NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 944 of 2024

[Arising out of the Impugned Order dated 06.02.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-I in I.A. No. 4460 (MB)/ 2023 in CP (IB) No. 1807 of 2018]

In the matter of:

Avil Menezes
Resolution Professional of
Topworth Urja & Metals Limited

Having its office at:
106, 1st Floor, Kanakia Atrium 2,
Cross Road A, Behind Courtyard Marriott,
Chakala, Andheri East, Mumbai,
Maharashtra – 400 093.

…Appellant

Versus

1. **Ministry of Coal**
   Through its Secretary
   Having its office at:
   120, F-Wing, Shastri Bhawan,
   Dr. Rajendra Prasad Road,
   New Delhi – 110 001.
   E-Mail: secy.moc@nic.in

   …Respondent No.1

2. **Aarti Mahawar**
   Deputy Director,
   Ministry of Coal,
   Office of Coal Controller
   Having its office at:
   Scope Minar, 5th Floor, Core -II
   Laxmi Nagar, New Delhi – 110092
   E-Mail: aarti.mahawar@gov.in

   …Respondent No.2

3. **Committee of Creditors**
   Through the Lead Bank
   State Bank of India
   Having its office at:
   SAMB 1 Branch Mumbai,

2nd Floor, The Arcade,
World Trade Centre, Cuffe Parade,
Mumbai, Maharashtra – 400 005.
E-Mail: SBI.04107@sbi.co.in

...Respondent No.3

Present:

For Appellant : Mr. Abhijeet Sinha, Sr. Advocate with Mr. J. Rajesh, Mr. Dhrupad Vaghani, Jaitegan Khurana, Md. Arsalan Ahmed, Advocates.

For Respondent : Ms. Shiva Lakshmi, CGSC, Mr. T. Hari Hara Sudhan, Advocates for UOI, Ministry of Coal.

Mr. Nitin Bindal, Advocate for R-2.

Mr. Arpan Behl, Mr. Aakash Sharma, Advocates for R3/ CoC.

Mr. Krishnendu Datta, Sr. Advocate with Mr. Madhav Kanoria, Ms. Srideepa Bhattacharyya, Advocates for intervener/ SRA.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 06.02.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-I) in I.A. No. 4460 of 2023 in CP (IB) No. 1807 of 2018. The Appellant had filed the I.A. No. 4460 of 2023 seeking direction against the Secretary, Ministry of Coal-Respondent No.1 and Coal Controller-Respondent No.2 not to withdraw the mine opening permission in respect of Marki Mangli – I Coal Block. By the impugned order, the Adjudicating Authority directed the Respondent No. 2 to

withdraw the withdrawal letter of mine opening permission and also directed the Appellant to keep aside the Annual Mine Closure Cost besides directing the Appellant personally liable for disposal of the mined coal in accordance with the terms of the Mine Agreement. Aggrieved with the last two directions given to the Appellant in the impugned order, the present appeal has been preferred by the Appellant.

2. Coming to the salient facts of the case, the same are as outlined below:

- The Ministry of Coal, Government of India, vide order dated 04.06.2015 under Rule 8(2) of the Coal Mines (Special Provisions) Rules, 2016 had directed the auction of the coal mines under Section 41 of the Coal Mines (Special Provisions) Act, 2015 ('**CMSPA**' in short).
- Respondent No. 1 issued a tender document dated 08.06.2015 for various coal mines across the country, including Marki Mangli – I Coal Mine (**"MM-I Coal Block"** in short).
- The Corporate Debtor participated in bidding and was declared the Successful Bidder for the MM-I Coal Block. The Corporate Debtor and the President of India, acting through the nominated authority, entered into a Coal Mine Development and Production Agreement dated 31.08.2015 (**"CMDPA"** in short) regarding the allocation of the MM-1 Coal Block in favour of the Corporate Debtor.
- A Mining Lease Deed dated 09.02.2017 was executed by the District Mining Officer, Govt. of Maharashtra, in respect of the MM-I Coal Block in favour of the Corporate Debtor.

- As part of the aforesaid CMDPA, the Corporate Debtor, State Bank of India (as Escrow Agent) and the Coal Controller's Organisation (**"CCO"** in short) had entered into an Escrow Agreement dated 20.03.2017 in respect of the MM-1 Coal Block. The Corporate Debtor was required to deposit the Annual Mine Closure Cost (**"AMCC"** in short) into the Escrow Account.
- The MM-I Coal Block started operations in April 2017. The Corporate Debtor deposited Rs 1.56 Cr. as AMCC for the FY 2017-18 but due to unfavourable business environment and other reasons, the Corporate Debtor failed to deposit the amount for the FY 2018-19 following which reminders for payment were issued by the COO.
- Show Cause Notice was also issued on 31.08.2021 to the Corporate Debtor for non-compliance with the efficiency parameters of the CMDPA in respect of the MM-I Coal Block. The Corporate Debtor sought exemption from non-compliance with efficiency parameters on 06.09.2021 on grounds of Covid-19 pandemic and series of forced lockdown.
- The Corporate Debtor furnished Performance Bank Guarantee ('**PBG**' in short) on 30.05.2022 of Rs 33.17 Cr. to the nominated authority. The nominated authority again demanded of the Corporate Debtor to submit PBG of Rs 41.47 Cr. within extended time period of 12.08.2022.
- Meantime a Section 7 application had been filed by Bank of Baroda against the Corporate Debtor. On 12.08.2022, the Adjudicating

Authority admitted CP (IB) No 1807 of 2022 and initiated Corporate Insolvency Resolution Process (**"CIRP"** in short).

- On 20.08.2022 the IRP informed the nominated authority about the commencement of CIRP and operation of moratorium under Section 14 and requested for time extension for furnishing the PBG.
- On 22.08.2022 Respondent No. 1 initiated the process for cancelling and termination of the CMDPA and issued an appropriation notice to the Corporate Debtor for appropriating bank guarantee as performance security.
- On 12.09.2022 Respondent No. 1 terminated the CMDPA by issuing a termination notice.
- Aggrieved by the said termination notice, the IRP approached the Hon'ble Delhi High Court by way of a Writ Petition No. 13282 of 2022. The Hon'ble Delhi High Court on 15.09.2022 granted an interim stay on the operation of the said termination notice and directed the Respondent No. 1 and Respondent No. 2 not to take any coercive action against the Corporate Debtor pursuant to the said termination notice. The Writ Petition is still pending before the Hon'ble Delhi High Court.
- The Committee of Creditors-Respondent No. 3 in the 2nd CoC meeting held on 20.02.2023 appointed the Appellant as the Resolution Professional (**"RP"** in short) of the Corporate Debtor.
- IRP issued Form G inviting expression of interest ("EoI") from prospective resolution applicants on 06.03.2023.

- Respondent No. 2 issued a withdrawal of mine opening permission vide letter dated 05.09.2023 (**"Withdrawal Letter"** in short) for the MM-I Coal Block due to non-deposit of the AMCC for the pre-CIRP period in the escrow account as per the Escrow Agreement.
- Aggrieved by the decision of Respondent No. 1 and Respondent No. 2 to withdraw the mine opening permission, the Appellant preferred IA No. 4460 of 2023 on 27.09.2023 before the Adjudicating Authority seeking withdrawal of the withdrawal letter.
- During the pendency of I.A. No. 4460 of 2024, the Resolution Plan submitted by the PRA's were put to vote in the 14th CoC meeting and the Resolution Plan of Evonith Holdings Pvt. Ltd. was unanimously approved by the CoC on 05.01.2024.
- The Adjudicating Authority vide Impugned Order partly allowed IA No. 4460 of 2023. The Adjudicating Authority directed the Appellant to keep aside the AMCC besides directing the Appellant personally liable for disposal of the mined coal in accordance with the terms of the Mine Agreement in the said Impugned Order. Since the Adjudicating Authority had passed directions beyond the reliefs sought by the Appellant, aggrieved by the same, the present appeal has been filed.

3. We have heard Shri Abhijeet Sinha, Ld. Sr. Advocate appearing for the Appellant. Ms. Shiva Lakshmi, CGSC appeared for Ministry of Coal-Respondent No.1 and Shri Nitin Bindal, Ld. Advocate for Respondent No. 2. Shri Arpan Behl, Ld. Advocate was heard representing for Respondent No.3-

CoC and Shri Krishnendu Datta, Ld. Sr. Advocate appeared for the SRA who is an Intervenor.

4. Making his submissions, the Learned Senior Counsel of the Appellant contended that the Adjudicating Authority committed an error in directing that the outstanding dues of AMCC of the pre-CIRP period be kept aside and holding the AMCC not belonging to the assets of the Corporate Debtor. It was contended that in terms of the Colliery Control Rules and the Escrow Agreement, the AMCC was to be placed in the Escrow Account and the Escrow Agreement itself provided that the AMCC was to be returned to the Corporate Debtor after completing mine closure activities. Thus, this sum clearly belonged to the Corporate Debtor. It was stressed that AMCC constituted an operational debt as it is relatable to performing mine closure operations and hence subject to the provisions of IBC. The AMCC being in the nature of an operational debt, the Respondents cannot be paid in preference to other creditors as that would defeat the purpose of CIRP and would prejudice other secured financial creditors who are members of the CoC. However, the directions of the Adjudicating Authority by allowing the AMCC to be kept outside the CIRP of the Corporate Debtor tantamount to giving the Respondents No.1 and 2 a special status that is not recognised by law. It has also been contended by the Appellant that Section 29 of the CMSPA cannot override the provisions of IBC. It has been vehemently contended by the Appellant that the Respondents having filed their claim in Form-B on 23.11.2023 as operational creditor by treating AMCC as a Pre-CIRP cost they

cannot be allowed to reprobate now and claim that AMCC is not an asset of the Corporate Debtor and that the same be kept out of CIRP altogether. In any case this relief could not have been granted by the Adjudicating Authority as this was neither sought nor pleaded by the Appellant or Respondents no.1 and 2. Thus, by granting such a relief which was not pleaded by either parties, the Adjudicating Authority had clearly erred by overstepping its bounds. It was also added that AMCC payable by the Corporate Debtor during the CIRP in terms of Escrow Agreement was being considered as CIRP cost which has utmost priority as per provisions of the IBC. AMCC which would accrue during the CIRP period would be treated as CIRP cost which has utmost priority as per provisions of IBC and the SRA would be required to make sufficient funds available for mine closure activities as CIRP cost. It is further contended that Section 233 of IBC protects insolvency professionals from actions taken in good faith while acting under provisions of IBC and the Rules and Regulations framed thereunder and hence the Adjudicating Authority had erred in observing that the RP would be personally liable for depositing AMCC.

5. The arguments canvassed by the Appellant that AMCC constituted a part of the assets of the Corporate Debtor was also echoed by the Learned Counsel for Respondent No.3-CoC. It was emphasised that the role of CoC to ensure a just and favourable outcome for all stakeholders associated with the Corporate Debtor was not only a statutory obligation of the CoC but that this was pivotal in determining the future viability of the Corporate Debtor. Additionally, it was contended that the Adjudicating Authority incorrectly held

mine-closure obligation to be a future obligation whereas it is an ongoing activity and therefore a continuous process. Hence the Adjudicating Authority had wrongly directed pre-CIRP AMCC to be kept outside the purview of the IBC scheme. It was also submitted that withdrawal of mine opening permission by issue of the withdrawal letter would negatively impact the asset valuation of the Corporate Debtor and disrupt the entire CIRP.

6. Rebutting the arguments and contentions of the Appellant, the Learned Counsel for Respondents No.1 and 2 submitted common arguments. It was pressed that Mine opening permission was withdrawn not because of insolvency of the Corporate Debtor but because of persistent default by Corporate Debtor since FY 2016-17 in depositing AMCC. AMCC was required to be deposited in the Escrow Account to address public health and safety issues and to facilitate the transition from active mining to post-closure operations enabling sustainable after-use of the coalmine site. Submission was also pressed that AMCC which is deposited in the Escrow Account is in the nature of trust as it is Union's duty to act as a trustee of nature's resources for the welfare of public. These costs are designated for environmental restoration and safety measures to be executed upon cessation of mining activities rather than ongoing business operations. Treating them as part of running costs would misrepresent the nature of these obligations which are future oriented and contingent upon closure of the mine. AMCC cannot be considered as an expense or cost incurred in running the business of the Corporate Debtor as a going concern. It was also contended that this obligation

to pay AMCC is a pre-requisite condition for functioning of mining operation and cannot be considered as a fee, tax or dues payable to the government. It was vociferously contended that AMCC did not fall within the purview of Section 5(13) of the IBC and cannot be subjected to any haircut. It has also been submitted that the CCO acquired the powers and duties to monitor mine-closure and operate the Escrow Account for funding mine closure activity from Rule 10A of the Colliery Control Rules, 2004 and Section 18 of MMDR Act. The Escrow Account opened by the Corporate Debtor had the CCO as the exclusive beneficiary of AMCC prior to commencement of mining activities. This money was to be used for rehabilitation of land and environment and only after fulfilling all statutory obligation, the balance was to go back to the Corporate Debtor. Hence, AMCC cannot be considered as money belonging to Corporate Debtor. It was also submitted that IBC cannot have over-riding effect over MMDR Act, the latter also being a special law enacted for a specific purpose to perform a public duty.

7. An intervention application has also been filed by the SRA. The Ld. Senior Counsel on behalf of the SRA opposed the contention of Respondents No.1 and 2 that pre-CIRP AMCC dues must be paid as per applicable laws and guidelines without any haircut. It has been submitted that the resolution plan of the SRA had been approved by the CoC on 05.01.2024 and is currently pending approval of the Adjudicating Authority. It was submitted that the protection of this Tribunal is being sought since in their resolution plan it has been stipulated that the SRA cannot be burdened with liabilities exceeding the

"Discharge Payment" stipulated in the resolution plan. Imposition of additional cost on the SRA not envisaged under the resolution plan will adversely affect its financial commitments. The impugned order alters the fundamentals of the resolution plan and dilutes the commercial wisdom of CoC which approved the resolution plan unanimously. It was also pointed out that residual obligation if any arising out of the order of the Adjudicating Authority to treat the AMCC as not part of the asset of the Corporate Debtor, such residual obligation should be redistributed so that it does not have any effect on the resolution plan. Maintaining the integrity of the approved resolution plan is vital and the residual obligations must be managed within this framework to avoid adverse effects on the SRA's financial position.

8. We have duly considered the arguments advanced by the Learned Counsel for all the parties and perused the records carefully.

9. When we look at the sequence of events, it is clear that the cause of action of IA No. 4460 of 2023 was the issue of withdrawal of mine opening permission letter dated 05.09.2023 for MM-I Coal Block by Respondent No. 2 due to non-deposit of the AMCC in the escrow account as per the Escrow Agreement by the Corporate Debtor. Aggrieved by the issue of withdrawal letter, the Appellant had filed IA No. 4460 of 2023 before the Adjudicating Authority seeking the following reliefs:

a. *To quash and set aside the Withdrawal Letter dated 05.09.2023 issued by the Respondent No. 2;*

b. *During pendency or disposal of this Application, direct the Respondent No. 1 and Respondent No. 2 to not take any coercive action in light of the Withdrawal Letter dated 05.09.2023;*

c. *During pendency or disposal of this Application, suspend the effect of Withdrawal Letter dated 05.09.2023 allowing the Corporate Debtor to continue with the mining operations;*

d. *For interim and ad-interim reliefs; and*

e. *Pass such other necessary orders as this Hon'ble Tribunal may deem fit.*

10. When we look at para 24 of the impugned order, we find that the Adjudicating Authority had delineated two issues to be answered:

> *"24. At the outset, it is hereby clarified that the issue for determination before us is (a) whether the withdrawal letter dated 05.09.2023 could have been issued in view of the CIRP commencement on 12.08.2022 and consequential imposition of moratorium in terms of Section 14 of the Code; (b) Whether the Mine closure cost upto the CIRP commencement date are operational Debt or money held in trust."*

11. On the first question at (a) above, the Adjudicating Authority held that it had jurisdiction to direct the nominated authority to withdraw the withdrawal letter and that having been ordered with immediate effect, the Appellant's prayer in IA No. 4460 of 2023 to that extent stood satisfied. With regard to second question at (b) above, the Appellant is aggrieved by paras 32 and 33 of the impugned order wherein the Appellant has been directed to consider the AMCC as money not belonging to the Corporate Debtor and to keep the same aside and made RP personally responsible for any deviation in relation to disposal of the mined coal.

12. At the outset, it may be useful for us to take notice of the relevant paras which have aggrieved the Appellant and the same are as reproduced below:

"32. During, the course of hearing held on 11.01.2024, the learned counsel for the Applicant submitted that the annual cost accrued during the CIRP period can be treated as CIRP Costs and be paid in priority. However, per contra, the learned counsel for the Respondents submits that the entire closure costs have to be paid failing which the permission has to be withdrawn. We find that the annual mine closure cost is in nature of funds created under the Mine Plan to ensure that the mining closure activities are completed by the lessee in accordance with the agreed timelines and guidelines laid down in this relation. The said obligation is in nature of guarantee towards fulfilment of social obligations arising out of mining of natural resources. The terms of maintenance of escrow account clearly provides for release of part money at interval of 5 years subject to the fulfilment of obligation towards closure of mined out land/back filling, and finally upon complete mine closure. The Escrow account clearly stipulates refund of the balance amount to the lessee. It follows therefrom that the annual mine closure costs are in nature of annual deposits which are to be applied towards the statutory obligation of closure of mined out land. Since, these are obligations of the lessee of the mine, even if there is shortfall in contribution of such charges, the lessee does not get discharged from its obligation of final closure. In other words, in case the costs of mine closure is treated as Pre-CIRP costs and is subjected to hair-cut, the short fall equivalent to hair cut shall become obligation of the Successful Resolution Applicant, as Government cannot be asked to fund such hair cut under any circumstances. The Code contemplates waivers of fiscal liabilities which has arisen in present, whereas the mine closure obligation is a future obligation, because the failure in fulfilment of progressive fulfilment of obligation cannot discharge the lessee from the final obligation of closing the mined land in accordance with the guidelines and statutory mandate. Accordingly, we are of considered view that annual mine closure charges are in nature of moneys held in trust in an Escrow Account to ensure fulfilment of obligation towards the Public at large for complete closure of mine and development of mined area, and such money cannot be part of Liquidation estate.

33. Accordingly, we direct the Applicant to consider the Annual Mine closure costs as money not belonging to the Corporate Debtor and keep the same aside. Our observation in this Order shall not prejudice the rights of the Respondent to take appropriate action, except termination of the Coal mine agreement on that ground, in relation to allegation of

sale of coal in open market in violation of MMDR Amendment Act, 2021. In view of these directions, the Respondent No. 2 is directed to withdraw the letter dated 5.9.2022 with immediate effect. However, it is clarified that the Applicant shall dispose of the mined Coal only in accordance with the terms of Mine Agreement and he shall be personally responsible for any deviation in relation to such disposal."

13. The correctness of the above view taken by the Adjudicating Authority in paras 32 and 33 of the impugned order supra is what has come up before us for determination in the present appeal.

14. While admitting the non-payment of pre-CIRP AMCC dues, it is the contention of the Appellant that non-payment of AMCC is an operational debt as it relates to the purpose of securing mine-closure obligations and that it has been wrongly held by the Adjudicating Authority to be in the nature of money held in trust. The Appellant has placed a tabular chart of AMCC dues at pages 189-190 of Appeal Paper Book (**"APB"** in short). The chart reflects that the total quantum of AMCC which stood due for the period 2016 till date of initiation of CIRP on 12.08.2022 was Rs 13.30 Cr. The balance which arose subsequent to 12.08.2022 was Rs 5.37 Cr. and it is the case of the Appellant that this amount of Rs 5.37 Cr. has to be treated as CIRP cost under IBC. However, the AMCC due of Rs. 13.30 Cr. for the pre-CIRP period has to be treated in terms of provisions of IBC and cannot be recovered in full or kept outside the CIRP process dehors the provisions of IBC.

15. Per contra, it is the contention of the Respondent No 1 and 2 that the purpose of AMCC is to rehabilitate the coal-mine land back to the original condition so as to mitigate the ill effects and damages caused to the

environment while mining. It was belaboured hard that AMCC draws its sustenance particularly from Article 39(b) of the Constitution of India. AMCC therefore helped in sub-serving the common good and in the protection of environment. Hence, AMCC amount was required to be deposited in the Escrow Account which was in the nature of trust to fulfils Union's obligation to act as a trustee of nature's resources for the welfare of public. Emphasising that AMCC was held in the nature of trust, it is the case of the Respondent No 1 and 2 that the Escrow Account opened by the Corporate Debtor had the CCO therefore as the exclusive beneficiary of AMCC. This money was only to be used for fulfilling the statutory obligation of rehabilitation of land and environment and therefore did not form the asset of the Corporate Debtor and that the Adjudicating Authority correctly held that the pre-CIRP AMCC due is fully recoverable. It was contended that AMCC cannot be treated as a fee, tax or dues payable to the government but was a payment in the nature of trust to fulfil the social obligation of mine-closure. It therefore falls outside the scope of CIRP costs as defined under Section 5(13) of the IBC and hence cannot be subjected to any haircut. It has also been contended by the Respondents that though the Corporate Debtor was obligated to pay the mining closure cost in annual instalments over the period of mine-life this was consistently breached by the Corporate Debtor which had led to issue of several reminders followed by issue of show cause notice calling upon the Corporate Debtor to explain why the mining operations should not be withdrawn. Hence withdrawal of mining permission arises out of breach of Escrow Agreement and not in pursuance of Termination Notice dated 12.09.2022.

16. This brings us to the first limb of the argument of the Respondent No. 1 and 2 which is premised on the basis that the AMCC deposit and unpaid balance were/are held by the Corporate Debtor in trust for the benefit of common good and that AMCC deposit are not assets of the Corporate Debtor. In support of their contention that AMCC was imposed to sub-serve common good, the Respondent No. 1 & 2 have relied on the judgment of the Hon'ble Supreme Court of India in ***Coal India Ltd and Anr. Vs Competition Commission of India and Anr 2023 10 SCC 345*** (***'CCI'*** in short) and attention was adverted to the following paragraph as under:

> *"100.The expression "common good" in Article 39(b) in a Benthamite sense involves achieving the highest good of the maximum number of people. The meaning of the words "common good" may depend upon the times, the felt necessities, the direction that the Nation wishes to take in the future, the socio-economic condition of the different classes, the legal and fundamental rights and also the Directive Principles themselves.*
> *….. As to how common good is best served is best understood by the representatives of the people in the democratic form of Government. We must bear in mind the wholesome principle that when Parliament enacts laws, it is deemed to be aware of all the existing laws. Properly construed and operated fairly, the "Act" would, in other words, harmonise with common good, being its goal as well."*

17. In the above ***CCI*** case, it has been held by the Hon'ble Apex Court that when Parliament enacts laws, it is deemed to be aware of all the existing laws and the legislative enactment should harmonise with common good being its goal as well. We have no quarrel with the above proposition of law and find no good reasons to disbelieve that the Parliament while passing the IBC was unaware of all other existing laws sub-serving the cause of common good. Further, in the present matter, as no challenge has been mounted to the vires

of the IBC, hence, this judgement does not come to the aid of the Respondent No. 1 & 2.

18. Another judgment of the Hon'ble Supreme Court which has been referred to by the Respondent No. 1 & 2 is ***Assam Sillimanite Ltd. Vs Union of India, 1992 Supp (1) SCC 692*** in which the Hon'ble Supreme Court examined the constitutional validity of the Industries (Development and Regulation) Act which enabled acquisition and transfer of the right, title and interest of the Assam Sillimanite Ltd. in respect of its refractory plant. The Hon'ble Supreme Court had upheld the validity of Industries (Development and Regulation) Act by holding that there is a direct and rational nexus between the objective of the enactment and the principles contained in Article 39 of the Constitution. The present is, however, not a case where the constitutional validity of IBC has been put on the test and hence this case law also does not come to the rescue of the Respondent No.1&2.

19. Yet another judgment of the Hon'ble Supreme Court which has been relied upon by Respondent No. 1 & 2 is ***Reliance Natural Resources Ltd. Vs Reliance Industries Ltd. (2010) 7 SCC 1*** wherein the Hon'ble Supreme Court held that the public trust doctrine *"is part of Indian law"* and that it *"is thus the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large."* This ratio also does not render any assistance to Respondent No. 1 & 2 since the Appellant has nowhere questioned the purpose and objective of AMCC or denied the obligation cast on the Corporate Debtor to take necessary measures for fulfilling mine-closure

responsibilities. This is also clearly evidenced by the fact that AMCC has been made part of CIRP costs during the CIRP period to make the Corporate Debtor fulfil these obligations while running as a going concern.

20. We have no doubts in our mind that our legal system includes the principle of public trust as a part of the Indian jurisprudence and the Hon'ble Supreme Court has held in a catena of judgements that the Constitution postulates the principle of public trust especially in Part IV. We also agree that Article 39(*b*) obligates justness in "ownership and control of material resources" so as to "subserve common good". Be that as it may, adjudicating on the contours of the public trust doctrine or its infringement is clearly not the remit of this Tribunal and any foray made in this direction by this Bench is clearly fraught with danger of leading to judicial over-reach and hence the transgression of the boundaries of our summary jurisdiction is not countenanced.

21. In any case, the Respondent No. 1 & 2 have failed to place on record any document to substantiate its averments regarding such purported treatment of the AMCC deposits as money held in the nature of trust. The Respondent No. 1 & 2 have also failed to place on record any contractual agreement to substantiate/show any arrangement how AMCC deposit was kept/held in trust by the Corporate Debtor/Respondent No. 1 and 2 for the benefit of others. There is no documentary evidence on record to establish that any steps were taken for creation of any separate trust account by the parties to the Agreement. Since no separate trust account was created or opened by

the Corporate Debtor in the absence of separate trust account, by no stretch of imagination it can be said that the AMCC deposit including unpaid balance thereto were/are held by the Corporate Debtor in trust for the benefit of the others. In the absence of any separate trust account, we are of the considered view that no trust can be said to have come into the existence in the present case.

22. Before we proceed further to examine the rival contentions, for better appreciation of the issue at hand, we need to first dwell upon the basis which AMCC was to be collected. We begin by looking at the statutory provisions and rules as adverted by Respondent No. 1 & 2 which permitted collection of AMCC. Section 18 of the Mines and Minerals (Development and Regulation) Act, 1957 ('**MMDR Act**') lays down that it shall be the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of environment by preventing or controlling any pollution which may be caused by prospecting or mining operations. Further, Section 29 of the Coal Mines (Special Provisions) Act, 2015 vests overriding powers which reads as follows: "*The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force, or in any instrument having effect by virtue of any such law.*" Further as per Clause 14 and 15 of the CMDPA, upon exhaustion of the extractable coal reserves at the Coal Mine, the Coal Mine shall be closed in the manner provided in the closure plan. In addition, Rule 10A and 12A of the Colliery

Control Rules empowers the Coal Controller to monitor mine-closure and operate the Escrow Account formed for funding mine-closure activity for which an Escrow Agreement was drawn up.

23. This brings us to salient terms of the Escrow Agreement, which provides for the modalities of the operation of the Escrow Account as extracted here-under:

> *"1. As per the guidelines of the Ministry of Coal, Government of India all Coal Mine owners who are operating Coal Mines are required to obtain a Mine Closure Plan within a period of One year from the day when the original guidelines came into effect (i.e. 27th August, 2009) and from the date of publishing of the amended guidelines i.e. 7th January, 2013 for those mine owners who have not yet complied to the same failing which the Government will take action as appropriate.*
> *.....*
> *3. The money to be deposited year-wise by the said Mining Company in the Escrow A/c to be opened by the Coal Mine owners with any Scheduled Bank and the President of India acting through Coal Controller's Organization as exclusive beneficiary, is the annual Mine closure cost as approved by the Ministry of Coal and which is to be verified by the Coal Controller's Organization as per the guidelines of the Ministry of Coal, Govt. of India. If mining activity starts after the approval of Mine Closure Plan, then project proponent will be required to recalculate the closure cost based on WPI which will be effective from the financial year of starting of the project.*
>
> *4. Up to 80% of the total deposited amount including interest accrued in the Escrow Account may be released after every 5 years in the line with the periodic examination of the closure plan as per clause 3.1 of the annexure of the guidelines. The amount released should be equal to the expenditure incurred in the Progressive Mine Closure in the past 5 years or 80% whichever is less. The balance amount at the end of the Final Mine Closure shall be released to the Mine Owners/Leaseholder on compliance of all provisions of closure plan duly signed by the Lessee to the effect that said closure of mine complied all statutory rules,*

regulations, orders made by the Central or State Government, statutory organizations, court etc. and duly certified by the Coal Controller.

5. If the Coal Controller has reasonable grounds for believing that the protective, reclamation and rehabilitation measures as envisaged in the approved mine closure plan in respect of which financial assurance was given has not been or will not be carried out in accordance with mine closure plan, either fully or partially, the Coal controller shall give the mine owner a written notice of his intention to issue the orders for forfeiting the sum assured at least thirty days prior to the date of the order to be issued after giving an opportunity to be heard.

Operation Of Escrow Account

Deposit

i) The Escrow Account shall continue as a fixed deposit account subject to withdrawal of 80% of total deposited amount including interest accrued in the Escrow Account after 5 years of every deposit in line with the periodic examination of the closure plan. The balance amount shall be released to the mine owner/leaseholder at the end of the final Mine Closure on compliance of all provision of closure Plan.

ii)The M/s. Topworth Urja & Metals Ltd. shall cause deposit in such "Escrow Account" in the following manner on yearly basis as would be communicated by the Coal Controller from time to time to it:

…….

***h)** If the Mine owner fail to deposit the annual amount required to be deposited, the Government can withdraw the mining permission."*

24. When we look at the terms of the Escrow Agreement, it is clear that Clause 3 provides that the AMCC was to be placed in the Escrow Account to perform the mine closure obligations. Undisputedly, the same clause also provides that CCO is to be the exclusive beneficiary and that AMCC is to be verified by the CCO. It is equally significant to note that in the very succeeding clause i.e. Clause 4, the Escrow Agreement clearly provides that 80% of the amount deposited by the Corporate Debtor as AMCC would be returned to the Corporate Debtor every 5 years and the balance would be returned after

completion of the final mine closure. Thus, when the Escrow Agreement itself provides that the entire amount is to be returned to the Corporate Debtor after completing mine closure activities, we are not persuaded by the argument canvassed by the Respondent No. 1 & 2 that AMCC was money held in trust and are more inclined to agree with the Appellant that this sum clearly belonged to the Corporate Debtor for discharge of mine closure obligations.

25. This brings us to the second tier of defence raised by the Respondent No. 1 & 2. The argument canvassed is that CCO acquired powers to operate the Escrow Account to perform duties relating to monitoring of mine-closure activities from Rule 10A of the Colliery Control Rules, 2004 and Section 18 and 20 of MMDR Act. It has been contended that MMDR Act is a special law having been enacted for a specific purpose, IBC cannot claim to have overriding effect over public duty which is cast upon the CCO by MMDR Act. Respondent No. 1 & 2 have relied on the judgement of the Hon'ble Supreme Court in the matter of ***Municipal Corporation of Greater Mumbai Vs Abhilash Lal (2020) 13 SCC 234*** wherein it was held that Section 238 of IBC cannot override the public duty and rights of a third party in controlling and regulating its own properties. In that case, the resolution plan was becoming an impediment to Municipal Corporation of Greater Mumbai's independent plans to ensure that public health amenities are developed in the manner it chooses. The present facts of the case are clearly distinguishable since the dispute is not on how the AMCC is to be used but whether the Respondent No. 1 & 2 can recover the pre-CIRP AMCC dues in respect of a Corporate

Debtor which has been admitted into the rigours of insolvency resolution under IBC. This case law is therefore not applicable in the facts of the present matter.

26. The Appellant has contended that neither the Section 29 of the Coal Mine Special Provision Act, 2015 nor the provisions of MMDR Act, 1957 can override the provisions of IBC, 2016 in view of the fact that IBC being a later legislative enactment it will prevail over the former. It is their case that though these enactments may contain a non-obstante clause, the IBC being a later non-obstante clause, it would override CMSPA. In support of their contention, the Appellant has relied on the judgment of Hon'ble Supreme Court in ***A.P. State Financial Corporation Vs Official Liquidator (2000) 7 SCC 291*** and ***R.S. Raghunath Vs State of Karnataka (1992) 1 SCC 335*** which has approved the Rule of *Lex Posteriori.* We quite agree that IBC being a subsequent enactment, the provisions of the IBC shall have an overriding effect and neither CMSPA nor MMDR Act can claim itself as not being subservient to the provisions of the IBC.

27. For ease of reference, Section 238 of the IBC is reproduced below:

> *"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."*

We also agree that there is a catena of judgments of the Hon'ble Supreme Court as in ***Sundaresh Bhatt, Liquidator of ABG Shipyard Limited Vs Central Board of Indirect Taxes and Customs- Civil Appeal No. 7667 of***

2021 and ***A. Navinchandra Steels Pvt. Ltd. Vs SREI Equipment Finance Ltd. & Ors. Civil Appeal Nos. 4230-4234 of 2022*** wherein it has been held that Section 238 of the IBC clearly overrides any provisions of law which is inconsistent with the IBC. In the case of ***Innoventive Industries Ltd vs ICICI Bank*** in ***CA Nos 8337-8338***, the Hon'ble Supreme Court had reaffirmed the IBC's overriding authority. Furthermore, the Court reiterated in this landmark ruling that the IBC serves as a comprehensive law, providing an exhaustive framework for matters related to insolvency concerning corporate entities. Consequently, the Court clarified that the later non-obstante clause of this Parliamentary enactment takes precedence over the limited non-obstante clause present in any other Act. This Bench is therefore of the considered view that IBC being a later enactment, it would override both CMSPA and MMDR Act.

28. This brings us to the contention of the Appellant that since the provisions of the IBC overrides and prevails over the CMSPA and MMDR Act, all contrary provision contained in the latter two statutes shall stand overridden. Thus, the Respondent No. 1 & 2 cannot be allowed to recover the pre-CIRP AMCC dues outside the resolution plan framework. The treatment of AMCC deposit, both pre-CIRP and during CIRP will have to be made subject to the resolution mechanism under the IBC.

29. When we look at the given factual matrix, we find that the Corporate Debtor stood admitted into the rigours of CIRP on 12.08.2022 under the provisions of the IBC. Pursuant to the admission of the Corporate Debtor into

CIRP, moratorium in terms of Section 14 of the IBC stood imposed against the Corporate Debtor. IBC places moratorium on all past dues of the Corporate Debtor. Once moratorium is declared in respect of any company, the institution of suits or continuation of pending suits or proceedings against such company including execution of any judgement, decree or any other order in any court of law, tribunal, arbitration panel or other authority is statutorily barred. Under the scheme of the IBC, each creditor is required to file its claim with the interim resolution professional/resolution professional as on the insolvency commencement date. So, for all pre-CIRP claims, there is a provision contemplated under IBC to file claims. These claims are then to be dealt in the resolution plan or during liquidation as the case may be.

30. In the IBC framework, the assets of the Corporate Debtor are to be taken over by the RP for resolution of the Corporate Debtor. The RP has to make every endeavour to protect and preserve the value of the property of the Corporate Debtor. Payment of pre-CIRP dues to creditors cannot be made by RP outside the resolution framework. If Respondents are allowed to recover their AMCC dues of pre-CIRP period in full by keeping it outside CIRP process, it would be a discriminatory arrangement which has not been envisaged or contemplated under the IBC. Respondent No. 1 & 2 cannot stand on different footing with other creditors of the Corporate Debtor who have filed their claims for the pre-CIRP period with the Appellant-RP. Such differential treatment is also contrary to the settled law which prescribes for non-differential treatment of similarly situated Operational Creditors or the Financial Creditors. The

payment of pre-CIRP dues is not sustainable since any such payment to any creditor is not only discriminatory to other similarly situated creditors, but also dilutes the scheme of the IBC. The Respondent No. 1 & 2 are entitled to receive pre-CIRP dues as per resolution framework. Hence, the Respondent No. 1 & 2 cannot be heard in contending that they be allowed to realize the said amount independent of the resolution plan as any such measure will not be in the overall interest of a composite resolution plan under the provisions of IBC. The claim of the Respondent No. 1 & 2 to realize the pre-CIRP AMCC by treating it as outside the resolution process is clearly in conflict of the statutory scheme as laid down in the IBC. The Respondent No.1 and 2 by seeking to recover the entire AMCC by keeping it outside purview of CIRP tantamount to bypassing the resolution process of IBC. Accepting the argument of the Respondent No. 1 & 2 will be clearly in derogation of the scheme for payment of creditors of the Corporate Debtor as delineated in the IBC.

31. As per the provisions of the IBC, any Government and/or statutory Authority is also required to file its claims for any dues pending to be paid to such authority. Therefore, by virtue of moratorium which is currently operating/subsisting against the Corporate Debtor, no proceedings can be instituted or continued against the Corporate Debtor during the CIRP period to recover the AMCC deposit which belonged to pre-CIRP period including AMCC that remained unpaid. Hence, recovery of unpaid AMCC as pre-CIRP dues independently of the other stakeholders of the Corporate Debtor is a step in direct contravention of the IBC as it is barred under Section 14 and

therefore deserves to be set aside. In terms of the provisions of IBC as contained in Section5(13) of IBC it would therefore also be accurate and appropriate to categorise AMCC as CIRP cost in running the Corporate Debtor as a going concern.

32. We also notice that it has been vehemently contended by the Appellant that after issue of withdrawal of mine opening permission the Respondents had filed their claim in Form-B on 23.11.2023 as operational creditor by treating AMCC as a pre-CIRP cost. It was also pointed out that the RP had rejected the claim filed by the Respondent on grounds of being time barred and this was also not challenged by them. It is also the contention of the Appellant that the Respondents having filed their claim as operational creditor, they cannot be allowed to reprobate now and claim that AMCC is not an asset of the Corporate Debtor and for keeping the sums out of CIRP altogether. It is also pointed out that the Respondents never took the stand that AMCC was held in the nature of trust and that it was not an asset of the Corporate Debtor either in the pleadings before the Adjudicating Authority or even in communications exchanged by them with the RP or with SRA. It was also asserted that keeping this asset outside the CIRP would not achieve the purpose of securing mine closure obligations.

33. The counter-contention of Respondent No. 1 & 2 is that they had filed their claim in Form-B as Operational Creditor without prejudice to their contention that AMCC cost should not be subjected to waterfall mechanism as it is not part of the estate of the Corporate Debtor and is not subject to

haircut. On the rejection of their claim, it has also been contended that in view of the law laid down by the Hon'ble Supreme Court in ***State Tax Officer Vs Rainbow Papers Ltd. (2023) 9 SCC 545*** ('***Rainbow***' in short) if a resolution plan fails to include statutory demands payable to the government, the resolution plan is bound to be rejected.

34. We are not inclined to agree with the above standpoint of Respondent No. 1 & 2 for ***Rainbow*** judgment does not support the argument that all government dues will be secured dues under all circumstances. The reasoning of Rainbow Papers will be applicable only in such cases where the statutory provision creating first charge in favour of the relevant government or statutory authority is pari materia with the provision of Section 48 of the GVAT Act. In the present facts of the case, we do not find that the CMSPA or MMDR Act or Colliery Control Rules contain any provision that imposes a first and paramount lien, charge or any form of security on the money towards AMCC. Since no such security interest has been created with respect to AMCC by operation of law, the defence of the Respondent No. 1 & 2 falls to the ground.

35. The IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India to dismantle many of the unhealthy, pernicious and ineffective practices of the past in addressing insolvency issues. One of the cardinal recalibrations was the treatment of dues owed to government or statutory authorities. The said intent is also manifest in the Preamble to the IBC which provides as follows:

> *"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and*

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

The same legislative stance, is manifested in the IBC's waterfall mechanism, which positions government dues, including taxes, below financial creditors. IBC as it stands today is a carefully considered and well thought out piece of legislation and due caution should be exercised that the efficacy and robustness of the insolvency and liquidation landscape embedded therein is not allowed to be rocked easily. This cautionary principle applies equally to both the adjudicatory as well as the appellate authority under the IBC to refrain from judicially interfering in the framework envisaged under the IBC and keep such interference at its bare minimum so as not to disturb the foundational principles of the IBC.

36. Having said that we are constrained to note that the present finding of the Adjudicating Authority is clearly at odds with one of the stated legislative intents behind IBC. The Adjudicating Authority grossly erred in holding that the AMCC is not part of the estate of the Corporate Debtor and that the same needs to be kept aside. Basis the foregoing discussion, we do not agree with the reasoning offered by Adjudicating Authority to allow AMCC to be kept out of the CIRP process to enable its recovery dehors the scheme of IBC. If the AMCC is allowed to be kept outside the CIRP of the Corporate Debtor, it would tantamount to giving the Respondents a special status that is not recognised

by law. Respondents cannot be paid in preference to other creditors as that would defeat the purpose of CIRP and would prejudice other secured financial creditors who are members of the CoC. This would cause serious prejudice to the discipline of IBC and would set at naught the salutary provisions of the IBC. Such ingenious method of recovering pre-CIRP dues will be setting a bad precedent and open room for government/statutory entities to device contrivances to recover pre-CIRP dues in the garb of public trust doctrine. This will open flood-gates for innovating new strategies to defeat the statutory scheme of IBC which is a complete code in itself for insolvency resolution process of the Corporate Debtor. We must be careful not to supplant and substitute the mechanism which has been laid down in the IBC framework with new mechanisms under judicial directions in the guise of the doctrine of public good and public interest.

37. Given this backdrop, we find sufficient reasons to allow the Appeal. The impugned order at para 33 is modified by setting aside the directions of the Adjudicating Authority to consider the Annual Mine Closure Costs as money not belonging to the Corporate Debtor and to keep the same aside. Further, the observations of the Adjudicating Authority fixing personal responsibility on the RP-Appellant for any deviation from the Coal Mine Development & Production Agreement is expunged subject to the RP not acting in breach of the statutory provisions of the IBC and Rules and Regulation framed thereunder. We must add that we are not expressing any opinion on the merits of the resolution plan. The Adjudicating Authority may bear in mind the above

directions while considering the approval of the resolution plan proposal. Rest of the impugned order at para 33 will remain unchanged. Intervention application filed by Successful Resolution Applicant is also disposed of with the above directions.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 23.10.2024

Abdul/Harleen