

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1053 of 2023

(Arising out of Order dated 05.06.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in IA(I.B.C)/749(KB)2021 in C.P.(IB)/2078(KB)2019)

IN THE MATTER OF:

1. Principal Commissioner of Customs
GST Bhavan, L.B. Stadium Road,
Hyderabad - 500004
Email: commr-cushyd@nic.in
2. Additional Commissioner of Customs
GST Bhavan, L.B. Stadium Road,
Hyderabad - 500004
Email: commr-cushyd@nic.in
3. Union of India
4th Floor, A-Wing, Shastri Bhavan,
New Delhi - 110001
Email: commr-cushyd@nic.in ... Appellants

Versus

Pratim Bayal
RP For M/s B.K.M. Industries Limited
CK-104, Sector 2, Salt Lake City,
Kolkata, West Bengal - 700091
Mob: 9903886782
Email: pratimbayal@gmail.com
Email: cirp.bkmindustries@gmail.com ... Respondent

Present:

For Appellants: Mr. Piyush Beriwal, Sr. Standing Counsel with Mr. Nikhil Kumar Chaubey, Advocates.

For Respondent: Mr. Rishav Banerjee, Mr. Shambo Nandy, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 05.06.2023 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in IA No.749

of 2021 filed by Kanchan Dutta, erstwhile Resolution Professional (“**RP**”) seeking direction to release the assets comprising machineries of the Corporate Debtor in favour of the Applicant, thereby allowing RP to take possession and control of the said machineries. The Adjudicating Authority by the impugned order allowed the Application and directed for release forthwith the assets comprising machineries of the Corporate Debtor. Aggrieved by the impugned order, Principal Commissioner of Customs and others, who were Respondents in the Application have come up in this Appeal.

2. Brief facts necessary to be noticed for deciding the Appeal are:

- (i) Corporate Insolvency Resolution Process (“CIRP”) against the Corporate Debtor – M/s. B.K.M. Industries Ltd. commenced vide order dated 30.12.2020.
- (ii) M/s. B.K.M. Industries prior to initiation of CIRP has entered into an agreement with Maruti Cottex Limited for purpose of facilitating transfer of machinery owned by the Corporate Debtor (“**CD**”) to its 100% subsidiary at Nigeria. The second consignment, which as being exported by Maruti Cottex Ltd. was seized by the Custom Authorities on 06.03.2019. A Show-Cause Notice was issued to the Corporate Debtor as well as Maruti Cottex Ltd. to show cause as to why the penalty be not imposed, goods be seized and value of the goods should not be redetermined etc. with regard to consignment seized by the

Custom Authorities. Show-cause notice was replied by the Corporate Debtor as well as M/s Maruti Cottex Ltd. and by an order dated 03.12.2020, Additional Commissioner confiscated the goods seized on 06.03.2019 in terms of Section 113(i) of the Customs Act, 1962. The Additional Commissioner also gave option for the goods to be redeemed on payment of redemption fine of Rs.16,83,872/- under Section 125(i) of the Customs Act, 1962. After the confiscation, the goods remained in the custody of the Customs Department.

- (iii) The Interim Resolution Professional (“**IRP**”) of the B.K.M. Industries Ltd. issued a letter dated 05.06.2021 to the Customs Department for return of the goods. Reminders were issued on 07.07.2021 and 05.08.2021 for return of the machinery lying with the Customs Department.
- (iv) Having received no response to the letter, an IA No.749 of 2021 was filed by the erstwhile RP of the Corporate Debtor before the Adjudicating Authority, praying for directions for release of the assets comprising of machineries of the Corporate Debtor. In the Application filed by RP, notices were issued to the Respondents on 21.09.2021. The Application came for consideration before the Adjudicating Authority and Adjudicating Authority by the impugned order dated 05.06.2023 directed for release of the goods. Aggrieved by

which order, Principal Commissioner of the Customs and others have filed this Appeal.

3. We have heard Shri Piyush Beriwal, Sr. Standing Counsel for the Appellant; and Shri Rishav Banerjee & Shri Shambo Nandy, learned Counsel appearing for the Respondent.

4. Shri Piyush Beriwal, learned Sr. Standing Counsel for the Appellant challenging the impugned order submits that order having already been passed on 03.12.2020, much before initiating of CIRP of the Corporate Debtor, confiscating the goods in exercise of powers under 113(i) of the Customs Act, the goods did not remain to be goods of the Corporate Debtor. The order dated 03.12.2020 passed by the Additional Commissioner, Customs was clearly mentioned in the Application filed by RP and the Adjudicating Authority without adverting to order dated 03.12.2020 has allowed the Application. The order passed by the Adjudicating Authority is unreasoned order and it does not give any reason for allowing the Application. Neither the Corporate Debtor nor the RP ever exercised option of paying the redemption fine, hence, no rights can be claimed by the RP in the machineries of the Corporate Debtor lying with the Customs Department.

5. Shri Rishav Banerjee, learned Counsel appearing for the RP supporting the impugned order submits that when the moratorium was imposed on 30.12.2020, the ownership of the machineries still lay with the Corporate Debtor. The order dated 30.12.2020 itself allow the Corporate Debtor to pay the redemption fine as per Section 125 of the Customs Act

within 120 days and before the expiry of said period, the CIRP commenced on 30.12.2020. As per Section 126 of the Customs Act, vesting of the machineries in the Central Government can take place once the right of the Appellant to pay the redemption fine under Section 125 of the Customs Act has not been availed of within the time limit prescribed. In other words, till such time the period of 120 days is not over, no vesting can take place. According to the learned Counsel for the Respondent vesting could not have been taken place till 02.04.2021, before which the CIRP commenced. Hence, the RP was entitled to take possession of the assets of the Corporate Debtor under Section 18(f) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”). The learned Counsel for the Respondent in support of his submission relied on judgment of the Hon’ble Supreme Court in **Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes & Customs, (2023) 1 SCC 472**; judgment of the Delhi High Court in **Writ Petition (C) No. 2063/2011 - MMTC v Surjit Singh Kanda & Ors.**; as well as the judgment of Delhi High Court in **Gillette India Ltd. v. Commr. of Customs - 2019 SCC OnLine Del 8199**. He has also relied on judgment of this tribunal in **Commissioner of Customs(Preventive), West Bengal v Ram Swarup Industries Ltd & Ors. Company Appeal (AT)(Ins.) No. 563 of 2018** and contended that since the ownership rights of the machineries were of the Corporate Debtor, the RP has right to take control and custody of any asset, though the Customs Authorities are in possession of the same. It is

submitted that goods do not automatically vest in the Central Government after confiscation.

6. We have considered the submissions of learned Counsel for the parties and have perused the records.

7. Before we proceed to examine the rival contentions of the parties, it is useful to notice certain paragraphs of the Application filed by the erstwhile RP, i.e., IA No.749 of 2021. In the Application, facts of the case has been mentioned in paragraph-4 of the Application. In part-IV 'Facts of the Case' at paragraph (m) (7), there is detailed reference to the order dated 03.12.2020, which is as follows:

"7) After detailed enquiry, the Respondent No. 1 passed an order dated 3rd December, 2020 confiscating the machinery proposed to be exported stating, inter alia, as follows: -

"(i) *I reject the FOB value of Rs. 8,18,57,300/- (Rupees Eight Crores Eighteen Lakhs Fifty Seven Thousand and Three Hundred Only) as declared in the Shipping Bill No. 7043751 dt. 21.08.2018 for the Machinery items, in terms of Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 and the value of the goods is re-determined as Rs. 1,68,38,720/- (Rupees One Crore Sixty Eight Lakhs Thirty Eight Thousand Seven Hundred and Twenty Only) in terms of Rule 6, ibid, read with the provisions of Customs Act, 1962.*

(ii) *I order for confiscation of the goods seized vide Panchanama dated 06.03.2019, as detailed in Annexure enclosed thereto, re-valued at Rs. 1,68,38,720/- (Rupees One Crore Sixty Eight Lakhs Thirty Eight Thousand Seven Hundred and Twenty*

Only), in terms of Section 113(i) of the Customs Act, 1962.

However, I allow the goods to be redeemed on payment of redemption fine of Rs. 16,83,872/- (Rupees Sixteen Lakhs Eighty Three Thousand Eight Hundred and Seventy Two Only) in terms of Section 125(i) of the Customs Act, 1962.

*(iii) ******

*(iv) ******

(v) I impose a penalty of Rs. 16,83,872/- (Rupees Sixteen Lakhs Eighty Three Thousand Eight Hundred and Seventy Two Only), on M/s BKM Industries Ltd, in terms of Section 114(iii) of the Customs Act, 1962.

(vi) I impose a penalty of Rs.10,00,000 (Rupees Ten Lakhs Only) on on M/s BKM Industries Limited in terms of Section 114AA of the Customs Act, 1962.

*(vii) ******

*(viii) ***** ”*

A copy of the aforesaid order dated 3rd December, 2020 is annexed hereto and marked with the letter ‘A-6’. It is pertinent to mention that the said order has been passed prior to the commencement of the CIRP of the Corporate Debtor and the Corporate Debtor, has chosen not to prefer an appeal therefrom.”

8. In sub-paragraph (p), (q) and (r), the RP has referred to letters written by RP to Customs Department to hand over and/or return the assets. The averments made in paragraph- (7) – (p), (q) and (r) are as follows:

“(p) The Applicant, under the circumstances stated in the paragraphs hereinbefore, issued a letter dated 5th June, 2021 to the Respondent No.2 requesting it to hand over and/ or

return the assets comprising of the machineries seized and lying in the custody of the Respondent Authorities to the Corporate Debtor. A copy of the aforesaid letter dated 5th June, 2021 issued by the Applicant to the Respondent No.2 is annexed hereto and marked with the letter 'A-7'. The Respondent No.2 failed and neglected to respond to the aforesaid letter issued by the Applicant.

- (q) The Applicant again issued another letter dated 7th July, 2021 to the Respondent, No: 2 referring to his earlier letter dated 5th June, 2021 and requesting for a response at the earliest and cooperation for taking control and custody of the said machineries comprising the assets of the Corporate Debtor in terms of Section 25 of the Insolvency and Bankruptcy Code, 2016. A copy of the aforesaid letter dated 7th July, 2021 issued by the Applicant to the Respondent No.2 is annexed hereto and marked with the letter 'A-8'.
- (r) The Applicant again issued another letter dated 5th August 2021 to the Respondent No.2 referring to his earlier letters dated 5th June, 2021 and 7th July, 2021 and requesting for a response at the earliest and cooperation for taking control and custody of the said machineries comprising the assets of the Corporate Debtor in terms of Section 25 of the Insolvency and Bankruptcy, Code, 2016. A copy of the letter dated 5th August, 2021 issued by the Applicant to the Respondent No.2 is annexed hereto and marked with the letter 'A-97'."

9. In the Application, following reliefs were sought by the RP:

- “(a) Direct the Respondents to cooperate with the Applicant and forthwith release the assets comprising machineries of the Corporate Debtor mentioned in details in a schedule at Annexure ‘A-5’ of this application in favour of the Applicant thereby allowing him to take possession and control in respect of the said machineries;

- (b) Ad interim orders in terms of prayers (a) above.
- (c) Such order or orders as this Hon'ble Tribunal may deem fit and proper."

10. The Adjudicating Authority in the impugned order, while allowing the Application passed following order in paragraph-4 (vii) to (ix):

- 4(vii) It is stated in the application that the respondents have till date failed and neglected to respond to the applicant and/or hand over/ cooperate with the applicant for taking control and custody of the assets of the Corporate Debtor comprising of the machineries, as aforesaid.
- (viii) Heard the Ld. Counsel for the parties, perused the application and the documents attached therewith.
- (ix) In the facts of the present case, we direct the respondents in terms of prayer (a) to release forthwith the assets comprising machineries of the Corporate Debtor mentioned in details in a schedule at Annexure "A-5" of this application within six weeks of uploading this order on the portal."

11. When we look into the order of the Adjudicating Authority, it is clear that the order contains only direction to release the goods to the Customs Department without giving any reason and without even adverting to the facts, which were mentioned by the Applicant himself in the Application as noted above. The order of Adjudicating Authority, which does not give any reason for allowing the Application, deserves to be set aside on this ground alone.

12. We, however, proceed to examine the respective submissions of the parties on merits of the Application. The order dated 03.12.2020 passed by the Customs Authorities was after issuing Show-Cause Notice to Corporate

Debtor as well as Maruti Cottex Ltd., who sought to export the consignment of machineries obtained from the Corporate Debtor. The findings in the order of the Additional Commissioner are contained in paragraph 43, which are as follows:

“43. Having found that the Department has followed the procedure envisaged under Customs Valuation (Determination of value of Export Goods) Rules, 2007, I find that the Case laws relied upon by the notices, viz, M/s MCL and M/s BKMIL in support of their claim that due procedure has not been followed by Department while re-determining the value of export goods are of no avail to them. I also find from the report dated 14.01.2019 of the Chartered Engineer that the goods were an assembly of certain imported parts and some indigenous parts. None of the goods have details of year of manufacturing, SI. No. Model No. and some of the goods were found to be broken or damaged. Neither the Exporter nor the manufacturer denied the same. M/s MCL have submitted vide their reply dated 29.07.2020 that they have purchased the impugned goods from M/s BKMIL at Rs.7,40,00,000/- and were being exported to BK Manaksia Nigeria Ltd; at Rs.8,18,57,300/- by keeping a margin of Rs.78,59,300/-. M/s BKMIL have admitted that the value of Rs. 1,68,38,720/- arrived at by the Chartered Engineer is the value of the components only. Therefore, the value of spares, raw material and other services involved shall be to the tune of Rs.5,71,61,280/- , as per the argument of M/s BKMIL and M/s MCL. The manufacturer M/s BKMIL could not submit any details regarding the value of spares to be supplied, raw material to be supplied, installation of machinery, maintenance cost, repairs cost and the details of manpower required for providing the services. Without having these details it would not have been possible to M/s MCL and M/s BKMIL to arrive at the transaction value declared by them. The non availability and non submission of these details by the Exporters, proves beyond doubt that M/s BKMIL and the Exporters have arrived at a value arbitrarily. In view of the above, I find that

the value of USD 1179500 (Rs.8,18,57,300/- declared by M/s MCL is liable for rejection in terms of Rule 8 of Customs Valuation (Determination of Value of Export Goods) Rules,2007 and the value is to be redetermined as USD 225071.25 (Rs. 1,68,38,720/-, in terms of Rule 6 of Customs Valuation (Determination of Value of Export Goods) Rules,2007. Thus, the export goods do not correspond to the value declared by the exporter, I find that the goods are liable for confiscation in terms of Section 113(i) of the Customs Act, 1962. However, as the goods are not prohibited goods, I allow the option of release of goods to the Exporter on payment of redemption fine, in terms of Section 125(i) of the Customs Act, 1962.”

13. In paragraph-58, after returning the finding and in consideration of issues, the Additional Commissioner passed the following directions:

- “(i) I reject the FOB value of Rs. 8,18,57,300/- (Rupees Eight Crores Eighteen Lakhs Fifty Seven Thousand and Three Hundred only) as declared in the Shipping Bill No. 7043751 dt. 21.08.2018 for the Machinery items, in terms of Rule 8 of the Customs Valuation (Determination of value of Export Goods) Rules, 2007 and the value of the goods is re-determined as Rs. 1,68,38,720/- (Rupees One Crore Sixty Eight Lakhs Thirty Eight Thousand Seven Hundred and Twenty Only) in terms of Rule 6, ibid, read with the provisions of Customs Act, 1962.
- (ii) I order for confiscation of the goods seized vide Panchanama dated 06.03.2019, as detailed in Annexure enclosed thereto, revalued at Rs. 1,68,38,720/- (Rupees One Crore Sixty Eight Lakhs Thirty Eight Thousand Seven Hundred and Twenty Only) in terms of Section 113(i) of the Customs Act, 1962. However, I allow the goods to be redeemed on payment of redemption fine of Rs. 16,83,872/- (Rupees Sixteen Lakhs Eighty Three Thousand Eight Hundred and Seventy Two Only), in terms of Section 125 (i) of the Customs Act, 1962.

- (iii) I impose a penalty of Rs. 16,83,872/- (Rupees Sixteen Lakhs Eighty Three Thousand Eight Hundred and Seventy Two Only), on M/s Maruti Cottex Limited; in terms of Section 114 (iii) of the Customs Act, 1962. (
- iv) I impose a penalty of Rs. 10,00,000/-(Rupees Ten Lakhs only) on M/s Maruti Cottex Limited in terms of Section 114AA of the Customs Act, 1962
- (v) I impose a penalty of Rs. 16,83,872/- (Rupees Sixteen Lakhs Eighty Three Thousand Eight Hundred and Seventy Two Only), on M/s BKM Industries Ltd; in terms of Section 114 (iii) of the Customs Act, 1962.
- (vi) I impose a penalty of Rs. 10,00,000/-(Rupees Ten Lakhs only) on M/s BKM Industries Limited, in terms of Section 114AA of the Customs Act, 1962.
- (vii) I impose a penalty of Rs. 3,00,000/-(Rupees Five Lakhs only) on M/s Simhapuri Farmers Agri Parks Ltd, Custom House Agent (represented by Shri G. Prabhakara Rao), in terms of Section 114AA of the Customs Act, 1962.
- (viii) I impose a penalty of Rs. 2,00,000/-(Rupees Two Lakhs only) on M/s Simhapuri Farmers Agri Parks Ltd, Custom House Agent (represented by Shri G. Prabhakara Rao), in terms of Section 114(iii) of the Customs Act, 1962.”

14. It is relevant to notice that Applicant in his IA No.749 of 2021 has also quoted the relevant parts of the order passed by the Additional Commissioner on 03.12.2020. The order passed on 03.12.2020 clearly indicates that the goods which were seized on 03.06.2019 were confiscated. The Additional Commissioner has, however, allowed the goods to be redeemed on payment of redemption fine of Rs.16,83,872/- in terms of Section 125(1) of the Customs Act, 1962. Before we proceed further, it is

useful to notice provisions of Sections 113, 125 and 126 of the Customs Act, 1962, which are as follows:

“113. Confiscation of goods attempted to be improperly exported, etc. The following export goods shall be liable to confiscation:--

(a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;

(c) any 1*** goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any 1*** goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

(f) any 1*** goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;

(g) any 1*** goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

(h) any 1*** goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;

(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;

(ja) any goods entered for exportation under claim of remission or refund of any duty or tax or levy to make a wrongful claim in contravention of the provisions of this Act or any other law for the time being in force;]

(k) any goods cleared for exportation 5*** which are not loaded for exportation on account of any wilful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;

(l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened

125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods

have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that], without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

Explanation.—For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.”

126. On confiscation, property to vest in Central Government.—(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government. (2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.”

15. Section 126, sub-section (1) of the Customs Act, clearly provides that when any goods are confiscated under the Act, such goods shall thereupon vest in the Central Government and the sub-section (2) provides that Officer adjudging confiscation shall take and hold possession of the confiscated goods.

16. The statutory provision of Section 126 is clear and it does not need any interpretative exercise to know the legislative intendment. The option of paying the redemption fine given under the order dated 03.12.2020 has not been availed of, which is an admitted fact. The submission, which has been pressed by the learned Counsel for the Respondent is that since the period of 120 days did not expire and the CIRP commenced, the vesting of goods in Central Government shall not take place. Vesting of goods under Section 126, sub-section (1) is not dependent on exercise of option to pay the redemption fine. The payment of redemption fine and redeeming the goods is a benefit, which is provided by the statute, which option can be availed after the confiscation of the goods. In the present case, it is not the case of RP that any option was exercised for payment of redemption of fine. The first letter, which has been written by erstwhile RP to the Customs Department is dated 05.06.2021, which is clear from the pleadings contained in IA No.749 of 2021 as extracted above. In the entire pleading of the Application, there is no claim of exercise of any option. Thus, the argument of Shri Rishav Banerjee that there shall be no vesting till the period for exercising the option comes to an end, has no relevance in the present case. More so, even CIRP commenced against the Corporate Debtor

on 30.12.2020, it was always open for the RP, who was entitled to represent the Corporate Debtor to exercise option and redeem the goods by payment of redemption fine. The contention of the Respondent that even though, it has neither exercised the option of payment redemption fine nor redeemed the goods, but still they continued to be owner of the goods cannot be accepted.

17. Now, we proceed to examine the cases, which have been relied by learned Counsel for the Respondent. The judgment of the Hon'ble Supreme Court in ***Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes & Customs, (2023) 1 SCC 472*** was a case where CIRP commenced on 01.08.2017 and the Custom Department for the first time issued notice demanding custom duty on 29.03.2019. The Liquidator in the above circumstances filed an IA No.474 of 2019 for release of the goods, which was allowed by the Adjudicating Authority on 25.02.2020, against which order, Appeal was filed before this Tribunal. This Tribunal allowed the Appeal filed by the Custom Department, against which Corporate Debtor through Liquidator filed the Appeal in the Hon'ble Supreme Court. In the judgment, Hon'ble Supreme Court, after considering the issues raised recorded the clear finding that Demand Notice issued by Customs Department was on 29.03.2019, i.e., after imposition of moratorium. Findings in paragraph-44 of the judgment are as follows:

“**44.** 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 1-8-2017 [Icici Bank Ltd. v. ABG Shipyard Ltd., 2017 SCC OnLine NCLT 554] . The first notice sent by the respondent authority was on 29-3-2019. Further, when insolvency resolution failed and the liquidation process began, NCLT passed an order on 25-4-2019 [Sunil Kumar Jain v. Sundaresh Bhatt, 2019 SCC OnLine NCLT 9931] imposing a 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.”

18. The Hon’ble Supreme Court in the aforesaid background allowed the Appeal and in paragraph 55 held following:

“**54.** The interpretation provided by 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 300-A 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.”

19. Two questions, which were raised in paragraph 56, were answered in negative in paragraphs 56.1 and 56.2. Paragraph 56.1, 56.2, 57.1 and 57.2 are as follows:

“(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.”

20. The judgment of the Hon’ble Supreme Court in **Sundaresh Bhatt** was on entirely different footing, where the CIRP commenced prior to taking any action by the Customs Department and for the first time Customs Department has issued Demand Notice on 29.03.2019, i.e., much after initiation of CIRP on 01.08.2017. The above judgment of Hon’ble Supreme Court, in no manner supports the submission of learned Counsel for the Respondent.

21. The next judgment relied by the learned Counsel for the Respondent is judgment of the Delhi High Court in **MMTC v Surjit Singh Kanda &**

Ors. - Writ Petition (C) No. 2063/2011. The Hon'ble Delhi High Court in the said case had occasion to examine Sections 125 and 126 of the Customs Act, which empowers the redemption after payment of redemption fine. The Division Bench of the Hon'ble Delhi High Court took the view that till the period for redemption, the confiscation order would not take effect. In paragraphs 20, 21 and 22 following has been laid down:

"20. We repeatedly called upon the learned ASG to point out to us any provision in the Customs Act, which entitles the Customs Department to appropriate the property in the imported goods-the import of which is not prohibited in law in the aforesaid factual background. Merely because the Customs Department has the right to recover the customs duty, penalty & interest in respect of the balance 19 kg of gold which was not converted into jewellery for export, the confiscation of the imported gold- the import whereof is not prohibited in law, can only be for the purpose of recovering the customs duty, penalty & interest, as is evident from section 125 of the said Act which provides:

"125. Option to pay fine in lieu of confiscation.

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force and shall in the case of any other goods, give to the owner of the goods [or, where such owner is not known the person from whose possession or custody such goods have been seized,"] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the provision to sub- section (2) of section

115, such fine shall not exceed the price of the goods confiscated, less in the case of imported goods duty chargeable thereon.

(2) [Where any fine in lieu of confiscation of goods is imposed under sub- section (1), the owner of such goods or the person referred to in sub- section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.] ”

(emphasis supplied)

21. Confiscation of the imported goods under the said Act (which we are treating as valid in the present case) does not vest unconditional right, title and interest in such confiscated goods in the Customs Department as, if the importer avails of the right vested under section 125 of the said Act, the confiscation order would not take effect. Only in the eventuality of the importer, or from whose possession or custody the goods have been ceased, failing to exercise the option to pay fine, duty and other charges payable in respect of the imported goods, the customs department would get the right to deal with the goods as its own.

22. No doubt, section 126 of the said Act provides that:

“126. On confiscation, property to vest in Central Government.

(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.”

However, the said provision cannot be read in isolation and has to be read in conjunction with section 125 of the said Act, as aforesaid. Confiscation of imported goods (import whereof is not prohibited in law) is done only as a means to recover its dues by the Customs Department. It

does not mean that the Department can appropriate the said goods forever, even when the penalty, duty and other charges are paid by the importer. Admittedly, the Customs Department has already recovered its entire customs duty, penalty & interest amounting to Rs.2.27 Crores from the MMTC in respect of the 19 Kgs. of gold which was not utilized by Shri S.S.Kanda for export of jewellery.”

22. It is relevant to notice that above Division Bench judgment in **MMTC** came to be questioned in the full Bench judgment of the Hon’ble Delhi High Court in ***Gillette India Ltd. v. Commr. of Customs – (2019) SCC OnLine Del 8199***. The full Bench has categorically held that proposition held in **MMTC** judgment, cannot be approved. The conclusion of the judgment in **Gillette India Ltd.** has been contained in paragraph-30, which is as follows:

“**30.** To summarise the conclusions :

(a) Once there is a failure to pay the redemption fine in lieu of confiscation as determined under section 125 of the Act, within the time stipulated, the consequence of the confiscation becoming absolute and the confiscated goods vesting absolutely in the central government inevitably has to follow in terms of section 126 of the Act. The consequence is the same whether the goods are "prohibited goods" or "other goods".

(b) sections 125 and 126 of the Act form one continuous scheme and are not to be read disjunctively. Once the vesting of the goods in the Government is absolute, it would be inconsistent with the character of that vesting to contend that the Central Government can only recover through the sale of such goods the duty, penalty and interest and should return the excess to the owner/possessor of the goods.

(c) Therefore, this court is unable to concur with the DB which decided *MMTC v. Surjit Singh Kanda* (supra) that on a collective reading of sections 125 and 126 of the Act, the Customs Department is precluded from retaining the excess sale proceeds after adjustment of duty, penalty and interest.”

23. The conclusion recorded in paragraph-30, sub-para (b) also clearly indicates that once the vesting of the goods in the Government is absolute, it would be inconsistent with the character of that vesting to contend that the Central Government can only recover through the sale of such goods the duty, penalty and interest and should return the excess to the owner. The issue which was came for consideration before the full bench was interpretation of Section 126, sub-section (1). The issue was noticed in paragraph-2, which is as follows:

“2. The answer to the above question would require interpretation of the expression "vest with the Central Government" occurring in section 126(1) of the Act. In this context, this Bench has also been tasked with examining the correctness of the decision of a DB of this court in *MMTC v. Surjit Singh Kanda* (2013) 196 DLT 725.

The background facts”

24. The above judgment of the Hon’ble Delhi High Court also does not support the submission of the Appellant that till the option to pay the redemption fine is not exercised within time period, there shall be no vesting of the goods by the Central Government by virtue of Section 126.

25. The clear provision of Section 126(1), we have already noticed above and the scheme of Section 125, which is for different purpose and object.

Accordingly to our considered opinion vesting of goods is on confiscation by the Central Government by provision of Section 126, sub-section (1) and the option to pay redemption fine and redeeming the goods, is only a benefit given to the Corporate Debtor, which however, shall not arrest the vesting of the goods as contemplated by Section 126, sub-section (1). We, thus, do not accept the submission of learned Counsel for the Respondent in the present case that till the option for payment of redemption fine is not exercised within 120 days, the goods continued to vest in the Corporate Debtor.

26. The learned Counsel for the Respondent also referred to the judgment of this tribunal in **Commissioner of Customs(Preventive), West Bengal v Ram Swarup Industries Ltd & Ors. Company Appeal (AT)(Ins.) No. 563 of 2018**, which was a case where this Tribunal held that the goods which were in custody of the Custom Authority, but the ownership remains with the Corporate Debtor. The above case is clearly distinguishable from the present case, where the Corporate Debtor does not remained owner after confiscation of the goods on 03.12.2020.

27. Another judgment relied by the learned Counsel for the Respondent is in **MSC Mediterranean Shipping Company S.A. v. CA Kannan Tiruvengadam & Anr. – Company Appeal (AT) (Ins.) No.1048-1049 of 2019**, which follows the earlier judgment of this Tribunal (**Commissioner of Customs(Preventive), West Bengal**) as noted above. This case is also clearly distinguishable as in the present case no auction was undertaken by the Customs Department, goods were confiscated and redemption

option was given to the Corporate Debtor, to which no action was taken by the Corporate Debtor/RP.

28. In view of the foregoing discussion, we are of the view that the order of the Adjudicating Authority impugned in the Appeal is unsustainable and deserve to be set-aside. In result, we allow the Appeal, set aside the impugned order dated 05.06.2023 passed in IA(IBC)/749(KB)2021. IA(IBC)/749(KB)2021 is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

19th April, 2024

Ashwani