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WP.No.29614 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26.06.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

WP.No.29614 of 2022 and
WMP.No.28992 of 2022

Czarnikow Group Limited

A company incorporated under the

Laws of United Kingdom

Paternoster House, 65, St. Paul's Churchyard,

London EC4M 8AB, United Kingdom

... Petitioner

Vs

1.Commissioner of Customs (Preventive),

No.1, Williams Road, Cantonment,

Tiruchirapalli-620 001

2.Ramakrishnan Sadasivan,

Chairman of Monitoring Committee of

M/s.Thiru Arroran Sugars Limited,

Old No.22, New No.28, Menod Street,

Purasawalkam, Chennai-600 007.

Email.thiruarooransugarsitd@gmail.com

(R2 cause title amended vide order dated 8.11.2022 made

in memo dated 8.11.2022 (USR.36777/2022) in

WP.29614/2022 by this Court)

3.M/s.KALS Distilleries Private Limited,

Having its registered office at No.23/5, Thanikachalam Road,

T.Nagar, Chennai 600 017, Email-vasu@kals.co.in,

natesh@kals.co.in, manikandanp@kals.co.in.

... Respondents

(R3 impleaded vide order dated 21.02.2023 made in

WMP.3774/2023 in WP.29614/2022)



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PRAAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the 1st Respondent in C.No.VIII/10/146/2019-Cus Adjn. Which has culminated in the order-in-original vide Order no.04 of 2022 dated 30.08.2022, quash the same and direct the re-export of the goods (sugar) weighing at 11,899.21 metri tonnes (approx.) which was imported by the 2nd Respondent.

For Petitioner : Mr.J.Sivanandaraj
For Mr.S.Kaushik Ramaswamy

For Respondents : Mr.S.R.Sundar (for R1)
Senior Standing Counsel
Mr.Mohammed Umal (for R2)
for Mr.B.Dhanaraj
Mr.R.Vidhya Shankar (for R3)

ORDER

The petitioner is an importer of Raw Sugar ('goods'/'goods in question') and is a company incorporated under the laws of England. Exports had been made to R2 under warehousing bills of entry as R2 had been unable to pay for the goods or establish a letter of credit. The goods were thus being retained in a bonded warehouse under the control and possession of an agent appointed by the petitioner, and continue to be so retained.



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2. Contracts had been entered into qua the petitioner and R2 dated 26.10.2016 with addendums on various dates between 05.01.2017 and 05.02.2018 for a total import quantity of 27,169 MT. Out of the aforesaid quantity 12,497.802 MT has been paid for and release secured by R2 from the petitioner. Out of the remaining, which is 14,671.698 metric tonnes, R2 had applied for a licence under the Advance Authorization Scheme (in short 'AA scheme'), and was granted licence dated 17.07.2017.

3. In the meanwhile, an application had been filed by a creditor before the National Company Law Tribunal (NCLT) and by order dated 07.06.2019, Corporate Insolvency Resolution Process (CIRP) was initiated as against R2. A resolution professional was appointed and an order of liquidation has been passed on 02.05.2022, liquidating R2 and sanctioning the scheme proposed by R3 (in short 'R3 or 'scheme proponent').

4. As petitioner claims title to the goods, representations came to be filed before the Customs Department/in short hereinafter 'R1' seeking re-export of the goods. Since the representations were not been disposed in a timely fashion, WP.No.14441 of 2000 came to be filed seeking



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directions from this Court to permit re-export of sugar. The prayer was limited to 11,899.21 metric tonnes as the difference of 2542.5 metric tonnes relates to a different importer and is stated to be the subject matter of different proceedings before the NCLT as well as before the Division Bench of this Court.

5. W.P.No.11441 of 2000 was decided on 09.07.2021. Inter alia, this Court had noted, applying the judgment of the Hon'ble Supreme Court in the case of *Union of India v. Sampat Raj Dugar*¹ that the petitioner, as an unpaid exporter held title over the goods. The validity/consequence of the advance licence obtained by R2 in regard to the goods imported, was unavailable to this Court.

6. Hence, R1 was, in conclusion, directed to dispose the representations seeking re-export within four weeks from date of that order bearing in mind that the goods were perishable. It was made clear that the re-export would be ordered upon payment of applicable charges.

7. At the outset, it is an admitted position that there has been a violation of the time frame fixed under order dated 09.07.2021. What R1 has done is to pursue the show cause notice issued on 30.01.2020 to R2

1. (56) ELT 739



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and pass an order on 30.08.2022 addressing therein, the representation of the petitioner as well.

8. However, much water has flowed under the bridge post issuance of show cause notice dated 30.01.2020 as the noticee, R2, has, in the meantime been liquidated by an order of the NCLT and the company has been taken over by R3. It is for this reason that there has been no response by R2 to the notice issued by R1 prior to the order passed on 30.08.2022.

9. Noting that there was no response from R2, the impugned proceedings culminate in an order (i) confirming confiscation of the goods, (ii) denying the benefit of customs duty exemption availed under Advance Authorisation Scheme, (iii) confirming the demand of customs duty to an extent of 30,68,86,724 and (iv) imposing penalty of Rs.3 crores.

10. The representation of the petitioner was taken up, albeit in an indirect sense, and the petitioner heard. The prayer of the petitioner was for re-export and this prayer was rejected, R1 stating at paragraph 8.3(e) that *'their plea cannot be entertain since M/s.Czarnikow is not a party to dispute adjudged by this office'*.



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11. The officer has lost sight of the specific direction of the Court to dispose their representation seeking re-export which ought to have been done on the strength of their plea in their representation. On the question of re-export at clause (e) of the operative portion of the order, the officer permits the noticee, that is, R2, to redeem the confiscated goods on payment of redemption fine as a pre-condition to re-export. Thus, and in effect re-export has been permitted on payment of duty and penalty, denying the benefit of Advance Authorisation Scheme.

12. Through all this and even prior to 09.07.2021, being the date of order in W.P.No.11441 of 2020, R1 was clearly aware of the proceedings before the NCLT as against R2. The defence of the resolution professional/liquidator, who appears on behalf of R2 in the present proceedings, is that R1 was well aware that R2 was before the NCLT, despite which, no claim was filed before the NCLT. It was liquidated as early as on 02.05.2022 and hence the impugned order is wholly unsustainable in law.

13. R1, in paragraph 40 in the counter to the present writ petition has sought to extend the coverage of the impugned order to R3 as well. R3 was impleaded on 21.02.2023, and had, prior thereto, filed a writ



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petition in W.P.No.11441 of 2020, on 20.08.2020 seeking a certiorari to call for and quash order dated 30.08.2022. The main arguments raised are that (i) R3 has come into the picture only on sanction of the scheme on 02.05.2022 (ii) It is not a party to the import transaction (iii) it was not in receipt of show cause notice or any other notice from R1 (iv) R3 is not a party to order dated 30.08.2022.

14. That writ petition was dismissed on 24.04.2023 with liberty to file a statutory appeal. Evidently the challenge to order dated 30.08.2022 by R3 was only by way of abundant caution and closure of the writ petition relegating R3 to appeal cannot create any liability, if there is no liability created by operation of statute or law. This Court is of the considered view that R3 stands outside the purview of any liability under order dated 30.08.2022 and the attempt of R1, albeit by way of counter, to draw R3 into the storm of controversy, is wholly misconceived.

15. The specific submission of the petitioner is that the directions in order dated 09.07.2021 have not been adhered to scrupulously. Admittedly, there is unexplained delay in complying with the direction in order of this Court and R1 has not bothered in counter to address or explain the specific ground raised relating to delay. However, in



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conclusion, the request for re-export has been accepted, though on terms of payment of customs duty and penalty denying the benefit of the Advance Authorisation Scheme.

16. The petitioner argues that it cannot be mulcted with any liability as it is an unpaid importer/seller and the goods have not been cleared by customs. The goods are in a bonded warehouse and the petitioner, through agent, is admittedly, in possession of the same. The question of levy of duty and penalty does not arise in these circumstances. It relies upon the judgment in the case of *Sampat Raj Dugar* (supra) applied by this Court in order dated 09.07.2021 in the following terms:

10. Both learned counsel in this regard have referred to the decision in the case of Union of India V. Sampat Raj Dugar ((1991) 56 ELT 739 (Bombay High Court) and ((1992) 2 Supreme Court Cases 66)) (Supreme Court).

11. Before the Bombay High Court, the Union had filed an appeal challenging an order of the learned single Judge confirming the order of the Collector confiscating certain consignments imported upon arrival. The consignments in that case were abandoned by the importer, whereas in this case, the importers have eschewed the same, admitting that they hold no title to the consignments and also for the reason that they are themselves before the NCLT undergoing Corporate Insolvency Resolution process.



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12. The conclusions of the Bombay High Court at paragraph 11 are to the following effect:

11. We have gone through the impugned Order. We concur with the findings and conclusion of the learned Judges when it is held that the title in the said goods had not passed to the 2nd respondent. In view of the fact that the title in the said goods had not passed to the 2nd respondent, the question of confiscation of the said goods which were exported by the 1st respondent, a foreign party did not arise. The title in the said goods had remained with the foreign exporter and the foreign exporter was entitled to have the said goods re-exported on payment of requisite duty for exportation thereof. The importation of the said goods was made against Advance Licence which was validly subsisting at the time when the said goods arrived at the Port of Bombay. Merely because the said licence was subsequently cancelled for lapses on the part of the 2nd respondent, it cannot be said that the importation of the said four consignments was without a valid and subsisting licence.

In the circumstances, provisions of Section 111 (d) of the said Act under which the order was passed by the 2nd appellant confiscating the said goods were not attracted and the said order was rightly quashed by the learned Judge in the said writ petition. The re-export of the goods covered by the said four consignments has to be permitted subject, however, to payment or requisite export duty payable in respect thereof. The 1st respondent is entitled to detention certificate in respect of the goods covered by the said four consignments for the period the said goods were wrongfully detained rendering the 1st respondent liable to pay demurrage to Bombay Port Trust.



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13. While dismissing the appeal filed by the Union of India and confirming the order of the learned single Judge, the Bench permits re-export subject to payment by the first respondent of requisite export duty. Consequently, the appellant, being the Customs Department was directed to issue a detention certificate in respect of the goods covered by the consignments in question. The first respondent in that case, the importer, was held liable to pay demurrage to the Bombay Port Trust.

14. The Union of India carried the matter in appeal before the Supreme Court and at paragraph 19, the issues that arose have been decided as follows:

19. We may first consider the question of title to the said goods. If we keep aside the provisions of law relied upon by the appellants viz., definition of 'importer' in Section 2(26) of the Customs Act, Clause 5(3) (ii) of the Imports (Control) Order as well as para 26 (iv) of the Import-Export Policy, the position is quite simple. Since the second respondent did not pay for and received the documents of the title she did not become the owner of the said goods, which means that the first respondent continued to be the owner. How do the aforesaid provisions make any difference to this position? The definition of 'importer' in Section 2(26) of the Customs Act is not really relevant to the question of title. It only defines the expression 'importer'. The first respondent does not claim to be the importer. The provision upon which strong reliance is placed by the appellants in this behalf is the one contained in Clause 5(3) (ii) of the Imports (Control) Order. Sub-clause (I) of Clause 5 specifies conditions which can be attached to an import licence at the time of its grant. Sub-clause (2) says that a licence granted under the Order shall be subject to the conditions specified in Fifth Schedule to the Order. Subclause (3) sets out three other



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conditions mentioned as (i), (ii), and (iii) which shall attach to every import licence granted under the Order. First of these conditions says that the import licence shall be non-transferable except under the written permission of the Licensing Authority or other Competent Authority. Condition (ii)-which is provision relevant herein-says that the goods for the import of which a licence is granted "shall be the property of the licensee at the time of import and thereafter upto the time of clearance through customs." This condition, however, does not apply to STC, MMTC and other similar institutions entrusted with canalisation of imports. It also does not apply to certain eligible export houses, trading houses and public sector agencies mentioned in the second proviso. Condition (iii) says that the goods for which the import licence is granted shall be new goods unless otherwise mentioned in the licence. Now coming back to Condition (ii), the question is what does it mean and what is the object underlying it when it says that the imported goods shall be the property of the licensee from the time of import till they are cleared through customs. It is necessary to notice the language of the sub-clause. It says "it shall be deemed to be a condition of every such licence that-the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of clearance through Customs." The Rule-making authority (Central Government), which issued the order, must be presumed to be aware of the fact that in many cases, the importer is not the owner of the goods imported at the time of their import and that he becomes their owner only at a later stage, i.e., when he pays for and obtains the relevant documents. Why did not Central Govt. yet declare that such goods shall be the property of the licensee from the time of import? For appreciating



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this, one has to ascertain the object underlying the said provision. The interpretation to be placed upon the provision should be consistent with and should be designed to achieve such object. In this context, it should also be remembered that expressions like 'Property of' and 'Vest' do not have a single universal meaning. Their content varies with the context. The aphorism that a word is not a crystal and that it takes its colour from the context is no less true in the case of these words. In our opinion the object underlying condition (ii) in Clause 5(3) is to ensure a proper implementation of the Imports (control) Order and the Imports and Exports (Control) Act, 1947. The idea is to hold the licensee responsible for anything and everything that happens from the time of import till they are cleared through Custom. The exporter is outside the country, while the importer, i.e. the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. This fiction is created for the proper and effective implementation of the said order and the Import and Exports (Control) Act. The fiction however cannot be carried beyond that. It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, i.e. in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/cancellation of licence. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position;



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he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation. Condition (ii) in sub-clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such situation.

15. On the question of title, the Supreme Court holds unambiguously that the definition of the term 'importer' and other statutory definitions would hardly be relevant to decide the issue. They conclude by saying that, in a situation where the goods imported into India by an exporter outside the Country are unavailable to him for various reasons including abandoning of the consignment by the Indian importer, or as in the present case, the importers not being in a position to take possession and claim ownership of the goods, it would place the foreign exporter in an unenviable position. Having lost possession of the goods, he would also not be in a position to enforce payment for the same, which would be detrimental to international trade.

16. Statutory provisions and regulations cannot, the Bench holds, be interpreted in a manner so as to deprive the exporter of his title to the goods imported. The above conclusion of the Supreme Court would apply on all fours to the present matter, quite apart from the position that the importers have themselves expressed no-objection to the release of the goods to the petitioner. In that case, the Supreme Court holds that the importer would have to be heard by the Customs



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Department before any order is passed dealing with the goods in any way, including re-export. This question does not arise in the present case in view of their no objection to the release.

17. Admittedly order dated 09.07.2021 has attained finality and was closed recording the no-objection of R3 and R4 in that writ petition, being Thiru Arooran Sugars Limited and Shri Ambika Sugars Ltd respectively. There is however a difference in interpretation of that order, as according to the R1, the reference to 'charges' in paragraph 18 of that order is to applicable duties etc. whereas the petitioner would argue that it would only refer to incidental and administrative charges, if at all. In any event, there can be no liability to duty bearing in mind the status of the petitioner as an unpaid exporter/seller.

18. Per contra, learned Senior Standing Counsel for R1 relies on the Advance Authorisation Scheme and the conditions thereunder that require to be satisfied within the time stipulated. According to them, the burden cast upon R2 under the Advance Authorisation Scheme, and the liability for non-compliance, would extend to the importer also by virtue of the contracts entered into by the importer with R2.

19. He draws attention to some clauses under the contract to show that there was a continuing relationship between the parties and



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consequently a burden to comply with all statutory requirements cast both upon R2 as well as the petitioner. He relies upon Sections 3(30) and 3(31) of the Insolvency and Bankruptcy Code, 2018 (in short '2018 Code'/'IB Code') defining 'secured creditor' and 'security interest' that, according to him, would support their case in full.

20. His argument is that the definition of 'security interest' includes any right created in a secured creditor by virtue of an 'agreement or arrangement securing payment or performance of any obligation of any person'. Thus, on account of the relationship inter se R2, and the Petitioner, the bills of entry and warehousing bond, the liability originally vesting upon R2 would now vest in the petitioner.

21. Reference is made to the decisions in the case of (i) *Japan Airlines Company Limited V. Commissioner of Income Tax, New Delhi*², (ii) *Bank of India V. Ahmedabad Manufacturing and Calico Printing Co. Limited*³ and (iii) *Premier Automobiles Limited V. Engineering Mazdoor Sabha and Ors.*⁴

22. One of the issues crystallized is whether at all the import of the goods in question by the petitioner would come within the ambit of

2. (2015) 10 SCC 591

3. (1972) 42 Comp Cas 211 Bom.

4. Manu/MH/0224/1981



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‘security interest’ under Section 3(31) of the Act. Section 3(31) reads

thus:

‘Security Interest’ means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;’

23. In my considered view, the attempt of R1 is misconceived on a plain reading of the definition. Security interest as envisaged, must be created by virtue of a ‘transaction’ securing payment or performance of an obligation. In the present case, there is no cause of action whatsoever that would construe a ‘transaction’ inter se R1 and the petitioner, much less one *which secures payment or performance of an obligation* inter se the two parties. Thus, there has been no creation of security interest giving rise to any scope for action by R2 as against the petitioner.

24. That apart, there has been no communication of any sort between R1 and the petitioner till the passing of impugned order, wherein also, the stand of R2 is that its claim cannot be entertained as the petitioner *‘is not a party to dispute adjudged by this office’*. The aforesaid conclusion reflects the categorical stand of R2 that the petitioner



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is wholly unconnected with the customs department. However, re-export requires the permission of the customs department, and it is to this limited extent that they have a role to play.

25. The judgments relied on by R1 elaborate on the interpretation of the term ‘agreement’/‘arrangement’. In the case of *Japan Airlines Company Limited*, the question that came up for consideration touched upon the provisions of the Income Tax Act, 1961, specifically the deduction of tax at source under Section 194I. The assessee, Japan Airlines, had urged that landing, parking and take-off facilities provided under an agreement/arrangement with the Airports Authority of India does not tantamount to ‘use of land’ for which rent is to be paid.

26. Their argument was premised on the language deployed in Section 194I dealing with rent and tax deduction thereon and the definition of rent under clause (i) of that provision as per which rent meant ‘any payment by whatever name called under any lease, sub-lease, tenancy or any other agreement/arrangement for the use of land or building’.

27. While deciding this question, the Court concurred with the view taken by the Madras High Court in the case of *Commissioner of*



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Income Tax v. Singapore Airlines Limited ⁵, wherein this Court had concluded that charges fixed by the Airports Authority of India for landing, parking and take off services would not amount to 'use of land' and no tax deduction need be made thereupon.

28. This judgment is of no assistance to R1, since that statutory provision is completely distinguishable from the provisions of Section 3(31) of the IB Code. Thus, the interpretation thereof would not be applicable to the present case. The purpose of the phrase agreement/arrangement in the definition of the term rent under Section 194I is to determine the scope of payments for use of land and bring the same within the ambit of tax deduction under the Income Tax Act.

29. Per contra, the scope of the definition of security interest under the IB Code is to determine those transactions that give rise to the creation of a charge in favour of the secured creditor. It is necessary that the party as against which a claim/demand is made or a charge laid, must be party to the transaction. In the present case, R1 has neither an agreement/arrangement with the petitioner nor does the in-bond warehousing agreement entered into between R2 and R1 make any reference to the petitioner.

5. Tax Case Appeal No.15 of 2006 dated 13.07.2012



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30. The agreements between the petitioner and R2 serve only to secure the interests of the former and do not impact in any way, either by reducing or expanding, the rights of R1. Thus, there is a clear absence of the requisite nexus between the petitioner and R1, and the argument that R1 holds a security interest in the goods qua the petitioner, is too circuitous to be countenanced apart from being untenable in law.

31. In the case of *Premier Automobiles Limited*, a learned single Judge of the Bombay High Court considered a challenge to an order passed by the Industrial Court, Bombay. The facts and legal position in that matter are also entirely at variance from those in the present case. In the case of *Ahmedabad Manufacturing & Calico Printing Company Limited*, a learned single Judge of the Bombay High Court was deciding a petition filed by Bank of India for sanction of scheme of arrangement under the applicable provisions of the Companies Act, 1956.

32. The learned Judge considered the import of the term arrangement in Chapter V of the Companies Act, 1956 and held that the word must be given a wide import such that it would include any understanding affecting the rights of the parties involved. In that case, the Court was concerned with the transfer of the undertaking and



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liabilities by one company to another, and whether such a transaction may or may not affect the rights of its members or creditors.

33. This decision is also distinguishable for the reason that the members/creditors whose interests were taken note of in that case were closely intrinsically connected with the company in amalgamation and the company court, in considering the scheme of amalgamation was required to take, in holistic perspective, the interests of all stakeholders. This situation does not arise in the present case.

34. The importer/petitioner is an unpaid vendor with no connection whatsoever with the Customs Department. It continues to hold possession of the goods. To state that the Customs Department would have a claim on the petitioner's goods based on violations committed by another party would be stretching the term 'security interest' beyond permissible scope, distorting the concept of security interest under the Code.

35. Faced with this position, R1 then makes an attempt to cement its claim as against R2. The two legal issues that arise in this context are (i) whether the condition imposed under the AA Scheme has been triggered and (ii) if the answer to (i) is in the affirmative, whether R1 is



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in a position to raise a claim in the subsisting circumstances.

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36. As far as the first issue is concerned, it is the case of R2 that no liability stands triggered. The AA is accompanied by a condition sheet and an additional condition sheet that read as follows, respectively:

*O/o Additional Director General of Foreign Trade
4th Floor, Shastri Bhawan Annexe, 26, Haddows Road,
Chennai-600006*

CONDITION SHEET

*Attached to DES Authorisation No: 0410163331 Dated:
17.07.2017 THIRU AROORAN SUGARS LTD..*

1. The Authorisation holder shall export to or import from any country other than that specified on the Authorisation or paragraph 2.02 of HBP 2015-2020.

2. The Authorisation holder shall export/supply the products of quantities and values specified below within a period prescribed under paragraph 4.22 of the Foreign Trade Policy 2015-2020.

..... goods

3. Foreign Exchange remittance against this authorisation shall be governed by the instructions issued by the Reserve Bank of India from time to time.

4. The Export obligation shall be fulfilled by the authorisation holder as per the terms and conditions specified in the Foreign Trade Policy 2015-20 and the Handbook of Procedures, 2015-20 and other guidelines issued by the Director General of Foreign Trade from time to time.

5. The Authorisation holder shall deliver or cause to



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deliver to this office within 2 months from the date of expiry of the export obligation period stated above, documents as prescribed under paragraphs 4.44 and 4.46 of Handbook of Procedures, 2015-2020, as amended, from time to time, as evidence of fulfillment of export obligation imposed on this authorisation. In case of bonafide defaults provisions of paragraph 4.49 of the Handbook of Procedures, 2015-2020 as amended from time to time shall apply. Failure to fulfillment of the export obligation in the manner as prescribed in the Handbook of Procedures, 2015-20 shall attract penal proceedings under the provisions of Foreign Trade (Development & Regulation) Act 1992.

6. The exempt goods imported against this authorisation shall only be utilised in accordance with the provisions of paragraph 4.16 of the Foreign Trade Policy 2015-2020 and other provisions and the relevant Customs Notification (Custom Notification 18/2015 dated 1.4.15 (for physical exports), 21/2015 dated 1.4.15 (for deemed exports), 22/2015 dated 1.4.15 (for Advance Authorisations for prohibited goods) and 20/2015 (for Annual Advance Authorisations) as the case may be), as amended from time to time.

7. The authorisation holder shall abide by the instructions contained in paragraph 4.21 of the HBP. (2015-2020), as the case may be maintenance of a true and proper account of consumption and utilisation of inputs and furnish returns to the concerned Regional Authority as per the provisions of FTP and the procedure laid thereunder.

8. Wherever, the input item list contains Acetic Anhydride, Ephedrine, and Pseudo-ephedrine, the authorisation holder shall be required to obtain an NOC from the Narcotic Commissioner of India, Central Bureau of Narcotic, Gwalior before effecting such imports, a per paragraph 4.08 of HBP 2015-2020.

9. Import of Scraps/Metal Scraps shall be subject to the conditions of the relevant licensing notes under relevant Chapters of ITC(HS) Classification Book. Import of



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Chemical falling under Montreal Protocol and Schedule I, II and III of the Chemical Weapons Convention shall be subject to the conditions specified thereunder and as appearing in the ITC(HS) classifications.

10. The authorisation holder to comply with the provisions of paragraph 4.10 and paragraph 4.35 of Handbook of Procedures 2015-2020, as amended from time to time, with regard to transfer of any material from one unit of the authorisation holder to any other unit of the authorisation holder included in the IEC or to the supporting manufacturer/jobber.

11. Import and Export of items Prohibited/Restricted/Reserved for State Trading Enterprises shall be governed by the provisions contained in paragraph 4.18 of Foreign Trade Policy 2015-2020.

12. All conditions of the Foreign Trade Policy and Procedures and ITC (HS) Classification Book as amended shall be applicable unless specifically dispensed with against this authorisation. That for any item/product restricted/SCOMET under Schedule 2 of ITC(HS), the exporter would be required to take a separate export licence.

13. The DES Authorisation holder shall execute BG/LUT with Customs Authority, as per the procedure prescribed by them before effecting imports, However, for domestic procurement of input, BG/LUT shall be executed with the concerned regional Authority in the manners specified in paragraph 2.35 of the FTP, 2015-2020.

14. Factory Address(es) of the Authorisation holder and/or the Supporting Manufacturer where the goods imported shall be processed.

..... goods

15. Name and Address(es) of the Co-Authorisation holder in terms of Para 4.35 of Handbook of Procedures, 2015-2020:

Name and Address of the Co-Licensee: No Co-Licensee.



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Additional Condition Sheet

1. IMPORTS SHOULD PRECEED EXPORTS (as per Public Notice No.8 dated 1.5.2015) 2. EXPORT OBLIGATION PERIOD FOR THE RAW SUGAR IMPORTED UNDER THIS ADVANCE AUTHORIZATION SHALL BE SIX MONTHS FROM THE DATE OF CLEARANCE OF EACH CONSIGNMENT BY CUSTOMS AUTHORITY, 3. THE CONTENT OF SUCROSE BY WEIGHT, IN DRY STATE IN RAW SUGAR MUST CORRESPOND TO A POLARIMETER READING OF LESS THAN 99.5% BUT NOT LESS THAN 96.5% (as per note No.1 to SION E-52)

16 Authorisation holder willing to take the finished components imported and Advance Authorisation scheme, directly from the port to the site of the recipient of deemed export supply (Project Authority) shall follow the procedure laid down by DOR in this regard. For availing the facility, name of such components and the address of the site where the said components are to be supplied, should indicated in the Advance Authorization issued by Regional Authority concerned.

17. No drawback shall be available for any duty paid material whether imported or indigenous unless such item(s) is/are endorsed on the authorisation by RA in terms of para 4.15 of the FTP 2015-2020

Date: 17.07.2017

Place Chennai

sd/-

*Assistant Director General of
Foreign Trade*

37. While R1 would draw attention to the conditions at clauses 4,



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6, 7, 10 and 11 above, the rival contention is that the export obligation must be fulfilled within 6 months from date of clearance of each consignment by the customs authority. To this, the petitioner points out that the consignments yet await clearance as they are still under bond and the goods are yet to cross the customs frontier.

38. R1 then draws attention to the observation in the impugned order, wherein the officer specifically states that out-of-charge order has been passed on 19.01.2018 for the first 18 bills of entry and on 28.02.2018 for the last bill of entry (see para 9.1(v) under head 'discussion and findings').

39. Thus, in terms of Appendix 4j of HBP 2015-2020 the officer states that the importer has to fulfill export obligation within six months from date of clearance of export consignment, i.e., 22.07.2018, 21.08.2018 and 27.08.2018. This has not been done and thus, according to R1, the condition for duty exemption has not been satisfied.

40. One question that arose was whether the passing of an out-of-charge order would tantamount to 'clearance' for the condition under the AA to stand triggered. A note has been circulated by learned Standing Counsel explaining the position in the following terms:



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'Under the EDI system, the Bill of entry, after assessment by the appraiser, the Bill of Entry need to be presented for registration for examination in the import shed. A declaration correctness of entries and genuineness of the original documents needs to be made at this stage. After registration, the B/e is passed on to the Shed officer (Inspector and Superintendent) for the examination of the goods. Along with the B/E, the CHA is to present all the necessary documents. After completing examination of the goods, the Shed Inspector enters the report in System and The Superintendent gives 'out of charge' in case of already assessee Bs/E. Thereupon, the system prints Bill of Entry and order of clearance'.

41. Simultaneous therewith, the bill of entry for warehousing (provisional) for some consignments have been furnished, dated 17.01.2017. Thus, in cases of provisional bills of entry (warehousing) as contra distinguished between bill of entry for home consumption, while the goods may not have crossed the customs frontier as they are being retained in the customs warehouse, the importer would be bound by the terms/conditions under AA which require processing and export to be carried out within a period of six months from date of out-of-charge order.

42. Thus, the answer to issue (i) is that the condition prescribed under the AA scheme stands triggered, though proper procedure prescribed in this regard must be followed for necessary consequences to follow. Coming to the second issue, the out-of-charge orders are stated to



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be dated 19.01.2018 and 28.02.2018, though copies of the same have not been supplied to the Court.

43. The show cause notice has been issued by R1 to R2 only on 30.01.2020, long past the order of moratorium dated 07.06.2019 passed under Section 14 of the IB Code. The only avenue of redressal available to R1 was thus to approach the NCLT by way of a claim. The IB Code under Section 53 thereof provides for a waterfall mechanism setting out the hierarchy/priority of charge.

44. Much has been made by R1 on the point that it constitutes a secured creditor, placing reliance upon the judgment of the Apex Court in the case of *State Tax Officer V. Rainbow Papers Limited*⁶ and the order of the learned single Judge in the case of *Dishnet Wireless Limited V. Assistant Commissioner of Income Tax (OSD)*⁷.

45. The decision in *Dishnet* has been challenged in Writ Appeals in W.A.Nos.1796 of 2022 etc. batch and the connected Miscellaneous Petitions seeking interim protection have been ordered on 16.08.2022 granting interim stay of the decision for a period of six weeks.

46. The Hon'ble Supreme Court in the case of *Ghanashyam*

6. (2022) SCC on line SC 1162

7. (2022) SCC online Madras 3643



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*Mishra and Sons P. Ltd., Vs. Edelweiss Asset Reconstruction Co. Ltd.,*⁸

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considered the impact of a resolution plan, and, taking note of the legislative intent of formulation of the resolution plan, held that the plan would be sacrosanct and binding on all stakeholders after it obtains a seal of approval from the adjudicating authority.

47. The ratio of the judgment is to the effect that no surprise claims should be flung on the successful resolution application after the resolution plan is approved by the NCLT. The dominant purpose of the plan is to enable the successful resolution applicant to start with a clean slate without having to deal with any claims that are made after the resolution plan is finalized.

48. The ratio of this judgment would apply across the Board to all stakeholders whether statutory, operational or financial. As held by the Hon'ble Supreme Court and as argued by R3, once a resolution plan is finalized, it must be given effect to scrupulously, as otherwise, the spirit, object and purpose of the Code would itself be defeated, quite apart from the economic and financial repercussions of a resolution proponent being blindsided by a belated claim.

49. The judgment in *Ghanashyam Mishra* has been followed in

8. (2021) 9 SCC 657



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Ruchi Soya Industries Ltd. V. Union of India ((2022) 6 SCC 343). In the case of *Rainbow*, the Hon'ble Supreme Court considered the claim of the Commercial Taxes Department challenging an order by the National Company Law Board Appellate Tribunal (in short 'NCLAT') holding that the State cannot claim first charge over the property of a corporate debtor as Section 48 of the Gujarat Value Added Tax Act, 2003 (in short 'GVAT Act') did not prevail over Section 53 of the IB Code.

50. The aforesaid judgment would be of no assistance to R1 in the present matter. It is an admitted position that R1 has not made a claim before the Liquidator appointed by the NCLT to stake its right in the distribution of assets. The right of any creditor whether a financial creditor, operational creditor, secured or unsecured creditor would arise only in the event, and upon condition, that a claim is made by that creditor. In the event no claim has been put forth that creditor would have no recourse to the distribution of assets by the Liquidator appointed.

51. The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (in short '2016 Regulations') provide for a clear and transparent procedure by which the public/creditors are made aware of the proceedings before the NCLT. The proceedings of the



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NCLT are stated to be uploaded promptly and advertisements are issued in publications with sufficient circulation to enable the creditors to be aware of pending proceedings.

52. It is thus necessary for the concerned creditor, whether operational or financial to file a claim within the time limit stipulated under Regulation 16 of the 2016 Regulations that is, within 30 days from date of publication of advertisements in order to secure its rights. In the present case, it is nobody's case that R1 has filed a claim and the fact that it has not, is admitted. Consequence would have to flow from this position.

53. That apart, the judgment in the case of *Rainbow* turns on an appreciation of the legal position that the GVAT Act contains Section 48 under which there was a first charge created on the property of a defaulting sales tax assessee. Section 48 of the GVAT Act states '*notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person*'.



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54. The provision in pari materia with Section 48 of the GVAT Act under the Customs Act, 1962 is Section 142A, extracted below:

142A. Liability under Act to be first charge.— Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) and 2 [the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

55. Section 142A makes it clear that the charge that is created relates to a demand raised upon an assessee. Thus, only a demand validly raised would stand protected by virtue of the charge created. It thus becomes relevant to note the assessments framed on the assessee prior to 07.06.2019 when moratorium was imposed.

56. Under customs law, the bill of entry would constitute a self-assessment till such time it is replaced by assessments under Sections 15, 16, 17 or 128. The assessment of the bill of entry is as on 30.01.2017. The licence for advance authorization came to be issued on 17.07.2017 and hence assessment on bill of entry would have to be read with the exemption granted under the advance authorization scheme dated



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17.07.2017, till such time the position regarding exemption was varied or disturbed in any way.

57. This came to be done by R1 only on 30.08.2022 by which time R2 had been released for liquidation and the scheme proponent had come into the picture. Thus, even the provisions of Section 142A are of no avail to R1 in the present case.

58. The relevant portion in the case of *Rainbow* reads thus:

30. The learned Solicitor General rightly argued that in view of the statutory charge in terms of Section 48 of the GVAT Act, the claim of the Tax Department of the State, squarely falls within the definition of "Security Interest" under Section 3(31) of the IBC and the State becomes a secured creditor under Section 3(30) of the Code.

59. The judgment in *Rainbow* thus proceeds on the admitted legal position that a statutory charge had been created under Section 48 of the GVAT Act and in such a case, the claim of the sales tax department would fall within the definition of 'security interest' under the Code.

60. In the present case, I am of the considered view that R1 cannot claim the benefit of any such statutory charge. It is hence not a secured creditor under Section 3(30) of the IB Code. In any event, even without recourse to this position and as seen earlier, no claim has been filed by R1 before the Liquidator which even a secured creditor is bound to do in



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terms of Regulation 16 of the 2016 Regulations. Regulation 16 reads thus:

16. Submission of claim. (1) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement.

(2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

61. Thus, any person who claims to be a stakeholder, financial/operational/secured/unsecured is liable to submit a claim as this is a pre-condition/requisite for any benefit to be obtained by an entity claiming to be a creditor in the proceedings before the NCLT. R1 has missed the bus in entirety.

62. A public announcement is to be issued in Form A as per Regulation 6 of the Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and has in this case, been issued on 10.06.2019 in strict compliance with the requirements under the Regulations in English and Vernacular language, published in the Hindu and Dinamalar, Chennai, Thanjavur and Cuddalore District.

63. It puts the public to notice that the NCLT, Division Bench,



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Chennai has ordered announcement of Corporate Insolvency Resolution Process (CIRP) of R2 on 07.06.2019. It calls upon the creditors of R2 to submit their claims with proof on or before 21.06.2019 to the Interim Resolution Professional in accordance with the applicable Regulations and in proper format.

64. Sufficient time is available for submission of claim even beyond the initial period granted, till such time the resolution process itself was complete. The customs department has not taken the benefit of the wide timeframe available.

65. The scheme of the IB Code proceeds on the basis that the CIRP shall be time bound and adhere to the statutory time frame, in a scrupulous manner. This is made clear by the provisions of Section 12 which sets out the time limit for completion of insolvency resolution process. A second proviso has been inserted to Section 12(3) making it clear that the outer time limit for completion of CIRP shall mandatorily be within a period of 30 days from commencement of insolvency taking into account any exemptions granted and the time taken in legal proceedings in relation to such process.

66. In light of this discussion and in the absence of any claim made



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by R1 before the Official Liquidator, there is no force whatsoever in the demand made under the impugned order. It is also quite mystifying as to how R1 proceeds to completely disavow the proceedings before the NCLT in toto. It is not as though the Customs Department is unaware of the proceedings before the NCLT.

67. In fact, in the earlier round of litigation, the Director General of Foreign Trade was arrayed as the first respondent and the Commissioner of Customs as the second respondent. This Court, in order dated 09.07.2021 had recorded the proceedings of the learned Standing counsel appearing for both R1 and R2. The submissions of the Customs Department on the right or otherwise of the petitioner to seek re-export have also been specifically noted at paragraph 9 of that order.

68. That apart, in the course of that hearing, detailed reference had been made to the proceedings pending before the NCLT and in fact R3, who is R2 in the present Writ Petition, and R4, who is not a party to the present proceedings had been represented by their respective Resolution Professionals. Thus, a claim should have been made at least in July, 2021 in the proceedings pending before the NCLT.

69. The scheme was sanctioned by the NCLT on 02.05.2022 and is



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stated to have been challenged by R1 by way of appeal filed in January, 2023 before the NCLAT. I am not per se concerned with that appeal.

However, one point that niggles in the back of my mind is the consequence of success by the customs department in that appeal. If it were to so succeed and the scheme were to be set aside, the question that would arise is as to who would bear the burden of the duty.

70. Thus, in the interests of a complete resolution of the matter before me, though the sole point urged by the petitioner is its entitlement to re-export without the burden of duty and penalty, I must consider the possibility of success of R1 in the appeal stated to have been filed by it before the NCLAT.

71. The appeal is stated to have been filed in terms of Section 421 of the Companies Act, 2013 (in short '2013 Act') and this is pointed out to get over the argument of the other parties that the appeal is not maintainable as it has been filed beyond the statutory period and in light of the fact that there is no provision for condonation of delay.

72. Section 421, insofar as it is relevant to this issue states thus:

421. Appeal from orders of Tribunal.—

(1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an



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order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

73. Thus, an appeal under Section 421 must be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved. It is the case of R1 that the appeal was filed as soon as R1 came to know of the order dated 07.06.2019 by the NCLT, that is, as and when a copy of the scheme was filed by R3 in these proceedings.

74. Per contra, the other parties would draw my attention to the provisions of Section 61 of the IB Code reading thus:

61. (1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal: Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that



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there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

75. Thus, any person aggrieved by an order of the adjudicating authority under part VI of the Code, shall be preferred before the NCLAT within 30 days and the proviso permits condonation of 15 days in filing the appeal if the NCLAT were satisfied that there was sufficient cause for not filing the appeal within the 30 days period provided under Section 61(2).

76. The NCLT adjudicates upon matters falling under the 2013 Act as well as the IB Code and Section 60 dealing with adjudicating authority for corporate persons, in sub-section (1), states thus:

60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

77. Thus, those appeals relating to those matters adjudicated upon by the NCLT falling under the IB Code would be filed in terms of Section 61 of the Code before the NCLT and those matters heard by the NCLT relating to the provisions of the Companies Act would be filed in terms of Section 421 of the 2013 Act.



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78. All matters adjudicated upon by the NCLT relatable to the 2016 Regulations would be circumscribed by the time limit set out under Section 61 of the Code which is 30 days or 15 days only. Thus, prima facie, the appeal filed by R1 as against the Scheme dated 02.05.2022 is in terms of Section 61 of the Code and not Section 421 of the 2013 Act, and is barred by limitation. I leave this issue at that.

79. R1 also relies upon the decision in *Motilal Gupta Karta of Kanta International v. Union of India and others*⁹, wherein a Division Bench of the Bombay High Court upheld confiscation of a consignment relegating the petitioner to statutory appeal. It would hardly be appropriate for me to relegate the petitioner to statutory appeal in the present case since there are no disputed facts involved and only questions of law arise for decision.

80. Then again, the judgment in *N.K.Bopna v. Union of India and others*¹⁰ is also not of any assistance to R1. In that case, three Judges of the Hon'ble Supreme Court decided a challenge to a detention order passed under the provisions of the COFEPOSA Act and whether removal of goods that were deposited in a warehouse without payment of duty

⁹ (1988) 36 E.L.T. 44 (Bom.)

¹⁰ (1992) 3 SCC 512



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would amount to smuggling.

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81. In the present case, it is admitted that the petitioner is an unpaid vendor/importer of the goods and is only seeking re-export. The question that arises is as to whether violation of advance authorisation committed by R2 can have any impact or can pose a hindrance to re-export by the petitioner. This is not the question that arises in N.K.Bapna's case.

82. R1 has also relied on a judgment by the Hon'ble Supreme Court in *Dhampur Sugar Mills Limited v. Commissioner*¹¹, wherein the Hon'ble Supreme Court has confirmed a decision of the Allahabad High Court to the effect that the assessee, Dhampur Sugar Mills Limited had failed to establish that raw sugar imported under the advance authorisation scheme was physically incorporated in sugar exported later, when the condition was relaxed only in respect of sugar imported during 2009.

83. The confiscation of the sugar imported in 2006 was sustained as it had been exported without any export release order. That case did not involve a claim for re-export by the unpaid vendor/importer and the entirety of the proceedings were conducted only against Dhampur Sugar

¹¹ 2016 (333) E.L.T. A241 (SC)



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Mills Limited, who was an assessee in India and the purchaser of the sugar. Hence, it is distinguishable on facts and in law.

84. In *Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal and others*¹² cited by R1, three Judges considered the interpretation of Section 238 of the IB Code to conclude that the Court would not override the right of the Corporation to control and regulate its properties. The attempt seems to be to state that the Code cannot nullify any rights of the Customs Department. Then again, this case has been cited out of context as it does not address the question that arises for decision before me.

85. In *ED and F Man Commodities India Pvt. Ltd. v. Union of India* (2022 (381) E.L.T. 644 (Guj.)), the Division Bench of the Gujarat High Court considered a prayer for mandamus by an unpaid vendor for a direction to the Customs Authority to extend the period of completion of export obligation in respect of the advance licence obtained by the customs by the assessee/purchaser, arrayed as R5 in that matter, and various other prayers. In that context and in light of the prayer sought, the Bench states as follows:

34. Under the Customs Act, 1962, the person who

¹² (2020) 13 SCC 234



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files a 'bill of entry' under [Section 46](#) of the Act is the importer of the goods covered under the 'bill of entry'. Such 'bill of entry' may be for home consumption (i.e. for clearing the goods from the customs station to any other place in India) or a 'bill of entry' for warehousing (i.e. for depositing the imported goods in a warehouse for a certain period of time). In any case, the person who files the bill of entry is the importer and, therefore, in the present case, the respondent no.5 is the importer of the goods in India. The stance of the respondents, that it is the respondent no.5 who has imported the goods in India and the respondent no.5 is the importer, appears to be correct and justified. The respondent no.5 holds an advance authorization and the details of such authorization are stated in the bill of entry while claiming exemption from the customs duty under the notification meant for the materials imported into India against the valid authorization. The stance of the department that the respondent no.5, as an importer, availed or claimed exemption of a notification that prescribes or lays down a condition of utilization of the imported materials and export of the resultant products for the fulfillment of the export obligation in respect of the authorization also appears to be correct.

35. We go to the extent of observing that if the export obligation period of 18 months from the date of issue of the authorization has elapsed and no extension has been granted in favour of the respondent no.5 being the authorization holder, then the stance of the department that as the exemption from duty was granted at the time of the import of the goods subject to the conditions of the Customs Notification No.79/2017-Cus and the condition of fulfillment of export obligation within the period specified in the authorization not being complied with, the goods are liable to be confiscated under [Section 111\(o\)](#) of the Act, 1962, also appears to be well justified.



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36. *The fact that the exporter, i.e. the writ-applicant, has not been paid the price of the goods and that his goods are liable to be confiscated because of a lapse or any irregularity on the part of the respondent no.5, the same would have no impact on the legal position as regards the goods being liable to be confiscated under [Section 111\(o\)](#) of the Act, 1962.*

86. Thereafter at paragraph 37, the Bench states ‘with all that has been observed above, still the writ applicant being the unpaid owner and exporter of the goods can claim ownership of the goods and also re-shipment’. Paragraph 42, where the Gujarat High Court has clarified the observations and conclusion in the judgment in the case of *Sampat Raj Dugar* (supra) are relevant and read as follows:

45. *In the aforesaid context, we may refer to and rely upon an order passed by a learned Single Judge of the Madras High Court in the case of M/s.Pacific (HK) Limited vs. The Commissioner of Customs (Airport and Air Cargo Complex), Meenambakkam, Chennai, reported in (2012) 281 ELT 522, wherein the importer had refused to clear and take delivery of the goods, and as the cost of the goods had not been paid, the petitioner therein had requested the authorities to permit re- export/reshipment of the goods. In such circumstances, a writ- application was filed before the Madras High Court under [Article 226](#) of the Constitution of India. While disposing of the writ- application, the Court observed as under :*

"4. The learned counsel appearing on behalf of the petitioner had submitted that the petitioner continues to be the owner of the goods in question, when the importer or the consignee concerned abandons the goods imported on their



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behalf, as held by the Supreme Court, in Union of India Vs. Sampath Raj Dugar, reported in 1992(58) ELT 163 (SC).

5. It had also been stated that the seller of the goods is deemed to be an 'unpaid seller', as per the terms of [Section 45](#) of the Sale Goods Act, 1930, when the whole of the price had not been paid or tendered. Under [Section 46](#) of the said Act it is stated that, notwithstanding the fact that the property in the goods may have passed to the buyer, the unpaid seller of the goods has a lien on the goods concerned, for the price, by implication of law. As such, the petitioner, who is an unpaid seller, has the right in respect of the goods in question. Therefore, he has the right to make a request to the respondents to re-ship or to re-export the goods in question. As per the decision of the Delhi High Court, in Agrim Sampada Ltd. Vs. Union of India, reported in 2004 (168) ELT 15 (Del), the title in respect of the goods abandoned by the importer would vest with the petitioner.

6. In the counter affidavit filed on behalf of the first respondent it has been stated that the importer has not abandoned the goods, even though he had chosen not to file the bill of entry, in order to escape from the clutches of law and in order to avoid detection of its mode of operation by the investigating agency. During the examination, it had been found that the goods had been mis-declared as imitation stones, in order to evade payment of a higher duty. Therefore, a show cause notice had been issued to the importer for the violation of the provisions of the [Customs Act](#), 1962. Hence, the request of the



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petitioner for re- shipment or re-export of the goods would not arise.

7. In fact, a show cause notice, dated 8.7.2011, had been issued to M/s.Sky Way Corporation, Jaipur, and certain others, proposing confiscation of the goods, under [Section 111\(d\)](#) of the Customs Act, 1962, read with [Section 11\(1\)](#) of the Foreign Trade (Development and [Regulation](#)) Act, 1992, as the goods in question are under investigation by the authorities concerned. While so, the request of the petitioner cannot be considered, at this stage.

8. In the counter affidavit filed on behalf of the third respondent it has been stated that the amount due to be paid to the petitioner, by the third respondent, for the goods in question, could not be paid due to severe financial constraints. Therefore, the goods could not be cleared and taken by the third respondent. It had also been stated that the value of the imported goods had not been paid, till date. As such, the petitioner continues to be the owner of the goods in question, as the third respondent, being the importer of the goods, had abandoned the goods in question.

9. In view of the above contentions, raised on behalf of the petitioner, as well as the respondents, and on a perusal of the records available, it is clear that the petitioner has the right to request the respondents for the necessary permission, to re-ship or to re-export the goods in question. Further, as the third respondent does not have any serious objection for the re-export of the goods in question, the respondents are directed to permit the petitioner to re-export the



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goods in question, as prayed for by the petitioner, in the present writ petition. However, it is made clear that it is open to the authorities concerned, to pass an appropriate order, with the view to initiate the necessary action against the parties concerned, if it is deemed to be necessary, in respect of the alleged infringement of the relevant provisions of law, if any, as expeditiously as possible, as the petitioner, has been incurring heavy demurrage charges. Further, it is made clear that the respondents are directed to consider the request of the petitioner, for the re-shipment and re-export of the goods in question, in view of the above observations made by this Court, in this order, unless there are other legal impediments, for granting such permission, as prayed for by the petitioner. The writ petition is ordered accordingly. No costs. Consequently, connected miscellaneous petition is closed."

87. At paragraph 44 the Bench notes that no irrevocable letter of credit was obtained by that unpaid seller and hence it has not properly protected its interest. In the present case, no LC has been opened by R2 and the goods are thus in possession of the petitioner. After referring to the decision in *M/s.Pacificorp (HK) Limited v. Commissioner of Customs (Airport and Air Cargo Complex), Meenambakkam, Chennai*¹³ and an order passed by the Customs, Excise and Gold Tribunal in the case of *M.V.Marketing and Supplies v. Commissioner of Customs (Import)*¹⁴ the writ petition was disposed granting liberty to that petitioner to make an

¹³ (281) E.L.T. 522

¹⁴ (178) E.L.T. 1034



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application for re-export.

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88. R1 would emphasise that the Court has directed that reasonable duty be paid on export of the goods. Thus, according to him, even in the case of re-export, duty should be paid on the consignment to be re-exported. There are some distinguishing features in that case which make the conclusion thereof inapplicable to the present matter.

89. In that case, it had been found that the goods had been mis-declared as imitation stones, in order to evade payment of higher duty. A show cause notice had been issued to the importer for the violation of the provisions of the [Customs Act](#), 1962. That apart, show cause notices had been issued to several parties proposing confiscation of the goods, under [Section 111\(d\)](#) of the Customs Act, 1962, read with [Section 11\(1\)](#) of the Foreign Trade (Development and [Regulation](#)) Act, 1992, as the goods in question were under investigation by the authorities concerned.

90. Even in such circumstances, the Court had not found the request of that petitioner for re-shipment unacceptable and had permitted it to make a representation before the authorities seeking re-export, though on terms. That apart, an added dimension in the present case is that the assessee/R2 has been liquidated and no valid claim has been



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made before the authorities.

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91. The show cause notice has been issued after moratorium has been imposed by the NCLT and the order determining liability has been issued long past the date of liquidation. This, when the customs department was well aware of the assessee/R2 being before the NCLT. Thus, and all the more, would the petitioner in the present case be eligible for re-export upon payment of charges alone.

92. In time, I would still maintain that it is only re-export charges that would be payable by the petitioner and not duty and penalty as computed under the impugned order, for the following reasons:

- i) It is an admitted position that the petitioner is an unpaid exporter. R2 has, admittedly, not settled the amounts relating to 11,000 MT of sugar.
- ii) Order dated 30.08.2022 has been passed on R2 post the date of liquidation. In any event, any liability under that order would attach only to R2 and not to the petitioner or R3.
- iii) R1, ought to have, if convinced of the violation committed by R2, secured its interest at the relevant point in time and



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in any event prior to 07.06.2019, when moratorium was imposed.

- iv) Securing of interest could have been of two kinds: a) by issuance of notice and passing of order-in-original denying the benefit of exemption granted under advance authorization scheme in a timely fashion or b) by filing a claim before the Resolution Professional appointed by the NCLT. Neither of the two options were availed.
- v) R1 was well aware of the proceedings pending before the NCLT even as early as in July, 2021 when order dated 09.07.2021 had been passed in the Writ Petition. Hence, the consequences from the failure to file a claim in time before the authority must be suffered.

93. The legal issues are thus answered in terms of the discussion as above. The challenge to order dated 30.08.2022 is at the instance of the petitioner, since, though it has been granted re-export that it seeks, such re-export comes with a heavy price tag.

94. The Hon'ble Supreme Court in the case of *Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and*



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*Customs*¹⁵ has considered the harmonious construction of the Code with the Customs Act. While so, the Court considered that the provisions of the Code were sacrosanct and that the Department would be duty bound to stake claim, though only in terms of Section 53 of the Code and not beyond. At paragraph 50, they state as follows:

50. As laid down earlier, the Customs Act and IBC can be read in a harmonious manner wherein authorities under the Customs Act have a limited jurisdiction to determine the quantum of operational debt – in this case, the customs duty – in order to stake claim in terms of Section 53 of the IBC before the liquidator. However, the respondent does not have the power to execute its claim beyond the ambit of Section 53 of the IBC. Such harmonious construction would be in line with the ruling in Gujarat Urja Vikas Nigam Ltd. V. Amit Gupta, (2021) 7 SCC 209, wherein a balance was struck by this Court between the jurisdiction of the NCLT under the IBC and the potential encroachment on the legitimate jurisdiction of other authorities.

95. As a matter of prudence, the Departments must consider appointing a Nodal officer who would monitor the proceedings before the NCLT on a regular basis. This process does not appear very cumbersome as the proceedings are stated to be available online for periodical reference and timely action.

96. In fine, this Writ Petition is allowed and the impugned order dated 30.08.2022 insofar as it raises a demand on duty and penalty as a

¹⁵ (2023) 1 SCC 472



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pre-condition to re-export by the petitioner, is quashed. As a consequence of this order, the petitioner is permitted to re-export the goods in question. Let the needful be done by R1 within a period of 4 weeks from date of receipt of this order. No costs.

26.06.2023

Index:Yes
Speaking order
Neutral Citation:Yes
vs/sl

To

1.Commissioner of Customs (Preventive),
No.1, Williams Road, Cantonment,
Tiruchirapalli – 620 001.



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DR.ANITA SUMANTH, J.

vs/sl

WP.No.29614 of 2022 and
WMP.No.28992 of 2022

26.06.2023