State Tax Officer (1) vs Rainbow Papers Limited on 6 September, 2022

Author: Indira Banerjee

Bench: Indira Banerjee, Hemant Gupta, Surya Kant, M.M. Sundresh, Sudhanshu Dhulia

REP

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1661 OF 2020

STATE TAX OFFICER (1) ...APPEL

VERSUS

RAINBOW PAPERS LIMITED ... RESPOND

WITH

CIVIL APPEAL NO. 2568 OF 2020

JUDGMENT

Indira Banerjee, J.

These appeals under Section 62 of the Insolvency and Bankruptcy Code, 2016, hereinafter referred to as 'IBC', is against a judgment and order dated 19th December, 2019, passed by the National Company Law Appellate Tribunal (NCLAT) dismissing Company Appeal (AT)(Insolvency) No. 404 of 2019 filed by the Appellant, against an order dated 27 th February 2019 of the Adjudicating Authority, rejecting the application being I.A No.224/271/272/337 of 2018 and P-01 of 2019 in C.P. No. (IB) 88/9/NCLT/AHM/2017 filed by the appellants and holding that the Government cannot claim first charge over the property of the Corporate Debtor, as Section 48 of the Gujarat Value Added Tax, 2003, hereinafter referred to as the "GVAT Act", which provides for first charge on the

property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty etc. under the said GVAT Act, cannot prevail over Section 53 of the IBC.

2. The short question raised by the appellant in this appeal is, whether the provisions of the IBC and, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act which is set out herein below for convenience:-

> "48. Tax to be first charge on property.— Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person."

3. The respondent, a company within the meaning of the Companies Act, 2013 is engaged in the business of manufacture and sale of Crafts and Oars within and outside the State of Gujarat since 16th April, 1990.

4. The appellant has, from time to time, been assessed for Value Added Tax (VAT) and Central Sales Tax (CST) under the GVAT Act. It is stated that an amount of Rs.53,71,65,489/- is due from the Respondent to the Sales Tax authorities towards CST and VAT, as per the statement enclosed at Page 44 of the Paper Book.

5. On or about 8th July, 2016, recovery proceedings were initiated against the respondent, in respect of its dues for the year 2011- 2012, and the appellant attached the property of the respondent being land at Survey No.2379 and 2381 situated at Rajpur, Taluka Kadi on 8th October, 2018.

6. One Neeraj Papers Private Limited, as operational creditor of the respondent, filed Company Petition (IB) No.88 of 2017 under Section 9 of the IBC before Ahmedabad Bench of the National Company Law Tribunal (NCLT), for initiation of the Corporate Insolvency Resolution Process (CIRP) against the respondent.

7. By an order dated 12th September, 2017, the said Company Petition [Company Petition (IB) No. 88 of 2017] filed by the said Neeraj Papers Private Limited was admitted. One George Samuel was appointed Interim Resolution Professional (IRP) on 22 nd September, 2017.

8. After appointment of the said George Samuel as IRP, claims were invited from Creditors under Section 15 of the IBC by issuance of newspaper publications. The last date for submission of claims was 5th October 2017.

9. After receipt of claims, a Committee of Creditors (CoC) was constituted on 10th October 2017. At its first meeting, the CoC passed a resolution to replace the IRP. Accordingly, Ramachandra D. Choudhary, a Chartered Accountant, was appointed as Resolution Professional (RP). The appointment of Mr. Choudhary was approved by the NCLT by an order dated 6th November 2017.

10. The appellant filed a claim before the RP in the requisite Form B, claiming that Rs.47.36 crores (approximately), was due and payable by the respondent to the appellant, towards its dues under the GVAT Act. The claim was filed beyond time.

11. After admission of the CIRP and appointment of the RP, one Kushal Limited submitted a Resolution Plan. Various Creditors had objected to the Resolution Plan.

12. The Tourism Finance Corporation of India Limited, a financial creditor of the Respondent-Corporate Debtor moved an interlocutory application No.273 of 2018 contending that the Tourism Finance Corporation of India Limited had wrongly been categorised as an unsecured financial creditor.

13. By an order Sr. No.JCCT/Div-4/Mahesana/NCLT/case/ O.W.No.3090 dated 22nd October, 2018, the appellant called upon the RP to confirm the claim of the appellant towards outstanding tax dues.

14. By a letter dated 22nd October, 2018, the Resolution Professional informed the appellant that the entire claim of the appellant had been waived off. The order of the RP was conveyed to the appellant by an email dated 6th November, 2018.

15. On or about 20th December, 2018, the appellant challenged the Resolution Plan by making an application being I.A No. P-01 of 2019 before the Ahmedabad Bench of the NCLT contending that Government dues could not be waived off. The appellant prayed for payment of total dues of Rs.47,35,72,314/- towards VAT/CST on the ground that the Sales Tax Officer was a secured creditor.

16. By an order dated 27th February, 2019 in IA No. 224/271/272/337 of 2018 and P-01 of 2019 in CP No.(IB) 88 of 2017, the Adjudicating Authority being the Ahmedabad Bench of the NCLT rejected the application made by the appellant as not maintainable. The Adjudicating Authority (NCLT) Ahmedabad held:-

> "13. The Resolution Applicant again filed the amended resolution plan on 26.05.2018. On scrutiny RP issued certificate on 28.05.2018 in compliance of the Regulation 39(2). Accordingly, RP/the applicant issued notice dated 29.05.2018 for convening the eighth and final meeting of CoC on 04.06.2018. In the said meeting, CoC sought certain changes in the plan. In view of that, the Resolution Applicant was permitted to provide the addendum to the revised plan within a period of one (1) day which was accepted and duly acted upon by the Resolution applicant.
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> 14. The said amended revised resolution plan along with the addendum dated 05.06.2018 was placed for e-

voting before the members of the CoC which took place on two (2) days i.e. on 06.06.2018 and 07.06.2018. The CoC in their aforesaid e-voting resolved to approve the resolution plan along with the addendum with majority of 79.79% voting share in favour of the Resolution Applicant.

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16. On filing of the application by the RP under Section 30(6) read with section 31 of the Code, notices were issued to the CoC and suspended management. CoC approved and conceded to the fact of filing application by the RP under section 33(6) of the Code and have supported the argument advanced by the Ld. Counsel of the RP. No representation received from the suspended management."

17. On or about 8th April, 2019, the appellant filed an appeal before the NCLAT against the aforesaid order dated 27 th February 2019 of the Adjudicating Authority, under Section 61 of the IBC. The appeal has been dismissed by the NCLAT by the judgment and order impugned.

18. The NCLAT held:-

> "34. The Adjudicating Authority noticed that the Appellant approached the 'Resolution Professional' on 22 nd October, 2018 whereas the 'Resolution Plan' dated 26th May, 2018 along with Addendum dated 5th June, 2018 was approved by the 'Committee of Creditors' with voting majority of 72.79 per cent in favour of the 'Resolution Plan'. Thus, the claim was made by the Appellant at a much belated stage not only before the 'Resolution Professional' but also before the Adjudicating Authority.
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> 35. We find that the Appellant has not filed claim within time. It approached the 'Resolution Professional' at belated stage after approval of the 'Resolution Plan' by the Adjudicating Authority.
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> 36. Learned counsel for the 'Resolution Professional' submitted that the claim of the Appellant- 'State Tax Officer (1)' comes within the meaning of 'Operational Debt' as defined under Section 5(21). The claim of the Appellant also does not fall within the meaning of 'Secured Creditor' as defined under Section 3(30) read with Section 3(31) of the I&B Code.

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38. In view of Statement of Objects and Reasons of the 'I&B Code' read with Section 53 of the 'I&B Code', the Government cannot claim first charge over the property of the 'Corporate Debtor'. Section 48 cannot prevail over Section 53. Therefore, the Appellant – 'State Tax Officer-(1)' do not come within the meaning of 'Secured Creditor' as defined under Section 3(30) read with Section 3(31) of the I&B Code'.

39. Further, as 'Sales Tax Department' filed its claim at belated stage after the plan had been approved by the 'Committee of Creditors', the 'Resolution Professional' had no jurisdiction to entertain the same and rightly not entertained."

19. Sections 30 and 31 of the IBC are set out hereinbelow for convenience:-

> "30. Submission of resolution plan.—(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under Section 29-A to the resolution professional prepared on the basis of the information memorandum.
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> (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
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> (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
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> (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—
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> (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53; or
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> (ii) 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 sub-section (1) of Section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which 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.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Explanation 2.—For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

Explanation.—For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2). (4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53, including the priority and value of the security interest of a secured creditor, and such other requirements as may be specified by the Board:

> Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:
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> Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of Section 29-A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of Section 29-A: Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.
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> Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018. (5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:
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> Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor. (6) The resolution professional shall submit the resolution plan as approved

by the committee of creditors to the Adjudicating Authority.

31. Approval of resolution plan.—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, 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, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub- section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-

section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

20. Section 53 of the IBC, which provides for the mode and manner for distribution of the proceeds of sale of the assets of a Corporate Debtor in liquidation, is set out hereinbelow for convenience :-

"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 (18 of 2013).”

21. In exercise of power conferred under Sections 5, 7, 9, 14, 15, 17, 18, 21, 24, 25, 29, 30, 196 and 208 read with Section 240 of the IBC, the Insolvency and Bankruptcy Board of India, hereinafter referred to as Board, has framed the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, hereinafter referred to as “the 2016 Regulations”. Some of the relevant provisions of the 2016 Regulations are extracted hereinbelow for convenience :-

> “4. Access to books.—(1) Without prejudice to Section 17(2)(d), the interim resolution professional or the resolution professional, as the case may be, may access the books of account, records and other relevant documents and information, to the extent relevant for discharging his duties under the Code, of the corporate debtor held with—
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> (a) depositories of securities;
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> (b) professional advisors of the corporate debtor;
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> (c) information utilities;
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> (d) other registries that records the ownership of assets;
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> (e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and
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> (f) contractual counterparties of the corporate debtor. (2) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide the information within such time and in such format as sought by the interim resolution professional or the resolution professional, as the case may be.
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> (3) The creditor shall provide to the interim resolution professional or resolution professional, as the case may be, the information in respect of assets and liabilities of the corporate debtor from the last valuation report, stock statement, receivables statement, inspection reports of properties, audit report, stock audit report, title

search report, technical officers report, bank account statement and such other information which shall assist the interim resolution professional or the resolution professional in preparing the information memorandum, getting valuation determined and in conducting the corporate insolvency resolution process.

4-A. Choice of authorised representative.—(1) On an examination of books of account and other relevant records of the corporate debtor, the interim resolution professional shall ascertain class(s) of creditors, if any. (2) For representation of creditors in a class ascertained under sub-regulation (1) in the committee, the interim resolution professional shall identify three insolvency professionals who are—

(a) not his relatives or related parties;

(aa) having their addresses, as registered with the Board,in the State or Union Territory, as the case may be,which has the highest number of creditors in the class as per their addresses in the records of the corporate debtor:

Provided that where such State or Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, as the case may be, shall be considered;

(b) eligible to be resolution professional under Regulation 3; and

(c) willing to act as authorised representative of creditors in the class.

(3) The interim resolution professional shall obtain the consent of each insolvency professional identified under sub-

regulation (2) to act as the authorised representative of creditors in the class in Form AB of the Schedule.

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 referred to 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; or

(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.

8. Claims by financial creditors.—(1) A person claiming to be a financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in Form C 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 financial creditor 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 financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been paid; or

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

8-A. Claims by creditors in a class.—(1) A person claiming to be a creditor in a class shall submit claim with proof to the interim resolution professional in electronic form in Form CA of the Schedule.

(2) The existence of debt due to a creditor in a class may be proved on the basis of—

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

(b) other relevant documents, including any—

(i) agreement for sale;

(ii) letter of allotment;

(iii) receipt of payment made; or

(iv) such other document, evidencing existence of debt. (3) A creditor in a class may indicate its choice of an insolvency professional, from amongst the three choices provided by the interim resolution professional in the public announcement, to act as its authorised representative.

9. Claims by workmen and employees.—(1) A person claiming to be a workman or an 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 D of the Schedule:

> Provided that such person may submit supplementary documents or clarifications in support of the claim, on his own or if required by the interim resolution professional, before the constitution of the committee. (2) Where there are dues to numerous workmen or employees of the corporate debtor, an authorised representative may submit one claim with proof for all such dues on their behalf in Form E of the Schedule. (3) The existence of dues to workmen or employees may be proved by them, individually or collectively on the basis of—
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> (a) records available with an information utility, if any; or
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> (b) other relevant documents, including—
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> (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;
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> (ii) evidence of notice demanding payment of unpaid dues and any documentary or other proof that payment has not been made; or
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> (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a dues, if any.

9-A. Claims by other creditors.—(1) A person claiming to be a creditor, other than those covered under Regulations 7, 8, 8-A or 9, shall submit its claim with proof to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule. (2) The existence of the claim of the creditor referred to in sub-section (1) may be proved on the basis of—

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

(b) other relevant documents sufficient to establish the claim, including any or all of the following—

(i) documentary evidence demanding satisfaction of the claim;

(ii) bank statements of the creditor showing non-satisfaction of claim;

(iii) an order of court or tribunal that has adjudicated upon non-satisfaction of claim, if any.

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.

11. Cost of proof.—A creditor shall bear the cost of proving the debt due to such creditor.

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;
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> (d) filed with the Adjudicating Authority; and
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> (e) presented at the first meeting of the committee.

14. Determination of amount of claim.—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."

22. Prior to amendment by Notification No.IBBI/2018-19/GN/REG013 dated 3rd July 2018, with effect from 4 th July, 2018, Sub-Regulation (1) of Regulation 12 read with Sub-Regulation (2) provided that a creditor shall submit proof of claim on or before the last date mentioned in the public announcement. Sub-Regulation (2) was amended with effect from 4 th July, 2018 and now reads "a creditor shall submit claim with proof on or before the last date mentioned in the public announcement".

23. The Regulations have to be read as a whole and not in a truncated manner and interpreted in the light of the statutory provisions of the IBC, as interpreted by this Court. This Court has time and again held that the time lines stipulated in the IBC even for completion of proceedings are directory and not mandatory.

24. In this case, claims were invited well before the 5th October, 2017 which was the last date for submission of claims. Under the unamended provisions of Regulation 12(1), the Appellant was not required to file any claim. Read with Regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for. The time stipulations are not mandatory as is obvious from Sub-Regulation (2) of Regulation 14 which enables the Interim Resolution Professional or the Resolution Professional, as the case may be, to revise the amounts of claims admitted, including the estimates of claims made under Sub-Regulation (1) of the said Regulation as soon as might be practicable, when he came across additional information warranting such revision.

25. In this case, at the cost of repetition, it may be noted that there was no obligation on the part of the State to lodge a claim in respect of dues which are statutory dues for which recovery proceedings have also been initiated. The appellants were never called upon to produce materials in connection with the claim raised by the Appellants towards statutory dues. The Adjudicating Authority as well as the Appellate Authority/NCLAT misconstrued the Regulations.

26. On behalf of the Appellant, it has been argued that there were proceedings initiated by the State against the respondent-Corporate Debtor to realise its statutory dues. The Books of Accounts of the Corporate Debtor would have reflected the liability of the Corporate Debtor to the State in respect of its statutory dues. In abdication of its mandatory duty, the RP failed to examine the Books of Accounts of the Corporate Debtor, verify and include the same in the information memorandum and make provision for the same in the Resolution Plan. The Resolution Plan does not conform to the

statutory requirements of the IBC and is, therefore, not binding on the State.

27. Mr. Tushar Mehta, learned Solicitor General of India appearing on behalf of the Appellant with Mr. K.M. Nataraj, Additional Solicitor General of India and Ms. Aastha Mehta, learned Advocate, referred to Sections 3(30) and 3(31) of the IBC, set out herein below :-

> "Section 3(30) and 3(31) of the Code read :
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> "3(30) "secured creditor" means a creditor in favour of whom security interest is created;
>
> 3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;"

28. The learned Solicitor General of India submitted that a reading of Sections 3(30) and 3(31) of the IBC makes it clear that the finding of the NCLAT that the State is not a secured creditor is erroneous and contrary to the clear definition of secured creditor under the IBC.

29. As argued by the learned Solicitor General, the term "Secured Creditor" as defined under the IBC is comprehensive and wide enough to cover all types of security interests namely, the right, title, interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction, which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.

30. The learned Solicitor General rightly argued that in view of the statutory charge in terms of Section 48 of the GVAT Act, the claim of the Tax Department of the State, squarely falls within the definition of "Security Interest" under Section 3(31) of the IBC and the State becomes a secured creditor under Section 3(30) of the Code.

31. Mr. Nataraj, Additional Solicitor General submitted that the Appellate Authority, NCLAT has held that the Tax Department of the State does not fall within the meaning of "Secured Creditor". The NCLAT has, according to Mr. Nataraj, come to such a conclusion on the erroneous premise that Section 48 of the GVAT Act, 2003, cannot prevail over Section 53 of the IBC.

32. The learned ASG argued that, it was not the case of the Appellant that Section 48 of the GVAT Act prevails over Section 53 of the IBC. It was the case of the Appellant that the State falls within the purview of "Secured Creditor".

33. The learned ASG submitted that the mere fact that a creditor might be an operational creditor would not result in loss of status of that operational creditor as a secured creditor. The finding of the Appellate Authority is contrary to law and cannot be sustained.

34. The learned ASG pointed out that the Appellant had made its claim to the RP on 28.02.2018, long before the resolution plan was approved by the CoC under Section 30(4) of the IBC. Yet, the RP did not include the claim in the Resolution Plan.

35. The learned ASG emphatically argued that the RP was obliged to receive, verify and collate claims and forward the same to the Adjudicating Authority for approval. The learned ASG cited Swiss Ribbons (P) Ltd. v. Union of India, 1 where this Court held that the Resolution Professional does not have adjudicatory powers to accept or reject the claim. His duty is only to receive, verify and collate the claims.

36. Referring to Section 30(2) of the IBC, the learned ASG argued that the afore-mentioned provision mandates the RP to ensure that the Resolution Plan conforms to the parameters/requirements laid down in the said provision. It was the duty of the Resolution Professional to examine, ensure and verify that the resolution plan conformed to the parameters/requirements laid down under Section 30(2) of the IBC. 1 (2019) 4 SCC 17 Further, Section 29 of the IBC casts a statutory duty and/or obligation on the Resolution Professional to prepare the information memo after following the procedure laid down in the Court.

37. The learned ASG pointed out that under Section 29 of the IBC, the Resolution Professional is required to prepare the Information Memorandum. The Information Memorandum is mandatorily required to contain the details as mentioned in Regulation 36(2) of the Regulations, 2016.

38. The learned ASG referred to Regulation 36(2) of the Regulations, 2016 which is set out herein below :-

> "36. Information memorandum (2) The information memorandum shall contain the following details of the corporate debtor -
>
> (a) .....
>
> (b) the latest annual financial statements;
>
> (c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;
>
> (d) ....

.....

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) ....

.....

(I) other information, which the resolution professional deems relevant to the committee."

39. The Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) have held that the claim of the State is belated. Regulation 12 of the 2016 Regulations deals with the time period for submission of a claim along with proof, as stipulated in the public announcement under Section 15 of the IBC. The time period is, however, not mandatory but only directory.

40. In the case of Vishal Saxena & Anr. v. Swami Deen Gupta Resolution Professional2, the NCLT took the view that the time stipulation in Regulation 12 for submission of a claim is directory and not mandatory. Similar view was also taken by the NCLT in its judgment and order dated 10th June 2021 in Assistant Commissioner of Customs v. Mathur Sabhapathy Vishwanathan 3. The rejection of the claim of the State is unsustainable in law.

41. Section 31 of the IBC which provides for approval of a Resolution Plan by the Adjudicating Authority makes it clear that the Adjudicating Authority can approve the Resolution Plan only upon satisfaction that the Resolution Plan, as approved by the Committee of Creditors (CoC), meets the requirements of Section 30(2) of the IBC. When the Resolution Plan does not meet the requirements of Section 30(2), the same cannot be approved.

2 (2020) SCC Online NCLT 2734 3 IBA/578/2019 NCLT, Chennai

42. In Ghanshyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.4, cited by the learned Solicitor General, this Court observed :-

> "64. 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 the I&B Code and of the appellate authority is limited to the extent provided under sub-section (3) of Section 61 of the I&B Code, is no more res integra.
>
> 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 sub-section (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 the 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 sub-section (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 sub-section (2) of Section 30 of the 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." 4 (2021) 9 SCC 657

43. The learned Solicitor General rightly argued that when a grievance was made before the Adjudicating Authority with regard to a Resolution Plan, the Adjudicating Authority was required to examine if the Resolution Plan met the requirements of Section 30(2) of the IBC. The word "satisfied" used in Section 31(1) contemplates a duty on the Adjudicating Authority to examine the Resolution Plan – The Resolution Plan cannot be approved by way of an empty formality.

44. Section 61(3) of the IBC which stipulated the grounds for challenge to the approval of a Resolution Plan, is set out hereinbelow for convenience :-

> "61. Appeals and Appellate Authority.—(1)... (2) ... (3) An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely—
>
> (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;
>
> (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
>
> (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board."

45. As rightly argued by the learned Solicitor General, there can be no question of acceptance of a Resolution Plan that is not in conformity with the statutory provisions of Section 31(2) of the IBC. Section 30(2)

(b) of the IBC, casts an obligation on the Resolution Professional to examine each resolution plan received by him and to confirm that such resolution plan provides for the payment of dues of operational creditors, as specified by the Board, 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 operational creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Sub-section 2 of Section 53, whichever was higher, and provided for the payment of debts of financial creditors, who did not vote in favour of the resolution plan, in such manner as might be specified by the Board.

46. Under Section 31 of the IBC, a resolution plan as approved by the Committee of Creditors under Sub-Section (4) of Section 30 might be approved by the Adjudicating Authority only if the Adjudicating Authority is satisfied that the resolution plan as approved by the Committee of Creditors meets the requirements as referred to in Sub- Section (2) of Section 30 of the IBC. The condition precedent for approval of a resolution plan is that the resolution plan should meet the requirements of Sub-Section (2) of Section 30 of the IBC.

47. In Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another 5, this Court 5 (2022) 2 SCC 401 affirmed that Resolution Plans would have to conform to the statutory provisions of the IBC, and held: -

"147. In terms of Regulation 39(4), the RP shall endeavour to submit the resolution plan approved by the CoC before the adjudicating authority for its approval under Section 31 IBC, at least fifteen days before the maximum period for completion of CIRP. Section 31(1) provides that the adjudicating authority shall approve the resolution plan if it is satisfied that it complies with the requirements set out under Section 30(2) IBC. Essentially, the adjudicating authority functions as a check on the role of the RP to ensure compliance with Section 30(2) IBC and satisfies itself that the plan approved by the CoC can be effectively implemented as provided under the proviso to Section 31(1) IBC. Once the resolution plan is approved by the adjudicating authority, it becomes binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan...".

48. A resolution plan which does not meet the requirements of Sub-

Section (2) of Section 30 of the IBC, would be invalid and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a Corporate Debtor.

49. Section 31(1) of the IBC which empowers the Adjudicating Authority to approve a Resolution Plan uses the expression " it shall by order approve the resolution plan which shall be binding..." subject to the condition that the Resolution Plan meets the requirements of sub- section (2) of Section 30. If a Resolution Plan meets the requirements, the Adjudicating Authority is mandatorily required to approve the Resolution Plan. On the other hand, Sub-section (2) of Section 31, which enables the Adjudicating Authority to reject a Resolution Plan which does not conform to the requirements referred to in sub-section (1) of Section 31, uses the expression "may".

50. Ordinarily, the use of the word "shall" connotes a mandate/binding direction, while use of the expression "may" connotes discretion. If statute says, a person may do a thing, he may also not do that thing. Even if Section 31(2) is construed to confer discretionary power on the Adjudicating Authority to reject a Resolution Plan, it has to be kept in mind that discretionary power cannot be exercised arbitrarily, whimsically or without proper application of mind to the facts and circumstances which require discretion to be exercised one way or the other.

51. If the established facts and circumstances require discretion to be exercised in a particular way, discretion has to be exercised in that way. If a Resolution Plan is ex facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. It is also a well settled principle of interpretation that the expression "may", if circumstances so demand can be construed as "Shall".

52. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan.

53. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.

54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

55. In our considered view, the NCLAT clearly erred in its observation that Section 53 of the IBC over-rides Section 48 of the GVAT Act. Section 53 of the IBC begins with a non-obstante clause which reads :-

> "Not withstanding 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....."

56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.

57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.

58. We are constrained to hold that the Appellate Authority (NCLAT) and the Adjudicating Authority erred in law in rejecting the application/appeal of the appellant. As observed above, delay in filing a claim cannot be the sole ground for rejecting the claim.

59. The appeals are allowed. The impugned orders are set aside. The Resolution plan approved by the CoC is also set aside. The Resolution Professional may consider a fresh Resolution Plan in the light of the observations made above. However, this judgment and order will not, prevent the Resolution Applicant from submitting a plan in the light of the observations made above, making provisions for the dues of the statutory creditors like the appellant.

60. There shall be no order as to costs.

.....,J.

[INDIRA BANERJEE] .....,J.

[A.S. BOPANNA] NEW DELHI;

SEPTEMBER 6, 2022