

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No.977 of 2020

**Kolkata Municipal Corporation and another
Vs.
Union of India and others**

For the petitioners : Mr. Ashok Kumar Banerjee, Sr. Adv.,
Mr. Rajdip Roy,
Mr. Anindya Sundar Chatterjee,
Mr. Goutam Dinda

For the respondent no.3 : Mr. Jishnu Chowdhury,
Mr. Dilwar Khan,
Mr. Sondwip Sutradhar

For the respondent no.4 : Mr. Rishav Banerjee,
Mr. Pronoy Agarwal,
Ms. Ankita Baid

Hearing concluded on : 18.01.2021

Judgment on : 29.01.2021

Sabyasachi Bhattacharyya, J:-

1. The Kolkata Municipal Corporation (KMC), a statutory authority under the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as "1980 Act"), has filed the present writ petition challenging an Order dated December 17, 2019 passed by the National Company Law Tribunal (NCLT), acting as Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the IBC") for handing over physical possession of the office premises at 127A, Sarat Bose Road, Kolkata – 700 026.

2. The KMC, in exercise of its authority under Sections 217-220 of the 1980 Act, had distrained the said property in recovery of municipal tax dues from an assessee.
3. Subsequently, the debt of the assessee came within the purview of a Corporate Insolvency Resolution Process (CIRP), thus prompting respondent no.4, the Resolution Professional, representing the owner of the asset, to approach the NCLT for handing over of such physical possession of the property-in-question from the KMC. Such action gave rise to the present writ petition.
4. Learned senior counsel appearing for the petitioner, by relying on the 1980 Act, submits that the KMC is a statutory authority and, as such, took possession of the asset in exercise of its statutory powers. Such independent statutory exercise, it is argued, cannot be interdicted by the NCLT within the scope of the IBC.
5. It is argued, by placing reliance on *Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and others*, reported at 2019 SCC OnLine SC 1542, that the powers of the NCLT, as Adjudicating Authority under Section 60 of the IBC, are circumscribed by the authority of the interim resolution professional, as contemplated in Section 18(f) of the IBC. In terms of Clause f(vi) of Section 18(1) of the IBC, it is contended by the petitioner, the control and custody of any asset to be taken by the interim resolution professional has to be subject to the determination of ownership by a court or authority. Since, in the present case, the writ petitioner is a statutory authority, the determination of ownership, by virtue of taking possession and

subsequent attachment and sale of the property, falls within the exclusive domain of the writ petitioner. The exercise of power by the interim resolution professional has to be subject to such authority, it is argued.

6. Learned senior counsel further argues that, as held in *Embassy Property (supra)*, the writ jurisdiction of this court under Article 226 of the Constitution can be invoked despite the availability of an alternative remedy, since the nature of the challenge pertains to lack of jurisdiction of the NCLT and not merely wrongful exercise of any available jurisdiction.
7. Learned counsel for respondent no.3 argues that, upon commencement of the Corporate Insolvency Resolution Process (CIRP), the National Company Law Tribunal (NCLT) passed an order dated January 17, 2019, lifting the attachment and directing the petitioner to hand over the registered office of the corporate debtor to the liquidation by an order dated January 31, 2020 (by which time the CIRP failed and liquidation commenced).
8. The impugned order dated January 17, 2019 it is argued, was passed by the NCLT within its jurisdiction. The IBC specifies that financial or operational creditors can file petitions before the NCLT. If the matter is admitted for CIRP, all attempts are made for a successful resolution, where the resolution applicant submits a plan for taking over the corporate debtor. If a plan is not submitted or does not get approval, the corporate debtor goes into liquidation. All debts of the corporate debtor are collated and paid, using the assets. Under

Section 60(5)(c) of the IBC, any question of law or fact arising out of or in relation to the insolvency resolution or liquidation proceedings is to be decided by the NCLT.

- 9.** Counsel argues that all issues pertaining to properties of the corporate debtor and rights or obligations in relation thereto can be decided by the NCLT. Learned counsel relies on the definition of “property” as given in Section 3(27) of the IBC and submits that Section 18(1)(f) stipulates that the IRP will take control and custody of assets subject to determination of ownership by a court or authority.
- 10.** Relying on paragraph no.40 of *Embassy Property (supra)*, it is argued that if NCLT has been conferred with jurisdiction to decide all types of claims with property of the corporate debtor, Section 18(1)(f)(vi) would not make the task of the IRP, in taking control and custody of an asset on which the corporate debtor has ownership right, subject to the determination of ownership of a court or other authority. Thus, the rights of the IRP to take control and custody of properties are not completely subject to the determination of ownership by courts or authorities. Secondly, it is not that the NCLT must yield to determination of ownership by courts or other authorities in all cases, insofar as the right to determination of ownership of properties of the corporate debtor is concerned.
- 11.** In *Embassy Property (supra)*, the mining lease of the corporate debtor was about to expire and a termination notice was issued by the Government. The IRP wanted extension of the lease and filed a writ petition for such purpose, during pendency of which the Government

rejected the application for extension. The writ petition was disposed of with liberty to apply afresh.

- 12.** The resolution professional approached the NCLT, wherein the order rejecting the extension application was set aside and a direction was issued to execute lease deeds. In a writ petition, the order was set aside. The NCLT again passed a similar order thereafter, against which a writ petition was preferred and an interim order granted, from which the matter went up to the Supreme Court.
- 13.** Paragraph no. 37 of *Embassy Property (supra)*, it is argued, clearly indicates that a decision taken by a Government or a statutory authority in relation to a matter which is in the realm of public law cannot be brought within the fold of the expression “arising out of or in relation to the insolvency resolution”, appearing in Section 60(5) of IBC, 2016. The Supreme Court created a distinction between proceedings which had attained finality, fastening a liability upon the corporate debtor, and other matters. Keeping in mind the said distinction, learned counsel for respondent no.3 argues, a distinction has to be drawn between matters which are relevant for the purpose of CIRP on the issue of debt or of property of the company and other matters; all other issues would be beyond the jurisdiction of the Tribunal. Likewise, even if it is within the jurisdiction of the NCLT, a distinction must be drawn between matters which have a direct bearing on the CIRP, that is, directly pertaining to debt or property of the corporate debtor, and other matters. Adjudicatory jurisdiction of other courts or Tribunals cannot be transgressed upon. However, in

the present case, the question involved directly relates to the property of the company and falls within the jurisdiction of the NCLT.

- 14.** Moreover, the petitioner in the present case is an operational creditor. The previous exalted status of a statutory creditor has now been removed. There is no primacy of statutory or crown debts.
- 15.** That apart, learned counsel argues, the writ petitioner itself submitted to the jurisdiction of the NCLT by lodging its claim. As such, the petitioner cannot now contend that its attachment for recovery of claim remains outside the jurisdiction of the NCLT.
- 16.** Learned counsel for respondent no. 3 next contends that the remedy of an appeal under Section 61 of the IBC was available against the impugned order. As such, the writ petition ought not to be entertained.
- 17.** Placing reliance on *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others*, reported at (1998) 8 SCC 1, learned counsel submits that, where there is an appellate remedy, this court does not entertain writ petitions unless the order impugned has been passed without jurisdiction or in violation of natural justice.
- 18.** In *Commissioner of Income Tax and others vs. Chhabil Dass Agarwal*, reported at (2014) 1 SCC 603, the Supreme Court held that interference is not warranted under Article 226 of the Constitution of India unless extraordinary circumstances are made out. In paragraph no. 15 of the report, exceptions to the rule of alternative remedy were reiterated. In paragraph no. 16 thereof, it was held that since the Income Tax Act provided a complete machinery, petitioner therein

could not be permitted to invoke the jurisdiction of the High Court under Article 226 of the Constitution.

- 19.** Learned counsel argues that, in Debts Recovery and SARFAESI Laws, the same principles have been applied by the Supreme Court in *Punjab National Bank vs. O.C. Krishnan and others* [(2001) 6 SCC 569], in *United Bank of India vs. Satyawati Tondon and others* [(2010) 8 SCC 110], and in *Authorized Officer, State Bank of Travancore and another vs. Mathew K.C.* [(2018) 3 SCC 85].
- 20.** In *Capital Electronics and Appliances Ltd. and others vs. Reserve Bank of India and others* [WPA No. 9226 of 2020], this court has reiterated the principle that writ petitions were not entertainable, except in cases of strict exceptions.
- 21.** As such, respondent no.3 prays for the writ petition to be dismissed.
- 22.** Learned counsel appearing for respondent no.4 argues that there is no distinction between statutory and operational debts. Even statutory dues/crown debts are considered as operational debt, as envisaged in Section 5(21) of the IBC.
- 23.** Learned counsel submits that the interim resolution professional has certain duties to perform, as envisaged under Section 18 of the IBC. Section 18(1)(f), Clauses (i), (ii) and (vi) of the IBC indicate that the IRP has to take control and custody of assets over which the corporate debtor has ownership rights, which may or may not be in possession of the corporate debtor, or any asset subject to determination of ownership by a court or authority. Section 25(1) and

Section 25(2)(b) of the IBC deals with the duties of the resolution professional.

- 24.** Section 36 of the IBC is relied on for the proposition that the assets attached by the writ petitioner, which are now under liquidation, have to be dealt with as per the mechanism provided under the IBC. The writ petitioner has only attached the asset of the corporate debtor and is in possession thereof. The assets have not been sold, thus retaining ownership of the asset with the corporate debtor. Particular reliance is placed on Section 36(3), Clauses (a) and (b) of the IBC for the proposition that the asset attached by the KMC will form part of the liquidation estate.
- 25.** A resolution plan, if received, must provide for payment to the operational creditors in terms of Section 30(2)(b) of the IBC. An approved resolution plan shall be binding on the Central and State Governments and the Local Authorities under Section 31(1) of the IBC. Since the writ petitioner has already filed its claim during the IRP and in the liquidation proceeding, it will have to wait for the outcome of the process and the distribution of the assets in terms of Section 53 of the IBC. The judgment rendered in *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and others*, reported at (2020) 8 SCC 531 is relied on in such context.
- 26.** Respondent no.4 also relies on the judgment rendered in *Commissioner of Income Tax vs. Monnet Ispat and Energy Ltd.* [Special Leave to Appeal (C) No. (S) 6483 of 2018] for the proposition that income tax dues, being in the nature of crown debts, do not take

precedence even over secured creditors who are private persons. Thus, in the case at hand, the petitioner cannot argue that their debt, which is in the nature of crown debt, will take precedence over the other debts.

- 27.** It is further argued by learned counsel appearing for respondent no.4 that Section 238 of the IBC gives overriding effect to the IBC over other laws, which has been upheld in *Duncans Industries Ltd. vs. A. J. Agrochem* [(2019) 9 SCC 725].
- 28.** Learned counsel goes on to argue that the order passed by the Adjudicating Authority (NCLT) was within jurisdiction. The Statement and Objects of the IBC, Section 5(21), Section 14, Section 18, Section 25, Section 30, Section 31, Section 32A, Section 36 and Section 238 of the IBC, read with Regulation 36 of the CIRP Regulations, 2016, make it evident that the NCLT, Kolkata had jurisdiction to pass the impugned order, on issues which were clearly covered by the said sections.
- 29.** Lastly, it is contended that a writ petition is not maintainable against an order of the NCLT, in view of *Sulochna Gupta & Anr. vs. RBG Enterprises Pvt. Ltd.*, reported at 2020 SCC OnLine Ker 4153.
- 30.** The two questions which arise in the matter are:
- 31.** Whether the writ jurisdiction of this court under Article 226 of the Constitution of India can be invoked in the matter, despite the availability of an alternative remedy; and
- 32.** Whether the property-in-question, having been seized by the KMC in recovery of its statutory claims against the debtor, can be the subject-

matter of a Corporate Resolution Process under the Insolvency and Bankruptcy Code, 2016.

- 33.** In order to resolve the first question, we merely have to look to the ratio of *Embassy Property (supra)*, as laid down in paragraph no. 4 of the said report. The Supreme Court held therein that, in so far as the question of exercise of the power conferred by Article 226, despite the availability of a statutory alternative remedy, is concerned, the distinction between lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.
- 34.** In the present case, the petitioners have urged that the NCLT and the Resolution Professional have no jurisdiction to take control and custody of any asset except as subject to the determination of ownership by a court or authority. The KMC, which is a statutory authority, exercised its powers under Sections 217 to 220 of the 1980 Act to distraint the asset of the debtor and to attach the property, to be followed by sale in future. Such exercise of power, it is argued, is beyond the purview of the IBC and does not come within the ambit of the powers conferred on the Resolution Professional or the NCLT by the IBC. As such, the Resolution Professional and the NCLT acted *de hors* their statutory powers in seeking to take control and custody of the asset.
- 35.** Hence, the nature of challenge thrown in the writ petition is on the ground of absence of jurisdiction and not 'wrongful exercise of the

available jurisdiction', thus bringing it within the fold of Article 226 of the Constitution. In such a scenario, the present writ petition is maintainable.

- 36.** As held in *Whirlpool Corporation (supra)*, alternative remedy would not be a bar where the order or the proceedings are wholly without jurisdiction. Such proposition, read in conjunction with *Chhabil Dass (supra)*, would facilitate interference under Article 226 of the Constitution, since absence of jurisdiction on the part of the authority concerned constitutes an exceptional case warranting interference.
- 37.** The self-imposed restriction, as highlighted in *Punjab National Bank (supra)* ought not to be a bar, if read harmoniously with the above judgments. Such an interpretation would be in consonance with the observations made in *Satyawati Tondon (supra)*, where it was held that the powers conferred upon the High Court under Article 226 of the Constitution of India are very wide and there is no express limitation on exercise of the power, although one cannot be oblivious of the rules of self-imposed restraint evolved by the Supreme Court. The rule of exhaustion of alternative remedy was held to be a rule of discretion and not one of compulsion, subject to the restrictions as highlighted in the said report. In *Mathew K.C.'s case (supra)*, it was also held that discretionary jurisdiction under Article 226 can be exercised even if alternative statutory remedies are available, within the well-defined exceptions as observed by the Supreme Court in *Chhabil Dass (supra)*.

38. As such, a combined reading of the aforesaid propositions, as laid down in the various judgments, boil down to the ratio that, although a wrongful exercise of available jurisdiction would not be sufficient to invoke the High Court's jurisdiction under Article 226 of the Constitution, the ground of absence of jurisdiction could trigger such invocation. Hence, in view of the nature of challenge involved in the present writ petition, the same is maintainable in law.
39. Question (i), posed above, is thus decided in the affirmative.
40. To answer the second question, it would be particularly apt to consider the tests laid down by the Supreme Court in paragraph nos. 37 and 40 of *Embassy Property (supra)*. While discussing the broad sweep of Section 60 (5)(c) of the IBC, the Supreme Court held, "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”***". Taking the instance of a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal at the time of initiation of CIRP, the Supreme Court observed that if Section 60 (5)(c) of the IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT

delineated in Section 60(5) cannot be stretched so far as to bring absurd results.

- 41.** Carving out an exception, it was held that it will be a different matter if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression “operational debt” under Section 5(21), making the Government an “operational creditor” in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT.
- 42.** Again, the Supreme Court found, if NCLT has been conferred with jurisdiction to decide all types of claims to property of the corporate debtor, Section 18(f)(vi) of the IBC would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, ***subject to the determination of ownership by a court or other authority.***
- 43.** There cannot be any doubt about the proposition that the contours of the powers conferred on the Adjudicating Authority, being the NCLT, under Section 60 of the IBC, are defined by the duties of the interim resolution professional under Section 18. The language of Section 18 (1) (f)(vi), however, leaves scope for two different interpretations of

such duties. From one perspective, the phrase “assets subject to the determination of ownership by a court of authority”, as prescribed in sub-clause (vi), qualifies the expression “assets” in the first paragraph of clause (f), that is, the interim resolution professional can take control and custody of any asset, including assets which are subject to the determination of ownership by a court or authority. From the second viewpoint, the expression “assets subject to the determination of ownership by a court of authority” pertain to the phrase “take control and custody”, used at the beginning of clause (f) of subsection (1) of Section 18. In *Embassy Property (supra)*, the second interpretation was accepted, indicating that the power of the resolution professional to take control of any asset, itself, is subject to the determination of ownership by a court or authority. In view of such interpretation by the Supreme Court, this court is bound by it and there is no further scope of dwelling on the question as to which of the two interpretations ought to be applied.

- 44.** Thus being the situation, what is to be seen to examine the charter of the interim resolution professional is whether the assets, of which control and custody is sought to be taken by the professional, are *sub judice* before a court or authority for the purpose of “determination of ownership” thereof.
- 45.** The writ petitioner proceeded with acquiring possession of the property-in-question and putting up the same for attachment under its powers as flowing from Sections 217-220 of the 1980 Act. The said provisions envisage a situation where an amount of tax, for which a

bill has been presented under Section 216 of the Act, is not paid within thirty days from the presentation thereof. In such event, the Municipal Commissioner may cause a notice of demand to be served on the person liable for payment. On non-payment of such tax, the petitioner is empowered under Section 219 of the 1980 Act to issue a distress warrant, for distraint of the property. The person charged with the execution of the warrant shall, in the presence of two witnesses, make an inventory of the property which he seizes under such warrant. Thereafter, steps are taken for disposal of such property, including attachment and sale.

- 46.** Such action follows from non-payment of tax and the cause of action arises upon presentation of a bill under Section 216 of the 1980 Act. After non-payment on the bill, there is no further scope for determination of the ownership of the property by the writ petitioner under the 1980 Act. The procedure, as laid down in Sections 217-220, automatically follow.
- 47.** In the present case, the Corporation followed such procedure and took possession of the disputed property for non-payment of tax. Thus, there was no further scope for any “determination” of ownership of the property by the KMC. As such, there arose no question of the task of the interim resolution professional, in taking control and custody of the asset, being subject to the determination of ownership by any authority, as contemplated under Section 18(f)(vi) of the IBC. Rather, the claim of the KMC, in the absence of any successful challenge thereto, attained finality, fastening a liability upon the corporate

debtor. As per the interpretation in *Embassy Property (supra)*, such a finalized claim would come within the purview of “operational debt” under Section 5(21) of the IBC. Hence, the Resolution Professional has jurisdiction to take custody and control of the same.

- 48.** As discussed earlier, the parameters of powers of the NCLT, as an Adjudicating Authority under Section 60 of the IBC, is defined and circumscribed by the scope of Section 18(f)(vi) of the IBC. Such exercise of power would fall within the ambit of the expression “arising out of or in relation to the insolvency resolution”, as envisaged in Section 60(5)(c) of the IBC.
- 49.** The proposition laid down in *Commissioner of Income Tax vs. Monnet Ispat of Energy Ltd.* [Special Leave to Appeal (C) No. (S) 6483 of 2018], that income tax dues, being in the nature of crown debts do not take precedence even over secured creditors, holds true in the present case as well. The claim of the KMC, being in the nature of crown debts, cannot gain precedence over other secured creditors, as contemplated in the IBC.
- 50.** Thus, in the light of *Embassy Property (supra)*, the finalized claim of the KMC can very well be the subject-matter of a Corporate Resolution Process under the IBC.
- 51.** Hence, question no. (ii), as posed above, is also answered in the affirmative and against the writ petitioner.
- 52.** Accordingly, WPA No. 977 of 2020 is dismissed on contest, without any order as to costs.

- 53.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)