

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1221 OF 2021

Under Section 53 of Insolvency &
Bankruptcy Code, 2016

Avil Menezes
Liquidator of Sunil Hitech Engineers
Limited

...Applicant

V/s

Directorate of Revenue Intelligence &
Another

...Respondents

In the matter of
C.P.(IB) No. 2295/MB/2018
American Express Bank Corp.

.... Financial Creditor

Vs.

Sunil Hitech Engineers Limited

...Corporate Debtor

Order delivered on: 01/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant

: Mr. Prakash Shah, Advocate

For the Respondent : Mr. Viraj Parikh, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application IA 1221/2021 was filed on 01.06.2021 by Avil Menezes, the Liquidator (“Applicant”) in the Corporate Insolvency Resolution Process (“CIRP”) in the matter of M/s Suni Hi-tech Engineers India Limited [In Liquidation] (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 ("Code"), for direction to Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai (“Respondent No. 1”), and The Assistant Commissioner of Customs (I), Office of the Commissioner of Customs, Mumbai (“Respondent No. 2”) to permit sale of Assets belonging to the Corporate Debtor under their detention, and to distribute the proceeds thereof in terms of Section 53 of the Code.
2. The Corporate Insolvency Resolution Process against the Corporate Debtor commenced pursuant to an Order dated 10/09/2018 in CP(IB)2295(MB) /2018, and the Respondent was appointed as the Liquidator of the Corporate Debtor by this Tribunal vide the liquidation Order dated 25/06/2019.
3. In the year 2008, the Corporate Debtor purchased certain second-hand cranes along with its parts on high seas (hereinafter referred to as "said Assets") from Pratham Industries and Dharmesh Steel. As per the High Seas Sale Agreement entered into with the said two sellers, the Company had paid the price as mentioned therein.

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C.P.(IB) No. 2295/MB/2018

3.1. The said goods were subjected to Custom assessment and were cleared for Home Consumption. However, after assessment and clearance of the Assets, Respondent No.1 issued various show cause notices ("SCNs") from time to time and vide its order dated 24th July 2014, 09 June 2016 and 31 March 2017, Respondent No.2 confiscated certain assets forming part of the said Assets. These orders were challenged before Customs Excise and Service Tax Appellate Tribunal ("CESTAT") in the following appeals, which are stated to be pending till date –

Sr. No.	SCN Details	Amount involved
1.	Order No.85/2014/CAC/CC(I)/AB/Gr-V bearing F No. S/10-Adjn-13(CC)/Gr.V/2013-14 dated 24 th July 2014	4,40,77,802.00
2.	Order No.21/RT/PC/2016-17 CAO No. 46/2016-17 bearing F No. S/10-Adjn-185(CC)/Gr.V/202-13 dated 31 st March 2017	47,06,707.00
3.	Order No. ADC/BT/18/15-16/ADJ/NCH bearing F.No. S/10-ADJ(ADC)-	1,04,41,913.00

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 1221 OF 2021

In

C.P.(IB) No. 2295/MB/2018

	170/2012-13 dated 09 th June 2016	
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3.2. Subsequent to the passing of the liquidation order dated 25 June 2019, the Applicant made a public announcement which was published in two newspapers namely Mumbai Edition of Business Standard and Navshakti Times on Monday, 1st July 2019 where the Registered Office of the Company is situated and in Nagpur Edition of Loksatta and Times of India where the Corporate Office of the Company is situated for inviting claims from stakeholders as per Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations").

3.3. The Applicant submits that pursuant to the public announcement, the Applicant was in receipt of Form C dated 24 August 2020 ("Form-C") from the Respondent for Rs. 7,43,38,012/- (plus Redemption Fine, Penalty & Interest for remaining three cases pending for adjudication). The Applicant submits that the Applicant vide its letter dated 4th December 2020 explained to the Respondents that it is unable to admit their claim due to pendency of disputes before CESTAT and Respondent No 1.

3.4. The Applicant submits that Applicant is to take custody of the assets of the corporate debtor and sell the immovable and movable property and actionable claims of the Corporate Debtor in liquidation by public auction of private contract and

distribute the same in accordance with Section 53 of the Code. Therefore, in this regard, it is imperative for the Applicant to take custody of the Assets and sell the same as per the provisions of the Code and its applicable regulations and distribute the same in accordance with Section 53 of the Code.

4. The Respondent No. 2 has filed reply dated 23.11.2021 stating that three Orders passed by their office are contested by the Applicant in Appeal before CESTAT and the same is pending. Besides this, three show cause notice issued by Respondent No. 1 were remanded back by CESTAT for fresh adjudication and the same are pending before Customs Department. The Respondents have confiscated Six Cranes. However, demand in respect of Cranes at Sl. No. 3,5 and 6 is contested before CESTAT but no stay has been granted. As regards Crane no. 1,2, and 4, the Order determining differential duty was remanded back by first appellate authority and matter is under adjudication, though these cranes were also confiscated, the details of cranes and its status are stated as Table 3 at Page 340 to 342 of the Reply.

- 4.1. The Respondent has also stated that the communication dated 4.12.2020, among other things, only makes a request to hand over the assets i.e. the cranes impugned in the above mentioned show cause notices, for disposal as per the provisions of the Code, however, it does not show any refusal from the Applicant to consider the claim submitted by the Respondent No. 2 in form 'C', and the confiscated assets are not assets of the Corporate debtor and ownership of these goods vest with Government of India and thus these cannot be liquidated under IBC, 2016.

5. We have heard the Counsel and perused the material available on record.

5.1. We find that the assets, in question, came to be seized by the Respondents on the ground of improper importation of goods in India in terms of Section 111 of the Customs Act, 1962. It is not the case of the Respondents that these goods fall under the category of Prohibited or Restricted Goods. Accordingly, these goods can be redeemed by the Importer on payment of the redemption fine in terms of provisions contained in Section 125 of the Customs Act, 1962, which reads as under –

Option to pay fine in lieu of confiscation.—

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit: Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.

5.2. The Respondent have admitted this fact in the claim form C that the Corporate Debtor is liable to pay redemption fine, which is yet to be determined, meaning thereby that the Respondents may have claim qua Corporate Debtor in respect of improper importation of goods in the form of Custom Duty, Interest, Penalty and Redemption Fine but can not claim the ownership thereupon. It is not the case of the Respondents that the Confiscation had become absolute as on the date of commencement of CIRP.

5.3. At this juncture, we find that Hon'ble Supreme Court in the case of *Sundresh Bhat v. Central Board of Indirect Taxes and Customs, 2022 SCC OnLine SC 1101* held that CBIC can only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive. The Court also took note of the fact that issuing a notice under Section 72 of the Customs Act for non-payment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor under Section 35(1)(b) of IBC. On the other hand, the authorities under the Customs Act have a limited jurisdiction to determine the quantum of operational debt in order to stake claim in terms of Section 53 of the IBC before the liquidator. CBIC does not have

the power to execute its claim beyond the ambit of Section 53 of the IBC.

5.4. Accordingly, the claim of the Respondent that the confiscated goods vests in the Central Government is incorrect as the confiscation had not become absolute on the date of commencement of CIRP in this case. In the case of *MMTC v Surjit Singh Kanda 196 (2013) DLT 725 (DB)*, the Hon'ble Delhi High Court had held that the confiscation of the imported goods under the Act is done only as a means to recover its dues by the Department and does not vest unconditional right, title and interest in such confiscated goods in the Department.

5.5. In view of the foregoing discussion, we are of considered view that the Respondent ought to be directed to release the goods under confiscation with them within one month from the communication of this Order, and determine the quantum of redemption fine payable by the Corporate Debtor, which shall be admitted by the Applicant as their claim, in addition to the amount what has already been admitted by the Applicant. However, it is made clear since that the redemption fine is payable as a condition precedent to release of goods, the Applicant shall admit the claim of redemption fine as Secured Creditors.

6. In view of the foregoing, IA 1221 of 2021 is disposed of as allowed.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)