NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No.891 of 2021

IN THE MATTER OF:

Commissioner of Customs & Excise – Jaipur-I
(Now known as "Principle Commissioner,
Central Goods & Service Tax")
NCR Building, Statute Circle,
C-Scheme, Jaipur (Raj.)-302 005 **...Appellant**

Vs.

1.M/s. Ashika Commercial Pvt. Ltd.
Through the Resolution Applicant
Registered office at 1,Grasting Place,
Orbit, 4th floor, Kolkata – 700 001 **...Respondent No.1**

2.M/s.Siddha Domicile Company Pvt. Ltd.
12, Park Lane, Kolkata – 700 016 **...Respondent No.2**

3. M/s. Himavanta Investors Pvt. Ltd.
12, Park Lane, Kolkata – 700 016 **...Respondent No.3**

4.Mr. Rajesh Kumar Agarwal,
Resolution Professional
1,GC Avenue, Kolkata – 700 013 **...Respondent No.4**

Present:

For Appellant	**:**	**Mr Sandeep Pathak, Mr. Avnish Dave, Advocates.**
For Respondents	**:**	**Mr. Vikrant Pachnanda, Ms.Shruti Swaika, Advocate for R1.** **Mr. Rituraj Choudhary, Mr. Chandan Kumar Advocate for R4**

J U D G M E N T

(16th December, 2022)

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appellant has filed the present appeal under Section 61 of the 'Insolvency and Bankruptcy Code 2016' (hereinafter referred as to 'the Code') against the impugned order dated 12.08.2020 passed by the 'National Company Law Tribunal, Kolkata Bench (hereinafter referred as to 'the Adjudicating Authority') in IA (IB) No. 600/KB/2020 in CP(IB) No. 503/KB/2018.
2. The Appellant /Commissioner of Custom and Excise, Jaipur -I now known as Principal Commissioner Central Goods and Service Tax Jaipur has prayed for setting aside the impugned order dated 12.08.2020 passed by the Adjudicating Authority as also non-provisioning for outstanding statutory dues of the Corporate Debtor (CD) amounting to Rs.2,88,53,538/-plus interest at applicable rate in the Resolution Plan etc.
3. The CD/Ashika Commercial Pvt. Ltd had failed to pay excise duty on manufactured goods in respect of which Cenvat Credit had been availed by the CD and which had been rejected and returned by the buyer.
4. The ld. Counsel for the Appellant has stated that under the Central Excise Act, 1944, Central Excise Rules, 2002 and the Cenvat Credit Rules, 2004,

a manufacturer of excisable goods is entitled to seek Cenvat Credit on inputs used in the manufacturing of certain goods manufactured and supplied by such manufacturer. However, in cases where such goods are rejected or returned by the buyer and are disposed without going through any manufacturing process, such manufacturer is required to pay excise duty equal to the amount of Cenvat credit claimed. Since the CD had failed to pay such excise duty for the period of 2011-12, a show cause notice was issued to the CD to show cause as to why Central Excise Duty amounting to Rs. 8,01,407/- along with applicable penalty and interest not be recovered from the CD. The show cause notice so issued to the CD was adjudicated vide order in Original dated 30.10.2015 passed by the Joint Commissioner, Central Excise Department, Jaipur, whereby the demand of Rs. 8,01,407/- and penalty amount to Rs. 4,31,213/- alongwith interest at applicable rate was confirmed against the CD. The CD preferred statutory appeal before the Ld. Commissioner (Appeals) against the OIIO dated 30.10.2015, which came to be dismissed vide order in appeal dated 07.03.2018. The order in appeal dated 07.03.2018 was challenged by the CD before the Custom, Excise and Service Tax Tribunal, New Delhi (CESTAT) which was dismissed by the CESTAT vide its final order dated 28.11.2019. In the meanwhile, during the course of audit of the records of the CD for the period of 2011-12 to 2015-16 by the officers of the Appellant

Department, it was discovered that the CD was engaged in clandestine clearance of finished goods without payment of central excise duty on such goods in violation of the provision of Central Excise Act, 1944. A show cause notice dated 03.05.2018 was issued to the CD to show cause as to why such central excise duty amounting to Rs. 1,38,10,459/- be not recovered from the CD along with applicable interest and penalty. The show cause notice dated 03.05.2018 was adjudicated vide order in original dated 28.02.2019 whereby the Adjudicating Authority was pleased to confirm the demand of Rs. 1,38,10,459/- and penalty of Rs. 1,38,10,459/- alongwith interest at applicable rate.

5. The CD was required to pay accordingly, an amount of Rs. 2,88,53,538/- for violation of various provisions of Central Excise Act, 1944 and relevant rules made thereunder. It was stated by the Ld. Counsel for the Appellant that the Adjudicating Authority initiated Corporate Insolvency Resolution Process (CIRP) vide its order dated 22.08.2019 on an application preferred under Section 7 of the Code before the Adjudicating Authority by the Financial Creditors. Mr. Rajesh Kumar Agarwal was appointed as Resolution Professional (RP) in the first Committee of Creditors (CoC) meeting. The Ld. Counsel has also stated that the RP invited Expression of Interest (EoI) and received four EoI from the Resolution Applicant. The CoC by 100% vote approved the Resolution Plan submitted by Mr.

Sanwarmal Jain and the same was approved by the Adjudicating Authority vide impugned order dated 12.08.2020.

6. It was also stated by the Ld. Counsel that in a hearing before ld. Commissioner (Appeals) on 12.08.2020, the RP of the CD didn't mention that Resolution Plan has been approved by the Adjudicating Authority. Similarly, in earlier appearances also before the Departmental Officer, the RP didn't provide any information regarding CIRP.

7. What has been accepted by the Ld. Counsel of the appellant that they have not filed the claim when it was invited by the RP and accordingly, there is no provision of statutory dues of Rs.2,88,53,538/- plus interest anywhere in the resolution plan and non-provision of statutory debt is a loss to the public exchequer and hence they have filed the appeal against the impugned order approving the Resolution Plan.

8. The ld. Counsel for the Respondent no.4/ RP on query from the Bench that whether any contingent provision exist in the plan. It was informed by her that plan has already been implemented and no residual is available in the plan. Hence, nothing can be done. She also stated that only a vigilant creditor is entitle for payment, however, when the claim was invited, the agency had not filed its claim and now it simply desires that its job be done based on correspondence/case file by the RP which is not the requirement of law so far.

9. The Respondent No.1/Resolution Applicant/CD has stated in its pleading that the appeal so filed involves abuse of process of law and not maintainable. The ld. Counsel for the R1 also stated that the Resolution plan so approved by the Adjudicating Authority under Section 31 of the Code warrants no interference. Now the law is settled that the commercial wisdom rest with the CoC and once the resolution plan is approved virtually it becomes untouchable. The Appellant has failed to file its claim when it was invited. The law provides for relief only for those who are diligent. Through elaborate pleadings, he has tried to justify that nothing can be done at this stage as they have even not filed its claim even at the belated stage and now only coming at the stage after the approval of the Resolution plan not only by the CoC but also by Adjudicating Authority.

10. The ld. Counsel for the R1 also stated that the CD had issued a letter dated 10.02.2020 to the Superintendent, CGST and Central Excise Range L1 opposite Central Bank of India, Ajmer road, KishanGarh, which is depicted as below to supplements its stand that the Appellant was aware of that CD is under CIRP even in February, 2020 whereas Resolution Plan by Adjudicating Authority has been approved in August, 2020:

ashika commercial
private limited
CIN No.-U74140WB1987PTC043404

Annexure- E ISO 9001 REGISTERED 63

DATE: 10.02.2020

TO

THE SUPERINTENDENT

CGST & CENTRAL EXCISE RANGE-LI

OPPOSITE CENTRAL BANK OF INDIA

AJMER ROAD, KISHANGARH

<u>SUB:- REGARDING PRODUCTION OF DOCUMENTS FOR CAG AUDIT</u>

Dear Sir

In reference to your letter no. F.No. GL-2/10/AG AUDIT/KSG/ L1/2019-20 Dated 07.02.2020 wherein your goodself had requested for documents for CAG Audit. To this regard we request your goodself to kindly defer the audit process as our unit is under CIRP proceedings and all the documents pertaining to the period mentioned are at our head office (Kolkatta) for verification by Resolution professional.

Kindly acknowledge and do the needful.

Best Regards

For Ashika Commercials Private Limited

For Ashika Commercial Pvt. Ltd.

Auth. Signatory

(Auth. Signatory)

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Engineering Systems Division : Plot No. F 48-50 RIICO Industrial Area, Phase-1, Silora, Kishangarh, Rajasthan 305802
Email : info@acpl.net.in **Web :** www.ashikacommercial.in

TRUE COPY

11. We heard at length the parties and have carefully gone through the pleadings of the parties, available material on record, the order of the Adjudicating Authority and we are having the following observations:

a. It is not in dispute that the Appellant/ Commissioner of Custom and Excise, Jaipur -I has not filed the claim while it was so notified by the RP. Even the claim has not been filed at the belated stage prior to approval of Resolution Plan by the CoC. The Appeal has been filed after the plan has been approved by the Adjudicating Authority. As a result of which the Appellant has not complied with the provisions of Section 13 & 15 of the Code.

b. At this belated stage no fund is available out of the kitty of the Resolution Plan which can be earmarked to the Appellant as informed by the RP and the Resolution Applicant also. Both Resolution Applicant and RP has confirmed implementation of the plan and nothing remains to be adjudicated.

c. It is very much clear that Section 238 of the Code provides very clearly that provisions of this Code to override other laws as also section 14 of the Code provides for moratorium during CIRP.

d. We are not in a position even to accede to the request of the Appellant based on Hon'ble Apex Court Judgment in Civil Appeal No. 1661 of 2020 with Civil Appeal No. 2568 of 2020 State Tax Officer (1) Vs.

Rainbow Papers Limited[1] para 4-10. Even this Judgment has elaborately dealt with the filing of claims and submission of proof etc. **However, in this case the property of the CD was attached by the Sales Tax Department prior to initiation of CIRP and as also in this case Sales Tax Department had already filed a claim before the RP in the requisite format.** Para 4-10 as stated supra is depicted below:

> *"4.The appellant has, from time to time, been assessed for Value Added Tax (VAT) and Central Sales Tax (CST) under the GVAT Act. It is stated that an amount of Rs.53,71,65,489/- is due from the Respondent to the Sales Tax authorities towards CST and VAT, as per the statement enclosed at Page 44 of the Paper Book.*
>
> *5. On or about 8th July, 2016, recovery proceedings were initiated against the respondent, in respect of its dues for the year 2011-2012, and the appellant attached the property of the respondent being land at Survey No.2379 and 2381 situated at Rajpur, Taluka Kadi on 8th October, 2018.*
>
> *6. One Neeraj Papers Private Limited, as operational creditor of the respondent, filed Company Petition (IB)*

[1] 2022 Livelaw (SC)743

No.88 of 2017 under Section 9 of the IBC before Ahmedabad Bench of the National Company Law Tribunal (NCLT), for initiation of the Corporate Insolvency Resolution Process (CIRP) against the respondent.

7. By an order dated 12th September, 2017, the said Company Petition [Company Petition (IB) No. 88 of 2017] filed by the said Neeraj Papers Private Limited was admitted. One George Samuel was appointed Interim Resolution Professional (IRP) on 22 nd September, 2017.

8. After appointment of the said George Samuel as IRP, claims were invited from Creditors under Section 15 of the IBC by issuance of newspaper publications. The last date for submission of claims was 5th October 2017.

9. After receipt of claims, a Committee of Creditors (CoC) was constituted on 10th October 2017. At its first meeting, the CoC passed a resolution to replace the IRP. Accordingly, Ramachandra D. Choudhary, a Chartered Accountant, was appointed as Resolution Professional

(RP). The appointment of Mr. Choudhary was approved by the NCLT by an order dated 6th November 2017.

10. The appellant filed a claim before the RP in the requisite Form B, claiming that Rs.47.36 crores (approximately), was due and payable by the respondent to the appellant, towards its dues under the GVAT Act. The claim was filed beyond time."

Hence this judgment is not in a position to help the Appellant herein as they have not filed their claim even at belated stage.

e. However, in this context we may also refer to the judgment of Ghanashyam Mishra and sons Pvt. Ltd. Vs. Edelweiss Reconstruction company Limited[2] held at para 102.1:

> *"102. In the result, we answer the questions framed by us as under:*
>
> *102.1 That once a resolution plan is duly approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the*

[2] (2021) 9 SCC 657

Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan

102.2. 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

102.3Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued."

f. In view of the above stated position of law, we are not in a position to accede to the prayer of the Appellant and accordingly, the Appeal is dismissed. No order as to costs.

Pending application, if any, stands disposed of.

[Justice Rakesh Kumar]
Member(Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

Raushan