HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Civil Writ Petition No. 9480/2019

Ultra Tech Nathdwara Cement Ltd., (formerly known as Binani Cements Ltd.) Registered Office at Block D, 4th Floor, 22 Camac Street, Kolkata- 700016, West Bengal Through its Power of Attorney holder Rajendra Vijay son of Shri Mohan Vijay, aged 50 years, Chief Financial Officer of the petitioner, Village Binanigram, Tehsil Pindwara, District Sirohi-307031.

----Petitioner

Versus

1. Union of India through the Joint Secretary, Department of Revenue, Ministry of Finance having its Office at Udyog Bhawan, New Delhi- 110 001
2. Commissioner, Central Goods And Service Tax and Central Excise Commissionerate, Jodhpur, Rajasthan having its Office at G-105, Road No.5, New Industrial Area, Opp. Diesel Shed, Basni, Jodhpur, Rajasthan- 342003
3. Commissioner (Appeals), Central Goods and Service Tax and Central Excise Commissionerate, Jodhpur, Rajasthan having its Office at G-105, New Industrial Area, Opp. Diesel Shed, Basni, Jodhpur, Rajasthan- 342003
4. Assistant Commissioner, GST Audit Circle, Udaipur having its Office at Plot No.9-10, Khasara Plot No.437-448, Maharana Pratap Housing Society, Hiranmagari, Sector 13, Udaipur.
5. Assistant Commissioner, Central Goods and Service Tax Division-E, Pali, Rajasthan Having its office at Ground Floor, TDM Office, Bsnl, Mahavir Nagar, Pali, Rajasthan.
6. Superintendent, Central Goods And Service Tax, Range XXI, Division- Sirohi, Rajasthan having its office at the Office of the Superintendent, Central Goods and Service Tax, Range-XXI, 113, Shanti Nagar, Sirohi.

----Respondents

For Petitioner(s)	:	Mr.Ajay Vohra, Sr.Advocate with Mr.Arnab Roy Ms.Aditi Vaishnav for Mr.Lokesh Mathur.
For Respondent(s)	:	Mr.Rajvendra Saraswat.

HON'BLE MR. JUSTICE SANDEEP MEHTA
HON'BLE MR. JUSTICE VIJAY BISHNOI

O R D E R

Reserved on : 10/02/2020

Pronounced on : 07/04/2020

Reportable

BY THE COURT : (PER HON'BLE MEHTA,J.)

The writ petitioner Ultra Tech Nathdwara Cement Ltd. has approached this Court by way of the instant writ petition being aggrieved of the demands raised vide notice dated 11.2.2019 (Annex.10), letter dated 7.9.2018 (Annex.11), order dated 20.3.2019 (Annex.12), notice dated 6.3.2019 (Annex.13), notice dated 8.3.2019 (Annex.14), notice dated 29.3.2019 (Annex.15), notice dated 29.3.2019 (Annex.16), notice dated 10.4.2019 (Annex.18), order dated 9.4.2019 (Annex.19), two notices dated 11.6.2019 (Annex.20) issued by the respondent Central Goods and Service Tax Department, Govt. of India whereby the petitioner was called upon to pay Goods and Service Tax (G.S.T.) for the period before it took over a company named M/s.Binani Cements Ltd. A restraint order is also sought for against the respondents from raising any further demands or from proceeding with any coercive steps so far as dues incurred in relation to the period prior to the transfer date on which the petitioner took over the company M/s Binani Cements in proceedings under the Insolvency Bankruptcy Code 2016 (hereinafter to be referred to as 'IBC' for brevity).

Brief facts relevant and essential for disposal of the case are that a company named Binani Cement suffered huge losses and was unable to pay the debts to the Financial Creditor i.e. Bank of Baroda, which preferred an insolvency application being Company

Petition (IB) No.359/KB/2017 under Section 7 of the Insolvency Bankruptcy Code 2016 before the National Company Law Tribunal, Kolkata Bench (hereinafter referred to as 'NCLT' for brevity). A Corporate Insolvency Resolution Process (hereinafter to be referred to as 'CIRP' for brevity) was initiated by the NCLT under the provisions of the IBC 2016. Shri Vijay Kumar V. Iyer was appointed as the Insolvency Resolution Professional and his appointment was affirmed by the Committee of Creditors (hereinafter to be referred to as 'COC' for brevity) constituted under the provisions of IBC vide its meeting dated 22.8.2017. Acting under the provisions of the IBC, the Resolution Professional invited prospective resolution applicants to stake a bid for the company facing insolvency proceedings. The petitioner company was one of the resolution applicants in the Corporate Insolvency Resolution Process. After reviewing and comparing the resolution plans received, the ***COC*** came to the conclusion that the resolution plan of the petitioner company Ultra Tech was the best one equipped to achieve the purpose of the IBC i.e. the maximization of the value of the assets. In the meeting of the ***COC*** held on 28.5.2018, the resolution plan submitted by Ultra Tech was approved unanimously and it was declared to be the successful resolution applicant. The resolution plan dealt with the dues of all the creditors equitably and was superior in terms of recovery to the banks and other creditors as compared to the losses which all the creditors would have suffered in case the company had gone into liquidation.

It may be mentioned here that while considering the resolution plan, the NCLT duly approved proportion/distribution of the payment to be made by the petitioner company to all the

creditors. The resolution professional collated claims of all operational creditors after following the due process of law and with due diligence, verified the claim of the respondent Goods and Service Tax Department to the extent of Rs.72.85 crores towards liabilities of excise duty and service tax. The resolution professional, also determined that liquidation value of the Binani Cement was Rs.2300/- crores which was much less than the outstanding debt and thus, the liquidation value available to the operational creditors including the respondent revenue would be zero.

It may be mentioned here that as per the admitted comparative analysis available on record, if the company had gone into liquidation, the operational creditors would have been deprived of any chance of recovery as their share in the liquidated assets has been assessed as nil in this situation. Be that as it may.

The resolution plan was approved by the National Company Law Appellate Tribunal (hereinafter to be referred to as 'NCLAT' for brevity) vide order dated 14.11.2018 passed in Company Appeal (AT) Insolvency No.188/2018. The Bank of Baroda being a financial creditor challenged the resolution plan affirmed by the NCLAT before Hon'ble the Supreme Court which affirmed the order of the NCLAT vide order dated 19.11.2018 passed in Civil Appeal No.10998/2018.

Pursuant to receiving this final seal of approval of the resolution plan, the petitioner Ultra Tech took over the management and operations of Binani Cement Ltd. and the name of the company was changed to Ultra Tech Nathdwara Cement Ltd. The resolution plan was fully implemented and payments in its

terms were duly made to all the creditors including the statutory creditors.

Despite the resolution plan having attained finality and having been executed, the respondents herein have raised numerous demands from the petitioner for the period from April 2012 to June 2017 and interest upto 25.7.2017. Having made the full and final payment as proposed by the resolution professional, the petitioner addressed a letter dated 26.11.2018 to the respondents informing them of the payment of dues as admitted by the CIRP and reminded them that all remaining claims and proceedings stood extinguished in terms of the resolution plan. Having failed to get any positive response from the respondents, the petitioner company has approached this Court through this writ petition under Article 226 of the Constitution of India seeking the relief referred to supra.

Shri Mr.Ajay Vohra, Sr.Advocate assisted by Mr.Arnab Roy and Ms.Aditi Vaishnav for Mr.Lokesh Mathur, learned counsel for the petitioner company urged that the IBC is a special law, which has been ordained for the purpose of bringing out an industry from distress and to ensure that its assets do not go to waste by liquidation. He contended that the resolution plan submitted by the resolution professional attained finality after approval by the COC and cannot be questioned in a court of law. It was further submitted that the financial creditors are given a precedence in the scheme of the Act when the resolution plan is being finalized and the statutory and operational creditors have to make a sacrifice. They further contended that the approved resolution plan has been affirmed by the NCLAT by a well reasoned judgment dated 14.11.2018 passed in Company Appeal (AT) Insolvency

No.188/2018 and thereafter, by Hon'ble the Supreme Court vide order dated 19.11.2018 passed in Civil Appeal No.10998/2018 and thus, the respondents authorities of GST Department had no jurisdiction to raise demands from the petitioner for the period prior to the date on which, the petitioner company took over the company under liquidation i.e. Binani Cement Ltd. after the resolution plan was finalized and approved. Learned counsel for the petitioner pointed out that the Commercial Taxes Department of Govt. of Rajasthan whose claim for a sum of Rs.479.73 crores was verified just at Rs.61.05 crores by the COC, also approached the Hon'ble Supreme Court of India against the order of the NCLAT and the appeal preferred by them being Civil Appeal No.5889/2010 (Diary No.1920/2019) has been rejected by the Hon'ble Supreme Court vide order dated 26.7.2019. This Court is apprised that the respondent Commissioner of Central Goods and Service Tax and Central Excise Commissionerate, Jodhpur also challenged the order passed by the NCLAT by filing Civil Appeal Nos.630–634 of 2020 (Diary No.21866/2019) before Hon'ble the Supreme Court, which has been dismissed vide order dated 24.1.2020. The Court’s attention was drawn to the following averments made in the SLP filed by the Goods and Service Tax Department before Hon'ble the Supreme Court and it was urged that the judgment of the NCLAT approving the resolution plan wherein the government revenue was curtailed by Rs.144.96 crores and was restricted at Rs.72.85 crores was specifically challenged by the Department:

> “(i) Whether the Hon’ble NCLAT was justified in approving the Resolution Plan, which is adversely affecting the Government revenue amounting to

Rs.144.96 crore, without giving any opportunity of hearing to the department?

(ii) Whether the Hon'ble NCLAT was justified in approving the Resolution Plan, wherein interest and penalty has been paid till the date of admission of Insolvency process, whereas as per Central Excise and Service Tax Laws interest and penalty has to be paid upto the date of payment of duty?

(iii) Whether the Hon'ble NCLAT was justified in approving the Resolution plan in which as per -

(a) Para 6.5.2.13 "all litigations instituted against the Corporate debtor, initiated or arising and pending before the Transfer date shall stand withdrawn, without any further act, instrument or deed"

(b) Para 6.2.3.5(g) "no amount shall be payable for any liability of the Corporate debtor towards tax, fee, interest or penalty for which the assessment in respect of applicable tax laws have not been completed".

(c) Para 6.5.6 "other than the discharge of the Resolution amount towards the liabilities of the financial creditors, the operational creditors; contingent liabilities and the CIRP costs, no other payment shall be made by the Corporate debtor for any liabilities of Corporate debtor for the period till the transfer date".

He also referred to the following pertinent prayers made in the SLP which stands rejected:

"(a) admit and allow the appeal filed by the appellant against the impugned Final Judgment dated 14.11.2018 passed by the Hon'ble National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018; and/or

(b) pass any other or further orders which Your Lordships may deem to be fit and proper in the interest of justice."

Learned Senior Counsel urged that Section 31 of the IBC which originally read as

> **Approval of resolution Plan**
> (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.
> (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.
> (3) After the order of approval under sub-section (1)-
> (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and
> (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

was amended vide gazette notification dated 6.8.2019 in the following terms:-

> **Approval of resolution Plan**
> (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, **including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to**

> **whom statutory dues are owed,** guarantors and other stakeholders involved in the resolution plan.
>
> [Emphasis supplied]

As per the amended provision of Section 31 of the IBC, the approved resolution plan has been made binding on the corporate debtor, its employees, members and all creditors including the Central Govt., 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 is owed.

This Court was further apprised that while the amendment was being adopted in the upper house of the Parliament, Hon'ble the Finance Minister with reference to the questions/issues raised by the Members of the Parliament, clarified the legislative intent behind the amendment in Section 31(1) of the IBC in the following terms:

> "**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.**"
>
> (Emphasis supplied)

It was urged that the message was conveyed loud and clear by the Hon'ble Minister for Finance in this debate that the

government will not raise any further claim of its dues after the resolution plan is approved. This amendment was introduced with the intention of lending assurance to the people, who intend to participate in the resolution proceeding.

The petitioners counsel contended that the issue regarding the resolution plan being final and binding on all parties; whether or not they had been heard by the resolution professional or the COC, has been laid to rest by Hon'ble The Supreme Court in the case of ***Committee of Creditors of Essar Steel India Ltd. Through Authorised Signatory Vs. Satish Kumar Gupta & Ors.*** reported in ***2019(16) SCALE 319***. Reliance in support of this content was placed on the following extracts from the above Hon'ble the Supreme Court judgment:

> *"20. The role of the resolution professional in the revival of the corporate debtor is stated in detail in several Sections of the Code read with the 2016 Regulations*
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> *21. The ball starts rolling with the Adjudicating Authority, after admitting an application under either Sections 7, 9 or 10, ordering that a public announcement of the initiation of the CIRP together with calling for the submission of claims Under Section 15 shall be made- see Section 13(1)(b) of the Code. For this purpose, the Adjudicating Authority appoints an interim resolution professional in the manner laid down in Section 16- see Section 13(1)(c) of the Code. In the public announcement of the CIRP, Under Section 15(1), information as to the last date for submission of claims, as may be specified, is to be given; details of the interim resolution professional, who shall be vested with the management of the corporate debtor and be responsible for receiving claims, shall also be given, and the date on which the CIRP shall close is also to be given-see Section 15(1)(c), (d) and (f) of the Code. Under Section 17 of the Code, the management of the affairs of the corporate debtor shall vest in the interim resolution professional, the Board of Directors of the corporate debtor standing suspended by law.*

Among the important duties of the interim resolution professional is the receiving and collating of all claims submitted by creditors and the constitution of a Committee of Creditors-see Section 18(1)(b) and (c) of the Code. Under Section 20 of the Code, the interim resolution professional is to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

22. At the first meeting of the Committee of Creditors, which shall be held within 7 days of its constitution, the Committee, by majority vote of not less than 66% of the voting share of financial creditors, must immediately resolve to appoint the interim resolution professional as a resolution professional, or to replace the interim resolution professional by another resolution professional-see Section 22(1) and (2) of the Code. Under Section 23(1), the resolution professional shall conduct the entire CIRP and manage the operations of the corporate debtor during the same. Importantly, all meetings of the Committee of Creditors are to be conducted by the resolution professional, who shall give notice of such meetings to the members of the Committee of Creditors, the members of the suspended board of directors, and operational creditors, provided the amount of their aggregate dues is not less than 10% of the entire debt owed. Like the duties of the interim resolution professional Under Section 18 of the Code, it shall be the duty of the resolution professional to preserve and protect assets of the corporate debtor including the continued business operations of the corporate debtor-see Section 25(1) of the Code. For this purpose, he is to maintain an updated list of claims; convene and attend all meetings of the Committee of Creditors; prepare the information memorandum in accordance with Section 29 of the Code; invite prospective resolution applicants; and present all resolution plans at the meetings of the Committee of Creditors-see Section 25(2)(e) to (i) of the Code. Under Section 29(1) of the Code, the resolution professional shall prepare an information memorandum containing all relevant information, as may be specified, so that a resolution plan may then be formulated by a prospective resolution applicant. Under Section 30 of the Code, the resolution

Applicant must then submit a resolution plan to the resolution professional, prepared on the basis of the information memorandum. After this, the resolution professional must present to the Committee of Creditors, for its approval, such resolution plans which conform to the conditions referred to in Section 30(2) of the Code-see Section 30(3) of the Code. If the resolution plan is approved by the requisite majority of the Committee of Creditors, it is then the duty of the resolution professional to submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority-see Section 30(6) of the Code.

23. The aforesaid provisions of the Code are then fleshed out in the 2016 Regulations. Under Chapter IV of the aforesaid Regulations, claims by operational creditors, financial creditors, other creditors, workmen and employees are to be submitted to the resolution professional along with proofs thereof-see Regulations 7 to 12. Thereafter, under Regulation 13, the resolution professional shall verify each claim as on the insolvency commencement date, and thereupon maintain a list of creditors containing the names of creditors along with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims, and constantly update the aforesaid list-see Regulation 13(1).

25. After receipt of the resolution plans in accordance with the Code and the Regulations, the resolution professional shall then provide the fair value and liquidation value to every member of the Committee of Creditors-see Regulation 35(2). Regulation 36 is important as it forms the basis for the submission of a resolution plan. The information memorandum, spoken of by this regulation, must contain the following:

(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: "Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

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

(i)the number of workers and employees and liabilities of the corporate debtor towards them;

*(j) ****

*(k) ****

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

27. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution Applicant and be finally negotiated and decided by the Committee of Creditors.

30. Accordingly, Regulation 38 then deals with the mandatory contents of a resolution plan, making it clear that such plan must contain a provision that the amount due to operational creditors shall be given priority in payment over financial creditors-see Regulation 38(1). Such plan must also include provisions as to how to deal with the interests of all stakeholders including financial creditors and operational creditors of the corporate debtor-Regulation 38 (1A). It must then provide for the term of the plan, management and control of the business of the corporate debtor during such term, and its implementation. It must also demonstrate that it is feasible and viable, and that the resolution Applicant has the capability to implement the said plan. Regulation 38, being important, is set out hereinbelow:

38. Mandatory contents of the resolution plan

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(2) A resolution plan shall provide:

(a)the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

(3) A resolution plan shall demonstrate that-

(a) it addresses the cause of default;

(a) it is feasible and viable;

(b) it has provisions for its effective implementation;

(d) it has provisions for approvals required and the time line for the same; and

(e) the resolution Applicant has the capability to implement the resolution plan.

Role of the committee of creditors in the corporate resolution process

31. Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. "Financial creditors" are defined in Section 5(7) of the Code as meaning persons to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. "Financial debt" is then defined in Section 5(8) of the Code as meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money. "Secured creditor" is separately defined in Section 3(30) of the Code as meaning a creditor in favour of whom a security interest is created and "security interest" is defined by Section 3(31) as follows:

***3. Definitions**.-In this Code, unless the context otherwise requires.-*

xxx xxx xxx

(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest should not include a performance guarantee;"

On these submissions, learned senior counsel Shri Vohra vehemently and fervently urged that the writ petition deserves acceptance and the impugned notices as well as any future

demands deserve to be quashed and set aside and the respondents be restrained from raising any future demands from the petitioner towards the goods and service tax for the period prior to the resolution plan being finalized.

Per contra, Shri Rajvendra Saraswat learned counsel representing the respondents vehemently and fervently opposed the submissions advanced by the petitioner's counsel and urged that the department was not heard by the COC before finalizing the resolution plan and as such, it is not bound by the same. He further contended that the mere summary rejection of the SLP preferred by the department against the resolution plan would not foreclose the right of the department to raise its valid demands from the successful resolution applicant. Nonetheless, Shri Saraswat was not in a position to dispute the fact that the SLP preferred by the department before Hon'ble the Supreme Court covered all issues including the issue that the department was not heard by the COC. Shri Saraswat is also not in a position to dispute the fact that the amended Section 31 of the Act applies to the situation hand fully because the operational creditors have pertinently been included in the scope and ambit thereof.

We have given our thoughtful consideration to the arguments advanced at the bar and have gone through the material available on record and the impugned notices.

It cannot be gainsaid that the controversy at hand hours around the simple issue as to whether the resolution plan approved by the COC is binding on the department or not. In this regard, it is trite to note that as per the amended Section 31 of the IBC referred to supra, the Central Govt., State Govt. or any

other local authority to whom, a debt in respect of payment of dues arising under any law for the time being in force are owed, have been brought under the umbrella of the resolution plan approved by the adjudicating officer which has been made binding on such governments and local authorities. The purpose of the IBC is salutary as it has been enacted to ensure that an industry under distress does not fade into oblivion and can be revived by virtue of the resolution plan. Once the offer of the resolution applicant is accepted and the resolution plan is approved by the appropriate authority, the same is binding on all concerned to whom the industry concern may be having statutory dues. No right of audience is given in the resolution proceedings to the operational creditors viz. the Central Govt. or the State Govt. as the case may be.

The reply given by Hon'ble the Finance Minister (referred to supra) emphatically conveys that the revival of the dying industry is of primacy and to secure this objective, the government would be ready to sacrifice, leaving its interest finally in the hands of the resolution professional and the COC as the case may be. Precedence in the Scheme of the Act is given to secure the interest of the financial creditors. On this aspect of the matter, the following extracts ere referred to in the case of Essar Steel:

> "Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution Applicant to the effect that such dues

ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution Applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution Applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.

44. The minimum value that is required to be paid to operational creditors under a resolution plan is set out Under Section 30(2)(b) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor Under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code. The Insolvency Committee Report, 2018 (hereinafter referred to as "The Committee Report, 2018"), inter alia, deliberated upon the objections to Section 30(2)(b) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:

"18. VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN

18.1 Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval

of resolution plan by the NCLT. The BLRC Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor. (BLRC Report, 2015)

18.2 However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors Under Section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a 'going concern' given that their chances of recovery are abysmally low.

18.3 The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using 'fair value' as the floor to determine the value to be given to operational creditors. Fair value is defined under Regulation 2(1)(hb) of the CIRP Regulations to mean "the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion." However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4 It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above

this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in the case of Synergies-Dooray Automative Ltd. (Company Appeal No. 123/2017, NCLT Hyderabad, Date of decision-02 August, 2017), the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under Regulation 38 of the CIRP Regulations. However, the same was modified by the NCLT and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in the case of Hotel Gaudavan Pvt. Ltd. (Company Appeal No. 37/2017, NCLT Principal Bench, Date of decision-13 December, 2017) provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code.

Ultimately, the Committee decided against any amendment to be made to the existing scheme of the Code, thereby retaining the prescription as to the minimum value that was to be paid to the operational creditors under a resolution plan.

56. By reading paragraph 77 *de hors* the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution Applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

57. Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial

creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above.

Quite clearly, secured and unsecured financial creditors are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors are separately viewed from these secured and unsecured financial creditors in S. No. 5 of paragraph 7 of statutory Form H. Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code-to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.

58. This power in Section 392 is conspicuous by its absence when it comes to the Adjudicating Authority under the Code, whose jurisdiction is circumscribed by Section 30(2). It is the Committee of Creditors, Under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the jurisdiction of the High Court Under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even Under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even Under Sections 391 and 392, the High Court cannot act as a

court of appeal and sit in judgment over such commercial wisdom.

66. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution Applicant starts running the business of the corporate debtor on a fresh slate as it were.

67. For the same reason, the impugned NCLAT judgment 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 this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who 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, the NCLAT judgment must also be set aside on this count."

[Emphasis supplied]

Considered in light of the ratio of the above judgment and the stance of Hon'ble the Finance Minister before the upper house of the Parliament, it is clear that the financial creditors have to be given a precedence in the ratio of payments when the resolution plan is being finalized. It is the financial creditors who are given

right to vote in the COC whereas, the operational creditors viz. Commercial Taxes Department of the Central Government or the State Government as the case may be, have no right of audience. The purpose of the statute is very clear that it intends to revive the dying industry by providing an opportunity to a resolution applicant to take over the same and begin the operation on a clean slate. For that purpose, the evaluation of all dues and liabilities as they exist on the date of finalization of the resolution plan have been left in the exclusive domain of the resolution professional with the approval of the COC. The courts are given an extremely limited power of judicial review into the resolution plan duly approved by the COC. In the case at hand, the situation has proceeded much further. The operational creditors i.e. the Commercial Taxes Department of Govt. of Rajasthan as well as the respondent Commissioner of Goods and Service Tax assailed the resolution plan by filing appeals before Hon'ble the Supreme Court with a specific plea that their dues have not been accounted for by the COC in the resolution plan. The objection so raised stands repelled with the rejection of the appeals by Hon'ble The Supreme Court. In addition thereto, it may be mentioned here that from the two possible situations; one being liquidation and the other being revival, the respondents will gain significantly in the later because as per the assessed liquidity value, their dues have been assessed as nil, whereas as per the resolution plan with revival of the industry at the instance of the resolution applicant (the petitioner company herein), their rights have been secured to the extent of Rs.72 crores odd. It may be emphasized here that the amount of Rs.72 crores assessed by the resolution professional in favour of the respondent GST Department has

already been deposited by the successful resolution applicant i.e. the petitioner company.

Therefore, we are of the firm opinion that the respondents would be acting in a totally illegal and arbitrary manner while pressing for demands raised vide the notices which are impugned in this writ petition and any other demands which they may contemplate for the period prior to the resolution plan being finalized.

The demand notices are ex-facie illegal, arbitrary and per-se and cannot be sustained.

Accordingly, the impugned demand notices and orders viz. notice dated 11.2.2019 (Annex.10), letter dated 7.9.2018 (Annex.11), order dated 20.3.2019 (Annex.12), notice dated 6.3.2019 (Annex.13), notice dated 8.3.2019 (Annex.14), notice dated 29.3.2019 (Annex.15), notice dated 29.3.2019 (Annex.16), notice dated 10.4.2019 (Annex.18), order dated 9.4.2019 (Annex.19), two notices dated 11.6.2019 (Annex.20) and any further demands pending as on the date of finalization of the resolution plan issued/raised by the respondents Central Goods and Service Tax Department, Govt. of India are quashed and struck down.

Before parting, we would like to express our serious reservation on the approach of the concerned Officers of the GST in persisting with the demands raised from the petitioner in gross ignorance of the pertinent statement made by Hon'ble the Finance Minister before the Parliament (referred to supra) and the amendment brought around in the IBC. We are of the firm view that the authorities should have adopted a pragmatic approach and immediately withdrawn the demands rather than indulging in

a totally frivolous litigation, thereby unnecessarily adding to the overflowing dockets of cases in the courts.

The writ petition is allowed accordingly.

No order as to costs.

(VIJAY BISHNOI),J **(SANDEEP MEHTA),J**

/tarun goyal/