

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL
BENCH, NEW DELHI**

**Comp. App. (AT) (Ins) No. 720 of 2021 & I.A. No. 3172 of
2024**

IN THE MATTER OF:

State Tax Officer

...Appellant(s)

Versus

Premraj Ramratan Laddha & Ors.

...Respondent(s)

Present:

For Appellant :

Ms. Ritu Guru, Advocate.

For Respondents :

Mr. Sunil Beniwal, Mr. Rajendra
Beniwal, Advocates for R-1/RP.

Mr. Ashkrit Tiwari, Advocate for R-3.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

M/s Harsh Foundry Fluxes & Alloys filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') bearing CP (IB) No.536 of 2019 against Twenty First Century Castings Pvt. Ltd. (Corporate Debtor) which was admitted on 16.01.2020 and Saurabh Zaveri was appointed as the Interim Resolution Professional (IRP).

2. In the second meeting of the CoC held on 25.02.2019, a decision was taken to replace the IRP and accordingly an application was filed before the Adjudicating Authority for

appointment of Premraj Ramratan Laddha as Resolution Professional (RP) which was allowed on 16.03.2020.

3. Shorn of unnecessary details, M/s Suryadeep Alloys Steel Casting Pvt. Ltd. was the only resolution applicant. The CoC with 100% voting, approved the plan on 28.08.2020 pursuant to which RP filed an application bearing I.A No. 591 of 2020 before the Adjudicating Authority under Section 30(6) r/w Section 31 of the Code for seeking approval of the resolution plan.

4. The said application has been allowed vide impugned order dated 09.12.2020.

5. The present appeal has been filed by the State Tax Officer, Gujarat because against its admitted claim no provision has been made for any payment to the Appellant though it is claimed that the Appellant is also a secured creditor.

6. The Appellant has alleged that a sum of Rs. 11,70,47,801/- has accrued pertaining to assessment year 2009-11 and 2014 – 16 of the CD under the GVAT Act, 2003 (in short 'Act') and CST Act, therefore, a charge was created on the property of the CD by operation of law.

7. It is further alleged that the assessment orders were challenged by the CD before the Gujarat Value Added Tax Tribunal, Ahmedabad but the appeal was rejected in the year 2019. After commencement of the CIRP, the Appellant submitted its claim on Form B on 06.07.2020 to the RP and thereafter sent an email dated 21.08.2020 and 16.02.2021 for consideration of the claim of the Appellant to which the RP replied that it has been admitted provisionally. However, in the plan, though the amount of Rs. 11,70,47,801/- has been admitted but nothing has been given to the Appellant being an operational Creditor whereas it is the case of the Appellant that it would receive its claim at par with other secured creditors on the ground that a charge has been created by operation of law and in this regard relied upon a decision of the Hon'ble Supreme Court in the case of State Tax Officer Vs. Rainbow Papers Limited (2022) SCC OnLine SC 1162 in which the Hon'ble Supreme Court has relied upon section 48 of the GVAT Act and CST Act and held that State Tax Department is a secured creditor. It is submitted by the Appellant that a review petition no. 1620 of 2023 titled as Sanjay Kumar Agrawal Vs. State Tax Officer & Ors. was also filed before the Hon'ble Supreme Court which has been

dismissed. It is also submitted that a Division Bench of the Hon'ble Gujarat High Court in the case of Shree Radhekrushna Ginning and Pressing Pvt. Ltd. Vs. SOG in Special Civil Application No. 5413 of 2022 decided on 29.03.2022 held that the dues of the State Tax Department under Section 48 of the GVAT Act would have first charge on the property of the CD by way of operation of law from the date when the assessment order was passed by the assessing officer. It is, therefore, the case of the appellant that the charge created by operation of law on the CD is prior to the initiation of CIRP and RP has erred in not considering the State Tax Department as the secured creditor under Section 53 of the Code.

8. On the other hand, Counsel for Respondent No. 1 has submitted that the classification of the Appellant as an operational creditor (OC) is in consonance with the settled position of law. The Appellant had filed proof of claim as an OC only and that statutory dues owed to governmental authorities such as VAT, GST and other taxes do not constitute secured debt until and unless they are specifically backed by a registered charge.

9. Counsel for the Respondent No. 1 has referred to a decision of the Hon'ble Supreme Court in the case of Paschimanchal

Vidyut Vitran Nigam Ltd. Vs. Raman Ispat (P) Ltd. (2023) 10 SCC 60 to contend that electricity dues or statutory dues owed to government bodies do not enjoy precedence over secured creditors or other classes unless backed by valid security interest, therefore, the dues of the Appellant falling within the meaning of Government Dues and in liquidation will rank lower in priority under Section 53(1)(e)(i) of the Code.

10. It is submitted that the resolution plan submitted by Respondent No. 3 was approved by CoC whose wisdom is paramount and in this regard reliance has been placed upon the decisions of the Hon'ble Supreme Court in the cases of Pratap Technocrats (P) Ltd. & Ors. Vs. Monitoring Committee of Reliance Infratel Limited & Anr. 2021 SCC OnLine SC 661 and K Sashidhar Vs. Indian Overseas Bank & Ors., 2019 SCC OnLine SC 257.

11. It is also submitted that the Tribunal has passed the order in terms of Section 30(2) of the Code and since the wisdom of the CoC is supreme, therefore, limited scope of judicial review is available. In this regard, a reference has been made to the case of CoC of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors. (2019) 2 SCC 1.

12. Counsel for Respondent No. 3 has also submitted that the appeal was filed without impleading it as a party but on an application bearing I.A No. 5238 of 2024 this Tribunal has impleaded it as R3 vide its order dated 09.08.2024. He has also repeated the argument of the Respondent No. 1 about the wisdom of the CoC and relied upon the decisions in the cases of Pratap Technocrats (P) Ltd. (Supra), K. Sashidhar (Supra) and CoC of Essar Steel India Limited (Supra). He has also submitted that the resolution plan gave due regard to the claims of OCs of the CD including the Appellant but the OC- Govt. Dues was apportioned NIL amount because as per the estimate of R3, liquidation value was not sufficient to make payment of secured financial creditor in full and therefore, no payment was proposed for the operational creditors and other creditors.

13. He has also submitted that the appellant filed its claim on Form B as an OC on 06.07.2020 after a lapse of 156 days from the last date of submission of the claim and that the reliance placed upon Section 48 of the GVAT Act by the Appellant is misplaced, firstly, because charge was not created under Section 48 of the Act and secondly, the alleged security interest was not registered with the registrar of companies or land revenue

department and also because the provisions of the IBC has overriding effect on the same by virtue of Section 238 of the IBC.

14. In the end, Counsel for Respondent No. 3 has submitted that the plan was approved way back on 28.08.2020 by CoC and by the Tribunal on 09.12.2020 and has been implemented, therefore, it should not be interfered with.

15. We have heard Counsel for the parties and perused the record with their able assistance.

16. The issue involved in this appeal is as to whether the government dues of 11,70,47,801/- accrued on the basis of assessment under the GVAT Act and CST Act pertaining to the year 2009-11 and 2014-16, before the date of CIRP and having been upheld in appeal, dismissed in the year 2019, are to fall in the category of Operational Creditors or the Appellant has to be treated as a secured creditor in view of the decision of the Hon'ble Supreme Court in the case of Rainbow Papers (Supra)?

17. Since there is no dispute about the admission of the debt of the Appellant and the only dispute is about the categorization of the Appellant as operational creditor instead of a secured creditor, therefore, it has to be seen as to whether by virtue of the

order passed under Section 48 of the GVAT Act a charge is created on the property of the CD by way of operation of law in view of the law laid down by the Hon'ble Supreme Court in the case of Rainbow Papers (Supra).

18. In the case of Rainbow Papers (Supra), the Hon'ble Supreme court has noticed the issue involved in para 4 which is reproduced as under:-

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

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

19. The Appellant in the said case challenged the plan by filing an appropriate application before the Tribunal. In this regard, a reference may be had to para 15 and 16 of the said judgment which are reproduced as under:-

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

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

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

14. The said amended revised resolution plan along with the addendum dated 05.06.2018 was placed for

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

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

20. Thereafter, the matter was taken up to the appellate tribunal and the appeal was also dismissed and a finding is recorded in para 38 of the order of NCLAT. In this regard, paras 17, 18 & 38 are reproduced as under:-

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

18. The NCLAT held:

“34. The Adjudicating Authority noticed that the Appellant approached the ‘Resolution Professional’ on 22nd October, 2018 whereas the ‘Resolution Plan’ dated 26th May, 2018 along with Addendum dated 5th June, 2018 was approved by the ‘Committee of Creditors’ with voting majority of 72.79 per cent in favour of the ‘Resolution Plan’. Thus, the claim was made by the Appellant at a much belated stage not only before the ‘Resolution Professional’ but also before the Adjudicating Authority.

35. We find that the Appellant has not filed claim within time. It approached the ‘Resolution Professional’ at belated stage after approval of the ‘Resolution Plan’ by the Adjudicating Authority.

36. Learned counsel for the ‘Resolution Professional’ submitted that the claim of the Appellant- ‘State Tax Officer (1)’ comes within the meaning of ‘Operational Debt’ as defined under Section 5(21). The claim of the Appellant also does not fall within the meaning of ‘Secured Creditor’ as defined under Section 3(30) read with Section 3(31) of the I&B Code.

38. In view of Statement of Objects and Reasons of the ‘I&B Code’ read with Section 53 of the ‘I&B Code’, the Government cannot claim first charge over the property

of the ‘Corporate Debtor’. Section 48 cannot prevail over Section 53. Therefore, the Appellant – ‘State Tax Officer-(1)’ do not come within the meaning of ‘Secured Creditor’ as defined under Section 3(30) read with Section 3(31) of the I&B Code’.

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

21. In this background, the Hon’ble Supreme Court has held that the CoC which might include financial institutions and other financial creditors cannot secure their own dues at the cost of statutory dues owed to any government or governmental authority or for that matter any other dues. The exact observations of the Hon’ble Supreme Court while allowing the appeal are as under:-

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

“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.....”

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

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

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

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

above, making provisions for the dues of the statutory creditors like the appellant.

60. There shall be no order as to costs.”

22. There was a review petition filed in the aforesaid decision of the Rainbow Papers (Supra) which was also dismissed by the Hon'ble Supreme Court.

23. The argument raised by the Respondent that in the case of Paschimanchal Vidyut Vitran Nigam Ltd. (Supra) the correctness of the decision of Rainbow Papers (Supra) has been doubted is of no avail to the Respondent because the decision in the case of Rainbow Papers (Supra) is still holding the field as it has not been held to be not a good law by the Hon'ble Supreme Court so far.

24. Submission made by the Respondents that the Appellant itself has filed its claim in Form B as an OC or that plan has been approved by the CoC in its wisdom are all inconsequential in the light of the law laid down by the Hon'ble Supreme court especially while interpreting Section 48 of the GVAT Act which is also the subject matter of the present appeal.

25. It has been found from the record that the admitted claims were of Rs. 37,95,64,751/- whereas the resolution plan has been proposed only of Rs. 4,00,05,000/-. Besides the CIRP cost of Rs. 10 Lakhs, the secured financial creditors have been given Rs. 3,90,05,000/- against their total claim of Rs. 26,13,27,227/- whereas the operational creditors – Govt. dues who had admitted claims of Rs. 11,70,47,801/- have not been allocated any amount.

26. We have already observed hereinbefore that in view of Section 48 of the GVAT Act a charge was created on the property of the CD by way of operation of law in favour of the Appellant as a result of which the Appellant is entitled to be treated as secured creditor under Section 53 of the code.

27. At this stage, we may also refer to some observations made in the case of Rainbow Papers (Supra) which read as under:-

“51. If the established facts and circumstances require discretion to be exercised in a particular way, discretion has to be exercised in that way. If a Resolution Plan is ex facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. It is also a well settled principle of

interpretation that the expression “may”, if circumstances so demand can be construed as “Shall”.

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

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

28. Thus, in view of the aforesaid discussion, we are of the considered opinion that the resolution plan is in violation of the statutory provisions and is directly hit by the judgement of the Hon’ble Supreme court rendered in the case of Rainbow papers (Supra) as it is clearly a case of material irregularity, in terms of Section 30(2) of the Code.

29. Hence, the appeal is allowed and the impugned order is set aside and the matter is remanded back to the Adjudicating Authority to take further action in accordance with law.

30. The parties are directed to appear before the Tribunal on 30th May, 2025.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi
16th May, 2025
Sheetal