NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

TA (AT) NO. 174/2021
(Company Appeal (AT) (Ins.) No. 1011/2020)

[Arising out of the Impugned Order dated 09.10.2020 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad in I.A. No. 487/2020 in CP (IB) No. 492/7/HDB/2019]

In the matter of:

Central Transmission Utility of India Ltd.

Plot No. 2, Sector 29, Gurgaon, Haryana,

122001.

...Appellant

Versus

1. Mr. Summit Binani
Resolution Professional
Of KSK Mahanadi Power Company Limited,
4th Floor, Room No. 6, Commerce House 2A,
Ganesh Chandra Avenue, Kolkata-700013.

2. Power Finance Corporation
Having its office at
URJANIDHI, 1, Barakhamba Lane,
Connaught Place, New Delhi-110001.

...Respondents

Present :

For Appellant : Mr. ARL Sundaresan, ASG
for Mr. Joshua Samuel, Advocate.

For Respondents : Mr. Vaijayant Paliwal, Ms. Charu Bansal
& Ms. Kirti Gupta, Advocates For RP/ R1

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

The present appeal has been filed by the Central Transmission Utility of India Limited (earlier Power Grid Corporation of India. The substitution was allowed vide order dated 30.06.2021) against the order dated 09.10.2020 of the National Company Law Tribunal, Hyderabad, passed in Interim Application bearing no. 487/2020 in CP (IB) No. 492/7/HDB/2019.

2. Briefly, the facts of the case are that KSK Mahanadi Power Company Limited (hereinafter called the **'Corporate Debtor** or **CD'**) is a company engaged in business of power generation. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (hereinafter called the **'CIRP'**) on 03.10.2019.

3. The following events prior to the CIRP are relevant for decision in this case:

Date	Particulars
05.12.2012	KSK Mahanadi Power Co. Ltd. ("**Corporate Debtor**") entered into a Transmission Service Agreement ("**TSA**") with CTUIL for transmitting power from generating point to point of distribution companies in certain states.
01.08.2018	CTUIL issued a notice to the Corporate Debtor for termination of the TSA on account of non-opening of the requisite letter of credit ("**Termination Notice**").
30.10.2018	The Termination Notice was challenged before the Central Electricity Regulatory Commission ("**CERC**") wherein the Corporate Debtor was directed to open a letter of credit of Rs. 108.44 crores.

08.02.2019	**The aforementioned proceedings were disposed of as infructuous as the Corporate Debtor had made a cash deposit of Rs. 108.44 crores in lieu of the letter of credit.**

4. Following events subsequent to the initiation of the CIRP on 03.10.2019 are relevant:

Date	Particulars
03.10.2019	**CIRP commenced against the Corporate Debtor.**
03.01.2020	CTUIL issued a notice of regulation of electricity to the Corporate Debtor for making defaults
03.01.2020	CTUIL filed its claim with the Resolution Professional for an amount of Rs. 356.41 crores.
21.01.2020	The above notice of regulation was challenged before the CERC wherein the Corporate Debtor was directed to pay Rs. 100 crores along with current transmission charges.
22.01.2020 and 7.02.2020	In compliance with the order dated 21.01.2020, the Corporate Debtor deposited the amount of Rs. 100 crores in instalments.
28.03.2020	**CTUIL invoked the security deposit of Rs. 108.44 crores for adjustment of the same against the outstanding amounts for pre-CIRP period.**
03.06.2020	CTUIL issued another notice on regulation of power supply w.e.f. 18.06.2020. On the same day, CTUIL issued another notice asking the Corporate Debtor to open a letter of credit for an amount of Rs. 134.71 crores.
22.06.2020	The Corporate Debtor filed an application bearing number I.A. No. 487 of 2020 challenging the notices dated 03.06.2020 and the action of CTUIL to adjust the security deposit of Rs. 108.44 crores against pre-CIRP dues.

09.10.2020	The Ld. NCLT vide the Impugned Order held that such appropriation of security deposit after initiation of CIRP was in contravention to the provisions of the Code. CTUIL preferred the present appeal assailing the Impugned Order.

5. In the impugned order dated 09.10.2020, the Ld. NCLT has noted the facts of the case as under:

a. One of the Financial Creditors (Power Finance Corporation Limited) had filed application for initiation of CIRP which was admitted and Mr. Mahendra Kumar Khandelwal was appointed as Interim Resolution Professional (**IRP**) and subsequently was replaced by Mr. Summit Binani as Resolution Professional (**RP**).

b. The Corporate Debtor, along with other generators in the state of Chhattisgarh and Chhattisgarh Power Trading Company Limited had entered into a Bulk Power Transmission Agreement dated 24.02.2010 with Power Grid Corporation of India Limited (**PGCIL**) in terms of the then applicable Regulations for transmission of power to its beneficiaries. The Corporate Debtor had also entered into Transmission Service Agreement (**TSA**) dated 05.12.2012 with the Appellant.

c. During the CIRP of Corporate Debtor, PGCIL issued notice for cessation on 31.12.2019 terminating the TSA on account of default. PGCIL accepted the clarification given by the Corporate Debtor and the PGCIL cessation notice became infructuous.

d. The PGCIL vide letter dated 03.01.2020 issued notice of Power Regulation for quantum of 500 MW. The Central Electricity Regulatory Commission (**CERC**) vide its record of proceedings dated 21.01.2010 in Petition No. 113/MP/2020 directed PGCIL not to regulate the power supply as long as Corporate Debtor makes the payment of Rs. 100 crores and maintains outstanding dues of more than 45 days to PGCIL at less than Rs. 122 crores as a consequence, the Corporate Debtor remitted Rs. 100 crores as payment towards outstanding amounts with the payments of regular bills and power regulation notice was lifted.

e. The Corporate Debtor had made a security deposit for an amount of Rs. 108.44 crores with PGCIL in accordance with its obligations. On 28.03.2020, PGCIL sent an email to the Corporate Debtor stating that it has unilaterally encashed the payment security mechanism maintained by the Corporate Debtor for an amount of Rs. 108.44 crores and adjusted the amount towards transmission charges outstanding.

f. The Corporate Debtor clarified that the payment of Rs. 100 crores was made by it to PGCIL, and the Corporate Debtor was maintaining outstanding dues bill at less than of Rs. 122 crores. Earlier invoices raised by PGCIL are currently in dispute in CERC No. 113/MP/2020, despite this, the PGCIL encashed the security deposit.

g. The PGCIL had filed claim as an 'Operational Creditor' with the Resolution Professional and the Resolution Professional had allowed the said application. This being the case, the action of PGCIL in enforcing the security mechanism of

Rs. 108 crores against outstanding payments of the pre-CIRP period is against the provisions of Code.

h. It was noted that moratorium has been declared in view of Section 14 of the IBC, 2016 on admission of Corporate Debtor in CIRP on 03.10.2019 and any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property is specifically prohibited under Section 14 of the Code.

i. The Ld. NCLT, through order dated 09.10.2020 held the action of Operational Creditor to be in violation of Section 14 and directed it to adjust the appropriated 'payment security' towards the post CIRP dues. The relevant para of the order is reproduced below:

> *"7. The appropriation of the security deposit available with an Operational Creditor on 28.03.2020, i.e., after the date of initiation of CIRP towards pre-CIRP dues is impermissible and contrary to the provisions of the IB Code, 2016. Accordingly, this Adjudicating Authority declares that the invocation of payment security mechanism of Rs. 108.44 crores is contrary of Law and consequently, directs the PGCIL/R1 herein to adjust the appropriated payment security towards the post CIRP dues."*

6. Against the order dated 09.10.2020 of Ld. NCLT, the Appellant has claimed following reliefs:

> *"A. That this Hon'ble Tribunal may be pleased to quash and set aside the Impugned Order dated 09.10.2020 passed by the Hon'ble National Company Law Tribunal, Hyderabad, in Interim Application being IA No. 487/2020, in CP No. (IB) No. 492/7/HBD/2019, to the extent challenged;*
> *B. That this Hon'ble Tribunal be pleased to hold that the Appellant is entitled to adjust the amount of Rs. 108.44 crores as sought by the Appellant, against the pre CIRP dues of the*

Corporate Debtor in FIFO method as per the CERC Sharing Regulations 2010;
C. Such other orders or order be passed as the Hon'ble Tribunal may deem fit and proper."

7. In its written and oral submissions, the Learned Counsel for the Appellant submitted that the issue in the present case relates to adjustment of amount available with the Appellant towards pre-CIRP dues of the Corporate Debtor. The Corporate Debtor being generator had availed Open Access of the inter-state transmission system and in terms of Regulatory regime under the Electricity Act, 2003 read with CERC Sharing Regulations, the entities enter into agreement with the Appellant setting out the terms and conditions of such open access. The Appellant as Central Transmission Utility (**CTU**) is liable to raise bills and collect transmission charges on behalf of all inter-state transmission licensees.

8. The Regulatory regime of CERC provides for mechanisms to ensure payment to ensure proper functioning of national grid. The Transmissions Service Agreement (**TSA**) between the Corporate Debtor and the Appellant also provides for Letter of Credit (**LC**) and application of the procedure. There is no dispute to the effect that the Corporate Debtor is liable to pay transmission charges to the Appellant. Admittedly, the amount of Rs. 108.44 Crores was deposited by the Corporate Debtor as payment security mechanism and the same is for transmission charges dues payable by the Appellant as CTU, which were accordingly appropriated towards said dues and the said amount of Rs. 108.44 Crores was accordingly adjusted.

9. The Impugned Order, by not allowing the adjustment is denying the payment security mechanism which has been recognized as necessary in the CERC order. It was submitted that the Adjudicating Authority has exceeded its jurisdiction by directing not to adjust the said amount towards pre-CIRP dues, and instead to adjust it against the post CIRP dues. It is contended by the Appellant that 'FIFO method' (First In First Out) is the approved procedure in relation to transmission charges and the amount is first to be adjusted against the older dues. In terms of the regulatory regime under the Electricity Act, 2003 and CERC Regulations, the amount of Rs. 108.44 crores is first to be adjusted against old dues. Thus, the adjustment of security deposit cannot be limited to the post-CIRP dues and the impugned order is contrary to regulatory regime under the Electricity Act and CERC order dated 30.08.2018.

10. The Learned Counsel for the Appellant relied upon following decisions in support of his contentions:

- Embassy Property Developments Pvt. Ltd. v. State of Karnataka, 2019 SCC online SC 1542 (paras 26, 28, 30, 37-42, 46);
- Municipal Corporation of Greater Mumbai v. Abhilash Lal and Others, 2019 SCC online SC 1479 (Para 48);
- Indian Overseas Bank v. Arvind Kumar, Company Appeal (AT) (Ins.) No. 558 of 2020 dated 28.09.2020, (2020) SCC NCLAT 666;
- GAIL (India) Limited v. Rajeev Manaadiar, Company Appeal (AT) (Ins.) No. 319 of 2018, (2018) SCC NCLAT 374.

11. Through its oral and written submissions, the Learned Counsel for the Respondents submitted that once CIRP is initiated against the Corporate Debtor, a moratorium under Section 14 of the Code comes into effect, which restricts recovery of money from the Corporate Debtor. The Appellant had filed its claim

in Form B on 03.01.2020 to the tune of Rs. 356.41 crores out of which an amount of Rs. 98.75 crores had been admitted by the Resolution Professional, while remaining amount was paid by the Corporate Debtor before admitting the claims. Despite such admission of the claim by Resolution Professional, the Appellant enforced the security deposit of Rs. 108.44 crores and adjusted it towards pre-CIRP dues, which is in violation of Section 14 of the IBC, 2016.

12. In support of his contention regarding moratorium under Section 14 of the IBC, 2016, the Learned Counsel for the Respondents cited the following judgments:

- ABG Shipyard Liquidator v. Central Board of indirect Taxes & Customs, (2023) 1 SCC 472, paras 38, 40, 41, 44-48, 55;
- Nimitya Infotech (P) Ltd. v. Cox & Kings Ltd., 2022 SCC OnLine NCLAT 1350, para 14;
- Pradeep Kumar Kabra v. Commissioner, 2023 SCC OnLine NCLAT 1849, paras 9, 17, 18.
- Indian Overseas Bank v. Mr. Dinkar T. Venkatasubramanian, Resolution Professional of Amtek Auto Ltd., 2017 SCC Online NCLAT 584, paras 2, 3, 5, 6.

13. We have heard the Learned Counsel for the Appellant and the Respondents and have perused the records of the case, as well as the judgments cited.

14. Apparently, the issue for decision in this case is whether a deposit lying with a third party can be adjusted against pre-CIRP dues by it during the

moratorium which comes into effect immediately on admission of Corporate Debtor in CIRP, during the pendency of the said CIRP.

15. As soon as a company is admitted under CIRP, moratorium under Section 14 of IBC, 2016 triggers in. At this stage, it will be relevant to look into the provisions of Section 14 of IBC, 2016, which is reproduced below:

> ***"14. Moratorium.*** *- (1) Subject to provisions of sub-sections (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 judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing off 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.*
>
> *[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit,*

registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(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.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

[(3) The provisions of sub-section (1) shall not apply to —

[(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

(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."

16. The moratorium under Section 14 starts from the Insolvency Commencement Date, which is defined in Section 5(12) of IBC, 2016 as under:

"5(12). "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency

> resolution process by the Adjudicating Authority under section 7, 9 or section 10, as the case may be:"

Further, as per Section 14(1)(c), there is prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor. Sub-section (2) envisages that the Corporate Debtor will continue to run as a going concern and that supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during the CIRP, whereas Sub-section (2A) provides that the supply of essential goods or services shall continue except where Corporate Debtor does not pay the dues arising from such supply during the moratorium period.

17. At this stage, it is relevant to peruse Section 238 of IBC, 2016, which lays down as under:

> *"**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."*

18. We have considered the judgments cited by the Appellant. It is of relevance to refer to para 37 of the judgment of Hon'ble Supreme Court in **Embassy Property Developments Pvt. Ltd. v. State of Karnataka, 2019 SCC online SC 1542,** which is reproduced below for reference:

> ***"37.** From a combined reading of Sub-section (4) and Subsection (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the government under the provisions of MMDR Act, 1957 and the Rules issued there-under. The only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT.*

Clause [c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or In relation to insolvency resolution. But, a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5). Let us take for instance a case where corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/ Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore, the jurisdiction of the NCLT delineated in Section 60 (5) cannot be stretched so far as to bring absurd results. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). The moment the dues to the Government are crystalized and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT.)"

(Emphasis supplied)

19. It is clear that this judgment relates to the power of NCLT under Section 60(5)(c). The later part of the said paragraph strengthens the case of the Respondent, instead of the case of the Appellant as it states that once a liability is fastened on the Corporate Debtor by any statutory authority, the dues payable to the Government will come within the meaning of the expression of Operational Debt and the claim of the Government will have to be adjudicated and paid only

in the manner prescribed in the resolution plan, as approved by the Adjudicating Authority. Apparently, the pre-CIRP dues have to be paid in a manner prescribed in the resolution plan.

20. The 2nd case cited by the Appellant had relied upon in the case of **Municipal Corporation of Greater Mumbai v. Abhilash Lal and Others, 2019 SCC online SC 1479,** wherein he had relied upon paragraph 48, which is reproduced below:

> ***"48.*** *In the opinion of this court, Section 238 cannot be read as overriding the MCGM's right - indeed its public duty - to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. This court is of opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question-which undeniably are public properties. The resolution plan therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)."*

21. In the aforesaid case, the Court has held that Section 238 will be of importance when the properties and assets of the Corporate Debtor are involved

and not when the assets of the 3rd party like MCGM is involved. The present case is regarding security deposit, which till it is adjusted, remains the property of the Corporate Debtor.

22. The other two judgments cited by the Appellant relate to performance bank guarantee. It is nobody's case that the security deposit made by the Corporate Debtor in this case, was a guarantee for any performance in operations. The security deposit was only a security held against any default in payment.

23. In further deciding the issue, we are guided by the following judgments:

(i) ABG Shipyard Liquidator v. Central Board of Indirect Taxes & Customs, (2023) 1 SCC 472, wherein the Hon'ble Supreme Court has held as under:

> ***"38.*** *Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process. In this context, it is relevant to quote the February 2020 Report of the Insolvency Law Committee, which notes as under:*
>
> > *"8.2. The moratorium under Section 14 is intended to keep "the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default." Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders.*

> *In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it "facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate."*

From the above, it can be seen that one of the motivations of imposing a moratorium is for Section 14(1)(a), (b), and (c) of the IBC to form a shield that protects pecuniary attacks against the Corporate Debtor. This is done in order to provide the Corporate Debtor with breathing space, to allow it to continue as a going concern and rehabilitate itself. Any contrary interpretation would crack this shield and would have adverse consequences on the objective sought to be achieved.

44. *At the cost of repetition, we may note that the demand notices issued by the respondent are plainly in the teeth of Section 14 of the IBC as they were issued after the initiation of the CIRP proceedings. Moratorium under Section 14 of the IBC was imposed when insolvency proceedings were initiated on 01.08.2017. The first notice sent by the respondent authority was on 29.03.2019. Further, when insolvency resolution failed and the liquidation process began, the NCLT passed an order on 25.04.2019 imposing moratorium under Section 33(5) of the IBC. It is only after this order that the respondent issued a notice under Section 72 of the Customs Act against the Corporate Debtor. The various demand notices have therefore clearly been issued by the respondent after the initiation of the insolvency proceedings, with some notices issued even after the liquidation moratorium was imposed.*

45. *We are of the clear opinion that the demand notices to seek enforcement of custom dues during the moratorium period would clearly violate the provisions of Sections 14 or 33(5) of the IBC, as the case may be. This is because the demand notices are an initiation of legal proceedings against the Corporate Debtor. However, the above analysis would not be*

complete unless this Court examines the extent of powers which the respondent authority can exercise during the moratorium period under the IBC.

57. *On the basis of the above discussions, following are our conclusions:*

57.1. *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.*

57.2. *After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.*

57.3. *In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC."*

(Emphasis supplied)

(ii) In the case of **Indian Overseas Bank v. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd.,** this Tribunal has held as under:

"5. *Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the Appellant in view of the fact that after admission of an application under Section 7 of the 'I&B Code', once moratorium has been declared It is not open to any person including 'Financial Creditors' and the appellant bank to recover any amount from the account of the 'Corporate Debtor', nor it can appropriate any amount towards its own dues.*

> ***6.*** *If the 'Corporate Debtor' has borrowed some amount from the Appellant-'Indian Overseas Bank and the Appellant 'Indian Overseas Bank' come within the definition of 'Financial Creditor' as defined in Section 5(7) of the 'I&B Code', it is always open to the Appellant 'Indian Overseas Bank' to file its claim before the 'Interim Resolution Professional for getting the amount back. If the Appellant claims to be 'Financial Creditor and file's such claim before the 'Interim Resolution Professional' showing the principal amount and interest thereon, the 'Interim Resolution Professional will consider the same and the Appellant being 'Financial Creditor may be taken in the Committee of Creditors'.*
>
> ***7.*** *We find no merit in this appeal, therefore, we are not inclined to interfere with the impugned order dated 13th October, 2017. However, liberty is given to the Appellant-Indian Overseas Bank' to raise its claim before the 'Interim Resolution Professional' and request him to allow it to be a member of the Creditors Committee which should be considered in accordance with law."*
>
> *(Emphasis supplied)*

24. In **Paschimanchal Vidyut Vitran Nigam Ltd. v. HAS Traders & Others, Civil Appeal No. 7976 of 2019,** the Hon'ble Supreme Court has held that IBC will prevail over provisions of the Electricity Act, 2003, despite the latter containing two specific provisions which open with non-obstante clauses (Sections 173 and 174). The relevant part of the judgment is reproduced below for ready reference:

> ***"52.*** *The views expressed by the present judgment finds support in the decision reported as Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs. In that case, Section 142A of the Customs Act 1962 was in issue - authorities had submitted that dues payable to it were to be treated as 'first charge' on the property of the*

assessee concerned. In the resolution process, it was argued that the Customs Act, 1962 acquired primacy and had to be given effect to. This court, after noticing the overriding effect of Section 238 of the IBC, held as follows:

> *"55. For the sake of clarity following questions, may be answered as under:*
>
> *(a) Whether the provisions of the IBC would prevail over the Customs Act,and if so, to what extent?*
>
> *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.*
>
> *(b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?*
>
> *Answered in negative.*
>
> *56. On the basis of the above discussions, following are our conclusions:*
>
> *(i) 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.*
>
> *(ii) After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.*
>
> *(iii) In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC."*

Similarly, in Duncans Industries Ltd. v. AJ Agrochem, Section 16G of the Tea Act, 1953 which required prior consent of the Central Government (for initiation of winding up proceedings) was held to be overridden by the IBC. In a similar manner, it is held that Section 238 of the IBC overrides the provisions of the Electricity Act, 2003 despite the latter containing two specific provisions which open with non-obstante clauses (i.e., Section 173 and 174). The position of law with respect to primacy of the IBC, is identical with the position discussed in Sundaresh Bhatt and Duncan Industries (supra) [refer also: Innoventive Industries (supra), CIT v. Monnet Ispat & Energy Ltd., Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., and Jagmohan Bajaj v. Shivam Fragrances Private Limited]"

(Emphasis supplied)

25. In a very recent judgment dated 13.11.2024, the Hon'ble Bombay High Court in Interim Application (Lodg.) No. 31055 of 2024 in Appeal No. 597 of 2016 has held as under:

"55. In the result, in view of the CIRP proceedings pending in relation to the Applicant-Appellant:-

A) We hold that monies or any other asset deposited by a corporate debtor in court prior to commencement of CIRP by way of security (to protect against execution of any judgement or decree), would not cease to be the asset of the corporate debtor;

B) Consequently, the monies deposited by the Applicant-Appellant in this Court constitute assets owned by the Applicant-Appellant although they are not in possession of the Applicant-Appellant;

C) Therefore, we hereby permit the Applicant-Appellant to withdraw Appeal No. 597 of 2016, and indeed withdraw the amounts deposited in this Court in these proceedings, along with all earnings thereon. Refund of Court fees shall be processed as per Rules;

D) The amounts deposited in Court shall be released to the Applicant-Appellant within a period of two weeks from today, subject to compliance with the procedural rules of this Court, administered by the Registry; and

E) The substantive rights of the Respondent who is the judgement creditor under the Impugned Judgement shall be subject to the provisions of the IBC."

26. In the scheme of the IBC, 2016 once a Corporate Debtor is admitted into CIRP, all recovery action for past dues come to a standstill. During CIRP period, the Corporate Debtor has to be kept as a going concern and all essential supplies of goods or services have to be continued, subject to payment of dues "arising from such supply during the moratorium period", that is, on payment of current dues. Recovery of past dues is specifically prohibited and the specified procedure envisages that the creditor will file claim, in proper form, before IRP/RP, which has been done in the present case. The Appellant could not have adjusted the 'security payment deposit' against pre-CIRP dues. In the light of the provisions of IBC, 2016 and the guidance provided by the judgments cited above, it is clear that the Ld. NCLT was correct in directing that the security payment deposit be not adjusted against the past dues of pre-CIRP period, but instead be adjusted only against the dues arising post CIRP. We do not find any reason to interfere

in the order of Ld. NCLT. This appeal, accordingly, is dismissed. All connected IAs, if pending, are closed. No order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 27.11.2024
Ram N.