National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 909 of 2020
&
I.A. Nos. 2947, 2948 of 2020

(Arising out of Order dated 15th July, 2020 passed by National Company Law Tribunal, Ahmedabad Bench, in I.A. No. 715 of 2019 in C.P. (IB) No.-320 of 2018).

IN THE MATTER OF:

1. Anilkumar Dudalal Kaneriya
(Anil Kaneria),
Son of Shri. Dudalal Bhagwanji Kaneria,
Directors of Suspended Board of Directors,
Kaneri Granito Limited,
803, Sagar Palace, Adajan Road, Makanji Pak,
Adajan, Surat – 395009. **...Appellant No. 1**

2. Jayantilal Vashrambhai Modia
(Jenti Modia),
Son of Shri Vasram Bhai Harjivanbhai Modia
Director of Suspended Board of Directors
Kaneria Granito Limited,
Modia Street, Bhayavadar,
Taluka: Upleta, District: Rajkot
Gujarat – 360450. **...Appellant No. 2**

3. Manoj Kumar Dudhabhai Kaneria
(Manoj Kumar Kaneria),
Son of Shri Dudalal Bhagwanji Kaneria,
Director of Suspended Board of Directors,
Kaneria Granito Limited,
A/43, Akruti Bunglows, B/h, Rajhans Cinema,
Vesu, Surat, Gujarat – 395007. **...Appellant No. 3**

Versus

CA Vineeta Maheshwari,
Resolution Professional,
Kaneria Granito Limited,
M-19-21, Metro Tower,
Nr. Kinnari Cinema, Ring Road,
Surat – 395002. **...Respondent**

Appellants: **Mr. Sougat Sinha & Ms. R. Gayathri Manasa, Advocates.**

Respondent: **Mr. Ravi Raghunath, Ms. Akashi Lodha, Ms. Vineet Maheshwari, for RP/Liquidator.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this *Company Appeal Insolvency No. 909 of 2020* is to the Impugned Order dated 17.08.2020 in I.A.715 of 2019 in C.P. (IB) No.- 320 of 2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench). By the Impugned Order, the Learned Adjudicating Authority has allowed I.A. 715 of 2019 seeking Liquidation under Section 34(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'Code'**).

2. The Hon'ble Supreme Court in ***Civil Appeal Nos. 6533 of 2021*** between ***'Bank of India' Vs. 'Anil Kaneria & Ors.'*** has noted that the matter be taken up for hearing on the date fixed, but as the Appellant Counsel has sought for adjournments to place some Judgements in support of his case, and the matter was taken up finally on 13.01.2022 and heard at length.

3. **Submissions of the Learned Counsel appearing on behalf of the Appellant:**

- It is submitted that the Insolvency Application under Section 7 of the Code was filed on 03.07.2018, which is more than three years after the 'Corporate Debtor' was declared as NPA on 30.03.2015 and hence is 'barred by Limitation'. The Learned Counsel relied on the Judgements of the Hon'ble Supreme Court in ***'Babulal Vardharji***

Gurjar' Vs. 'Veer Gurjar Aluminium Industries Private Limited & Anr.' (2020) 15 SCC 1, 'Laxmi Pat Surana' Vs. 'Union Bank of India and Anr.' (2021) 8 SCC 481, and in ***'B.K. Educational Services (P) Ltd.' Vs. 'Parag Gupta & Associates', (2019) 11 SCC 633.***

- As the 'Corporate Debtor' falls into the new classification criteria of MSME, the benefit of exemption under Section 240A of the Code should have been availed by the Resolution Professional ('RP') for the benefit of the 'Corporate Debtor'; more so because the Notification dated 26.06.2020 was *prior* to the date of the Impugned Order (17.08.2020).
- The decision of CoC for Liquidation not being justiciable, is not an issue in the present case, but rather the eligibility in view of the MSME Notification is the primary issue.
- The matter of Resolution of an MSME must be weighed in light of the recent Amendments vide Notification dated 26.06.2020. Before the passing of the Impugned Order, the MSME Act, 2006, was amended with effect from 01.07.2021 wherein a new threshold for classification of MSME entities was prescribed. As a result of the said Amendment, the 'Corporate Debtor' fell within the definition of MSME now the maximum limit for plant and machinery investment is increased to Rs.50 Crs. for a medium enterprise.
- While the entire effort of the Government is towards the revival of the economy, Liquidation of MSME should be the last resort and every opportunity must be availed to revive the MSME 'as a going concern'.

- It is strenuously argued that the RP ought to have been directed to obtain the registration at the earliest and that there is no law that prohibits the RP to have the 'Corporate Debtor' registered under the MSME Act, 2006.
- Learned Counsel submitted that until the Resolution Plan is approved there is no bar in availing exemption under Section 240A, as was held by NCLT, Kochi in ***'Joseph and Joseph & Ors.' Vs. 'Churakulam Tea Estate Private Limited' dated 30.06.2021.*** In the present case, no Resolution Plan was filed since there was no Resolution Applicant, therefore, the Appellant ought to have been permitted to bid for the 'Corporate Debtor' 'as a going concern' even after the Liquidation has commenced allowing the benefit of exemption under Section 240A.
- Learned Counsel placed reliance on the following Judgements in support of his case:
    - *'Sanjay Bagrodia' Vs. 'Sathyam Green Power Plant Ltd.', Company Appeal (AT) (Insolvency) No. 193 of 2017.*
    - *'B.K. Educational Services (P) Ltd.' Vs. 'Parag Gupta & Associates', (2019) 11 SCC 633.*
    - *'Gaurav Hargovindbhai Dave' Vs. 'Asset Reconstruction Company (India) Limited', (2019) 10 SCC 572.*
    - *'Babulal Vardharji Gurjar' Vs. 'Veer Gurjar Aluminium Industries Private Limited & Anr.' (2020) 15 SCC 1.*
    - *'Laxmi Pat Surana' Vs. 'Union Bank of India and Anr.' (2021) 8 SCC 481.*

- *'Committee of Creditors of Essar Steel through Authorized Signatory' Vs. 'Satish Gupta & Ors.', (2020) 8 SCC 531.*
- *'Joseph Joseph & Ors.' Vs. 'Churakulam Tea Estate Pvt. Ltd.' NCLT Kochi, IA/(IBC)/74/KOB/2021 in IBA/21/KOB/2019.*
- *'Enviiro Bulkk Handling Systems Pvt. Ltd.', I.A. No. 741 of 2021 in C.P. (IB) No. 1319/MB/2017.*

4. **Submissions of the Learned Counsel appearing on behalf of the Respondent:**

- Learned Counsel submitted that CIRP against the 'Corporate Debtor' commenced on 26.04.2019 and as no Resolution Plan was received even after issuance of three publications for 'Expression of Interest' on 16.07.2019, 31.07.2019 and on 23.08.2019 respectively, the members of the CoC resolved to go for Liquidation by Resolution dated 09.10.2019. I.A. 715 of 2019 was filed seeking a direction from the Adjudicating Authority for liquidating the 'Corporate Debtor' and the same was allowed.
- It is submitted that the Appellant/'Corporate Debtor' was present in the sixth CoC Meeting held on 04.10.2019 and also in the eighth CoC Meeting held on 20.04.2020 which discussed the status of the Liquidation Application. The Liquidator kept the Appellant informed about filing of the Liquidation Application in the seventh CoC Meeting vide email dated 02.12.2019 and 11.12.2019.
- The decision of the CoC for Liquidation of the 'Corporate Debtor' is non-justiciable unless there is a material irregularities or fraud committed, which in an instant case is not established. The Learned

Counsel for the Respondent in support of his case relied on ***'K. Sashidhar' Vs. 'Indian Overseas Bank & Ors.', 2019 12 SCC 150*** and ***'Jaypee Kingston Boulevard Apartments Welfare Association & Ors.' Vs. 'NBCC (India) Ltd. & Ors.', (2021) SCC OnLine SC 253.***

- It is strenuously argued by Learned Counsel that the MSME Notification dated 01.06.2020 and 26.06.2020 clearly state that they shall come into effect from 01.07.2020 and therefore are prospective in nature. Further as the 'Corporate Debtor' was not an MSME as on the date of filing of the Insolvency Application or as on the date of commencement of CIRP, the Appellants cannot claim the benefit of Section 240A of the Code.
- This Tribunal in ***'Amit Gupta, Promoter/Shareholder M/s. Varanasi Auto Sales Pvt. Ltd.' Vs. 'Yogesh Gupta, Resolution Professional of M/s. Varanasi Auto Sales Pvt. Ltd.', Company Appeal (AT) Insolvency No. 903 of 2019,*** held that a prospective Resolution Applicant claiming to be an MSME should get a memorandum certificate under the MSME Act to seek benefit under the Code. In the present case, the 'Corporate Debtor' is not registered as an MSME.
- The Notification dated 01.06.2020 and 26.06.2020 do not create any material irregularity in relation to the Liquidation Order passed on 15.07.2020. The 'Corporate Debtor' now cannot go back to the stage of submissions of Resolution Plan which is not permissible either under the Code or under the Regulations.
- The Application under Section 7 is not 'barred by Limitation' as there were numerous revival letters given by the 'Corporate Debtor'

acknowledging their liability, the last of such a revival letter is dated 28.11.2015 and therefore Section 18 of the Limitation Act, 1963, is applicable.

- The CoC, by a majority of 88.44% approved the Resolution for Liquidation of the 'Corporate Debtor' during the e-voting held on 09.10.2019. Based on this decision, the IA seeking Liquidation was filed on 17.10.2019. It is submitted by the Learned Counsel that this Appeal itself is barred by Limitation as the Appellants have falsely stated that the date of knowledge of the Impugned Order is 16.09.2020, whereas the Respondent issued a Public Announcement of the Liquidation Process on 18.07.2020 itself.

Assessment:

Issue of Limitation

5. The contention of the Learned Counsel for the Appellant that the date of NPA is 30.03.2015 and Section 7 Application was filed on 03.07.2018 and hence is 'barred by Limitation', is unsustainable as the material on record evidences the revival letters, written by the 'Corporate Debtor', the last one being 28.11.2015. It is seen that the Bank has enclosed these revival letters duly acknowledged and signed by the 'Corporate Debtor' from time to time and the Section 7 Petition filed on 06.07.2018, cannot be said to be 'barred by Limitation'. The ratio of the Hon'ble Supreme Court in ***'Dena Bank (Now Bank of Baroda)' Vs. 'C. Shivkumar Reddy & Anr.' (2021) 10 SCC 330,*** is squarely applicable to the issue of limitation raised in this case as we hold that there is a jural relationship between the Bank and the Appellant herein

and the revival letters addressed to the Bank substantiate debt as acknowledgement by the Appellant.

6. Additionally, it is seen from the record that the Order of Admission dated 26.04.2019 has not been challenged and it has attained finality.

Commercial Discussion of CoC – whether justiciable

7. Now we address ourselves to the issue, whether the decision of CoC for Liquidation in the instant case, is justified. In a catena of Judgements, the Hon'ble Supreme Court has laid down that the threshold for interference in an Order of Liquidation is very high and have observed that the business decision of the majority of the CoC members is non-justiciable. The Hon'ble Supreme Court in ***'Ghanshyam Mishra and Sons Private Limited' Vs. 'Edelweiss Asset Reconstruction Company Limited', (2021) 166 SCL 237 (SC),*** has observed as follows:

> ***"149.*** *It will be further relevant to refer to the following observations of this Court in K. Sashidhar (supra):*
>
> > *57. …Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute.* ***The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31****. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts*

owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds— be it under Section 30(2) or under Section 61(3) of the I&B Code —are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision."

[emphasis supplied]

150. *It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.*

151. *The position is clarified by the following observations in paragraph 59 of the judgment in the case of K. Sashidhar (supra), which reads thus:*

> ***"59.*** *In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors….."*

152. *This Court in Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) after reproducing certain paragraphs in K. Sashidhar (supra) observed thus:*

> *"Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned,*

the parameters of such review having been clearly laid down in K. Sashidhar"

153. *It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.*

154. *In the case of Maharashtra Seamless Limited (supra), NCLT had approved the plan of appellant therein with regard to CIRP of United Seamless Tubulaar (P) Ltd. In appeal, NCLAT directed, that the appellant therein should increase upfront payment to Rs.597.54 crore to the "financial creditors", "operational creditors" and other creditors by paying an additional amount of Rs. 120.54 crore. NCLAT further directed, that in the event the "resolution applicant" failed to undertake the payment of additional amount of Rs.120.54 crore in addition to Rs. 477 crore and deposit the said amount in escrow account within 30 days, the order of approval of the 'resolution plan' was to be treated to be set aside. While allowing the appeal and setting aside the directions of NCLAT, this Court observed thus:*

> *"**30.** The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of subsection (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531], the relevant passage (para 54) of which we have reproduced*

> *in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront."*
>
> ***155.*** *This Court observed, that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.*
>
> ***156.*** *It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code."*

8. The Hon'ble Supreme Court in ***'Jaypee Kingston Boulevard Apartments Welfare Association & Ors.' (Supra)*** has observed that 'there is an intrinsic assumption that Financial Creditors are fully informed about the viability of the 'Corporate Debtor' and feasibility of the proposed Resolution Plan. They act on the basis of thorough examination of the proposed Resolution Plan and assessment made by their team of experts. The opinion on the said matter expressed by them after due deliberations in the CoC Meeting through e-voting, as per voting shares, is a collective business decision. The Legislature, consciously, has not provided any ground to challenge the 'commercial wisdom' of the individual Financial Creditors or their collective decisions before the Adjudicating Authority that has made it non-justiciable.

9. In the instant case, the Appellants have failed to establish by means of any documentary evidence that there was any material irregularity under Section 30(2) of the Code in the Order of the Liquidation passed by the Adjudicating Authority.

Eligibility under the amended MSME Act 2006, Notified on 26.06.2020

10. It is the case of the Appellant that vide Notification dated 26.06.2020, before the passing of the Impugned Order, the MSME Act 2006, was amended with effect from 01.07.2021 wherein a new threshold for classification of MSME entities was prescribed as a result of the said Amendment, the 'Corporate Debtor' falls within the definition of MSME since the investment in plant and machinery is less than the threshold limit mentioned in the said Notification dated 26.06.2020 and therefore the Resolution Professional ought to have given an opportunity to the 'Corporate Debtor' to obtain the registration to enable the availment of the exemption provided under Section 240A of the Code.

11. The Notification issued by the Ministry of Micro, Small and Medium Enterprise dated 26.03.2020 regarding the classification of enterprises is reproduced as hereunder:

> ***1. Classification of enterprises.****-An enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely:-*
>
> > *(i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;*
> >
> > *(ii) a small enterprise, where the investment in plant and machinery or equipment does not*

exceed ten crore rupees and turnover does not exceed fifty crore rupees; and

(iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

2. Becoming a micro, small or medium enterprise.–

(1) Any person who intends to establish a micro, small or medium enterprise may file Udyam Registration online in the Udyam Registration portal, based on self-declaration with no requirement to upload documents, papers, certificates or proof.

(2) On registration, an enterprise (referred to as "Udyam" in the Udyam Registration portal) will be assigned a permanent identity number to be known as "Udyam Registration Number".

(3) An e-certificate, namely, "Udyam Registration Certificate" shall be issued on completion of the registration process."

12. It is the cardinal principle of construction that every statue is prima facie prospective, unless it is expressly or by necessary implication made to have retrospective operation. The Hon'ble Supreme Court in ***'Keshoram' Vs. 'The State of Bombay', AIR 1951 SC 128,*** has observed that a new law ought to regulate what is to follow, not the past and this presumption operates unless shown to the contrary by express provision in the statute or is otherwise discernible by necessary implication. The legal magazine *'nova constitutio futuris fornam imponery debet, right known praetpritis'* specifies this fundamental rule of construction.

13. It is an admitted fact that the registration itself of the Appellant Company under MSME has not taken place. Further, it is subsequent to the

initiation of the CIRP and therefore the Appellant is ineligible to take the benefits of Section 240A under the Code. The eligibility to be a Resolution Applicant is tested on the date of submission of the Plan. In the instant case, that stage of submission of Resolution Plan was completed and subsequently the CoC has decided by a vote of majority of 88.44% to liquidate the Company. It is significant to mention that the eighth CoC Meeting was held on 20.04.2020 which was attended by the Appellant wherein the status of the Liquidation Application was discussed. To reiterate, the 'Corporate Debtor' was not an MSME as on the date of filing of the Application, or as on the date of commencement of CIRP and was not even *registered as an MSME* which is stipulated under the MSME Act. In the instant case, the MSME Act, 2006, was amended with effect from 01.07.2020 whereas the CIRP Admission Order was passed on 26.04.2019.

14. The Hon'ble Supreme Court in ***'S.L. Srnivas Jute Twine Mills P. Ltd.' Vs. 'Union of India & Ors.', (2006) 2 SCC 740,*** has observed in para 14 as hereunder:

> *"14. Now it is well settled rule of interpretation hallowed by time and sanctified by judicial decisions that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general-rule as stated by HALSBURY in Vol. 36 of the LAWS OF ENGLAND (3rd Edn,) and reiterated in several decisions of this Court as well as English Courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that*

effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

15. We also find it relevant to refer to paragraphs 110.2 to 110.5 in ***'Director General of Trade & Anr.' Vs. 'Kanak Exports & Anr.' (2016) 2 SCC 226,*** in which it is observed as hereunder:

> ***State of Rajasthan & Ors. v. Basant Agrotech (India) Ltd.***
>
> *"21. There is no dispute over the fact that the legislature can make a law retrospectively or prospectively subject to justifiability and acceptability within the constitutional parameters. A subordinate legislation can be given retrospective effect if a power in this behalf is contained in the principal Act. In this regard we may refer with profit to the decision in Mahabir Vegetable Oils (P) Ltd. v. State of Haryana (2006) 3 SCC 620, wherein it has been held that:*
>
> > *"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making 10 (2006) 13 SCC 542 11 (2013) 15 SCC 1 Page 96 96 power is a species of delegated legislation. A delegate therefore can make rules only within the four corners thereof.*
> > *42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."*
>
> .....
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> ***Trimbak Damodhar Rajpurkar v. Assaram Hiraman Patil & Others (AIR pp.1760-61, para 8-11)***
>
> *"8. Besides, it is necessary to bear in mind that the right of the appellant to eject the respondents would arise only on the termination of the tenancy, and in the present case it would have been available to him on 31-3-1953 if the statutory provision had not in the*

meanwhile extended the life of the tenancy. It is true that the appellant gave notice to the respondents on 11-3-1952 as he was then no doubt entitled to do; but his right as a landlord to obtain possession did not accrue merely on the giving of the notice, it accrued in his favour on the date when the lease expired. It is only after the period specified in the notice is over and the tenancy has in fact expired that the landlord gets a right to eject the tenant and obtain possession of the land. Considered from this point of view, before the right accrued to the appellant to eject the respondents amending Act 33 of 1952 stepped in and deprived him of that right by requiring him to comply with the statutory requirement as to a valid notice which has to be given for ejecting tenants.

9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. As observed by Buckley, L.J. in West v. Gwynne retrospective operation is one matter and interference with existing rights is another.

> *".....If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."*

These observations were made in dealing with the question as to the retrospective construction of Section 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). In substance Section 3 provided that in all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall

be payable for or in respect of such licence or consent. It was held that the provisions of the said section applied to all leases whether executed before or after the commencement of the Act; and, according to Buckley, L.J., this construction did not make the Act retrospective in operation; it merely affected in future existing rights under all leases whether executed before or after the date of the Act. The position in regard to the operation of Section 5(1) of the amending Act with which we are concerned appears to us to be substantially similar.

10. A similar question had been raised for the decision of this Court in ***Jivabhai Purshottam v. Chhagan Karson*** *in regard to the retrospective operation of Section 34(2)(a) of the said amending Act 33 of 1952 and this Court has approved of the decision of the Full Bench of the Bombay High Court on that point in* ***Durlabbhai Fakirbhai v. Jhaverbhai Bhikabhai.*** *It was held in Durlabbhai case that the relevant provision of the amending Act would apply to all proceedings where the period of notice had expired after the amending Act had come into force and that the effect of the amending Act was no more than this that it imposed a new and additional limitation on the right of the landlord to obtain possession from his tenant. It was observed in that judgment that (Juvabhai Purshottam Cases, AIR p. 1493, para 4)*

> *"4…….a notice under Section 34(1) is merely a declaration to the tenant of the intention of the landlord to terminate the tenancy; but it is always open to the landlord not to carry out his intention. Therefore, for the application of the restriction under sub-section 2(a) on the right of the landlord to terminate the tenancy, the crucial date is not the date of notice but the date on which the right to terminate matures; that is the date on which the tenancy stands terminated".*

16. From the aforenoted catena of decisions ***'Director General of Trade & Anr.' (Supra)*** in which the Hon'ble Apex Court has referred to the decisions of ***'Keshavlal Jethalal Shah' Vs. 'Mohanlal Bhagwandas & Anr.', 'CIT' Vs. 'Vatika Township Private Limited' and 'Triambak***

Damodhar Rajpurkar' Vs. 'Assaram Hiraman Patil & Ors.', we are of the considered view that unless a contrary intention is expressly implied, a legislation is presumed not to be intended to have a retrospective operation.

17. After going through the contents of the Notification, dated 26.06.2020, under the MSME Act, 2006, this Tribunal arrives at a definite conclusion that the said notification is only 'Prospective in nature' and not a 'Retrospective' one because the said notification does not in express terms speak about the applicability of retrospective operation. The relevant words are conspicuously absent besides there being no implicit reference to be drawn for such a construction.

18. The Learned Counsel for the Appellant strenuously argued that paras 43 & 83 of ***'Arcelormittal India Private Limited' Vs. 'Satish Kumar Gupta & Ors.', (2019) 2 SCC 1,*** are applicable to this case. Paras 43 & 83 are detailed as follows:

> ***"43.*** *According to us, it is clear that the opening words of Section 29A furnish a clue as to the time at which sub-clause (c) is to operate. The opening words of Section 29A state: "a person shall not be eligible to submit a resolution plan…". It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset. Further, the expression used is "has", which as Dr. Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression "has been", which is used in sub-clauses (d) and (g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words "at the time of submission of the resolution plan" is clarificatory, as this was always the correct interpretation as to the*

point of time at which the disqualification in sub-clause (c) of Section 29A will attach. In fact, the amendment was made pursuant to the Insolvency Law Committee Report of March, 2018. That report clearly stated:

> *"In relation to applicability of section 29A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to section 29A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP."*

.....

***"83.** Given the fact that both the NCLT and NCLAT are to decide matters arising under the Code as soon as possible, we cannot shut our eyes to the fact that a large volume of litigation has now to be handled by both the aforesaid Tribunals. What happens in case where the NCLT or the NCLAT decide a matter arising out of Section 31 of the Code beyond the time limit of 180 days or the extended time limit of 270 days? Acts curie neminem gravabit - the act of the Court shall harm no man - is a maxim firmly rooted in our jurisprudence (see **Jang Singh v. Brijlal & Ors.** (1964) 2 S.C.R. 146 at page 149, and **A.S. Antulay v. R.S. Nayak & Ors.** [1988) Supp. 1 S.C.R. 1 at page 71). It is also true that the time taken by a Tribunal should not set at naught the time limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible. A reasonable and balanced construction of this statute would therefore lead to the result that, where a resolution plan is upheld by the Appellate Authority, either by way of*

allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers."

19. The contentions of the Learned Counsel that amendments enforced during CIRP shall be applicable to decide the eligibility to submit the Resolution Plan & that the promoters of the 'Corporate Debtor' become eligible as the law was amended during the CIRP & the threshold for MSME has been increased, is untenable in this case for the following reasons:

- It is an admitted position that the CIRP commenced on 26.04.2019, the MSME Notification amending the threshold was notified on 26.06.2020, wherein it is clearly specified that the MSME Act, 2006, would be effective from 01.07.2021. This itself makes it clear that the provisions therein are effective prospectively from 01.07.2021. Keeping in view the ratio laid down by the Hon'ble Supreme Court in ***'S.L. Srnivas Jute Twine Mills P. Ltd.' (Supra)*** and in ***'Director General of Trade & Anr.' (Supra),*** we hold that the amendments are prospective in nature.
- It is also not in dispute that the 'Corporate Debtor' as on the date of filing of the CIRP was not registered as an MSME. Therefore, the contention of the Learned Counsel for the Appellant that though CIRP commenced on 26.04.2019 the Order by the Adjudicating Authority was passed only on 17.08.2020 and therefore the RP ought to have

given an opportunity to register the 'Corporate Debtor' as an MSME under the MSME Act, 2006, cannot be sustained.

- Having regard to the principle laid down by the Hon'ble Supreme Court in ***'K. Sashidhar' Vs. 'Indian Overseas Bank', (2019) 12 SCC 150, 'Ghanshyam Mishra and Sons Private Limited' (Supra)***, we note that the threshold for interfering in a commercial decision of the CoC is very high and the Company has already been recommended for liquidation by a majority of 88.44%. There is no documentary evidence to substantiate that there was any 'material irregularity' as defined under Section 30(2) of the Code in the Order impugned passed by the Adjudicating Authority directing for Liquidation.
- The decisions relied upon by the Counsel for the Appellant in ***'Swiss Ribbons Pvt. Ltd. & Ors.' Vs. Union of India (UOI) & Ors. (2019) 4 SCC 17, 'Arcelormittal India Private Limited' (Supra), 'Joseph and Joseph & Ors.' (Supra)*** passed by NCLT, Kochi and in ***'M/s. Elecon Engineering Company Ltd.' Vs. 'M/s. Enviiro Bulkk Handling Systems Pvt. Ltd.', dated 21.06.2021,*** passed by NCLT Mumbai, are not applicable to the facts of this case as in this matter, the benefit of exemption under Section 240A cannot be raised at this belated stage especially keeping in view the fact that there is no Resolution Plan pending approval and that the 'Corporate Debtor' was not registered as an MSME even till the eighth CoC Meeting, when the Liquidation Application was discussed and passed.

20. For all the aforenoted reasons this Appeal and the IAs are dismissed accordingly. No order as to costs.

21. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
28th January, 2022

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