



2024/KER/6723

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

TUESDAY, THE 30TH DAY OF JANUARY 2024 / 10TH MAGHA, 1945

WP(C) NO. 39185 OF 2022

PETITIONER/S:

DEPUTY COMMISSIONER (WORKS CONTRACT),
KERALA STATE GOODS AND SERVICES TAX DEPARTMENT,
ERNAKULAM, PIN - 672018

BY ADV GOVERNMENT PLEADER ARUN CHANDY

RESPONDENT/S:

- 1 NATIONAL COMPANY LAW TRIBUNAL,
COMPANY LAW BHAVAN BMC ROAD, THRIKKAKKARA P.S,
KAKKANAD, KOCHI, KERALA, PIN - 682021
- 2 MR.VINOD BALACHANDRAN (RESOLUTION PROFESSIONAL OF
M/S.ALBANA ENGINEERING (INDIA) PVT.LTD).,
HAVING REGISTERED OFFICE AT 70/1909, ASOKA ROAD, KALOOR,
KOCHI, PIN - 682017

BY ADV K.B.ARUNKUMAR

OTHER PRESENT:

ARUN CHANDY-GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
30.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



J U D G M E N T

The petitioner, Deputy Commissioner (Works Contract), has approached this Court under Article 227 of the Constitution of India impugning the Order dated 26.10.2022 passed by the National Company Law Tribunal, Kochi Bench, under Section 33(5) of the Insolvency and Bankruptcy Code, 2016 (for short, 'IBC').

2. The 2nd respondent Company is under liquidation. The 2nd respondent, M/s Albanna Engineering (India) Private Limited, a Corporate Debtor, was admitted into Corporate Insolvency Resolution Process (CIRP) on 25.10.2019. M/s Sanghvi Movers Ltd filed IBA No.38/2019 under Section 9 of the IBC against the 2nd respondent. The CIRP effected public commencement on 03.11.2019. The CIRP order was passed against the Corporate Debtor, and the moratorium was



declared as provided under Section 14 of the IBC. The moratorium declared against the Corporate Debtor existed till 02.12.2021, the day on which the liquidation order was passed in I.A. No.147/KOB/2021.

2.1 On verification of the assessment records of the 2nd respondent Company pertaining to the period 2015-16 certain irregularities were noticed. Hence, notice under Section 25(1) of the KVAT Act was issued to the 2nd respondent. The assessment for the year 2015-16 was completed vide Order dated 25.02.2021, and the total liability of KVAT was determined to be Rs.11,76,35,628.70, which would include interest of Rs.4,31,82,699.14. The Department had claimed Rs.11,76,35,626.70 in Form-C dated 04.01.2022 before the resolution professional appointed by the Company Law Board for M/s Albanna Engineering (India) Private Limited.



2.2 Against the petitioner's Form-C application, the 2nd respondent had filed an application before the National Company Law Tribunal, Kochi Bench, under Section 33(5) of the IBC seeking permission to prefer an appeal against the order of assessment dated 25.02.2021 passed by the petitioner. Though the application was only for seeking permission to file an appeal against the assessment order dated 25.02.2021, the National Company Law Tribunal had passed the impugned order stating that the Assessment Order was passed in violation of the prohibition provided under Section 14(1)(a) of IBC. Therefore, the Assessment Order was declared *void ab initio*. The National Company Law Tribunal dismissed the application of the 2nd respondent and directed the 2nd respondent to consider the claim submitted by the KVAT Works Contract Authorities independently, ignoring the assessment order dated 25.02.2021.



3. The question which falls for consideration in this writ petition before this Court is *whether the NCLT is empowered to declare the assessment order as void ab initio under Section 33(5) of IBC?*

4. Section 14 of IBC provides that when the insolvency process commences, the NCLT is mandated to declare a moratorium on the initiation of any coercive legal action against the Corporate Debtor. Section 14 of the IBC on reproduction reads as under:

“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-

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;



- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

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 licence, 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 licence, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium



period.

(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.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

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

- (a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
- (b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:



Provided that where at any time during the corporate insolvency resolution process period, if the adjudicating authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

4.1 From the provisions of Section 14 of the IBC it is evident that Section 14 prescribes a moratorium on the initiation of CIRP proceedings and its effects. The Supreme Court, in its judgment in the case of *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes & Customs*¹, after considering the February 2020 Report of the Insolvency Law Committee, held that 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

¹ (2023) 1 SCC 472



completion of the processes envisaged under the Statute. Moratorium under Section 14 is to ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process. Section 14(1)(a), (b) and (c) of the IBC shields and protects against pecuniary attacks against the Corporate Debtor. This is to provide the Corporate Debtor with breathing space to allow it to continue as a going concern and rehabilitate itself.

4.2 Section 33(5) of the IBC, under which the impugned order has been passed, on reproduction 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 corporate debtor:

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



4.3 Under Section 238, the provisions of IBC have an overriding effect on any other law for the time being in force or any instrument having effect by virtue of any law.

5. The Supreme Court, in the case of *S V Kandoakar v. V M Deshpande*² held that the authorities can only take steps to determine the tax, interest, fines or any such 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. The Supreme Court in *Sundaresh Bhatt* (supra) agreed with the said ratio laid down in *V M Deshpande* (supra) and held that the authority could only initiate assessment or reassessment of the duties or other levies. However, they cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 and 33(5) of the IBC. The

² (1972) 1 SCC 438



Interim Resolution Professional or the Liquidator, as the case may be, is empowered to question the legality of the assessment order before the deputed authority.

5.1 Paragraphs 47 to 49 of the judgment in the case of *Sundaresh Bhatt* (supra), are extracted hereunder:

“47. Therefore, this Court in V.M. Deshpande cases 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.

48. From the above discussion, we hold that the respondent could only initiate assessment or reassessment of the duties and other levies. 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.

49. 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 11-7-2019 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 the IBC.”

5.2 The twin questions framed by the Court have been answered in paragraph 57 of the aforesaid judgment.

Paragraphs 56 and 57 are reproduced hereunder:

“56. 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?

56.1. 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?

56.2. Answered in negative.

57. On the basis of the above discussions, following are our conclusions:

57.1. 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.

57.2. 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.

57.3. 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.”

5.3 Thus, after declaring the moratorium, there is an embargo on enforcing the demand, but there is no embargo under Section 14, read with Section 33(5) of the IBC, for determining the quantum of tax and other levies, if any, against the Corporate Debtor.

6. This Court finds the impugned order passed by the National Company Law Tribunal, Kochi Bench, as preposterous and untenable. The Company Law Tribunal has no power and authority under the IBC to declare an assessment order as *void ab initio* and *non est* in law. Such an order only reflects the competence of the persons who are manning such an important Tribunal. The Order shows the lack of basic



understanding of the law. Instead of considering the application by the 2nd respondent for permission to file an appeal against the assessment order, the National Company Law Tribunal, Kochi Bench, has assumed the jurisdiction of the Constitutional Court to declare the assessment order as *void ab initio*.

7. In view thereof, the impugned order is unsustainable, and the same is set aside. The writ petition is allowed. The matter is remitted back to the National Company Law Tribunal, Kochi Bench, to consider and pass an order on the application of the 2nd respondent in IA(IBC) 331/KOB/2022 in IBA/38/KOB/2019 at an early date.

Sd/-

DINESH KUMAR SINGH

JUDGE



W.P.(C) No.39185/2022

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APPENDIX OF WP(C) 39185/2022

PETITIONER EXHIBITS

- | | |
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| Exhibit P1 | TRUE COPY OF THE ASSESSMENT ORDER
NO.32072000387/2015-16 DATED 25.02.2021. |
| Exhibit P2 | TRUE COPY OF THE FORM 'C' APPLICATION
SUBMITTED BY THE PETITIONER DATED 04.01.2022. |
| Exhibit P3 | TRUE COPY OF THE ORDER OF THE 1ST RESPONDENT
DATED 26.10.2022. |

RESPONDENT EXHIBITS

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|---------------|--|
| Exhibit R2(a) | The true copy of the IA (IBC) 331/KOB/2022 filed by
this respondent before the 1st respondent |
| Exhibit R2(b) | The true copy of the Circular No.187/19/2022GST
issued by the GST Policy Wing, Central Board Of
Indirect Taxes and Customs, Department Of Revenue,
Ministry Of Finance, Government Of India |