

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 232 of 2024

&

I.A. No. 737, 783 of 2024

[Arising out of order dated 01.09.2023 passed by the Adjudicating Authority
(National Company Law Tribunal, Indore Special Bench, Court No. 1), in
IA/131/MP/2020 in TP/125/MP/2019 in CP(IB)/159/2018]

IN THE MATTER OF:

1. Commercial Tax Department

Through Assistant Commissioner
Office of Assistant Commissioner
Indore Circle-15, 5th Floor,
Chetak Chamber, R.N.T. Marg,
Indore – 452001.

...Appellant

Versus

1. Mr. Mangesh Vitthal Kekre

(Resolution Professional)
M/s. Bhagwan Motors Private Limited
101/F, Sector – 1, Industrial Area Road – II
Pithampur, Dist. Dhar,
Madhya Pradesh – 454775.

...Respondent No. 1

2. M/s. Bhagwan Motors Private Limited

101/F, Sector – 1, Industrial Area Road – II
Pithampur, Dist. Dhar,
Madhya Pradesh – 454775.

...Respondent No. 2

3. Mr. Amit Chopra

Through its Liquidator
BCP Jain and Co.
E-2/33 Area Colony
Bhopal, Madhya Pradesh – 462016.

...Respondent No. 3

Present:

For Appellant : Mr. Shashwat Parihar, Mr. Shashwat Anand, Mr. Mrinal Elkar Mazumdar, Mr. Deepanshu Badiwal and Mr. Rishabh Kumar, Advocates.

For Respondents : Mr. Kushal Bansal and Mr. Anish Ahlawat, Advocates.

ORDER

ASHOK BHUSHAN, J.

This Appeal by Commercial Tax Department has been filed challenging the Order dated 01.09.2023 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Indore Special Bench, Court No. 1), in IA/131/MP/2020 in TP/125/MP/2019 in CP(IB)/159/2018.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- i. Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, M/s. Bhagwan Motors Private Ltd., commenced by Order dated 21.06.2019.
- ii. The Commercial Tax Department issued a Notice dated 03.07.2019 under Section 128 of the Madhya Pradesh VAT Act, 2002, upon VE Commercial Vehicles Limited to pay sum of Rs.17,12,094/-. VAT amount due of Assessment Year 2014-15 of M/s. Bhagwan Motors Private Limited in response to Notice issued by Commercial Tax Department, the VE Commercial Vehicles Limited deposited the amount of Rs.17,12,094/- to the Commercial Tax Department.
- iii. The Resolution Professional (RP) filed an IA131/MP/2020 against the VE Commercial Vehicles Limited, Respondent No. 1 and Commercial Tax Officers as Respondent No. 2 under Section 43 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016, (for short 'The

Code' or 'The IBC') for refund of the aforesaid amount from the Commercial Tax Department.

- iv. The Application I.A. 131/MP/2020 was opposed both by VE Commercial Vehicles Limited as well as the Commercial Tax Department pleading that the deposit of amount of Rs.17,12,094/- is not a Preferential Transaction within meaning of Section 43 and the Application is not maintainable.
- v. It is further pleaded that there is no violation of Moratorium by the Respondents to the Application.
- vi. Adjudicating Authority after hearing the Parties observing that VAT/GST recovered the amount of tax payable by Corporate Debtor as per Notice dated 03.07.2019, whereas CIRP was initiated vide Order dated 21.06.2019. The recovery having been made during Moratorium period, the Commercial Tax Department is liable to refund the amount.
- vii. Aggrieved by the Order passed by the Adjudicating Authority in I.A. 131/MP/2020, this Appeal has been filed.

3. We have heard Learned Counsel for the Appellant as well as Learned Counsel appearing for the Resolution Professional (RP).

4. Learned Counsel for the Appellant submits that Application filed by the RP under Section 43 was misconceived. There was no Preferential Transaction within meaning of Section 43. Payment was not made from the Corporate Debtor's property or asset and transaction was done by third-party M/s. VE Commercial Vehicles Limited in response to statutory demand under

the MP VAT Act. For attracting Section 43 of the Code, the Preferential Transaction has to be done by the Corporate Debtor. Transaction did not involve Corporate Debtor, hence Application under Section 43 was wholly misconceived and not maintainable. Moratorium under Section 14 was also not attracted since it prohibits action against the Corporate Debtor and its asset. Moratorium under Section 14 does not extend to third-party transaction carrying out in accordance with the statutory obligation. Notice dated 03.07.2019 was issued by Appellant under Section 28(1) of the MP VAT Act towards payment of VAT dues of the Corporate Debtor. Both the Corporate Debtor and M/s. VE Commercial Vehicles Limited availed input tax credit against their respective tax liabilities. M/s. VE Commercial Vehicles Limited has reversed its input tax benefit by deposit of the amount of Rs.17,12,094/-, which had already credited against input tax liabilities. The Adjudicating Authority committed error in directing for refund of the amount of Rs.17,12,094/- from the Appellant which Order is unsustainable.

5. Learned Counsel for the RP opposing the submissions of the Appellant submits that once Moratorium was imposed by Order dated 21.06.2019, the amount due by M/s. VE Commercial Vehicles Limited to the Corporate Debtor could not have been adjusted by payment of any VAT liability to the Appellant. After imposition of Moratorium it is not open for Appellant to recover any amount on account of the Corporate Debtor nor can it appropriate any amount towards its own dues.

6. We have considered the submissions of Counsel for the Parties and perused the record.

7. The Application I.A.131/MP/2020 was filed by the RP under Section 43 read with Section 60(5) of the Code. Amount deposited by M/s. VE Commercial Vehicles Limited to the Appellant of Rs.17,12,094/- was to discharge the liability of Corporate Debtor towards VAT Tax. The above amount was deposited by M/s. VE Commercial Vehicles Limited consequent to the Notice issued under Section 28(1) of the MP VAT Act, 2002. Section 28(1) of the MP VAT Act, 2002 provides as follows:

“28: Special mode of recovery

(1) Notwithstanding anything contained in Section 24 or any law or contract to the contrary, the Commissioner or any officer other than the officer appointed under clause (g) of subsection (1) of section 3, may at any time or from time to time, by a notice in the prescribed form a copy of which shall be sent to the dealer or person, at his last address known to the officer issuing the notice, require, -

(a) any person from whom any amount is due or may become due to a dealer or person who has failed to comply with a notice of demand for any amount due under this Act;

(b) any person who holds or may subsequently hold any money for or on account of such dealer or person, to pay to the Government under this sub-section, either forthwith or upon the money becoming due or being held, or within the time specified in the notice (not being before the money becomes due or is held), so much of the money, as is equal to the amount due from the dealer or person in respect of the arrears of the tax, interest and penalty under this Act or the whole of the money when it is less than that amount.

Explanation - For the purpose of this sub-section the amount due to a dealer or person or money held for or on account of a dealer or person, by any person shall be computed after taking into account such claims, if any, as may have fallen due for payment by such dealer or person to such person, as may be lawfully subsisting.”

8. The Notice which was issued to the VE Commercial Vehicles Limited on 03.07.2019 by Commercial Tax Officer has been extracted by Adjudicating Authority in Paragraph 7 of the Judgment, which Notice is as follows:

“Notice in IA/131/MP/2020:

“Notice under section 28(1) of the Madhya Pradesh VAT Act, 2002

To,

Date: 03.07.2019

VE Commercial Ltd.

22/2 Y.N. Road Indore (M.P.)

Tin – 23321001945

Where the sum of Rs 17,12,094/- VAT TAX TOTAL AMT Rs 17,12,094/- is due of A.Y. 01.04.2014 to 31.03.2015 of M/s Bhagwan Motors Pvt. Ltd, Indore TIN 23111503890 on account of VAT.

I M/s Bhagwan Motors Pvt Ltd, Indore TIN 23111503890 hereby require you under section 28(1) of the Madhya Pradesh Vat Act, 2002 to pay into the Government Treasury at Indore on or before Three Days (date) and to produce of Five Days any amount due from you to, or held by you for or on account of said VAT TAX upto the amount of arrears shown above also require to pay money, which may subsequently become due from you to him/them or which you may subsequently held for or on account of him/them upto the amount of arrears still remaining unpaid within Three Days of the money becoming due or being held by you as aforesaid as such payment is required to meet the amount due from the above said dealer in respect of arrears of Indore.

Please Note that any payment made by you in compliance with this notice is in las deemed to have been made under the authority of the above named dealer and money receipt will constitute a good and sufficient discharge of your liability to the person to the extent of the amount specified in the receipt.

Please note further that if you fail to make payment in pursuance of this notice, proceedings will be initiated to recover the said amount from you as an arrear of land revenue.

A Copy of this notice is being sent to (dealer)

*(Name) M/s Bhagwan Motors Pvt Ltd., Indore TIN
23111503890*

Commercial Tax Officer

(Additional Tehsildar)

Indore, Circle – 15”

9. We may first notice the applicability of Section 43 under which the Application was filed by the RP questioning the above transaction. Section 43(1) & 43(2) provides as follows:

“43. Preferential transactions and relevant time.–

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.”

10. The condition precedent for attracting Section 43(1) is whether the Corporate Debtor has at any relevant time given a preference in transaction. The present is a case where no transaction was made by the Corporate Debtor which was questioned in Application filed by the RP. Transaction in question

was act of depositing of Rs.17,12,094/- by M/s. VE Commercial Vehicles Limited before the Commercial Tax Department in consequence of the Notice dated 03.07.2019. Thus, clearly Section 43 was not attracted and Application under Section 43 was wholly misconceived.

11. The submission made by the Applicant as noted by the Adjudicating Authority is that VE Commercial Vehicles Limited has unduly and unauthorised deposit the sum of Rs.17,12,133/- with VAT GST Department.

12. Now next question is to be considered is as to whether the deposit of the VAT Tax by M/s. VE Commercial Vehicles Limited can be treated to be in violation of Moratorium imposed under Section 14 against the Corporate Debtor. Opposing the I.A. 131/MP/2020 filed by the RP, M/s. VE Commercial Vehicles Limited refuting the submissions has made following submissions which have been noticed by the Adjudicating Authority in Paragraph 5. Paragraph 5 (iii), (iv) & (v) of the Impugned Order is as follows:

“5. In reply, submissions made by respondent no. 1 in IA/ 131/MP/2020 are summarized hereunder:

(iii) As per section 43 of the Code a resolution professional can approach the Adjudicating Authority for avoidance of a preferential transaction if it is of the opinion that the corporate debtor has given a transaction preference at a relevant time. However, in the present case, payment of the VAT/GST by respondent no. 1, who is not a corporate debtor, can under no circumstances fall within the purview or be regarded as a preferential transaction created by the corporate debtor.

(iv) NCLT, INDORE BENCH IA/ 130/MP/2020 & IA/ 131/MP/2020 in TP/ 125/MP/2019 [CP(IB)/ 159/2018 The contention of the resolution professional that the said deposit was made with the consent of the suspended management is

false and hence denied. Respondent no.1 paid the aforesaid amount to the VAT/GST department in compliance with a notice issued by the concerned authorities dated 03.07.2019 under section 28(1) of the Madhya Pradesh VAT Act, 2002 and hence, for complying with the said notice and the applicable laws and regulations, respondent no. 1 did not require the consent of the management of the corporate debtor.

(v) The claim made in the present application is strongly disputed. In this context, it is submitted from the latest statement of account of respondent no.1, a sum of Rs 69,41,214/- has been shown as a GST amount paid by respondent no. 1 to the corporate debtor as of 01.03.2020 but the same has not been remitted by the corporate debtor to the GST authority, therefore, despite such payment, the corporate debtor has failed to make a contemporaneous payment to the GST Authority. Assuming an amount of Rs 11,90,744/- as claimed by the resolution professional is payable, the same is to be deducted from the sum of Rs 69,41,214/- which is the unremitted GST amount withheld by the corporate debtor, for which respondent no. 1 is entitled to the ITC of a sum of Rs 57,15,862/-. Despite the remittance of the payment to the corporate debtor, the said amount was not paid further to the competent authority and respondent no. 1 is unable to claim a credit for such amount.”

13. Section 14(1) of the IBC provides as follows:

“14. Moratorium.–

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]...

14. Present is a case where no recovery has been affected by Commercial Tax Department from the Corporate Debtor, the GST Tax Liability of the Corporate Debtor which was not satisfied by the Corporate Debtor was directed to be discharged by M/s. VE Commercial Vehicles Limited which has taken benefit of input tax without GST dues being deposited by the Corporate Debtor. As noted above, under Section 28 of the MP VAT Act, 2002, the recovery can be from any person who holds any money for on account of such dealer or person. M/s. VE Commercial Vehicles Limited has contended before the Adjudicating Authority that it has reversed input tax benefit taken by it

by depositing the amount of Rs.17,12,094/-, since the Corporate Debtor did not deposit the GST amount. GST amount was paid by VE Commercial Vehicles Limited to the Corporate Debtor but the same was not remitted by the Corporate Debtor to the GST Authority which submission has been noticed in Paragraph 5(v) of the Order of the Adjudicating Authority as extracted above. The transaction which was questioned by the RP before the Adjudicating Authority of M/s. VE Commercial Vehicles Limited depositing the amount of Rs.17,12,094/- before the Commercial Tax Department to reverse the input tax availed by it cannot be in any manner said to be violate provisions of Section 14 of the IBC. Commercial Tax Department did not recover any amount from the Corporate Debtor or form its assets, the amount was recovered from an entity, M/s. VE Commercial Vehicles Limited which had taken the benefit of input tax where GST had not been deposited, hence M/s. VE Commercial Vehicles Limited reversed it benefits of input tax taken from Commercial Tax Department.

15. We, thus are satisfied that there was no applicability of Section 14, the transaction in question under which the M/s. VE Commercial Vehicles Limited deposited the amount of Rs.17,12,094/- before the Commercial Tax Department in response of statutory Notice dated 03.07.2019 cannot be said to be in violation of Section 14 of the IBC.

16. In view of the above reasons and conclusion, we are of the view that Adjudicating Authority committed error in directing the Appellant to refund the amount of Rs.17,12,094/-. The Order passed by the Adjudicating

Authority directing the Appellant to refund the aforesaid amount is unsustainable and is set aside.

17. In result, the Appeal is allowed, Order dated 01.09.2023 passed by the Adjudicating Authority in IA/131/MP/2020 is set aside. IA/131/MP/2020 filed by the RP is dismissed.

Parties shall bear their own cost.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

NEW DELHI

05th December, 2024

himanshu