Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9288 OF 2015

DIGHI PORT LTD,
a company incorporated under the provisions of the Companies Act, 1956 having its Registered Office at New Excelsior Building, 6th Floor AK Nayak Marg, Fort, Mumbai 400 001 through its director Mr Vishal Kalantri ...**PETITIONER**

~ VERSUS ~

1. **REVENUE MINISTER, MANTRALAYA,**
Mumbai, Maharashtra.
2. **THE TAHSILDAR, SHRIVARDHAN,**
Taluka Shrivardhan, District Raigad, Maharashtra.
3. **THE SUB DIVISIONAL OFFICER, MAHAD,**
Mahad Division, At Mahad, District Raigad, Maharashtra.
4. **THE ADDITIONAL COLLECTOR RAIGAD,**
At Post Alibag, Alibag, District Raigad, Maharashtra.
5. **THE ADDITIONAL COMMISSIONER,**

Konkan Division, Maharashtra.

6. **SECRETARY & OFFICER ON SPECIAL DUTY (APPEALS),**
Revenue & Forest Department,
Mantralaya Industrial Assurance
Building, 1st Floor, JT Road,
Churchgate, Mumbai.

7. **STATE OF MAHARASHTRA,**
Through the Secretary, Ministry of
Revenue, Mantralaya,
Mumbai 400 032. ...**RESPONDENTS**

APPEARANCES

FOR THE PETITIONER	**Mr Vikram Nankani, Senior Advocate**, *with Kiran Gandhi & Nirav Shah, i/b Little & Co.*
FOR RESPONDENT-STATE	**Mr NC Walimbe, AGP**.

CORAM : G.S.Patel & Neela Gokhale, JJ.

DATED : 4th August 2023

ORAL JUDGMENT (*Per GS Patel J*):-

1. Rule was issued on 28th February 2018. The previous ad-interim order of 16th September 2015 was continued as an interim order. The interim order was that protection granted under clause 7(e) of that order on 17th July 2015 in Writ Petition No. 6904 of 2015 would operate until the next date. That interim order prevented the enforcement of demands for royalty by the Respondents. These demands were made *inter alia* under Section 48 of the Maharashtra Land Revenue Code, 1966 (“**MLRC**”).

2. After this Petition was filed, the Petitioner, Dighi Port Limited (“**DPL**”), underwent a Corporate Insolvency Resolution Process (“**CIRP**”) and it is now under new management and control of the resolution applicant in that process. The subsequent events considerably alter the assessment on merits. The narrative thus divides itself into two parts: before the CIRP when the Petition was first filed by DPL, and following the CIRP after the completion of which the Petition has been amended. A proper understanding of even the latter conspectus makes it necessary to set out the historical background.

3. In 1996, the State Government formulated what was called a Port Policy. Dighi port was one of seven such ports identified for development under this policy. The State Government invited global tenders. This met with no response. The government decided that it would develop all the minor ports in the state with private sector participation. It then invited competitive bids for the ports situated at Dighi and Rewas in Raigad district. The Maharashtra Maritime Board issued a tender for the development of the Dighi port. Balaji Leasing and Industries Co Limited put in a successful bid and was awarded the tender. The Maharashtra Maritime Board then executed a concession agreement on 17th March 2002 for this project. This was a greenfield project, meaning that the port was to be developed from scratch. The Concession Agreement was with

Balaji Infra Projects Limited, the holding company and *inter alia* contemplated their 50 years' licence on a build-operate-own-share and transfer basis. DPL was incorporated specifically for the purposes of the Dighi Port Project. It is a joint venture between the State of Maharashtra through the Maharashtra Maritime Board, which held about 11% of its equity. Another financial institution held 20% equity in the company. On 7th December 2006, there was a novation to the Concession Agreement. Back-up infrastructure was now to be provided by the State Government along the lines followed in industrial estates everywhere in the state.

4. Obviously, DPL needed land for this project. At its 47th board meeting on 13th March 2007, the Maharashtra Maritime Board approved the transfer of 114 acres of land at Dighi to the Petitioner on lease for 50 years. The lease terms and conditions were spelt out in a lease agreement dated 20th March 2007. This covered several survey numbers at Village Dighi, in Taluka Shrivardhan, District Raigad. Gat Nos. 70 and 71 formed part of the land so leased.

5. DPL then applied under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 for the purchase of additional agricultural lands in and around Dighi village for the development of the port. The Directorate of Industries on 9th June 2008 granted permission. DPL began work which included levelling of the site, excavation, reclamation and so on. It appointed contractors. Some hilly portions were required to be levelled. Part of the work involved soil excavation. All this was incidental to the development of the port. According to DPL, there was no commercial element to either the levelling or the excavation; DPL was not excavating earth, murrum or anything else for commercial transactions or trade. All this work was being done only in furtherance of the project.

6. Given this background, according to Mr Nankani, learned Senior Counsel for the Petitioners, it was incomprehensible that the 2nd Respondent, the Tehsildar, Shrivardhan could ever have issued a show cause notice on 25th April 2007 alleging that the Petitioner had carried out 'unauthorized' soil excavation of a quantity of 88,942 brass on Gat Nos. 70 and 71 of village Dighi, that this was contrary to Section 48 of the MLRC, and asking DPL to show cause why an amount of Rs 88,84,300/- should not be recovered from it. DPL replied on 4th May 2007 pointing out the project, the transfer of land, the fact that Gat Nos. 70 and 71 were part of the leased land, disputing the measurements and quantity, saying that no actual measurement was carried out at the site, and also questioning the authority of the Tehsildar to issue such a notice in the first place. DPL relied upon a notification of the Ministry of Finance of the Central Government issued on 9th February of 2004 declaring Dighi to be a port under Section 7(A) of the Customs Act, 1962. DPL pointed out that the Dighi project had been approved by both the Central and the State Governments, and that all development was being done according to government-approved layouts and plans. Gat Nos. 70 and 71 were entirely hilly and it was necessary to not only level those portions, but to excavate the soil and that soil was being used for port construction activity. There was no mining properly so called, let alone any commercial mining. Hence, DPL contended there was no contravention of any provision of the MLRC.

7. On 10th July 2007, the Tehsildar passed an order under Section 48(7) of the MLRC imposing a penalty of Rs 1.51 lakhs towards royalty and penalty for the unauthorised extraction of 1500 brass dubber. We are not concerned with the rates at which this penalty was computed. But on a without prejudice basis, DPL deposited this amount of Rs 1.51 lakhs. There followed on 26th July 2007 another show cause notice by the Tehsildar now alleging that DPL had unauthorizedly excavated 86,787 brass of which 4240 brass had been moved to Gat No. 78 and used for reclamation and 25,181 brass soil was being used for levelling from the land on Gat Nos. 70 and 71 contrary to Section 48(7) of the MLRC. It was also contended that 61,606 brass of soil had been excavated by DPL in 2005–2006 on the land that belong to SICOM. The Tehsildar imposed a penalty of Rs 11,93,880/- towards royalty and Rs 1,000/- towards a fine, in all Rs 16,18,880/-.

8. DPL replied to this notice on 1st August 2007 and the reply followed more or less the lines of the earlier one. It seems that there was a report of the Circle Officer thereafter. No copy was given to DPL, or so it says, but relying on this the Tehsildar passed an order on 14th August 2007 under Section 48(7) of the MLRC and imposed a royalty demand of Rs 4,24,000/- on DPL and Rs 1,000/- as penalty.

9. On 3rd January 2008, the Tehsildar issued another notice cum order and now called upon DPL to pay what was called a balance royalty of Rs 100/- per brass on 84,603 brass of soil amounting to Rs 84,60,370/- after giving credit for the amount already paid.

10. DPL replied on 16th January 2008 reiterating that it was not engaged in any form of mining. On 3rd March 2008, the Tehsildar issued yet another show cause notice saying that since DPL had not deposited the amount of Rs 84,60,370/-, it was to show cause why proceedings for recovery should not be initiated under the MLRC. DPL replied to this on 10th March 2008 denying its liability to make any payment.

11. The very next day, the Tehsildar on 11th March 2008 reiterated the demand and now contended that a judgment relied on by DPL did not apply to the facts of this case. On 19th March 2008, DPL made a representation to the 4th Respondent, the Collector, Raigad. DPL requested a stay on the actions of the Tehsildar. Then on 18th July 2008, DPL filed a Mining Appeal No. 1 of 2008 before the 3rd Respondent, the Sub Divisional Officer, Mahad. Without considering the contentions, Mr Nankani submits, and the applicable judgment, the Sub Divisional Officer, Mahad dismissed DPL’s appeal. He actually went further and directed the Tehsildar to conduct a re-inquiry and to issue orders for recovery of the royalty for 84,603 brass of soil and also to initiate penal action. The Tehsildar therefore began a fresh inquiry and called on the Petitioner now by a communication of 3rd October 2008 to pay an amount of Rs 5,00,37,824/- plus Rs 88,84,300/-, i.e., a combination of market value and royalty. The Petitioner filed Appeal No. 3 of 2008 before the 4th Respondent, the Additional Collector, Raigad in which it took the stand that we have already summarized above.

12. In parallel, on 9th January 2009, the Tehsildar issued yet another notice once again referring to the site inspection report, now claiming that there was unauthorized excavation of 2,07,659 brass of soil from Gat Nos. 70 and 71 and making an order for payment of a balance amount of Rs 5,00,37,824/- and for a penalty of three times of the market value, i.e., Rs 5,56,05,888/- combined with a royalty demand of Rs 1,18,81,600/-. It seems that on a without prejudice basis, DPL paid certain amounts periodically to the Tehsildar and did so under protest. On 29th June 2009, the Tehsildar once again claimed that there was an illegal excavation of minor minerals, alleged that there was a violation of Section 48(7) of the MLRC and made a fresh demand now aggregating to Rs 11,75,32,904/-. In the meantime, on 2nd November 2009, the Additional Collector dismissed DPL's Appeal No. 3 of 2008. Immediately thereafter, the Tehsildar made a demand on DPL to pay an amount of Rs 29,90,19,734/- within seven days. Now DPL filed a Revision Application No. 423 of 2009 before the 5th Respondent, the Additional Commissioner of the Konkan Division. It maintained its stand throughout. The demands by the Tehsildar continued rising. On 9th December 2009, there was an additional demand for Rs 8,91,91,690/- apart from the previous demand of Rs 29,90,19,734/-. The 5th Respondent dismissed DPL's Revision Application on 12th March 2010. DPL filed another Revision Application No. 155 of 2010 before the Revenue Minister, i.e., the

1st Respondent, on broadly the same grounds that it had taken throughout. The Tehsildar issued yet another notice and now the demand went up even more. Now action was threatened under Section 174 of the MLRC. By 14th February 2011, the demand against DPL now stood at Rs 38,82,11,424/-.

13. DPL's Revision before the Minister was still pending. On 21st March 2011, the Tehsildar passed a prohibitory order restraining the Petitioner from operating its bank account with the Union Bank of India except to make payment of the royalty demand. DPL asked the Tehsildar to withdraw the stay order, correspondence continued and ultimately the Tehsildar did raise the attachment on the bank account with the Union Bank of India. The 1st Respondent's directorate in the meantime stayed the order of the Additional Commissioner of 12th March 2010.

14. On 29th February 2012, the Government of Maharashtra passed a resolution allowing a 100% concession on royalty on secondary minerals excavated and used during the work of development of small ports, multipurpose jetties and cargo terminals (RR services) on the coastline of Maharashtra and all connected works. DPL was also exempted from payment of stamp duty pursuant to an order of 1st August 2002 passed by the State of Maharashtra.

15. On 15th March 2014, DPL was informed that its Revision proceedings before the Minister had been transferred to the Secretary & Officer on Special Duty (Appeals), Revenue and Forest

Department. On 10th November 2014, the 6th Respondent passed an order dismissing DPL's Revision Application and confirming previous orders. On 20th November 2014, the Tehsildar issued two demand notices *inter alia* demanding Rs 38,82,11,424/-.

16. Relying on the decision of the Supreme Court in *Promoters and Builders Association of Pune v State of Maharashtra,*[1] DPL sought a review under Section 258 of the MLRC before the 1st Respondent. The hearing of that Review Petition was adjourned without a date. While it was pending, the Tehsildar issued various notices between January 2015 and June 2015 for forfeiture of property, distraint of movables and attachment of immovable properties.

17. Then on 24th June 2015, DPL was told that its offices would be sealed on 1st July 2015. According to DPL, there was reference to an order of 22nd December 2014 regarding unauthorized stocks of gravel, sand, soil and grit stored at the project site and a demand of Rs 2,55,37,400/- along with a penalty of Rs 92,21,669/-. DPL says that this was completely without application of mind because this was material not excavated but purchased by DPL from third parties. It denied all liability to make this payment.

18. On 11th May 2015, the State Government amended the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013 to provide that no royalty was to be paid on soil extracted while developing a plot of land and utilized on the

1 2014 SCC OnLine SC 967 : 2015 (1) BCR 26.

very same plot for land levelling or any work in the process of development of the plot.

19. Now despite this notification and the pending Review Application, on 10th July 2015 the Tehsildar sealed DPL's project site including the customs bonded area. The Petitioner challenged this in Writ Petition No. 6904 of 2015 and in this Petition, this Court directed on 17th July 2015 that the Review Application was to be heard for interim relief, and the seal was to be removed on the port and the moveable property. If the resultant order was against the Petitioner, action was not to be taken for three weeks thereafter. The Writ Petition was disposed of in these terms.

20. DPL went to a hearing before the 1st Respondent. Ultimately that Review Application was dismissed on 31st August 2015 essentially on the ground of maintainability.

21. In all, the Petitioner has paid an amount of about Rs 1,12,40,000/- under protest periodically. The Petition as originally filed challenged the dismissal of the Review Application and the confirmation of other orders.

22. Then came subsequent events. A creditor of the Petitioner, one DBM Geotechnics & Constructions Ltd, filed a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") to initiate a CIRP against the Petitioner. By an order of 25th March 2018, the National Company Law Tribunal ("**NCLT**") admitted this Petition and appointed an Interim Resolution Professional

("**IRP**"). A moratorium came into force under Section 14. Then a Resolution Professional ("**RP**") was appointed. He invited claims from creditors of the Petitioners by issuing a public notice in the newspapers.

23. This is today the heart of the dispute before us because the case is that the State Government did not, apart from writing one letter to the chairman of the NCLT, lodge a claim for royalty and penalty with the RP at all. The Committee of Creditors ("**COC**") approved the proposed resolution plans submitted by Adani Ports Special Economic Zone ("**APSEZ**"), the resolution applicant. This resolution plan was finally approved by the NCLT under Section 31(1) of the IBC on 5th March 2020. The COC approval is of 19th September 2019. On 16th February 2021, following the COC approval and the final approval of the NCLT, Adani Ports completed the acquisition of DPL.

24. Mr Nankani's submission is that under the provisions of the IBC, as interpreted by undisturbed judgments of the Supreme Court, all liabilities of DPL not included in the proposed and finally approved resolution plan stand extinguished. It does not matter, he says, that the demand comes from the revenue, the government or any statutory authority.

25. On 9th May 2022, DPL received a notice from the Tehsildar demanding payment of Rs 41,37,48,824/- as penalty, again for the same alleged excavations. It also threatened action against Section 48 (7) of the MLRC. On 26th May 2022, DPL replied pointing out the subsequent events including the orders of the NCLT and the approval of the resolution plan. This is where matters stand today.

26. These subsequent events have literally eclipsed the original cause of action that brought the Petitioner to Court. We are no longer required to examine whether the Review Application was or was not correctly decided, whether or not the demands were justified and whether or not the Tehsildar was correct in making those demands. The limited question is whether, absent a claim being lodged and pursued in the resolution process, i.e., in the CIRP and being included in the approved resolution plan, the State Government can still maintain its demand for royalty or penalty. Putting it conversely, if the State Government did not lodge that claim with the RP pursuant to the notice he issued specifically for that purpose and within the time provided in that notice, and if that claim was not incorporated in the COC decision of September 2019 and the NCLT final approval thereafter, i.e., if it did not form part of the approved resolution plan, whether it can still be said to be an outstanding demand or stands extinguished. Can the State Government stand outside the insolvency resolution process and yet maintain its demand and now seek to apply against the resolution application?

27. We believe the matter is squarely covered by the decision of the Supreme Court in *Ghanashyam Mishra and Sons Pvt Ltd v Edelweiss Asset Reconstruction Co Ltd and Ors.*[2] In particular, we have

2 (2021) (9) SCC 657.

reference to paragraphs 65 to 69, 102 and 108, quoted below for easy reference:

> 65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is revival of the corporate debtor and to make it a running concern.
>
> 66. The resolution plan submitted by the successful resolution applicant is required to contain various provisions viz. provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor. Explanation 1 to clause (b) of sub-section (2) of Section 30 of the I&B Code clarifies for the removal of doubts that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the corporate

debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of sub-section (2) of Section 30 of the I&B Code also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force.

67. **Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal that it requires RP to prepare an information memorandum containing various details of the corporate debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the corporate debtor, including the details about the creditors and the amounts claimed by them.** It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by the Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the corporate debtor towards them are required to be contained in the information memorandum.

68. **All these details are required to be contained in the information memorandum so that the resolution applicant is aware as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the corporate debtor is revived and made a running establishment.** The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the adjudicating authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is that after the approval of the resolution

plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he should start with fresh slate on the basis of the resolution plan approved.

69. This aspect has been aptly explained by this Court in *Essar Steel (India) Ltd.* (CoC) [*Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta*, (2020) 8 SCC 531: (2021) 2 SCC (Civ) 443]: (SCC p. 616, para 107)

> "107. For the same reason, the impugned NCLAT judgment in *Standard Chartered Bank v. Satish Kumar Gupta* [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] **in holding that claims that may exist apart from those decided on merits by the resolution professional and by the adjudicating authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as 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 resolution professional 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. For these reasons, Nclat judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] must also be set aside on this count.**"

Conclusion

102. In the result, we answer the questions framed by us as under:

102.1. 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. <u>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</u>.

102.2. The 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 the I&B Code has come into effect.

102.3. **<u>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 and 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</u>**.

> 108. While allowing the application filed by RP, granting approval to the resolution plan of Gmspl (i.e. CA No. 402/KB/2018) and rejecting the application of EARC challenging the grant of approval to the resolution plan of Gmspl by CoC (i.e. CA No. 398/KB/2018), NCLT found that RP had followed the entire procedure as required under the I&B Code and the Regulations. It also found that CoC after applying its mind found that the resolution plan submitted by Gmspl was in conformity with the requirements under Section 30(2) of the I&B Code.

(*Emphasis added*)

28. As the emphasized portions show, the decision in *Ghanshyam Mishra*'s case clearly states that any dues to the Government, if not included in the resolution plan, stand extinguished. In particular, *Ghanashyam Mishra* makes reference to the earlier decision of the Supreme Court in *Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta and Ors.*[3]

29. So far as the fundamental point being made throughout by DPL is concerned, it is based on the decision of the Supreme Court in *Promoters and Builders Association of Pune v State of Maharashtra and Ors.* Shortly stated, the Supreme Court held that where action is to be taken whether by way of levy of penalty or otherwise in regard to extraction or removal of minerals, the penalty depends on the purpose. In other words, it is not extraction or excavations simpliciter that attracts penalty. If that purpose is to use it on-site domestically for the purpose of development, then the question of penalty would not arise. This decision, as we have seen, is in any

3 (2020) (8) SCC 531.

case covered now by government resolutions and the notification that followed.

30. We must have reference to the decision of the Supreme Court in *Paschimanchal Vidyut Vitran Nigam Ltd v Raman Ispat Pvt Ltd and Ors.*[4] The reason is that this decision not only reaffirms *Ghanashyam Mishra* but also clarifies that the decision of the Supreme Court in *State Tax Officer (1) v Rainbow Papers Ltd*[5] does not actually alter the position in law as set out in the *Ghanashyam Mishra* decision. In particular, in paragraph 50, the Supreme Court in the *Paschimanchal Vidyut* case held that the *Rainbow Papers* judgment did not take note of the provisions of the IBC which treat the dues payable to secured creditors at a higher footing than those payable to the Central or State Government. It therefore concluded that no reliance could be placed on the decision in *Rainbow Papers* in support of the suggestion that the dictum or ratio of *Ghanashyam Mishra* stood diluted by *Rainbow Papers*.

31. Our attention is drawn at this stage to page 392 of the paperbook, which is the part of the resolution plan and in particular to Clause 3.2 at pages 411 to 413. The relevant portions in paragraphs 3.2.4, 3.2.6 and 3.2.7 say this:

> "3.2.4 In this Resolution Plan, except for a voluntary payment to MMB of the net amounts outstanding as on the NCLT Approval Date, and in any case not exceeding INR 11,38,04,099 (Indian Rupees Eleven Crores Thirty Eight Lakhs Four Thousand and Ninety Nine only) as a full and

4 2023 SCC Online SC 842.

5 2022 13C OnLine 1162.

final settlement of MMB Claims ("**MMB Payments**"), each Operational Creditor shall be paid such amounts as would have been payable to such Operational Creditor upon liquidation of the Corporate Debtor in accordance with the provisions of the Code (including Section 53), as full final settlement of the Admitted Operational Creditor Debt ("**Mandatory Operational Creditor Payments**"). Therefore, in case the Liquidation Value is insufficient for payment to Secured Financial Creditors in full, then the Operational Creditors (including any Governmental Authorities) shall be paid NIL amounts, except, (I) any amounts that may qualify as Mandatory Employees and Workmen Payments; (ii) any amount payable to secured Operational Creditors (if any); and (iii) MMB Payment. It is clarified that all dues or the remaining dues, as the case may be, of the Operational Creditors (excluding Mandatory Employees and Workmen Payments) as on the CIRP Commencement Date shall be written off in full and shall be, and be deemed to be, permanently extinguished as on the NCLT Approval Date.

3.2.6 Following the payment, write-off, cancellation and extinguishment (as applicable) of the Admitted Operational Creditor Debt (excluding Mandatory Employees and Workmen Payments) in accordance with this Resolution Plan, no amounts shall be payable to any Operational Creditors whether or not set out in the Information Memorandum, Virtual Data Room, balance sheets or the profit and loss account statements of the Corporate Debtor.

3.2.7 Further, any and all rights entitlements of any actual or potential Operational Creditors (including any person who may claim to be such a creditor by way of exercise of rights under Applicable Laws or equity) of the Corporate Debtor, whether such claims rights or entitlements (including any demand for any losses or damages, principal, interest, compound interest, penal

> **interest, liquidated damages, and other charges already accrued/accruing or in connection with any third party claims) have been submitted to the Resolution Professional or not, whether admitted by the Resolution Professional or not, and whether or not set out in the not, whether admitted by the Resolution Professional or not, and whether or not set out in the Information Memorandum, the Virtual Data Room, the balance sheets of the Corporate Debtor or the profit and loss account statements of the Corporate Debtor, being due or contingent, asserted or unasserted, crystallised or uncrystallised, known or unknown, disputed or undisputed, present or future, till the Effective Date shall be deemed to be permanently extinguished with effect from the NCLT Approval Date, by virtue of the order of the NCLT approving this Resolution Plan. The Resolution Applicant shall at no point of time, directly or indirectly, have any obligation, liability or duty in relation thereto. For the removal of doubt, it is clarified that any claim (as determined and verified in accordance the Code) in respect of any debt that is in the nature of Operational Debt (as defined under Section 5 (21) of the Code), whether claimed or unclaimed, whether admitted or unadmitted, whether crystallized or uncrystallised, on the NCLT Approval Date shall be deemed to constitute Admitted Operational Creditor Debt for the purposes of this Resolution Plan, and shall be accorded such treatment as it proposed under this sub-section 3.2 (*Treatment of Operational Creditor*) of the Resolution Plan.**"

(*Emphasis added*)

32. Of particular importance in this context is also Clause 3.2.9 at page 413. It reads thus:

"3.2.9 For abundant clarity, and all dues payable to Government Authorities, other than such dues that constitute part of the Mandatory Operational Creditor Payments (including Mandatory Employees and Workmen Payments) and MMB Payments, shall be treated as follows:

(i) **all claims or demands made by, or liabilities or obligations owed or payable to or assessed by, any Governmental Authority, in relation to any dues, direct Taxes (including for any previous or current assessment year(s)), indirect Taxes, duties (including stamp duties), penalties, fees, interest, fines, levies, cesses, assessments or additions or any other charges or payments whatsoever on the Corporate Debtor or in relation to the Corporate Debtor**, whether or not such claims or demands are admitted, due or contingent, asserted or unasserted, crystallised or uncrystallised, assessed or unassessed, known or unknown, secured or unsecured, disputed or undisputed, present or future;

(ii) any liabilities in relation to any consent, permission, privilege, entitlement exemption, benefit, license or approval granted tot he Corporate Debtor, or in relation to the Corporate Debtor, whether or not such consent, permission, privilege, entitlement, exemption, benefit, license or approval is subsisting, lapsed or expired;

(iii) all financial liabilities (including without limitation, for any penalty, interest, fines or fees) and other liabilities and obligations which may have a financial impact on the Corporate Debtor, in relation to (i) any investigation, inquiry, show-cause, notices, causes of action, suits, claims, disputes, litigation, arbitration or other judicial or regulatory or administrative proceedings whether civil or criminal against, or in relation to, or in connection with the Corporate Debtor or the affairs of the Corporate Debtor,

> **pending or threatened, present or future; (ii) any non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, approvals consents or permissions;** (iii) cross subsidies availed by the Corporate Debtor; (iv) any unmet export obligations under the Applicable Law and policies; and **(v) any and all actual or potential rights and entitlements of the Central Government, the State Government, any regulatory or local authority or body or any agency or instrumentality thereof or any other party or entity (under any agreement, lease, license, approval, consent, permission or privilege) which may have a financial impact on the Corporate Debtor, whether admitted or not, due or contingent, asserted or unasserted, crystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future,**
>
> **whether or not such claim, demand, liability is set out in the Information memorandum, the balance sheets or the profit and loss account statements of the Corporate Debtor, in relation to any period up till the Effective Date, will be written off in full and shall be, and be deemed to be, permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan and the Resolution Applicant or the Corporate Debtor** shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto."

(*Emphasis added*)

33. This is important because the Affidavit in Reply by the government to which Mr Walimbe draws our attention, apart from reiterating this history, refers at page 566 to a communication of 18th January 2020 by the Maharashtra Government to the

Chairman of the NCLT in regard to the demand for Rs 38,82,11,424/-.

34. But the question before us is how the making of this demand IS to be reconciled with the law as set out in *Ghanashyam Mishra*. Mr Walimbe submits that once the demand was brought to the notice of the NCLT, then it was for the resolution applicant or the COC or both to have made adequate provision in the resolution plan for the payment of that amount. He submits that it was not for the government to do more than place before the final authority, namely NCLT, the fact that there was this demand from the State Government. After this it was the responsibility of the COC to take into account that demand, make the necessary inquiries and make adequate provision for it in the resolution plan. He does not dispute Mr Nankani's general proposition that a resolution applicant must know the liabilities of the corporate debtor that it has to assume. But Mr Walimbe's submission is that once this demand was placed by the State Government before the NCLT, there is no possibility at all of the COC or of the resolution applicant saying that it was unaware of this demand.

35. The answer from Mr Nankani is that it is not the lodgement of a demand that is determinative. That is not the law as enunciated or interpreted in *Ghanashyam Mishra*. There is a defined process to be followed. It is for this reason that the RP gives and is mandated to give a notice. It is not possible to expect that somebody in the NCLT will harvest data gathered from diverse sources. All claims must be funnelled through the RP and this must happen on a schedule before an appointed date. The manner and form in which it is to be done is also prescribed. The State Government has done none of this. Once the initial steps are over, then the demand is reflected in the information memorandum that would be drawn up and it is at this point that every prospective resolution applicant would have an unambiguous idea of what was involved and what needed to be proposed. The State Government cannot assume that it is the only person with a demand against the corporate debtor. There are others including secured creditors who possibly, following the *Ghanashayam Mishra* ratio as interpreted in the *Paschimanchal Vidyut* case, stand on a higher footing. It does not make a difference whether this is a demand for tax or for some payment, for example for electricity dues; that demand must be made in the stipulated time following the prescribed procedure in the prescribed manner and must be pursued to its logical conclusion, that is to say by the claimant indicating whether or not the claimant is willing to make a concession or is demanding full payment. It is only when this is asserted that the COC can take an informed decision and make a recommendation of which of the resolution applications it lends its support to. It is thereafter that the RP will need to make a report to the COC. This, the Supreme Court has also held, is not an idle formality but requires an application of mind and the resultant NCLT order itself must take into account all these various factors including compliances. In this entire scheme, Mr Nankani submits, there is absolutely no wriggle room for an outlier claim, i.e., for some entity, be it the government or anyone else, to say that some communication or letter had been addressed and therefore there is a claim that must be deemed to have been made. There is no such concept in the IBC, which, it is well settled, is a complete code in itself.

36. We believe Mr Nankani is correct so far as the demand is concerned, but this does not mean that future actions of DPL are immune to supervision and action by the State Government. Those will undoubtedly follow the process of law. All that this means is that the present demand, not having passed through IBC process cannot be enforced or levied against the resolution applicant Adani Ports and the assets of DPL that it now holds.

37. Thus, Rule will have to be made absolute in terms of prayer clause (b)(i) viz., that the claim/demand for royalty/penalty under the impugned notices stands extinguished in view of the approval of the Resolution Plan under the IBC in regard to the Petitioner.

38. There remains the question of refund. It is difficult to see how this can be ordered in this Writ Petition. That may have been paid by DPL on a without prejudice basis but equally, that was also subject to an assessment of the rightness or wrongness of DPL's contentions regarding excavation and levelling and its use of the soil on ground.

39. If we are not addressing that question from the perspective of the State Government, we do not see how we can address the question from the perspective of DPL or the resolution applicant that now holds it either. Just as the demand of the State Government never entered the resolution plan, this concept of a refund from the State Government also did not form part of the resolution plan. If according to Mr Nankani the amount deposited of a little over Rs 1.4 crores is an 'asset' of the company, then it is open to DPL now to take appropriate steps in a jurisdictionally competent Court for that recovery against the State Government. All contentions in that regard are expressly kept open.

40. The Writ Petition is disposed of in these terms. There will be no order as to costs.

(Neela Gokhale, J) **(G. S. Patel, J)**