THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

M.A. 4018 OF 2019

Under Section 19(2) of Insolvency & Bankruptcy Code, 2016

Mr. Ashish Chhawchharia,
Resolution Professional

…Applicant

Vs.

Commissioner of Customs (Import) & Others

…Respondents

In the matter of

C.P.(IB) No. 2205/MB/2019

State Bank of India

…Operational Creditor

Vs.

Jet Airways (India) Limited

…Corporate Debtor

Order delivered on: 02.01.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances

For the Applicant	:	Mr. Rohan Rajadhyaksha, Advocate
For the Respondent 1	:	Ms. Maya Majumdar, Advocate
For the Respondent 2 to 4	:	Mr. Advait M. Sethna, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application MA 4018/2019 is filed by Sh. Ashish Chhawchharia, Erstwhile Resolution Professional ("Applicant") of Jet Airways (India) Limited ("Corporate Debtor")
under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code"), seeking directions against Respondent Nos. 1 to 4 directing them to not dispose off in any way the assets of the Corporate Debtor held by them and co-operate in handing over the assets detained by them in the customs bonded warehouse and further. The Respondents are the Commissioner of Customs (Import) having offices at Chennai, New Delhi, Raigad and Mumbai. The Applicant has sought following reliefs :

   a. Direction to the Respondent Nos. 1-4 to release the assets of the Corporate Debtor with immediate effect;
   b. Direction to file the claim for the pending dues in the proper format in Form B to the Resolution Professional as per the provisions of the Code.

2. Pursuant to commencement of Corporate Insolvency Resolution Process ("CIRP") and Admission Order dated 20.6.2019, the Applicant began taking custody and control of assets of Corporate Debtor in accordance with Section 18(1) (f)(ii) of the Code.

3. The Applicant has filed additional affidavit to place on record the Additional Documents with regard to the subsequent developments in the matter which took place after filing of the present application and additional affidavit dated 30.1.2020. Only Respondent No. 1 has filed the Reply as well written submissions.

Goods lying with Respondent No. 1

4. On August 28, 2019 the Applicant intimated Respondent No. 1 of the commencement of CIRP and Admission Order and asked to handover custody of assets of the Corporate Debtor worth INR 18,41,702/- and file his claims as per as per the provisions of the Code. On October 25, 2019, the Applicant was informed that the relevant department has been informed however, post that the Applicant has received no response despite several emails being sent.
   4.1. The Respondents No 1 has not submitted their claims as per the provisions of the Code.
   4.2. The Corporate Debtor had imported goods under three Bill of Entry filed by it pertaining to three UCC Lot files viz., Lot No. 20/2020, Lot No. 23/2020 and Lot No. 27/2020, of which earlier two lots have already been auction by the Respondent No. 1 in terms of provisions of Section 48 of the Customs Act, 1962 prior to commencement of CIRP. As regards third lot i.e. 27/2020, the auction could not be concluded in view of pending CRCL report.

4.3. Section 48 of the Customs Act, 1961 reads as follows –

Section 48. Procedure in case of goods not cleared, warehoused, or transhipped within 1 [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 within thirty days from the date of the unloading 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).

4.3.1. We find that goods were imported prior to commencement of CIRP and notice in terms of Section 48 of the Customs Act, 1962 was issued to the Corporate Debtor, prior to commencement of CIRP vide notice(s) dated 17.05.2019, 1.6.2019, and 01.6.2019 (finally on 29.6.2019) and CIRP commenced on 20.6.2019. Section 48 vests the powers in the Proper Officer of the Customs

Department to auction the unclaimed goods after following due procedure. We find that due procedure was concluded prior to the commencement of CIRP in case of Lot No. 20/2020, and Lot No. 23/2020 and the goods under these lots have already been auctioned. Accordingly, we are of considered view that these goods cannot be claimed by the Applicant. However, as regards Lot No. 27/2020, we find that final notice was issued on 29.6.2019 after the commencement of CIRP, accordingly the Respondent No. 1 could not have initiated the process of auction to recover the dues of various claimants in relation to these goods. Undisputedly, the Respondent No. 1 has a lien over such goods for the claim of customs duty and other charges of custom house station and the Resolution Plan in relation to Corporate Debtor has already been approved by this Tribunal, we are of the considered view that their claims stands extinguished.

4.3.2. We further find that the Honourable Supreme Court in the case of ***Sundaresh Bhatt, liquidator of ABG Shipyard versus CBIC, in Civil Appeal No 7667 /2021***, which quotes the decision of the Hon'ble Apex Court in Gujarat Urja Vikas Nigam Ltd. versus Amit Gupta at paragraph 49 stated that "*position cannot be assumed or deemed. In the case at hand no such adjudication on notice has been placed on record to suggest that such abandonment of the warehouse goods had taken place prior to the imposition of the moratorium*". The Respondent has disputed this position of law stating that it Honourable court while expressing its reservation in the judgement in paragraph number 49 have mentioned "*the* *position cannot be assumed or deemed. In the case at hand no such adjudication on notice has been placed on record to suggest that such abandonment of the warehouse goods had taken place prior to the imposition of the moratorium*". The Respondent has further pleaded that "*the deemed relinquishment happened by operation of law before initiation of CIRP of jet Airways, thereby satisfying para 49 of the above Sundaresh Bhatt (Supra) judgement".*

4.3.3. We find that the Hon'ble Supreme Court in Para 43 & 44 of Sundraresh Bhatt (Supra) judgement observed that *"In the above context, the judgment of this Court in S.V. Kondaskar v. V.M. Deshpande, AIR 1972 SC 878, is extremely relevant. In that case, this Court, while expounding the interplay of Section 446 of the Companies Act 1956 (bankruptcy provision) with the Income Tax Act,1961, held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context".*

4.3.4. The Hon'ble Supreme Court further held that "*However, the respondent does not have the power to execute its claim beyond the ambit of Section 53 of the IBC. Such harmonious construction would be in line with the ruling in Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta (2021) ibclaw.in 44 SC, wherein a balance was struck by this Court between the jurisdiction of the NCLT under the IBC and the potential encroachment on the legitimate jurisdiction of other authorities".*

4.3.5. Finally, the Hon'ble Supreme Court at Para 49 held that "*Before any goods can be declared to have been "abandoned", the same must be adjudged by some authority after due notice. The position cannot be assumed or deemed. In the case at hand, no such adjudication or notice has been placed on record to suggest that such abandonment of the warehoused goods had taken place prior to the imposition of the moratorium. Accordingly, we direct the Respondent No. 1 to release these goods*".

4.3.6. We find that, in the present case, the final notice dated 29.6.2019 was after the commencement of CIRP, the Custom Authorities can not proceed further to auction the goods, hence we direct them to release the goods under Lot No. 27/2020.

4.4. The Applicant further states that Respondent No. 1 has demanded IGST in the amount of Rs. 2,25,990/- (Rupees Two Lakhs twenty five thousand nine hundred and ninety only), being amount paid @ 12% instead of 18% alleging that the imports goods exigible to 18% IGST in terms of Schedule III Sl. No. 153A of the IGST Notification 01/2017 dated 28.6.2017; and has also confiscated certain assets belonging to the Corporate Debtor, i.e. "Air Sickness Bags" under section 111(m) of the Customs Act, 1962 vide Order dated 31.12.2022.

4.4.1. We find that Section 111(m) of the Customs Act, 1961 any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54 liable for confiscation.

4.4.2. It is the case of Respondent that the Corporate Debtor was intimated of its obligation to pay differential duty vide letter dated 26.02.2019 and has also relied upon one letter dated 25.03.2019 from the one of officer of Corporate Debtor that the differential duty will be paid by them through online. The Respondent has passed Order in Original dated 31.12.2022 for the aforesaid confiscation and demand of IGST stating that "*Since the present notice and claims arising there from were not included as operational creditors at ICD, so, no fresh claims can be raised now for activities undertaken prior to 19th June, 2019. Accordingly, they have requested to withdraw the notice. But however claim from SIIB was on 16.02.2019 which is before their Insolvency Commencement Date (ICD) i.e. 20.6.2019*".

4.4.3. We find that the demand for the aforesaid duty was raised prior to the Insolvency Commencement Date and that must be part of the records of the Corporate Debtor. We further find that such non-payment of duty has resulted into confiscation of goods on the ground of misdeclaration as contemplated u/s 111(m) of the Customs Act, 1962. Since, the goods imported by the Corporate Debtor, though belonged to him, can be brought into India only after payment of Customs Duty and IGST payable thereon and as payment of customs duty is a consequence of importing the goods rather than a liability on the Corporate Debtor to pay it, there remains a charge over goods under importation in relation to payment of IGST. However, in terms of provisions of section 14 of the Code, continuation of pending proceedings against the corporate debtor, except for determination of amounts payable by the Corporate Debtor, is barred and accordingly, no order for confiscation could have been passed by the Respondent No. 1. Accordingly, we consider it appropriate to direct the Respondent No. 1 to release the goods. Since, the claim of the Respondent No. 1 was made prior to Insolvency Commencement Date and the Respondent No. 1 has charge over such goods for appropriation of goods, we allow the release of these subject to payment of IGST of Rs. 2,25,990/-.

Goods lying with Respondent No. 2 & 3

5. On August 28, 2019 the Applicant intimated Respondent No. 2 and Respondent No. 3 of the commencement of CIRP and Admission Order and asked to handover custody of assets of the Corporate Debtor worth INR 49,68,922/- and INR 26,21,560/- respectively. The Applicant has also requested the respondents to file their claims as per as per the provisions of the Code. The Applicant has received no response despite multiple reminders in the form of emails and letters sent to Respondent No. 2 and Respondent No. 3.

5.1. The Applicant has further apprised vide Additional Affidavit stating that the Respondent had issued letter dated 08.08.2020 seeking confirmation of payment of two demands raised vide Order ref no. 210/2019-20/AS/DC/ACC/Import dated 10.12.2019 for Rs. 2,35,402/- (along with interest) and Order ref no. 101/2020/AS/DC/ACC Import dated 19.3.2020 for Rs. 2,00,030/- (along with interest). The imports took place prior to insolvency commencement date in relation to these two orders and the goods were lying with the Customs Department.

5.2. The Respondent No. 2 is stated to have passed another Order dated 3.5.2023 demanding a sum of Rs. 3,84,24,239/- in respect of Corporate Debtor's assets imported prior to insolvency commencement date. These demands were raised in the proceedings arising from "Post clearance Audit".

5.3. The Respondents No 2 & 3 have not submitted their claims as per the provisions of the Code.

5.4. In view of Sundraresh Bhatt (Supra) judgement, we have no hesitation to hold that the Respondents can not detain the goods, and are obligated to release the same. As regards their demands, we find that these demands pertain to imports made prior to Insolvency Commencement Date, and the demands for these claims has been raised after commencement of CIRP. Since, the Respondents have not filed any claim so far, their claims stand extinguished pursuant to approval of Resolution Plan in the case of Corporate Debtor by this Tribunal. Accordingly, these claims can not be sustained as has been held by Hon'ble Supreme Court in Sundaresh Bhatt (Supra) that "*The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act*".

Goods lying with Respondent No. 4

6. On August 28, 2019 the Applicant intimated Respondent No. 4 of the commencement of CIRP and Admission Order and asked to handover custody of assets of the Corporate Debtor worth INR 23,12,79,331/- and file his claims as per as per the provisions of the Code. On October 31, 2019, Respondent No. 4 rejected the request of the Applicant stating that imported goods lying unclaimed under section 48 of the Customs Act, 1962 are not subject to the provisions of the Code.

6.1. The Applicant has further apprised vide Additional Affidavit stating that the Respondent issued a show cause notice dated March 25, 2022 asking the Corporate Debtor to show cause as to why differential duty amounting to Rs. 20,47,67,247/- for the period July 2017 to December, 2020 on the goods imported by Corporate Debtor be not recovered, however no order is stated to have been passed. Further, the cost recovery charged demanded for the period from 1.4.2019 to 16.4.2021 have been paid in full.

6.2. The Respondents No 4 has submitted their claims for Rs. 1,68,16,818/- as per the provisions of the Code and the same has been admitted in full by the Applicant.

6.3. In view of Sundraresh Bhatt (Supra) judgement, we have no hesitation to hold that the Respondents can not detain the goods, and are obligated to release the same. As regards their demands, we find that these demands pertain to imports made prior to Insolvency Commencement Date. The demands for cost recovery from 1.4.2019 has already been paid, and demand prior to that period has been admitted as claim. No final order has been passed in relation to Show cause notice dated 25.03.2022 and even if any order has been passed, no claim can be raised against the Corporate Debtor in view of facts all such claims shall stand extinguished after the approval of the Resolution Plan in the matter of Corporate Debtor. Accordingly, the claims to the extent not made in accordance with the Code, can not be sustained as has been held by Hon'ble Supreme Court in Sundaresh Bhatt (Supra) that "*The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act*". As regards claim filed in CIRP process, the same shall be dealt with in accordance with the approved resolution plan. The Respondents shall release the goods, if any, pending settlement of their claims.

6.4. In view of the foregoing, MA 4018 of 2019 is disposed of as partly allowed.

Sd/- **Sd/-**

Prabhat Kumar
Member (Technical)

Justice V.G. Bisht
Member (Judicial)