

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 236 of 2021

[Arising out of Impugned Order dated February 25, 2020, passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in IA No. 474/2019 in Company Petition (IB) No.53/NCLT/AHM/2017]

IN THE MATTER OF:

**Central Board of Indirect Taxes and Customs
Through**

**Office of the Commissioner of Customs,
JNPT Bonds Section, EPCG Section &
Disposal Section**

**Jawaharlal Nehru Customs House
Sheva, Taluka Uran, Dist. Raigad
Maharashtra – 400707**

Appellant

Versus

**Sundaresh Bhatt
The Liquidator of ABG Shipyard**

**1881 Registered address:
BDO India LLP, Level 9
The Ruby, North West Wing
Senapati Bapat Road, Dadar (W)
Mumbai – 400028, INDIA**

**Insolvency Professional Entity:
BOO Restructuring Advisory LLP
Level 9, The Ruby, North West Wing
Senapati Bapat Road, Dadar (W)
Mumbai – 400028, INDIA**

Respondent

Present:

**For Appellant : Mr Abhishek Rana and Mr Ajit Sharma,
Advocates.**

**For Respondent : Mr Abhishek Sharma, Ms Anjali Sharma and Ms
Ashly Cherian, Advocates.**

CORAM:

**Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Ashok Kumar Mishra, Member (T)**

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. The present Appeal emanates from the Order dated February 25, 2020, passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in IA No. 474 of 2019 in Company Petition (IB) No.53/NCLT/AHM/2017, whereby the Adjudicating Authority had issued directions to the Appellant to allow removal of the materials lying in the Customs Bonded Warehouses without payment of Customs Duty under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**').

2. The Parties are represented by their original status in the Company Petition for the sake of convenience.

3. **BRIEF FACTS**

The brief facts of the case are as follows:

3.1 The Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench had disposed of the Application, being numbered as IA 474 of 2019 in CP (IB) No. 53/NCLT/AHM/2017 filed by Liquidator of the Corporate Debtor, ABG Shipyard, with the following order directions;

- i) *"The Respondents are directed to allow the applicant-liquidator to remove the Material, which is lying in the Customs Bonded Warehouses without any condition, demur and/or payment of Customs Duty.*
- ii) *The Respondents are at liberty to lodge its Claim with the Applicant-Liquidator with regard to the Customs Duty charges payable on the release of Material, which form*

part of the assets of the Corporate Debtor company in Liquidation), before the Liquidator under the provisions of Insolvency and Bankruptcy Code, 2016 and in accordance with law.

iii) The Customs Department shall allow removal of goods/material within two weeks, from the date of receipt of an authentic copy of this Order from the Liquidator.

iv) Meanwhile, the Respondents shall not proceed for auctioning, selling or appropriating the Materials owned by the Corporate Debtor company, for the purpose of recovery of its Customs Duty, which may tantamount to violation of the I&B Code and put the applicant/liquidator of the Corporate Debtor company (under Liquidation) in disadvantageous position."

(verbatim copy)

3.2 The Respondent claims that the Corporate Debtor Company imported materials presently lying in customs bonded warehouses at specific locations for construction and building the ships. These ships were further to be exported after the completion of manufacturing. Hence, the Corporate Debtor Company availed its benefit under the Export Promotion Capital Goods Scheme (EPCG Scheme) (the Notification 12/2012 dated March 17, 2012) and other related schemes/notifications. Consequently, the Corporate Debtor was provided with a license under the EPCG Scheme concerning the Material.

3.3 Since the Corporate Debtor failed to submit an Export Obligation Discharge Certificate (EODC) and thereby comply with its obligations in respect of the EPCG license, the Office of the Commissioner of Customs

(Export), EPCG (Monitoring Cell), Mumbai (Customs Authority) had issued various notices (Notices) to the Corporate Debtor, inter-alia, directed the Corporate Debtor to pay the applicable customs duty concerning the Material.

4. **APPELLANT'S SUBMISSIONS**

4.1 The impugned Order does not consider the question of the title of imported warehoused goods, which have been lying in a warehouse from 2005 onwards. It is submitted that the warehoused goods do not belong to the debtor. Hence Liquidator cannot take control of the same.

4.2 Before commencement of liquidation proceedings, the debtor itself could not have taken possession of the imported warehoused goods except by paying the applicable customs duty after an order clearing the goods for consumption was passed by Customs u/s 68 & 71 of Customs Act, 1962. Thus, the Official Liquidator cannot be in a better position than the debtor itself.

4.3 The Customs Act, 1962 is a complete code in itself, under that it is provided that goods that are once warehoused cannot be released from the warehouse unless and until the import duties are paid. Reliance is placed on Sections 45, 47(2), 68, 71 and 72 of the Customs Act,

4.4 The principle enunciated in the judgement of Division Bench of Calcutta High Court in Collector of Customs Dytron India Ltd. (1999 (108) ELT 342 (Cal.)) squarely applies to the present case even though the judgment was rendered in the context of Companies Act, 1956 since it interpreted provisions of the Customs Act, 1962 vis-a-vis claims of the Liquidator.

Based on the above judgement, it is contended that the goods can be released to the Liquidator only after the customs duty is paid.

4.5 It is settled law that a legal question can be raised even at the appellate stage, and as such, the issue of whether the debtor has clear and perfect title over the warehoused goods under Customs Act, 1962, being a legal issue, has been validly raised in the Appeal filed by the Appellant.

4.6 As such, it is most respectfully prayed that this Hon'ble Tribunal may be pleased to set aside the impugned Order.

5. **Respondent/Liquidator's Submission**

5.1 Respondent submits its reply on every issue raised in the Appeal, which is as follows;

5.2 **CORPORATE DEBTOR IS THE OWNER OF THE GOODS**

a) The Appellant refers to Sections 48 and 72 of the Customs Act. It refuses to release the goods of the Corporate Debtor and asserts its right to sell the same, despite the Order of Liquidation passed by the NCLT, which would bar such proceedings under the Customs Act. Thus, the Appellant's case appears to be based on a mixed and convoluted Application of Section 48 and 72 of the Customs Act.

b) Section 48 of the Customs Act applies only to goods neither cleared nor Warehoused by the importer, which is not the case for the Appellant as the Notice (issued under Section 72 of the Customs Act) and 'Form C' filed by the Appellant is about Warehoused Goods.

Moreover, it is undisputed and even admitted by the Appellant that the goods of the Corporate Debtor have been Warehoused by filing a bill of entries for Warehousing. The Appellant itself acknowledged in its 'Form C', which identifies 2531 Bills of Entries for Warehousing. Thus, the Notice issued by the Appellant under Section 72 of the Customs Act and consequent 'Form C' ("Claim") filed by the Appellant does not attract Section 48 of the Customs Act in any manner whatsoever contended by the Appellant.

c) In addition to the above, it is submitted that the Corporate Debtor has not lost ownership of the goods, as alleged by the Appellant. In this regard, reference is made to Section 72 of the Customs Act, which can be applied only against the "owner" of the goods. By issuing a Notice under Section 72 of the Customs Act against the Corporate Debtor and filing its Claim with the Liquidator, the Appellant acknowledges the ownership of the Corporate Debtor about the warehoused goods. Neither Section 48 nor Section 72 of the Customs Act signifies any transfer of title or vesting property in Appellant as alleged in the present Appeal.

d) Relinquishment of title under the Customs Act is governed by Sections 23(2) of the Act and proviso to Section 68 of the Act. These provisions reinforce that relinquishment is purely the prerogative of the owner. The Corporate Debtor has never relinquished title to the goods either under Customs Act or under the Code. No communications in this regard have also been made to the Appellant. The Appellant has

not produced any shred of evidence to show that the Corporate Debtor has actively or consciously relinquished title to the goods. [CIT, Bombay v. Rasiklal Manoklal (HUF) and Ors. (1989) 2 SCC 454 and [ICICI Bank Ltd. v. SIDCO Leathers and Ors (2006) 10 SCC 452]].

e) Even if some of the assets/goods are not in possession of the Corporate Debtor, it does not amount to relinquishment of rights over the said goods in any manner whatsoever. (Encore Asset Reconstruction Company Pvt. Ltd vs Ms Charu Sandeep Desai & Ors. (Company Appeal (AT) (Insolvency) No. 719 of 2018)).

f) By submitting a Claim (under Section 38 of the Code), the Appellant has subjected its statutory dues to be governed by the Code's provisions and, more specifically, to the priority of distribution provided under Section 53 of the Code. Furthermore, the Claim filed by the Appellant is based on the premise of ownership of these goods. Therefore it is clear that the Corporate Debtor has not lost the ownership rights over the goods.

g) Assuming without admitting, even the Respondent/Liquidator could not have, after the commencement of CIRP and Liquidation process, relinquished the title of the goods in favour of the Appellant. Such action would cause prejudice to the creditors of the Corporate Debtor and would violate his duties under Section 35 of the Code and the common law Anti-Deprivation Rule. (Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta (CA No 9241 of 2019)) and [Perpetual Trustee Co Ltd. v BNY Corporate Trustee Services Ltd & Anr. (2009) EWHC 1912 (Ch)].

h) Further, assuming without admitting that any loss of title occurs by deeming fiction under the Customs Act, this deeming fiction cannot be extended to other statutes, such as the Code. A deeming fiction under one statute cannot be extended to other statutes. (State of Maharashtra v Laljit Rajshi Shah (2002) 2 SCC 699)] and [Meghraj Biscuits Industries Ltd. Vs. Commissioner of C. Ex., UP (2007 (210) ELT 161 (SC)]

i) Hon'ble Appellate Tribunal in Commissioner of Customs (Preventive), West Bengal v. Ram Swarup Industries Ltd. & Ors. (2019 SCC Online NCLAT 371) has held that the Customs Department does not have a right to auction the goods of the Corporate Debtor under the provisions of the Customs Act, specifically under Section 48 of the Customs Act, and must hand over custody of the goods to the Resolution Professional/Liquidator.

5.3 BAR ON PROCEEDINGS AFTER COMMENCEMENT OF CIRP/LIQUIDATION

a. The Appellant could not have exercised its right under the Customs Act to recover its alleged dues against the Corporate Debtor by putting the property of the Corporate Debtor for sale after the Order of CIRP (on 01.08.2017), and Liquidation (on 25.04.2019) was passed against the Corporate Debtor.

b. Even otherwise, under Section 142A of the Customs Act, the statutory charge of the Appellant is expressly subordinate and subject

to the provisions of the Code. Accordingly, it cannot recover any of the Appellant's alleged dues against the Corporate Debtor. [Kaledonia Jute & Fibres Pvt. Ltd. v. Axis Nirman & Industries Ltd. (2021) 2 SCC 403]; [Deepak Cochhar v. Indusind Bank Ltd. 2006 SCC OnLine Bom 368] and (Unilever Industries Private Limited & Another v. Kwaliti Limited 2018 SCC OnLine Cal 5978)].

c. Further, under Section 33 (5) of the Code, which squarely applies upon the passing of an order of Liquidation, "no suit or other legal proceeding shall be instituted by or against the Corporate Debtor". The term "legal proceedings for a moratorium in Liquidation, will include proceedings for recovery of taxes. [Governor-General in Council v. Shiromani Sugar Mills Ltd. 1946 SCC OnLine FC 5] and [Ludovico Sagrado Goveia v. Cirila Rosa Maria Pinto and Ors. (2016) 9 SCC 615)].

d. The Appellant's purported and continued custody of the Corporate Debtor's goods violates Sections 14 and 33 of Code. Section 14(1)(a) of the Code expressly prohibits the institution or continuation of proceedings against the Corporate Debtor during the moratorium period, i.e., the period between the insolvency commencement date and the completion of the Insolvency Resolution Process or until an order of Liquidation is passed under Section 33 of the Code, whichever is earlier. Further, Section 14(1)(c) of the Code also expressly prohibits any action for the foreclosure, recovery or enforcement of any security interest against the Corporate Debtor in respect of its property.[CIT v. Monnet Ispat and Energy Ltd. (2018 SCC OnLine SC 3465)], [National

Plywood Industries Ltd. v. Union of India (2020 (3) GLT 345)) and Dishnet Wireless Limited & Another v. The Deputy Commissioner of Income Tax & Anr. (2013 SCC OnLine Mad 3701].

5.4 **APPELLANT SEEKING PRIORITY IN SETTLEMENT OF DUES**

a) Distribution of all debts, including alleged claims of Appellant, are to be governed by the Code alone, being a special law enacted for this purpose. In Liquidation, the priority of debts shall be governed by the law relating to the liquidation process and not the law under which such debt is claimed to have arisen. Accordingly, Appellant cannot invoke the powers under Sections 48, 72, 142, 142A or any other provisions of Customs Act to recover its alleged dues in priority to other dues.

b) Section 53 (1) of the Code begins with a non-obstante clause and thus prevails over any other law of debt recovery, including the one sought by Appellant Section 53 (1) of the Code overrides Section 142A of the Customs Act in the entirety. Further, post the amendment to Section 142A, any charge under the Customs Act is subject to the Code's provisions and distribution of dues under Section 53 of the Code. Government dues are covered under Section 53 (1) (e) of the Code. Therefore, they are placed in the 5th position in priority while distributing the proceeds in Liquidation. Thus, there can be no question of the Appellant having a first charge or priority over the Corporate Debtor's assets. [Leo Edibles & Fats Ltd. v. The Tax Recovery Officer (Central) Income Tax Department, Hyderabad and Ors. (2018 SSC

Online Hyd 193)] and [Technology Development Board v. Mr Anil Goel and Ors. (Company Appeal (AT) Insolvency No. 731 of 2020)].

c) Allowing customs dues to be recovered in priority over all other creditors shall be arbitrary, unlawful, and breach settled principles of natural justice and Article 14 of the Constitution. Any artificial classification attempted by Appellant to distinguish itself from all other creditors, including other tax authorities, will be arbitrary and place it in an unequal position. Moreover, the Hon'ble Supreme Court in the case of Swiss Ribbons specifically held that the Liquidator is the sole adjudicator of claims of all creditors, which can be challenged before the Adjudicating Authority. Therefore, the Appellant cannot decide its claims in the overreach of the Liquidator and place itself above other creditors.

5.5 CODE TO SUPERSEDE AND OVERRIDES THE CUSTOMS ACT

a. Section 238 of the Code provides that its provisions shall have a superseding effect notwithstanding any law inconsistent with the Code. The Hon'ble Supreme Court has also affirmed the overriding effect of the Code in the cases of CIT v. Monnet Ispat and Energy Ltd. (2018) SCC Online SC 3465, Duncans Industries Ltd. v. A.J. Agrochem (2019) 9 SCC 725, wherein it was held that by Section 238, the provisions of the Code would override anything inconsistent contained in any other law. A similar observation has been made by this Hon'ble Appellate Tribunal in the case of Om Prakash Agrawal v. CIT (TDS)(Company Appeal (AT) Insolvency No. 624 of 2020).

b. For argument sake, if it is considered that the Appellant has a right to proceed under Sections 48, 72, 142 and 142A of the Customs Act, then also it will not be applicable because of the overriding effect of Sec 238 of the I&B Code. There is an apparent inconsistency between the provisions of the Customs Act and the I&B Code. Because the Customs Act allow the Appellant to initiate recovery proceedings against the Corporate Debtor by putting to sale the assets of the Corporate Debtor in the custody of the Appellant. This is in contravention to the Code as it expressly bars initiation or continuation of any such proceedings under Sections 14 and 33 and does not provide any priority to the Appellant's debt under Section 53 of the Code.

c. When two special statutes contain non-obstante provisions, the later statute must prevail. Thus, the Appellant cannot bypass the mandatory requirements of the Code by unlawfully resorting to provisions of the Customs Act. (Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. & Ors. (2001) 3 SCC 71] [Maruti Udyog Ltd. v. Ram Lal & Ors. ((2005) 2 SCC 638) and (Union of India v. India Fisheries (P) Ltd. (1965 3 SCR 679)]

6. **ADDITIONAL WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT**

6.1 **JURISDICTION OF NCLT**

a) The Appellant neither raised the issue of jurisdiction before the NCLT nor made ground in the present Appeal.

- b) The Hon'ble Supreme Court, in its decision in M/S Embassy Properties vs the State of Karnataka – Civil Appeal No. 9170 of 2019 decided on 03.12.2019 examined the extent to which the NCLT can exercise its powers under Section 60(5) of the Code. The judgment in Embassy Properties must be examined in the specific context of the facts and the question of law decided, which are culled out as under. –
- c) The RP sought to include 'a mining lease right within the meaning of the word "property as per 5.3(27) of the Code. [Para 37]
- d) Considering those above, Hon'ble, the Supreme Court concluded that the mining lease right does not fall within the context of "property and that the correctness of the said decision can be called into question only in a superior court which is vested with the power of review over administrative action. [Para 28]. The Supreme Court accordingly held 'wherever the Corporate Debtor has to exercise a right that falls outside the purview of the IBC, 2106, especially in the realm of public law, they cannot, through the Resolution Professional, take a bypass and go before the NCLT for the enforcement of such a right". [Para 40].
- e) In the instant case, the goods of the Corporate Debtor (in short 'CD') are Warehoused at the Customs Bonded Warehouse (admitted by the Appellant at Para 7(1) of the Appeal) and as such is the "property of the CD in terms of S.3(27). Moreover, the Appellant does not deny that the CD has imported these goods. The Respondent thus has a right over the Goods (even if they are not in possession of the CD) as per S.18(f)(ii) r/w S.36 (3)(b) of the Code. Consequently, the NCLT has the jurisdiction

to entertain the Application of the Liquidator under S.60(5), since the right sought to be exercised is over the "property of the CD and the right sought to be enforced is not a "new right" but the "right to be not exercised" as per the case of Embassy Properties (supra) specifically in Para 44.

f) Appellant has not taken any steps since 2014 to take into possession and confiscate the Goods under the Customs Act. They have sought to enforce this right after the Order of Liquidation was passed in July 2019, which cannot be permitted since the Appellant has already filed its Claim for the duty payable by the CD. Any payment received by the Appellant from the removal/ sale of the goods of the CD would amount to a preference being given to the Appellant over the other creditors and breach of the waterfall for payment of dues provided under S.53 of the Code. The Appellant will be paid twice - first, by selling the assets of the CD and second, when they receive the amounts in terms of S.53. If this is permitted, the Appellant will receive more than the FC's, whose dues are around 21,000 crores, compared to the dues of the Appellant, which is about 769 crores.

g) Hon'ble Supreme Court in Embassy Properties at Para 36 recognises the exception that once the dues of the Government Authority is crystallised, they have to be paid as per the Code. Accordingly, the government dues have been finalised in the present case, and 'Form C' duly filed.

h) The Hon'ble Supreme Court in Gujarat Urja Vikas Nigam vs Mr Amit Gupta & Ors - Civil Appeal No. 9241 of 2019 decided on 08.03.2021 considered the judgment of Embassy Properties on the issue of jurisdiction of NCLT and upheld the interference by the NCLT in restraining Gujarat Urja (the DISCOM) from terminating the PPA with the Corporate Debtor, even though the termination of the PPA was governed by a contract which vested exclusive jurisdiction under the Electricity Act to the Electricity Commission.

i) The judgment in both Embassy Properties (supra) and Gujarat Urja (supra) arose out of a contractual dispute (i.e., PPA and mining lease). However, Hon'ble Supreme Court in Gujarat Urja (Para - 39 (iii), 71-72, 87, 173) upheld the Order and jurisdiction exercised by the NCLT, despite the decision of the Embassy Properties adjudicating on a similar issue arising out of a contractual right. The dispute in the present case has arisen out of Goods that form part of the Liquidation Estate, and therefore solely arising out of the insolvency/liquidation of the Corporate Debtor- hence, NCLT is empowered to adjudicate under S.60(5).

6.2 OWNERSHIP OF THE GOODS

i) Determination of Ownership of Goods must be seen in terms of the Code and not under the Customs Act, and as per S.18(f)(ii) r/w, S.(3)(b) of the Code. Therefore, the RP/Liquidator can even take those assets that did not have the CD. In a similar case having almost identical facts, this Appellate Tribunal, in Commissioner of Customs

(Preventive), West Bengal v. Ram Swarup Industries Ltd. & Ors. 2019 SCC Online NCLAT 371 [Para 3-9 and 15-24] restrained the Customs Authorities from selling the assets of that CD and had directed the officers to hand over the assets to the RP, after referring to the provisions of the Customs Act and the decision of the Calcutta High Court in *Collector of Customs v. Dytron (India) Ltd* (also relied upon by the Appellant in the present case). The Appellant has failed to plead how the decision of Ram Swarup does not apply to this Appeal.

ii) Similarly, the Hon'ble High Court of Andhra Pradesh in the case of *Leo Edibles & Fats Ltd. v. The Tax Recovery Officer (Central) Income Tax Department, Hyderabad and Ors.* 2018 SSC Online Hyd 193 (Para - 1, 13-19, 24 & 31) directed the Income Tax Authorities to file its Claim with the Liquidator and further directed the IT authorities to lift the Order of attachment over the goods of the CD.

iii) The Appellant does not dispute the CD's ownership of these Goods in various warehouses and CFSs in any manner whatsoever. The Appellant's claims were made before the Respondent on the assumption that the Goods belonged to the CD. Assuming without admitting that any loss of title occurs by deeming fiction under the Customs Act, this deeming fiction cannot be extended to other statutes, such as the I & B Code. A deeming fiction under one statute cannot be extended to other statutes. [Para - 6 *State of Maharashtra v Laljit Rajshi Shah* (2002) 2 SCC 699] and (Para - 18, *Meghraj Biscuits Industries Ltd. Vs. Commissioner of C. Ex., UP* (2007 (210) ELT 161 (SC))].

iv) Even the Customs Act recognises the primacy of the Code. Accordingly, as per S.142A (non-obstante Clause) of the Customs Act, the statutory charge of the Appellant is expressly subordinate and subject to the provisions of the Code (see S.238 of the Code) and cannot be resorted to for the recovery of any of the Appellant's alleged dues against the Corporate Debtor.

v) The Appellant has not relied on a single decision to bolster its argument that the Customs Authorities can sell the Assets of the CD after CIRP/Liquidation has been initiated even though it has the goods despite filing its Claim with the Liquidator and subjecting itself to the jurisdiction of the Code. The Code does not permit creditor (including a statutory authority) who is in possession of an asset of the CD to sell such asset to realise its statutory dues, particularly when FC's who might also similarly be in possession over the assets of the CD is otherwise restrained from selling the assets in their possession having subjected themselves to the jurisdiction of the Code.

vi) The Customs Act, the I&B Code, and the decisions of the Hon'ble Supreme Court, various Hon'ble High Courts and even the decision of this Hon'ble Appellate Tribunal are squarely in favour of the Respondent and against the Appellant.

7. **ANALYSIS**

7.1 The learned Adjudicating Authority has passed the impugned Order on the premise that Insolvency and Bankruptcy Code, 2016 is a special law that

provides a non-obstante clause under Section 238 of the Code with overriding effect over other prevailing law and statute, time being in force. Further, relying on the case-law of Hon'ble Supreme Court in the case of Solitaire India Private Limited versus Fairgrowth Financial Services (2001) 3 SCC 71, it is argued that if there are two special statutes, which contain non-obstante provisions, the later statute must prevail. Therefore, by virtue of Section 238 of the Code being a subsequent law, the proceeding contained therein shall have an overriding effect on the other proceedings of the Customs and Central Excise Act.

7.2 Based on the above, the Adjudicating Authority held that provisions of Section 53 of the Code prescribe the Order of priority for distribution of proceeds from the sale of liquidation assets, which shall prevail over the provisions of Section 11(e) of the Central Excise Act and other provisions of the Customs Act.

7.3 Therefore, the Respondent Department cannot legally withhold the releasing of the material/goods, which are the property of the Corporate Debtor Company (in Liquidation) and impose a prerequisite condition for making payment of the customs duty by the Liquidator of the Corporate Debtor Company (under Liquidation) because the claims of the Respondent's Department have to be treated as a Government Dues and needs to be dealt with under the waterfall mechanism provided under Section 53 of the Insolvency and Bankruptcy Code, 2016.

7.4 It is essential to mention that the goods lying in the Customs bonded warehouses are not the Corporate Debtor's assets since it never claimed them

after importing them. Although the containers were imported between 2012 to 2015, the Corporate Debtor entered the liquidation process on April 25 2019. In this long span of about four years, the Corporate Debtor never cleared the bills of entry for some of the said goods.

7.5 Given the definition of 'imported goods' under Section 1 (25) of the Customs Act, 1962', goods brought into India from a place outside India but do not include goods cleared for home consumption. In the present case, the goods lying in various CFS imported by Corporate Debtors are not cleared for home consumption. The Customs Act 1962 provides a procedure to import goods into India. However, Section 45 states that all imported goods shall remain in the port area unless cleared for import.

7.6 Admittedly, in the instant case, the containers were not cleared after import. Section 46 (3) mandates the importer to present a bill of entry within 30 days of the arrival of the goods at the Port. Admittedly, for 15 containers, no bill of entry has been filed to date. Section 48 provides that imported goods for which no bill of entry has been filed or cleared for import can be sold by the custodian of those goods. Therefore, the importer has relinquished his title to the imported goods by not filing a bill of entry for several years and not removing the imported goods.

7.7 It is essential to mention that Section 35 (1) (b) of the Insolvency and Bankruptcy Code, 2016 empowers the Liquidator to take control of the Corporate Debtor's assets and properties. Therefore, the Liquidator has first

to ascertain that the assets for which custody has been sought belong to the Corporate Debtor.

7.8 By not filing the bill of entry for several years and not paying the Customs Duty and other charges, and taking clearance for home consumption about the imported goods, the importer deemed to have lost his title to the imported goods, in terms of Section 48 & Section 72 of the Customs Act. Thus the Custom Authorities are empowered to sell the goods and to recover the government dues. But, on the other hand, the Liquidator had no power to take into possession of those goods in respect of which the Corporate Debtor itself had relinquished its Claim and left it abundant without taking any steps for clearance of the goods for home consumption by paying the customs duty and other applicable charges.

7.9 The Liquidator intends to possess the uncleared goods from the customs warehouses without upfront payment of custom duty is flawed. In the context of identifying the goods or properties of the Company, 'imported goods', subject to levy of Customs, stand on a different footing. The customs duty is more a consequence of importing the goods than the importer's liability to pay it. Even before initiating the Corporate Insolvency Resolution Process, the Corporate Debtor Company could not have secured the possession of the imported goods except by paying the Customs duty. The Resolution Professional/Liquidator who virtually represents the Company cannot stand better than the Corporate Debtor.

7.10 The Liquidator could take possession of only the Company's assets, which the Company itself could have obtained. The liquidation proceedings

do not change the rights in this regard, and Customs Duty needs to be paid for the release of the goods by the importer. In the circumstances as stated above, the materials lying in the customs bonded warehouses can not be treated as 'Assets of the Corporate Debtor'. Thus, the Liquidator cannot claim goods without payment of Customs dues to settle claims of the secured creditors. Section 142 of the Customs Act deals with the provision to settle the claims of Customs by proceeding against the materials lying uncleared/unclaimed in the warehouses since liabilities under the Customs Act are the first charge under Section 142 A of the Customs Act.

7.11 Before taking a decision, it is also necessary to go through the relevant provisions of Customs Act 1962, which are given below for ready reference;

Clearance of Imported Goods

45. Restrictions on custody and removal of imported goods.—

(1) *Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.*

(2) *The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,—*

(a) *shall keep a record of such goods and send a copy thereof to the proper officer;*

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer ²³⁰[or in such manner as may be prescribed].

[(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an [arrival manifest or import manifest] or, as the case may be, an import report to the proper officer under Section 30 for the arrival of the conveyance in which the said goods were carried.]

46. Entry of goods on importation.—(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting ²[electronically] [on the customs automated system] to the proper officer a bill of entry for home consumption or Warehousing [in such form and manner as may be prescribed]:

[Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically [on the customs automated system], allow an entry to be presented in any other manner:

Provided further that] if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information,

permit him, previous to the entry thereof: (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under Section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

[(3) The importer shall present the bill of entry under sub-section (1) [before the end of the day (including holidays) preceding the day] on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or Warehousing:

[Provided that the Board may, in such cases as it may deem fit, prescribe different time limits for presentation of the bill of entry, which shall not be later than the end of the day of such arrival:

Provided further that] a bill of entry may be presented [at any time not exceeding thirty days prior to] the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

[Provided also that] where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.]

(4) The importer while presenting a bill of entry shall [* * *] make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if

any, [and such other documents relating to the imported goods as may be prescribed].

[(4-A) The importer who presents a bill of entry shall ensure the following, namely—

- (a) the accuracy and completeness of the information given therein;
- (b) the authenticity and validity of any document supporting it; and
- (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for Warehousing or vice versa.

47. Clearance of goods for home consumption.—[(1)] Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

[Provided that such Order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that] the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.]

[(2) [The importer shall pay the import duty—

(a) on the date of presentation of the bill of entry in the case of self-assessment; or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf, and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent but not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette.]

[Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that] where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill

of entry to him shall be deemed to be the date of such commencement for the purpose of this section:]

[Provided also that] if the Board is satisfied that it is necessary in the public interest so to do, it may, by Order for reasons to be recorded, waive the whole or part of any interest payable under this section.]

48. Procedure in case of goods not cleared, warehoused, or transhipped within [thirty days] 255 after unloading.—If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within [thirty days] from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after Notice to the importer and with the permission of the proper officer, be sold by the person having the custody thereof:

Provided that—

(a) *animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;*

(b) *arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.*

Explanation.—In this section, "arms" and "ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959).

[49. Storage of imported goods in warehouse pending clearance or removal.—Where,—

(a) *in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time;*

(b) *in the case of any imported dutiable goods, entered for Warehousing, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be removed for deposit in a warehouse within a reasonable time, the goods may pending clearance or removal, as the case may be, be permitted to be stored in a public warehouse for a period not exceeding thirty days:*

Provided that the provisions of Chapter IX shall not apply to goods permitted to be stored in a public warehouse under this section:

Provided further that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time.]

68. **Clearance of warehoused goods for home consumption.** – *Any warehoused goods may be cleared from the warehouse] for home consumption, if—*

(a) *a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;*

[(b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and]

(c) *an order for clearance of such goods for home consumption has been made by the proper officer:*

[Provided that the Order referred to in Clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that] the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of 295[* *] penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon:]*

[Provided also that] the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.]

71. Goods not to be taken out of warehouse except as provided by this Act.—No warehoused goods shall be taken out of a warehouse except on clearance for home consumption or [export], or for removal to another warehouse, or as otherwise, provided by this Act.

72. Goods improperly removed from warehouse, etc.—(1)
In any of the following cases, that is to say,—

- (a) where any warehoused goods are removed from a warehouse in contravention of Section 71;
- (b) **where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to remain in a warehouse;**
- (c) [* * *]

(d) *where any goods in respect of which a bond has been executed under [Section 59 [* * *]] and which have not been cleared for home consumption or [export or] are not duly accounted for to the satisfaction of the proper officer, **the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with [interest, fine and penalties] payable in respect of such goods.***

(2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after Notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may [deem fit]."

7.12 It is pertinent to mention that the Customs Act 1962 is a complete Code in itself. It provides that goods that are once warehoused cannot be released from the warehouse unless and until the import duties are paid. Hon'ble High Court of Calcutta in case of Collector of Customs v Dytron (India) Ltd, (05.11.1998 - MANU/WB/0334/1998) has held that:

"23. The Customs Authorities are correct in their submission that until and unless their duties and statutory dues are paid under the provisions noted above, the chemicals were not available legally for sale to the purchasers at all. That is to say the assets would form a part of the assets of the Company available for distribution by virtue of Liquidation subject to payment of the Customs Duties and interest etc. The provisions of Sections 529 and 530A of the Companies Act, 1956 apply to situations where the Claim of creditors in respect of the sale proceeds of the assets of the Company sold in Liquidation are

to be determined. The Customs Authorities claim to the chemicals in question, in which the Customs Authorities had a statutory right of detention and confiscation, had to be met before the chemicals could be validly sold as assets of the Company in Liquidation. The Claim of the Customs Authorities would, therefore, stand outside proceedings under Sections 529, 529A and 530 of the 1956 Act."

7.13 Further, Section 45 of the Customs Act lays down restrictions on custody and removal of imported goods. It provides that all imported goods unloaded in the customs area shall remain in the custody of such person as the Commissioner of Customs may approve until they are cleared for home consumption or warehoused or transhipped. Section 47 of the Customs Act provides that if any goods are entered for home consumption and the importer has paid the import duty, if any assessed thereon and any charges payable in respect of the same, then only the proper officer may make an order permitting clearance of the goods for home consumption. Section 48 of the Customs Act lays down the provision if goods are not cleared, warehoused, or transhipped within 30 days after unloading. It provides that if goods are not cleared for home consumption or warehoused or transhipped within 30 days from the date of unloading thereof at the customs station, or within such other time, as the proper officer may allow, such goods may after notice to the importer and with the permission of the proper officer, be sold by the person having the custody thereof. Finally, section 71 of the Act lays down the restriction that no good shall be taken out of the warehouse except provided under the Act.

7.14 Based on the statutory provisions of the Customs Act, 1962, it is clear that the goods imported for home consumption cannot be removed from the custody of the customs without paying the import duty and the charges thereon under the provisions of the Act.

7.15 Hon'ble Supreme Court in case of Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209: 2021 SCC OnLine SC 194 at page 262 has held that;

"69. The institutional framework under IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of Appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganisation or Liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in Innoventive [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] this Court observed that : (SCC p. 422, para 13)

"13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process."

The principle was reiterated in *ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1]* where this Court held that : (SCC p. 88, para 84)

"84. The non obstante Clause in Section 60(5) is designed for a different purpose : to ensure that NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."

Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor. However, in doing so, we issue a note of caution to NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the corporate debtor. The nexus with the insolvency of the corporate debtor must exist.

77. Reliance has also been placed on the judgment of this Court in *Embassy Property [Embassy Property Developments (P) Ltd. v. State of Karnataka, (2020) 13 SCC 308]* , where this Court held that NCLT and NCLAT did not have jurisdiction over a dispute arising under the Mines and Minerals (Development and Regulation) Act, 1957, in relation to the refusal of the State of Karnataka to extend a mining lease. The primary consideration which weighed with this Court while coming to its decision was that NCLT cannot have jurisdiction on matters of public law. This Court held: (SCC p. 331, para 37)

"37. Clause (c) of sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of sub-section (5)."

(emphasis in original)

In the present case the decision to terminate PPA has not been taken by any governmental or statutory authority acting within the domain of its public law functions. The decision has been simply taken by a contracting party solely on account of the initiation of insolvency proceedings against the corporate debtor in terms of an agreement between the parties."

7.16 Thus, it is clear that NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute does not arise solely from or relating to the Insolvency of the Corporate Debtor. In the instant case, the Corporate Debtor had abandoned the imported goods in the Customs warehouses for several years and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years. Therefore, the importer had lost his right to the imported goods. Consequently, the Customs Authorities are fully empowered under Section 72 of the Act to sell those goods to recover the government dues. The Liquidator has no right to take into possession over those goods for which the Corporate Debtor's title is deemed relinquished by implication of law. Even before initiating the Corporate Insolvency Resolution Process, the Corporate

Debtor Company could not have secured the possession of the imported goods except by paying the customs duty. The Resolution Professional/Liquidator, who virtually represents the Company, cannot stand on a better footing than the Corporate Debtor itself.

7.17 The learned Counsel for the Respondent Liquidator has placed reliance on the judgement of the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta*, (2021) 7 SCC 209: 2021 SCC OnLine SC 194 at page 262, wherein it is held that;

"176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised in a consistent line of authority, we hold that NCLT was empowered to restrain the Appellant from terminating PPA. However, our decision is premised upon a recognition of the centrality of PPA in the present case to the success of CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the corporate debtor. In doing so, we reiterate that NCLT would have been empowered to set aside the termination of PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of NCLT under Section 60(5)(c) of IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death

by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

177. *The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under Section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of PPA which is the sole contract of the corporate debtor, governing the supply of electricity which it generates, it will pull the rug out from under CIRP, making the corporate death of the corporate debtor a foregone conclusion."*

7.18 The learned counsel for the Respondent Liquidator submits that 'Form C' filed by the Appellant is about the Corporate Debtor's warehoused goods, which were warehoused by filing bills of entries for Warehousing. Claim Form C itself identifies 2531 bills of entries for Warehousing. It is further argued that the Corporate Debtor has not lost ownership of the goods is also evident from the fact that the Appellant has filed its Claim about the Warehoused goods in 'Form C' before the Liquidator. It is also said that by filing the Claim before the Liquidator, the Appellant admits the ownership of the Corporate Debtor and accepts the authority of the Liquidator to decide the Claim about the Government Dues, which shall be decided in terms of Sec 53 of the Code.

7.19 It is essential to mention that by filing the Claim before the Liquidator, it cannot be said that the Appellant had relinquished its right over the warehoused goods and submitted it to the jurisdiction of the Liquidator. Hon'ble Supreme Court in case of **ICICI Bank Ltd. v. SIDCO Leathers Ltd.**,

(2006) 10 SCC 452: 2006 SCC OnLine SC 498 at page 469 clarified the position of law regarding relinquishment of right which is as under;

"53. The expression "relinquish" has a different connotation. In *P. Ramanatha Aiyar's Advanced Law Lexicon* at p. 4047, it is stated:

"*Relinquish*.—To give over possession or control of; to leave off."

It envisages a conscious act i.e. an act where a person was aware of his right and then relinquishes the same. The same must be for the general benefit of the creditors. His action must lead to a conclusion that he, for one reason or the other, intended to stand in the queue for receiving money owed to him. It, however, does not stand obliterated only by the filing of an affidavit or proof of Claim with the Official Liquidator. Such a claim had been filed pursuant to a notice issued by the Official Liquidator. If the creditor does not respond to the said Notice, he would not be in a position to bring to the Notice of the Official Liquidator, the existence of his right.

7.20 In the instant case, the Appellant has filed its Claim before the Liquidator in response to the Notice issued by the Liquidator. Given the law laid down by the Hon'ble Supreme Court in the above-mentioned case, it is clear that by submission of Claim in response to the Notice issued by the Liquidator, it can not be presumed that the Appellant had relinquished its right over the property and submitted to the jurisdiction of the Liquidator. The Claim is filed in an effort to realise its dues. Still, it will not amount to relinquishment of its right over the Warehoused goods under its custody for

which Appellant has every right to sell those goods for the realisation of the Government dues.

7.21 The learned Counsel for the Respondent further emphasised Section 238 of the Code, which provides that it shall have an overriding effect notwithstanding any law inconsistent with the Code. The Appellant's contention is not sustainable on the ground that Sections 48, 72, 142 and 142 A of the Customs Act is inconsistent with Sections 14 and 33 of the I&B Code. Because it allows the Appellant to initiate recovery proceedings against the Corporate Debtor by selling the assets of the Corporate Debtor in the custody of the Appellant, it is in contravention of the provisions of the Code, which bars initiation or continuation of any such proceeding under Sections 14 and 33 of the Code, which does not provide any priority to the Appellant under Section 53 of the Code.

7.22 It is further said that when two special statutes contain non-obstante provisions, the later statute must prevail. Thus the Appellant cannot bypass the mandatory and special provisions of the Code by unlawfully resorting to provisions of the Customs Act.

7.23 We are not convinced with the argument advanced by the Respondent because the goods imported by the Corporate Debtor were imported much before the initiation of the Corporate Insolvency Resolution Process, and the Corporate Debtor never claimed them after import. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated

against the Corporate Debtor in 2017, and the liquidation order was passed on April 25 2019.

7.24 Therefore, the Corporate Debtor's assets because the Corporate Debtor never made any effort for clearing the goods by paying Customs Duty and other applicable charges before the initiation of Liquidation proceeding after importing them. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed in April 25, 2019. Therefore the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor. The Liquidator intends to possess the uncleared goods from the customs warehouses without upfront payment of Customs duty, which is against the statutory provisions of the Customs Act, 1962. Therefore, the imported goods subject to levy of Customs stand on a different footing than the goods /assets, not in the Corporate Debtor's possession. Therefore the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor.

7.25 Based on the above discussion, we believe that the Adjudicating Authority committed an error in directing the release of goods without paying customs duty and other applicable charges. Thus Appeal deserves to be allowed.

ORDER

The Appeal is allowed - no Order as to costs. Impugned Order dated February 25, 2020, passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in IA No. 474 of 2019 in *Company Appeal (AT) (Insolvency) No. 236 of 2021*

Company Petition (IB) No.53/NCLT/AHM/2017, whereby the Adjudicating Authority had directed removal of the materials lying in the Customs Bonded Warehouses without payment of Customs Duty under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 is modified to the extent that goods can be released or disposed of as per Applicable Provisions of Customs Act by the Proper Officer.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
22nd November, 2021

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