

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1067 of 2022

IN THE MATTER OF:

1. M/s. Netfinity Solutions,

A Partnership Firm through,
Mr. Ramakrishna Kadiyala, Partner,
No. 16 and 17, 2nd Floor,
Lumbini Jewel Mahal, Road No. 2,
Banjara Hills, Hyderabad – 500034
E-mail: rk@netfinity.co.in

...Appellant

Versus

1. M/s. Karvy DigiKonnnect Limited,

(Previously known as M/s. Karvy Digicall
Teleservices Pvt. Ltd.)
Having registered office at:
Flat Nos. 502 & 503,
5th Floor, Arunachal Building,
19, Barakhamba Road, New Delhi – 110001
compsec@karvy.com

Also At:

Karvy Gateway, Plot No. 38, 39
4th Floor Financial District, Nanakramguda
Hyderabad - 500032

...Respondent

For Appellant: Mr. Ravi Raghunath, Advocate

For Respondent:

J U D G E M E N T

ASHOK BHUSHAN, J:

1. This Appeal by an Operational Creditor has been filed against the Order dated 07th July, 2022 passed by the National Company Law Tribunal, New Delhi, Court-V (hereinafter referred to as “The Adjudicating Authority”) by which Order, I.A. No. 3100/2022 filed by the Appellant has been rejected.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:-

- The Appellant is a partnership firm. The Corporate Debtor (Respondent No. 1) issued orders on the Operational Creditor for supply of equipment to the various offices of the Corporate Debtor. The Appellant issued invoices for payment.
- Operational Creditor issued demand notice on 23rd June, 2021 under Section 8 of the Code calling for Corporate Debtor to pay an amount of Rs. 46,64,249/- with interest. An Application under Section 9 was filed by the Operational Creditor (Appellant) on 08.09.2021 being I.B.-527/ND/2021. Notices were issued in the Company Petition. Corporate Debtor and Operational Creditor entered into Settlement Agreement dated 04.01.2022. On the basis of Settlement between the parties, the Adjudicating Authority permitted the Operational Creditor (Appellant) to withdraw the Company Petition. The Company Petition was dismissed as withdrawn by Order dated 06.01.2022.
- The Corporate Debtor having not made payment as per the Settlement Agreement, the Appellant filed an I.A. No. 3100/2022 praying for revival of the IB-527/ND/2021, which Application came for hearing before the Adjudicating Authority, the Adjudicating Authority took the view that there is no any provision to revive the Application. The Tribunal observed that Petitioner (Appellant) can avail such remedy as available under law.

- The Appellant placed reliance on Judgment of this Tribunal to contend that Application can be revived. After noticing the Judgement relied on by the Appellant, the Adjudicating Authority took the view that claim amount under Section 9 being only Rs. 46,64,249/-, the Tribunal is unable to entertain the Application hence the Application of revival was dismissed without cost. Aggrieved by the said Order, the Appellant has come up in this Appeal.

3. Mr. Ravi Raghunath, Learned Counsel for the Appellant challenging the Order submits that the Adjudicating Authority erroneously held that there is no power for revival of the Insolvency Application under the Code. It is submitted that the Adjudicating Authority has failed to consider the decision in **“Shree Bhadra Parks and Resorts Ltd. vs. Sri Ramani Resorts and Hotels Pvt. Ltd.”**, (Company Appeal (AT) (CH) Ins. No. 06 of 2021). It is further submitted that the Adjudicating Authority considered the issue of pecuniary jurisdiction without first reviving the Insolvency Application and listing the main Insolvency Application for hearing. Learned Counsel further submits that in the present case right to apply for initiating ‘Corporate Insolvency Resolution Process’ (CIRP in short) under the Code arose to the Appellant prior to notification dated 24th March, 2020 and Demand Notice was issued to the Corporate Debtor prior to notification dated 24th March 2020. It is further submitted that the notification dated 24th March, 2020 has to be read with ordinance inserting Section 10-A of the Code. The Appellant cannot be deprived with his vested right of filing an application under Section 9 for a debt for which default occurred prior to notification

dated 24th March, 2020. It is submitted that in the present case, first Demand Notice dated 05th February, 2020 was issued on 06.02.2020.

4. We have considered the submissions of Learned Counsel for the Appellant and have perused the record.

5. In so far as the submissions of Learned Counsel for the Appellant that Adjudicating Authority erred in observing that there is no enabling provision in the Code to revive the Application, Learned Counsel for the Appellant has relied on a Judgment of **“Shree Bhadra Parks and Resorts Ltd.”** (supra). This Tribunal had held that the Adjudicating Authority has jurisdiction under Rule 11 of NCLT, Rules to revive the Application. In the above case, the Adjudicating Authority had passed an Order dated 28th January, 2021 restoring the Company Petition. An Appeal was filed by the Corporate Debtor in the above case challenging the Order contending that the Adjudicating Authority has no power to revive the Company Petition, dismissing the Appeal, this Tribunal in paragraph 56 held as under:

“56. It is to be mentioned that an ‘inherent power’ of the ‘Tribunal’ has its gross root in necessity and the said power can be exercised by a ‘Tribunal’ based on the rudimentary principle that an ‘act of Court shall prejudice no person’. Further, to meet the ends of justice an ‘inherent power’ of a ‘Tribunal’ being ‘Co-extensive with need’ can be exercised to render justice to the litigants. Also that, I A No. 02/KOB/2021 filed by the Respondent/Financial Creditor/Applicant to restore and Revive the Application IBA/13/KOB/2020 (filed under Section 7

of the Code) is not to be termed as one of 'Review Application' or to be confused with, in the considered opinion of this 'Tribunal'. Undoubtedly, the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) had rightly allowed IA No.02/KOB/2021 in IBA/13/KOB/2021 on 28.01.2021 (filed under Rule 11 of National Company Law Tribunal Rules, 2016 by the 'Respondent'/ 'Financial Creditor') of course, based on proper material before it and the same requires no interference in the hands of this 'Appellate Tribunal' sitting in 'Appeal'. Looking at from any angle, the 'Appeal' sans merits."

6. Another Judgement of this Tribunal relied on by Learned Counsel for the Appellant in Company Appeal (AT) Ins. No. 103 of 2022 in **"Pooja Finlease Ltd. Vs. Auto Needs (India) Pvt. Ltd. & Anr."** where this Tribunal has set aside the Order of the Adjudicating Authority refusing to revive the Company Petition.

7. We thus are of the view that Adjudicating Authority did not lack jurisdiction to revive the Company Petition and the observations of the Adjudicating Authority in the Impugned Order in so far as it held that there is no enabling provision in the Code to revive the Application is erroneous.

8. Now we come to the second aspect of the matter due to which the Adjudicating Authority has held that Application filed under Section 9 being for a claim amount of Rs. 46,64,249/-, the Tribunal is unable to entertain the Application.

9. From the facts as have been noticed above, it is clear that Application under Section 9 was filed by the Appellant before the Adjudicating Authority on 08.09.2021. The Appellant's case in the Appeal is that the Appellant had issued a demand notice on 05.02.2020 demanding an amount of Rs. 31,14,620/- which was before the notification dated 24th March, 2020. Mr. Ravi Raghunath, Learned Counsel for the Appellant contends that Appellant has vested right to file an Application even after Notification dated 24th March, 2020 in a case where default occurred prior to Notification dated 24th March, 2020. The question as to whether Application filed by the Appellant under Section 9 was entertainable by the Adjudicating Authority is the relevant question which need to be considered, which has arisen in the present Appeal.

10. In view of the fact that one of the reasons given by the Adjudicating Authority for refusing the revival of the Application is that Application under Section 9 is not entertainable since the claimed amount being only Rs. 46,64,249/-, we thus need to consider the submission of Learned Counsel for the Appellant in the above respect and the question of remitting the matter back for fresh consideration shall arise only when we find that Application under Section 9 filed by the Appellant was maintainable under Section 9.

11. Section 4 of the Code provides as follows:-

“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 notification¹, 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 pre-packaged insolvency resolution process of corporate debtors under Chapter III-A.]”

12. Under Section 4 proviso, a notification was issued by Central Government dated 24th March, 2020 which is to the following effect:

“MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 24th March, 2020

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.

[F. No.30/9/2020-Insolvency]

GYANESHWAR KUMAR SINGH, Jt. Secy.”

13. An amount of Rs. 1 Crore as a minimum amount of default for the purposes of Section 4 was notified with effect from 24th March, 2020. Section

6 of the Code deals with the persons who may initiate CIRP. Section 6 is as follows:

“Section 6: Persons who may initiate corporate insolvency resolution process.- *Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.”*

14. Section 9 provides for Application for initiation of CIRP by Operational Creditor. The word “initiation” is defined in Section 5(11) to the following effect:-

“5(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 or pre-packaged insolvency resolution process, as the case may be”

15. Initiation of proceeding under Section 9 by filing an Application to the Adjudicating Authority has to be made by Operational Creditor which must comply with requirement of Section 4. Part-II of the Code which deals with Insolvency Resolution and Liquidation for Corporate Persons applies only when minimum amount of default is Rs. 1 Crore (w.e.f. 24th March, 2020). Thus initiation of an Application under Section 9 has to conform to the requirement under Section 4. Section 4, as it is in operation with effect from 24th March, 2020, is not a mere procedural provision but provides a

substantive condition to be fulfilled by an Applicant to initiate CIRP. The most celebrated Judgement of the Hon'ble Supreme Court which has been referred to and relied on time and again is a Constitution Bench Judgement in the matter of **“Garikapatti Veeraya Vs. N. Subbiah Choudhury” [MANU/SC/0008/1957]**. Hon'ble Supreme Court after referring to the earlier judgement laid down five principles in paragraph 28 of the Judgement which is to the following effect:

“From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved, to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.”

16. In the above case, the Hon’ble Supreme Court was considering the question of right of Appeal which was held to be vested right which exists as from the date the lis commenced. We may also refer to the Judgement of the Hon’ble Supreme Court in (1994) 4 SCC 602 in **“Hintendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors.”** In paragraph 26, the Hon’ble Supreme Court while considering a case of amendment in a statute reiterated the principles. Following was stated in paragraph 26:

“26.From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be called out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

ii. Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

iii. *Every litigant has a vested right in substantive law but no such right exists in procedural law.*

iv. *A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*

v. *A state which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”*

17. Section 4 as amended as per notification dated 24.03.2020 affect the substantive rights hence the provision is to be treated prospective in nature and shall be applicable to the Applications filed on 24th March, 2020 and thereafter.

18. The submission which has been raised by the Learned Counsel for the Appellant is that when the default was committed by the Corporate Debtor prior to 24.03.2020 and notice under Section 8 was issued prior to 24.03.2020, the right to file an Application under Section 9 is a vested right which can be enforced by litigant even after 24.03.2020 and threshold of Rs. 1 Crore is not to be applied on such Application.

19. We do not find any support of the above submission from the statutory scheme. When it was decided to change the threshold for initiating Insolvency Resolution Process against a Corporate Debtor, no Applicant can be heard in saying that even if he does not fulfill the threshold of Rs. 1

Crore, he should be permitted to initiate the CIRP. Threshold of Rs. 1 Crore is statutorily fixed for all Application to initiate CIRP after 24th March, 2020 irrespective of any exceptions. Accepting the submission of Learned Counsel for the Appellant that an Application can be filed by Operational Creditor after 24th March, 2020 for which default was committed prior to 24.03.2020 on threshold of Rs. 1 Lakh only, shall be reading an exception which is not provided in the statute.

20. This Tribunal in large number of cases have held that even if default was committed prior to 24.03.2020 and Application is filed under Section 9 after 24th March, 2020, it has to fulfill the threshold of Rs. 1 Crore. We may refer to following judgements of this Tribunal where the above view has been taken.

A. This Tribunal has occasion to consider this question in **“Company Appeal (AT) (Ins.) No. 910 of 2022, V-Con Integrated Solutions Pvt. Ltd. vs. Argos Technology Resources Pvt. Ltd.”**. The submission was also made in the aforesaid case that default was committed prior to 24.03.2020, hence the notification dated 24.03.2020 is not applicable. Para 4 of the order notices the contentions of the Appellant in the above case and the consideration of submissions was in Para 6, 7 and 8. In Paras 6, 7, and 8 following was laid down:-

“6. Section 4 of the Code provided initially threshold of Rs. 1 Lakh which was substituted vide Notification dated 24th March, 2020 to 1 Crore. The Submissions which has been pressed by the Learned Counsel for the Appellant is that the notification being prospective

as has been held by this Tribunal in “Madhusudan Tantia” (supra) it should not apply on the default which had occurred prior to 24th March, 2020. We have perused the Judgment of this Tribunal in “Madhusudan Tantia”. In the above case, the Application under Section 9 was filed prior to 24th March, 2020 which fact is noticed in paragraph 5 of the Judgement. Emphasis has been laid by Learned Counsel of the Appellant in paragraphs 56 and 57 which are to the following effect:

“56. As far as the present case is concerned, this Tribunal, after carefully and with great circumspection, ongoing through the contents of the notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Government of India, whereby and whereunder the minimum amount of default limit was specified as Rs. one crore (obviously raising the minimum amount from Rs. one lakh to one crore) unerringly comes to a definite conclusion that the said notification is only ‘Prospective in nature’ and not a ‘retrospective’ one because of the simple reason the said notification does not in express term speaks about the applicability of ‘retrospective’ or ‘retroactive’ operation. Suffice it for this Tribunal to point out that from the tenor, spirit and the plain words employed in the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, one cannot infer an intention to take or make it retrospective as in this regard,

the relevant words are conspicuously absent and besides there being no implicit inference to be drawn for such a construction in the context in issue. That apart, if the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is made applicable to the pending applications of IBC (filed earlier to the notification in issue) it will create absurd results of wider implications / complications.

57. In view of the upshot and also this Tribunal, on a careful consideration of respective contentions advanced on either side and considering the facts and circumstances of the instant case in a conspectus fashion holds unhesitatingly that the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is prospective in nature and it is not retrospective or retroactive in nature. Further, the said notification will not apply to the pending applications filed before the concerned 'Adjudicating Authority' (Authorities), under IBC (waiting for admission), prior to the issuance of the aforesaid notification, as opined by this Tribunal. Viewed in the above prospectives, the conclusion arrived at by the 'Adjudicating Authority' in the impugned order to the effect that the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, shall be

considered as prospective and not retrospective and the finding that there was no payment on the side of 'Corporate Debtor' after receipt of Demand Notice, no pre-existing dispute also alleged or proved and ultimately admitting the application filed by the 2nd Respondent / Operational Creditor are free from legal infirmities. Resultantly, the instant Appeal fails."

7. When we read paragraphs 56 and 57, it is clear that this Tribunal categorically held that Notification dated 24th March, 2020 is only prospective and not a retrospective. This Tribunal held that the said notification will not apply to pending application of IBC. It is clear that Applications under Section 9 filed prior to 24th March, 2020 shall not be affected by the Notification dated 24th March, 2020 and notification being prospective shall apply to Applications filed thereafter. The provision is clear that the amendment shall come into force after its publication in the Gazette and Application filed thereafter has to fulfil the threshold as provided in Section 4 i.e. threshold of Rs. 1 Crore. In the present case, the Judgment relied by Learned Counsel for the Appellant does not contain any ratio that in event the default has been committed prior to 24th March, 2020 and Application is filed thereafter the same shall be governed by the unamended provision of Section 4 of the Code.

8. The Application in the Appellant's case filed on 27th March, 2021 was rightly hit by threshold of Rs. 1 Crore as implemented with effect from 24th March,

2020. There is no error in the Order of the Adjudicating Authority, the Appeal is dismissed.”

B. We may also refer to a judgment of this Tribunal in “**Company Appeal (AT) (CH) (INS) No. 55 of 2021, B. Sreekala vs. Al Sadiq Sweets and Ors.**” decided on 13.12.2021. In the above case, the cause of action arose on 03.01.2020 and application under Section 9 was filed on 16.09.2020 which was admitted by the Adjudicating Authority by order dated 26.02.2021. Appeal was filed by the Suspended Director of the Corporate Debtor contending that the application having not fulfilled the threshold of Rs.1 Crore was liable to be rejected. This Tribunal has taken a view that even if the default is of a date prior to 24.03.2020, after 24.03.2020 applicant has to be comply with threshold of Rs.1 Crore. Following conclusion was recorded in Para 80 of the judgment. This Tribunal, however, although allowed the Appeal by setting aside the order dated 26.02.2021 but held the application to be hit by Section 10A.

“80. It is to be pointed out that a change in Law is a procedural one. A party is to avail the change in I & B Code, 2016, notwithstanding the fact his/its actionable right of ‘cause of action’ had arisen earlier to an amendment that has been brought about, increasing the threshold limit to Rs. 1 Crore [vide Notification dated 24.03.2000 issued by the ‘Ministry of Corporate Affairs’ in S.O. 1205(E)] for considering the Application filed under Section 7 or 9 of I&B Code on after 24.03.2020, even if the ‘Debt’ is of a date prior to 24.03.2020. In law, a Party has no vested

right in respect of a 'Fora', albeit he has a 'Actionable Right'. After all, the impediment in Section 10(A) of the I & B Code is to be viewed from the point of view of the purpose and object sought to be achieved in enacting the same by the Parliament in its wisdom."

It is to be noticed that against the above judgment of this Tribunal dated 13.12.2021, Civil Appeal No. 1914 of 2022 was filed by the Corporate Debtor 'Al Sadiq Sweets' which also was dismissed by the Hon'ble Supreme Court on 25.03.2022 by the following order:-

O R D E R

We have heard the learned senior counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgment impugned does not warrant any interference. The appeal is accordingly dismissed."

C. Another judgment of this Tribunal in Company Appeal (AT) Ins. No. 1036 of 2022 in the matter of **"Hyline Mediconz Pvt. Ltd. Vs. Anandalok Medical Centre Pvt. Ltd."** decided on 20.09.2022, where this Tribunal after referring to Judgment of the Hon'ble Supreme Court in the matter of **"Manish Kumar Vs. UoI"** [(2021) 5 SCC 1] laid down following:

"25. The law laid down by the Hon'ble Supreme Court in the above case lend support to our conclusion that threshold of Rupees One Crore has to be fulfilled by an applicant under Section 9 on the date of filing of the application. The fact that default was committed prior to 24.03.2020 and notice under

Section 8 was issued and served prior to 24.03.2020 are not determinative or material although they are condition precedent for initiating an application under Section 9. We have noticed the provision of Section 6 which provides that where any Corporate Debtor commits a default, a Financial Creditor, an Operational Creditor or the Corporate Debtor itself may initiate Corporate Insolvency Resolution Process in respect of such Corporate Debtor in the manner as provided under this Chapter. Thus, a default is a condition precedent. Part II of the Code becomes applicable only when default is Rupees One Crore or more w.e.f. 24.03.2020 and an Operational Creditor can initiate Corporate Insolvency Resolution Process against the Corporate Debtor after 24.03.2020 when default is more than Rupees One Crore. No application can be initiated after 24.03.2020 irrespective of the date of default if the threshold of Rupees One Crore is not fulfilled.”

21. Learned Counsel for the Appellant has placed reliance on the Judgement of the Hon’ble Supreme Court in **“Manish Kumar Vs. UoI”** [(2021) 5 SCC 1]. Hon’ble Supreme Court in the above case was considering the second proviso to Section 7 which was under challenge in the writ petitions filed before the Hon’ble Supreme Court. Hon’ble Supreme Court in the “Manish Kumar” (supra) laid down following in paragraph 332.4, 380, 384 and 402:

“332.4 Our attention is drawn to the judgment of this Court in 345 Hitendra Vishnu Thakur and others v. State of Maharashtra and others⁷¹, wherein this

Court laid down that Statute, which affects substantive right, is presumed to be prospective, unless made retrospective expressly or by necessary intendment. Every litigant has a vested right in substantive matters but no such right exists in procedural law. The law relating to right of action and right of appeal, even though remedial, is substantive in nature. A procedural Statute should not, generally speaking, be applied retrospectively, where the result would be to create new disabilities or obligations or to impose new duties in respect of accomplished transactions.

.....

380. A right of appeal is a vested right, as noticed. However, it becomes vested not because the right is created under the Statute alone. It becomes vested, as noticed by this Court in Garikapati Veeraya (supra), from the date of institution of the suit. What about a right to sue? In the case of a right to file a civil suit, equally there is a vested right to file a suit but the question would be as to when does it arise. From the line of argument pursued on behalf of the Union that in the case of the right to take advantage of an existing Statute, there is no accrued right, which means also that there is no vested right, should we proceed on the basis that the concept of a vested right qua a civil suit, can be recognized only after the civil suit is filed, at a time when there is no law, ousting or barring a civil suit and a law is passed, during the pendency of a civil suit, which again does not expressly bar the suits, which had already been filed? Since we are in the regions of vested rights,

and every right must have a title to the right, and since every civil suit is based on a cause of action, could it not be said that the right to sue becomes vested from the point of time when the cause of action arises? Since, for every civil suit, there is a period of limitation prescribed, could it not be said that since a period of limitation has been prescribed for instituting a suit, the right to sue becomes vested from the first day when the period of limitation starts to run?

.....

384. *We may, in this context also, notice that one of the five characteristics for a legal right to exist, is that every legal right has a title. It is further stated, in Salmond on Jurisprudence that every legal right has a title, which are apparently the facts or events by reason of which the right has become vested in its owner. Now, it must be noticed also, at this stage that the Limitation Act, in fact, contemplates the time, within which the suit must be brought, beginning necessarily on the supposition, that at least, on the very first day of the period of time, from which a plaintiff can sue, the right is already vested in him. This would reinforce us in our view that a vested right to sue could be said to accrue, and it would always precede the institution of the suit. At any rate, it could be said to exist from the very first day, on which the time begins to run, under the Limitation Act. Thus, a vested right to sue could be tested with reference not to the date on which the suit is filed as would be the case where a question arises, whether a right of appeal exists.*

.....

402. A vested right is not limited to property rights. A right of action should conditions otherwise exist, can also be a vested right. Such a right can be created by a Statute and even on a repeal of such a Statute, should conditions otherwise exist, giving a right under the repealed Statute, the right would remain an accrued right [See Isha Valimohamed].

(Emphasis Supplied)

22. The above Judgement of the Hon'ble Supreme Court laid down that right of action, should conditions otherwise exist, can also be vested right. Thus right of action by Operational Creditor can also be treated as vested right as per law laid down by the Apex Court subject to "conditions otherwise exist". Thus vested right which can be enforced by the Operational Creditor under Section 9 is subject to existence of conditions otherwise. Fulfillment of condition of threshold of Rs. 1 Crore with effect from 24.03.2020 is a condition precedent which need to be fulfilled before proceedings under Section 9 can be initiated by an Operational Creditor. Existence of default is undoubtedly a condition to be fulfilled for initiating Section 9 Application but the default alone is not the condition which entitles the Operational Creditor to initiate Section 9 proceeding after 24.03.2020 on default of Rs. 1 Lac. The Application is further conditioned with compliance of threshold of Rs. 1 Crore as laid down in Section 4. Admittedly Application under Section 9 was filed in the present case on 08.09.2021 hence the Application under Section 9 had to fulfill the threshold of Rs. 1 Crore. The Adjudicating Authority thus rightly took the view that Application filed by the Appellant on 08.09.2021 under Section 9 for claim of an amount which is less than Rs. 1 Crore

cannot be entertained. When the Application is clearly non-entertainable, no purpose will be served by reviving the Application of the Operational Creditor and asking the Adjudicating Authority to again decide the entertainability of the Application.

23. One of the submissions of Learned Counsel for the Appellant is that Notification dated 20.03.2020 be construed in accordance with Section 10-A. Section 10-A is as follows:

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

24. The statement of objects and reasons of the bill introducing Section 10 reads as under:

“.....

2. *In the light of the extraordinary economic situation caused by COVID-19 pandemic, a need was felt to temporarily suspend initiation of corporate insolvency resolution process under the Code, initially for a period of six months or such further period, not exceeding one year from 25th March, 2020, to provide relief to companies affected by COVID-19 to recover from the financial stress without facing immediate threat of being pushed to insolvency proceedings. The benefit of the above said suspension will be available to all those defaults of the corporate debtor that occur from 25th March, 2020 and till the end of the period of suspension.*

3. *In the aforesaid circumstances, it has become necessary to amend certain provisions of the Code. However, as the Parliament was not in session and immediate action was required to be taken, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 was promulgated by the President on the 5th day of June, 2020.*

4. *The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020 which seeks to replace aforesaid Ordinance, inter alia, provide for the following, namely:—*

(a) to insert a new section 10A in the Code to provide for temporary suspension of sections 7, 9 and 10 in respect of 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; and

.....”

25. The period of default after 25.03.2020 as provided in Section 10-A was entirely for different purpose. The purpose was to protect the corporate debtor from insolvency initiation for default committed on or after 25.03.2020 when whole country was suffering from Covid-19 and all corporate debtors were unable to function effectively, hence default in the said period legislatively was treated to be not giving rise to initiate insolvency. The threshold in Section 4 is entirely different from the protection given under Section 10 A hence Section 10-A has no relevance with regard to interpreting requirement of Section 4.

26. In view of the fore-going discussion, we are of the view that Application filed by the Appellant under Section 9 on 08.09.2021 for an amount of Rs. 46,64,249/- was not entertainable due to not fulfilling the threshold of Rs. 1 Crore as statutorily required under Section 4 of the Code with effect from 24.03.2020. We thus uphold the Order of the Adjudicating Authority, for the reasons as noted above. There is no merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Mr. Barun Mitra]
Member (Technical)**

NEW DELHI

27th September, 2022

Basant