IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WP-LD-VC-NO.268 OF 2020

GGS Infrastructure Private Limited ..Petitioner
Versus
Commissioner of CGST & Central Excise ..Respondent

Mr. Amir Arsiwala, Advocate for the Petitioner.
Mr. Pradeep S. Jetly, Senior Advocate a/w Mr. J. B. Mishra, for the Respondent.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.

RESERVED ON : 26.11.2020
PRONOUNCED ON : 22.12.2020

Judgment and Order (Per Ujjal Bhuyan, J.)

Heard Mr. Amir Arsiwala, learned counsel for the petitioner and Mr. Pradeep S. Jetly, learned senior counsel for the respondent.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has sought for the following reliefs :-

(I) To set aside and quash the order in original dated 22.07.2020 passed by the Commissioner of Central Goods and Services Tax and Central Excise, Mumbai Central;

II) For a declaration that total liability of the petitioner to the respondent does not exceed Rs.35,54,682.55 in accordance with the order dated 30.08.2019 passed by the National Company Law Tribunal, Mumbai Bench

sanctioning the resolution plan of the petitioner under section 31 of the Insolvency and Bankruptcy Code, 2016;

III) For a direction to the respondent not to appropriate an amount of Rs.6,23,82,214.00 already recovered following the order in original dated 22.07.2020;

IV) For a direction to the respondent to refund an amount of Rs.5,88,27,531.45 to the petitioner.

3. Case of the petitioner is that it is a company incorporated under the Companies Act, 1956 having its registered office at P. D'mello Road, Mumbai. Having been incorporated on 16.01.2010, petitioner was engaged in the business of providing cranes for hire/lease to other companies involved in infrastructure business. It is stated that as had happened with many companies engaged in infrastructure business, petitioner also underwent a period of great financial stress which resulted in failure to repay dues of various creditors.

4. One of the unsecured creditors of the petitioner Shri. Sanjay Talakshi Mamaniya filed a petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (briefly "the Code" hereinafter). The said petition was filed before the National Company Law Tribunal, Mumbai Bench (briefly "the Tribunal" hereinafter). The petition was registered as Company Petition No.1340/I&BP/NCLT/MB/MAH/2017. By order dated 04.10.2017 Tribunal admitted the said petition and appointed Shri. Martin S. K. Golla as the interim resolution professional to initiate insolvency resolution process on the corporate debtor i.e. the petitioner.

5. The interim resolution professional made a public announcement on 17.10.2017drawing the attention of the creditors of the petitioner about the order dated 04.10.2017 passed by the Tribunal ordering commencement of corporate insolvency resolution process against the petitioner. Creditors were called upon to submit proof of their claims to the interim resolution professional. Be it stated that the said public announcement was made under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (briefly "the Regulations" hereinafter).

6. It is stated that Shri. Aahad Karim Jagmagia, one of the creditors of the petitioner expressed interest in submitting resolution plan for revival of the petitioner. Eventually, Shri. Aahad Karim Jagmagia (referred to as "the resolution applicant" hereinafter) submitted a resolution plan seeking to take over the petitioner for the purpose of reviving it.

7. In the meanwhile, Tribunal passed order dated 28.01.2019 substituting Shri. Naren Sheth in place of Shri. Martin S. K. Golla who was earlier appointed as the interim resolution professional. Shri. Naren Sheth was appointed as the resolution professional and was directed to immediately complete the corporate insolvency resolution proceedings.

8. The resolution applicant thereafter submitted resolution plan for revival of the petitioner. In accordance with the provisions of the Code a committee of creditors was formed to evaluate the resolution plan so submitted. In the meeting of the committee of creditors held on

25.03.2019, it voted in favour of the resolution plan submitted by the resolution applicant with 90.93% of the total voting share of the committee of creditors approving the plan. One of the important features of the resolution plan was that it provided for settlement of dues of operational creditors at the rate of 5% of the principal amount only with waiver of interest, penal interest and penalty.

9. Thereafter the resolution professional Shri. Naren Sheth filed misc. application before the Tribunal under section 30(1) and (6) of the Code for sanction of the resolution plan in accordance with section 31 of the Code. The misc. application was registered as MA No.1240 of 2019. It is stated that the application was heard from time to time and was finally allowed by the Tribunal vide order dated 30.08.2019. In the said order reference was made to the service tax dues of the petitioner, particularly in the backdrop of two show cause cum demand notices dated 18.04.2015 and 13.02.2017 (01.02.2017) issued to the petitioner raising demand of service tax, interest, late fee and penalty, totalling Rs.1929.85 lakhs. Tribunal noted that the claim raised on account of service tax dues fell under the definition of operational creditors and held that the dues should be settled at par with other operational creditors under the resolution plan. It was pointed out that the resolution plan provided for settlement of dues of operational creditors at the rate of 5% of the principal amount and waiver of interest, penal interest and penalty. Noting that petitioner had contested the demand raised, it was directed that in the interest of safeguarding sustainability of the company (petitioner) and not to derail the company (petitioner) in the event of a substantial claim by the department, the liability, if any, that would crystalise would be settled at 5% of the amount

of principal dues adjudicated by the appropriate appellate authority/tribunal and in case of interest, penal interest and penalty charged by the authority that should be waived. By the said order the resolution plan as was approved by the committee of creditors was sanctioned by the Tribunal.

10. It is stated that the respondent adjudicated upon three show cause cum demand notices dated 18.04.2015, 01.02.2017 (13.02.2017) and 19.04.2018. Personal hearing granted by the respondent was attended by the resolution professional. Petitioner contended before the respondent that all the claims for and against the petitioner pertaining to the period prior to commencement of the corporate insolvency resolution process have been adequately dealt with by the Tribunal in its order dated 30.08.2019. Copy of the said order was also furnished to the respondent. At a subsequent stage petitioner informed the respondent that against the demand raised i.e. Rs.7,10,93,651.00, the liability which was contested by the petitioner stood at Rs.2,92,47,370.00. Remaining amount of Rs.4,18,46,281.00 was an admitted claim which was required to be settled at 5% in terms of the order of the Tribunal dated 30.08.2019.

11. It is further stated that before adjudication respondent had issued notices under section 87(b)(i) of the Finance Act, 1994 to branch managers of banks where the petitioner had maintained its accounts directing them to transfer the amounts held by them to the government treasury. Similar notices were issued to various debtors of the petitioner as well directing them to deposit the amounts owed by them to the petitioner directly to the account of government treasury. In the process respondent

had recovered total amount of Rs.6,23,82,214.00 on account of service tax liability of the petitioner, the break up of which has been mentioned in paragraphs 19 and 20 of the writ petition.

12. Ultimately, respondent passed the impugned order in original on 22.07.2020. The demand raised in the three show cause cum demand notices dated 18.04.2015, 01.02.2017 (13.02.2017) and 19.04.2018 were confirmed. As per the said order the total demand raised against the petitioner was quantified at Rs.7,02,20,725.00. As stated above, respondent had already recovered an amount of Rs.6,23,82,214.00. In the impugned order respondent had recorded the statement of the petitioner that petitioner is required to pay 5% of the admitted liability and thereafter 5% of the crystallized amount upon adjudication of the contested liability in terms of the resolution plan as approved by the committee of creditors and sanctioned by the Tribunal. However, there appears to be no discussion of the effect of the Tribunal's order dated 30.08.2019 on the demand raised by the respondent. However, it is seen that a copy of the impugned order dated 22.07.2020 was forwarded to the resolution professional Shri. Naren Sheth.

13. With the grievance that the impugned order in original is exfacie illegal and in complete violation of the order of the Tribunal dated 30.08.2019, present writ petition has been filed seeking the reliefs as indicated above.

14. Respondent has filed two affidavits, both through Shri. Rajesh Sanan, Commissioner of CGST and Central Excise, Mumbai Central. In

the first affidavit filed on 17.08.2020 it is stated that respondent has passed the order in original dated 22.07.2020 adjudicating three show-cause notices, namely, centralized show-cause notice dated 18.04.2015, centralized show-cause notice dated 01.02.2017 and show-cause notice dated 19.04.2018. Referring to the Tribunal's order dated 30.08.2019 it is stated that Tribunal had noted that the claim amounting to Rs.1929.85 lakhs was being contested by the corporate debtor before the authority and therefore the amount of admitted claim could not be determined until outcome of the adjudication proceeding. Therefore, the said amount of Rs.1929.85 lakhs was kept in abeyance ; however the amount that would be crystallized upon adjudication would be settled at the appropriate time. Proceeding further it is mentioned that Tribunal had held that for safeguarding sustainability of the company and not to derail the same in the event of substantial claim made by the department, the liability that would crystalize would be settled at 5% of the amount of principal dues adjudicated by the appropriate appellate authority/tribunal and interest, penal interest and penalty charged by the said authority shall be waived.

14.1. Thus, Tribunal had kept in abeyance the claim of Rs.1929.85 lakhs which was under contestation by the corporate debtor till finalization of adjudication proceeding.

14.2. Respondent had adjudicated the demand in terms of the three show-cause notices and thereafter passed the order in original dated 22.07.2020 which is in conformity with the order of the Tribunal dated 30.08.2019.

15. In the additional affidavit filed by the respondent on 29.09.2020 respondent has contended that claim of the petitioner that Tribunal had ordered that it is only required to pay an amount equivalent to 5% of the admitted liability is incorrect and misleading. Referring to paragraph 24.3.2 of the Tribunal's order it is contended that as per the said order the liability that would be crystallized would be settled at 5% of the amount of principal dues "adjusted" by the appropriate appellate authority/ tribunal.

15.1. Responding to the contention of the petitioner that respondent could not have appropriated an amount of Rs.6,23,82,214.00, it is stated that respondent had already appropriated an amount of Rs.6,56,73,337.00 which is in conformity with the Tribunal's order that claim of the department would be settled at 5% of the amount of principal dues after "adjustment" of dues by the appropriate authority.

15.2. In so far the question of refund is concerned, it is contended that petitioner has not applied for any refund under the provisions of the Finance Act, 1994 to the concerned jurisdictional authority. Respondent therefore submits that there is no merit in the writ petition which should be dismissed.

16. Mr. Arsiwala, learned counsel for the petitioner has elaborately referred to the scheme of the Code and submits that the Code is a major departure from the erstwhile legal framework applicable to liquidation of insolvency companies. Under the Code the focus is on revival of an insolvent company rather than liquidating it. It is in that context the

corporate insolvency resolution process has to be understood and appreciated. Liquidation of the corporate debtor is ordered only upon failure of the corporate insolvency resolution process. Learned counsel has explained the procedural aspect of corporate insolvency resolution process and submits that a resolution plan must have the approval of the committee of creditors by a voting share of 66 percent in its favour. In the present case the resolution plan submitted by the resolution applicant had the approval of the committee of creditors by a voting share of 90.93 percent in its favour. The resolution plan provided settlement of dues of operational creditors at the rate of 5% of the principal amount and waiver of interest, penal interest and penalties.

16.1. Petitioner was served with three show-cause notices. Out of the amount covered by the show-cause notices claim amount of Rs.1929.85 lakhs was contested by the corporate debtor (petitioner). Since the amount of admitted claim could not be determined until outcome of the proceedings, the said amount of Rs.1929.85 lakhs was kept in abeyance. Once adjudicated upon, it would be settled at the appropriate time. He submits that by the order dated 30.08.2019 Tribunal held that in the interest of safeguarding sustainability of the company (petitioner) so as not to derail the company in the event of substantial claim by the department the liability that would crystallize upon adjudication would be settled at 5% of the principal dues and interest, penal interest and penalty would be waived. Mr. Arsiwala submits that under section 31 of the Code the said order of the Tribunal is binding on all concerned including the respondent.

16.2. Adverting to the three show-cause notices and the impugned

order, he submits that the total demand covered by the three show-cause notices and determined upon adjudication stood at Rs.7,02,20,725.00. This order was passed under section 73 of the Finance Act, 1994. However, before passing the impugned order in original respondent had already collected an amount of Rs.6,23,82,214.00 by invoking provisions of section 87 of the Finance Act, 1994 which is absolutely illegal. From the impugned order it is seen that the adjudicating authority had directed for appropriation of the said amount against the adjudicated liability of Rs.7,02,20,725.00. This is wholly untenable because firstly the recovery itself was bad in law and secondly such order for appropriation is in violation of the Tribunal's order. He submits that though the adjudicating authority was fully aware of the order of the Tribunal dated 30.08.2019 he has not abided by the same. As per the Tribunal's order read with the resolution plan respondent is entitled to recover 5% of the principal adjudicated amount i.e. 5% of Rs.7,02,20,725.00 which works out to Rs.35,11,036.00. Beyond this amount respondent cannot make any realization. All authorities are bound by the order of the Tribunal under the Code. He therefore submits that respondent cannot retain the amount of Rs.6,23,82,214.00 collected from the petitioner under section 87 of Chapter V of the Finance Act, 1994. All that respondent can retain is 5% of the principal adjudicated amount i.e. Rs.35,11,036.00 and thereafter refund the balance amount to the petitioner. Otherwise it would amount to unjust enrichment of the respondent holding money of the petitioner beyond what is permissible under the law. In support of his submissions, learned counsel for the petitioner has placed reliance on a number of decisions. He has also filed written submissions.

17. *Per contra,* Mr. Jetly, learned senior counsel for the respondent submits that there is no illegality in the impugned order in original. Respondent had rightly passed the said order adjudicating the service tax dues of the petitioner pursuant to three show-cause notices dated 18.04.2015, 01.02.2017 (13.02.2017) and 19.04.2018. Following the said order service tax dues of the petitioner has crystallized which is Rs.7,02,20,725.00. Respondent has the power to make recovery under section 87 of the Finance Act, 1994. Accordingly, various recoveries were made which amounted to total of Rs.6,23,82,214.00 which is part of the service tax dues of the petitioner. Therefore respondent has every right to appropriate the said amount.

17.1. On a query by the Court Mr. Jelty submits that the resolution plan and the order of the Tribunal dated 30.08.2019 have to be read and understood in a practical and pragmatic manner. If so understood, 5% of the principal amount would mean the crystallized dues less the amount already collected. It is from this adjusted amount that 5% is required to be calculated and realized. Therefore, there is no question of respondent making any refund to the petitioner. On the contrary, it is the petitioner who has to make payment of 5% of the adjusted amount (Rs.7,02,20,725.00 less Rs.6,23,82,214.00).

17.2. Finally Mr. Jetly submits that the principle of unjust enrichment cannot be applied against the State. There cannot be any unjust enrichment by the State. He therefore submits that the writ petition filed by the petitioner is completely misplaced and is as such liable to be dismissed.

18. In his reply submission Mr. Arsiwala has drawn the attention of the Court to the additional affidavit filed by the respondent and submits that respondent has completely misconstrued the order of the Tribunal because the word "adjudicated" used by the Tribunal in paragraph 24.3.2 of its order has been wrongly construed as "adjusted". Because of this misconstruction and incorrect application of the word used by the Tribunal in its order dated 30.08.2019 that such a fallacious submission has been made by Mr. Jetly that 5% of the dues would mean 5% of the amount of principal dues after adjustment of dues recovered by the appropriate authority. Further, relying on case laws he submits that principle of unjust enrichment is equally applicable to the State.

19. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the materials on record and the judgments cited at the bar.

20. Before examining the rival contentions, it would be apposite to advert to the relevant provisions of the Insolvency and Bankruptcy Code, 2016 (already referred to as "the Code" herein-above).

21. As per the statement of objects and reasons which preceded the bill while being introduced in the parliament, there was no single law in India dealing with insolvency and bankruptcy. There were several laws dealing with different aspects and providing for creation of multiple fora. Existing framework for insolvency and bankruptcy was found to be inadequate and ineffective resulting in undue delays in resolution. Therefore, the said legislation was proposed. Objective of the Code is to

consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund and matters connected therewith or incidental thereto. It was hoped that an effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve *Ease of Doing Business* and facilitate more investments leading to higher economic growth and development. The Code seeks to provide the National Company Law Tribunal and Debts Recovery Tribunal as the adjudicating authorities for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects besides providing for an Insolvency and Bankruptcy Board of India for regulation of insolvency professionals etc.. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code.

21.1. From the above, it is evident that focus of the Code is resolution of insolvency and bankruptcy. In other words the thrust is for revival of such corporate persons, partnership firms and individuals facing insolvency and bankruptcy rather than liquidation.

22. Preamble to the Code says that it is an act to consolidate and amend the laws relating to reorganization and insolvency resolution of

corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

22.1. The preamble of the Code was examined by the Supreme Court in the case of ***Swiss Ribbons Pvt. Ltd. Vs. Union of India, (2019) 4 SCC 17.*** It was held that the preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time bound manner, the value of the assets of such persons will deplete. Therefore, the maximization of the value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately the interests of all stakeholders are looked after as the

corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full and shareholders/investors are able to maximise their investments. Timely resolution of a corporate debtor who is in the red by an effective legal framework would go a long way to support the development of credit markets. What is interesting to note is that the preamble does not in any manner refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. While observing as above, Supreme Court referred to its decision in ***Arcelor Mittal (India) (P) Ltd. Vs. Satish Kumar Gupta, (2019) 2 SCC 1.*** Reiterating the above, Supreme Court in ***Committee of Creditors of Essar Steel India Limited -Vs- Satish Kumar Gupta, 2019 SCC Online SC 1478,*** observed that the preamble of the Code speak of maximization of the value of assets of corporate debtors and balancing of the interest of all stakeholders. A key objective of the Code is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution process.

23. Section 3 deals with definitions of words or expressions used in the Code. Sub section (6) of section 3 defines "claim" to mean amongst

others a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means right to remedy for breach of contract, if such breach gives rise to a right to payment. "Creditor" is defined under section 3(10) to mean any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder. Likewise, "debt" is defined under section 3(11) to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and an operational debt. "Insolvency professional" has been defined under sub section (19) of section 3 to mean a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Insolvency and Bankruptcy Board of India as an insolvency professional under section 207.

24. Part II of the Code is concerned with insolvency resolution and liquidation for corporate persons. Section 5 deals with definitions of words and expressions appearing in this part. "Adjudicating authority" under sub section (1) has been defined to mean for this part National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. Sub section (11) of section 5 defines "initiation date" to mean the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the adjudicating authority for initiating corporate insolvency resolution process. "Insolvency commencement date" has been defined under sub section (12) of section 5 to mean the date of admission of an application for initiating corporate insolvency resolution process by the adjudicating authority under sections 7, 9 or 10, as the case may be. Sub section (20) of section 5 defines

"operational creditor" to mean a person to whom an operational debt is owned and includes any person to whom such debt has been legally assigned or transferred. "Operational debt" is defined under sub section (21) of section 5 to mean a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. Section 5(25) defines "resolution applicant" to mean a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under section 25(2)(h). "Resolution plan" has been defined to mean a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II [sub section (26) of section 5]. "Resolution professional" for the purpose of Part II has been defined under section 5 (27) to mean an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.

25. Chapter II of Part II deals with corporate insolvency resolution process. Section 6 forming part of Chapter II says that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor. While section 7 deals with initiation of corporate insolvency resolution process by financial creditor, section 9 deals with initiation of such a process by operational creditor. On the other hand section 10 deals with initiation of corporate insolvency resolution process by the corporate debtor itself. Whatever be the mode of initiation of

corporate insolvency resolution process, the procedure prescribed under section 13 would be equally applicable. As per sub section (1) the adjudicating authority, after admission of the application under section 7 or section 9 or section 10 shall by an order declare a moratorium, cause a public announcement of the initiation of corporate insolvency resolution process and call for submission of claims under section 15 and appoint an interim resolution professional. As per section 14(1), on and from the insolvency commencement date the adjudicating authority shall by an order declare moratorium prohibiting institution or continuation of suits or proceedings against the corporate debtor including execution of any judgment and decree ; transferring, encumbering, alienating or disposing of any asset or any legal right or interest therein by the corporate debtor; recovery of any property which is in occupation or possession of the corporate debtor etc.. We may also mention that time limit is fixed for completion of insolvency resolution process which is one hundred and eighty days from the date of admission of the application to initiate such process.

26. Public announcement of corporate insolvency resolution process is dealt with in section 15. Section 16 deals with appointment of interim resolution professional by the adjudicating authority. While section 17 deals with management of affairs of the corporate debtor by the interim resolution professional, duties of interim resolution professional are laid down in section 18.

27. Section 21 of the Code is important. It deals with committee of creditors. As per sub section (1) the interim resolution professional shall

after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors. As per sub section (2) the committee of creditors shall comprise all financial creditors of the corporate debtor.

28. Section 22 deals with appointment of resolution professional. Sub section (1) says that the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors and as per sub section (2) the committee of creditors may, in its first meeting, by a majority vote of not less than 66% of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as the resolution professional or to replace the interim resolution professional by another interim resolution professional. The resolution professional so appointed shall conduct the entire corporate insolvency process and manage operations of the corporate debtor during the process period. Section 25 lays down the duties of resolution professional which includes inviting prospective resolution applicants to submit a resolution plan or plans.

28.1. Section 30 provides for submission of resolution plan. As per sub section (1) a resolution applicant may submit a resolution plan to the resolution professional. Under sub section (2) the resolution professional shall examine such resolution plan whereafter he shall present the same to the committee of creditors for its approval under sub section (3). Sub section (4) provides for approval of the resolution plan by the committee of creditors by a vote of not less than 66% of voting share of the financial creditors, after considering its feasibility and viability etc. It shall also

consider the manner of distribution proposed, order of priority amongst creditors etc. Once the resolution plan is approved by the committee of creditors, the resolution professional under sub section (6) shall submit the same to the adjudicating authority.

29. Section 31 deals with approval of resolution plan. Sub section (1) thereof is relevant and the same is extracted hereunder :-

> "**31. Approval of resolution plan.** - (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:
>
> Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."

29.1. From the above, it is evident that if the adjudicating authority is satisfied that the resolution plan as approved by the committee of creditors under sub section (4) of section 30 meets the requirements of sub section (2) of section 30, it shall by order approve the resolution plan. Once such approval is granted by the adjudicating authority, it shall be binding on the corporate debtor and its employees, members, creditors

(including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed), guarantors and other stakeholders involved in the resolution plan. As per the proviso, before passing an order under section 31 the adjudicating authority has to satisfy itself that the resolution plan has provisions for its effective implementation.

30. Section 238 of the Code provides that provisions of the Code shall have overriding effect. Section 238 reads as under :-

> "**238. Provisions of this Code to override other laws.** - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time in force or any instrument having effect by virtue of any such law."

31. From a conjoint reading of section 31(1) and section 238 of the Code, it is quite evident that the provisions of the Code shall have overriding effect. The *non obstante* clause in section 238 and the use of the expression "shall" in sub section (1) of section 31 makes it abundantly clear that a resolution plan approved by the committee of creditors and further approved (or sanctioned) by the adjudicating authority would be binding on all creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed.

32. Having broadly surveyed the relevant provisions of the Code,

we may now deal with the resolution plan as approved by the committee of creditors and the order of the adjudicating authority (Tribunal) dated 30.08.2019.

33. It may be mentioned that the respondent herein as operational creditor had submitted proof of claim against the petitioner before the resolution professional on 19.03.2018 in respect of the corporate insolvency resolution process. Referring to two show-cause notices dated 18.04.2015 and 13.02.2017 (01.02.2017), it was mentioned that the total amount of claim of the respondent against the petitioner was Rs.19,29,85,804.00 which included applicable interest and penalty as on insolvency commencement date. It was however mentioned that the said claim was being contested by the corporate debtor and was pending.

34. The resolution plan deals with various aspects including dues of operational creditors at clause 7.3 under the heading "details of dues of operational creditors". Clause 7.3(ii) deals with "other statutory dues" including service tax payable. It is mentioned that claim amounting to Rs.1929.86 lakhs was received from the service tax department. The said claim was being contested by the corporate debtor and was awaiting adjudication. Amount of claim could not be determined until the outcome of the such proceeding. Hence, the said amount of Rs.1929.86 lakhs was kept in abeyance. However, the amount that would come to be adjudicated, if any, would be settled at the appropriate time as per provisions of the Code. Being a contingent liability this has been dealt with separately under the resolution plan at clause 16.3 dealing with disputed statutory dues.

34.1. It may be mentioned that certain undisputed statutory dues are shown in clause 16.1 which includes an amount of Rs.3,20,55,000.00 on account of service tax dues. As noted above clause 16.3 says that there were some disputed statutory liabilities in respect of service tax, income tax and customs duty which was being strongly contested by the petitioner before various fora. Clause 16.3.2 deals with contingent dues arising out of service tax. Service tax dues arose out of two show-cause cum demand notices, one dated 18.04.2015 and the other dated 13.02.2017 (01.02.2017). The show-cause cum demand notice dated 18.04.2015 raised demand of Rs.524.72 lakhs out of which petitioner had accepted service tax liability to the tune of Rs.320.55 lakhs. Against the said show-cause cum demand notice service tax department had filed its claim under various heads, such as, service tax, interest calculated upto 04.10.2017 etc. totalling Rs.1754.04 lakhs.

34.2. The second show cause cum demand notice raised demand of Rs.47.24 lakhs. Against this show-cause notice the service tax department had filed its claim under various heads including service tax and interest calculated upto 04.10.2017 etc. total amounting to Rs.175.82 lakhs. It is stated that total demand raised by the service tax department under both the show-cause cum demand notices was Rs.1929.85 lakhs. It is noted that adjudication of the show-cause cum demand notices were pending. Thereafter the resolution plan mentions as follows :-

> "The aforesaid claim falls under the definition of Operational Creditors and the said dues shall be settled at par with other Operational Creditors under this Resolution Plan. The Resolution plan provides for settlement of dues of

> Operational Creditors @ 5% of principal amount and waiver of interest, penal interest and penalties. Therefore, it is specifically provided that the Service Tax liability under both SCN dated 18.04.2015 of Rs.528 Lacs out of which a service tax liability Rs.320.55 Lacs has been provided by GGS in its books of accounts as on cut-off date and the same has been already addressed and settled under the settlement of dues of Operational Creditors as per Clause No.11 of the Resolution Plan.
>
> The said claim amounting to Rs.1929.85 Lacs are being contested by the Corporate Debtor before the Joint/Additional Commissioner and Commissioner, Mumbai Central GST Commissionerate and the amount of admitted claim cannot be determined until the outcome of the said proceedings. Hence, the said amount of Rs.1929.85 Lacs has been kept in abeyance. However, the amount that will come to be adjudicated, if any, will be settled at the appropriate time.
>
> In the interest of safeguarding the sustainability of the Company and so as to not derail the company in the event of a substantial claim by the said departments, the liability, if any, that will crystalized will be settled at 5% of the amount of principal dues adjudicated by the appropriate appellate authorities/tribunals and in case of interest, penal interest, penalties charged by the said authorities shall be waived."

34.3. Thus, the resolution plan mentions that the claim of service tax dues falls under the definition of operational creditors. Such dues should be settled at par with other operational creditors under the resolution plan which provides for settlement of dues of operational creditors at the rate of 5% of the principal amount with waiver of interest, penal interest and penalties. The claim amounting to Rs.1929.85 lakhs was

being contested by the corporate debtor before the concerned authority and the amount of admitted claim could not be determined until the outcome of the said proceeding. Therefore, the said amount of Rs.1929.85 lakhs was kept in abeyance. However, the amount that would come to be determined upon adjudication would be settled at the appropriate time. The resolution plan highlighted that in the interest of safeguarding the sustainability of the company and so as not to derail the same in the event of a substantial claim by the department, the liability, if any, that would crystallize would be settled at 5% of the amount of the principal dues adjudicated by the appropriate authority and interest, penal interest as well as penalty that may be charged shall be waived.

35. We have already noted that the resolution plan was approved by the committee of creditors with 90.93 percent of votes in its favour much in excess of the requirement of 66 percent. Thereafter the same was filed before the Tribunal by the resolution professional for approval/ sanction of the same. After discussing the salient features of the resolution plan, Tribunal by order dated 30.08.2019 sanctioned the same. In this connection reliance was placed on a decision of the Supreme Court in ***K. Sashidhar Vs. Indian Overseas Bank***, ***2019 SCC Online SC 257***. Tribunal noted that adjudicating authority is not required to go into the merit or reasoning of the decision taken by the committee of creditors for approval or rejection of a resolution plan. The only benchmark which is required to be followed is as to whether the plan has been approved by the requisite percentage of voting of the committee of creditors or not. Commercial wisdom of the committee of creditors is not to be interfered with. In so far the instant case is concerned, Tribunal held that approval of the resolution

plan by the committee of creditors is to be accepted by the adjudicating authority if 66% voting share approves the said plan. Tribunal referred to section 238 of the Code and held that provisions of the Code shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force. Though the respective tax authorities would be at liberty to take such decision as per law but that should not be against the spirit or provisions of the Code. The resolution plan is binding on the corporate debtor and other stakeholders so that revival of the debtor company comes into force with immediate effect.

36. Having discussed and analyzed the resolution plan and the sanctioning order of the Tribunal, we may now advert to the order in original dated 22.07.2020 passed by the Commissioner of CGST and Central Excise, Mumbai Central. The said order in original was passed upon adjudication of three show-cause cum demand notices dated 18.04.2015, 01.02.2017 (13.02.2017) and 19.04.2018. It may be mentioned that even before issuance of the first show-cause cum demand notice dated 18.04.2015, respondent had initiated recovery proceedings under section 87(b)(i) of the Finance Act, 1994 for recovery of service tax dues by issuing letter dated 18.04.2013 calling upon the bankers and debtors to deposit the amounts of the petitioner or due to the petitioner and available with them to the government account on behalf of the noticee (petitioner). Pursuant to such proceedings various debtors made payments from time to time.

36.1. Show-cause cum demand notice dated 18.04.2015 covered the period from 01.06.2010 to 31.03.2014; show-cause cum demand notice

dated 13.02.2017 (01.02.2017) covered the period from 01.04.2014 to 31.03.2015 and show-cause notice dated 19.04.2018 covered the period from 01.04.2015 to 31.03.2016.

36.2. In paragraphs 2.1 and 2.2 the adjudicating authority made a summary of the demand covered by the three show-cause notices in the following manner :-

i)	Total demand covered by the three show-cause notices	:	Rs.7,10,93,651.00
ii)	Amount already paid (recovered under section 87(b)(i))	:	Rs.6,23,82,214.00
iii)	Claim filed by the department with the resolution professional	:	Rs.1929.85 lakhs
iv)	Admitted liability of service tax	:	Rs.4,18,46,281.00
v)	Contested liability	:	Rs.2,92,47,370.00

36.3. Submission of the petitioner was recorded by the adjudicating authority. Petitioner had submitted that it is required to pay an amount equivalent to 5% of the admitted liability. Regarding the amount contested by the petitioner, it was submitted that the final payable amount would be decided upon completion of the adjudication proceeding whereafter petitioner would be required to pay 5% of the crystallized amount with interest, penalty etc. being waived off. After hearing the matter, including granting personal hearing to Shri. Naren Sheth, the resolution professional, the adjudicating authority summarized the total demand against the petitioner covered by the three show-cause notices at Rs.7,02,20,725.00. This slight reduction in the quantum of total amount was on account of adjustment for utilization of irregular cenvat credit. Initially the amount of

cenvat credit availed of was Rs.1,31,51,284.00. After deduction of Rs.8,72,926.00 from the said amount on account of non-reversal of cenvat credit, the amount due under the said heading i.e. inadmissible cenvat credit became Rs.1,22,78,358.00 which led to reduction of the total demand from Rs.7,10,93,651.00 to Rs.7,02,20,725.00.

37. While adjudication of the show-cause notices to arrive at the total service tax dues may be the requirement of law and in conformity with the resolution plan because only upon crystallization of the amount due, the amount that the petitioner would be liable to pay at the rate of 5% could be arrived at. However, what is disconcerting is the order of the respondent for appropriation of the amounts already realized/recovered from the bankers and debtors of the petitioner.

38. Though learned counsel for the petitioner has assailed recoveries made by the respondent by invoking the provisions of section 87(b)(i) of the Finance Act, 1994, the same may not detain us in view of what we have discussed above and on the basis of which the conclusions that may be reached. It is true that many High Courts of the country have held in unequivocal terms that exercise of power under section 87(b)(i) of the Finance Act, 1994 without determination of the amount payable by a person under section 73 thereof would amount to putting the cart before the horse. It has been held that the expression "amount payable by a person" appearing in section 87 of the Finance Act, 1994 would have to be

considered in the background of section 73 inasmuch as show cause notice issued under section 73 would have to be adjudicated upon and thereafter the amount payable is to be determined, otherwise it would be in violation of the principle of *audi alteram partem*. The jurisdictional authority would be entitled to recover the amount payable from the person concerned only after adjudication has been done.

38.1. In the present case, what we have noticed is that section 87(b)(i) was invoked as early as on 18.04.2013 whereas the first show-cause cum demand notice was issued to the petitioner only on 18.04.2015. While invocation of section 87(b)(i) and recoveries made thereunder are highly questionable, it may not be necessary for us to delve into the legality or illegality of the same in the present proceeding because of the binding nature of the resolution plan as approved by the committee of creditors and sanctioned by the Tribunal. However, attempt by the respondent for appropriation of the amount recovered through such questionable means in the face of the resolution place so approved and sanctioned is a live issue and hence needs to be adverted to.

38.2. In ***K. Sashidhar (supra)***, Supreme Court examined the role of the committee of creditors. If the committee of creditors had approved the

resolution plan by requisite percentage of voting share, then as per section 30(6) of the Code, it is imperative for the resolution professional to submit the same to the adjudicating authority. On receipt of such a proposal, the adjudicating authority is required to satisfy itself that the resolution plan as approved by the committee of creditors meets the requirements of section 30(2). No more and no less. The legislature has not endowed the adjudicating authority with the jurisdiction or authority to analyze or evaluate the commercial decision of the committee of creditors. From the legislative history and the background in which the Code has been enacted, it is noticed that the commercial wisdom of the committee of creditors has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. The opinion on the subject matter expressed by the financial creditors after due deliberations in the committee of creditors' meetings through voting, as per voting shares, is a collective business decision. The legislature consciously has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made

nonjusticiable.

38.3. This has been reiterated by the Supreme Court in ***Committee of Creditors of Essar Steel India Limited (supra)***, wherein the Supreme Court highlighted that what is important is that it is the commercial wisdom of the majority of creditors in the requisite percentage which is to determine through negotiation with the prospective resolution applicant as to how and in what manner the corporate resolution process is to take place.

38.4. Supreme Court in the said case further held that the Code provides for limited judicial review which can in no circumstance trespass upon a business decision of the majority of the committee of creditors. Examination by the adjudicating authority has to be within the four corners of section 30(2) of the Code. In this connection, Supreme Court referred to the views expressed by it in ***K. Sashidhar (supra)***.

39. Following the above, we have no hesitation to hold that once a resolution plan is approved by the committee of creditors by the requisite percentage of voting and the same is thereafter sanctioned by the adjudicating authority (Tribunal in this case), the same is binding on all the stakeholders including the operational creditors. As a matter of fact,

respondent herein as an operational creditor had lodged its claim before the resolution professional. The resolution plan provides for settlement of service tax dues at 5% of the amount of principal dues that would be crystallized upon adjudication, further providing for waiver of interest, penal interest and penalty that may be charged. As we have held above, respondent may be justified in proceeding with the show-cause cum demand notices because that has resulted in crystallization of the total amount of service tax dues i.e., the principal amount payable by the petitioner which is Rs.7,02,20,725.00. The amount of service tax dues having thus crystallized as above, the resolution plan says that the same would be settled at 5% of the principal dues adjudicated. The word used is "adjudicated" and not "adjusted" as sought to be read and applied by the respondent. Therefore, the amount that the petitioner would be required to pay is 5% of Rs.7,02,20,725.00. In so far the recovered amount i.e. Rs.6,23,82,214.00 is concerned, the same is part of the total demand determined i.e. Rs.7,02,20,725.00. After retaining 5% of Rs.7,02,20,725.00, respondent would be duty bound to refund the balance amount to the petitioner which will not only be in terms of the resolution plan and thus in accordance with law but will also be a step in the right direction for revival of the petitioner which is the key objective of the Code.

There is no question of retaining the said amount. Submissions made by Mr. Jetly that the amount already recovered should be allowed to be appropriated by the respondent and that petitioner should pay 5% of the balance of the principal dues i.e. 5% of Rs.7,02,20,725.00 less Rs.6,23,82,214.00 is without any substance and liable to be rejected. It is accordingly rejected.

40. It cannot be argued that the State having recovered certain money even though such recovery may be illegal or questionable cannot be compelled to refund the same. Such a contention is clearly untenable, notwithstanding the question as to whether it is a case of unjust enrichment or not. Once it is determined that the State is holding money beyond what is legally permissible, it has a binding duty to refund the same. A Full Bench of this Court in ***New India Industries Ltd. Vs. Union of India, 1990 Mh.L.J. 5***, held that an application under Article 226 of the Constitution of India would lie for enforcing the obligation of the State to refund and/or return the money collected towards illegal tax or dues. In that case, this Court held that it would be abhorrent to the principles of justice if the State is permitted to retain money unjustly gained or recovered. The same would have to be be refunded. The Full Bench also negated a contention that in a case of tax refundable, the State should be allowed to retain the same with

the discretion of how to benefit those who has borne the burden.

41. Thus, having considered all aspects of the matter, we have no hesitation to hold that principal service tax dues quantified by the respondent vide order in original dated 22.07.2020 has to be settled at the rate of 5%, in other words 5% of Rs.7,02,20,725.00. The directions of the respondent for appropriation of the amount of Rs.6,23,82,214.00 already recovered cannot be sustained. Respondent shall retain 5% of Rs.7,02,20,725.00 from the above amount recovered and thereafter refund the balance amount to the petitioner. To that extent, impugned order in original dated 22.07.2020 is interfered with. Refund shall be made within a period of three months from the date of receipt of a copy of this judgment and order.

42. Writ Petition is accordingly allowed. However, there shall no order as to cost.

43. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

ABHAY AHUJA, J UJJAL BHUYAN, J