

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 19804 of 2022****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE BIREN VAISHNAV sd/-****and****HONOURABLE MR. JUSTICE DEVAN M. DESAI sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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KRBL LIMITED
Versus
STATE OF GUJARAT

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Appearance:

MR DEVAN PARIKH, SENIOR COUNSEL WITH MR SP MAJMUDAR(3456)
AND MR ARPIT R SINGHVI(9524) for the Petitioner(s) No. 1
MR PRANAV TRIVEDI, AGP for the Respondent(s) No. 1
MR HS MUNSHAW(495) for the Respondent(s) No. 2
NOTICE SERVED BY DS for the Respondent(s) No. 1,3,4

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CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV
and
HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 22/09/2023

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

“28(A) YOUR LORDSHIPS may be pleased to issue a writ of mandamus writ in the nature of mandamus or any other appropriate writ, order or directions directing the Respondent No. 2 to certify the Entry No. 4454 in revenue record pursuant to the sale of the land in question by way of registered sale deed dated 17.12.2021 in favour of the Petitioner;

B) YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions setting aside order dated 05.01.2022 passed by Respondent No. 3 and further set aside the consequential Entry No. 6295 mutated in the revenue record;

BB) YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions quashing and setting aside endorsement of Respondent No. 4 - Circle Officer rejecting the Entry 4454 as the same was without hearing the Petitioner and is

completely illegal;

2. Facts in brief are as under:

2.1 The petitioner is a public limited company incorporated under the Companies Act, 1956. It is engaged in the business of rice processing and exporting and is the world's largest rice miller.

2.2 The petitioner is an auction purchaser of land being non agricultural land situated at Survey No.113, Village:Varsamedi, Taluka:Anjar, District:Kutch, admeasuring 44,212 square meters. The land in question was purchased by an auction by way of a registered sale deed dated 17.12.2021 from the liquidator of M/s. Gran Electronics Private Limited.

2.3 M/s.Gran Electronics Private Limited has purchased the land from one Neha Ashwin Mehta

vide sale deed dated 30.08.2005. The company had obtained permission for bona-fide industrial use as provided under the Bombay Tenancy and Agricultural Lands Act. Since, M/s.Gran Electronics Private Limited was desirous of availing financial facilities, it approached the Indian Overseas Bank for availing financial facilities. In order to secure financial assistance from Indian Overseas Bank and Saraswat Bank an equitable mortgage deed dated 02.06.2006 was created. The loans were repaid and the mortgage deed was released. Desirous of obtaining additional financial facilities, M/s.Gran Electronics Private Limited approached IFCI Limited and secured the said financial facility by executing an indenture of mortgage dated 03.12.2015. Since the company had to close its operations, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016, was filed

by one Universal Digital Connect Limited against M/s.Gran Electronics Private Limited. By an order dated 17.01.2020, the National Company Law Tribunal, Mumbai, admitted the petition and ordered moratorium under Section 14 of the Code and appointed an Interim Resolution Professional.

2.4 The Interim Resolution Professional issued a public advertisement dated 25.01.2020 inviting claims as per the provisions of the Code. Interim Resolution Professional was thereafter confirmed as the Resolution Professional. The list of claims with respect to the operational creditors was put forth in the several claims. It is the case of the petitioner that the claim of the sales tax department in the sum of Rs.77,08,69,644/- was rejected. In a meeting held on 30.06.2020, it was decided to liquidate M/s.Gran Electronics Private

Limited. An application was accordingly filed and vide order dated 12.02.2021, the National Company Law Tribunal ordered liquidating M/s.Gran Electronics Private Limited and further appointing a liquidator.

2.5 On 19.02.2021, a public announcement was issued by the liquidator calling for the stakeholders to submit their claims on or before 20.03.2021. By a letter dated 23.02.2021 the liquidator had also addressed a letter to the office of the Assistant Commissioner of State Tax asking him to submit its claim. No claim was received from the State Goods and Services Department. Thereafter, an auction sale notice was issued on 14.09.2021 for sale of assets including the land in question. E-auction took place on 01.10.2021 which was extended thereafter. The petitioner participated in the

auction proceedings and submitted a bid form on 26.10.2021. He was declared as a successful bidder of the land in question and the buildings. He was informed accordingly and the payments were made by the petitioner to the liquidator.

2.6 The Gram Panchayat – Varsamedi addressed a letter on 12.11.2021 to M/s.Gran Electronics Private Limited to pay outstanding property tax. On 15.11.2021, the petitioner requested the Gram Panchayat to issue No Due Certificate. A registered sale deed was executed on 17.12.2021. The liquidator by letter dated 17.12.2021 informed the Panchayat stating that any dues other than secured, unsecured or of the workman and employees will fall under operational creditors. Vide notice dated 10.01.2022, the SGST department in an absolutely illegal manner intimated attachment

of the land in question. A pencil entry bearing no.4454 was mutated in favour of the petitioner. On a request made by the petitioner on 16.02.2022 to certify the entry, the Talati-cum-Mantri refused to do so on the ground that there existed a charge of the SGST department. By the impugned order dated 05.01.2022, the respondent no.3 has demanded an amount of Rs.56,01,79,095/- towards outstanding GST dues and mutated entry no.6295, *inter-alia*, recording a charge on the property of the SGST Department. Hence, the petition.

3. Mr.Devan Parikh learned Senior Advocate appearing with Mr.S.P.Majmudar learned advocate for the petitioner would make the following submissions:

3.1 That the Insolvency and Bankruptcy Code is

divided into two halves. Firstly, Sections 1 to 32 are concerned with reconstruction of the company by a resolution process. Secondly, Section 33 onwards deals with the liquidation if the resolution plan is not possible.

3.2 That IBC is a complete code which deals with solutions on a holistic perspective concerning a company and all stakeholders, irrespective of whether the provision pertains to the resolution plan or the liquidation process which is settled law that all concerns including the company, creditors, purchasers start with a 'clean slate'. He would submit that as far as the resolution process is concerned, the judgement of the Hon'ble Supreme Court in case of ***Ghanshayam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited***, reported in ***(2021) 9 SCC***

657, has dealt with the issue and the Hon'ble Supreme Court held that a successful resolution application cannot suddenly face with undecided claims after a resolution plan submitted by him has been approved.

3.3 Mr. Parikh would also rely on a decision of the Supreme Court in the case of ***Paschimanchal Vidhyut Vitran Nigam Limited v. Raman Ispat Private Limited and others*** rendered in ***Civil Appeal No.7976 of 2012***, whereby the Supreme Court has held that the IBC is a complete code. It has explained Section 52 of the Code inasmuch as, a secured creditor can either seek to opt to liquidate his secured assets on his own or to relinquish his security and permit the liquidator to sell the same. A specific procedure has been prescribed under Section 52(3). If the secured creditor

liquidates his assets on his own, he can take his money and for the remaining he stands at the bottom of the waterfall mechanism. He would therefore submit that it is conclusively held that Sections 52 and 53 are complete and comprehensive code and all rights even of secured creditors in the secured assets stands diluted and compromised.

3.4 Mr.Parikh would submit that once the property was sold by the liquidator in the public auction and on “as is where is basis”, the secured creditor cannot be allowed to assert an entry for the asset once sold. He would submit that the claim of the SGST department was rejected by the Committee of creditors on 22.02.2020. Pursuant to an auction notice and proceedings thereafter, the petitioner had purchased the property by a registered sale deed dated

17.10.2021. As a purchaser, the petitioner was never aware of any dues. Reading the sale deed, it is very clear that it was categorically decided that the petitioner shall not be responsible to pay any dues to the Government.

3.5 Mr.Parikh would submit that even taking into consideration the position under the general law as per Section 100 of the Transfer of Properties Act, a charge created by operation of law or otherwise is not a mortgage. It is therefore not an interest in the property but only it is a legal or a contractual right to the person in whom the charge is vested. He would submit that as per the proviso to Section 100, a charge cannot be enforced against any property in the hands of the person to whom such property has been transferred for consideration and without any notice of change.

3.6 He would rely on the covenant in the sale deed wherein it was specifically stated that the purchaser will not be responsible to pay any due amount to the Government / Bank / Financial Institution / GST Department etc.

3.7 Mr.Parikh would submit that even as per Section 26E, no person can claim a preexisting charge against the purchaser.

3.8 He would therefore submit that under the IBC or under the general law, the charge under VAT Act 2005 cannot be enforced against the petitioner in the facts of the case.

4. Mr.Pranav Trivedi, learned AGP would oppose the petition and make the following submissions:

4.1 He would submit that pursuant to the dues, a charge is created in Section 48 under the Value Added Tax Act, 2003. Charge of the State Government being a crown dues would have precedence on the charge.

4.2 He would submit that once the property was sold on “as is where is basis” the dues of the State Government cannot be wiped out.

4.3 Mr.Trivedi would further submit that the rigors of Section 31 are not applicable to the facts of the present case. Since the insolvency proceedings did not materialize the rights of dues of the State Government did not get extinguished. He would submit that once there was a failure of insolvency resolution process, the rights of the secured creditor are restored.

4.4 With regard to the submission of the learned counsel for the petitioner on “waterfall mechanism” he would submit that in the present case since the liquidator has while distributing the asset sold the asset on ‘as is where is basis’, the rights of the State Government stood secured. They do not stand relinquished even if the distribution is done after following watershed mechanism.

4.5 He would distinguish the judgement in the case of ***Paschimanchal Vidhyut Vitran Nigam Limited*** (supra), because in that case the issue was with regards to removal of charge prior to distribution of assets under the watershed mechanism. In the present case, the sale was on an ‘as is where is basis’.

5. Considered the submissions made by the learned

advocates for the respective parties.

5.1 A recapitulation of facts would indicate that one M/s.Gran Electronics Private Limited had obtained financial facilities from IFCI Limited. Unable to sustain its business, it had closed its operations from February 2019 onwards. An application under Section 7 of the IBC was filed by one Universal Digital Connect Limited and on 17.01.2020 the National Company Law Tribunal (NCLT) admitted the petition wherein moratorium under Section 14 of the Code became operative and an IRP was appointed.

5.2 On 25.01.2020 a public advertisement was issued inviting claims. The advertisement/public announcement was issued under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Reforms) Regulations 2016. In accordance with the Regulations a creditor had to provide/submit proofs of claim by 06.02.2020.

5.3 On 22.02.2020 the IRP was confirmed as a Resolution Professional and list of claims with respect to operational creditors were put forth.

5.4 The Sales Tax Department on 30.06.2020 submitted its claim of Rs.77,08,69,644/- which was rejected by the Resolution Professional. After a unanimous vote of the Committee of Creditors to liquidate the company the NCLT Mumbai, on 12.02.2021 passed an order liquidating M/s.Gran Electronics Private Limited ('GEPL' for short). The relevant portion of the order of the NCLT reads as under:

"5. The Applicant further submitted that the estimated liquidation value of fixed assets of the Corporate Debtor is Rs.8,59,59,303/- and the total amount of claims admitted by the Applicant against

the Corporate Debtor is Rs. 13,20,90,326/-. This apart from the claim of IFCI Limited which is in the amount of Rs.191,09,39,984/- which could not be admitted because of the judgment of the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the matter of Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Limited [Company Appeal (AT) (Insolvency) No. 346 of 2018]. The claim of the Sales Tax Department was also not admitted as requisite documents supporting the claim of Rs. 77,08,69,644/- were not submitted. Further in the said meeting, a plan for the contribution of the liquidation costs was discussed, showcasing the estimated total value of the assets to the tune of Rs.190.08 Lakhs. Thereafter, the RP had informed the CoC that substantial funds in order to meet the said costs were available."

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a. Ms. Jovita Reema Mathias, having Registration No. IBBI/IPA-002/IP-N000337/2017-2018/1094 and having office at: 506, Inizio, Cardinal Gracious Road, Chakala, Andheri (E), Mumbai 400099, is hereby appointed as the Liquidator as provided under Section 34(1) of the Code.

b. That the Liquidator for conduct of the liquidation proceedings would be entitled to the fees as provided in Regulation 4(2)(b) of the IBBI (Liquidation Process Regulations), 2016.

C. The Liquidator appointed in this case to initiate liquidation process as envisaged under Chapter-III of the Code by following the liquidation process given in the Insolvency & Bankruptcy Board Regulations, 2016. of India (Liquidation Process)

d. The Liquidator appointed under section 34(1) of the Code. Will have all powers of the board of directors, key managerial personnel and the partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be vested

with the liquidator.

e. That the Corporate Debtor to be liquidated in the manner as laid down in the Chapter by issuing Public Notice stating that the Corporate Debtor is in liquidation with a direction to the Liquidator to send this order to the ROC under which this Company has been registered.

f. All the powers of the Board of Directors, key managerial persons, the partners of the Corporate Debtor hereafter ceased to exist. All these powers henceforth vest with the Liquidator.”

5.5 A public announcement was made on 19.02.2021 under Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016. The stakeholders were called to submit their claims with proof on or before 20.03.2021 to the liquidator. The liquidator addressed a letter on 23.02.2021 to the Assistant Commissioner State Tax to submit claims in accordance with Rule 16 of the Liquidation Process Regulations. However, the State Tax Department did not lodge any claim either physically or through e-mail. An E-

auction for 01.10.2021 was notified on “AS IS WHERE IS” “AS IS WHAT IS” and “WHATEVER THERE IS BASIS”. By a subsequent corrigendum the date was changed to 29.10.2021. The petitioner on 26.10.2021 offered to bid for the land and building and made a deposit of EMD. On 29.10.2021, the petitioner was declared as a successful bidder and the balance amount was credited in the liquidator’s account. A sale deed was executed on 17.12.2021. A sale certificate was issued by the liquidator of GEPL. The relevant extract of the covenant with respect to past dues reads as under:

“The purchaser will not responsible to pay any due amount to the government / Bank / Financial Institute / Semi Government Office / GST Department / VAT Department / Labour Department / Central Excise Department / Income Tax Department or any other Government Department or to the Gram Panchayat or any other public body or authority in respect thereof since the same will fall under the waterfall mechanism and will be dealt with in the manner specified in Section 53(1) of IBC, 2016.”

5.6 Therefore, there was a clear stipulation thereunder that the purchaser i.e. the petitioner will not be responsible to pay any due amount to the government since the same would fall under the waterfall mechanism and will be dealt with in the manner specified in Section 53(1) of IBC, 2016. Certain other covenants in the sale deed read as under:

“THE VENDOR have not received any notice for acquisition of the said property from the government nor any suit or any recovery proceeding or any proceeding is pending in any court of law or before any competent authority in respect of the said property. The Purchaser shall be entitled to get its name entered in the government record, survey record and Gram Panchayat record of the said property by presenting this deed of sale and the vendor do hereby agree to give statement and signatures whenever and wherever necessary to transfer the said property in the name of the purchaser.”

5.7 Since the revenue record showed a charge of the State Tax Department, the Liquidator addressed a letter on 22.04.2022 to the office of the Deputy Commissioner (SGST). Relevant

extracts of the letter read as under:

"April 22, 2022

*Office of Deputy Commissioner (SCST)
Goods and Service Tax Department,
SGST Bhawan, Transport Nagar,
Railway Colony, Gopalpuri,
Gandhidham,
Gujarat-370201*

Dear Sir/Madam,

*Sub:Request to remove attachment from the
Land records of Gran Electronics Private
Limited-In Liquidation*

Ref:GST Registration No. 24AACCG4003A1ZL

As you are aware that the Hon'ble National Company Law Tribunal (NCLT), Mumbai Bench vide its order dated January 17, 2020 admitted the application made by Universal Digital Connect Limited (Financial Creditor') under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('the Code/IBC, 2016') and pronounced the commencement of Corporate Insolvency Resolution. Process (CIRP) of Gran Electronics Private Limited ('Corporate Debtor') and my appointment as an Interim Resolution Professional ('IRP'). A copy of the said order is enclosed herewith for your ready reference as Annexure A. The same was intimated to your department vide letter dated 12 March, 2020 (enclosed herewith as Annexure B) and in response to which I had received your claim however, due to insufficient supporting documents, the claim submitted by you was not admitted.

...

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Subsequently, a public announcement in accordance with Regulation 12 of the IBBI (Liquidation Process), Regulations, 2016

(Liquidation Regulations, 2016) was published on 19 February, 2021 in the following newspapers, the copy of the Public announcement is enclosed herewith as Annexure E:

sr. no.	Edition	Publication	Language
1.	Mumbai	Fress Press Journal	English
		Navakal	Marathi
2.	Gandhidham, Kutch	The Indian Express	English
		Kutch Uday	Gujarati

Further, in compliance with Regulation 16 of the Liquidation Regulations, 2016, I had requested your good office to kindly submit or update their claim on or before 20 March, 2021 in Form C as on the liquidation commencement date Le. 12 February, 2021 so as to enable me to verify the same and admit in accordance with Regulation 30 of Liquidation Regulations, 2016. Subsequent to which, in accordance with Regulation 31(1) & (2) of the Liquidation Regulations, 2016, I had filed the List of Stakeholders with the Hon'ble NCLT and 1881 on 44 May, 2021. Further, In accordance with Regulation 31A of Liquidation Regulations, 2016 a Stakeholders Consultation Committee was formed considering the claims received and admitted by me. However, I have not received any claim from your good office either physically or through email till date."

...

...

KRBL Limited is now in the process of transferring title of the said land in their name in the records (Hak Patrak) of Varsamedi Gram Panchayat ('Gram Panchayat) however, the same could not be concluded due to the reason that there is an attachment of GST department for non- payment of dues. In view of the same, they have informed

KRBI. Limited to approach the local GST department for removal of said attachment & subsequent to which the Gram Panchayat will be able to proceed with transferring of title of the said land in their name."

5.8 This letter was addressed in pursuance of a letter dated 05.01.2022 of the office of the Deputy Commissioner (SGST) demanding a sum of Rs.56,01,79,095.00 and mutating entry 6295 recording a charge.

5.9 The scenario that unfolds on the basis of the aforesaid recapitulation of facts indicates that at the stage of the corporate insolvency resolution process, on the basis of a public announcement, that State Government had lodged its claim but the same was rejected for want of sufficient proof. We have, in the earlier part of this judgement reproduced the relevant portion of the order of the NCLT substantiating the fact that the State at that stage could not prove its

claim. Post the initiation of resolution process which failed and it was resolved by the COC to liquidate the company and after such order of the NCLT liquidating the company and appointing the Resolution Professional as the Liquidator, the Liquidator once again called for lodging of claims by way of a public announcement under the liquidation process regulations. To this, as the letter dated 22.04.2022 indicates no claim was lodged in accordance with Regulation 31A of the Liquidation Regulations.

5.10 The relevant regulations, namely Regulations 6, 7, 10, 12 and 13 of Insolvency Resolution Process for Corporate persons read as under:

“6. Public announcement.—(1) An insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional. Explanation: ‘Immediately’ means not later than three days from the date of his appointment. (2) The public announcement

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.

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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.

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12. Submission of proof of claims.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement. (2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date. (3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim: Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion. 12-A. Updation of claim.—A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.

13. Verification of claims.—(1) The interim

resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. (2) The list of creditors shall be— (a) available for inspection by the persons who submitted proofs of claim; (b) available for inspection by members, partners, directors and guarantors of the corporate debtor or their authorised representatives; (c) displayed on the website, if any, of the corporate debtor; (ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020; (d) filed with the Adjudicating Authority; and (e) presented at the first meeting of the committee.”

5.11 Regulations 16, 17, 31, 31A, 32 and 33 of the Liquidation Process Regulations, 2016 read as under:

“16. Submission of claim. (1) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement. (2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.]

17. Claims by operational creditors. (1) A person claiming to be an operational creditor of the corporate debtor, other than a workman or employee, shall submit proof of claim to the liquidator in person, by post or by electronic means in Form C of Schedule II. (2) The existence of debt due to an operational creditor under this Regulation may be proved on the basis of- (a) the records available with an information utility, if any; or (b) other relevant documents which adequately establish the debt, including any or all of the following - (i) a contract for the supply of goods and services with corporate debtor; (ii) an invoice demanding payment for the goods and services supplied to the corporate debtor; (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; and (iv) financial accounts

...

...

31. List of stakeholders. (1) The liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with- (a) the amounts of claim admitted, if applicable, (b) the extent to which the debts or dues are secured or unsecured, if applicable, (c) the details of the stakeholders, and (d) the proofs admitted or rejected in part, and the proofs wholly rejected. (2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims, and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3). (3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority. (4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42. (5) The list of stakeholders, as modified from time

to time, shall be- (a) available for inspection by the persons who submitted proofs of claim; 21 (b) available for inspection by members, partners, directors and guarantors of the corporate debtor; (c) displayed on the website, if any, of the corporate debtor.

31A. Stakeholders' consultation committee.

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

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

Table

<i>Class of Stakeholders</i>	<i>Description</i>	<i>Number of Representatives</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>Secured financial creditors, who have relinquished their security interests under section 52</i>	<i>Where claims of such creditors admitted during the liquidation process is less than 50% of liquidation value</i>	<i>Number of creditors in the category, subject to a maximum of 2</i>
	<i>Where claims of such creditors admitted during the liquidation process is at least 50% of liquidation value</i>	<i>Number of creditors in the category, subject to a maximum of 4</i>
<i>Unsecured financial creditors</i>	<i>Where claims of such creditors admitted during</i>	<i>Number of creditors in the category, subject</i>

	<i>the liquidation process is less than 25% of liquidation value</i>	<i>to a maximum of 1</i>
	<i>Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value</i>	<i>Number of creditors in the category, subject to a maximum of 2</i>
<i>Workmen and employees</i>	<i>1</i>	<i>1</i>
<i>Governments</i>	<i>1</i>	<i>1</i>
<i>Operational creditors other than Workmen, employees and Governments</i>	<i>Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value</i>	<i>Number of creditors in the category, subject to a maximum of 1</i>
	<i>Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value</i>	<i>Number of creditors in the category, subject to a maximum of 2</i>
<i>Shareholders or partners, if any</i>		<i>1</i>

(3) The liquidator may facilitate the stakeholders of each class to nominate their representatives for inclusion in the consultation committee.

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

(5) Subject to the provisions of the Code and these

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

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

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

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

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

(10) The advice of the consultation committee shall not be binding on the liquidator: Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing.]

[32A. Sale as a going concern. (1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses. (2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the

committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern. (3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee. (4) If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.]

33. Mode of sale. (1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when- (a) the asset is perishable; (b) the asset is likely to deteriorate in value significantly if not sold immediately; (c) the asset is sold at a price higher than the reserve price of a failed auction; or (d) the prior permission of the Adjudicating Authority has been obtained for such sale: Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to- (a) a related party of the corporate debtor; (b) his related party; or (c) any professional appointed by him.

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

appropriate orders against the colluding parties.”

5.12 Sections 7, 29, 31, 33, 52 and 53 of the IBC
read as under:

“7. Appointment of professionals. (1) A liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost. (2) The liquidator shall not appoint a professional under sub-regulation (1) who is his relative, is a related party of the corporate debtor or has served as an auditor to the corporate debtor in the five years preceding the liquidation commencement date. (3) A professional appointed or proposed to be appointed under sub-regulation (1) shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders, or the concerned corporate debtor as soon as he becomes aware of it, to the liquidator.

...

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

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

unsecured, if applicable, (c) the details of the stakeholders, and (d) the proofs admitted or rejected in part, and the proofs wholly rejected. (2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims, and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3). (3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority. (4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42. (5) The list of stakeholders, as modified from time to time, shall be- (a) available for inspection by the persons who submitted proofs of claim; 21 (b) available for inspection by members, partners, directors and guarantors of the corporate debtor; (c) displayed on the website, if any, of the corporate debtor.

...

33. Mode of sale. (1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when- (a) the asset is perishable; (b) the asset is likely to deteriorate in value significantly if not sold immediately; (c) the asset is sold at a price higher than the reserve price of a failed auction; or (d) the prior permission of the Adjudicating Authority has been obtained for such sale: Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

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

...

52 A secured creditor in the liquidation proceedings may—

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

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

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

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

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

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

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

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

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

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

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

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

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

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any

realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

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

...

53-Distribution of assets.

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

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

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

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

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

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

- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:—
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;
- (g) preference shareholders, if any; and
- (h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

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

Explanation.—For the purpose of this section—

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

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

5.13 Extensive reliance was paid to the decision of the Supreme Court in the case of **Ghanshayam Mishra and Sons Private Limited** (supra). The Supreme Court in the aforesaid case after an extensive review of the IBC and various decisions rendered thereunder, the Court observed that once the resolution plan is approved, it becomes binding on the stakeholders including creditors. Relevant paragraphs of the judgement read as under:

“65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is 61 satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running

concern.

66. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of 62 the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with subsection (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of subsection (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of subsection (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of

the 63 assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum.

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

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

“107. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT

388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as 65 this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.”

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

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

frustrate the very purpose for which the I&B Code is enacted.

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

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

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

...

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

"IBC has actually an overriding effect. For

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

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

80. It could thus be seen, that in the speech the Hon'ble Finance Minister has categorically stated, that Section 238 provides that I&B Code will prevail in case of inconsistency between two laws. She also stated, that there was question about indemnity for successful resolution applicant and that the amendment was

clearly making it binding on the Government. She stated, that the Government will not make any further claim after resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated, that she would want all the Hon'ble Members to recognize this message and 73 communicate further that I&B Code gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states, that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company.

...

84. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was Granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

...

93. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon

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

94. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out

the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

...

CONCLUSION

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

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

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

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

5.14 What therefore emerges is that on the facts of the present case the CIRP was undertaken. Claims were invited and the State during the process failed to substantiate it and at the stage of liquidation did not lodge its claim. In light of the judicial pronouncement above the debt therefore did not form a part of the resolution plan and therefore stood extinguished.

5.15 Admittedly state tax dues and the State would be a claimant as an operational creditor. The claim lodged during insolvency process stood rejected and during the liquidation, no such claim was lodged. This fact is reiterated at the cost of repetition as this would lead us thus to examine the provisions of Section 52 and 53 of the IBC.

5.16 Reading Section 52 would indicate that a

secured creditor in the liquidation proceedings may relinquish its security interest to the liquidation asset and receive proceeds on the sale of assets by the liquidation in the manner specified under section 53 or realise its security asset by enforcing its claim or settling it. In the facts of the present case having failed to assert its claim the State as an operational creditor/stakeholder/secured creditor would have to fall in line as per the “waterfall mechanism” under Section 53 of the IBC.

5.17 The decision of the Supreme Court in the case of ***Paschimanchal Vidhyut Vitran Nigam Limited*** (supra) appreciating the provisions held as under:

“25. During the insolvency resolution process, a secured creditor is not permitted to realize its dues by initiating any proceeding. This is by virtue of Section 14 (1) (c) which enables the imposition of a moratorium period, during which a secured creditor is precluded from bringing any action to

foreclose, recover or enforce any security interest. Secured creditors' rights are restored only in the event of failure of the insolvency resolution process, at the stage of liquidation. B. THE 'WATERFALL MECHANISM'

26. Section 53 of the IBC, which contains the 'waterfall mechanism', provides for the order of distribution of assets. It states as follows: "(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. 14 (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)."

27. The priority of claims, indicated in the hierarchy of preferences, under the waterfall mechanism is therefore: Firstly, insolvency resolution process costs and the liquidation costs; Secondly, workmen's dues for the period of 24 months preceding the liquidation commencement date and debts owed to a secured creditor in the event such secured creditor has relinquished security; Thirdly, wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date; Fourthly, financial debts owed to unsecured creditors; Fifthly, any amount due to the central government and the state government and debts owed to a secured creditor for any amount unpaid following the enforcement of security interest; Sixthly, any remaining debts and dues; Seventhly, preference shareholders; and Eighthly equity shareholders or partners. This hierarchy or order of priority thus accords government debts [clause (e)] and operational debts [clause (f)] lower priority than dues owed to unsecured financial creditors.

28. Debts owed to a secured creditor, whenever such secured creditor "has relinquished security in

the manner set out in section 52” receive a fairly high priority (immediately after insolvency resolution process costs), whereas in other cases, i.e., when the secured creditor does not relinquish security, the priority of claim is lower [Section 53 (1) (e) (ii)] in respect of “any amount unpaid following 15 the enforcement of security interest”. Another feature is that amounts due to the government (i.e., payable into the Consolidated Fund of India or Consolidated Fund of a State) are ranked in the same manner as those of secured creditors who do not relinquish their security interest [Section 53 (1) (e) (ii)].

29. The Bankruptcy Law Reforms Committee Report, 2015, which led to the framing and later enactment of IBC, pertinently stated that: “The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer.”

“For the remaining creditors who participate in the collective action of Liquidation, the Committee debated on the waterfall of liabilities that should hold in Liquidation in the new Code. Across different jurisdictions, the observation is that secured creditors have first priority on the realizations, and that these are typically paid out net of the costs of insolvency resolution and

Liquidation. In order to bring the practices in India in-line with the global practice, and to ensure that the objectives of this proposed Code is met, the Committee recommends that the waterfall in Liquidation should be as follows: 1. Costs of IRP and liquidation. 2. Secured creditors and Workmen dues capped up to three months from the start of IRP. 3. Employees capped up to three months. 4. Dues to unsecured financial creditors, debts payable to workmen in respect of the period beginning twelve months before the liquidation commencement date and ending three months before the liquidation commencement date; 5. Any amount due to the State Government and the Central Government in respect of the whole or any part of the period of two years before the 16 liquidation commencement date; any debts of the secured creditor for any amount unpaid following the enforcement of security interest 6. Remaining debt 7. Surplus to shareholders.”

30. The explanation to this appears in the Report of the Insolvency Law Committee (2020):24 “7.3. The Committee noted that the Code aims to promote a collective liquidation process, and towards this end, it encourages secured creditors to relinquish their security interest, by providing them second-highest priority in the recovery of their dues, as under Section 53(1)(b). Thus, they are not treated as ordinary unsecured creditors under the Code, as they would have been under the Companies Act, 1956. It was noted that, to some extent, this provision intends to replicate the benefits of security even where it has been relinquished, in order to promote overall value maximisation. However, even if secured creditors realise their security interest, they would only recover to the extent of their security interest, and would claim any excess dues remaining unpaid under Section 53(1)(e) of the liquidation waterfall. Thus, the Committee was of the view that this provision could not have been intended to provide secured creditors who relinquish their security interest,

priority of repayment over their entire debt regardless of the extent of their security interest, as it would tantamount to respecting a right that has never existed. Further, if the “debts owed to a secured creditor” is not restricted to the extent of the security, there would be broad scope for misuse of the priority Granted under Section 52(1) (b), as even creditors who are not secured to the full extent of their debt would rely on the mere fact of holding any form of security, to recover the entire amount of their unpaid dues in priority to all other stakeholders. 7.4. On the basis of the above discussion, the Committee agreed that the priority for recovery to secured creditors under Section 53(1)(b)(ii) should be applicable only to the extent of the value of the security interest that is relinquished by the secured creditor. The Committee was of the opinion that this issue stands clarified in terms of the reasoning provided above and does not necessitate any further amendment to the provisions of the Code.”

31. The Preamble to the IBC expressly recognizes the shift in the law, with respect to ordering priority of claims, especially with respect to government dues: “An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

32. In response to the comments received on this aspect from Parliamentary Debates on the Amendment Act in the Sixteenth Lok Sabha Session in 2018, the Report of the Insolvency Law Committee stated: “Section 53 of the Code places

secured creditors who have relinquished their security above unsecured financial creditors. Thus, clear distinction has been drawn between unsecured and secured creditors who join the liquidation proceedings for the purpose of the payment waterfall in case of liquidation. Unsecured creditors are ranked above secured creditors who have unpaid debts following enforcement of securities as it is presumed that such secured creditors have recovered most of their dues by enforcement of their security outside the liquidation proceedings. Moreover, as stated in the BLRC Report, protection of dues of unsecured creditors is intentional in order to encourage the market for corporate bonds and other unsecured debt. With respect to dues of workmen, they have been placed at the highest priority along with secured creditors who have relinquished their security, second only to IRP costs under the payment waterfall provided in section 53 of the Code.”

33. The rationale for placing secured creditors who relinquish their security, higher in priority, is found upon a conjoint reading of Sections 52 and 53. Section 52 reads as follows: “Secured creditor in liquidation proceedings. (1) A secured creditor in the liquidation proceedings may— (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or (b) realise its security interest in the manner specified in this section. (2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised. (3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either— (a) by the records of such security interest

maintained by an information utility; or (b) by such other means as may be specified by the Board. (4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it. (5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing of the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force. (6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force. (7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall— (a) account to the liquidator for such surplus; and (b) tender to the liquidator any surplus funds received from the enforcement of such secured assets. (8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate. (9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.

...

37. The recent judgment of this court, in *Moser Baer Karamchari Union thr. President Mahesh Chand Sharma v. Union of India & Ors*²⁸ had dealt with the waterfall provisions of the IBC at length, albeit in the context of priority of claims of workmen's dues. This court observed as follows: "66. ...Sub-section (1) to Section 52 of the Code gives two options to a secured creditor. First, the secured creditor in a liquidation proceeding may relinquish its security interest and receive the proceeds from the sale of assets by the liquidator in the manner specified in Section 53 of the Code. The second option is to realise the security interest, but in the manner specified in Section 52 of the Code. Sub-section (2) to Section 52 of the Code states that where the secured creditor realises the security interest, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised. The liquidator is to verify the security interest and shall permit the secured creditor to realise such security interest, which is proved either by records of such security interest maintained by an information utility, or by such other means as may be specified by the Board. Sub-section (4) to Section 52 of the Code states that the secured creditor may enforce, realise, settle, compromise or deal with the secured asset in accordance with such law as applicable to the security interest being realised and to the secured creditor. The secured creditor is to accordingly apply the proceeds to recover the debts due to him. We need not refer to Sub-section (5) to Section 52 of the Code as it relates to the action which the secured creditor may take if he faces resistance from the corporate debtor or any other person connected therewith in taking possession of, selling or otherwise disposing off the security. Sub-section (6) to Section 52 of the Code applies when an adjudicating authority is in receipt of an application Under Sub-section (5) to Section 52 of the Code. Sub-section (7) to Section 52 of the

*Code, however, is important as it states that where on enforcement of the security interest, an amount by way of proceeds is in excess of the debts due to the secured creditor, the secured creditor shall account for and pay the excess/surplus amount to the liquidator from enforcement of such secured assets. The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in the section, are to be deducted from the proceeds of any realisation by such secured creditors. They are to be transferred and included in the liquidation estate. Sub-section (9) to Section 52 of the Code states that where proceeds for realisation of the secured assets are not adequate to repay the debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in Clause (e) to Sub-section (1) to Section 53 of the Code. 67. To protect the interest of the workmen where the secured creditor does not relinquish its security interest to fall Under Section 53 of the Code, Regulation 21A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 has been enacted, and it requires that the secured creditor, who opts to realise its security interest as per Section 52 of the Code, has to pay as much towards the amount payable under the Clause (a) and Sub-clause (i) to Clause (b) of Sub-section (1) to Section 53 of the Code to the liquidator within the time and the manner stipulated therein. The workmen's dues, even when the secured creditor opts to proceed Under Section 52 of the Code, are therefore protected in terms of Sub-clause (b) of Sub-section (1) to Section 53 of the Code. ***** 69. We now turn our attention to Section 53 of the Code which begins with a non-obstante Clause and states that 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 liquidation assets shall be distributed in the order of priority, which is*

stipulated, and within such period and such manner as may be specified. The consequence of Sub-section (1) to Section 53 of the Code is that it will override the rights of parties, including the secured creditor, when the said provision applies. Section 53 of the Code is the complete and comprehensive code which ensures collection of assets and then provides the manner in which the creditors are to be paid. Even the rights of the secured creditor falling Under Section 53 of the Code to enforce, realise, settle, compromise or deal with the secured assets as applicable to the security interest are diluted and compromised. 70. Clause (a) to Sub-section (1) to Section 53 deals with insolvency resolution process costs and the liquidation costs which are to be paid in full. No grievance or issue can be raised in respect of the said clause. Clause (b) to Sub-section (1) to Section 53 states that the debts due in the form of workmen's dues for a period of twenty four months preceding the liquidation commencement date and the debts owed to the secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52 of the Code shall rank equally between and amongst the workmen and the secured creditors. The Explanation to Section 53 of the Code states that 'workmen's dues' shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013. In other words, Explanation to Section 326 of the Companies Act, 2013 has been incorporated and applies to the waterfall mechanism as prescribed in Clause (b) to Sub-section (1) to Section 53 of the Code. What is significant here is that under Clause (b) to Sub-section (1) to Section 53 of the Code, the workmen's dues are for the period of twenty four months preceding the liquidation commencement date. The liquidation commencement date, as defined in terms of Sub-section (17) to Section 5 of the Code, is much earlier in point of time and need not coincide with the date of winding up. This is in the interest of the workmen. Clause (i) of Explanation to Section 53 of the Code states that

where the distribution of proceeds in respect of class of recipients that rank equally, each of the debts would be paid either in full or would be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full. Ex facie, the Clause is very just and fair. It is to be noted that the wages and unpaid dues owed to employees other than the workmen fall in Clause (c), which is below Clause (b) to Sub-section (1) to Section 53 of the Code. They are to be paid wages and unpaid dues only for a period of twelve months preceding the liquidation commencement date, and that too only if surplus funds are available after making payment in terms of Clause (a) and (b) of Sub-section (1) to Section 53 of the Code. Clause (d) of Sub-section (1) to Section 53 of the Code relates to financial debts owed to unsecured creditors. The amounts due to the Central Government and the State Government, etc., and the debts owed to a secured creditor for any amount that remains unpaid following the enforcement of security interest, have been clubbed together in Clause (e) of Sub-section (1) to Section 53 of the Code, and have to be ranked equally between and among both of them. The remaining debts and dues fall in Clause (f) of Sub-section (1) to Section 53 of the Code. Preference shareholders fall under Clause (g) of Sub-section (1) to Section 53 of the Code, and equity shareholders or partners fall under Clause (h) of Sub-section (1) to Section 53 of the Code. Sub-section (2) to Section 53 of the Code states that any contractual arrangements between recipients Under Sub-section (1) with equal ranking, if disrupting the order of priority under the said Sub-section will be disregarded by the liquidator 71. The waterfall mechanism is based on a structured mathematical formula, and the hierarchy is created in terms of payment of debts in order of priority with several qualifications, striking down any one of the provisions or rearranging the hierarchy in the waterfall mechanism may lead to several trips and disrupt

the working of the equilibrium as a whole and stasis, resulting in instability. Every change in the waterfall mechanism is bound to lead to cascading effects on the balance of rights and interests of the secured creditors, operational creditors and even the Central and State Governments. Depending upon the facts, in some cases, the waterfall mechanism in the Code may be more beneficial than the hierarchy provided Under Section 326 of the Companies Act, 2013 and vice-versa. Therefore, we hesitate and do not accept the arguments of the Petitioners. 72. The Code is based on the organic evolution of law and is a product of an extensive consultative process to meet the requirements of the Code governing liquidation. It introduced a comprehensive and time-bound framework to maximise the value of assets of all persons and balance the interest of the stakeholders. The guiding principle for the Code in setting the priority of payments in liquidation was to bring the practices in India in line with global practices. In the waterfall mechanism, after the costs of the insolvency resolution process and liquidation, secured creditors share the highest priority along with a defined period of dues of the workmen. The unpaid dues of the workmen are adequately and significantly protected in line with the objectives sought to be achieved by the Code and in terms of the waterfall mechanism prescribed by Section 53 of the Code. In either case of relinquishment or non-relinquishment of the security by the secured creditor, the interests of workmen are protected under the Code. In fact, the secured creditors are taking significant haircut and workmen are being compensated on an equitable basis in a just and proper manner as per Section 53 of the Code. The Code balances the rights of the secured creditors, who are financial institutions in which the general public has invested money, and also ensures that the economic activity and revival of a viable company is not hindered because it has suffered or fallen into a financial crisis. The Code focuses on

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

...

49. Rainbow Papers (supra) did not notice the ‘waterfall mechanism’ under Section 53 – the provision had not been adverted to or extracted in the judgment. Furthermore, Rainbow Papers (supra) was in the context of a resolution process and not during liquidation. Section 53, as held earlier, enacts the waterfall mechanism providing for the hierarchy or priority of claims of various classes of creditors. The careful design of Section 53 locates amounts payable to secured creditors and workmen at the second place, after the costs and expenses of the liquidator payable during the liquidation proceedings. However, the dues payable to the government are placed much below those of secured creditors and even unsecured and operational creditors. This design was either not brought to the notice of the court in Rainbow Papers (supra) or was missed altogether. In any event, the judgment has not taken note of the provisions of the IBC which treat the dues payable to secured creditors at a higher footing than dues payable to Central or State Government.

50. The Gujarat Value Added Tax Act, 2003 no doubt creates a charge in respect of amounts due and payable or arrears. It would be possible to hold

[in the absence of a specific enumeration of government dues as in the present case, in Section 53(1)(e)] that the State is to be treated as a 'secured creditor'. However, the separate and distinct treatment of amounts payable to secured creditor on the one hand, and dues payable to the government on the other clearly signifies Parliament's intention to treat the latter differently - and in the present case, having lower priority. As noticed earlier, this intention is also evident from a reading of the preamble to the Act itself."

5.18 Reading of the aforesaid paras would indicate that once having relinquished its interest under Section 52, the State cannot continue the insistence of maintaining the charge in the revenue records and its claim will have to stand in priority.

5.19 The argument of the State that since the asset was sold on a condition of "AS IS WHERE IS BASIS", the charge of the State was rightly recorded is misconceived as the deed already records that the purchaser shall not be liable for payment of any outstanding dues of the

government. This too was, in the opinion of the Court a clause that would relieve the petitioner of the liability to pay tax dues. In light of the decision in the case of ***Ghanshayam Mishra and Sons Private Limited*** (supra), the petitioner was entitled to a clean slate.

5.20 Even otherwise as per Section 100 of the Transfer of Property Act, a charge cannot be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of such charge. The State moved in to get a charge registered on 15.12.2022 much later.

6. For the aforesaid reasons, petition is allowed. The order dated 05.01.2022 is set aside and so also is the consequential entry no.6295 mutated in the revenue record. The respondents are

directed to certify entry No.4454 in the revenue records pursuant to the sale of land in question by registered sale deed dated 17.12.2021. No costs.

sd/-

(BIREN VAISHNAV, J)

sd/-

(D. M. DESAI, J)

ANKIT SHAH