



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA



IBC AU-COURANT

Latest updates On Insolvency & Bankruptcy

8th September 2022

"I must not fear. Fear is the mind-killer"

➤ **CIRP Can Be Initiated Against Corporate Guarantor Without Proceeding Against Principal Borrower: Supreme Court**

The Supreme Court has held that an insolvency resolution plan, approved by the financial creditors, by ignoring the statutory demands payable to state governments or other legal authorities, is liable to be rejected.

The apex court said that lenders cannot secure their own dues at the cost of statutory dues owed to a government authority.

While setting aside a National Company Law Appellate Tribunal order approving a resolution plan to revive Rainbow Papers, a Bench comprising justices Indira Banerjee and AS Bopanna said that the resolution plan to revive the company did not consider the dues of over Rs 53.71 crore payable to the Gujarat government on account of value added tax (VAT) and Central Sales Tax under the Gujarat VAT Act.

While directing for a fresh resolution plan in the light of its observations, the top court said: "In our considered view, the Committee of Creditors — which may include financial institutions and other financial creditors — cannot secure its own obligations at the expense of any other obligations, including statutory obligations to any government or governmental authority."

According to the judges, the definition of a secured creditor in the Insolvency and Bankruptcy Code does not exclude any government or legal authority, thus terming Gujarat as a secured creditor for tax purposes in the case.

Section 48 of the Gujarat VAT Tax Act is not contrary to or inconsistent with Section 53, which provides for the mode and manner of distribution of the proceeds of sale of assets, or any other provisions of the IBC, the judgment stated, which rejecting the resolution professional's stand that the tax authority entire claim had been waived off as the provision overrides Section 48 of the Gujarat Value Added Tax Act.

If a company is unable to pay its debts, which should include its statutory dues to the government or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the

company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated under the IBC, the Bench said.

The debts owed to a secured creditor, which would include the state under the GVAT Act, are to rank equally with other specified debts under the IBC, it said.

However, legal experts feel that the SC's observations is not in tune with the Code.

Says Yogendra Aldak, Partner, Lakshmikumaran & Sridharan Attorneys, "the definition of 'secured interest' in IBC clearly provides that security interest is created by a transaction that secures payment. The creation of security interest is restricted to be created by a transaction as enumerated in the definition and not by operation of law. The observation of the Supreme Court that security interest can be created by operation of law may invite concerns and give priority to government dues during CIRP which is not specifically intended under IBC."

"Further, the observation that the relevant provision of the GVAT Act is not contrary to IBC may invite issues in terms of the overriding effect of IBC which is recognised in a number of decisions," Aldak added.

The judgment came on an appeal by the state revenue authorities against the NCLAT's 2019 decision upholding the NCLT's order that had held that the government cannot claim first charge over the property of a corporate debtor, as Section 48 of the GVAT Act which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty, among others, under the said GVAT Act, cannot prevail over Section 53 of the IBC.

The department had attached Rainbow Papers' property for recovering its dues for 2011 to 2012. Later, it filed its claim before the resolution professional when insolvency proceedings were started against the company in 2017 on the grounds that the government can claim first charge over the property of the corporate debtor under a provision of the Gujarat VAT Act.

Source: Financial Express

Read Full news at: <https://www.financialexpress.com/industry/insolvency-resolution-lenders-cant-secure-own-dues-at-the-cost-of-statutory-ones-says-scnbsp/2659023/>

➤ **Gujarat Secured Creditor Under IBC For Tax Purposes: Top Court**

The Supreme Court on Tuesday ruled Gujarat is a "secured creditor" for tax purposes, saying financial creditors cannot secure their own dues at the cost of statutory ones owed to a government authority in approving a resolution plan to revive a sick company under the Insolvency and Bankruptcy Code (IBC).

A bench comprising justices Indira Banerjee and A S Bopanna also set aside the orders of the tribunals by which the resolution plan to revive Rainbow Papers

Limited, a private firm, was approved, on the ground that it did not consider the dues of over Rs 53.71 crore payable to the state government on account of VAT and Central Sales Tax (CST) under the Gujarat Value Added Tax (GVAT) Act.

“If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan,” the judgment, penned by Justice Banerjee on behalf of the bench, said.

It held the state is “a secured creditor under the GVAT Act” and said Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited.

“Such security interests could be created by the operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.

“In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.”

Elaborating further, the judgment said if a company is unable to pay its debts, which should include its statutory dues to the government or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated under the IBC.

It said the provision of the Gujarat state law was not contrary to or inconsistent with the provision of the IBC.

The debts owed to a secured creditor, which would include the state under the GVAT Act, are to rank equally with other specified debts under the IBC, it said.

“We are constrained to hold that the Appellate Authority (NCLAT) and the Adjudicating Authority erred in law in rejecting the application/appeal of the appellant... The appeals are allowed. The impugned orders are set aside,” it held.

The bench set aside the resolution plan approved by the CoC (Committee of Creditors) and directed that the Resolution Professional may consider a fresh plan in the light of its observations.

The verdict came on the appeal of a Sales Tax Officer of the Gujarat government against the 2019 judgment passed by the National Company Law Appellate Tribunal dismissing the plea of the state.

The state tax department had moved the NCLAT against rejection of its plea that the government can claim first charge over the property of the corporate debtor under a provision of the Gujarat Value Added Tax Act.

Source: Outlook

Read Full news at: <https://www.outlookindia.com/business/gujarat-secured-creditor-under-ibc-for-tax-purposes-top-court-news-221523>



Insolvency Professional Agency of Institute of Cost Accountants of India
(A Section 8 Company registered under Companies Act, 2013)
CMA Bhawan, 3, Institutional Area, Lodhi Road
New Delhi - 110003