

**NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II**

COMPANY PETITION NO. IB-340(ND)/2021

IN THE MATTER OF:

**SECTION 9 AND OTHER RELEVANT PROVISIONS OF INSOLVENCY AND
BANKRUPTCY CODE, 2016**

IN THE MATTER OF:

**BLS Polymers Limited
604, Indra Parkash Building,
21 Barakhamba Road,
New Delhi- 110001**

...Operational Creditor

Versus

**M/s RMS Power Solutions Private Limited
Registered Address:-
4327/3, Ansari Road,
Darya Gang New Delhi 110002**

**Also at:-
SP4-867, Industrial Area,
Pathredi Bhiwadi, Alwar-301019,
Rajasthan**

...Corporate Debtor

Order Delivered on: 27.07.2021

CORAM:

**SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)
SH. L. N. GUPTA, HON'BLE MEMBER (T)**

PRESENT:

Mr. Gautam Dhamija & Ms. Parul Sachdeva, Advs. For Operational Creditor

ORDER

Mr. Abni Ranjan Kumar Sinha, Member (Judicial)

The petitioner has filed this application under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC') for initiation of Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor for the total defaulted amount of Rs. 35,74,942/-, which includes both the principal and interest amount.

2. In the course of hearing, a preliminary objection was raised in the light of the notification no. CG-DL-E-24032020-218898 (hereinafter referred to as 'notification') dated 24.03.2020, issued by Ministry of Corporate Affairs, by exercising its powers under proviso of Section 4 of IBC, 2016, by which the minimum threshold amount to trigger the insolvency proceedings is enhanced from one lakh to one crore.

3. Heard the Ld. Counsel for the petitioner and perused the averments made in the application.

4. The following are the admitted facts :

- i. *The invoice was raised by the petitioner on 07.08.2019 & 05.09.2019 in pursuance of the purchase order dated 04.09.2019 received through email.*
- ii. *The demand notice was delivered on 16.03.2020, prior to the issuance of the notification dated 24.03.2020.*
- iii. *As per the averments made by the Corporate Debtor in its reply to the Demand notice, the Corporate Debtor has received the demand notice on 21.03.2020 (page 118, Annexure-11 of the petition).*
- iv. *The Corporate Debtor in its reply to the demand notice has raised the question of maintainability, in view of the minimum threshold amount enhanced from Rs.*



*one lakh to one crore vide notification dated
24.03.2020.*

5. It is an admitted fact that prior to the issuance of the demand notice, in order to trigger the insolvency proceedings under part-II, Chapter I, Sections 7, 9 or 10 of IBC, 2016, the minimum threshold amount of default was Rs. one lakh, which was increased to one crore rupees vide notification dated 24.03.2020.

6. In the course of his arguments, Ld. counsel for petitioner submits that the Corporate Debtor had issued two cheques, bearing no. 291660 dated 30.12.2019 for Rs. 16,04,800/- and cheque bearing no. 291661 dated 15.12.2019 for Rs. 16,23,880/- towards the payment of the defaulted amount but the said cheques were dishonored.

7. He contended that as per the invoices, the amount shown in the invoices became due and payable after 15 days from the date of invoices (page 23 & 24 of the petition).

8. He further contended that the Corporate Debtor vide letter dated 12.03.2020 (Page 108 of the petition), acknowledged and undertook to make the payment by mid April, 2020.

9. He further contended that the cause of action for initiation of the application under Section 9 accrues on default by the Corporate Debtor and 'default' is defined under Section 3 (12) of the IBC, 2016, ***which means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.***



10. He further contended that this has also been held by the Hon'ble Supreme Court in the matter of **Sesh Nath Singh vs. Baidyabati Sheoraphuli Cooperative Bank Ltd., 2021 SCC OnLine SC 244.**

11. He further contended that as per the invoices, the amounts were due and payable prior to the issuance of notification dated 24.03.2020 and the demand notice was also served upon the Corporate Debtor prior to that notification.

12. Hence, the notification dated 24.03.2020 is not applicable in the matter in which the default has occurred, prior to the issuance of said notification and also the demand notice was served prior to that notification.

13. He also placed reliance upon the decision of Hon'ble Supreme Court in **Manish Kumar vs Union of India, 2021 SCC OnLine SC 30** and submits that the 'right to sue' or the 'right to apply' is a vested right and the cause of action arose as the result of default by the Debtor.

14. He further contended that a statute is presumed to have a prospective effect unless it is held to be retrospective either expressly or by necessary implication. The Notification nowhere mentions that the enhancement of the threshold amount will have a retrospective or retroactive effect and this has also been held by the Hon'ble NCLAT in case of **Madhusudan Tantia vs Amit Choraria, Company Appeal (AT) (Insolvency) No. 557 of 2020.**

15. He further contended that nowhere in the IBC, the Central Government is empowered to issue any notification, under the delegated legislation power, which have retrospective effect.

16. He also placed reliance upon the decision of Hon'ble Supreme Court in **Indramani Pyarelal Gupta (Dr.) vs W.R. Natu, (1963) 1 SCR 721.**



17. He further submitted that even the intention of legislature is to tackle large scale insolvencies as a result of lockdown due to COVID-19 pandemic and for that reason, a new Section 10A was inserted to suspend the operation of Sections. 7, 9, and 10 of IBC with effect from 25.03.2020.

18. Now, in the light of the aforesaid submissions, we consider the prayer of the applicant.

19. Before considering the submissions, we would like to refer to Section 4 of IBC, 2016, which empowers the Central Government to enhance the minimum amount of default to the extent of one crore rupees and the said section is quoted below:

“IBC Section 4: Application of this Part.

(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

Provided further that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the prepackaged insolvency resolution process of corporate debtors under Chapter III-A.”

20. A bare perusal of the provision shows that part-II Chapter-I of IBC is applicable to the matters relating to the insolvency and liquidation of the Corporate Debtor, if any default in respect of the payment of dues has occurred. Originally, the minimum threshold amount, as per Section 4 of IBC, 2016 was one lakh rupees, which has been enhanced to one crore rupees by the Central Government.



21. At this juncture, we consider the notification issued by the Central Government (Ministry of Corporate Affairs) under proviso to Section 4 of IBC, 2016 and the said notification is quoted below:

S.O. 1205(E).- In exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section.

22. A bare perusal of the notification dated 24.03.2020 shows that nowhere in the notification the date of enforcement of the notification is mentioned and it is a well settled principle of law that if the date of enforcement/effectiveness of law is not shown in the notification, it shall have the prospective effect.

23. But there are certain circumstances, for which, no direction is given in the notification regarding its applicability. Those circumstances are:

- i. In the case of an operational debt, where demand notice under Section 8 of IBC has already been delivered prior to the notification dated 24.03.2020) but the application is filed after 24.03.2020.*
- ii. Where the default has occurred prior to the issuance of notification dated 24.03.2020 (but no demand notice was sent in case of application filed Under Section 9.*
- iii. Where the application has already been filed but not admitted by the Adjudicating Authority against the Corporate Debtor.*
- iv. Where application has been admitted for initiation of CIRP against the Corporate Debtor.*

24. So far as the circumstances referred to point nos. (iii) & (iv) are concerned, there is no dispute regarding the non-applicability of the notification dated 24.03.2020 because every notification has

prospective effect unless and until it is specifically mentioned in the notification that the same will have the retrospective effect.

25. Now, we consider the circumstance no. (i) where the default has occurred prior to the issuance of the notification dated 24.03.2020 and demand notice is also duly delivered but the application is filed after 24.03.2020. As in the case in hand also, the demand notice was duly delivered prior to the notification dated 24.03.2020.

26. At this juncture, we consider the relevant provisions of Section 7, 8, 9 & 10 of IBC, 2016 and the same are quoted below:

IBC Section 7- Initiation of corporate insolvency resolution process by financial creditor.

(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Provided that for the financial creditors, referred to in clauses (a) and (b) of the sub-section (6A) of the section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten percent of the total number of such creditors in the same class, whichever is less:

Provided further that for the financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the insolvency and Bankruptcy Code (Amendment) Ordinance,



2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

- (2)
- (3)
 - (a)
 - (b)
 - (c)
- (4)
- (5)
 - (a)
 - (b)
- (6)
- (7)
 - (a)
 - (b)

IBC Section 8 - Insolvency resolution by operational creditor.

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

- (2)
 - (a)
 - (b)
 - (i)
 - (ii)

IBC Section 9 - Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

- (2)
- (3)
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
- (4)
- (5)
 - (i)
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
 - (ii)
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
- (6)

IBC Section 10 - Initiation of corporate insolvency resolution process by corporate applicant.

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

- (2)
- (3)
 - (a)
 - (b)
- (3)
 - (a)
 - (b)
 - (c)
- (4)
 - (a)
 - (b)
- (5)

27. When we read all the above provisions under Sections 7, 8, 9 & 10 of IBC together, we observe that, the word '**default**' is common to all and the right to file an application under any of these Sections 7, 9, 8 or 10 of IBC accrues only when the default has occurred. And in addition to that an application under Section 9 can only be filed, if demand notice is delivered under Section 8 of IBC, 2016, and 10 days' time is given to the Corporate

Debtor to bring to the notice of the operational creditor the existence of dispute, if any.

28. Therefore, even if the default has occurred, an application under Section 9 of IBC can only be filed, if an opportunity is given to the Corporate Debtor to file the reply to the demand notice issued.

29. Under such circumstances, a situation may arise, when a person has delivered the demand notice prior to the issuance of notification dated 24.03.2020 but the reply to the demand notice was filed after the issuance of said notification but within ten days from the delivery of the demand notice, as it has happened, in the case in hand.

30. The question is whether by issuance of said notification dated 24.03.2020 under proviso to Section 4 of IBC, can a right, which has already accrued to a person, can be taken away by that notification, which is admittedly issued thereafter. As we have observed that every notification has prospective effect and so far as the filing of application either under Section 7 or 9 or 10 is concerned, it can only be filed, if the default in making payment has occurred, except in the matter of Section 9 of IBC, where Demand Notice is to be delivered after the default.

31. The Limitation Act is also applicable from the date when the default has occurred.

32. At this juncture, we consider the Article 137 of Limitation Act, 1963 and the same is quoted below:

“Three Years, When the right to apply accrues.”

33. As discussed in the aforementioned paragraphs, under the IBC, a right to apply accrues when default has occurred. Therefore, the application under Section 7 or 9 of IBC can be filed within three years from the date when right accrues, i.e. when the default has occurred. If the statute provides a person to file an application within a prescribed period, when the right accrues, then



by exercising delegated powers, an executive can not take away that right and it is also not the intention of the executive.

34. Ld. Counsel for petitioner in the course of his arguments contended that a right, which is vested, cannot be divested. No doubt, it is a well settled principle of law that once a right is vested, it cannot be divested.

35. For the reasons discussed above, we are of the considered view that once the default has occurred prior to the issuance of notification dated 24.03.2020 and demand notice was also sent/ delivered prior to that notification, the enhancement of the threshold limit from one lakh to one crore rupees is not applicable in such matters. Hence, circumstances no. (i) is decided in the manner stated above.

36. Now, coming to circumstances no. (ii) i.e., when the default has occurred prior to the notification and demand notice was not sent prior to that notification in that case, whether the present notification dated 24.03.2020 is applicable or not?

37. While deciding the point no. (i), as we observed, an application under Section 7, 9 or 10 IBC can only be filed, when the default has occurred. Therefore, the intention of the legislature is to give right to an aggrieved person under Section 7, 9 or 10 IBC, only when a default has occurred in making the payment of the dues.

38. Once the default has occurred prior to the issuance of the said notification dated 24.03.2020 then that right cannot be taken away by issuance of that notification.

39. Hence, we are of the considered view that even in the matter, in which the default has occurred prior to the issuance of said notification dated 24.03.2020 and no demand notice (as in the case of Section 9) was delivered prior to that notification, in that case too, the said notification is not applicable. rather, the minimum threshold in that case, as per Section 4 of IBC, 2016, is one lakh rupees and not one crore rupees.



40. The notification is applicable only in respect of the default which has occurred on or after 24.03.2020 and not prior to that.

41. Hence, circumstances no.(ii)is decided in the manner stated above.

42. Now on the basis of above discussion, we consider the case of the applicant. We notice that the demand notice was delivered prior to the issuance of the notification dated 24.03.2020. Hence, the said notification dated 24.03.2020 is not applicable in the case of the petitioner.

43. List the matter for hearing on other issues on 09.08.2021.

-Sd-

(L. N. Gupta)
Member (T)

-Sd-

(Abni Ranjan Kumar Sinha)
Member (J)