

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

**Ivn. A 11/2018 & MA 73/2018
in CP 1487/I&BP/2017**

Under section 60(5) of the IBC, 2016

In the matter of
The Mormugao Port Trust
....Applicant

v/s.

1. Mr. Om Prakash Kanoongo (RP)
2. ICICI Bank
3. Western India Shipyard Ltd.
....Respondents

Order delivered on 08.02.2018

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Ajit Singh Tawar, Adv.

For the Respondent: Mr. Animesh Bisht, Advt. a/w Mr. Anush
Matkar, Adv. i/b Cyril Amarchand Mangaldas
-(ICICI Bank)
Mansi Jani, Adv. i/b Pan India Legal
(Western India Shipyard)

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

ORDER

Order pronounced on 07.02.2018

It is an application moved by the Mormugao Port Trust (MPT) through its Chairman Vasco-da-Gama, Goa seeking intervention in the CP for modification of Order dated 12.12.2017 in CP 1487/017 so as to facilitate the statutory functioning of the Port Trust and due compliance of the orders of Hon'ble High Court and other statutory authorities.

2. The case of the Applicant is that the Corporate Debtor herein has leased land and water area from the Applicant for a period of 25 years from 5.4.1993 to 4.4.2018, for having this Corporate Debtor failed to discharge their obligations under the Agreement dated 5.4.1993, the Applicant herein by invoking statutory power issued termination notice against the Corporate Debtor on 4.3.2017. By the Agreement entered between the Applicant and Corporate Debtor, the Corporate Debtor is entitled to make

use of dock water area around 50,000 M2 from the break water for parking the Floating Dry Dock (FDD) to do business.

3. The Applicant herein submits that the corporate debtor having failed to discharge their obligations, the Floating Dry Dock of the Corporate Debtor at Mormugao Port has already started sinking being positioned close to another abandoned vessel which has grounded within the area in possession of Corporate Debtor which contains about 350 tons of fuel oil whereby there is high possibility of danger to the grounded vessel with a threat of oil spill that would cause environmental damage to the ecology and to the biodiversity of the area which thereafter cannot be compensated in terms of money as well as by way of undoing the damages. This was informed to the Corporate Debtor herein on 17.05.2017 itself by Director General of Shipping Mercantile Marine Dept. by giving a notice u/s 356 (J) of the Merchant Shipping Act 1958 to the Corporate Debtor stating that the Floating Dry Dock owned by the Corporate Debtor which is parked in MPT area leased to the Corporate Debtor was found to have taken in by huge amount of water and dangerously listed and it is likely that the FDD is aground in its North-West section. It is also made clear in the notice that the Corporate Debtor is required to take all necessary steps to prevent pollution of Indian waters and coastline due to the reported listed FDD by preventing escape of oil from the FDD, removal of oil from the FDD, removal of oil slicks from the surface area but till date no action has been taken by this Corporate Debtor.

4. The Applicant has also filed before this Bench a letter dated 17.05.2017 addressed by Goa State Pollution Control Board to the Collector & Dist. Magistrate, South Goa Disaster Management Authority (South Goa), Margao, Goa stating that Dy. Commandant, Dist. OPS and Plans Officer for Dist. Commander, Indian Coast Guard informed through fax that the said authority has observed that the FDD of the Corporate Debtor is going down/listing dangerously probably due to water ingress inside buoyancy tank by saying though grounding of Floating Docks may not have serious pollution hazards but discharge of oil/bilges in some of the tanks of the floating docks cannot be ruled out and that leakage of oil post grounding can have catastrophic damage to fragile marine environment of coastal Goa. In view of the same, pollution authority requested the Disaster Management Authority to initiate appropriate steps for prevention of any disastrous at the earliest.

5. By looking at the overall situation and on personal of inspection on the same day by the Dist. Collector, he passed an order on 18.05.2017 under section 30(2)(Y) and section 34(C) of Disaster Management Act, 2005 directing the CMD of the Corporate Debtor to take up the task of re-floating the FDD and/or in the alternate to remove all such hazardous material/sludge/oil contained in the partially sinking FDD within 24 hours from the date of receipt of this order, failing which the Dockyard of the Corporate Debtor situated harbour Mormugao, Goa shall stand to be taken over by MPT for conducting salvage operation to remove all such oil/sludge which may be there in the bunkers of the FDD which upon sinking may cause damages to the grounded vessel M.V.Qing and the cost incurred to be recovered through the Corporate Debtor failing which, the Collector orders further action in terms of the Disaster Management Act, 2005.
6. The Applicant submits that the wreckage of FDD can affect the cruise business of the Port since it poses environmental threat, in view thereof, the Applicant u/s 14 of Indian Port Trust Act has proposed to hold auction of the FDD on 09.02.2018. The Applicant submits the action is purely to avoid environmental hazard as directed by the Dist. Authority of Disaster Management.
7. The Applicant further submits when Workers union of Corporate Debtor filed WP 882/2017 before the Hon'ble High Court of Bombay-Goa seeking the relief of injunction against this Applicant, the Hon'ble High Court on being satisfied by the submissions of the Applicant, permitted this Applicant for auctioning the wreckage.
8. Since moratorium has been declared in respect of the affairs of the Corporate Debtor, the Applicant has come before this Bench to place the ground reality explaining as to what danger is likely to occur in case immediate action is not taken in pursuance of the Dist. Disaster Management Authority.
9. To which the Resolution Professional representing the Corporate Debtor and the Financial Creditor who filed this Company Petition argued before this Bench that the auction proposed to be held on 9.2.2018 is at under valuation, which is likely to cause the economic interest of the company as well as all the stakeholders connected to this company, thereby the Corporate Debtor filed MA 73/2018 in this Company Petition seeking stay against the auction scheduled to be held on 9.2.2018.

10. Their argument is that since the FDD is the asset of the Corporate Debtor, for already having moratorium declared on 12.12.2017 suspending everybody to proceed against the Corporate Debtor or to create any third party rights over the assets of the Corporate Debtor as long as moratorium is in force, they further submit, in view of the overriding effect of the Insolvency and Bankruptcy Code, no proceedings shall be initiated and no transactions should be held in respect of the property of the Corporate Debtor, whereby the auction proposed to be held on 9.2.2018 shall be stayed.
11. Looking at the documents and submissions made by the Applicant, it is evident that various authorities have come to a conclusion that in case anything happened to this FDD of the Corporate Debtor, there is likely to be environmental hazard and loss of lives, which is paramount consideration to the State as well as the public rather than the economic interest of the stakeholders of the Corporate Debtor. Director General of Shipping already sent a notice to the Corporate Debtor on 17.5.2017 itself stating that the corporate debtor should take preventive steps so as not to let any disaster happen to the coastal area, but till date no corrective steps have been taken either by the Corporate Debtor or by the Resolution Professional who has stepped into the shoes of the Corporate Debtor. The Pollution Authority has also made it clear that the District Disaster Management Authority shall take immediate action in respect to the sinking FDD. Thereafter, on the Dist. Disaster Management Authority having personally inspected the Port on 18.5.2017, it has ordered the Corporate Debtor to remove all hazardous material from the FDD of the Corporate Debtor failing which the Port Trust is directed for conducting salvage operations. Thereby, the subject matter involved in this case is not auction of the FDD but it is an action in progress in pursuance of the order given under the Disaster Management Act, 2005. When such an action being ordered, can anybody remain waiting until the Resolution Professional/ Corporate Debtor take necessary steps to remove the sinking FDD from the Port. If for any reason, such salvage operations are put to stay in the light of the declaration of moratorium, what will happen if any grave occurrence taken place? Instead of applying equity, let us look into as to whether overriding effect and the moratorium directions given under Insolvency & Bankruptcy Code will have any bearing on the Disaster Management Act, 2005.

12. In the light of the submissions made by the Goa Port Trust Authority, Resolution Professional and ICICI Bank, if you set the overriding effect of Insolvency & Bankruptcy Code against The Disaster Management Act 2005, then we can realize which enactment prevails over which enactment. Both are central enactments. It is also a fact that the Disaster Management Act 2005 is a prior enactment to Insolvency & Bankruptcy Code; therefore, normally later enactment prevails over prior enactment provided both are pari passu to each other. As to non-obstante clause, both (section 72 of the Disaster Management Act 2005 and section 238 of Insolvency & Bankruptcy Code) are ipso facto same, no difference.

13. But as to bar of jurisdiction is concerned, it is essential to look at the text of bar of jurisdiction given under both enactments.

Insolvency and Bankruptcy Code 2016

Part-II: Insolvency Resolution and Liquidation for Corporate Persons

Chapter – Adjudicating Authority for Corporate Persons

63. No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.

Part-V: Miscellaneous

231: No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.

The Disaster Management Act 2005

d) "disaster" means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or manmade causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area;

e) "disaster management" means a continuous and integrated process of planning, organizing, coordinating and implementing measures which are necessary or expedient for –

- i) prevention of danger or threat of any disaster;
- ii) mitigation or reduction or risk or any disaster or its severity or consequences;
- iii) capacity building;
- iv) preparedness to deal with any disaster;
- v) prompt response to any threatening disaster situation or disaster;
- vi) assessing the severity or magnitude of effects of any disaster;

f) "District Authority" means the District Disaster Management Authority constituted under sub section 91) of section 25;

33. Requisition by the District Authority – The District Authority may by order require any officer or any Department at the district level or any local authority to take such measures for the prevention mitigation of disaster or to effectively respond to it, as may be necessary, and such officer or department shall be bound to carry out such order.

34. For the purpose of assisting, protecting or providing relief to the community, in response to any threatening disaster situation or disaster, the District Authority may –

- a) give directions for the release and use of resources available with any Department of the Government and the local authority in the district;
- b) control and restrict vehicular traffic to, from the within, the vulnerable or affected area;
- c) control and restrict the entry of any person into, his movement within and departure from, a vulnerable or affected area;
- d) remove debris, conduct search and carry out rescue operations;
- e) provide shelter, food, drinking water and essential provisions, healthcare and services;
- f) establish emergency communication systems in the affected area;

g) make arrangements for the disposal of the unclaimed dead bodies;

h) recommend to any Department of the Government of the State or any authority or body under that Government at the district level to take such measures as are necessary in its opinion;

i) require experts and consultants in the relevant fields to advise and assist as it may deem necessary;

j) procure exclusive or preferential use of amenities from any authority or person;

k) construct temporary bridges or other necessary structures and demolish structures which may be hazardous to public or aggravate the effects of the disaster;

l) ensure that the non-governmental organizations carry out their activities in an equitable and non-discriminatory manner;

m) take such other steps as may be required or warranted to be taken in such a situation.

71. Bar of jurisdiction of court – No court (except the Supreme Court or a High Court) shall have jurisdiction to entertain any suit or proceeding in respect of anything done, action taken, orders made, direction, instruction or guidelines issued by the Central Government, National Authority, State Government, State Authority or District Authority in pursuance or any power conferred by, or in relation to its functions, by this Act.

72. Act to have overriding effect – The provisions of this Act, shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

74. Immunity from legal process – Officers and employees of the Central Government, National Authority, National Executive Committee, State Government, State Authority, State Executive Committee or District Authority shall be immune from legal process in regard to any warning in respect of any impending disaster communicated or disseminated by them in their official capacity or any action taken or direction issued by them in pursuance of such communication or dissemination.

14. On perusal of both the enactments having regard to bar of jurisdiction, under Insolvency & Bankruptcy Code, it only says that **no civil court** can pass any order and injunction in respect to the action this Bench has jurisdiction under this Code, but when it comes to the Disaster Management Act 2005, it says that **no court shall** pass any order, not even criminal court is permitted to entertain any action against any of the actions or against authorities conferred with jurisdiction under the Act of 2005, except High Courts and Supreme Court, meaning thereby only constitutional courts alone can exercise jurisdiction under Constitution of India, none others. In view of the legal position as on today existing, can it be construed that Insolvency & Bankruptcy Code, simply for the reason of later enactment, prevails over the Act of 2005? To my belief, it can't be, because this Tribunal is barred to interfere with the jurisdiction exercised by the Collector of Goa. In the light of this background, I don't even believe that we need to further clarify that operation of fields under both enactments is distinct and therefore overriding effect will not operate on the Act of 2005. Once jurisdiction itself is barred to this Adjudicating Authority under section 71 of the Act 2005, this Bench could not even look into the merits as to whether such order is right or wrong or into maintainability of the proceedings initiated or orders issued under the Act of 2005, let alone overriding effect of Insolvency & Bankruptcy Code on the Disaster Management Act 2005.

15. Since no Court has jurisdiction to intervene with the proceedings initiated under Disaster Management Act 2005, the only competent jurisdiction to deal with that issue is either Hon'ble High Court or Hon'ble Supreme Court, therefore, even in respect to auction also, this Corporate Debtor has to go before Hon'ble High Court of Bombay-Goa by way of filing Writ Petition or by making its grievance in the Writ Petition already pending before the Hon'ble High Court of Bombay-Goa. As to auction is concerned, since it is not the subject matter before this Bench, whether the proceeds of the auction to go to Port Trust Authority or to the Corporate Debtor, this Bench has not gone into that issue. At this juncture, moreover, Hon'ble High Court having already given direction to the Port Trust Authority to deposit auction proceeds with the Hon'ble High Court, this

Corporate Debtor is always at liberty to place its grievance in respect to the auction proceeds before the Hon'ble High Court but not by seeking a stay over an action in pursuance of the direction given under Disaster Management Act 2005.

16. Accordingly, the intervention application filed by MPT is hereby disposed of making it clear that the moratorium declared u/s 14 of IB Code will have no bearing over the action taken under Disaster Management Act, 2005. In view of the discussion above, ~~the~~ MA 73/2018 filed ^{by} the Corporate Debtor is hereby dismissed as misconceived.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

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