

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT III

M.A. 2555/2019

IN

C.P.(IB)-350(MB)/2019

(Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

Devendra Singh,

Resolution Professional,

ATS Greens Paradiso, Flat No. 02053, Tower-2,

Plot No. GH-03, Sector-CHI-04,

Greater Noida, Uttar Pradesh-201308.

.....Applicant

Vs.

1. Sanjay Rathi,

Commissioner, Government of India,

Ministry of Finance, Department of Revenue,

Office of the Principal Commissioner,

Central GST and Central Excise having its office at
Nagpur-I, Telangkhedi Road, Civil Lines,

Nagpur-440001.

2. N.K. Bapat,

Superintendent (Preventive),

Office of the Commissioner of

Central GST and Central Excise having its office at
Nagpur-I, GST Bhavan, PO Box 81,

Civil Lines, Nagpur 440001.

.....Respondents

In the Matter of:

Venus Rolling Mills Private Limited

Company incorporated under the Companies Act,
1956, having its registered office at E-8, MIDC,
Butibori, Nagpur-441122.

.....Corporate Debtor

Order Reserved On : 05.06.2023

Order Pronounced On : 25.07.2023

Coram:

Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Madhu Sinha, Member (Technical)

Appearance:

For the Applicant in Person : Mr. Devendra Singh

For the Applicant : Mr. Palash S. Singhai a/w Ms.
Sneha Panchmukh, Advocates

For the Respondent : Adv. Sangeeta Mishra
(authorized CGST Commissioner Nagpur)

For the Respondent in Person : Mr. V. Rishi
(Commissioner)

ORDER

Per: H. V. Subba Rao, Member (Judicial)

1. The above application is filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") for seeking the following reliefs:

- (a) *That this Hon'ble Tribunal be pleased to direct the Respondents themselves, and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, to release/remove/lift the attachment on the goods described herein in favour of the Applicant;*
- (b) *That this Hon'ble Tribunal be pleased to direct the Respondents themselves, and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, to handover custody of the goods described herein, to the Applicant;*
- (c) *That this Hon'ble Tribunal be pleased to direct the Respondents themselves and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, to depute*

competent person(s) to facilitate the physical verification of the goods described herein, by the Applicant himself, or his agents or assigns and/or any other persons claiming through or under him;

(d) Pending the final hearing and disposal of this Application, this Hon'ble Tribunal be pleased to restrain the Respondents themselves, and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, from acting upon the attachment levied on the goods described herein, by the Panchnama and Supardnama dated 16th August,2018 and/or restraining them from dealing with the attached goods in any form or manner;

(e) Pending the final hearing and disposal of this Application, this Hon'ble Tribunal be pleased to direct the Respondents themselves, and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, to depute competent person(s) to facilitate the physical verification of the goods described herein, by the Applicant himself, or his agents or assigns and/or any other persons claiming through or under him;

(f) An ex-parte relief in terms of prayers (d) and (e) above may be granted; and;

(g) Such other orders or order be passed as the Hon'ble Tribunal may deem fit and proper.

2. The brief facts behind filing the above application as pleaded in the following Paras are as follows:

- 1) The Applicant is the Resolution Professional of the Corporate Debtor, appointed in accordance with the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code] and the Regulations framed thereunder.
- 2) The Respondent No.1 is the Principal Commissioner of the Central Goods and Service Tax and Central Excise Department, having

his office at the address provided in the cause title. The Respondent No.2 is a Superintendent (Preventive) officer of the Office of the Commissioner of Central GST and Central Excise, having his office at the address provided in the cause title.

- 3) The Respondents attached the goods of the Corporate Debtor described herein below, under the attachment order dated 16th August 2018, under the provisions of the Central Excise Act, 1944 [hereinafter referred to as "the Central Excise Act"] read with the Central Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act"], for non-payment of Central Excise duty of Rs.1,95,00,000/- [INR One Crore and Ninety-Five Lakhs only].
- 4) Subsequently, on 22nd April 2019, this Hon'ble Tribunal admitted the instant Company Petition filed by the Corporate Debtor under Section 10 of the Code. Pursuant to which the Corporate Insolvency Resolution Process [hereinafter referred to as "CIRP"] commenced and the Applicant was appointed as the Interim Resolution Professional
- 5) Despite numerous requests from the Applicant, the Respondent has refused to hand over custody of the attached goods and vacate/lift the attachment order dated 16th August, 2018 and has also neglected to depute competent persons to facilitate physical verification of the attached goods. Since, the order of attachment is squarely hit by the provisions of the Code, in particular Sections 14 and 238 of the Code, the said order of attachment under the Central Excise Act is a nullity and non-est in law and the attached goods ought to be handed back to the Applicant for the purpose of carrying on the CIRP of the Corporate Debtor.
- 6) The Applicant is therefore, constrained to file the instant Application inter alia, to direct the Respondent to release the attachment levied on the finished goods of 1108.680 MT valued at Rs. 3,54,77,696/- as per the Respondents' estimation and further, to release the said goods into the custody and possession of the Applicant and allow the Applicant to appropriately deal with

them under the provisions of the Code as if there is no attachment order.

7) The material facts giving rise to the instant Application are set out hereunder:

- a. By and under a Panchnama dated 16th August, 2018 [hereinafter referred to as "the attachment Order], Respondent No.2 *inter alia*, attached the stock of finished goods of 1108.680 MT valued at Rs.3,54,77,696/- [Rupees Three Crores Fifty-Four Lakhs Seventy- Seven Thousand and Six Hundred And Ninety-Six only] [hereinafter referred to as "the attached goods"], under the provisions of Section 11 of the Central Excise Act read with Section 174(2)(e) of the CGST Act for non-payment of the Central Excise duty pertaining to the period prior to 1st July 2017, of Rs. 1,95,00,000/- [INR One Crore and Ninety-Five Lakhs only]. Further, the Panchnama recorded *inter alia*, that the ownership of the attached goods now vested with the President of India and Respondent No.2 offered to handover the attached goods to Mr. Amol Vishwanath Mashakhetre, the erstwhile Accountant of the Corporate Debtor for safe custody of the goods. Thereafter, under the Supurdnama, the Respondents handed over the attached goods for safe custody to Mr. Amol Vishwanath Mashakhetre. Hereto annexed and marked as Exhibit-"A" is a copy of the Panchnama dated 16th August, 2018.
- b. On 16th August 2018, Respondent No.2 addressed a letter to Mr. Yatendra Singh Panwar, the erstwhile Managing Director of the Corporate Debtor, summoning him on 20th August 2018, in relation to an enquiry regarding evasion of Central GST and Central Excise by the Corporate Debtor. Hereto annexed and marked as Exhibit- "B" is a copy of the letter dated 16th August, 2018.

- c. Thereafter, the Corporate Debtor filed the Company Petition (I.B.) No.350 of 2019 before this Hon'ble Tribunal under Section 10 of the Code read with Rule 7 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016. The Applicant craves leave to refer to and rely on the same as and when produced.
- d. By way of an Order dated 22nd April 2019, this Hon'ble Tribunal *inter alia*, admitted the Company Petition (I.B.) No.350 of 2019 and appointed the Applicant as the Interim Resolution Professional of the Corporate Debtor. Pursuant to this Order, the CIRP of the Corporate Debtor commenced and concomitantly the period of Moratorium as per Section 14 of the Code also commenced. Hereto annexed and marked as Exhibit - "C" is a copy of the Order dated 22nd April, 2019 passed by this Hon'ble Tribunal
- e. On 13th May 2019, the Advocate for the Applicant, addressed a letter to the office of the Respondents, regarding "*Release of goods attached against recovery of demand*". For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below.

"... We wish to inform you that our company has been gone under CIRP by order of honourable NCLT...

...Since the company is under moratorium period, hence no recovery can be processed against the company and you have to file Form B for the same to recovery of dues as per section 53 of the IBC 2016.

Assessee therefore prays to kindly release the stock attached by you vide attachment order dated 16.08.2018, so that the company can start its operations and also starts its restructuring process. It has to review its resolution plan to pay its liability to be decided by COC in meeting and approved by honourable NCLT. You can claim your dues by

filling Form B to the company. It is pre-decided that no attachment is valid during moratorium period and in case of failure to get release, RP shall apply to NCLT for the same.

...

Meanwhile, assessee prays to kindly release the attachment & oblige." [emphasis applied]

Hereto annexed and marked as Exhibit-"D" is a copy of the letter dated 13th May, 2019.

f. On 17th May 2019, the Respondents submitted their claims in the requisite Form B of Rs.49.51Crores [INR Forty-Nine Crores and Fifty One Lakhs] to the Applicant. The Applicant craves leave to refer to and rely on the same as and when produced.

g. Thereafter, on 28th May 2019, the Advocate for the Applicant, addressed a letter to the office of the Respondents, in reference to the letter dated 13th May, 2019. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced hereinbelow:
*"With due respect, Assessee states that he had filed his application dated 13/05/2019 for release of goods attached against recovery of demand. He further states that, **the company is under CIRP process which is time bound program** to resolve the issues; therefore, he is expecting quick action from their department.*

He has received your Form B to finalize your demand of liability and also informed as per provision of sec 14 of IBC 2016, you cannot retain any attachment on the property of the company against your demand during its moratorium period. He presumes that your attachment will be vacated on your submission of your form B for your claim filed with us, as the same is not attached with your claim form B filed with us.

*...RP is authorized to take charge of the company and his first act is to restore the company in operation condition. Therefore, he will act with the stock lying with company to put the company into normal working conditions **and co-operation from all respective creditors for their settlement.***

You are requested to give your reply within 7 days or RP is free to take the stock attached by you as released at your end." [emphasis applied]

Hereto annexed and marked as Exhibit-"E" is a copy of the letter dated 28th May, 2019.

- h. On 28th May 2019, the first meeting of the Committee of Creditors of the Corporate Debtor was held wherein it was resolved inter alia, to confirm the Applicant as the Resolution Professional of the Corporate Debtor. Hereto annexed and marked as Exhibit - "F" is a copy of Minutes of Meeting of the Committee of Creditors held on 28th May, 2019.
- i. On 1st June 2019, the Applicant addressed an e-mail to the Respondents, after due examination of the claims submitted by the latter, wherein it inter alia, stated that the amount of interest, penalty and service tax had been erroneously calculated by the Respondents without considering the input tax credit and further, taking cognizance of an order of the competent court having jurisdiction further amount of Rs.17,43,42,168/- and interest penalty of Rs.21,60,88,035/- pertaining to dues of 2008 ought to be disregarded as the claim had been set aside. Therefore, the Applicant stated that only claim of Rs.49,166/- can be admitted for the purpose of CIRP. The Applicant sought further clarification in order to substantiate part of the said claim. Hereto annexed and

marked as Exhibit - "G" is a copy of the e-mail dated 1st June, 2019.

- j. On 3rd June 2019, the Respondent No.1 addressed a letter to the Corporate Debtor in response to the letters dated 13th May, 2019 and 28th May, 2019 requesting release of the attached goods. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below:

*"...It is observed that as per Hon'ble NCLT, Mumbai order dated 2.04.2019, there is complete stay on sale proceedings including proceedings for adjudication, and recovery of any claim against M/s Venus Rolling Mills Pvt. Ltd. **and accordingly the auction proceedings of the attached goods have been kept in abeyance.***

In so far as attachment of goods is concerned, the same has been carried out under the authority of law granted by the Central Excise Act and the same cannot be overruled/set aside by the NCLT Act. There is no automatic lifting of attachment. In compliance of the NCLT order dated 22.04.2019 the proceedings subsequent to attachment have been put in abeyance, but the attachment cannot be deemed to have been vacated.

As in the instant case, neither the amount of Central Excise duty nor the due interest thereon has been paid to the Govt. Exchequer nor sufficient Surety/Bank Guarantee has been furnished in the matter, the request for release of attached goods cannot be acceded to, at this stage. However, the goods are available for physical verification." [emphasis applied]

Hereto annexed and marked as Exhibit-"H" a copy of the letter dated 3rd June, 2019.

- k. Thereafter, on 4th June 2019, the Applicant reverted to the Respondents' letter dated 3rd June, 2019. The Applicant referred and relied on the relevant provisions of the Code being Section 17, 19 and 25. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below.

*"... As per provisions of Section 25(2)(a) of IBC, 2016 which is explained above, **the RP has to take immediate custody and control of all the assets of the Corporate Debtor.** Therefore as you mentioned in your letter dated 03.06.2019 that the attached goods of 1108.678 MT were handed over to the Assessee for safe custody under Supurdnama on 16.08.2018, now to be handed over to the undersigned and in your letter dated 03.06.2019, it was also mentioned that the goods are also available for physical verification.*

In view of the above, you are requested to handover the custody of the attached goods of 1108.678 MT from the Assessee to the undersigned which will remain under the attachment of your department. It is also requested you to depute competent authority of your department to facilitate the physical verification of attached goods of 1108.678 MT and for providing the handover of attached goods from Assessee to me.

The undersigned alongwith the team would be available at Nagpur on 08.06.2019 for the necessary compliance as enumerated above. Kindly confirm the schedule as requested."

Hereto annexed and marked as Exhibit-"I" is a copy of the letter dated 4th June, 2019.

1. On 10th June 2019, the Applicant addressed a letter to Respondent No.1, in reference to the letters dated 3rd June, 2019 and 4th June, 2019. The Applicant reiterated the

submissions made vide its letter dated 4th June, 2019. For ease of reference and convenience. relevant extracts of the aforesaid letter are reproduced herein below:

*“...As per provisions of Section 25(2)(a) of IBC, 2016 which is explained above, **the RP has to take immediate custody and control of all the assets of the Corporate Debtor.** Therefore, as you mentioned in your letter dated 03.06.2019 that the attached goods of 1108.678 MT were handed over to the Assessee for safe custody under Supurdnama on 16.08.2018, now to be handed over to the undersigned and in your letter dated 03.06.2019, it was also mentioned that the goods are also available for physical verification. **As per the provisions under IBC, 2016 the custody of all assets has to be with IRP/RP.***

In view of the above, you are requested to handover the custody of the attached goods of 1108.678 MT from the Assessee to the undersigned which will remain under the attachment of your department. It is also requested you to depute competent authority of your department to facilitate the physical verification of attached goods of 1108.678 MT and for providing the handover of attached goods from Assessee to me.

The undersigned alongwith the team would be available at Nagpur for the necessary compliances as enumerated above on the date and time confirm by you. Kindly confirm the schedule as requested so that the necessary compliances can be done. Awaiting your confirmation in the matter.”

Hereto annexed and marked as Exhibit-"J" is a copy of the letter dated 10th June, 2019.

m. On 12th June 2019, the Respondents addressed through email and letter to the Applicant in response to its e-mail

dated 1st June, 2019. Hereto annexed and marked as Exhibit - "K" is a copy of the letter dated 12th June, 2019.

- n. On 17th June 2019, the Applicant and Respondent No.2 held a meeting to discuss the release of the attachment levied on the goods wherein the Applicant delivered a copy of the aforesaid letters addressed to the Respondents dated 4th June 2019 and 10th June, 2019.
- o. Thereafter, on 18th June 2019, the Applicant addressed a letter to Respondent No.1, in reference to the letters dated 3rd June, 2019, 4th June, 2019 and 10th June, 2019 and meeting with Respondent No.2 at his office on 17th June, 2019. The Applicant reiterated the submissions made vide its letters dated 4th June, 2019 and 10th June, 2019. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below:

*"... As per provisions of Section 25(2)(a) of IBC, 2016 which is explained above, the RP has to take immediate custody and control of all the assets of the Corporate Debtor. Therefore, as you mentioned in your letter dated 03.06.2019 that the attached goods of 1108.678 MT were handed over to the Assessee for safe custody under Supurdnama on 16.08.2018, now to be handed over to the undersigned and in your letter dated 03.06.2019, it was also mentioned that the goods are also available for physical verification. **As per the provisions under IBC, 2016 the custody of all assets has to be with IRP/RP.***

In view of the above, it is also requested you to depute competent authority of your department to facilitate the:

- 1. Physical Verification of attached goods***
- 2. Handover the custody of attached goods of 1108.678 MT from the Assessee to the undersigned.***
- 3. Vacation of attachment order.***

The undersigned alongwith the team would be available at Nagpur for the necessary compliances as enumerated above on the date and time confirm by you. Kindly confirm the schedule as requested so that the necessary compliances can be done. Awaiting your confirmation in the matter."

Hereto annexed and marked as Exhibit-"L" is a copy of the letter dated 18th June, 2019.

- p. It is evident from the facts detailed above, that the Applicant has made numerous applications to the Respondents for physical verification of the attached goods and to transfer the custody and control of the attached goods in favour of the Applicant, in compliance with the provisions of the Code. However, the Respondents have turned a blind eye to the numerous attempts of the Applicant and have failed to extend cooperation to the Applicant in performing his duties as the Resolution Professional and concomitantly hindered the CIRP proceedings
- 8) The Applicant submits that as per the provisions of the Code, it is the duty of the Resolution Professional to inter alia, preserve and protect the assets of the Corporate Debtor and for that purpose, the Resolution Professional shall inter alia, take immediate custody and control of all the assets of the Corporate Debtor.
- 9) The Applicant states and submits that he dutifully made numerous applications to the Respondents to hand over the custody of the attached goods and depute competent persons to enable the physical verification of the attached goods by the Applicant. However, the Respondents have failed to extend cooperation to the Applicant in performance of his duties as the Resolution Professional and concomitantly hindered the CIRP proceedings, The Respondents only reverted to one of the numerous letters addressed by the Applicant. Wherein, it refused to release the attachment and failed to address the question of

handing over the custody of the same. Further, although the Respondent No.1 acceded to the Applicant's request for physical verification of the attached goods vide its letter dated 4th June 2019, it has subsequently neglected to appoint any competent persons to facilitate the same or take any other active steps for that purpose.

- 10) The Applicant states that this Hon'ble Tribunal by its Order dated 22nd April 2019, admitted the Company Petition (I.B.) No.350 of 2019 and consequently imposed a Moratorium under Section 14 of the Code whereby it prohibited 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"*. The Applicant submits that the proceedings before the Respondents for recovery of outstanding Excise duty are squarely covered and prohibited under the Code during the period of Moratorium.
- 11) The Applicant has extracted Section 238 of the Code for ease of reference and convenience, which succinctly states:

"238. 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."

The Applicant submits that the above non-obstante clause stipulates that the provisions of the Code shall have an over-riding effect over anything inconsistent therewith in any other law. Therefore, it is submitted that the said order of attachment under the Central Excise Act, is a nullity and non-est in law. The Applicant submits that the attachment of the goods under the Central Excise Act ought to yield to the provisions of the Code on commencement of CIRP and concomitant declaration of moratorium. Therefore, the attachment levied there under must

be raised and the goods released into the custody and control of the Applicant being the Resolution Professional of the Corporate Debtor under the provisions of the Code.

- 12) Further, the Applicant states and submits that as per the provisions of the Code only the Hon'ble National Company Law Tribunal has the jurisdiction to decide the distribution of properties and assets of the Corporate Debtor during the CIRP proceedings. Therefore, the Applicant is undoubtedly entitled to an Order of release of attachment and handover of the custody and possession of the goods attached by the office of the Respondents.
- 13) The Applicant states and submits that the objective of the Code is to expedite the Insolvency Resolution Process and to secure maximization of the value of assets of the Corporate Debtor for distribution to all stake holders. Therefore, the Applicant is constrained to file this Application to prevent prejudice being caused to the financial and other creditors and stakeholders of the Corporate Debtor. It is submitted that all assets of the Corporate Debtor should be distributed in accordance with the provisions of the Code and no persons/ parties to be accorded any special opportunity or preferential treatment to settle their debts in priority over the other creditors and/or stakeholders in violation of the Code.
- 14) The Applicant submits that the attached goods are of a substantial value and the creditors and other stakeholders would be at a loss if the Applicant were constrained to exclude the same from the list of assets of the Corporate Debtor. The Applicant submits that the list of assets plays an integral role in estimating the value of the Corporate Debtor for any potential Resolution Applicants and in the absence thereof, thereafter, in estimating the Liquidation Value of the Corporate Debtor.

- 15) It is submitted that the only means of recovery of dues available to the Respondents is by submitting their claims to the Applicant in the requisite form and manner set out in the Code.
- 16) It is pertinent to note that the Respondents have submitted their claims on 17th May 2019 for Rs.49.51 Crores of which only Rs.49,166/- has been considered eligible for admission by the Applicant. Clarifications regarding claim of GST of Rs.8,69,94,911/- and interest penalty of Rs.1,59,29,566/- are pending verification of the Applicant. However, the Respondents have neglected to release the attachment levied on the goods. It is submitted that the inclusion of the Respondents' claim and exclusion of the value of the attached goods prejudicially affects the other creditors and stakeholders of the Corporate Debtor.
- 17) The Applicant states and submits that unless the attachment levied by the Respondents on the goods is withdrawn and the goods are released, the Applicant will be unable to proceed with CIRP of the Corporate Debtor in accordance with the Code and the provisions set out therein.
- 18) The Applicant states that the Code provides for a fixed timeline of 180 days which can be further extended by 90 days. It is submitted that as on the date of filing this instant Application 70 days have already lapsed. It is submitted that the Respondents are causing inordinate and unwarranted delay and consequently hampering the CIRP process.
- 19) The Applicant has a strong prima facie case for grant of the reliefs prayed for herein under. No harm, loss or prejudice will be caused to the Respondents if the reliefs prayed for herein are granted, but if the reliefs are not granted, irretrievable damage and loss would be caused to the Corporate Debtor in valuing the assets available to any potential Resolution Applicants and consequently affecting the amounts to be recovered by the financial creditors and other stakeholders. The balance of convenience is, therefore, entirely in favour of the Applicant.

- 20) The Applicant declares that this Application falls within the jurisdiction of this Hon'ble Tribunal.
 - 21) The Applicant further declares that no part of this Application is barred by limitation.
 - 22) The requisite fees have been duly paid and the receipt thereof has been submitted separately.
3. The Respondent filed affidavit in reply of Ms. Sonal Jawanjal, Assistant Commissioner, CGST & Central Excise Division Hingnan, Nagpur-I strongly opposing the above application. The Paras of the affidavit in reply are extracted hereunder for ready reference:

- I. **As to Para 1:** All the application made by the applicant or on behalf of the applicant have been considered and replied from time to time.
- II. **As to Para 2, 4 to 8:** The department is having legal possession of the attached goods and the same cannot remain as assets of the Assessee and thus lie outside claim and purview of the applicant.
- III. **As to Para 3:** With regards to physical verification to be undertaken by the applicant, Department vide letter dated 18/19-07-2019 (Exhibit A 2) has already informed the applicant to intimate date of physical verification to be done by him, to facilitate nomination of Departmental officer to be available for the same.

Brief Facts of the case:

- i. M/s Venus Rolling Mills Pvt. Ltd., E-8, MIDC, Butibori, Dist. Nagpur (hereinafter referred to as the "Assessee") is registered for the activity of manufacture of finished goods and were paying Central Excise Duty. Shri Devendra Singh, Resolution professional (hereinafter referred to as the "applicant") has been

appointed as Interim Resolution Professional by The Hon'ble NCLT Mumbai bench vide order dated 22-04-2019.

- ii. The Assessee has filed their ER-1 returns and assessed their Central Excise duty liability however not paid the Central Excise duty to the tune of Rs.1,95,46,034/- in respect the liability for the months of Sept, 2016, Oct., 2016, Jan., 17 to Apr., 17 & Jun., 2017. Thus, the assessed duty liability not paid by the Assessee was required to be recovered along with interest of Rs.60,88,542/- (upto 22-04-2019) as applicable under Section 11AA of the Central Excise Act, 1944, as well as penalty under Rule 8(3A) of Central Excise Rules, 2002 of Rs.52,03,359/- (upto 22-04-2019) totalling to Rs.3,08,37,935/- under the provisions of Section 11 of Central Excise Act, 1944. Accordingly, finished goods of the Assessee have been attached vide panchanama dated 16-08-2018 and further process of determination of reserve price and e-auctioning of the attached goods was in progress.
- iii. In the meantime, the applicant had served upon the intimation of commencement of Corporate Insolvency Resolution Process dated 06-05-2019. Accordingly, after obtaining legal advice from Sr. CGSC, Nagpur the process of auctioning of attached goods was stalled. Further the Division Hingna, Nagpur I Commissionerate filed claim of the Department with the Applicant in the matter as Form B along with supportive documents enclosed as (Exhibit A 3).
- iv. Further, Shri R. K. Ganeriwala, counsel authorized by applicant, filed application dated 13-05-2019 on behalf of the Assessee for releasing the attached goods with subsequent reminder letter dated 28-05-2019. After obtaining legal advice from Sr. CGSC, Nagpur the application made by Shri R. K. Ganeriwala, counsel was considered and replied to by the Commissioner, CGST & Central Excise Nagpur I Commissionerate, Nagpur vide letter dated 03-06-2019.

- v. Thereafter, the applicant requested via letters dated 04-06- 2019, 10-06-2019 personally on 17-06-2019 for handing over custody of attached goods as also physical verification of these goods. The applicant sent another letter dated 18-06-2019 for vacation of attachment order, handing over custody of attached goods as also physical verification of these goods. After obtaining legal advice from Sr. CGSC, Nagpur all the three applications made by the applicant was considered and replied to by the Commissioner, CGST & Central Excise Nagpur I Commissionerate, Nagpur vide letter dated 18/19-07-2019 (Exhibit A 2).
- vi. Accordingly, the parawise comments in respect of Application made by Shri Devendra Singh, Resolution Professional under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 in the matter of M/s Venus Rolling Mills Pvt. Ltd., Butibori, Dist. Nagpur are as under-

Parawise comments

- A. **Para 1 to 4:** No comments offered.
- B. **As to Para 5:** All the applications of the applicant or on behalf of the applicant have been considered and replied. The applicant is required to intimate the date of physical verification to be undertaken by him, which has yet not been communicated. Further, the finished goods of the Assessee have been attached by the Department on 16-08-2018 prior to the matter before Hon'ble NCLT, Bench at Mumbai and these goods have been under the provisions of Section 11 of the Central Excise Act, 1944. In this respect it please be considered that the words used in the section 25(2)(a) of IBC, 2016 with regard to Assets and Business records, speaks of "Custody from Corporate Debtor" and not from any statutory authority, like Central Excise Department. In the instant case the Department has legally taken possession of the property under authority of law and has handed over the said possession to M/s Venus Rolling Mills for safe custody. The Legal

possession of the attached goods is with Central Excise Department and M/s Venus Rolling Mills is just appointed as custodian for protecting the property attached by the department. Further, Department is not "Corporate Debtor" as defined in the said provision, hence the claim of IRP is not maintainable under law and it is not necessary to hand over the possession of goods to the applicant as claimed by him.

- C. **As to Para 6:** In view of the facts of the case, it appears that the applicant is not entitled to file the present application.
- D. **As to Para 7 a) to j):** It is a matter of record.
- E. **As to Para 7 k & o):** The copy of letter dated 04-06-2019 & 10-06-2019 has been filed by the Applicant personally on 17-06-2019 (as mentioned in Para 7 n) of the application) for handing over custody of attached goods as also physical verification of these goods. No such copy / letter has been received by the Department prior to 17-06- 2019. All the applications dated 04-06-2019 & 10-06-2019 (both received on 17-06-2019) and dated 18-06-2019 filed by the Applicant were considered and replied to by the Commissioner, CGST & Central Excise Nagpur I Commissionerate, Nagpur vide letter dated 18/19-07- 2019 (copy enclosed)
- F. **As to Para 7 P:** All the applications made by the applicant / made on behalf of the applicant have been considered by the Department and replied from time to time. It appears that the applicant is trespassing his duties, and responsibilities / mandate as allocated to him by the Hon'ble NCLT and is attempting to take over the possession of the attached goods in a manner which doesn't appears to have any legal backing. The goods are currently under legal possession of the CGST & Central Excise Department.
- G. **As to Para 8:** The attached goods are no more assets of the Assessee but the legal possession has been taken over by the Department, hence the applicant does not have any right to take legal possession of the attached goods.

- H. **As to Para 9:** All the application filed by the applicant / on behalf of the applicant have been considered by the Department and replied from time to time. As regards verification of the attached goods, vide letter dated 18/19-07-2019 (copy enclosed) it has already been informed to the applicant to intimate date of physical verification to be done by him, to facilitate nomination of Departmental officer to be available for the same.
- I. **As to para 10:** The recovery proceedings have already been stalled as per the order of the Hon'ble NCLT.
- J. **As to para 11:** The Action taken under the provisions of Central Excise Act, 1944 prior to initiation of proceedings before the Hon'ble NCLT cannot get nullified. The prior lawful actions cannot be reverted subsequently and retrospectively, subsequent to initiation of proceedings before the Hon'ble NCLT.
- K. **As to Para 12 to 14:** The Legal possession of the attached goods is with Central Excise Department and the Assessee is just appointed as custodian for protecting the property attached by the department. Further, Department is not "Corporate Debtor" as defined in the said provision, hence the claim of applicant is not maintainable under law. The attached goods are thus no more remains assets of the Assessee.
- L. **As to para 15:** The contention of the applicant is not correct, legal and proper in considering the fact that the goods are already in legal possession of the Department. The goods can subsequently be auctioned with necessary and due permission of the Hon'ble NCLT.
- M. **As to para 16:** It is a matter of record.
- N. **As to para 17:** The attached goods are in legal possession of the Department and outside the purview of the applicant.
- O. **As to para 18:** The allegations levelled by the applicant are unwarranted, illegal and without any basis. The Department has always considered and promptly replied to the applications filed

by the applicant and ensured that, Department is not causing delay to any legal process.

P. **As to para 19:** The applicant is trying make his case out of none. The legal possession of the attached goods is with the Department and the same cannot form assets of the Assessee and Department does not fall under the purview/ Category of "Corporate Debtor".

Q. **As to para 20 to 22:** no comments offered.

It is therefore submitted that the Resolution Professional cannot go beyond the code and the prayer of the applicant deserves to be dismissed as the same is infructuous against the interest of justice.

OBSERVATIONS & FINDINGS

4. Heard Mr. Palash S. Singhai a/w Ms. Sneha Panchmukh, Counsel appearing for the Liquidator and Ms. Sangeeta Mishra, counsel appearing for the Respondent.
5. As mentioned earlier the above application is filed by the Liquidator seeking directions to the Respondent/Department and its officials to remove the attachment on the goods described in the application with a further direction to the Respondent to handover the custody of the goods described in the application. As stated in the reply, the Respondents are resisting both lifting the attachment and handing over the custody of the goods to the Liquidator on the ground that the department has lien over the goods towards their unpaid statutory dues payable by the Corporate Debtor and therefore they are not under legal obligation to return them to the Liquidator.
6. The entire contention of the Respondents is no longer res-integra. The Hon'ble NCLAT after analysing the entire case law in the similar

circumstances in Company Appeal (AT) (Insolvency) No. 409 of 2023 & Interlocutory Application No. 1357 of 2023 in the matter of Pradeep Kumar Kabra Vs. Assistant Commissioner, CGST & Central Excise set aside the rejection order of the Adjudicating Authority in a similar application filed by the Liquidator and admitted the appeal by allowing the application filed by the Liquidator with the following observations and findings in Para Nos. 17, 18 & 19 of the judgment:

17. *In view of the Circular issued by Central Board of Excise and Customs, the Department itself has understood that when CIRP has been initiated for recovering any amount, the claim has to be filed and no recovery can be made since moratorium has been imposed under the Code. The Respondent after imposition of moratorium with effect from 27.04.2022 could not have recovered its dues. The attachment of the goods of the Corporate Debtor were made before initiation of CIRP. The assets, which were attached were still the assets of the Corporate Debtor, which were in the 'supurdagi' of the Corporate Debtor. Respondent being unable to recover the amount from the attached assets, the RP has rightly filed the Application seeking a direction for release of the attachment, so that assets can be included in the assets of the Corporate Debtor for payment to the creditors.*

18. *In view of what has been stated above, we are of the view that the Adjudicating Authority has committed error in rejecting Application filed by RP, by holding that Adjudicating Authority has no jurisdiction to issue direction to the State Authority, when the IRP is duty bound to take custody and control of the assets belonging to the Corporate Debtor, Application under Section 60, sub-section (5), sub-clause (c) was clearly maintainable and the Adjudicating Authority had ample jurisdiction to issue necessary direction.*

19. In result, we allow the Appeal and set-aside the order dated 07.02.2023 passed by the Adjudicating Authority. We direct the Respondent to release the attachment in question. Parties shall bear their own costs.

7. It is also needless to mention that the Hon'ble Supreme Court time and again in catena of decisions held that the IB Code has overriding effect over other laws and the remedy of the Government department and statutory authorities for recovering their pre CIRP dues is only by way of submitting their claim to the RP/Liquidator and not by attaching and selling the properties of the Corporate Debtor after commencement of the moratorium.
8. Therefore, after hearing both sides and upon perusing the above order passed by the Hon'ble NCLAT, this Bench is of the considered opinion that the above application filed by the Liquidator has to be allowed directing Respondents to release the attachment of the goods and also to handover them to the Liquidator forthwith.
9. Accordingly, the above application bearing no. **M.A. 2555/2019 is allowed.** The Respondent shall remove the attachment and handover the attached goods of the Corporate Debtor to the Liquidator within two weeks from the date of uploading of the order.

Sd/-
MADHU SINHA
Member (Technical)

Shubham

Sd/-
H.V. SUBBA RAO
Member (Judicial)