

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.302/2023
(IA No.968/2023)
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 05.04.2021 in
IA No.393/2022 in CP(IB) No.51/BB/2018, passed by the
'Adjudicating Authority' (National Company Law
Tribunal, Bengaluru Bench)

IN THE MATTER OF:

**Assistant Commissioner of Commercial Taxes
LGSTO – 150, Bengaluru,
No. 80/8, 2nd Floor, Samaya Towers
Kodigehalli Main Road,
Bangalore – 560092**

...Appellant

Versus

**1. Mr. Alok Kailash Saksena
Resolution Professional of Associate
Décor Limited
C/o Desai Saksena and Associates
Chartered Accountants, 1st Floor
Laxmi Building, Sir Phirozshah Mehta
Road, for Mumbai – 400001**

...Respondent No.1

**2. Punjab National Bank
(Formerly Oriental Bank of Commerce)
Corporate Banking Branch at:
Maker Tower, F – wing,
Cuffe Parade, Mumbai – 400005
Rep. by its DGM**

...Respondent No.2

**3. Union Bank of India
Bharat House, Ground Floor
Near Bombay Stock Exchange
Fort Mumbai – 400001
Rep. by its DGM**

...Respondent No.3

4. **Bank of Baroda**
Corporate Financial Services Branch
1st Floor, 3 Walchand Hirachand Marg
Ballard Pier, Mumbai – 400001
Rep. by its DGM **...Respondent No.4**
5. **Mohammed Enterprises (Tanzania) Ltd.**
Corporate Office: 20th Floor,
Golden Jubilee Towers, Ohio Street
P.O. Box 20660 Dar as Salaam, Tanzania **...Respondent No.5**
6. **Svमितva Landmarks**
110/2, 1st Floor, Krishnappa Layout
Lalbagh Road, Bengaluru – 560027 **...Respondent No.6**

Present:

For Appellant : Mr. Sandip Huligol, Advocate

For Respondent : Mr. E. Om Prakash, Senior Advocate, For R5
Mr. Divyanshu Rai, Advocate, For R1

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Introduction

The ‘Appellant’ / ‘Assistant Commissioner’ of Commercial Taxes LGSTO, Bangalore has preferred the instant ‘Appeal’ before this Tribunal, as an ‘aggrieved person’ in respect of the impugned order dated 28.06.2023 in IA No. 393/2022 in CP (IB) No. 51/BB/2018 (Filed under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016 by the Appellant / Applicant) passed by the Adjudicating Authority / NCLT Bengaluru Bench.

2. Earlier, the Adjudicating Authority / NCLT Bengaluru Bench while passing the impugned order on 28.06.2023 in IA No. 393/2022 in CP (IB) No. 51/BB/2018 filed by the Appellant / Applicant, u/s 60(5) of the I&B Code, 2016 at paragraph Nos. 8 to 19 had observed the following: -

8. *“On perusal of the facts it is observed that the Applicant herein i.e. Asst. Commissioner of Commercial Taxes, LGSTO-150, Bangalore has filed a claim on 21.12.2018 in Form-F for Rs.54,46,13,819/- after adjusting the receipts of Rs.10,36,36,873/- in respect of GST liability and the same has*

been rejected by the R1-Resolution Professional of the Corporate Debtor, as the claim was based on estimates and orders of best judgment assessment under Section 62 of the Karnataka GST Act, 2017.

9. It is seen that the Applicant herein has earlier filed IA No.134 of 2020 *inter alia* seeking an order for setting aside the RP's order rejecting the entire claim of the Applicant for Rs.54,46,13,819/-; to admit its entire claim; to suitably revise the IM and EoI in the CIRP of Corporate Debtor after taking into account its claim for Rs.54,46,13,819/-. This Adjudicating Authority *vide* order dated 28.05.2021 dismissed the said application with a direction to the Commercial Taxes Dept. to place before the RP only ascertained, crystallised demand that may have arisen from a regular assessment for the period under consideration and the RP shall place the same before the CoC/reconstituted CoC, for its consideration.

10. However, the Applicant through the instant IA has *inter alia* sought to declare the Resolution Plan dated 11.02.2020 approved by the CoC based on the Information Memorandum prepared by the R-1/RP as null and void as the said Plan is contrary to the provisions of the Code and Regulations and to direct the R2, R3 and R4 to comply with the common order dated 28.05.2021 passed by this Adjudicating Authority in IA No.134 of 2020. Therefore, the Applicant had raised same issues between the same Parties in the IA No.134 of 2020 in which case order has already been passed by this AA.

11. It has been correctly contended by the Respondents that once an issue has already been adjudicated upon by this Tribunal, the same cannot be adjudicated again without taking necessary consequential steps in accordance with the observations of the Tribunal. It was stated by this Adjudicating Authority in the above order dated 28.05.2021 that once the

IA No.393 of 2022 in
CP (IB) No.51/BB/2018



return is already filed and taxes paid, the demand raised in the best judgment assessment order would not be enforceable. Therefore, the IA was disposed of with directions that the Commercial Taxes Department should place before the RP only ascertained, crystallised demand after the regular assessment is made.

12. The contention of the Respondents is that the Applicant has come up with the same claim amount which arose on account of the best judgment assessment order made earlier and the regular assessment has not been made; so the demand is not ascertained and crystallised and placed before the R-1 for the consideration of the CoC. Therefore, the Respondents have rightly contended that the Applicant is barred by *res judicata* and is estopped to raise similar grounds for consideration before this Adjudicating Authority without following the directions in accordance with Law.

13. In this connection, the relevant provisions of Section 62 of the Karnataka GST Act, 2017 is reproduced hereunder:

"62. Assessment of non-filers of returns.- (1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates. (2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue."



14. As stated supra, pursuant to the interim order of the Hon'ble High Court of Karnataka dated 13.02.2019 in WP No.40360-40364/2018, the Corporate Debtor filed its GST returns for the period September 2017 to October 2018 on 30.03.2019. Ordinarily, as per Section 62(2) of KGST Act, 2017, where the GST returns are filed within 30 days from the date of passing of the best judgment orders, these assessment orders shall be deemed to have been withdrawn.

15. The RP submitted that pursuant to the orders of the Hon'ble High Court of Karnataka in WP 15646/2018, WP 40360-40364/2018 and in particular the interim order dated 13.02.2019 in WP 40360-40364/2018, the Corporate Debtor was allowed to file its return within one week and the CD complied with the order and finally filed its GST returns for the period September 2017 to October 2018 on 30.03.2019. The CD paid its entire GST liability for this period before filing the GST returns. The actual GST liability for the said period was Rs.53,23,37,694/- based on the books of accounts and the transactions which was also paid in full as against the best judgment orders (which are estimates) of Rs.84,82,50,692/-. Pursuant to the filing of GST returns which were pursuant to orders of the Hon'ble High Court of Karnataka, Bangalore and payment of the GST taxes for the period Sept. 2017 to October 2018, there is no liability or amount payable towards GST.

16. From the pleadings, it is noticed that the Corporate Debtor filed another WP No.45290/2019 before the Hon'ble High Court of Karnataka seeking quashing of the best judgment assessment orders issued since the CD had already filed its returns and made payment towards the GST liability. The Hon'ble High Court vide its order dated 02.07.2021 has set aside all the assessment orders issued by the Applicant between September 2017 to December 2018 and directed the GST Department to process the return

filed by the Corporate Debtor in accordance with Law. However, after this setting aside order, the GST Department has not undertaken to make any regular assessment in accordance with the returns filed. Therefore, it has been emphasised by the Respondent that this IA is liable to be dismissed.

17. Another line of argument by the Applicant is that keeping the powers of the State by having first charge on the property of taxable person against the demands and amounts payable, the Hon'ble Supreme Court in *State Tax Officer v. Rainbow Papers Ltd.* dated 06.09.2022, has inter alia held that the Sales Tax authority is a 'secured creditor' for tax purposes. In this context, it is also to be noted that the Hon'ble Apex Court in Rainbow Papers case at para 56 has held as under:

"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."

18. However, it has been explained that the Applicants' case would not be covered as a 'Secured Creditor' in the same manner as decided in the above judgment of the Hon'ble Apex Court. In the instant case, the claim of the Applicant would not be considered to have first charge at par with secured creditors under the mandatory provisions of Section 82 of the Karnataka Goods and Services Tax Act, 2017, Section 82 of the Central Goods and Services Tax Act, 2017 and Section 20 of the Integrated Goods and Services Tax Act, 2017 in view of the provisions contained in these Acts. Section 82 of both the KGST Act and CGST Act is reproduced hereunder:

"82. Tax to be first charge on property - Notwithstanding anything to the contrary in any law for the time being in force, the tax shall be a first charge on the property of the taxable person as otherwise provided in the

Insolvency and Bankruptcy Code, 2016 (Central Act 31 of 2016), any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person."

19. Further, Section 20 of the IGST Act provides that certain provisions of CGST Act *inter alia* those falling under demands and recovery section of CGST Act shall, *mutatis mutandis*, apply, so far as may be, in relation to integrated tax as they apply in relation to central tax as if they are enacted under the IGST Act. The provisions extracted above laid down a specific exception to the provisions of the Code and expressly gives an over-riding effect to the Code. Therefore, the contention of the Applicant that it falls under the definition of 'Secured Creditor' under the Code is not tenable.

and resultantly, dismissed the ‘Application’.

Appellant’s Submissions

3. According to the Learned Counsel for the Appellant / Applicant, the ‘Corporate Debtor’, is a ‘Company’, among other things, engaged in the ‘Business of Manufacture and sale of products of wood, cork, straw and plating materials’. In the course of its’ Business’, the ‘Corporate Debtor’, had effected taxable supplies of ‘Goods’ in and from the State of Karnataka and registered under the provisions of the ‘Karnataka VAT Act’, ‘KGST Act’, the ‘Central Goods’ and ‘Services Tax Act, 2017’, (‘the CGST Act’ for short), and the Integrated Goods and Services Tax Act, 2017 (‘the IGST Act, for short) and accordingly, liable to comply with the requirement of the aforesaid Acts, including for payment of taxes as applicable.

4. The Learned Counsel for the Appellant, advances an argument that the Adjudicating Authority / Tribunal had passed the impugned order, in an unjustified manner, against law, facts, and the same is liable to be set aside.

5. The Learned Counsel for the Appellant points out that the ‘Adjudicating Authority’ / ‘Tribunal’, committed an error in dismissing the interlocutory application filed by the Appellant bearing IA No. 393/2023, on the ground that it was barred by ‘*res judicata*’ without appreciating the vital fact, that the Appellant,

was prevented from proceedings, to crystallise its demand, mainly because the ‘Corporate Debtor’, had in the ‘interregnum’, approach the Hon’ble High Court by filing WP No. 17303/2021, in which the High Court had restrained the ‘Department’, from proceeding any further, with ‘audit’ and re-assessment proceeding. Moreover, the unilateral withdrawal of the Department’s Appeal, in Appeal No. 171/2022, from this Tribunal had resulted in the Appellant / Applicant being unfairly and unjustly prohibited, from proceeding, with taking steps for crystallisation of its demand and not for any fault, attributable to the Appellant.

6. The Learned Counsel for the Appellant, proceeds to point out, that the ‘Adjudicating Authority’ / ‘Tribunal’ had failed to appreciate that the ‘statutory demand of the Appellant’ is/or nothing but having a ‘First Charge’ on the property of the ‘Corporate Debtor’ vis-à-vis other claims, there is no power bestowed upon the 1st Respondent, to act in such a blatant violation of such mandate of law and to act against the interest of the State.

7. The other contention advanced on behalf of the Appellant, is that the ‘Adjudicating Authority’, had failed to appreciate that the provisions of KVAT Act, KGST Act, IGST Act and CGST Act are not contrary or inconsistent with the provisions of the I&B Code and further that the judgement of the Hon’ble

Apex Court is applicable in entirety to the facts of the matter. Further, considering the gross breach committed by Resolution Professional, in rejecting the claim / demand of Rs. 54,46,13,819/- of the Appellant, and not by indicating the 'claim', in its entirety in the IM, and, therefore, it is obvious that placing reliance upon the decision in State Tax Officer (1) Vs. Rainbow Papers Ltd. Dated 06.09.2022, the 'Information Memorandum', the Resolution Plan, as approved by the 'Committee of Creditors' and the Application filed by R3, 4 and 5 before this Tribunal, all of which merits to be set aside as 'null and void' and 'not in accordance with law', as prayed for by the Appellant.

8. The Learned Counsel for the Appellant, points out that the Adjudicating Authority, had failed to appreciate that the 1st Respondent, had failed to follow the requirements u/s 30(2) of the I&B Code, 2016, which mandates that the 1st Respondent, to ensure that the 'Resolution Plan' conforms to the parameters prescribed in the said provision, in the I&B Code.

9. Advancing his argument, the Learned Counsel for the Appellant, comes out with a plea, that the Adjudicating Authority had not appreciated the decision of the Hon'ble Supreme Court in ***Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Ltd. and Anr.***, reported in (2022) 2 SCC 401 wherein at paragraph 147 it is observed as under:-

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

10. The Learned Counsel for the Appellant, advances an argument, that the Adjudicating Authority, had failed to appreciate that the ‘Resolution Professional’, had committed an error in law, by ‘waiving of the statutory dues’, and the same will constitute breach, of the relevant statute, under which such dues arose.

11. The Learned Counsel for the Appellant, emphatically points out that the Adjudicating Authority/Tribunal, had failed to appreciate that the Resolution

Professional cannot extinguish statutory dues, without seeking an approval of the concerned revenue authority, as it does not arise out of a mutual agreement or contract under the dues arise pursuant to the ‘provisions of Law’, in the respective statute, levying such charges or obligations on the ‘payer’.

12. The Learned Counsel for the Appellant, takes a stand that the Adjudicating Authority, should have considered the Appellant’s contentions in regard to the order passed in WP No. 17303/2021 by the Hon’ble Karnataka High Court, wherein the Appellant was barred by the said order, to complete the re-assessment proceedings.

13. The Learned Counsel for the Appellant, forcefully points out that the ‘Resolution Professional’ had committed an error by waiving off statutory dues and the same will constitute a violation of the relevant statute under which such dues arose. Also, that the Learned Counsel points that the 1st Respondent as well as the ‘Committee of Creditors’, comprising of R3, 4 and 5 had ignored the ruling of the Hon’ble Supreme Court in ‘Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors.’ Reported in 2020 8 SCC 531, wherein it was observed and held that all claims must be submitted to and decided by the Resolution Professional, so that all prospective resolution applicants know

exactly what was to be paid in order that it may then take over and run the business of the Corporate Debtor.

14. According to the Appellant, the Adjudicating Authority, had failed to appreciate that the Respondent No. 1/Resolution Professional, was placing the interest of the 'Corporate Debtor', on a high pedestal, than that of State's interest and hence the information memorandum prepared on 17.10.2019 by the Respondent No. 1 is prejudicial to the State's interest and hence, cannot be allowed to stand.

15. The Learned Counsel for the Appellant, points out that the 'Adjudicating Authority' / 'Tribunal' has failed to taking into account that actions of 1st Respondent, adjudicating, and rejecting the demand of Appellant, of a sum of Rs.54,46,13,819/- in the information memorandum, is nothing but an abuse of process of law, and the same had resulted in causing use loss to the 'Exchequer', besides, being contrary to law, absurd, arbitrary and bad in 'Law'.

16. The Learned Counsel for the Appellant, submits that the 'Adjudicating Authority' has failed to appreciate that, on a perusal of 'Information Memorandum', it could be seen, that out of the claims submitted in Form-F, to the extent Rs. 146.35 crores, comprising of all State and Central Government authority, the 1st Respondent / Resolution Professional had rejected the claims of

the value of Rs.105.43 crore, unilaterally, arbitrarily and in an illegal manner without any authority of law and restricted the claim to Rs. 40.92 crores by rejecting the entire demand of Appellant of Rs. 54,46,13,819/-.

17. According, to the Appellant, the ‘Adjudicating Authority’, has failed to take into account that a perusal of the I&B Code, 2016 will reveal that under Section 40(1) of the Code, ‘power’, is granted only to the ‘Liquidator’, and to reject ‘any claims’, after ‘verification’ and ‘no such power of rejection’, is conferred on the Resolution Professional, under the Code.

18. The Learned Counsel for the Appellant, points out that the ‘claim’ of the Appellant, is being covered and being protected by the ingredients of Section 82 of KGST Act, and further the provisions of KVAT Act, as per Section 48 of the Act were not appreciated by the Adjudicating Authority in a proper real prospective.

19. The Learned Counsel for the Appellant, comes out with the version that the very object of the Information memorandum under the Code, is required to furnish information, so that ‘any person’ showing ‘Expression of Interest’ / ‘Resolution Plan’, shall be full informed of the total outflow of the monies to the state and the demands of the Authority / Appellant, without which the ‘whole

actions’ initiated by the Committee of Creditors / Resolution Applicant will render in ‘null and void’.

20. The Learned Counsel for the Appellant, contends that the Appellant’s submission, in regard to the order, in WP No. 17303/2021, passed by the Hon’ble Karnataka High Court, wherein the Appellant, was bared by the said order, to complete ‘Reassessment’ ‘proceedings’ and submitting a crystalised demand was not taken into account by the Adjudicating Authority, which has resulted in serious miscarriage of justice.

21. While winding up, the Learned Counsel for the Appellant, prays for setting aside the impugned order dated 28.06.2003 in I.A. No. 393/2022 in CP(IB) No. 51/BB/2018 passed by the ‘Adjudicating Authority’ / ‘Tribunal’.

1st Respondent’s ‘Pleas’

22. Contending contra, the Learned Senior Counsel for the 1st Respondent, points out that the 1st Respondent had not withdrawn the ‘Appeal’, filed before this Tribunal and that the said ‘Appeal’ was dismissed as ‘infructuous’, as the Hon’ble High Court of Karnataka had set aside the ‘Best Judgment Assessment,’ orders, passed by the Appellant. Further, the claim of the ‘Appellant’, was based on the ‘Best Judgment Assessment’.

23. According to the 1st Respondent, Appellant, had moved the ‘Adjudicating Authority’ / ‘Tribunal,’ with similar reliefs, prayed in his earlier I.A. No. 134/2020, on the basis of Assessment Order quashed on the Hon’ble High Court in its order dated 02.07.2021 and is ‘estopped’, by the ‘Principle of ‘Res-Judicata’.

24. It is represented on behalf of the 1st Respondent, that the ‘Adjudicating Authority’, had rightly held, that the Appellant, is not a ‘secured creditor’, and that the decision of the Hon’ble Supreme Court in ‘Rainbow Papers’ case, ‘inapplicable’, to the facts of the present case, as the Section 82 of the ‘KGST Act’ and ‘CGST Act’ makes a ‘specific exception’, to the ‘provisions of the I&B Code, 2016’.

25. In this connection, the Learned Counsel for the 1st Respondent, points out in the judgment dated 02.08.2023 of this Tribunal, in the matter of ***Assistant Commissioner of Central Tax Vs. Mr. Sreenivasa Rao Ravinuthala RP Samyu Glass Pvt. Ltd. (Company Appeal (AT) (CH)(Ins.) No. 346 of 2021***, wherein, at paragraph Nos. 7 to 9, it is observed as under:

7. “As regarding the contention of the Learned Counsel for the Appellant that the decision of the Hon’ble Supreme Court in the matter on ‘State Tax Officer Vs. Rainbow Papers Limited’, reported in [(2022) SCC Online SC 1162], is applicable to the

facts of this case, this Tribunal is of the considered view that the ratio laid down by the Hon'ble Apex Court in the matter on 'State Tax Officer Vs. Rainbow Papers Limited', (Supra) is with respect to whether the provisions of the IBC, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act, 2003 and it was held by the Hon'ble Apex Court that Section 48 of the 'Gujarat Value Added Tax Act, 2003' (GVAT Act, 2003) is not contrary or inconsistent with Section 53 or any other provisions of IBC. It was observed that under Section 53 (1) (b) (ii), the debts owed to a Secured Creditor, which would include the State, under the 'GVAT Act, 2003', 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 and hence it was held in that case that the State, is a Secured Creditor under 'GVAT Act, 2003'. In this instant case, the Demand orders were issued to the Corporate Debtor under the 'Central Excise Act, 1944'. Section 11E of the 'Central Excise Act, 1944' is distinct from the provisions of 'GVAT Act, 2003'. For better understanding of the case, the said Section 11E of the Central Excise Act, 1944 is reproduced as hereunder:

*"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, 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, be the first charge on the property of the assessee or the person, as the case may be.

8. *From the usage of the words 'save as provided in' in Section 11E is in the nature of an exception intended to exclude the class of cases, mentioned in Companies Act, 1956, 'The Recovery of Debts due to Banks and the Financial Institutions Act, 1993', 'SARFAESI Act, 2002' and 'I & B Code, 2016'. The 'Secured Interest' as defined under the Code excludes charges created by Operation of law. Section 11E of the Central Excise Act, 1944 is distinct from the provisions of the 'Gujarat VAT Act, 2003' and therefore, the decision in the matter of 'State Tax Officer Vs. Rainbow Papers Limited', (Supra) cannot be made applicable to the facts of this case. It is also pertinent to mention that the Master Circular No.1053/02/2017-CX, issued by the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs specifies that dues under 'Central Excise Act, 1944' would have first charge only after the dues under the Provisions of the Code are recovered. Once again, for better understanding of the case, Clause 20 of the Regulation is reproduced as hereunder:*

“20. Recovery from the assets under liquidation: Section 53 of the Insolvency and Bankruptcy Code, 2016 provides for order of priority for distribution of proceeds from the sale of the liquidation assets. Pari-materia changes have been made in Section 11E of the Central Excise Act, 1944. In effect, the Central Excise dues shall have first charge, after the dues, if any, under the provisions of Companies Act, Recovery of Debt due to Bank and Financial Institution Act, 1993 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Insolvency and Bankruptcy Code, 2016, have been recovered.”

9. Keeping in view, the aforementioned Section of the ‘Central Excise Act, 1944’ is quite different from the ‘GVAT Act, 2003’ and Clause 20 of the aforementioned Circulation, this ‘Tribunal’ is of the considered view that the Appellant herein, cannot be treated as a ‘Secured Creditor’.”

26. The Learned Counsel for the 1st Respondent, brings it to the notice of the Tribunal, that the ‘Adjudicating Authority’, had reserved its ‘order’ on 12.04.2023 and that the ‘Appeal’, came to be filed on 07.06.2023 (vide Annexure-M at page 242 of the Appellant’s Appeal Paper Book).

27. The Learned Counsel for the 1st Respondent, while summing up, points out that the ‘impugned order’, is a well-reasoned and the same, requires no

‘interference’ in the hands of this ‘Tribunal’ sitting in ‘Appellate’ Jurisdiction under Section 61 of the I&B Code, 2016.

Assessment

28. At the outset, this ‘Tribunal,’ pertinently points out that the ‘Appellant’ / ‘Applicant’ had filed a claim in Form-F for a sum of Rs.54,46,13,819/-, on 12.012.2018, after adjusting the receipts of Rs.30,36,36,873/-, in respect of GST Liability and the same was rejected by the 1st Respondent / Resolution Professional of the Corporate Debtor, because of the fact that the claim was resting upon the Estimates and Best Judgment Assessment orders, in the teeth of Section 62 of the KGST Act, 2017.

29. It cannot be forgotten preferred I.A. No. 134/2020 among other things praying for relief, in setting aside the Resolution Professional’s, order negating the ‘whole claim’ of the Appellant / Petitioner, for Rs.54,46,13,819/-; in admitting the ‘whole claim’, and to ‘suitably’, revised the ‘Information Memorandum’ and ‘Expression of Interest’, in the ‘CIRP’, of the ‘Corporate Debtor’, after taking into consideration of its claim for Rs.54,46,13,819/-.

30. It transpires that the Adjudicating Authority / Tribunal, had dismissed the I.A. No. 134/2020, with a direction being issued to the ‘Commercial Taxes Department’, to place before the ‘Resolution Professional’, only ‘ascertained’

‘crystalised Demand’ that might have arisen from a regular assessment for the period under consideration and that the ‘Resolution Professional’ is to place the same, before the Committee of Creditors/ reconstituted Committee of Creditors for its considerations.

31. It cannot be brushed aside, that in IA No. 393/2022 in CP(IB) No.51/BB/2018, (Filed by the Appellant / Petitioner under Section 60(5) of the Code, 2016, read with Rule 11 of the NCLT Rules, 2016), a declaration was sought in respect of the Resolution Plan, approved by the Committee of Creditors, based on the ‘Information Memorandum’ prepared by the 1st Respondent / Resolution Professional, as ‘null and void’, since, the ‘plan’ is contrary to the provisions of the ‘Code’ and ‘Regulations’ and added further, in directing the R2 to R4, to comply with the common order, passed by the ‘Adjudicating Authority’ / ‘Tribunal’ on 28.05.2021 in IA No. 134/2020.

32. It cannot be gainsaid that, if an ‘issue’, was already determined, by a ‘Tribunal’, once again, the same cannot be decided, without taking resultant necessary steps, in terms of the observations made by the ‘Tribunal’. It may not be out of place for this Tribunal, to make a significant mention that the ‘Adjudicating Authority’ / ‘Tribunal’, in the common order dated 28.05.2021 had pertinently observed that ‘once the return was already filed and taxes paid, the

‘Demand’ made in the ‘Best Judgment Assessment’ order is an unenforceable one, viewed in that prospective with the direction that the commercial taxes department should place before the Resolution professional, only ascertained, crystalised Demand, after the regular assessment was made.

33. Considering the fact that Appellant / Petitioner, came up with the same ‘claim’, ‘sum’, which arose, based on ‘Best Judgment Assessment’ order, made on earlier occasion, and the ‘regular assessment’, was not made, hence, this Tribunal, is of the ‘cocksure’ opinion, that the ‘demand’ was not ‘ascertained’ and not crystalised and placed before the 1st Respondent / Resolution Professional for consideration of the ‘Committee of Creditors’. Suffice it, for this ‘Tribunal’, to pertinently point out that the Appellant / Petitioner, is prohibited, based on the ‘Principle of Res judicata’, and ‘by its conduct, is estopped’ from agitating the likewise, grounds for determination before the ‘Adjudicating Authority’ / ‘Tribunal’.

34. At this juncture, this Tribunal, worth recalls and recollects decision of the Hon’ble Supreme Court, in the matter of ***Paschimanchal Vidyut Vitran Ltd. V Raman Ispat Private Limited & Ors.***, reported in ***SCC OnLine SC 842***, wherein at paragraphs 50 to 53, it is observed as under:

50. “*The Gujarat Value Added Tax Act, 2003 no doubt creates a charge in respect of amounts due and payable or arrears. It*

would be possible to hold [in the absence of a specific enumeration of government dues as in the present case, in Section 53(1)(e)] that the State is to be treated as a ‘secured creditor’. However, the separate and distinct treatment of amounts payable to secured creditor on the one hand, and dues payable to the government on the other clearly signifies Parliament’s intention to treat the latter differently - and in the present case, having lower priority. As noticed earlier, this intention is also evident from a reading of the preamble to the Act itself.

51. According to the principles of statutory interpretation, when an enactment uses two different expressions, they cannot be construed as having the same meaning. It was held in *Member, Board of Revenue v. Anthony Paul Benthall*³⁶ that:

“When two words of different import are used in a statute, in two consecutive provisions, it would be difficult to maintain that they are used in the same sense...”

This idea is reflected in a subsequent judgment in Brihan Mumbai Mahanagarpalika & Anr. v. Willington Sports Club & Ors.”

52. The views expressed by the present judgment finds support in the decision reported as *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs*³⁸. In that case, Section 142A of the Customs Act 1962 was in issue – authorities had submitted that dues payable to it were to be treated as ‘first charge’ on the property of the assessee

concerned. In the resolution process, it was argued that the Customs Act, 1962 acquired primacy and had to be given effect to. This court, after noticing the overriding effect of Section 238 of the IBC, held as follows:

“55. For the sake of clarity following questions, may be answered as under:

(a) Whether the provisions of the IBC would prevail over the Customs Act, and ifso, to what extent?

The IBC would prevail over the Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

(b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

Answered in negative.

56. On the basis of the above discussions, following are our conclusions:

(i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine

the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

(ii) After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.

(iii) In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC.”

Similarly, in Duncans Industries Ltd. v. AJ Agrochem³⁹, Section 16G of the Tea Act, 1953 which required prior consent of the Central Government (for initiation of winding up proceedings) was held to be overridden by the IBC. In a similar manner, it is held that Section 238 of the IBC overrides the provisions of the Electricity Act, 2003 despite the latter containing two specific provisions which open with non-obstante clauses (i.e., Section 173 and 174). The position of law with respect to primacy of the IBC, is identical with the position discussed in Sundaresh Bhatt and Duncan Industries (supra) [refer also: Innoventive Industries (supra), CIT v. Monnet Ispat & Energy Ltd. 40, Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset

*Reconstruction Co. Ltd. 41, and Jagmohan Bajaj v. Shivam
Fragrances Private Limited.*

53. *In view of the above discussion, it is held that the reliance on Rainbow Papers (supra) is of no avail to the appellant. In this court's view, that judgment has to be confined to the facts of that case alone."*

35. It is to be remembered that the 'Hon'ble High Court Karnataka', had set aside all the 'Assessment Orders', (vide order dated 02.07.2021 in WP No.45290/2019) issued by the Appellant / Petitioner relating to the period September, 2017 to December, 2018, and directed the 'GST Department' to 'process' the Return, filed by the 'Corporate Debtor' in accordance with law, however, the GST Department had not adhered to the Hon'ble High Court's order dated 02.07.2021, in WP No.45290/2019 and had not made any Regular Assessment' in accordance with the Returns Filed.

36. As far as the present case is concerned, this Tribunal, ongoing through the impugned order dated 28.06.2023, in IA No. 393/2022 in CP(IB) No. 51/BB/2018, passed by the 'Adjudicating Authority' / 'NCLT Bengaluru Bench, is of the considered opinion, that the 'observations' made in paragraph 18 and 19 to the effect 'that the claim of Applicant, would not be considered to have 'First Charge' at par with secured creditors under the mandatory provisions of Section

82 of the Karnataka Goods and Services Act, 2017, Section 82 of the Central Goods and Services Tax Act, 2017 and Section 20 of the integrated goods and Services Tax Act, 2017 and that ‘Section 20 of the IGST Act provides that certain provisions of CGST Act inter alia, those falling under Demands and recovery section of CGST Act shall, ‘mutatis mutandis’, apply, so far as may be, in relation to integrated tax, as they apply in relation to the ‘Central Tax’, as if they are enacted under the IGST Act etc.’ and that apart, a ‘specific exception to the provisions of the Code’ was prescribed in the aforesaid provisions, and expressly providing and overriding effect to the I&B Code, are ‘free from any legal errors’. Viewed in that prospective, the instant ‘Appeal’, is ‘devoid of merits’ and it fails.

Result

37. In fine, the instant ‘Company Appeal (AT) (CH) (Ins) No. 302/2023’ is dismissed, of course for the reasons ascribed by this Tribunal. No costs. Connected pending IA No.968/2023 is closed.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

27th September, 2023

ss/pks