NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 956 of 2021

IN THE MATTER OF:

Writer Business Services Pvt. Ltd. & Anr. **....Appellants**

Vs.

Mr. Ashutosh Agrawala
Resolution Professional for Cox & Kings Ltd.

...Respondent

For Appellants: Mr. Arun Kathpalia, Sr. Advocate with Ms. Ishani Mookherjee, Ms. Prabh Simran Kaur, Mr. Vaijayant Paliwal, Mr. Ameya Gokhale, Ms. Diksha Gupta, Advocates.

For Respondent: Mr. Nirman Sharma, Mr. Pulkitesh Dutt Tiwari, Mr. Bency Ramakrishnan, Advocates.

J U D G M E N T
(04th February, 2022)

Ashok Bhushan, J.

1. This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("Code" for short) has been filed against the order dated 29.10.2021 of the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court III, allowing I.A. No. 1239/2020 & I.A. No. 484/2021 filed by the Resolution Professional and rejecting the I.A. No. 1628/2021 filed by the Appellant in CP/(IB) 2640/2019. Brief facts necessary for deciding this Appeal are:-

The Appellant No.1 entered into Record Management Agreement with Corporate Debtor on 15.01.2007 under which Agreement 'M/s. Writer Information Management Services', a division of P.N. Writer & Co. Pvt. Ltd. agreed to provide record management services to 'Cox & Kings' for its record. The Agreement contained details of pricing etc. In terms of the payment procedure under the terms of Agreement, the Corporate Debtor was required to pay to the Appellant No.1 charges for the said services within 15 days from the date of receipt of monthly invoices raised by the Appellant. On 22.10.2019, Adjudicating Authority passed an order initiating Corporate Insolvency Resolution Process ("CIRP" for short) against Corporate Debtor- 'Cox & Kings'. A Moratorium under Section 14 of the Code was also declared. After public announcement on 26.10.2019, the Appellant filed its claim in Form-B raising a claim of Rs.24,60,525/- against the Corporate Debtor. The Respondent- Mr. Ashutosh Agrawala was appointed as Resolution Professional on 10.01.2020. In 4th Committee of Creditors meeting held on 30.01.2020, the Resolution Professional was directed to arrange vacation of the premises of the Corporate Debtor and approach vendors in relation to the same. The Resolution Professional wrote to the Appellant. The Appellant was informed by the Corporate Debtor that all charges for CIRP period will be paid in accordance with the Code. The Resolution Professional wrote to the Appellant asking to undertake packing of certain packing requirements. Appellant wrote to the Resolution Professional that outstanding bills to be paid to the Appellant to start with activity of packing and addition of new cartons. It was also communicated by the Appellant that for future work shall be undertaken unless advance

payment is made. The Appellant informed the Resolution Professional that they would continue to provide service upon receipt of amount outstanding from the Corporate Debtor for the services rendered. An Application being I.A. No. 1239/2020 was filed by the Resolution Professional, the Respondent before the Adjudicating Authority seeking a direction to Appellant to continue providing its service to the Corporate Debtor as per terms of the Agreement dated 15.01.2007 and further Appellant be directed to provide all records, information and documents being sought in respect of the Corporate Debtor. I.A. No. 1239/2020 was replied by the Appellant before the Adjudicating Authority. In the Reply, it was stated that the Respondent arrayed in the Application i.e. 'M/s. Writer Information Management Services Pvt. Ltd.' is not the entity with whom agreement was entered. In the Reply, it was stated that after demerger in 2015 by 'M/s. Writer Information Management Services' division, relocation service division and safeguard business division collectively referred to order as service division of P.N. Writer & Co. Pvt. Ltd. were transferred to and vested in the 'Writer Business Services Pvt. Ltd.' as a going concern business. The copy of the order of Bombay High Court dated 23.10.2015 approving the scheme was also filed along with the Reply. It was stated that current services in question are being provided by 'Writer Business Services Pvt. Ltd.'. It was pleaded that Respondent to the Application is unconnected party. It was stated that 'Writer Business Services Pvt. Ltd.' continued to provide service as per the contract even after the commencement of Moratorium period. It was stated that the payment has been made only till 31.01.2020. Details of invoices raised from 01.02.2020 to 30.06.2020 were also mentioned in the Reply.

Another Application I.A. No. 484 of 2021 was preferred by the Resolution Professional praying for a declaration that the Respondent is not entitled to any payments in terms of the Agreement towards record management services and record retrieval services after commencement of CIRP of the Corporate Debtor from 22.10.2019. Direction was also sought for refunding the money received by the Appellant from the Corporate Debtor. An amount of Rs. 6.22 Crores was also claimed towards losses suffered by the Corporate Debtor on account of the refusal of the Respondent to provide uninterrupted critical services. The Appellant No.1 has also filed I.A No. 1628/2021 where the Appellant sought a declaration that the Applicant is entitled for payment of services and also payment for storage charges in advance for the next three years or till such further period if the Respondent wishes to continue the storage of records. Declaration was also sought that in event the Corporate Debtor fails to make payment then the Applicant will be entitled to suspend all retrievals services till such payment is made by the Corporate Debtor.

All the three Applications came for consideration before the Adjudicating Authority on 29.10.2021. By the impugned order, the Adjudicating Authority allowed both the Applications filed by the Resolution Professional and dismissed the Application filed by the Appellant No.1. Direction was also issued for continuance of providing services to the Corporate Debtor as per Agreement dated 15.01.2007. Direction was also issued to refund the payment for the period from commencement of CIRP till date. A fine of Rs.20 lakh was also imposed on the Respondent to the Application. Aggrieved by the order, this Appeal has been filed by two

Appellants- one 'Writer Business Services Pvt. Ltd.' who claims to be the entity who is providing record management services to the Corporate Debtor and Appellant No.2 who was impleaded in I.A filed by the Resolution Professional as Respondent.

2. We have heard Shri Arun Kathpalia, Learned Senior Counsel for the Appellant and Shri Nirman Sharma, Learned Counsel appearing for the Respondent and perused the record.

3. Shri Arun Kathpalia, Learned Senior Counsel for the Appellants challenging the impugned judgment submits that the Adjudicating Authority committed error in imposing a fine of Rs.20 lakh on the Appellant No.2 who was arrayed as Respondent in the I.A filed by the Resolution Professional. It is submitted that the Appellant No.2 has nothing to do with providing services to the Corporate Debtor and it was Appellant No.1 who was providing services to the Corporate Debtor and is successor to 'M/s. Writer Information Management Services Pvt. Ltd.' who entered into an Agreement with Corporate Debtor on 15.01.2007. It is submitted that in the reply filed to I.A No. 1239 of 2020 all relevant facts were brought which clearly proved that Appellant No.2 arrayed by Resolution Professional as Respondent has nothing to do with dispute and has wrongly been impleaded but still without considering the aforesaid facts directions have been issued to Appellant No.2 who was arrayed as Respondent in the I.A. It is submitted that the Adjudicating Authority committed error in imposing fine by the impugned judgment after referring to Section 235A of the Code whereas power to impose fine and punish any person is to be exercised only in accordance

with Section 236 on a complaint filed by Central Government or by the Board. Adjudicating Authority has no jurisdiction to impose punishment or fine of Rs.20 Lakh on the Appellant. It is submitted that for imposing punishment which is an offence it is only Special Court as referred to in Section 236 who can award any punishment including punishment of fine. Section 235A is not a provision for imposing cost as has been referred to in paragraph 13 of the judgment. It is submitted that even after CIRP proceeding, the Appellants were provided record management services although after February 2020 no payment has been made to the Appellants. It is submitted that advance payment which was asked by Appellants was with regard to after services i.e. service of packing and others which was not part of the earlier Agreement. Appellant had never asked for advance payment for providing record management services as for which agreement was entered with Corporate Debtor. It is submitted that part of payment which was received by the Appellant was in response to the invoices and there was no justification for directing refund of said payment. Insofar as direction (A) in para 15 in order is concerned, the Appellants have been provided its services as per Agreement dated 15.01.2007 without receiving the payment of its invoices.

4. Mr. Nirman Sharma, Learned Counsel for the Respondent refuting the submission of Learned Senior Counsel for the Appellant contends that the fine of Rs. 20 Lakh was correctly and appropriately imposed by the Adjudicating Authority. It is submitted that the power to impose fine under Section 235A can be exercised by the Adjudicating Authority and it is not

required that the fine should be imposed only by the Special Court as provided in Section 236. It is submitted that the punishment under Section 235A is adjudicatory power of the Adjudicating Authority and no error has been committed in imposing fine of Rs. 20 Lakh. The Appellant has violated the Moratorium in refusing the record management services which were critical services within the meaning of Section 14(2A). After February, 2020, Appellants did not permit the Resolution Professional to have access of its records due to which it suffered substantial loss. Under the terms of Agreement, there was no requirement of making advance payment by the Resolution Professional for services asked for. Learned Counsel for the Respondent has placed heavy reliance on judgment of the Hon'ble Supreme Court in ***"(1996) 2 SCC 471- Director of Enforcement vs. M.C.T.M Corporation Pvt. Ltd. & Ors."***.

5. We have considered the submissions of the Learned Counsel for the parties and perused the record as well as the Written Submissions filed by both the parties.

6. From the submissions of the Learned Counsel for the parties and materials on record, following are the questions which arise for consideration in this Appeal:-

(i) Whether the Adjudicating Authority in exercise of jurisdiction under Section 235A can impose a fine of Rs.20 Lakh as has been imposed by the impugned judgment on the Appellant?

(ii) Whether Record Management Services are critical services within the meaning of Section 14(2A) which should not be terminated

during the period of Moratorium and the Adjudicating Authority is right in issuing direction to Appellant to continue to provide Record Management Services during CIRP period?

(iii) Whether Adjudicating Authority has rightly issued direction to the Appellant to refund the amount received from the Resolution Professional after initiation of CIRP?

QUESTION No.1

7. Section 235A which falls for consideration in this Appeal has been inserted in the Code by Act 8 of 2018 w.e.f. 23.11.2017. Section 235A was inserted in the Code vide Ordinance by Insolvency Bankruptcy Code Ordinance, 2017 (No. 7/2017). On the date when Ordinance was issued i.e. 27.11.2017 Press Information Bureau, Government of India, Ministry of Corporate Affairs issued orders highlighting on aims of the Ordinance. The press release outline the object of amendment which is to the following effect:-

> *"The Government of India promulgated today the Ordinance to amend the Insolvency and Bankruptcy Code, 2016 (the Code). Earlier the President of India had given his assent to the Ordinance to amend the Code.*
>
> *The Ordinance aims at putting in place safeguards to prevent unscrupulous, undesirable persons from misusing or vitiating the provisions of the Code. The amendments aim to keep-out such persons who have wilfully defaulted, are associated with non-performing*

assets, or are habitually non-compliant and, therefore, are likely to be a risk to successful resolution of insolvency of a company. In addition to putting in place restrictions for such persons to participate in the resolution or liquidation process, the Amendment also provides such check by specifying that the Committee of Creditors ensure the viability and feasibility of the resolution plan before approving it. The Insolvency and Bankruptcy Board of India (IBBI) has also been given additional powers.

It may be recalled that the Regulations by the IBBI were also amended recently to ensure that information on the antecedent of the applicant submitting the Resolution Plan along with information on the preferential, undervalued or fraudulent transactions are placed before the Committee of Creditors in order for it to take an informed decision on the matter.

Along with other steps towards improving compliances, actions against defaulting companies to prevent misuse of corporate structures for diversion of funds, reforms in the banking sector, weeding-out of unscrupulous elements from the resolution process is part of ongoing reforms initiated by the Government. These would help strengthen the formal economy and encourage honest businesses and budding entrepreneurs to work in a trustworthy, predictable regulatory environment."

8. With regard to Section 235A in para (viii), following has been stated:-

"(viii) In order to ensure that the provisions of the Code and the Rules and Regulations prescribed thereunder

are enforced effectively, the new Section 235A provides for punishment for contravention of the provisions where no specific penalty or punishment is provided. The punishment is fine which shall not be less than one lakh rupees but which may extend to two crore rupees."

9. Before proceeding further, we need to notice the scheme of the Code regarding penalty and punishment. Chapter VII of Part-II of the Code provides for 'Offences and Penalties'. Section 68 to Section 77 and Section 77A have enumerated different offences and punishment for such offences. For example, we may notice Section 68, which is to the following effect:-

*"**68. Punishment for concealment of property.** - Where any officer of the corporate debtor has, –*

(i) within the twelve months immediately preceding the insolvency commencement date, –

(a) wilfully concealed any property or part of such property of the corporate

debtor or concealed any debt due to, or from, the corporate debtor, of the value of ten thousand rupees or more; or

(b) fraudulently removed any part of the property of the corporate debtor of the value of ten thousand rupees or more; or

(c) wilfully concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the property of the corporate debtor or its affairs, or

(d) wilfully made any false entry in any book or paper affecting or relating to the property of the corporate debtor or its affairs, or

(e) fraudulently parted with, altered or made any omission in any document affecting or relating to the property of the corporate debtor or its affairs, or

(f) wilfully created any security interest over, transferred or disposed of any property of the corporate debtor which has been obtained on credit and has not been paid for unless such creation, transfer or disposal was in the ordinary course of the business of the corporate debtor, or

(g) wilfully concealed the knowledge of the doing by others of any of the acts mentioned in clauses (c), (d) or clause (e); or

(ii) at any time after the insolvency commencement date, committed any of the acts mentioned in sub-clause (a) to (f) of clause (i) or has the knowledge of the doing by others of any of the things mentioned in sub-clauses (c) to (e) of clause (i); or

(iii) at any time after the insolvency commencement date, taken in pawn or pledge, or otherwise received the property knowing it to be so secured, transferred or disposed, such officer shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both:

Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor."

10. All Sections under Chapter VII from Sections 68 to 77A provide for punishment of imprisonment as well as fine except for Section 75. Section

75 which deals with punishment for false information furnished in Application provides punishment of fine only. Section 75 is as follows:-

> *"**75. Punishment for false information furnished in application.** - Where any person furnishes information in the application made under section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees."*

11. In Part-III Chapter VII again deals with 'offences and penalties' from Sections 184 to 187. We may also notice a provision in Chapter VI Part-II which deals with 'Adjudicating Authority for Corporate Persons'. Section 65 empowers the Adjudicating Authority to impose penalty for fraudulent or malicious initiation of proceedings. Section 65 of the Code is as follows:-

> *"**65. Fraudulent or malicious initiation of proceedings.** - (1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon a such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*
>
> *(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.*

[(3) If any person initiates the pre-packaged insolvency resolution process—
(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or
(b) with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.]"

12. Section 236 deals with 'Trial of offences by Special Court'. Section 236 is as follows:-

*"**236. Trial of offences by Special Court.** - (1) Notwithstanding anything in the Code of Criminal Procedure, 1973(2 of 1974), offences under of this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013 (18 of 2013).*
(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.
(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.
(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court

trying the offences shall not be necessary unless the Court requires his personal attendance at the trial."

13. In background of the above statutory scheme delineated by the Code, we need to answer as to whether under Section 235A it is the Adjudicating Authority which can impose fine. Whether such fine is to be treated as punishment for offence and procedure as prescribed in Section 236 has to be resorted to?

14. The expression 'offence' has neither been defined under the Code nor in the Companies Act, 2013. The expression, 'offence' is defined in the General Clauses Act, 1897 in Section 3(38) which is to the following effect:-

*"**3. Definitions.**- .....(38) "offence" shall mean any act or omission made punishable by any law for the time being in force;*

15. The Code uses two expressions one penalty and other punishment. The submission of Learned Counsel for the Respondent is that the power under Section 235A is in the nature of penalty which is power of the Adjudicating Authority and the object is to clothe the Adjudicating Authority with such power so that contravention of provisions of the Code, Rules or Regulations are taken care of. The object is to give tooth to Adjudicating Authority to ensure the compliance of the provisions of the Code, Rules and Regulations. In support of his submission, Learned Counsel for the Respondent has relied on judgment of the Apex Court in "Director of Enforcement" case (Supra) where the Apex Court has occasion to consider the provisions of Foreign Exchange Regulation Act, 1947 where penalty was

imposed under Section 23(1)(a) of the FERA Act, 1947. The argument raised before the Apex Court was that the provisions of Section 23 was a penal provision which is quasi-criminal in nature hence, unless criminality is established penalty cannot be imposed. Madras High Court has set aside the penalty on the ground that no finding has been recorded regarding provisions of *mens rea* on the part of the offender, against which the Appeal was filed. We may first notice the provisions of Section 23(1)(a) which provisions came for consideration before the Hon'ble Supreme Court. The relevant provisions has been quoted in paragraph 4 of the judgment which is to the following effect:-

> *"**4.** With a view to answer these questions, it would be appropriate to first notice the relevant provisions of Section 10 and 23 of FERA, 1947, as they stood at the Material time, (prior to the amendment of the FERA in 1964 and 1973). Those provisions read thus,:*
>
> *xxx xxx xxx*
>
> *Section 23. Penalty and procedure.- (1) If any person contravenes the provisions of Section 4, Section 5, Section 9, Section 10, Sub-section (2) of Section 12, Section 17, Section 18A or Section 18B or of any rule, direction or order made thereunder, he shall*
>
> > *(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Directorate of Enforcement in the manner hereinafter provided, or*

(b)...

*23. (1-A)-23-EEE * ** * *

23F. If any person fails to pay the penalty imposed by the Director of Enforcement or the Appellate Board, or fails to comply with any of their directions or orders, he shall, on conviction before a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both."

16. The Hon'ble Supreme Court, in the above context, after noticing the judgment of the High Court, in paragraphs 6 and 7 laid down following:-

"6. The High Court, while dealing With the first question opined that Section 23 is a "penal provision" and, the proceedings Under Section 23(1)(a) are "quasi-criminal" in nature and therefore, unless "criminality" is established, the penalty provided Under Section 23(1)(a) of the Act cannot be imposed on any person. The High Court thus held the existence of "mens-rea" as a necessary ingredient for the commission of an "offence' Under Section 10 of the Act and in the absence of a finding about the presence of "mens-rea" on the part of the offenders, no punishment Under Section 23(1)(a) of FERA, 1947 could be imposed. For what follows, we cannot agree.

7. "Mens-rea" is a state of mind. Under the criminal law, means-rea is considered as the "guilty intention" and unless it is found that the "accused" had the guilty intention to commit the "crime" he cannot be held "guilty" of committing the crime. An "offence' under

Criminal procedure Code and the General clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force". The proceedings Under Section 23(1)(a) FERA, 1947 are "adjudicator" in nature and character and are not "criminal proceedings'. The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to "adjudicate' only. Indeed they, have to act "judicially" and follow the rules of natural justice to the extent applicable but, they are not "Judges' of the "Criminal Courts" trying an "accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as "Courts" but only as "administrators' and "adjudicators'. In the proceedings before them, they do not try "an accused" for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his "obligations" imposed under the Act. They impose "penalty' for the breach of the "civil obligations' laid down under the Act and not impose any "sentence" for the commission of an offence. The expression "penalty' is a word of wide significance. Sometime, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a "penalty'. When penalty is imposed by an adjudicating officer, it is done so in "adjudicator proceedings' and not by way of fine as a result of "prosecution" of an "accused' for commission of an "offence" in a criminal Court. Therefore, merely because "penalty' clause exists in Section 23(1)(a), the nature of the proceedings under that Section is not changed from "adjudicator' to "criminal' prosecution. An

order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender."

17. The Hon'ble Supreme Court in the above case laid down that penalty is imposed by the Adjudicating Authority in adjudicatory proceedings and not by way of fine as a result of prosecution of an accused. The Hon'ble Supreme Court was interpreting Section 23(1)(a) which specifically provided imposition of penalty not exceeding three times the value of the foreign exchange. There was no indication that Section 23 provided for penalty for any offence. The above judgment does not help the Respondent in the present case due to more than one reason. Firstly, Section 235A does not use expression 'penalty' rather it uses the expression 'shall be punishable with fine'. Secondly, where the Adjudicating Authority is empowered to impose penalty specifically it has been provided in the Code. For example, Section 65 where the Adjudicating Authority can impose a penalty on fraudulent and malicious intention of proceedings of not less than Rs. 1 Lakh but may extend to Rs. 1 Crore.

18. We may also notice that provisions of Chapter VII in Part-II as well as Chapter VII in Part-III of the Code uses expression 'punishment'. Punishments provided under Chapter VII are punishment of imprisonment or fine or with fine or fine alone.

19. P Ramanatha Aiyar, Advanced Law Lexicon, 6th Edition defines the 'fine' as a pecuniary punishment imposed by the judgment of a Court upon a person convicted of crime. The word 'penalty' has different shades of

meaning which depends upon the context in which it has been used. P Ramanatha Aiyar defines 'penalty' in following words:-

> *"PENALTY" means a monetary penalty or fine or any other sum imposed by the Commission and realizable under the Act. [Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011, Regn. 2(1)(g) [Competition Act, 2002 (12 of 2003)]*
>
> *Whether or not a statute creates a criminal offence is a question of interpretation, e.g., if the word "penalty" as distinct from the word "fine" is used the general rule is that the penalty must be recovered as a debt in a civil Court."*

20. The Hon'ble Supreme Court in ***"State of U.P. & Ors. vs. Sukhpal Singh Bal and Ors.- (2005) 7 SCC 615"*** explaining the meaning of 'penalty' stated in paragraph 12:-

> *"12. In the light of the above judgments as applicable to the provisions of the said 1997 Act, we are of the view that the High Court had erred in striking down section 10(3) as ultra vires articles 14 and 19(1)(g) of the Constitution. "Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute.*
>
> *A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction*

is responsible for any enactment intended to protect public revenue.

Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication. In our view, penalty under section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. Section 10(3) is enacted to protect public revenue. It is enacted as a deterrent for tax evasion. If the statutory dues of the State are paid, there is no question of imposition of heavy penalty. Everything which is incidental to the main purpose of a power is contained within the power itself. The power to impose penalty is for the purpose of vindicating the main power which is conferred by the statute in question. Deterrence is the main theme of object behind that imposition of penalty under section 10(3).”

21. We may also refer to one judgment of UK High Court reported in (2004) EWHC 3010 (Ch). The High Court has occasion to consider Rule 12.3(2) of the Insolvency Rules, 1986 where the expression of fine was held to be imposed by the Criminal Court. It is useful to extract paragraphs 5, 6 & 9 of the judgment, which are to the following effect:-

“5. Rule 12.3(2) of the Insolvency Rules 1986 defines what debts are provable in inter alia a bankruptcy, subrule (1) providing as follows:-

"All claims by creditors are provable as debts against the company, or, as the case may be, the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages.

(2) The following are not provable (a) in bankruptcy any fine imposed for an offence and any obligation arising under an order-"

and the remainder of that subrule is irrelevant.

6. S.28.1 of the Insolvency Act subsection (8) provides:

"In this section 'fine' means the same as in the Magistrates Courts Act 1980."

S. 150(1) of the Magistrates' Courts Act 1980 defines 'fine' as:

"Except for the purposes of any enactment imposing a limit on the amount of any fine, includes any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction."

xxx xxx xxx

9. In my judgment the construction to be placed on the word conviction in s. 150(1) of the Magistrates' Courts Act 1980 is the meaning given to it in the Oxford Dictionary of English and in the primary meaning given to it in the One Look Dictionary Search which Mr. Marcus has put before me. It follows that in my judgment when the word 'fine' is spoken of in the

Insolvency Rules, Rule 12.3(2) it means a fine imposed by a criminal court as a result of a criminal conviction. This is to be contrasted with a fine, perhaps not properly so-called, imposed by an organisation such as the Institute of Chartered Accountants. That institute is inter alia a regulatory body which regulates the conduct of its members entitled to describe themselves as chartered accountants. The relationship between the institute and its members is, it seems to me, a contractual one in which in order to attract the right to call themselves chartered accountants' members enter into a contract with the institute to obey its rules and, amongst other things, to submit themselves to the hearing and verdict of disciplinary tribunals instituted by the institute itself. It is accepted by Mr. Marcus that one of the penalties which a disciplinary tribunal of the Institute of Chartered Accountants is able to impose is a financial penalty."

22. The above authority also supports our view that punishment of fine is a fine which is imposed on a delinquent for an offence.

23. The Code has used both the expressions punishment and fine. The use of expressions 'punishment' and 'fine' has been in reference to the provisions which provision in Chapter VII of Part-II and Chapter VII of Part-III in reference to offence which are enumerated in Code. A question will be asked as to why Section 235A has not been inserted in Chapter VII of Part-II or Chapter VII of Part-III. The answer is obvious i.e. since Section 235A encompasses contravention of any of the provisions of the Code, Rules and

Regulations, it was placed in Part-V i.e. Miscellaneous. Placing of Section 235A in Part-II & III while dealing with specific offences in Chapter VII would not have been appropriate. The use of expression 'punishable with fine' in Section 235A makes it is nearer to the nature of acts defined in Chapter VII Part II and Chapter VII Part-III, Section 235A is not a provision which empowers the Adjudicating Authority to impose penalty. Applying the definition of offences as contained in Section 3(38) of the General Clauses Act, 1897 in Section 235A, the contravention of any provisions of the Code, Rules and Regulations is an offence which has been made punishable by the Code.

24. After we have come to the conclusion that Section 235A is a provision for awarding a punishment of fine and the provision is for punishment of an offence. The trial of such offence has to be as per Section 236 on taking cognizance by Special Court by complaint made by the Board or Central Government for punishment of a person. For any offence law prescribe a procedure which broadly requires framing of charges and opportunity to answer the same. In event, it is accepted that power under Section 235A can be exercised by the Adjudicating Authority while passing orders on an I.A filed for different reliefs pertaining to CIRP, the person punished with fine may be deprived of his right to answer charge of an offence. The present case is an example which fully supports the interpretation which we have put on Section 235A.

25. In the present case, in both the I.As filed by the Resolution Professional there was neither any prayer for imposition of fine or any kind

of punishment was prayed for except there was allegation that Appellant has violated the Moratorium by refusing to provide its record management services. In I.A No. 484 of 2021, we will look into the prayers made in I.A No. 484 of 2021 which is to the following effect:-

> *"a. A declaration that the Respondent, by refusing to provide its Record Management Service and Record Retrieval Services, has violated the provisions of Section 14 (2A) of the IBC;*
> *b. A declaration that the Respondent is not entitled to any payment in terms of the Agreement towards Record Management Services and Record Retrieval Services after commencement of CIRP of the Corporate Debtor from 22nd October 2019 onwards;*
> *c. Pass an order directing the Respondent to refund the monies received by it from the Corporate Debtor in terms of the Agreement towards Record Management Services and Record Retrieval Services (as defined hereinafter);*
> *d. Pass an order directing the Respondent to pay an amount Rs. 6,22,25,415 (Rupees Six Crore Twenty Two Lakhs Twenty Five Thousand Four Hundred and Fifteen), as specified in **Exhibit 'S'**, to the Corporate Debtor towards the losses suffered by the Corporate Debtor on account of the refusal of the Respondent to provide uninterrupted critical services in terms of the Agreement."*

26. Section 74 of the Code which is part of Chapter VII of Part-II specifically provide for 'punishment for contravention of Moratorium or Resolution Plan'. Section 74 is as follows:-

*"**74. Punishment for contravention of moratorium or the resolution plan.** - (1) Where the corporate debtor or any of its officer violates the provisions of section 14, any such officer who knowingly or wilfully committed or authorised or permitted such contravention shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to three lakh rupees, or with both.*

(2) Where any creditor violates the provisions of section 14, any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both"

27. When the allegation of Resolution Professional was that Appellant has contravened the Moratorium there was allegation of commission of an offences on which punishment could have been awarded after following the procedure under Section 236. An act which is termed as offence within

specific provision of Chapter VII of Part-II could not have been indirectly dealt with by the Adjudicating Authority by imposing a fine.

28. We are, thus, satisfied that fine imposed by the Adjudicating Authority of Rs.20 Lakh on the Appellant in exercise of powers under Section 235A was beyond jurisdiction and direction insofar as in para 15(c) is to be set aside.

QUESTION NO.2:

29. Section 14(2A) provides:-

> *"**14. Moratorium...**.....(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified."*

30. In the facts of the present case, Resolution Professional was of the opinion that services of record management services are critical services for Corporate Debtor and it should be provided during period of Moratorium. In the facts of the present case, we are of the view that record management services can fall within the definition of 'critical services' as referred to in

sub-section (2A) of Section 14. The Appellant in this Appeal has categorically stated that they have continued to provide record management services during CIRP proceedings, we do not find any error in the direction issued by the Adjudicating Authority in paragraph 15(A) to continue providing its services to the Corporate Debtor. Hence, direction issued in paragraph 15(A) is affirmed.

31. In the Rejoinder filed by the Appellants an order dated 06.12.2021 has been brought on record by which order Adjudicating Authority has directed for liquidation of the Corporate Debtor. The CIRP thus has come to an end w.e.f. 16.12.2021.

QUESTION NO.3:

32. Appellants in its Affidavit has stated that Appellant has continued to provide record management services after initiation of CIRP also and advance payment which was asked for was only with respect to future services i.e. service of packing etc. which payment was not asked for services which were continued from earlier. It is on the record that Appellant has issued invoices for payment for the services provided during CIRP and part payment was made during the period. The prayer of the Resolution Professional in his second Application i.e. I.A. 484 of 2021, the direction be issued to the Appellants that they are not entitled to receive any payment for services during CIRP period could not have been granted. We thus are of the view that there was no occasion for the Adjudicating Authority to issue any direction to refund the amount which has already been paid by the

Resolution Professional for the services provided during the CIRP. Thus, direction issued in paragraph 15(B) also cannot be sustained.

33. In view if the foregoing discussion, we thus allow the Appeal partly by setting aside the direction in para 15(B) and 15(C). The directions issued in paragraph 15(A) are affirmed. The parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
Anjali