

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 32 of 2021

IN THE MATTER OF:

Pinakin Shah-Liquidator of

M/s. Brew Berry Hospitalities Pvt. Ltd.

A/201 Siddhi Vinayak Towers,

Next to Kataria House, off S.G. Highway,

Makarba, Ahmedabad-380051, Gujarat

...Appellant.

Versus

1. The Assistant Commissioner of State Tax

05th Floor, Kuber Bhavan, Kothi Charrasta,

Raopura, Baroda -1, Gujarat

...Respondent No. 1

2. Kotak Mahindra Bank Ltd.

Shop No. 11-17 Kabir Plaza Bhavans

Makarpura Road, Village, Tarsali,

Vadodara, Gujarat – 390009

... Respondent No. 2.

Present:

For Appellant: Mr. Ishan Shah, Advocate.

For Respondent: None.

ORDER
(Virtual Mode)

25.02.2021 Heard Learned Counsel for the Appellant-Liquidator. The Respondent Nos. 1 and 2 have been served notice of the Appeal which was returnable on 23rd February, 2021. Nobody appeared for the Respondent Nos. 1 and 2 on 23rd February, 2021. We had then posted this matter for today i.e. 25th February, 2021. Even today there is nobody present on behalf of Respondents.

2. The Present Appeal arises out of Order dated 04th December, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad

Bench, Ahmedabad, Court-2. In I.A. No. 769 of 2020 in CP (IB) No. 107/NCLT/AHM/2019.

3. The Appellant-Liquidator had moved the Adjudicating Authority with a prayer to pass directions upon Respondent No. 2 to defreeze the Account No. 08432090000149 held in the name of the Corporate Debtor – M/s. Brew Berry Hospitalities Pvt. Ltd. at Kotak Mahindra Bank Ltd.- the Respondent No. 2.

4. The Adjudicating Authority after hearing the Appellant passed the orders, relevant part of which is as under:-

“On perusal of the record, it is found that the applicant has annexed copy of notice, issued by the office of the Assistant Commissioner of State Tax, Unit 44, 5th Floor, Kuber Bhavan, Kothi Compound, Raopura, Vadodara, Gujarat, under Section 44 of the Gujarat Value Added Tax Act, 2003 (GVAT Act) dated 01.09.2020. However, on receipt of the said notice, the applicant has not responded, i.e. within seven days from the date of receipt of the notice, as stipulated in the notice itself.

It is the prime duty of the liquidator to apprise the competent authority of the State Tax office, Vadodara, about the present status and give appropriate reply to the said notice. Instead of doing that, approached this Adjudicating Authority. In our opinion, it is not wise to transgress with the jurisdiction of the competent authority of State Tax, as the State Tax Authority is having ample power to take cognizance of the matter by passing any appropriate order.

Under such circumstance, the liquidator may approach before the competent authority, i.e. office of the State Tax, and get redress and / or apprise the present status of the corporate debtor company with the relevant provisions as provided in the I&B Code. It is needless to mention herein that the Assistant Commissioner of State Tax have their own Adjudicating Authority as well as Appellate Authority to adjudicate upon any matter as per law so provided by the parliament.

In view of that, the instant application is not maintainable and the liquidator is at liberty to approach before the competent authority to redress his grievance(s).

Accordingly, the instant application is dismissed, as not maintainable.”

The Appellant has thus filed the present Appeal.

5. The Appeal claims and it is argued that with regard to the Corporate Debtor, CIRP started on 29th May, 2019. The Learned Counsel for the Appellant-Liquidator says that the same Liquidator was Resolution Professional in the same CIRP and the Respondent No. 1 had filed claim in the CIRP for amount which was processed and accepted. The Company however subsequently could not get Resolution Plan and the Liquidation Orders came to be passed on 02nd July, 2020. The Learned Counsel submits that thereafter the Respondent No. 1 sent communication to the Respondent No. 2-Kotak Mahindra Bank Ltd. to freeze the Account of the Corporate Debtor under Section 44 of Gujarat Value Added Tax Act, 2003 dated 01st September, 2020. (Page 47/48). The Learned

Counsel submits that the status of the claim of Respondent No. 1 is that of an Operational Creditor under the Provisions of I & B Code, 2016 and one Operational Creditor cannot march over the other claimants without standing in queue under Section 53 of I & B Code, 2016 and the Provisions of I & B Code, 2016 being complete Code and I & B Code, 2016 being subsequent enactment of the Central Government, the earlier Gujarat Value Added Tax Act giving right to seize and recover is inconsistent and not binding. It is argued that the Adjudicating Authority failed to exercise jurisdiction vested in it and to invoke section 238 of I & B Code, 2016.

6. Having gone through the matter, we find substance in the submissions made by the Learned Counsel for the Appellant. The Learned Counsel for the Appellant is submitting that the Respondent No. 1 has filed claim even before the Liquidator at the stage of Liquidation Proceedings and still it went on to send directions to the Respondent No. 2 to freeze the Account.

7. The Learned Counsel for the Appellant has relied on Judgment of the Hon'ble Supreme Court in the matter of *Pr. Commissioner of Income Tax versus Monnet Ispat and Energy Ltd. in SLP Civil No. 6483 of 2018 ((2018) 18 SCC 786)* (Annexure- I page 53) where Hon'ble Supreme Court in Order dated 10th August, 2018 observed as under:

“ Heard.

Delay, if any, is condoned.

Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything

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inconsistent contained in any other enactment, including the Income-Tax Act.

We may also refer in this connection to Dena Bank Vs. Bhikhabhai Prabhudas Parekh and C. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

We are of the view that the High Court of Delhi, is, therefore, correct in law.

Accordingly, the Special Leave Petitions are dismissed.

Pending applications, if any, stand disposed of.”

8. The Learned Counsel has referred to this Order of Hon'ble Supreme Court as well as the Judgment referred by the Hon'ble Supreme Court in the Order and submits that the freezing of Account by the Respondent No. 1 is not maintainable and the Liquidator cannot be made to run to the parties and Authorities under the Sales Tax Act to get the Account defreezed. Learned Counsel submits, and, rightly says that Liquidation Proceedings are time-bound to maximize the value and all the Creditors are entitled to get their dues only in terms of Section 53 of I & B Code, 2016 and different Creditors cannot be allowed to resort to different proceedings and enactments only because they are Authorities under earlier enactments considering the Provision of Section 238 of I & B Code, 2016.

9. We accept the submissions made by the Learned Counsel for the Appellant.

10. We find that the Adjudicating Authority has failed to exercise jurisdiction vested in it to give relief to the Appellant in the context of the position of law under Section 238 of IBC.

11. For the above reasons, we allow the Appeal. The Impugned Order is quashed and set aside. The Interlocutory Application No. 769 of 2020 filed by the Appellant in CP (IB) No. 107/NCLT/AHM/2019 before Adjudicating Authority shall be treated as allowed with following directions:

- i. The Respondent No. 2 is directed to defreeze the Account No. 08432090000149 held in the name of Corporate Debtor-M/s. Brew Berry Hospitalities Pvt. Ltd., at Kotak Mahindra Bank Ltd.- the Respondent No. 2.
- ii. The Appeal is allowed, accordingly. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

Basant B./md.