

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

**Company Appeal (AT) (Insolvency) No. 26 of 2021**

[Arising out of order dated 12.10.2020 in IA No. 1459(PB)/2020 in Company Petition No. (IB)/239/2017 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.)]

**IN THE MATTER OF:**

**1. Commissioner of State Taxes & Excise,**

Excise and Taxation Department, Kusumpti,

Shimla, Himachal Pradesh 171009

Email: [etc-hp@nic.in](mailto:etc-hp@nic.in)

**2. Deputy Commissioner of State Taxes & Excise**

Flying Squad, South Enforcement Zone, Sector-1A,

Parwanoo, District, solan, Himachal Pradesh 173220

**3. Joint Director of Industries,**

Single Window Clearance Agency,

Department of Industries, Baddi

District Solan Himanchal Pradesh 173205

Email: [swcabaddi@gmail.com](mailto:swcabaddi@gmail.com)

**..... Appellants**

**Versus**

**Naresh Kumar Sood, Liquidator,**

R/o UGF 1/15, Tilak Nagar,

Near PNB Tilak Nagar,

New Delhi-110018

Email: [liquidator.biotropics@gmail.com](mailto:liquidator.biotropics@gmail.com)

**..... Respondent.**

**Present:**

**For Appellant:** Mr. Abhimanyu Jhamba, Mr. R.A. Thanpinao Thangal, Ms. Hatneimawi, Advocates.

**For Respondent:-** Mr. Ajay Kumar Jain, Mr. Sourit Arora, Advocates for Liquidator.

**J U D G M E N T**  
***(18<sup>th</sup> October, 2022)***

**Justice Anant Bijay Singh;**

The instant Appeal has been preferred by the three Appellants being aggrieved and dissatisfied by the order dated 12.10.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in IA/1459/2020 in (IB)/239(PB)/2017 whereby and whereunder the Adjudicating Authority directed the Respondent No. 1 and 2 (the Appellant Nos. 1 and 2 herein) to issue No Objection Certificate (NOC) to the Liquidator and Director of Industries in order to register the properties and allowed the application filed by the Liquidator under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ***(for short IBC)***.

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

i) The Excise and Taxation Officer Flying Squad, South Zone Parwanoo (office of Appellant No. 2) vide letter dated 05.02.2016 issued to Dy Director Industries, Baddi (Appellant No. 3) directed that the property of M/s Biotropics Pharma Private Limited be debarred for sale/transfer in the interest of Government revenue as the dealer has made a default of additional demand

under the HP VAT Act, 2005 and this was done in terms of Section 25 and 26 of the HP VAT Act, 2005.

ii) The Corporate Insolvency Resolution Process (**For short CIRP**) was initiated against M/s Biotropics Pharma Private Limited – Corporate Debtor and Mr. Naresh Kumar Sood, the Liquidator initially appointed as Interim Resolution Professional in the matter. The IRP sent a letter on 16.04.2018 (Annexure A/3 of the Appeal) to Assistant Commissioner, Sales Tax Department intimating the last date of submission of claims is 25.04.2018.

iii) Pursuant to the letter dated 16.04.2018, the Appellants submitted his Additional Demand of Rs. 3,32,32,912/- created against the dealer as a claim of State Revenue. Thereafter, The Respondent was appointed as a Liquidator vide an order dated 26.10.2018 passed by the NCLT. Pursuant to his appointment as a Liquidator, the Respondent vide a letter dated 05.11.2018 intimated only Appellant No. 2 of his appointment and requested the Appellant No. 2 to submit his claim latest by 25.11.2018.

iv) Further case is that no letter was issued to the Assessing Authorities at Baddi despite the existence of letter dated 15.06.2018 (Annexure A/4 of the Appeal) whereby the Assessing Authorities at Baddi had intimated the claim of Rs. 3,32,32,912 under HP VAT Act to the Liquidator who at that time was the Interim Resolution Professional.

v) The Respondent as the Liquidator intimated the factum of such appointment to Appellant No. 1 vide letter dated 15.11.2018 (Annexure A/7 of

the Appeal) as is statutorily required under Section 88 of the Central Goods and Service Act, 2017. The sail letter nowhere required the Appellant No. 1 to submit any claim etc. On the contrary it required the advice and assistance of the Appellant No. 1 as to applicability or otherwise of GST to certain assets proposed to be disposed of.

vi) The Appellant No. 1 acting bonafide after making due enquiry as stipulated under sub-Section 2 of Section 88 of CGST Act, reiterated its claim under the HP VAT Act, 2005 for the assessment year 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 aggregating to Rs. 3,62,86,336.00 vide email and letter dated 06.02.2019. The limitation to make such claim was to expire on 15.02.2019. In the letter dated 06.02.2019 (Annexure A/8 of the Appeal) filed through Assistant Commissioner, Sales Tax Department BBND, Baddi a specific note referring to earlier claim dated 15.06.2018 was made by the Assessing Authorities.

vii) The Respondent vide email dated 07.02.2019 (Annexure A/9 of the Appeal) informed the Appellant No. 1 that the last date for submission of claim expired under Section 38(1) of the Code and Regulations read therewith and hence the claim of Appellant No. 1 was rejected.

viii) Further case is that the Respondent on the ground of delay rejected the claim of the Appellants herein and proceeded with the liquidation process. In pursuance thereto inter alia sold through private sale mode the following immovable properties comprised of land and building of the Corporate Debtor.

- a. Unit 1 & 2 at Plot No. 76/II (hereinafter referred to as 'Plot No. 76/II) DIC Industrial Area, Baddi, District, Solan, Himachal Pradesh-173205 sold to M/s Global Merchandise (A Partnership Firm) and
- b. Unit III at Plot No. 17 and Plot No. 18 (hereinafter referred to as 'Plot No. 17 & 18) at APCIA, Katha, Bhatolikam, Baddi, Himachal Pradesh-173212 sold to Packzone Industries Private Limited.
- ix) The Appellants appeared and filed his reply affidavit along with written submissions before the NCLT in which the Appellants taken plea that the claim of the Appellants within the knowledge of Respondent whereby the Appellants have been intimated the Respondent vide letter dated 15.06.2018. Despite these facts, the impugned order was passed and Appellants were also directed to issue No Objection Certificate to the Respondent. Hence this Appeal.

### **Submissions on behalf of the Appellants**

3. The Ld. Counsel for the Appellants during the course of argument and in his memo of Appeal along with written submissions submitted that the Adjudicating Authority while passing impugned order failed to appreciate that a demand of Rs. 1,22,70,000/- was raised by the State Taxes and Excise, Assessing Authorities at Parwanoo on the corporate debtor viz. Biotropics Pharma Pvt. Ltd. and a further demand of Rs. 3,32,32,912/- was raised by the Assessing Authorities at Baddi. In view of the unrealized demand and provisions of Section 26 of the HP VAT Act, 2005, an attachment order dated 05.02.2016

was passed by the Excise Authorities since the State Excise Authorities have a first charge on the property of the dealer.

4. It is further submitted that Section 26 of the HP VAT Act, 2005 admits of no ambiguity and provides for a mandatory first charge on the property of the dealer. The State of Himachal Pradesh has a first charge over the property of the dealer in terms of Section 26 of the HP VAT Act read with Section 25 thereof.

5. It is further submitted that the supremacy of the first charge of the State has been succinctly discussed by the Hon'ble Supreme Court in the case of Central Bank of India Vs. State of Kerala, reported in (2009)4 SCC 94. In this case Hon'ble Supreme Court was considering the overriding impact of Central Acts viz DRT Act and SARFAESI Act (akin to Section 238 of the IBC, 2016) over Section 26 of Kerala General Sales Tax Act (akin to Section 26 of HP VAT Act 2005).

6. The Ld. Counsel for the Appellant in his written submissions given comparison of the Judgments and facts of the present case which is tabulated hereunder:

<i>Central Bank Judgment- Hon'ble Supreme Court</i>	<i>Facts in present case</i>
<b>The Securitisation Act</b> <b>95.2.</b> <i>"35. The provisions of this Act to override other laws.-The provisions of this Act shall have effect, notwithstanding anything inconsistent</i>	<b>IBC, 2016; Section 238</b> <i>"238. Provisions of this Code to override other laws- The provisions of this Act shall have effect, notwithstanding anything inconsistent</i>

<i>therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”</i>	<i>therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”</i>
<b>The Kerala General Sales Tax Act, 1963.</b> <b>95.4.</b> <i>“26-B. tax payable to be first charge on the property. Notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other amount, if any, payable by a dealer or any another person under this Act, shall be the <b>first charge</b> on the property of the dealer, or such person.”</i>	<b>Himachal Pradesh Value Added Tax Act 2005</b> <i>“26. Tax, penalty and interest to be first charge on property. Notwithstanding anything to the contrary contained in any law, any amount of tax and penalty including interest, if any, payable by a dealer or any other person under this Act <b>shall be a first charge</b> on the property of the dealer or such other person.”</i>

**7.** It is further submitted that Section 26B of the Kerala Sales Tax is same to Section 26 of HP VAT Act, 2005. In Central Bank’s case the Hon’ble Supreme Court was pleased to hold that the ‘first charge’ referred to in the State law would prevail over the Central Act i.e. DRT and Securitisation Act. The relevant paragraphs from the judgment of the Hon’ble Supreme Court are paras 111, 112, 113, 126, 129, 130 and 131.

**8.** It is further submitted that the issue is now settled by the Hon’ble Supreme Court vide judgment dated 06.09.2022 in the case of “**State Tax Officer (1) Vs. rainbow Papers Limited bearing Civil Appeal No. 1661 of 2020**”. While

dealing with Section 48 of the Gujrat VAT Act which is verbatim of Section 26 of the HP VAT Act. The relevant paragraphs of the of the judgment is reproduced hereunder:

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

***“48. Tax to be first charge on property.—***

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

*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 :-*

*“Not withstanding 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.”*

**9.** The Ld. Counsel for the Appellant submits that in view of the submissions and judgment passed by the Hon’ble Supreme Court the impugned order is fit to be set aside and the Appeal be allowed.

**Submissions on behalf of the Respondent**

**10.** The Ld. Counsel for the Respondent during the course of argument and in his reply along with written submissions submitted that the Section 238 of the IBC overrides other laws. As per Section 77(3) of the Companies Act, 2013 liquidator cannot take into account any charge, unless it is duly registered with the ROC.

**11.** It is further submitted that the Adjudicating Authority has rightly observed and held in para 12 of the impugned order which is hereunder:

*“As to the facts of the present case, it is seen that the Respondent has filed a claim before the Liquidator, and from the written submission filed by the Liquidator, it is seen that the Liquidator has accepted the claim of 2<sup>nd</sup> Respondent and included his name in the list of stakeholders. As per Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016, the secured creditor has to inform the Liquidator of its decision to relinquish its security interest to the liquidation estate or to realize its security interest in the prescribed Form and if the secured creditor has failed intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall form part of the Liquidation estate. Admittedly in the present case, 2<sup>nd</sup> Respondent has filed its claim before the Liquidator which came to be admitted by the Applicant to the tune of Rs. 1,22,70,000/- as “operational debt”. Further, once 2<sup>nd</sup> Respondent has submitted himself to the liquidation process, he cannot exercise any charge over the property and the said property would form part of the Liquidation Estate. And 2<sup>nd</sup> Respondent has not*

*placed on record any document to show that they have submitted any Form in the prescribed format or intimated their decision to the Liquidator, with respect to their stand in the Liquidation process. 2<sup>nd</sup> Respondent cannot approbate and reprobate at the same time, by submitting themselves to the Liquidation process and to have charge over the property. Under the circumstances, Respondents 1 and 2 are directed to issue No objection Certificate (NoC) to the Liquidator and Director of Industries in order to register the properties. Accordingly, the Application stands allowed.”*

**12.** It is further submitted that Regulation 21 of the IBBI (Liquidation process) Regulations, 2016 provide the provisions for proving security interest. The Appellants have failed to provide any records or documents in compliance with the above regulation for proving their claim as a secured creditor. Based on these submissions, there is no merit in the present Appeal, the Appeal is fit to be dismissed.

### **FINDINGS**

**13.** After hearing the parties and going through the pleadings made on behalf of the parties and also perusing the impugned order, it appears that the Adjudicating Authority relied on a judgment of **“Sanjay Gupta, Liquidator vs. Office of the Deputy Commissioner of State Taxes and Excise (H.P.), IA-1428/2020 in CP NO. (IB)-473(PB)/2018”** wherein the Adjudicating Authority has held that “detail about the priority of charge to be held among the creditors and also opined that as long as the asset is declared as part of Liquidation Estate,

it has to be governed by IBC not by some other enactment”. Further, in para 12 of the impugned order the Adjudicating Authority taken note of the fact that the Respondent (the Appellant herein) has filed a claim before the Liquidator and the Liquidator accepted the claim of 2<sup>nd</sup> Respondent and included his name in the list of stakeholders. As per Regulation 21A of the IBBI (Liquidation Process) Regulation, 2016 the secured creditor has to inform the Liquidator of its decision to relinquish its security interest to the liquidation estate or to realize its security interest in the prescribed Form and if the secured creditor has failed to intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall form part of the Liquidation estate. Admittedly in the present case, 2<sup>nd</sup> Respondent has filed its claim before the Liquidator which came to be admitted by the Applicant to the tune of Rs. 1,22,70,000/- as ‘operational debt’. Further, held once 2<sup>nd</sup> Respondent has submitted himself to the liquidation process, he cannot exercise any charge over the property and the said property would form part of the Liquidation Estate.

- The Hon’ble Supreme Court recently decided the issue in the case of **“State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 dated 06<sup>th</sup> September, 2022”** wherein the Hon’ble Supreme Court held as follows:

“.....

**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.”*

- In view of the authority pronouncement by the Hon'ble Supreme Court, we are of the view that the impugned order passed by the Adjudicating

Authority cannot sustain in the eye of law as the Adjudicating Authority has failed to consider the aspects of the matter, therefore, the impugned order dated 12.10.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in IA/1459/2020 in (IB)/239(PB)/2017 is hereby set aside. Accordingly, the instant Appeal is allowed.

**14.** 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, Principal Bench, New Delhi) forthwith.

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

**[Ms. Shreesha Merla]  
Member (Technical)**

***New Delhi***  
***18<sup>th</sup> October, 2022***  
*R. Nath.*