



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.10.2021

PRONOUNCED ON: 01.11.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

WRIT PETITION NO.11448 OF 2020
AND WMP NOS.13966, 13968, 13969 AND 13970 OF 2020

Czarnikow Group Limited
A company incorporated under the laws of
United Kingdom, Paternoster House,
65 St. Paul's Churchyard,
London EC4M 8AB, United Kingdom,
Represented by its power of attorney holder,
Yerramallu Venkateshwar Naresh Kumar,
No.34-141/102, Mythili Residency,
Bharani Colony, Sainikpuri, Hyderabad -500 094.

...Petitioner

Vs

1. The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
Hyderabad Zonal Unit,
10-2-289/57/1 & 2, Suryanvanshi Residency,
II X Road, Shanthi Nagar,
AC Guards, Hyderabad 500 028.
2. The Additional Director General of Foreign Trade,
The Directorate General of Foreign Trade,
4th Floor, Shastri Bhavan Annexe,
26, Haddows Road, Chennai,
Tamil Nadu 600 006.
3. The Commissioner of Customs,
5, Williams Road, Melapudur,
Cantonment, Tiruchirappalli,
Tamil Nadu 620 001.
4. The Commissioner of Customs,
Chennai -II, No.60, Customs House,
Rajaji Salai, Chennai,
Tamil Nadu 600 001.



5. M/s.Shri Ambika Sugars Limited,
Nungambakkam High Road, Eldorado 5th Floor,
Nungambakkam, Chennai, Tamil Nadu- 600 034,
Represented by its Resolution Professional.

... Respondents

WEB COPY

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus to call for the records of Respondent No.1 leading to the Attachment Order, DRI/HZU/26C/ENQ-46 (INT-32)/2018 dated 29.08.2019 and quash the same and consequently direct Respondent Nos.1,2,3 and 4 to permit the Petitioner to re-export the sugar amounting to approximately 19,537.60 MT supplied under the Contract dated 20.10.2016, currently in Kottur and Pennandum warehouses of Respondent No.5, morefully described in the Schedule or whichever warehouse this Hon'ble Court has permitted the sugar to be relocated.

For Petitioner : Mr.J.Sivanandaraj
Assisted by Mr.S.Kaushik Ramasamy,
For Mr.AdeeshAnto

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel for R1, 3 & 4

Mr.AjayK.Jain for

Mr.Raghav Rajeev Menon for R5,

No Appearance for R2.

O R D E R

The petitioner is a company incorporated in England primarily engaged in trading in sugar. It had entered into a contract dated 20.10.2016 (in short 'contract') with Shri Ambika Sugars Limited/R5 for the supply of 29,830.50 Metric Tonnes (MT) of standard VHP cane raw sugar. A Collateral Management Agreement (in short 'CMA') had also been entered into providing for the simultaneous opening of a Letter of Credit for payment and supply, insofar as the sugar was to be released in instalments.

2. As and when payments were effected by R5, lease deeds were executed between R5 and the petitioner's agent in India to protect the custody of the sugar and to ensure that title of the petitioner to the asset stood secured till such time the entirety of the sugar was released to R5 upon receipt of payment.



3. Sale consideration has been paid by R5 in respect of 9899 MT of sugar and this quantity has been released. The balance is yet to be sold as and when the consideration is received from R5. According to the petitioner, it continues to hold title to the balance of the sugar, i.e., approximately 19,537.60 MT, valued at USD 9 million (approx.) or Rs.67.5 crores (in short 'asset').

4. The sugar has been imported in anticipation of the sale to R5 and upon import, sugar has been retained in a bonded warehouse in the customs frontier and according to the petitioner, has not entered into the territory of India. The bonded warehouse is under lock and key, both at the instance of R5 as well as the petitioner, the latter having placed its lock above the lock placed by the petitioner. The petitioner's agent under the CMA, Mr.Amin (in short 'agent') is said to be supervising the safety of the asset.

5. According to both the petitioner and R5, the latter had applied for and obtained an approval under the Advance Authorisation Scheme (in short 'AA Scheme') issued by R2, i.e., Additional Director General of Foreign Trade (ADGFT) and implemented by R3 and R4, i.e., Commissioner of Customs, Tiruchirappalli/R3 Commissioner of Customs, Chennai II/R4, thus entitling the import of the sugar without the payment of customs duty.

6. The eligibility of the consignment to the AA Scheme is not the concern of this Court and the Court is only concerned with the adjudication of the plea put forth on behalf of the petitioner that, the petitioner being the owner of the asset holding full title to it, should be permitted to take custody of the asset from the bonded warehouse, where it presently lies, and re-export the same.

7. The reason for the request for re-export is that R5 is presently before the National Company Law Tribunal (NCLT) where an Insolvency Petition has been filed by the Punjab National Bank, as Financial Creditor in terms of the Insolvency and Bankruptcy Code, 2016 (in short 'code') as against R5 and a Resolution Professional (RP) has been appointed to take control of the management and administration of R5. Corporate Insolvency Resolution Process (CIRP) is presently on-going.

8. There appears to have been non-compliance by R5 to the terms of the AA Scheme leading to coercive action by R1, i.e., Directorate of Revenue Intelligence (DRI), by attachment of the asset. Despite the petitioner having written to the official respondents that the title to the asset vests in it and thus the



attachment by R1 is liable to be lifted, there has been no response to the same and also no adjudication of the request of the petitioner before the official respondents seeking re-export of the sugar.

WEB COPY

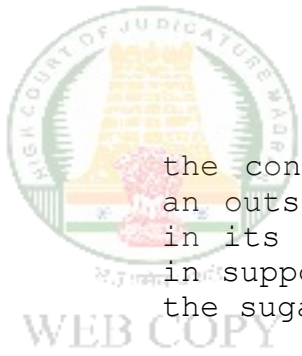
9. The petitioner is at pains to explain to the Court that the asset, being an edible commodity, is rapidly deteriorating, particularly in the present climatic conditions. Rain water is stated to be seeping into the warehouse and damaging the asset irreversibly. The petitioner hence prays that the order of attachment by R1 dated 29.08.2019 be quashed and the official respondents, i.e., R1 to R4 be directed to permit the petitioner to re-export the asset.

10. Mr. Ajay K. Jain, learned counsel appearing for Mr. Raghav Rajeev Menon, learned counsel for the Resolution Professional appointed in the CIRP of R5 raises a preliminary and serious objection to the maintainability of this Writ Petition as according to him, the petitioner should have approached the NCLT for redressal in terms of the Code. The Resolution Professional has filed an application seeking the leave of the NCLT to auction the asset, that had been resisted by the petitioner herein who contended that the NCLT has no jurisdiction to adjudicate upon the fate of the asset. The present Writ Petition has been filed by the petitioner as a counter-blast to the aforesaid application of R5, though seeking an independent relief. During the pendency of this Writ Petition, the application filed by the Resolution Professional has come to be closed by the NCLT.

11. The first argument advanced is that there are serious differences in the facts as projected by the petitioners and R5, and these questions of fact are not liable to be addressed, adjudicated upon or resolved under Article 226 of the Constitution of India. According to R5, there are discrepancies in the language of the contract and he would draw my attention to contract dated 20.10.2016, wherein the first sentence states as follows:

We write to confirm the terms of a contract concluded between you and Czanrnikow Group Limited on 25th October 2016 under in terms set out below.

12. Though the date of contract is 20.10.2016, the parties state in the sentence extracted aforesaid that the contract is dated 25.10.2016. This, according to him, is the first serious discrepancy. The second discrepancy pointed out is that the contract at internal page 4 is not signed by the buyer, R5. The third discrepancy pointed out is that addendum No.9 attached to



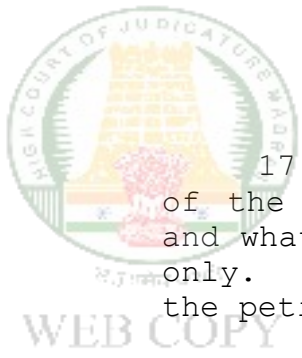
the contract states that 'payment has not been made by SAS for an outstanding balance of 16847.50 MT ' whereas the petitioner, in its pleadings, at paragraph 8, page 4 of the affidavit filed in support of the Writ Petition, would state that the balance of the sugar in custody is quantified at 19537.60 MT.

13. In response, Mr.Sivanandaraj, learned counsel appearing for Mr.Adeesh Anto, learned counsel on record for the petitioner explains away the first discrepancy as a mere typographical error pointing out that there was nothing in the voluminous pleadings to establish any discrepancy in the date of contract. Even according to the respondents, the date of contract as between the parties is only 20.10.2016 and thus no credence, according to him, must be given to the alleged difference in date.

14. With regard to the third discrepancy/difference in the quantification of the asset in custody now, he confirms the quantification as 19,537.60 MT, though initially the contract did reflect the balance as 16,847.50 MT. In this regard, I need only refer to the application filed by R5 before the NCLT seeking permission to auction the asset, that quantifies the asset as remaining in the warehouse at a figure of 19,537.50 MT, matching the quantum stated by the petitioner. Thus, and in the light of the averments in the application of R5, nothing more remains to be said on this issue as the quantification of the asset by both parties is in synchrony.

15. As far as the other two allegations go, I find no merit in the alleged discrepancies pointed out. The error in the date of contract appears to be just that, a typographical and inadvertent error. As far as the absence of signature is concerned, it is a fact that the column for the signature of R5 is indeed blank. However, nowhere is the transaction in itself disputed and in fact, R5 has admittedly effected payments for some portion of the sugar imported under the Customs Concessional Duty Rules.

16. It is also not the case of R5 that there is another contract that governs the transaction as between the parties. The defence of R5 also refers to, and is based upon the very same contract and in my view, R5 cannot be permitted to blow hot and cold in this regard.



17. The bank statements circulated by R5 upon the direction of the Court also make it clear that the remittances effected and what has been paid there for, would be in respect of 9899 MT only. The schedule of payments as per the pleadings filed by the petitioner is as under:

Payments: Value		Date	Type
SAS	\$ 300,000.00	12/01/2017	Prepayment
SAS	\$ 19,357.60	30/01/2017	Cash
SAS	\$ 480,642.40	30/01/2017	Prepayment
SAS	\$ 100,000.00	02/02/2017	Cash
SAS	\$ 200,000.00	11/05/2017	Cash
SAS	\$ 100,000.00	31/05/2017	Cash
SAS	\$ 750,000.00	30/06/2017	Cash
SAS	\$2,850,000.00	18/07/2017	Cash
SAS	\$1,570,000.00	23/08/2017	Cash

Both learned counsel before me concur upon the position that the amounts as set out above match the remittances from R5 as evidenced by bank statements supplied by R5.

18. In my view, there is no dispute on facts and the question of i) error in the contract heading, ii) inadvertent absence of the signature of R5 in the copy of the contract placed in the typed set, iii) quantification of the asset supplied and paid for being 9899 MT and the remaining being 19537.50 MT stand categorically explained. Thus, the so-called factual discrepancies will not frustrate the maintainability of this writ petition.

19. Mr.Jain then draws attention to the provisions of Section 5(20) and 5(21) of the Code defining 'operational creditor' and 'operational debt' stating that the petitioner is, at best, an operational creditor and the debt owed to it, if at all, would constitute an operational debt. The said provisions read as follows:

5. In this Part, unless the context otherwise requires,—
- (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;
- (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.



20. Section 60(5) of the Code vests complete jurisdiction in the NCLT to entertain and dispose (a) applications by or against the corporate debtor or person, (b) any claim made by or against the corporate debtor or person and in clause (c) thereof, the question of priority or question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or person under the Code.

21. Thus, according to him, the Code is a complete and wholesome panacea that addresses the evil of corporate debt and this Court has no jurisdiction to entertain any matter in that regard. He would also, in this connection, rely on Section 238 of the Code, which provides that the Code shall have effect and override all other laws notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

22. He refers to the provisions of Sections 18 and 20 of the Code that vest power in the Resolution Professional to manage the business of the corporate debtor as a going concern and for this power, permit him to carry out various functions including the safeguarding of the assets of the corporate debtor as recorded in its balance sheets.

23. The following cases have been cited at the Bar:
Petitioner:

1. Embassy Property Developers Pvt. Ltd. V. State of Karnataka and others: (2019 SCC Online SC 1542)
2. Smt. Gunwant Kaur & Ors. V. State of Karnataka and Others (2019 SCC Online SC 1542)
3. Century Spinning and Manufacturing Company Ltd. & Anr V. The Ulhasnagar Municipal Council & Anr. (1970 (1) SCC 582)
4. K.I. Shephard & Others V. Union of India & Ors. (1987 (4) SCC 431)
5. ABL International Ltd & Anr v. Export Credit Guarantee Corporation of India Limited & Ors. ((2004) 3 SCC 553)
6. V.C. Banaras Hindu University & Ors v. Shrikant ((2006) 11 SCC 42)
7. Popatrao Vyankatrao Patil v. State of Maharashtra & Ors (2020 SCC Online SC 291)
8. Canon India Pvt Ltd. Vs. Commissioner of Customs (2021 SCC Online SC 200)
9. Union of India v. Sampat Raj Dugar: (1991) 56 ELT 739 (Bom HC)
10. Union of India v. Sampat Raj Dugar ((1992) 2 SCC 66)



11. Judgment dated 09.08.2021 in Czarnikow Group Ltd. V. The Additional Director General of Foreign Trade and Ors in W.P. No.11441 of 2020

12. Leo Edibles & Fats Limited v. The Tax Recovery Officer, W.P. No.8560 of 2018, Division Bench of Hon'ble High Court of Telangana and Andhra Pradesh

13. Pr. Director General of Income Tax (Admin & TPS) Vs. Synergies DoorayAutomotive Ltd. Company Appeal (AT) (Insolvency) 205 of 2017, National Company Law Appellate Tribunal

Respondent No.5:

1. The State of Orissa v. Mdan Gopal Rungta (AIR 1952 SC12)

2. Mahima Savin Bansal v. savinbansal and Ors. (2015) 16 SCC 228

3. The Collector of Customs v. Madras Electric Castings P. Ltd. (1994) 1 MLJ 664

4. The Delhi Golf Club employees Union v. Union of India and Ors. WP (C) 3403/2020 (Delhi High Court)

23. In the case of Embassy Property Developments Pvt. Ltd. V. State of Karnataka and others (2019 SCC Online SC 1542) two seminal questions of importance have been identified for resolution by the Hon'ble Supreme Court as follows:

i) Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of a statutory remedy of appeal to the National Company Law Appellate Tribunal and if so, under what circumstances; and

ii) Whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016, arise for our consideration in these appeals.

24. After exhaustively setting out the background to the matter, the Hon'ble Supreme Court decided the question of maintainability of a Writ Petition under Article 226/227 of the Constitution of India as against an order passed by the NCLT, stating as follows:

11. It is beyond any pale of doubt that IBC, 2016 is a complete Code in itself. As observed by this Court in M/s Innoventive Industries Limited vs. ICICI Bank,³ it is an exhaustive code on the subject matter of insolvency in relation to corporate entities and others. It is also true that IBC, 2016 is a single Unified Umbrella Code, covering the entire gamut of the law



WEB COPY

relating to insolvency resolution of corporate persons and others in a time bound manner. The code provides a three-tier mechanism namely (i) the NCLT, which is the Adjudicating Authority (ii) the NCLAT which is the appellate authority and (iii) this court as the final authority, for dealing with all issues that may arise in relation to the reorganisation and insolvency resolution of corporate persons. In so far as insolvency resolution of corporate debtors and personal 3 AIR 2017 SC 4084 guarantors are concerned, any order passed by the NCLT is appealable to NCLAT under Section 61 of the IBC, 2016 and the orders of the NCLAT are amenable to the appellate jurisdiction of this court under Section 62. It is in this context that the action of the State of Karnataka in bypassing the remedy of appeal to NCLAT and the act of the High Court in entertaining the writ petition against the order of the NCLT are being questioned..

25. The jurisdiction and powers of the High Court under Article 226 were then delved into and after noticing the ratio of several cases, they state at paragraph 28 as follows:

28. Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. Judicial review, as observed by this court in SubCommittee on Judicial Accountability vs. Union of India,²⁴ flows from the concept of a higher law, namely the Constitution. Paragraph 61 of the said decision captures this position as follows:

"But where, as in this country and unlike in England, there is a written Constitution which constitutes the fundamental and in that sense a "higher law" and acts as a limitation upon the legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary sovereignty do not obtain and the concept is one of 'limited



WEB COPY

government'. Judicial review is, indeed, an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under the Constitution and that the judicial wing is the interpreter of the Constitution and, therefore, of the limits of authority of the different organs of the State. It 24 (1991) 4 SCC 699 is to be noted that the British Parliament with the Crown is supreme and its powers are unlimited and courts have no power of judicial review of legislation."

29. The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT. Jurisdiction and powers of NCLT.

26. The Bench then deals with the jurisdiction and powers of NCLT in extenso, concluding that only the High Courts have been vested with powers under Article 226/227 wide enough to correct errors of jurisdiction. The NCLT being a creature of Statute does not have the jurisdiction to entertain an application against the Government of Karnataka seeking a direction to execute deeds for extension of mining lease and in so entertaining such application, had exercised a jurisdiction not vested in it. Such a jurisdictional error or in other words, exercise of jurisdiction that it did not possess, is a fundamental flaw and this can be corrected by judicial review, the Hon'ble Bench held.

27. Yet another question raised related to whether the NCLT was competent to enter into allegations of fraud, especially in the matter of initiation of CIRP. The Bench held that both the NCLT and National Company Law Appellate Tribunal (NCLAT) would hold such jurisdiction, but neither forum would have the jurisdiction to adjudicate upon disputes arising under other enactments, in that case, the Mines and Minerals (Development Regulation) Act, 1957 and the Rules issued



thereunder. If the NCLT and NCLAT did venture into such alien territories, it would constitute a jurisdictional error that could be corrected by way of judicial review of administrative action.

WEB COPY

28. In the course of answering both the questions, the Court has made important observations in regard to the nature of disputes that the NCLT is equipped to handle and in respect of which it has been vested with the power to adjudicate. One of the arguments advanced was that an RP was duty bound under Section 20(1) to preserve the value of the property of the Corporate Debtor and that the word "property", as interpreted in Section 3(27) excluded even actionable claims and interest of every description, be it present, future, vested or contingent interest arising out of, or incidental to property and that the RP was thus entitled to move the NCLT for appropriate orders for protection of the asset.

29. This argument was rejected, the Hon'ble Bench reading the provisions of Section 20(1) in conjunction with Section 18 (f)(vi) of the Code with the Explanation thereunder. The decision is at paragraphs 39 to 41, extracted below:

39. But the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT. In fact Section 20 (1) cannot be read in isolation, but has to be read in conjunction with Section 18(f)(vi) of the IBC, 2016 together with the Explanation thereunder. Section 18 (f) (vi) reads as follows:

"18. Duties of interim resolution professional. The interim resolution professional shall perform the following duties, namely:

(a) ...

(b)...

(c) ...

(d)...

(e)...

(f) 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, or with information utility or the depository of securities or any other registry that records the ownership of assets including-

(i)...

(ii)...

(iii)...



WEB COPY

- (iv) ...
- (v)...
- (vi) assets subject to the determination of ownership by a court or authority;
- (g) ... Explanation. For the purposes of this section, the term 'assets' shall not include the following namely:
 - (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
 - (b) assets of any Indian or foreign subsidiary of the corporate debtor; and
 - (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". Another important aspect is that under Section 25 (2) (b) of IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasijudicial and arbitration proceedings. Section 25(1) and 25(2) (b) reads as follows:

"25. Duties of resolution professional - (1)
It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including



WEB COPY

the continued business operations of the corporate debtor.

(2) For the purposes of subsection (1), the resolution professional shall undertake the following actions:

(a).....

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi judicial and arbitration proceedings."

41. This shows that wherever the corporate debtor has to exercise rights in judicial, quasijudicial proceedings, the resolution professional cannot shortcircuit the same and bring a claim before NCLT taking advantage of Section 60(5).

30. The aforesaid three paragraphs have been relied upon by the petitioner to bring home the fact that it is only those assets in respect of which ownership has been established to be that of the corporate debtor that could constitute the subject matter of adjudication/consideration by the RP or the NCLT and not such assets that do not vest in the corporate debtor.

31. The issue to be decided in the present matter is thus whether the ownership of the asset vests in the petitioner or RS, which in turn, would determine, as a consequence, whether the NCLT is the appropriate forum to adjudicate the petitioner's prayers, including for re-export, and the prayer of R5 for auction of the asset.

32. The Code is intended to consolidate and address the laws relating to re-organisation and insolvency resolution of corporate persons, firms and individuals in a time bound manner and in the interests of all stake holders. The RP is appointed to guide the process of CIRP under Section 20 of the Code and is expected to manage the operations of the corporate debtor as a going concern. As a part of such management, he is to make every endeavour to protect and preserve the value of the 'property of the corporate debtor'.

33. In the present case, the RP endeavours to auction the asset and secure the proceeds of such sale to the credit of the debtor and the benefit of the insolvency proceedings. In order to preserve the property either by way of auction or otherwise, the pre-condition under Section 20 is that what is stated to be preserved would be the 'property of the corporate debtor'. This is on the one side.



34. The duties of the interim resolution professional under Section 18 have been enumerated under clauses (a) to (g) and clause (f) provides that the RP is empowered '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 or with information utility or the depository of securities or any other registry that records the ownership of assets'.

35. Since the question of title/ownership of the goods rests upon a determination as to whether the said goods/asset are recorded in the balance sheet of the corporate debtor, the RP was directed to produce the relevant balance sheets and has so produced the balance sheets accompanied by the schedules for the relevant period, being years ending 31.03.2017 and 31.03.2018.

36. A perusal of the annual reports of R5 for financial years 2016-17 and 2017-18 reveals that inventories that have been referred to as part of commercial assets in the balance sheet for the year ending 31.03.2018 and described in detail in Note 6 of the schedule are comprised of (a) raw materials (b) work-in-progress (c) finished goods (d) stores and spares and (e) others. Clauses (b) to (e) are irrelevant to the facts of this case and what might be relevant is clause (a), being raw materials.

37. The assets comprising 'sugar' would constitute raw materials in the business of R5 and as such it become relevant to determine whether the schedules to the entries in the balance sheet reveal the appropriate quantum of sugar as imported by the petitioner. For the purposes of quantification of the raw materials, one need look no further than the application filed by the RP before the NCLT in terms of Section 60(5) of the Code read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking permission to auction the asset amounting to 19537.50 MT.

38. The application is accompanied by a statement of stock-in-trade as on 31.03.2018 that reveals raw sugar of 'nil' quantity as on 31.03.2018 in the inventories of R5 at all its locations. Since the asset imported comprises raw sugar, it appears clear to me that the inventory of R5 as on 31.03.2018 does not comprise of raw sugar and the stand of R5 thus supports



that of the petitioner to the effect that it does not lay claim raw sugar as being part of its inventory.

39. The balance sheets filed by the petitioner and the schedules thereto give no indication whatsoever that the asset has been included therein and hence, I conclude that the remainder of the sugar imported by the petitioner does not constitute stock-in-trade of R5. In coming to this conclusion, I have not taken assistance of any disputed facts as the documents upon which my factual observation, are based rest upon the application filed by R5 before the NCLT and the annexures thereto, being its own balance sheets and annexures thereto.

40. While on the application filed by R5 through RP before the NCLT, I may also advert to paragraphs 5 and 8 of the application which states as follows:

5. It is upon such inspection by the personnel of the Applicant, they were made aware that there was a pre-existing lock on the from doors of the afore-mentioned warehouses which were placed by a third party. The Applicant took necessary steps to place his lock over and above the pre-existing lock without tampering or breaking the erstwhile lock place by the third party.

.

8. It is submitted that as per the records available with the Applicant that, the total amount of sugar stocked in the warehouses at Pennadum and Kottur amounts to 19537.50 metric tonnes, as per details made available to the Applicant, however the same is subject to verification after actual weighment.

41. The submissions at paragraph 8 are material, since R5 confirms the position that the amount of sugar stocked in the warehouses at Pennadam and Kottur are quantified at 19537.50 MT which corresponds to the quantification of the asset filed by the petitioner in its affidavit filed in support of the Writ Petition. Thus the quantification of the asset is not in dispute.

42. The contents of paragraph 5 of the application extracted above also confirm the statement of the petitioner that the asset is presently under lock and key, both at the instance of R5 and the petitioner. Though R5 refers to the lock placed by the petitioner as that of 'a third party', the petitioner would confirm the position that it is his agent, who has secured the warehouse in the interests of the petitioner.



43. Moreover, the report of the Bankruptcy Law Reforms Committee discusses in detail the issue of availability of assets of a debtor for realization in liquidation and how they are to be determined. Clause 5.5.5 entitled 'Establishing assets in Liquidation' reads as follows:

"5.5.5 Establishing assets in Liquidation

The Committee debated what assets of the entity must be available for realisation in liquidation. Not all assets that are present within the entity, from the start of the IRP, can be considered for Liquidation. The Committee agrees that the following sets of assets must be kept out of the liquidation process:

- a. Assetsheldbytheentityintrust
(suchasemployeepensions).
- b. Assets held as collateral to certain financial market institutions (such as clearing corporations or similar financial transactions to either creditors or non- creditors). In other jurisdictions, these may be referred to as "assets subject to netting and set-off in multi-lateral trading or clearing transactions".

In defining these assets, the Code will take cognisance of the assets that are used as collateral to ensure counterparty guarantees in financial transactions where clear legal documentation is available as proof of transaction (Reference to IFC). These funds and assets cannot be used for recovery in Liquidation.

- c. Assets held as part of operational transactions where the entity has rights over the asset but is not the owner of the title of the asset. For example, there could be goods belonging to third parties given to the debtor for processing or value addition. The entity only has rights over goods held in inventory. But these are owned by the producer or a wholesale distributor of these goods. These can be claimed back by the owner, and cannot be sold to realize value in liquidation.



WEB COPY

Box 5.19: Drafting instructions for establishing the assets of the entity in Liquidation

1. Only assets where the entity is a beneficial owner before the start of the IRP can be considered as available to realisation during Liquidation.
2. The assets that are not owned by the entity include:
 - (a) Assets held in trust.
An example are funds and securities held for employees pensions programs.
 - (b) Assets that are held as security by financial market institutions that are laid out in the Indian Financial Code. These include collateral posted to the clearing corporation.
 - (c) Assets held as part of operational transactions which have been provided to the entity with reservation of title. These include goods in inventory where the title of the goods belongs to a trade creditor or a wholesale distributor.
All such assets cannot be used by the liquidator to realise recoveries for creditors.
3. Access to security in contracts that were entered into prior to the IRP and Liquidation will not be changed as a consequence of Liquidation.

44. It is thus clear that the intention of the Code is never to address those assets over which a debtor has no title. Such assets, infact, stand specifically excluded from the liquidation process, being assets where the debtor might hold



some right, but is not the owner to title of the asset. A pre-condition set out is the inclusion of the asset in question in the inventory of the debtor.

WEB COPY

45. The case law relied upon by R5 touches upon the aspect of maintainability and in light of the view that I have taken in the paragraphs above, do not come to its aid. The facts and circumstances that arose in those writ petitions are different and distinct from those that present themselves in the matter under consideration now. Reliance upon those decisions is thus to no avail.

46. In these circumstances, I answer the question in regard to maintainability in favour of the petitioner. The contract at clause 20 thereof, confirms the position that title to the goods would not pass until the buyer, i.e., R5 has made payment for the entirety of the goods. In my considered view, the petitioner thus assumes the status of an unpaid seller who continues to hold title/ownership to the asset imported.

47. Coming to the prayer for re-export, this is a question that is best left to the official respondents to decide. The petitioner would bring to my notice a representation filed before the Customs Authorities as well as DRI seeking permission to re-export on the ground that the asset stands secured in the customs frontier and has not yet entered the domestic market. Let this aspect be verified by the customs as also the question of whether such goods are entitled to the benefit of the AA Scheme.

48. The Writ Petition is held to be maintainable and the official respondents are directed to dispose the representations of the petitioner dated 04.10.2019 and 04.02.2020 within a period of four weeks from today. No costs. Connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

S1



To

1. The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
Hyderabad Zonal Unit,
10-2-289/57/1 & 2, Suryanvanshi Residency,
II X Road, Shanthi Nagar,
AC Guards, Hyderabad 500 028.
2. The Additional Director General of Foreign Trade,
The Directorate General of Foreign Trade,
4th Floor, Shastri Bhavan Annexe,
26, Haddows Road, Chennai,
Tamil Nadu 600 006.
3. The Commissioner of Customs,
5, Williams Road, Melapudur,
Cantonment, Tiruchirappalli,
Tamil Nadu 620 001.
4. The Commissioner of Customs,
Chennai -II, No.60, Customs House,
Rajaji Salai, Chennai, Tamil Nadu 600 001.

+1CC to Mr.B.Rabu Manohar, Advocate, Sr.No.56512
+1CC to Mr.Adeesh Anto, Advocate, Sr.No.57005
+1CC to Mr.A.P.Srinivas, Advocate, Sr.No.57110
+1CC to Mr.R.Sivaraman, Advocate, Sr.No.57266

W.P. No.11448 of 2020
and WMP Nos.13966, 13968, 13969
and 13970 of 2020

KSM (CO)
K.RK. (24.11.2021)