

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 495 of 2025

(Arising out of Order dated 21.01.2025 passed by the Adjudicating Authority (National Company Law Tribunal), Court V, New Delhi in I.A. No.2537/2024 in Company Petition No.(IB) – 60/PB/2018)

IN THE MATTER OF:

GST & Central Excise Angul Division,
Rourkela GST Commissionerate

...Appellant

Versus

Shri Dinesh Sood and Ors.

...Respondents

Present:

**For Appellant : Mr. Prasenjeet Mohapatra, Sr. Standing Counsel,
CGST**

**For Respondents : Shri Abhijeet Sinha, Sr. Advocate with Mr.
Sanwal Tiberwal, Advocates for R-3.**

Mr. R.K. Srivastava, Advocate for R1.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 21.01.2025 passed by National Company Law Tribunal (“**NCLT**”), Court V, New Delhi in IA No.2537 of 2024. By the impugned order IA No.2537 of 2024 filed by the Appellant has been dismissed.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- (i) The Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor (“**CD**”) – M/s Bindals Sponge Industries Ltd. Was initiated vide order dated 11.05.2018 passed in an

Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) by the Oriental Bank of Commerce.

- (ii) On publication made by Insolvency Resolution Professional, claim was filed by the Appellant in Form-B as an Operational Creditor for an amount of Rs.24,26,89,882/-. The Appellant’s claim comprised of various statutory dues under the Central Excise Act, 1944 and the Finance Act, 1994 (as a service tax). The Resolution Professional (“**RP**”) admitted the claim filed by the Appellant.
- (iii) Resolution Plan submitted by Respondent No.3 – Kalinga Allied Industries India Pvt. Ltd., was approved by the Committee of Creditors (“**CoC**”) on 12.11.2019. Resolution Plan provided for allocation of only 2.71% of the total dues of the Appellant. The Appellant filed objection on 05.12.2019 to the Resolution Plan approved by the CoC, alleging discriminatory treatment.
- (iv) On 06.09.2022, the Hon’ble Supreme Court delivered judgment in **State Tax Officer v. Rainbow Papers Ltd – (2023) 9 SCC 545** (“**Rainbow Papers**”) holding that statutory dues owed under Gujarat Value Added Tax Act, 2003, would constitute a secured debt and have priority in payment over other debts, it being secured by operation of law.

- (v) In 24th CoC Meeting held on 19.04.2024, Resolution Plan was modified to enhance payment percentage to the State GST Department, Government of Odisha from originally approved 2.71% to 29.61%, taking note of the law laid down by the Hon'ble Supreme Court in **Rainbow Papers** (supra). The CoC, however, did not provide similar treatment to Appellant's claim.
- (vi) The Appellant filed IA No.2537 of 2024 seeking modification of the approved Resolution Plan in the light of the judgment of the Hon'ble Supreme Court in **Rainbow Papers** and treating the Appellant as secured creditor under the IBC. The RP filed reply in IA No.2537 of 2024 opposing the contention raised by the Appellant. The RP in his reply pleaded that ratio of judgment of the Hon'ble Supreme Court in **Rainbow Papers** is not applicable with respect to claim under Section 11E of the Central Excise Act, 1944, which provision is not *pari materia* with Section 48 of the Gujarat VAT Act.
- (vii) The Adjudicating Authority heard the Appellant and learned Counsel for the RP in IA No.2537 of 2024 and vide the impugned order dated 21.01.2025 rejected the Application. The Adjudicating Authority held by the impugned order that judgment of the Hon'ble Supreme Court in **Rainbow Papers** is not applicable. It was held that provision of Section 11E of the Central Excise Act are not *pari materia* to provisions of

Gujarat VAT Act. Aggrieved by rejection of the Application, this Appeal has been filed.

3. We have heard Shri Prasanjeet Mohapatra, Sr. Standing Counsel, CGST, Shri Abhijeet Sinha, learned Sr. Counsel with Shri Sanwal Tiberwal, learned Counsel for Respondent No.3; and Shri R.K. Srivastava, learned Counsel for Respondent No.1.

4. Shri Prasanjeet Mohapatra, Sr. Standing Counsel appearing for the Appellant challenging the impugned order submits that Hon'ble Supreme Court in **Rainbow Papers** had held that government dues are to be treated as secured debt. Learned Counsel has extensively referred to the judgment of the Hon'ble Supreme Court in **Rainbow Papers** to support his submissions. It is submitted that **Rainbow Papers** is a law laid down by the Hon'ble Supreme Court, which is binding under Article 141 of the Constitution of India. It is submitted that Review Petition (Civil) No.1620 of 2023 questioning the judgment of the Hon'ble Supreme Court in **Rainbow Papers** has also been rejected by the Hon'ble Supreme Court, setting at rest all doubts regarding secured creditors status of Government dues. The Appellant's dues are Government dues, hence, the Appellant was entitled to be treated as secured creditor and was entitled to be paid same percentage of amount, which have been paid to the secured creditors as well as the State GST Department. It is submitted that Resolution Plan is patently discriminatory and violative of Section 30, sub-section (2)(b) of the IBC, as it provides for 29.61% payment to State GST Department while the Appellant has been made payment of only

2.71%, when both the State GST Department and the Appellant dues fall in the same class under Section 53 of the IBC. The discriminatory treatment violates the fundamental principle of equitable treatment of similarly situated creditors as laid down by the Hon'ble Supreme Court ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta (2020) 8 SCC 531***. It is submitted that NCLT has relied on judgment of NCLAT Chennai Bench in ***Asst. Commissioner of Central Tax vs. Sreenivasa Rao – CA (AT) (Ins.) No.346 of 2021***, whereas the said judgment has not attained finality. The Appeal against which judgment is pending in the Hon'ble Supreme Court being Civil Appeal No.7882 of 2023. The entire dues of the State GST Department have been given the status of secured creditor and the allocation made under the Plan has been increased to 29.61% from 2.71% allocated earlier, whereas allocation to the Appellant has been reduced from 2.71% to 2.69%. It is submitted that **Rainbow Papers** does not distinguish between different kinds of Government dues, carving out such distinction between similarly situated operational creditors is flawed and contrary to binding ratio of **Rainbow Papers** and **Essar Steel** judgments.

5. Shri Abhijeet Sinha, learned Sr. Counsel appearing for Respondent No.3 refuting the submissions of the Appellant, submits that dues of the Appellant are under Section 11E of Central Excise Act, 1944, which cannot be treated as secured debt within the meaning of Section 53 of the IBC. The Hon'ble Supreme Court in **Rainbow Papers** (supra) was considering the provisions of Section 48 of the Gujarat VAT Act. The

provision of Section 11E of Central Excise Act, are not *pari materia* to Section 48 of Gujarat VAT Act, so as to treat the Appellant as secured creditor on the strength of judgment of the Hon'ble Supreme Court in **Rainbow Papers**. Section 11E itself craves out exception with regard to creation of first charge, i.e. "save as otherwise provided in Section 529A of the Companies Act, RDDBFI Act, SARFAESI Act, and the Insolvency and Bankruptcy Code, 2016". Thus, the first charge of the debt under 11E, cannot be treated with respect to claim under IBC, which is a statutory scheme itself. The judgment of the Hon'ble Supreme Court in **Rainbow Papers** declaring claim of State VAT was based on statutory provision of Section 48 of the Gujarat VAT Act, hence, no benefit of the said judgment can be taken by the Appellant. Learned Counsel for Respondent No.3 has also relied on CBDT Circular dated 10.03.2017. It is submitted that Hon'ble Supreme Court in **Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Ltd. & Ors. – (2023) SCC OnLine SC 842** has held that judgment of Hon'ble Supreme Court in **Rainbow Papers** is confined to factual circumstances, i.e. Section 48 of the Gujarat VAT Act. Learned Counsel for Respondent No.3 has also relied on another judgment of Hon'ble Supreme Court in **Sundaresh Bhatt Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs - (2023) 1 SCC 472**. The Hon'ble Supreme Court in **Sundaresh Bhatt** has held that in cases of any conflict, the IBC overrides the Customs Act. In **Sundaresh Bhatt**, Section 142A of the Customs Act came for consideration, which is *pari materia* to Section 11E of the Customs Act.

6. Learned Counsel for the RP also supports the submissions of learned Counsel for the Respondent No.3 and submits that the Appellant cannot claim any benefit of the judgment of **Rainbow Papers**.

7. We have considered the submissions of learned Counsel for the parties and have perused the records.

8. In IA No.2537 of 2024, the prayers made by the Appellant have been noticed by the Adjudicating Authority in the impugned order in paragraph 2 of the order, which are as follows:

- “a) Allow the present application;
- b) Direct the Respondent to place the present Resolution Plan before the CoC for necessary modification in terms of S.30(2) of the Code;
- c) Pass any other Order(s) / Direction(s) as this Hon'ble Adjudicating Authority may deem fit in the facts and circumstances of the present matter.”

9. The Appellant's case before the Adjudicating Authority as well as before this Tribunal is that the Appellant is entitled to be treated as secured creditor of the CD, in the light of the law laid down by the Hon'ble Supreme Court in **Rainbow Papers**. We need to first notice the judgment of the Hon'ble Supreme Court in **Rainbow Papers**. The Hon'ble Supreme Court in **Rainbow Papers** had occasion to consider Section 48 of the Gujarat VAT Act, 2003. In the above case, the Appellant - State Tax officer has filed a claim in Form-B of Rs.47,35,72,314/- towards VAT/CST on the ground that the Sales Tax officer was a secured creditor. An IA was filed before the Adjudicating Authority, which was rejected. The

Appeal filed in this Tribunal also came to be dismissed, which order came to be challenged before the Hon'ble Supreme Court by the State Tax Officer. The Hon'ble Supreme Court considered in the above case, as to whether the State Tax Officer is to be treated as secured creditor within the meaning of Section 53 of the IBC. The Hon'ble Supreme Court had occasion to consider Section 48 of the Gujarat VAT Act, which has been quoted in paragraph 2 of the judgment, which is as follows:

"2. The short question raised by the appellant in this appeal is, whether the provisions of IBC and, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act which is set out hereinbelow 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 may be, such person."

10. Learned Counsel for the Appellant has relied on paragraphs 52 and 54 of the judgment of the Hon'ble Supreme Court, which are as follows:

"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.

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."

11. The Hon'ble Supreme Court further held that Section 48 of the Gujarat VAT Act is not contrary to or inconsistent with Section 53 of the IBC. In paragraphs 56 to 59, following was held:

“56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of 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) 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 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 [Tourism Finance Corpn. of India Ltd. v. Rainbow Papers Ltd., 2019 SCC OnLine NCLAT 910] , [STO v. Chandra Prakash Jain, 2020 SCC OnLine NCLAT 536] 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.”

12. The Hon'ble Supreme Court in the above case has held that State is a secured creditor under the GVAT Act. It was held that security interest

could be created by operation of law, i.e., by Section 48 in the above case. It was held that definition of secured creditor in IBC does not exclude any Government or Governmental Authority. The Appellant's submission is that in paragraph 52 of the judgment, it was held that if the Resolution Plan ignores the statutory demands payable to any State Government or a local authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. The State Tax officer was declared as a secured creditor on the strength of Section 48 of the Gujarat VAT Act, which foundation is reflected in paragraphs 56 to 57 of the judgment. The State Tax Officer was held to be secured creditor by virtue of security interest created by operation of law, i.e. Section 48. The above judgment of Hon'ble Supreme Court cannot be read to mean that Hon'ble Supreme Court has held that all Government dues are secured debt whether any security interest is created or not. The creation of security interest to declare a creditor as secured creditor is *sine-qua-non* for treating a creditor as secured creditor. The due of the Appellant are dues under Section 11E of Central Excise Act, 1944. Section 11E of Central Excise Act provides as follows:

“11E. Liability under Act to be first charge.-- Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in Section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993) the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the

Insolvency and Bankruptcy Code, 2016, be the first charge on the property of the assessee or the person, as the case may be.”

13. Section 11E of the Central Excise Act provides that any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under the Act shall be the first charge on the property of the assessee or the person. However, the said provision contains a saving clause, i.e. “*save as otherwise provided in Section 529A of the Companies Act, 1956; the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993; the Securitisation and Reconstruction of financial Assets; and the Enforcement of Security Interest Act, 2002; and the Insolvency and Bankruptcy Code, 2016*”. Thus, the legislative scheme in Section 11E recognizes the first charge on the assets of assessee, except in respect of the enactments mentioned therein, one of which is IBC. The plain meaning of the above provision is that except for the enactments mentioned in Section 11E, there shall be first charge on the property of the assessee. Section 48 of the Gujarat VAT Act, does not create any exception as has been carved out in Section 11E as noticed above. We, thus, are of the clear opinion that Section 11E of the Central Excise Act is not *pari materia* to Section 48 of the Gujarat VAT Act and the judgment of the Hon’ble Supreme Court in **Rainbow Papers**, cannot be applied in context of Section 11E of the Central Excise Act, which is a provision on the basis of which claim was filed by the Appellant as Operational Creditor in Form-B. The Hon’ble Supreme Court in Rainbo Papers held that security interest can be created by operation of law, but Section 11E of Central Excise Act, cannot be held for creation of any security interest

by operation of law, rather the provision itself recognizes exception contained therein. Use of expression “save as otherwise provided” clearly means that Section 11E does not create any first charge on the assets of the CD, which are being dealt with under the provisions of Insolvency and Bankruptcy Code, 2016. We, thus, do not find any error in the order of the Adjudicating Authority rejecting the above submission.

14. Next submission pressed by the learned Counsel for the Appellant is that the State GST Department has been treated to be secured creditor and was allocated the amount equivalent to secured creditors, i.e. 29.61% relying on the judgment of Hon’ble Supreme Court in **Rainbow Papers**. It is submitted that there cannot be any discrimination between Operational Creditors, i.e. State GST Department and the Appellant. The allocation to State GST is disproportionate and unfair allocation. It is contrary to the law laid down by the Hon’ble Supreme Court in *Essar Steel*.

15. The Hon’ble Supreme Court in ***CoC of Essar Steel v. Satish Kumar Gupta, (2020) 8 SCC 531*** has laid down that there has to be equal treatment of creditors in a class. There can be no dispute to the proposition laid down by the Hon’ble Supreme Court in the above case. The Hon’ble Supreme Court, however, has held that there has to be equitable treatment with respect to creditors of a particular class. The Hon’ble Supreme Court in the above case has held that equitable principle will apply in respect of creditors of the same class and that cannot be applied in case of secured and unsecured creditors. In

paragraph 88 of the judgment, the Hon'ble Supreme Court laid down following:

“**88.** By reading para 77 of *Swiss Ribbons Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17 de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 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 para 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, para 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 para 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.”

16. The claim of State GST was treated as secured creditor. Learned Counsel for the Appellant himself has referred to Section 55 of the Odisha Value Added Tax Act, 2004, which provision is as follows:

“55. Tax to be first charge on property.—

Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, including interest or penalty or both, if any, payable by a dealer or any other person under this Act, shall be a first charge on the property of the dealer or such person, as the case may be.”

17. Section 55 of the Odisha Value Added Tax Act, 2004 is *pari materia* to Section 48 of Gujarat VAT Act. Hence, in the Resolution Plan, reliance on judgment of Rainbow Papers has rightly been made, treating the State GST Department to be secured creditor relying on Section 55 of the Odisha Value Added Tax Act and the Appellant cannot claim any parity with Section 55 of the Odisha Value Added Tax Act with respect to its claim in Section 11E. We do not find any substance in the submission of the Appellant that there has to be equal treatment with respect to State GST Department and the Appellant. We do not find any violation of Section 30, sub-section (2), sub-clause (b) in the facts of the present case and submission of the Appellant on the above count also fails.

18. Reliance has been placed by Respondent on the judgment of the Hon’ble Supreme Court in **Sundaresh Bhatt** (supra). In the above case, the Hon’ble Supreme Court has noticed the provisions of Section 142A of the Customs Act, which provision has been quoted in paragraph 32 of the judgment, which is as follows:

“**32.** In order to complete the discussion on the Customs Act, it may be necessary to take note of Section 142-A extracted below:

“142-A. Liability under Act to be first charge.— Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in Section 529-A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993), and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016 (31 of 2016) be the first charge on the property of the assessee or the person, as the case may be.”

19. Section 142-A of the Customs Act is *pari materia* to Section 11, sub-clause (E) of the Customs Act, which fact has been noticed in paragraph 40 of the judgment, which is as follows:

“**40.** We may note that the IBC, being the more recent statute, clearly overrides the Customs Act. This is clearly made out by a reading of Section 142-A of the Customs Act. The aforesaid provision notes that the Customs Authorities would have first charge on the assets of an assessee under the Customs Act, except with respect to cases under Section 529-A of the Companies Act, 1956; Recovery of Debts and Bankruptcy Act, 1993; Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Accordingly, such an exception created under the Customs Act is duly acknowledged under Section 238 of the IBC as well.”

20. The Hon’ble Supreme Court referring to Section 142-A has laid down following in paragraph 44:

“**44.** At the cost of repetition, we may note that the demand notices issued by the respondent are plainly in the teeth of Section 14 of the IBC as they were issued after the initiation of the CIRP proceedings. Moratorium under Section 14 of the IBC was imposed when insolvency proceedings were initiated on 1-8-2017 [*Icici Bank Ltd. v. ABG Shipyard Ltd.*, 2017 SCC OnLine NCLT 554] . The first notice sent by the respondent authority was on 29-3-2019. Further, when insolvency resolution failed and the liquidation process began, NCLT passed an order on 25-4-2019 [*Sunil Kumar Jain v. Sundaresh Bhatt*, 2019 SCC OnLine NCLT 9931] imposing a moratorium under Section 33(5) of the IBC. It is only after this order that the respondent issued a notice under Section 72 of the Customs Act against the corporate debtor. The various demand notices have therefore clearly been issued by the respondent after the initiation of the insolvency proceedings, with some notices issued even after the liquidation moratorium was imposed.”

21. The aforesaid provision notices that the Customs Authorities would have the first charge on the property of the assessee under the Customs Act, except with respect to cases under Section 529A of the Companies Act, 1956; the Recovery of Debts Due to the Banks and the Financial Institutions Act, 1993; and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Thus, the legislative scheme, which is delineated under Section 142-A is same as under 11E. Thus, there cannot be any first charge on the assets of the CD, which are being dealt with under the IBC.

22. In view of the foregoing discussions, we are of the view that Adjudicating Authority did not commit any error in rejecting the IA filed by the Appellant, being IA No.2537 of 2024. The Appellant cannot be held to be secured creditor of the CD and hence, the Appellant also cannot

claim any parity with the payment of State GST. The judgment of the Hon'ble Supreme Court in **Rainbow Papers** cannot be relied by the Appellant for the proposition that for dues under Central Excise Act, there shall be first charge on the assets of the CD.

23. We do not find any error in the order of the Adjudicating Authority rejecting IA No.2537 of 2024. There is no merit in the Appeal. The Appeal is dismissed. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

NEW DELHI

30th June, 2025

Ashwani