

Smc Power Generation Limited vs Odisha Industrial on 17 May, 2024

Author: D.Dash

Bench: D.Dash, V. Narasingh

A.F.R. IN THE HIGH COURT OF ORISSA: CUTTACK
W.P.(C) No.22033 of 2021

In the matter of an application under Articles 226 & 227
of the Constitution of India, 1950.

...
SMC Power Generation Limited Petitioner

-versus-

1. Odisha Industrial
Infrastructure Development
Corporation; and

2. Kshitiz Chhawechharia Opposite Parties

Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):

For Petitioner - Mrs. Pami Rath, Sr. Advocate
Mr.Satyajit Mohanty,
D.P. Sahu & A. Acharya
(Advocates)

For Opp. Party No.1 - Mr.P.K. Mohanty,
Sr. Advocate
P.Pasayat, P.K. Nayak
S.N.Dash
(Advocates)

For Opposite Party No.2- None
CORAM:

MR. JUSTICE D.DASH

MR. JUSTICE V. NARASINGH

Date of Hearing :16.04.2024 : Date of Judgment : 17.05.2024
D.Dash,J.

Introduction:-

The Petitioner, SMC Power Generation Limited, a Company registered under the Indian Companies Act, 1956 by filing this writ petition has invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India in advancing the following prayers as against the Opposite Party No.1 (Odisha Industrial

Infrastructure Development Corporation (herein after in short, 'the IDCO):-

"(i) to quash the demand letter dated 28.06.2021 issued by the Opposite Party No.1 under Annexure-25 directing the Petitioner-Company to pay an amount of Rs.13.52 crores towards penalty (damage charge) and GST;

(ii) to direct the Opposite Party No.1 to refund the amount of Rs.1.92 crores paid by the Petitioner-

Company under Annexure-23 series towards outstanding statutory dues of SPS/CONCAST for processing Petitioner-Company's application for transfer of land; and

(iii) to direct that the application for transfer/recording of the subject lands be processed and the lands be transferred/recorded in the name of Petitioner-Company as per the order of National Company Law Tribunal in liquidation process under Insolvency and Bankruptcy Code."

2. Initially when the matter was listed on 16.08.2021, this Court passed the following order:-

"Issue notice both in the writ petition as well as in the interim application to the Opposite Parties through Speed Post/Registered Post with A.D., fixing the returnable date. Requisites be filed within three days Tracking report be placed on record by the next date. Replies be filed within four weeks from the date of service of notice. Rejoinder thereto, if any, be filed before the next date."

On 23.09.2021, the following order had been passed:-

"1. Mr. P. Mohanty, learned Senior Advocate enters appearance on behalf of IDCO. A complete set of paper books be supplied on him during course of the day. Replies be filed within four weeks. Rejoinder thereto, if any, be filed within four weeks thereafter.

2. List on 16thDecember, 2021.

3. Till then no coercive steps shall be taken against the Petitioner pursuant to the impugned demand dated 28thJune, 2021.

4. The next date of 9thNovember, 2021 stands cancelled."

The matter being listed on 16.12.2021 in the interim application (I.A. No.11821 of 2021), this Court has passed the following order:-

"Mr. Asok Mohanty, learned Senior Advocate appearing for the Petitioner states that without prejudice to the rights and contentions of the Petitioner, it is prepared to deposit the entire dues as demanded by IDCO with the condition that IDCO will upon

such deposit execute a lease in favour of the Petitioner and revoke the cancellation and further subject to the condition that in the event the Petitioner succeeds, the entire amount deposited with interest as the Court may order will be returned to the Petitioner as directed by this Court."

2. Mr. P.K. Mohanty, learned Senior Advocate appearing for the IDCO agrees to the above suggestion without prejudice to the rights and contentions of the IDCO.

3. Accordingly, it is directed as under:

(i) Without prejudice to the rights and contentions of the parties, the Petitioner will deposit with IDCO on or before 3rd January 2022 the entire dues as demanded by IDCO.

(ii) Upon such deposit, IDCO will revoke the cancellation order challenged in the present petition and execute a lease in favour of the Petitioner in respect of the plot in question on or before 17th January, 2022.

(iii) The above steps are subject to the further condition that in the event that the Petitioner succeeds in this writ petition, the amount deposited by it together with interest as per the direction of this Court will be returned to the Petitioner by IDCO.

4. The I.A. is disposed of."

1. Mr. P.K. Mohanty, learned Senior Advocate appearing for the IDCO states that he will file a reply on or before 10th January, 2022. Rejoinder thereto, if any, be filed before the next date."

Factual Background

3. The Petitioner-Company SMC Power Generation Limited is a Public Limited Company (hereinafter for short, 'the SMCPGL') incorporated under the Companies Act, 1956 is having its registered office at Hirma, Jharsuguda; the plant and Industrial Growth Center at Kukurjhangha, Badmal in the District of Jharsuguda, Odisha. The Petitioner-Company (SMCPGL) engaged in the business of manufacture and sale of Sponge Iron and Steel goods in all forms. The Petitioner-Company (SMCPGL) has an existing integrated Steel Plant located at village Hirmah, Jharsuguda with a production capacity of 200,000 MTPA of Sponge Iron, 350,000 MTPA of Billets, 250,000 MTPA of TMT Bars and it has also a 33 MW Captive Power Plant.

The Opposite Party No.1-Odisha Industrial Infrastructure Development Corporation (IDCO) is an undertaking of Government of Odisha.

3.1. The Opposite Party No.1 (IDCO) had granted a leasehold right over the land measuring Ac.154.208 dec. at Industrial Growth Center, Jharsuguda to a Company named SPS Steel and Power Limited (hereinafter in short as 'SPSS & PL') in terms of the Memorandum of Understanding

(MOU) entered with the State Government for setting up integrated Steel Plant. Similarly, land of an area of Ac.41.98 dec. had been allotted in favour of the Pawansut Sponge (P) Limited (hereinafter referred to as 'PSPL') at Industrial Growth Center, Jharsuguda.

By virtue of an order dated 19.02.2010 passed by this Court in COPET No.35 of 2009 approving the scheme of amalgamation, PSPL was amalgamated with SPSS & PL whereby all the properties, rights and interest of PSPL stood transferred in the name of SPSS & PL.

In the same year 2010, SPSS & PL entered into a share transfer agreement with Concast Steel and Power Limited (hereinafter referred to as 'CS & PL'). By virtue of that share transfer agreement, the entire shareholding of SPSS & PL was transferred in the name of CS & PL. In pursuance of the said transfer of shares, the name of SPSS & PL was changed to CS & PL with effect from 30.03.2021. And, required under law, fresh Certificate of Incorporation was issued by the Registrar of Companies, Ministry of Corporate Affairs, West Bengal (Annexure-1).

3.2. The above change of the name in the shareholding was duly intimated to the IDCO pursuant to which the Land Officer of IDCO vide letters sought necessary orders from the Chairman-cum-Managing Director of IDCO for procurement of the land in favour of CS & PL with the earlier recommendations issued in favour of SPSS & PL by letter under Annexure-2. Vide letter dated 28.03.2014 issued by the Government of Odisha in the Department of Steel and Mines under Annexure-3 the change of name from SPSS & PL to CS & PL was intimated to all the Authorities including the IDCO (Opposite Party No.1).

Even though the fact regarding change of the name of the Company was intimated to the IDCO which had been acknowledged by the Government of Odisha, the name of SPSS & PL, however, continued as before in the records of the IDCO in so far as the allotted lands are concerned. 3.3 After change of the name of the Company from SPSS & PL to CS & PL, the operation of the Steel Plant was continuing in the name of CS & PL.

On account of labour unrest and disputes the operation of the plant at the site was suspended with effect from 01.01.2017 and due notice in this regard had been given by the CS & PL to the local Administration.

3.4. At this juncture, the IDCO (Opposite Party No.1) vide its letters dated 14/16.03.2017 under Annexure-4 series, addressed to SPSS & PL cancelled the allotment of the land of an area of Ac.154.208 due to default in payment of the statutory dues concerning the allotted land in contravention of the allotment/agreement/undertaking, and for non- functioning of the unit. It was directed that the possession of the lands be handed over, free from all encumbrances to the concerned Officials of the IDCO at Sambalpur indicating therein that the failure would entail action as deemed proper for vacation of the property at the risk and cost of the possessors. All these letters were issued to SPSS & PL and not CS & PL.

On account of closure of the plant, the above referred letters had not been received by CS & PL. However, when the cancellation letters dated 14/16.03.2017 came to be received, the CS & PL gave a

proposal to the IDCO that they would make payment towards the said outstanding dues of Rs.69,70,523/- in 12 (twelve) equal installments and, therefore, they made a request not to give effect to the order of cancellation of the allotted land. The CS & PL gave the above proposal vide its letters dated 04.05.2017 and 21.08.2017 under Annexure-5 series.

Although IDCO (Opposite Party No.1) received all those letters from CS & PL, no further communication in that regard was made by IDCO (Opposite Party No.1) with CS & PL. Rather the IDCO (Opposite Party No.1) issued the demands for payment in respect of the statutory dues under Annexure-6 and that to without giving effect to the cancellation of the allotment of the lands as intimated earlier. 3.5. When the matter stood thus, the Corporate Insolvency Resolution Process (CIRP) came to be initiated against CS & PL with the invocation of the provisions of Insolvency and Bankruptcy Code, 2016 (hereinafter called as 'the I & B Code') by M/s. Shreeshyam Metaliks Limited.

That was admitted at NCLT, Kolkata Bench by order dated 07.11.2017 (Annexure-7) whereby Interim Resolution Professional (IRP) was appointed. The IRP on 22.11.2017 made a public announcement in that regard by publication through widely circulated Newspapers (Annexure-8) as per the provision contained in section 13 of the I & B Code. The creditors of CS & PL were required to submit their claims/dues before the IRP (Interim Resolution Professional) during that CIRP within the statutory period as per the provisions of I & B Code In view of the order passed by the NCLT, Kolkata Bench on 07.11.2017 in Company Petition (IB No.446/KB/2017) proceeding on an application under section 9 of the I&BCode filed by the M/s. Shreeshyam Metaliks Private Limited and the Newspaper advertisement/Public Announcement dated 22.11.2017 (Annexure-8), the CS & PL vide its letter dated 04.12.2017 under Annexure-9 informed the IDCO about the said developments and informed that all the dues of IDCO as had been demanded shall now be paid through NCLT route with further request to the IDCO to submit its claim in proper form (Form-B) by 05.12.2017 as per the public announcement. (Emphasis supplied) 3.6. In that proceeding under I&B Code one Mr. Sanjay Agarwal was appointed as Interim Resolution Professional (IRP). But the Committee of Creditors (CoC) in its first meeting held on 22.12.2017 replaced Mr. Sanjay Agarwal as IRP and in his place appointed Mr. Kshitiz Chhawchharai (Opposite Party No.2) as the Resolution Professional (RP).

The newly appointed RP then made fresh public announcement of CIRP of CS & PL in widely circulated Newspapers on 19.01.2018 and 21.02.2018. The RP also called for Expression of Interest (EoI) as well as the Resolution Plan (RP) from Prospective Resolution Applicants. A public announcement in this regard was made by the RP in widely circulated Newspapers on 21.02.2018. Despite the above efforts, no Resolution Plan came to be received by the RP.

Although IDCO (Opposite Party No.1) was required to submit its claim (outstanding statutory dues and penal interest etc.) relating to CS & PL before the RP as provided under the provisions of I & B Code, they chose not to submit any such claim during the stipulated time period before the RP.

When the CIRP period of 180 days was to be complete on 05.05.2018, the CoC in its meeting held on 13.04.2018 instructed the RP to make an application under section 12 of the I&B Code for extension

of CIRP for a period of ninety days. That was accordingly extended till 04.08.2018. Even during this extension of CIRP period, the RP did not receive any Resolution Plan nor the IDCO (Opposite Party No.1) made any representation before the RP stating its claim towards outstanding statutory dues etc. The IDCO also did not intimate the RP/NCLT regarding the status of the lease land, which was cancelled by it, prior to initiation of CIRP and that the land was still in possession of CS & PL. The CoC in its meeting held on 31.07.2018 instructed the RP to file an application under section 33 of the I&B Code before the Adjudicating Authority (NCLT) to pass necessary order of Liquidation of CS & PL.

3.7. The NCLT, Kolkata Bench passed the order under section 33 of the Code for Liquidation of CS & PL and appointed the Opposite Party No.2 as the Liquidator with a direction to issue Public Announcement (under Annexure-11 series) stating that CS & PL is in liquidation in terms of Regulation 12 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (in short, 'the Liquidation Process Regulations'). After that order dated 26.09.2018 passed by the NCLT, Kolkata Bench for liquidation of CS & PL, there came a public announcement in Form-B, Regulation-12 of the Liquidation Process Regulations on 29.09.2018. On that day all the stake holders of CS & PL were requested to submit the proof of their claim on or before 26.10.2018.

3.8. The IDCO (Opposite Party No.1), however, submitted nothing in support of their claim before the Liquidator (Opposite Party No.2) even though it had the knowledge regarding ongoing CRP/liquidation proceeding as would be evident from the letter dated 06.03.2018 issued by the Chief General Manager, MSME to the Division Head, IDCO, Sambalpur Division directing him to provide certain particulars in detail and documents, such as copy of allotment, lease deed, possession etc., as early as possible for preparation and submission of the petition before the NCLT, Kolkata Bench. In pursuance of the request made by the Liquidator, the Adjudicating Authority (NCLT) vide order dated 16.05.2019 allowed the Liquidator to undertake the exercise of E-auction of the assets of CS & PL.

The Assets Sale Process Memorandum inviting the bids for auction of assets of CS & PL was prepared by the Liquidator on 22.11.2019 in terms of the provisions of Liquidation Process Regulations. The public announcement of E-auction of assets of CS & PL was made by the Liquidator on 23.11.2019 in two leading Newspapers both in Odia and English vide Annexure-14 series inviting interested bidder to participate in the said auction. The IDCO (Opposite Party No.1) even after that initiation of the process for E-auction of assets of CS & PL by the Liquidator, did not lodge any claim before the Liquidator as regards the outstanding dues of CS & PL as had been demanded by them. The E-auction pursuant to the above invitation to the bidders was conducted on 23.12.2019 and this Petitioner-Company (SMCPGL) participated in the bidding process for purchase of assets of Lot No.4 of CS & PL and it was declared as the highest bidder for that lot of the assets of CS & PL relating to Jharsuguda Plant (the assets of Lot No.4). A Letter of Intent was thus issued in favour of the Petitioner-Company (SMC PGL) on 06.01.2020. Subsequent thereto vide sale deed dated 15.02.2020, the assets of CS & PL relating to Jharsuguda Plant (assets of Lot No.4) were transferred in favour of the Petitioner-Company (SMCPGL) by the Liquidator on receipt of payment of full bid amount of Rs.288,09,00,797.00 (consideration money) and GST to the tune of Rs.42,19,46,426.00. The lease hold land over which the Jharsuguda Plant (assets of Lot No.4) of CS

& PL very much formed part of the deed of sale (Annexure-15) was specifically shown in Schedule-II of the Schedules of assets. 3.9. The Petitioner-Company (SMCPGL) after acquisition of the Jharsuguda Unit of CS & PL vide its letter dated 02.03.2020 under Annexure-16 series made a request to the IDCO (Opposite Party No.1) for transfer of leasehold interest of the land measuring Ac.196.188 under Mouza-Badmali and Kakurjanga in the District of Jharsuguda in its favour. The Liquidator (Opposite Party No.2) in this connection, also made a request to the IDCO vide its letter dated 03.03.2020 under Annexure-16.

Similarly, the Petitioner-Company (SMCPGL) also vide letter dated 04.03.2020 under Annexure-17 requested the Government in the Department of Steel and Mines and Industrial Promotion and Investment Corporation of Odisha Limited (IPICOL) for change of the name of the CS & PL to SMCPGL.

The matter was placed before the 179th State Level Facilitation Committee (SLFC) meeting of IPICOL held on 16.03.2020 and the representative of the IDCO was very much a party to the same. In the said meeting, the proposal for change of name as aforesaid was approved and communicated by IPICOL to the Petitioner-Company (SMCPGL) vide letter dated 18.03.2020. Subsequent thereto, the Government in the Department of Steel and Mines vide its letter dated 20.06.2020 under Annexure-19 approved the said change of name from CS & PL to SMCPGL.

The Liquidator (Opposite Party No.2) issued a letter on 23.03.2020 stating therein that the sale to the Petitioner- Company (SMCPGL) was only of asset under Lot No.4 (Jharsuguda Unit of CS & PL) having no past liabilities pertaining to asset or in the running of unit and the transfer to the Petitioner-Company (SMCPGL) was as such. It was further clarified that the Petitioner-Company (SMCPGL) has assumed no liability towards discharge of any such past dues. It was next clarified that the Petitioner-Company (SMCPGL) had not assumed liability of any nature, whatsoever; in relation to asset under Lot No.4, (Jharsuguda Unit of CS & PL) and that the liabilities which had arisen before the date of sale would be dealt by the Liquidator (Opposite Party No.2) in accordance with section 53 of the Code. The Petitioner-Company (SMCPGL) in order to restart the acquired unit then applied to various Government Authorities in different Departments seeking approval and license. (Emphasized) 3.10. When the matter stood thus, the Divisional head of IDCO, Sambalpur vide letter dated 12.08.2020 (Annexure-21) for the first time intimated the Petitioner-Company (SMCPGL) that due to default in payment of statutory dues of the leasehold plots and non-working of plants, the allotment had been cancelled and it was then intimated that the said outstanding statutory dues of the SPSS & PL was Rs.1,68,55,329.00 and that of CS & PL was Rs.20,44,669.00, stating further that in addition to that damage @ Rs.500 per acre per day coming to Rs.9,57,63,168.00 for the period from 17.03.2017 to 12.08.2020 was also payable. The Divisional Head of IDCO, Sambalpur further stated that in this context, direction had been sought for from the Headquarter.

Basing on the application of the Petitioner-Company (SMCPGL) for transfer of the leasehold land of SPS/ CS& PL, the Petitioner-Company (SMCPGL) then was advised to apply Online as per the prevailing procedure of the IDCO (Opposite Party No.1) for said transfer in IDCO portal. After submission of said application for transfer of the land in IDCO (Opposite Party No.1) portal, the

IDCO (Opposite Party No.1) tagged the land details of erstwhile SPS & CSPL into the application of the Petitioner-Company (SMCPGL) and simultaneously, the outstanding dues of those two Companies amounting to Rs.1.92 crores was shown as liability in the hands of the Petitioner-Company. 3.11. The Petitioner-Company (SMCPGL) then represented before the IDCO (Opposite Party No.1) that such dues need be settled at NCLT and not by the Petitioner-Company (SMCPGL) in terms of the letter of the Liquidator (Opposite Party No.2) dated 23.03.2020 under Annexure-20. Since the Petitioner-Company (SMCPGL) was facing problem with the Departments of Government in relation to settlement of the past liabilities of CS & PL, a meeting was held on 09.10.2020 under the Chairmanship of Principal Secretary, Industries Department along with the Chairman-cum-Managing Director of IDCO (Opposite Party No.1) and the Managing Director of IPICOL and the representatives of various other Government Departments and Agencies. It was decided therein that IDCO (Opposite Party No.1) shall be guided by the order of NCLT in the matter. The minutes of the meeting dated 09.10.2020 (Annexure-22) reflect the said state of affair.

Despite the same, the Petitioner-Company (SMCPGL) was informed by the IDCO (Opposite Party No.1) that its application for transfer of land could not be processed till the outstanding dues reflected in the application were fully paid. Under the circumstance, in order to avoid delay being compelled, the Petitioner-Company (SMCPGL) made the online payment of Rs.1,92,24,618.00 on 09.10.2020 vide Annexure-23 series for settlement of outstanding statutory dues of SPSS & PL and CSPL for processing its application for transfer of land even though it was not payable by the Petitioner-Company (SMCPGL).

3.12. The Petitioner-Company (SMCPGL) then intimated the IDCO (Opposite Party No.1) vide letter dated 09.10.2020 that by operation of law as well as by the conduct of the IDCO (the Opposite Party No.1), cancellation of lease stood revoked and the IDCO (Opposite Party No.1) waived its right to claim any amount towards the outstanding dues of SPSS & PL and CS & PL by not participating in the proceeding under the I&B Code. Therefore, the demand of Rs.1.92 crores for processing the application of the Petitioner-Company (SMCPGL) for transfer of the land and subsequent payment of the same by the Petitioner-Company (SMCPGL) under the compelling circumstance is said to be illegal, arbitrary and contrary to law.

3.13. After payment of the outstanding statutory dues of Rs.1.92 crores and odd so as to process the Petitioner- Company's transfer application in order to ensure smooth sail in running the unit, the IDCO then further informed that in terms of Clause-2.11 of the Circular dated 02.11.2016 and 23.07.2016 (Annexure-24 series), the revocation of cancellation of allotment is allowable only on payment of penalty (damage charges) @ Rs.500/- per day from the date of cancellation up-till the date of revocation.

The Chief General Manage, IDCO then issued a letter dated 28.06.2020 under Annexure-25 demanding payment of Rs.13,52,00,322.00 towards penalty (damage charges) and GST for revocation of cancellation of the allotment of IDCO land measuring Ac.154.208 with further stipulation therein that in case the Petitioner-Company (SMCPGL) failed to pay, it would be construed that the Petitioner-Company (SMCPGL) was no more interested for revocation of cancellation of allotment and also not interested for any further progress of its proposal.

3.14. The Petitioner-Company (SMCPGL) states that the impugned demand raised under letter dated 28.06.2021 under Annexure-25 to the tune of Rs.13,52,00,322.00 for revocation of cancellation of allotment is illegal, arbitrary, perverse and contrary to law, i.e., the provisions of I& B Code and Liquidation Process Regulations.

The Petitioner-Company (SMCPGL) having received the demand letter dated 28.06.2021 from the IDCO (Opposite Party No.1) under Annexure-25 again made a representation before the Chairman-cum-Managing Director of the Opposite Party No.1 (IDCO) vide letter dated 15.07.2021 under Annexure-26 with a request for waiver of penalty/damage charge. But that went unheeded.

3.15. The Petitioner-Company (SMCPGL) had participated in the E-auction process with a fixed pre-assessed amount for acquiring the assets of the erstwhile CS & PL which included the leasehold land in question. It is said that the Petitioner- Company (SMCPGL) had infused huge amount in making the plant operational. The industrial unit had revived and is operational having provided employment opportunity for more than 3000 persons besides generating revenue for the Government to the tune of Rs.180 crores per annum. The demand made by the IDCO (Opposite Party No.1) is said to be arbitrary and illegal and as the IDCO (Opposite Party No.1) had failed to file any claim with the RP/Liquidator (Opposite Party No.2), it is said that the IDCO (Opposite Party No.1) cannot now seek to recover the said dues from the Petitioner-Company (SMCPGL) which is in contravention of the provisions of the I&B Code and Liquidation Process Regulations. The IDCO (Opposite Party No.1) being Operational Creditors is bound by the outcome of the CRIP in the same method and manner as provided for all other operational creditors of CS & PL.

3.16. The IDCO (Opposite Party No.1) having the knowledge regarding initiation of CIRP proceeding against CS & PL had never made/lodged any claim before the NCLT nor before the RP or even before the Liquidator (Opposite Party No.2) as regard all the said dues which, are now being demanded.

Therefore, it is stated that the claim of IDCO (Opposite Party No.1) against this Petitioner-Company (SMCPGL) for payment of said outstanding dues of SPSS & PL/CS & PL and penalty (damage charge) is also unsustainable in the eye of law since the same patently runs counter to the provisions of the I&B Code read with the Liquidation Process Regulations as well as law laid down by the Apex Court.

The CS & PL was in possession of the land when the IDCO (Opposite Party No.1) issued the letter of cancellation of the allotted land to the SPSS & PL and that was fully within the knowledge of IDCO (Opposite Party No.1) as would be revealed from the fact that the CS & PL was seeking to pay the statutory dues in installments and for revocation of the cancellation of the allotment of the land. The IDCO (Opposite Party No.1) pursuant to the same issued statement directing payment of statutory dues of Rs.69,70,523 to CS & PL. So, it is said that the letter of cancellation of allotment of the land was never given effect to and said statutory dues have already been paid by the Petitioner-Company (SMCPGL) on 09.10.2020 (Annexure-23 series). Demand of Rs.1.92 crores by IDCO towards outstanding statutory dues against SPSS & PL/PS & PL for processing of the Petitioner's application for transfer of land and subsequent payment thereof by the Petitioner-Company (SMCPGL) was

under the compelling circumstance in order to run the unit which was idle even after huge investment is assailed as illegal, arbitrary and contrary to law and thus it is said that the Petitioner-Company (SMCPGL) is entitled to refund of the said deposited amount as the Petitioner-Company (SMCPGL) is not the original allottee but an auction purchaser in the IBC proceeding. All such demands made by the IDCO (Opposite Party No.1) being for the period prior to the vesting assets of the units upon the Petitioner-Company (SMCPGL) as per the action taken in that IBC proceeding by the order of the NCLT are said to be unsustainable.

4. The IDCO (Opposite Party No.1) in its counter affidavit stated all the background facts of the case as regards the allotment of the land to SPSS&PL and PSPL which then came to the hands of SPSS&PL and finally the same coming to rest with CS & PL which of course, though within the knowledge of IDCO (Opposite Party No.1), there has been no final approval.

It is stated that due to non-payment of statutory dues, letter of cancellation of allotment of the land had been rightly issued by the IDCO under Annexure-D/1 series. 4.1. It is admitted by the Opposite Party No.1 (IDCO) that finally by virtue of the order of NCLT, Kolkata Bench on 26.09.2018, the unit in question of CS & PL which was previously SPSS & PL had been sold to the Petitioner-Company-SMCPGL. It is also admitted that the Opposite Party No.2 had been appointed as the Liquidator and the liquidation process having started was completed on 23.12.2019 and in that process the Petitioner-Company (SMCPGL) was the successful bidder. The Petitioner- Company (SMCPGL) having acquired the unit in the public auction carried out by the Liquidator (Opposite Party No.2) under the I&B Code read with the Liquidation Process Regulations, on 15.02.2020 the sale deed was executed by the Liquidator (Opposite Party No.2) in favour of the Petitioner-Company (SMCPGL) and that the Liquidator (Opposite Party No.2) handed over the possession of the assets to the Petitioner-Company (SMCPGL) on 15.02.2020. 4.2. It is further admitted that the Principal Secretary to Government in the Department of Industries had taken a meeting on 09.10.2020 and the decision therein as reflected in the minutes, was that the IDCO (Opposite Party No.1) shall be guided by the order of the NCLT. It is further admitted that the Petitioner-Company (SMCPGL) had deposited Rs.1,92,24,618.00 on 09.10.20 under Annexure-23 series towards the outstanding dues and the IDCO Board thereafter decided to revoke the cancellation of allotment upon release of the demand from the Petitioner-Company (SMCPGL) towards damage and GST as per their Circular under Annexure-24 series. It is stated that the total area of land in the hands of SPSS & PL was Ac.196.188 and consequent upon the transfer of the share of SPSS & PL in favour of CS & PL, Government in the Department of Steel and Mines vide letter dated 28.03.2014 had observed that this change of the name of the unit would be considered for the acts already done/to be done by the proponent pursuant to the original MOU. So, it is said that IDCO (Opposite Party No.1) had not approved the change of the name of the SPSS & PL.

It is then, however, admitted that PSPL had made a representation to the IDCO (Opposite Party No.1) on 06.06.2017 and 20.06.2017 that due to labour unrest, the unit had been put on suspension of work with effect from 01.01.2017 and it had requested for waiver of the interest and penal interest and to allow them to pay the outstanding dues in installments. It is stated that as per the IDCO norms, there is no provision of waiver of interest. It is also stated that on receipt of the cancellation letters, CS & PL had represented to the IDCO for revocation of cancellation of allotment of land. But

the reply had been given that in the default of payment of outstanding dues in deviation of the Clause in the agreement executed between the IDCO and SPSS & PL the allotment had been cancelled and that was intimated vide letter dated 02.06.2017 under Annexure 4/1.

4.3. It is further stated that CS & PL then vide letter dated 04.12.2017 intimated the IDCO about the initiation of CIRP by the NCLT, Kolkata Bench vide its order dated 07.11.2017. It is also admitted that the CS & PL then had informed the IDCO that the outstanding dues would be paid through NCLT route, in further apprising that the matter had been published in the Company website and English Newspaper (Business Standard) on 22.11.2017 fixing the last date of submission of claims as 08.12.2017. It is also admitted that the IDCO, did not file any claim therein.

It is next stated that IDCO was not aware of the fact regarding change of IRP and appointment of the Opposite Party No.2 as RP. It is stated that IDCO (Opposite Party No.1) being the owner of the leased lands had not received any notice from the RP for filing any claim.

It is next stated that by the time the auction was carried out by the order of the Adjudicating Authority (NCLT), leasehold land was under the occupation of the CS & PL and it had already been cancelled on 16.03.2017 for nonpayment of the statutory dues. Therefore, it is said that cancellation ought to have been revoked before the auction and then the auction ought to have been carried out which has not been done in the present case.

4.4. It is thus asserted that rightly the decision had been taken for revocation of the cancellation of allotment of the land payment since all such outstanding dues including the penalty (damage charges) and GST are payable by the Petitioner-Company (SMCPGL), which has been impliedly consented to by the Petitioner-Company (SMCPGL).

In view of all the aforesaid, it is said that the Petitioner- Company (SMCPGL) has to pay the damage charges with GST to the tune of Rs.11,45,76,544/- and Rs.2,06,23,778/- besides the payment of Rs.1.92 crores already made.

5. The prayer thus now is limited as to refund of the all said demanded amount to the Petitioner-Company (SMCPGL) including what has already been paid. Submissions:-

6. Mrs. Pami Rath, learned Senior Counsel for the Petitioner-Company (SMCPGL) referring to the provision of section 3(6), 3(10), 3(11), 3(12), 5(7) and 5(8) of I & B Code, particularly to clause (d) thereunder submitted that the IDCO (Opposite Party No.1) and its due were covered by the legislation, i.e., the I&B Code.

She further submitted that sections 6 and 7 of the I&B Code allowed the IDCO (Opposite Party No.1) to initiate Insolvency Resolution Process and thus IDCO (Opposite Party No.1) was squarely covered under the I&B Code as regards its dues. According to her, section 14, particularly Clause (d) of sub-section (1) of said section of the I&B Code protects the right of possession over any property of the Corporate Debtor and section 15 provides modalities of public announcement to be made in terms of section 13 of the I&B Code. The said section 13 also postulates appointment of IRP (Interim

Resolution Professional). Section 15(1)(d) of the I&B Code states that the IRP shall receive all the claims and the management of the Corporate Debtor shall vest in the IRP as provided in section 17 of the I&B Code. She further submitted that section 18 of the I&B Code provides that the IRP was the person to whom all the creditors are duty bound to make fair disclosure of all liabilities and assets, as per section 21 after collecting all such information and the liabilities, the IRP would form a CoC (Committee of Creditors). She, therefore, submitted that had the IDCO (Opposite Party No.1) made the claim/s as regards the dues which are now demanded against the Petitioner-Company (SMCPGL); it would have been very much a party to it. She also submitted that as per section 34(2) of the I&B Code on the appointment of the Liquidator all powers shall vests in the Liquidator. When section 35(1) (a),

(b), (f), (j), (m) and section 36 of the IBC clearly lay down that the Corporate Debtor can no more function and all claims against it and the assets then would be at the disposition of the Liquidator. She further submitted that when section 39 of the I&B Code gives the power to the Liquidator to verify the claim, section 40 empowers the Liquidator to admit or reject the claims and section 41 of the I&B Code gives the exclusive power to the Liquidator to make valuation of the claim whereafter section 42 of the I&B Code provides a forum of Appeal against the decision of the Liquidator and sections 53 of the IBC deals with the distribution of assets whereas section 54 of the I&B Code deals with the dissolution of the Corporate Debtor.

6.1. Mrs. Rath, submitted that in the case at hand, the Corporate Debtor (CS & PL) was in possession of the land of the IDCO (Opposite Party No.1) as the IDCO has never evicted the Corporate Debtor (CS & PL) or taken possession of the same and rather it was with their full knowledge. Therefore, as per section 14(1) (d) of the I&B Code, the right to possession being recognized as a right, was not to be disturbed, once the moratorium was declared. She next submitted that Annexure-2,3,8,9,11,12,13 and 14 being read together, it would be evident that the IDCO (Opposite Party No.1) was aware of the proceeding under the I&B Code and also regarding the provisions therein, that required the IDCO (Opposite Party No.1) to lodge the claims. Referring to the events dated 07.11.2017, 22.11.2017, 04.12.2017, 09.01.2018, 21.02.2018, 26.09.2018, 29.09.2018, 26.12.2018 and 22.11.2019/23.11.2019, she submitted that IDCO (Opposite Party No.1) at all these stages was given the opportunity to lodge its claim and was duty bound to do so if it wanted the past debt to be recovered. She then submitted that as per the Codal provisions, the present transaction in favour of the Petitioner-Company (SMCPGL) was not a transfer of liabilities and the Petitioner-Company (SMCPGL) did not step into the shoes of the erstwhile CS & PL but as per section 64 of the Code, all liquidation of the assets of the Corporate Debtor (CS & PL), the Corporate Debtor (CS & PL) stood dissolved and that liquidation has resulted in the legal death of the entity after sale of all its assets and, therefore, there is no transfer of liabilities. But, only discharge of the liabilities out of the sale proceeds are to be carried out. She thus submitted that in view of the provision contained in sections 33 to 54 of the I&B Code, the only way by which that the IDCO (Opposite Party No.1) can recover its dues is by approaching the Liquidator (Opposite Party No.2) resorting to the provisions of law, if so permitted.

In order to buttress her submission, she relied upon the decisions of the Hon'ble Apex Court in case of Essar Steel India Limited, Committee of Creditors Vrs. Satish Kumar Gupta & Others (2020) 8

SCC 531; Ghanashyam Mishra and Sons Private Limited through the Authorized Signatories Vrs. Edelweiss Asset Reconstruction Company Limited & Others, through the Directors and Others, (2021) 9 SCC 657 and a decision of this Court in case of M/s. Sree Metaliks Ltd. & Another Vrs. State of Odisha and Others in W.P.(C) No.8259 of 2019 disposed of an 21.06.2021.

7. Mr. P.K. Mohanty, learned Senior Counsel for the IDCO (Opposite Party No.1) submitted that the IDCO (Opposite Party No.1) is a Public Authority, Government of Odisha Undertaking and also Statutory Authority under the Odisha Industrial Infrastructure Development Corporation Act, 1980. It owes the responsibility to protect the public money. He further submitted that it may be under bona fide mistake and also impression that the dues as aforesaid under Annexure 23 series (Rs.1,92,24,618/-) and Annexure-25 (Rs.11,62,00,322/-) should be recovered from the subsequent purchaser from the earlier allottee (which in the present case is the Petitioner- Company-SMCPGL); somehow did not submit its claim before the RP pursuant to the public notice or thereafter. He submitted that under the circumstance, this Court, being a Court of equity, if holds that the Petitioner-Company- SMCPGL is not liable to pay the dues, in that event the legal right of the IDCO (Opposite Party No.1) be kept alive and liberty may be given to move the Liquidator under section 39 read with section 40 of the I&B Code with a petition for condonation of delay in laying the claim for determination of the claim dues so as to be received as payment from out of the sale proceeds already obtained through the auction of the property and the period of pendency of the writ petition be not counted towards the delay in submitting the claim and/or to take recourse such other remedy as available under the I&B Code to protect the dues of the IDCO (Opposite Party No.1). In support of said submission, he relied on the decision of the Apex Court in Greater Noida Industrial Development Authority Vrs. Prabhjit Singh Soni & Another (2024) 2 SCR 258 and contended that even at a belated stage, the claim of an Public Authority can be entertained.

8. We have meticulously gone through the written notes of submission filed by the Petitioner-Company (SMCPGL) and the IDCO (Opposite Party No.1).

Analysis and Finding:-

9. The I & B Code is a complete Code in itself which deals with situations on a holistic perspective concerning a Company and all stake holders, irrespective of whether the provisions pertains to the Resolution Plan or the Liquidation Process. It is self sufficient Code and provides a complete mechanism in respect of Corporate Insolvency Resolution (CIR) and liquidation.

The I&B Code is divided in to two halves. Firstly, sections 1 to 32 are concerned with reconstruction of the Company by Resolution Process. Secondly, Section 33 of onwards deals with the Liquidation if resolution plan/s is/are not received or rejected and thus resolution is not possible.

10. The central issue being the alleged outstanding owed by the Petitioner-Company (SMCPGL) to the IDCO (Opposite Party No.1); it is not disputed by the IDCO (Opposite Party No.1) that the aforementioned demand pertains to the period prior to the initiation of the Corporate Insolvency Resolution Process (CIRP) against the CS & PL which was admitted by NCLT by order dated 07.11.2017. The scenario that on the basis of afore-stated recapitulation of facts, would indicate that

when IRP on 22.11.2017 made a public announcement with regard to the initiation of the CIRP through widely circulated Newspaper (Annexure-8) as per the provision of section 13 of the I&B Code, the IDCO (Opposite Party No.1) had not lodged its claim upon the initiation of the CIRP. When it failed and it was resolved by the CoC to liquidate the Company and after such order of the NCLT for liquidation of the Company (CS & PL), appointing the RP as the Liquidator (Opposite Party No.2), the Liquidator (Opposite Party No.2) once again called for lodging of claims by way of public announcement under Liquidation Process Regulations and then also no claim was lodged by IDCO (Opposite Party No.1) in accordance with Regulation 31-A of the Liquidation Process Regulations.

11. The relevant Regulations, i.e., Regulations 6, 7, 10, 12 and 13 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for short, the Insolvency Resolution Process Regulations) governing and regulating the Insolvency Resolution Process (IRP) for Corporate Persons read as under:

6. Public announcement.--

(1) An insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional.

Explanation: 'Immediately' means not later than three days from the date of his appointment.

(2) The public announcement in sub-regulation (1) shall: (a) be in Form A of the Schedule; (b) be published--

(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations; (ii) on the website, if any, of the corporate debtor; and (iii) on the website, if any, designated by the Board for the purpose, (ba) state where claim forms can be downloaded or obtained from, as the case may be; (bb) offer choice of three insolvency professionals identified under Regulation 4- A to act as the authorised representative of creditors in each class; and (c) provide the last date for submission of proofs of claim, which shall be fourteen days from the date of appointment of the interim resolution professional.

(3) The applicant shall bear the expenses of the public announcement which may be reimbursed by the committee to the extent it ratifies them.

7. Claims by operational creditors.-

(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit claim with proof to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the Committee.

(2) The existence of debt due to the operational creditor under this regulation may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents, including-- (i) a contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor; (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; (iv) financial accounts. (v) copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Services Tax and the copy of e-way bill wherever applicable: Provided that provisions of this sub-clause shall not apply to those creditors who do not require registration and to those goods and services which are not covered under any law relating to Goods and Services Tax.

10. Substantiation of claims.-

The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

xxx xxx xxx xxx

12. Submission of proof of claims.-

(1) Subject to sub- regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

12-A. Updation of claim.-A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.

13. Verification of claims.-

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be- (a) available for inspection by the persons who submitted proofs of claim; (b) available for inspection by members, partners, directors and guarantors of the corporate debtor or their authorised representatives; (c) displayed on the website, if any, of the corporate debtor; (ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020; (d) filed with the Adjudicating Authority; and (e) presented at the first meeting of the committee."

12. When the Resolution Process does not yield any success or no application is received and in certain other situations, the Corporate Debtor enters into the liquidation phase, section 33 of the I&B Code comes into play, which is extracted herein below:-

Section 33 - Initiation of liquidation (1) Where the Adjudicating Authority, --

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall-

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 2[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-

clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority 4[under section 31 or under sub- section (1) of section 54L] is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses

(i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator."

13. Upon initiation of liquidation, a liquidator has to be appointed, to carry out the liquidation process and manage other affairs of the corporate debtor. The RP, appointed to conduct the resolution process, is ordinarily appointed as liquidator. The powers and duties of liquidator are prescribed by Section 35 of the I&B Code. It includes verification of claims of creditors, evaluation of assets of the corporate debtor, carrying on the business of the corporate debtor, taking into consideration the assets of the corporate debtor, etc. The liquidator has to issue a public announcement within 5 days from appointment in a prescribed format; the purpose of public announcement is to call upon creditors and others persons to submit their claims in relation to the corporate debtor. The creditors of the corporate debtor have to send their claims within 30 days from the initiation of the liquidation process. After the receipt of the claims, the liquidator has to verify the claims submitted by the creditors (Section 39). The liquidator may also ask the creditors to submit any evidence in relation to their claims for the purpose of verification.

14. The Liquidator is empowered to either admit or reject the claims on the basis of due verification. If the liquidator rejects or admits a claim of a creditor, the same has to be communicated to the creditor as well as the corporate debtor within 7 days from such decision (Section 40). The liquidator has to concurrently determine what constitutes the "liquidation estate". Section 36 (3) lists out the various assets and claims, etc. which form the liquidation estate.²² After the admission of claims, the liquidator has to determine the value of the claims, for the purpose of distribution of assets of the Corporate Debtor. (Emphasized)

15. In terms of Regulation 47 of the Liquidation Regulations, liquidation proceedings should be completed within 1 year from the date of its initiation.

This contrasts with the extendable time limit of 330 days, for the resolution process under I & B Code.

16. During the insolvency resolution process, a secured creditor is not permitted to realize its dues by initiating any proceeding. This is by virtue of Section 14 (1) (c) which enables the imposition of a moratorium period, during which a secured creditor is precluded from bringing any action to foreclose, recover or enforce any security interest. Secured creditors' rights are restored only in the event of failure of the insolvency resolution process, at the stage of liquidation.

17. Regulations 16, 17, 31, 31A, 32, 32-A and 33 of the Liquidation Process Regulations, read as under:

"16. Submission of claim.

(1) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement.

(2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

17. Claims by operational creditors.

(1) A person claiming to be an operational creditor of the corporate debtor, other than a workman or employee, shall submit proof of claim to the liquidator in person, by post or by electronic means in Form C of Schedule II.

(2) The existence of debt due to an operational creditor under this Regulation may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents which adequately establish the debt, including any or all of the following -

(i) a contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;

(iii) an order of a court or tribunal that has adjudicated upon the non- payment of a debt, if any; and

(iv) financial accounts.

31. List of stakeholders.

(1) The liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with-

(a) the amounts of claim admitted, if applicable,

(b) the extent to which the debts or dues are secured or unsecured, if applicable,

(c) the details of the stakeholders, and

(d) the proofs admitted or rejected in part, and the proofs wholly rejected.

(2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims, and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3).

(3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority.

(4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42.

(5) The list of stakeholders, as modified from time shall be-

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor.

31A. Stakeholders' Consultation Committee.

(1) The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32.

(2) The composition of the consultation committee under sub-regulation (1) shall be as shown in the Table below:

Class of Description Stakeholders			Number of Representatives	
(1)	(2)	(3)		
	Secured financial creditors, who have relinquished under section 52	Where claims of such creditors admitted during the liquidation process is less than 50% of liquidation value	Number of creditors in the category, subject to a maximum of 2	of
	Unsecured financial creditors	Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value	Number of creditors in the category, subject to a maximum of 1	of
		Where claims of such creditors	Number	of

admitted during the liquidation creditors in the process is at least 50% of liquidation category, subject to value a maximum of 4 Where claims of such creditors Number of creditors in the admitted during the category, subject to a liquidation process is at least maximum of 2 25% of liquidation value Workmen and 1 1 employees Government 1 1 [Operational Where claims Number of creditors creditors other of such in the category, than Workmen, creditors subject to a employees and admitted maximum of 1 Governments during the liquidation process is less than 25 % of liquidation value Where claims of such Number of creditors in creditors admitted during the category, subject to a the liquidation process is at maximum of 2 least 25% of liquidation value s or partners, if any (3)The liquidator may facilitate the stakeholders of each class to nominate their representatives for inclusion in the consultation committee.

(4) If the stakeholders of any class fail to nominate their representatives, the required number of stakeholders with the highest claim amount in that class shall be included in the consultation committee.

(5) Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator under sub-regulation (1).

(6) The liquidator shall convene a meeting of the consultation committee when he considers it necessary and shall convene a meeting of the consultation committee when a request is received from at least fifty-one percent of representatives in the consultation committee.

(7) The liquidator shall chair the meetings of consultation committee and record deliberations of the meeting.

(8) The liquidator shall place the recommendation of committee of creditors made under sub-regulation (1) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before the consultation committee for its information.

(9) The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, present and voting.

(10) The advice of the consultation committee shall not be binding on the liquidator:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing.

32. Sale of Assets, etc.- The liquidator may sell-

(a) an asset on a standalone basis;

(b) the assets in a slump basis;

- (c) a set of assets collectively;
- (d) the assets in parcels;
- (e) the corporate debtor as a going concern; or
- (f) the business (s) of the corporate debtor as a going concern:

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.

32-A. Sale as a going concern.

(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.

(2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.

(3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

(4) If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.

33. Mode of sale.

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I. (2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-

- (a) the asset is perishable;

(b) the asset is likely to deteriorate in value significantly if not sold immediately;

(c) the asset is sold at a price higher than the reserve price of a failed auction; or

(d) the prior permission of the Adjudicating Authority has been obtained for such sale: Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(a) a related party of the corporate debtor;

(b) his related party; or

(c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties."

18. At this juncture, we need to take into account the provisions contained in sections 7, 29, 31, 33, 52 and 53 of the I&B Code, which read as under:-

"7. Appointment of professionals.

(1) A liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost.

(2) The liquidator shall not appoint a professional under sub-regulation (1) who is his relative, is a related party of the corporate debtor or has served as an auditor to the corporate debtor in the five years preceding the liquidation commencement date.

(3) A professional appointed or proposed to be appointed under sub-regulation (1) shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders, or the concerned corporate debtor as soon as he becomes aware of it, to the liquidator.

29. Mutual credits and set-off.

Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party. Illustration: X owes Rs. 100 to the corporate debtor. The corporate debtor owes Rs. 70 to X. After set off, Rs. 30 is payable by X to the corporate debtor.

31. List of stakeholders.

(1) The liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with- (a) the amounts of claim admitted, if applicable, (b) the extent to which the debts or dues are secured or unsecured, if applicable, (c) the details of the stakeholders, and (d) the proofs admitted or rejected in part, and the proofs wholly rejected.

(2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims, and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3).

(3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority.

(4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42. (5) The list of stakeholders, as modified from time to time, shall be-

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor.

33. Mode of sale.

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I. (2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when- (a) the asset is perishable; (b) the asset is likely to deteriorate in value significantly if not sold immediately; (c) the asset is sold at a price higher than the reserve price of a failed auction; or (d) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to (a) a related party of the corporate debtor; (b)

(b) his related party; or (c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's

related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.

52. A secured creditor in the liquidation proceedings may-

(1) A secured creditor in the liquidation proceedings may-

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either-

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall--

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53."

53-Distribution of assets.

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following :--

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be. (2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.--For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013."

19. Reliance was placed on the decision of the Hon'ble Apex Court in case of Ghanashyam Mishra and Sons Private Limited (supra).

The Supreme Court in the aforesaid case after an extensive review of the I&B Code and various decisions rendered thereunder, observed that once the resolution plan is approved, it becomes binding on the stakeholders including creditors. Relevant paragraphs of the judgement read as under:

"65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.

66. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53,

whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of 62 the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with subsection (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of subsection (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of subsection (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum.

68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities, that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in subsection (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved.

69. This aspect has been aptly explained by this Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra).

"107. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and

by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided"

claims after the resolution plan submitted by him has been accepted as 65 this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

70. In view of this legal position, we could have very well stopped here and held, that, the observation made by NCLAT in the appeal filed by EARC to the effect, that EARC was entitled to take recourse to such remedies as are available to it in law, is impermissible in law.

71. As held by this Court in the case of Pr. Commissioner of Income Tax vs. Monnet Ispat and Energy Ltd.¹⁰, in view of provisions of Section 238 of I&B Code, the provisions thereof will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of any such law. As such, the observations made by NCLAT to the aforesaid effect, if permitted to remain, would frustrate the very purpose for which the I&B Code is enacted.

72. However, in Civil Appeal arising out of Special Leave Petition (Civil) No.11232 of 2020, Writ Petition (Civil) No.1177 of 2020 and Civil Appeals arising out of Special Leave Petition (Civil) Nos. 71477150 of 2020, the issue with regard to the statutory claims of the State Government and the Central Government in respect of the period prior to the approval of resolution plan by NCLT, will have to be considered.

73. Vide Section 7 of Act No.26 of 2019 (vide S.O. 2953(E), dated 16.8.2019 w.e.f. 16.8.2019), the following words have been inserted in Section 31 of the I&B Code. "including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed"

74. As such, with respect to the proceedings, which arise after 16.8.2019, there will be no difficulty. After the 67 amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished....

79. In the Rajya Sabha debates, on 29.7.2019, when the Bill for amending I&B Code came up for discussion, there were certain issues raised by certain Members. While replying to the issues raised by certain Members, the Hon'ble Finance Minister stated thus:

"IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC.

There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the hon. Members to recognize this message and communicate further that this Code, therefore, gives that comfort to all new bidders. So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear. (emphasis supplied)"

80. It could thus be seen, that in the speech the Hon'ble Finance Minister has categorically stated, that Section 238 provides that I&B Code will prevail in case of inconsistency between two laws. She also stated, that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated, that the Government will not make any further claim after resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated, that she would want all the Hon'ble Members to recognize this message and 73 communicate further that I&B Code gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states, that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company.

84. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was Granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such

claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

93. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in subsection (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can Grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

94. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

102. In the result, we answer the questions framed by us as under:

102.1 That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

102.2 The 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code

has come into effect; 102.3 Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority Grants its approval under Section 31 could be continued."

20. Admittedly, in the present case, when the CIRP was undertaken, claims were invited; the IDCO (Opposite Party No.1) did not lodge any such claim and that having not been done, the IDCO (Opposite Party No.1) had also no occasion to update the claim during Liquidation Process. Thereafter, at the stage of liquidation also IDCO (Opposite Party No.1) did not come forward to lodge any such claim.

The Hon'ble Supreme Court in case of Ghanashyam Mishra & Sons (supra) considered all other earlier decisions including the Essar Steel India Limited, Committee of Creditors (Supra) and Maharashtra Seamless Ltd., Vrs. Padmanavan Venketesh & Others (2020) 11 SCC 467 and Innovative Industries Vrs. ICICI Bank, (2018) 1 SCC 407. The Hon'ble Supreme Court also referred to its earlier decision in K. Sashidhar Vrs. Indian Overseas Bank (2019) 12 SCC 150. After discussing all the above judgments, the Hon'ble Supreme Court in Ghanashyam Mishra & Sons Private Ltd. (supra) has held as under:-

"57. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by Adjudicating Authority is limited to the extent provided under Section 31 of I&B Code and of the Appellate Authority is limited to the extent provided under subsection (3) of Section 61 of the I&B Code, is no more res integra.

58. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.

59. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with

sub section (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of sub section (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors.

The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of subsection (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

60. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in subsection (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved."

21. As pointed out in *Ghanashyam Mishra & Sons Private Ltd.* (supra); after the approval of the Resolution Plan, no surprise claim should be flung on the successful resolution of the applicant. (Emphasized) Further the resolution Applicant "should start with fresh slate on the basis of the resolution plan approved".

22. The liquidation as envisaged in the I&B Code is not a mere isolated off shoot of Insolvency Resolution Proceeding but is one of the logical conclusion of the Resolution Proceeding. The procedure as contemplated in the I&B Code is an integrated continuum.

23. Now to examine the scheme of liquidation under the I&B Code in such context, section 51 (18) of the I&B Code has to be considered.

The said sub-section provides that the Liquidator means an Insolvency Professional appointed as Liquidator in accordance with the provisions of Chapter-III, Chapter-V of Part-2 as the case may be. Section 5(20) of the I&B Code stipulates that "Operational Creditor" means a person to whom an Operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred. Section 5(21), on the other hand, defines "Operational Debt" as a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Section 33, I&B Code provides for initiation of liquidation. It is clear from a plain reading of Section 33 that liquidation begins where a Corporate Insolvency Resolution fails.

23.1. Section 35 stipulates the powers and duties of the liquidator. Clauses (a) to(d), (f) and (j) of Section 35, sub- section (1) are relevant in the context. Clause (a) empowers the liquidator to verify claims of all the creditors, Clause (b) to take into custody or control all the assets, property, effects and actionable claims of the corporate debtor, Clause (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report and Clause (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary. Clause (f) confers power on the Liquidator, subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate or to sell the same in parcels in such manner as may be specified.

The proviso thereto says that the liquidator shall not sell immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

Clause (j) empowers the liquidator to invite and settle claims of the creditor and claimants and distribute proceeds in accordance with the provisions of the Code.

Section 38 of the IBC provides for consolidation of claims by the liquidator, Section 39 the verification of claims and Section 40 deals with the admission or rejection of claims by the liquidator.

Hence, the powers of the liquidator are on a similar footing as those of a Resolution Professional in a resolution proceeding with the distinction that where the actions carried out by Resolution Professionals (RP) when are more or less administrative in nature, the Liquidator discharges quasi judicial function while admitting and rejecting the claim independently assessing the merit based on documents which orders are appealable under section 41 and 42 of the I&B Code.

In this context, when it can be said that the IRP/RP assists in the process of continuation of Corporate Debtor; the liquidator assists upon to prepare the liquidation estate to institute eventual dissolution of the Corporate Debtor.

Unlike CIRP, post completion of liquidation of Corporate-Debtor; creditors do not have any recourse to claim settlement. It is also noteworthy that Section 5 (18) of the IBC stipulates that a Liquidator has to be a Resolution Professional in the first place.

23.2. Section 53 provides for distribution of assets in liquidation and sets out the order of priority of distribution of proceeds from the sale of the liquidation assets.

The sixth category in such pecking order is Section 53(1)(f), "any remaining debts and dues". Clause (f) is the only provision in Section 53 which confers rights on the operational creditors to recover their dues.

As such, Section 53 is the culmination of the entire endeavour of the Liquidator and the order of priority given therein cannot be overridden by any of the operational creditors of the corporate debtor by jumping the queue in contravention of the priorities enumerated in Section 53. 23.3. What is next relevant is Regulation 32 of the Liquidation Process.

The different types of sale of asset have been enumerated therein. Up to Clause (d) of Regulation 32, sale of assets is dealt with. Clause(e) provides for sale of the corporate debtor as a going concern. Again, Clause(f) contemplates the business of the Corporate Debtor being sold as a going concern.

Regulation 32-A of the said Regulations provides for sale as a going concern. Sub-regulation(2) of Regulation 32-A stipulates that for the purpose of sale under Sub-regulation (1), the group of assets and liabilities of the Corporate Debtor, as identified by the Committee of Creditors under sub-regulation (2) of Regulation 39-C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, shall be sold as a going concern.

23.4. On the other hand, Regulation 32-A (3) provides that where the Committee of Creditors has not identified the assets and liabilities under sub- regulation (2) of Regulation 39-C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

24. It is evident from the schematic arrangement of the I&B Code, in respect of Liquidation, is that the pecking order as stipulated in Section 53 of the I&B Code cannot be superseded by any of the categories as provided therein. The said provision is set out below for convenience of ready reference "53. Distribution of Assets. - (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:-

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be. (2) Any contractual arrangements between recipients under sub- section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.- For the purpose of this section--

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients , if the proceeds are insufficient to meet the debts in full; and class of recipients, if the proceeds are insufficient to meet the debts in full; and class off recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013."

Thus, the operational creditors, who fall within category

(f), that is, "any remaining debts and dues", cannot claim any priority over the preceding categories in having their debts paid off.

25. However, it is worth considering what precisely will happen if the demand of the IDCO (Opposite Party No.1) is accepted in the context of expression "sale of going concern", as used in the I&B Code and connected Regulations in respect of liquidation, to construe and include transfer of pre-CIRP liabilities of the Corporate Debtor.

Regulation 32-A of the Liquidation Process Regulations clearly specifies that "liabilities" for the purpose of going concern sales in liquidation are only those liabilities which have been identified and earmarked for the going concern sale by the Committee of Creditors, if not, by the liquidator.

Section 53 of the I&B Code which, again, is preceded by a non obstante clause, can be attributed to the expression "going concern sale", as contemplated in Rule 32 of the Liquidation Process Regulations.

These dues which are presently demanded by the IDCO (Opposite Party No.1) to be paid by the Auction Purchaser (Petitioner-Company-SMCPGL), of the Corporate Debtor in the Liquidation Process do not operate a charge on the assets of the Corporate Debtor.

Hence, the sale of the Corporate Debtor and the business(es) of the Corporate Debtor as a going concern, as envisaged in Regulation 32, Clauses (e) and (f) respectively, do not contemplate automatic transfer of all Pre-CIRP liabilities of the Corporate Debtor to the Auction Purchaser.

26. Taking a pause here, we feel it apposite at this stage also refer to the recent judgment in case of Moser Baer Karmachari Union Vrs. Union of India (2023) 9 SCC 499, which has been duly taken note of in the decision of the Hon'ble Supreme Court in case of Paschimanchal Vidyut Vitaran Nigam Ltd., Vrs. Raman Ispat Pvt. Ltd., (2023) 10 SCC 60, which we feel is necessary to be borne in mind while dealing the matters like the one in our hand. It has been held therein:-

"49. The Code is based on the organic evolution of law and is a product of an extensive consultative process to meet the requirements of the Code governing liquidation. It introduced a comprehensive and time-bound framework to maximise the value of assets of all persons and balance the interest of the stakeholders. The guiding principle for the Code in setting the priority of payments in liquidation was to bring the practices in India in line with global practices. In the waterfall mechanism, after the costs of the insolvency resolution process and liquidation, secured creditors share the highest priority along with a defined period of dues of the workmen. The unpaid dues of the workmen are adequately and significantly protected in line with the objectives sought to be achieved by the Code and in terms of the waterfall mechanism prescribed by Section 53 of the Code. In either case of relinquishment or non-relinquishment of the security by the secured creditor, the interests of workmen

are protected under the Code. In fact, the secured creditors are taking significant hair-cut and workmen are being compensated on an equitable basis in a just and proper manner as per Section 53 of the Code. The Code balances the rights of the secured creditors, who are financial institutions in which the general public has invested money, and also ensures that the economic activity and revival of a viable company is not hindered because it has suffered or fallen into a financial crisis. The Code focuses on bringing additional gains to both the economy and the exchequer through efficiency enhancement and consequent greater value capture.

50. In economic matters, a wider latitude is given to the law- maker and the Court allows for experimentation in such legislations based on practical experiences and other problems seen by the law-makers. In a challenge to such legislation, the Court does not adopt a doctrinaire approach. Some sacrifices have to be always made for the greater good, and unless such sacrifices are prima facie apparent and ex facie harsh and unequitable as to classify as manifestly arbitrary, these would be interfered with by the court."

:(2023) 9 SCC 19) (supra)

27. It has been further said in case of Paschimanchal Vidyut Vitaran Nigam Ltd., (supra):-

41. It is hence clear that the provisions of IBC are carefully thought out and give options to secured creditors, and balance their interests with those of other creditors in a liquidation proceeding.

28. In another recent ruling of the Supreme Court in case of K.C.Ninan Vrs. Kerala SEB (2023) 14 SCC 431 examining the circumstances' in which such a charge could be constituted in law, it has been held thus:-

"Consequently, in general law, a transferee of the premises cannot be made liable for the outstanding dues of the previous owner since electricity arrears do not automatically become a charge over the premises. Such an action is permissible only where the statutory conditions of supply authorise the recovery of outstanding electricity dues from a subsequent purchaser claiming fresh connection of electricity, or if there is an express provision of law providing for creation of a statutory charge upon the transferee."

29. At this juncture, it is pertinent to refer to Clause 'H' of the deed of sale in question between the Corporate Debtor (in liquidation) acting through its Liquidator (Opposite Party No.2) referred to as the Owner and the Petitioner-Company (SMCPGL) dated 15.02.2020. The said Clause 'H' reads as under:-

"H. The E-action was conducted on December, 23, 2019 and the purchaser was declared as the highest bidder at the price of INR 288,55,00,000 (Indian Rupees Two

Hundred Eighty-Eight Crores and Fifty-Five Lacs only), inclusive of the Escrow amount (hereinafter defined) (Sale Consideration) plus taxes as applicable for the assets listed in Schedule I and Schedule II hereto (collectively the Scheduled assets), pursuant to which a letter of intent was issued by the Liquidator in favour of the purchaser on January, 06, 2020 and was executed by Purchaser on January 06, 2020."

The parties thereto in consideration of the mutual covenants, terms and conditions and understandings set forth in the deed, legally bound themselves that the Schedules to the Deed would form part of the deed. It has been further clarified that the right, title and interest which the owner has on the Schedule Assets as on the date of the deed has been transferred to the Purchaser on "As is Where is", "As is What is"

and "whatever there is" basis. Thus, the transfer of right, title and interest which the Corporate Debtor represented by the liquidator had stood transferred on "As is where is" "As is what is" and "Whatever there is". This is quite distinct then what those generally postulates that the purchaser would be acquiring the assets with all its existing rights, obligations and liabilities; that when a property is sold on an 'as is where is basis'; the encumbrances on the property stand transferred to the purchaser upon the sale. All these, appear to have been so provided in the deed keeping in view the contrary intention if expressed would run/stand to counter the intention behind the legislation and the final objective sought to be achieved by the I&B Code.

30. Subsequently upon execution of the deed, the Owner through the Liquidator has delivered to the Purchaser the physical possession of all the assets specified at Part-A of Schedule-I of the deed, at their then current locations. The detail history and description of lease hold land very much finds place in Schedule-II of the said deed.

31. Thus we find no such stipulation thereunder that the Purchaser, i.e., the Petitioner-Company (SMCPGL) will be liable to pay the prior statutory dues and the damage charge as now being levied upon the Petitioner-Company (SMCPGL) by the IDCO (Opposites Party No.1) running from the time before the initiation of the Corporate Insolvency Process. In that connection, it would also be profitable to refer to the letter of the Liquidator (Opposite Party No.2) dated 23rd March, 2020. The Liquidator (Opposite Party No.2) has confirmed that the sale to the Petitioner-Company (SMCPGL) was only of the assets (Asset Lot No.4), the unit of the Corporate Debtor at Jharsuguda, Odisha and that no past liabilities pertaining to the assets or in the running of the unit was transferred to the Petitioner-Company (SMCPGL) nor that the Petitioner- Company (SMCPGL) had thereby assumed any liability towards discharge of the same. It has been further clarified that the Purchaser (Petitioner-Company-SMCPGL) had not assumed any liability of any nature, whatsoever in relation to Jharsuguda Unit-Lot No.4, the cause of action in relation to which had arisen before the date of the sale deed and that such liability would be dealt by the Liquidator (Opposite Party No.2) in accordance with section 53 of the I & B Code. Therefore, even an argument that the asset was sold on a condition of "As is Where is", "As is What is" and "whatever there is" basis, the demand of the IDCO (Opposite Party No.1) of the dues to be paid by the Petitioner-Company (SMCPGL), which is

the subject matter of the present proceeding is untenable. This too is, in our opinion, a clause that relieves the Petitioner-Company (SMCPGL) of the liabilities to pay the statutory dues and the demand fees raised by the IDCO (Opposite Party No.1).

32. Even otherwise as per the section 100 of the Transfer of Property Act, 1862, a charge cannot be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of such charge as the bona fide transferee for value as that carves out with-save as otherwise expressly provided by any law for the time being in force which can be enforced against any property in the hands of a person to whom property has been transferred for consideration and without notice of the charge.

33. In *AI Champdany Industries Ltd. v. Official Liquidator*; (2009) 4 SCC 486; the Apex Court held that such a provision of law should not merely create a charge, but it must expressly provide for the enforcement of a charge against the property in the hands of a transferee for value without notice of the charge.

34. In *Haji Abadulgafur Haji Husseinbhai*, (1971) 1 SCC 757; the Hon'ble Supreme Court considered the doctrine of constructive notice as provided under Section 100. In that case, the Municipal Corporation had a charge on the property of a person who was in arrears of property tax. An auction purchaser, who became the owner of the property, resisted the attempt of the Municipal Corporation to recover the arrears of pending taxes in exercise of its charge on the ground that they were not aware of the past municipal tax arrears. The Corporation argued that the transferee was imputed with constructive knowledge of the charge created against the property due to Section 141 of the Bombay Provincial Municipal Corporations Act 1949. The Court held against the Municipal Corporation on the ground that in the facts of the case, the plaintiff did not have constructive notice of the arrears of municipality.

35. While explaining the purport of Section 100 of the T.P. Act, 1862, the Hon'ble Supreme Court held that the second half of Section 100 enacts a general prohibition and no charge can be enforced against property in the hands of a transferee for consideration without notice of the charge. In terms of Section 100, an exception to this rule must be expressly provided by law. The Court held that whether a transferee has actual or constructive notice which satisfies the requirement of notice in the proviso to Section 100, must be determined in the facts and circumstances of each case. It has been observed:

"4. This section in unambiguous language lays down that no charge is enforceable against any property in the hands of a transferee for consideration without notice of the charge except where it is otherwise expressly provided by any law for the time being in force. The saving provision of law must expressly provide for enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge. The real core of the saving provision of law must be not mere enforceability of the charge against the property charged but enforceability of the charge against the said property in the hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act

is clearly not such a provision. The second contention fails and is repelled."

36. As regards the contention of learned Senior Counsel for the IDCO (Opposite Party No.1) that the IDCO (Opposite Party No.1) be granted liberty to move the Liquidator (Opposite Party No.2) under section 39 read with section 40 of the I & B Code seeking condonation of delay in laying the claim for determination and payment of the statutory dues and damage charges from out of the sale proceeds already obtained through the auction by not counting the period spent after the present proceeding before this Court towards delay; we may first state here that the decision in case of Greater Noida Industrial Development Authority (supra) relied upon in support of the same does not come to the aid of the IDCO (Opposite Party No.1) as the factual settings of the said case were completely different.

In the said case, the Greater Noida Industrial Development Authority pursuant to the public notice upon initiation of the CIRP and its admission by the NCLT had submitted the claim towards the unpaid installments payable towards premium for the lease of the land to the Corporate Debtor asserting to be the Financial Creditor of the Corporate Debtor. The RP treated the said Authority as an Operational Creditor and asked the said Authority to submit its claim in Form-B as an Operational Creditor of the Corporate Debtor. The said Authority did not, however, act upon the request by submitting the claim afresh as an Operational Creditor. In the meantime the CoC approved a plan which being presented to the Adjudicating Authority (NCLT) received the approval. It was only thereafter that the Authority having received a letter about the finalization and approval of the plan moved the Adjudicating Authority (NCLT) by filing an application questioning the Approved Resolution Plan, the decision of the RP to treat the Authority as an Operational Creditor and all actions in pursuance thereof. The Adjudicating Authority (NCLT) rejected the move.

Appeal being preferred, the NCLAT also dismissed the same. So, the orders of Adjudicating Authority (NCLT) and Appellate Authority (NCLAT) were assailed by the Authority under section 62 of the I & B Code carrying an Appeal.

The Hon'ble Supreme Court by its decision allowed the Appeal finding fault with the NCLT and NCLAT of having not taken note of several basic facts touching upon the consideration of the status of the said Authority as the Claimant and the claim, also finding fault with the Resolution Plan being based on factual errors as to the claim of the said Authority. In the given case, the IDCO (Opposite Party No.1) as already stated, at no point of time during the resolution process or even when the Corporate Debtor went for liquidation pursuant to the public announcement from time to time had lodged its claims which are now demanded from the Petitioner-Company (SMCPGL). Therefore, the said decision relied upon does not provide any help for acceptance of the submission as above advanced.

Although there appears no provision for consideration of claims beyond the prescribed period by the Liquidator and for condonation of delay in filing the claim; we, however, feel it apposite only to observe that if the distribution from the sale proceeds is yet to be completed in the case and no prejudice would be caused if the claim of the IDCO (Opposite Party No.1) is considered on merit; the IDCO (Opposite Party No.1) may seek the permission before the Appropriate Forum as provided in

law for consideration of its belated claim.

37. In that view of the matter, the impugned demand of Rs.1,92,24,618/- made by the IDCO (Opposite Party No.1) from the Petitioner-Company (SMCPGL) towards outstanding statutory dues of SPSS & PL and CS & PL for processing its application as well as the demand raised by the IDCO (Opposite Party No.1) under Annexure-25 directing the Petitioner-Company(SMCPGL)to pay a sum of Rs.13,52,00,332/- crores towards penalty (damage charge) and GST are hereby set aside.

Consequently, the Petitioner-Company (SMCPGL) having earlier paid Rs.1,92,24,618/- under Annexure-23 series to the IDCO (Opposite Party No.1) and also having paid a sum of Rs.13,52,00,332/- and GST during pendency of the proceeding as per the order dated 16.12.2021 of this Court without prejudice to its rights and contentions vis-à-vis the IDCO (Opposite Party No.1); we hereby direct that the same be refunded to the Petitioner-Company (SMCPGL) within a period of 6 (six) weeks hence, along with interest @ 9% (nine percent) per annum in terms of this Court's earlier order dated 16.12.2021.

38. The writ petition is disposed of in the above terms, and in the circumstances without costs.

(D. Dash), Judge.

V. Narasingh, J.

I Agree.

(V. Narasingh),
Judge.

Himansu

Signed by: HIMANSU SEKHAR DASH