

V.

(Civil Appeal No. 5910 of 2019)

APRIL 19, 2022

[M. R. SHAH AND ANIRUDDHA BOSE, JJ.]

Insolvency and Bankruptcy Code, 2016 – ss.5(13), 36(4), 53(1)(b) & (c) – Claim of the appellants-workmen/employees of Corporate Debtor, working at Dahej Yard and Mumbai, relating to wages/salary for the period involving Corporate Insolvency Resolution Process (CIRP) and the amount due and payable to the respective workmen/employees towards Pension Fund, Gratuity Fund and Provident Fund – Held: On a fair reading of s.5(13) of the IB code which defines “insolvency resolution process costs”, the dues towards the wages/salaries of only those workmen/employees who actually worked during the CIRP are to be included in the CIRP costs – Rest of the claims towards the wages/salaries of the workmen/employees shall be governed by ss.53(1)(b) & (c) of the IB Code – Further, considering s.36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds – In the present case, there are disputed questions, whether in fact the IRP/RP managed the operations of the corporate debtor as a going concern during the CIRP and there is a serious dispute whether Dahej Yard was operational during the CIRP or not and the concerned workmen/employees of the Dahej Yard and the Mumbai Head Office actually worked during the CIRP or not – Appellants to submit their claims before the Liquidator and establish and prove that during CIRP, IRP/RP managed the operations of the corporate debtor as a going concern and that they actually worked during the CIRP – Liquidator to adjudicate such claims in accordance with law and on its own merits and on the basis of the evidence, independently.

Insolvency and Bankruptcy Code, 2016 – ss. 3 (36), 5 (13) & (14), 17, 20, 25, 33 (7), 36 (4), 53(1)(a), (b) & (c) – Companies Act, 1956 – ss.59 A, 529A (1) (c), 530– Companies Act, 2013 – ss.326, 327 – Legislative History with respect to workmen/employee’s dues towards the wages/salaries including the amount due and payable towards provident fund, gratuity and pension fund – Discussed.

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Insolvency and Bankruptcy Code, 2016 – ss.36(4), 53 – Held: Under the IB Code, the workmen dues have been duly protected and the provident fund, gratuity and pension fund have been excluded from the liquidation estate assets [s.36(4)] – Furthermore, as per s.53 of the IB Code, the workmen dues are given the top priority in the waterfall mechanism.

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Insolvency and Bankruptcy Code, 2016 – ss.5(13), 20, 53(1)(a) – Held: It cannot be disputed that as per s.5(13), “insolvency resolution process costs” shall include any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern – It is also true that s.20 mandates that the interim resolution professional/resolution professional is to manage the operations of the corporate debtor as a going concern and in case during the CIRP the corporate debtor was a going concern, the wages/salaries of such workmen/employees who actually worked, shall be included in the CIRP costs and in case of liquidation of the corporate debtor, dues towards the wages and salaries of such workmen/employees who actually worked when the corporate debtor was a going concern during the CIRP, being a part of the CIRP costs are entitled to have the first priority and they have to be paid in full first as per s.53(1)(a)– Therefore, while considering the claims of the concerned workmen/employees towards the wages/salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the corporate debtor was a going concern and that the concerned workmen/employees actually worked while the corporate debtor was a going concern during the CIRP – Plea of the appellants that as the RP is under mandate to manage the operations of the corporate debtor as a going concern u/s.20 and therefore it is to be presumed that the RP managed the operations of the Corporate Debtor as a going concern and thus, the workmen/employees are entitled to their wages and salaries during the CIRP, as their wages/salaries to be included

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- A *in the CIRP costs, is not acceptable – However, the wages and salaries of the workmen/employees of pre-CIRP period will have to be governed as per the priorities mentioned in s.53(1).*

Swiss Ribbons Pvt. Ltd. v. Union of India (2019) 4 SCC

17 : [2019] 3 SCR 535; *Gujarat Urja Vikas Nigam*

- B *Limited v. Amit Gupta* (2021) 7 SCC 209 – referred to.

Case Law Reference

[2019] 3 SCR 535 referred to Para 6.5

(2021) 7 SCC 209 referred to Para 6.5

- C CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5910 of 2019.

From the Judgment and Order dated 31.05.2019 of the National Company Law Appellate Tribunal at New Delhi in Company Appeal(AT) (Insolvency) No. 605 of 2019.

- D Ms. Shobha Ramamoorthy, J. Thalapaty Sriram, Shilp Vinod, Pushkin Rajkumar, Ms. Vincy George, Nawaz Sherif, Advs. for the Appellants.

- E Nakul Dewan, Sr. Adv., Abhishek Sharma, Ashly Cherian, Kamlendra Pratap Singh, Gautam Talukdar, Dinesh Tripathi, Pradeep Kumar Jaiswal, Ms. Sundri, Parminder Singh Bhullar, Yogesh Pachouri, Sanjay Kumar Tyagi, M/S. Cyril Amarchand Mangaldas, Advs. for the Respondents.

The Judgment of the Court was delivered by

M. R. SHAH, J.

- F 1. Feeling aggrieved and dissatisfied with the impugned order dated 31.05.2019 passed by the National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as the ‘Appellate Tribunal’) in Company Appeal (AT) (Insolvency) No. 605 of 2019, by which the Appellate Tribunal has dismissed the said appeal preferred by the appellants herein – workmen/employees of M/s ABG Shipyard Limited (hereinafter referred to as the ‘Corporate Debtor’), working at Dahej and Mumbai, which was filed against the order passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (hereinafter referred to as the ‘Adjudicating Authority’) dated 25.04.2019 not granting any relief to them with regard to their claim relating to salary, which they
- G claimed for the period involving ‘Corporate Insolvency Resolution
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Process' (hereinafter referred to as the 'CIRP') and the prior period, original applicants – workers/employees have preferred the present appeal. A

2. That the Corporate Debtor was a private sector Ship Building Yard with its manufacturing activities at Dahej Yard and Surat Yard in Gujarat and having its corporate office at Mumbai. That prior to the initiation of CIRP, the Corporate Debtor had 562 workmen and 93 employees at Dahej; 291 workmen and 99 employees at Surat and 101 employees at its Mumbai Head Office. The appellants herein are the 272 employees and workmen employed at Mumbai Head Office and Dahej Yard of the Corporate Debtor. None of the 201 employees and workmen at Surat Yard are the appellants herein. B C

3. Vide its order dated 1.8.2017, the Adjudicating Authority admitted an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC Code') and the CIRP was initiated. The Adjudicating Authority also appointed the Interim Resolution Professional of the Corporate Debtor who was thereafter confirmed as the Resolution Professional (for short, 'RP') by the Committee of Creditors (for short, 'COC') of the Corporate Debtor on 7.9.2017. First meeting of the COC was held on 4.9.2017. D

3.1 On 23.10.2017, Company Application No. 348 of 2017 was filed before the Adjudicating Authority, praying inter alia to direct the Resolution Professional to make payment to the employees and the workmen. On 9.3.2018, the appellants herein filed Company Application No. 78 of 2018 in Company Application No. 348/2017 before the Adjudicating Authority, praying inter alia to direct the RP to utilize the amount of Rs.9,75,33,236/- to be received from the Indian Coast Guard solely for employees/workmen. E F

3.2 Vide order dated 25.04.2018 passed in Company Application No. 78/2018, the Adjudicating Authority directed the RP to deposit Rs.2,75,00,000/- in the Registry of the Adjudicating Authority, subject to the outcome of Company Application No. 348/2017. In the meantime, in the 4th meeting of the COC held on 08.12.2017, the issue with respect to the payment of salaries/wages of the employees/workers respectively was discussed in view of the directions passed by the Adjudicating Authority vide its order dated 01.12.2017. However, the issue was not resolved and thereafter the appellants herein filed the aforesaid IA No. G H

A 78/2018 in which the Adjudicating Authority directed to deposit Rs. 2.75 crores out of the total amount of Rs.9,75,33,236/- with the Registry of the NCLT towards disbursement of the outstanding salaries/wages to the appellants, subject to the final outcome of IA No. 348/2017 and the Adjudicating Authority accordingly disposed of Company Application No. 78/2018.

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3.3 It appears that thereafter since no agreed resolution plan could be adopted of the Corporate Debtor, the RP filed IA No. 113/2019 before the Adjudicating Authority praying for an order of liquidation of Corporate Debtor. The Adjudicating Authority by order dated 25.04.2019, after deciding various other applications including the application of the appellants being Company Application No. 348/2017 passed an order of liquidation of the Corporate Debtor and appointed respondent no.1 herein as Liquidator of the Corporate Debtor. While passing the order of liquidation, the Adjudicating Authority also disposed of Company Application No. 348/2017 in view of the order passed in Company Application No. 78/2018 by which the Adjudicating Authority earlier directed to deposit Rs.2.75 crores towards the dues of the appellants which as such was subject to the final outcome of Company Application No. 348/2017. Therefore, as such, the Adjudicating Authority while disposing of Company Application No. 348/2017 did not grant the relief claimed by the appellants – 272 workers/employees working at Dahej Yard and Mumbai Head Office for their claim relating to salary for the period involving CIRP and the prior period.

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4. Feeling aggrieved and dissatisfied with the order passed by the Adjudicating Authority, not granting the relief to the appellants herein with regard to their claim relating to salary/wages, which they claimed for the period involving CIRP and prior period, the appellants-workmen/employees working at Dahej Yard and Mumbai Head Office preferred Company Appeal No. 605/2019 before the Appellate Tribunal. By the impugned order, the Appellate Tribunal has disposed of the said appeal declining to interfere with the order passed by the Adjudicating Authority, however, allowed the appellants – 272 workmen/employees to file their individual claims before the Liquidator, who after going through the record and taking into consideration the pleadings made by the workmen/employees will determine the claim. The Appellate Tribunal has also further observed that if claim of one or other workmen/employee is rejected, it will be open to them to move before the Adjudicating Authority,

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which may decide the same in accordance with law. The Appellate Tribunal has also observed that so far as the Gratuity and Provident Funds are concerned, the same cannot be treated to be the asset of the Corporate Debtor and they are to be disbursed amongst the employees/workmen who are entitled for the same. A

5. Feeling aggrieved and dissatisfied with the impugned order passed by the Appellate Tribunal, the appellants-workmen/employees of the Corporate Debtor working at Dahej Yard and Mumbai Head Office have preferred the present appeal. B

6. Ms. Shobha Ramamoorthy, learned Advocate appearing on behalf of the appellants has vehemently submitted that in the present case the respective appellants are all the workmen and employees – 272 in number and were employed at Dahej Yard and Mumbai Head Office of the Corporate Debtor. It is submitted that in the present case, the CIRP period commenced from 01.08.2017 and ended on 25.04.2019 – commencement of liquidation. It is submitted that for this entire period of 20 months and 25 days, the respective employees and workmen were on the payrolls of the Corporate Debtor. It is submitted that the RP did not terminate the employment contracts or retrench or layoff the workmen. It is submitted that on the other hand, RP issued instructions dated 4.9.2017 to all the employees and workmen to report to him and follow his instructions. It is submitted that on 15.11.2017, RP issued an email to HR Department of Corporate Debtor instructing strictly not to relieve or permit resignation of any employee/workmen, without written approval. C D E

6.1 It is further submitted that in the present case, the Corporate Debtor was managed as a going concern in accordance with Section 21 of the IB Code. It is submitted that even the proposal to suspend operations at Dahej Yard and provide workmen with paid leave was rejected by the COC for lack of majority. It is submitted that therefore when the Corporate Debtor was managed as a going concern, which as such is mandatory under Section 19 of the IB Code and when the operations at Dahej Yard were not suspended, the workmen/employees at Dahej Yard are entitled to at least the wages/salaries during the CIRP period. It is submitted that irrespective of whether the wages/salaries for the period during CIRP are to be qualified as CIRP cost or not, provident fund, gratuity and pension fund are to be paid to the workmen and employees at Dahej Yard under Section 36(4) of the IB Code in priority over other dues, which are also not paid till date. F G H

A 6.2 It is further submitted that in the present case, throughout the CIRP period, the employees and workmen of Dahej Yard were asked to assemble at ABG Enclave and sign the attendance register since transportation to the yard was discontinued by the RP. It is submitted that throughout the CIRP period, the employees of Mumbai office had regularly attended the office; recorded their attendance with the Attendance Reader installed at the Mumbai office. Learned counsel appearing on behalf of the appellants has relied upon some documents from the paper book as well as rejoinder affidavit in respect of proof of work done by the respective employees/workmen during the CIRP period.

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C 6.3 It is submitted that all claims filed by the employees/workmen in Form-E with the Liquidator have been verified. It is submitted that the verified and admitted claims of the employees and workmen of the Corporate Debtor for CIRP period on the basis of the records available including the attendance register have been uploaded by the RP/Liquidator on 24.12.2020 on the official website of the Corporate Debtor as per regulations. It is submitted that therefore further verification in respect of the claims of the appellants based on their actual attendance is vexatious.

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E 6.4 Learned counsel appearing on behalf of the appellants has taken us to the relevant provisions of the IB Code in support of her submission that the workmen/employees of the Dahej Yard and Mumbai Head Office are at least entitled to the wages/salaries during the period of CIRP and are also entitled to the amount due and payable towards provident fund, gratuity and pension. Learned counsel appearing on behalf of the appellants has taken us to Section 3(36); Section 5(13); Section 5(14); Section 5(23); Section 17, Section 18; Section 19; Section 20; Section 25; Section 33(7); Section 36(4) and Section 53 of the IB Code.

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G 6.5 It is further submitted that the objective of the IB Code is for maximising of value of assets of the Corporate Debtor so that they are efficiently run as a going concern. Reliance is placed on the decision of this Court in the case of *Swiss Ribbons Pvt. Ltd. v. Union of India*, reported in (2019) 4 SCC 17 (para 37); and in the case of *Gujarat Urja Vikas Nigam Limited v. Amit Gupta*, Civil Appeal No. 9241 of 2019 decided on 8.3.2021 (para 57).

H 6.6 It is submitted that even under Section 20(1) of the IB Code, the RP is mandated to manage the operations of the Corporate Debtor

as a going concern. It is submitted that for this purpose he is vested with the authority to issue instructions to the personnel of the Corporate Debtor as may be necessary for keeping the Corporate Debtor as a going concern. It is submitted that the RP is under the mandate to take all such actions as are necessary to keep the Corporate Debtor as a going concern.

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6.7 It is submitted that Section 5(13) of the IB Code defines “Insolvency Resolution Process Cost”. It is submitted that as per Section 5(13) of the Code, “Insolvency Resolution Process Cost” means any costs incurred by the RP in running the business of the Corporate Debtor as a going concern and any other costs as may be specified by the IBBI – Liquidator. It is submitted that in the present case, vide Circular dated 12.06.2018, the Liquidator had clearly provided the costs on account of employees and workmen under the head “other services in a running business” in Forms I, II and III submitted by the RP with respect to CIRP costs incurred by him. It is submitted that therefore the salaries/wages and the dues payable to the employees/workmen during the CIRP period will be qualified as CIRP costs under Section 5(13) of the IB Code and are liable to be disbursed even prior to the amount distributed under Section 53 of the IB Code.

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6.8 It is further submitted that even otherwise the provident fund, gratuity and pension fund amounts remain outside the liquidation under Section 36(4) of the IB Code. It is submitted that the obligation to pay the provident fund, gratuity fund amount would arise as soon as the employees and workmen are deemed to have been discharged under Section 33(7) of the IB Code. It is submitted that even the workmen/employees are required to be paid the wages/salaries for the pre-CIRP period as per the priorities mentioned in Section 53 of the IB Code.

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6.9 It is further submitted by the learned counsel appearing on behalf of the appellants that the salaries and wages payable to the workmen/employees for the CIRP period are a component of the resolution professional costs and therefore the CIRP period salaries and wages payable to the respective workmen/employees are to be first paid and are not to be paid “*pari passu*” in terms of Section 53(1)(b) and (c) of the IB Code. It is submitted that even the ‘Workmen’s Dues’ is explained in Explanation (ii) to Section 53 of the Code as the term having the same meaning as assigned to it in Section 326 of the Companies Act, 2013. It is submitted that Section 327 of the Companies Act provides

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- A for preferential payments upon winding up of a company, enlists the component of the wages or salary and dues payable to an employee under clauses b, c, e & f under sub-clause 1.

6.10. It is submitted that thus on a combined reading of the provisions of Sections 326 & 327 of the Companies Act, it is clear that the workmen's dues and the employee's dues are comprised of several components including wages or salary, holiday remuneration, sums due from the provident fund, pension fund and the gratuity fund amongst other items. It is submitted that as observed by this Court in the case of *Swiss Ribbons Pvt. Ltd. (supra)*, the costs and expenses of the RP/Liquidator are to be given preferential treatment by excepting them from the *pari passu* principle.

6.11 It is submitted that Rs. 2.75 crores are earmarked and kept apart towards the dues of the workmen/employees. It is submitted that therefore the said sum of Rs.2.75 crores which is deposited for the benefit of the workmen/employees is liable to be disbursed in terms of Section 53(1)(a) r/w Section 5(13)(c) of the IB Code. It is submitted that the amount in the sum of Rs.16.8 crores (approximately) payable towards the provident fund, gratuity and pension in terms of Section 36(4) to all the employees and workmen of the Corporate Debtor including the appellants and therefore is required to be paid in priority over the disbursement to be made under Section 53(1)(b) & (c).

6.12 Making the above submissions and relying upon the aforesaid decisions, it is prayed to allow the present appeal.

7. The present appeal is vehemently opposed by Shri Nakul Dewan, learned Senior Advocate appearing on behalf of respondent no.1 – Liquidator of Corporate Debtor.

7.1 Shri Nakul Dewan, learned senior counsel appearing on behalf of the Liquidator of Corporate Debtor has vehemently submitted that the wages and salaries claimed by the appellants who have done no work during the CIRP period and have not assisted the RP/Liquidator during the CIRP, would not fall within the parameters of CIRP costs within the definition of Section 5(13)(c) of the IB Code.

7.2 It is submitted that only 8 employees at the Mumbai location for eight months during the CIRP and workmen/employees from Surat (from August 2017 to October 2017) assisted the RP in providing services required under the CIRP process. It is submitted that the remaining

employees and workmen including the appellants herein were not required to and did not perform any services to run the Corporate Debtor during the CIRP period. It is submitted that therefore the COC of the Corporate Debtor rightly did not approve any payments to the appellants as part of the CIRP costs. It is submitted that the wages and salaries of the appellants – workmen/employees of the Corporate Debtor would fall under Sections 53(1)(b) and 53(1)(c) of the IB Code. A B

7.3 It is submitted that as per Section 5(13)(c) of the IB Code r/w Regulations 31 and 33 of the CIRP Regulations, cost incurred by the RP in running the business of the Corporate Debtor is required to be ratified by the COC for it to be classified as CIRP costs. It is submitted that only the costs for those employees who have assisted the RP during the CIRP period, have been approved by the COC in the first COC meeting, held on 4.9.2017. It is submitted that therefore no other costs can be classified as CIRP costs, except unless it is ratified by the COC. It is submitted that the remaining dues of the workmen will form part of the dues falling under Section 53(1)(b) of the IB Code. C D

7.4 It is submitted that in the meetings of the COC held periodically right from first meeting to fourth meeting, it was specifically recorded that the Dahej Shipyard is not operational and that the Corporate Debtor is not in a position to pay the salaries of the workmen and employees due to paucity of funds since the Corporate Debtor was not a going concern and did not have a running business. E

7.5 It is further submitted that the main business of the Corporate Debtor was shipbuilding and ship repairing which was carried out at its Yards at Surat and Dahej. It is submitted that the Yard at Dahej was not in operation since 2015 and the Yard at Surat was closed in October 2017 and therefore it cannot be said that the Corporate Debtor was a going concern during the CIRP and therefore all its employees would be required to be treated as those who assisted the RP to run the Corporate Debtor as a going concern. F

7.6 It is further submitted that as such there is no evidence to suggest that the respective workmen/employees deployed at Dahej Yard and Mumbai Head Office have actually worked during the CIRP period. It is therefore submitted that the Appellate Tribunal has rightly observed that the respective workmen/employees can at least have to prove their claims before the RP/Liquidator by submitting their respective claims and the same are required to be adjudicated upon and/or verified by the G H

- A Liquidator. It is submitted that therefore the Appellate Tribunal has rightly not interfered with the order passed by the Adjudicating Authority in not passing any order in favour of the workmen/employees.

- 7.7 It is further submitted that Section 53 of the IB Code sets out the waterfall mechanism in terms of which the dues of the creditors are paid. It is submitted that even the operational creditors fall sixth in line after payment of CIRP dues, dues of Secured Creditors etc. It is submitted that even after the Corporate Debtor goes into liquidation in terms of Section 33 of the IB Code, the dues of the employees and workmen being operational creditors would be paid in last in terms of the waterfall mechanism of Section 53(1)(f) of the IB Code. It is therefore submitted that the respective appellants – workmen/employees are not entitled to any wages/salaries for the period during CIRP as CIRP costs, as claimed by them.
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- 7.8 Shri Nakul Dewan, learned Senior Advocate appearing on behalf of respondent no.1 – RP/Liquidator has further submitted that the costs incurred during the CIRP period by the Corporate Debtor/RP will qualify as CIRP costs only with respect to costs incurred by the RP running the company as a going concern under Section 5(13) (c) of the IB Code and in a case where the same has been approved by the COC under Regulations 31 and 33 of the CIRP Regulations.
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- E It is submitted that in the present case the Corporate Debtor is neither a going concern nor the RP has incurred any costs. It is submitted that therefore the wages/salaries of the workmen/employees at the Dahej Yard cannot be included in the CIRP costs.

- 7.9 It is further submitted that after the commencement of the CIRP, workmen and employee's dues which are outstanding as on the date of CIRP, are treated as operational creditors in terms of Section 5(20) and 5(21) of the IB Code. It is submitted that in terms of Section 30(2)(b) of the IB Code, the amount payable to operational creditors by a prospective resolution applicant shall not be less than the amount to be paid to such creditors in the event of a 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.
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7.10 It is submitted that Section 53 of the IB Code sets out the waterfall mechanism in terms of which the dues of the creditors are paid. It is submitted that operational creditors fall sixth in line after payment of CIRP dues, dues of secured creditors etc. A

7.11 It is submitted that in the present case, it is only few of the Surat workmen/employees and 8 Mumbai employees who have rendered services during the CIRP period to assist the RP to complete the CIRP process whose dues would be treated as CIRP costs. Otherwise, all dues of employees and workmen which have accrued prior to CIRP would be paid in terms of Section 53(1)(f) of the IB Code, both during CIRP and during liquidation. It is submitted that in the present case, the Liquidator has accepted the claim filed by the workmen and employees. However, the said claims filed by the workmen/employees cannot be considered as CIRP costs and cannot be paid in priority to all other claims. The treatment of the said claims of the workmen and employees have to be treated in accordance with the provisions of Section 53(1)(b)(i) and 53(1)(c) of the IB Code respectively, as applicable and not as CIRP costs. B C D

7.12 It is submitted that in the present case the appellants who are the workmen at Dahej Yard and employees at Mumbai Head Office, did not help to maintain the Corporate Debtor as a going concern, since (i) the Corporate Debtor was never a going concern and (ii) the Dahej Yard was not in operation since June, 2015 and (iii) Operations at the Surat Shipyard were completely shut from October, 2017. It is submitted that therefore the appellants who are the workmen of the Dahej Yard and employees of the Mumbai Head Office, cannot claim any amounts towards wages/salaries for the CIRP period, since no work/services were rendered by them, except for the critical Mumbai employees whose salaries were ratified by the COC during the first COC meeting. E F

7.13 Making the above submissions, it is submitted that the wages and salaries of the workmen/employees at Dahej Yard and the employees at Mumbai Head Office, except those who worked during the CIRP period, cannot be included and/or considered as CIRP costs and therefore they have to be paid as per the waterfall mechanism mentioned in Section 53(1)(b) & (c) of the IB Code. G

7.14 It is submitted that therefore the respective workmen employed at Dahej Yard and some of the employees employed at Mumbai H

- A Head Office were required to submit their individual claims and they have to establish before the RP/Liquidator that in fact they actually worked during the CIRP period, the Appellate Tribunal has rightly observed that the respective workmen/employees have to submit their claims before the RP/Liquidator, who is required to verify whether the Corporate Debtor was a going concern during the CIRP period and whether in fact the concerned workmen/employees actually worked during the CIRP period or not. It is submitted that therefore no interference of this Court is called for.

8. We have heard the learned counsel for the respective parties at length.

- The issue before this Court is with respect to wages/salaries of the workmen/employees during the CIRP period and the amount due and payable to the respective workmen/employees towards Pension Fund, Gratuity Fund and Provident Fund.

- 8.1 While considering the aforesaid claims, the legislative history and the relevant provisions of the IB Code are required to be referred to.

Relevant Provisions of the IB Code:

“Section 3(36)”

- Section 3(36) “workman” shall have the same meaning as assigned to it in clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947);

Section 5(13)

- (13) “insolvency resolution process costs” means—
- (a) the amount of any interim finance and the costs incurred in raising such finance;
 - (b) the fees payable to any person acting as a resolution professional;
 - (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
 - (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
 - (e) any other costs as may be specified by the Board;

Section 5(14)

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5(14) “insolvency resolution process period” means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;

Section 17

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17. Management of affairs of corporate debtor by interim resolution professional. (1) From the date of appointment of the interim resolution professional, —

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

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(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;

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(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

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(2) The interim resolution professional vested with the management of the corporate debtor shall—

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(a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;

(b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;

(c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;

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(d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with

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A government authorities, statutory auditors, accountants and such other persons as [may be specified; and]
[(e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.]

B **Section 20**

20. Management of operations of corporate debtor as going concern. - (1) The interim resolution professional shall make every

C endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

D (a) to appoint accountants, legal or other professionals as may be necessary;

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

E (c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:

F Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

G (e) to take all such actions as are necessary to keep the corporate debtor as a going concern.

Section 25

H **25. Duties of resolution professional** - (1) It shall be the duty of the resolution professional to preserve and protect the assets

of the corporate debtor, including the continued business operations of the corporate debtor. A

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: —

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor; B

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings; C

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims; D

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of the creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans. E

(i) present all resolution plans at the meetings of the committee of creditors; F

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board. G

Section 33(7)

33(7). The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen

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A of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Section 36(4)

Section 36 (4) Liquidation Estate –

B (4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: —

(a) assets owned by a third party which are in possession of the corporate debtor, including—

C (i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

D (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

E (b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

F (d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

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Section 53

H **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

(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:— B

(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

(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; D

(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; E

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

(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. G

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of

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- A 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—

- B (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
- C (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).”

Legislative History with respect to workmen/employee’s dues towards the wages/salaries including the amount due and payable towards provident fund, gratuity and pension fund:

- D 8.2 Under the Companies Act, 1956 (hereinafter referred to as “1956 Act”), Section 59A provided that workmen’s dues and debts due to secured creditors in terms of Section 529A(1)(c) of the 1956 Act shall be paid in priority to other debts. Further, it provided that in case of insolvent company, winding up should be undertaken in terms of laws of
- E insolvency with respect to the status of persons adjudged insolvent.

- F 8.2.1 The proviso to Section 59(1) of 1956 Act provided that workmen shall deem to have *pari passu* charge in his favour to the extent of workmen’s portion. It further stated that where the secured creditor (instead of relinquishing) is enforcing his security, the debt due to the extent of workmen’s share/ portion in the security shall rank *pari passu* with workmen’s dues for the purposes of Section 529A. The said section was brought in by way of Companies (Amendment) Bill, 1985 with the objective to introduce necessary legislation for the legitimate dues of workers rank *pari pasu* with the secured creditors in the event of the closure of the Company. The laudable objective was that in the
- G unfortunate event of liquidation, workers whose labour and effort constitute an invisible but easily perceivable part of the capital of the company, are not deprived of their legitimate right to participate in the product of their labour and effort.

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8.2.2 Section 530 of 1956 Act provided the waterfall mechanism as per which priority is to be given to different kinds of debts. Subsequently, the Companies Bill, 2009 and 2011 were introduced wherein wages/salaries payable to workmen for a period of 2 years were protected in case of winding up of the Company. Thereafter, under the Companies Act, 2013 (hereinafter referred to as “2013 Act”), Section 326 and Section 327 i.e. “Overriding Preferential Payment” and “Preferential Payments” were introduced wherein a proviso to Section 326 of the 2013 Act was inserted. Initially the insolvency process in case of winding up of insolvent companies were provided under Section 325 of 2013 Act. However, Section 325 of the 2013 Act was omitted w.e.f. 15.11.2016 on the coming into force the IB Code. On enactment of the IB Code, the winding up proceedings in case of insolvency are to be governed by the provisions of the IB Code and the provisions of the IB code only shall be applicable to deal with the winding up proceedings as the IB Code is a complete Code in itself. That thereafter, an amendment w.e.f. 15.11.2016 has been brought in under Section 327 (7) of 2013 Act wherein it has been clarified that the provisions of Section 326 and Section 327 of the 2013 Act will not be applicable in the event of liquidation under the IB Code.

8.2.3 In case of any insolvency, in a winding up of a company under Section 326 and 327 of the Companies Act, the workmen dues are to be paid as under: -

- workmen’s portion in the security shall be paid in priority to all other debts.
- however, workmen’s dues (given in (b)(i) and (ii) payable for the period of 24 months, shall be paid in priority to all other debts (including debts due to secured creditors). This means that wages/salary for the period of 24 months is over and above every other claim/debts (including debts due to secured creditors).
- workmen’s dues include Provident Fund, Pension Fund and Gratuity Fund or any other Fund for the welfare of the workmen maintained by the Company.

8.2.4 Under the IB Code, the workmen dues have been duly protected and the provident fund, gratuity and pension fund have been excluded from the liquidation estate assets (Section 36(4) of the IB Code).

- A Furthermore, as per Section 53 of the IB Code, the workmen dues are given the top priority in the waterfall mechanism.

8.2.5 The issue of giving priority to the workmen dues have been considered time and again in the various Committee's Reports:

- B In the Bankruptcy Law Reforms Committee (Volume 1) (November, 2015), it was agreed that the assets held in by the entity in trust (such as employee pensions), assets held as collateral to certain financial market institutions and assets held as part of operational transactions where the entity has right over the asset but is not the owner of the same shall be excluded from the liquidation estate. Furthermore, it was also debated with respect to the waterfall mechanism under the Code and was agreed that the workmen dues capped up to 3 months will be given the second priority with the secured creditor after the costs of the corporate insolvency and resolution process and liquidation.
- C
- D Subsequently, a report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 was prepared and presented in Lok Sabha on 28.04.2016 wherein the issue of exclusion of provident fund, pension fund and gratuity fund from the liquidation estate assets and estate of bankrupt was debated. The Committee, after in dept examination, was of the view that provident fund, pension fund and gratuity fund provide the social safety net to the workmen and employees and hence, need to be secured in the event of liquidation of a company or bankruptcy of partnership firm. The Committee observed that the workers are the nerve center of any company and in the event of any company becoming insolvent or bankrupt, the workmen get affected adversely and therefore, priority must be given to their outstanding dues. Therefore, all sums due to any workman or employee from the provident fund, gratuity fund or pension fund should not be included in the liquidation estate assets. Thus, to protect the interest of the workmen, the Committee decided that that the workmen dues for a period of 12 months as provided under Section 53 of the Code be increased to 24 months preceding liquidation commencement date. 6
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- H In light of the same, the Section 36 of the Code has clearly given outright protection to workmen's dues under Provident Fund, Pension Fund and Gratuity Fund which is not treated as liquidation

assets and liquidator has no claim over such funds. Therefore, A
this share of workmen's dues has consciously been taken outside
the liquidation process.

8.2.6 In light of the above statutory provisions under the IB Code
and the legislative history, the claims of the workmen/employees towards
wages/salaries prior to CIRP and during the CIRP are required to be B
considered.

9. It cannot be disputed that as per Section 5(13) of the IB Code,
“insolvency resolution process costs” shall include any costs incurred by
the resolution professional in running the business of the corporate debtor
as a going concern. It is also true that Section 20 of the IB Code mandates C
that the interim resolution professional/resolution professional is to manage
the operations of the corporate debtor as a going concern and in case
during the CIRP the corporate debtor was a going concern, the wages/
salaries of such workmen/employees who actually worked, shall be
included in the CIRP costs and in case of liquidation of the corporate D
debtor, dues towards the wages and salaries of such workmen/employees
who actually worked when the corporate debtor was a going concern
during the CIRP, being a part of the CIRP costs are entitled to have the
first priority and they have to be paid in full first as per Section 53(1)(a)
of the IB Code. Therefore, while considering the claims of the concerned
workmen/employees towards the wages/salaries payable during CIRP, E
first of all it has to be established and proved that during CIRP, the
corporate debtor was a going concern and that the concerned workmen/
employees actually worked while the corporate debtor was a going
concern during the CIRP. The wages and salaries of all other workmen/
employees of the Corporate Debtor during the CIRP who actually have F
not worked and/or performed their duties when the Corporate Debtor
was a going concern, shall not be included automatically in the CIRP
costs. Only with respect to those workmen/employees who actually
worked during CIRP when the Corporate Debtor was a going concern,
their wages/salaries are to be included in the CIRP costs and they shall
have the first priority over all other dues as per Section 53(1)(a) of the G
IB Code. Any other dues towards wages and salaries of the employees/
workmen of the corporate debtor shall have to be governed by Section
53(1)(b) and Section 53(1)(c) of the IB Code. Any other interpretation
would lead to absurd consequences and violate the scheme of Section
53 r/w Section 5(13) of the IB Code. If any other interpretation, more H

A particularly, the interpretation canvassed on behalf of the appellants is accepted, in that case, the wages/salaries of those workmen/employees who had not worked at all during CIRP shall have to be treated and/or included in the CIRP costs, which cannot be the intention of the legislature.

10. On a fair reading of Section 5(13) of the IB code which defines
B “insolvency resolution process costs”, it is observed and held that the dues towards the wages/salaries of only those workmen/employees who actually worked during the CIRP are to be included in the CIRP costs. The rests of the claims towards the wages/salaries of the workmen/employees, as observed hereinabove, shall be governed by Sections
C 53(1)(b) & (c) of the IB Code.

11. In the present case, the RP/Liquidator has seriously disputed that during the CIRP, the Corporate Debtor was a going concern. It is seriously disputed that the respective appellants – workmen/employees employed at Dahej Yard and Mumbai Head Office actually worked during the CIRP. It is true that while submitting the claims towards CIRP costs,
D the RP has not submitted the claims towards the wages/salaries of the appellants, however, still the claims submitted/to be submitted by the appellants will have to be adjudicated upon and considered by the Liquidator and the Liquidator has to adjudicate and consider, (i) whether the Corporate Debtor was a going concern during the CIRP; (ii) how
E many workmen/employees actually worked during the CIRP while the Corporate Debtor was a going concern.

If on adjudication of the claims made by the respective workmen/employees, if it is established and proved that during CIRP, the Corporate Debtor was a going concern and the concerned workmen/employees
F actually worked during the CIRP when the Corporate Debtor was a going concern, the wages and salaries of such workmen/employees to be included in the CIRP costs as defined under Section 5(13) of the IB Code and they will have to be paid such wages/salaries as per Section 53(1)(a) of the IB Code as part of the CIRP costs in full before making any payment as per priorities mentioned in Section 53(1) of the IB code.

G 12. Now so far as the submission on behalf of the appellants that as per Section 20 of the IB Code and even as per the decisions of this Court in the cases of *Swiss Ribbons Pvt. Ltd. (supra)* and *Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta (supra)*, the RP is under mandate to manage the operations of the Corporate Debtor as a going concern

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and therefore it is to be believed that during CIRP, the Corporate Debtor was a going concern, managed and/or operated as a going concern cannot be accepted. It is true that under Section 20 of the IB Code, it is the duty of the RP to manage and run the operations of the Corporate Debtor as a going concern. However, the words used in Section 20 are “the interim resolution professional shall make **every endeavour** to manage the operations of the corporate debtor as a going concern”. Therefore, even if it is found that the Corporate Debtor was not a going concern during the CIRP despite best efforts by the resolution professional, it cannot be presumed that still the Corporate Debtor was a going concern during the CIRP period. It depends on the facts of each case. In a given case, the Corporate Debtor may be a going concern and in a given case, the corporate debtor might not be a going concern. Therefore, submission on behalf of the appellants that as the RP is under mandate to manage the operations of the corporate debtor as a going concern under Section 20 of the IB code and therefore it is to be presumed that the RP managed the operations of the Corporate Debtor as a going concern and therefore the workmen/employees are entitled to their wages and salaries during the CIRP, as their wages/salaries to be included in the CIRP costs cannot be accepted. However, the wages and salaries of the workmen/employees of pre-CIRP period will have to be governed as per the priorities mentioned in Section 53(1) of the IB Code.

Dues of the workmen/employees towards Provident Fund, Gratuity Fund and Pension Fund

13. Now so far as the dues of the workmen/employees on account of provident fund, gratuity and pension are concerned, they shall be governed by Section 36(4) of the IB Code. Section 36(4)(iii) of the IB Code specifically excludes “all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund”, from the ambit of “liquidation estate assets”. Therefore, Section 53(1) of the IB Code shall not be applicable to such dues, which are to be treated outside the liquidation process and liquidation estate assets under the IB Code. Thus, Section 36(4) of the IB Code has clearly given outright protection to workmen’s dues under provident fund, gratuity fund and pension fund which are not to be treated as liquidation estate assets and the Liquidator shall have no claim over such dues. Therefore, the concerned workmen/employees shall be entitled to provident fund, gratuity fund and pension fund from such funds which are specifically kept out

- A of liquidation estate assets and as per Section 36(4) of the IB Code, they are not to be used for recovery in the liquidation.

14. In view of the above and for the reasons stated above, it is held as under:

- B i) that the wages/salaries of the workmen/employees of the Corporate Debtor for the period during CIRP can be included in the CIRP costs provided it is established and proved that the Interim Resolution Professional/Resolution Professional managed the operations of the corporate debtor as a going concern during the CIRP and that the concerned workmen/employees of the corporate debtor actually worked during the CIRP and in such an eventuality, the wages/salaries of those workmen/employees who actually worked during the CIRP period when the resolution professional managed the operations of the corporate debtor as a going concern, shall be paid treating it and/or considering it as part of CIRP costs and the same shall be payable in full first as per Section 53(1)(a) of the IB Code;

- D ii) considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds.

- F 15. As observed hereinabove, there are disputed questions, whether in fact the IRP/RP managed the operations of the corporate debtor as a going concern during the CIRP and there is a serious dispute whether Dahej Yard was operational during the CIRP or not and there is a serious dispute that the concerned workmen/employees of the Dahej Yard and the concerned employees of the Mumbai Head Office actually worked during the CIRP or not and therefore it is directed that let the appellants submit their claims before the Liquidator and establish and prove that during CIRP, IRP/RP managed the operations of the corporate debtor as a going concern and that they actually worked during the CIRP and the Liquidator is directed to adjudicate such claims in accordance with law and on its own merits and on the basis of the evidence which may be laid/produced, irrespective of the fact whether the RP who himself is now the Liquidator included the claims of the appellants being wages/

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salaries during CIRP as CIRP costs or not. The Liquidator is directed to A
adjudicate such claims independently. If it is found that in fact the IRP/
RP managed the operations of the corporate debtor as a going concern
during the CIRP and the concerned workmen/employees actually worked
during CIRP, their wages and salaries be considered and included in B
CIRP costs and they will have to be paid as per Section 53(1)(a) of the
IB Code in full before distributing the amount in the priorities as mentioned
in Section 53 of the IB Code. The aforesaid exercise shall be completed
within a period of twelve weeks from today and such amount shall be
paid out of the amount which is directed to be kept aside earlier by the
Adjudicating Authority/Appellate Tribunal and thereafter by this Court.
Till such claims are adjudicated upon, the Liquidator is directed to keep C
aside the said amount exclusively to be used for the workmen/employee's
dues which is to be paid on adjudication as above.

16. The present appeal is partly allowed to the aforesaid extent
and disposed of accordingly. No costs.

Divya Pandey and Amarendra Kumar
(Assisted by : Adnan Khan, LCRA)

Appeal partly allowed.