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MORATORIUM PROHIBITS RECOVERY PROCEEDINGS OF CUSTOMS DUTY AGAINST CORPORATE DEBTOR: SUPREME COURT

5 September 2022

INTRODUCTION

The 3-Judge Bench of the Supreme Court (SC) in its judgment dated 26 August 2022, in *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs*, Civil Appeal No. 7667/2021, has held that the pendency of insolvency proceedings and imposition of moratorium on an assessee under Section 14 of the Insolvency and Bankruptcy Code ("Code"), restricts the powers available to customs authorities under the Customs Act, 1962 ("Customs Act"), for recovery of customs duty from such assessee. The SC held that the scope of proceedings under the Customs Act during continuation of moratorium is limited only to determination of quantum of customs duty.

BACKGROUND

- The Corporate Debtor (ABG Shipyard) was engaged in the business of importing ship building components and materials, and export of constructed ships after completion. The imported goods were stored in Custom Bonded Warehouses in Gujarat and Container Freight Stations in Maharashtra, and the Corporate Debtor had availed the Export Promotion Capital Goods Scheme ("EPCG Scheme"), and was granted a license under the said scheme ("EPCG License"), with respect to the said warehoused goods.
- The National Company Law Tribunal, Ahmedabad Bench ("NCLT") passed an order dated 1 August 2017 commencing Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor, appointed an interim resolution professional ("IRP"), and imposed moratorium in terms of Section 14 of the Code.
- The IRP (Appellant) informed the Respondent of the ongoing CIRP of the Corporate Debtor, sought to take custody of the warehoused goods, and further requested the Respondent not to auction or dispose of the said goods.
- The Corporate Debtor went into liquidation proceedings on 25 April 2019, which brought an end to the moratorium under Section 14 of the Code, but moratorium in liquidation proceedings under Section 33 (5) of the Code was initiated.
- The Respondent issued a demand notice to the Corporate Debtor under Section 72 (1) of the Customs Act amounting to INR 763,12,72,645/- in respect of 2531

Bills of Entries during subsistence of moratorium in liquidation proceedings. Parallely the Respondent also filed its claims before the Appellant under the provisions of the Code.

- The Appellant thereafter instituted an application before the NCLT under Section 60 (5) of the Code, seeking directions to be issued to the Respondent for release of the warehoused goods belonging to the Corporate Debtor. The Appellant claimed custody of the warehoused goods, as liquidator of the Corporate Debtor.
- The NCLT vide order dated 25 February 2020 allowed the application filed by the Appellant, and directed the Respondent to inter alia, allow the Appellant to take custody of the warehoused goods without any condition, demur and/or payment of customs duty. The NCLT reasoned that the provisions of the Code have overriding effect over the Customs Act, and that the government dues would have to be treated in accordance with the waterfall mechanism prescribed under Section 53 of the Code.
- The NCLT further restrained the Respondent from alienating, disposing or appropriating the warehoused goods of the Corporate Debtor, while allowing the Respondent the liberty to lodge its claims with the Appellant with regard to the leviable customs duty, and which claims were to be treated in accordance with law.
- The Respondent instituted appeal before the National Company Law Appellate Tribunal ("NCLAT") challenging the NCLT order, and which was decided on 22 November 2021 (i.e., the Impugned Order before the SC). The NCLAT set aside the order of the NCLT, held that the Corporate Debtor had relinquished title to the warehoused goods under Section 48 and 72 of the Customs Act, and directed that the warehoused goods were to be dealt with by customs authorities under the provisions of the Customs Act.

QUESTION FOR CONSIDERATION

- Whether the provisions of the Code would prevail over the Customs Act, and if so, to what extent?
- Whether the customs authorities could claim title over imported goods, and sell the same goods in terms of the Customs Act, during pendency of liquidation process of the Corporate Debtor?

WHAT THE SUPREME COURT HELD

- The SC set aside the Impugned Order of the NCLAT and held that the provisions of the Code have overriding effect over the provisions of the Customs Act by virtue of Section 238 of the Code. The SC construed the provisions of the Code and the Customs Act harmoniously, and accordingly, held that during moratorium period, customs authorities would only have the limited jurisdiction to determine quantum of customs duty, without initiating recovery of the dues.
- The customs authorities can file its claims before the resolution professional or liquidator (as the case may be), and the claims would be treated in accordance with the waterfall mechanism prescribed under Section 53 of the Code.

- No demand notices under the Customs Act can be issued by customs authorities to the assessee once moratorium under Section 14 or Section 33 (5) of the Code is imposed.
- There can be no deemed transfer of title of the goods from the assessee to the Customs Authority under Section 72 of the Customs Act, as this violates the mandate of Section 14 read with Sections 25 and 33 (5) of the Code as well as Article 300-A of the Constitution of India, 1950 (Constitution).

CONCLUSION

- The SC circumscribed the jurisdiction of the customs authorities under the Customs Act as against the Code, which is limited only to determination of quantum of the customs duty payable by the assessee.
 - The judgment protects the interest of the corporate debtor as well as the Revenue, by protecting the corporate debtor from recovery proceedings under the Customs Act, and at the same time, enabling customs authorities to file claims before the resolution professional in respect of unpaid customs duty.
 - The SC has clarified the scope and ambit of moratorium imposed under the Code. It was held that the legislative intent in enacting provisions of moratorium was to ensure parallel proceedings are not instituted and to avoid conflicting outcomes during the insolvency process.
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