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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 17.10.2022

% ***Judgement pronounced on:16.02.2023***

\+ **W.P.(C) No.3119/2021 & CM APPL. 9461/2021**

SREE METALIKS LIMITED ......Petitioner

Through: Mr Ramji Srinivasan, Sr. Adv. with Mr Vikash Kumar Jha, Mr Ritu Anand Vishwakarma and Ms Varalika Dev, Advs.

versus

ADDITIONAL DIRECTOR GENERAL AND ORS.....Respondents

Through: Mr Ajit Sharma, Sr. St. Counsel with Mr A. Renganath, Adv. for R-1 to 3.

Mr Asheesh Jain, CGSC with Mr Keshav Mann & Mr Gaurav Kumar, Advs. for R-4 to 7.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARAVITASTA GANJU
[Physical Court hearing/ Hybrid hearing (as per request)]

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Preface:

1. The short issue which arises for consideration in the writ petition concerns the sustainability of the show-cause notice [in short "impugned show-cause notice"] dated 18.07.2019, issued by respondent no.2 i.e., Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), Zonal Unit, Hyderabad.

1.1 Before we proceed further, we may indicate, that unless the context requires otherwise, hereafter, the respondents will be collectively referred to as the "DRI/DGFT".

Background:

2. The petitioner i.e., Sree Metaliks Limited ["SML"] asserts, that the impugned show-cause notice is liable to be quashed and/or set aside, for the reason, that it has been issued after the Resolution Plan framed under the aegis of the National Company Law Tribunal, Kolkata Bench [in short "NCLT"] on 07.11.2017, received the imprimatur of the National Company Law Appellate Tribunal [in short "NCLAT"].

3. In support of this plea, SML adverts to two significant documents.

3.1 Firstly, the Public Announcement made by one Mr Vinod Kumar Kothari i.e., the Interim Resolution Professional (IRP) on 01.02.2017, calling upon all creditors of SML to submit proof of their claims on or before 13.02.2017 in such Forms as prescribed under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ["2016 Regulations"] with him i.e., the IRP.

3.2 Secondly, the e-mail dated 17.05.2017 addressed by the Resolution Professional (RP) i.e., one Mr Kuldeeep Verma to Senior Intelligence Officer, Directorate of Revenue Intelligence, Bhubaneshwar Regional Unit/respondent no.3. *Via* this e-mail, the RP informed respondent no.3, that Corporate Insolvency Resolution Process (CIRP) had been initiated qua SML, pursuant to an order dated 30.01.2017 passed by the NCLT.

4. The aforementioned communication i.e., the e-mail dated 17.05.2017 also adverted to the following aspects:

(i) First, the power of the Board of Directors under Section 17 of the Insolvency and Bankruptcy Code, 2016 [in short “Code”] stood suspended and vested with the RP.

(ii) Second, the provisions of Section 14 of the Code had kicked in.

(iii) Third, the factum of issuance of summons under section 108 of the Customs Act, 1962 [in short “1962 Act”] and its service on SML had been brought to the notice of the RP, and since the moratorium had kicked in, further proceedings against SML ought to be kept in abeyance.

(iv) Fourth,respondent no.3 should provide details concerning SML till 30.01.2017, and for the period ensuing thereafter up until the date of the communication i.e., 17.05.2017.

5. Concededly, the respondents did not lodge their claims with the RP.

6. We may indicate here, that the DRI’s stand is, that prior to the amendment brought about in Regulation 12 of the 2016 Regulations, it was only required to file “proof of claim”.

6.1 Admittedly, proof of claim was not filed.

6.2 The stand taken *vis-à-vis* non-filing of proof of claim is, that SML had acknowledged the debt due, and accordingly sought an extension of time to fulfilits export obligations.

7. Therefore, the short issue, as indicated at the very outset, which requires examination is: which of the opposing points of view should be sustained, given the facts arising in the matter and the current state of the law.

8. Before proceeding further, it may be necessary to broadly etch out the background in which the instant writ action has been filed.

9. The petitioner, at the relevant point in time when it was in the business of manufacturing SpongeIron, MS Billets, TMT and Pellets had imported certain capital goods, albeit at a concessional rate of customs duty, under the Export Promotion Capital Goods Scheme [“EPCG scheme”].

9.1 The EPCG scheme, concededly, required the fulfilment of export obligations. The stand of respondent nos.2, 3 and 7 is, that SML has not fulfilled export obligations against 16 licenses/authorizations issued between October 2005 and November 2011, for the import of capital goods under the EPCG Scheme.

10. It is alleged, that SML had imported capital goods under the EPCG Scheme, bearing an assessable value of Rs 43,21,20,733/-, and that in respect of such goods, it saved duty amounting to Rs. 8,51,13, 531/-. It is averred, that in this context, SML took benefit of the exemption notifications dated 17.09.2004, 09.05.2008 and 11.09.2009.

11. It is also averred by respondent nos. 2,3 and 7, that since SML had not fulfilled obligations under the 16 licences/authorizations issued in its favour, it has violated the conditions of EPCG authorisations, as enunciated in Chapter 5 of the Foreign Trade Policy, 2004-2009 and 2009-2014 as also the conditions of EPCG Bonds and relevant applicable Customs Notifications.

12. Pertinently, the impugned show-cause notice was issued at a point in time when SML's networth stood eroded, which had propelled SML to file a reference before the Board for Industrial and Financial Reconstruction (BIFR) and register itself under section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 [in short "SICA"].

12.1 The BIFR registered the petitioner's reference on 18.11.2014. However, before a final decision could be taken with regard to SML's reference by the BIFR, SICA was repealed, with the enactment of the Code. Consequently, all references stood abated, given the provisions of the Eighth Schedule, read with Section 252 of the Code.

13. Although the Code was published in the Gazette of India, Extra, Part II, Section 1, No. 37 on 28.05.2016, the provisions contained therein were enforced on different dates, including Section 252 of the Code, which dealt with sick industrial companies; which, evidently, was brought into force on 01.11.2016.

14. Importantly, on 16.11.2016, respondent no.3 initiated an enquiry against SML, and issued summons under Section 108 of the 1962 Act to one Mr Mahesh Kumar Agarwal i.e., the managing director of SML. Mr

Agarwal was directed to furnish information concerning EPCG licenses obtained by SML from the Director General of Foreign Trade (DGFT).

15. The record shows, that on 21.11.2016, a fresh summon was served by respondent no.3 on Mr Agarwal and that on 05.12.2016, Mr Agarwal appeared and had his statement recorded.

16. To be noted, a financial creditor of SML, namely SREI Equipment Finance Limited [in short “SREI”] had filed an application dated 25.01.2017 under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process [CIRP]. The record shows, that just before the institution of the application by SREI with the NCLT, respondent no.3, once again, on 03.01.2017 issued a fresh summon to Mr Agarwal.

17. SML, thereafter i.e., on 5.01.2017 and 06.01.2017 wrote to respondent nos. 4 and 5, in effect DGFT, seeking extension of time to fulfil export obligations. *Via* these letters, SML sought an extension of three years concerning the licenses/authorizations issued in its favour.

18. The record also shows, that on 11.01.2017, once again, a summon was served by respondent no. 3 on Mr Agarwal, whereupon Mr Agarwal appeared before the concerned officer, and *inter alia* confirmed that SML had obtained 20 licenses. Mr Agarwal also confirmed, that out of the 20 licenses issued, it had fulfilled its export obligations against one license, surrendered one license, and made no import against one license.

19. When the aforesaid enquiry was on, the NCLT on 30.01.2017 admitted SREI’s application and appointed Mr Vinod Kumar Kothari as the IRP.

19.1 The IRP, as adverted to hereinabove, on 01.02.2017 made a Public Announcement inviting claims from SML's creditors. The Public Announcement stipulated, that creditors were required to file their proof of claims with the IRP on or before 13.02.2017.

20. On 09.03.2017, the Committee of Creditors (COC) met and appointed one Mr Kuldeep Verma as the RP. The management of SML from that date, thus, vested with the RP.

21. Consequently, on 17.05.2017, the RP, as alluded to hereinabove, wrote to respondent no.3 *inter alia* calling upon it to furnish details concerning SML in the backdrop of the summons which had been issued to SML under Section 108 of the 1962 Act.

22. The record shows, that Mr Agarwal, the erstwhile managing director of SML was also the resolution applicant. Evidently, he submitted a Resolution Plan on 17.08.2017, which was amended and finally approved by the COC, with 78.53% voting share favouring approval of the Resolution Plan.

23. Since SREI preferred an appeal to NCLAT, the operation of the Resolution Plan, as approved by the NCLT, was stayed on 28.11.2017. However, finally, the NCLAT approved the Plan with certain modifications *via* an order dated 13.12.2018.

24. We are informed, that since then, the revised/modified Resolution Plan has been implemented.

25. In the interregnum though, SML not only informed respondents nos. 4 and 5 concerning the initiation of CIRP qua itself but also sought an extension of time for fulfilling export obligations.

26. As far as information with regard to the fact that CIRP was on, the same was furnished by SML *via* a letter dated 08.03.2018. Likewise, the request for an extension is reflected in the letters dated 04.05.2018, 29.05.2018 and 13.11.2018. As a matter of fact, on 07.12.2018, SML received a letter dated 11.07.2018, whereby it was asked to deposit 2% of the composition fee.

26.1 SML on its part responded via communication dated 12.12.2018, wherein it indicated that the composition fee was not payable. Furthermore, once again, a request for an extension was made to fulfil the export obligations.

27. The petitioner’s assertion, that the composition fee was not payable, was rejected by the DGFT on 10.01.2019.

28. The saga of SML seeking an extension of time continued till May 2019. In fact, the petitioner's hopes were raised, given the public notice dated 11.03.2019, being issued which *inter alia* indicated that a one-time extension for the fulfilment of export obligation could be granted on payment of the condonation fee. The petitioner, thus, paid the condonation fee and requested for extending the validity of the licenses/authorizations via communication dated 08.05.2019.

29. Although no extension was granted by the DGFT, respondent no.2 on its part, issued the impugned show-cause notice on 18.07.2019. This was

followed by the appointment of respondent no. 1, who is located in Delhi, as the adjudicating authority concerning the impugned show-cause notice *via* a notification dated 29.08.2019.

30. SML, in response to the impugned show-cause notice informed respondent no. 2 where it was positioned, in the sense that since its Resolution Plan had been approved, it would fulfil its export obligations. Parallelly, respondent no.1 continued chasing SML to conclude the adjudicatory process triggered under the impugned show-cause notice.

30.1 There are, on record, reminders which were served on the petitioner for personal hearing, that are dated 02.01.2020, 28.02.2020, 15.10.2020, 21.01.2021 and 16.02.2021. The record also shows, that on 09/10.02.2021, an accommodation was sought on behalf of SML.

31. It is in this context, that on 10.03.2021 the instant writ petition was moved before a coordinate bench. The coordinate bench, on 10.01.2022 issued interim directions, whereby it stayed the operation of the deficiency letters dated 01.11.2021 and 22.11.2021 issued by respondent no. 4, and also restrained respondent no.1 from taking any coercive action against SML. The record also shows that SML had also moved an application i.e., CM APPL. 44248/2021 during the pendency of the writ petition for issuance of the following directions:

> *"(a) Direct the Respondents and more specifically Respondent No.4 to take no coercive action during the pendency of the present Writ Petition.*
> *(b) Pass an order directing [the] Respondent No. 4 to remove the Petitioner's/Applicant's name from the DEL, enabling the Petitioner/Applicant to obtain [a]fresh EPCG License and avail its lawful entitlement to the EPCG Scheme issued by the Government of India.*

> *(c) Set aside the deficiency letter dated 01.11.2021 and 22.11.2021 issued by Respondent No.4 to obtain the fresh EPCG License."*

31.1 This application was not entertained, since according to the Court, the main relief sought in the writ petition was for setting aside and/or quashing the impugned show-cause notice issued by respondent no.2, which as noted above is required to be adjudicated by respondent no.1.

32. We may also note, that a counter-affidavit in the matter has been filed only by respondent nos. 2, 3 and 7, and written submissions have been filed by respondents nos. 1 to 3, although on 25.05.2022 it had been indicated by one Mr Adarsh Kumar Gupta, Advocate appearing on behalf of respondent nos. 4 to 7, that the said respondents do not wish to file a counter-affidavit in the matter.

Submissions advanced on behalf of the petitioner:

33. We have heard, on behalf of SML, Mr Ramji Srinivasan, learned senior counsel, while arguments on behalf of respondents nos. 1 to 3 have been addressed by Mr Ajit Sharma, learned senior standing counsel.

34. The submissions advanced by Mr Srinivasan can broadly be paraphrased as follows-

(i) The impugned show-cause notice is untenable in law, as the DRI/DGFT failed to register their claims with the RP, despite a Public Announcement being made on 01.02.2017, followed by a specific e-mail on the issue dated 17.05.2017.

(ii) The Resolution Plan takes into account statutory liabilities, which *inter alia* includes excise duty. In this behalf, our attention was drawn to Clause 3.2, 8.2.3 and 8.14.2 of the Resolution Plan.

(iii) The Resolution Plan makes it clear, that liquidation value for undisclosed and unclaimed statutory liabilities, including liability arising out of non-fulfilment of export obligations or on account of customs duty, would be nil.

(iv) Once a Resolution Plan is approved, it is binding on all stakeholders, including the respondents, in terms of Section 31 of the Code. Resultantly, those claims, which do not form part of the Resolution Plan stand extinguished. The corporate debtor is, thus, given a clean slate to operate in terms of the Resolution Plan, which is the object of the Code.

(v) The writ petition is maintainable, as *via* notification dated 29.08.2019, respondent no.1, who was located within the territorial jurisdiction of this Court has been appointed as the adjudicating authority.

Submissions advanced on behalf of the respondents:

35. On the other hand, Mr Sharma for respondents nos. 1 to 3 has contended the following:

(i) That this Court is not a convenient forum, since the impugned show-cause notice was issued by respondent no.2, who is located in Hyderabad, the petitioner is based in Orissa, and none of the goods had been imported into the country *via* Delhi. Therefore, merely because the adjudicating authority was in Delhi "does not confer jurisdiction" on this Court. In support of this plea, reliance was placed on the judgement dated 01.08.2011

rendered in the case of ***Sterling Agro Industries Ltd. vs Union of India & Ors.*** 2011 SCC OnLine Del 3162.

(ii) Section 142A of the 1962 Act recognises the fact, that the liability of the assessee under the Act is a first charge on its property. The Supreme Court, in the judgement dated 06.09.2022 rendered in the case of ***State Tax Officer (1) vs Rainbow Papers Ltd.*** 2022 SCC Online SC 1162, in the context of a *pari materia* provision i.e., Section 48 of the Gujarat Value Added Tax, 2003 [in short "GVAT Act"] has held, that such authorities were "secured creditors" under Section 3(30) of the Code, and accordingly, their claims had a higher priority under the waterfall mechanism, contemplated in Section 53 of the said Code. Since the Resolution Plan approved by NCLAT did not treat the Customs department as a secured creditor, it was liable to be set aside, on this short ground alone.

(iii) SML never disputed its dues. This situation obtained, both before and during the period when insolvency proceedings were on. Although SML was aware of its customs dues, it deliberately chose to ignore the same. In this context, reference is made to the EPCG bonds executed by SML to pay customs duty, along with interest at the rate of 15%.

(iv) The Customs department was not required to file a formal claim before the amendment of Regulation 12 of the 2016 Regulations. The only obligation, that the Customs department bore, was to file a proof of claim. Since SML had acknowledged, that it was liable to the Customs department, there was no obligation to file even the proof of claim. The fact that SML knew that it had to bear the burden of its liability is evident from the fact that it repeatedly sought extension of time to fulfil its export obligations.

Reasons and Analysis:

36. We have heard the learned counsel for the parties, and perused the record.

37. The controversy lies in a narrow compass. The admitted facts, as noted above, are the following:

(i) SML had imported capital goods between October 2005 and November 2011 against EPCG licenses/authorizations issued in its favour by the DGFT. The imports against these licenses/authorizations obliged SML to fulfil stipulated export obligations.

(ii) SML, concededly, failed to fulfil its export obligations within the stipulated timeframe, and hence through various communications [to which we have referred above] sought an extension of time.

(iii) That SML was in financial distress is evident, given the fact that a reference was registered under Section 15(1) of SICA on 18.11.2014. Clearly, SML's net worth stood eroded on that date.

(iv) With the enforcement of the Code, in particular, Section 252 of the Code coming into force from 01.11.2016, SICA was repealed, which left SML in a state of flux, as its reference lodged with BIFR stood abated in terms of the provisions of the Eighth Schedule of the Code.

(v) SML's woes did not come to an end, as SREI i.e., a financial creditor applied Section 7 of the Code. This triggered the process of forging a Resolution Plan under the Code. The IRP, thereafter, made a Public Announcement on 01.02.2017, calling upon all creditors [which included

operational creditors, such as the respondents before us] to submit their proof of claims.

(vi) As noticed above, a specific e-mail dated 17.05.2017 was served on respondent no. 3 by the RP, whereby not only was the said respondent informed that CIRP was on, but also that since SML had been issued summons under Section 108 of the 1962 Act, details concerning SML should be furnished to the RP.

(vii) Admittedly, the DRI/DGFT did not submit their proof of claims. Furthermore, respondent no.3 neither replied nor furnished any information, as required by the RP *via*the e-mail dated 17.05.2017.

38. Given this position, one would have to examine, which side of the Rubicon [i.e., the law enunciated by the Supreme Court] SML's case falls on.

39. The Supreme Court in the case of ***Ghanashyam Mishra & Sons Pvt. Ltd. vs. Edelweiss Asset Reconstruction Company Ltd.*** (2021) 9 SCC 657 was *inter alia* called upon to rule on the following:

(i) Whether the claims reflected in the Resolution Plan as approved under Section 31 of the Code would stand frozen, and thus bind all stakeholders?

(ii) Whether statutory dues, owed to the central government, state government or local authority, which did not form part of the approved Resolution Plan would stand extinguished, and thereby disable the continuation of any proceedings qua claims which concerned the period arising prior to the approval of the Resolution Plan by the adjudicating authority under Section 31 of the Code?

40. *Vis-a-vis* these issues, the following conclusions were reached by the Supreme Court.

> ***"102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of [the] resolution plan by the adjudicating authority, all such claims, which are not a part of [the] 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.***
>
> ***102.2. The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.***
>
> ***102.3. Consequentlyall 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."***
>
> [Emphasis is ours]

41. The position of law, as articulated above, continues to hold the field.

42. Mr Sharma has, however, placed reliance on the judgement rendered by the Supreme Court in *Rainbow Papers*, and contended that the Resolution Plan should be set aside, on the short ground that it did not classify the Customs department as a secured creditor.

43. Furthermore, it was stated, that being a liability payable under the 1962 Act, the Customs department would have the first charge on the property of SML, which would be an assessee under the 1962 Act. In this regard, reliance was placed on Section 142A of the 1962 Act.

44. It is important to note, that although Section 142A of the 1962 Act commences with a non-obstante clause, it also adverts to certain enactments

[such as the Code] which may provide otherwise. A plain reading of Section 142A of the 1962 Act, makes that crystal clear.

> *"142A. Liability under Act to be first charge.—**Notwithstanding anything to the contrary contained in any Central Act or State Act,** any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, **save as otherwise provided in** section 529A of the Companies Act, 1956, the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993, [the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 **and the Insolvency and Bankruptcy Code, 2016]**, be the first charge on the property of the assessee or the person, as the case may be.] "*

45. Mr Sharma, in effect, has sought to draw a parity between Section 48 of the GVAT Act, which came up for consideration in the context of Section 53 of the Code, and Section 142A of the 1962 Act. Pertinently, Section 48 of the GVAT Act does not save provisions of other statutes, in particular the Code, as noticed above. For the sake of convenience, Section 48 of the GVAT Act, as extracted in *Rainbow Papers* is set forth hereafter:-

> *"**48. Tax to be first charge on property.**— Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person."*

46. Thus, the controversy which arose for consideration before the Supreme Court was, whether Section 53 of the Code, which provides for a waterfall mechanism for the distribution of proceeds, obtained from the sale of liquidation of assets, would override Section 48 of the GVAT Act.

47. The broad facts, in the background of which this issue was decided by the Supreme Court, were as follows-

47.1 The appellant i.e., the statutory authority claimed that the respondent-company owed dues towards Central Sales Tax (CST) and Value Added Tax

(VAT). Recovery proceedings in that regard were initiated against the respondent company in and about 8.07.2016, concerning 2011-2012.

47.2 In furtherance of the recovery proceedings, the statutory authority attached the immovable property of the respondent-company on 08.10.2018. In the interregnum, an operational creditor filed a petition under Section 9 of the Code with the NCLT, which was admitted on 12.09.2017.

47.3 On 22.09.2017, the NCLT appointed an IRP. The IRP invited claims from the creditors, as required under Section 15 of the Code, by taking out a publication to that effect in the newspaper. The last date fixed for submission of claims before the IRP was 05.10.2017.

47.4 The COC was constituted on 10.10.2017. The COC replaced the IRP with the RP, whose appointment was approved by the NCLT on 06.11.2017.

47.5 On 22.10.2018, after the last date for submission of claims had expired, the appellant/statutory authority lodged their claim with the RP. *Via* communication of even date i.e., 22.10.2018, the RP informed the appellant/statutory authority, that its entire claim had been waived, which was also conveyed to the appellant/statutory authority *via* e-mail dated 06.11.2018.

47.6 It is this, which led to the appellant/statutory authority first approaching the NCLT, and thereafter the NCLAT. A statutory appeal was also filed, under Section 62 of the Code, with the Supreme Court. Importantly, the NCLAT had confirmed the order of NCLT, as the appellant/statutory authority, according to the NCLAT, had approached not only the RP but also the NCLT, at a belated stage.

48. It is in this context, that the Supreme Court ruled as follows:

(i) First, because of the statutory charge created under Section 48 of the GVAT Act, the appellant/statutory authority was a secured creditor within the meaning of Section 3(30) of the Code. Furthermore, the Supreme Court also ruled, that the timeline for submission of claims under the 2016 Regulations was not mandatory, but only directory.

(ii) Second, prior to the amendment carried out *via* notification dated 03.07.2018 [with effect from 04.07.2018] the creditor was required to submit “proof of claim” before the expiration of the last date mentioned in the public announcement. [See Regulation 12(1) read with sub-Regulation (2)]. However, with effect from 04.07.2018, the creditor is required to submit a "claim with proof” on or before the last date mentioned in the public announcement.

(iii) Third, in case the Resolution Plan did not meet the requirements of Section 30(2) of the Code, it would be invalid, and thus not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditors to whom a debt in respect of dues **arising under any law for the time being in force is owed**.

(iv) Fourth, if a Resolution Plan ignores the statutory demands payable to any State Government or legal authority, altogether, the NCLT is bound to reject the Resolution Plan.

(v) Fifth, in the event the corporate debtor is unable to pay its debts, which should include statutory dues owed to the government and/or authorities and if there is no plan which contemplates dissipation of those

debts in a phased manner, uniform proportional reduction, it would necessarily lead to liquidation, thus, triggering the sale of assets and their distribution in the manner stipulated in Section 53 of the Code.

(vi) Sixth, the COC, which might include financial institutions and other financial creditors, cannot secure their dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other authority.

(vii) Seventh, NCLAT erred in holding that Section 53 of the Code overrides Section 48 of the GVAT Act. Section 48 of the GVAT is neither contrary to nor inconsistent with Section 53 or any other provisions of the Code.

(viii) Eighth, Section 3(30) of the Code defines a secured creditor to mean a creditor in favour of whom security interest is credited. Security interests of this kind can also be created by the operation of law. Therefore, the definition of a secured creditor in the Code does not exclude any government or governmental authority.

49. It is in this context, that the decisions of the NCLAT and NCLT were held to be erroneous, and accordingly, the Resolution Plan approved by COC was set aside, with an observation that the RP may consider a fresh Resolution Plan, in light of the observations made by the Court.

50. Clearly, as noticed above, the judgement rendered by the Supreme Court is distinguishable on facts.

50.1 In the instant case, the DRI/DGFT neither submitted a proof of claim nor responded to a specific communication *via* e-mail dated 17.05.2017, addressed to respondent no.3.

50.2 In contradiction, in *Rainbow Papers*, a claim was lodged in the prescribed form, albeit after the last date of submission indicated in the public announcement by the IRP, but before the NCLT had rendered its decision in the matter.

50.3 Besides this, Section 48 of the GVAT Act is not *pari materia* with Section 142A of the 1962 Act. Section 142A of the 1962 Act plainly states that any amount payable by way of duty, penalty, interest or any other sum payable by an assessee or any other person under the Act shall have the first charge on the property of the assessee or the person, as the case may be, save as otherwise provided *inter alia* under the Code. Section 48 of the GVAT Act does not contain any such exception and/or carve out.

51. This is a case, where despite knowledge, the statutory authorities chose not to submit their proof of claim. Mr Sharma's argument, that since it was known to SML that amounts were due, proof of claim [under the unamended Regulation i.e., Regulation 12] was not required to be filed, is difficult to accept, because if this argument were to be sustained, then whatever the assessee [in this case SML] were to state before the RP would have to be taken as the gospel truth. In a given case, the assessee could state, that nothing was due to the concerned creditor. In our view, once a Public Announcement was made, it was incumbent upon all creditors, which included the statutory creditors, to submit the proof of claim.

52. Therefore, the fact that extensions were sought to fulfil export obligations would not help the cause of the respondents. As a matter of fact, respondent nos. 2, 3 and 7 have, in their counter-affidavit, admitted that since the amounts due had not been crystallized, they could not respond to the Public Announcement made by the IRP.

52.1 According to us, this argument is flawed. If this was the stand of the respondents, it could have been articulated before the RP, something which the respondents failed to do, despite knowledge of the fact that the CIRP was on.

52.2 Pertinently, in the reply dated 10.10.2019 submitted qua the impugned show-cause notice, this very aspect was highlighted. The respondents, throughout, have chosen not to take recourse to the provisions of the Code, to agitate their point of view.

53. Given this situation, we are of the view, that if the law, as enunciated by the Supreme Court in *Ghanashyam Mishra* is applied, then the dues, if any owed to the respondents would have to be declared as having extinguished, and if such is the position, the adjudication of the impugned show-cause notice would be an exercise in futility.

54. This brings us to the other submission made on behalf of Mr Sharma, which is that this Court should not entertain the instant writ petition. In this context, in our view, Mr Sharma has made contradictory submissions. Mr Sharma's first submission is, that this Court does not have the jurisdiction. His second submission is, that this Court is not a convenient forum, since except for the adjudicating authority, all other aspects concerning the matter

at hand arise outside the territorial jurisdiction of this Court. In our opinion, the doctrine of *forum non-conveniens* assumes, that although the Court has jurisdiction, in certain cases, it takes the view, that the action filed before it could be agitated conveniently before another forum. Therefore, in such an eventuality, the writ action is not entertained by the Court for the reasons of convenience, and not on the ground that it does not have the jurisdiction to try and adjudicate the action lodged before it.

55. Lastly, Mr Sharma contends, that this Court should return the action, by applying the doctrine of *forum non conveniens*. Having regard to the fact, that respondent no.1 was vested with the powers to adjudicate the impugned show-cause notice *via* a notification dated 29.08.2019, the cause for palpable apprehension qua the petitioner arose, to our minds, within the jurisdiction of this Court. Furthermore, given the fact, that this writ petition was filed in March 2021, and the objection concerning the Court's power to entertain the writ action was taken much later, it would be unfair to return the writ petition, on the ground that this Court is not a convenient forum for adjudicating the dispute arising between the parties.

Conclusion:

56. Thus, for the foregoing reasons, we are of the view, that the impugned show-cause notice seeks to do, what is, in fact, an exercise in futility, given the law laid down by the Supreme Court in *Ghanashyam Mishra*. The Supreme Court has enunciated, in no uncertain terms, the clean slate

principle[1]; it cannot be set at naught by entertaining claims that concern the period obtaining before the approval of the Resolution Plan.

57. Accordingly, the impugned show-cause notice is quashed.

58. Parties will, however, bear the burden of their respective costs.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

FEBRUARY 16, 2023/ad

[1]See Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta &Ors. (2020) 8 SCC 531, Para 107; also see Jaypee Kensington Boulevard Apartments Welfare Association &Ors. vs NBCC (India) Limited &Ors. (2022) 1 SCC 401, para 165.