

IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT NO. 5, MUMBAI BENCH

I.A. 823/2020

in

C.P. 2556/I&B/MB/2019

Under Sections 60(5), 14, 18 (1)(f)  
and 238 of the Insolvency &  
Bankruptcy Code, 2016

*In the matter of*

Mr. Nandkishor Vishnupant  
Deshpande, Resolution Professional

... Applicant

vs.

Director of Revenue Intelligence

... First Respondent

Diamond India Limited

... Second Respondent

and

*In the matter of*

Raksha Bullion

... Financial Creditor

vs.

Royal Refinery Private Limited

... Corporate Debtor

Order delivered on: 09.11.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)  
Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

For the Applicant: Adv. Ayush J. Rajani

For the First Respondent: Adv. Maya Majumdar

For the Second Respondent: Adv. Arjun Srirangam

*Per: Suchitra Kanuparthi, Member (Judicial)*

ORDER

1. The Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor by an order dated 13.11.2019, on a Section 9 Petition filed by the Financial Creditor, wherein Mr. Nandkishor Vishnupant Deshpande, was appointed as an Interim Resolution Professional (IRP).

2. The Applicant then made the public announcement in Form A on 21.11.2019 for intimating commencement of CIRP and inviting claims from the creditors of the Corporate Debtor by 04.12.2019.

Contentions of the Applicant:

3. The Applicant submits that the Corporate Debtor is mainly engaged in the business of Trading in Bullion, i.e., importing gold and then exporting the same after performing manufacturing activity over the imported gold. While gold is imported, the Corporate Debtor pays customs duty as applicable, which lie as a security deposit with Respondent No. 2 and thereafter, on export of the said gold by the Corporate Debtor within a stipulated time frame of 3 months, the said customs duty is refunded to the Corporate Debtor. This has been the main arrangement with the Respondent No. 2. Respondent No. 2 is a government notified nominated agency licensed by DGFT, for import of gold and silver. It is a trade body formed at the behest of Ministry of Commerce, Govt. of India to import precious metals for supply to the jewelers and mainly small exporters facing difficulty in availability of gold. Respondent No. 2 supplies gold to both domestic jewelers as well

as exporters through outright sale as well as metal loan basis.

4. The Applicant submits that while analyzing the last audited balance sheet as on 31.03.2018 of the Corporate Debtor, the Applicant found that a sum of Rs. 3.39 crores is receivable from the Respondent No. 2. Therefore, the Applicant called upon the Respondent No. 2 through an email dated 12.12.2019 to provide the ledger account of the Corporate Debtor in its books for the period 01.04.2018 to 13.11.2019 and from 13.11.2019 till date. Later, the Respondent No. 2 vide an email dated 18.12.2019 sent across ledger of the Corporate Debtor in its books to the Applicant which confirmed that a sum of Rs. 77,39,624/- reflected as a payable balance to the Corporate Debtor.

5. The Applicant further submits that on asking Respondent No. 2 to transfer the funds in the bank account of the Corporate Debtor, the Respondent No. 2 informed the Applicant that the Respondent No. 1 has directed the Respondent No. 2 to not release any funds as per an attachment letter dated 31.05.2019 and Respondent No. 2 is merely acting on the directions of the Respondent No. 1.

6. The Applicant then submits that the Respondent No. 1 is the apex anti-smuggling agency of India, working under the Central board of Indirect Taxes & Customs, Ministry of Finance, Govt. of India. The Respondent No. 1 had conducted search operations in the premises of the Corporate Debtor on 23.05.2018, thereby seizing the available documents/ files and hard disk drives. The said search operations have been conducted before the commencement of the CIRP, i.e., 13.11.2019 and hence, any claim that arose prior to the insolvency commencement date needs to be crystallized and be filed before the Applicant. The Applicant submits that the Respondent No. 1 is at liberty to continue with their investigations on the erstwhile management of the Corporate Debtor. Further, the Respondent no. 1 may file their claim with the Applicant after concluding their investigations.

7. The Applicant then submits that on the basis of confirmation received from the Respondent No. 2, the amount of Rs. 77,39,624/- is not payable to any party and the same can be refunded back to the Corporate Debtor. Thus, it is established that the said amount, which is lying as payable in the books of Respondent No. 2, is payable back to the Corporate Debtor. The Applicant, on the advise of the Respondent No. 2, approached Respondent No. 1 to take up the matter with them for vacation of restrictions imposed by it for disbursement of amount of Rs. 77,39,624/-. The Applicant then submits that even after meeting Respondent No. 1 on several occasions and making several requests, neither the Respondent No. 1 nor the Respondent No. 2 provided the copy of the said letter dated 31.05.2019 even after several follow ups. Moreover, the Respondent No. 2 informed that the said letter is confidential and hence, it cannot be shared with the Applicant.

8. The present Application is filed seeking removal of restriction imposed vide letter dated 31.05.2019 by the Respondent No. 1 upon the Respondent No. 2 and directing Respondent No. 2 to deposit Rs. 77,39,624/- into the bank account of the Corporate Debtor in view of the provisions of Sections 14, 18(1)(f) and 238 of the Code.

Contentions of the Respondent No. 1:

9. The Respondent No. 1 submits that the Respondent No. 1 had initiated an investigation into diversion of duty-free Gold Bars imported under Advance Authorization Scheme by the Corporate Debtor including the fraudulent exports of jewelry made up of alloys of copper and nickel in the guise of gold jewelry as found in one of the intercepted and seized export shipment at Ahmedabad Air Cargo. On account of the investigation being undertaken by Respondent No. 1, Respondent No. 2 was requested not to disturb the duty deposit lying with them to safeguard the interest of Govt. revenue vide letter dated 31.05.2019.

10. The Respondent No. 1 further submits that the Corporate Debtor, as an exporter, had entered into an agreement dated 14.07.2019 with Respondent No. 2 for purchase of gold for export purposes. For this purpose, the margin account was maintained by the Corporate Debtor which essentially was for payment towards gold value, duty, taxes, expenses etc. So, a balance of Rs. 77,39,624/- of this margin account was lying with Respondent No. 2 after paying the government dues on account of failure of the Corporate Debtor to furnish the proof of export. The Respondent No. 1 advised Respondent No. 2 not to disburse the duty deposit lying with them to safeguard the interest of government revenue.

11. The Respondent No. 1 submits that the averment made in the Application that the Respondent No. 1 acted against the Section 14 of the I & B Code is not correct. The I & B Code mandates that the assets of the Corporate Debtor cannot be alienated, transferred or sold to a third party during the period of moratorium. In the instant case, the customs duty which was kept as security by Respondent No. 2 on behalf of the Corporate Debtor has been paid back to the department. The bond and cash secured by Respondent No. 2 will become ripe for discharge once investigation is complete and no customs duties are found recoverable. The Respondent No. 1 submits that it has not sought any recovery of the likely dues pertaining to the pre-CIRP period.

12. The Respondent No. 1 submits that its office is in the process of filing Proof of Claim (Form B). One Proof of Claim has already been filed by the jurisdictional Principal Commissioner of Airport Special Cargo, Mumbai on behalf of the port of Precious Cargo Customs Clearance Centre, Mumbai and another Proof of Claim is in the process of being filed by the Principal Commissioner (Customs-Ahmedabad) on behalf of the port of Air Cargo Complex, Old Airport, Ahmedabad. The

filing of these Proof of Claims will be done with the Applicant herein.

Contentions of the Respondent No. 2:

13. The Respondent No. 2 submits that the Respondent No. 2 is a nominated agency as notified by the Director General of Foreign Trade, GOI. It imports and supplies duty free gold to the exporters under the provisions of Customs Act, 1962, FTDR Act, 1992, Foreign Trade Policy etc. The Corporate Debtor, as an exporter, entered into an agreement with the Respondent no. 2 for purchase of gold on payment of customs duty. In the process, it had opened a Margin Account with the Respondent No. 2 which has a balance of Rs. 77,39,624/-.

14. The Counsel for the Respondent no. 2 further submits that the duty amount is deemed as paid to Customs to account for the quantity of gold imported under bond. Customs grants duty exemption only if the exporter would export jewelry in compliance with Foreign Trade Policy & Customs Law. FTP provides the exporters 360 days after the date of purchase to complete the due procedures (i.e. 90 days for export & 270 days for realization of proceeds). Thus, duty exemption is not available to the exporter front-end on the date of purchase but back-end only after compliance with due procedures. Moreover, it is not available to exporter as a matter of right but granted by Customs on condition of compliance with due procedures. The date of the purchase of gold by the purchaser-exporter, i.e., Corporate Debtor in this case, becomes the relevant date and the customs duty is deemed to have been paid by the exporter on the date of purchase of gold but held on behalf of Customs as it may subsequently grant duty exemption to the exporter. Otherwise, the gold purchase by the purchaser – exporter would not be possible at all, in the first instance.

15. The Respondent No. 2 further submits that the DRI, Mumbai, i.e., Respondent No. 1, has no legal authority or mandate to offset the gold

purchased by one entity with the gold exported by any other entity. It cannot even offset one purchase transaction against another purchase transaction of the same entity. Each purchase transaction is settled independently. Under FTP procedures, DIL needs to submit a date-wise statement of purchases/deliveries made to the exporters so that Customs may verify the due date of export and due of BRC for each delivery. It is, thus, clear from the nature of the transactions that DIL as a Nominated Agency, merely administers the FTP provisions to account for each instance of delivery of gold, unlike the continuous transactions which happen in a debtor-creditor relationship. But, the Respondent No. 1 had advised the Respondent No. 2 to not to part with the balance therein, i.e., Rs. 77,39,624/-, without obtaining its NOC vide a confidential letter dated 31.05.2019. Hence, the Respondent No. 2 had no option other than to comply with the directions of the DRI, Mumbai who were carrying out their investigations under the applicable laws.

16. The Respondent No. 2 lastly submits that it will release the balance in the account of the Applicant if the Respondent No. 2 receives a written NOC from the DRI, Mumbai, i.e., Respondent No. 1 in respect to the same.

Rejoinder by the Applicant to the Reply of the Respondent No. 1:

17. The Applicant submits that the Applicant, neither in the present Application nor in this Affidavit-in-Rejoinder, seeks any sort of relief nor the Applicant objects to the investigation of the Respondent No. 1 against the suspended directors or its related parties or any other party which the Respondent No. 1 deems necessary. The Applicant's contention and relief sought in the present Application is limited to seeking vacation/ withdrawal of the attachment letter dated 31.05.2019 issued to Respondent No. 2.

18. The Applicant then submits that it remains an undisputed fact that the amount of Rs. 77,39,624/- which is the balance of margin money deposited by the Corporate Debtor with the Respondent No. 2, after having paid the Govt. dues, is an asset of the Corporate Debtor and by virtue of the declaration of Moratorium under Section 14 of the Code, it warrants that the Applicant ought to take control and custody of any asset over which the Corporate Debtor has ownership rights. In view of this undisputed fact, the Respondent No. 1 ought to release the said attachment to the account maintained with the Respondent No. 2 and allow the Applicant to have control over the said account. Moreover, Section 248 of the Code also amends Section 142A of the Customs Act, 1962 whereby the right of the Custom's Authority to exercise its right as a 'first charge' stands amended and the provisions of the Code has superseding effect to that extent of any inconsistency with other laws.

19. The Applicant submits that the Respondent No. 1 referred to the extract of an agreement dated 14.09.2017 to buttress that the Respondent no. 2 has the first lien as well as right of set-off over the margin money and all other assets of the Corporate Debtor held with Respondent No. 2. It is submitted that this reference to the said extract does not support the stand of the Respondent No. 2 at all because the said terms of a contract cannot supersede the explicit provisions of the Code and also, the Respondent No. 1 also agrees that the said sum is an asset of the Corporate Debtor in the nature of margin money under the possession of the Respondent No. 2.

20. The Applicant further submits that the customs dues, i.e., the Govt. dues/ statutory dues fall within the category of 'operational debt' in terms of provision of Section 5(21) of the Code. The Respondent No. 1 itself stated that it restrained Respondent No. 2 from releasing the funds to safeguard the interest of Govt. Revenue which is actually bad in law since safeguarding the interests of secured lenders, i.e.,

financial creditors is a priority when compared to the government dues as is clearly laid down in the Code.

21. The Applicant then submits that the stand of the Respondent No. 1 that the payments already recovered was towards pre-CIRP dues and the outstanding balance, i.e., Rs. 77,39,624/- is towards the bond and this cash secured by Respondent No. 2 will ripe for discharge once investigation is complete is clearly contrary to the Code. The Respondent No. 1 has already submitted that the customs duty sought from the Corporate Debtor is towards the imports made much prior to CIRP commencement date, i.e., 13.11.2019. Even the customs department has already filed its claim with the Applicant.

Rejoinder by the Applicant to the Reply of the Respondent No. 2:

22. The Applicant submits that the Respondent No. 2 has no locus in opposing the present Application since it has undisputedly agreed in its Affidavit-in-Reply that it would release the said funds of Rs. 77,39,624/- once the Respondent No. 1 issues an NOC with respect to the same.

23. The Applicant then submits that the reference to the 'indemnity clause' of the Agreement has no bearing to the present Application since it is the Corporate Debtor's funds which are already under the control of the Respondent No. 2.

24. The Applicant further submits that the sum of Rs. 77,39,624/- remaining in the account maintained with the Respondent No. 2, after paying off Rs. 93,11,498/- in the month of December, 2019 towards the customs duty after the initiation of CIRP, i.e., 13.11.2019. Even on this count, the right of the Applicant prevails over the said account in view of provisions of Section 14, 18(1)(f) and 238 of the Code. Furthermore, Section 248 of the Code also amends Section 142A of the Customs Act, 1962 whereby the right of the Custom's Authority to

exercise its right as a 'first charge' stands amended and the provisions of the Code has superseding effect to that extent of any inconsistency with other laws.

Findings:

25. The legal issue for consideration are as follows:

- A) Whether the Govt. due which are in the nature of the Crown debts take precedence over the secured creditors under the Code?
- B) Whether the margin money of Corporate Debtor lying in the account of the Respondent No. 1 is the asset of the Corporate Debtor?
- C) Whether the order of attachment dated 31.05.2019 issued by Respondent No. 1 is conflicting with the CIRP of Corporate Debtor and hence needs to be vacated?

26. The CIRP of the Corporate Debtor was commenced on 13.11.2019. Thereafter, the Applicant has taken charge as an IRP. The Applicant observed that in accordance with the audited balance sheet as on 31.03.2018, a sum of Rs. 3.39 crores is receivable from the Respondent No. 2 and therefore wrote an email dated 12.12.2019 calling upon Respondent No. 2 to provide ledger account of Corporate Debtor in its books for a period from 1<sup>st</sup> April, 2018 to 30<sup>th</sup> November, 2019.

27. The Respondent No. 2 vide an email dated 18.12.2019 sent across ledger account of the Corporate Debtor in its books which reflects as payable balance of Rs. 77,39,624/-. The Leger Account is reproduced as below:

**Diamond India Limited -(18-19)**  
2A-A WING,LAXMI TOWER,  
BEHIND ICICI BANK LTD.BKC-BANDRA EAST  
Mumbai-400 051

**ROYAL REFINERY PVT. LTD.**  
Ledger Account  
3-E, TRISHLA PREMISES CO.OP SOC. LTD.3 RD FLOOR,  
122, SHEIKH MENON STREET,  
MUMBAI-400002

1-Apr-2019 to 18-Dec-2019

					Page 1	
Date	Particulars	Vch Type	Vch No.	Debit	Credit	
1-4-2019	Dr	Opening Balance				6,28,96,792.00
8-4-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	65	43,50,000.00		
10-4-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	83	33,00,000.00		
15-4-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	129	32,00,000.00		
23-4-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	191	28,00,000.00		
30-4-2019	Dr	400621-Interest on Security Deposit	130			2,57,051.00
	Dr	400513-Delivery Charges	148			15,815.00
	Cr	400621-Bank Charges	149	363.00		
10-5-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	389	17,00,000.00		
	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	390	22,00,000.00		
13-5-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	409	20,00,000.00		
	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	411	10,00,000.00		
16-5-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	448	23,00,000.00		
17-5-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	457	89,00,000.00		
18-5-2019	Cr	2190400 BANK LTD C.A.N.B.K.P.INDIA LTD	478	28,00,000.00		
31-5-2019	Dr	400621-Interest on Security Deposit	361			6,10,363.00
18-7-2019	Cr	CGST PAYABLE MAHARASHTRA	418	3,078.00		
	Cr	CGST PAYABLE MAHARASHTRA	419	21,12,501.00		
	Cr	CGST PAYABLE MAHARASHTRA	420	2,39,757.00		
	Cr	CGST PAYABLE MAHARASHTRA	421	10,604.00		
	Cr	CGST PAYABLE MAHARASHTRA	422	6,354.00		
	Cr	CGST PAYABLE MAHARASHTRA	423	14,18,636.00		
	Cr	CGST PAYABLE MAHARASHTRA	424	36,32,423.00		
	Cr	CGST PAYABLE MAHARASHTRA	425	36,10,040.00		
	Cr	CGST PAYABLE MAHARASHTRA	426	36,33,853.00		
31-7-2019	Dr	400621-Interest on Security Deposit	782			24,89,678.00
31-8-2019	Dr	400621-Interest on Security Deposit	982			32.00
5-12-2019	Cr	CGST PAYABLE MAHARASHTRA	1000	32,33,747.00		
18-12-2019	Cr	CGST PAYABLE MAHARASHTRA	1038	25,93,770.00		
	Cr	CGST PAYABLE MAHARASHTRA	1039	5,57,689.00		
	Cr	CGST PAYABLE MAHARASHTRA	1040	29,26,292.00		
				5,85,29,107.00	6,62,66,731.00	
	Cr	Closing Balance		77,39,624.00		
				6,62,68,731.00	6,62,68,731.00	

28. The email from the Respondent No. 2 also mentioned that though the amount is receivable by the Corporate Debtor, they have instructions from the Respondent No. 1 not to disburse the amount vide the letter dated 31.05.2019. Respondent No. 1 is apex anti-smuggling agency of India working under the Indirect Taxes and Customs, Ministry of Finance, Govt. of India.

29. The Respondent No. 2 is withholding the funds of the Corporate Debtor in compliance of law of foreign trade and in view of the order of

attachment passed by the Respondent No. 1.

30. The contentions of the Respondent No. 1 in the reply state that they had specific intelligence that the directors of the Corporate Debtor, before initiation of the CIRP, diverted the duty free gold bars imported under advance authorization in to the open market for their benefit to fulfill the export obligations under the advance authorization. The exports of cheap imitation jewelry were made in the guise of gold jewelry which is an offence under the Customs Act. The officers of the Respondent No. 1 examined the export consignment in respect of shipping bill no. 4338382 dated 22.05.2019 filed by the Corporate Debtor which sought to export 12.708 kgs of 22 kt gold bangles and chain valued at declared FOB value of USD 5,32,665.84 (Rs. 3,66,47,410/-) and net receivable of USD 25633 to profit point general trading SZE, Ajman, UAE. Therefore, the enquiry is pending with regard to the said offence and the jewelry were seized under Section 110 of the Customs Act, 1962. The statements of Director of the Corporate Debtor, Mr. Vishal Harish Chaudhary, were recorded and he has admitted a shortage of approximately 294 kgs of gold was recorded. Shri Vishal Harish Chaudhary was arrested on 25.05.2019. The statement of other directors were also recorded. The statement of other Director of the Corporate Debtor, Shri Gaurav Dilip Panwar, was also recorded. The statement of Shri Rajesh Yaswant Gangan, employee of the Corporate Debtor, was also recorded. Therefore, an investigation is pending against the Corporate Debtor and its directors. The Respondent No. 1 further mentions that the Corporate Debtor has entered into an agreement dated 14.09.2017 with Respondent No. 2. Respondent No. 2 is a nominated agency to import duty free gold for its supply to its exporters like that of the Corporate Debtor. The quantity of duty free gold was obtained by the Corporate Debtor under the provisions of Foreign Trade Policy and handbook of procedures governing customs notification no. 57/2000 dated 08.05.2000. The laws and procedures required that the gold jewelry made up of the

duty free gold bars obtained by the Respondent No. 2 by the Corporate Debtor are exported. On verification of the same, duty exemption is granted to the Corporate Debtor.

31. The Respondent No. 1 vide letter dated 31.05.2019 informed Respondent No. 2 of the fraudulent export of the jewelry made up of copper and nickel in the guise of gold jewelry as found in one of the intercepted export shipments at Ahmedabad Air Cargo. On an investigation being undertaken, the Respondent No. 1 has requested, vide letter dated 31.05.2019, the Respondent No. 2 not to disburse the duty deposit lying with the Respondent No. 2 to safeguard the revenue interest of the Respondent No. 2.

32. The contentions of the Respondent No. 2 in their reply specifically plead that they are the nominated agency under notification no. 88/2008 dated 26.02.2019 of DGFT, Ministry of Commerce Industry, Govt. of India. The Corporate Debtor as an exporter had entered into an agreement of purchase of precious metals with the Respondent No. 2 as nominated agency on 14.09.2017.

33. The Corporate Debtor maintained a margin account with the Respondent No. 2 for the payment towards gold value, custom duty, taxes, charges, expenses etc. and the Respondent No. 2 received a letter from Respondent No. 1 directing Respondent No. 2 not to disburse any amounts held by them in the account of the Corporate Debtor without obtaining an NOC from Respondent No. 1. The Respondent No. 2 also confirmed with the reply that in case they receive an NOC from DRI Mumbai, they will release the balance lying in the account of the Corporate Debtor to the Applicant, RP.

34. The Applicant has filed its rejoinder stating that in view of the moratorium under section 14 of the Code and section 18 (1)(f) of the Code, the RP has to take control of the asset of the Corporate Debtor

and the amount lying in with the Respondent No. 2 is an asset of the Corporate Debtor and hence in view of Section 238, Section 18 (1)(f), Section 248 of the Code, the provisions of the I & B Code supersede with the provisions of the Customs Act, 1962.

35. The Professional appearing for the Applicant relies on the decision of Madras High Court in the case of *Dishnet Wireless Limited v/s Aircel Limited [WP No 24097 and 24098 of 2018]* which has yet again referred to the decision of the Apex Court in the case of *Pr. CIT v/s Monnet Ispat* wherein it was held asunder:

*"10. A perusal of the above provisions clearly tells us that once an order of moratorium is granted by the NCLT, the legal fiction under Section 14 of the IBC will come to the rescue of the corporate debtor. Therefore, taking into consideration all the above said provisions of law and also the ratio laid down by the Apex Court in the above said case, as also the Delhi High Court holding that when once the Moratorium is granted by the NCLT, it will continue till the completion of Corporate Insolvency Resolution Process or until it approves the resolution plan under Section 31(1) of the IBC or passes an order of liquidation of corporate debtor under Section 33 of the IBC, as the case may be, the present Writ Petitions shall stand disposed of, directing the respondents to keep the impugned orders in respect of both the petitioners, in abeyance, till the disposal of the proceedings pending before the NCLT, Mumbai and also the further appeal(s), if any that may be filed by any of the parties to these Writ Petitions. No costs. Consequently, W.M.Ps. are closed."*

36. The Professional appearing for the RP also relied upon the decision of the Apex Court in the case of *Pr. CIT v/s. Monnet Ispat (supra)* and

decision of Hon'ble High Court of Andhra Pradesh in the case of *Leo Edibles & Fats Ltd. vs. Tax Recovery Officer [2018 SSC Online Hyd 193]* and held as under:

*"This bench has given anxious consideration to the submissions made by the Applicant and in view of the provisions of Section 14 of Code, the moratorium is in operation. The contention of the Applicant that he is empowered to take custody of all the assets owned by the Corporate Debtor is also correct and in view of this he is entitled to utilize the money blocked due to garnishee orders for the normal business of the Corporate Debtor. Further, Section 238 of the Code which overrides the provisions of the other enactments to the extent they are inconsistent to the Code is also in favour of the applicant for considering the prayer in this applications. Further, this Code has not provided priority to the government dues on the basis of crown debts as provided under the erstwhile Companies Act, 1956, the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. In fact under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 the claim preferred by government authorities are treated as preferential claim and the payment will be made accordingly. However under Section 53 of the Code the claim of the government authorities are relegated to 5th position in priority while distributing the proceeds in Liquidation. If the Respondents 1, 2 and 3 are allowed to take the money blocked under the garnishee orders that will be against the explicit provisions of this Code. Since Section 238 of this Code, overrides the provisions of Madhya Pradesh VAT Act, 2002, Telangana VAT Act, 2005 and West Bengal VAT Act, 2003, based on which the Respondents 1, 2 and 3 issued the garnishee orders, these garnishee orders do not have legs to*

*stand.”*

Conclusion:

37. Upon commencement of CIRP, the Resolution Professional is duty bound under Section 18(f) of the Code to take control of the assets of Corporate Debtor and in the process has ascertained that certain monies were lying in the account of Corporate Debtor as maintained by Respondent No. 2 and sought refund of the said monies, but was informed about the order of attachment passed by Respondent No. 1. The Respondent No. 1's claim, if any, upon crystallization and completion of investigation/ enquiry against the Corporate Debtor, will be construed to be an Operational Debt in terms of Section 5(21) of the Code, as the Corporate Debtor is under CIRP. Section 5(21) is reproduced below:

*"Operational Debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."*

Therefore, under the CIRP regime as enunciated under the I & B Code, the government dues do not take precedence over the dues of Secured Financial Creditors. However, under Section 53 of the Code, the claim of the Government authorities are relegated to 5th position in priority while distributing the proceeds in Liquidation.

38. It is clear from the language of Section 14 of the Code that moratorium is imposed immediately upon the commencement of the CIRP and that all the pending proceedings against the Corporate Debtor are automatically stayed. Section 14 of the I & B Code is reproduced as below:

*“(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 judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

*(b) transferring, encumbering, alienating or disposing of 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;*

*(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.*

*(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."*

39. It is also held that in strict interpretation of Section 238 & 248 of the Code read with Section 142A of the Customs Act, 1962, it is obvious that the code will override anything inconsistent contained in any other enactment. With the initiation of CIRP of the Corporate Debtor, the order of attachment dated 31.05.2019 passed by Respondent No. 1 is in conflict with the ongoing CIRP and shall be stayed/ vacated. Section 238 and Section 248 of the Code including Section 142A of the Customs Act, 1962 are extracted below:

*"Section 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."*

*"Section 248: Amendments of Act 52 of 1962:*

*The Customs Act, 1962 shall be amended in the manner specified in the Fourth Schedule."*

*"Section 142A. Liability under Act to be first charge:*

*Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in section 529A of the Companies Act, 1956, (1 of 1956 51 of 1956) the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, (54 of 2002) be the first charge on the property of the assessee or the person, as the case may be."*

40. There cannot be any doubt that the amount of Rs. 77,39,624/- which is the balance of margin money deposited by the Corporate Debtor with the Respondent No. 2, is an asset of the Corporate Debtor and by virtue of the declaration of Moratorium under Section 14 of the Code, there shall be a stay of all proceedings pending against the Corporate Debtor. The Applicant shall take control and custody of any asset over which the Corporate Debtor has ownership rights under Section 18(f) of the Code.

41. In the light of the aforesaid paragraphs, it is doth ordered as follows:

- A) The order of attachment dated 31.05.2019 issued by Respondent No.1 is hereby vacated.
- B) The Respondent No.2 is directed to release the margin money of Rs. 77,39,624/- deposited by the Corporate debtor with the Respondent No. 2 to the RP immediately forthwith.

C) In view of the above, the I.A is allowed and disposed off.

SD/-  
Chandra Bhan Singh  
Member (Technical)

SD/-  
Suchitra Kanuparthi  
Member (Judicial)

