IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 16.07.2019

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.RC.No.687/2019

Union of India
Ministry of Commerce and Industry
Department of Commerce,
O/o.The Development Commissioner
MEPZ, Special Economic Zone and
HEOUs in Tamil Nadu, Pondicherry,
Andaman & Nicobar Island
rep.by the Development Commissioner
Administrative Office Building
National Highway-45
Tambaram, Chennai 600 045. .. Petitioner

Vs

1.State Bank of India
Overseas Branch
Chennai 600001
Rep.by the Deputy General Manager. ..Respondent / Petitioner

2.The Inspector of Police
SPE-CB ACB:Chennai. .. Respondent / Complainant

3.Surana Corporation Ltd
Chennai, No.30, GNT Road
Madhavaram, Chennai 600 110. .. Respondent / A-8

Prayer:- Petition filed under section 397 & 401 Cr.P.C., to call for the records relating to the order passed by the learned Principal Judge, Special Court for CBI Cases, Chennai in Crl.MP.No.5916/2015 in RC MAI 2013A 0039 dated 12.12.2017 and set aside the same and direct the 2nd respondent to hand over the seized gold articles admeasuring 400.47 Kgs to the petitioner for initiating adjudicating process under the provisions of the Foreign Trade [Development and Regulation] Act, 1992.

For Petitioner : Mr.V.Chandrasekaran

For R1 : Mr.Ilaya Rajkumar for M/s.Ramalingam Associates

For R2 : Mr.K.Srinivasan, Spl.PP [CBI]

For R3 : Mr.Vipon Warrier for M/s.Indian Law Firm

ORDER

The revision has been filed by the petitioner/third party challenging the order dated 12.12.2017 in Crl.MP.No.5916/2015 in RC MAI 2013A 0039 on the file of the learned Principal Judge, Special Court for CBI Cases/8th Additional Judge, City Civil Court, Chennai.

2 The brief facts of the case is that the Inspector of Police, CBI, ACB, Chennai, registered a case in FIR in RC MA1 2013 A 0039 against Dr.S.Swarna, IAS, Joint Development Commissioner, Special Economic Zone [SEZ], Madras Export Processing Zone [MEPZ], Tambaram, Chennai-45, and others including one Surana Corporation Limited for the offences u/s.120-B read with 420 IPC and 13[2] read with 13 [1][d] of the Prevention of Corruption Act, 1988. The allegations levelled in the FIR is that the accused persons without following the relevant Rules, Regulations and laws relating to imports, imported Gold Bullions and jewelery items between the years 2010-2013. After conducting investigation, the Central Bureau of Investigation [for brevity ''CBI''] had filed the Final Report for closing the FIR, finding no sufficient materials for prosecuting the accused persons. During the course of investigation, CBI had seized 400.47 Kgs of gold Bullion and jewelery items from the custody of Surana Corporation Limited who was arrayed as A-8. Meanwhile, the Director General of Foreign Trade [hereinafter referred to as ''DGFT''], being the Adjudicating Authority, under the provisions of the Foreign Trade [Development and Regulation] Act, 1992, had initiated adjudication proceedings against M/s.Surana Corporation Limited. At the time of filing the Final Report, closing the FIR, the learned Principal Special Judge for CBI Cases/VIII Additional Judge, City Civil Court, Chennai, [hereinafter referred to as ''the Trial Judge/Court''] had directed CBI to file a Memo to mention specifically the mode of disposal of the property seized during the course of investigation. The CBI had filed the Memo dated 24.02.2015, wherein, it had requested to pass a separate order to hand over the custody of the case property, i.e., 400.47 Kgs of Bullion and jewelery items to the Directorate

General of Foreign Trade [DGFT], Department of Commerce, Government of India, New Delhi, till the disposal of the adjudication proceedings. The Trial Judge/Court, vide order dated 26.02.2015, passed an order granting permission to CBI to produce the case properties, viz., 400.47 Kgs of Bullion and jewelery items to the appropriate authority, viz., DGFT, Department of Commerce, Government of India, New Delhi.

3 Challenging the order dated 26.02.2015 passed by the Trial Judge/Court, A-8, viz., Surana Corporation Limited, filed Crl.RC.No.254/2015 before this Court. However, in the revision petition, the Director General of Foreign Trade, Department of Commerce, Government of India, New Delhi, was not impleaded as a party. The State Bank of India, Overseas Branch, Chennai, [for brevity ''SBI''], filed an impleading petition contending that M/s.Surana Corporation Limited had purchased the said gold after availing loan from them and thereby, they had given custody of the seized gold. In the revision, CBI had contended that DGFT is the competent authority to adjudicate the matter since proceedings have been initiated by them under the provisions of Foreign Trade [Development and Regulation] Act, 1992. This Court, after hearing M/s.Surana Corporation Limited, SBI and CBI, had passed an order in the revision on 14.07.2015, setting aside the order passed by the Trial Judge/Court in Crl.MP.No.828/2015 dated 26.02.2015 insofar as Clause 8[c], directing production of gold Bullion, viz., 400.47Kgs, to DGFT, New Delhi. However, this Court directed the Trial Judge/Court to give reasonable opportunity to all the parties concerned and to permit them to file counters etc., and hear all the parties and pass orders in accordance with law at an early date. This Court had also directed all the parties to appear before the Trial Judge/Court on 03.08.2015. After the orders passed by this Court, the Trial Judge/Court reopened the case on 11.08.2015 and the parties were directed to file their counters. During enquiry, SBI filed Crl.MP.No.5916/2015 seeking to deliver possession of gold to them stating that they are entitled for the possession of same on behalf of Consortium Lender Banks who have lent money to M/s.Surana Corporation Limited. M/s.Surana Corporation Limited had also filed Crl.MP.No.7885/2015 seeking to order the release of the gold in their favour. However, during enquiry, SBI and Surana Corporation Limited entered into a compromise and filed a Common Joint Compromise Memo, whereby Surana Corporation Limited agreed to handover custody of the seized gold of 400.47 Kgs by CBI to SBI. The Joint Compromise Memo was also recorded by the learned Judge. Based on the Joint Compromise Memo, the learned Trial Judge, on 12.12.2017, passed the following order in Crl.MP.No.828/2015:-

> ''In the result, in view of Joint Compromise Memo filed by the both parties, Clause 8[c] of the order passed in Crl.MP.No.828/2015 dated 26.02.2015 is hereby modified and the 1st respondent/CBI, ACB, Chennai, is hereby ordered to hand over the gold siezed by the 1st respondent, viz., 400.47 Kgs, in RC MA1 2013 A 0039 to the State Bank of India, the leader of consortium of six banks. The Joint Compromise Memo shall form part of this petition.'

4 The present revision has been filed by the petitioner/third party challenging the above common order dated 12.12.2017 made in Crl.MP.Nos.828, 5916 & 7885/2015.

5 Mr.V.Chandrasekaran, learned counsel appearing for the petitioner/third party would submit that Surana Corporation Limited commenced its operation during the year 2007 as an Export Oriented Unit [EOU] and they had approached the petitioner for setting up a Special Economic Zone in MEPZ, Tambaram, for manufacturing and exporting jewelery articles and that Surana Corporation Limited being an EOU, was administered under the provisions of Foreign Trade Policy and that they were issued with the requested Star Trading House Certificate No.D-0307 dated 22.11.2010 and during June 2012, CBI had registered a case against the accused company and other officials for violating various obligations mandated for a Nominated Agency and during investigation, CBI seized 400.47 Kgs of gold Bullions and jewelery items. He would submit that the gold articles which are the subject matter herein, were imported by the accused on the strength of the Nominated Agency Certificate under the obligation to fulfil the Foreign Trade Policy and since there was violation of the Rules, the Ministry of Commerce and Industry, Department of Commerce, has initiated proceedings against Surana Corporation Limited under the provisions of the Foreign Trade [Development and Regulation] Act, 1992 and as per section 12 of the Act, the property is entitled for confiscation after adjudication and thereby, DGFT is a necessary and important party to the proceedings. However, despite the order of this Court, directing notice to all the parties, the learned Trial Judge/Court, without issuance of notice to DGFT, had directed handing over of Bullions to SBI. The learned counsel for the petitioner/third party would submit that after the closure of the criminal case nothing survives for adjudication before the Criminal Court and that the impugned order passed by the Trial Court/Judge on 12.12.2017 is causing an hindrance for deciding other issues and he had further submitted that NCLT had directed handing over the Bullion to SBI, placing reliance only on

the impugned order passed by the Trial Court dated 12.12.2017 without conducting any independent adjudication and unless the petitioner/third party as a necessary party, is entitled to be heard with regard to the distribution of assets and handing over of the Bullion to SBI and since because of the said order, NCLT has passed an order without affording an opportunity and unless the order impugned herein, is set aside, the petitioner will not be having a fair hearing. He would also submit that in the meanwhile, SBI, as a Financing Creditor, has filed a petition before NCLT u/s.7 of the Insolvency and Bankruptcy Code, 2016, against M/s.Surana Corporation Limited and during the proceedings one Mr.Chandramouli Ramasubramaniam, has been appointed as the Resolution Professional on 05.12.2018. It is his further submission that the order passed by the Trial Court/Judge without affording an opportunity to DGFT is illegal and that the petitioner/third party has initiated adjudication proceedings against M/s.Surana Corporation Limited under the provisions of the Foreign Trade [Development and Regulation] Act, 1992 and notwithstanding the closure of the criminal case, the accused can be proceeded against them for having violation the Foreign Trade Policy and only after adjudication, the fate of the seized gold could be decided. When such being so, the order of the CBI Court directing handing over of the gold to SBI is prematured and mechanical in nature and it would indicate non-application of mind and would pray that the same has to be set aside.

6 The State Bank of India, had filed the counter. Mr.Ilayaraj Kumar, learned counsel appearing for SBI would submit that the revision has to be dismissed for suppression of facts and that the revision petitioner has suppressed about the pendency of the issues before NCLT. He would submit that SBI as a Consortium lender of the other lenders, viz., Punjab National Bank, IDBI Bank, Central Bank of India, Bank of India, Standard Chartered Bank, had sanctioned credit facilities to the tune of Rs.1160 Crores to Surana Corporation Limited for business purpose. In consideration of the availing credit facilities, Surana Corporation Limited has executed necessary loan documents and apart from executing the same, Surana Corporation Limited has also executed a Joint Deed of Hypothecation, thereby hypothecating the entire stocks of raw materials, semi finished and finished goods, stores and other assets etc. In continuation of the same, necessary charges have also registered with ROC from time to time and the last consortium documents for Rs.1160 Crores was filed with ROC on 13.06.2014. Thereafter, several steps have been taken by SBI and that SBI has also approached DRT by filing an Original Application seeking for recovery of a sum of Rs.570 Crores as on 07.11.2016 on

behalf of the consortium Bankers. While so, CBI had filed FIR against Surana Corporation Limited and had recovered gold from the premises of the said Company. The learned counsel would submit that the learned Judge, after hearing SBI and finding that SBI is the person entitled for the custody of the Bullion, had directed handing over of the gold to the custody of SBI. He would further submit that despite the orders being passed by the Trial Court on 12.12.2017, the Bullion has not been handed over to SBI so far. Meanwhile, proceedings were initiated against Surana Corporation Limited before the National Company Law Tribunal [NCLT] by filing an application under section 7, seeking to initiate Corporate Insolvency Process against the said Company. The said application was taken on file in CP.No550/[IB]/2018. NCLT, after hearing SBI, was pleased to admit the application and by order dated 05.10.2018, had passed an order of commencement of Corporate Insolvency Resolution Process against Surana Corporation Limited and appointed one Mr.Chandramouli Ramasubramaniam as the Resolution Professional and that the Resolution Professional has taken steps through NCLT by filing an application seeking for a direction to CBI to release the seized goods and NCLT, after hearing the respective parties, was pleased to pass an order on 14.03.2019, directing CBI to release the seized gold to SBI. The learned counsel would further submit that despite the order being passed on 14.03.2019, the gold has not been handed over to SBI.

7 Mr.Vipon Warrier, learned counsel appearing for the Resolution Professional representing M/s.Surana Corporation Limited would submit that Mr.C.Ramasubramaniam was appointed as Resolution Professional on 05.11.2018 by NCLT and that since CBI did not hand over the case property pursuant to the order passed by the Trial Court dated 12.12.2017, the Resolution Professional has filed a petition in MA.No.142/2019 seeking for a direction to CBI to hand over the custody of the gold. He would submit that before NCLT, CBI had contended that the matter has been referred to DGFT [Adjudicating Authority] ; whereas, NCLT, in order to enable the Resolution Professional to complete the Corporate Insolvency Resolution Process without any further delay, had directed CBI to release the custody of the case property to SBI, the Lenders Bank. He would also submit that as per section 14[1] of the Insolvency and Bankruptcy Code, 2016, NCLT has passed an order of Moratorium and as per the said section, all proceedings pending in any Court of Law, Tribunal, Arbitration or other Authority are prohibited and thereby, the entire issues with regard to dealing with the properties of the Corporate Debtor, have to be decided only by NCLT and only in order to circumvent the order passed by NCLT, the

petitioner/third party has come up with the present petition. He would further submit that section 53 of the Code prescribes the mode with regard to distribution of assets, proceeds from the sale of assets and as per the said procedure, the State Bank, as a secured creditor, is entitled to priority over the claim of the Central Government and since SBI has priority over the gold, NCLT has rightly passed the order.

8 Mr.K.Srinivasan, learned Special Public Prosecutor appearing for CBI Cases, would submit that since adjudication has been initiated by DGFT under the provisions of the Foreign Trade [Development and Regulation] Act, 1992, prior to the initiation of the proceedings before NCLT, CBI had intended to hand over the gold to DGFT, being an Organization under the Government of India. He would further submit that CBI had filed a Memo before the Trial Court only on the instructions of the Trial Judge/Court and that when the initial order passed by the Trial Court was set aside by this Court in Crl.RC.No.254/2015 dated 14.07.2015, this Court while remitting the case back, had directed the Trial Judge/Court to give opportunity to all the interested parties whereas

the learned Trial Judge/Court did not give an opportunity to DGFT before directing handing over of the property / gold to SBI. He would further submit that pursuant to the closure of FIR, all criminal proceedings have been closed and nothing survives for adjudication before any criminal court. Learned Special Public Prosecutor would also submit that CBI undertakes to abide by any orders to be passed by this Court.

9 At this juncture, the learned counsel for the petitioner/third party would submit that the petitioner being an Statutory Authority, is a necessary party with regard to custody of the gold since as per section 11[2] of the Foreign Trade [Development and Regulation] Act, 1992, M/s.Surana Corporation Limited shall be liable to a penalty, not exceeding Rs.1000/- or five times the value of the goods in respect of which, any contravention is made or attempted to be made, whichever is more and after adjudication, the gold might be liable for confiscation and he would submit that NCLT has, in order dated 14.03.2013, had directed return of the case property to SBI placing reliance on the order passed by the Trial Judge dated 12.12.2017. It is his further submission that the order dated 12.12.2017 made by the Trial Court/Judge is a rider and it would be an impediment to the petitioner/third party claiming the custody of gold before NCLT or before any Appellate Forum and thereby, would seek to set aside the order impugned herein dated 12.12.2017.

10 Mr.Vipin Warrier, learned counsel appearing for the Resolution Professional would reiterate and submit that now since NCLT has passed an order of Moratorium, all proceedings in respect of dealing with rival claims being made by the Union of India, Ministry of Commerce and Industry on one side and the Resolution Professional representing M/s.Surana Corporation Limited and SBI on the other side, has to be adjudicated only by NCLT.

11 This Court has considered the rival submissions and also perused the materials including the typed set of documents and the order impugned herein.

12 Taking into consideration the facts and circumstances of the case and the submissions made by the learned counsel on either side, this Court is of the opinion that NCLT is the appropriate Forum to decide the rival claims of the parties in respect of bullion. Since now that the FIR has been closed and further criminal proceedings have been terminated, this Court is also of the opinion that the order passed by the learned Principal Judge, Special Court for CBI Cases/VIII Additional City Civil Court, Chennai in Crl.MP.No.5916/2015 dated 12.12.2017 has to be set aside.

13 In the result, the Criminal Revision Petition stands allowed and the order passed by the learned Principal Judge, Special Court for CBI Cases/VIII Additional City Civil Court, Chennai in Crl.MP.No.5916/2015 in RC MAI 2013A 0039 dated 12.12.2017 is set aside. The petitioner shall approach NCLT and NCLT shall decide the issue with regard to handing over of 400.47 Kgs of Bullion/gold afresh in accordance with law after affording opportunity to all the parties concerned. However, a direction is issued to CBI to hand over the custody of 400.47 Kgs of Bullion/Gold to the State Bank of India, Overseas Branch, Chennai, the 1st respondent herein, and the 1st respondent herein, viz., SBI, shall not dispose of the property, viz., 400.47 Kgs of Bullion/Gold, till the issue is decided by NCLT.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

AP
To

1.State Bank of India
Overseas Branch
Chennai 600001
Rep.by the Deputy General Manager.

2.The Inspector of Police
SPE-CB ACB:Chennai.

3.The Development Commissioner
Union of India
Ministry of Commerce and Industry
Department of Commerce,
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MEPZ, Special Economic Zone and
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Administrative Office Building
National Highway-45
Tambaram, Chennai 600 045.

4.Surana Corporation Ltd
Chennai, No.30, GNT Road
Madhavaram, Chennai 600 110.

5.The Public Prosecutor
High Court, Chennai.

6.The Principal Judge, Special Court for CBI Cases/8th Additional Judge,
City Civil Court, Chennai.

+1cc to Mr.K.Srinivasan , Advocate SR.No. 60048
+1cc to Mr.V.Chandrasekaran , Advocate SR.No. 60108
+2ccs to M/s.Ramalingam and associates , Advocate SR.No. 60441

Crl.RC.No.687/2019

A.SK(26/08/2019)