

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT-III**

I. A. No.2659 of 2023

In

C. P. No. (IB) 1667/MB/C-III/2018

Application under Section 60(5) of The Insolvency and Bankruptcy Code, 2016
read with Rule 11 of NCLT Rules, 2016 and Rule 154 of the NCLT Rules

Amit Gupta,

Liquidator of Provogue (India) Limited

101, Kanakia Atruim 2, Cross Road A,
Chakala MIDC, Andheri (E), Mumbai – 400093

...Applicant/Liquidator

Vs

Assistant commissioner of Sales

Tax and Excise, Baddi Circle – 2

BBN, Baddi Circle -2, Solan District,
Himachal Pradesh – 173205

...Respondent

IN THE MATTER OF

ANDHRA BANK LTD

... Financial Creditor

Vs

PROVOGUE (INDIA) LTD.

... Corporate Debtor

Order pronounced on: 15.05.2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Shri Charanjeet Singh Gulati, Member (Technical)

Appearances:

For the Liquidator : Adv. Saurabh Bachhawat i/b Chandhiok &
Mahajan

For the Respondent : Mr. V. Sridharan, Senior counsel a/w Adv. Rahul
Hakani a/w Niyati Mankad a/w Advait Dalvi a/w
Sahil Parghi

Per: Ms. Lakshmi Gurung, Member (Judicial)

ORDER

1. The present application has been filed by the Liquidator (**'Applicant'**) of M/s Provogue (India) Limited (**'the Corporate Debtor'**) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 read with Rule 11 and Rule 154 of the NCLT Rules, 2016 seeking rectification of the order passed by this Tribunal on 19.09.2022.
2. **Brief facts leading to filing of present application:**
 - 2.1. The Corporate Debtor was admitted to Corporate Insolvency Resolution Process ("**CIRP**") by an order dated 25.07.2018. Later, the Applicant was appointed as the Resolution Professional (**RP**) by CoC in place of the IRP. Upon failure of the Resolution Process, this Tribunal on 14.10.2019 passed the liquidation order and the Applicant was appointed as the Liquidator.
 - 2.2. The Liquidator made a public announcement in November 2020 inviting bids for sale of the property of the Corporate Debtor bearing survey numbers 753, 748, 749, 919/906/ 747/ 903/ 743 situated at Village Gullarwala, Paryana Dharampur, Tehsil Nalagrah, District Solan, Baddi Himachal Pradesh Baddi, Himachal Pradesh (**'the said property'**). The E-auction for inviting bids for the said property was conducted in December 2020, wherein one M/s Eva Grow Medicaps Pvt. Ltd. (**Eva Grow**) was declared as the successful bidder of the said property.
 - 2.3. In January 2021, the Applicant issued a sale certificate in favour of Eva Grow. When, Eva Grow requested Assistant Commissioner of Sales Tax and Excise, Baddi (**Respondent**) to issue a no-objection certificate under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 for transfer of the said property of the Corporate Debtor in its favour, the Respondent refused to issue such certificate, till its dues were

cleared by the Corporate Debtor. Consequently, the Applicant and Eva Grow filed separate applications being I.A. No. 918/2022 and I.A. No. 2766/2021 seeking appropriate directions qua the Respondent.

- 2.4. Vide Order dated 05.05.2022 the above applications were allowed with directions to the Respondent to issue No Objection Certificate in respect of the Property immediately on receiving the said order dated 05.05.2022 failing which appropriate proceedings would be initiated against the Respondent under Contempt of Court's Act. Aggrieved with the above order dated 05.05.2022, the Respondent filed two applications bearing I.A. No. 1949/2022 and I.A. No. 1951/2022, seeking recall of the said ex-parte order dated 05.05.2022 and praying for an opportunity to respond to the said applications.
- 2.5. While the above applications were pending adjudication, the Hon'ble Supreme Court passed a judgment dated 06.09.2022 in **State Tax Officer (1) v Rainbow Papers Ltd. [2022 SCC Online SC 1162]** wherein it was *inter alia* held that the State is a secured creditor under the GVAT Act.
- 2.6. It is the case of the Applicant that the Applicant relied on the representation of the Respondent that the entire amount of Rs. 19.13 crores was due under the Himachal Pradesh VAT Act, 2005 (**HPVAT Act**) and following the **Rainbow Papers** (supra), the Applicant agreed that the Respondent is to be treated as "secured creditor". Keeping in view the submission of the Applicant, this Tribunal disposed of IA 1949/2022 & IA 1951/2022 vide order dated 19.09.2022 in following terms:

"Today Ld, counsel appearing for the Liquidator fairly submitted before the Bench that, in view of the recent judgement of the Hon'ble Apex Court in the matter of State Tax Officer (1) Versus Rainbow Paper Limited in Civil Appeal No. 1661 of 2020 the claim of the Department has priority and have to be included under the category of "Secured Financial Creditors" and shall be paid to them at the time of distribution for which the Department has no objection."

- 2.7. In the Order dated 19.09.2022, the Tribunal had stated the Respondent to be a 'secured financial creditor' whereas the Respondent is an 'operational creditor'. Clearly the dues of Sales Tax Department fall under category of 'government dues' and are therefore 'Operational debt'. The Applicant had merely agreed that Department was a secured creditor and had never stated that department was a financial creditor.
- 2.8. Under this background, the Applicant has moved the present application seeking following reliefs:
- a. *Allow the present application*
 - b. *Clarify that the claim of the Respondent mentioned in the order dated 19.09.2022 has to be considered as per law;*
 - c. *Delete the word "financial" from the line "...have to be included under the category of "Secured Financial Creditor..." in this tribunal's order dated 19.09.2022 and*
 - d. *Pass any other order(s) as may be deemed fit and proper in the facts and circumstances of the present case.*

3. **Submission of the Respondent:**

- 3.1. The Respondent contended that the Applicant is seeking review of the Order of dated 19.09.2022 and that this Tribunal has no jurisdiction to review its own order. The clarification/correction sought in the impugned Order is not a clerical or arithmetical mistake or accidental slip or omission and therefore, Application under Rule 154 of the NCLT Rules is not maintainable.
- 3.2. It is further submitted that the Applicant has also made an attempt to invoke inherent power under Rule 11 of the NCLT Rules. The inherent power is not conferred by the substantive statute being IBC. The said power is conferred under a subordinate legislature. However, considering the inherent power of this Tribunal, this Tribunal is required to dismiss the above IA as the same is abuse of process of the Tribunal. It is clear from the facts recorded in subsequent paras and also on reading Paras 15 and 17 of the above Application, that that said Order was passed on admission and also same was acted upon by the Applicant himself. In

fact, the above IA is taken out as an escape route by the Applicant to escape from the action of contempt against him under the provisions of Section 425 of the Companies Act, 2013 read with Contempt of Courts Act, 1971.

FINDINGS/OBSERVATIONS

4. Heard Ld. Counsel for the parties on both sides and perused the record.
5. The present application is filed by the Liquidator under Section 60(5) of the I&B Code read with Rule 11 of NCLT Rules, 2016 and read with Rule 154 of the NCLT Rules, 2016 for rectification in the Order dated 19.09.2022 passed by this Tribunal in I.A. 1951/2022, I.A. 1949/2022 and I.A. 2099/2022 in CP(IB)/ 1667/ MB/2018.
6. Before moving forward, it would be profitable to refer to the provision relating to rectification of orders passed by Tribunal. We refer to Section 420 of the Companies Act, 2013 which is reproduced below:
 - (1) *The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.*
 - (2) *The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties: Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.*
 - (3) *The Tribunal shall send a copy of every order passed under this section to all the parties concerned.*
7. Thus, it is by virtue of section 420 of the Companies Act, 2013 that this Tribunal is empowered to rectify any mistake apparent from the record and amend any order passed by it, if such mistake is brought to its notice by the parties. There are 3 (three) conditions to exercise power under section 420 of Companies Act which are as follows:

- i. the mistake should be apparent from record;
 - ii. the mistake is brought to the notice of the Tribunal at any time within two years from the date of the order;
 - iii. no appeal has been preferred in respect of such order which is sought to be amended.
8. When there is express provision under the statute for rectification/amendment of an order. Therefore, we agree with the submission of the Respondent that attempt to invoke inherent power under Rule 11 of the NCLT Rules is not desired. Therefore, instead of invoking Rule 11 of NCLT Rules, we have to consider and examine whether the conditions required under section 420 of the Companies Act, 2013 are met with or not.
9. The main prayer of the Liquidator is to replace the words “secured financial creditor” with “secured creditor”. The operative portion of the Order dated 19.09.2022 sought to be rectified is reproduced below:

*“Today Ld, counsel appearing for the Liquidator fairly submitted before the Bench that, **in view of the recent judgement of the Hon’ble Apex Court in the matter of State Tax Officer (1) Versus Rainbow Paper Limited in Civil Appeal No. 1661 of 2020** the claim of the Department has priority and have to be included under the category of **“Secured Financial Creditors”** and shall be paid to them at the time of distribution for which the Department has no objection.*

In the light of the above facts and circumstances, nothing remains to be decided in any of the three applications i.e. I.A. 1951/2022 I.A. 1949/2022 & I.A. 2099/2022 and accordingly, all the above three applications stands disposed of with a direction to the Department i.e. Assistant Commissioner of State and Excise, Himachal Pradesh to issue NOC to Liquidator within two weeks from today without waiting for uploading of the order and receive their claim at the time of distribution.”

(Emphasis Provided)
10. From bare reading of the order dated 19.09.2022, it is clear that the Liquidator had admitted the claim of the Respondent in view of the

judgement of **State Tax Officer (1) Versus Rainbow Paper Limited [Civil Appeal No. 1661 of 2020]**. In the **Rainbow Papers** (supra) judgment, the Hon'ble Supreme Court has held as follows:

“... 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.”

11. Section 5(21) of the I&B Code defines “operational debt” which includes any debt in respect of dues under any law payable to the Central Government, any State Government or any local authority. Section 5(20) of the I&B Code defines “operational creditor” being a person to whom an operational debt is owed. When there is a definition of ‘operational debt’ and ‘operational creditor’ and the dues of the Respondent are clearly covered by such definition of ‘operational debt’ under section 5(21) of I&B Code, the Respondent is clearly falling under ‘operational creditor’. In **Rainbow Papers** (supra), the Hon'ble Supreme Court has nowhere given its finding that the Sales Tax Department is a secured financial creditor. It has been held that the State is a secured creditor under GVAT Act. Therefore, we are fully convinced with the submissions of the Liquidator that the Liquidator merely agreed to follow the judgment of **Rainbow Papers** (supra) and an error has crept in the order dated 19.09.2022 stating that the claim of the Department be included under the category of **“Secured Financial Creditors”** which is mistake apparent from record.
12. Further, the mistake is brought to the notice of this Tribunal within 2 (two) years from the date of the impugned order dated 19.09.2022 and no appeal has also been filed.
13. Therefore, we rectify the order dated 19.09.2022 by deleting the word ‘financial’ from the sentence *“the claim of the Department has priority and*

have to be included under the category of “Secured Financial Creditors”. Rest of the order remains unchanged. Accordingly, Prayer ‘c’ is allowed.

14. As regards prayer ‘b’ for clarification about claims of the Respondent, similar issue is raised by the Sales Tax Department i.e. the Respondent in IA 2734/2022 which is disposed of by a separate order and there is no need to deal with prayer ‘b’ in this IA.
15. In the result, the I.A. No. 2659/2023 is **allowed in above terms and disposed of**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

/Uma, LRA/Rakesh, Steno/

Sd/-

Ms. Lakshmi Gurung
Member (Judicial)

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT-III

I. A. No. 2734 of 2022
IN
C. P. No. 1667/IB/C-III/2018

Under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016.

Assistant Commissioner of State)
Taxes & Excise Circle-2,)
Excise & Taxation Department, BBN)
Baddi, Solan, Himachal Pradesh) **... Applicant**

Vs

CA Amir Gupta)
Liquidator of Provogue (India) Ltd.)
702, Janki Centre, Dattaji Salvi Road,)
Andheri, Mumbai 400053) **...Respondent/Liquidator**

IN THE MATTER OF

Andhra Bank Ltd *... Financial Creditor*

Vs

Provogue (India) Ltd. *... Corporate Debtor*

Order pronounced on: 15.05.2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati, Member (Technical)

Appearances:

For the Applicant : Mr. V. Sridharan, Senior counsel a/w Adv. Rahul
Hakani a/w Niyati Mankad a/w Advait Dalvi a/w
Sahil Parghi

For the Liquidator : Adv. Saurabh Bachhawat i/b Chandhiok & Mahajan

Per: Ms. Lakshmi Gurung, Member (Judicial)

1. The neat legal issue involved in the instant application is whether the Applicant i.e. the Assistant Commissioner of State Taxes & Excise is a 'secured creditor' with respect to the demand raised under Central Sales Tax Act 1956 (CST Act). While the Liquidator has accepted the Applicant as 'secured creditor' for the dues under the Himachal Pradesh Value Added Tax (HPVAT) Act, 2005 but has argued that the Applicant is not a 'secured creditor' for the dues under the CST Act.
2. **Background:**
 - 2.1. M/s Provogue (India) Limited (**Corporate Debtor**) was admitted into Corporate Insolvency Resolution Process vide order dated 25.07.2018 passed in Company Petition No. 1667/2018 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**IBC/Code**) by Andhra Bank Ltd. Mr. Jitendra Kumar was appointed as the Interim Resolution Professional. The Committee of Creditors (CoC), in its 1st CoC meeting held on 24.08.2018, resolved to appoint Mr. Amit Gupta (**Respondent**) as the Resolution Professional (**RP**).
 - 2.2. Upon failure of the Resolution Process, the CoC, in its 15th Meeting held on 03.06.2019, resolved to liquidate the Corporate Debtor. Accordingly, vide order dated 14.10.2019, the liquidation process was initiated with respect to the Corporate Debtor and the Respondent was appointed as the Liquidator.
 - 2.3. The then officer, Mr. Pawan Kumar submitted claim dated 21.11.2019 of Rs. 19,13,24,020/- in Form C. The Deputy Commissioner, State Tax, Baddi, Himachal Pradesh has recorded red entry in the revenue record on 31.01.2020 thereby attaching the property of the Corporate Debtor bearing Survey No. 753, 748, 749, 979/ 906/ 747/ 903/ 742 situated at Village Gullarwala, Parana Dharampur, Tehsil Nalagarh, District Solan, Baddi, Himachal Pradesh together with structure thereon and containing

by admeasurement 40,428 square feet of built-up area and plant and machinery lying thereon(the '**said property**').

- 2.4. The Liquidator, by an email dated 31.01.2020, informed the Applicant that on due verification of the claims, only amount of Rs. 2,45,96,391/- out of the total claim of Rs. 19,13,24,020/- has been admitted.
- 2.5. The said property of the Corporate Debtor was sold to one M/s Eva Grow Medicaps Pvt. Ltd. in e-auction who requested the Respondent, to issue a 'No Objection Certificate' for transfer of the said property. When the Applicant refused to issue No Objection Certificate (**NOC**), the successful bidder had filed an application no. 2766/2021 before this tribunal seeking direction to Tax Department to issue NOC.
- 2.6. The Tribunal, vide order dated 05.05.2022, directed the Applicant to issue NOC to Successful Bidder. Aggrieved by the same, the Tax Department had filed two applications bearing I.A. No. 1949/2022 and I.A. No. 1951/2022 seeking recall of the order dated 05.05.2022. The Department also pleaded that its claim should be considered as a Secured Creditor claim. In reply to I.A. No. 1951/2022, the Liquidator submitted that he has admitted the entire claim of Rs. 19,13,24,020/-.
- 2.7. While the above applications were pending adjudication, the Hon'ble Supreme Court passed judgment on 06.09.2022 in the matter of **State Tax Officer (1) v. Rainbow Papers Ltd. [2022 SCC Online SC 1162]** wherein it was held that State is a Secured Creditor under GVAT Act. Thereafter, IA 1951/2022 was disposed of on 19.09.2022 considering the submission of the Liquidator that the claim of the Tax Department has to be considered in view of the judgment of Hon'ble Supreme Court passed in **Rainbow Papers** (supra).
- 2.8. However, the Liquidator later on realized that the claim submitted by the Applicant was under two statutes viz. Himachal Pradesh VAT Act, 2005

(**HPVAT Act**) and Central Sales Tax Act, 1956 (**CST Act**). On perusing the provisions of both the statutes, the Liquidator noted that unlike in the HPVAT Act, there is no non-obstante provision in the CST Act which provides that the tax, penalty and interest will be considered to be a first charge on a property. Accordingly, the Liquidator admitted the claim of the Applicant as a secured creditor only to the extent of the dues claimed under the HPVAT Act, and for the dues under the CST Act, the Applicant has been treated the Applicant as unsecured creditor.

3. Aggrieved by the same, the Applicant has taken out the present Application seeking *inter alia* following relief:

- a. *To quash and / or set aside the decision of the Ld. Liquidator to classify the Applicant as “unsecured creditor” under “operational creditor- statutory authorities” as per the List of the Stakeholders with further direction to the Ld. Liquidator to reclassify the Applicant as “secured creditor” instead of “unsecured creditor”.*

Submission by the Liquidator

4. Ld. Counsel for the Liquidator has contended that the issue involved in the present case is a legal issue which does not require reply on facts. It is submitted that the law laid down by the Hon'ble Supreme Court in the Rainbow Papers Judgment would not be applicable to the fact and circumstances of the present case as the Corporate Debtor is under Liquidation while in the Rainbow Papers Judgment (supra) judgment was in the context of a resolution process.
5. He has relied on the judgment passed by the Hon'ble Supreme Court in the matter of **Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Pvt. Ltd. & Ors (2023 INSC 625) (PVVNL judgment)** which, according to him is more appropriate in the present case as (i) it is in the context of liquidation and (ii) Rainbow Papers judgment has been referred

therein. He has referred to following paragraphs of the judgment to contend that the government dues are placed much below the secured creditors. Relevant extracts are reproduced below:

*“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.*

...

59. 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.”

(emphasis supplied)

6. It was further submitted that Section 53 of the Code provides for the distribution of assets from the sale of the liquidation assets (*‘Waterfall Mechanism’*) i.e. hierarchy or priority of claims of various classes of Creditors. Under the Section 53 of the Code, the amounts payable to secured creditor and workmen are at the second place, after the Liquidation Cost. However, the dues payable to the government are

placed even below the dues payable to employees other than workmen and financial debts owed to unsecured creditors. Therefore, from a plain reading of Section 53, and the PVVNL Judgment it is clear that the dues owed to the Government whether or not under HPVAT or CST cannot be considered to be a secured debt if a company is under liquidation.

Findings/Observations

7. Heard Mr. Shridharan, Senior Advocate for the Applicant and Mr. Saurabh Bachhawat for the Liquidator. We have given our thoughtful consideration to the rival submissions and the judgments relied upon by both the sides.
8. It is noted that the Liquidator has admitted the entire claim of Rs. 19,13,24,020/- of the Department. The only contention raised by the Liquidator is that the Rainbow Judgment (supra) will apply only for demand raised under the HPVAT Act which is Rs. 2,45,96,391/- and not to the demand raised under Central Sales Tax Act, 1956.
9. It is the case of the Applicant that in the **Rainbow Papers** (supra) judgment, the Hon'ble Supreme Court did not bifurcate the claim amount under GVAT Act and CST Act and treated the Appellant therein (i.e. the State Tax Officer) as secured creditor for the entire claim amount.
10. Mr. Shridharan, Sr. Adv. representing for the Applicant has taken us through the legislative history and constitutional framework of VAT/ Sales Tax and Central Sales Tax which is explained below:
 - i) The Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I, and the legislature of any State has exclusive power to make laws for any such State with respect to any of the matters enumerated in List II and both Parliament and the legislature of a State have power to make laws with respect to any of the matters enumerated in List III.

- ii) Entry 54 of List II empowers the State legislature to enact a legislation relating to taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.
- iii) Entry 92A of List I empowers the Parliament to enact a legislation relating to taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
- iv) With reference to tax on sale or purchase taking place in the course of inter-state trade or commerce, even though the legislation is by the Centre, the tax so collected is fully assigned to the State within which that tax is leviable.
- v) Ld. Senior Counsel submitted that the taxes under entry 92A List I are not only fully assigned to states but the actual administration and collection of taxes is also with the States. He referred to the Report of the Taxation Enquiry Commission which explains the relationship between the Union and State for tax on inter- state trade as follows:

“Place of the Union and the States in the sales tax system.

2..... That law and administration in the interstate sphere should formally, and when need arises effectively, be with the Union; in actual practice, the administration should, in their individual jurisdictions, be delegate to the States. The revenue, inter-State or intra-State, should wholly devolve on the appropriate States...”

- vi) Further, Article 269 of the Constitution provides that the taxes enumerated in the article shall be levied and collected by the Union but assigned to the States:

“269. Taxes levied and collected by the Union but assigned to the States.

Taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

Explanation-For the purposes of this clause, -

- (a) The expression “taxes on the sale or purchase of goods” shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;*
 - (b) The expression “taxes on the consignment of goods” shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce:*
- (2) The net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the State within which that tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.*
- (3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.”*

11. Ld. Senior Counsel further referred to Section 9 of CST Act and submitted that in light of the same, all provisions under the General Sales Tax law including provisions dealing with recovery of tax will be applicable for levy and collection of taxes under the CST Act. Accordingly, Section 26 of the HPVAT Act creating first charge will also apply for demand raised under the CST Act.
12. Further, the Applicant also referred to judgement of Hon'ble Delhi High Court in the case of **IFCI Ltd Vs. Commercial Taxes Officer & Anr. [2011 SCC OnLine Del 2563]**. Finally, Ld. Senior Counsel concluded that provisions relating to charge created under HPVAT Act will also apply to taxes under the CST Act.
13. Ld. Counsel for Liquidator argued that the dues of the Department under CST Act do not fall within the secured debt as there is no provision under CST Act by which a first charge is created for the dues under CST Act.
14. Upon considering the rival contentions of the parties, it is relevant to understand various provisions of the CST Act as well as the HPVAT Act.
15. We shall first refer to section 17 (3), (4) & (6) of the Central Sales Tax Act, 1956 which provides the following:

“(3) The liquidator shall not part with any of the assets of the company or the properties in his hands until he has been notified by the appropriate authority under sub-section (2) and on being so notified, shall set aside an amount equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands:

Provided that nothing contained in this sub-section shall debar the liquidator from parting with such assets or properties in compliance with any order of a court or for the

purpose of the payment of the tax payable by the company under this Act or for making any payment to secured creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation or for meeting such costs and expenses of the winding up of the company as are in the opinion of the appropriate authority reasonable.

- (4) *If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by, or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of sub-section (3), he shall be personally liable for the payment of the tax which the company would be liable to pay:*

Provided that if the amount of any tax payable by the company is notified under sub-section (2), the personal liability of the liquidator under this subsection shall be to the extent of such amount.

- (6) *The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.”*

It is seen from the above quoted section that the CST Act mandates the Liquidator to set aside the amount as notified before disposing the assets of a Company.

16. It is pertinent to note that various Central Acts have been amended by the I&B Code starting from section 245 to section 255 of the I&B Code. These sections amend the Central Acts like Central Excise Act, 1944, the Income Tax Act, 1961, the Customs Act, 1962, the Finance Act, 1994, the SARFAESI Act, 2002, Recovery of Debts due to Banks and Financial Institutions, 1993, etc. However, the CST Act has not been amended.

Similarly, the General Sales Tax Act and the Value Added Tax (VAT) Acts of the States have not been amended.

17. At this point, we shall refer to the observations of Hon'ble Supreme Court, in **Imperial Chit Funds (P.) Ltd. V/S. Income- Tax Officer [(1996) 219 ITR 498]**, wherein the income tax department was held to be a 'secured creditor' by virtue of Section 178(3) and (4) of the Income Tax Act, 1961 (IT Act). It was further held that this principle would apply in cases pertaining to Section 17 of the CST Act considering the fact that Section 178 of IT Act and Section 17 of CST Act contain similar clauses. Relevant portion of the judgement is reproduced below:

“7. ... On a total view of the relevant statutory provisions, it appears to us, that the Income Tax Department, is treated as a 'secured creditor'. The decisions of the Mysore, Calcutta, Rajasthan, Gujarat and Delhi High Courts have failed to give due importance to the legislative history and background that held to the enactment of the section and the crucial words occurring in Sections 178(3) and 178(4) of the Income-tax Act to the effect that the Official Liquidator "shall set aside" the amount notified by the Income Tax Officer and if it is not so done, the Official Liquidator is personally liable to pay the amount of tax which the company would be liable to pay.

8. During the course of hearing, our attention was drawn to Section 17 of the Central Sales Tax Act, 1956 which is similar to Section 178 of the Income-tax Act, 1961. We are of the view that the interpretation placed by us on Section 178 of the Income-tax Act, should govern cases arising under Section 17 of the Central Sales Tax Act, 1956 as well.”

(Emphasis Provided)

18. It is also appropriate here to consider the observations of Hon'ble Bombay High Court in **Leo Edibles & Fats Limited vs The Tax**

**Recovery Officer (Central), Income Tax Department, Hyderabad and
ors. [Writ Petition No.8560 OF 2018]:**

“The Supreme Court took the view that the Income-tax Department is to be treated as a secured creditor in the light of the words occurring in Sections 178(3) and (4) of the Act of 1961 to the effect that the liquidator shall set aside the amount notified by the Income-tax Officer and if it is not so done, the liquidator is personally liable to pay the amount of tax. It may however be noticed that by virtue of the amendment of Section 178(6) of the Act of 1961 by Section 247 of the Code read with the Third Schedule appended thereto, the whole of Section 178 has no application to liquidation proceedings initiated under the Code. Therefore, if the only source for treating the Income-tax Department as a secured creditor is the language used in Sections 178(3) and (4) of the Act of 1961, the said provisions stand excluded when it comes to the liquidation proceedings under the Code and such status cannot be conferred upon the Income-tax Department and it would necessarily have to take its place in the order of priority mentioned in Section 53(1) of the Code.”

As already noted, no such amendment as in Section 178 of the Income Tax Act, 1961 has been carried out in Section 17 of the CST Act, 1956.

19. We now refer to Section 9(2) of the CST which reads as follows:

*“(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under **general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act as if the tax or interest or penalty payable by such a dealer under this Act is a tax or interest or penalty payable under the general sales tax law of the State; and for***

this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, charging or payment of interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly.

20. From the bare reading of the above, it is clear that the dues under CST Act would be assessed and collected as per the General Sales Tax Act of the relevant State. Therefore, we have to refer to the applicable State Sales Tax Act which will also apply to dues under CST Act which in the present case is the Himachal Pradesh Value Added Tax (HPVAT) Act, 2005. We refer to Section 26 of the HPVAT Act:

“26. Tax, penalty and interest to be first charge on property.

*Notwithstanding anything to the contrary contained in any law, any amount of tax and penalty including interest, if any, payable by a dealer or any other person under this Act **shall be a first charge on the property of the dealer** or such other person.”*

21. A conjoint reading of Section 9 of the CST Act, 1956 and Section 26 of the HPVAT Act, 2005 would clearly indicate that the provisions of section 26 of the HPVAT Act also applies to the tax levied under the CST Act. We derive support from the decision of the Hon’ble Delhi High Court in **IFCI Ltd Vs. Commercial Taxes Officer & Anr. [2011 SCC OnLine Del 2563]** wherein the Hon’ble Delhi High Court has referred to Section 9(2) of the CST Act and Section 50 of the Rajasthan Sales Tax Act, 1954 (RST

Act) and has held that charge created, and priority of payment given under Section 50 of the RST Act to the recovery of local sales tax will apply with equal force to the recovery of Central sales tax also, in following terms:

*“24. This provision is followed by Section 9(2) of the said Act (which is the relevant provision for consideration in the present case) providing for assessment, re-assessment, collection and enforcement of payment of tax including interest or penalty payable by a dealer under the CST Act to be as if a tax, interest or penalty is payable under the general sales tax law of the State. Thus, **for all ends and purposes, the mode of assessment, re-assessment, collection and enforcement of payment of tax mechanism provided under the State sales tax act would equally apply to the Central sales tax to be collected under the CST Act. Not only this, but also all or any of the powers as are exercisable under the general sales tax law of the State, are to be available for the recovery of the central sales tax.***

*26. If the aforesaid scheme is appreciated in its true spirit and with the legislative enactment in mind (preamble to the CST Act itself stating that the Act was to formulate principles determining inter State trade or commerce and for levy and collection of taxes on sale of goods in the course of inter State trade or commerce), **we have no doubt that not only assessment & re-assessment but also mode of recovery and the principle of priority of claim as incorporated under Section 50 of the RST Act would be available for collection of Central sales tax within the State of Rajasthan in view of the provisions of Section 9(2) of the CST Act.***

27. ... We have come to a conclusion that such a charge stands created if meaning is to be given to the words "collection" and "enforcement" found in various provisions, more specifically Sections 9(1) and 9(3) of CST Act read with the relevant provisions of Section 9(2) of the CST

*Act, coupled with the right of appropriation conferred in the States though the tax may be collected by the Central Government. **Thus, the priority given under Section 50 of the RST Act to the recovery of local sales tax will apply with equal force to the recovery of Central sales tax qua inter- State trade or commerce.***

(Emphasis Provided)

22. The Liquidator has also objected the applicability of **IFCI Ltd** (supra) judgment as the same was passed on 03.06.2011 i.e. before the enactment of the I&B Code. Further, Section 238 of the Code will have overriding effect on other statutes. The contention of the Liquidator is not accepted. The legal principle that emerges from **IFCI Ltd** (supra) judgment is that the assessment, re-assessment and mode of recovery of the dues under the CST Act would be as per the provisions of General Sales Tax Act in view of section 9(2) of the CST Act. The Hon'ble Delhi High Court has clearly explained the provisions of section 9(2) of the CST Act. Hence, there is no question of non-applicability of the judgment in the present case.
23. The language of Section 50 of Rajasthan Sales Tax Act is *pari materia* to Section 26 of the HPVAT Act. Thus, we have no hesitation to hold that the dues under CST Act shall be treated in the same manner as dues treated under the HPVAT Act.
24. We also note that the Sales Tax Department had even marked a red entry on the property of the Corporate Debtor which is recorded in the Revenue Record dated 31.01.2020, thereby creating security interest.
25. Now, we shall refer to the judgment passed by Hon'ble Supreme Court in **State Tax Officer (1) v Rainbow Papers Ltd. [2022 SCC Online SC 1162]**. Relevant paragraphs are reproduced below:

“***

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

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

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.”

(Emphasis Provided)

26. The Hon’ble Supreme Court has clearly held that Section 48 of the GVAT Act is not contrary or inconsistent with Section 53 of I&B Code. Section 48 of GVAT Act is reproduced below:

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

27. The language of Section 48 of GVAT Act is *pari materia* to Section 26 of HPVAT Act. Therefore, the facts and circumstances as well as the issue involved in the present case are squarely covered by the judgment of **Rainbow Papers** (supra).
28. The Liquidator has submitted that the **Rainbow Papers** (supra) is not applicable in the facts and circumstances of the present case as **Rainbow Papers** (supra) was in the context of Resolution Plan. He submitted that since the Corporate Debtor is under liquidation, the more applicable judgment is **Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Pvt. Ltd. & Ors (2023 INSC 625)**.
29. Let us analyse the **Paschimanchal** (supra) judgment wherein the Hon’ble Supreme Court has made the following observations regarding the **Rainbow Papers** (supra) judgment:

“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.

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.”

(Emphasis Provided)

30. We see that the controversy in the present case is whether the Applicant is a secured creditor under the CST Act or not. Once a creditor is classified as a “secured creditor” or “unsecured creditor”, such classification shall remain irrespective of whether the Corporate Debtor is in the Resolution Plan process or Liquidation process. Even in **Paschimanchal** (supra) judgment, it is held that “*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’*”. Under a Resolution Plan, certain amounts would be offered to the secured creditors and to the unsecured creditors. In any case, secured government dues cannot take precedence over financial creditors during the Resolution Plan stage under sections 30 and 31 of I&B Code. However, secured creditors take precedence over unsecured financial creditors under section 53 of I&B Code.
31. The **Paschimanchal** (supra) judgment states that **Rainbow Papers** (supra) did not notice the ‘waterfall mechanism’ under section 53 of I&B Code. However, the above observations of the Hon’ble Supreme Court in **Paschimanchal** (supra) has been rejected by the Hon’ble Supreme Court in **Sanjay Kumar Agarwal vs. State Tax Officer (1) & Anr [Review Petition (Civil) N. 1620/2023 in Civil Appeal No. 1661/2020]** in following terms:

“24. Apart from the well-settled legal position that a co-ordinate Bench cannot comment upon the judgment rendered by another co-ordinate Bench of equal strength and that subsequent decision or a judgment of a co-ordinate Bench or larger Bench by itself cannot be regarded as

a ground for review, the submissions made by the learned Counsels for the Review Petitioners that the court in the impugned decision had failed to consider the waterfall mechanism as contained in Section 53 and failed to consider other provisions of IBC, are factually incorrect. As evident from the bare reading of the impugned judgment, the Court had considered not only the Waterfall mechanism under Section 53 of IBC but also the other provisions of the IBC for deciding the priority for the purpose of distributing the proceeds from the sale as liquidation assets.”

32. Thus, it is clear that both the judgments now serve as precedents in law and have their own applicability in accordance with the facts and circumstances of a particular case. We note that the languages in the GVAT Act and the HPVAT Act are *pari materia* and therefore, the judgement of **Rainbow Papers** (supra) is applicable in the present case since the Hon'ble Supreme Court, in **Rainbow Papers** (supra) had dealt with the VAT Acts which has a direct nexus in the present case whereas the **Paschimanchal** (supra) case is in the context of interplay between the I&B Code and Electricity Act, 2003.
33. The Liquidator has heavily relied upon **Paschimanchal** (supra) to contend that all the government dues are placed under section 53(e)(ii) of the I&B Code instead of section 53(b)(ii) thereof, and thus, any government department whether under the HPVAT Act or CST Act cannot be considered as a 'secured creditor'. We note that the Liquidator has already accepted the claims of the Applicant as 'secured creditor' for the dues under the HPVAT Act following the **Rainbow Papers** (supra) judgement which is recorded in the order dated 19.09.2022 of this Tribunal. Having accepted the classification of the Applicant as 'secured creditor' under the HPVAT Act in view of **Rainbow Papers** (supra), the Liquidator cannot now turn *volte-face* and make submission that the **Rainbow Papers** (supra) have no applicability in the present case.

34. Further, we note that under section 53 of the I&B Code, the debts owed to a secured creditor, in the event such secured creditor has relinquished its security, are to be given priority and treated under section 53(b)(ii) of the Code. In **Paschimanchal** (supra), the Hon'ble Supreme Court has made general observations that all government dues shall fall under section 53(e)(ii) of the I&B Code, 2016 whereas in **Rainbow Papers** (supra), the Hon'ble Supreme Court has clearly laid down that in view of the language in section 48 of the GVAT Act, State is a 'secured creditor', even after considering the waterfall mechanism in section 53 of I&B Code. Further, the Hon'ble Supreme Court, in the **Review Petition** (supra), has noted the observations of the Hon'ble Co-ordinate Bench in **Paschimanchal** (supra). Even after referring to the same, the Hon'ble Supreme Court has rejected the Review Petition thereby upholding the judgment of **Rainbow Papers** (supra) that State is a 'secured creditor'. Thus, for all the reasons discussed above, we reject the submission of the Liquidator that **Rainbow Papers** (supra) will not apply in the facts of the present case.
35. In view of the authoritative judgment by the Hon'ble Supreme Court in the **Review Petition** which is binding on all the courts by virtue of Article 141 of the Indian Constitution, we are bound by the ratio in **State Tax Officer (1) v Rainbow Papers Ltd. [2022 SCC Online SC 1162]** read with **Sanjay Kumar Agarwal vs. State Tax Officer (1) & Anr [Review Petition (Civil) N. 1620/2023 in Civil Appeal No. 1661/2020]**.
36. This leads us to the next question that whether the dues under the CST Act is covered by the **Rainbow Papers** (supra) judgment. As we have already held that a conjoint reading of section 9 of the CST Act with Section 26 of the HPVAT Act would mean that dues under the CST Act are to be collected in accordance with the HPVAT Act, and therefore, the Applicant is a secured creditor even under the CST Act also.

37. **Conclusion**

- i) Since Section 26 of the HPVAT Act is *pari materia* to section 48 of GVAT Act, the **Rainbow Papers** (supra) is the binding judgment in the present case.
- ii) From a conjoint reading of Section 9 of the CST Act and Section 26 of the HPVAT Act and relying on the judgment of **IFCI Ltd.** (supra), we hold that the State Sales Tax Department is a 'Secured Creditor' for the dues under the Central Sales Tax Act, 1956 also.

38. In the result, the present IA No. 2734 of 2022 is **allowed** and **disposed of**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

Uma, LRA/Rakesh, Steno/

Sd/-

Ms. Lakshmi Gurung
Member (Judicial)