

Deputy Commissioner Of State Taxes & ... vs Sh. Sanjay Gupta Liquidator on 20 October, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 336 of 2021

[Arising out of order dated 01.10.2020 in IA-1428/2020 in CP No. (IB)-473(PB)/2018 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.)]

IN THE MATTER OF:

Deputy Commissioner State Taxes & Excise
District Sirmour, At Nahan, Himachal Pradesh-173001
Email: dcste.sirmour@mailhptax.gov.in

..... Appellant.

Versus

Sh. Sanjay Gupta
Liquidator
For Case Cold Roll Forming Limited
C-4E-135 Janakpuri
New delhi-110058

..... Respondent.

Present:

For Appellant: Mr. Abhinav Mukherji, Additional Advocate General,
State of H.P.

For Respondent:- Mr. Abhishek Anand, Mr. Mohak Sharma, Advocates.

JUDGMENT

(20th October, 2022) Justice Anant Bijay Singh;

The present Appeal has been filed by the Appellant being aggrieved and dissatisfied by the order dated 01.10.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.) in IA No. 1428 (PB)/2020 in CP No. (IB)-473(PB)/2018 whereby and whereunder the application filed by the Liquidator under Section 35 (1) (f) & 36 of Insolvency and Bankruptcy Code, 2016 (for short IBC) against the office of the Deputy Commissioner of Sales Taxes and Excise (Himachal Pradesh) seeking a relief for setting aside the order dated 25.04.2019 passed by the Respondent levying Rs. 12,27,77,844/- as failure to pay tax, interest and penalty and for a direction against the Respondent to remove the lien created over the factory premises and landed property Khasra No. 167/177 962.18 bhigas) at Trilokpur Road, Kala Amb, Himachal Pradesh and after hearing the parties, the Adjudicating Authority vacated the lien marked on the Corporate Debtor on 13.05.2019 for two reasons:

i. It being subsequent to the admission of the company petition; and ii. This order will not have any primacy over the overriding effect covered under Section 238 of the IBC and allowed the application filed by the Liquidator vacating the lien marked on asset of the Corporate Debtor on 13.05.2019.

2. The facts giving rise to this Appeal are as follows:

i) That one M/s Case Cold Roll Forming Ltd. (Corporate Debtor) is a dealer registered under the Himachal Pradesh Value Added Tax, 2005 and the Central Sales Tax, 1956, for manufacturing Telecom Towers/Transmission Towers and Guard Rails etc. Assessment proceeding for the years 2011-12 to 2015-16 remained pending because of non-appearance of dealer despite issuance of statutory notices under Sections 21 and 32 of HPVAT Act, 2005 from time to time.

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ii) On 30.08.2018 another notice was issued for finalization of tax assessment for the period 2011-12 to 2017 and dealer was asked to report in the office of DCSTE Sirmour on or before 14.09.2018. On this day Sh. Onkar Chand Accounts Manager of the Corporate Debtor appeared alongwith Mr. Jain, the CA of the Company and submitted partial record and requested for more time for submission of statutory forms etc. but never appeared thereafter.

iii) The Adjudicating Authority vide order dated 11.12.2018 admitted the company petition i.e. Company Petition No. (IB) - 473 (PB)/2018 filed on behalf of the Financial Creditor namely Oriental Bank of Commerce against the Corporate Debtor- Case Cold Roll Forming Limited for initiating the CIRP under Section 7 of the IBC and one Interim Resolution Professional was appointed.

iv) Pursuance of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation 2016, the Respondent duly made a public announcement in FORM "A" in various newspapers on 14.12.2018.

v) The assessment proceeding for the years 2011-12 to 2017-18 were finalized on 25.04.2019 under HPVAT Act, 2005, CST Act, 1956 and HP TEGLA Act, 2010. The tax demand notice to the tune of Rs. 12,27,77,844/- was issued by the Appellant to the Corporate Debtor on the same day through registered post. Subsequently, tax demand was declared as arrear of Land revenue on 01.05.2019 and red entry (lien) in the properties of Case Cold Roll Forming Limited, Trilikipur Road, Kala Amb was done on 14.05.2019 in the land bearing Khata Khatoni No. 76 min/80 min, Khasra No. 424/208 (9 Bighas and 12 Biswa) Company Appeal (AT) (Insolvency) No. 336 of 2021 and Khatauni No. 93/98, Khasra No. 204/110, Hadbust No. 137, measuring 53 bighas and 6 Biswa, Totaling 62 Bigha 18 Biswa 9 as per Jamabandi 2000-01.

vi) Further case is that the Appellant vide letter dated 02.05.2019 written to the Respondent informed that the Corporate Debtor has an outstanding liability of Rs. 12,27,77,844/- and enclosed therewith a Demand Notice dated 02.05.2019 (Annexure A-4 of the Appeal). The appellant also

submitted its claim with a request to the Respondent to consider the said claim of the Appellant without prejudice to its statutory rights.

vii) Further case is that the Respondent in absence of resolution plan, the Committee of Creditors decided to resolve for Liquidation of the Corporate Debtor and the Adjudicating Authority vide its order dated 05.11.2019 passed an order of liquidation of the Corporate Debtor under Section 33(1) of the IBC and appointed the Respondent, Mr. Sanjay Gupta, as the Liquidator.

viii) The Appellant in response to the Respondent's letter dated 14.11.2019 again filed its claim under Form-C on 20.11.2019. In the meanwhile, an application was filed by the Respondent / Liquidator being IA No. 1428/2020 in Company Petition No. 473(PB)/2018 praying, inter-alia, setting the orders dated 25.04.2019 passed by the Appellant levying Rs. 12,27,77,844/- and for directions to remove the lien marked over the immovable property of the Corporate Debtor and after hearing the parties the Adjudicating Authority by its impugned order dated 01.10.2020 allowed the application filed by the Respondent/Liquidator and vacated the lien marked on the asset of the Corporate Debtor on 13.05.2019 for two reasons: i. It being subsequent to the Company Appeal (AT) (Insolvency) No. 336 of 2021 admission of the company petition; and ii. This order will not have any primacy over the overriding effect covered under Section 238 of the IBC

3. The Ld. Counsel for the Appellants during the course of argument and in his memo of Appeal along with written submissions submitted that it is undisputed that a demand of Rs. 12,27,77,844/- was raised by the State Taxes and Excise, Assessing Authority on the Corporate Debtor - Case Cold Roll Forming Ltd. In view of the unrealized demand and provisions of Section 26 of the HP VAT Act, 2005 and attachment order dated 25.04.2019 was passed by the Excise Authorities since the State Excise Authorities have a first charge on the property of the dealer. Section 26 of the HP VAT Act, 2005 admits no ambiguity and provides for a mandatory first charge on the property of the dealer/corporate debtor.

4. It is further submitted that the supremacy of the first charge of the State has been succinctly discussed by the Hon'ble Supreme Court in the case of Central Bank of India Vs. State of Kerala, reported in (2009)4 SCC 94. In this case Hon'ble Supreme Court was considering the overriding impact of Central Acts viz DRT Act and SARFAESI Act (akin to Section 238 of the IBC, 2016) over Section 26 of Kerala General Sales Tax Act (akin to Section 26 of HP VAT Act 2005).

5. The Ld. Counsel for the Appellant in his written submissions given comparison of the aforesaid Judgments and facts of the present case which is tabulated hereunder:

Company Appeal (AT) (Insolvency) No. 336 of 2021 Central Bank Judgment- Hon'ble Facts in present case Supreme Court The Securitisation Act IBC, 2016; Section 238 95.2. "35. The provisions of this Act to "238. Provisions of this Code to override other laws.-The provisions of override other laws- The provisions of this Act shall have effect, this Act shall have effect, notwithstanding anything inconsistent notwithstanding anything inconsistent therewith contained in any other law therewith contained in any other law for the time being in force or any for the time

being in force or any instrument having effect by virtue of instrument having effect by virtue of any such law." any such law."

The Kerala General Sales Tax Act, Himachal Pradesh Value Added 1963. Tax Act 2005 95.4. "26-B. tax payable to be first "26. Tax, penalty and interest to be charge on the property. first charge on property.

Notwithstanding anything to the Notwithstanding anything to the contrary contained in any other law for contrary contained in any law, any the time being in force, any amount of amount of tax and penalty including tax, penalty, interest and any other interest, if any, payable by a dealer or amount, if any, payable by a dealer or any other person under this Act shall any another person under this Act, be a first charge on the property of the shall be the first charge on the dealer or such other person." property of the dealer, or such person."

6. It is further submitted that another judgment in the case of "State Bank of Bikaner and Jaipur Vs National Iron and Steel Rolling Corporation & Ors. Reported in (1995) 2 SCC 19", the Hon'ble Supreme Court was considering the supremacy of 'statutory first charge' under Section 11AAAA of Rajasthan Sales Tax Act, 1954 Company Appeal (AT) (Insolvency) No. 336 of 2021 over an existing mortgage. The provisions of Section 11AAAA are pari material with Section 26 of the HP VAT Act, which is tabulated hereunder:

Rajasthan Sales Tax Act, 1954 Himachal Pradesh Value Added "11-AAAA. Liability under this Act to be Tax Act, 2005 the first charge.- Notwithstanding "26. Tax, penalty and interest to be anything to the contrary contained in first charge on property.- any law for the time being in force, any Notwithstanding anything to the amount of tax, penalty, interest and contrary contained in any law, any any other sum, if any, payable by a amount of tax and penalty including dealer or any other person under this interest, if any, payable by a dealer or Act, shall be the first charge on the any other person under this Act shall property of the dealer, or such person." be a first charge on the property of the dealer or such other person."

In this case it was held in paragraphs 8, 10 and 11 that the statutory first charge created on a property of the dealer would have precedence over existing mortgage.

7. It is further submitted that the issue is now settled by the Hon'ble Supreme Court vide Judgment dated 06.09.2022 in the case of "State Tax Officer (1) Vs. Rainbow Papers Limited bearing Civil Appeal No. 1661 of 2020". While dealing with Section 48 of the Gujrat VAT Act which is verbatim of Section 26 of the HP VAT Act. The relevant paragraphs of the of the judgment is reproduced hereunder:

"2. The short question raised by the appellant in this appeal is, whether the provisions of the IBC and, in particular, Section 53 Company Appeal (AT) (Insolvency) No. 336 of 2021 thereof, overrides Section 48 of the GVAT Act which is set out herein below for convenience:-

"48. Tax to be first charge on property.--

Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person."

53. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.

54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

55. In our considered view, the NCLAT clearly erred in its observation that Section 53 of the IBC over-rides Section 48 of the GVAT Act. Section 53 of the IBC begins with a non-obstante clause which reads :-

"Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the Company Appeal (AT) (Insolvency) No. 336 of 2021 proceeds from the sale of the liquidation assets shall be distributed in the following order of priority....."

56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.

57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority."

8. The Ld. Counsel for the Appellant submits that in view of the submissions and judgment passed by the Hon'ble Supreme Court, the impugned order is fit to be set aside and the Appeal be allowed.

9. The Ld. Counsel for the Respondent during the course of argument submitted that the present Appeal has been filed by the Appellant after a period of more than 150 days from the date of passing of the impugned order dated 01.10.2020, therefore, the Appeal is hit by limitation and it is fit to be dismissed on this ground only.

10. On the other hand, the Ld. Counsel for the Appellant placed reliance that he has filed I.A. No. 780 of 2021 in the instant Appeal for condonation of delay Company Appeal (AT) (Insolvency) No. 336 of 2021 in filing the present Appeal in which paragraphs 2, 3 and 4 categorically stated that the certified copy of the impugned order was applied on 09.02.2020 after gaining knowledge of the impugned order and the same became available on 18.02.2021. The Appellant has also relied on the order dated 23.03.2020 passed by the Hon'ble Supreme Court of India in Suo-Motu Writ Petition (Civil) No. 03/2020 wherein the Hon'ble Supreme Court passed the following orders:

"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

Company Appeal (AT) (Insolvency) No. 336 of 2021 We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction."

11. The Ld. Counsel for the Appellant submitted that the present Appeal was filed on 23.03.2021, therefore, the delay, if any, covered by directions passed by the Hon'ble Supreme Court in Suo-Motu Writ Petition (Civil) No. 03/2020.

12. After hearing the parties and having gone through the aforesaid orders, we are of the view that this Appeal is covered by directions passed by the Hon'ble Supreme Court, therefore, the delay, if any, is condoned. I.A. No. 780 of 2021 is hereby allowed.

13. The Ld. Counsel for the Respondent submitted that Section 238 of the IBC provides overriding effect to the provisions of the Code over all other laws in the Country including the provisions of the Income Tax Act, 1961. In view of the facts and circumstances, the Adjudicating Authority has rightly passed the impugned order, therefore, there is no merit in the present Appeal, the Appeal is fit to be dismissed.

14. The Ld. Counsel for the Respondent further during the course of argument and in his reply affidavit in the merits of the present appeal along with written submissions submitted that the Respondent intimated various statutory Company Appeal (AT) (Insolvency) No. 336 of 2021 authorities of initiation of CIRP by the Adjudicating Authority vide order dated 11.12.2018 and in terms of Section 14 of the IBC moratorium was declared. The appellant acknowledged the receipt of the letter dated 05.02.2019 on 13.03.2019 in its letter dated 02.05.2019. However, in complete disregard and violation of imposition of moratorium by the Adjudicating Authority the Appellant sent a demand order dated 25.04.2019 as attachment of its letter dated 02.05.2019 which was passed during the CIRP period in violation of moratorium declared by the Adjudicating Authority. It is further submitted that demand order dated 25.04.2019 was passed after receipt of the information of initiation of CIRP and the same was also passed ex-parte.

15. We note that the Adjudicating Authority vide order dated 05.11.2019 passed the liquidation process against the Corporate Debtor, thereafter, the Appellant filed their claim under Form-C based on assessment order dated 25.04.2019.

16. After hearing the parties and having gone through the record, we find that the Adjudicating Authority while passing the impugned order dated 01.10.2020 has not considered the ratio of the latest judgment of the Hon'ble Supreme Court in the case of "State Tax Officer (1) Vs. Rainbow Papers Limited bearing Civil Appeal No. 1661 of 2020 (supra)" the ratio of which is discussed in para

7. Therefore, we are of the considered view that the impugned order passed by the Adjudicating Authority cannot be sustained in the eye of law, therefore, the impugned order dated 01.10.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.) in IA No. 1428 Company Appeal (AT) (Insolvency) No. 336 of 2021 (PB)/2020 in CP No. (IB)-473(PB)/2018 is hereby set aside. Accordingly, the instant Appeal is allowed. The Adjudicating Authority shall proceed in accordance with law. No order as to costs.

17. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.) forthwith.

[Justice Anant Bijay Singh] Member (Judicial) [Ms. Shreesha Merla] Member (Technical) New Delhi 20th October, 2022 R. Nath.

Company Appeal (AT) (Insolvency) No. 336 of 2021