

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 366 of 2023**

**IN THE MATTER OF:**

**Tapadia Polyesters Pvt. Ltd.**

**...Appellant**

**Versus**

**Sales Tax Officer  
Professional Tax Officer & Anr.**

**...Respondents**

**Present:**

**For Appellant:** Advocate Nakul Mohta, Advocate Riya Dhingra

**For Respondent:** Advocate Zulifer Ali

**With**

**Company Appeal (AT) (Insolvency) No. 362 of 2023**

**IN THE MATTER OF:**

**Manish Kumar Baldeva  
Liquidator of Linkson International Ltd.**

**...Appellant**

**Versus**

**Sales Tax Officer  
Professional Tax Officer & Anr.**

**...Respondents**

**Present:**

**For Appellant:** Advocate Dinkar Singh with Rahul, Advocate

**For Respondent:** Advocate Zulifer Ali

**ORDER**

**22.08.2023:** Heard Learned Counsel for the Appellants as well as  
Learned Counsel for the Respondent.

2. Company Appeal (AT) Ins. No. 362 of 2023 has been filed by the  
Liquidator challenging the Order dated 10<sup>th</sup> February, 2023.

3. Company Appeal (AT) Ins. No. 366 of 2023 has been filed by the Auction Purchaser who claims to be Successful Bidder in the Auction held on 25.09.2021.

4. These two Appeals have been filed against the same impugned Order dated 10<sup>th</sup> February, 2023 passed by the Adjudicating Authority in I.A. No. 1300/MB/C-I, 2020.

5. Brief facts of the case necessary to be noticed for deciding these two Appeals are:-

i. Corporate Insolvency Resolution Process for the Corporate Debtor-Linkson International Limited commenced on 06.10.2017.

ii. There were dues of Sales Tax Department of the State of Maharashtra on the Corporate Debtor and to recover the dues of the Sales Tax Department of the State of Maharashtra, the Attachment Orders were passed on 28<sup>th</sup> May, 2015 attaching the assets of the Corporate Debtor. The Attachment Order continued, however the asset could not be sold by the Sales Tax Department.

iii. Liquidation commenced on 20<sup>th</sup> July, 2018 in which liquidation proceedings, the claim was filed by the Sales Tax Officer, which claim to the extent of Rs. 101.87 Crore was admitted by the Liquidator. In the Liquidation Proceeding, the Liquidator proceed to issue Auction Notice on 01<sup>st</sup> August, 2021 and Tapadia Polyesters Pvt. Ltd. was declared the Successful Bidder on 25.09.2021.

iv. I.A. No. 1300 of 2020 was filed by the Liquidator before the Adjudicating Authority praying for direction to the Respondents-Sales Tax Officer to release the attachment on all three properties so as to enable the Applicant to continue the auction/private sale of the assets. The said Application were opposed by the Sales Tax Department and the Adjudicating Authority by the Impugned Order passed on 10<sup>th</sup> February, 2023 rejected the Application.

v. Aggrieved by the said order, these two Appeals have been filed.

6. Learned Counsel for the Liquidator challenging the Order contends that Sales Tax Department cannot be held to be Secured Creditor and the Properties attached by the Department is part of the Liquidation Asset hence the Adjudicating Authority ought to have lifted the Attachment to proceed further with the Liquidation Process. Learned Counsel for the Liquidator has relied on the Judgment of this Tribunal in C.A. (AT) Ins. No. 246 of 2022, **“Department of State Tax, Through the Dy. Commissioner of State Tax Vs. Zicom Saas Pvt. Ltd. & Anr”** decided on 07.02.2023.

7. Learned Counsel appearing for the Successful Bidder challenging the Order contends that the properties were mortgaged to the Punjab National Bank and charge of the PNB was registered with the Ministry of Corporate Affairs and at best the Sales Tax Officer will have Second Charge. It is submitted that even if it is assumed that Sales Tax Department was secured creditor, they have not exercised their right under Section 52 of the Code to proceed with the assets. The assets become part of Liquidation Assets. He

further referred to Regulation 21A of Liquidation Process Regulations, 2016. He submits that assets being part of the liquidation assets, Liquidator has rightly declared the Appellant Successful Bidder.

8. Learned Counsel appearing for the State Tax Department refuted the submissions of Learned Counsel for the Appellants and submits that attachment which was made of the properties under Section 35 of Maharashtra Value Added Tax Act was never challenged by the Appellant and although the right of Appeal is given under Section 35(6) but they having never exercised the right, the said order of attachment became final. He further submits that the Adjudicating Authority has rightly relied on Judgment of the Hon'ble Supreme Court in **M/s Embassy Property Development Pvt. Ltd. Vs. State of Karnataka & Ors.** holding that the issue of attachment having become final cannot be brought before the Adjudicating Authority under Section 60(5) of the Code. He has relied on the portion of the Judgment which has been relied on by Learned Adjudicating Authority in paragraph 25 of the Order. Learned Counsel further submits that attachment being continued, the Adjudicating Authority has rightly rejected the Application of the Liquidator.

9. We have considered the submissions of Learned Counsel for the parties and have perused the record.

10. There is no dispute between the parties regarding the sequence of the events. There is also no dispute that properties of the Corporate Debtor were attached by the Sales Tax Department on 28.05.2015. Attachment was made

prior to initiation of CIRP and continued even during the Liquidation Process that is why the Liquidator filed an Application for release of the attachment.

11. We may first notice the submission of Learned Counsel for the Respondent relying on the Judgment of the Hon'ble Supreme Court in 'M/s. Embassy Property Development Pvt. Ltd.'. In paragraph 25 of the Impugned Order, the relevant portion of the Judgment of the Hon'ble Supreme Court which has been relied by Learned Adjudicating Authority is as follows:

*"25. The Respondent has relied on the Judgment of the Hon'ble Apex Court in **M/s Embassy Property Development Pvt. Ltd. Vs. State of Karnataka & Ors** wherein it was held as under:*

*"The only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5).*

*Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky an Interim Resolution Professional/ Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal 40 (7j-rL*

*before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment. the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT."*

12. There cannot be dispute to the preposition laid down by the Hon'ble Supreme Court in the said Judgment. Hon'ble Supreme Court while giving reference of an Order suffered by the Corporate Debtor took the view that Order of the Income Tax Appellate Tribunal which has become final could not have been called in question. There cannot be any dispute to the preposition that orders passed by the Statutory Authorities which have become final against the Corporate Debtor cannot be questioned and the said order can be questioned under the relevant statute only. Present is not a case where the Liquidator has questioned the attachment order. Attachment Order has become final and Attachment continued till date. The question is of consequence of the attachment on the assets of the property. Learned Counsel for the Successful Bidder has rightly relied on Section 52 of the IBC and

Regulation 21A of Liquidation Process Regulations. Section 52 and Regulation 21A are as follows:

**“Section 52: Secured creditor in liquidation proceedings.-** (1) A secured creditor in the liquidation proceedings may—

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being

*realised and to the secured creditor and apply the proceeds to recover the debts due to it.*

*(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.*

*(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.*

*(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—*

*(a) account to the liquidator for such surplus; and*

*(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.*

*(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.*



*(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of [section 53](#). ”*

***Regulation 21A: Presumption of security interest.- (1)***

*A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:*

*Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.*

*(2) Where a secured creditor proceeds to realise its security interest, it shall pay –*

*(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of [section 53](#), as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and*

*(b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:*

*Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable*

*under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:*

*Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.*

*(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.]*

*[Explanation.- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.]*

13. The argument that even if it is assumed that Sales Tax Department is secured creditor, it has not exercised its right under Section 52, the assets will be part of the Liquidation Estate as per the statutory provisions has substance. Further, Learned Counsel has rightly pointed out to the fact that charge is registered of the PNB as first charge holder. The judgment of this Tribunal in **“Department of State Tax, Through the Dy. Commissioner of State Tax Vs. Zicom Saas Pvt. Ltd. & Anr”** as has been relied by Learned Counsel for the Liquidator, the provisions of Section 37 of Maharashtra Value Added Tax Act, 2002 which is the provision applicable in the present case have been considered and the Judgment of the Hon’ble Supreme Court in **“State Tax Officer Vs. Rainbow Papers Limited”** was also taken note and relied on.

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After quoting the provisions of GVAT Act, Section 48 which was relied in **“Rainbow Papers Limited”** and Section 37 of MVAT Act, following was stated in paragraphs 9 to 10:

*“9. When we compare the provisions of Section 48 of the provision of Gujarat Values Added Tax which was relied in “Rainbow Papers Limited” and the Provisions of Section 37 which is sought to be relied on in the present Appeal, distinction between the provisions is clear. Section 37 specifically uses the expression “subject to any provision regarding creation of first charge in any central act”. The provision itself contemplated thus that Section 37 was subject to any provision in Central Act. The IBC Section 53 itself provides waterfall mechanism which may be treated to be law which has been contemplated under Section 37 of the MVAT Act, 2002.*

*10. We thus are of the view that the Judgement of the Hon’ble Supreme Court in “Rainbow Paper Limited” relied by Learned Counsel for the Appellant is distinguishable. The Appellant having been treated as Operational Creditor allocation of amount in the Resolution Plan cannot be said to be in violation of Section 30 (2)(b). We thus are of the view that no ground has been made to interfere with the Impugned Order.”*

14. The above supports the submission of Liquidator that the Respondent Department cannot be treated as secured creditor of the Corporate Debtor. We thus are of the view that even when there is attachment of the assets, Sales Tax Department cannot be the owner of the assets and the asset continued to be owned by the Corporate Debtor and will be part of the Liquidation Estate.

The Adjudicating Authority committed error in rejecting the I.A. filed by the Liquidator relying on the Judgment of Hon'ble Supreme Court in "M/s. Embassy Property Development Pvt. Ltd." which judgment has no application in the facts of the present case. We thus are of the view that the Order of the Adjudicating Authority in the Appeal cannot be sustained. Order dated 10<sup>th</sup> April, 2023 is set aside. I.A. No. 1300 of 2020 filed by the Liquidator is allowed. Let attachment be released by the Respondent so as to take further steps in the liquidation. Both the Appeals are allowed accordingly.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Mr. Barun Mitra]**  
**Member (Technical)**

*Basant/nn*