NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1062 of 2024

(Arising out of Order dated 19.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Division Bench Court-1 in IA/ 1111(AHM)/2023 in CP(IB) 387 of 2020)

IN THE MATTER OF:

Employees' Provident Fund
Organization Regional Office, Vashi, Navi Mumbai
Through Regional PF Commissioner-II (Legal) …Appellant

Versus

Jaykumar Pesumal Arlani
Resolution Professional of
M/s. Decent Laminates Pvt. Ltd. …Respondent

Present:

For Appellant : Mr. Sandeep Vishnu, Advocate.
Appearance not marked.

For Respondents : Mr. Vashisht, Advocate for R-1.

With
Company Appeal (AT) (Insolvency) No.1065 of 2024
& I.A. No.3665 of 2024

(Arising out of Order dated 22.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai bench, Court-II in IA No.743 of 2023 in C.P.(IB)3484(MB) 2019)

IN THE MATTER OF:

Employees' Provident Fund
Organization Regional Office, Vashi, Navi Mumbai
Through Regional PF Commissioner-II (Legal) …Appellant

Versus

Sanjay Kumar Lalit,
Resolution Professional of
Apollo Soyuz Electricals P. Ltd. & Anr …Respondents

Present:

For Appellants : Mr. Sandeep Vishnu, Advocate.
Appearance not marked.

For Respondents : Mr. Malak Bhatt, Ms. Neeha Nagpal, Mr. Shreyansh Chopra, Advocates for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) raising common questions of facts and law, have been heard together and are being decided by this common judgment.

2. Company Appeal (AT) (Ins.) No.1062 of 2024 has been filed challenging order dated 19.10.2023 passed by National Company Law Tribunal, Ahmedabad, Division Bench, Court-1 in IA No.1111(AHM) 2023 filed by the Appellant in CP(IB) 387 of 2020. By the impugned order IA filed by the Applicant/ Appellant has been rejected. Aggrieved by which order this Appeal has been filed.

3. Company Appeal (AT) (Ins.) No.1065 of 2024 has been filed challenging order dated 22.08.2023 passed by National Company Law Tribunal, Mumbai Bench, Court-II in IA No.743/2023 in C.P.(IB)/3484(MB) 2019. By the impugned order, Application – IA No.743 of 2023 filed by the Applicant/ Appellant has been rejected. Aggrieved by which order this Appeal has been filed.

4. We need to notice brief background facts giving rise to these two Appeal(s):

Company Appeal (AT) (Ins.) No.1062 of 2024

(i) The Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor – Decent Laminate Pvt. Ltd.

Commenced after an order dated 03.05.2021 passed by NCLT, Ahmedabad Bench. The Appellant vide email dated 11.06.2021 requested the Resolution Professional ("**RP**") to forward the copy of NCLT order along with other details. On 16.06.2021, the RP replied forwarding the copy of NCLT order dated 03.05.2021.

(ii) The Appellant initiated proceedings under Section 7A of the Employees' Provident Fund & Misc. Provisions Act, 1952 (for short **"EPF & MP Act"**). On 22.06.2022, summon was issued under Section 7A with copy to Interim Resolution Professional (**"IRP"**). The IRP appeared and informed that he does not have relevant records. On 09.05.2023, summons were again issued to the Establishment under Section 14B & 7Q of the EPF & MP Act to show cause as to why damages under Section 14B and interest under Section 7Q of the Act may not be levied and recovered.

(iii) On 11.05.2023, the claim of Rs.76,09,494/- was submitted before the IRP. On 16.08.2023, order was passed under Section 14B and 7Q. On 31.08.2023, a revised claim of Rs.1,58,90,685/- was submitted. On 05.09.2023, RP replied that claim cannot be considered as the Plan has been approved by the Committee of Creditors ("**CoC**")

(iv) An IA No.1111 of 2023 was filed by the Appellant praying for direction to the IRP to admit the total claim of

Rs.2,35,00,179/-. The Adjudicating Authority heard the Applicant/ Appellant as well as the RP and by the impugned order rejected the Application. The Adjudicating Authority noticed in the order that order under Section 7A, 14B and 7Q was passed only on 11.08.2023 and the Resolution Plan has been approved by the CoC long back. It was held that IBC (Insolvency and Bankruptcy Code, 2016) is a time bound process and the claim, which was submitted by the Applicant at a belated stage, after the approval of Resolution Plan was rightly rejected by the RP. With the above observation the Adjudicating Authority rejected IA No.1111 of 2023. Aggrieved by which order this Appeal has been filed.

Company Appeal (AT) (Ins.) No.1065 of 2024

(i) CIRP against the Corporate Debtor – Apollo Soyuz Electricals P. Ltd. commenced on 12.07.2021. On 18.10.2021, IRP wrote to the Appellant to submit their PF claim and other related information with proof.

(ii) Inquiry under Section 7A was initiated against the Establishment in the year 2019. An order dated 29.8.2022 was passed by the Appellant under Section 7A for an amount of Rs.10,89,938/-. IRP sent a letter dated 12.07.2022 to the Appellant informing that Resolution Plan of the CD has been approved by the CoC on 23.06.2022 and RP is prohibited to accept any claim from any creditor, including the Appellant.

(iii) The Appellant filed IA No.743 of 2023 on 30.01.2023seeking a direction to the RP to accept and pay the claim of Rs.10,89,938/- towards PF dues. During pendency of IA No.743 of 2023, the NCLT Mumbai Bench passed order dated 13.04.2023 in IA No.1785 of 2022 approving the Resolution Plan in the CIRP. The Appellant has also filed an Appeal, challenging the order dated 13.04.2023 in this Tribunal. IA No.743 of 2023 was heard and rejected by order dated 22.08.2023 passed by the Adjudicating Authority. The Adjudicating Authority took the view that order under which amount of Rs.10,89,938/- is claimed was passed by EPFO on 29.08.2022, i.e., during moratorium period. It was also noticed that Resolution Plan has been approved by the CoC on 01.06.2022 and prior to approval of Resolution Plan, no claim by the EPFO was lodged with the RP. It was held that order dated 29.8.2022 was hit by Section 14 of the IBC. The Adjudicating Authority held that at this stage, no direction can be issued to the RP to entertain or pay the claim of Rs.10,89,938/-. Consequently, IA No.743 of 2023 was rejected.

5. We have heard learned Counsel for the parties. The submissions, which have been advanced by learned Counsel for the Appellant challenging the impugned order being common submissions, we notice the submissions, as submission of the Appellant.

6. Learned Counsel for the Appellant submitted that despite imposition of moratorium under Section 14 of the IBC, proceeding under Section 7A of the EPF & MP Act can still continue. It is submitted that moratorium under Section 14 of the IBC, does not prevent proceedings under Section 7A of the EPF & MP Act. Learned Counsel for the Appellant has relied on judgments of the Hon'ble Supreme Court of India in ***S.V. Kindaskar v. V.M. Deshpande – AIR (1972) SC 878*** and ***Sundresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs, (2023) 1 SCC 472*** to support his submission that moratorium under Section 14 and 33(5) of the IBC, do not bar for determination of quantum of dues or taxes or other levies and the embargo is only against its enforcement. It is submitted that in the proceedings under Section 7A, the Establishment delayed to give its reply and it was the CD, who is to blame for delay in passing order under Section 7A. The CD at no point of time in proceedings under Section 7A has raised objection to inquiry proceedings and always took time to produce the relevant records. The assessment under Section 7A related to period prior to CIRP initiation. By rejection of the Application filed by the Appellant, prejudice has been caused to the Appellant, since its claim has not been accepted. PF dues, inclusive of damages and interest, are excluded from the liquidation estate in light of Section 36(4)(a)(iii) of the IBC. The order rejecting the claim is in contravention of the law laid down by NCLAT and Hon'ble Supreme Court of India in ***Tourism Finance Corporation of India & Ors. vs. Rainbow Papers Ltd. & Ors.***, where it was held that no provisions of the EPF & MP Act is not in

conflict of IBC. The priority of PF dues operates against all other debts including secured and unsecured creditors.

7. Learned Counsel appearing for the Respondent refuting the submissions of learned Counsel for the Appellant(s) submits that no claim was filed by the Appellant before the Plan was approved by the CoC and the assessment proceedings were carried out and final order under Section 7A of the EPF & MP Act was passed during the CIRP is in violation of the moratorium. When assessment order has been passed post moratorium, it is bad in law and on the basis of said assessment, no claim can be admitted in the CIRP. Learned Counsel for the Respondent has also placed reliance on the judgment of the Hon'ble Supreme Court of India in **Sundresh Bhatt, Liquidator of ABG Shipyard** (supra). It is submitted that post approval of Resolution Plan by the CoC, no claim can be considered by the RP. In both the Appeal(s), the claims were filed by the Appellant(s) subsequent to the approval of Plan by the CoC and further assessment orders were made subsequent to imposition of moratorium. Hence, the said claims cannot be accepted.

8. We have considered the submissions of learned Counsel for the parties and have perused the records.

9. From the submissions of learned Counsel for the parties, following issues arise for consideration:

(1) Whether after imposition of moratorium under Section 14 of the IBC, assessment proceedings can be carried on by the

EPFO under Section 7A, 14B and 7Q of the EPF & MP Act, 1952.

(2) Whether any claim on the basis of assessment, subsequent to imposition of moratorium, can be admitted in the CIRP.

(3) Whether claims, which were filed by the Appellant(s), subsequent to the approval of Resolution Plan by the CoC, could have been admitted in the CIRP.

Question Nos.(1) & (2)

Question Nos.(1) & (2) being interrelated, are being taken together.

10. In Company Appeal (AT) (Ins.) No.1062 of 2024, CIRP was initiated vide order dated 03.05.2021 and the assessment order under Section 7A was passed on 11.08.2023 and order under Section 14B and 7Q was issued on 16.08.2023. In Company Appeal (AT) (Ins.) No.1065 of 2024, the CIRP against the CD commenced on 12.07.2021 and assessment order under Section 7A was passed on 29.08.2022. It is an admitted position that in both the cases, assessment orders under Section 7A, 14B and 7Q were passed subsequent to initiation of CIRP against the CD. Moratorium under Section 14 was imposed by the Adjudicating Authority, initiation CIRP. Section 14(1) of the IBC provides as follows:

> "**14. Moratorium. -**
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> (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-
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> (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including

execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b)transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period."

11. The Hon'ble Supreme Court had occasion to consider effect and consequence of imposition of moratorium. The Hon'ble Supreme Court in ***(2020) 13 SCC 208 – Rejendra K. Bhutta vs. Maharashtra Housing and Area Development and Anr.*** held that after the imposition of moratorium, a statutory freeze takes place. In paragraph 25 of the judgment, following was held:

> **"25.** There is no doubt whatsoever that important functions relating to repairs and reconstruction of dilapidated buildings are given to MHADA. Equally, there is no doubt that in a given set of circumstances, the Board may, on such terms and conditions as may be agreed upon, and with the previous approval of the Authority, hand over execution of any housing scheme under its

own supervision. However, when it comes to any clash between MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the adjudicating authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet *albeit* with a new management."

12. In ***(2021) 6 SCC 258 – P. Mohanraj and Ors. Vs. Shah Brothers ISPAT Pvt. Ltd.***, the Hon'ble Supreme Court had occasion to interpret the expression "proceeding" in Section 14. The object and purpose of moratorium has been captured in paragraph 30 of the judgment, which is as follows:

> **"30.** It can be seen that Para 8.11 refers to the very judgment under appeal before us, and cannot therefore be said to throw any light on the correct position in law which has only to be finally settled by this Court. However, Para 8.2 is important in that the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders. The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space

to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor. Also, the judgment of this Court in *Swiss Ribbons (P) Ltd.* v. *Union of India* [*Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17] states the raison d'être for Section 14 in para 28 as follows : (SCC p. 55)

> "*28*. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protect the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

13. The plain reading of Section 14, sub-section (1) indicates that expression 'suits or proceedings against the corporate debtor' has been used. The word 'proceeding' is not qualified, so as to confine it to proceedings before the Civil Court. The proceedings, which have the effect on the assets of the CD are all covered in the expression 'proceeding'. The question to be answered is as to whether after moratorium has been imposed, it was open for EPFO to proceed

with the assessment proceeding. Learned Counsel for the parties state that during moratorium proceeding, no recovery proceeding can be initiated against the CD. However, submissions of the learned Counsel for the Appellant is that assessment proceedings against the CD may continue. Hence, the orders of assessment passed during moratorium period, were fully permissible and the claim on the basis of the said proceedings had to be admitted in CIRP.

14. Learned Counsel for the Appellant placed reliance on the judgment of the Hon'ble Supreme Court in ***S.V. Kindaskar v. V.M. Deshpande – AIR (1972) SC 878.*** **In the above case, the Hon'ble Supreme Court had occasion to consider provisions of Section 446 of the Companies Act, 1956 in context of re-assessment proceedings under Section 148 of the Income Tax Act, 1961. Section 446, which came for consideration before the Hon'ble Supreme Court has been extracted in paragraph 4 of the judgment, which is as follows:**

> "**4. Section 446 of the Act reads**:
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> "(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.
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> (2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of —
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> (a) any suit or proceeding by or against the company;
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> (b) any claim made before against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of the Company; (sic)

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or High Court."

15. The words used in Section 446, sub-section (1) is "*no suit or other legal proceeding shall be commenced ..., except by leave of the Court*". The Hon'ble Supreme Court dwell upon the expression "legal proceeding" in sub-section (1). The Hon'ble Supreme Court in the above case was considering the assessment proceeding qua winding up proceeding under the Companies Act. In paragraph 9 of the judgment, the Hon'ble Supreme Court made following observations:

"9. In this case the observations already reproduced from the judgment of the Federal Court in *Shakuntla case* were approved. It may also be pointed out that in this decision this Court observed that the winding up Court assures pro rata distribution of the assets of the company in the same way in which the Court under the Presidency Towns Insolvency Act or the Provincial Insolvency

Act ensures such distribution of assets. Section 232(1) of the Act of 1913 which was held supplemental to Section 171 was also stated to have reference to legal proceedings in the same way as such proceedings were envisaged by Section 171. These two decisions in our opinion do not lay down the assessment proceedings under the Income Tax Act should be held to be within the contemplation of Section 171 of the Indian Companies Act, 1913. The next decision to which reference has been made by Shri Desai is *Union of India* v. *India Fisheries* (*P*) *Ltd.* [AIR 1966 SC 35 : (1965) 3 SCR 679] In that case the respondents, Fisheries (P) Ltd., had been directed to be wound up by the winding up court and an Official Liquidator had been appointed by an order of the High Court in October 1950. The headnote in that cases gives a clear idea of the facts and the decision. It reads:

"The respondent company was directed to be wound up and an official liquidator appointed by an order of the High Court in October 1950. In December 1950, the respondent was assessed to tax amounting to Rs 8737 for the year 1948-49. A claim made for this tax on the official liquidator was adjudged and allowed as an ordinary claim and certified as such in April 1952. The Liquidator declared a dividend of 9½ annas in the Rupee in August 1954, and paid a sum of Rs 5188 to the Department, leaving a balance of Rs 3549.

In June 1954, the Department made a demand from the respondent and was paid Rs 2565 as advance tax for the year 1955-56. On a regular assessment being made for that year, only Rs 1126 was assessed as payable so that a sum of Rs 1460, inclusive of interest, became refundable to the respondent. However, the Income Tax Officer, purporting to exercise the power available to him under Section 49-E of the Income Tax Act, 1922, set off this amount against the balance of Rs 3549 due for the year 1948-49. A revision petition filed by respondent in respect of this set off was rejected by the Commissioner of Income Tax.

Thereafter, petition under Article 226 filed by the respondent to set aside the orders of the Income Tax Officer and Commissioner

was allowed by the High Court, mainly on the ground that the demand for Rs 8737 in respect of 1948-49, being adjudged and certified came to have all the incidents and character of an unsecured debt payable by the liquidator to the Department; it was therefore governed by the provisions of Company Law and no other remedy or method to obtain satisfaction of the claim was available to the creditor.

In the appeal to this Court it was contended on behalf of the appellant that Section 49-E gave statutory power to Income Tax Officer to set off a refundable amount against any tax remaining payable and that this power was not subject to any provision of any other law.

Held :

The Income Tax Officer was in error in applying Section 49-E and setting off the refund due to the respondent.

The effect of Sections 228 and 229 of the Companies Act, 1913, is inter alia, that an unsecured creditor must prove his debts and all unsecured debts are to be paid pari passu. Once the claim of the Department has to be proved and is proved in liquidation proceedings, it cannot, by exercising the right under Section 49-E get priority over other unsecured creditors and thus defeat the very object of Sections 228 and 229 of the Companies Act. Furthermore, if there is an apparent conflict between two independent provisions of law, the special provision must prevail. Section 49-E is a general provision applicable to all assessees in all circumstances; Sections 228 and 229 deal with proof of debts and their payment in liquidation. Section 49-E can be reconciled with Sections 228 and 229 by holding that Section 49-E applies when insolvency rules do not apply.""

16. The Hon'ble Supreme Court held that the Company Court, cannot be invested with the powers of an Income Tax Officer conferred on him. The Company Court, which is winding the Company cannot carry on assessment under the Companies Act. Hence, it was held that

assessment proceedings are not covered by Section 446 and under both sub-section (1) and (2), winding up Court cannot deal with the Income Tax proceedings. There can be no two opinions about the law laid down by the Hon'ble Supreme Court in the above case in context of Section 446 of the Companies Act. Section 446, sub-section (1) uses the expression "suit or other legal proceeding". There is marked difference in the expression used in Section 14, sub-section (1) of the IBC. Section 446, sub-section (1) uses expression "other legal proceeding", while Section 14, sub-section (1) uses the expression "proceedings". In view of the law laid down by the Hon'ble Supreme Court in **Rejendra K. Bhutta** (supra), it is clear that no proceeding can continue after imposition of moratorium, which has effect of depleting the assets of the CD or creating new liabilities on the CD, since the object or purpose of IBC is to resolve the CD.

17. Now we come to the judgment of the Hon'ble Supreme Court relied by learned Counsel for the Appellant in **Sundresh Bhatt, Liquidator of ABG Shipyard** (supra). In the above case, the Hon'ble Supreme Court had occasion to consider Section 14, 25 and 33(5) of the IBC in reference to the provisions of Customs Act. In the above case, CIRP against the CD commenced on 01.08.2017. Notice for payment of custom dues was issued by the Customs Authorities on 29.03.2019 and thereafter on 02.04.2019 and 07.04.2019. Five different notices were issued. Order of liquidation was passed on 25.04.2019. The claim was filed by the Custom Authorities before the Liquidator. The question, which essentially came for consideration before the Hon'ble Supreme Court is as

to whether any demand notice can be issued demanding customs' due from the Corporate Debtor, after initiation of CIRP. Sections 14 and 33(5) was considered by the Hon'ble Supreme Court and in paragraphs 36, 37, 38, 39, 40 and 41, following was observed:

> **"36.** Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the corporate debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process. In this context, it is relevant to quote the February 2020 Report of the Insolvency Law Committee, which notes as under:
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> > "8.2. The moratorium under Section 14 is intended to keep 'the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default'. Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximise value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganisation proceedings. Uncitral Guide notes that a moratorium is critical during reorganisation proceedings since it 'facilitates the continued operation of the business and allows the debtor a breathing space to organise its affairs, time for preparation and approval of a reorganisation plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate'."

From the above, it can be seen that one of the motivations of imposing a moratorium is for Sections 14(1)(a), (b) and (c) of the IBC to form a shield that protects pecuniary attacks against the corporate debtor. This is done in order to provide the corporate debtor with breathing space, to allow it to continue as a going concern and rehabilitate itself. Any contrary interpretation would crack this shield and would have adverse consequences on the objective sought to be achieved.

37. Even if a company goes into liquidation, a moratorium continues in terms of Section 33(5) of the IBC which reads as under:

> "33. (5) — Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:
>
> Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the adjudicating authority."

38. We may note that the IBC, being the more recent statute, clearly overrides the Customs Act. This is clearly made out by a reading of Section 142-A of the Customs Act. The aforesaid provision notes that the Customs Authorities would have first charge on the assets of an assessee under the Customs Act, except with respect to cases under Section 529-A of the Companies Act, 1956; Recovery of Debts and Bankruptcy Act, 1993; Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Accordingly, such an exception created under the Customs Act is duly acknowledged under Section 238 of the IBC as well. Additionally, we may note that Section 238 of the IBC clearly overrides any provision of law which is inconsistent with the IBC. Section 238 of the IBC provides 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 being in force or any instrument having effect by virtue of any such law."

39. The NCLAT, while playing down the effect of Section 142A of the Customs Act and Section 238 of the IBC, has held that the Customs Act is a complete code in itself and no person can seek removal of goods from the warehouse without paying customs duty. The NCLAT relies on the judgment in Collector of Customs v. Dytron (India) Ltd., MANU/WB/0334/1998 : 1999 ELT 342 Cal., by the High Court of Calcutta, which laid down that customs duty carry first charge even during the insolvency process Under Section 529 and 530 of Companies Act, 1956. However, reliance on the said precedent is not appropriate as the NCLAT has failed to notice that such interpretation has been legislatively overruled by the inclusion of Section 142A under the Customs Act, through Section 51 of the Finance Act of 2011.

40. From the above, it is to be noted that the Customs Act and the IBC act in their own spheres. In case of any conflict, the IBC overrides the Customs Act. In present context, this Court has to ascertain as to whether there is a conflict in the operation of two different statutes in the given circumstances. As the first effort, this Court is mandated to harmoniously read the two legislations, unless this Court finds a clear conflict in its operation.

41. At the cost of repetition, we may note that the demand notices issued by the Respondent are plainly in the teeth of Section 14 of the IBC as they were issued after the initiation of the CIRP proceedings. Moratorium Under Section 14 of the IBC was imposed when insolvency proceedings were initiated on 01.08.2017. The first notice sent by the Respondent authority was on 29.03.2019. Further, when insolvency resolution failed and the liquidation process began, the NCLT passed an order on 25.04.2019 imposing moratorium Under Section 33(5) of the IBC. It is only after this order that the Respondent issued a notice Under Section 72 of the

> Customs Act against the Corporate Debtor. The various demand notices have therefore clearly been issued by the Respondent after the initiation of the insolvency proceedings, with some notices issued even after the liquidation moratorium was imposed."

18. The Hon'ble Supreme Court in paragraph 42 held that demand notice to seek enforcement of the customs dues during the moratorium period, clearly violate the provisions of Section 14 or 33(5) of the IBC. In paragraph 42, following was held:

> "**42.** We are of the clear opinion that the demand notices to seek enforcement of custom dues during the moratorium period would clearly violate the provisions of Sections 14 or 33(5) of the IBC, as the case may be. This is because the demand notices are an initiation of legal proceedings against the Corporate Debtor. However, the above analysis would not be complete unless this Court examines the extent of powers which the Respondent authority can exercise during the moratorium period under the IBC."

19. Ultimately the Hon'ble Supreme Court relied on the its judgment in ***S.V. Kandoakar v. V.M. Deshpande*** (supra) and held following in paragraphs 44 and 45:

> "**44.** Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context.
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> **45.** From the above discussion, we hold that the Respondent could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The

interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive."

20. In paragraph 46, the Hon'ble Supreme Court noticed that demand notice dated 11.07.2019 was issued under Section 72 of the Customs Act, which was in clear breach of the moratorium imposed under Section 33(5) of the IBC. In paragraph 46, following was held:

> "**46.** There is another aspect of this case that needs to be highlighted to portray the inconsistency of the Customs Act vis-à-vis the IBC during the moratorium period. In the present case, the demand notice dated 11.07.2019 was issued by the Respondent Under Section 72 of the Customs Act, in clear breach of the moratorium imposed Under Section 33(5) of the IBC. Issuing a notice Under Section 72 of the Customs Act for nonpayment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor Under Section 35(1)(b) of IBC."

21. Ultimately, the Hon'ble Supreme Court answered the question in paragraphs 53 and 54 in following manner:

> "**53.** For the sake of clarity following questions, may be answered as under:
>
> a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?
>
> The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the Respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The

Respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

b) Whether the Respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

answered in negative.

54. On the basis of the above discussions, following are our conclusions:

i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the Respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The Respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

ii) After such assessment, the Respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.

iii) In any case, the IRP/RP/liquidator can immediately secure goods from the Respondent authority to be dealt with appropriately, in terms of the IBC.

22. In the case before the Hon'ble Supreme Court in **Sundresh Bhatt, Liquidator of ABG Shipyard**, demand notice was issued subsequent to initiation of CIRP and that was not the case of any assessment carried out by Customs Authorities and the liquidation order was passed on 25.04.1999 and notice under Section 72 was issued on 11.07.2019, i.e.

after the liquidation. Hence, applicability under Section 33, sub-section (5) found to be there as held in paragraph 46 of the judgment as noted above. It is well settled law that a judgment of the Court has to be read in the context of the facts and ratio of judgment has to be read in reference to the facts, which have come for consideration before the Court. It is well settled that ratio of a judgment cannot be read as statute and above judgment of the Hon'ble Supreme Court, does not support the submission of the Appellant that after imposition of moratorium under Section 14, sub-section (1), it was open for the EPFO Authority to proceed with the assessment and conclude the assessment.

23. In the present case, admittedly assessment has been completed after initiation of the moratorium. We, thus, are of the view that once order of liquidation is passed, moratorium under Section 14 comes to an end and moratorium under Section 33(5), which is differently worded, comes into play. Under Section 33(5), the expression used are "suit or other legal proceeding", which occurs in Section 446 of sub-section (1) noticed above. Thus, bar is only against suit or legal proceeding and there is no bar against assessment proceeding to be conducted by statutory Authorities, including the EPFO. Thus, after the liquidation, it is open for EPFO to carry on the assessment. Section 33(5), cannot be held to apply on assessment proceedings. However, while looking to the expression used in Section 14(1), assessment proceedings before the EPFO, cannot be continued after initiation of CIRP.

24. In view of the aforesaid, we answer Question Nos.(1) and (2) in following manner:

(1) We hold that after initiation of moratorium under Section 14, sub-section (1), no assessment proceedings can be continued by the EPFO. If after an order of liquidation is passed, Section 33, sub-section(5), does not prohibit initiation or continuation of assessment proceedings.

(2) No claim on the basis of assessment carried during the moratorium period, which is prohibited under Section 14(1) can be pressed in the CIRP.

Question No.(3)

25. It is an admitted fact that claims were filed by the Appellant subsequent to approval of Resolution Plan by the CoC. The Adjudicating Authority has relied on the judgment of the Hon'ble Supreme Court in ***RPS Infrastructure Ltd. Vs. Mukul Kumar & Anr. – Civil Appeal No.5590 of 2021*** decided on 11.09.2023, which judgment squarely applies to the facts of the present case. More so, when the claim on the basis of assessment, which has been made subsequent to initiation of moratorium is hit by Section 14, sub-section (1) of the IBC, we are of the view that no such claim can be admitted in the CIRP.

Question No.(3) is answered accordingly.

26. In view of the foregoing discussions, we do not find any error in the order impugned in the present Appeal(s) passed by Adjudicating

Authority. In the result, both the Appeal(s) are dismissed. Pending IAs, if any, are also disposed of. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

3rd January, 2025

Ashwani