



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH - II, HYDERABAD**

**IA No.414 of 2023 in  
IA No.939 of 2020 in  
CP(IB) No.296/HDB/2018**

*[Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016  
read with Rule 11 of the National Company Law Tribunal Rules, 2016]*

**In the matter of :**

**M/s.Lanco Babandh Power Limited**

**M/s.Pradeep Port Trust,**  
Traffic Manager, M/s.Paradeep Port Trust,  
Paradip Port,  
District Jagatsinghpur,  
Odisha - 754142

**...Applicant**

***V e r s u s***

- 1. Mr.Sanjay Gupta,**  
Liquidator, M/s.Lanco Babandh  
Power Limited,  
E-10 A, Kailash Colony,  
New Delhi – 110 048.
- 2. M/s.Jindal Steels & Power Limited,**  
Represented by its Director,  
Regd Office: OP Jindal Marge,  
Hisar, Haryana – 125 005.

**Respondents**

Date of Order: 10.05.2024

**Coram:**

Hon'ble Rajeev Bhardwaj, Hon'ble Member (Judicial)  
Hon'ble Sanjay Puri, Member (Technical)

**Counsel/Parties present:**

For the Applicant : Ms.D.V.Padmaja, Advocate  
For the Liquidator : Mr.Shalya Agarwal, Advocate



**[PER : Rajeev Bhardwaj, Hon'ble Member(Judicial)]**

**ORDER**

1. This Application has been filed by the Paradeep Port (hereinafter referred as Applicant) seeking the following reliefs :
  - a) Declare the Applicant as a secured creditor by virtue of the statutory charge created under Section 59 of the Major Port Trust Act, 1963 and the assets vested with the Applicant is a security interest as contemplated under Section 3(31) of the Code.
  - b) Declare the sale of the import assets of M/s.Lanco Babandh Power Limited vested with the Applicant under the Major Port Trust Act, 1963, by way of e-auction on 27.08.2021 through sale notice dated 28.07.2021 by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent, as null and void.
2. The facts necessary to dispose of the present application, as stated, are that:
  - 2.1. The Corporate Debtor was setting up thermal power plant at Khadagprasad P.S., Motagan, District Dhenkanal, Odisha and it got registered for the import of goods under Regulation 5 of the Project Import Regulation, 1986. During the period from 25.11.2011 to 10.08.2016, the Corporate Debtor imported 17,273 MTs of goods/assets against 45 Bills of Entry, which are lying with the Applicant since 25.11.2011.
  - 2.2. The consortium of banks led by ICICI bank filed CP No.296/7/HDB/2018, which was admitted on 29.08.2008. The liquidation order was passed on 27.11.2019.



- 2.3. The Respondent No.1 filed IA No.939 of 2020 in CP No.296 which was allowed vide order dated 29.03.2023 by directing the Applicant and the Customs Authorities to release the goods of the Corporate Debtor in their possession. The Applicant challenged this Order before the Hon'ble NCLAT in Company Appeal No.345 of 2023. It is claimed that from the counter filed by the Respondent No.1 in the said Appeal, it came to the notice of the Applicant that the imported goods were sold to the Respondent No.2 through e-auction held on 27.08.2021. However, no such sale certificate has been issued till date.
- 2.4. In view of the disclosure of new facts during appeal by the Respondent No.1, the Applicant has withdrawn the Company Appeal No.345 of 2023 to challenge the sale notice dated 28.07.2021 before this Authority.
- 2.5. The Applicant has also secured statutory rights under Section 59 of the Major Port Trusts Act, 1963 over the assets of the Corporate Debtor. However, the Liquidator has failed to discharge his duties as contemplated under Section 34 of the IBC by denying the Applicant's statutory right to its entitlement under Section 53 of the IBC.
- 2.6. The Liquidator has also failed to evaluate the value of the assets as per Regulation 35 of IBBI (Liquidation Process) Regulation, 2016. No proper valuation has been made of the said assets as per this Regulation.
- 2.7. The Applicant has lodged a claim before the Respondent No.1 for release of their security interests under Section 52 of IBC and such right does not extinguish with the lodging of its claim. The claim of the Customs Department and the Paradeep Port Trust Authority cannot be equated as there is no charge under Section 48 of the



Customs Act in contrast to charge over the assets under Section 59 of the Major Ports Trust Act.

3. In the Counter, the Respondent No,1 has contended and contested the averments of the Applicant and submitted that:
  - 3.1 In view of Section 36, assets of the Applicant are part of the liquidation estate and accordingly, the Liquidator has powers to sell, dispose of etc the said property.
  - 3.2 The Applicant has also filed claim of Rs.4,36,50,691/- which was admitted on 22.05.2020 classifying the Applicant as unsecured operational creditor. The Applicant has appealed against the said order after a lapse of 3.8 years while the Appeal as per Section 42 of IBC was to be filed within 14 days after receipt of such decision.
  - 3.3 The Applicant is also refrained from challenging the decision of the Liquidator because it gave 'No Objection Certificate' on 02.06.2020. The Liquidator has already sent e-mail dated 02.06.2020 that its claim will be treated under Section 53 of the IBC.
  - 3.4 For the sale of the assets, auction for sale was conducted after following the due process of law. The Valuation Report of the property was also taken from two valuers as per Regulation 35 of the Liquidation Regulations. On the basis of the reports of the valuers, it was found that the physical condition of the assets lying with the Applicant was in bad shape and accordingly it was recommended to dispose of the said property on piece-meal basis and thereupon, it was sold to the Respondent No.2.
  - 3.5 When the possession of the imported goods was not handed over to the Respondent No.1, IA No.939 of 2023 was filed and vide order dated 29.03.23, the Applicant and the Customs Authorities were



directed to release the goods. It is submitted that the Applicant was requested to handover the goods by Respondent No.2 and Respondent No.1 vide letters dated 17.04.2023, 09.05.2023 and 23.05.2023. Even the Liquidator as well as representative of the Respondent No.2 visited the office of the Applicant to apprise about the urgency of the matter and further releasing of the goods. However, the Applicant did not hand over the imported goods to the Liquidator.

- 3.6 The Respondent No.1 has also referred to the decisions in *Sudershan Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs (Civil Appeal No.7667 of 2021)*, *Ananad Rao Korada, Resolution Professional versus Varsha Fabrics (P) Limited & others (2019 SCC Online SC 1508)* and *Commissioner of Customs, West Bengal versus Ram Swarup Industries Limited & Others (CA No.563 of 2018 of Hon'ble NCLAT)* to say that the provisions of the Insolvency and Bankruptcy Code will prevail over the Customs Act and Major Ports Trusts Act.
- 3.7 Regarding the status of the Applicant as secured creditor, the Respondent No.1 has referred to Sections 3(30) and 3(31) of the IBC and Regulation 21 of the Liquidation Regulation to submit that the charge has not been registered by the Applicant with the Registrar of Companies under Section 77 of the Companies Act and on this point has relied upon the decision of the Hon'ble NCLAT in *Volkswagen Finance Private Limited versus Shree Balaji Printopack Private Limited and Others CA(AT) (Ins) No.02 of 2020*.
4. We have heard both the Learned Counsels for both the parties and have also gone through the entire records.



5. To our dismay, the Applicant has misused the provisions of the IBC to the hilt and as a consequence thereof, the assets of the Corporate Debtor which are lying in its custody have virtually turned into scrap.
6. The goods in the custody of the Applicant are undoubtedly the property of the Corporate Debtor and as per section 35 IBC, the liquidator is to deal with the said property including by way of sale. The person(s) who has/have right over the property of the Corporate Debtor can file claim with the Liquidator. Accordingly, the Applicant has also filed the claim of Rs.4,36,30,691/- which was admitted by the Liquidator vide **Annexure R-2** dated 22.05.2020 (Page No.44 of the Application). It is clearly stipulated in **Annexure R-2** that the claim shall be paid as per Section 53 of the IBC. This was also intimated to the Applicant by the Liquidator vide e-mail **Annexure R-3** dated 22.05.2020 and the relevant information is reproduced below:

“This is to inform that you that the claim has been admitted and will be dealt as per Section 53 of the Insolvency and Bankruptcy Code, 2016 wherein the disbursement of sale proceeds will be done as per the waterfall mechanism upon the sale of assets.

You are requested to release the assets of the Corporate Debtor at the earliest to enable the Liquidator to take custody of the assets and sell the assets as per Section 35 of the Code. The assets lying at the port are a part of the Liquidation Estate as mentioned in the letter dated 24.01.2020. Retention of assets by your office is leading to further destruction in the value of assets.”

7. In response, the Applicant informed vide e-mail **Annexure R-3** dated 09.10.2023 that Paradeep Port has no objection for the release of the assets and the relevant portion of the reply is given hereunder:

“Paradeep Port has no objection to release the assets of the Corporate Debtor to enable you to take custody to sell the assets as per Section 35 of the Code.



You are requested to obtain No-objection/Out of Charge Order from Customs to sell the assets of the Corporate Debtor.

You are requested to consider payment of the outstanding dues of PPT, on priority basis, as PPT is an autonomous organization under the Ministry of Shopping, Government of India”.

8. There is a limitation period of 14 days to file an appeal against the decision of the Liquidator under Section 42 of the IBC, which says:

“42. A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision”.

9. However, the Applicant has not challenged that order even after the lapse of more than 3.8 years from the date of the admission of the claim on 22.05.2020 and now it has instead tried to put the entire liquidation process back to square one by taking the plea that the auction notice was wrongly issued. When the Applicant has neither challenged the order dated 22.05.2020 nor explained the reasons for delay, this is suffice to dismiss the present Application.
10. The Applicant is also estopped from re-agitating the matter because it has already given ‘No Objection Certificate’ for the release of the assets of the Corporate Debtor vide **Annexure R-3** (Page Nos.45-50 of the Application). When the Liquidator approached the Applicant after completing the necessary formalities for the release of goods, the latter backtracked. The Applicant is precluded from denying the earlier admission in view of section 115 of Evidence Act. Even the admission of the Applicant is immaterial because once the liquidation starts, the property of the Corporate Debtor has become part of the liquidation



estate under Section 36 of the IBC and the Applicant at the most can file claim which is to be decided by the Liquidator. The Applicant despite of approaching the Respondent No.1 with its claim, has refused to hand over the goods, but it can't refuse because of position of law.

11. It is not only the limitation and estoppel, but by not complying with the directions dated 29.03.2023 in in IA No.939 of 2020, the Applicant is also dis-entitled to file the present application. The relevant portion of the order is:

"We, accordingly, hereby direct the Respondents to release the goods belonging to the Corporate Debtor lying with them without insisting for filing the Installation Certificate, reconciliation statement, final payment R certificate etc., corporate or a payment of customs duty by the debtor under liquidation, within 30 days from the date of this order, besides 1st Respondent to issue No Objection Certificate for sale of these goods by the Liquidator in accordance with the provisions of the IB No 147Code. It is further ordered that upon complying the first direction, the Liquidator shall sell the goods of the Corporate Debtor within three months as per the provisions of the Code and the relevant regulations and deposit the sale proceeds into the liquidation account of the Corporate Debtor."

10. The Applicant has challenged this order by filing an appeal, which was withdrawn vide order dated 22.11.2023 (**Annexure R-10 – page No123 of the Application**). The Applicant has explained in para No.7 of the Application that the appeal was withdrawn because the Applicant came to know from the counter filed by the Respondent in the appeal that the imported goods vested with the Applicant have been sold to the Respondent No.2 through e-auction on 22.08.2021. However, it is wrongly stated by the Applicant that the counter has been filed in the appeal, but the same must have been filed in IA No.939 of 2020,



wherein reference of sale has been made. Therefore, the Applicant has tried to mislead in order to defeat justice by prolonging the process and at the same time not complying with the directions of this Authority. If the Applicant feels that he was aggrieved by the sale notice, it should have challenged that order of the Liquidator within the limitation period i.e., 14 days as explained above. He was also having the opportunity in IA 939 of 2020 or by filing separate IA immediately after the issuance of e-auction notice dated 27.08.2021. Even the grounds taken for agitating the said notice are unfounded because due process including assessing the value of property from two valuers has been followed. Therefore, the Applicant wants to get relief which he is not legally entitled.

12. Besides the aforesaid grounds on which the Application is not maintainable, the Applicant's contention that it should be treated as secured creditors is without any basis. The Applicant has already been intimated vide e-mail dated 22.05.2020 (**Annexure R-3**) that its claim will be dealt under Section 53 of the IBC as unsecured creditor and now the it can't re-agitate the matter. In addition, the mode for providing the security interest by secured creditor is as per Regulation 21 of the Liquidation Regulation which stipulates that:

*21. Proving security interest.*

*The existence of a security interest may be proved by a secured creditor on the basis of-*

*(a) the records available in an information utility, if any;*

*(b) certificate of registration of charge issued by the Registrar of Companies;  
or*

*(c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.*



12. Thus, security interest can be proved in any of the ways as provided in Regulation 21 of the Liquidation Regulations. However, no security interest has been created in favour of the Applicant in accordance with the provisions of IBC. Accordingly, the Applicant cannot be treated as a secured creditor. This is apart from the fact that the Applicant has not challenged the decision of the liquidator communicated vide e-mail dated 22.05.2020 (**Annexure R-3**) that its claim is covered under Section 53 of the IBC.
13. Therefore, there is also no merit in the stand of the Applicant that he is the secured creditor and accordingly entitled for preferential treatment vis-à-vis disbursement of the amount by the Liquidator.
14. Another plea of the Applicant that in view of Major Port Trusts Act, it has charge over all the assets of the Corporate Debtor in its possession until the charges are paid. The Applicant has tried to distinguish its right from the right of the Customs Authority under section 48 of the Customs Act. Besides the fact Applicant has not challenged the decision of the Liquidator whereby it was declared unsecured creditor vide e-mail dated 22.05.2020 (**Annexure R-3**), there is no difference between the dues under the Major Port Trusts Act and Customs Act as far as the Insolvency and Bankruptcy Code is concerned. Section 238 gives overriding power to the IBC over other law. No doubt, the judgment in *Sudarshan Bhatt, Liquidator of ABG Shipyard versus Central Board of Indirect Taxes and Customs supra* is under the Customs Act, but the principles are applicable in respect of Major Port Trusts Act also. The relevant portion of the order reads 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.**

54. *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."*

15. In view of non obstante clause in Section 238 IBC, there is overriding nature and supremacy of the provisions of the IBC over any other enactment in case of conflicting provisions which is also the case of the Applicant. Here we rely upon the decisions of the Hon'ble Apex Court in *Paschimanchal Vidyut Vitran Nigam Ltd. versus Raman Ispat (P) Ltd.*, (2023)10 SCC 60, *Asset Reconstruction Company (India) Limited versus Tulip Star Hotels Limited and Ors.* AIR 2022 SC 3559, *Vishal Chelani and Ors. versus Debashis Nanda* (2023)10SCC395, *Pr. CIT versus Monnet Ispat & Energy Ltd.* [SLP (C) No.6487 of 2018, dated 10-8-2018 and *Alchemist Asset Reconstruction Co. Ltd. versus Hotel Gaudavan (P.) Ltd.* [2017] 88 taxmann.com 202.



16.As a result, we come to this conclusion that there is no merit in the application and it has been made only to delay the proceedings and therefore, **IA No.414 of 2023 in IA No.939 of 2020 in CP(IB) No.296/HDB/2018 is dismissed with costs of Rs.50,000/- (Rupees fifty thousand only)** to be recovered from the defaulting official(s).

**Sd/-**  
**(Sanjay Puri)**  
**Member, Technical**

*Vinod*

**Sd/-**  
**(Rajeev Bhardwaj)**  
**Member, Judicial**