

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 09.12.2024

Delivered on 23.01.2025

CORAM

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.DHANABAL

WP.No.712/2024

and

WMP.Nos.730 & 732/2024

1.Dharamshi K.Patel

2.Kamala D.Patel

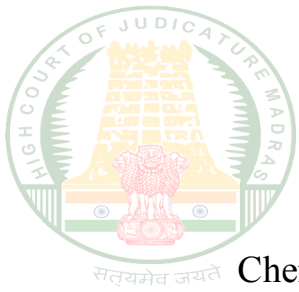
... Petitioners

Vs.

1.Indian Bank,
No.55, 2nd Floor
Zonal Office Building
Ethiraj Salai, Egmore
Chennai 600 008.

2.Shriraam Shekher
Resolution Professional
Flat 11, Prayag Apartments
1st Floor, 8/15, Gandhi Nagar
First Main Road, Adyar
Chennai 600 020.

3.National Company Law Tribunal



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Chennai Bench, II Floor, Corporate Bhawan
Beach Road, Mannadi, George Town
Chennai 600 001.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of certiorari to call for the records and quash the order dated 23.06.2023 passed in CP[IB].No.13/2023 by the NCLT, Chennai in view of the Statutory bar of the IB code.

For Petitioners	: Mr.P.H.Arvind Pandian Senior counsel for M/s.Ananda Gomathy
For R1	: Mr.P.V.Murlidhar
For R2	: Mr.B.Thilak Narayanan

ORDER

S.S.SUNDAR, J.

(1) This writ petition is filed by the Shareholders and suspended Directors of the Corporate Debtor, namely, Evershine Wood Packaging Private Limited, seeking for issuance of a writ of certiorari to quash the order passed by the National Company Law Tribunal [in short 'NCLT'], Division Bench-II, Chennai, dated 23.06.2023 in CP[IB].No.13/2023, admitting the Company Petition with directions and appointing Interim



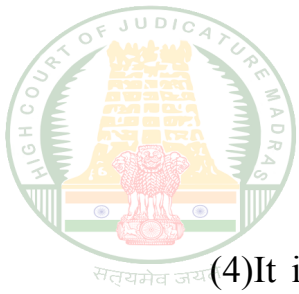
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Resolution Professional [IRP] with further direction.

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(2) Brief facts that are necessary for the disposal of this writ petition are as follows:

(3) The Company/Corporate Debtor, namely Evershine Wood Packaging Private Limited is carrying on business of timber and availed various credit facilities with M/s.Indian Bank from the year 2017. The Corporate Debtor signed the Demand Promissory Note, Letter of Continuity, Agreement of Guarantee etc. The Corporate Debtor also acknowledged the liability which is not in issue. It is admitted that the Corporate Debtor committed default in payment of loan/debt and hence, a Demand Notice was issued on 10.11.2021. The Accounts of the Corporate Debtor was declared as "Non Profitable Asset" [NPA] on 31.03.2021 with effect from 23.12.2020 as per RBI guidelines. It is also stated that the Corporate Debtor paid some amounts on irregular basis until 25.10.2021. However, the default continued thereafter. Hence, the financial creditor, namely, the Indian Bank, filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 [in short 'IBC, 2016'] for initiating Corporate Insolvency Resolution Process [in short 'CIRP'].



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(4) It is also admitted that the Corporate Creditor issued a statutory notice under Section 13[2] of SARFAESI Act. Even though the Corporate Debtor had sent a revised OTS proposal to the Bank on 04.03.2023, after rejection of the earlier OTS proposal, it is admitted that the Corporate Creditor did not accept the OTS offer. Though the account of the Corporate Debtor was declared NPA, the Corporate Debtor sought permission to operate the accounts on the premise that the Corporate Debtor being a MSME Unit, it can be permitted to operate the account. In all the OTS proposals, it appears that the Corporate Debtor has admitted the default. After referring to the statutory provisions and the admitted facts, the Tribunal admitted the Company Petition with a few directions. Aggrieved by the same, the above writ petition is filed even though a statutory appeal is also provided as against the order of the Tribunal.

(5) This Court, taking note of the alternative remedy available to the petitioners, admitted the writ petition after recording the submission of the learned Senior counsel that no application under Section 7 is maintainable before NCLT as the default is committed between 25.03.2020 and 24.03.2021. This Court also recorded the argument of the learned Senior



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counsel that relying upon the judgment of Hon'ble Supreme Court in *Ramesh Kymal Vs. SiemensGamesa Renewable Power Private Limited* reported in **2021 [3] SCC 224**.

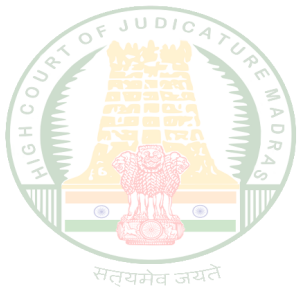
(6) This Court granted interim order and the same was extended thereafter.

The only ground on which the order of NCLT was challenged before this Court is by relying upon Section 10-A of IBC, 2016, which reads as follows:-

"10A. Suspension of initiation of corporate insolvency resolution process 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 notified² 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



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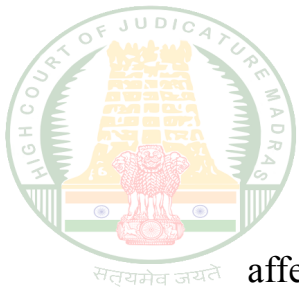


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not apply to any default committed under the said sections before 25th March, 2020."

(7)The petitioners who have filed the above writ petition, are the shareholders and suspended Directors of the Corporate Debtor. It is not in dispute that the Corporate Debtor had taken a huge loan of Rs.61 Crores from the Indian Bank / 1st respondent for the business run by the Corporate Debtor. It is the case of the petitioners that the 1st respondent refused to restructure the loan facilities as the business was running concern. Referring to the fact that the 1st respondent has taken action because the account had slipped into NPA on 23.12.2020, it is contended by the learned Senior counsel that the default occurred during Covid period arbitrarily.

(8)Though the petitioners admit that the OTS proposal submitted by the Corporate Debtor was rejected, the learned Senior counsel submitted that since the date of default is admittedly 23.12.2020, the application is not maintainable by virtue of Section 10-A of IBC, 2016. It is the case of petitioners that due to Covid 19, the entire situation turned against the Corporate Debtor. It is also stated by the petitioners that the business was



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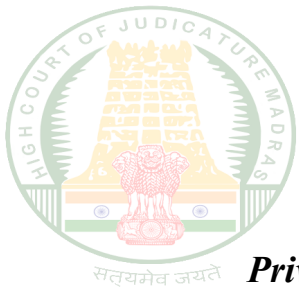
affected like any other business throughout country which had faced recession. Except referring to Section 10-A of IBC, 2016, the learned Senior counsel has not addressed any other point while challenging the jurisdiction of NCLT.

(9) Since the petitioners have raised the issue regarding jurisdiction of NCLT, this Court probably had issued notice to the respondents.

(10) After notice to the respondents, the 1st respondent/Bank has filed a detailed counter affidavit. The 2nd respondent has also filed a Report.

(11) In the report, the 2nd respondent stated that the Resolution Process is at the advanced stage. It is also stated in the report that the Resolution Professional has made an enquiry and pointed out several irregularities against the petitioner after a Forensic Audit and the report of the Auditor.

(12) In the counter affidavit of the 1st respondent, it is pointed out that the petitioners have admitted their default and the outstanding liability of the Corporate Debtor in every proposal submitted by them for OTS. The 1st respondent in the counter affidavit raised an objection as to the maintainability of the writ petition referring to the judgment of Hon'ble Supreme Court in the case of *M/s.Dhammanagi and Sanu Developers*



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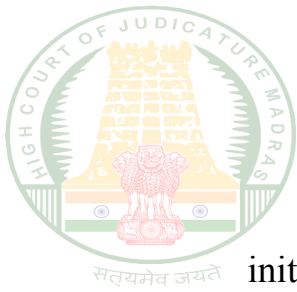
Private Limited and Another Vs. State of Karnataka and Others [2020

[1] MLJ 65]. It is further contended by the 1st respondent/Bank that the petitioners have admitted the default as per the statement of Accounts from the Bank. It is also contended by the 1st respondent that the liability as on the date of filing the petition before NCLT, i.e., 29.12.2023, is Rs.78,85,09,547.45p. and the liability has now grown to Rs.92.26 Crores as on 04.03.2024. Referring to the facts and conduct of the petitioners, it is stated in the counter affidavit that there is no *bona fide* in the writ petition and the purpose of the writ petition is to stall the proceedings before NCLT for no genuine cause.

(13) This Court has carefully considered the submissions made on either side and also perused the materials placed.

(14) The only issue that arise for consideration in this writ petition is whether the petition filed before NCLT is maintainable in view of Section 10-A of IBC, 2016. In other words, the question arise for consideration in this writ petition is whether NCLT has jurisdiction to entertain CP[IB].No.13/2023.

(15) Section 10-A of IBC, 2016 is only a moratorium temporarily suspending



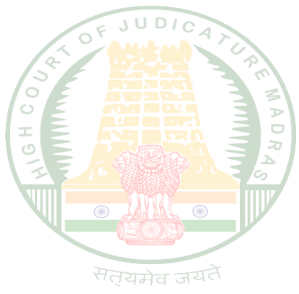
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initiation of CIRP. It is true that Section 10-A prohibits an application for initiation of CIRP of a Corporate Debtor, for any default arising on or after 25.03.2020 for a period of six months. The proviso also indicates that no application can ever be filed for initiation of CIRP of a Corporate Debtor for the said default occurring during the said period, i.e., on or after 25.03.2020 for a period of six months or such further period not extending one year from such date.

(16) In the instant case, though the default commenced after the period specified in Section 10-A, it is not in dispute that it continued even after the moratorium period. The intention of the legislature is to give relief by suspending initiation of CIRP. This Court, from the plain reading of Section 10-A is unable to agree with the learned Senior Counsel that even in a case where the default continued after the period of moratorium, no application can be filed.

(17) Learned Senior counsel relied upon the judgment of Hon'ble Supreme Court in *Ramesh Kymal [cited supra]* reported in *2021 [3] SCC 224*. Paragraphs No.27 to 32 of the said judgment are relevant and they are extracted below:-



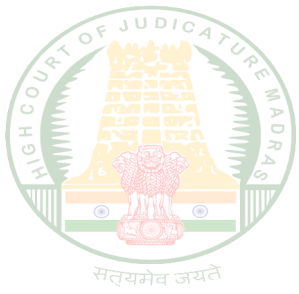
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"27. Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10-A. The onset of the COVID-19 Pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25-3-2020 as the cut-off date. The proviso to Section 10-A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25-3-2020 for a period of six months, extendable up to one year as notified. The Explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25-3-2020.

28. The substantive part of Section 10-A is to be construed harmoniously with the first proviso and the Explanation. Reading the provisions together, it is



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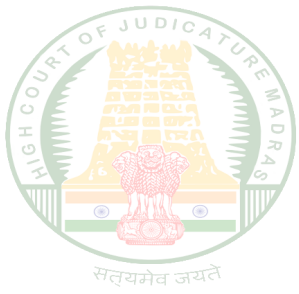


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evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25-3-2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10-A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25-3-2020 outside the pale of protection because the application was filed before 5-6-2020.

29. We have already clarified that the correct interpretation of Section 10-A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.

30. Section 10-A does not contain any requirement that the adjudicating authority must launch



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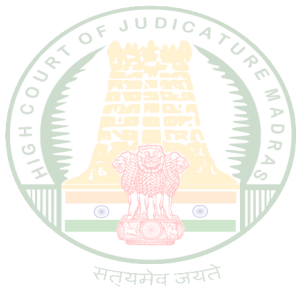


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into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the COVID-19 Pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. This would go against the very object of the IBC, as has been noted by a two-Judge Bench of this Court in its judgment in Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] .

31. Speaking through Rohinton F. Nariman, J. the Court in Swiss Ribbons (P) Ltd. [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] held as follows : (SCC p. 55, para 27)

“27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of

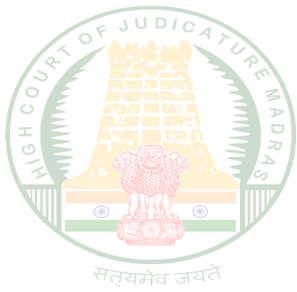


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the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.
(See *ArcelorMittal [ArcelorMittal (India) (P)*



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Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] at SCC p. 89, para 86, footnote 46.)”

32. Hence, the embargo contained in Section 10-A must receive a purposive construction which will advance the object which was sought to be achieved by enacting the provision. We are therefore unable to accept the contention of the appellant. ”

(18) From the reading of the initial paragraphs of the said judgment, it is seen that the default by the Corporate Debtor in that case was on 30.04.2020. The application under Section 9 of IBC, 2016 was filed on 11.05.2020 on the ground that there was a default in payment of the operational dues. It was only in the said context, the application filed by the Corporate Debtor seeking dismissal of the application by virtue of Section 10-A of IBC, 2016 was allowed and the said order was confirmed by Hon'ble Supreme Court. Therefore, the judgment of Hon'ble Supreme Court which is appropriate in the facts of the case, cannot be relied upon to any other case where the default continued even after the moratorium period and the petition by the Corporate Creditor was filed long after the moratorium period.

(19) Learned Senior counsel then relied upon the order of NCLT at Chennai



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in a Company Petition arising out of the order passed by the Adjudicating Authority namely, NCLT, Hyderabad dated 08.08.2023 in CA.[AT][CH][Ins].No.124/2022 ***[Carissa Investments LLC, Mauritius Vs. Indu Techzone Pvt Ltd and Others]***. The NCLT, in the said order, relying upon the judgment of Hon'ble Supreme Court in ***Ramesh Kymal case [cited supra]***, has held as follows:-

"15.The Hon'ble Apex Court concluded that the embargo in Section 10-A must receive a purposive construction which will advance the contention of the learned Senior counsel for respondent No.2 that though the date of default is on 31.03.2020, Section 10-A will not be applicable is unsustainable in the light of the observations made by the Hon'ble Apex Court in the aforenoted judgment."

(20)The Tribunal, in the said case, also considered the case where the alleged default had occurred on 31.03.2020 and hence, initiation of CIRP on the basis of default is held to be in direct contravention of Section 10-A.

(21)The learned Senior counsel then relied upon another order dated 09.09.2024 passed by NCLT, Principal Bench, New Delhi in similar

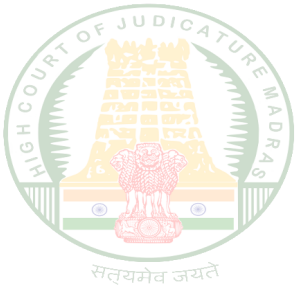


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matter **[Company Appeal [AT] [Insolvency] No.1725/2024]**, wherein it has been held as follows:-

"The mere fact that the observation of the Hon'ble Supreme Court that debt owed by the Corporate Debtor is not extinguished is the law declared by the Hon'ble Supreme Court, but their being clear prohibition for filing an application under Sections 7, 9 and 10 for default occurring in 10A period there is apparent case. The language of the statute provides no application for initiation of Corporate Insolvency Resolution Process of a Corporate Debtor shall be filed for any default arising on or after 25.03.2020. The provision cannot be read to mean that after the period is over the application can be filed. If such interpretation is accepted, the whole purpose and object shall be defeated. The purpose and object of introduction of Section 10A was to give relief to Corporate Debtor who committed default during the period which is covered by Section 10A. The debt is not wiped out is only for the purpose that other proceedings are not prohibited but Sections 7, 9 and 10 applications are clearly barred. No application can be filed, even after the expiry of the period under Section 10A for the



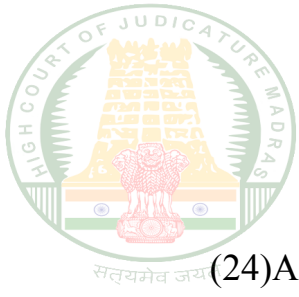
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default which occurred during the 10A period."

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(22) Since proviso to Section 10-A mandate that no application shall ever be filed for initiation of CIRP of the Corporate Debtor for the default occurring during the moratorium period, the above judgment relied upon by the learned Senior counsel is in tune with the statutory provision. However, the proviso cannot be extended to cases where the default is continued beyond the moratorium period. Therefore, there is no jurisdictional error to entertain a writ by-passing an effective alternative remedy.

(23) Both sides relied upon a few judgments on the maintainability of the writ petition under Article 226 of the Constitution of India in view of the alternative remedy available. This Court in exceptional cases can entertain a writ petition under Article 226, as there are several exceptions carved out by this Court and Hon'ble Supreme Court to entertain a writ petition under Article 226 despite there is an alternative remedy. However, we find no extraordinary situation or circumstance warranting this Court to entertain a writ petition when there is an effective alternative remedy. Therefore, this Court finds no merit in this writ petition.



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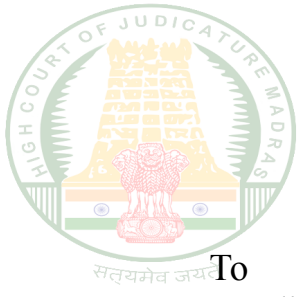
(24) Accordingly, this writ petition stands **dismissed**. No costs.

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Consequently, connected miscellaneous petitions are closed.

[S.S.S.R., J.] [P.D.B., J.]
23.01.2025

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Index: Yes
Internet : Yes
Neutral Citation: Yes



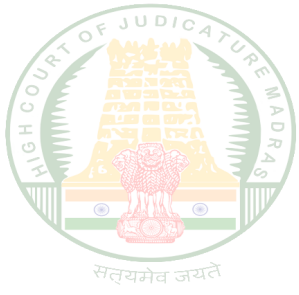
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S.S. SUNDAR, J.,
and
P.DHANABAL, J.,

AP

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