

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

Company Appeal (AT) (Ins.) No. 1265 of 2022

&

I.A. No. 3870, 3871, 3872, 4564 of 2022

IN THE MATTER OF:

Commercial Tax Department

....Appellant

Vs.

Mrs. Teena Saraswat Pandey & Anr.

....Respondents

Present:

For Appellant: Mr. Shashwat Parihar, Mr. Shashwat Anand, Ms. Mrinal Elker Mazumdar, Mr. Deepanshu Badiwal, Mr. Shikhar Mishra, Mr. Rishabh Kumar, Ms. Ritambara, Advocates.

For Respondents: Mr. Sumesh Dhawan, Mr. Praveen N. Surange, Mr. Shaurya Shyam, Ms. Vatsala Kak, Advocates for R-2/SRA. Ms. Shraddha Deshmukh, Advocate for R-1. Mr. Siddharth Sangal and Mr. Chirag Sharma, Advocates for SBI in I.A. 4564/2022.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

M/s Chandraudai Automobiles Pvt. Ltd. filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against M/s Rajpal Abhikaran Pvt. Ltd. (Corporate Debtor) bearing CP (IB) No. 6 of 2020 which was admitted by the Adjudicating Authority (National Company Law Tribunal, Indore

Bench) on 26.03.2021 and appointed Ms Teena Saraswat as the Interim Resolution Professional.

2. The IRP formed the CoC of the following financial creditors which is reproduced as under:-

Sr.	Name of FC	% Voting share
1.	State Bank of India	23.24%
2.	Volark Auto Pvt. Ltd.	1.61%
3.	Suraksha ARC	42.36%
4.	AU Small Finance Bank Limited	12.45%
5.	Sudaaram Finance Limited	0.63%
6.	Shri Ram City Union Finance Ltd.	7.98%
7.	Toyota Financial Services India Ltd.	11.12%
8.	PPG Asian Paints Pvt. Ltd.	0.60%

3. The resolution plan submitted by Agarwal Real City Pvt. Ltd. (PRA) was approved by the CoC with 90.41% votes in 17th meeting held on 17.12.2021.

4. The Liquidation value and fair value of the CD was reported at Rs. 18,39,91,863/- and Rs. 23,22,47,203/- respectively.

5. The Prospective Resolution Applicant proposed to pay a sum of Rs. 22,61,33,000 against the total admitted claim which is as follows:-

Sr.	Particulars	Claim admitted by RP (Rs.)	Resolution Plan Proposal (Rs.)
1.	Insolvency Resolution Process costs	NIL	30,33,000
2.	Secured Financial Creditor	23,02,07,114	19,11,00,000
3.	Unsecured Financial creditor	76,01,44,603	3,20,00,000
4.	Operational Creditor	14,91,18,974	0
	Total	113,94,70,691	22,61,33,000

6. The Liquidation value of the Operational Creditors was NIL and therefore, the resolution applicant proposed NIL payment to the Operational Creditors.

7. The RP filed an application bearing I.A No. 12(MP)2022 under Section 30(6) read with Section 31 of the Code for the

approval of the resolution plan submitted by Agarwal Real City Pvt. Ltd. (SRA).

8. The aforesaid application was allowed vide impugned order dated 25.08.2022.

9. The present appeal has been filed by Commercial Tax Department, Government of Madhya Pradesh against the order dated 25.08.2022 having the grievance that the Appellant was treated as an unsecured creditor, the claim of the appellant was termed as unsecured debt and was not considered as secured debt under Section 30 of the Code.

10. The Appellant has solely relied upon a decision of the Hon'ble Supreme Court rendered in the case of State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 to contend that the statutory demand of the Appellant of Rs. 12,61,57,345/-, filed vide Form B dated 29.07.2021, should have been considered as a secured debt.

11. Counsel for the Appellant has submitted that Section 48 of the Gujarat Value Added Tax Act, 2003 (GVAT Act) and Section 33 of the Madhya Pradesh Value Added Tax Act, 2002 (MPVAT Act) are pari materia which clearly states that any tax, interest,

or penalty owed by a dealer or other person is a first charge on their property. Thus, which placing reliance upon the decision in the case of Rainbow Papers (Supra), paragraphs 22, 24, 25 & 55 have been referred to which are reproduced as under:-

“22. Prior to amendment by Notification No.IBBI/2018-19/GN/REG013 dated 3rd July 2018, with effect from 4th July, 2018, Sub-Regulation (1) of Regulation 12 read with Sub-Regulation (2) provided that a creditor shall submit proof of claim on or before the last date mentioned in the public announcement. Sub-Regulation (2) was amended with effect from 4th July, 2018 and now reads “a creditor shall submit claim with proof on or before the last date mentioned in the public announcement”.

24. In this case, claims were invited well before the 5th October, 2017 which was the last date for submission of claims. Under the unamended provisions of Regulation 12(1), the Appellant was not required to file any claim. Read with Regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for. The time stipulations are not mandatory as is obvious from Sub-Regulation (2) of Regulation 14 which enables the Interim Resolution Professional or the Resolution Professional, as the case may be, to revise the amounts of claims admitted, including the estimates of claims made under Sub-Regulation (1) of the said Regulation as soon as might be practicable, when he came across additional information warranting such revision.

25. In this case, at the cost of repetition, it may be noted that there was no obligation on the part of the State to lodge a claim in respect of dues which are statutory

dues for which recovery proceedings have also been initiated. The appellants were never called upon to produce materials in connection with the claim raised by the Appellants towards statutory dues. The Adjudicating Authority as well as the Appellate Authority/NCLAT misconstrued the Regulations.

55. In our considered view, the NCLAT clearly erred in its observation that Section 53 of the IBC overrides Section 48 of the GVAT Act. Section 53 of the IBC begins with a non-obstante clause which reads :-

“Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority.....”

12. On the other hand, Counsel appearing on behalf of Respondent No. 2 (SRA) has submitted that the judgment in the case of Rainbow Papers (Supra) is not applicable to the facts of this case as Section 48 of the GVAT Act and Section 33 of the MPVAT Act are not *pari materia*. It is submitted that the Appellant submitted its claim as an unsecured operational creditor on Form B and also failed to state any security interest in the assets of the CD for an amount of Rs. 12,61,84,867/- before the RP of the CD. It is further submitted that in Form B, against the column ‘details of any retention of title arrangement in respect of goods or properties to which the claim refers’, the Appellant had specifically mentioned NA, admitting that no

security interest was held by the Appellant in the assets of the CD. It is further submitted that the claim of the Appellant has been considered as an operational creditor and proposed NIL amount under the waterfall mechanism in the event of liquidation. It is further submitted that the difference between Section 48 of the GVAT Act and Section 33 of the MPVAT Act is writ large as it is submitted that Section 33 of the MPVAT Act has been made subject to the provisions of the Section 530 of the Companies Act, 1956 which is not a condition stipulated in Section 48 of the GVAT Act. He has further submitted that in the case of Department of State Tax Vs. Zicom Saas Pvt. Ltd., CA (AT) (Ins) No. 246 of 2022 decided on 07.02.2023, while dealing with Section 37 of the Maharashtra Value Added Tax Act, 2002 (MVAT Act) which was sought to be equated with Section 48 of the GVAT Act, this Court found that Section 37 of MVAT Act was subject to any provision regarding creation of first charge in any Central Act and was not akin to the provision of Section 48 of the GVAT Act and thus it was held that the decision in the case of Rainbow papers (Supra) is not applicable. It is further submitted that the decision in the case of Zicom Saas (Supra) was followed in the case of Department of State Tax Vs. D.S Kulkarni Developers

Ltd., CA (A) (Ins) No. 1284 of 2023 and Devarajan Raman Liquidator Vs Principal Commissioner Income Tax, CA (AT) (Ins) No. 977 of 2023. It is further submitted by Counsel for Respondent No. 2 that the decision in the case of Rainbow papers (Supra) has been held to be a decision in the facts of that case in a subsequent judgment by the Hon'ble Supreme Court in the case of Paschimanchal Vidyut Vitran Nigam Limited Vs. Rama Ispat Pvt. Ltd. & Ors. Civil appeal No. 7976 of 2019 decided on 17.07.2023. In order to bring all the facts of record, he has referred to a decision in the Review Petition (Civil) No. 1620 of 2023 filed in the matter of Rainbow Papers (Supra) which came to be dismissed on 31.10.2023. Counsel for Respondent No. 2 has further submitted that Section 530 of the Companies Act, 1956 which is para materia with Section 327 of Companies Act, 2013 stipulates the order of payments which are to be made in the case of winding up of a company whereunder the dues of all revenues, taxes, cesses and rates due from the company shall be paid in priority subject to the provisions of Section 529A of the Act, 1956. He further submitted that Section 529A of the Act, 1956 states that during the winding up of a company the dues of the workmen and secured creditors to the extent such debts

rank under clause (iii) of the proviso to sub-section (1) of Section 529 pari assu with such debts, shall be paid in priority to all other debts. In this regard, he has also relied upon a decision in the case of Commissioner of Income Tax Vs. M/s KTC Tyres (India) Pvt. Ltd., Civil Appeal No. 6257-6259 of 2004 and referred to Paras 2 and 3 which are reproduced as under:-

“2.)The language of the section is clear and unambiguous and having regard to the clear language employed by the Legislature, there can be no doubt that notwithstanding any other provision in the Companies Act or any other law for the time being in force, in the winding up of a company, the workmen's dues and debts due to the secured creditors to the extent such debts rank Under Clause (c) of the proviso to Sub - section (1) of Section 529 pari passu with such debts, shall be paid in priority to all other debts. There is no dispute that the debts due to the secured creditors are those described Under Section 529A(1)(b).

3.Having regard to the clear language of the section, Mr.Rajeev Dutta, learned senior Counsel appearing on behalf of the Union of India, submitted that the capital gains tax which was payable by the company to the Union of India must be treated as liquidation expenses and, therefore, must be paid first, even before the dues of the workmen and secured creditors are discharged. The submission must be rejected in view of the provisions of Section 530 of the Companies Act which puts the matter beyond controversy. Section 530 of the Companies Act in clear terms provides that in a winding up, in priority to all other debts all revenues, taxes, cesses, etc., shall be paid but this is made expressly

subject to the provisions of Section 529A. The Act, therefore, does not treat the revenue taxes as liquidation expenses. Reading Sections 529A and 530 together, there is no escape from the conclusion that the liability towards workmen's dues and debts due to secured creditors as provided Under Clause (b) of Section 529A(1), has to be paid in priority to all other debts, including tax dues to the Revenue. In view of the clear language of Sections 529A and 530, there is no escape from this conclusion, and we must, therefore, hold that the High Court was right in its decision. We, therefore, find no merit in these appeals and the same are accordingly dismissed.”

13. The contention of the R2 is that priority has to be given in terms of Section 529A of the Act, 1956.

14. State Bank of India also filed an application to intervene in this matter and Counsel appearing on its behalf has argued that SBI had a voting share of 23.24% in the CoC, the SBI was the sole secured creditor having admitted claims of Rs. 23 Cr. and was paid around Rs. 19 Cr. under the resolution plan which has been approved by voting share of 98.39% of the CoC. He has also supported the argument of Respondent No. 2 to contend that the decision in the case of Rainbow papers (Supra) is not applicable to the facts of this case because Section 48 of the GVAT Act and Section 33 of the MPVAT Act are not *pari materia*.

15. In rebuttal, Counsel for the Appellant has submitted that even if the claim submitted by the Appellant in Form-B is concerned, it would not change its status. In this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of Greater Noida Industrial Development Authority Vs. Prabhjit Singh Soni & Anr. 2024 SCC OnLine SC 922 to contend that the claim cannot be rejected solely because it was submitted on a different form. It is contended that the form specified under the CIRP Regulations is directory rather than mandatory and the key requirement is that the claim is supported by proof.

16. We have heard Counsel for the parties and perused the record with their able assistance.

17. The entire case of the Appellant is based upon the decision in the case of Rainbow Papers (Supra) in which, while interpreting Section 48 of the GVAT Act, the Hon'ble Supreme Court has held that the State Tax Office, in the said case, was secured creditor. In order to appreciate the argument of the Appellant as well as the Respondents it would be relevant to refer to Section 48 of the GVAT Act which is reproduced as under:-

“48. Tax to be first charge on property.

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

18. At the same time, it would be relevant to refer to Section 33 of the MPVAT Act under which the claim submitted by the Appellant alleging it to be pari materia with Section 48 of the GVAT Act. Section 33 MPVAT Act is also reproduced as under:-

“33. Tax to be first charge.

Notwithstanding anything to the contrary, contained in any law for the time being in force and subject to the provisions of Section 530 of the Companies Act, 1956 (No. I of 1956), any amount of tax and/or penalty or interest, if any, payable by a dealer or other person under this Act shall be first charge on the property of the dealer or such person.

19. As we have found that Section 33 of the MPVAT Act has been made subject to provisions of Section 530 of the Companies Act, 1956, therefore, it would be relevant to refer to Section 530 of the Act which is reproduced as under:-

“530. Preferential payments .

(1) In a winding up, [subject to the provisions of section 529-A, there shall be paid] in priority to all other debts-

(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause

(c) of sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date [* * *] [Certain words omitted by Act 35 of 1985, Section 6 (w.e.f. 24.5.1985).], subject to the limit specified in sub-section (2);

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(d) unless the company is being wound-up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948 (34 of 1948), or any other law for the time being in force;

(e) unless the company is being wound-up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by the company; and

(g) the expenses of any investigation held in pursuance of section 235 or 237, in so far as they are payable by the company.

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, [exceed such sum as may be notified by the Central Government in the Official Gazette] [Substituted by Act 5 of 1997, Section 9, for " exceed one thousand rupees" (w.e.f. 1.3.1997).].

[* * *] [Proviso omitted by Act 35 of 1985, Section 6 (w.e.f. 24.5.1985).]

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923) is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (e) of sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4) Where any payment has been made to any employee of a company,-

(i) on account of wages or salary; or

(ii) to him, or in the case of his death, to any other person in his right, on account of accrued holiday remuneration, out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right, would have been

entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall-

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8) For the purposes of this section-

(a) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period;

(b) the expression "accrued holiday remuneration" includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday; [*] [The words " and" omitted by Act 35 of 1985, Section 6 (w.e.f. 24.5.1985).]

(bb) [the expression "employee" does not include a workman; and] [Inserted by Act 35 of 1985, Section 6 (w.e.f. 24.5.1985).]

(c) the expression "the relevant date" means-

(i) in the case of a company ordered to be wound-up compulsorily, the date of the appointment (or first appointment) of a provisional Liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound-up voluntarily before that date; and

(ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

(9) This section shall not apply in the case of a winding up where the date referred to in sub-section (5) of section 230 of the Indian Companies Act, 1913 (7 of 1913), occurred before the commencement of this Act, and in such a case, the provisions relating to

preferential payments which would have applied if this Act had not been passed, shall be deemed to remain in full force.

Effect of winding up on antecedent and other transactions”

20. Section 530 has been made subject to the provisions of Section 529A of the Act which is also reproduced as under:-

“529A. [Overriding preferential payments

(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues, shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.]”

21. In the case of Commissioner of Income Tax Vs. KTC Tyres (India) Ltd. (Supra), the argument raised was that the capital gain tax which was payable by the company must be treated as liquidation expenses and therefore, must be paid first even before the dues of the workmen and secured creditors are discharged. This contention was totally rejected by the Hon’ble Supreme Court in the aforesaid case KTC Tyres (Supra) holding

that “reading sections 529A and 530 together, there is no escape from the conclusion that the liability towards workmen’s dues and debts due to secured creditors as provided under clause (b) of Section 529A(1) has to be paid in priority to all other debts including tax dues to the revenue.”

22. In the case of Zicom Saas Pvt. Ltd. (Supra), the Department of State Tax of Maharashtra filed the claim before the RP of an amount of Rs. 43,72,97,479/- out of which Resolution Professional accepted the claim of Rs. 36,68,12,729/-and in the plan they were allotted only 1% of the admitted claim. In this case also reliance has been placed upon in the case of Rainbow Papers (Supra) alleging that the claim of the State Tax Maharashtra has to be treated as secured charge in terms of Section 37 of the MVAT Act, however, while interpreting Section 48 of the GVAT Act vis a vis Section 37 of the MVAT Act, this Court has found that Section 37 was made subject to any provision regarding creation of first charge in any central act, the provisions of Section 48 of the GVAT Act and Section 37 of the MPVAT Act were not pari materia and therefore, it was held that “9. When we compare the provisions of Section 48 of the provision of Gujarat Values Added Tax which was relied in

“Rainbow Papers Limited” and the Provisions of Section 37 which is sought to be relied on in the present Appeal, distinction between the provisions is clear. Section 37 specifically uses the expression “subject to any provision regarding creation of first charge in any central act”. The provision itself contemplated thus that Section 37 was subject to any provision in Central Act. The IBC Section 53 itself provides waterfall mechanism which may be treated to be law which has been contemplated under Section 37 of the MVAT Act, 2002. 10. We thus are of the view that the Judgement of the Hon’ble Supreme Court in “Rainbow Paper Limited” relied by Learned Counsel for the Appellant is distinguishable. The Appellant having been treated as Operational Creditor allocation of amount in the Resolution Plan cannot be said to be in violation of Section 30 (2)(b). We thus are of the view that no ground has been made to interfere with the Impugned Order. The Appeal is dismissed.”

21. Although it has also been held by the Hon’ble Supreme Court in the case of Paschimanchal Vidyut Vitran Nigam Limited (Supra) that the decision in the case of Rainbow Papers (Supra) is a decision of the Court in the facts of the said case but without going into this aspect of the matter, we are of the considered

opinion that argument of the Appellant would not cut any ice that Section 48 of the GVAT Act and Section 33 of the MPVAT Act are pari materia, therefore, the ratio laid down by the Hon'ble Supreme Court in the case of Rainbow Papers (Supra) has to be applied rather the provisions of Section 37 of the MVAT Act and Section 33 of the MPVAT Act appears to be pari materia about which a decision has been taken by this court in the case of Zicom Saas (Supra) that both the provisions are not pari materia with Section 48 of the GVAT Act, therefore, no benefit can be given to the Appellant on the basis of the decision of the Rainbow Papers (Supra).

22. In view of the aforesaid discussion, we find no merit in the present appeal and hence, the same is hereby dismissed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

New Delhi
09th September, 2024.

Sheetal