

SUNDARESH BHATT, LIQUIDATOR OF ABG SHIPYARD A

v.

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS

(Civil Appeal No. 7667 of 2021)

AUGUST 26, 2022 B

**[N. V. RAMANA, CJI, J. K. MAHESHWARI AND
HIMA KOHLI, JJ.]**

Insolvency and Bankruptcy Code, 2016 – ss.14, 33(5), 53, 238 – Customs Act – Whether the provisions of the IBC would prevail over the Customs Act and if so, to what extent – Held: The IBC would prevail over the Customs Act to the extent that once moratorium is imposed in terms of ss.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 – 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 – 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 – Interpretation of Statutes – Harmonious Construction. C D E

Insolvency and Bankruptcy Code, 2016 – Corporate Insolvency Process – Various stages involved in the corporate insolvency process in India – Discussed. F

Insolvency and Bankruptcy Code, 2016 – s.14 – Purpose of the moratorium – Held: s.14 of the IBC prescribes a moratorium on the initiation of Corporate Insolvency Resolution Process (CIRP) proceedings and its effects – One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute – Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process – One of the motivations of imposing a moratorium is for s.14(1)(a), (b), and (c) of the IBC to G H

- A *form a shield that protects pecuniary attacks against the Corporate Debtor – This is done in order to provide the Corporate Debtor with breathing space, to allow it to continue as a going concern and rehabilitate itself – Any contrary interpretation would crack this shield and would have adverse consequences on the objective sought to be achieved.*

B *Words and Phrases – “Abandonment of Goods” – Discussed.*

Collector of Customs v. Dytron (India) Ltd. 1999 ELT 342 Cal (39); S.V. Kondaskar v. V.M. Deshpande, AIR 1972 SC 878 : [1972] 2 SCR 965 (43); Gujarat Urja

- C *Vikas Nigam Ltd. v. Amit Gupta (2021) 7 SCC 209 (47)*
– referred to.

Case Law Reference

[1972] 2 SCR 965	referred to	Para 43
D (2021) 7 SCC 209	referred to	Para 47

CIVIL APPELLATE JURISDICTION : Civil Appeal No.7667
of 2021.

- E From the Judgment and Order dated 22.11.2021 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.236 of 2021.

- F Tushar Mehta, SG, K.M. Nataraj, ASG, Dr. Abhishek Manu Singhvi, Gaurav Mitra, Arvind Datar, Jay Savla, Mukul Rohatgi, Siddhartha Dave, Vikram Nankani, Sr.Advs., Sameer Pandit, Aman Raj Gandhi, Parthasarathy Bose, Anuj Jain, Aditya Ladha, Ananya Pratap Singh, Azeem Samuel, Nidhiram, Akash Kakade, Gurdeep Singh Sachar, Vikrant Shetty, Shriya Ray Chaudhary, Swetab Kumar, Somanatha Padhan, Abhishek Sharma, Ms. Ashly Cherian, Gaurav Arora, Kamlendra Singh, Ms. Renuka, Ms. Renuka Sahu, Alok Tripathi, Rupesh Kumar, Kannu Agarwal, Mayank Pandey, Mukesh Kumar Maroria, Shiv Mangal Sharma, Saurabh Rajpal, Ms. Shrinjan Khosla for M/S. Aura & Co., Jasdeep Singh Dhillon, Salil Thakore, Prabhay Chaurasia, Rahul Gupta, Ms. R. Nair, Gaurav Mathur, Ms. Anushree Prashit Kapadia, Abhishek Shah, Ms. Priyanka Rathi, Shashank Khurana, M/S. Cyril Amarchand Mangaldas, Advs. for the appearing parties.

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The Judgment of the Court was delivered by A

N. V. RAMANA, CJI

1. The present Civil Appeal under Section 62(1) of the Insolvency and Bankruptcy Code, 2016 (“IBC”) arises out of the impugned judgment dated 22.11.2021 passed by the National Company Law Appellate Tribunal, New Delhi (“NCLAT”) in Company Appeal (AT) (Insolvency) No. 236 of 2021. *Vide* the impugned judgment, the NCLAT has allowed the appeal filed by the respondent against the order of the National Company Law Tribunal, Ahmedabad (“NCLT”)/Adjudicating Authority whereby the Adjudicating Authority directed the release of certain goods lying in the Customs Bonded Warehouses without payment of custom duty and other levies. B C

2. A conspectus of the facts necessary for the disposal of the present appeal is as follows: ABG Shipyard (“**Corporate Debtor**”) was in the business of shipbuilding prior to the initiation of corporate insolvency proceedings against it. As a part of its business enterprise, it used to regularly import various materials for the purpose of constructing ships which were to be exported on completion. Some of these goods were stored by the Corporate Debtor in Custom Bonded Warehouses in Gujarat and Container Freight Stations in Maharashtra. Bills of entry for warehousing were submitted at the relevant time. The Corporate Debtor also took the benefit of an Export Promotion Capital Goods Scheme (“**EPCG Scheme**”) and was granted a license under the said scheme (“**EPCG License**”) with respect to the said warehoused goods. D E

3. On 01.08.2017, the National Company Law Tribunal, Ahmedabad (“NCLT”) passed an order commencing the Corporate Insolvency Resolution Process (“CIRP”) against the Corporate Debtor, and the appellant was appointed as the Interim Resolution Professional. In the same order, the NCLT also declared a moratorium under Section 13(1)(a) of the IBC. F

4. On 21.08.2017, the appellant informed the respondent of the initiation of CIRP and sought custody of the warehoused goods and requested the respondent not to dispose of or auction the same. On 29.03.2019, the respondent for the first time, issued a notice to the Corporate Debtor regarding non-fulfilment of export obligations in terms of the EPCG license demanding customs duty of Rs. 17,13,989/- with interest. From 02.04.2019 to 07.04.2019, the respondent issued five G H

- A different demand notices to the Corporate Debtor regarding non-fulfillment of export obligations under different EPCG licenses for various amounts. The details of the demand notices issued by the Respondent for non-fulfilment of EPCG License conditions by the Corporate Debtor are tabulated herein for ease of reference:

	S. NO.	DATE	DETAILS OF DEMAND NOTICE	DEMANDED AMOUNT (PLUS INTEREST AS APPLICABLE)
B	1.	29.03.2019	EPCG License No. 5230007265 dated 16.07.2010	Rs. 17,13,989
	2.	02.04.2019	EPCG License No. 5230008206 dated 16.11.2010	Rs. 96,20,325
	3.	04.04.2019	EPCG License No. 5230007016 dated 17.05.2010	Rs. 53,29,072
C	4.	05.04.2019	EPCG License No. 5230007082 dated 03.06.2010	Rs. 2,05,73,402
	5.	05.04.2019	EPCG License No. 5230006881 dated 31.03.2010	Rs. 6,64,646
	6.	07.04.2019	EPCG License No. 5L32206936 dated 20.04.2010	Rs. 12,04,09,501

5. On 25.04.2019, the NCLT passed an order commencing liquidation against the Corporate Debtor under Section 33(2) of the IBC.
- D *Vide* the said order, the NCLT declared that the earlier moratorium imposed under Section 13(1)(a) of the IBC shall cease to have effect by the operation of Section 14(4) of the IBC. However, a fresh direction was passed under Section 33(5) of the IBC barring the institution of any suit or legal proceeding by or against the Corporate Debtor. Further, the
- E NCLT also appointed the appellant as the liquidator *vide* the same order.

6. Thereafter, the respondent filed claims before the appellant for goods warehoused in both Gujarat and Maharashtra on 20.05.2019, 27.05.2019 and 29.05.2019 under the IBC. On 27.06.2019, the appellant informed the respondent through its officers that liquidation proceedings had commenced against the Corporate Debtor and that the goods were to be released to the appellant.

- G 7. Due to inaction by the respondent, the appellant filed I.A. No. 474 of 2019 before the NCLT under Section 60(5) of the IBC seeking a direction against the Respondent to release the warehoused goods belonging to the Corporate Debtor on 01.07.2019.

- H 8. At this juncture, for the first time on 11.07.2019, the respondent issued a notice to the Corporate Debtor under Section 72(1) of the Customs Act for custom dues amounting to Rs. 763,12,72,645/- on 2531 Bills of entries. The respondent filed a concurrent claim for the said amount before the appellant under the IBC. Details of the amount claimed by the respondent before the appellant are as follows:

S. NO.	DATE	DETAILS OF CLAIMS FILED BY RESPONDENT BEFORE APPELLANT UNDER FORM C	CLAIMED AMOUNT (PLUS INTEREST AS APPLICABLE)
1.	20.05.2019	Non-fulfilment of obligations under 11 EPCG Licenses	Rs. 37,92,29,749
2.	27.05.2019	Non-fulfilment of obligations under 37 EPCG Licenses	Rs. 151,33,06,859
3.	29.05.2019	Non clearing of imported goods from Jawaharlal Nehru Port Trust, Nhava Sheva, Maharashtra	Rs. 22,70,50,898
4.	18.09.2019	Dues for all cargo in custom bounded warehouses in Gujarat	Rs. 763,12,72,645

9. On 25.02.2020, the NCLT allowed I.A. No. 474 of 2019 filed by the appellant and passed the following directions:

“14) Therefore, the present IA deserves to be allowed. Accordingly, it is allowed in terms of its prayer clause as well as with following directions.

- i) The Respondents are directed to allow the applicant-liquidator to remove the Material, which is lying in the Customs Bonded Warehouses without any condition, demur and/ or payment of Customs Duty.
- ii) The Respondents are at liberty to lodge its claim with the Applicant-Liquidator with regard to the Customs Duty charges payable on the release of material, which form part of the assets of the Corporate Debtor company (in liquidation), before the Liquidator under the provisions of Insolvency and Bankruptcy Code, 2016 and in accordance with law.
- iii) The Customs Department shall allow removal of goods/ material within two weeks, from the date of receipt of an authentic copy of this order from the Liquidator.
- iv) Meanwhile, the Respondents shall not proceed for auctioning, selling or appropriating the Materials owned by the Corporate Debtor company, for the purpose of recovery of its Customs Duty, which may tantamount to violation of the I&B Code and put the applicant/liquidator of the Corporate Debtor company (under liquidation) in disadvantageous position.”

10. The NCLT considered Section 238 of the IBC and held that the *non-obstante* clause in the IBC, being part of a subsequent law,

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- A shall have overriding effect on proceedings under the Customs Act. Further, looking to the waterfall mechanism under Section 53 of the IBC, the NCLT held that distribution of proceedings from sale of liquidation of assets shall also prevail over the Customs Act provisions. The NCLT held that, as Government dues, the claims by the respondent would have to be dealt with in accordance with Section 53 of the IBC. Apart from the above, the NCLT also placed reliance on a circular issued by the Central Board of Excise and Custom, being Circular No. 1053/02/2017-CX dated 10.03.2017 relating to Section 11E of the Central Excise Act, 1944. The abovementioned circular clarifies that dues under the Central Excise Act would have first charge only after the dues under the provisions of the IBC are recovered. As Section 142A of the Customs Act is *pari materia* with Section 11E of the Central Excise Act, 1944, the NCLT applied the same rationale to interpret the said section in holding that the provisions of the IBC have priority.
- D 11. Subsequent to the above judgment, the appellant sold the goods warehoused in Surat for a consideration of Rs. 169.11 crores. The sales process with respect to the goods warehoused in Dahej, Gujarat is currently ongoing, and is challenged before this Court in C.A. No. 7722 of 2021 and C.A. No. 7731 of 2021.
- E 12. On 04.03.2021, the respondent filed an appeal before NCLAT challenging the order dated 25.02.2020 passed by the NCLT. On 22.11.2021, the NCLAT passed the impugned order, whereby it allowed the appeal filed by the respondent and set aside the directions of the NCLT requiring the respondent to release the warehoused goods to the possession of the appellant without seeking the custom dues. The NCLAT rather directed that the warehoused goods can be “*released or disposed of as per Applicable Provisions of Customs Act by the Proper Officer*”.
- G 13. The NCLAT, in allowing the appeal of the respondent, held that the goods lying in the customs bonded warehouse were not the Corporate Debtor’s assets as they were neither claimed by the Corporate Debtor after their import, nor were the bills of entry cleared for some of the said goods. By not filing the said bills of entry, the NCLAT held that the importer, *i.e.*, the Corporate Debtor, had relinquished his title to the imported goods. The NCLAT held that the Corporate Debtor is deemed to have lost his title to the imported goods by action of Sections 48 and 72 of the Customs Act. As such, the respondent is empowered to sell the goods and recover the government dues.

14. The NCLAT held that ‘imported goods’, which are subject to levy of Customs, stand on a different footing as payment of customs duty is a consequence of importing the goods rather than a liability on the Corporate Debtor to pay it. The appellant cannot stand at a better footing than the Corporate Debtor that he represents and cannot take possession of assets which the Corporate Debtor itself could not have obtained. Customs duty therefore needs to be paid for the release of the warehoused goods.

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15. The NCLAT held that the Customs Act is a complete Code which provides that warehoused goods cannot be released until the import duties are paid. Mere filing of claims under ‘Form C’ by the respondent before the appellant cannot be taken to signify the relinquishment of the right of the respondent over the warehoused goods.

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16. On the issue of priority of IBC over the Customs Act, the NCLAT held that the issue did not arise in the present case, as the goods in question were imported prior in time to the initiation of the CIRP. While the containers were imported between 2012 to 2015, the CIRP was initiated only in 2017 and the Corporate Debtor went into liquidation in 2019. By not paying the import duties, the Corporate Debtor had lost the right to the warehoused goods prior to the initiation of the CIRP. The NCLAT held that these warehoused goods stand on a different footing and cannot be considered assets of the Corporate Debtor which were subject to the IBC provisions.

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17. Aggrieved by the above judgment passed by the NCLAT, the appellant has filed the present Civil Appeal against the impugned judgment.

18. Mr. Arvind Datar, learned Senior Counsel appearing on behalf of the appellant, submitted as follows:

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i. The Corporate Debtor is the owner of the goods. The learned Senior Counsel referred to Section 48 of the Customs Act and stated that it only applies to goods which are neither cleared nor warehoused by the importer. This Section, however, is not applicable to the present case as the notice issued and Form C filed by the respondent are in relation to warehoused goods. Thus, the notice issued by the respondent under Section 72 of the Customs Act and the consequent Form C does not in any manner attract Section 48 of the Customs Act.

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- A ii. The Corporate Debtor has not lost ownership of the goods as alleged by the respondent. The respondent, by issuing notice under Section 72 of the Customs Act and filing its claim with the liquidator, has admitted that the Corporate Debtor is the owner. Neither Sections 72 nor 48 of the Customs Act signifies any transfer to the respondent. The Corporate Debtor has also never relinquished title to the goods and no communication regarding the same has been made to the respondent.
- B iii. By submitting claims under Section 38 of the IBC, the respondent has elected to subject its dues to be governed by IBC, and more specifically, to the distribution matrix provided Section 53 of the IBC. The claims made by the respondent before the appellant are based solely on the Corporate Debtor's ownership of the goods. The respondent cannot blow hot and cold at the same time by again claiming before this Court that the Corporate Debtor has lost ownership of the said goods.
- C iv. The respondent could not have exercised its right under the Customs Act, as the statutory charge of the respondent under Section 142A of the Customs Act is expressly subordinate to the IBC.
- D v. The respondent's custody of the Corporate Debtor's goods is in violation of Sections 14 and 33 of the IBC. Section 14(1)(a) of the IBC expressly prohibits the institution or continuation of proceedings against the Corporate Debtor during the moratorium period. Further, Section 14(1)(c) states that foreclosure, recovery, or enforcement of any security interest against the Corporate Debtor is prohibited.
- F 19. Mr. K.M. Nataraj, learned Additional Solicitor General of India appearing for the respondent, submitted as under:
- G i. The goods left in the Custom Bonded Warehouse are not the assets of the Corporate Debtor. This is because these goods were never claimed after being imported. As per the record, the goods were imported between the years 2012 and 2015, and the Corporate Debtor started the liquidation process in 2019. In this span of 4 years, the Corporate
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- Debtor never cleared bills of entry for part of the goods and abandoned all the material lying in the Custom Bonded Warehouse. Despite receipt of various demand notices by the respondent, the Corporate Debtor did not clear the goods and hence the same are liable to be sold by the respondent under the Customs Act. A
- ii. The liquidator can take into his possession only the assets of the Corporate Debtor as under Section 35(1)(b) of the IBC. However, in the present case, the warehoused goods cannot be termed as assets of the Corporate Debtor, until and unless the same are legally cleared from the warehouses upon payment of relevant dues and duties. The Corporate Debtor herein has not even paid the bill of entry for part of the goods. B
- iii. Section 45 of the Customs Act lays down restrictions on custody and removal of imported goods. It stipulates that all imported goods unloaded in the customs area shall remain in the custody of such person approved by the commissioner till the time the same are cleared for home consumption or are warehoused or transshipped. Further, it provides that if such goods are not cleared as per the criteria mentioned above, they can be sold after permission from the proper officer. Section 71 of the Customs Act further states that no goods shall be taken out of the warehouse except as provided under by the Customs Act. Hence, the goods cannot be removed without payment of import duties and charges. C
- iv. The Corporate Debtor has abandoned the imported goods for several years, refused to pay the import duties and other charges, and has not taken any effort to take possession of the goods for several years. Consequently, the Corporate Debtor has lost its right to the warehoused goods, and hence under Section 72 of the Customs Act, the government authorities are fully authorized to recover the dues. In such a circumstance, where the Corporate Debtor's title to the goods has been deemed to have been relinquished, the liquidator does not have the authority to take possession of them. D
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- A v. Customs duty is an incidence or consequence of import. Even before the CIRP was initiated, the Corporate Debtor could not have secured the possession of the warehoused goods without paying the due charges. Hence, the liquidator, who is representing the Corporate Debtor, cannot stand on a better footing than the Corporate Debtor itself.
- B vi. It is further submitted that merely because the respondent had filed its claim before the liquidator, it cannot be said that the respondent had relinquished its rights over the warehoused goods. The claim was filed by the respondent only to realize its dues, and hence cannot be viewed as a relinquishment or abandonment of its rights.

20. In light of the arguments advanced and the documents submitted before this Court, we are called upon to answer two important questions which arise for our consideration:

- D a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?
- 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?

E ANALYSIS

- F 21. It must be noted that this question assumes significance as the warehoused goods belonging to the Corporate Debtor which is under liquidation, are sought to be sold by the Customs Authorities in lieu of custom dues. The respondent has relied on certain provisions of the Customs Act to assume such power. This has been vehemently opposed by the appellant herein, who has argued that once the insolvency process has been initiated against the Corporate Debtor, the IBC becomes squarely applicable and overrides any other enactment giving priority to the charges on the property.

- G 22. The NCLAT has not directly answered this question of law. Rather, it has entered into the facts of the case to distinguish the applicability of the IBC as compared to the Customs Act. The NCLAT held that the Corporate Debtor had abandoned the goods much before the insolvency process was initiated, and thereby the title of the goods had passed to the Customs Authority. The NCLAT held as under:

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“7.16 Thus, it is clear that NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute does not arise solely from or relating to the Insolvency of the Corporate Debtor. In the instant case, the Corporate Debtor had abandoned the imported goods in the Customs warehouses for several years and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years. Therefore the importer had lost his right to the imported goods. Consequently, the Customs Authorities are fully empowered under Section 72 of the Act to sell those goods to recover the government dues. The Liquidator has no right to take into possession over those goods for which the Corporate Debtor’s title is deemed relinquished by implication of law. Even before initiating the Corporate Insolvency Resolution Process, the Corporate Debtor Company could not have secured the possession of the imported goods except by paying the customs duty. The Resolution Professional/Liquidator, who virtually represents the Company, cannot stand on a better footing than the Corporate Debtor itself.

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7.20 In the instant case, the Appellant has filed its Claim before the Liquidator in response to the Notice issued by the Liquidator. Given the law laid down by the Hon’ble Supreme Court in the above-mentioned case, it is clear that by submission of Claim in response to the Notice issued by the Liquidator, it can not be presumed that the Appellant had relinquished its right over the property and submitted to the jurisdiction of the Liquidator. The Claim is filed in an effort to realise its dues. Still, it will not amount to relinquishment of its right over the Warehoused goods under its custody for which Appellant has every right to sell those goods for the realisation of the Government goods.

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7.23 We are not convinced with the argument advanced by the Respondent because the goods imported by the Corporate Debtor were imported much before the initiation of the Corporate Insolvency Resolution Process, and the Corporate Debtor never claimed them after import. Undisputedly the containers were

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- A imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed on April 25 2019.
- 7.24 Therefore, the Corporate Debtor's assets because the Corporate Debtor never made any effort for clearing the goods by paying Customs Duty and other applicable charges before the initiation of Liquidation proceeding after importing them. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed in April 25, 2019. Therefore the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor. The Liquidator intends to possess the uncleared goods from the customs warehouses without upfront payment of Customs duty, which is against the statutory provisions of the Customs Act, 1962. Therefore, the imported goods subject to levy of Customs stand on a different footing than the goods /assets, not in the Corporate Debtor's possession. Therefore, the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor.
23. In the above context, this Court is required to analyze whether the NCLAT's treatment of the facts is correct or if a fresh look is required.
- E Before we enter into a detailed discussion and analysis of the case at hand, it would be beneficial to analyze certain provisions of the Customs Act which may be relevant to this case.
24. When goods are imported/exported from India, such goods may be subjected to custom duty as indicated under Section 12 of the Customs Act. There are many objectives behind such exaction – some F of it is to maintain trade balance, control imports and exports, protection of domestic industry, prevention of smuggling, conservation and augmentation of foreign exchange, and so on.
25. When goods are imported, it can be either for home consumption or for transshipment. An importer can either choose to pay the duty and G utilize the goods immediately for domestic usage or execute a bond so as to warehouse the said goods. Accordingly, an importer has to submit a bill of entry either for home consumption or for warehousing in terms of Section 46 of the Customs Act, in the prescribed format.
26. When a person chooses to warehouse the goods, he ought to execute a bond in terms of Section 59 of the Customs Act. Such H

warehoused goods can subsequently be either cleared for home A consumption or can be exported.

27. Section 61 of the Customs Act mandates the time period allowed for warehousing. For example, in the case of capital goods intended for a 100% export-oriented undertaking, warehousing is permitted till such goods are cleared from the warehouse. In case of goods not intended for such export-oriented purpose, a time period of one year is prescribed in terms of Section 61(1)(c) of the Customs Act. The provision also provides for an extension which could be granted by the appropriate authority, for a period of not more than one year. Under Section 61(2) of the Customs Act, provision is made to charge interest on those goods which are warehoused beyond the period granted. B C

28. Section 71 of the Customs Act provides that no warehoused goods shall be taken out of the warehouse, except on clearance for home consumption or export or for removal to another warehouse, or as provided by the Act. D

29. Section 72 of the Customs Act deals with the issue of when the goods can be said to have been improperly removed from the warehouse. As this provision is of some relevance to the present case, it is extracted below:

“72. Goods improperly removed from warehouse, etc.—(1) E
In any of the following cases, that is to say,—

(a) where any warehoused goods are removed from a warehouse in contravention of section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods F are permitted under section 61 to remain in a warehouse;

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(d) where any goods in respect of which a bond has been executed G under section 59 and which have not been cleared for home consumption or export or are not duly accounted for to the satisfaction of the proper officer, the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with interest, fine and penalties payable in respect of such goods

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- A (2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may deem fit.”
- B From the aforesaid, it can be noted that when goods are warehoused and the importer has not taken sufficient steps to take the goods out for domestic consumption or for transshipment, within the required time period, then the proper office has to take steps in terms of Section 72(2) of the Customs Act. The aforesaid provision mandate that it is only after the determination of dues by the proper officer that goods may be sold, in the event that the demanded amount relating to custom duty, interest, fines, and other penalties have not been paid. In that case alone, after such determination, a sufficient portion of goods may be sold.
- D 30. In order to complete the discussion on the Customs Act, it may be necessary to take note of Section 142A extracted below:
- 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), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993), and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016 (31 of 2016) be the first charge on the property of the assessee or the person, as the case may be..
- G 31. In the present case, the Corporate Debtor as part of its business used to regularly import and warehoused goods in the custom bonded warehouses from at least 2011. As has already been mentioned above, the CIRP process commenced against the Corporate Debtor on 01.08.2017 by the order of the NCLT. It appears from the record that no notices were issued by the respondent against the Corporate Debtor with respect to the warehoused goods prior to initiation of the CIRP. In fact, all the duty demand notices issued by the respondent were from March 2019
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onwards. It is in this context that it is necessary for us to ascertain A whether the IBC overrides the Customs Act or vice-versa.

32. Insolvency and Bankruptcy Code came into force in India from 28.05.2016 to combine provisions relating to insolvency found across different statutes into a single comprehensive instrument. Under the earlier legal regime, different statutes were resulting in multiple parallel proceedings, which inevitably resulted in uncertainty for the creditors over their recovery. One of the objectives behind the enactment of the IBC was to end the conflict between different statutes. B

33. The purpose behind insolvency law has been captured in Halsbury's Laws of England (para 8, vol. III, 4th edition) in the following C manner:

“A man has a perfect right, so long as he is solvent, to continue a losing business; but the moment he becomes insolvent he does so at the risk of his creditors. As soon as he finds that he cannot pay loop in the pound, although he may nevertheless think that if he goes on he may be able to retrieve his position, he ought to call together his creditors, who will have to bear the loss in case his calculations are wrong, and leave them to determine whether the business shall be continued or not. Moreover, it is not enough to consult only the largest creditors. There is no insolvency within the meaning of this offence if a careful, prudent, and unhurried realization of the assets would produce enough to pay loop in the pound on the amount of liabilities.” D

34. It may be relevant to capture a brief outlook as to various stages involved in the corporate insolvency process in India: E

- (i) When a financial default occurs, either the borrower (Corporate Debtor under Section 10 read with Section 11 of the IBC) or the lender (creditors – financial creditor under Section 7 or operational creditor under Section 9 of the IBC) can approach the NCLT for initiating the resolution process. Operational creditors need to give a notice of 10 days to the Corporate Debtor before approaching the NCLT. If the Corporate Debtor fails to repay dues to the operational creditor, or fails to show any existing dispute or arbitration, then the operational creditor can approach the NCLT. F G H

- A (ii) Upon admission of an application by the NCLT, the claims of the creditor will be frozen for 180 days, during which time, the NCLT will hear proposals for revival of the Corporate Debtor and decide on future course of action. During this period, a moratorium is imposed to ensure no coercive proceedings are launched or continued against the Corporate Debtor in any other forum or under any other law, until approval of the resolution plan or initiation of the liquidation process.
- B (iii) The NCLT first appoints an interim insolvency professional. The interim insolvency professional is to hold office until a resolution professional is appointed. He further takes control of the Corporate Debtor's operations and collects its financial information from information utilities. The NCLT must also ensure public announcement of the initiation of corporate insolvency process and call for submission of claims.
- C (iv) The Corporate insolvency process must normally be completed within 180 days of admission of the application by the NCLT. The Committee of Creditors has to then take decisions regarding insolvency resolution as provided by law.
- E 35. In this context, we may note that when the insolvency process commences, the adjudicating authority is mandated to declare a moratorium on continuation or initiation of any coercive legal action against the Corporate Debtor. Section 14 of the IBC reads as under:
 - F **14. Moratorium.**—(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:—
 - G (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;
 - G (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
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(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 (54 of 2002); A

(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. B

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period; C

(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. D E

(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. F

(3) The provisions of sub-section (1) shall not apply to — G

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority; H

(b) a surety in a contract of guarantee to a corporate debtor.

- A (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.
36. Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process. In this context, it is relevant to quote the February 2020 Report of the Insolvency Law Committee, which notes as under:
- E “8.2 The moratorium under Section 14 is intended to keep “the corporate debtor’s assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.” Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it “facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate.”
- H From the above, it can be seen that one of the motivations of imposing a moratorium is for Section 14(1)(a), (b), and (c) of the IBC to

form a shield that protects pecuniary attacks against the Corporate Debtor. This is done in order to provide the Corporate Debtor with breathing space, to allow it to continue as a going concern and rehabilitate itself. Any contrary interpretation would crack this shield and would have adverse consequences on the objective sought to be achieved. A

37. Even if a company goes into liquidation, a moratorium continues B in terms of Section 33(5) of the IBC which reads as under:

33 (5) - Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by C the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

38. We may note that the IBC, being the more recent statute, clearly overrides the Customs Act. This is clearly made out by a reading D of Section 142A of the Customs Act. The aforesaid provision notes that the Custom Authorities would have first charge on the assets of an assessee under the Customs Act, except with respect to cases under Section 529A of Companies Act 1956, Recovery of Debts Due to Banks and Financial Institutions Act 1993, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Accordingly, such an exception created under the Customs Act is duly acknowledged under Section 238 of the IBC as well. Additionally, we may note that Section 238 of the IBC clearly overrides any provision of law which is inconsistent with the IBC. Section 238 of IBC provides as under:

238. Provisions of this Code to override other laws- F

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. G

39. The NCLAT, while playing down the effect of Section 142A of the Customs Act and Section 238 of the IBC, has held that the Customs Act is a complete code in itself and no person can seek removal of goods from the warehouse without paying customs duty. The NCLAT relies on the judgment in ***Collector of Customs v. Dytron (India) Ltd.***, H

- A 1999 ELT 342 Cal., by the High Court of Calcutta, which laid down that customs duty carry first charge even during the insolvency process under Section 529 and 530 of Companies Act, 1956. However, reliance on the said precedent is not appropriate as the NCLAT has failed to notice that such interpretation has been legislatively overruled by the inclusion of Section 142A under the Customs Act, through Section 51 of the Finance Act of 2011.

- B 40. From the above, it is to be noted that the Customs Act and the IBC act in their own spheres. In case of any conflict, the IBC overrides the Customs Act. In present context, this Court has to ascertain as to whether there is a conflict in the operation of two different statutes in the given circumstances. As the first effort, this Court is mandated to harmoniously read the two legislations, unless this Court finds a clear conflict in its operation.

- C 41. At the cost of repetition, we may note that the demand notices issued by the respondent are plainly in the teeth of Section 14 of the IBC as they were issued after the initiation of the CIRP proceedings. Moratorium under Section 14 of the IBC was imposed when insolvency proceedings were initiated on 01.08.2017. The first notice sent by the respondent authority was on 29.03.2019. Further, when insolvency resolution failed and the liquidation process began, the NCLT passed an order on 25.04.2019 imposing moratorium under Section 33(5) of the IBC. It is only after this order that the respondent issued a notice under Section 72 of the Customs Act against the Corporate Debtor. The various demand notices have therefore clearly been issued by the respondent after the initiation of the insolvency proceedings, with some notices issued even after the liquidation moratorium was imposed.

- F 42. We are of the clear opinion that the demand notices to seek enforcement of custom dues during the moratorium period would clearly violate the provisions of Sections 14 or 33(5) of the IBC, as the case may be. This is because the demand notices are an initiation of legal proceedings against the Corporate Debtor. However, the above analysis would not be complete unless this Court examines the extent of powers which the respondent authority can exercise during the moratorium period under the IBC.

- G 43. In the above context, the judgment of this Court in *S.V.Kondaskar v. V.M. Deshpande*, AIR 1972 SC 878, is extremely H

relevant. In that case, this Court, while expounding the interplay of Section 446 of the Companies Act 1956 (bankruptcy provision) with the Income Tax Act, 1961, held as follows:

“7. ...Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446, read as a whole, it appears to us that the expression “other legal proceeding” in sub-section (1) and the expression “legal proceeding” in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income Tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income tax payable also being a debt has to rank pari passu with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under Section 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income Tax Officers while assessing the amount of tax payable by the assessees even if the assessee be the company which is being wound up by the Court. The orders made by the Income Tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income Tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income tax. The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of Section 446

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- A must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income Tax Officer conferred on him by the Income Tax Act, because in our view the legislature could not have intended such a result.
- B **8.** The argument that the proceedings for assessment or re-assessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income tax determined by the Department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the Bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of *Seth Spinning Mills Ltd., (In Liquidation)* (1962) 46 ITR 193 (Punj) (Supra) and the *Mysore Spun Silk Mills Ltd., (In Liquidation)* (1968) 68 ITR 295 (Mys) (supra) do not seem to lay down the correct rule of law that the Income Tax Officers must obtain leave of the winding up court for commencing or continuing assessment or re-assessment proceedings.”
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- G 44. Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above *ratio* squarely applies to the interplay between the IBC and the Customs Act in this context.
- H 45. From the above discussion, we hold that the respondent could only initiate assessment or re-assessment of the duties and other levies.
- I They cannot transgress such boundary and proceed to initiate recovery

in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.

46. There is another aspect of this case that needs to be highlighted to portray the inconsistency of the Customs Act *vis-à-vis* the IBC during the moratorium period. In the present case, the demand notice dated 11.07.2019 was issued by the respondent under Section 72 of the Customs Act, in clear breach of the moratorium imposed under Section 33(5) of the IBC. Issuing a notice under Section 72 of the Customs Act for non-payment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor under Section 35(1)(b) of IBC.

47. As laid down earlier, the Customs Act and IBC can be read in a harmonious manner wherein authorities under the Customs Act have a limited jurisdiction to determine the quantum of operational debt – in this case, the customs duty – in order to stake claim in terms of Section 53 of the IBC before the liquidator. However, the respondent does not have the power to execute its claim beyond the ambit of Section 53 of the IBC. Such harmonious construction would be in line with the ruling in **Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta**, (2021) 7 SCC 209, wherein a balance was struck by this Court between the jurisdiction of the NCLT under the IBC and the potential encroachment on the legitimate jurisdiction of other authorities.

48. However, it appears to us that in the impugned order, the NCLAT has misinterpreted the aforesaid judgment of this Court in **Gujarat Urja Vikas Nigam Case (supra)** and held as follows:

“7.16 Thus, it is clear that NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute does not arise solely from or relating to the insolvency of the corporate debtor. In the instant case, the Corporate Debtor had abandoned the imported goods in the Customs warehouses for several years and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years. Therefore, the importer had lost his right to the

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- A imported goods. Consequently, Customs Authorities are fully empowered under Section 72 of the Act to sell those goods to recover the Government dues. Liquidator has no right to take into possession over those goods for which the Corporate Debtors title is deemed relinquished by implication of law. Even before initiating the Corporate Insolvency Resolution Process, the Corporate Debtor company could not have secured the possession of the imported goods except by paying the Customs duty. Resolution Professional/liquidator, who virtually represents the company, cannot stand on a better footing than the Corporate Debtor itself.”
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- C 49. Such interpretation clearly ignores the fact that there was no “abandonment of goods” which would authorize the Customs Authorities to initiate the adjudicatory process to transfer title to themselves. Before any goods can be declared to have been “abandoned”, the same must be adjudged by some authority after due notice. The position cannot be assumed or deemed. In the case at hand, no such adjudication or notice has been placed on record to suggest that such abandonment of the warehoused goods had taken place prior to the imposition of the moratorium.
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- E 50. The NCLAT, by deciding the question of passing of title from the Corporate Debtor to the respondent authority, has clearly ignored the mandate of Section 72(2) of the Customs Act relating to sale. This interpretation of the NCLAT clearly ignores the effects of the moratorium under Sections 14 and 33(5) of the IBC. The fact is that the duty demand notice and notice under Section 72(2) of the Customs Act, were issued during the moratorium period, which has been completely ignored by F NCLAT and has resulted in rendering the moratorium *otiose*.
- G 51. The interpretation provided by the NCLAT, regarding the deemed transfer of title of the goods from the assessee to the Customs Authority under Section 72 of the Customs Act, would fly in the face of Section 14 of the IBC, read with Sections 25 and 33(5). Moreover, such deemed transfer cannot be countenanced in law as the same would be in breach of Article 300A of the Constitution, as properties are deemed to be transferred to the Customs Authority without there being adequate hearing or any adjudication of any form. Such an interpretation cannot be accepted by this court.
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52. Interestingly, in the present case, on 20.05.2019, 27.05.2019, 29.05.2019 & 18.09.2019 the Customs Authorities filed Form C under Regulation 17 of IBBI Liquidation Process Regulation 2016 before the appellant/liquidator in order to stake claims for distribution of proceeds of sale in consonance with Section 53 of the IBC. The respondent authority, does a U-turn on filing such claims and instead, unilaterally decides to initiate recovery proceedings under Section 72(2) of the Customs Act. Further, the Customs Authority bypasses even the notice and adjudicatory requirements contemplated under Section 72(2) of the Customs Act and takes the position that there is a deemed transfer of title with respect to the assets as customs duty and other levies were not duly paid. Such a change in stance is clearly an afterthought, without there being any basis in law to by-pass the specialized procedure laid down under the IBC.

53. For the sake of clarity following questions, may be answered 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

- A 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 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.
- C 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.
55. Resultantly, we allow the appeal and set aside the impugned order and judgment of the NCLAT. There shall be no orders as to costs.
- D Divya Pandey
(Assisted by : Roopanshi Virang, LCRA) Appeal allowed.