



**SECTION 238 OF THE IBC OVERRIDES THE PROVISIONS OF THE
ELECTRICITY ACT, 2003**

The Hon'ble Apex Court established that the IBC accords higher footing to the dues payable to secured creditors compared to dues payable to the Central or State Government. The Hon'ble Court highlighted the 'waterfall mechanism' under Section 53 of the IBC, which establishes the priority of claims during liquidation proceedings over government debts. Furthermore, the Hon'ble Court held that the judgement in **State Tax Officer v. Rainbow Papers Ltd.**¹ was limited to its factual context concerning resolution processes and failed to account for the 'waterfall mechanism' under Section 53. As a result, the Hon'ble Court upheld the overriding effect of the IBC provisions on dues payable to the government, affirming that they have a lower priority compared to unsecured financial creditors.



2023 INSC 625

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REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NOS. 7976 OF 2019

PASCHIMANCHAL VIDYUT VITRAN NIGAM LTD. ...APPELLANT(S)

VERSUS

RAMAN ISPAT PRIVATE LIMITED & ORS. ...RESPONDENT(S)

JUDGMENT

S. RAVINDRA BHAT, J

1. The appellant Paschimanchal Vidyut Vitran Nigam Limited (hereinafter, "PVVNL") is aggrieved by an order of the National Company Law Appellate Tribunal (hereinafter, "NCLAT")¹ which rejected its appeal against an order of the National Company Law Tribunal, Allahabad (hereinafter, "NCLT"/ "Adjudicating Authority"),² which allowed an application directing the District Magistrate and Tehsildar, Muzaffarnagar to immediately release property (which was previously attached at the request of the appellant) in favour of the liquidator of the respondent Raman Ispat Pvt. Ltd. (hereinafter, "corporate debtor") for enabling its sale, and after realisation of its value, for distributing the proceeds in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter, "IBC" / "Code").

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¹ Company Appeal (AT) (Insolvency) No. 639 of 2018, dated 15.05.2019.

² C.A. No. 88/ALD/2018 in CP No. (IB) 23/ALD/2017, dated 21.08.2018.



I. FACTS

2. The parties had entered into an agreement on 11.02.2010 for supply of electricity. Clause 5 of the agreement provided that:

“The outstanding dues will be a charge on the assets of the company. Before sale is made, the outstanding dues will be cleared and, (in) the alternative the deed to agreements/sale will specifically mention the outstanding dues and the method of its payment.”

3. PVVNL raised bills for supply of electricity to the corporate debtor from time to time. Since the dues remained unpaid, PVVNL attached the corporate debtor's properties by Order No. 1048, dated 12.01.2016. The Tehsildar, Muzaffarnagar by Order No. 1423F dated 23.01.2016, restrained transfer of property by sale, donation or any other mode, and also created a *charge* on the properties. The corporate debtor initially underwent resolution process under the IBC, however that process was not successful. It therefore became subject to liquidation.

4. Under the final bill dated 27.01.2017, the total arrears due were ₹ 4,32,33,883/-. Of this, the District Collector issued notice for recovery of outstanding dues to the tune of ₹ 2,50,14,080/-, by auction of movable and immovable properties located at Khasara No. 0.4710, on 05.03.2018. The liquidator alleged that unless the attachment orders of the District Collector, Muzaffarnagar and Tehsildar, Muzaffarnagar were set aside by the NCLT, no buyer would purchase the property of the corporate debtor due to uncertainty about the authority of the liquidator to sell the property. The liquidator also took the plea that PVVNL's claim would be classified in order of priority prescribed under Section 53 of the IBC, and PVVNL would be entitled to *pro rata* distribution of proceeds along with the other secured creditors from sale of liquidation assets.

5. The liquidator's position ultimately led the NCLAT to direct the District Magistrate and Tehsildar, Muzaffarnagar to immediately release the attached



property in its favour so as to enable sale of the property, and after realisation of the property's value, to ensure its distribution in accordance with the relevant provisions of the IBC. The NCLAT also endorsed NCLT's reasoning that PVVNL fell within the definition of 'operational creditor', which could realize its dues in the liquidation process in accordance with the law.

II. PVVNL'S ARGUMENTS

6. Mr. Pradeep Mishra, learned advocate for PVVNL, submitted that Sections 173 and 174 of the Electricity Act, 2003 (hereinafter, "2003 Act") had an overriding effect on all other laws except Consumer Protection Act, 1986; the Atomic Energy Act, 1962; and the Railway Act, 1989. Being a special law relating to all aspects of electricity – generation, transmission, distribution and adjudication of disputes – it had primacy over all other laws, including the IBC, which was a 'general' law dealing with corporate insolvency implemented much later. In terms of the 2003 Act, and the regulations framed under it, including the Uttar Pradesh Electricity Supply Code, 2005 (hereinafter, "2005 Code"), a special mechanism for recovery of electricity dues existed. The rights of electricity suppliers like PVVNL, therefore, were not subordinate and subject to the 'priority of claims' mechanism under the IBC. Therefore, PVVNL could opt to independently stay out of the liquidation process and recover its dues.

7. Learned counsel relied on the judgment of this court in *Board of Trustees, Port of Mumbai v. Indian Oil Corporation*,³ wherein this court had ruled that port dues, under the Major Port Trust Act, 1963 overrode all other claims, including those of secured creditors in liquidation proceedings. Learned counsel urged that Section 238 of IBC could not override Sections 173 and 174 of the 2003 Act, since

³ *Board of Trustees, Port of Mumbai v. Indian Oil Corporation*, 1998 (2) SCR 774.



the latter (i.e. the Electricity Act) is a special enactment, and would prevail over the IBC, which is a later general law, dealing with insolvency.

8. Counsel urged that provisions of the 2003 Act (Sections 42, 45 and 56) and the 2005 Code (Clauses 4.3 and 6.15), prescribed the mechanism for recovery of electricity charges. The 2003 Act being a ‘special Act’ with a non-obstante clause, would have an overriding effect over the ‘general’ IBC law. This mechanism for speedy recovery of electricity dues, had to be given full effect. Thus, the provisions of IBC and the priority of claims under it in liquidation proceedings, were separate and applied in respect of other amounts available for distribution, *after* the recovery of electricity dues were permitted under the 2003 Act and 2005 Code.

9. Learned counsel also relied upon the decision of this court in *State Tax Officer v. Rainbow Papers Ltd.*,⁴ in which this court held that by virtue of a security interest created in favour of the government for tax claims under the Gujarat Value Added Tax Act, 2003, tax authorities i.e., the government, was a secured creditor under the IBC. This court held that if a resolution plan excluded such tax or statutory dues payable to the government, it would not be in conformity with the provisions of the IBC and, as such, would not be binding on the State.

10. Alternatively, the learned counsel submitted that electricity dues were also ‘security interests’ in favour of electricity service providers. He relied on the definition of ‘secured creditor’ which meant “*a creditor in favour of whom security interest is created.*”⁵ Such ‘security interest’ was defined under the IBC as:

“Right, title or interest or a claim in a 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,

⁴ *State Tax Officer v. Rainbow Papers Ltd.*, 2022 (13) SCR 808.

⁵ Section 3 (30), IBC.



assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.”⁶

11. ‘Claim in a property’ section of the definition could be invoked when one secured payment or performance of any obligation under the law. Additionally, the term “transfer” was defined under the IBC to mean:

“Includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.”⁷

12. It was urged that a reading of the definitions of ‘security interest’ and ‘transfer’ indicated that the intent of the IBC was to include, in the concept of ‘security interest’, all claims, including statutory claims arising in law, against the corporate debtor. Thus, obligations and statutory charges were also ‘security interests’.

III. LIQUIDATOR’S ARGUMENTS

13. Mr. Arvind Kumar Gupta, learned advocate appearing for the liquidator, argued that under the IBC, creditors were classified either as secured or unsecured. Further, a highlight of the IBC was the distinction between the financial and operational creditors, and their differential treatment with regards to recovery. He submitted that the Bankruptcy Law Reforms Committee Report, 2015 and the UNCITRAL Legislative Guide on Insolvency Law, stipulate that government dues were not given priority under the IBC. This formed the backdrop of the legislation. In fact, the Statement of Objects and Reasons to the IBC stipulates alteration in the priority of payment of government dues.

14. It was argued that in terms of Section 52(3), before realization of security interest by secured creditors, the liquidator had to verify the existence of security interest from the records maintained by an information utility or by such other

⁶ Section 3 (31), IBC.

⁷ Section 3 (34), IBC.



means as may be specified by the Insolvency and Bankruptcy Board of India (hereinafter, “Board / IBBI”).⁸ The existence of a security interest could be proved by a secured creditor in terms of Regulation 21, IBBI (Liquidation Process) Regulations, 2016 (hereinafter, “Liquidation Regulations”).

15. Learned counsel submitted that the registration of any charge was mandatory under Section 77 of the Companies Act, 2013 (corresponding to Section 125 of the erstwhile Companies Act, 1956). It was highlighted that Section 48 of the Transfer of Property Act, 1882 (hereinafter, “TPA”) dealt with priority of rights, and *inter-se* priorities amongst creditors prevailed in the distribution of assets in liquidation proceedings. Counsel referred to this court’s judgments of *Jitender Nath Singh v. Official Liquidator & Ors.*⁹ and *ICICI Bank Ltd. v. Sidco Leathers Ltd.*¹⁰

16. It was submitted that government dues were placed in the ‘waterfall mechanism’ under Section 53(1)(e)(i) of the IBC. Learned counsel emphasized that even under the old Companies Act, 1956, Section 529A provided priority to the debts due to the secured creditors and the workers, and Section 530 made payment of taxes subject to the priority embodied in Section 529A. Similarly, priority of debts due to secured creditors and workers was reflected under Section 326 of the Companies Act, 2013. Section 327 made payment of taxes subject to the priority embodied in Section 326. It was urged that Section 26E of the Securitization of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter, “SARFAESI Act”) and Section 31B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter, “RDDBFI Act”) accorded priority to secured creditors over other dues. The Full Bench judgment of the Bombay High Court in *Jalgaon Janta Shakari Bank Ltd. v. Joint Commissioner*

⁸ The Insolvency and Bankruptcy Board of India is established under Section 188 of the IBC. Its powers are enumerated under Section 196.

⁹ *Jitender Nath Singh v. Official Liquidator & Ors.*, 2012 (13) SCR 339.

¹⁰ *ICICI Bank Ltd. v. Sidco Leathers Ltd.*, 2006 Supp (1) SCR 528



of Sales Tax, Nodal 9, Mumbai & Anr.,¹¹ reinforced the priority accorded to secured creditors under Section 26E of SARFAESI Act.

17. Learned counsel submitted that electricity dues did not enjoy any priority, and cited High Court rulings, especially the judgment of the Calcutta High Court in *The West Bengal State Electricity Distribution Company Limited v. Sri Vasavi Industries Limited & Anr.*¹² It was submitted that creation of charge under a law was a matter of fact which had to be proved. In the present case, the statute (the 2005 Code) merely enabled recovery of electricity dues as though they were recovery of arrears of revenue. That did not result in the creation of 'security interest' in favour of the appellant. Moreover, such interest was not registered in accordance with the Liquidation Regulations and Section 77 of the Companies Act, 2013.

18. Learned counsel urged that in case of apparent overlapping between the two entries, the doctrine of 'pith and substance' had to be applied to find out the true nature of the legislation and the entry within which it fell – reliance was placed on the decisions of *Union of India & Ors. v. Shah Goverdhan L. Kabra Teachers' College*¹³ and *UCO Bank & Anr. v. Dipak Debbarma & Ors.*¹⁴. Having regard to this principle, IBC was thus a special law dealing with the entire subject matter of insolvency, bankruptcy and winding up of companies. Its provisions were later than those of the 2003 Act. Despite Sections 173 and 174 of the 2003 Act, by virtue of Section 238 of IBC, the provisions of the latter would prevail and have overriding effect. It was submitted that the law under IBC was constantly evolving since its inception in 2016. Reliance was placed on *Innoventive Industries Ltd. v. ICICI Bank & Anr.*,¹⁵ and *Swiss Ribbons (P) Ltd. v. Union of India*¹⁶ which upheld

¹¹ *Jalgaon Janta Shakari Bank Ltd. v. Joint Commissioner of Sales Tax, Nodal 9, Mumbai & Anr.*, 2022 SCC OnLine Bom 1767.

¹² *The West Bengal State Electricity Distribution Company Limited v. Sri Vasavi Industries Limited & Anr.*, 2022 SCC Online Cal 1918

¹³ *Union of India & Ors. v. Shah Goverdhan L. Kabra Teachers' College*, (2002) Supp (3) SCR 220.

¹⁴ *UCO Bank & Anr. v. Dipak Debbarma & Ors.*, (2016) (11) SCR 723.

¹⁵ *Innoventive Industries Ltd. v. ICICI Bank & Anr.*, (2017) 8 SCR 33.

¹⁶ *Swiss Ribbons (P) Ltd. v. Union of India* (2019) 4 SCC 17.



the IBC, and emphasized the overriding nature of the enactment, by virtue of Section 238.

IV. ANALYSIS

A. SCHEME OF THE IBC

19. The IBC was enacted with the objective of unifying the legal regime on commercial insolvency. Upon a corporate debtor's default¹⁷ in repayment of a debt,¹⁸ the insolvency resolution process can be triggered when the value of the default crosses the statutory threshold (Section 4); or it may be initiated by the corporate debtor itself or a financial creditor or operational creditor (Section 6). IBC makes a distinction between debts owed to both these classes of creditors. A financial creditor has been defined under Section 5(7) as, "*A person to whom a financial debt is owed*". A "*financial debt*" is defined by Section 5(8) as a debt which is disbursed against consideration for the time value of money. On the other hand, an operational creditor is one to whom an operational debt is owed. "*Operational debt*" under Section 5(21) is "*a claim in respect of provision of goods or services*".

20. Sections 7 and 8 of the IBC control the initiation of insolvency process by financial creditors and operational creditors respectively. The corporate debtor can contest a debt within a stipulated time period. The Adjudicating Authority has to determine the existence of a default from the records of the information utility or on the basis of evidence furnished by the creditors, and communicate the same to the corporate debtor – this initiates the resolution process, which must be completed within 180 days from the date of admission of the application (Section 12), and can be extended beyond 180 days for a further period of not exceeding

¹⁷ Default is defined in Section 3(12) in wide terms as, "*Non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be*".

¹⁸ Per Section 3(11), which states that a debt is, "*A liability of obligation in respect of a 'claim'*". A 'claim' is *inter alia* defined under Section 3(6) as, "*A right to payment*".



90 days if the committee of creditors (hereinafter, “CoC”) by a vote of 75% of voting shares so decides. Speedy resolution thus forms the mainstay of the entire resolution process. Upon admission of the application, a moratorium under Section 14 of the Code is to be declared by the Adjudicating Authority followed by a public announcement indicating the last date for submission of claims, along with the details of the interim resolution professional (hereinafter, “IRP”). The management of the corporate debtor *as a going concern* on the instructions of the CoC is vested in the IRP (and later under the RP under Section 28), who is a trained person registered under Chapter IV of IBC, *per* Section 17. The CoC’s decisions have to be taken by a vote of not less than 75% of the voting share of financial creditors. Anyone interested or willing to put the corporate debtor back to its rails can, under Section 30, submit a resolution plan to the RP, prepared on the basis of an information memorandum. When such a plan is approved by the CoC, the Adjudicating Authority has to record satisfaction of the same – it then becomes binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Immediately upon approval of the resolution plan, the moratorium order passed by the Authority under Section 14 ceases to have effect.

21. When the resolution process does not yield any success, or no application is received, and in certain other situations, the corporate debtor enters into the liquidation phase. This is provided by Section 33 of the IBC, which is extracted below:

“Section 33 - Initiation of liquidation

(1) Where the Adjudicating Authority, --

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall--



- (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;*
- (ii) issue a public announcement stating that the corporate debtor is in liquidation; and*
- (iii) require such order to be sent to the authority with which the corporate debtor is registered.*

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 2[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority 4[under section 31 or under sub-section (1) of section 54L,] is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.”



22. According to the judgment of this court *K. Shashidhar v. Indian Overseas Bank*¹⁹ the Adjudicating Authority is, “obligated to initiate liquidation process under Section 33(1) of the I&B Code.” It was also held that the Parliament did not empower the Adjudicating Authority “with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.” Thus, on occurrence of any eventuality specified under Section 33, the liquidation process has to begin, as a matter of course – there is no choice in the matter. Again, in *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.*,²⁰ this court rejected the argument that the NCLT possessed any discretionary jurisdiction with regard to initiation of liquidation proceedings, upon an interpretation of Sections 30, 31(2) and 60(5)(c) of IBC.

23. Upon initiation of liquidation, a liquidator has to be appointed, to carry out the liquidation process and manage other affairs of the corporate debtor. The RP, appointed to conduct the resolution process, is ordinarily appointed as liquidator. The powers and duties of liquidator are prescribed by Section 35²¹ of the IBC. It includes verification of claims of creditors, evaluation of assets of the corporate debtor, carrying on the business of the corporate debtor, taking into

¹⁹ *K. Shashidhar v. Indian Overseas Bank*, 2019 (3) SCR 845.

²⁰ *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.*, 2019 (16) SCR 275.

²¹ “35. Powers and duties of liquidator.-- (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:-

(a) to verify claims of all the creditors;

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant;”



consideration the assets of the corporate debtor, etc. The liquidator has to issue a public announcement within 5 days from appointment in a prescribed format; the purpose of public announcement is to call upon creditors and others persons to submit their claims in relation to the corporate debtor. The creditors of the corporate debtor have to send their claims within 30 days from the initiation of the liquidation process. After the receipt of the claims, the liquidator has to verify the claims submitted by the creditors (Section 39). The liquidator may also ask the creditors to submit any evidence in relation to their claims for the purpose of verification. The liquidator is empowered to either admit or reject the claims on the basis of due verification. If the liquidator rejects or admits a claim of a creditor, the same has to be communicated to the creditor as well as the corporate debtor within 7 days from such decision (Section 40). The liquidator has to concurrently determine what constitutes the “*liquidation estate*”. Section 36 (3) lists out the various assets and claims, etc. which form the liquidation estate.²² After the admission of claims, the liquidator has to determine the value of the claims, *for the purpose of distribution of assets of the corporate debtor*.

24. In terms of Regulation 47 of the Liquidation Regulations, liquidation proceedings should be completed within 1 year from the date of its initiation. This contrasts with the extendable time limit of 330 days, for the resolution process under IBC.

²² Section 36 (3) enumerates the liquidation estate as comprising of the following:

“(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.”



25. During the insolvency resolution process, a secured creditor is not permitted to realize its dues by initiating any proceeding. This is by virtue of Section 14 (1) (c) which enables the imposition of a moratorium period, during which a secured creditor is precluded from bringing any action to foreclose, recover or enforce any security interest. Secured creditors' rights are restored only in the event of failure of the insolvency resolution process, at the stage of liquidation.

B. THE 'WATERFALL MECHANISM'

26. Section 53 of the IBC, which contains the 'waterfall mechanism', provides for the order of distribution of assets. It states as follows:

“(1) 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 and within such period and in such manner as may be specified, namely:--

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:--

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:--

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.



(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation - For the purpose of this section--

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013)."

27. The priority of claims, indicated in the hierarchy of preferences, under the waterfall mechanism is therefore: *Firstly*, insolvency resolution process costs and the liquidation costs; *Secondly*, workmen's dues for the period of 24 months preceding the liquidation commencement date and debts owed to a secured creditor in the event such secured creditor has relinquished security; *Thirdly*, wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date; *Fourthly*, financial debts owed to unsecured creditors; *Fifthly*, any amount due to the central government and the state government and debts owed to a secured creditor for any amount unpaid following the enforcement of security interest; *Sixthly*, any remaining debts and dues; *Seventhly*, preference shareholders; and *Eighthly* equity shareholders or partners. This hierarchy or order of priority thus accords government debts [clause (e)] and operational debts [clause (f)] lower priority than dues owed to unsecured financial creditors.

28. Debts owed to a secured creditor, whenever such secured creditor "*has relinquished security in the manner set out in section 52*" receive a fairly high priority (immediately after insolvency resolution process costs), whereas in other cases, i.e., when the secured creditor does *not relinquish security*, the priority of claim is lower [Section 53 (1) (e) (ii)] in respect of "*any amount unpaid following*



the enforcement of security interest". Another feature is that amounts due to the government (i.e., payable into the Consolidated Fund of India or Consolidated Fund of a State) are ranked in the same manner as those of secured creditors who do not relinquish their security interest [Section 53 (1) (e) (ii)].

29. The Bankruptcy Law Reforms Committee Report, 2015, which led to the framing and later enactment of IBC, pertinently stated that:

"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer."

"For the remaining creditors who participate in the collective action of Liquidation, the Committee debated on the waterfall of liabilities that should hold in Liquidation in the new Code. Across different jurisdictions, the observation is that secured creditors have first priority on the realizations, and that these are typically paid out net of the costs of insolvency resolution and Liquidation. In order to bring the practices in India in-line with the global practice, and to ensure that the objectives of this proposed Code is met, the Committee recommends that the waterfall in Liquidation should be as follows:

- 1. Costs of IRP and liquidation.*
- 2. Secured creditors and Workmen dues capped up to three months from the start of IRP.*
- 3. Employees capped up to three months.*
- 4. Dues to unsecured financial creditors, debts payable to workmen in respect of the period beginning twelve months before the liquidation commencement date and ending three months before the liquidation commencement date;*
- 5. Any amount due to the State Government and the Central Government in respect of the whole or any part of the period of two years before the*



liquidation commencement date; any debts of the secured creditor for any amount unpaid following the enforcement of security interest

6. *Remaining debt*

7. *Surplus to shareholders.*²³

30. The explanation to this appears in the Report of the Insolvency Law Committee (2020):²⁴

“7.3. The Committee noted that the Code aims to promote a collective liquidation process, and towards this end, it encourages secured creditors to relinquish their security interest, by providing them second-highest priority in the recovery of their dues, as under Section 53(1)(b). Thus, they are not treated as ordinary unsecured creditors under the Code, as they would have been under the Companies Act, 1956. It was noted that, to some extent, this provision intends to replicate the benefits of security even where it has been relinquished, in order to promote overall value maximisation. However, even if secured creditors realise their security interest, they would only recover to the extent of their security interest, and would claim any excess dues remaining unpaid under Section 53(1)(e) of the liquidation waterfall. Thus, the Committee was of the view that this provision could not have been intended to provide secured creditors who relinquish their security interest, priority of repayment over their entire debt regardless of the extent of their security interest, as it would tantamount to respecting a right that has never existed. Further, if the “debts owed to a secured creditor” is not restricted to the extent of the security, there would be broad scope for misuse of the priority granted under Section 52(1)(b), as even creditors who are not secured to the full extent of their debt would rely on the mere fact of holding any form of security, to recover the entire amount of their unpaid dues in priority to all other stakeholders.

7.4. On the basis of the above discussion, the Committee agreed that the priority for recovery to secured creditors under Section 53(1)(b)(ii) should be applicable only to the extent of the value of the security interest that is relinquished by the secured creditor. The Committee was of the opinion that this issue stands clarified in terms of the reasoning provided above and does not necessitate any further amendment to the provisions of the Code.”

²³ The Bankruptcy Law Reforms Committee Report (2015), Heading 5.5.8 – Establishing Priority of Payout in Liquidation.

²⁴ Report of the Insolvency Law Committee (2020) – Heading 7.3 – Realisation or Relinquishment of Security Interest by a Secured Creditor (pg. 76).



31. The Preamble to the IBC expressly recognizes the shift in the law, with respect to ordering priority of claims, especially with respect to government dues:

“An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

32. In response to the comments received on this aspect from Parliamentary Debates on the Amendment Act in the Sixteenth Lok Sabha Session in 2018, the Report of the Insolvency Law Committee stated:

“Section 53 of the Code places secured creditors who have relinquished their security above unsecured financial creditors. Thus, clear distinction has been drawn between unsecured and secured creditors who join the liquidation proceedings for the purpose of the payment waterfall in case of liquidation. Unsecured creditors are ranked above secured creditors who have unpaid debts following enforcement of securities as it is presumed that such secured creditors have recovered most of their dues by enforcement of their security outside the liquidation proceedings. Moreover, as stated in the BLRC Report, protection of dues of unsecured creditors is intentional in order to encourage the market for corporate bonds and other unsecured debt. With respect to dues of workmen, they have been placed at the highest priority along with secured creditors who have relinquished their security, second only to IRP costs under the payment waterfall provided in section 53 of the Code.”²⁵

33. The *rationale* for placing secured creditors who relinquish their security, higher in priority, is found upon a conjoint reading of Sections 52 and 53. Section 52 reads as follows:

“Secured creditor in liquidation proceedings.

(1) A secured creditor in the liquidation proceedings may—

- (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or*
- (b) realise its security interest in the manner specified in this section.*

²⁵ Report of the Insolvency Law Committee (2018) (pg. 87).



(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing of the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.”

34. Section 52 gives an option to secured creditors to either relinquish their security interest, in the liquidation process (the procedure for which is prescribed in Regulations 21 and 21A of the Liquidation Regulations²⁶), or proceed to

²⁶ The said provisions of the Liquidation Regulations read as follows:

“21. Proving security interest. The existence of a security interest may be proved by a secured creditor on the basis of-

(a) the records available in an information utility, if any;

(b) certificate of registration of charge issued by the Registrar of Companies; or



enforce it. In case of the latter option, the secured creditor has to first indicate its option, within the time prescribed (30 days, in Form C or D of Schedule II to the Liquidation Regulations). The liquidator may then, *per* Section 52 (3), permit the secured creditor to realize *such dues as are proved to exist, as security debts*. Upon clearance by the liquidator, the secured creditor may proceed to enforce its claim, under Section 52 (4). If there is resistance during the process, the secured creditor may approach the NCLT [Section 52 (5) and (6)]. Upon enforcement, any excess amount realized should be tendered to the liquidator [Section 52 (7)].

35. It is thus, apparent, that a secured creditor has to take a calculated decision, at the outset of the liquidation process, *whether or not to relinquish its secured interest*. In case it does so, its dues rank high in the waterfall mechanism. In case it chooses not to relinquish its security interest, and instead proceeds to enforce it without success or is unable to realize all its dues in the process of enforcement, it has to then perform *stand lower in priority, and await distribution of assets upon realization of the liquidation estate, by the liquidator, vis-à-vis* the balance of its dues.

36. The procedure envisioned, thus, takes a nuanced approach for the recovery of a secured creditor's dues. In case they opt to relinquish the security, their priority is ranked high; in case, they seek to enforce such security, subject to intimation and verification by the liquidator, they can proceed to do so. In the event of short fall, they rank lower in priority. This appears to be the reason, as is

(c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

21A. Presumption of security interest. (1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

(2) Where a secured creditor proceeds to realise its security interest, it shall pay as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest."



clear from the explanation provided in response to comments as a result of Parliamentary debates in 2018, that secured creditors opting not to relinquish their security interest are “presumed that such secured creditors have recovered most of their dues by enforcement of their security outside the liquidation proceedings”.²⁷ There is sound logic in this, because those opting to ‘stand out’ and enforce security interest, are permitted to do so; in the event of excess recovery, they have to intimate and hand over such excess for distribution in liquidation proceeding; in case they are unable to recover their dues, for such of the dues as are outstanding, such secured creditors are ranked low.

37. The recent judgment of this court, in *Moser Baer Karamchari Union thr. President Mahesh Chand Sharma v. Union of India & Ors*²⁸ had dealt with the waterfall provisions of the IBC at length, albeit in the context of priority of claims of workmen’s dues. This court observed as follows:

“66. ...Sub-section (1) to Section 52 of the Code gives two options to a secured creditor. First, the secured creditor in a liquidation proceeding may relinquish its security interest and receive the proceeds from the sale of assets by the liquidator in the manner specified in Section 53 of the Code. The second option is to realise the security interest, but in the manner specified in Section 52 of the Code. Sub-section (2) to Section 52 of the Code states that where the secured creditor realises the security interest, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised. The liquidator is to verify the security interest and shall permit the secured creditor to realise such security interest, which is proved either by records of such security interest maintained by an information utility, or by such other means as may be specified by the Board. Sub-section (4) to Section 52 of the Code states that the secured creditor may enforce, realise, settle, compromise or deal with the secured asset in accordance with such law as applicable to the security interest being realised and to the secured creditor. The secured creditor is to accordingly apply the proceeds to recover the debts due to him. We need not refer to Sub-section (5) to Section 52 of the Code as it relates to the action which the secured creditor may take if he faces resistance from the corporate debtor or any other person

²⁷ *Supra* note 25.

²⁸ *Moser Baer Karamchari Union thr. President Mahesh Chand Sharma v. Union of India & Ors.*, 2023 SCC OnLine SC 547.



connected therewith in taking possession of, selling or otherwise disposing off the security. Sub-section (6) to Section 52 of the Code applies when an adjudicating authority is in receipt of an application Under Sub-section (5) to Section 52 of the Code. Sub-section (7) to Section 52 of the Code, however, is important as it states that where on enforcement of the security interest, an amount by way of proceeds is in excess of the debts due to the secured creditor, the secured creditor shall account for and pay the excess/surplus amount to the liquidator from enforcement of such secured assets. The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in the section, are to be deducted from the proceeds of any realisation by such secured creditors. They are to be transferred and included in the liquidation estate. Sub-section (9) to Section 52 of the Code states that where proceeds for realisation of the secured assets are not adequate to repay the debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in Clause (e) to Sub-section (1) to Section 53 of the Code.

67. To protect the interest of the workmen where the secured creditor does not relinquish its security interest to fall Under Section 53 of the Code, Regulation 21A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 has been enacted, and it requires that the secured creditor, who opts to realise its security interest as per Section 52 of the Code, has to pay as much towards the amount payable under the Clause (a) and Sub-clause (i) to Clause (b) of Sub-section (1) to Section 53 of the Code to the liquidator within the time and the manner stipulated therein. The workmen's dues, even when the secured creditor opts to proceed Under Section 52 of the Code, are therefore protected in terms of Sub-clause (b) of Sub-section (1) to Section 53 of the Code.

69. We now turn our attention to Section 53 of the Code which begins with a non-obstante Clause and states that 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 liquidation assets shall be distributed in the order of priority, which is stipulated, and within such period and such manner as may be specified. The consequence of Sub-section (1) to Section 53 of the Code is that it will override the rights of parties, including the secured creditor, when the said provision applies. Section 53 of the Code is the complete and comprehensive code which ensures collection of assets and then provides the manner in which the creditors are to be paid. Even the rights of the secured creditor falling Under Section 53 of the Code to enforce, realise, settle, compromise or deal with the secured assets as applicable to the security interest are diluted and compromised.



70. Clause (a) to Sub-section (1) to Section 53 deals with insolvency resolution process costs and the liquidation costs which are to be paid in full. No grievance or issue can be raised in respect of the said clause. Clause (b) to Sub-section (1) to Section 53 states that the debts due in the form of workmen's dues for a period of twenty four months preceding the liquidation commencement date and the debts owed to the secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52 of the Code shall rank equally between and amongst the workmen and the secured creditors. The Explanation to Section 53 of the Code states that 'workmen's dues' shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013. In other words, Explanation to Section 326 of the Companies Act, 2013 has been incorporated and applies to the waterfall mechanism as prescribed in Clause (b) to Sub-section (1) to Section 53 of the Code. What is significant here is that under Clause (b) to Sub-section (1) to Section 53 of the Code, the workmen's dues are for the period of twenty-four months preceding the liquidation commencement date. The liquidation commencement date, as defined in terms of Sub-section (17) to Section 5 of the Code, is much earlier in point of time and need not coincide with the date of winding up. This is in the interest of the workmen. Clause (i) of Explanation to Section 53 of the Code states that where the distribution of proceeds in respect of class of recipients that rank equally, each of the debts would be paid either in full or would be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full. Ex facie, the Clause is very just and fair. It is to be noted that the wages and unpaid dues owed to employees other than the workmen fall in Clause (c), which is below Clause (b) to Sub-section (1) to Section 53 of the Code. They are to be paid wages and unpaid dues only for a period of twelve months preceding the liquidation commencement date, and that too only if surplus funds are available after making payment in terms of Clause (a) and (b) of Sub-section (1) to Section 53 of the Code. Clause (d) of Sub-section (1) to Section 53 of the Code relates to financial debts owed to unsecured creditors. The amounts due to the Central Government and the State Government, etc., and the debts owed to a secured creditor for any amount that remains unpaid following the enforcement of security interest, have been clubbed together in Clause (e) of Sub-section (1) to Section 53 of the Code, and have to be ranked equally between and among both of them. The remaining debts and dues fall in Clause (f) of Sub-section (1) to Section 53 of the Code. Preference shareholders fall under Clause (g) of Sub-section (1) to Section 53 of the Code, and equity shareholders or partners fall under Clause (h) of Sub-section (1) to Section 53 of the Code. Sub-section (2) to Section 53 of the Code states that any contractual arrangements between recipients Under Sub-section (1) with equal ranking, if disrupting the order of priority under the said Sub-section will be disregarded by the liquidator.



71. The waterfall mechanism is based on a structured mathematical formula, and the hierarchy is created in terms of payment of debts in order of priority with several qualifications, striking down any one of the provisions or rearranging the hierarchy in the waterfall mechanism may lead to several trips and disrupt the working of the equilibrium as a whole and stasis, resulting in instability. Every change in the waterfall mechanism is bound to lead to cascading effects on the balance of rights and interests of the secured creditors, operational creditors and even the Central and State Governments. Depending upon the facts, in some cases, the waterfall mechanism in the Code may be more beneficial than the hierarchy provided Under Section 326 of the Companies Act, 2013 and vice-versa. Therefore, we hesitate and do not accept the arguments of the Petitioners.

72. The Code is based on the organic evolution of law and is a product of an extensive consultative process to meet the requirements of the Code governing liquidation. It introduced a comprehensive and time-bound framework to maximise the value of assets of all persons and balance the interest of the stakeholders. The guiding principle for the Code in setting the priority of payments in liquidation was to bring the practices in India in line with global practices. In the waterfall mechanism, after the costs of the insolvency resolution process and liquidation, secured creditors share the highest priority along with a defined period of dues of the workmen. The unpaid dues of the workmen are adequately and significantly protected in line with the objectives sought to be achieved by the Code and in terms of the waterfall mechanism prescribed by Section 53 of the Code. In either case of relinquishment or non-relinquishment of the security by the secured creditor, the interests of workmen are protected under the Code. In fact, the secured creditors are taking significant hair-cut and workmen are being compensated on an equitable basis in a just and proper manner as per Section 53 of the Code. The Code balances the rights of the secured creditors, who are financial institutions in which the general public has invested money, and also ensures that the economic activity and revival of a viable company is not hindered because it has suffered or fallen into a financial crisis. The Code focuses on bringing additional gains to both the economy and the exchequer through efficiency enhancement and consequent greater value capture. In economic matters, a wider latitude is given to the law-maker and the Court allows for experimentation in such legislations based on practical experiences and other problems seen by the law-makers. In a challenge to such legislation, the Court does not adopt a doctrinaire approach. Some sacrifices have to be always made for the greater good, and unless such sacrifices are prima facie apparent and ex facie harsh and unequitable as to classify as manifestly arbitrary, these would be interfered with by the court.”



38. It is hence clear that the provisions of the IBC are carefully thought out, and give options to secured creditors, and balance their interests with those of other creditors in a liquidation proceeding.

C. RECOVERY MECHANISM UNDER THE 2003 ACT AND 2005 CODE

39. By virtue of Section 56 of the 2003 Act, in the event of any person's neglect "to pay any charge for electricity or any sum other than a charge for electricity" payable "in respect of supply, transmission or distribution or wheeling of electricity to him" (after a clear fifteen days' notice in writing) "and without prejudice to his rights to recover such charge or other sum by suit", a licensee (including a distribution licensee such as PVVNL) is empowered to disconnect electricity supply to such consumer or person.

40. By virtue of Section 181(2)(x) of the 2003 Act, State Commissions are empowered to frame regulations. Section 50 empowers the State Commissions to frame the "Electricity Supply Code" to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment, etc. These provisions in the 2003 Act and the respective Codes form the legal framework for recovery of dues by various kinds of licensees under the 2003 Act. In the present case, the Uttar Pradesh State Commission had framed the 2005 Supply Code. Clause 4.3 (f) (iv) of the 2005 Code is relevant, which *inter alia* provides as follows:

"The outstanding dues will be first charge on the assets of the company, and the licensee shall ensure that this is entered in an agreement with new applicant."

41. Clause 6.15 of the 2005 Code enacts that recovery of arrears shall be in accordance with the provisions of the Uttar Pradesh Government Electrical Undertakings (Dues Recovery) Act, 1958:

"6.15 Recovery of Arrears

(a) The payments due to the Licensee shall be recovered as per provision of Section 56 of the Act, and arrears of land revenue as per the provisions of the



U.P. Government Electrical Undertaking (Dues Recovery) Act, 1958, as amended from time to time.

(b) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges of electricity supplied, and the licensee shall not cut off the supply of the electricity.

(Explanation: The date from which such charges becomes 'first due', needs to be correctly interpreted. If as a result of regular meter reading / inspection of installation of consumer, such charges / penalties levied as per this code or tariff schedule, shall become first due after 15 days of receipt of such a bill by consumer, and such bill shall be provided to the consumer not later than two billing cycle for that category of consumer)."

42. As previously stated above, the corporate debtor entered into an agreement with PVVNL for supply of electricity on 11.02.2010 which provided that outstanding electricity dues would constitute a 'charge' on its assets.²⁹ This was in accordance with Clause 4.3(f)(iv) of the 2005 Code. Clause 8 of the agreement³⁰ also mentioned that the parties would be governed by the 2003 Act.

43. A recent ruling of this court in *K.C. Ninan v. Kerala State Electricity Board*³¹ examined the circumstances in which such a 'charge' could be constituted in law, and held as follows:

"107. Consequently, in general law, a transferee of the premises cannot be made liable for the outstanding dues of the previous owner since electricity arrears do not automatically become a charge over the premises. Such an action is permissible only where the statutory conditions of supply authorise the recovery of outstanding electricity dues from a subsequent purchaser claiming fresh connection of electricity, or if there is an express provision of law providing for creation of a statutory charge upon the transferee."

This court held that the creation of a charge need not necessarily be based on an express provision of the 2003 Act or plenary legislation, but could be created by

²⁹ Clause 5 of the agreement, extracted at paragraph 2.

³⁰ Clause 8 of the agreement read as follows: "This agreement shall be governed by the Electricity Act, 2003 with all its amendments, various other laws of India for the time being in force, but not limited to various regulations of UPERC, as applicable to the State of U.P. and shall be subject to the jurisdiction of the Court subordinate to High Court of Judicature of Allahabad."

³¹ *K.C. Ninan v. Kerala State Electricity Board*, 2023 SCC Online SC 603.



properly framed regulations authorized under the parent statute. In these circumstances, the argument of PVVNL that by virtue of Clause 4.3(f)(iv) of the Supply Code, read with the stipulations in the agreement between the parties, a charge was created on the assets of the corporate debtor, is merited. A careful reading of the impugned order of the NCLT also reveals that this position was accepted. This is evident from the order of the NCLAT which clarified that PVVNL also came under the definition of ‘secured operational creditor’ as per law. This finding was not disturbed, but rather affirmed by the impugned order. In these circumstances, the conclusion that PVVNL is a secured creditor cannot be disputed.

44. The counsel for the liquidator had submitted that dues owed to PVVNL were technically owed to the “government”, and thus occupied a lower position in the order of priority of clearance. The expression “government dues” is not defined in the IBC - it finds place only in the preamble. However, what constitutes such dues is spelt out in the ‘waterfall mechanism’ under Section 53(1)(e), which *inter alia* states that, “Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of the State” ranks lower in priority to the class of creditors described in Clauses (a) to (d) of Section 53(1). Thus, there exists a separate enumeration or specification of the Central Government and State Government dues, *as a class apart from other creditors, including creditors who may have secured interest (in respect of which amounts may be payable to them)*. The repeated reference of lowering of priority of debts to the government, on account of statutory tax, or other dues payable to the Central Government or State Government, or amounts payable into the Consolidated Fund on account of either government, in the various reports which preceded the enactment of the IBC, as well as its Preamble, means that these dues are distinct and have to be treated as separate from those owed to secured creditors. The Central Government and State Government are defined by the General Clauses Act, 1897. The former



is defined by Section 3(8),³² and latter by Section 3 (60).³³ The distinction between the governments has been recognized and maintained by previous decisions of this court. For instance, in *Shrikant v. Vasantrao & Ors.*,³⁴ this court underlined that while an entity or corporation may be “State” under Article 12 of the Constitution of India, nevertheless, its distinct entity, for other purposes, is always maintained, and fact-dependent:

“Both may answer the definition of 'State' under Article 12 for the limited purpose of Part-III of the Constitution. Further, the very inclusive definition of 'State' under Article 12 by referring to Government of India, the Government of each of the States and the local and other authorities, makes it clear that a 'State Government' and a local or other authorities, are different and that they fall under a common definition only for the purpose of Part-III of the Constitution. This Court has consistently refused to apply the enlarged definition of 'State' given in Part-III (and Part-IV) of the Constitution, for interpreting the words 'State' or 'State Government' occurring in other parts of the Constitution. While the term "State" may include a State Government as also statutory or other authorities for the purposes of part-III (or Part- IV)

³² (8) “Central Government” shall,—

(a) in relation to anything done before the commencement of the Constitution, mean the Governor General or the Governor General in Council, as the case may be; and shall include,—

(i) in relation to functions entrusted under sub-section (1) of section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that subsection; and

(ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act; and

(b) in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include,—

(i) in relation to functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause; 1***

(ii) in relation to the administration of a Part C State 2[before the commencement of the Constitution (Seventh Amendment) Act, 1956], the Chief Commissioner or the Lieutenant Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be; and

(iii) in relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution”.

³³(60) “State Government”,—

(a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorised at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government; 1***

(b) as respects anything done 2[after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956], shall mean, in a Part A State, the Governor; in a Part B State, the Rajpramukh, and in a Part C State, the Central Government;

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor; and in a Union territory, the Central Government; and shall, in relation to functions entrusted under article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article”

³⁴ *Shrikant v. Vasantrao & Ors.*, 2006 (1) SCR 496



of the Constitution, the term "State Government" in its ordinary sense does not encompass in its fold either a local or statutory authority".

45. The judgment of this court, in *Municipal Commissioner of Dum Dum Municipality & Ors. v. Indian Tourism Development Corporation & Ors.*,³⁵ noticed that, *"In the case of major public utilities, statutory corporations were created under different enactments"*, and went on to enumerate some examples such as Road Transport Corporations, Electricity Boards under the Electricity Supply Act, 1948 and so on. The court observed that:

"With a view to enable these statutory corporations and companies to carry on the activity which was hitherto carried on by the governments, the relevant properties, assets and liabilities were transferred to such new corporations. They were supposed to operate on business lines, pay taxes and justify their creation and constitution. These corporations, whether created under the statute or registered under the Companies Act are distinct juristic entities owning their own properties, having their own fund, capable of borrowing and lending monies and entering into contracts like any other corporation. In many cases, the entire share capital of these corporations is owned by the Government whether Central or State. In some cases, the major share holding is of the Government with some private share holding as well. In case of some statutory corporations, the enactment creating them did not provide for any share capital, though it was made a body corporate with all the necessary and incidental powers that go with such concept. The International Airports Authority is one such corporation created under the Act with no share capital but which has its own properties, its own fund, accounts, employees and capable of lending and borrowing and entering into contracts."

46. The specific mention of other class of creditors whose dues are statutory, such as dues payable to workmen or employees, *"the provident fund, the pension fund, the gratuity fund"* under Section 36(4), which excludes these enumerated amounts from the liquidation, especially clarifies that not all dues owed under statute are treated as 'government' dues. In other words, dues payable to statutory corporations which do not fall within the description *"amounts due to the central or state government"* such as for instance amounts payable to corporations created by statutes which have distinct juristic entity but whose dues do not constitute

³⁵ *Municipal Commissioner of Dum Dum Municipality & Ors. v. Indian Tourism Development Corporation & Ors.*, 1995 (5) SCC 251.



government dues payable or those payable into the respective Consolidated Funds *stand on a different footing*. Such corporations may be operational creditors or financial creditors or secured creditors depending on the nature of the transactions entered into by them with the corporate debtor. On the other hand, dues payable or requiring to be credited to the Treasury, such as tax, tariffs, etc. which broadly fall within the ambit of Article 265 of the Constitution are ‘government dues’ and therefore covered by Section 53(1)(f) of the IBC.

47. PVVNL undoubtedly has government participation. However, that does not render it a government or a part of the ‘State Government’. Its functions can be replicated by other entities, both private and public. The supply of electricity, the generation, transmission, and distribution of electricity has been liberalized in terms of the 2003 Act barring certain segments. Private entities are entitled to hold licenses. In this context, it has to be emphasized that private participation as distribution licensees is fairly widespread. For these reasons, it is held that in the present case, dues or amounts payable to PVVNL do not fall within the description of Section 53(1)(f) of the IBC.

48. PVVNL had relied upon the decision *Rainbow Papers* (supra). In that case, the issue involved was interpretation of Section 48 of the Gujarat Value Added Tax Act, 2003 which enacted that any amount payable towards tax or penalty by any person would constitute a ‘first charge’ on the property of such dealer or person. The corporate debtor had defaulted in payment of its tax dues and recovery proceedings had been initiated. In the meanwhile, insolvency proceedings had commenced. During the resolution process, the State tax authorities claimed that the dues payable had to be accrued previously and relied upon Section 48, in addition to Section 53 of the IBC. The State contended that the *non-obstante* clause in the state enactment and the *non-obstante* clause in the IBC operated at different fields, and the State had to be treated as a ‘secured creditor’ by virtue of Section 48 of the state act. This was rejected by the NCLT and the NCLAT.



However, this court took note of Sections 30 and 31 of the IBC and certain other provisions and held that NCLT had erred in its observations. It was held that:

“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 appellants. As observed above, delay in filing a claim cannot be the sole ground for rejecting the claim.”

49. *Rainbow Papers* (supra) did not notice the ‘waterfall mechanism’ under Section 53 – the provision had not been adverted to or extracted in the judgment. Furthermore, *Rainbow Papers* (supra) was in the context of a resolution process and not during liquidation. Section 53, as held earlier, enacts the waterfall mechanism providing for the hierarchy or priority of claims of various classes of creditors. The careful design of Section 53 locates amounts payable to secured creditors and workmen at the second place, after the costs and expenses of the liquidator payable during the liquidation proceedings. However, the dues payable to the government are placed much below those of secured creditors and even unsecured and operational creditors. This design was either not brought to the notice of the court in *Rainbow Papers* (supra) or was missed altogether. In any event, the judgment has not taken note of the provisions of the IBC which treat the dues payable to secured creditors at a higher footing than dues payable to Central or State Government.



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.*³⁷

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:

³⁶ *Member, Board of Revenue v. Anthony Paul Benthall* (1955) 2 SCR 842.

³⁷ *Brihan Mumbai Mahanagarpalika & Anr. v. Willington Sports Club & Ors.*, (2013) (16) SCR 216.

³⁸ *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs*, 2022 SCC Online SC 1101.



“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 if so, 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 Agrochem*³⁹, 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

³⁹ *Duncans Industries Ltd. v. AJ Agrochem*, (2019) 9 SCC 725.



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*⁴²].

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.

D. EFFECT OF SECTION 77 OF THE COMPANIES ACT

54. Lastly, the liquidator had urged that without registration of charge, the same was unenforceable under liquidation proceedings. Section 77 of the Companies Act, 2013 reads as follows:

“77. Duty to register charges, etc.—(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation: Provided that the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed: Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87: Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section

⁴⁰ (2018) 18 SCC 786

⁴¹ [2021] 13 SCR 737

⁴² 2018 SCC OnLine NCLAT 413



(1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.”

55. Section 78 enacts, that when a company whose property is subject to charge, fails to register it, the charge holder (or the person entitled to the charge over the company’s assets) can seek its registration. Section 3 (31) of the IBC defines “security interest” in the widest terms. In this court’s opinion, the liquidator cannot urge this aspect at this stage, because of the concurrent findings of the NCLT and the NCLAT that PVVNL is a secured creditor.

56. The record further shows that after the NCLT passed its order, the appellant preferred its claim on 10.04.2018. Based on that application, the liquidator had filed an application before the NCLT for modification of its order dated 21.08.2018, and contended that PVVNL also came under the definition of ‘secured operational creditor’ in realization of its dues in the liquidation proceedings as per law. The application sought amendment of the list of stakeholders. The application was allowed. In view of these factual developments, this Court does not consider it appropriate to rule on the submissions of the liquidator *vis-a-vis* the fact of non-registration of charges under Section 77 of the Companies Act, 2013.

V. CONCLUSION

57. For the above reasons, it is held that the appeal deserves to fail. At the same time, the liquidator is directed to decide the claim exercised by PVVNL in the manner required by law. It shall complete the process within 10 weeks from the date of pronouncement of this decision, after providing such opportunity to the appellant, as is necessary under law.



58. The appeal is dismissed, subject to the above direction, without order on costs.

.....J.
[S. RAVINDRA BHAT]

.....J.
[DIPANKAR DATTA]

**NEW DELHI
JULY 17, 2023.**