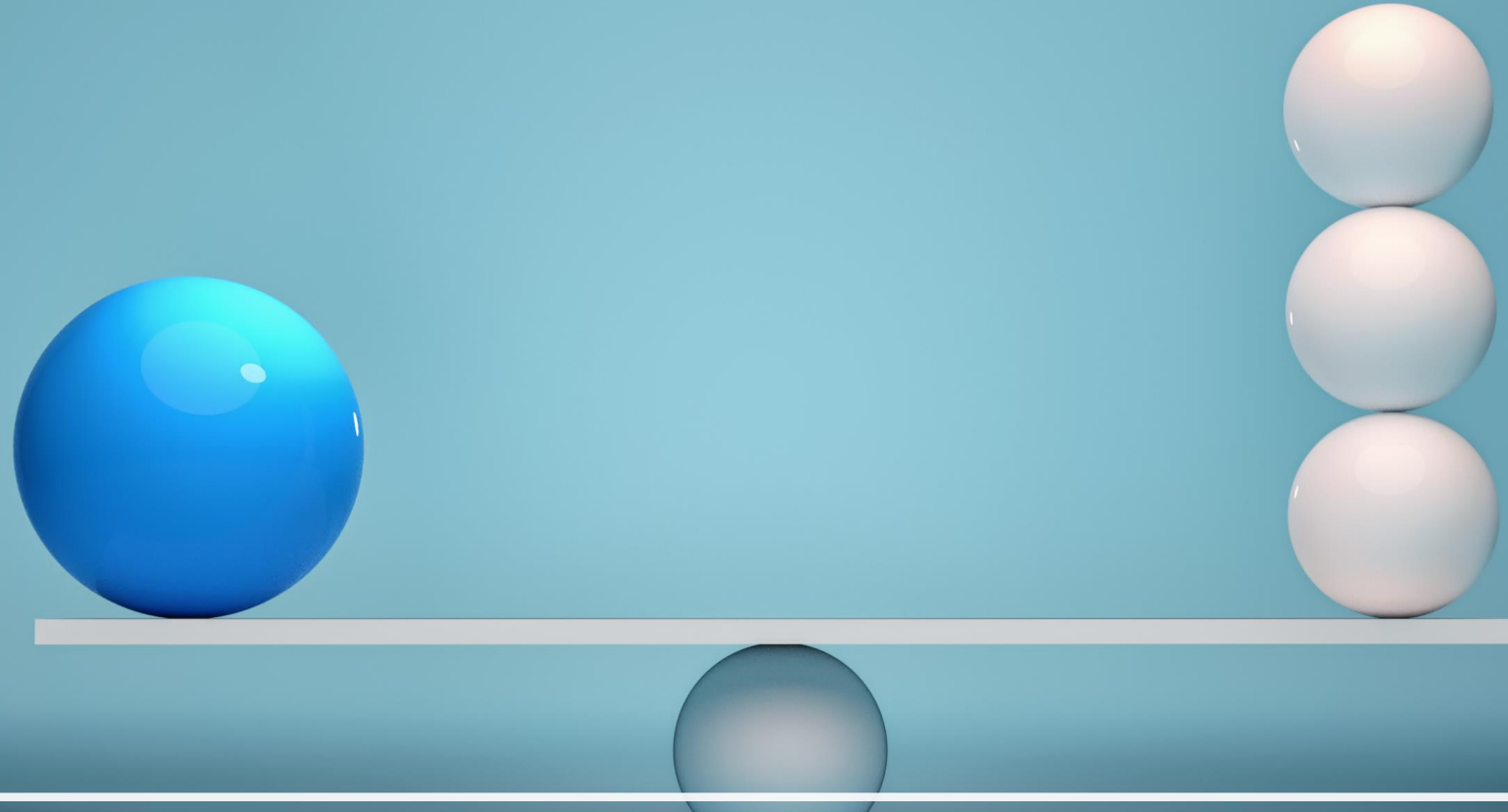




ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



INTERPLAY OF SOME OF THE RECENT JUDGMENTS UNDER IBC

Goltens India Pvt. Ltd.

Vs

*Sudip Bhattacharya,
Insolvency*

Resolution professional of Reliance Naval
and Engineering Ltd

NCLAT, Principal Bench, New Delhi
O R D E R 16.08.2022

Liability of Resolution Applicant (RA) for Contingent Liability of Corporate Debtor

- The Appellant had filed a Commercial Suit (No. COMS/1218/2019) before the Bombay High Court for recovery of outstanding amount from the Corporate Debtor (CD), which Suit is still pending. The Resolution Professional has accepted the claim of the Resolution Appellant (RA) as 'Contingent Claim'. The Resolution Plan was approved by the Committee of Creditors (CoC) where a sum of INR 1 was earmarked to the claim of the Appellant as a contingent claim.
- The Adjudicating Authority (AA) having already observed and noticed that the claim of the Applicant is to be treated as contingent till the judgment is pronounced in the suit. **In the event the suit of the Appellant is decreed, the claim being contingent, the Appellant shall be entitled claim from the successful Resolution Applicant.**

Contingent Claims under IBC: Legal Position



Section 3(6) (6) “claim” means – (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.



Section 41 of the Code requires the liquidator to determine the value of claims admitted under section 40 in such manner as may be specified by the Board.



Regulation 14 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations; Regulation 25 of IBBI (Liquidation Process) Regulations , 2016 requires IRP/RP/Liquidator, as the case may be, to make the best estimate of the amount of the claim, which cannot be ascertained due to any contingency or any other reason, based on the information available with him.



Although, such claims cannot be a basis for filing insolvency applications under sections 7, 9, 10; yet they should be provable and should form part of overall claims against the debtor.



In Axis Bank Ltd. & Ors. v. Edu Smart Services Private Limited and in Export Import Bank of India vs. Resolution Professional JEKPL Pvt. Ltd, NCLAT, held that claims under non-invoked corporate guarantee have to be admitted under the Code, as contingent claims. NCLAT observed, “we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under Section 13(1)(b) r/w Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor.”

State Tax Officer Vs. Rainbow Papers Limited: Factual Matrix

[Civil Appeal No. 1661 of 2020]

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

On July 8, 2016 recovery proceedings were initiated by Tax Authorities for its dues for the year 2011- 2012, and the property of the CD was attached.

By an order dated September 12, 2017 CIRP admitted against the CD.

By a letter dated October 22, 2018 the RP informed the appellant that the entire claim of the appellant had been waived off.

The Tax Authority filed a claim in Form B, claiming INR 47.36 crores (approximately). The claim was filed beyond time.

The last date for submission of claims was October 5, 2017.

On or about December 20, 2018, the tax authority challenged the Plan contending that Government dues could not be waived off . It claimed payment of dues as a secured creditor.

FACTUAL MATRIX

State Tax Officer Vs. Rainbow Papers Limited: What was held

24. In this case, claims were invited well before October 5, 2017 which was the last date for submission of claims. Under the unamended provisions of Regulation 12(1), the ***Appellant was not required to file any claim. Read with Regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for.***

In abdication of its mandatory duty, the ***RP failed to examine the Books of Accounts of the Corporate Debtor, verify and include the same in the information memorandum*** and make provision for the same in the Resolution Plan. The Resolution Plan does not conform to the statutory requirements of the IBC and is, therefore, not binding on the State.

30. The learned Solicitor General rightly argued ***that in view of the statutory charge in terms of Section 48 of the GVAT Act, the claim of the Tax Department of the State, squarely falls within the definition of "Security Interest"*** under Section 3(31) of the IBC and the State becomes a secured creditor under Section 3(30) of the Code.

State Tax Officer Vs. Rainbow Papers Limited : Critical Observations of the Apex Court

A resolution plan which does not meet the requirements of Sub Section (2) of Section 30 of the IBC, ***would be invalid and not binding on the Central Government***, any State Government, any statutory or other authority

If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan.

There is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.

Interplay of provisions of IBC and other enactments and rulings of the Hon'ble Supreme Court as regards priority of dues of statutory bodies and clean state concept.

Position under Central Goods & Services Act, 2017

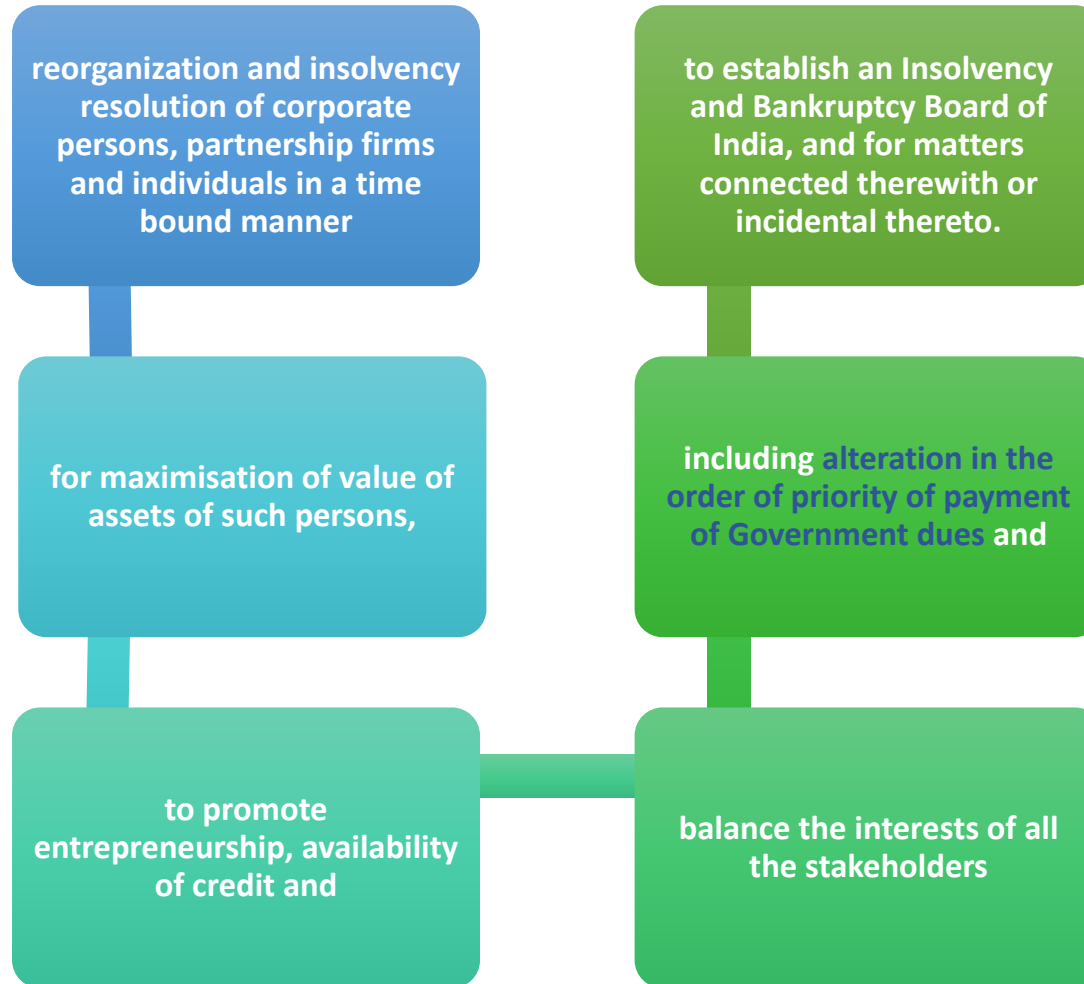
In the context of issue of priority of dues and status of Government, it is important to note that Section 82 specifically protects the provisions of IBC.

Section 82 of the Central Goods & Services Act, 2017 :

Notwithstanding anything to the contrary contained in any law for the time being in force, *save as otherwise provided in the Insolvency and Bankruptcy Code, 2016*, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

Preamble to the Code specifically state that one of the objectives of the Code is 'alteration of priority of the Government dues

An Act to consolidate and amend the laws relating to:



Section 53 of the Code (Distribution of Assets)

Places Government dues at fifth place of waterfall mechanism along with secured creditors (for the residual amount thus protecting security of secured creditors)

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:

(e) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

Overriding Effect of the Code

The Code contains provisions to give overriding effect, which, in turn, is also protected by the provisions of Section 82 of Central Goods & Services Act, 2017.



Section 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.

Axis Bank Ltd vs. State of Maharashtra

through the Office of the Assistant Commissioner of Sales Tax Investigation

MVAT Act, 2002

PRIORITY OF SECURED CREDITOR OVER VAT DUES: MAHARASHTRA CT UPHELD BY HC

SECTION 37. Liability under this Act to be the first charge - Notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer or, as the case may be, person.

HELD: “The applicability of provisions of Section 31-B of RDB Act which is pari materia to Section 26E of the SARFAESI Act was subject matter for consideration before the Full Bench of the Madras High Court in the matter of Assistant Commissioner (CT) Chennai vs. the Indian Overseas Bank (decided on 11.11.2016). The Full Bench has observed in paragraph 4 of the Judgment that *“the law having now been come into force naturally it would govern the rights of the parties in respect of even lis pendence”* We do not propose to analyze the Full Bench judgment delivered by the Madras High Court. 23) However, for the reasons recorded in the foregoing paragraphs of the instant judgment, we are of the opinion that the petitioner bank has a priority claim over the statutory dues claimed by Respondent no.1.”

*Ghanshyam Mishra and Sons
Ltd vs. Edelweiss Asset
Reconstruction Company
Limited*

April 13, 2021 (Supreme Court)

CENTRAL GOVERNMENT, STATE GOVERNMENT OR ANY LOCAL AUTHORITY IS BOUND BY THE RESOLUTION PLAN

The Apex Court Answered the three issues in the manner following:

ISSUE No.1 : *As to whether any creditor including the Central Government, State Government or any local authority is bound by the Resolution Plan once it is approved by an adjudicating authority under subsection (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code')?*

HELD: Vide Section 7 of Act No.26 of 2019 (vide S.O. 2953(E), dated 16.8.2019 w.e.f. 16.8.2019), the following words have been inserted in Section 31 of the I&B Code.

“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”

As such, with respect to the proceedings, which arise after 16.8.2019, there will be no difficulty. After the amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished.

*Ghanshyam Mishra and Sons
Ltd vs. Edelweiss Asset
Reconstruction Company
Limited*

April 13, 2021 (Supreme Court)

**CENTRAL GOVERNMENT, STATE GOVERNMENT OR ANY LOCAL
AUTHORITY IS BOUND BY THE RESOLUTION PLAN**

ISSUE No.2 : *As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?*

HELD: The amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

*Ghanshyam Mishra and Sons
Ltd vs. Edelweiss Asset
Reconstruction Company
Limited*

April 13, 2021 (Supreme Court)

**CENTRAL GOVERNMENT, STATE GOVERNMENT OR ANY LOCAL
AUTHORITY IS BOUND BY THE RESOLUTION PLAN**

ISSUE No.3 : *As to whether after approval of resolution plan by the Adjudicating Authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the Resolution Plan approved by the adjudicating authority?*

HELD: The Apex Court held that we have no hesitation to say, that the word “other stakeholders” would squarely cover the Central Government, any State Government or any local authorities.

Critical Observations: Extinguishment of Claims and Govt Dues

(Ghanshyam Mishra and Sons Ltd vs. Edelweiss Asset Reconstruction Company Limited)

That once a resolution plan is duly approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders.

On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished . ***No proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under [Section 31](#) could be continued.***

**Maharashtra Seamless Limited
VS
Padmanabhan Venkatesh &
Ors.
(Civil Appeal No 4242 of 2019)**

PLAN BELOW LIQUIDATION VALUE

- In the case of Maharashtra Seamless Limited, NCLT had approved the plan for CD-United Seamless Tubular (P) Ltd.
- In appeal, NCLAT directed, that the appellant therein should increase upfront payment to INR 597.54 crores to the “financial creditors”, “operational creditors” and other creditors by paying an additional amount of INR 120.54 crore.
- NCLAT further directed, that in the event the “resolution applicant” failed to undertake the payment of additional amount of INR 120.54 crore in addition to INR 477 crore and deposit the said amount in escrow account within 30 days, the order of approval of the ‘resolution plan’ was to be treated to be set aside.
- The Supreme Court while allowing the appeal and setting aside the directions of NCLAT, this Court observed thus:
- *“26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. ”*
- ***“30. The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code.***

***Karad Urban Cooperative Bank
Ltd. vs.
Swapnil Bhingardevay & Ors***

Three judge bench of the Supreme Court of the Supreme Court- On jurisdiction of the adjudicating authority as regards approval of resolution plan

JURISDICTION OF AA AS REGARDS DECISION OF COC APPROVING RESOLUTION PLAN

“14. If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode.

Essar India Limited

Important observations of the Supreme Court

EXTINGUISHMENT OF CLAIM

- A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted . This would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor.
- ***All claims must be submitted to and decided by the RP*** so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does **on a fresh slate**, as has been pointed out by us hereinabove.

SOME OF THE IMPORTANT OBSERVATIONS OF THE SUPREME COURT AS REGARDS CUSTOM ACT AND POWERS OF CUSTOM

IBC Prevails over the Provisions of Custom Act.



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graph TD; A[IBC Prevails over the Provisions of Custom Act.] --> B[Customs cannot claim title over the goods and issue notice to sell the goods in terms of the Custom Act when the liquidation process has been initiated.]; B --> C[The Appellate Authority cannot don the mantle of a supervisory authority for overseeing the validity of the approach of the Liquidator, in opting for a particular mode of sale of the assets of the Corporate Debtor.];
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Customs cannot claim title over the goods and issue notice to sell the goods in terms of the Custom Act when the liquidation process has been initiated.

The Appellate Authority cannot don the mantle of a supervisory authority for overseeing the validity of the approach of the Liquidator, in opting for a particular mode of sale of the assets of the Corporate Debtor.

Liquidation/CIRP of ABG Shipyard dated 26.08.2022

*R.K. Industries (UNIT-II) LLP & Welspun Steel Resources Pvt Ltd
vs.
H.R. Commercials Pvt Ltd & Ors.*

SUPREME COURT EXTENDS CONCEPT OF COMMERCIAL WISDOM TO SCC AT LIQUIDATION STAGE

The jurisdiction bestowed upon the Adjudicating Authority [NCLT] and the Appellate Authority [NCLAT] cannot act as a Court of equity or exercise plenary powers to unilaterally reverse the decision of the Liquidator based on commercial wisdom and supported by the stakeholders.

Commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority..... The aforesaid view will apply with equal force to any commercial or business decision taken by the Liquidator for conducting the sale of the movable/immovable assets of the Corporate Debtor in liquidation

*Yogesh Singh vs.
Supriyo Kumar Chaudhuri*
Liquidator of M/s JVL Agro Industries Ltd

LIABILITY OF LIQUIDATOR TO DISTRIBUTION REALISATION

Being custodian of the account of corporate debtor it was duty on the part of the Liquidator to immediately distribute accumulated profit lying in the said account.

CONTINGENT CLAIMS

IRP/RPs SHOULD BE CAUTIOUS WHILE HANDLING CLAIMS BASED ON PENDING LITIGATIONS

SUCH CLAIMS, IF SHOWN AS CONTINGENT AND NOT PROVIDED FOR IN THE RESOLUTION PLAN, MAY CREATE PROBLEM IN RESOLUTION AND FOR RESOLUTION APPLICANT.

ALL CLAIMS NEEDS TO BE SPECIFICALLY ADDRESSED AND RESOLVED IN THE RESOLUTION PLAN

CLAIMS BY STATUTORY BODIES

RP NEED TO INFORM THEM ABOUT CIRP AND SEEK FILING OF CLAIMS IN THE RELEVANT FROM.

PRIORITY OF STATUTORY DUES

THIS NEEDS TO BE VIEWED IN THE LIGHT OF PROVISIONS OF THE RELEVANT ACT, WHETHER THERE IS ANY PROVISION PROVIDING FOR STATUTORY CHARGE AND PRIORITY FOR THE RELEVANT CLAIM OF THE STATUTORY BODIES.

DUES UNDER THE CUSTOM ACT

IBC WILL OVERRIDE THE PROVISIONS AND ALSO AUTHORITY OF THE CUSTOM TO SELL THE GOODS

JUDGEMENT OF GHANSHAYM MISHRA AS REGARDS GUARANTEE

NEEDS TO BE VIEWED IN THE LIGHT OF SPECIFIC FACTS OF THE CASE.

SALE BY WAY OF PRIVATE TREATY AT LIQUIDATION STAGE

LIQUIDATOR AND SCC MAY ADOPT SUCH METHOD SUBJECT TO ADOPTION OF APPROPRIATE PRICE DISCOVERY MECHANISM.



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