IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 209
(IB)-1744(ND)2019
IA-1449/2022, IA-1286/2022,
IA-240/2024, IA-828/2024, IA-1349/2024

IN THE MATTER OF:

(Under Section: 7 of IBC, 2016)

Canara Bank **... Applicant/Financial Creditor**

Versus

M/s. Bulland Buildtech Pvt. Ltd. **... Respondent/Corporate Debtor**

AND IN THE MATTER OF IA. NO. 1449/ND/2022:

(Under Section: 31(1) of IBC, 2016)

Mr. Debashis Nanda
(RP of Bulland Buildtech Private Limited)
C-304, Paradise Apartments,
Plot No. 04, IP Extension, Patparganj,
New Delhi – 110092 **... Applicant**

Under Section: 31(1) of IBC, 2016 (CIRP)

Order delivered on 09.04.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	**:**	Adv. Deepak Somani and Adv Vipul Kumar in IA-828/2024
For the SRA	**:**	Adv. Neeraj Gupta & Adv. Divya Gattani, Adv. Saransh Goel
For the RP	**:**	Adv. Sumant Batra, Adv. Nidhi Yadav, Adv. Sarthak Bhandari, PCS Aradhana Singh, Mr. Debashish Nanda in person, Adv. Nidhi, Adv. Nipun Gautam
For the Respondent	**:**	Adv. Sumesh Dhawan, Adv. Vatsala Kak, Adv. Raghav Dembla, Adv. Sagar Thakkar in IA-1286/2022

Hearing Through: VC and Physical (Hybrid) Mode

ORAL ORDER

IA-1449/2022: While dealing with IA-3940/2022 and IA-1449/2022, this Adjudicating Authority (hereinafter referred to this Tribunal) passed the following order:

> *" **IA-3940/2023:** The prayer made in the application reads thus:*
>
> *a. "Reject the Resolution Plan put up for its approval in I.A. No. 1449/2021; and*
> *b. Direct the respondents to make the provision to pay the dues of applicant-objector as secure creditor within the meaning of section 3(30) and 3(31) of the Insolvency and Bankruptcy Code, 2016 and section 13A of the Uttar Pradesh Industrial Area Development Act, 1976."*
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> *Mr. U. N. Singh, Ld. Counsel appearing for the Applicant saliently contended that in the wake of the order dated 24.07.2023 passed by this Tribunal in VMS Equipment vs. Primrose Infratech Private Limited viz. IA-4869/ND/2022 and the judgment of the Hon'ble Supreme Court in Sanjay Kumar Agarwal vs. State Tax Officer (1) & Anr. (in Review Petition (Civil) No. 1620 of 2023 in Civil Appeal No. 1661 of 2020) read with the provisions of Sections 13 and 13A of the Uttar Pradesh Industrial Area Development (UPIAD) Act 1976, the Applicant need to be treated as secured OC and its claim should be assessed and determined accordingly. Relying upon the order dated 05.12.2023 passed by a co-ordinate bench of this Tribunal, Mr. Sumant Batra, Ld. Counsel appearing for the RP/CD contended that the order passed by this Tribunal in VMS Equipment vs. Primrose Infratech Private Limited (ibid) has been distinguished.*
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> *We heard the Ld. Counsels for the parties and perused the record. Indubitably, in the judgment passed in the matter of State Tax Officer vs. Rainbow Papers Limited [2022 LiveLaw (SC) 743], the Hon'ble Supreme Court ruled that where the statute so provide and the charge of the state/ instrumentality of state is created qua the assets of CD, the claim of the state should be treated as that of the secured creditor.*

The order could be referred to in para V of the order dated 05.12.2023 passed in M/s Dynacon Project Private Limited vs. M/s Today Homes & Infrastructure Private Limited. The said para reads thus:

> *"v. The Applicant has also submitted that in the judgment dated 06.09.2022 passed by Hon'ble Supreme Court in Civil Appeal No. 1661 of 2020 in the case of* ***State Tax Officer (1) vs. Rainbow Paper Limited****, wherein the Hon'ble Supreme Court has held that the State is a Secured Creditor under the GVAT Act.*
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> *The relevant paragraph of the said judgment is reproduced hereunder:-*
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> > *"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.*
> >
> > *57. As observed above, the state is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secure creditor to mean a creditor in favour of whom security interest is created.* ***Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Government Authority..."***

The judgment was sought to be reviewed by way of Review Petition (Civil) No. 1620 of 2023 viz. Sanjay Kumar Aggarwal vs. State Tax Officer and Anr. In the said review application, the Hon'ble Supreme Court passed the judgment/order dated 31.10.2023. Having analysed, the factual and legal position, the Hon'ble Supreme Court reiterated the view taken in the judgment passed in Civil Appeal. In the said case, the Hon'ble Supreme Court again reiterated the view originally taken by it and rejected the review petition. In the judgment

originally passed by the Hon'ble Supreme Court, a view was taken that at the strength of the statutory provision, the Sales Tax Officer could be treated as a secured creditor. Para 19 to 28 of the judgment passed in the Review Petition (Civil) No. 1620 of 2023 in Civil Appeal No. 1661 of 2020 (ibid) reads thus:

> *"19. The learned Senior Counsels and learned Counsels for the Review Petitioners/Intervenors placing heavy reliance on the observations made by a two Judge Bench of this Court in* ***C.A. No. 7976 of 2019 (Paschim Anchal Vidyut Vitran Nigam Limited vs. Raman Ispat Private Limited and Others),*** *delivered on 17th July, 2023, submitted that the court in the impugned judgment had failed to consider the waterfall mechanism contained in Section 53, as also failed to consider other provisions of the IBC. They have relied upon the observations made by the co-ordinate Bench in the following paragraph: -*
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> > *"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."*
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> *20. Taking recourse to the said observations made by the co-ordinate bench, the learned Counsels for the Review Petitioners have urged to review the impugned judgment. The said submission of the learned Counsels for the review petitioners deserves to be outrightly rejected for the simple reason that any passing reference of the impugned judgment made by the Bench of the equal strength could not be a ground for review. It*

is well settled proposition of law that a co-ordinate Bench cannot comment upon the discretion exercised or judgment rendered by another co-ordinate Bench of the same strength. If a Bench does not accept as correct the decision on a question of law of another Bench of equal strength, the only proper course to adopt would be to refer the matter to the larger Bench, for authoritative decision, otherwise the law would be thrown into the state of uncertainty by reason of conflicting decisions.

21. In JaiSri Sahu vs. Rajdewan Dubey and Others, a Bench of four Judges have made very pertinent observations in this regard: -

> *"11. Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled."*

22. In ***Mamleshwar Prasad and Another vs. Kanhaiya Lal (Dead) Through L.Rs.,*** *it was observed that: -*

> *"7. Certainty of the law, consistency of rulings and comity of courts – all flowering from the same principle – converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission."*

23. A precise observations made by a three Judge Bench in Sant Lal Gupta and Others vs. Modern Cooperative Group Housing Society Limited and Others, are worth noting –

> *"17. A coordinate Bench cannot comment upon the discretion exercised or judgment rendered by another coordinate Bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciate the rules of law form the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a coordinate Bench must be followed. (Vide Tribhovandas Purshottamdas Thakkar vs. Ratilal Motilal Patel, Sub-Committee of Judicial Accountability vs. Union of India, and State of Tripura vs. Tripura Bar Association.)"*

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.

25. To be precise, the Court in the impugned judgment had categorically reproduced Section 53 in Paragraph 20, other provisions of IBC along with the Regulations of 2016 in Paragraph 21, and the subsequent amendments in the Regulations of 2018, with regard to the submission of claims to be made by the creditors in Paragraphs 22 & 23 of the judgment. The Court in the impugned judgment has also considered the earlier decisions of this Court in case of Ghanashyam Mishra and Sons Private Limited through the authorized signatory vs. Edelweiss Asset Reconstruction Company Limited through the Director and Others in Paragraph 42. The decision in case of Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited and Another in Paragraph 47, and thereafter observed as under: -

> *"48. A resolution plan which does not meet the requirements of SubSection (2) of Section 30 of the IBC, would be invalid and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a Corporate Debtor.*
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> *49. Section 31(1) of the IBC which empowers the Adjudicating Authority to approve a Resolution Plan uses the expression "it shall by order approve the resolution plan which shall be binding ... " subject to the condition that the Resolution Plan meets the requirements of subsection (2) of Section 30. If a Resolution Plan meets the requirements, the Adjudicating Authority is*

mandatorily required to approve the Resolution Plan. On the other hand, Sub-section (2) of Section 31, which enables the Adjudicating Authority to reject a Resolution Plan which does not conform to the requirements referred to in sub-section (1) of Section 31, uses the expression "may".

50. Ordinarily, the use of the word "shall" connotes a mandate/binding direction, while use of the expression "may" connotes discretion. If statute says, a person may do a thing, he may also not do that thing. Even if Section 31(2) is construed to confer discretionary power on the Adjudicating Authority to reject a Resolution Plan, it has to be kept in mind that discretionary power cannot be exercised arbitrarily, whimsically or without proper application of mind to the facts and circumstances which require discretion to be exercised one way or the other."

26. After considering the Waterfall mechanism as contemplated in Section 53 and other provisions of IBC for the purpose of deciding as to whether Section 53 IBC would override Section 48 of the GVAT Act, it was finally concluded in the impugned order as under: -

"55. In our considered view, the NCLAT clearly erred in its observation that Section 53 of the IBC over-rides 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. .....

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(l)(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."

27. In view of the above stated position, we are of the opinion that the well-considered judgment sought to be reviewed does not fall within the scope and ambit of Review. The learned Counsels for the Review Petitioners have failed to make out any mistake or error apparent on the face of record in the impugned judgment, and have failed to bring the case within the parameters laid down by this Court in various decision for reviewing the impugned judgment. Since we are not inclined to entertain these Review Petitions, we do not propose to deal with the other submissions made by the learned Counsels for the parties on merits.

28. In that view of the matter, all the Review Petitions are dismissed."

The bit tricky proposition need to be addressed by us in the captioned application is that whether in view of the later order dated 05.12.2023 passed in M/s Dynacon Projects Private Limited vs. M/s Today Homes & Infrastructure Private Limited, the view taken in VMS Equipment vs. Primrose Infratech Private Limited need to be ignored. In our considered view, there is no variance in the two orders. When in VMS Equipment, taking the view that the charge of the state need not be registered, as the only object and purpose of registration of charge is just to create an evidence, in M/s Dynacon Projects Private Limited, a view could be taken that the Section 30 & 30A of the UPIAD Act 1976, uses the expression charge and not the first charge. In the wake, when in VMS Equipment, a view could be taken that the Greater Noida Industrial Development Authority should be treated as secured OC, the view taken in M/s Dynacon Projects Private Limited was that the charge of the Greater Noida Industrial Development Authority could not be treated as first charge. It is not disputed by counsels for either parties that as far as the issue of priority of charges is concerned, the same becomes relevant only at the time of distribution of assets of the CD, in terms of the provisions of Section 53 of IBC, 2016 or making provision in the plan regarding payment of dues/debts of the stakeholders in due deference to the water fall mechanism i.e. again with reference to Section 53 of IBC, 2016. In view of the aforementioned, particularly in the wake of the judgment

of the Hon'ble Supreme Court and order dated 24.07.2023 passed by this Tribunal in VMS Equipment vs. Primrose Infratech Private Limited, we are left with no option but to take a view that the Applicant need to be treated as secured OC. Nevertheless, as far as the issue of priority of charge, i.e. whether the Greater Noida Industrial Development Authority would be having first charge or any other secondary charge is concerned, the same would be determined only by the RP/CoC and the issue is not within our domain. For such purpose, the RP/CoC would take a view in accordance with the applicable rules, law and procedure.

Mr. Sumant Batra, Ld. Counsel for the RP pointed out that the Applicant before us has never preferred his claim as OC and had preferred the same only as a secured FC which could be nixed and the CoC/RP only on it own volition had allocated certain amount of money to be payable to Applicant, in due deference to the provisions of law. It is made clear that at this stage, we are not reopening the issue of classification of the Applicant as FC/OC and we have already ordered that the Applicant would be treated as secured OC.

Mr. Sumant Batra, Ld. Counsel appearing for the RP also submitted that originally the Applicant had submitted its claim only as FC which had been rejected by the RP and the Applicant never raised any issue qua the same. According to him, only in order to make the plan implementable and to avoid any further controversy, the SRA had made a provision in the plan for payment of an amount of Rs. 3 crores to the Applicant, as OC only. At this stage, we make it clear that in the present application we are no going into the claim of the Applicant as FC at all. It is only with reference to the provision made by the SRA in plan in favour of the Applicant as OC that we are inclined to take a view that in the wake of the orders passed by the Hon'ble Supreme Court and this Tribunal in VMS Equipment, the Applicant may be treated only as secured OC. The CoC would re-examine the claim and file an addendum. It would also be open to SRA to file an affidavit

that, it would offer the amount mentioned either in plan or as SoC to Applicant, whichever is higher.

Accordingly, the IA stands disposed of. No cost.

IA-1286/2022: *List on 29.01.2024.*

IA-1449/2022: *In the wake of the order passed in IA-3940/2023, the Ld. Counsels appearing for SRA and RP seeks an opportunity to file the additional affidavit and revised Form-H within 2 weeks. For approval of the affidavit/revised plan, the RP would be entitled to call CoC meeting in terms of the explanation to Regulation 18(2) of the IBBI CIRP Regulations, 2016. It goes without saying that the Applicant in IA-3940/2020 would be at liberty to make a representation to RP regarding his claim for charge qua the plot allotted by the Applicant to CD, supported documents to buttress his plea regarding its first charge over the plot allotted by the Applicant to the CD.*

List on 29.01.2024."

2. Commencing from the stage of passing the said order Mr. Suman Batra, Learned Counsel appearing for the RP submitted that the proposition raised by the Applicant in IA-3940/2023 i.e. GNIDA could already be examined and a view has been taken.

3. Mr. U.N. Singh, the Learned Counsel for the GNIDA i.e. Applicant in IA-3940/2023 submitted that while disposing of the IA-1449/2022 this Tribunal reserved liberty to GNIDA to make a representation to RP regarding his claim for charge qua the plot allotted by the Applicant to CD, supported by documents to buttress the plea regarding his first charge over the plot allotted by the Appellant and when such representation has already been made, the RP could not examine his such plea and there is no communication made to him in this regard.

4. He took pain to produce before us a copy of letter dated 28.07.2016 addressed by GNIDA (Greater Noida Industrial Development Authority) to the Corporate Debtor i.e. Bulland Buildtech Pvt. Ltd. to espouse that GNIDA shall have the first charge towards the pending payment in respect of plot premium/lease rent/taxes or any other charges as levied by the Authority on the plot and financial institution shall have the second charge on the plot qua the financial facilities extended by it. The Clause B of the letter reads thus:-

> *"B. GNIDA shall have the first charge towards the pending payment in respect of plot premium/lease rent/taxes or any other charges as informed or levied by the Authority on the plot and your bank/financial institution shall have the second charge on the plot being financed."*

5. Mr. U.N. Singh, also relied upon the recent judgment of the Hon'ble Supreme Court in **Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Another** (Civil Appeal Nos. 7590-7591 of 2023), to buttress that after the said judgment there remains no doubt that the GNIDA is secured creditor and being so it is entitled to all consequential benefits.

6. Mr. Batra, the Ld. Counsel appearing for the RP submitted that he has no different submission than the one made by Mr. U.N. Singh regarding the ramification of the Judgment of Hon'ble Supreme Court (ibid) and in terms of the view taken in such judgment, the GNIDA may be treated as secured creditor. To take the issue further, he produced before us a physical copy of the affidavit dated 09.03.2024 (the same should be uploaded on the DMS/CIS by tomorrow). In his submission, though in due deference to the law declared by the Hon'ble Supreme Court in Greater Noida Industrial Development

Authority vs. Prabhjit Singh Soni & Anr. (ibid), GNIDA is secured creditor, but on the security i.e. the plot allotted by the GNIDA to the Corporate Debtor, the Canara Bank is first charge holder and in terms of the extent provisions of law, the claim of the Applicant has been dealt with only as secured Creditor, appropriately. The text of the affidavit filed by RP (Paras 1 to 7) reads thus:-

"1. I, the above-named Applicant in IA No. 1449 of 2022 ('Resolution Plan Approval application') affirm the instant affidavit and am fully aware of the facts and circumstances of this case and hence competent to swear on the affidavit

2. I say that I am the Applicant in the Resolution Plan approval application and as such I am well acquainted with the facts of the instant case and hence, I am competent to swear this Affidavit.

3. That this affidavit is being filed in view of the judgement passed by the Hon'ble Supreme Court in Greater Noida Industrial Development Authority Vs Prabhjit Singh Soni & Anr. which has treated GNIDA as a secured Creditor. It is pertinent to mention that Canara Bank is the first charge holder whose claim amounts to 41,61,01,637/- and is being paid 11,00,00,000/- in terms of the Resolution Plan. Further, the Liquidation value of the Corporate Debtor is Rs. 15.54 crore.

4. Thus, the Liquidation value to be paid to the GNIDA will remain nil even if it is treated as secured operational creditor as it is not a first charge holder over the assets of the Corporate Debtor and therefore as per section 53(1) of Insolvency and Bankruptcy Code, 2016 the First Charge Holder shall be paid in priority to GNOIDA however the RA in its own wisdom has chosen to pay Rs.4,00,00,000/- which is more than the Liquidation Value and CoC has also taken note of it and an affidavit to this effect has already been filed.

5. *Further, in terms of judgement passed in* ***State Tax Officer v. Rainbow Papers Ltd (2022 SCC OnLine SC 1162),*** *the word used in statute in this judgement is First Charge however in terms of Section 13 and 13 A of UP Act, the word Charge is used and therefore those who have filed their Charge in terms of Companies Act,2013 and is also recorded in CERSAI will be the first charge holders and will have priority over other creditors.*

6. *Thus, in terms of the above, the Liquidation value to be paid to the GNOIDA is NIL even though it is a secured operational creditor but doesn't have first charge and thus, the treatment of GNIDA in terms of the Resolution Plan is in accordance with the provisions of Insolvency and Bankruptcy Code, 2016.*

7. *The content of the affidavit is based on true records. The contents of affidavit are true to my personal knowledge and information."*

7. The Ld. Counsel appearing for the GNIDA argued that this Tribunal cannot ignore to see the documents produced by GNIDA before the RP and if the documents are analyzed properly, it would be concluded that the GNIDA is Secured Creditor. He also raised the plea of the form prescribed in relevant Rules regarding submission of the claim by various stakeholders.

8. The plea of use of form to stake the claim would be relevant if the GNIDA could not be treated as a claimant in either of the categories. In the present case, initially, GNIDA was treated as operational category, but after our order dated 08.01.2024 (supra), in the meeting of CoC dated 23.01.2024 it was treated as secured creditor. The relevant excerpt of the minutes of meeting of CoC dated 23.01.2024 enclosed with the affidavit dated 27.01.2024 reads thus:-

*"**Resolution: To consider and if found fit, to pass with or without modification the following:***

***Resolved that** the liquidation value payable to GNIDA was considered by CoC in terms of the order dated 08.01.2024 passed by the Hon'ble NCLT in the matter of Bulland Buildtech Private Limited. The CoC noted that the liquidation value of debt of GNIDA as secured operational creditor, calculated in accordance with Sec 30(4) read with section 53 of IBC Code 2016 is Nil, the first charge on the Group Housing Project is being with Canara Bank, whose claim itself is more than the Liquidation value*

***Further Resolved that** the CoC however noted the amount of Rs. 3 crore proposed by Saviour Builders Pvt Ltd - Successful resolution applicant, in their Resolution Plan towards payment to GNIDA duly increased from Rs. 3.00 Crore (Rupees Three Crore only) to Rs. 4.00 Crore (Rupees Four crore only) and CoC has hereby taken on record the same and approved as integral part of the plan submitted by them.*

***Further Resolved that** the SRA may file an addendum to the resolution plan to this effect which can be placed before Hon'ble NCLT by the RP."*

9. In the wake of the aforementioned factual position, there remains only one question as to whether the GNIDA should be first charge-holder or not. Nevertheless, to keep the factual and legal position straight, we note that in judgment dated 12.02.2024 passed by Hon'ble Supreme Court in Civil Appeal No. 7590-7591 of 2023 (Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Another), the Greater Noida Industrial Development Authority needs to be treated as secured creditor. The relevant excerpt of the Judgment reads thus:-

*"**9.** In the two applications referred to above, the appellant pleaded, inter alia, that, —*

(a) there was gross error on part of the RP in treating the appellant as an operational creditor, particularly, when it had no adjudicatory power under Regulation 13 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;

(b) the resolution plan erroneously states that appellant did not submit a claim when, in fact, it was submitted;

(c) appellant being owner of the land with statutory charge over assets of the CD ought to have been given top priority for its dues as a secured creditor;

(d) no opportunity of hearing was given to the appellant by the COC, and the entire process right up to the approval of the plan by the Adjudicating Authority was ex parte.

NCLT's Order

10. *The NCLT, vide order dated 5.4.2021, rejected the aforesaid applications, inter alia, on the ground that, despite lapse of seven months between the date of filing its claim in January, 2020 and the date of approval of the plan in August 2020, the appellant took no steps against the RP for not taking a decision on its claim, even though it was aware about initiation of the CIRP, and now it is not permissible to take a decision on the claim application of the appellant as the CIRP is complete consequent to approval of the plan.*

Appeal before NCLAT

11. *Aggrieved with the order of the NCLT, the appellant filed an appeal before the NCLAT, inter alia, on the following grounds:*

(i) The appellant was a financial creditor and, therefore, ought to have been a member of the COC. On account of absence of the

appellant in the COC, the approval of the resolution plan by the COC and, thereafter, by the NCLT is rendered invalid;

(ii) By virtue of Sections 13, 13A and 14 of the 1976 Act, the appellant had a charge over the assets of the CD and was therefore a secured creditor within the meaning of Section 3(30) read with Section 3(31) of the IBC, yet the resolution plan does not treat the appellant as a secured creditor;

(iii) The appellant had submitted its claim with proof, yet the appellant was shown as one who submitted no claim. Additionally, the appellant was neither informed of the meetings of the COC nor adequate amount, commensurate to its status as a secured creditor and owner of the land with statutory rights, was allocated to it in the resolution plan, which is violative of the provisions of Section 30(2) of the IBC; and

(iv) The NCLT failed to address and appreciate the grounds taken in the correct perspective."

X X X

54. *In our view the resolution plan did not meet the requirements of Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:*

a. The resolution plan disclosed that the appellant did not submit its claim, when the unrebutted case of the appellant had been that it had submitted its claim with proof on 30.01.2020 for a sum of Rs. 43,40,31,951/- No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different Form. As already discussed above, in our view the Form in which a

claim is to be submitted is directory. What is necessary is that the claim must have support from proof. Here, the resolution plan fails not only in acknowledging the claim made but also in mentioning the correct figure of the amount due and payable. According to the resolution plan, the amount outstanding was Rs. 13,47,40,819/- whereas, according to the appellant, the amount due and for which claim was made was Rs. 43,40,31,951/- This omission or error, as the case may be, in our view, materially affected the resolution plan as it was a vital information on which there ought to have been application of mind. Withholding the information adversely affected the interest of the appellant because, firstly, it affected its right of being served notice of the meeting of the COC, available under Section 24 (3) (c) of the IBC to an operational creditor with aggregate dues of not less than ten percent of the debt and, secondly, in the proposed plan, outlay for the appellant got reduced, being a percentage of the dues payable. In our view, for the reasons above, the resolution plan stood vitiated. However, neither NCLT nor NCLAT addressed itself on the aforesaid aspects which render their orders vulnerable and amenable to judicial review.

b. *The resolution plan did not specifically place the appellant in the category of a secured creditor even though, by virtue of Section 13-A of the 1976 Act, in respect of the amount payable to it, a charge was created on the assets of the CD. As per Regulation 37 of the CIRP Regulations 2016, a resolution plan must provide for the measures, as may be necessary, for insolvency resolution of the CD for maximization of value of its assets, including, but not limited to, satisfaction or modification of any security interest. Further, as per Explanation 1, distribution under clause (b) of sub-section (2) of Section 30 must be fair and equitable to each class of creditors. Non-placement of the appellant in the class of*

secured creditors did affect its interest. However, neither NCLT nor NCLAT noticed this anomaly in the plan, which vitiates their order.

c. *Under Regulation 38 (3) of the CIRP Regulations, 2016, a resolution plan must, inter alia, demonstrate that (a) it is feasible and viable; and (b) it has provisions for approvals required and the time-line for the same. In the instant case, the plan conceived utilisation of land owned by the appellant. Ordinarily, feasibility and viability of a plan are economic decisions best left to the commercial wisdom of the COC. However, where the plan envisages use of land not owned by the CD but by a third party, such as the appellant, which is a statutory body, bound by its own rules and regulations having statutory flavour, there has to be a closer examination of the plan's feasibility. Here, on the part of the CD there were defaults in payment of instalments which, allegedly, resulted in raising of demand and issuance of pre-cancellation notice. In these circumstances, whether the resolution plan envisages necessary approvals of the statutory authority is an important aspect on which feasibility of the plan depends. Unfortunately, the order of approval does not envisage such approvals. But neither NCLT nor NCLAT dealt with those aspects."*

10. There would be no gainsaying that in terms of the provisions of Sec. 30(4) of IBC, 2016, the Committee of Creditor may approve a resolution plan by vote of less than 66% of voting share of the financial creditor after considering its feasibility and viability including the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53 including the priority and value of security interest of secured creditors. The Sec. 53 of the Code reads thus:-

*"**53. Distribution of assets.—**(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) workmens 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)."

11. Thus, if in the meeting dated 23.01.2024 (supra), after considering the provisions of the Code i.e. Section 30(4) and 53 thereof and after the priority of the charge of Creditor, the CoC has taken a particular view in the exercise of our summary jurisdiction, we can look into the same, only to the limited extent, saying, by applying such yardsticks which may be applicable to the jurisdiction exercised in judicial review and not by making roving inquiry or conducting such trial as is needed to determine the issues by the Civil Courts.

12. While looking at the factual proposition i.e. who should have the first charge, we need to examine the legal position in this regard. The expression 'charge' has been defined in Sec. 3(4) of IBC, 2016 which means an interest or lien created on the property or assets of any person or any of its

undertakings or both, as the case may be, as security and includes a mortgage.

13. The priority to secured creditors has been amplified in Sec. 26E of the SARFAESI Act, 2002. The Section reads thus:-

> ***"26E. Priority to secured creditors.—****Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.*
>
> *Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."*

14. Undoubtedly, the charge in a way may be both interest or lien created on a property. If we look at the content of letter dated 28.07.2016 written by Greater Noida Industrial Development Authority to the Corporate Debtor, the GNIDA should continue to have the first lien/charge over the property. But, the letter is a unilateral missive. The terms of communication become operative as a contract only when the terms of the same are agreed to by the parties thereto. No response to letter dated 28.07.2016, either from Bulland Buildtech Pvt. Ltd. or Syndicate Bank could be produced before us to say that the term of the letter was considered. The response from the Corporate Debtor i.e. M/s Bulland Buildtech Pvt. Ltd. may still be of no consequence but the stand of Syndicate Bank is of much relevance. The lien/charge over a property

viz-a-viz the parties to loan agreement could be determined by the terms of the contract and the consent thereto by all parties. In the absence of some deed/agreement/contract duly signed by all concerned viz. the GNIDA, CD and the Syndicate Bank, before recording any authoritative finding that the merely on the basis of the letter dated 28.07.2016, written by the GNIDA to accord permission to CD to mortgage the property, the GNIDA may become priority/first charge holder qua the Plot No. GH-03A, Sector 16C, area 2028559 20285.96 sq. mtrs. we need to do further research, as no assistance in this regard has come from GNIDA.

15. It is not in dispute that in the MCA record, the Syndicate Bank (Canara Bank) is recorded as exclusive charge holder. May be in terms of the judgment of the Hon'ble Supreme Court, the GNIDA has to be treated as secured creditor but at the strength of the same, the GNIDA may not be placed in the position of first charge holder. We are unable to appreciate that if the reliance by the GNIDA is placed on letter dated 28.07.2016, why and how it could not question the record maintained with RoC/MCA regarding its priority. There was nothing to prevent the GNIDA to ensure that at the strength of the letter dated 28.07.2016, it should have been entered as priority charge holder in the record of MCA.

16. Reading of Section 26E of the SARFAESI Act (ibid) makes it clear that the registered charge holder of a security would have priority over all other debts and revenues, taxes, cesses and other rents payable to the Central Government or the State Government or local authorities.

17. In the backdrop of the aforementioned provisions of SARFAESI Act, may be by operation of statute , the GNIDA would be treated as secured creditors but it is difficult to say that it gets priority as charge holder qua the plot allotted by it to the builder.

18. At this stage, Mr. U.N. Singh, Ld. Counsel appearing for the GNIDA would argue that when it is the provision of law/statute which declare the GNIDA as secured creditor, the registration of charge is MCA/ROC should be of no consequence. To our mind the proposition stand answered by the provisions of Section 26E of the SARFAESI Act, which says that notwithstanding anything contained any other law for time being in force, after registration of security interest, the debt due to any secured creditor shall be paid in priority over all other debts and revenues, taxes, cesses and other rents payable to the Central Government or the State Government or local authorities to some extent. Apparently, the Section 26E of the SARFAESI Act is a non-obstante provision.

19. As has been analyzed hereinabove, Section 30(4) of IBC, 2016 entitle the CoC to take a view regarding the distribution of the funds with reference to the priority amongst the charge holders including the priority referred to in Section 53(1) of IBC, 2016.

20. Here it would not be out of place to refer to the Judgment of Hon'ble High Court of Judicature at Bombay in Writ Petition No. 11733/2023 titled "**Indian Overseas Bank vs. Deputy Commission of State Tax, GST Department and Others**" wherein Section 26 of SARFAESI Act has been analyzed. With reference to the said Section, Hon'ble High Court has viewed

that the Section would give the security interest of secured creditor registered prior in time, priority over even a proclamation for recovery of land revenue. Para 34 and 37 of the Judgment reads thus:-

> *"34. After 24th January, 2020, Section 26-E would give a security interest of a secured creditor registered prior in time, priority over even a proclamation for recovery of land revenue. Since in the facts of this case, the attachment orders came to be passed well after 24th January, 2020, and no registration was effected in CERSAI, and indeed no proclamation for recovery of revenue had been made, we refrain from delving further into whether an attachment would suffice or a proclamation would be necessary in respect of tax recovery proceedings.*
>
> ***X X X***
>
> *37. Therefore, in our opinion, the writ petition deserves to be allowed. We, therefore, issue the following directions and declarations:-*
>
> *a) The impugned attachment orders of the MVAT Authorities dated 24th February, 2022, 7th April, 2022 (issued to the Borrower) and 31st July, 2023 (issued to the Petitioner) would not confer any priority over the registered security interest enjoyed by the Petitioner-led consortium banks over the Secured Assets;*
>
> *b) The Petitioner has the first priority in respect of enforcement against the Secured Assets by reason of Section 26-E and having a prior registration of the security interest with CERSAI. The Petitioner is therefore entitled to enforce such security interest enjoying priority over the MVAT Authorities;*
>
> *c) The Petitioner is entitled to enforce the mortgage over the Secured Assets without hindrance and disturbance from the MVAT Authorities, who cannot claim against the Petitioner, except to seek any excess residual amounts from the proceeds of the enforcement of the mortgage over the Secured Assets,*

after extinguishing the dues owed by the Borrower to the mortgagees constituting the Petitioner-led consortium;

d) *If the sale of the Secured Assets realises any amount in excess of the amounts owed by the Borrower to the Petitioner-led consortium of banks, the MVAT Authorities may make a claim for such residual excess amount towards the dues owed by the Borrower to the MVAT Authorities;*

e) *The demand notice dated 4th August, 2023 asking the Petitioner to pay the tax dues allegedly owed by the Borrower is misconceived, unsustainable and without legal basis, and is hereby quashed and set aside;*

f) *Consequently, any mutation entries purporting to mark an encumbrance in favour of the MVAT Authorities in the land records shall be invalid. Accordingly, Respondent Nos. 1, 2 and 5 shall cause such entries, if any, to be removed from the land records within a period of two weeks from today; and*

g) *Nothing contained in this judgement is an expression of an opinion on the right of the MVAT Authorities to undertake enforcement action in accordance with law against any other assets, properties and persons that are not subject matter of a registered security interest registered in favour of any secured creditor under the SARFAESI Act, and which may therefore be amenable to enforcement for recovery of tax arrears owed by the Borrower.*

h) *It is clarified that the MVAT dues of the Borrower cannot be sought to be recovered from any purchaser of the Secured Assets, who acquire them from the Petitioner-led consortium under SARFAESI Act"*

21. In view of the rival contentions of the parties and the legal proposition before us, the only controversy/dispute remains to be decided is whether the Canara Bank or GNIDA should get the share in distribution u/Sec. 53 of IBC, 2016 in priority over Canara Bank. In a way both are public bodies and the

distribution payment to either of them would not be of much difference.

Arguments to continue tomorrow.

IA-1286/2022, IA-828/2024, IA-1349/2024, IA-240/2024:- List on 10.04.2024.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Satya Prakash/Ruchita