

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

**MA 549/2017 in CP 292/I&B/NCLT/MAH/2017**

**Under Section 60(5) of IBC, 2016**

In the matter of

Bharati Defence and Infrastructure Ltd. ... Applicant/Corporate Debtor  
vs

Mannu Carrier Corporation ... Respondent

Order delivered on 8.2.2018

Coram: Hon'ble B. S. V. Prakash Kumar, Member (J)  
Hon'ble V. Nallasenapathy, Member (T)

For the Applicant : Mr. Malhar Zatakia, Mr. Aniket Nimbalkar, Ms.  
Sukanya Bhaumik, Advocates, i/b AZB & Partners.

For the Respondent : Mr. Mukesh Pabari, Advocate

*Per B.S.V. Prakash Kumar, Member (Judicial)*

**ORDER**

**Pronounced on 7.2.2018**

The applicant, Bharti Defence & Infrastructure Ltd., through its Resolution Professional appointed in the Corporate Insolvency Resolution Process initiated pursuant to the order of Moratorium dated 6.6.2017 passed by this Tribunal, filed this Miscellaneous Application for transfer of the goods lying at the Respondent's warehouse to the Applicant's warehouse for the purpose of utilising the same, inter alia, for construction of shipping vessels for the Ministry of Defence.

2. The Resolution Professional submits, pursuant to the moratorium order, that he is in the process of taking control of the applicant's assets and operations so as to protect and preserve the company's assets including the assets owned by the applicant that are not in the Respondent possession. The applicant being in the business of building ships, in its regular course of business, on 20.8.2009, entered into a Leave and License Agreement with the Respondent maintaining a warehouse situated at the Village- Bandarli, Mumbra Panvel Road, Dist- Thane for a period of 5 years, commencing from 1.9.2009 to 31.8.2014

for using its premises for commercial purposes of custom bond warehouse for storage of the applicant's ship building material for construction of vessels for its customers. Since the leave and license agreement period came to end on 31.8.2014, the applicant and the Respondent entered into an Amendment Agreement dated 9.5.2016 reducing the licensed premises from 1,00,000 sq.ft to 25,000 sq.ft for a further period of 3 years i.e. from 1.9.2014 to 31.8.2017 with a clause of further modification.

3. The Resolution Professional submits that the applicant's material worth approximately ₹13 crores is still lying in the licensed premises, for having the applicant failed to pay crane hiring charges, transport charges, warehouse rent, labour charges from 30.3.2009 owing to its poor financial situation despite the Respondent on 22.1.2014 requested the applicant to clear all its outstanding dues allegedly pending since February, 2011. Since payment has not been made by the applicant, this Respondent has even filed a Company Petition 948/2015 before the Hon'ble High Court of Bombay on or about 23.1.2015 for recovery of lease rent in respect to the licensed premises making a claim of ₹10,96,06,876 against the applicant herein, which is still pending for hearing before the Hon'ble High Court of Bombay. That apart, this Respondent has also made a claim of ₹10,96,06,876 plus ₹3,89,91,748 for the period from 16.6.2015 up to 6.6.2017 with 18% interest per annum on the principal amount by participating in the Corporate Insolvency Resolution process for recovery of its dues. As against these historical facts, since moratorium has been declared, the Resolution Professional submits that this Respondent ought to hand over all the goods owned by the applicant lying in its warehouse to him so as to enable the Resolution Professional to fulfil the mandate in terms of the Code and the admission order dated 6.6.2017 passed by this Bench.

4. As to legal submissions, the Resolution Professional submits that under Section 18 (f) of the Code, the IRP is required to take control and custody of the assets of the Corporate Debtor as recorded in its Balance Sheet including assets that may not be in the possession of the Corporate Debtor and the same power being extended to Resolution Professional under Section 23(2) of the Code, this Respondent shall forthwith deliver the possession of the goods of the Corporate Debtor to the Resolution



professional herein. The balance sheet of the company of the year 2015-16 having confirmed that the material mentioned above belongs to the Corporate Debtor, since the Resolution Professional is endowed with the duty under section 25 (2)(a) of the Code to take immediate custody and control of all the assets of Corporate Debtor, the Resolution Professional says that he has filed this Miscellaneous Application for suitable directions from this Bench for delivery of the goods lying with the Respondent. He has also mentioned Section 20 of the Code to state that Interim Resolution Professional shall make every effort to protect and preserve the value of the property of the corporate debtor and manage the operations of the Corporate Debtor as a going concern. In addition to it, the applicant submits that under Section 14 of the Code, the Respondent shall not withhold the applicant's goods towards lease outstanding dues payable by the applicant because such withholding is not only contrary to the terms of the agreement but also amounts to exercising a security interest which is expressly barred by the order passed under Section 14 of the Code.

5. To which, the Respondent submits that this applicant is due to pay ₹14,85,24,824 towards the charges aforementioned, for the same not being paid, it has preferential right of set-off by virtue of right of lien it has over the goods lying with it, moreover that these goods having been in the custody of custom bonded warehouse, the customs authority shall be necessary party in the present application because these goods cannot be moved out of the warehouse until and unless Customs Commissioner has granted permission to move out these goods from the warehouse. The Respondent has admitted making a demand of payment of dues for goods lying in the warehouse by filing a company petition against this applicant. This Respondent further submits that this applicant is not entitled to have any order from this Bench in pursuance of the legal propositions the applicant has placed because either the law under Insolvency & Bankruptcy Code, 2016 or the law under Customs Act mandates this Tribunal to pass an order against this Respondent for delivery of the goods lying in the warehouse to the applicant.

6. To which, the argument presented by the Respondent side is that this Respondent has a right of lien over the goods aforesaid under Section 171 of the Indian Contract Act, apart from this, the Applicant is liable to



pay labour charges, crane hiring charges, warehouse charges, transport charges and other facilities for these services fall under the relationship of bailer and bailee as per Section 148 read with Section 170 of Indian Contract Act. The Counsel further submits as per Section 15 of Carriage by Road Act, it has right to retain the goods until its dues are cleared because this consignor failed to take delivery of the goods within the time frame as mentioned under Carriage by Road Act. The Counsel of the Respondent further submits that the importer of any goods shall execute a bond under Section 59 of the Customs Act in respect of Bill of Entry for warehousing in a sum equal to thrice the amount of the duty assessed on such goods binding itself to comply with all provisions of the Customs Act and the Rules and the Regulations made thereunder in respect of such goods, to pay on or before the dates specified in the notice demand, all duties and interest payable under sub-section 2 of Section 61 and also to pay all penalties and fines incurred for the contravention of the provisions of this Act, if at all the applicant herein intends to manufacture and other operations in relation to goods in a warehouse, the Principal Commissioner of Customs or Commissioner of Customs shall grant permission for such operations in a warehouse and there being a section (Section 71) saying that no warehoused goods shall be taken out of warehouse except on clearance for home consumption or export or for removal to another house or as otherwise provided by The Customs Act, the applicant under any circumstances, cannot take a leverage of declaration of moratorium as a cover for release of the goods lying under the custody of the customs authorities. In view of these grounds, apart from debt liability payable to the Respondent, this application is liable to be dismissed.

7. On hearing the submissions of either side, this Bench has observed that it is a fact that the goods have been lying in the custody of the Respondent governed by The Customs Act to which this applicant neither paid dues payable by it nor obtained permission from the respective customs authorities for delivery of these goods from the warehouse maintained by the Respondent herein. The only ground that has been taken by the applicant is, since moratorium has been declared on 6.6.2017 under Section 14 of the Insolvency & Bankruptcy Code and the Resolution Professional being vested with the duty to take the custody of the Corporate Debtor properties, the Resolution Professional shall be



permitted to take the delivery of the goods from the Respondent. As to compliances set out under The Customs Act, the Counsel of the applicant says that they need not be complied with because Insolvency & Bankruptcy Code has overriding effect upon the provisions of The Customs Act.

8. In the backdrop of these contentions, let us look into the provisions of Insolvency & Bankruptcy Code mentioned by the applicant to find out as to whether any relief could be granted by this Bench by looking at the provisions mentioned by the Corporate Debtor. Let us go by the chronological order, dealing with section after section to deal with whether any right is vested with the applicant for seeking delivery of those goods from the Respondent. Though the Applicant Counsel has mentioned Section 14, he has not specified which provision of Section 14 is applicable to say a right is vested with the Resolution Professional to get the delivery of these goods from the Respondent. In Section 14, it has only been said that institution of proceedings against the Corporate Debtor, creating 3<sup>rd</sup> party rights on any of the assets of the Corporate Debtor, transactions under SARFAESI Act and recovery of any property owned by the Corporate Debtor or possessed by the Corporate Debtor are being suspended during the moratorium period. But no right has been given to the Corporate Debtor to proceed against others and to obtain either possession or recovery of anything by citing Section 14 of Insolvency & Bankruptcy Code. This suspension will remain exempted from the transactions notified by the Central Government in consultation with any financial sector regulator. So by close observation of this Section, it can be safely held that no right has been given to the Corporate Debtor to proceed against others under Insolvency & Bankruptcy code whereby, we are of the view that no special right has been accrued to the Corporate Debtor for getting delivery of the goods lying with somebody governed by other provisions of law.

9. The other provision of law that has been cited by the Applicant is Section 18 (1) (f) of the Code to say that the Interim Resolution Professional is conferred with a duty to take control and custody of any asset over which the Corporate Debtor has ownership rights as recorded in the balance sheet of the Corporate Debtor including an asset (Section 18(1)(f)) that may or may not be in possession of the Corporate Debtor.



In addition to it, other corollary rights reflected under Sections 20, 23(2) and 25(2)(a) have also been mentioned for saying that the Resolution Professional has a right to recover the assets of the Corporate Debtor.

10. On perusal of these provisions, if we see Section 18, i.e. in relation to duties of Interim Resolution Professional, it has been said that he can take control and custody of assets of the Corporate Debtor over which the Corporate Debtor has right of ownership, as against this right, if we see The Customs Act, the Corporate Debtor's right of ownership over the goods lying in the custody of the Customs Authority is very much qualified under various provisions of The Customs Act. By which, the Corporate Debtor/importer has to take permission of the Customs Authority to keep the goods in the warehouse governed by The Customs Act, the importer has to take a warehousing bond as reflected under Section 59 of The Customs Act. Once these bonded goods are kept in warehouse, as per Section 65 of The Customs Act, permission has to be taken from the Principal Commissioner of the Customs or Commissioner of Customs as may be prescribed, unless such permission is taken, the goods cannot even be moved out from one warehouse to other warehouse as well. Unless and until such clearance has come from the Customs Commissioner, it cannot be construed that the Corporate Debtor is free to exercise any right over the said goods. When custody of goods lying in the warehouse is connected to a permission from Government Authority under a statute based restriction, it cannot be construed that such assets/goods belong to the Corporate Debtor to exercise ownership rights, as long as ownership right is not free to the Corporate Debtor, we are afraid to mention that the Corporate Debtor is entitled to take out these goods from the rigours of The Customs Act without complying with the mandates that are set out under The Customs Act, therefore we strongly believe that it will not fall under the category mentioned under Section 18 (1)(f) (ii) of the Code, because the Corporate Debtor has no free ownership rights over the said goods henceforth, it will not fall under Section 18(1)(f)(ii) of the Code, whereby we have not found any merit in the argument of the Applicant.

11. Under The Customs Act, sometimes if goods are otherwise not to be released, cannot be released unless dues are cleared, warehouse will have right of bailment over the assets since this applicant has admittedly



not paid to the services rendered by the warehouse and that warehouse has bailment rights over the assets and there being a Tribunal to decide all these issues, the Corporate Debtor is not expected to obtain delivery of the goods without routing through the channel that has been mentioned under The Customs Act. Non obstante clause present in the Insolvency & Bankruptcy Code, 2016 is only in respect to the field the provisions operating, for Customs clearance being different field, it can't be construed that this Tribunal can exercise overriding jurisdiction to wipe out the rights of the parties accrued under different field that is falling under Entry 83 of List I of the Seventh Schedule of the Constitution.

12. On further perusal of The Customs Act having regard to the goods imported, two situations arise for clearance of imported goods, one is the importer shall make entry of the goods by presenting a Bill of Entry to the proper officer for home consumption or warehousing in the prescribed form, if at all the importer is unable to subscribe to a declaration before the proper officer furnishing all the particulars of the goods, the proper officer after examination deposits goods in the public warehouse, two is if the importer pays import duty alongwith Bill of Entry, the proper officer makes an order permitting clearance of goods for home consumption. The difference between home consumption and warehouse is not that the goods consumed in India fall under the caption of home consumption. The meaning in fact is if duty is paid after making Bill of Entry with all documents specified therein, clearance will be given for taking out goods which is called home consumption. If goods for any reason put to warehousing on execution of a Bond, they may be stored either in a public warehouse or a private warehouse licensed by Customs Authorities. When goods are deposited in a warehouse they shall be caused to be locked by the proper officer and no person shall enter the warehouse or remove the goods therefrom without the permission of the proper officer. In case the licensee, i.e. Private Warehouse, contravenes any of the provisions of this Act or other Rules thereto, the Principal Commissioner of Customs or Commissioner of Customs may cancel the license granted under Section 58 of this Act. For depositing goods in a warehouse, as I said earlier, the importer shall execute a Bond in a sum equal to thrice the amount of duty assessed on such goods binding himself to comply with all provisions of this Act and Rules and Regulations made thereunder in respect of such goods, to pay such duty on or before the date specified in the notice of



demand and all duties and interest payable under sub-section 2 of Section 61 and to pay all other penalties and fines incurred for contravention of the provisions of this Act in respect of such goods. Even if any transfer from one place to other place or transfer from one person to other person of those goods, the transferee shall execute a bond in the manner specified in Section 59 of this Act.

13. The owner of any goods warehoused is limited to inspect goods, deal with their containers in such manner as may be necessary to prevent loss, or deterioration or damage to the goods, sort the goods or show the goods for sale. Therefore, the importer/owner is not even entitled to exercise any of the characteristics of ownership over the said goods without permission of the Customs Authorities.

14. In this case, the admitted position is the goods have been warehoused on a bond executed by the importer/applicant, neither the private warehouse owner nor the importer can lay their hands on those goods unless customs authority permitted them to do so even to exercise the rights as mentioned under Section 64 The Customs Act. In view of the above proposition of law, this applicant cannot today say that he has ownership rights over the goods warehoused under the care and custody of Customs Authority. Perhaps for this reason only, the Applicant has consciously not made the Customs Authority as a party to the proceedings as if no permission of the Customs Authority is required for moving out the goods from the warehouse. The applicant has filed the Leave and License Agreement entered between the applicant and the respondent to impress upon this Bench that goods are kept in the private warehouse basing on the agreement entered between them without saying that to maintain a warehouse, license is to be obtained from the customs authorities and the goods will be kept in the warehouse solely on the permission given by the Customs Authorities.

15. The Applicant Counsel relied upon *M/s. Innoventive Industries Ltd vs. ICICI Bank Ltd. & Anr. (2017) SCC OnLine SC 1025* to say that Insolvency & Bankruptcy Code will have overriding effect upon the remaining enactments, but having gone through this citation, it is clear that this doctrine of repugnancy has invoked to say that central enactment will have overriding effect over the state enactment, i.e. Maharashtra Relief Undertaking (Special Provisions) Act, 1958. Since that



not being the case herein, the ratio decided in the case aforesaid is not applicable to the present case.

16. The Applicant Counsel relied upon *Board of Trustees of the Port of Bombay and Ors vs. Sriyanesh Knitters* (1999) 7 SCC 359 to say that the lien given under Section 171 of the Contract Act will not enable the Respondents to retain goods as security. On going through this citation, it appears that the Port Authority is no doubt a wharfinger, but the reason for not allowing to exercise the right of lien is, the authority wanted to retain goods in respect to the earlier dues, not for the goods present in the custody of Port Authorities, therefore, this ratio cannot be directly applicable to the given case.

17. The Applicant Counsel relied upon *Lalchand Ramchand vs. Pyare Dasrath Chamar & anr.* (AIR 1971 MP 245) to say that Section 171 of the Contract Act is not applicable to an advocate to retain the promissory note for an advocate will not fall under the category of attorneys of High Court as mentioned under Section 171 of the Contract Act, since we have not stated anywhere that the Respondent herein will come under the categories of either Banker, or factor or wharfinger or attorneys of High Court or even Policy brokers, this citation is no way helpful to say this finding is relevant for deciding this application.

18. The Applicant Counsel relied upon *Official Liquidator vs. Assistant Collector Customs Disposal Unit Bombay & Ors.* (1990) 68 Comp Cas 184 (Rajasthan) to say that when a property lying with Bombay Port Trust Dock was directed to be auctioned in the presence of Official Liquidator by virtue of Section 446 and 456 of the Companies Act, 1956, the same analogy is to be applicable to ensure that property is delivered to the custody of the Resolution Professional.

19. When right of lien is available to the authority and when right of bailment is available to the licensee of the warehouse, it can't be said that Corporate Debtor is entitled to knock out those rights and take out the property from the custody of the custodians without following the recourse available under the Customs Act and Contract Act, it is nothing but bulldozing the rights of the parties emanated under other provisions of law.



20. On reading the judgement aforesaid, 3-4 things are clear, 1. the official liquidator was appointed, 2. that property lying at Bombay Port Trust Dock belonging to the Company, which is permitted under Section 63 of Major Port Trust Act to auction the same by giving notice to the owner of the goods, 3. The Port Trust is assured that the claim of the custom duty would be paid by the Official Liquidator after the amount has been remitted to the account of the Official Liquidator. If we look into Section 446 (2) of 1956 Act, it is clear that the Court has jurisdiction, notwithstanding anything contained any other law for the time being in force, to entertain or to dispose of any suit or proceeding by or against the company, which is conspicuously absent under Insolvency & Bankruptcy Code more specially in CIRP period, whereby the sweeping power that was given under Section 446 read with Section 456 of the Companies Act, 1956 not being given in Insolvency & Bankruptcy Code, the ratio that has been decided in the aforesaid case cannot be straight away applicable to the present situation. In the aforesaid case, the Court has invoked 446 read with 456 jurisdiction post liquidation order whereas, when we read Section 18(1)(f) (ii), juxtaposed to the powers and duties of the liquidator under Section 35 of this Code, they are variable to the extent to say that the liquidator can take into his custody or control all the assets, property, effects and the actionable claim of the Corporate Debtor which is almost analogous to Section 456 (1) of the Companies Act, 1956, but the same is not the case under Section 18(1) (f)(ii) of the Code.

21. In view of these variations and absence of power to this Adjudicating Authority to decide the issues governed by another enactment which is otherwise governed by another Tribunal, we are of the view that there being no explicit jurisdiction to this Bench to the issues and subject matter falling under another enactment, thereby it can't be said that jurisdiction available under 1956 Act in respect to liquidation proceedings is equally available under Insolvency & Bankruptcy Code, henceforth this ratio decided in the above case is not applicable in the present case.

22. In a similar situation arose before, the Hon'ble Supreme Court in between *Board of Trustees Port Mumbai vs. Indian Oil Corporation and Anr.* (1998) 4 SCC 302, it has categorically mentioned that Port Board's



Law over the vessel is paramount even over the claims of secured creditors in winding up thereby such right cannot be extinguished by any other authority unless consented to by the Board. Of course, it is in respect to the vessel that is involved in this case, but by having been categorically mentioned that port is entitled to realise the proceeds from the vessel by giving a notice to the Official Liquidator, the ratio decided in the case supra (1990) 68 Comp Cas 184 cannot be construed as ratio applicable to this case.

23. As to ownership rights over the assets lying with the customs authorities, an importer cannot exercise ownership rights over the goods lying with customs, because unless and until customs clearance is given, no goods lying in the customs authority cannot be said as governed by Indian Law. Can any importer say that since he has bought goods from a foreign country, he can exercise ownership rights by virtue of either Sale of Goods Act or Indian Contract Act for that matter any other Act on the goods lying with Customs Authority. The importer will get ownership rights only after Customs Authority cleared the goods on furnishing the requisite documents and compliance under The Customs Act. In the present case, the goods of the Corporate Debtor are still under the Bond executed by this Corporate Debtor to the Customs Authority, in view of this reason, goods are still in the custody of the Customs Authority in the licensed warehouse. In the backdrop of this legal impediment, can it be said that the Corporate Debtor is owner of the goods even before Customs Authorities have given clearance to the goods so as to apply Insolvency and Bankruptcy Act provisions on the goods treating the Corporate Debtor as owner of the goods.

24. We must also make it clear that since the Corporate Debtor has taken money from various people, that is Financial Creditors or Operational Creditors, it does not mean Insolvency & Bankruptcy Code can wipe out the rights accrued to various authorities and people under various enactments who are no way concerned to the affairs of the Company. No doubt, consolidation of the assets of the company is very much required to distribute the assets of the company to the various claimants, it does not mean the Corporate Debtor or the Resolution professional will have right to take the custody of the assets of the company without availing the recourse available under other enactments.



For example, under The Customs Act, a party can assail the actions of the Customs Authorities before the Appellate Tribunal constituted under The Customs Act. If at all any importer is felt aggrieved of the actions of the Customs Authority, he has to avail the recourse before the Competent Appellant Tribunal constituted under the said enactment not by filing an application before this Authority without even making Customs Authority as a party to this proceeding. It goes without saying, to apply Indian Law over any transaction that happened on the soil of a foreign country, goods have to pass through the gateway of Customs Authority for getting foreign goods into India and to avail rights over these goods, without which no saleable interest will be accrued to the importer to enter into any commercial transaction because the very element of right of disposal will not come to the importer. It may be said that when an asset encumbered with security interest is covered under Section 14 of moratorium, how these goods lying with the customs authorities should be treated otherwise. The simple answer to this point is, under Indian Law ownership right has already accrued to the man creating security interest over the goods, here in respect to customs goods, the ownership purported to have come to the importer by virtue of transaction happened outside the country, unless it has been recognised by India, it can't be said that the importer is conferred with rights of ownership. The first threshold to get this imprimatur of recognition, the customs authority has to clear the goods from its custody. In this case, so far the corporate Debtor has not got any clearance from the customs authority except keeping the goods in warehouse under the care and custody of customs authority, therefore, the analogy of security interest is not in pari materia with goods lying with customs authority.

25. It is not out of context to say that overriding effect given under one statute cannot be taken granted that it can be applied against any and every statute without looking into the effect of other enactments and implications, in this aspect, Hon'ble Supreme Court has umpteen times has held that when any conflict comes in between two laws when explicit overriding effect is not apparent on record, the best recourse is to harmonise both the laws so as to protect rights of the subjects governed by other laws. The basic doctrine behind harmonious construction is not to violate the other laws as well as rights already accrued to the parties under other laws.



26. Moreover, it is not the case that the Respondent herein proceeding to take some action against the Corporate Debtor for appropriating the proceeds of the goods lying in the warehouse, indeed the Corporate Debtor has come forward through RP to take out the asset from the custody of the Respondent and the Customs Authority. Assuming that Section 14 is applicable even against this Respondent, that can come into force only when the Respondent initiates some action against the Corporate Debtor subsequent to declaration of moratorium. Here in the given case, no action has been initiated by the Respondent against the Corporate Debtor therefore, suspension of some right against the Corporate Debtor under Section 14 shall not be construed as a right to the Corporate Debtor to take out the assets lying with others solely on the ground that property is shown in the books of the Corporate Debtor. Right of suspension will not become right of taking delivery of the property from other parties.

27. Therefore, the applicant herein cannot be said that it has a right under Insolvency & Bankruptcy Code to get the delivery of the goods lying with the Respondent herein henceforth, this Application is hereby dismissed without costs.

Sd/-

**V. NALLASENAPATHY**  
**Member (Technical)**

Sd/-

**B. S. V. PRAKASH KUMAR**  
**Member (Judicial)**