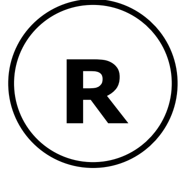

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 27th DAY OF MAY, 2021

PRESENT

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

AND

THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR

WRIT APPEAL No.2575/2018 (T-TAR)

BETWEEN:

1. Union of India
   Through the Secretary
   Ministry of Finance,
   North Block,
   New Delhi – 110 001.

2. The Commissioner of Customs
   New Customs House,
   Panambur,
   Mangalore – 575 010.

3. Deputy Commissioner of Customs
   Office of the Commissioner of Customs
   New Customs House, Panambur
   Mangalore – 575 001.

... Appellants

(By Sri.Jeevan J.Neeralgi, Advocate)

AND:

M/s. Ruchi Soya Industries Ltd.,
301, Mahakosh House,
7/5, South Tukoganj,
Nath Mandir Road,
Indore – 452 001
Madhya Pradesh.

... Respondent

(By Sri.Rajesh Rawal, Advocate,
through V/C for Sri.Sachindra Karanth, Advocate)

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This Writ Appeal is filed under Section 4 of the Karnataka High Court Act, 1961, praying to set aside the Final Order in Writ Petition No.41394/2015, dated 06.03.2018, passed by the learned Single Judge of this Court and pass such other order as this Hon'ble Court deems fit in the facts of the case, in the interest of justice and equity.

This appeal coming on for 'Hearing on Interlocutory Application' this day, ***NAGARATHNA J.,*** delivered the following:

J U D G M E N T

This appeal is listed to consider IA No.1/2021 seeking dismissal of the appeal on the basis of Section 31 of the Insolvency and Bankruptcy Code, 2016 ("IBC" for the sake of convenience) and on the basis of the latest judgment of the Hon'ble Supreme Court in the case of ***Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory vs. Edelweiss Asset Reconstruction Company Limited through the Director [2021 SCC Online SC 313]*** *(Ghanashyam Mishra)* to the effect that the claim of the Revenue as well as the liability of the respondent has stood extinguished permanently. But, with consent of learned counsel on both sides, it is heard finally.

2. This appeal is filed by the Union of India, the Commissioner and Deputy Commissioner of Customs,

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being aggrieved by the order of the learned Single Judge dated 06.03.2018 passed in writ petition No.41394/2015. In that petition, respondent herein had sought a declaration that the reassessment of the subject goods imported by the respondent on 17.09.2015 and demanding the higher rate of duty of 12.5% for clearance of the subject goods was illegal. The learned Single Judge, accepted the contentions of the respondent-importer and quashed Annexures – W, X, Y and Z and held that the respondent herein was liable to pay duty only at 7.5% based on Notification No.12/2012-Cus. dated 17.03.2012. Consequently, the differential duty as per Notification No.46/2015-Cus. dated 17.09.2015 at the rate of 12.5% was not applicable to the respondent herein.

3. Succinctly stated, the facts are, the respondent herein is a public limited Company registered under the provisions of the Companies Act, 1956. According to the respondent, it entered into a contract on 27.07.2015 with 'M/s.Aavanti Industries Private Limited, Singapore,' for import of 10,000 Metric Tons (MTs.) of Crude Palm Oil of Edible Grade in bulk, as per the terms and conditions stipulated in the contract. The vessel carrying the aforesaid imported item arrived at Mangalore Port on

17.09.2015 around 1600 hours. The respondent herein had filed four bills of entry bearing Nos.2619662, 2619678, 2619680 and 2619708, dated 16.09.2015, seeking clearance of the subject goods for home consumption. According to the respondent herein, as per Notification No.12/2012-Cus. dated 17.03.2012, it was liable to pay duty at 7.5%. That the four bills of entry stipulating duty at 7.5% were assessed on 16.09.2015 and the respondent herein was required to deposit duty of Rs.2,64,95,907/- in terms of bills of entry and TR-6 challans generated by Electronic Data Interchange (EDI) Service Centre, Mangalore.

4. It is not in dispute that the inward entry of the vessel was permitted at 22.45 hours on 17.09.2015. The respondent herein contended that the appellants herein were not right in applying Notification No.46/2015-Cus. dated 17.09.2015 and demanding the enhanced duty at the rate of 12.5% and thereby claiming the enhanced rate in terms of the bills of entry and TR-6 challans generated by EDI Service Centre, Mangalore, on 18.09.2015 i.e. subsequent to the assessment of the bills of entry already made on 16.09.2015. Therefore, the respondent/writ petitioner filed the petition before this Court, seeking a

declaration that the reassessment of the bills of entry on 18.09.2015 consequent to issuance of the notification on 17.09.2015 and demanding the higher rate of duty at 12.5% for clearance of the subject goods was illegal.

5. The learned Single Judge by applying the judgment of the Hon'ble Supreme Court in the case of ***Union of India vs. Param Industries Ltd., [2015 (321) ELT 192 (SC)]*** *(Param Industries Ltd.)* held that, under Section 25(4) of the Customs Act, 1962 (hereinafter referred to as the 'Act' for the sake of convenience), there was non-compliance of the stipulation under clause (b) of Section 25(4) of the Act and the Notification No.46/2015-Cus. dated 17.09.2015 was not applicable to the subject goods and appellant/Revenue could not claim the differential rate of duty on the basis of the said Notification dated 17.09.2015. Consequently, the demand made at Annexures W, X, Y and Z were quashed and it was declared that the importer was liable to pay duty at 7.5% based on the Notification Nos.12/2015 dated 17.03.2012 and no differential amount of duty could be claimed on the basis of the notification dated 17.09.2015. Being aggrieved by the order of the learned Single Judge, the Union of

India and Department of Customs have preferred this appeal.

6. At this stage, it may be mentioned that the respondent/importer has filed IA No.1/2021, seeking dismissal of the appeal on the basis of Section 31 of the "IBC". While considering the said application, the merits of the appeal were also heard.

7. Learned counsel for the appellants, Sri.Jeevan J.Neeralgi contended that the learned Single Judge was not right in declaring that the notification dated 17.09.2015 was not applicable to the subject goods on the premise that, clause (b) of sub-section (4) of Section 25 of the Act was not applicable. He submitted that the said stipulation in clause (b) is not a mandatory or compulsory stipulation. But, in the instant case, the notification was issued and published on 17.09.2015, the same was applicable to the subject goods, having regard to Section 15 of the Act.

8. Learned counsel for the appellants contended that, Section 15 of the Act deals with the date for determination of rate of duty and tariff valuation on the imported goods. The rate of duty and tariff valuation of imported goods, shall be the rate and valuation in force

and in case of entry for home consumption under Section 46 of the Act, as in the instant case is, on the date on which a bill of entry in respect of such goods is presented under the Section. A proviso has been inserted to Section 15, with effect from 28.09.1996. The said proviso is a deeming fiction and it states that, if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards.

9. In the instant case, though four bills of entry were assessed on 16.09.2015, the date of entry of the ship was only on 17.09.2015 i.e. the deeming date, which must be taken into consideration as the date of presentation. In other words, the contention was that, even if the bills of entry were presented before the date of entry inwards of the vessel, the bills of entry shall be deemed to have been presented on the date of such entry inwards. In the instant case, the date of entry inwards of the vessel was 17.09.2015. On the said date, the Notification was issued and the said Notification was applicable to the subject goods. In this context, learned counsel for the appellant placed reliance on a judgment of a Division Bench of the

Calcutta High Court in respect of the very same respondent, ***Ruchi Soya Industries Ltd. vs. Union of India [2017 (350) ELT 201 (Cal.)],*** *(Ruchi Soya Industries Ltd.),* and the judgment of learned Single Judge of Madras High Court again in respect of the very same respondent/importer in ***Writ Petition No.31090/2015 dated 26.04.2021.*** It was contended that having regard to the aforesaid judgments interpreting Section 25(4)(b) in the context of Section 15 of the Act, the Notification dated 17.09.2015 was squarely applicable to the subject goods and the higher duty at the rate of 12.5% was payable by the respondent. The learned Single Judge has failed to appreciate this aspect of the matter and has instead held that the said Notification was not applicable to the subject goods, which is not correct.

10. Learned counsel for the appellants in this context also drew our attention to sub-section (5) of Section 25 of the Act. He further submitted that with effect from 14.05.2016, Section 25(4)(b) has been omitted and therefore, the said provision no longer being on the statute book, would not apply even to the instant case, since the omission relates back to the date of enforcement of the Act itself.

11. Learned counsel for the appellants contended that the learned Single Judge was not right in coming to the conclusion that the notification dated 17.09.2015 was offered for sale only on 21.09.2015 and therefore, there was non-compliance of Section 25(4)(b) of the Act, as well as the higher rate of duty as per notification dated 17.09.2015 was not applicable to the respondent. He submitted that the impugned order may be set aside and the respondent be directed to pay the differential duty at the rate of 12.5% as per notification dated 17.09.2015.

12. *Per contra*, learned counsel for the respondent Sri.Rajesh Rawal, supported the order of the learned Single Judge and contended that the learned Single Judge has rightly relied on the judgment of the Hon'ble Supreme Court in *Param Industries Ltd.* and has correctly held that the Notification dated 17.09.2015 was not applicable to the subject goods, as there was non-compliance of Section 25(4)(b) of the Act, in the instant case. The said Notification was available for sale only on 21.09.2015, which was later than the date of issuance of Notification and its publication in the Official Gazette. He contended that, when it is not otherwise provided in the Notification,

the date of issuance of the Notification and the date of publication in the Official Gazette would coincide. In such an event, the publication must be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, so as to bring to the notice of the concerned importer about the Notification, such as in the instant case, Notification dated 17.09.2015, enhancing the rate of basic customs duty from 7.5% to 12.5%. In the absence of the said Notification being made available to the importer, there would be non-compliance of what has been mandated under clause (b) of sub-section (4) of Section 25 of the Act. In such an event, the enhanced duty could not have been made applicable, when the goods entered for home consumption and there could not have been reassessment of the bills of entry on the basis of the said Notification, which had not been offered for sale. He further contended that the mandate of Section 25(4)(b) of the Act has been underlined by the Hon'ble Supreme Court in *Param Industries Ltd.* and drew our attention to the relevant paragraphs of the said judgment.

13. Learned counsel for the respondent further submitted that the judgments of the Calcutta High Court and Madras High Court relied upon by appellants' counsel

do not apply in the present case and they could be distinguished. Learned counsel further submitted that as far as the judgment of the Calcutta High Court is concerned, it has been clearly noted by the Division Bench of the said Court that the affidavit filed by the Revenue in the said case was neither controverted nor denied by the respondent herein. On that basis held that, in the absence of any denial of the contents of the affidavit filed by the Revenue, there was acceptance of the fact that the notification dated 17.09.2015 was made available on the same date for sale. Hence, on that premise, the respondent was unsuccessful in the said matter. It was submitted, as against the judgment of the Calcutta High Court, Special Leave Petition (SLP) has been preferred before the Hon'ble Apex Court and leave has been granted by order dated 04.05.2017.

14. It was further submitted that the judgment of the Madras High Court can also be distinguished, inasmuch as the said judgment did not consider the mandate of Section 25(4)(b) of the Act and it proceeded on the basis that, with the advancement of technology, the said provision has been rendered vestigial and there is no useful purpose in carrying out the mandate of the said

provision, having regard to the fact that, such a notification is always available on the website of the Department. He contended that the said reasoning does not take into consideration the judgment of the Hon'ble Supreme Court in *Param Industries Ltd.* Therefore, same cannot be a precedent in the instant case.

15. Learned counsel for the respondent drew our attention to the impugned order and submitted, in this case there was a specific reference made to the reply furnished by the Department under the provisions of The Right to Information Act, 2005 (RTI Act, 2005), which has been adverted to by the learned Single Judge to come to the conclusion that on 17.09.2015, the Notification was not available for sale and therefore, the learned Single Judge rightly applied the ratio of the judgment of the Hon'ble Supreme Court in *Param Industries Ltd.* and granted the relief to the respondent herein, which would not call for any interference in this appeal.

16. Learned counsel further submitted that the aforesaid distinguishing aspect of the matter did not arise either before the Calcutta High Court or the Madras High

Court and therefore, for this reason also, those judgments could be distinguished.

17. Learned counsel for the respondent further contended that an application has been filed seeking dismissal of the appeal on the basis of Section 31 of the "IBC", which has now been interpreted by the Hon'ble Supreme Court recently in the case of *Ghanashyam Mishra*. The questions raised in the said matter have been answered in favour of the respondent herein, inasmuch as a creditor, including the Central Government and State Government or any local authority, is bound by the plan under sub-section (1) of Section 31 of the "IBC". The said authorities are not entitled to initiate any proceeding for recovery of any of the dues from the corporate debtor, if the operational debt is not a part of the resolution plan approved by the adjudicating authority. He contended that, in the said case it has also been held that Section 7 of Act 26 of 2019, which is an amendment to Section 31 is clarificatory, declaratory and substantive in nature and therefore the application by the respondent herein may be allowed and the claim of the appellants may be held to have abated.

18. Learned counsel for the respondent drew our attention to the relevant paragraphs of the judgment of the Hon'ble Supreme Court in *Ghanashyam Mishra* and contended that the application filed by the respondent may be allowed.

19. By way of reply, learned counsel for the appellants submitted, it may be, as against the judgment of the Calcutta High Court, leave has been granted by the Hon'ble Supreme Court in the SLP preferred by the respondent. However, the fact remains that the respondent cannot place reliance on the reply given to the RTI application made by it and contended that the Notification dated 17.09.2015 was not available with the respondent. He submitted that the Calcutta High Court has rightly held against the respondent and therefore, the order of the learned Single Judge may be set aside and the appeal filed by the appellants may be allowed.

20. Learned counsel further submitted that, it is not known, whether, the claim of the appellants is a part of the resolution plan vis-à-vis the respondent Company or not. If the said claim, which is in the nature of an operational debt, is covered under the resolution plan and

if the appellants succeed on merits, they can initiate proceedings for recovery of the dues from the respondent.

21. By way of response to these submissions, learned counsel for the respondent contended that the appellants have not produced any evidence to establish the fact that the dues to the Department are part of the resolution plan. He submitted that the application IA No.1/2021 was filed as early as on 01.04.2021. In the circumstances, the application filed by the respondent may be allowed.

22. The detailed narration of facts and contentions would not call for reiteration. Before we consider the application filed by the respondent herein, we would consider the appeal on its merits.

23. It is not in dispute that the respondent had imported 10.000 metric tons of Crude Palm Oil of Edible Grade in bulk from its foreign supplier. The goods arrived at Mangalore Port on 17.09.2015 and on the previous date i.e. on 16.09.2015, four bills of entry were presented for clearance and the same were cleared. However, the vessel was permitted entry into the Port only on 17.09.2015. Co-incidentally, on the very same day the Notification was

issued enhancing the customs duty from 7.5% to 12.5%. In the circumstances, the appellants - Department sought for payment of differential duty on the subject goods on the basis of Section 15 of the Act.

24. Section 15 of the Act reads as under:

"**15. Date for determination of rate of duty and tariff valuation of imported goods.-** The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,-

(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under section 68, on the date on which a bill of entry for home consumption in respect of such goods is presented under that section;

(c) in the case of any other goods, on the date of payment of duty;

Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be;

(2) The provisions of this section shall not apply to baggage and goods imported by post."

25. Section 15 of Customs Act prescribes that rate of duty and tariff valuation applicable to imported goods shall be the rate and valuation in force at one of the following dates. (a) if the goods are entered for home consumption under Section 46 of the Act, the date on which Bill of Entry is presented (b) in case of warehoused goods, when Bill of Entry for home consumption is presented u/s 68 of the Act, for clearance from warehouse and (c) in other cases, date of payment of duty.

26. As per section 46 of Customs Act, every importer of goods has to submit a 'Bill of Entry' giving details of goods being imported. The carrier of goods has to submit 'Arrival manifest or import manifest (words 'arrival manifest' inserted w.e.f. 29.3.2018) or 'Import Report' giving details of all goods which are brought for unloading at the port. If shipping berth is available, 'Entry Inwards' is granted to the vessel. Normally, Bill of Entry should be presented after ship, aircraft or vehicle arrives and arrival manifest or import manifest, is submitted by shipper.

However, this will delay the assessment process and goods lying on docks will incur heavy demurrage. Hence, it is permitted to submit 'Bill of Entry' if the vessel in which goods have been shipped is expected to arrive at any time not exceeding 30 days prior to date of such presentation – (proviso to section 46(3) of Customs Act, as amended w.e.f. 6.8.2014). However, even if Bill of Entry is submitted earlier, relevant date for purpose of assessment (valuation and rate of customs duty) will be (a) date of grant of 'entry inward' to vessel or (b) date of submission of Bill of Entry whichever is later. *(Source: Customs Law and Foreign Trade Policy, by V.S.Datey, 22nd Edition, 2020)*

27. A reading of the same would indicate that the said provision deals with date for determination of right of duty of imported goods, which is, in the case of goods cleared for home consumption, on the date of which the bill of entry in respect of such goods is presented under the said Section.

28. A reading of the proviso would indicate that, if a bill of entry has been presented before the date of entry inwards of the vessel by which the goods are imported, the

bill of entry shall be deemed to have been presented on the date of such entry inwards. In other words, by a deeming fiction, the date of entry inwards of the vessel is construed to be the date of presentment of the bill of entry even in a case where the bill of entry may have been presented before the date of entry inwards of the ship or the vessel. This is in order to take care of a situation, where there would be a time lag between presentment of the bill of entry and movement of the vessel inward to the Port and if in the interregnum there are any contingencies which may occur by issuance of notification under the provisions of the Act, may be in the form of grant of exemptions from payment of customs duty, increase or decrease in the rate of duty etc.

29. In the instant case, it is no doubt true that the four bills of entry were presented on 16.09.2015 i.e. the day prior to issuance of the Notification, which was on 17.09.2015. However, the proviso to sub-section (1) of Section 15 is significant.

30. Therefore, having regard to the legal fiction in the proviso to sub-section (1) of Section 15, it must be held that, in the instant case, although four bills of entry

were presented on 16.09.2015 i.e. the date before the vessel entered the Mangalore Port, which was 17.09.2015, it must be deemed that the bills of entry were presented on the date of entry of the vessel i.e. on 17.09.2015. In this context, we find considerable force in the submissions made by the learned counsel for the appellants.

31. But, the matter does not end. The bone of contention between the parties is, on the day the ship entered the Mangalore Port i.e. on 17.09.2015, co-incidentally, a Notification was issued enhancing the rate of customs duty on Crude Palm Oil of Edible Grade from 7.5% to 12.5% and therefore, the contention of the Revenue is that, the enhanced rate of customs duty was liable to be paid by the respondent importer.

32. To this submission, learned counsel for the respondent has placed reliance on sub-sections (4) and (5) of Section 25 of the Act to contend that, unless the mandate of sub-section (4) of Section 25 was complied, Notification dated 17.09.2015 could not have been made applicable to the respondent in the instant case.

33. Before delving on the said contention, it would be useful to extract Section 25 of the Act as under:

"25. Power to grant exemption from duty.-

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2) insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had

always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation - "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(4) Every notification issued under sub-section (1) or sub-section (2A) shall.-

(a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the

> Directorate of Publicity and Public Relations of the Board, New Delhi.
>
> (5) Notwithstanding anything contained in sub-section (4), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force.
>
> (6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees."

34. A reading of the same would indicate that the notification issued under sub-section (1) or sub-section (2A) of Section 25 shall come into force on the date of its issue by the Central Government for publication in the Official Gazette. This is, unless any other date is indicated in said notification itself (unless otherwise provided).

35. Further, the said notification which is published must be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi. No doubt, Section 25(4)(b) of the Act has been omitted with effect from 14.05.2016, but as far as this

case is concerned, the said provision was very much on the statute book and hence is relevant.

36. The bone of contention between the parties is, whether, in the instant case, Notification dated 17.09.2015, which was published on the same day in the Official Gazette was not made available to the respondent, inasmuch as it was not offered for sale on the date of its issuance i.e. on 17.09.2015 itself and therefore, the said mandate not having been complied with, the ratio of the judgment of the Hon'ble Supreme Court in *Param Industries Ltd.* would squarely apply. Hence, the enhanced rate of customs duty as stipulated in the said Notification, cannot be applied to the imported goods.

37. In this regard, learned counsel for the respondent submitted that, the learned Single Judge rightly relied on the said judgment to grant the relief to the respondent herein. In *Param Industries Ltd.,* it was observed that the two conditions namely, (i) Notification should be duly published in the official gazette and (ii) it should be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi, are mandatory in nature. If both the

conditions are not complied with, then the Notification cannot be made applicable on the date of its issuance. In that regard, reliance was placed on ***Harla vs. State of Rajasthan [AIR 1951 SC 467],*** wherein the modes of publication of a Notification was considered and it was observed that a Notification or an order would not become operative until it is made known to the public. Therefore, wide publication to such a Notification, which is issued by the Department, is a necessity. This is unlike making of a law or legislation by the Parliament or the State Legislatures, where the debate is in the public domain and enlightened citizens could participate in the legislation being made in the Parliament and the Legislature by offering their suggestions or criticism.

38. In *Param Industries Ltd.,* on facts, it was observed that the second condition was not satisfied, inasmuch as the Notification dated 3.8.2001 was offered for sale only on 6.8.2001 as the intervening period was holiday and therefore, the said Notification could not have been made applicable with effect from 3.8.2001 itself.

39. Relying on the said judgment, learned counsel for the respondent submitted, in the instant case, learned

Single Judge has very pertinently referred to the reply given to the RTI query sought by the respondent, wherein it was been stated that, the Notification dated 17.09.2015 was received for sale at Kitab Mahal, Sale Counter of the Department from Government of India Press, Mayapuri, New Delhi, and put on sale to the general public on 21.09.2015. In view of this categorical reply to the RTI query of the respondent by the Revenue, it becomes crystal clear that the notification dated 17.09.2015 was not available for sale on the said date and therefore it could have been made applicable only with effect from 21.09.2015 and not with effect from 17.09.2015.

40. It was also pointed out that, the Division Bench of the Calcutta High Court has recorded that, in response to any query dated 13.10.2015 under RTI Act, 2005, it was revealed that the printed gazette notification dated 17.09.2015 was dispatched from the Government of India Press, Mayapuri Ring Road, New Delhi, for sale on 21.09.2015. Therefore, the Notification dated 17.09.2015 which was not made available till 21.09.2015, could not have been applied in the instant case.

41. While referring to the same, learned counsel for the respondent submitted that during the course of proceedings before Calcutta High Court, Revenue filed an affidavit, which was extracted in the judgment and it was observed that the contents of the affidavit were uncontroverted by the respondent herein. In that regard, it was contended by learned counsel for the respondent that, firstly, there was no opportunity to controvert the said affidavit and secondly, in the instant case, before this Court the learned Single Judge has categorically accepted the reply given by the Department under the RTI Act, 2005, which is totally contrary to the contents of the affidavit filed by the Department before the Calcutta High Court.

42. We have pondered over the contentions of learned counsel for the respondent and we find that the same require consideration and acceptance.

43. One of the legislative controls over delegated legislation is 'Publication'. The other two being 'Laying Procedure' and 'Consultation of Interests'.

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44. The Latin Maxim '*ignorantia Juris non excusat* (ignorance of law is no excuse) means that every one is presumed to know the law. The said presumption could apply only when the law is made known to the person to whom it would apply. This is particularly so in the case of delegated legislation.

45. It is a mandatory requirement that there is publication of every law, so that the people to whom it would apply are aware of it. In this context, it would be necessary to distinguish between a legislation being made by the Parliament or Legislature of a State and a delegated legislation. When a particular legislation is made by a Parliament or State legislature, the process of legislation is in the public domain, inasmuch as the debate of the legislation is not only within the houses of legislature, but also a simultaneous debate amongst the citizens would be underway. Therefore, there is great deal of publicity attached to legislation. By contrast, delegated legislation which also affects the right of individuals and imposes obligation on them, is not made in public gaze, inasmuch as delegated legislation is formulated by the concerned departments involved in the regulation or governance of the same and it is only by the system of publication that a

delegated legislation in the form of Rules, Notifications, Circulars etc. is made known to the public.

46. The *Statutory Instruments Act, 1946*, in England, mandates systematic publication of delegated legislation. A Statutory Instrument, according the said Act, is a document, by which power of delegated legislation is exercised by Her Majesty. When a power is exercised to the statutory instrument, the Statutory Instruments Act, 1946 would apply. Subject to a few exceptions, every statutory instrument must bear on its face a statement showing the date on which the instrument came or will come into force and steps must be taken for bringing the statutory instrument to the notice of the persons likely to be affected by it. The object is to acquaint the people with a particular statutory instrument before it is applied to them. What is required is not actual knowledge, but the publication of a statutory instrument is to bring to the notice of the persons likely to be affected by it.

47. In fact, it is necessary to note the distinction between making and publication of an instrument. An instrument may come into effect when made, or from the date fixed for its commencement. Its non-publication does

not its affect validity or effectiveness. Publication of an instrument in the manner prescribed is a notice to every one of its existence. If a publication of an instrument is to be made, it is with the object of giving constructive notice of the said instrument, which may be in the form of a Rule or Notification etc. to the affected persons. But, where publication of a Notification is a mandatory requirement even on the date of its issuance, it must be sent for publication in the Official Gazette.

48. ***Panama Refining Co. vs. Ryan [293 US 388, 434 (1935)]*** is the landmark decision of United States of America. In that case, the Supreme Court therein was dealing with publication of delegated legislation. Thereafter, the Federal Register Act was enacted in the year 1935 to provide a Federal Register for publication of all federal rules, regulations, orders and other documents of "general applicability and legal effect". The Register is published every day from Monday through Friday. Failure to publish rules results in an infirmity insofar as such rules are not to adversely affect a person having no actual knowledge of them. Thus, publication in the Register is a mandatory requirement for legal effectiveness of rules; failure to publish renders a regulation unenforceable,

except against a person who has actual knowledge thereof. A corollary of the above principle is that once a rule is published in the federal Register, it is legally binding regardless of the lack of knowledge of those persons who are subject to it. Thereafter, the Administrative Procedure Act, 1946 has dealt with publication of rules.

49. In India, while no general statutory provision requiring or regulating publication of delegated legislation, such publication of the rules or other form of delegated legislation is regarded as an essential requirement of their validity. Each statute may have its own variant of the publication requirement. Even where publication of rules or Notification in the Official Gazette is not provided, having regard to the judgment of the Hon'ble Supreme Court in Harla, it has been held that promulgation or publication of some reasonable sort is essential to bring a law into force, to make it legally effective, as it would be against natural justice to punish people under a law of which they had no knowledge and of which they could not, even with the exercise of reasonable diligence, have acquired any knowledge. Thus, in the aforesaid case, it has been held that publication is essential to bring the law into being, to make it legally effective, but the Court did not define the

channels of publication that have to be adopted to the concerned authorities.

50. Generally, each statute would make a stipulation with regard to the requirement of publication. Where the date of enforcement of a Notification is having due publication of the same in the Official Gazette, the rules cannot be said to have force, if not published in the Gazette. Also, the rules are not enforceable, if published in any other mode but not in the Gazette. Therefore, while the Notification or rule is made before its publication, the condition that, it would not come into force without publication in the Gazette, has to be read as essential or mandatory condition.

51. Publication of the rules or Notification in the Official Gazette gives authenticity to the same and it creates certainty in the mind of the individual that the rules have been duly made, also the individual can have easy access to the rules or Notification, where to look for the rules or Notification made under any statute. *(Source: M.P.Jain and S.N.Jain – Principles of Administrative Law – 7th Enlarged Edition)*

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52. In the context of the controversy in the present case, the question that would arise is, when the delegated legislation (the impugned Notification) in the instant case came into force. On a reading of Section 25(4)(a) of the Act, unless otherwise provided, a notification would come into force on the date of its issue by the Central Government for publication in the Official Gazette. Therefore, the day on which it comes into force is connected with the publication of the notification. Thus, the date of the Notification, coming into force is, when the same is issued by the Central Government and sent for publication in the Official Gazette. But, Section 25(4)(b) of the Act states that, such a notification must *also* be published *and* offered for sale on the date of its issue by the Directorate of Publicity and Public relations of the Board, New Delhi. This would imply that, not only publication of the notification, but also offering the same for sale on the date of its issue are concomitant conditions which have to be complied with before it can be enforced. Thus, a notification issued under that Section would not become enforceable only if it is issued and sent for publication and not published at all. It would become enforceable only when such a notification is published and

also offered for sale on the date of its issue. In other words, if a notification is published in the Official Gazette and not offered for sale on the date of its issue, such a Notification cannot be enforced on the date of its issue itself. This is because, the provision provides for enforcement of a notification on the date of its issue itself provided the two conditions namely; (i) its publication in the Official Gazette and (ii) the same being offered for sale on the date of its issue, are also complied with. The same is evident from the use of the word "also" in Section 25(4)(b) of the Act.

53*. **Union of India vs. Param Industries Ltd. [2016)16 SCC 692,*** is a case which arose before the Hon'ble Supreme Court from the judgment of this Court reported in ***ILR 2002 KAR 4523,*** wherein it was held that the two conditions namely; (i) Notification should be duly published in the Official Gazette, (ii) it should be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi, were mandatory conditions. It was held that, in that case the second condition has not been satisfied inasmuch as the notification dated 3.8.2001 published on the same day in the late evening hours was offered for sale only on

6.8.2001 (the intervening days being holidays). Therefore, relief was granted in the said case, which was affirmed by the Hon'ble Supreme Court.

54. In ***G.T.C. Industries Ltd. vs. Union of India [(1988) 33 ELT 83],*** exemption in favour of cigarettes from excise duties was withdrawn by an order dated March 1, 1979. The Excise Department informed the petitioners about the withdrawal of exemption on December 14, 1982. The withdrawal of exemption order was published in the Gazette which was on sale from December, 8, 1982. The Court ruled that the petitioners were liable to pay excise duties on cigarettes manufactured by them with effect from December 8, 1982. The principle is thus established that an order becomes operative from the date from which the Gazette copies are made available to the public.

55. To the same effect is the judgment in ***Universal Cans and Containers Ltd. vs. Union of India [(1993) 64 ELT 23].*** In that case the Division Bench of the Delhi High Court has observed at paragraph 18 as under:

> "18. What is the use of the Official Gazette which is lying in the printing press of the Government of India or any Government Department and is not made known to the public who are to be affected by such a Gazette. We have seen what is meant by the words

> "notification" and "publication". Principle "ignorance of law is no excuse" cannot be invoked unless that law is made public. It is, therefore, the date on which the Official Gazette is made available to the public that matters, and not the date on which it is shown to have been printed."

56. In this context it would also be relevant to refer to the judgment of the Hon'ble Supreme Court in the case of ***Govindlal Chhaganlal Patel vs. The Agricultural Produce Market Committee, Godhra and Others [AIR 1976 SC 263]***. In that case, a Notification to regulate purchase and sale of agricultural produce in any area had to be published as a draft Notification followed by a final notification in the Official Gazette as well in Gujarati language local newspaper. Thus, double publication of the final notification was prescribed. In that case, the final Notification was published in the Gazette, but not in Gujarati in the local newspaper. The Hon'ble Supreme Court declared that the publication of notification in Gujarati in the local newspaper was mandatory. The publication in a newspaper attracts greater public attention than publication in the Official Gazette, therefore, same was held to be obligatory. The use of the word 'shall' was held to be mandatory.

57. If the instant case is viewed in light of the aforesaid decision, it must be held that, the Gazette publication being offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi, is also a mandatory requirement and until the same was available for sale, the notification though issued and published in the Official Gazette could not have been enforced. Therefore, the enforcement of the notification has to coincide with the date of its issuance and publication and offered for sale on the date of its issuance, in the instant case.

58. In view of the judgment of the Hon'ble Supreme Court in *Param Industries Ltd.,* also, having regard to the reply given by the Department to the query made by the respondent under the provisions of the RTI Act, 2005, it is held that, the notification dated 17.09.2015, not being available for sale on the said day and the same being available for sale only on 21.09.2015, the said Notification could not have been made applicable to the subject goods imported on 17.09.2015. That too by reassessing the bills of entry which had already been assessed on 16.9.2015

itself, prior to the issuance of the Notification *de hors* the legal position as per Section 15 of the Act.

59. For the aforesaid reasons, we also hold that the judgment of the Madras High Court to the effect that in view of advancement of technology, Section 25(4)(b) of the Act is redundant and has become vestigial and it serves no purpose, would not persuade us. The proposition that any information being made available on the website of the Department would comply with Section 25(4)(b) of the Act, cannot be accepted in view of the provision being otherwise on the statute book at the relevant point of time. We also observe that the dictum of the Madras High Court is contrary to the dictum of the Hon'ble Supreme Court in *Param Industries Ltd.*

60. That apart, a reading of sub-section (5) of Section 25 of the Act would indicate that, where a notification is to come into force later than the date of its issue, the same shall be published and offered for sale by the Directorate of Publicity and Public Relations of the Board, New Delhi, on a day or before the date of which, the said notification comes into force. Sub-section (5) of Section 25 of the Act also has been omitted with effect

from 14.05.2016. Be that as it may. A reading of the same would clearly indicate the fact that, the Notification must be offered for sale before the date, the same comes into force. In other words, if a notification is to come into force at a later date than the date of issue, prior to the date of its coming into force, the same must be offered for sale and be available to those persons to whom it would have an impact or effect. Therefore, what is crystal clear before a Notification issued under Section 25(1) is made applicable to a party, it must be made available to the party by offering the same for sale. The reason being, as the provision itself indicates that, unless otherwise provided, the Notification would come into force on the date of its issue for its publication in the Official Gazette. But, in the absence of any availability of the said Notification to the concerned parties, although the same is published, it cannot be made applicable to the said parties. This is clear from the use of the expression *"also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi"* in Section 25(4)(b) of the Act.

On a reading of the said provision, it is evident that Section 25(4)(a) speaks about coming into force of a

Notification issued under Section 25(1) of the Act. It indicates that such a Notification would come into force on the date of its issue by the Central Government for publication in the Official Gazette. However, the Central Government can provide otherwise inasmuch as such a Notification can come into force on a future date also, if so provided. This is clear on a reading of sub-section (5) of Section 24 of the Act, which enables the Central Government to enforce a Notification on a date later than the date of its issue. However, the same must be enacted in the Notification itself.

61. Section 25(4)(b) of the Act states that apart from a Notification coming into force on the date of its issue, when the same is sought for publication in the Official Gazette, the same must also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi. In other words, mere issuance of a Notification perse would not make it enforceable.

62. The issuance of the Notification must be followed by its publication in the Official Gazette and on such publication being offered for sale on the date of its issue. If

for any reason, the Notification issued by the Central Government is published and offered for sale on the date of its issue, but offered for sale on a later date, then it is only with effect from the date of which it is offered for sale, such a Notification would become enforceable. Mere issuance of a Notification without its publication is of no consequence, inasmuch as unless a Notification is published, the persons to whom it applies would not be aware of the same, unless there is knowledge or awareness of issuance of such a Notification. The person to whom it is to apply cannot be affected by the consequence of such a Notification or have the benefit of such a Notification in the absence of having knowledge about the same. This is also evident from the fact that under sub-section (5) of Section 24 of the Act, if a Notification is to come into force later than the date of its issue, then on or before the date of which the said Notification is to come into force, the same must be published and offered for sale by the Directorate of Publicity and Public Relations of the Board, New Delhi. Therefore, even when the Central Government provides that a Notification issued on a particular date is to come into force from a future date on or before coming into effect of the said Notification on a

future date. The two requirements are to be complied, namely, publication of the said Notification and offering of the same for sale by the Directorate of Publicity and Public Relations of the Board, New Delhi. This is to ensure that on the date the said Notification comes into force, the same is published and available to the persons to whom it would apply. Therefore, in *Param Industries Ltd.,* the Hon'ble Supreme Court opined that, both the conditions must be complied with.

63. In view of the aforesaid discussion, we hold that the learned Single Judge was justified in holding that notification dated 17.09.2015 could not have been made applicable to the imported goods in question and the demand for payment of differential amount of duty was rightly quashed by the learned Single Judge.

64. Since we do not find any merit in the appeal, appeal is liable to be dismissed and is ***dismissed***.

65. There is another aspect of the matter, which requires consideration. An application has been filed by the respondent seeking dismissal of the appeal. This is on the premise that no proceeding could have been initiated for recovery of the dues from the respondent, which is a

corporate debtor within the meaning of the provisions of the "IBC". This is because the dues are not part of the resolution plan approved by the adjudicating authority under Section 31 of the "IBC".

66. In the affidavit in support of the application it is stated that the respondent was subjected to insolvency proceedings under the provisions of "IBC" and by order dated 08.12.2017 read with 15.12.2017 (Annexure 'R1'), the National Company Law Tribunal, Mumbai (NCLT) admitted the petition filed. Thereafter, public notice inviting claims from all the creditors of the respondent was issued by the Interim Resolution Professional on 21.12.2017. No claim was filed by the appellant/department in the said proceedings. In terms of the provisions of "IBC", a resolution plan was submitted by the consortium of Patanjali Ayurved Limited, Divya Yog Mandir Trust (through its business undertaking, Divya Pharmacy), Patanjali Parivahan Pvt. Ltd., and Patanjali Gramudhyog Nyas with the resolution professional. The resolution plan was approved by the Committee of creditors of the respondent on 30.04.2019 as per Section 30(4) of "IBC" and orders dated 24.07.2019 and 04.09.2019 were passed by the adjudicating authority in

terms of Section 31 of IBC. The order dated 04.09.2019 was received on 06.09.2019. The copies of order dated 24.07.2019 and 04.09.2019 are filed as annexures 'R2' and 'R3' respectively.

67. According to the respondent, resolution plan was successfully implemented on 18.12.2019, there has been a change in the control and ownership of the present respondent with effect from that date. Also, there is no involvement of the erstwhile directors on the board of directors of the respondent, as they have ceased to be the directors on the Board of respondent. It is further stated that as per Section 32A of the "IBC", upon completion of corporate insolvency resolution process, the liability of corporate debtor would cease as the said provision has a *non-obstante* clause. It is further stated that the present proceedings concerning the subject import leading to demand of duty relates to the year 2015. The said proceedings pertain to the period prior to the commencement of the corporate insolvency resolution process and in any case, the same relates to period prior to the effective date and therefore, the same shall stand extinguished.

68. Reliance has been placed on the judgments of the Hon'ble Supreme Court in the matter of ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and others dated 15.11.2019 (Civil Appeal Nos.8766-67 of 2019)*** and ***Ultra Tech Nathdwara Cement Ltd. (formerly known as Binani Cements Ltd.) vs. Union of India and others (D.B. Civil Writ Petition No.9480/2019) disposed of on 07.04.2020*** by the Rajasthan High Court. It is stated that the aforesaid facts were brought to the notice of the appellant/department by the respondent through its communication dated 24.04.2020, which was received and acknowledged on 05.05.2020 vide Annexure 'R6'. Therefore, the prayer in the application is to dismiss this appeal as having become infructuous in view of the subsequent events.

69. It was contended by the learned counsel for the respondent that the resolution plan in the instant case was approved on 24.07.2019 and 04.09.2019. The dues, in the instant case, arose in the year 2015, which is prior to the approval of the resolution plan; that unless and until the said dues are made part of the resolution plan, the same cannot be recovered. This is having regard to the latest

dictum of the Hon'ble Supreme Court in the case of *Ghanashyam Mishra*. In the said case, following three questions arose for consideration:

> "(i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the Resolution Plan once it is approved by an adjucating authority under sub-section (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code')?
>
> (ii) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?
>
> (iii) As to whether after approval of resolution plan by the Adjudicating Authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the Resolution Plan approved by the adjudicating authority?"

70. In the said judgment, the following conclusions were arrived at:

> "**95.** In the result, we answer the questions framed by us as under:
>
> (i) That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as

provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stake holders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person, will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

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

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

71. It is necessary to highlight the relevant parts of the said judgment with reference to the provisions of "IBC" in light of the factual controversy that arises in this case. "IBC" is a Code 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. "IBC" came into effect on 28.05.2016. On 13.03.2020, the Insolvency and Bankruptcy Code (Amendment) Act, 2020, was enacted amending certain provisions of the Act. Section 2 of the "IBC" deals with the application of "IBC" to the entities mentioned under the said Code. Section 3 of the "IBC" is the definitions clause. The relevant definitions for the purpose of this case are as under:

> "3. Definitions – In this Code, unless the context otherwise requires:
>
> 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;

x x x x x

10. "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

11. "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

12. "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;

x x x x x

19. "insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207."

72. The Hon'ble Supreme Court in the case of ***INNOVENTIVE INDUSTRIES LIMITED VS. ICICI BANK,*** reported in ***(2018) 1 SCC 207*** has observed as follows:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency

resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section

7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of

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receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense

that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act.

Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors."

33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile

> management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins."

73. Learned counsel for the respondent submitted that having regard to the conclusion of the Hon'ble Apex Court in *Ghanashyam Mishra,* since the dues claimed by the appellants herein is one coming within the scope and ambit of 'operational debt', the Central Government would be the 'operational creditor' as defined under Sub-section-20 of Section 5 of the Act. That even without the amendment made to Section 30 by 2019 Amendment Act, the dues to the Central Government including the statutory dues would be covered within the definition of "operational debt" owed to a creditor, in terms of Sub-Section 10 of Section 3 of "IBC". In such an event, unless the said statutory dues owed to the Central Government is covered or made part of the resolution plan, it would stand extinguished.

74. We find that the said contention of the learned counsel for the respondent is in consonance with what has been opined recently by the Hon'ble Supreme Court in *Ghanashyam Mishra,* on which judgment, the respondent has placed heavy reliance. The relevant paragraphs of the aforesaid judgment are extracted for immediate reference:

> "58. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.
>
> 59. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed

under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with subsection (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of subsection (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of sub-section (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

60. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been

given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum.

61. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities, that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stake-holders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved.

x x x x x

66. Vide Section 7 of Act No. 26 of 2019 (vide S.O. 2953(E), dated 16.8.2019 w.e.f. 16.8.2019),

the following words have been inserted in Section 31 of the I&B Code.

"including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed"

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

68. The only question, which remains is, what happens to such dues if they pertain to a period wherein Section 7 petitions have been admitted prior to 16.8.2019.

69. To answer the said question, we will have to consider, as to whether the said amendment is clarificatory/declaratory in nature or a substantive one. If it is held, that it is declaratory or clarificatory in nature, it will have to be held, that such an amendment is retrospective in nature and exists on the statute book since inception. However, if the answer is otherwise, the amendment will have to be held to be prospective in nature, having force from the date on which the amendment is effected in the statute.

x x x x x

77. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

x x x x x

86. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum.

The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

87. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019

amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

x x x x x

91. It is a cardinal principle of law, that a statute has to be read as a whole. Harmonious construction of subsection (10) of Section 3 of the I&B Code read with subsections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of 'operational debt'. The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under sub-section (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of 'creditor' as defined under sub-section (10) of Section 3 of the I&B Code. As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in subsection (1) of Section 31 of the I&B Code.

x x x x x

94. Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold, that the 2019 amendment is declaratory and clarificatory in nature. We also hold, that even if

> 2019 amendment was not effected, still in light of the view taken by us, the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the Adjudicating Authority (i.e. NCLT).
>
> **x x x x x**
>
> 130. In the foregoing paragraphs, we have held, that 2019 amendment to Section 31 of I&B Code is clarificatory and declaratory in nature and therefore will have a retrospective operation. As such, when the resolution plan is approved by NCLT, the claims, which are not part of the resolution plan, shall stand extinguished and the proceedings related thereto shall stand terminated. Since the subject matter of the petition are the proceedings, which relate to the claims of the respondents prior to the approval of the plan, in the light of the view taken by us, the same cannot be continued. Equally the claims, which are not part of the resolution plan, shall stand extinguished."

75. In this regard, the learned counsel for the respondent also relied on the facts on the judgment of the Rajasthan High Court in the case of ***Ultra Tech Nathdwara Cement Limited vs. Union of India*** in D.B. Civil Writ Petition No.9480/2019. It was considered in the said case, and it was observed that since the 2019 amendment to Section 31 of "IBC" is clarificatory and declaratory in nature it would have a retrospective

operation. As such, if the resolution plan approved by the National Company Law Tribunal (for short NCLT), does not comprise all the claims of the Central / State Governments or the local authority, the said claim shall stand extinguished and the proceedings relating thereto shall stand terminated. Hence, the Hon'ble Supreme Court held that with regard to any claim prior to the approval of the resolution plan cannot be continued and would stand extinguished, if not made a part of the plan. Thus, claims which are not part of the resolution plan, shall stand extinguished.

76. Madras High Court has applied the judgment of the Hon'ble Supreme Court in *Ghanashyam Mishra* in the case of the respondent herein. However, the matter was remanded to the NCLT to give a finding as to whether the corporate resolution plan filed by the respondent therein included the customs duty on the import of goods in that case.

77. The provisions of Section 238 of "IBC" states that the provisions of "IBC" 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. Further, it is noted that crown debts do not take precedence even over secured creditors, who are private persons. This is clear on a reading of Section 238 of "IBC" which provides for the overriding effect of "IBC" notwithstanding anything inconsistent contained in other law for the time being in force or effect by any such law. Therefore, if the departments of Central or State Governments do not file an application or participate in the resolution process, their claims automatically get extinguished having regard to the judgment of the Hon'ble Supreme Court in the case of *Ghanashym Mishra*.

78. We are of the view that this matter does not require to be remanded to the NCLT, Mumbai, before which forum the resolution plan was approved. We however observe that the reasons are two fold: firstly, this appeal has been dismissed on merits and the respondent has succeeded on merits in this appeal, secondly, the appellants have not produced any material before us to demonstrate that the claim in the instant case was part of the resolution plan approved by the NCLT, Mumbai.

79. In the circumstances, we pass the following order:

ORDER

i. The appeal is ***dismissed*** on merit.

ii. The application in I.A.No.1/2021 is allowed.

iii. Parties to bear their respective costs.

Sd/-
JUDGE

Sd/-
JUDGE

*AP/JJ**

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