

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 701 of 2020

(Arising out of Order dated 9th July, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench-I, Chennai in IA/395/2020 in IBA/215/2020)

IN THE MATTER OF:

Ramesh Kymal

....Appellant

Versus

**M/s. Siemens Gamesa
Renewable Power Private Limited**

.....Respondent

Present:

For Appellant:

Mr. P.H. Arvinth Pandian, Senior Advocate with Mr. Goutham Shivshankar, Ms. Varsha Raghvan and Mr. Arivandhan, Advocates.

For Respondent:

Mr. Gopal Jain, Senior Advocate with Ms. Shruti Rana, Ms. Srishti Khare and Mr. Samudra Sarangi, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

IBA/215/2020 came to be filed as an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) by the Operational Creditor- Mr. Ramesh Kymal (Appellant herein) against the Corporate Debtor-'M/s. Siemens Gamesa Renewable Power Pvt. Ltd.' (Respondent herein). The Adjudicating Authority, taking note of the newly inserted Section 10A of the 'I&B Code' as a sequel to the

promulgation of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 published in the Gazette of India on 5th June, 2020 declined to admit the application holding that there was a bar created by law in terms of the newly inserted Section 10A coming into force. Aggrieved thereof and thereunder the Operational Creditor has preferred the instant appeal.

2. Heard learned counsel for the parties on the limited question of interpretation/ applicability of Section 10A of the 'I&B Code'. The sole question for consideration is whether the amending provision of Section 10A introduced in 'I&B Code' providing for suspension of initiation of Corporate Insolvency Resolution Process (CIRP) at the instance of a Financial Creditor, an Operational Creditor or a Corporate Person would be applicable, for any default arising on or after 25th March, 2020 for the specified period of six months or any extended period not exceeding one year as may be notified to applications filed post 25th March, 2020 and if so what would happen to an application filed by a Financial Creditor, an Operational Creditor or a Corporate Person who has preferred such application for the said default on or after 25th March, 2020 and before promulgation of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 on 5th June, 2020. Section 10A inserted vide Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 published in Gazette of India on 5th June, 2020 is reproduced hereunder:-

“10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation.- For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

3. It is submitted by learned counsel for the Appellant that the word “initiation date” is defined under Section 5(11) of the ‘I&B Code’, to mean the date on which the Financial Creditor, Operational Creditor or the Corporate Debtor, makes an application to the Adjudicating Authority for initiating CIRP. It is further submitted that Section 5(12) of the ‘I&B Code’ deals with “Insolvency Commencement Date”, which means the date of admission of an application for initiating CIRP by the Adjudicating Authority. According to learned counsel for Appellant, Section 10A of the ‘I&B Code’ deals with the aspect of “initiation” and not “commencement”. Drawing a distinction between the two concepts of “initiation” and “commencement”, learned counsel relied upon a

Division Bench judgment of the Hon'ble Bombay High Court in "**Kamal K Singh v. Union of India- MANU/MH/3538/2019**". He further submits that in the instant case proceedings were at the stage of Section 9 (5) i.e., at the stage of admission or rejection and when the application was filed on 11th May, 2020, it was maintainable, there being no bar on filing of such application as on 11th May, 2020. It is submitted that the application was complete in all respects and the Adjudicating Authority could not have invoked the bar in terms of Section 10A. It is further submitted that the Adjudicating Authority failed to appreciate the difference between 'initiation' and 'admission' which landed it in error resulting in misinterpretation of Section 10A. It is further submitted that Section 10A prohibits filing of application on or after 5th June, 2020 for defaults occurring during the relevant period specified in the Ordinance and not "initiation" of CIRP after the said date. Once an application has been filed, Section 10A does not stand as an impediment in its admission or non-admission on the basis of merit. It is lastly submitted that Section 10A cannot be construed to include applications that had already been filed and were pending before the Adjudicating Authority. It is further submitted that the intention is further clarified by the expression 'shall ever be filed' which refers to applications that are intended to be filed on or after 5th June, 2020 for defaults occurring during the relevant period specified in the Ordinance.

4. Per contra, it is submitted on behalf of the Respondent that initiation of insolvency proceedings against businesses, when the economy and markets have been critically impacted on account of COVID-19, would not only be counterproductive to the legislative scheme of the 'I&B Code', but also detrimental to the revival of the economy. This is said to be the intention of the legislature as gathered from the preamble of the Ordinance. Dwelling upon the scope of Section 10A, learned counsel for the Respondent submits that Section 10A contains three distinct parts:

(i) main provision which begins with a wide non-obstante clause, providing for suspension of initiation of proceedings under Sections 7, 9 & 10 for a period of atleast 6 months for any default occurring on or before 25th March, 2020;

(ii) proviso to the main provision which provides that for defaults occurring between 25th March, 2020 and 24th September, 2020 viz. the contemplated 6 months, the proceedings under aforesaid Sections cannot be initiated even in the post suspension period and;

(iii) the explanation which clarifies that the provisions of Section 10A would not apply to any default committed prior to 25th March, 2020.

5. According to learned counsel for the Respondent, 25th March, 2020 is the specifically identified cut-off date for any default and the

legislature intended the suspension to be effective from such date. Thus, learned counsel for Respondent submits that Section 10A would apply to all insolvency applications which have been initiated in relation to defaults occurring post 25th March, 2020, regardless of whether such insolvency applications had been filed before the Adjudicating Authority or not. It is submitted that if the interpretation placed on this provision by learned counsel for the Appellant is accepted, same would be result in creation of a class within a class insofar as creditors whose claims arise out of defaults occurring during the intervening period (25th March, 2020 and 05th June, 2020), but have actually not filed proceedings and those who have merely completed such filing. Lastly, it is submitted that mere filing of proceedings does not confer any substantive rights on the creditors and there is no rational basis whatsoever to suggest that similarly placed Corporate Debtors and creditors are to be treated differentially based on filing of proceedings.

6. Heard learned counsel for the parties and perused the record. The fate of this appeal entirely rests upon interpretation of Section 10A of the 'I&B Code' introduced through Ordinance No.9 of 2020 dated 05th June, 2020 which has been reproduced hereinabove.

7. The precise issue for consideration is whether an application for initiation of CIRP of a Corporate Debtor in respect of default committed before 25th March, 2020 but filed before 05th June, 2020 i.e. the date on which amending ordinance came into force, in respect of such default,

would be maintainable in view of the express bar created by the main provision of Section 10A.

8. It is by now well settled that a substantive administrative right cannot be taken away except by clear indication of intention to that effect by an express statutory provision or by necessary implication. No statute, unless it deals with procedure only, can be construed to have retrospective operation unless there is an express provision to that effect or same can be inferred by necessary implication. Dealing with interpretation of statutes and the concept of purposive interpretation qua a welfare legislation in “***Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi and Ors.- (1986) 2 SCC 614***”, the Hon’ble Apex Court observed as under:

“11. In interpretation of statutes, Courts have steered clear of the rigid stand of looking into the words of the Section alone but have attempted to make the object of the enactment effective and to render its benefits unto the person in whose favour it is made. The legislators are entrusted with the task of only making laws. Interpretation has to come from the Courts. Section 17-B on its terms does not say that it would bind awards passed before the date when it came into force. The respondents' contention is that a Section which imposes an obligation for the first time, cannot be made retrospective. Such sections should always be considered prospective. In our view, if this

submission is accepted, we will be defeating the very purpose for which this Section has been enacted. It is here that the Court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the Court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the Courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the Court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided. This Section was intended to benefit the workmen in certain cases. It would be doing injustice to the Section if we were to say that it would not apply to awards passed a day or two before it came into force.”

9. On a plain reading of the newly inserted Section 10A, it is manifestly clear that the Section, beginning with a non-obstante clause overriding provisions of Sections 7, 9 & 10 of the 'I&B Code' places an embargo on filing of application for initiation of CIRP of a Corporate Debtor for any default arising on or after 25th March, 2020 for a period of six months or such further period as may be notified but not exceeding one year from such date. This provision is clearly prohibitory in nature and filing of applications under Sections 7, 9 & 10 in respect of default arising on or after 25th March, 2020 is clearly barred for the specified period of six months or the extended period not exceeding one year, if so notified. Proviso to this main provision creates a further bar qua a default that may occur during the specified period. This construction is placed on the proviso adopting purposive interpretation to advance the intended object of the Ordinance viz. to prevent corporate persons experiencing distress due to impact of COVID-19 pandemic. Any other interpretation would lead to absurdity and defeat the object of the amending Ordinance. The explanation clarifies that Section 10A cannot be interpreted to apply the embargo in terms of main provision to any default committed before 25th March, 2020.

10. It is significant to notice that the embargo on filing of applications under Sections 7, 9 & 10 for initiation of CIRP of a Corporate Debtor for default arising on or after 25th March, 2020 for the specified period would not apply in regard to default committed prior to 25th March,

2020. The amending Act was published in Gazette of India dated 05th June, 2020 and Clause 1(1) thereof specifically provides that the Ordinance shall come into force at once. It is, therefore, to be considered whether an application in respect of a default committed on or before 25th March, 2020 but filed thereafter though before 05th June, 2020 i.e. the date of enforcement of Ordinance, would lie.

11. Chapter II of the 'I&B Code' deals with CIRP. Section 6 provides that in the event of a Corporate Debtor committing a default, a Financial Creditor, and Operational Creditor or the Corporate Debtor itself may initiate CIRP in respect of such Corporate Debtor in the manner as provided. Under Section 7 of the 'I&B Code' a Financial Creditor may singly or jointly with other Financial Creditors file an application for initiating CIRP against a Corporate Debtor before the Adjudicating Authority when default has occurred. Under Section 9 an Operational Creditor may file an application before the Adjudicating Authority for initiating CIRP after the expiry of period of 10 days from the date of delivery of demand notice if the amount of operational debt is not received from the Corporate Debtor or no notice of dispute is received in response to the demand notice. Under Section 10 a Corporate Applicant may file application before the Adjudicating Authority for initiating CIRP in respect of Corporate Debtor when default has been committed by the Corporate Debtor. From the scheme of these legislative provisions, it is manifestly clear that CIRP is initiated

by the Financial Creditor, Operational Creditor or Corporate Debtor itself by filing an application in the prescribed format and the Adjudicating Authority upon being satisfied that the default in respect of debt has occurred, shall admit such application. Sub-section (6) of Section 7, sub-section (6) of Section 9 and sub-section (5) of Section 10 provide in unambiguous terms that the CIRP shall “commence” from the date of admission of the application in each case. The commencement of CIRP in each case falling within the purview of Sections 7, 9 & 10 would thus, be from the date of passing of order of admission of application by the Adjudicating Authority. Same appears to be the position recognised in definition of ‘Insolvency Commencement Date’ as defined under Section 5(12) which provides as under:

“5. Definition.-..... (12)“insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be”

12. However, ‘initiation date’ in respect of CIRP in regard to Corporate Debtor is different from the ‘Insolvency Commencement Date’. Section 5(11) defines ‘initiation date’ as under:

“5. Definition.-(11) “initiation date” means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating

Authority for initiating corporate insolvency resolution process;”

13. It is manifestly clear that ‘initiation date’ for CIRP is the date on which the Financial Creditor, Operational Creditor or Corporate Applicant (for short “eligible applicant”) makes an application to the Adjudicating Authority for initiating such process. Thus, it is crystal clear that “initiation date” is different from “commencement date” of CIRP in respect of the Corporate Debtor. Reading the two definition clauses in juxtaposition, it emerges that while the first viz. ‘initiation date’ is referable to filing of application by the eligible applicant, the later viz. ‘commencement date’ refers to passing of order of admission of application by the Adjudicating Authority. The ‘initiation date’ ascribes a role to the eligible applicant whereas the ‘commencement date’ rests upon exercise of power vested in the Adjudicating Authority. Adopting this interpretation would leave no scope for initiation of CIRP of a Corporate Debtor at the instance of eligible applicant in respect of default arising on or after 25th March, 2020 as the provision engrafted in Section 10A clearly bars filing of such application by the eligible applicant for initiation of CIRP of Corporate Debtor in respect of such default. The bar created is retrospective as the cut-off date has been fixed as 25th March, 2020 while the newly inserted Section 10A introduced through the Ordinance has come into effect on 5th June, 2020. The object of the legislation has been to suspend operation of

Sections 7, 9 & 10 in respect of defaults arising on or after 25th March, 2020 i.e. the date on which Nationwide lockdown was enforced disrupting normal business operations and impacting the economy globally. Indeed, the explanation removes the doubt by clarifying that such bar shall not operate in respect of any default committed prior to 25th March, 2020. It would however, be absurd to hold that the embargo would extend to an application filed by the eligible applicant in respect of such default after 25th March, 2020 but before 5th June, 2020 i.e. the commencement of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 as the bar operates in respect of default arising on or after 25th March, 2020 and not before such date. An eligible applicant could, by no stretch of imagination, have the foresight of having even an inkling of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 being promulgated. The bar on initiation cannot operate in respect of applications filed for initiation of CIRP by the eligible applicant in respect of default committed before 25th March, 2020 though such application has been filed after 25th March, 2020 but before enforcement of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 on 5th June, 2020. Such interpretation not only serves the object of basic legislation but also goes along the tone and tenor of Section 10A with the explanation appended thereto clarifying the mist, if any, surrounding, the newly inserted provision. We hold accordingly.

14. Adverting to the facts of instant case, be it seen that in Form-5 i.e. the application to the Adjudicating Authority as also in Form-3 i.e. Demand Notice, the Appellant- Operational Creditor has specified 30th April, 2020 as the date of default which clearly goes beyond the cut-off date. Therefore, the Adjudicating Authority was perfectly justified in rejecting the application under Section 9 of the 'I&B Code' at the instance of Appellant- Operational Creditor as the default has occurred after the cut-off date and the bar imposed under Section 10A was clearly attracted.

15. In view of the forgoing discussion, the appeal is dismissed. However, there shall be no order as to cost.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
19th October, 2020
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