

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

IA/1294/IB/2020 in IBA/839/2019

*(filed under Section 35(1)(k) read with 60(5) of the Insolvency &
Bankruptcy Code, 2016)*

In the matter of Bharat Coal Chemicals Limited

P. Sriram

Liquidator
Bharat Coal Chemicals Limited
(Company under liquidation)

..... *Applicant*

Vs

1. **The Director General of Foreign Trade**
Department of Commerce
Ministry of Commerce and Industry
Government of India, Udyog Bhavan
Moulana Azad Marg
New Delhi – 110 011.
2. **Directorate of Revenue Intelligence**
Kolkata Zonal Unit
8 Ho-Chi-Minh Sarani, suite No. 16 & 17
Kolkata – 700 071
3. **Directorate of Revenue Intelligence**
Bhubaneswar Regional Unit
Plot No. 206, 206/474, Gajpati Nagar
P O Sainik School,
Bhubaneswar – 751 005
4. **The Additional Director General**
Directorate of Revenue Intelligence
2nd Floor, Old Building, New Custom House
Ballard Estate, Mumbai 400 001

..... *Respondents*

Order pronounced on 20th June 2022

CORAM:

Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)



For Applicant : S. Sathyanarayana, Advocate
For Respondent : Madhumitha Bhattacharjee, Advocate

ORDER

Per: Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)

The application under consideration is filed by the Liquidator of M/s. Bharath Coal Chemicals Limited (company under liquidation) under section 35(1)(k) of the Insolvency and Bankruptcy Code, 2016 read with Section 60(5) and also read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking the following prayers:

- (i) *To direct the 4th Respondent to drop the proceedings in SCN No. DRI/KZU/CF/ENQ/-32((INT-28)/2015 dated 16.03.2016 against the Corporate Debtor.*
- (ii) *To direct the 3rd Respondent to revoke its seizure order dated 23.09.2015 against the capital goods of Corporate Debtor and make the capital goods available to the Liquidator for sale.*

2. The brief facts of the application are that upon filing of a Petition under section 9 of the IBC, 2016 in IBA/839/2019, this Tribunal initiated CIRP in respect of the Corporate Debtor and the Applicant was appointed as IRP, thereafter as RP and finally as Liquidator for the Company under liquidation vide its order dated 13.03.2020. The Company under liquidation was carrying on its business under the name and style of M/s. Haldia Chemicals and later it was changed to M/s Bharath Coal Chemicals Limited.



3. It was submitted that the Haldia Development Authority, West Bengal had offered land admeasuring to 98 acres at Mouza Bhuniaraichak, JL No 122 P S Durgachak, dist Purba Medinapur for setting up of an Ammonia manufacturing unit vide its memo dated 02.12.2009 and the Company under liquidation had also paid Rs. 5 crores of Rs. 15 crores towards initial payment of premium towards the land to be allotted to the Company under liquidation. The Company under liquidation had also obtained 4 EPCG Authorizations from the 1st Respondent under "Zero Duty EPCG Scheme" and imported capital goods worth to Rs. 425 crores. By virtue of the EPCG Scheme availed, the Company under liquidation had export obligation and is obliged to bring in foreign currency equivalent to 600 percent of the duty saved within 6 years failing which the Company under liquidation is duty bound to payback the duty exemption availed.

4. It was submitted that the Union Ministry of Environment and Forests declared the Haldia District as Critically Polluted Industrial Cluster with a CEPI Score of 75.43. Further, it had taken a policy decision not to grant permission for establishing of new industries in the region of Very Critically/Critically Polluted Industrial Cluster. The Union Ministry of Environment and Forests had also given a detailed Office Memorandum on 15.03.2010 in this regard and owing to the notification of the said Ministry, the Company under

liquidation could not establish the project at Haldia District. In view of the same, it was also decided by the Company under liquidation to shift the project out of Haldia to Paradip in Odisha and accordingly shifted the project to Odisha in the year 2012.

5. It was submitted that after shifting the project to Odisha, the Company under liquidation got all the in-principal approvals from Ministry of Environment and Forests and various Government Authorities. The in-principal approval was also obtained from SBI Capital Markets Limited for loan syndication and to raise term loan for the project. However, the Odisha Government on 18.01.2014 informed to the Company under liquidation, that the earlier earmarked land could not be allocated to the Company and directed to find alternate suitable land for the said project.

6. It was submitted that as the Company under liquidation felt that Export Obligations under the EPCG Scheme could not be fulfilled, it approached the 1st Respondent to extend the Export Obligation (EO) period by 2 years in the month of March 2014 and the 1st Respondent had also condoned the delay in fulfilling the EO in its Committee Meeting held on 24.07.2014. The Committee had also directed the Company under liquidation to get a certificate from the Central Excise that the items imported are under their possession. However, it was submitted that the Central Excise

refused to give such certificate as the Company under liquidation did not have a registered unit at Odisha.

7. In the meantime, it was submitted that the 2nd Respondent summoned the Company under liquidation and in compliance the erstwhile director of the Company under liquidation explained the facts and the 'force majeure' situation faced by the Company under liquidation at that point of time. However, in the circumstances, the 3rd Respondent conducted an inspection at the godown of the Company under liquidation at Jajpur (Odisha) and issued a seizure order dated 23.09.2015 against the imported capital goods of the company under liquidation. Since it was difficult to remove or confiscate, the imported goods were left under the custody of the company under liquidation with an order not to deal with the said items without the prior permission of the 3rd Respondent.

8. It was submitted that the 2nd Respondent had issued two show cause notices directing the company under liquidation to respond to the Commissioner of Customs at Kolkata and Bhubaneswar for the alleged failure to discharge the Export obligations arising for the 1st Block of the Export obligation period. In the meanwhile, the 1st Respondent vide its order dated 29.03.2016 approved the regularization of shifting of capital goods from Haldia to Odisha. Further, the 1st Respondent ordered extension in block-wise Export

Obligation period and directed the Company under liquidation to pay 2% composition fee on duty saved.

9. It was submitted that the Company under liquidation had apprised the 1st Respondent's order to the 2nd Respondent by letter 18.04.2016 to drop the penalty and other proceedings under the provisions of the Customs Act, 1963 and also the seizure proceedings. Further, it was submitted that the Company under liquidation has also taken up the matter with the 1st Respondent vide its letter dated 29.07.2016 and 29.09.2016 requesting the 1st Respondent to extend the date of commencement of Export obligation from the date of physical allotment of land by the Government of Odisha and also sought for the waiver of 2% composition fee. That in the month of September, 2016, Government of Odisha allotted the land for the project and the 1st Respondent considering the request of the Company under liquidation vide its order dated 19.10.2016 directed to approach the Regional Authority of the 1st Respondent at Chennai. The Company under liquidation had also applied before the Regional Authority of the 1st Respondent at Chennai.

10. It was submitted that in the meanwhile, the 2nd Respondent by its letter dated 21.10.2016 appointed the 4th Respondent as a common adjudicator for the pending proceedings and it had issued

a show cause notice dated 03.01.2017. The Company under liquidation had filed its interim reply and also requested the 4th Respondent to drop the proceedings initiated by the 2nd and 3rd Respondent or to keep the proceedings in abeyance pending disposal of the EPCG proceedings.

11. It was submitted that in the application filed before the 4th Respondent, the Company under liquidation mentioned that the Government of Odisha had allotted the land, however, the 3rd Respondent seized the capital goods, the Company under liquidation could not mobilize and relocate the capital goods at allotted land at Paradip, Odisha. The copy of the said application was also sent to the 1st Respondent.

12. The Learned Counsel for the Applicant submitted that when the Company under liquidation was taking all effective steps, the Government of Odisha had withdrawn the allotment of land and hence a Writ Petition was preferred by the company under liquidation before the Hon'ble High Court of Odisha and the same is pending for disposal.

13. It was submitted that the erstwhile directors of the Company under liquidation met the 1st Respondent in person on 08.06.2017, apprising the 'force majeure' situation faced by the Company under

liquidation and also requested to extend the Export Obligation period from the date of physical allotment of land to the Company under liquidation and an email was also sent to the 1st Respondent on 09.06.2017 in this regard.

14. It was submitted that the 4th Respondent had also directed the Company under liquidation to file its final response by its notice dated 15.11.2017 and the Company under liquidation had also requested for cross examination and for written submission which was accepted by the 4th Respondent. However, it was submitted that at the request of the Company under liquidation the cross examination was adjourned to 31.10.2018.

15. It was submitted that the Company under liquidation had requested the 1st Respondent to consider for a total waiver of the Export Obligation or extend the period of Export Obligation from the date of physical allotment of land. It was also apprised about the availability of offers for setting up the project. Considering the request, the 1st Respondent informed the Company under liquidation that it is proposed to take up the request in the EPCG committee meeting to be held on 12.07.2018, however, the 1st Respondent has not informed the decision of the EPCG Committee upon the said request and the said request is still pending. On 31.10.2018, the representatives of the Company under liquidation appeared before



the 4th Respondent and apprised them of the pending request before the 1st Respondent. Further, on the request of the Company under liquidation, the 4th Respondent had also kept the proceeding under abeyance and it had not proceeded till date.

16. In the meantime, it was submitted that this Tribunal has initiated CIRP of the Company under liquidation and finally order has been passed for liquidation.

17. The Learned Counsel for the Liquidator while reiterating the above averments submitted that the Capital Goods of the Company under liquidation forms larger part of the liquidation estate and unless the proceeding pending before the 4th Respondent are dropped and 3rd Respondent's seizure order dated 23.09.2015 is revoked, the Liquidator will not be able to sell the assets which are covered by the Customs Prohibitory order and to realize the proceeds for distribution as contemplated under IBC, 2016.

18. It was further submitted that as per the mandate of Section 36(2) of the Code, the Liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors. Further, going by Section 36(3)(a) & (b) of the Code, all the assets of the Company under liquidation that may or may not be in possession of the



Company under liquidation including the encumbered asset shall from part of the liquidation estate of the Company under liquidation.

19. The Learned Counsel for the Liquidator also submitted that by virtue of order made on 23.02.2018 by the 2nd Respondent, the first relief in this application had become infructuous. Therefore, he prayed to allow the 2nd prayer made in the application and to pass appropriate orders. The Learned Counsel for the Liquidator has relied on the following judgments in support of his submissions:

- Hon'ble Supreme Court order dated 10.08.2018 made in the matter of *Pr. Commissioner of Income Tax Vs Monnet Ispat and Energy Limited* (Special Leave to Appeal (C) Nos 6483/2018) for the proposition that section 238 of the Insolvency and Bankruptcy Code, 2016 will override anything inconsistent contained in any other enactment, including the Income Tax Act.

20. The Respondents filed a common written submissions and submitted that in the present case, the company in liquidation had availed the benefits under the EPCG Scheme and other related schemes/notifications, but, failed to pay the requisite custom duty and without payment of requisite custom duty, the company in liquidation cannot claim title to the goods which are in the Respondent's custody.

21. It is stated in the written submissions that the Company in Liquidation had imported the Capital goods in the year 2011 and

CIRP was initiated in 2019 and thereafter liquidation was ordered in the year 2020. It is submitted that by not paying the Customs Duty and other charges and not taking clearance, the Company in liquidation is deemed to have lost/relinquished its title to the imported goods, in terms of Section 45, 48 & Section 72 of the Customs Act and in view of the same, the Customs Department is empowered to sell the goods and to recover the Government dues. The Respondents in support of their submissions relied upon the following judgment:

- Hon'ble NCLAT judgment in the matter of **Central Board of Indirect Taxes and Customs vs Sundaresh Bhatt, Liquidator of ABG Shipyard and Ors. Company Appeal (AT) (Insolvency) No. 236 MANU/NL/0511/2021** for the proposition that *goods imported by the Corporate Debtor were imported much before the initiation of the Corporate Insolvency Resolution Process, and the Corporate Debtor never claimed them after import. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed on April 25, 2019. Therefore, the Corporate Debtor's assets because the Corporate Debtor never made any effort for clearing the goods by paying Customs Duty and other applicable charges before the initiation of Liquidation proceeding after importing them. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed in April 25, 2019. Therefore the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor. The Liquidator intends to possess the uncleared goods from the customs warehouses without upfront payment of Customs duty, which is against the statutory provisions of the Customs Act, 1962. Therefore, the imported goods subject to levy of Customs stand on a different footing than the goods/assets, not in the Corporate Debtor's possession. Therefore the assets*

lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor. Based on the above discussion, we believe that the Adjudicating Authority committed an error in directing the release of goods without paying customs duty and other applicable charges. Thus Appeal deserves to be allowed."

22. In view of the above judgment, the Respondents pray for the dismissal of the application.

23. We have heard the submissions and also perused the pleadings.

24. The Liquidator contended that the capital goods of the Company in liquidation form part of larger liquidation estate and appropriation of the said assets by the Respondents alone would tantamount to fraudulent preference which will not only prejudice the interests of the Company under liquidation, but also the other creditors, shareholders and the stake holders of the Company under liquidation. *Per contra*, the Respondents contended that the Company under liquidation had availed EPCG scheme and upon its failure in the EPCG scheme, it has not remitted the customs duty to the Respondents as per the terms of EPCG scheme. Therefore, the capital goods seized by the Respondent could be sold by the customs authority and appropriate its proceeds for the customs duty payable by the Company in liquidation.



25. While this being the scenario, a question fell for our consideration is as to whether the case law cited by the Respondents i.e. NCLAT judgment in the matter of **Central Board of Indirect Taxes and Customs vs Sundaresh Bhatt, Liquidator of ABG Shipyard and Ors.** would come to their rescue or not. In the said matter, the capital goods imported by the Company was under the custody of the Customs and they were kept in the ware-houses of customs, whereas in the present case the capital goods imported were kept in the godown of the Company under liquidation. In the said case, the Company had completely relinquished the right over the capital goods and in the case in hand, it cannot be deemed that the company under liquidation had relinquished the right over the capital goods as they are in the custody of the Company under liquidation. In the case in the hand, the Company under liquidation was in a piquant situation. It is a fact on record that the Company in liquidation initially proposed to setup the project at the Haldia District, West Bengal and upon the declaration of the Ministry of Environment and Forests that the said district is critically polluted, the Company under liquidation was advised to find suitable alternate location for its project. Thereafter, the Company had shifted the project to the State of Odisha where the State Government has allotted land. It is pertinent to note that in view of the same, the Respondents allowed the Company in liquidation to shift the capital goods imported from Haldia to Jajpur (Odisha) and they were kept

in the godown of the Company under liquidation not in any of the bonded warehouse of the Customs. Unfortunately, the Government of Odisha allotted land twice and subsequently withdrew the same which caused filing of writ petition before the Hon'ble High Court of Odisha.

26. It is also on record that the Company under liquidation had approached the Respondents for its extension of EPCG scheme and requested the 1st Respondent to consider for a total waiver of the Export obligation or extend the period of Export obligation from the date of physical allotment of land. Considering the request, the 1st Respondent informed the Company under liquidation that it is proposed to take up the request in the EPCG committee meeting to be held on 12.07.2018, however, the 1st Respondent has not informed the decision of the EPCG Committee upon the said request and the said request is still pending. It is also on record that the Company under liquidation appeared before the 4th Respondent and apprised them of the pending request before the 1st Respondent. Further, on the request of the Company under liquidation, the 4th Respondent had also kept the proceeding under abeyance. On the other hand, the decisions in *Prem Lal Dhar vs. Official Assignee* (1987) ILR 25 Cal. 179 (P.C.) relied in the *Ananta Mills Limited (In Liquidation) vs. City Deputy Collector, Ahmedabad* (1972) 42 Company Cases 476 and *Leo Edibles & Fats Limited vs. The Tax*

Recovery Officer (Writ Petition No.8560 of 2018 decided on 26.07.2018 by the Division Bench of the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh) reveal that mere levy of attachment does not create any interest in the property in favour of the tax authorities; attachment simpliciter of the properties of a company, which was subsequently ordered to be wound up, without any further action being taken would be of no consequence or effect against the official liquidator and the property could be disposed of by the official liquidator, wholly ignoring the attachment; even if the order of attachment constitutes an encumbrance on the property, it still does not have the effect of taking it out of the purview of section 36(3)(b) of the Code and the attachment cannot be a bar for completion of the sale under the provisions of the Code and the tax authorities have to only submit the claims to the liquidator for consideration as and when the distribution of assets in terms of section 53(1) of the Code is taken up.

27. Accordingly, in the instant case, even though the attachment had been made by the Respondents prior to the initiation of the CIRP and order for liquidation of the company under liquidation, in view of the above consistent position of law, as the authorities have not created any title over the imported goods either in their or any third



parties' favour, there is no prohibition to include the said properties into the liquidation estate.

28. The Learned Counsel for the Liquidator rightly said that the circumstances in the company in liquidation is a 'force majeure' situation and it had taken every step to commence the project, however, the succeeding in the task was out of their control. It is on record that the 1st Respondent till date has not come out with the result of the EPCG meeting held on 12.07.2018 and the 4th Respondent had also kept the proceeding under abeyance. The Respondents did not deal with the said points in their written submissions. The persons who have failed to inform the Company about the result of their decision which are in their powers cannot be allowed to have the right over the capital goods of the Company under liquidation. It is also a fact on record that the Respondents even after repeated reminders of the Liquidator had not filed their claims so far and hence the said assets would form part of the Liquidation estate.

29. In view of the above, in our considered view the case law cited by the Respondents is not applicable for the present case as the facts and circumstances of the said case are completely different from the facts and circumstances of the present case. Therefore, we are inclined to allow the application and accordingly we allow the

application. Therefore, the 3rd Respondent is hereby directed to revoke its seizure order dated 23.09.2015 against the capital goods of Corporate Debtor and make the capital goods available to the Liquidator for sale. All the Respondents are at liberty to file their claims before the Liquidator and he is directed to deal with the claims, if filed, as per the provisions of the Code and other applicable law.

30. With the above directions, the application stands **disposed of**.

-SD-

ANIL KUMAR B
MEMBER (TECHNICAL)

-SD-

Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)