Andhra Pradesh, India-530035

...Respondent No.1

...Respondent No.2

...Respondent No.3

...Respondent No.4



Date:10.05.2024

5. Office of the Principal Commissioner of Customs
Customs House, Port Area,
Visakhapatnam-530035

...Respondent No.5

Date:10.05.2024

Counsel/Parties present:

For the Applicant : Ms. Shalya Agarwal, Advocate
For the Respondent : None appeared for the Respondents.

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. Unable to release the imported goods lying in the custody of the Respondents, the liquidator of Corporate Debtor M/s. Lanco Babandh Power Limited (hereinafter referred as Applicant) approached this Authority seeking directions to the Respondents for its release.
2. The brief facts, necessary to dispose of the present application, as stated, are that:
 - 2.1 The Corporate Debtor got registered its project under Regulation 5 of the Project Import Regulation, 1986, with Paradeep Customs Division, Paradeep, Odisha for setting up of Thermal Power Plant (2×600 MW) located at Khadagprasad, Orissa.
 - 2.2 The goods were imported by the Corporate Debtor and now these are lying in the custody and control of the Respondents.
 - 2.3 The liquidation order against the Corporate Debtor was passed on 27.11.2019 and the said property became part of the liquidation estate



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in view of the provisions of the IBC. Accordingly, the liquidator is empowered under section 35 of the IBC to sell and dispose of the said goods.

- 2.4 The Respondent Nos.1 and 2 filed claim of Rs.2,65,40,296/- with the liquidator which was admitted vide letter dated 22.05.2022 and the claim of Rs.3,61,61,661/- of Customs VPL – Integral CFS at Visakhapatnam and Maersk Line India Pvt Ltd., Respondent Nos.3 to 5 was also admitted vide letter dated 05.02.2022.
- 2.5 An e-auction of the sale of the goods lying with the Respondents also took place and M/s.Srivari Enterprises was the successful bidder. The entire sale amount was deposited on 30.04.2023, but possession of the property could not be handed as it was not released by the Respondents.
- 2.6 The Respondents were asked time and again to release the goods as per the correspondences detailed in Para 14 of the application and when nothing happened, an IA/940/2020 was filed impleading (i) VPL Integral CFS Pvt. Ltd., (ii) Maersk Line India Pvt. Ltd., and (iii) Customs House, Visakhapatnam as parties. The Respondents in the said IA were directed vide order dated 29.03.2023 to release the goods/assets. Thereafter the Respondents were requested orally as well as by writing letters to release the goods, but to no avail.
- 2.7 The Respondent No.1 vide letter dated 17.05.2023 stated that the Visakhapatnam Port Authority will not release the said goods because directions in IA/940/2020 were not passed against it. Notwithstanding the non-impeachment of the Respondent No.1 and 2, it is explained that their claim of Rs.2,65,40,296/- has already been admitted by the liquidator and therefore objections taken by them are immaterial.



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- 2.8 Regarding the power of this Authority, the Applicant has referred to Section 238 of the Code, and various decisions to say that the provisions of the IBC will prevail over the Customs Act and any other enactment and therefore the stand taken by the Respondents for not releasing the property is not justified. At the most, they can take steps only to determine the taxes, interests, fines or any penalty but they cannot refuse to hand over the goods.
3. Respondent Nos. 1 to 3 were set ex-parte on 10.01.2024 and it is the Respondent Nos.4 and 5 who have contested and contended the averments of the application and have filed the counter by submitting:
- 3.1 The effect of the importing goods vide 14 numbers of Bills of Entry and other goods lying with the Respondents, have not been disputed by the replying Respondents. It is claimed that the goods with the Respondents have not been released because they have not submitted the Bills.
- 3.2 In response to the letter of the liquidator, the NOC for the release of the goods was issued by the Custom House, Visakhapatnam vide letter dated 02.03.2020 subject to filing of Bills of Entry and payment of Customs duty. Against this, the liquidator filed this IA/940/2020 and vide order dated 29.03.2023, directions were passed for the release of the said goods.
- 3.3 However, it is claimed that the Custom House, Visakhapatnam was neither served nor given opportunity to file counter in IA/940/2020 and therefore the Appeal has been filed by the Respondent No.4 and 5 which is pending before the Hon'ble NCLAT.



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- 3.4 On the question of releasing the goods to the Applicant, the Respondent No.4 and 5 relied upon some judicial pronouncements and emphasized that the position of the Customs Department is that of secured creditor and therefore the order passed in IA/940/2020 is not good in law.
4. We have heard the Learned Counsel and have also gone through the entire records.
5. Undisputedly, the goods imported by the CD are lying in the Custody of the Respondents because of non-compliance of the statutory requirements. After the passing of the liquidation order dated 27.11.2019, all the assets of the CD have become part of the 'liquidation assets' and the proceeds will be distributed to discharge its liabilities.
6. The liquidator has already admitted claim of Rs.2,65,40,296/- of the Respondent Nos.1 and 2 and of Rs.3,61,61,661/- by Respondent No.3 vide **(Annexure-2)**. When the Respondents did not release the goods despite the admission of their claims by the liquidator, IA/940/2020 was filed wherein vide order dated 29.03.2023, the following direction were issued.
- “XI. Therefore, we are of the firm view that the Respondents in this case can be directed to release the goods belonging to the Corporate Debtor lying with them without insisting for filing the bill of entry or a payment of customs duty and CFS charges by the Corporate Debtor under liquidation, within 30 days from the date of this order, besides to issue No Objection Certificate for sale of these goods by the Liquidator in accordance with the provisions of the IB Code.”*
7. In pursuance of the said order, the Visakhapatnam Port Authority vide letter **(Annexure-4)** dated 17.05.2023 raised objection for not releasing the property on the ground that the Port Authority was not party in the said IA/940/2020 and therefore, no direction was issued to it.



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8. Once the property of the Corporate Debtor including the goods lying with the Respondents become part of the liquidation assets, it is for the liquidator to decide as to how to deal with the said property as per the provisions of law. The claim of the Respondents No.1 and 2 have already been admitted and vide **Annexure-2** dated 05.02.2022 and it was intimated how the amount will be released to the Respondent Nos. 1 and 2.
9. After the admission of the claim of the Respondent Nos. 1 and 2 by the liquidator and intimation as how they will get their dues, the Respondent No.1 and 2 now can't refuse to release the goods. The Respondents No.1 and 2 have also not turned up to contest the application and moreover the law is well settled that the provisions of the IBC will prevail over any other enactment. In view of non obstante clause in section 238 IBC, there is overriding nature and supremacy of the provisions of the IBC over any other enactment in case of conflicting provisions including Major Port Trusts Act. Here we rely upon the decisions of the Hon'ble Apex Court in ***Sudershan Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs (Civil Appeal No.7667 of 2021)***, ***Paschimanchal Vidyut Vitran Nigam Ltd. versus Raman Ispat (P) Ltd., (2023)10 SCC 60***, ***Asset Reconstruction Company (India) Limited versus Tulip Star Hotels Limited and Ors. AIR 2022 SC 3559***, ***Vishal Chelani and Ors. versus Debashis Nanda (2023)10SCC395***, ***Pr. CIT versus Monnet Ispat & Energy Ltd. [SLP (C) No.6487 of 2018, dated 10-8-2018*** and ***Alchemist Asset Reconstruction Co. Ltd. versus Hotel Gaudavan (P.) Ltd. [2017] 88 taxmann.com 202***. Therefore, the Respondents No.1 and 2 are bound to release the goods in their custody to the liquidator.



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10. On the question of issuing direction to the Respondents No.3 to 5, this matter has already been covered in IA/940/2020. It is settled law that a party can't take up the same plea again because of the principle of res-judicata. The Respondents No.4 and 5 have already moved the Hon'ble NCLAT by filing an appeal. Therefore, no such direction can be issued to the Respondent Nos.3 to 5.
11. As a result, the Respondent Nos.1 and 2 are directed to release the goods/assets of the CD in their custody.
12. Therefore, the IA No.1001 of 2023 in CP (IB) No.296/7/HDB/2018 is allowed.

Sd/-
(SANJAY PURI)
MEMBER (TECHNICAL)

Sd/-
(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)

Apoorva