



Judgment reserved on : **24<sup>th</sup> August, 2021.**

Judgment delivered on : **26<sup>th</sup> August, 2021.**

## **IN THE GAUHATI HIGH COURT**

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

### **WP(C) No.575 OF 2020**

1. Hindustan Paper Corporation Limited Officers' and Supervisors' Association, having its registered office at Kagaj Nagar, Jagiroad, District: Morigaon, Assam, represented by its General Secretary, Sri Krishna Kanta Sutradhar.

2. Shri Hemanta Kumar Kakati,  
Son of Late Keshob Chandra Kakati,  
Resident of HPC Township, C 18/4,  
Kagaj Nagar, Assam, Jagiroad,  
District: Morigaon, Assam, PIN –  
782413.

3. Shri Krishna Kanta Sutradhar,  
Son of Amulya Sutradhar,  
Resident of HPC Township, B 9/4,  
Kagaj Nagar, Assam, Jagiroad,  
District: Morigaon, Assam, PIN –  
782413.

**.....Petitioners**

**-Versus-**

1. The Union of India, represented by the Secretary to the Government of India, Ministry of Heavy Industries and Public Enterprises, Government of India, Udyog Bhawan, new Delhi – 110011.

2. Hindustan Paper Corporation Limited, represented by its Chairman cum Managing Director, having its Corporate Headquarter at Kolkata, 75-C, Park Street, West Bengal and registered office at New Delhi, 4<sup>th</sup> Floor, South Tower, Scope Minar, Laxmi Nagar, District Centre, New Delhi – 110092.

3. Hindustan Paper Corporation Limited Employees Contributory Provident Fund Trust, represented by Chairman of Board of Trustees, Kolkata, 75-C, Park Street, West Bengal.

4. The Regional Provident Fund Commissioner, EPFO, Regional Office at Park Street, Kolkata.

5. The Employees Provident Fund, represented by the Additional Central Provident Fund Commissioner, having its office at Bhavishya Nidhi Bhawan, G.S. Road, Bhangagarh, Guwahati – 781005.

6. Income Tax Department, represented by the Chief Commissioner of Income Tax, North Eastern Region, having its office at Aaykar Bhawan, G.S. Road, Christian Basti, Guwahati – 781005.

7. Mr. Kuldeep Verma, the Official Liquidator, 46, BB Ganguly Street, 5<sup>th</sup> Floor, Room No.501, Kolkata – 700021.

8. The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Department of Commerce & Industries, Guwahati, Dispur, PIN – 781006, Assam.

**.....Respondents**

**- B E F O R E -**

**HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA  
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK**

- For the Writ Petitioners : Mr. K.N. Choudhury,  
Sr. Advocate.
- For the Respondent No.1 : Mr. R.K.D. Choudhury, Asstt.  
Solicitor General of India.
- For the Respondent Nos.2 & 7 : Mr. V. Sibal, Sr. Advocate.
- For the Respondent Nos.4 & 5 : Mr. P.K. Roy, Advocate.
- For the Respondent No.6 : Mr. S. Sharma, Standing  
Counsel, Income Tax.
- For the Respondent Nos.8 : Ms. M. Bhattacharjee, Addl.  
Sr. Govt. Advocate, Assam.

**JUDGMENT & ORDER**

**(Sudhanshu Dhulia, CJ)**

Heard Mr. K.N. Choudhury, learned senior counsel for the petitioners. Also heard Mr. R.K.D. Choudhury, learned Assistant Solicitor General of India, appearing for

the respondent No.1; Mr. V. Sibal, learned senior counsel, appearing for the respondent Nos.2 & 7; Mr. P.K. Roy, learned counsel, appearing for the respondent Nos.4 & 5; Mr. S. Sharma, learned standing counsel, Income Tax Department, appearing for the respondent No.6 and Ms. M. Bhattacharjee, learned Additional Senior Government, Assam, appearing for the respondent No.8.

**2.** This writ petition was filed by the petitioners, *inter alia*, challenging the constitutional validity of some of the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Insolvency Code"). In addition, it also sought a writ in the nature of a mandamus for declaring the provisions of the Insolvency Code as not applicable for Government Companies. During the course of his arguments, however, Mr. K.N. Choudhury, learned senior counsel for the petitioners has limited his arguments to the second prayer as referred above. i.e. a declaration that a Government Company is not amenable to the Insolvency Code.

**3.** The concerned Company here is a Government Company, which is called Hindustan Paper Corporation Limited, and petitioner No.1 is an Association of the employees serving in the Paper Mill of the Company at Nagaon, Assam, and the petitioner Nos.2 & 3 are the President and General Secretary of the said Association, respectively. According to the petitioners, the Nagaon Paper Mill of the Company was set up in the year 1985.

Hindustan Paper Corporation Limited, is incorporated under the Indian Companies Act, 1956, and the Company was registered with the Registrar of Companies on 29.05.1970 and 100% of the share are owned by the Government of India in the name of the Hon'ble President of India. Since its inception, the Paper Mill was manufacturing writing and printing papers and was in fact running in profit for a great many years. Thereafter, it started incurring losses and it is an admitted case of the petitioners that the production of the Mill is suspended since 13.03.2017. The Members of the petitioner No.1 Association, who are employees and workers in the Company, have not received their salary since March, 2017. This Company is presently facing insolvency proceedings before the National Company Law Tribunal (NCLT).

**4.** In *Mobilox Innovations Private Limited -Vs- Kirusa Software Private Limited*, reported in **(2018) 1 SCC 353**, the whole purpose of bringing the Insolvency Code was discussed. The Apex Court held the Code to be a path breaking legislation and then traced its history to United Nations General Assembly Resolution of 02.12.2004, which had resolved where the Member Nations come out with a "Legislative Guide", which would be useful both to States who do not have an effective and efficient insolvency regime and to States that are undertaking the process of review and modernization of their insolvency regimes. Then the Apex Court went on to quote provisions after provisions of the Legislative Code.

5. With this background and later with recommendations of several Committees, finally the Insolvency and Bankruptcy Code, 2016 was enacted by the Parliament in the year 2016 and was published in the Gazette of India on 28.05.2016. The purpose of the aforesaid Code is given in the Statement of Objects and Reasons of the Insolvency Code, which is as under:-

*"2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish and Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development."*

6. The main purpose of the Insolvency Code is for reorganisation and insolvency resolution of Corporate Persons, Partnership Firms and individuals and this has to be done in a time bound manner. Insolvency Code is not intended to be a substitute to a recovery forum (***Innovations Private Limited -Vs- Kirusa Software Private Limited***, reported in ***(2018) 1 SCC 353***). Its purpose is to seek revival of a Corporate Person and only when it is not feasible that assets of the Company are finally liquidated with an aim to get the maximum return out of it, which are then to be given to the creditors of the

Company as well as to the workmen. There is a whole scheme in the Act for this, and it may not be necessary for us to go down in detail on the procedure.

**7.** All the same, insolvency proceedings under the Insolvency Code can be initiated by a financial creditor under Section 7 or by an operational creditor under Section 8. In the present case, one of the operational creditors of the Company, namely, M/s Alloys and Metals (India), initiated this proceeding by giving a notice under Section 8 to the Company demanding its dues. Since these dues were not paid, an application was moved before the adjudicating authority under Section 9 of the Act. On 13.06.2018, the NCLT (the judicial authority under the Insolvency Code) admitted the application for initiation of Corporate Insolvency Resolution Process. Thereafter, on 10.07.2018, the present petitioners before this Court, i.e. the Association of Employees and Workers of the Company, filed its claim for salary and other dues before the Resolution Professional pursuant to the public announcement dated 28.06.2018 issued under Section 15 of the Insolvency Code.

**8.** At this stage, we may also mention that against the order of admission dated 13.06.2018, an appeal was filed before the appellate authority, i.e. National Company Law Appellate Tribunal (NCLAT), which was dismissed by the appellate authority on 18.01.2019.

9. Thereafter, efforts were made to get a resolution plan for the Company in terms of the Insolvency Code and the Regulations made therein, however, no positive results came out and the maximum period, which is given under the Insolvency Code for coming to a decision in this matter, i.e. 180 plus 90 days, expired on 22.03.2019<sup>1</sup>. On 02.05.2019, an order was passed by the NCLT directing initiation of liquidation of the Corporate Debtor, i.e. Hindustan Paper Corporation Limited. On 14.05.2019, Mr. Mr. Kuldeep Verma, i.e. the respondent No.7 before this Court, was appointed as liquidator of Hindustan Paper Corporation Limited. On 17.05.2019 public announcement was made by the liquidator calling upon the stakeholders to submit their claims.

10. We may also mention at this stage that the liquidation order was challenged by the present petitioners under Section 61 of the Insolvency Code, where the

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<sup>1</sup> **12. Time-limit for completion of insolvency resolution process.**— (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.



liquidation order was upheld with certain directions by the appellate authority. On 15.06.2019, the present petitioner Association before this Court also filed its claim for salary, gratuity, provident fund, pension fund and other dues before the liquidator pursuant to the public announcement dated 17.05.2019. The total claim raised on behalf of the petitioner No.1 is of Rs.119,76,92,408/- (Rupees One Hundred Nineteen Crores Seventy Six Lakhs Ninety Two Thousand Four Hundred Eight).

**11.** Pursuant to the efforts made by the liquidator to raise funds to keep the Corporate Debtor as a going concern and bring about a scheme of compromise under Section 230 of the Companies Act, 2013. All the same, the Government of India informed the liquidator that it is not able to offer a scheme of compromise under Section 230 of the Companies Act nor is in a position to make available the funds required to keep the Company as a going concern. On 25.11.2019, orders were passed by the NCLT recording that no scheme under Sections 230/232 of the Companies Act, 2013 has been received by the liquidator inspite of opportunity and, therefore, it is expedient to liquidate the assets of Corporate Debtor at the earliest. On 19.01.2020 and 10.01.2020, liquidator made public announcements in newspapers inviting expression of interest from bidders for selling certain non-core assets of the Corporate Debtor at Guwahati and Mumbai. No expression of interest was received for the same. We have been informed at the bar by the learned senior counsel for the respondent Nos.2 & 7

Mr. V. Sibal that liquidation proceedings are going on and on 06.08.2021, the liquidator has made a public announcement for e-auction non-core of the assets of the Corporate Debtor.

**12.** Meanwhile, this writ petition has been filed by the petitioners, who have all along participated in the proceedings before the adjudicating authority by raising a plea that a Government Company is neither a "Corporate Person" or "Corporate Debtor" as defined under Sections 3(7) and 3(8) of the Insolvency Code, and, therefore, proceeding cannot be initiated under Section 9 of the Insolvency Code against the Company as it is not a "Corporate Person" or "Corporate Debtor" and therefore, the entire proceedings under the Insolvency Code before the adjudicating authority are without jurisdiction.

**13.** In the present case, the petitioners would contend that the Operational Creditor, i.e. M/s Alloys and Metals (India), who allegedly owes Rs.98,00,000/- (Rupees Ninety Eight Lakhs) from HPCL, Nagaon Paper Mill instituted the proceedings under Section 8 of the Insolvency Code by giving a demand notice to the Company and later an application before the NCLT under Section 9. The learned senior counsel for the writ petitioners would argue that under the Insolvency Code, "Corporate Debtor" is defined under Section 3(8) of the Insolvency Code, which reads as under:-

*"3(8) 'Corporate debtor' means a corporate person who owes a debt to any person."*

**14.** "Corporate Person" is defined under Section 3(7) of the Insolvency Code, which reads as under:-

*"3(7) 'Corporate person' means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider."*

**15.** The argument of the learned senior counsel for the petitioners would be that a "Corporate Person" means a Company as defined in Clause (20) of Section 2 of the Companies Act, 2013, which is as under:-

*"2(20) 'Company' means a company incorporated under this Act or under any previous company law."*

**16.** The learned senior counsel would then argue that this would not include a Government Company as Government Company has been separately defined under Section 2(45) of the Companies Act, 2013, which reads as under:-

*"2(45) 'Government company' means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company."*

**17.** The argument here is that, if the intention of the Legislator was to include a Government Company also as a Corporate Person then it would have definitely included "Government Company" in the definition of "Corporate

Person” given in Section 3(7) of the Insolvency Code. It has been submitted that in order to cover a Company under the Insolvency Code, it must be first a “Corporate Person” within the meaning of Section 3(7) of the Insolvency Code and since the definition of Section 3(7) does not include Government Companies, then HPCL which is Government Company, cannot be come within the ambit of the Insolvency Code. The learned senior counsel for the petitioners has then relied upon a number of judgments, such as ***Hindustan Paper Corporation Limited -Vs- Government of Kerala & Ors.***, reported in ***AIR 1986 SC 1541***; ***Hindustan Construction Company Limited & Anr. - Vs- Union of India & Ors.***, reported in ***2019 SCC Online 1520***; ***Hindustan Antibiotics Limited & Anr. -Vs- Union of India & Ors.*** in ***WP(C) No.11366/2019***; ***Madhav Rao Jivaji Rao Scindia Bahadur & Ors. -Vs- Union of India & Ors.***, reported in ***AIR 1971 SC 530*** and ***Director of Settlements, Andhra Pradesh & Ors. -Vs- M.R. Apparao & Ors.***, reported in ***AIR 2002 SC 1598***. On the strength of these decisions of the Hon’ble Apex Court, he would argue that a Government Company forms a different class as in fact it is performing the functions of the State and, therefore, it is an instrumentality of the State, which cannot be brought to under the Insolvency Code.

**18.** Mr. V. Sibal, learned senior counsel, appearing for the respondent Nos.2 & 7, would, on the other hand would submit that the matter is no more *res integra* as it has been held in a recent judgment of the Hon’ble Supreme Court

**(Hindustan Construction Company Limited & Anr. -Vs- Union of India & Ors., reported in 2019 SCC Online SC 1520)**, that the Insolvency Code covers Government Companies though an exception has been carved out in that case for an authority of the Government, which is of performing sovereign functions, such as National Highway Authority of India (hereinafter referred to as "NHAI"). The respondent Nos.2 & 7 before this Court are the Company and the Liquidator, respectively.

**19.** Before we come down to the aforesaid case, we must note down the objections of Mr. K.N. Choudhury, learned senior counsel for the petitioners, who would argue that the judgment referred by Mr. V. Sibal, learned senior counsel for the respondent Nos.2 & 7, cannot be held an authority on the present question as in the said decision, what was actually being challenged before the Hon'ble Supreme Court was the constitutional validity of certain provisions of the Arbitration and Conciliation Act, 1996 and the question whether a Government Company is included in the Insolvency Code was an incidental matter, and, therefore, the observations of the Hon'ble Supreme Court on this should be construed only as an obiter. These are only in the nature of observations and not a ratio given by the Court in its judgment.

**20.** In **Hindustan Construction Company Limited** (hereinafter referred to as "Hindustan Construction Company decision"), what was before the Apex Court was

a challenge to the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 as well as a change to the various provisions of the Insolvency and Bankruptcy Code, 2016. According to the petitioners (i.e. the petitioners before the Apex Court) these provisions resulted in a discriminatory treatment towards them, which is violative of Articles 14 and 19(1)(g) of the Constitution of India, and also arbitrary, it was contended. We are not concerned with the challenge being made by the petitioners to the constitutional validity of Section 87 of the Arbitration and Conciliation Act, but the admitted position is that apart from a challenge to the constitutional validity of the provisions of the Arbitration and Conciliation Act, the petitioner had also challenged the provisions of the Insolvency Code. Their case was that the provisions of the Insolvency Code operates arbitrarily on the petitioner as on the one hand an arbitral award given in favour of the petitioner would be stayed under Section 34 of the Arbitration and Conciliation Act, 1996 and as a result of which money cannot be used to pay of the debts of creditors and on the other hand any debt of over Rs.1,00,000/- owed to a financial and Operational Creditor, which remains unpaid would attract the provisions of the Insolvency Code against the petitioner No.1 making these provisions arbitrary, discretionary and violative of Article 14 and 19(1)(g) of the Constitution of India. Therefore, a suggestion was made on behalf of the petitioners such as the definition of "Corporate Person" contained in Section

3(7) of the Insolvency Code should either be read without the words "with limited liability" contained in the third part of the definition or have Section 3(23)(g) of the Insolvency Code, which defines "Person" read into the aforesaid provisions (Paragraph 62 of ***Hindustan Construction Company Limited***). This suggestion was, however, turned down by the Court.

**21.** The Hon'ble Supreme Court then read the definition of "Company" as well as "Government Company" given under Section 2(20) and Section 2(45) of the Companies Act, 2013. It was then submitted by the learned Solicitor General of India, who appeared for Union of India, that out of the four Companies, three are Government Companies and, therefore, they are covered under the definition 2(20), i.e. under the Notification of Company, since these Government companies have been incorporated under the Companies Act, 2013. But as far as NHAI is concerned, the argument of the petitioners' counsel cannot be accepted for adding or deleting any words from the definition clause inasmuch as if that is done then an authority such as NHAI would come within the ambit of the Insolvency Code and that would be catastrophic, inasmuch as the development and maintenance of NHAI is a Government function and falls in Entry 23 of List I of 7<sup>th</sup> Schedule to the Constitution of India and more importantly the functions of the NHAI are not functions of an ordinary Government Company, but these are sovereign functions. NHAI cannot be wound up under the Insolvency Code.

**22.** The argument of Mr. K.N. Choudhury, learned senior counsel for the petitioners would be that this is not a finding where any reasoning had been given by the Hon'ble Supreme Court as to why a Government Company is included under the Insolvency Code. What actually happened is that a concession was given by the counsel defending the State, which was accepted by the Court. This, therefore, cannot be construed as a *ratio decidendi*.

**23.** This is, however, not correct even factually. The dispute which was before the Apex Court in the said case, is set out in the very first paragraph of the judgment, which is reproduced below:-

*"This set of Writ Petitions seek to challenge the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act, 1996') as inserted by Section 13 of the Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter referred to as the "2019 Amendment Act") and brought into force with effect from 30.08.2019. They also seek to challenge the repeal (with effect from 23.10.2015) of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the '2015 Amendment Act') by Section 15 of the 2019 Amendment Act. Apart from the aforesaid challenge, a challenge is also made to various provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Insolvency Code') which, as stated by the Petitioners, result in discriminatory treatment being meted out to them."*

(Emphasis provided)

**24.** It is thus clear that not only was there a challenge to the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 but a challenge was also there to various provisions of the Insolvency Code. Therefore, the



contention of the learned senior counsel for the petitioners that the matter relating to the Insolvency Code was not before the Court, is not correct. The Company before the Hon'ble Apex Court was an Infrastructure Construction Company, which does construction works, such as a public utilities and projects like roads, bridges, hydro power, nuclear plants, etc., and it works as a contractor for Government Bodies, such as National Highway Authority of India (NHAI), Government Companies like, National Hydroelectric Power Corporation (NHPC), National Thermal Power Corporation Limited (NTPC), etc. Its grievance was that many a times, disputes arise between the petitioners and these Companies, which arise are resolved through arbitration, which takes a long time, i.e. at an average of about six years. But the moment an award is made in favour of the Company, it is challenged under Section 34 and there is automatic stay to the award. The petitioners then argued that Government Bodies other than Government Companies are exempted from the Insolvency Code as they are statutory authorities of the Government Department and, therefore, they cannot be taken before the adjudicating body under the Insolvency Code. On the other hand, the petitioners, who also owes large amount of dues to its Operational Creditors can be taken to the adjudicating authority under the Insolvency Code. Therefore, apart from a challenge to Section 87 of the Arbitration and Conciliation Act, 1996, there was also constitutional challenge to the Insolvency Code. This was

stated in Paragraph 62 of the judgment, which reads as under:-

"Constitutional Challenge to the Insolvency Code

62. It now falls on us to decide the second part of the challenges made in the present Writ Petitions, i.e. the challenge to the constitutionality of the Insolvency Code. As mentioned above, Dr. Singhvi has argued that the provisions of the Insolvency Code would operate arbitrarily on his client inasmuch as, on the one hand, an automatic-stay of arbitral awards in his favour would be granted under the Arbitration Act, 1996 as a result of which those monies cannot be used to pay-off the debts of his client's creditors. On the other hand, any debt of over INR one lakh owed to a financial or operational creditor which remains unpaid, would attract the provisions of the Insolvency Code against the Petitioner No. 1 - making these provisions arbitrary, discriminatory and violative of Articles 14 and 19(1)(g) of the Constitution of India. As a result, he has suggested that in order for his client, in turn, to recover monies from Government Companies and NHAI, the definition of 'corporate person' contained in Section 3(7) of the Insolvency Code should either be read without the words "with limited liability" contained in the third part of the definition, or have Section 3(23)(g) of the Insolvency Code, which is the definition of 'person', read into the aforesaid provision. In order to appreciate this contention it is necessary to set out these definitions:

**'Definitions**

3. In this Code, unless the context otherwise requires,-

xxx xxx xxx

(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

*(8) "corporate debtor" means a corporate person who owes a debt to any person;*

*(23) "person" includes-*

*(a) an individual;*

*(b) a Hindu Undivided Family;*

*(c) a company;*

*(d) a trust;*

*(e) a partnership;*

*(f) a limited liability partnership;*

*(g) any other entity established under a statute; and includes a person resident outside India."*

**25.** At this stage, we must note that the learned Solicitor General of India, who was defending the constitutional validity of the provisions had submitted before the Court that three of the five entities, which were respondents in the case and who have arbitral award against them, such as NTPC, NHPC and IRCON are "Government Companies" and, therefore, they would come within the definition of "Corporate Person" and "Corporate Debtor" under Sections 3(7) and 3(8) of the Insolvency Code. It was then argued on behalf of the Union of India that what is left here is National Highway Authority of India. As far as NHAI is concerned, it is a statutory body, which functions as an extended arm of the Central Government and which carries sovereign functions of laying down National Highways and, therefore, obviously, the Insolvency Code cannot be used against such a statutory body, because no resolution professional or private individual can take over the management of such body since it performs sovereign functions, nor can such body be driven to insolvency under an Insolvency Code.

**26.** On these rival submissions, the Hon'ble Apex Court gave its finding in Paragraphs 63, 64 & 65, which are as under:-

*"63. As correctly argued by the learned Solicitor General, Shri Tushar Mehta, the first part of 'corporate person', as defined in Section 3(7) of the Insolvency Code, means a company as defined in Clause 20 of Section 2 of the Companies Act 2013. Sections 2(20) and 2(45) of the Companies Act, 2013, which define 'company' and 'Government company' respectively, are set out hereinbelow:*

*'2(20). 'company' means a company incorporated under this Act or under any previous company law;'*

*'2(45). 'Government company' means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.'*

*64. From a reading of the aforesaid definition, Shri Tushar Mehta is clearly right in stating that the three entities who owe monies under arbitral awards to the Petitioner No. 1, being Government companies, would be subsumed within the first part of the definition. However, so far as NHAI is concerned, Dr. Singhvi's argument of either deleting certain words in Section 3(7) of the Insolvency Code, or adding certain words in Section 3(23)(g) of the Insolvency Code into Section 3(7) cannot be accepted.*

*65. It is clear from a reading of the Statement of Objects and Reasons of the NHAI Act, that the development and maintenance of national highways is a government function that falls within Entry 23 of List I of the Seventh Schedule to the Constitution of India. Further, under Section 5 of the National Highways Act, 1956, the Central Government may direct that any function in relation to the development or maintenance of national highways shall also be exercisable by any officer or authority subordinate to the Central Government. Under this provision, the function of execution of activities relatable to national highways was earlier delegated to the State Governments under an "agency system". Though the system worked through the*

*State Public Works Departments for a period of 40 years, as difficulties were experienced, the Centre itself decided to take over development and maintenance of the national highways system through the creation of a national highways authority.*

**27.** The Hon'ble Apex Court thereafter went on to describe in detail about the constitution of the NHAI, its statutory functions and how it is different from a ordinary Government Company, etc. and then it said at Paragraph 69 as under:-

*"69. From a conspectus of the above provisions, what is clear is that NHAI is a statutory body which functions as an extended limb of the Central Government, and performs governmental functions which obviously cannot be taken over by a resolution professional under the Insolvency Code, or by any other corporate body. Nor can such Authority ultimately be wound-up under the Insolvency Code. For all these reasons, it is not possible to accede to Dr. Singhvi's argument to either read in, or read down, the definition of 'corporate person' in Section 3(7) of the Insolvency Code."*

**28.** As we can gather from the above judgment, the whole effort of the petitioners was to get a declaration from the Hon'ble Supreme Court to the effect that even Government Bodies or authorities, like NHAI come within the ambit of Insolvency Code. Giving its reasons that this cannot be done as a Government authority performs statutory functions, this plea was rejected. At the same time, it was held that many of the Companies who owe a debt to the petitioner are Government Companies and come within the definition of a "Corporate Person" and "Corporate Debtor", as defined under Sections 3(7) and 3(8) of the Insolvency Code. The plea of the petitioner for

including certain words in the statute or deleting them was also rejected.

**29.** To reiterate, the stand taken by Mr. K.N. Choudhury, learned senior counsel for the petitioners is that this finding of the Hon'ble Supreme Court that a Government Company comes within the definition of "Corporate Person" or "Corporate Debtor" is an obiter and that was not the main issue decided by the Hon'ble Supreme Court, and in any case it has been granted as a concession and, therefore, can never be a part of the *ratio decidendi* of the judgment.

**30.** All the same, when we examine the arguments of the rival parties before the Hon'ble Apex Court, as we have done in the preceding paragraphs, it cannot be said by any stretch of imagination that a proposition was made by the petitioners and the concession was granted by the learned Solicitor General of India. Both the rival counsels were only reading the provisions of law and both of them agreed that Government Companies are included as a "Corporate Person" or a "Corporate Debtor". This has the mark of approval by the Hon'ble Supreme Court, not as a matter of concession on a point, but an acceptance of a legal proposition. The learned Solicitor General of India correctly argued, as held by the Hon'ble Court, that the Government Company, such as the three Government Companies which were before the Hon'ble Apex Court, namely, NTPC, NHPC and IRCON, come under the definition of "Corporate

Person” under Section 3(7) of the Insolvency Code and this the Hon’ble Apex Court approved holding that to be the correct legal position.

**31.** It is indeed true that a judgment is only an authority on what it decides. In ***Hindustan Construction Company Limited*** case, the Apex Court has given a clear finding that Insolvency Code is applicable to Government Companies though not applicable to such Government Authorities or bodies, which are performing statutory functions as they would be different from Government Companies, and that is a *ratio decidendi* in the judgment, yet even if that was not the central aspect of the said judgment, it would be still binding upon this Court, as held by the Hon’ble Apex Court in the case of ***Peerless General Finance and Investment Company Limited -Vs- Commissioner of Income Tax***, reported in ***2019 SCC Online SC 851***. The Hon’ble Apex Court held as under:-

*".....We reiterate that though the Court’s focus was not directly on this, yet, a pronouncement by this Court, even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the High Court."*

**32.** A Company which is defined under Section 2(20) of the Companies Act makes no distinction between a Government Company and a Private Company. Any Company, which is incorporated under the Companies Act, is a Company. True, Section 2(45) of the Companies Act then defines what is a Government Company, i.e. a Company where more than 51% shares are held by the

State or Central Government. All the same, even a Government Company is also a company which is incorporated under the Companies Act. The argument of the learned senior counsel for the petitioners is that Section 3(23) of the Insolvency Code while defining a "Person" states Company differently. It merely states "a Company" and not a Company as defined under Section 2(20) of the Companies Act. The definition under Section 3(23) of the Insolvency Code of a "Person" is as follows:-

*"(23) 'person' includes-*

*(a) an individual;*

*(b) a Hindu Undivided Family;*

*(c) a company;*

*(d) a trust;*

*(e) a partnership;*

*(f) a limited liability partnership;*

*(g) any other entity established under a statute;  
and includes a person resident outside India."*

**33.** It is indeed true that in Section 3(23) of the Insolvency Code, "Person", *inter alia*, includes "a Company", and it is true that here it is not specifically stated a Company as defined under Section 2(20) of the Companies Act, 2013. But that does not matter. Words and phrases are always to be understood in the context where they have been used. Even here "a Company" would include a Government Company, in our considered opinion.

**34.** Moreover, if the Legislature had deliberately omitted certain words or definition from a Clause, it is not given to



the Court to include that in a statute. A Government Company is a Company as defined under Section 2(20) of the Companies Act and had the Legislature intended to exclude Government Companies from the definition of a "Corporate Person", it would have very well done that by excluding "Government Companies" from the definition of "Corporate Person" as it has been done in the case of "Financial Service Provider". It is not a function of a Court to supply the supposed omissions of the Legislature.

**35.** We may add that merely because 100% share capital of the company are owned by the Central Government which are in the name of the President of India, does not make the company an agent of the Government of India or an arm of the Central Government, as is being suggested, i.e. at par with Government Bodies, like NHAI. A company has a distinct identity of its own after being incorporated as a company under the Companies Act. An incorporated company has a separate identity and existence recognised under the law, as a 'juristic person'.

***[Heavy Engineering Mazdoor Union –vs- State of Bihar & Ors., (1969) 1 SCC 765]***. The Hon'ble Supreme Court in Para 4 of the said judgment held as under:

*"4. ....The company so incorporated derives its powers and functions from and by virtue of its memorandum of association and its articles of association. Therefore, the mere fact that the entire share capital of the respondent-company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the shareholders being, as aforesaid, distinct entities the fact that the President of India*

*and certain officers hold all its shares does not make the company an agent either of the President or the Central Government."*

**36.** This was reiterated by the Hon'ble Supreme Court in the case of ***A.K. Bindal -Vs- Union of India***, reported in ***(2003) 5 SCC 163***, wherein at Para 17 it was held as under:

*"17. The legal position is that identity of the government company remains distinct from the Government. The government company is not identified with the Union but has been placed under a special system of control and conferred certain privileges by virtue of the provisions contained in Sections 619 and 620 of the Companies Act. Merely because the entire shareholding is owned by the Central Government will not make the incorporated company as Central Government."*

**37.** Mr. K.N. Choudhury, learned senior counsel for the petitioners has referred to a number of judgments including a recent judgment of the Hon'ble Apex Court in the case of ***Pawan Hans Limited & Ors. -Vs- Aviation Karmachari Sanghatana & Ors.***, reported in ***(2020) 13 SCC 506***, where a Government Company is seen not as an ordinary Company but as something different, with more responsibility where the Courts expect such a Company to be a model employer where there is fairness in the treatment of its workers, etc. There can never be a quarrel on this proposition. These are all accepted principles now. But as we have seen from the decisions given by the Hon'ble Apex Court in the above two judgments, a Company has its separate identity after being incorporated as a Company under the Companies Act. It is not an arm of

the State. It is usually performing a commercial or/and business functions. A Government Company cannot be equated with a State authority, like National Highway Authority of India (NHAI), which is performing statutory functions or like other Departments, like Postal, Telegraph or the Railways or Public Works Department. This distinction has been clearly made by the Hon'ble Apex Court in the case of ***Hindustan Construction Company Limited***, which is binding upon this Court. Accordingly, the writ petition fails and is hereby dismissed.

**38.** *Interim* orders are hereby vacated. No order as to costs.

**JUDGE**

**CHIEF JUSTICE**

*M. Sharma*

**Comparing Assistant**