(2023) 07 NCLT CK 0039

In the National Company Law Tribunal

Case No : IA No. 497/2022 In CP (IB) No.56/Chd/Hry/2018

PAN Chemicals Inc Vs Sainath Texport Ltd ?

Date of Decision : 18-07-2023

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 9, 33(2), 53, 60(5)
Income Tax Act, 1961 — Section 143(3), 144, 226(3), 226(3)(iii), 271(1)(c)

Citation : (2023) 07 NCLT CK 0039

Hon'ble Judges : Harnam Singh Thakur, Member (J);Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Prashant Kumar Kapila, Vipul Joshi, Yogesh Putney, Randhir SIngh Badhran

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

IA No. 497 of 2022:-

1. This application has been filed by Mr. Vikas Garg-Liquidator of the corporate debtor, for issuance of appropriate and necessary directions to the respondents who are impeding the process of liquidation of assets of the corporate debtor-Sainath Texport Ltd. under Section 60(5) of the Insolvency and Bankruptcy Code, 2016.

2. The following contentions have been raised by the applicant-liquidator in its application:

a) This adjudicating authority vide its order dated 16.04.2018 admitted the petition filed by the operational creditor under Section 9 of the IBC, 2016.

b) Subsequently, this Adjudicating Authority admitted the petition filed under Section 33(2) of the IBC, 2016 for liquidation of the corporate debtor vide its order dated 20.02.2019 and Mr. Vikas Garg was appointed as a liquidator for the purposes of the liquidation of the corporate debtor.

c) A requisite public announcement was made inter-alia, inviting the claims and in pursuance of the said public announcement, a claim dated 18.03.2019 was duly received by respondent No. 1, i.e. Income Tax Department in Form-C of Schedule II of IBBI (Liquidation Process) Regulations, 2016. (Annexure-2 of the application)

d) Respondent No. 1 debited Rs.11,32,452/- from the bank account of the corporate debtor which was maintained with the same branch of the present respondent No. 2, i.e. State Bank of India vide Demand Draft No. 650197 dated 27.01.2022. On inquiry, the applicant found that the above-mentioned sum of money was paid to respondent No. 1 in compliance with a notice under Section 226(3) of the Income Tax Act, 1961, and such withdrawal of monies was done without any knowledge or consent of the applicant who is currently pursuing the process of liquidation of the corporate debtor.

e) In pursuance to this, the applicant wrote a letter to respondent No. 2 on 01.02.2022, in which a demand was raised to credit the monies back to the bank account of the corporate debtor. Thereafter, respondent No. 2 wrote to respondent No. 1 demanding the said money to be credited back to the bank account of the corporate debtor.

f) A detailed response was received from the Assistant Commissioner of Income Tax, Panchkula Circle, Panchkula, who asserted that respondent No. 1 had rightly and rightfully obtained the said money from respondent No. 2. The said letter sent by respondent No. 1 is attached as Annexure-6 of the application.

g) The applicant has submitted that he has been unable to recover the said monies as respondent No. 1 continues to be in wrongful possession of the said monies, and such a unilateral and arbitrary transaction during the pendency of liquidation is wholly and ex-facie illegal.

h) Further, the applicant asserts that the claim of respondent No. 1 is amenable to the provision of Section 53 of IBC, 2016, which provides for the order of priority and mode and manner of distribution of proceeds from the sale of assets of the company. Since the claim of respondent No. 1 already stands lodged and is a part of several other claims received by the applicant-liquidator, such a transaction by the respondents leads to interference in the process of liquidation of the corporate debtor.

i) The applicant places reliance on the judgment of Hon'ble Punjab and Haryana High Court, Chandigarh in the case of "M/s Kamla Engineering and Steel Industries, Ludhiana Vs. Punjab, National Bank, Ludhiana, and Ors." C.W.P. No. 35417 of 2019 dated 10.08.2020 in which the Central Excise Department was not justified in encumbering the assets in question on the ground that the corporate debtor had some dues to pay to the Central Excise Department.

3. Reply has been filed by respondent No. 1 and the following contentions have been raised:-

a) Respondent No. 1 has placed reliance on the judgment of the Hon'ble Apex Court in the case titled "Embassy Property Developments Private Limited Vs. State of Karnataka and Others" reported as (2020) 13 SCC 308 wherein it was held that the jurisdiction of the adjudicating authority is confined only to contractual matters between parties and an order passed by a statutory/quasi-judicial authority under certain special laws or which falls in the realm of public law, cannot be determined by the NCLT. Similarly, the respondent has also quoted the case of Hon'ble NCLT, Ahmedabad Bench title as "Dada Dhuniwale Khandwa Power Limited Vs. Commissioner of Income Tax" in Misc. Application No. 18/NCLT/AHM/2019 in which it was held that the application of the liquidator seeking direction to the Income Tax Authorities is not maintainable. The Hon'ble NCLAT in Company Appeal (Insolvency) No. 821 of 2019 in the case titled "Dada Dhuniwale Khandwa Power Ltd., Liquidator Vs. Commissioner of Income Tax (Appeals)-1" in which the said decision has been further upheld, stated that "no such power is vested with the adjudicating authority to give any direction to any of the authority under the income tax act."

b) After the initiation of liquidation of the corporate debtor the assessment of the corporate debtor for Assessment Year 2011–2012 was framed on 16.10.2018 under Section 143(3) read with Section 144 of the Income Tax Act, 1961, resulting in a demand of Rs.1,14,21,610/– (Principal Amount: Rs. 62,75,616 + Interest Amount: Rs. 51,45,992/–). Thereafter, the claim of the Income Tax Department was filed under Form-C of Schedule-II of the IBBI (Liquidation Process) Regulations, 2016, on 18.03.2019. It is also stated that at the time of filing of the above-mentioned claim, the penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961, for Assessment Year 2011–2012 were pending, and this penalty proceeding was passed on 30.04.2019, resulting into additional demand of Rs. 62, 75, 616/–.

c) Respondent No. 1 states that there had been no intimation from the side of the applicant of either acceptance or rejection of the claim and no communication in that regard had been made. Thereafter, a recovery notice was issued on 27.12.2021 and 05.01.2022. However, in the absence of any reply or compliance by the applicant, notice under Section 226(3) of the Income Tax Act, 1961 was issued to respondent No. 2, i.e. State Bank of India on 24.01.2022 and the copy of the same was forwarded to the corporate debtor in terms of provisions of Section 226(3)(iii) of the Income Tax Act, 1961. Copy of notice dated 27.12.2021, 05.01.2022, and 24.01.2022 are attached as Annexure R-3, R-4, R-5 of the Reply.

d) Respondent No. 1 further mentioned that no objection had been raised by the applicant or respondent No. 2 to the notice issued by respondent No. 1, and pressed the trite law which states that deemed consent can be inferred when no objection is received. The payment was made by respondent No. 2 in response to the aforementioned notice issued by respondent No. 1 for a sum of Rs.11,32,452/– on 27.01.2022, which has been adjusted against the outstanding demand.

e) Respondent No. 1 states that no interference is called for by this Adjudicating Authority as the Income Tax Department is also a secured creditor and has the first charge. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of "Imperial Chit Fund Private Limited Vs. Income Tax Officer" (1996) 219, ITR 498 (SC), in which it has been stated that while examining the issue of the company and the liquidation has answered in affirmative and here that the Income Tax Department is a secured creditor. Rule 93 of Part VI (miscellaneous) of the Second Schedule of the Income Tax Act, 1961, prescribes the procedure for recovery of tax, which is reproduced hereunder:-

"93. Saving regarding charge- Nothing in the Schedule shall affect any provisions of this act, where under the tax is the first charge upon any asset."

In view of this, the dues of the Income Tax would have precedence in the matter of recovery.

4. Respondent No. 2 has filed its reply and has stated the following;-

a) It has been stated that the answering respondent No. 2 (State Bank of India) had to comply with the Notice u/s 226(3) of the Income Tax Act, 1961 which was issued by respondent No. 1 to respondent No 2. The answering respondent No. 2 under compelling circumstances and for the purpose of compliance with the order of respondent No.1 has to deposit the Income Tax without any malice. It is further stated that as and when respondent No.2 came to know about the pendency of the liquidation proceeding wrote a letter on 01.02.2022 to respondent No. 1 requesting that the Assistant Commissioner be instructed to refund the amount of Rs.11.32.452/- so that same can be deposited back into the account of the corporate debtor.

b) Respondent No. 2 received the reply of respondent No.1 on 16.02.2022 along with a report dated 07.03.2022 issued from the office of respondent No. 1 wherein the claim of the refund of the assessee has been rejected which renders it difficult for respondent No. 2 to refund the said amount.

5. In the present case, respondent No. 2 adjusted the impugned amount of Rs.11,32,452/- on 27.01.22, during the period of liquidation which was initiated by our order dated 10.02.2019. The records indicate that the related demand pertains to the assessment year 2011-12 which got crystallised on 16.10.2018. We also note the fact that the department had lodged its claim before the liquidator as per the provisions of the IBC, 2016.

6. The judicial decisions relied upon by respondent No. 1 can be distinguished on facts from the present case at hand. In the case of Embassy property development Private Ltd. (supra), the issue was related to contractual matters between the parties, and in Dada Dhuniwale Khandwa Power Ltd. (supra), the issue was whether the liquidator can seek directions from the income tax

authority. The facts of the present case dealing with the justification of attachment by the Income Tax Department during the liquidation period, are entirely different. The ratios of the case cited, therefore, are held to be not applicable to the facts of the present case.

7. The attachment has been carried out as per Section 226 (3) of the Income Tax Act. The said action is not in consonance with the provisions of the Code which lays down that the claims of financial and operational creditors should be dealt with as per the waterfall mechanism under Section 53 of the code. It is trite law that the provisions of the Code will override other laws as laid down in Section 238 of the Code.

8. In view of the aforementioned discussions, respondent No. 1 is directed to refund the amount of Rs. 11,32,452/- to the applicant within one month of this order.

9. In the result, this application i.e. IA No.497/2022 is allowed and disposed of accordingly.