

**20TH SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT
COMPETITION, 2023**

**IN THE
HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU**

WP No. 1001 to 1004 of 2023

SUIT No. XXXX/2022

MIDAS ONLINE GAMES PRIVATE LTD. (REPRESENTED BY RESOLUTION PROFESSIONAL)

.....APPELLANT

v.

DIRECTORATE GENERAL OF GST INTELLIGENCE BENGALURU

.....RESPONDENT

[UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA]

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

TABLE OF CONTENTS

Statement of Jurisdiction.....	v
Statement of facts.....	vi
Statement of Issues	vii
Summary of Arguments.....	viii
Arguments Advanced.....	1
I. Midas is liable to be taxed at a rate of 28% and not 18%	1
A. Lotteries and poker are games of chance and qualify as gambling.....	2
B. Fantasy Gaming is a Game of Chance and qualifies as gambling.....	5
C. Online Horse Racing is taxable at a rate of 28%	6
II. Midas is bound to pay tax on the entirety of the consideration by virtue of the Cgst Rules read with the Cgst Act	8
III. GST DEPARTMENT CAN BE TREATED AS A SECURED CREDITOR AND DOES NOT HAVE TO WAIT IN QUEUE TO RECEIVE ITS DUES.....	10
A. It does not go against the provisions of IBC	10
B. The recovery proceedings were carried out in a reasonable manner.....	12
C. The Resolution professional cannot challenge the orders of GST department.	13
D. The Karnataka HC lacks jurisdiction to decide on this case	15
Prayer for Relief.....	16

INDEX OF AUTHORITIES

PROPOSITION

¶1.....	1, 8
¶3.....	8

JOURNALS, BOOKS AND REPORTS

Bryan A Garner, <i>Black's Law Dictionary</i> 1995 (8th ed. 2004)	1, 2
G.P Singh, <i>Principles of statutory interpretation</i> (14th ed. 2020).....	2
Jay Satya, <i>Article Legality of Poker and Other Games of Skill: A Critical Analysis of India's Gaming Laws</i>	3
John William Salmond, <i>Salmond on Jurisprudence</i>	2
Joseph M Kelly et al., , <i>Is It a Game of Skill or Chance and Legally Does It Matter</i>	4
K.G Balakrishna, <i>The Role of Foreign Precedents in a Country's Legal System</i>	4
Simon Stephen A, <i>The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study</i>	4
Swedish Supreme Court Makes Controversial Poker Ruling, <i>Poker News Daily</i>	4

STATUTES

Central Goods and Services Tax (CGST) Rules, 2017, Rule 31A	8
Central Goods and Services Tax Act, 2017, §74(2)	13
Central Goods and Services Tax Act, 2017, §78	12
Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, Regulation 14	14

Insolvency and Bankruptcy Code, 2016, §3(30)	11
Insolvency and Bankruptcy Code, 2016, §3(31)	11
Insolvency and Bankruptcy Code, 2016, §5(21)	11
Insolvency and Bankruptcy Code, 2016, §63	15
Insolvency and Bankruptcy Code, 2017, §53	10
N.J. Rev Stat § 2C:37-1 (2013).....	6
N.Y. Const. art. I, § 9, cl. 2	5
The Central Goods And Services Tax Act, 2017, §2(52)	1
The Central Goods And Services Tax Act, 2017, §9(1)	1
The Lotteries (Regulation) Act, 1998, §2(b)	2

CASES

Ashok Kumar v. Union of India and Ors	4
Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Others	16
B. Prabhakar Rao v. State of Andhra Pradesh	4, 6
Bijoy Prabhakaran Pulipra v. State Tax Officer	15
Commr. of Customs v. Gujarat Perstorp Electronics Ltd.	8
Dominance Games Pvt. Ltd. v. State of Gujarat.....	3
Empee Distilleries Ltd. v. Pudukottai Electricity Distribution Circle	15
Forasol v. Oil and Natural Gas Commission	4
Gurdeep Singh Sachar v. Union of India	10
K.R. Lakshmanan (Dr) v. State of T.N.	3, 4, 7
Kesavananda Bharati v. State of Kerala	4
L.C. Infra Projects (P) Ltd. v. Union of India.....	14

M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Others	16
Manoranjitham Manamyil Mandram v. The State Of Tamil Nadu	7
Principal Commissioner of Income Tax v. Assam Company India Ltd., 2019	11
Puttaswamy (Privacy-9J.) v. Union of India.....	4
Ruchi Soya Industries Ltd. v. Union of India	12
Shri K.L. Mansukhani v. Senior Inspector of Police & Ors., 1999 SCC OnLine Bom 843.....	2
Skill Lotto Solutions Pvt. Ltd. v. Union of India.....	10
Sonka Publication (India) Pvt. Ltd. v. Union of India	8
South Asia Industries Pvt Ltd v S Sarup Singh	2
State of A.P. v. K. Satyanarayana.....	3
State of Karnataka v. State of Meghalaya.....	2
State Tax Officer (1) v. Rainbow Papers Ltd	11, 12, 13, 15
Sunrise Associates v Govt of NCT of Delhi.....	10
U.P. State Bridge Corporation Ltd and Others. Vs. U.P. RajyaSetu Nigam S. KaramchariSangh.....	16
Vishwanath Realtor v. State of Gujarat	14
White v. Cuomo	5

STATEMENT OF JURISDICTION

The Respondent most humbly submits that this Hon'ble High Court of Karnataka has jurisdiction to hear and adjudicate upon the matters of:

- **WP No. 1001 TO 1004 OF 2023** under Article 226 of The Constitution of India.

All of which is urged in detail in the written submission and submitted most respectfully.

The parties most humbly submit to the jurisdiction of the Hon'ble High Court of Karnataka

STATEMENT OF FACTS

Midas Online Games India Pvt Ltd is a company registered under the Companies Act, 2013 in Bengaluru, it was involved in online betting games with fees comprising of the admission fee and pooling fee. The company paid GST on 25% of the fees but did not pay on the remaining 75% of the fees. On April 01, 2022, the Office of the Director General of GST Intelligence issued show cause notices for the same and statements to the company for the financial years FY 2017-18 till FY 2020-21 under section 74(2) for FY 2017-18 and under section 73(2) for FY 2018-19 and statements under section 73(3) for FY 2019-20 and FY 2020.

On September 1st, 2022, the software supplier company MIDAS had an application filed against them by their software supplier under the Insolvency and Bankruptcy Code, 2016. On September 30th, 2022, the NCLT reserved its order and posted the case for orders on October 6th, 2022. On October 3rd, 2022, the GST department passed separate orders asking MIDAS to pay the entire demand of tax, interest, and penalty of around INR 11,000 crores before 5 PM on October 5th, 2022. If they failed to do so, the department informed MIDAS that recovery proceedings would be initiated under section 79 forthwith. On October 6th, 2022, the department-initiated recovery proceedings under section 79(1)(c) of the GST Act, and the NCLT directed that the CIRP under section 14 of IBC be initiated and appointed the Interim Resolution Professional. Moratorium was also ordered as per section 14 of the Code. On October 10th, 2022, the GST department filed its claim as secured creditor in Form B as per the Code. On October 20th, 2022, the Committee of Creditors was constituted. The first meeting of the COC was convened on October 26th, 2022. The Resolution Professional filed four writ petitions before the Karnataka High Court as the representative of the company challenging the orders and the recovery proceedings initiated by the GST department.

STATEMENT OF ISSUES

- I. WHETHER MIDAS IS LIABLE TO BE TAXED AT A RATE OF 28% OR 18%?
- II. WHETHER MIDAS IS BOUND TO PAY TAX ON THE ENTIRETY OF THE CONSIDERATION OR ONLY ON THE COMMISSION IT CHARGES?
- III. WHETHER THE GST DEPARTMENT CAN BE TREATED AS A SECURED CREDITOR IN THE INSOLVENCY PROCEEDINGS OF MIDAS?

SUMMARY OF ARGUMENTS

I. MIDAS IS LIABLE TO BE TAXED AT A RATE OF 28% AND NOT 18%.

Midas is a major player in the online betting games industry, offering various services such as card games like poker and rummy, fantasy cricket, horse racing, and lotteries. All these games are taxable under the Goods and Services Tax (GST) as they fall under the category of "gambling and betting services." SAC 999692 covers such services, and they are taxed at a rate of 28%. Midas is liable to pay this tax, not the 18% it has claimed. Lotteries and poker are games of chance, and they qualify as gambling, so Midas is liable for 28% tax on the value of the supply. Similarly, fantasy gaming and online horse racing are also taxable at 28%.

II. MIDAS IS BOUND TO PAY TAX ON THE ENTIRETY OF THE CONSIDERATION.

Midas, engaged in online betting games, horse racing, and lottery, generates actionable claims that qualify as supply under CGST rules. Schedule 3 states that actionable claims in respect of lottery, betting, and gambling are considered supply. The taxable value of the supply of lotteries includes the prize money. Midas' escrow account for operating an online fantasy game also constitutes an actionable claim. Thus, the entire amount is taxable.

III. GST DEPARTMENT CAN BE TREATED AS A SECURED CREDITOR IN THE INSOLVENCY PROCEEDINGS OF MIDAS.

The Goods and Services Tax (GST) department can be treated as a secured creditor and does not have to wait in a queue to receive its dues, according to a recent report. The reason given is that the GST department complies with §53 of the Insolvency and Bankruptcy Code [**Hereinafter IBC**], and the recovery proceedings were carried out reasonably. The resolution professional also cannot challenge the orders of the GST department, and the Karnataka HC lacks jurisdiction to decide on this case.

ARGUMENTS ADVANCED

I. MIDAS IS LIABLE TO BE TAXED AT A RATE OF 28% AND NOT 18%

Midas is involved in the business of online betting games such as card games like rummy, poker, and the like; fantasy cricket; horse racing; lottery; etc. and is one of the prominent leaders in this industry.¹

All these games are taxable under GST as they constitute Supply under GST.² The debate therefore, arises on the rate of tax leviable on these services. Service Accounting code [Hereinafter “SAC”] 999692 reads as covering “*Gambling and Betting Services Including Similar Online Services*” and services under this SAC are taxable at a rate of 28%. Gambling is the act of risking something of value, esp. money, for a chance to win a prize.³ Therefore, all games of chance qualify as gambling.

Therefore, Midas is liable to pay 28% tax instead of the 18 % it claims, as lotteries and poker are a game of chance and qualifies as gambling. [A] Fantasy Gaming is a game of chance and qualifies as gambling. [B] Furthermore, Online Horse racing is also amenable to taxation at a rate of 28% due to the principles of HSN. [C]

¹ ¶1, Casedata.

² The Central Goods And Services Tax Act, 2017, §9(1) : The Central Goods And Services Tax Act, 2017, §2(52).

³ Bryan A Garner, *Black's Law Dictionary* 1995 (8th ed. 2004).

A. LOTTERIES AND POKER ARE GAMES OF CHANCE AND QUALIFY AS GAMBLING

To determine whether any game is a ‘game of chance’ what essentially needs to be arrived at is that, the element of chance predominates over the element of skill.⁴ Game whose outcome is determined by luck rather than skill is a game of chance.⁵

Lotteries by virtue of their result being uncertain are games of chances and a similar situation is witnessed when examining poker. Lotteries and poker are therefore, game of chances as the element of uncertainty is high in lotteries [i] and poker [ii].

i. Lotteries are games of chances

Midas is involved in the business of lotteries. The nature of the game of lottery makes Midas liable to pay 28% tax and not 18 % tax on the value of the supply.

‘Lotteries’ is a species of gambling activity and hence lotteries is within the ambit of ‘betting and gambling’, making it taxable by the state.⁶ The duty of judicature is to act upon the true intention of the Legislature—the mens or sententia legis.⁷ The legislative intent behind a statute is very important when interpreting the statute and this legislative intent is communicated through the various explanations and the words that are used in the statute.⁸ In this case the legislative intent is visible from §2(b) of the Lotteries Act⁹ which provides that:

⁴ Shri K.L. Mansukhani v. Senior Inspector of Police & Ors. ¶24, 1999 SCC OnLine Bom 843.

⁵ *Supra note. 3, at 1996.*

⁶ State of Karnataka v. State of Meghalaya, 2022 SCC OnLine SC 350

⁷ South Asia Industries Pvt Ltd v S Sarup Singh, AIR 1966 SC 346 ; John William Salmond, *Salmond on Jurisprudence* 152 (11th ed. 1957).

⁸ G.P Singh, *Principles of statutory interpretation* (14th ed. 2020).

⁹ The Lotteries (Regulation) Act, 1998, §2(b).

“‘lottery’ means a scheme, in whatever form and by whatever name called, for distribution of prizes by lot or chance”

The provision uses the word “lot or chance” which clearly portrays the legislative intent behind lottery. Even the Hon’ble Supreme Court has accepted that lotteries are games of chance.¹⁰ Therefore, it is most humbly submitted that the lotteries are a game of chance.

ii. *Poker is a game of chance*

Poker is a game which highly draws upon the element of chance and therefore, therefore, it qualifies as a game of chance.

The Hon’ble High Court of Gujarat in the case of *Dominance Games Pvt. Ltd. v. State of Gujarat*¹¹ had examined that the game of poker was essentially a variant of the game of Flush or Teen Patti and held that since the game of Teen Patti had been determined as a game of chance by the Hon’ble Supreme court¹², even poker was a game of chance.

In the absence of any direct decision of the Supreme Court on the game of poker, any analysis of the legality of poker for any state in India would have to be given in light of the objects of different state acts and international case laws concerning the game of poker.¹³

It has been observed that constitutional systems in several countries, especially those belonging to the common law tradition, have routinely been borrowing doctrines and precedents from

¹⁰ K.R. Lakshmanan (Dr) v. State of T.N., (1996) 2 SCC 226.

¹¹ *Dominance Games Pvt. Ltd. v. State of Gujarat*, 2017 SCC OnLine Guj 1838.

¹² *State of A.P. v. K. Satyanarayana*, (1968) 2 SCR 387

¹³ Jay Satya, *Article Legality of Poker and Other Games of Skill: A Critical Analysis of India’s Gaming Laws*, 5 NUJS Law Review 93-102 (2012).

each other.¹⁴ There are myriad instances when the Indian Courts have relied on the judgments of foreign Courts.¹⁵ The Supreme Court in the case of *B. Prabhakar Rao v. State of Andhra Pradesh*¹⁶ opined that:

“Where internal aids are not forthcoming, we can always have recourse to external aids to discover the object of the legislation. External aids are not ruled out.”

Courts across the world have been tempted to perceive poker predominantly as a game of chance rather than skill and the same has been seen as UK courts as well.¹⁷ Furthermore, even civil law courts have declared poker to be a game of chance with recent decisions coming from the Swedish Supreme Court.¹⁸

A perusal of the Hon’ble Gujarat High court’s decision coupled with the concurrent rulings from around the world, it is evident that poker is a game of chance and not a game of skill.

¹⁴ Simon Stephen A, *The Supreme Court’s Use of Foreign Law in Constitutional Rights Cases: An Empirical Study.*, 1 Journal of law and courts 279-301 (2013).

¹⁵ K.G Balakrishna, *The Role of Foreign Precedents in a Country’s Legal System.*, 22 National Law School of India Review 1-16 (2010) ; Dr. K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1; Ashok Kumar v. Union of India and Ors., (2008) INSC 614; Forasol v. Oil and Natural Gas Commission, AIR 1984 SC 241; General Electric Company v. Renuagar Power Company, (1987) 4 SCC 137.

¹⁶ B. Prabhakar Rao v. State of Andhra Pradesh, 1985 S.C.R. Supl. (2) 573.

¹⁷ Joseph M Kelly et al., *Is It a Game of Skill or Chance and Legally Does It Matter*, 11 Gaming Law Review 190 (2007).

¹⁸ Swedish Supreme Court Makes Controversial Poker Ruling, Poker News Daily (Apr. 10, 2011), <https://www.pokernewsdaily.com/swedish-supreme-court-makes-controversial-poker-ruling-18704/>.

B. FANTASY GAMING IS A GAME OF CHANCE AND QUALIFIES AS GAMBLING

Midas games engages in Fantasy Sports gaming which is a game of chance. This is proved on the basis of the fact that the game sees a preponderance of chance over skill and there are foreign judgements which further this proposition.

In *White v. Cuomo*¹⁹, The New York Supreme Court had to examine whether regularization of fantasy sports gaming was a contravention of the constitution which by virtue of article 1²⁰, banned gambling in the state. The Hon'ble Court held that the regularization of fantasy sports gaming could not be allowed as it qualified as gambling and would be in contravention of the state's constitution. This decision can be relied on as where internal aids are not forthcoming, we can always have recourse to external aids to discover the object of the legislation. External aids are not ruled out.²¹

In the case of fantasy sports gaming, participants create virtual teams composed of real-life athletes, and they earn points based on the athletes' actual performance in real-life games. While skill is involved in the selection of players and the management of the team, the outcome of the game is ultimately determined by the performance of the real-life athletes, which is largely a matter of chance. As a result, it could be argued that fantasy sports gaming is primarily a game of chance.

Therefore, it is most humbly submitted that fantasy sports gaming do not rely on the skill of the better and considering the position of foreign courts on this issue it is evident that fantasy

¹⁹ *White v. Cuomo*, 118 N.Y. State Law Reporting Bureau 375 (N.Y. Supreme Ct. 2022).

²⁰ N.Y. Const. art. I, § 9, cl. 2.

²¹ *B. Prabhakar Rao v. State of Andhra Pradesh*, 1985 S.C.R. Supl. (2) 573.

sports gaming is a game of chance rather than a game of skill making it classifiable as gambling and taxable at a rate of 28%.

C. ONLINE HORSE RACING IS TAXABLE AT A RATE OF 28%

Midas is an online platform which conducts betting on Horse races. Therefore, Midas is liable to be taxed at a rate of 28% rather than 18%. This is argued on the basis of the facts that this type of an online betting on horse races is different from the normal horse racing when it comes to the preponderance of chance over skill. [i] Furthermore, the Service accounting code applicable on horse racing would also qualify it for being taxed at 28%. [ii]

*i. **Online Horse racing qualifies as gambling***

Midas is engaged in the practice of online betting on horse racing. It has been held previously by the Hon'ble Supreme court that horse racing is a game of skill²², however, that decision of the Hon'ble court is not applicable in this case as online Horse racing has a much higher preponderance of luck than the skill required.

Whether a game is one of chance or skill is a question of fact to be decided on the facts and circumstances of each case.²³ The legal definition of gambling in other jurisdictions typically involves the "*staking or risking something of value upon the outcome of a contest of chance or a future event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.*"²⁴

²² K.R. Lakshmanan (Dr) v. State of T.N., 245, (1996) 2 SCC 226.

²³ Manoranjitham Manamyil Mandram v. The State Of Tamil Nadu, AIR 2005 Mad 261

²⁴ N.J. Rev Stat § 2C:37-1 (2013).

The Hon'ble Supreme Court while declaring horse racing as a game of skill, based its decision on the rationale that in a horse race the winner is not determined by chance alone, as the condition, speed and endurance of the horse and the skill and management of the rider are factors affecting the result of the race and the better can exercise his judgment and discretion in determining the horse on which to bet.²⁵

Offline horse races have a bit of interference from the bettor as he can see the horse, decide upon the trainer and while having an informed decision, make an informed decision with his skill. However, the online arena keeps the bettor behind a computer screen and he can see only what the company shows him. He does not see the horse or the trainer physically and most websites only show him the past record of the horse along with its breed meaning there is no sufficient information flow because of which the result instead of relying more upon skill, is dependent upon chance and luck. The above decision of the Hon'ble Supreme court does not therefore, apply when judging online horse racing as the reasons behind presence of a better's control in offline horse racing do not exist in the online arena.

Therefore, the differences between offline and online betting on horse racing coupled with the preponderance of chance over skill makes online betting on horse racing a game of chance.

ii. The Service accounting code applicable on horse racing would also qualify it for being taxed at 28%.

SAC (Service Accounting code) 999692 reads as covering "*Gambling and Betting Services Including Similar Online Services*". It takes within its ambit all betting services. Horse racing is based on the betting of money and is adequately covered by this SAC which imposes a taxation liability of 28%.

²⁵ K.R. Lakshmanan (Dr) v. State of T.N., 245, (1996) 2 SCC 226.

In *C.C. (General), New Delhi v. Gujarat Perstorp Electronics Ltd.*²⁶, the Hon'ble Supreme Court was seized of the issue of deciding the classification of certain imported equipment's and design plans. In the process of answering, it was observed that one must refer not only to the physical, but also functional characteristics. The Hon'ble Delhi High had interpreted this Supreme Court decision to mean that the Court must ask what purpose will the item serve.²⁷

The basic character of horse racing includes betting on it and therefore, the adequate applicable SAC on horse racing is no. 999692. Henceforth, it is most humbly submitted that horse racing is to be taxed at 28% by virtue of the application of SAC no. 999692.

Since, lotteries, poker, fantasy sports gaming and online betting on horse racing are games of chance which qualify as gambling and is taxable at a rate of 28% by virtue of it coming under SAC No. 999692, it is submitted that, Midas is liable to 28% tax on the whole proceeds of its bet value and stake values.

II. MIDAS IS BOUND TO PAY TAX ON THE ENTIRETY OF THE CONSIDERATION BY VIRTUE OF THE CGST RULES READ WITH THE CGST ACT

Midas is engaged in the business of online betting games, horse racing and lottery. These games qualify under the heads of "*betting, gambling and horse racing*" as provided under the CGST Rules.²⁸ Midas charges its customers to play these games and keeps 25% of this charged fee as admission charge and claims that it is liable to pay tax only on this 25%.²⁹

²⁶ Commr. of Customs v. Gujarat Perstorp Electronics Ltd., (2005) 7 SCC 118.

²⁷ Sonka Publication (India) Pvt. Ltd. v. Union of India, 2019 SCC OnLine Del 8429.

²⁸ Central Goods and Services Tax (CGST) Rules, 2017, Rule 31A.

²⁹ ¶1, ¶3, Casedata.

GST is applicable only when there is a supply of goods or services. If there is a taxable supply then GST is to be applicable on the supply event. The value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator.³⁰

In purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser's possession³¹. Further, amounts pooled in an escrow account for operating an online fantasy game constitute an actionable claim, as the same are to be distributed among the winning participants.³²

Additionally, Schedule 3 of the CGST Act says, that Actionable claims qualify as supply when they are in respect to lottery, betting, and gambling.³³ The Hon'ble Supreme court has explicitly said that while determining the taxable value of supply of lotteries, the prize money is not to be excluded for the purpose of levy of GST.³⁴

Since Midas is engaged in betting, horse racing, lottery and poker, the actionable claims it generates through transfer of the pooling fees to the escrow account would also form part of the supply under Rule 31A (3) of CGST Rules; in such a case 100% of the amount would be included as supply making it taxable under GST.

Therefore, the actionable claim in addition to the commission fees would constitute the supply and the tax would be charged on the whole amount and not only on the commission of 25%.

³⁰ Id.

³¹ Sunrise Associates v Govt of NCT of Delhi (2010 (10) SCC 420)

³² Gurdeep Singh Sachar v. Union of India, 2019 SCC OnLine Bom 13059.

³³ *Supra note. 12, at Schedule 3 Entry no.6.*

³⁴ Skill Lotto Solutions Pvt. Ltd. v. Union of India, 2020 SCC OnLine SC 990.

III. GST DEPARTMENT CAN BE TREATED AS A SECURED CREDITOR AND DOES NOT HAVE TO WAIT IN QUEUE TO RECEIVE ITS DUES

It is humbly submitted that the GST department can be treated as a secured creditor and does not have to wait in queue to receive its dues, because [A] It does not go against the provisions of IBC [B] The recovery proceedings were carried out in a reasonable manner [C] The Resolution professional cannot challenge the orders of GST department. [D] The Karnataka HC lacks jurisdiction to decide on this case

A. IT DOES NOT GO AGAINST THE PROVISIONS OF IBC

The GST Department does not go against the provisions of IBC, as, [i] *It comes under the definition of Secured Creditor* [ii] *It complies with the §53 of IBC*³⁵.

i. It comes under the definition of Secured Creditor

The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority³⁶. The definition of "Secured Creditor" under the IBC is broad and inclusive enough to encompass all types of security interests, including mortgages, charges, hypothecations, assignments, encumbrances, and any other agreements or arrangements that secure the payment or performance of any obligations. Government dues owed to a governmental authority are treated as dues owed to a secured creditor³⁷.

GST Department is deemed to be a secured creditor as security interest is created by way of attachment of property by the Respondent. It is undisputed that the properties of the Corporate

³⁵ Insolvency and Bankruptcy Code, 2016, §53.

³⁶ State Tax Officer (1) v. Rainbow Papers Ltd., 2022 SCC OnLine SC 1162.

³⁷ Principal Commissioner of Income Tax v. Assam Company India Ltd., 2019 SCC OnLine NCLT 561.

Debtor were attached by the Department i.e. Respondent herein vide its Attachment Orders 01.10.2022.

Keeping the principle laid down in *State Tax Officer (1) vs Rainbow Papers Limited* in mind we can submit that the claim of the Department, squarely falls within the definition of “Security Interest” under §3(31)³⁸ of the IBC and the it becomes a secured creditor under §3(30)³⁹ of the Code. A reading of §§ 3(30) and 3(31) of the IBC makes it clear that the finding of the NCLAT that the State is not a secured creditor is erroneous and contrary to the clear definition of secured creditor under the IBC⁴⁰.

§ 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law⁴¹. Tax once determined to be paid in accordance with law is a sovereign debt⁴². Tax and duties levied and collected under law can never be treated as operational debt as defined in § 5(21)⁴³ of IBC, 2016.⁴⁴

³⁸ Insolvency and Bankruptcy Code, 2016, §3(31).

³⁹ Insolvency and Bankruptcy Code, 2016, §3(30).

⁴⁰ *State Tax Officer (1) v. Rainbow Papers Ltd.*, 2022 SCC OnLine SC 1162.

⁴¹ *Id.*

⁴² *Ruchi Soya Industries Ltd. v. Union of India*, (2022) 6 SCC 343.

⁴³ Insolvency and Bankruptcy Code, 2016, §5(21).

⁴⁴ *Ruchi Soya Industries Ltd. v. Union of India*, (2022) 6 SCC 343.

ii. It complies with the § 53 of IBC

Under § 53(1)(b)(ii), the debts owed to a secured creditor, which would include the GST Department, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date⁴⁵.

§ 53(1) begins with a non-obstante clause, stating that the proceeds from the sale of the liquidation assets shall be distributed in the order of priority listed, notwithstanding anything to the contrary contained in any other law enacted by the parliament or any state legislature for the time being in force. The IBC is both a central act and an umbrella legislation that deals with the specific subject of insolvency and bankruptcy.

It is humbly submitted that if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in § 53 of the IBC.

B. THE RECOVERY PROCEEDINGS WERE CARRIED OUT IN A REASONABLE MANNER

It is most humbly submitted that the recovery proceedings were carried out in a reasonable manner, because, [i] *There was no compliance of the show cause notices* [ii] *The recovery proceedings follow the directions under § 78⁴⁶ of CGST Act*

⁴⁵ State Tax Officer (1) v. Rainbow Papers Ltd., 2022 SCC OnLine SC 1162.

⁴⁶ Central Goods and Services Tax Act, 2017, §78.

i. There was no compliance of the show cause notices

The show cause notices were sent well within the limitation period under § 74(2)⁴⁷ of the Act. Since there was no compliance of the notice sent by the Department, a bank attachment in the following banks were carried out. The **issuance of show Cause Notice is sine qua non to proceed**⁴⁸ with the recovery of interest and the same was complied by the GST department and the order of provisional attachment is justifiable as it is done for the purpose of protecting the interest of the Government Revenue⁴⁹.

ii. The recovery proceedings follow the directions under § 78 of CGST Act

§ 78 of CGST Act says Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him. In the present case, the threshold of fraud was very high and if excess time was provided there was a risk of fabricating of evidence so it was necessary to expedite the recovery proceedings.

C. THE RESOLUTION PROFESSIONAL CANNOT CHALLENGE THE ORDERS OF GST DEPARTMENT.

The GST amount is an amount of tax levied under the assessment order as per the Goods and Services Tax Act, 2017. The exercise of revision of the GST assessment order was beyond the

⁴⁷ Central Goods and Services Tax Act, 2017, §74(2).

⁴⁸ L.C. Infra Projects (P) Ltd. v. Union of India, 2019 SCC OnLine Kar 3545.

⁴⁹ Vishwanath Realtor v. State of Gujarat, 2015 SCC OnLine Guj 6564.

jurisdiction of the Interim Resolution Professional/Resolution Professional [**Hereinafter “IRP” & “RP” respectively**].⁵⁰

It is pertinent to mention that the IRP/RP was not having the adjudicatory power given by the CGST Act. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016⁵¹ [**Hereinafter “CIRP Regulations”**] only authorises the IRP/RP to exercise power where the claim is not precise due to any contingency or other reasons⁵², in the present case, there was no possibility of the claims not being precise or any other contingency arising so the Resolution Professional cannot exercise his adjudicatory power.

In the present case, the Resolution professional challenged the orders passed by the GST department dated on 03.10.2022 under §§ 74(9) and 73(9) and recovery proceedings initiated on 06.10.2022 under § 79(1)(c) of the GST Act.

Therefore, the said act of the Resolution Professional is without jurisdiction and not sustainable in law. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority⁵³, altogether, the Adjudicating Authority is bound to reject the Resolution Plan⁵⁴.

⁵⁰ Bijoy Prabhakaran Pulipra v. State Tax Officer, 2021 SCC OnLine NCLAT 992.

⁵¹ Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, Regulation 14.

⁵² Bijoy Prabhakaran Pulipra v. State Tax Officer, 2021 SCC OnLine NCLAT 992.

⁵³ Empee Distilleries Ltd. v. Pudukottai Electricity Distribution Circle, 2022 SCC OnLine Mad 5272.

⁵⁴ State Tax Officer (1) v. Rainbow Papers Ltd., 2022 SCC OnLine SC 1162.

D. THE HON'BLE KARNATAKA HIGH COURT LACKS JURISDICTION TO DECIDE ON THIS CASE

No civil court or any other authority shall have jurisdiction on any matter in which an AA or NCLAT is empowered by the IBC to pass orders.⁵⁵ Nor can such courts grant an injunction on any action taken—or about to be taken— following an order passed by an AA. The Code provides a three-tier mechanism - namely the NCLT, which is the Adjudicating Authority; the NCLAT, which is the appellate authority; and the Supreme Court as the final authority⁵⁶. A writ remedy is one which can only be exercised in exceptional cases and the Courts should, therefore, have good reasons to bypass the alternate remedy to entertain a writ⁵⁷.

In the present case, no good reasons were present and was done only to obtaining interim orders and thereafter prolong the proceedings. The Supreme Court has in fact laid down the principle that whenever a writ petition is filed for enforcement of right flowing from any statutory enactment, forum of which is provided to be a specific forum, the High Court should decline to entertain the writ petition under Articles 226/227 of the Constitution of India⁵⁸.

The writ petitions, in the present case, are therefore, filed before the Karnataka High Court, which falls outside the jurisdiction as provided under § 63 of IBC.

⁵⁵ Insolvency and Bankruptcy Code, 2016, §63.

⁵⁶ M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Others, 2019 SCC Online SC 1542.

⁵⁷ Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Others, (1985) 1 SCC 260.

⁵⁸ U.P. State Bridge Corporation Ltd and Others. Vs. U.P. RajyaSetu Nigam S. KaramchariSangh, (2004) 4 SCC 268.

PRAYER FOR RELIEF

Wherefore in the light of facts stated, issues raised, authorities cited and arguments advanced, it is most humbly and respectfully prayed that this Hon'ble Court may be pleased to:

1. Declare the demands of the GST department to be sustainable in law and hold Midas Games liable to pay GST on the entire consideration.
2. Hold the GST Department be treated as Secured Creditor and declare that it does not have to wait in the queue as per the IBC provisions to receive its dues.

And further pass any other order in favour of the Respondents, as this Court may so deem fit in the ends of equity, justice and good conscience.

Date: 03 April, 2023.

Counsel No. TC-02

Place: Bengaluru, Karnataka

(Counsel for the Respondents)