

SUNDARESH BHATT, LIQUIDATOR OF ABG SHIPYARD vs CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS

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INTRODUCTION: FACTS OF THE CASE

The Appellant in the present case is the liquidator of ABG Shipyard, the Corporate Debtor while the Central Board of Indirect Taxes and Customs is the respondent. The Corporate Debtor was a ship-building company. As a part of its business importing shipbuilding materials and exporting completed ships were frequently done. For the same, such goods were stored in Custom Bonded Warehouses by the Corporate Debtor. The Corporate debtor had taken benefit of the Export Promotion Capital Goods Scheme (EPCG Scheme) and a license for the same was provided.

The CIRP against the Corporate Debtor was initiated by the National Company Law Tribunal (NCLT) by order dated 01/08/2017 and proclaimed a moratorium under section 13(1)(a) of the IBC. The appellant was then appointed the Interim Resolution Professional. The Corporate Debtor had goods in the Customs Bonded Warehouse which were requested to be released by the appellant as the Corporate Debtor's asset. The respondent issued six notices demanding the customs duty with interest that was to be unpaid by the Corporate Debtor from 29/03/2019 to 07/04/2019.

The NCLT passed an order on 25/04/2019 commencing the liquidation procedure against the Corporate Debtor and placing the appellant as the liquidator. The moratorium ceased to operate incidentally¹ and section 33(5) of IBC was ordered. However, the respondent filed claims for the goods in the warehouse. The appellant had directed the release of the goods from the respondents but no action was taken. Thus, the appellant filed an interlocutory application in the NCLT for the release of the same. In return, the respondent sent a notice for recovery of its dues under section 72(1) and claimed the same before the appellant. The NCLT declared in favor of the appellant that IBC overrides the Customs Act and releases the goods to the appellant. The Tribunal also held that the dues to the respondent are government dues and can

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¹ Insolvency and Bankruptcy Code 2016, s 14(4)

be realized during the distribution. Aggrieved by the decision of the Tribunal the respondent appealed against it before the Appellate Tribunal.

The NCLAT set aside the order by the NCLT and held that the goods need not be released unless according to the Customs Act, which the Corporate Debtor failed to fulfill. The Appellate Tribunal held that the question of overriding power does not arise in the case. The Corporate Debtor had not cleared the bills and claimed the goods over the years the title to the same is deemed relinquished long before the initiation of the CIRP. The respondent has the right to recover its dues from selling the goods by section 72(2) of the Customs Act. Thus, the goods are not assets of the Corporate Debtor and resultantly the appellant cannot claim the same. This civil appeal under section 62(1) of the IBC by the appellant was filed against the order of the NCLAT.

ISSUES

1. Do the provisions of IBC prevail over the Customs Act? If it does, to what extent?
2. Can the respondents claim the title of goods and sell the same to recover their dues while the liquidation procedure had already commenced?

OBSERVATION BY THE COURT

The respondent has repeatedly argued that during the period from 2012 to 2015, the Corporate Debtor took no action to claim the goods and abandoned the same. However, it is to be noticed that neither did the respondent take any action to claim the customs dues until the initiation of the insolvency procedure. The first notice demanding the dues was dated 29/03/2019. The respondent had the opportunity to demand the dues after the expiration of the warehousing period but waited for the insolvency process to commence to make the demand.

Similarly, Form C under the liquidation process by the respondent shows their recognition of the goods as the Corporate Debtor's own. These actions prove that the respondent wanted to stake a claim under section 53 of IBC that distributes the assets of the Corporate Debtor. However, the Customs Authority soon abandon these claims and took action to claim the goods as their own asserting deemed transfer. These, actions by the respondent show inconsistency and questionable intentions.

The Hon'ble Supreme Court observed that the title cannot be deemed relinquished and the title remains with the Corporate Debtor. The Liquidator has the complete right to claim the release of the goods. was on the title of the warehoused goods. The NCLAT held that the Corporate Debtor had abandoned the warehoused goods even before the initiation of the insolvency procedure and resultantly relinquished the title to the respondent. During the period from 2012 to 2015, the Corporate Debtor made no action to claim the goods while the CIRP was initiated only in 2017. Thus, the liquidator cannot claim the goods as they are no longer assets of the Corporate Debtor. By section 72(2) of the Customs Act, the respondent is empowered to sell the goods to realize the custom dues. The Court held that the NCLAT erred in its interpretation and did not consider the provisions of the IBC. There is no abandonment and thus no deemed transfer of goods. The respondent did not provide any notice on such deemed transfer and such transfer would be a violation of Article 300A of the Indian Constitution.

The issuance of a demand notice after the initiation of CIRP is a violation of the IBC. Section 14 of IBC holds that no legal proceedings against the Corporate Debtor shall be initiated or continued during the process. On initiation of the liquidation process, this moratorium ceases to operate but section 33(5) of IBC sets forth another moratorium till the end of the process. Placing reliance on the judgment of *S.V. Kondaskar v V.M. Deshpande*² the Court held that computing the quantum of dues and related assessment or reassessment does not amount to a violation of the moratorium as these are procedures completely under the respective legislation. However, any action to recover such dues from the Corporate Debtor instantly becomes a breach of the moratorium.

Section 238 of IBC provides it with overriding power over other legislations. Section 142A of the Customs Act holds that customs dues are liable to the first charge except in certain cases that include IBC. This clearly shows that IBC prevails over Customs Act. The Court opines for a harmonious interpretation of the provisions of the enactments. However, when a conflict between the two arises the IBC shall prevail.

JUDGMENT

The Hon'ble Supreme Court held that the IBC shall prevail over the Customs Act. The Customs Act has limited jurisdiction on customs duty as an operation debt. The claim cannot be beyond section 53 of IBC. Once the moratorium begins operation under section 14 or 33(5) of IBC no

² S.V. Kondaskar v V.M. Deshpande (1972) 1 SCC 438

action against the Corporate Debtor can be initiated to recover the dues under the Customs Act. Also, the apex court stated that the respondent is not entitled to claim the title of the warehoused goods and sell them as a title after the initiation of the liquidation procedure.

ANALYSIS

The Insolvency and Bankruptcy Code 2016 (IBC) was enacted to compile together the provisions on insolvency and bankruptcy procedures. Before the enactment of the Code, the provisions relating to insolvency procedure and liquidation process were scattered around in different statutes which resulted in conflict between them. The Code was given an overriding power over other statutes by section 238 of the Code. Thus, it is clear that in case of any conflict, the IBC shall prevail. Similarly, section 142A of the Customs Act 1962 also recognizes that the IBC shall be given priority over the Customs Act on liability to be the first charge.

According to provisions of the IBC, on the initiation of the Corporate Insolvency Resolution Process (CIRP) after the adjudicating authority admits the application, a moratorium is declared under section 13(1)(a). This moratorium prevents the initiation or continuance of any legal proceedings against the Corporate Debtor. On the initiation of the liquidation procedure, this moratorium shall cease but by virtue of section 33(5) of the Code, no legal proceeding can be initiated or continued against the Corporate Debtor. This is to ensure that the liquidator can take charge and complete the liquidation process clearer and faster. The Customs Act does not empower its authorities to initiate a legal proceeding against a Corporate Debtor for its custom dues neither during the moratorium under section 14 nor during the liquidation process under section 33(5). It can only claim its dues as government dues during the distribution of assets under section 53 of IBC.

The respondent had shown several inconsistencies in their approach to claiming the custom duty. Firstly, the Customs Authority took action only after the initiation of CIRP in 2019 many years after the non-fulfillment of the EPCG License. Secondly, they issued notice and filed Form C to claim the dues from the assets of the Corporate Debtor under 53 of IBC but later went on to file recovery action and claim the title to the warehoused goods. Even when the respondent claims that the goods were deemed relinquished no notice for the same was given to the Corporate Debtor.

The NCLT had rightly held the decision while the NCLAT was narrow in its interpretation. The Appellate Tribunal only considered the Customs Act and ignored the provisions of the IBC. It also held that no question of the IBC overriding Customs Act had arisen in the case. It also misinterpreted the decision of *Gujarat Urja Vikas Nigam Ltd. v Amit Gupta*³ on the jurisdiction of NCLT under IBC and held Customs Act and Customs Authority completely entitled to recover and sell the goods when the same was a breach of the moratorium under IBC.



³ (2021) 7 SCC 209