

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 243 of 2022

[Arising out of order dated 20.01.2021 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati in IA No. 10 of 2020 in C.P. (IB) No. 20/GB/2017]

IN THE MATTER OF:

1. Principal Commissioner of Income Tax,

Dibrugarh, Pushkara House,
Natun Gaon, N.H. 37, University Road,
Dibrugarh-786017.

2. Assistant Commissioner of Income Tax,

Circle-1, Dibrugarh, Pushkara House,
Natun Gaon, N.H. 37, University Road,
Dibrugarh-786008.

..... Appellants.

Versus

M/s Assam Company India Ltd.

(BRS Ventures Investment Ltd.
For Assam Company India Ltd.)
Registered Office "Nilhat House"
11, R.N. Mukherjee Road,
Kolkata-700001.

..... Respondent.

Present:

For Appellant: **Mr. Ruchir Bhatia, Sr. Standing Counsel, Mr. Shlok Chandra, Jr. Standing Counsel and Mr. Keshav Garg, Advocates.**

For Respondent: **Mr. Abhijeet Sinha, Mr. Ajay Gaggar, Advocates.**

J U D G M E N T
(07th February, 2023)

Justice Anant Bijay Singh;

The instant Appeal was heard together with Company Appeal (AT) (Insolvency) Nos. 241 and 242 of 2022. The instant Appeal preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 **(for short IBC)** being aggrieved and dissatisfied by the order dated 20.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) in IA No. 10 of 2020 in C.P. (IB) No. 20/GB/2017 wherein the application i.e. I.A. No. 10 of 2020 filed by the Respondent herein /Corporate Debtor- Assam Company India Ltd. prayed for the following reliefs:

- i) Direction to be given to the respondents for stay of all the operations for attachment against the Applicant.*
- ii) Setting aside of the order for attachment.*
- iii) Recalling of the observation passed by the Hon'ble National Company Law Tribunal, Guwahati.*
- iv) Ad-interim order in terms of prayers above.*

By which the Adjudicating Authority passed the following orders:

“20. *Since the Respondents have filed its further claim by issuing attachment notices dated 28.01.2020 under Section 226 (3) of the Income Tax Act, 1961 attaching a sum of Rs. 6,71,05,730.00 towards Income Tax and Rs. 1,70,53,311.00 towards interest for the assessment year 2014-15 to the Banker of the applicant i.e. to the Chief Manager/Principal Officer, Allahabad Bank, Dibrugarh Bench i.e. after 15 months of the approval of the Resolution Plan, their claim at this stage cannot be entertained. Prayer made by the Resolution Applicant in this I.A. No. 10 of 2020 [in CPIB No. 20/GB/2017] is accepted to the following extent:*

(1) Attachment orders issued by the Income Tax Department are hereby set aside.

(2) Company can operate the Bank Account without any obstructions from the Income Tax Department.

(3) The Resolution Applicant / the Petitioner is hereby directed to strictly implement the Resolution Plan as approved in time without any violation.

(4) The Petitioner is further directed to file a compliance report within 15 days of this order before the Registry stating that the Company has been paying all current statutory dues up-to-date especially, EPF, Income Tax, GST without delay.

21. *Accordingly, the IA No. 10 of 2020 is disposed of with the above observations and directions.”*

2. The facts giving rise to this Appeal are as follows:

i) A Financial Creditor i.e. Seri Infrastructure Pvt. Ltd. had approached the National Company Law Tribunal, Guwahati Bench by filing an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 seeking initiation of corporate insolvency resolution process ("*CIRP*") of the Assam Company India Ltd. ("*Corporate Debtor*"). The said application was registered and numbered as CP (IB) No. 20/GB/2017 and the same was admitted vide order dated 26.10.2017 and an interim resolution professional ("*IRP*") was appointed. On coming to know about the insolvency proceedings, the Appellants placed before the Resolution Professional ("*RP*") demand of income tax for the Assessment Year 2013-14 for Rs. 6,69,84,657 and Assessment Year 2014-15 for Rs. 9,50,41,296 totaling to Rs. 16,20,25,953/- which were outstanding before the date of

admitting the said application. The claim was filed in the form of 'Form B' dated 14.11.2017.

ii) On 12.01.2018, a Resolution Professional named CA Kannan Tiruvengada was appointed. The Resolution Professional informed the Appellants that the claim of the Department would not be admitted since the Respondent has preferred an appeal with the Commissioner of Income Tax (Appeals) for both the aforementioned Assessment Years. The Resolution Professional, however, communicated that after the final order of the CIT(A), the new promoter of the Respondent would pay the demand which is a statutory liability. In response to this, the Appellants contended that the mere filing of an appeal would not grant immunity to the Respondent from recovery of tax dues. The Resolution Professional in a written communication dated 31.07.2018 to the Income Tax Department stated that *"The matter is still pending in the CIT (Appeals) and till date no order of judgment is passed by them, the corporate debtor also consider your claim as contingent liability in the books of accounts of the company. We are also in the same opinion that your claim is a future obligation for ACIL and cannot be considered as current liability, the payable amount is also not certain at present (it may increase or decrease upon the judgment) and also involved uncertainty as per the provisions of applicable laws and accounting standards. The matter will be finalized after the final order is given by the CIT, so in that circumstances we cannot admit your claim because if we admit your claim then there is no validity of filing of appeal with CIT. We have to wait for the final order of the CIT (Appeals). We also want to intimate you that this is a statutory liability and I the CIT also in*

the future demanded the same then in that case if it all the resolution process completes then the new promoter of ACIL has to pay the liability to the concern department.”

iii) It was subsequently intimated by the Resolution Professional vide email dated 08.08.2018 that the National Company Law Tribunal, Guwahati Bench may consider payment of Rs 1,97,92,084/- being 15% of the outstanding dues owed to the Appellants since the Respondent had filed petition for stay of demand before the Assessing Officer. Further, the balance amount which is considered as "contingent liability" by the Respondent in the audited accounts for the year 2017 stands payable by the Respondent upon final outcome of the appeal. The Respondent failed to deposit the required tax amount and as such the proposed stay demand was considered "null and void" and the entire amount of Rs 16,20,25,953/- was outstanding and collectible demand as on the date of CIRP. On 25.10.2018, the Appellants received a draft of Rs 41,22,407/- from the Resolution Professional as a tranche payment. Further, the Appellants received another draft of Rs 78,90,284/- vide letter dated 07.01.2019 as a full and final payment totalling to Rs 1,20,23,691/- which is not even 15% of the outstanding demand.

iv) On 16.01.2019, the appeal pending before the CIT(A), Dibrugarh for Assessment Year 2013-14 was dismissed and the entire demand of Rs 6,69,84,657 stood outstanding. Further, the appeal for Assessment Year 2014-15 was also disposed on 16.01.2019 after giving appeal effect and adjustment of refund and draft payment and further the demand for Rs 6,71,90,630/- stood

outstanding. On 21.02.2019, after receipt of the above payment, the Appellants wrote a letter to the registry of the Hon'ble Bench of NCLT seeking clarification in this regard as the Appellants were never made a party when the CIRP Proceedings were drawn further stating that the Appellants had not received the order of the Bench of NCLT dated 20.09.2018 and the copy of the approved resolution plan as well. The Respondent was asked to pay the outstanding demand vide letter no. 674 dated 12.03.2019. However, the Respondent wrote to the Appellants for extinguishing all claims against them relating to the period prior to the date of order of the Hon'ble Bench of NCL T since as per the approved resolution plan at clause 12.1 no other amount was to be paid to the operational creditors. In view of the above, the Appellants filed an application for review of the order of the Hon'ble NCLT dated 20.09.2018 with necessary directions to the Resolution Professional for submission of the revised resolution plan incorporating the entire amount alleged to be due to the Appellants. Subsequently, the Hon'ble NCLT, Guwahati vide its order dated 22.10.2019 stated that since the IRP intimated the Department that the demand after finalization of appeal by CIT(A) would be payable by the new promoter, such written intimation of the IRP is to be read with the new resolution plan and the demand of the Appellants is duly considered and the Appellants have a right to lay its claim before the new promoter of the Respondent Company.

v) The Appellants vide letter bearing no. ITBA/COM/F/17/2019-20/1021317132(1) dated 29.11.2019 wrote to the Respondent for payment of outstanding dues along with interest under Section 220(2) of the Income Tax Act,

1961. In response to this, the Respondent stated that the demands of the Appellants are premature as it is pending with CIT(A) for Assessment Year 2013-14 and with the ITAT, Guwahati Bench for the Assessment Year 2014-15. Further, the Respondent also stated that the demand for Assessment Year 2014-15 has been stayed by the Tribunal vide its order dated 14.06.2019 [*Annexure A/7 (Colly)*]. The contentions of the Respondent were examined and rebuttal letter bearing no ITBA/COM/F/17/2019-20/1024086061(1) dated 21.01.2020 was sent to the Respondent stating that the stay granted by the Appellate Authority had since expired on 13.12.2019 and therefore, the Respondent was requested to pay the outstanding demand for the Assessment Year 2014-15 immediately and intimate within 7 days.

vi) Since there was no compliance of the notice sent by the Appellants, a bank attachment in the following banks were carried out Allahabad Bank, Dibrugarh Branch and Allahabad Bank, Industrial Finance Bank, Kolkata and further an email dated 28.01.2020 was received from the Allahabad Bank, Industrial Finance Bank, Kolkata that accounts have been marked debit freeze. Subsequently, an email dated 03.02.2020 was sent to the concerned Bank to remit the outstanding demand forthright and withdrawal of the attachment notice immediately after remittance. Further, a departmental inspector was deputed to visit the Allahabad Bank to obtain the demand draft. However, the inspector was informed that the matter was being taken up by the legal cell and the decision has been awaited for the same and hence the request for the same was denied. In the meantime, the Respondent approached the Hon'ble ITAT,

Guwahati Bench bearing I.T.A No. 123/GTY/2019 and obtained an interim stay of demand. On 07.02.2020 a stay for 3 months was granted and the Appellants were directed to withdraw the attachment. Simultaneously, the Respondent also filed a stay petition before the NCLT, Guwahati Bench and the NCLT Guwahati further asked the Appellants not to proceed further on the attachment order till further order. Simultaneously, the Respondent also filed a stay petition before the NCLT, Guwahati Bench and the NCLT further asked the Appellants not to proceed further on the attachment order till further order. The Respondent filed an application bearing I.A. No. 10/2020 under Section 60(5)(c) of the I&B Code and sought for the following reliefs (*supra*). After hearing the parties, the Adjudicating Authority passed the order impugned dated 20.01.2021. Hence this Appeal.

3. This instant Appeal has been preferred on the grounds that Impugned Order fails to take into account that the Appellants have made the recovery of the outstanding demand for the Assessment Year 2013-14 and Assessment Year 2014-15 vide Form B on 14.11.2017 which is prior in time to the resolution plan being approved on 20.09.2018. The Resolution Professional himself acknowledged the dues of the Appellants and the Resolution Professional had intimated that after the finality of first appeal these dues would be payable by the new promoter. The Impugned Order also fails to take into consideration that these dues are of the Revenue Department and if not paid the Appellants would be in great difficulty and grave injustice would be caused to the Revenue Department and a huge loss to the public exchequer. The NCLT, Guwahati vide

its order dated 22.10.2019 stated that since the IRP intimated the department that the demand after finalization of appeal by CIT(A) would be payable by the new promoter, such written intimation of the IRP is to be read with the new resolution plan and the demand of the Appellants is duly considered and the Appellants have a right to lay its claim before the new promoter of the Respondent Company.

4. Further, the Impugned Order has erred in stating that the Appellants claims cannot be entertained after 15 months of the approval of the Resolution Plan. It is submitted that the Appellants have not made any fresh claims but has laid its right to such claims which were made before the NCLT, Guwahati Bench and which has been duly considered by the Bench.

5. The Ld. Counsel for the Appellants during the course of argument and in his memo of appeal along with written submissions submitted that the Financial Creditor i.e. Seri Infrastructure Pvt. Ltd. approached the NCLT, Guwahati Bench by filing an application under Section 7 of the IBC seeking initiation of Corporate Insolvency and Bankruptcy Code. On coming to know about the insolvency proceedings, the Appellants placed before the Resolution Professional demand of income tax for the Assessment Year 2013-14 for Rs. 6,69,84,657 and Assessment Year 2014-15 for Rs. 9,50,41,296 totalling to Rs. 16,20,25,953/- which were outstanding before the date of admitting the said application. The claim was filed in the form of 'Form B' dated 14.11.2017 by Income Tax Department and that there was no delay on the part of the Appellants on filing the said form.

6. It is further submitted that on 12.01.2018, a Resolution Professional named CA Kannan Tiruvengada was appointed. The Resolution Professional informed the Appellants that the claim of the Department would not be admitted since the Respondent has preferred an appeal with the Commissioner of Income Tax (Appeals) for both the aforementioned Assessment Years. The Resolution Professional in a written communication dated 31.07.2018 addressed to the Appellants stated that the Corporate Debtor has considered the claim of the Appellants as contingent liability in the books of accounts of the Company. Further, it was intimated by the Resolution Professional vide email dated 08.08.2018 that the NCLT, Guwahati Bench may consider payment of Rs. 1,97,92,084 being 15% of the outstanding dues owed to the Appellants since the Respondent had filed petition for stay of demand before the Assessing Officer. Subsequently, the balance amount which is considered as “contingent liability” by the Respondent in the audited accounts for the year 2017 stands payable by the Respondent upon final outcome of the appeal. The Respondent failed to deposit the required amount and as such the proposed stay demand was considered “null and void” and the entire amount of Rs. 16,20,25,953 was outstanding and collectible demand as on the date of CIRP.

7. It is further submitted that on 25.10.2018, the Appellants received a draft of Rs. 41,22,407 from the Resolution Professional as a tranche payment. Further, the Appellants received another draft of Rs. 78,90,284 vide letter dated 07.01.2019 as a full and final payment totaling to Rs. 1,20,23,691 which is not even 15% of the outstanding demand. The Respondent was asked to pay the

outstanding demand vide letter no. 674 dated 12.03.2019. However, the Respondent wrote to the Appellants for extinguishing all claims against them relating to the period prior to the date of order of the Hon'ble Bench of NCLT since as per the approved resolution plan at clause 12.1 no other amount was to be paid to the operational creditors. In view of the above, the Appellants filed an application for review of the order passed by the NCLT dated 20.09.2018 with necessary directions to the Resolution Professional for submission of the revised resolution plan incorporating the entire amount alleged to be due to the Appellants. Subsequently, the NCLT vide its order dated 22.10.2019 stated that since the Resolution Professional intimated the Appellants that the demand after finalization of appeal by CIT(A) would be payable by the new promoter, such written intimation of the Resolution Professional is to be read with the new resolution plan and the demand of the Appellants is duly considered and the Appellants have a right to lay its claim before the new promoter of the Respondent Company. Thereafter, the Appellants vide letter dated 29.11.2019 wrote to the Respondent for payment of outstanding dues along with interest under Section 220(2) of the Income Tax Act, 1961. In response to this, the Respondent stated that the demands of the Appellants are premature as it is pending with CIT(A) for Assessment year 2013-14 and with the ITAT, Guwahati Bench for the Assessment Year 2014-15. Further, the Respondent also stated that the demand for Assessment Year 2014-15 has been stayed by the tribunal vide its order dated 14.06.2019.

8. It is further submitted that plea of the Respondent was examined and rebuttal letter dated 21.01.2020 was sent to the Respondent stating that the stay granted by the Appellate Authority had since expired on 13.12.2019 and therefore, the Respondent was requested to pay the outstanding demand for the Assessment Year 2014-15 immediately and intimated within 7 days. Since, there was no compliance of the notice sent by the Appellants a bank attachment in the following banks were carried out; (i) Allahabad Bank, Dibrugarh Branch and (ii) Allahabad bank, Industrial Finance Bank, Kolkata and further an email dated 28.01.2020 was received from the Allahabad Bank Industrial Finance Bank, Kolkata that accounts have been marked debit freeze. Thereafter, the Respondent approached the ITAT, Guwahati Bench and obtained an interim stay of demand. On 07.02.2020 a stay for three months was granted and the Appellants were directed to withdraw the attachment. Simultaneously, the Respondent also filed a stay petition before the NCLT, Guwahati Bench and the NCLT further asked the Appellants not to proceed further on the attachment order till further orders. The NCLT held that after 15 months of the approval of the resolution plan the claim of the Appellants cannot be entertained.

9. It is further submitted that the Impugned Order is bad in law as the claims of the Income Tax department were upheld by the NCLT, Guwahati Bench vide its order dated 22.10.2019. Thus, the order of the NCLT dated 20.01.2021 is contrary to the order dated 22.10.2019 passed by the NCLT. It is respectfully submitted that once NCLT had directed that the emails of the Resolution Professional are to be treated as part of the resolution plan, it was clearly open

to the Income Tax Department / Appellants to take necessary steps available to them under law for recovery of their dues. If the Respondent was aggrieved by the order of the NCLT dated 22.10.2019 he had the remedy to appeal before this Appellate Tribunal within 30 days of passing of the order which he failed to do. Thus, the order dated 22.10.2019 has attained finality and cannot be challenged in the same forum.

10. The Ld. Counsel for the Appellants also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **“State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 dated 06th September, 2022”** wherein Hon'ble Supreme Court held as hereunder:

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

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

“64. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by adjudicating authority is limited to the extent provided under Section 31 of the I&B Code and of the appellate authority is limited to the extent provided under sub-section (3) of Section 61 of the I&B Code, is no more res integra.

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

66. *The resolution plan submitted by the successful resolution applicant is required to contain various provisions viz. provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor. Explanation 1 to clause (b) of 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 sub-section (2) of Section 30 of the I&B Code also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force.”

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

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

“61. Appeals and Appellate Authority.—(1)...

(2) ...

(3) An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

*(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
(v) the resolution plan does not comply with any other criteria specified by the Board.”*

45. *As rightly argued by the learned Solicitor General, there can be no question of acceptance of a Resolution Plan that is not in conformity with the statutory provisions of Section 31(2) of the IBC. Section 30(2) (b) of the IBC, casts an obligation on the Resolution Professional to examine each resolution plan received by him and to confirm that such resolution plan provides for the payment of dues of operational creditors, as specified by the Board, which shall not be less than the amount to be paid to such creditors, in the event of liquidation of the Corporate Debtor under Section 53, or the amount that would have been paid to such operational creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Sub-section 2 of Section 53, whichever was higher, and provided for the payment of debts of financial creditors, who did not vote in favour of the resolution plan, in such manner as might be specified by the Board.*

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

47. *In **Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another**, this*

Court affirmed that Resolution Plans would have to conform to the statutory provisions of the IBC, and held: -

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

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

49. Section 31(1) of the IBC which empowers the Adjudicating Authority to approve a Resolution Plan uses the expression “it shall by order approve the resolution plan which shall be binding...” subject to the condition that the Resolution Plan meets

the requirements of subsection (2) of Section 30. If a Resolution Plan meets the requirements, the Adjudicating Authority is mandatorily required to approve the Resolution Plan. On the other hand, Sub-section (2) of Section 31, which enables the Adjudicating Authority to reject a Resolution Plan which does not conform to the requirements referred to in sub-section (1) of Section 31, uses the expression “may”.

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

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

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

53. *In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional*

reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.

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

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

“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.”*

11. It is further submitted that the facts of the instant Appeal are covered by ratio of aforesaid judgment. This aspect of the matter has not been considered by the Adjudicating Authority, therefore, the impugned order is fit to be set aside and the Appeal be allowed.

12. On the other hand, the Ld. Counsel for the Respondent during the course of argument and in his reply affidavit along with written submissions submitted that instant Appeal is not maintainable as the Successful Resolution Applicant cannot be burdened with liability after the plan has been approved. Section 31 of the IBC clearly states that upon approval of the resolution plan it becomes binding on all the stakeholders including Central Government, 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 is owed cannot be burdened with the liability when the resolution plan is already approved. In the

instant case the paragraph No. 12.1.1 and 12.1.2 of the resolution plan duly approved by the NCLT, Guwahati bench states that the Successful Resolution Applicant and the Respondent shall have no liability towards any Operational Creditors and other creditors with respect to any claims (as defined under the Code) relating in any manner to the period prior to the Effective Date. All claims (whether final or contingent, whether disputed or undisputed and whether or not notified to or claimed against ACIL) of all Government Authorities (including in relation to Taxes and all other dues and statutory payments to any Government Authority) relating to the period prior to the Effective Date, shall stand fully and finally discharged and settled. In this regard referred following judgments:

- *Essar Steel India Limited Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : 2019 SCC OnLine 1478 Page 616.*
- *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657; (2021) 4 SCC (Civ) 638 : 2021 SCC OnLine SC 313 Page 699.*
- *Manish Kumar v. Union of India (2021) 5 SCC 1 : 2021 SCC OnLine SC 30 Page 161.*
- *Department of Goods & Service Tax, Deputy Commissioner of CGST, Kadi v. Technovaa Plastic Industries Pvt. Ltd. and Anr 2021 OnLine NCLAT 499.*

13. It is further submitted that the Resolution Plan duly approved and implemented cannot be modified. The law is well laid down that once the resolution plan is duly approved by the Committee of Creditors and the Adjudicating Authority, it cannot be altered or modified. In the present case the Appellants had filed its claim for Rs. 16,20,25,953/- which was accepted to the extent of Rs. 1,97,92,084/-. The claim of the appellants formed the part of the

information memorandum, pursuant to which the successful resolution applicant has already paid an amount of Rs. 1,20,23,691.30. Therefore, the claim raised by the Appellants for Rs. 16,20,25,953/- cannot be accepted as it would lead to a modification of the resolution plan which otherwise is not allowed under I&B Code. Once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions of I&B Code. In this regard referred following judgments:

- *Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd. (CoC) (2022) 2 SCC 401 : 2021 SCC OnLine SC 707.*
- *Pratap Technocrats 9P) Ltd. v. Reliance Infratel Ltd. 9Monitoring Committee) 2021 10 SCC 623 : 2021 SCC OnLine SC 569.*
- *QVC Exports Pvt. Ltd. v. United Tradeco FZC Company Appeal (AT) (Insolvency) No. 1351 of 2019.*

14. It is further submitted that the Resolution Professional has no power to adjudicate a claim. Under I&B Code, the Resolution Professional is only required to collect the claims filed by the creditor and prepare the information memorandum accordingly. In the present case, the Appellants vide its email dated 31st July, 2018 mentioned such instructions which has so bearing under the I&B Code as the resolution professional has no powers to give such instructions or otherwise allow such claim which is not forming the part of Information Memorandum to be received from the successful resolution applicant. Thus, such communication made in email dated 31st July, 2018 is not

binding upon the successful resolution applicant. In this regard referred following judgment.

- *Swiss Ribbons Pvt. Ltd. v. Union of India & Ors. (2019) SCC OnLine SC 73.*

15. It is further submitted that the resolution plan approved does not deal with any entitled to what has been admitted by the Resolution Professional. The resolution plan has approved the claim of the Appellant to the extent of Rs. 1,20,23,691.03 and it does not deal with any further entitlement to the Appellants beyond what is admitted by the Resolution Professional. In this regard referred following judgment.

- *Mack Star Marketing Pvt. Ltd. v. Ashish Chauwharia Resolution Professional of Jet Airways (India) Pvt. Ltd., 2019 SCC OnLine SC 73.*

16. It is further submitted that the Appellate Tribunal has no inherent power to review. A mere perusal of the NCLAT Rule, 2016 unerringly point out that there is no express Rule for 'Review'. There can be no two opinions of a prime fact that Rule 11 of NCLAT Rules, 2016 is not a substantive Rule which confers any power or jurisdiction on the 'Tribunal'.

- *Kapra Mazdor Esta Union v. Brla Cotton Spg. And Wvg. Mills Ltd. (2005) 13 SCC 777 : 2006 SCC (L&S) 1635.*
- *Kuntesh Gupta v. Hinu Kanya Mahavidyalaya (1987) 4 SCC 525 : 1987 SCC (L&S) 491.*
- *Deepakk Kumar v. M/s Phoenix ARC Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 848 of 2019.*
- *Swiss Ribbons Pvt. Ltd. v. Union of India & Ors. (2019 SCC OnLine SC 73).*

17. It is further submitted that the Appellant relied upon the judgment passed by the Hon'ble Supreme Court in the case of "*State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 dated 06th September, 2022*" which is not maintainable since the statutory authority was not paid any amount through the resolution plan whereas in the instant case Rs. 1,97,92,084/- was accepted and subsequently Rs. 1,20,23,691.03 was paid towards full and final settlement of its claim. The Hon'ble Bombay High Court in the case of "*NRC Limited V. State of Maharashtra & Anr. (Writ Petition No. 8449 of 2022)*" has clearly stated that the judgment of "*State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 dated 06th September, 2022*" was on a different footing and under different circumstances which cannot be referred to in the instant case. In "*Rainbow Papers Limited case*" it is stated that the judgment of "*Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*" shall be binding in all respect and also the Adjudicating Authority recording submission subject to its satisfaction of such confirmation.

18. After hearing the parties and going through the pleadings made on behalf of the parties and also the judgment passed by the Hon'ble Supreme Court in the case of "*State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 dated 06th September, 2022, paragraphs nos. 24, 25, 26, 27, 30, 33, 34, 41 to 57 (supra)*" and also taking consideration the fact that the Appellants placed demand of Income Tax for the Assessment Year 2013-14 for Rs. 6,69,84,657 & Assessment Year 2014-15 for Rs. 9,50,41,296 totaling to Rs. 16,20,25,953/- before the Resolution Professional which were outstanding

before the date of admitting the application and the claim was filed in the form of 'Form - B' dated 14.11.2017 by Income Tax Department.

We also observed that on 25.10.2018, the Appellants received a draft of Rs. 41,22,407 from the Resolution Professional as a tranche payment. Further, the Appellants received another draft of Rs. 78,90,284 vide letter dated 07.01.2019 as a full and final payment totalling to Rs. 1,20,23,691 which is not even 15% of the outstanding demand. The Respondent was asked to pay the outstanding demand vide letter no. 674 dated 12.03.2019. However, the Respondent wrote to the Appellants for extinguishing all claims against them relating to the period prior to the date of order of the NCLT since as per the approved resolution plan at clause 12.1 no other amount was to be paid to the Operational Creditors. The Appellants filed an application for review of the order passed by the NCLT dated 20.09.2018 with necessary directions to the Resolution Professional for submission of the revised resolution plan incorporating the entire amount alleged to be due to the Appellants. Subsequently, the NCLT vide its order dated 22.10.2019 stated that since the Resolution Professional intimated the Appellants that the demand after finalization of appeal by CIT(A) would be payable by the new promoter, such written intimation of the Resolution Professional is to be read with the new resolution plan and the demand of the Appellants is duly considered and the Appellants have a right to lay its claim before the new promoter of the Respondent Company. Thereafter, the Appellants vide letter bearing no. ITBA/COM/F/17/2019-20/1021317132(1) dated 29.11.2019 (*Annexure A/7*)

wrote to the Respondent for payment of outstanding dues along with interest under Section 220(2) of the Income Tax Act, 1961. Further, the Respondent stated that the demands of the Appellants are premature as it is pending with CIT(A) for Assessment year 2013-14 and with the ITAT, Guwahati Bench for the Assessment Year 2014-15. Further, the Respondent also stated that the demand for Assessment Year 2014-15 has been stayed by the Tribunal vide its order dated 14.06.2019.

We also observed that the Respondent were examined and rebuttal letter bearing no. ITBA/COM/F/17/2019-20/1024086061(1) dated 21.01.2020 (*Annexure A/8*) was sent to the Respondent stating that the stay granted by the Appellate Authority had since expired on 13.12.2019 and therefore, the Respondent was requested to pay the outstanding demand for the Assessment Year 2014-15 immediately and intimated within 7 days. Since, there was no compliance of the notice sent by the Appellants a bank attachment in the following banks were carried out; (i) Allahabad Bank, Dibrugarh Branch and (ii) Allahabad Bank, Industrial Finance Bank, Kolkata and further an email dated 28.01.2020 was received from the Allahabad Bank Industrial Finance Bank, Kolkata that accounts have been marked debit freeze.

19. Taking all the facts aforementioned, we are of the considered view that these facts have not been considered by the Adjudicating Authority while passing the impugned order. Admittedly, the judgment passed by the Hon'ble Supreme Court in the case of "*State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 dated 06th September, 2022*", the dues of the Appellants are

'Government dues' and they are Secured Creditors. Thus, the impugned order dated 20.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) in IA No. 10 of 2020 in C.P. (IB) No. 20/GB/2017 is hereby set aside and the matter is remitted back to the Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) with a request to hear the parties (Appellants and Respondent herein) considering the aforesaid facts and also judgment passed by the Hon'ble Supreme Court in the case of '*Rainbow Papers Limited Case (supra)*' and pass fresh orders as expeditiously as possible.

With these observations and directions, the instant Appeal is disposed off.
No order as to costs.

20. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati), forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Mr. Barun Mitra]
Member (Technical)**

New Delhi
07th February, 2023
R. Nath.