

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.109
IA/538(AHM)2021 in CP(IB) 208 of 2017

Proceedings under Section 60(5) IBC,2016

IN THE MATTER OF:

Amit Gupta Liquidator of Winsome Diamonds and Jewellery**Applicant**
Ltd.
V/s**Respondent**
Madras Export Processing Zone-SEZ & Ors

Order delivered on: 21/02/2023

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)
Mr.Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court vide separate sheet.

-SD-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-SD-
DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

**IA/538(AHM)/2021
IN
CP (IB) 208/NCLT/AHM/2017**

IA/538(AHM)/2022

(An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

Mr. Amit Gupta

A Liquidator of
Winsome Diamonds and Jewellery Limited
Having Office at 702, Janki Centre,
Dattaji Salvi Road, Off. Veera Desai Road,
Andheri (W), Mumbai – 400 053

..... Applicant/Liquidator

Versus

1. Madras Export Processing Zone - Sez

Rep. by its Development Commissioner SEZ
O/o Development Commissioner
MEPZ Special Economic Zone & HEOUs in
Tamil Nadu, Administrative Office Building,
National Highway – 45, Tambaram, Chennai,
Tamil Nadu – 600 045

.....Respondent No. 1

2. Cochin Special Economic Zone

Rep. by its Development Commissioner SEZ,
O/o Development Commissioner,
Kakkanad, Cochin, Kerala – 682 037

.....Respondent No. 2

3. Commissionerate of Customs, Chennai Zone

Rep. by its Jt. Commissioner of Customs
Customs House,
33, Rajaji Salai, Chennai – 600 001

.....Respondent No. 3

4. Commissionerate of Customs, Cochin Zone

Rep. by its Jt. Commissioner of Customs
Customs House,
Willingdon Island, Cochin – 682 009

.....Respondent No. 4

5. Union of India

Ministry of Commerce and Industry,
Rep. by its Addl. Secretary (SEZ),
Udyog Bhawan, New Delhi – 110 107

.....Respondent No. 5

In the matter of:

CP (IB) 208 of 2017

(An application under Section 9 of the Insolvency and Bankruptcy Code, 2016)

Ramesh T. Mehta

....Operational Creditor

Versus

M/s. Winsome Diamonds and Jewellery Limited

....Corporate Debtor

Order delivered on 21/02/2023

**Coram: Dr. Madan B. Gosavi, Member (Judicial)
Kaushalendra Kumar Singh, Member (Technical)**

Appearance:

Mr. Navin Pahwa, Ld. Sr. Adv. a.w. Mr. Nipun Singhvi, Ld. Adv. for
the Applicant

Mr. Jaimin Dave, Ld. Adv. a.w. Ms. Hirva Dave, Ld. Adv. for the
Corporate Debtor

None appeared for the Respondents

ORDER

1. The instant application has been filed by Mr. Amit Gupta-liquidator of Winsome Diamonds and Jewellery Limited, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 [**“IB Code”**] for the direction(s) to the respondents to grant all necessary permission and assistance to the Successful Bidders for clearance of assets i.e., gold, silver, plant and machinery and other metals to home consumption i.e., Domestic Terrif Area [**“DTA”**]. The applicant further prayed for the direction to respondent no. 1 to allow the applicant to remove the documents/papers of the corporate debtor lying in the premises of the corporate debtor which is under the authority of respondent no. 1.

2. The averments made by the applicant and as argued/presented by the learned counsels for the applicant are summarised as under:

(i) The liquidation process was initiated against Winsome Diamonds and Jewellery Limited-Corporate Debtor vide order dated 01.09.2020 passed by this Adjudicating Authority and Mr. Amit Gupta was appointed as a Liquidator, the applicant herein for conducting the liquidation process. The applicant published Form-A under Regulation 12 of the IBBI (Liquidation Process) Regulations, 2017 [**“Liquidation Regulations”**] inviting the claims of the stakeholders. Respondent no. 1 has filed its claim in Form-C and the same has been acknowledged by the applicant and the admission of claim was given by the Applicant vide email dated 26.10.2020.

(ii) The applicant and his team visited the unit of the Corporate Debtor for the valuation of plant and machinery with the prior permission of respondent no. 1 and on 16.12.2020 and 17.12.2020 for the valuation of assets (Jewellery).

(iii) The applicant on 01.02.2021 and 11.02.2021 intimated to regarding the public announcement for e-auction of assets (except jewellery) jewellery respectively.

(iv) On 25.02.2021, the applicant sent a separate e-mail to respondent no. 1 regarding the e-auction of assets of the Corporate Debtor along with the details of the assets put for the auction which was to be conducted on 26.02.2021 and 08.03.2021 and the applicant also requested to provide the procedure which required to be followed by the Successful Bidder for clearance of goods to the Domestic Tariff Area along with the import duty, charges, rates if any, to be paid for clearance of goods outside SEZ for home consumption.

(v) The e-auction was conducted on 26.02.2021 for the plant and machinery and on 08.03.2021 for precious metals i.e. jewellery. The applicant also shared copies of the notice of sale with respondent no. 1. The aforesaid auction was conducted by the applicant on "*as is where is basis, as is whatever there is and no recourse*" basis with prior intimation of respondent no. 1 in accordance with the regulation 32 r.w. regulation 33 of Liquidation Regulations.

(vi) The applicant through an e-mail dated 06.03.2021, 09.03.2021 and also vide letter dated 15.03.2021, informed respondent no. 1 about the sold assets and also gave the details of successful bidders i.e the sale of Plant & Machinery to M/s Yadgaar Enterprises and Gold to M/s Star Brillian. The applicant in addition to that, requested respondent no. 1 for providing information about the procedure to be followed by the Successful Bidder for clearance of goods along with the applicable import duty, fee, charge and compliance, if any, to be paid or complied with for clearance of goods for the outside SEZ. The applicant in the said email also mentioned the mandate of section 238 of the IB Code. Despite the e-mail and communication to respondent no. 1, the authorized officer of Respondent No. 1, vide email replied that in reference to DGFT

Notification No. 36/2015-2020 dated 18.12.2019 and Rule 74 para 3 of SEZ Rules, 2006, the import of goods is restricted. It was also mailed that the Successful Bidder is responsible for undertaking necessary actions and compliances for making payment of any duties, obtaining requisite regulatory or statutory or third party approvals.

(vii) The applicant vide letter dated 26.03.2021 requested respondent no. 1 to allow the applicant to remove documents/papers of the Corporate Debtor lying in the premises of the Corporate Debtor at respondent no. 1 SEZ. As per regulation 6(2) of liquidation Regulations, the liquidator is required to maintain all registers, and books relating to the Corporate Debtor for a period of eight years. However, the applicant has not received any permission from respondent no. 1 for the removal of such documents/papers. The applicant further vide letters dated 05.04.2021 and 14.04.2021 requested respondent no. 1 to expedite the clearance of goods to the Successful Bidder to enable the applicant to carry out his duty under the IB Code in the interest of all the stakeholders. The applicant also requested the DGFT, Chennai vide letter dated 14.04.2021 for granting the necessary permission for the removal of goods to DTA. The successful bidder also vide letter dated 14.04.2021 sought permission for the same. However, till date, no communication has been received by the applicant from the DGFT, Chennai.

(viii) Respondent no. 1 vide letter dated 20.04.2021 replied to the applicant wherein the respondent has stated that this kind of case is a first case for the respondent no. 1 where the goods lying within the SEZ are to be cleared in DTA under the liquidation process. There is no precedent in respondent No.1 SEZ where the duty-free goods have been allowed to be cleared in DTA without following the procedures prescribed in SEZ law. Therefore, the liquidator is required to take clarification from DGFT as to whether the restricted goods in SEZ can be allowed to be cleared in DTA without complying with the restrictions

imposed by DGFT on such removal as such removal from SEZ to DTA is treated at par with the import of goods into the country. Respondent no. 1 further mentioned in its letter that there is an ongoing investigation initiated by CBI, and BSFB Mumbai therefore clarification must be sought from the said Investigating Agencies as to whether such goods are permissible to be released. Hence the request of the applicant for filing a manual bill of entry for clearance of subject goods into DTA cannot be considered.

(ix) The applicant vide letter dated 26.04.2021 replied to the letter dated 20.04.2021 of the respondent wherein the applicant categorically listed the events in the instant case and clarified the aspect that the terms and conditions of the e-auction process of the Corporate Debtor have already indicated that obligation for obtaining requisite permission of paying necessary duties for clearance of the goods in terms of the auction is lying with the Successful Bidder.

(x) Respondent no. 1 vide letter dated 05.05.2021 replied that the Respondent No.1 can allow the removal of goods in DTA only upon taking an approval/occurrence from the Investigating Agencies unless there is a specific order from Adjudicating Authority to allow the removal of goods without the approval of the Investigating Agencies.

(xi) The details of the e-auctions along with the details of the Successful Bidder have also been intimated by the applicant vide e-mail dated 15.03.2021. The details of the e-auction are as under:

S. No.	Asset	Weight	Successful Bidder	Highest Bid Value (INR)
1.	Gold	445.000 gms	M/s Star Brilliant	16,64,500/-
2.	Plant & Machinery	-	M/s Yaadgaar Enterprises	3,51,000 /-

The details of the e-auctions of silver with the details of the Successful Bidder are as under:

<i>S. No.</i>	<i>Asset</i>	<i>Weight</i>	<i>Successful Bidder</i>	<i>Highest Bid Value (INR)</i>
1.	Silver	1472.000 gms	M/s Ganeshguru LLP	75,000/-

(xii) Respondent no. 2 vide its letter dated 24.03.2021 replied to the letter dated 15.03.2021 of the applicant wherein respondent no. 2 has stated that the buyer shall file the bill of entry for home consumption as per rule 48 of SEZ Rules, and in case of gold and silver, Notification No. 36/2015-2020 of DGFT and Notification No. 36/2001-Customs (N.T.) shall be applicable as per rule 47 of SEZ rules and section 30 of the SEZ Act. Respondent no. 2 also reiterated the averments as made by respondent no. 1 with the communication with the applicant regarding the applicability of import policy in view of the aforesaid notification of the DGFT and the applicant may approach the DGFT in case of seeking an exemption of the condition and clarification is required from the investigating agencies i.e., CBI, BSFB Mumbai for releasing goods to the Successful Bidder.

(xiii) The applicant vide its letter dated 25.03.2021 replied to the letter dated 24.03.2021 of respondent no. 2 wherein the applicant has stated that the provisional attachment was made by the Enforcement Directorate vide order dated 31.05.2016 on the assets of the Corporate Debtor.

(xiv) The applicant vide letter dated 26.04.2021 intimated the Respondent No.2 for the sale of assets of the Corporate Debtor i.e. plant and machinery along with details of assets put for auction which was conducted on 23/04/2021 and requesting to know the procedure/documents to be followed/submitted by the prospective

bidders and the Liquidator for Customs Clearance along with import duty, taxes, charges, compliances if any, to be paid or complied for clearance of goods outside SEZ for home consumption.

S. No.	Asset	Weight	Successful Bidder	Highest Bid Value (INR)
1.	Plant & Machinery	-	M/s Unity Enterprises	1,43,000/-

(xv) The Applicant vide letter dated 17/06/2021 informed the Respondent No. 2 that on account of procedural formalities for clearance of the goods to DTA and extensive delay faced by the successful bidder having DTA status, the subject goods being Gold (2334.00 gms) have been invoiced to a unit in SEZ viz. M/s. H.K. DESIGNS (INDIA) LLP (“Transferee”) situated at Unit No. 113, SDF-IV, SEEPZ-SEZ, Andheri (E), Mumbai upon execution of the necessary documents in this regard. Accordingly, the subject goods now stand transferred to another SEZ unit (SEEPZ-SEZ) as supported by the bill of supply dated 15/06/2021 issued to H.K. DESIGNS (INDIA) LLP. Further, the Applicant requested the Respondent No. 2 to take the same on record and provide co-operation and assistance in respect of the procedural compliances for clearance of the subject goods from the Respondent No. 2, Cochin SEZ to Santacruz Electronic Export Processing Zone SEZ.

(xvi) It is pertinent to mention that the Respondent No.1 as mentioned above vide letter dated 05/05/2021, has categorically emphasized on the Applicant to approach the Hon’ble National Company Law Tribunal to seek for a specific order to allow the removal of the goods without the approval/concurrence of the Investigating Agencies.

(xvii) The coordinating NCLT Chennai Bench in the matter of “**C Ramasubramaniam, the liquidator of Surana Corporation Ltd/.**

(MA 645 of 2019 in MA 142 of 2019 in CP 550/IB/2018) has made the following observation relating to the same case.

“ ...that when the Corporate Debtor is under Liquidation, any claims of statutory dues from Corporate Debtor, have to be filed before the Liquidator, and for any violation of the FTDR Act, 1992 the statutory authorities are at liberty to proceed against suspended directors and for recovering penalty due thereto.

...that “the assets of the Corporate Debtor form a part of the Liquidator estate. Since the liquidation is under process, the MEPZ cannot hold back the liquidation estate asset of the Corporate Debtor which has to be distributed to the stakeholders of the Corporate Debtor as envisaged in the Act”

...That MEPZ cannot hold back the asset, the proceeds of which has to be distributed to various stakeholders of the company as envisaged under the Insolvency and Bankruptcy Code.”

3. Heard the Ld. Sr. Counsel for the Applicant. It is noted that liquidation against the Corporate Debtor was initiated vide order dated 01.09.2020 passed by this Adjudicating Authority. The goods (Gold, Silver and precious metals) and plant and machinery were auctioned by the liquidator as per the terms and conditions of the Bid Process Documents. The details of the auctioned goods and plant and machinery along with the details of the Successful Bidder are as under;

S. No	Location	Assets	Successful Bidder (s)	Highest bid value (INR)	Auction date
1.	MEPZ-SEZ (R-1)	Gold	Star Brillian	16,64,500/-	08.03.2021
2.	MEPZ-SEZ (R-1)	Plant and Mchinery	M/s Yaadgar Enterprise	3,51,000/-	08.03.2021
3.	MEPZ-	Silver	Ganeshguru	75,000/-	22.03.2021

	SEZ (R-1)		Jewellers LLP		
4.	Cochin SEZ (R-2)	Gold	Namrata Jewellers	93,29,500/-	08.03.2021
5.	Cochin SEZ (R-2)	Silver	Ganeshguru Jewellers LLP	3,98,200/-	08.03.2021
6.	Cochin SEZ (R-2)	Plant and Machinery	M/s Unity Enterprise	1,43,000/-	23.04.2021

4. It is not in dispute that aforesaid mentioned goods have been auctioned under the liquidation process. The clearing of goods (gold) to the DTA from SEZ cannot be read as an import in a literal sense in view of notification bearing No. 36/2015-2020 dated 18.12.2019 read with section 30 of the SEZ Act, 2015. Though provisions of Section 30 of the SEZ Act, 2005 have been incorporated to impose customs duty on considering the goods to be imported in India, in case goods clear to DTA. But, clearing the goods to DTA cannot be equated with goods imported outside India in a literal sense. Though the Successful Bidder is liable to pay the customs duty on the goods clear to DTA but such release of goods cannot be read with provisions of said notification of DGFT. Hence, clearing the goods (gold) from SEZ to DTA does not violets the notifications bearing NO. 36/2015-2020 dated 18.12.2019 of the DGFT. Moreover, the Hon 'ble Supreme Court in the matter of **"Sundresh Bhatt, Liquidator of ABG Shipyard Versus Central Board of Direct Taxes and Customs" Civil Appeal No. 7667 of 2021** has held that if there is any inconsistency between the IB Code and any other provisions of law, the provisions of the IB Code would prevail in view of section 238 of the IB Code. The relevant para (s) of the aforesaid judgment of the Hon'ble Supreme Court are as under:

"38. We may note that the IBC, being the more recent statute, clearly overrides the Customs Act. This is clearly

made out by a reading of section 142A of the Customs Act. The aforesaid provisions note that Customs Authorities would have the first charge on the assets of an assessee under the Customs Act, except with respect to a case under Section 529A of Companies Act, 1956, recover of Debt Due to Bank and Financial Institutions Act 1993, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Accordingly, such an exception created under the Customs Act is duly acknowledged under section 238 of the IBC as well. Accordingly, we may note that section 238 of the IBC clearly overrides any provision of law which is inconsistent with IBC.

5. Hence, we allow the present application and direct Respondents No. 1 to 4 to grant all necessary permissions and assistance to the successful bidder for clearance of assets i.e. gold, silver, plant and machinery to home consumption i.e. DTA.
6. It is also directed to Respondents No. 1 and 2 to allow the Applicant for removal of documents/papers of the Corporate Debtor lying in the premises of the Corporate Debtor at Respondent No. 1 and 2 respectively.
7. It is also directed to the liquidator to provide the necessary available documents to the investigation authorities if asked for.
8. This order will not come in the way of proceedings initiated by the Government Authorities against the previous Directors/ Management of the Company.
9. Accordingly, we allow this application and dispose of it.

-SD-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

Shweta Desai - LRA

-SD-

**DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**