

**BEFORE THE ADJUDICATING AUTHORITY  
NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
AHMEDABAD  
Court 2**

**IA 496 of 2020 in CP(IB) 148/NCLT/AHM/2017**

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL  
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH  
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 15.10.2020**

Name of the Company: Rakesh Kumar Agarwal & Ors  
V/s  
Devendra P Jain Liquidator of Asis  
Logistics Ltd  
Section 60(5)(c) of the Insolvency and Bankruptcy  
Code, 2016.

<b>S.NO.</b>	<b>NAME (CAPITAL LETTERS)</b>	<b>DESIGNATION</b>	<b>REPRESENTATION</b>	<b>SIGNATURE</b>
1.				
2.				

**ORDER**

Advocate, Mr. Rajesh Bohra appeared on behalf of Applicant. Advocate, Mr. Jaimin Dave appeared for the Respondent.

The order is pronounced in the open court vide separate sheet.

  
**CHOCKALINGAM THIRUNAVUKKARASU  
MEMBER TECHNICAL**

  
**MANORAMA KUMARI  
MEMBER JUDICIAL**

Dated this the 15th day of October, 2020

**BEFORE THE ADJUDICATING AUTHORITY  
(NATIONAL COMPANY LAW TRIBUNAL)  
AHMEDABAD BENCH  
AHMEDABAD**

IA 496/2020 in  
C.P.(IB) No. 148/NCLT/AHM/2017

**In the matter of:**

1. Mr. Rakesh Kumar Agarwal,  
3<sup>rd</sup> Floor Plot No. 326, Matrusmruti Linking,  
Road Khar (W), Mumbai, 400052
  2. Mr. Mukesh Bansal,  
4<sup>th</sup> Floor Plot No. 326, Matrusmruti Linking,  
Road Khar (W), Mumbai, 400052
  3. Mr. Sarvesh Agarwal,  
3<sup>rd</sup> Floor Plot No. 326, Matrusmruti Linking,  
Road Khar (W), Mumbai, 400052
  4. M/s Asis Industries Limited,  
A Wing, 2<sup>nd</sup> Floor, Mhatre Pen,  
Building Senapati Baapt Marg,  
Dadar West,  
Mumbai-400028
- : Applicants

**Versus**

Mr. Devendra P Jain,  
Liquidator of M/s Asis Logistics Limited,  
1109 & 1112, Regus Centre,  
11<sup>th</sup> Floor, Peninsula Business Park,  
S.B. Road, Lower Parel,  
Mumbai-400013

: Respondent

**Order delivered on 15<sup>th</sup> October, 2020**

**Appearance:** Advocate, Mr. Rajesh Bohra for the Applicant. Advocate, Mr. Jaimin Dave for the Respondent.

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)  
Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

**ORDER**

**[Per: Ms. Manorama Kumari, Member (Judicial)]**

- 1) The instant application is filed by the Applicant with the following prayers:





*Allow the Applicants to propose the scheme of arrangement which Applicants can submit within a week of giving the permission by this Hon'ble Authority and while giving permission to the Applicants also issue direction to the liquidator of the corporate debtor to consider the scheme of arrangement with due process of law once the same is submitted by the applicants immediately on granting such approval by this Hon'ble Authority.*

- 2) The fact of the case is that the C.P. (I.B) No. 148/2017 filed under section 10 of the Insolvency and Bankruptcy Code with a request to initiate CIRP against itself. On hearing the said C.P. (I.B) No. 148/2017 was admitted on 11.01.2018 under section 10 of the Code, appointing Mr. Devendra P Jain as Insolvency Resolution Professional (herein after referred as IRP). During the first meeting of the COC, the COC unanimously resolved that the IRP, Mr. Devendra P Jain shall continue as Resolution Professional (herein after referred as RP) and shall invite prospective bidder and other persons to forward Resolution Plan by the publication of EOI. As per the provision of the Code, RP made public announcement for inviting EOI. In view of the said public announcement on 23.05.2018, RP received EOI from one Growfast Global Management Services, LLP and RP has also received proposal from the promoters of the Corporate Debtor for submission of Resolution Plan.
- 3) The Plan so received were discussed in the third COC meeting and accordingly, the EOI of Growfast Global Management Services, LLP was taken on record for discussion. The Resolution Plan of the Corporate Debtor was not considered by COC on the ground that the Applicants are not eligible to submit the Resolution Plan under section 29A of the IBC, 2016, though the Applicants were very keen in revival of the Corporate Debtor.





- 4) Meanwhile, the RP conducted fourth COC meeting, wherein, it was resolved for further extension of 90 days beyond 180 days, in accordance with section 12 of the Code and pursuant to the said Resolution and filing of IA being No. as 257/2018, the CIRP has been extended for further 90 days vide order dated 13.07.2018. In view of such extension, the COC in its fifth meeting resolved to call fresh EOI. In pursuant to the fresh invitation of EOI, RP received EOI from Indsur Gears Ltd., Classic Real-estate, Continental Carriers(P) Ltd. and Prudent ARC, however, no Resolution Plan was received from any of the prospective Applicants named above. In view of that, the submission of Resolution Plan was extended upto 10.10.2018 with the consensus of the COC that if any plan is/was received by RP, the COC meeting shall be called forthwith within 2 to 3 days.
- 5) Even after extension of time, no prospective applicant filed their Resolution Plan. Under the circumstances, the COC in its seventh meeting resolved and approved for the liquidation of the Corporate Debtor with 97.37% of voting in favour of liquidation. In view of that, the Liquidation Application being IA No. 461/2018 was filed before this Bench and the same is allowed on 28.08.2019.
- 6) Thereafter, one Mr. Rakesh Agrawal on behalf of the Suspended Management submitted Scheme of Arrangement in the nature of compromise within 90 days from the date of liquidation in accordance with the provision of Insolvency Bankruptcy Code, 2016 and Section 230-231 of the Companies Act. The said scheme was placed before the stakeholders of the Corporate Debtor in second meeting dated 12.12.2019, wherein all the stakeholders, present and have shown their preliminary interest in the

*Shankar Agrawal*

*Shankar*

Scheme of Arrangement in the nature of compromise and has resolved that the Liquidator shall move appropriate application for approval of the Scheme of Compromise and Arrangement. Accordingly, an Application is filed being IA No. 66/2020 before this Bench for approval of the Scheme of Arrangement submitted by the Applicant. However, before any order being passed by this Bench, the Government of India, issued notification in the month of January 2020 and made an amendment in Regulation 2B of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, thereby a promoter and guarantor become ineligible to submit the Scheme of Arrangement in view of the said notification of the Government of India, the Liquidator had withdrawn the IA 66/2020 and the same was dismissed as withdrawn vide order dated 28.01.2020.

- 7) It is further submitted that subsequently the Government of India vide its notification dated 01.06.2020 has carried out certain changes in the criteria for classification of Micro, Small and Medium Enterprises and in view of that the Applicant claiming himself to be eligible to submit Scheme of Arrangement as the criteria for classification of MSME has been amended with effect from 01.07.2020 and in view of such amendment, *Company* fall under the criteria of MSME <sup>applicant</sup> and <sup>is</sup> keen to revive the Corporate Debtor and make it a going concern, so that the value of the assets can be maximised, while the stakeholders can be benefited, Employee and Workers can also be absorbed. Therefore, the Applicant wish to submit Scheme of Arrangement duly revised and updated, which ensure that the Stakeholders get much more than the Liquidation Value over a period of time and the Company is kept as a going concern.

*Shankar*

*Adarsh*

- 8) In view of such amendment, the Petitioner filed the instant application and during the course of arguments seeking direction to the Liquidator to consider the Scheme of Arrangement, though such prayer is not made out in Application.
- 9) Heard the parties, also seen the documents annexed and the notification of the Government of India issued on 01.06.2020 having its effect from 01.07.2020.
- 10) Admittedly, on the date of filing of petition under section 10 of the Insolvency and Bankruptcy Code bearing no. C.P. (I.B) No. 148/2017 and its admission thereon, the Company was not falling under the category/criteria fixed by the Government of India for Micro, Small and Medium Enterprises. However, in view of the said amendment vide notification date 01.06.2020, as mentioned hereinabove criteria for classification of Micro, Small and Medium Enterprises has been changed, consequent upon which, the Applicant submitted that the Company falls under the criteria of MSME and for last five years the investment and turnover of the Corporate Debtor fall within the amended criteria, notified by the Central Government on 01.06.2020. While deciding the eligibility criteria as MSME, the turnover and investment are to be taken into account based on the audited balance sheet, as reflected herein below:

Particular	Turnover	Investment
2015-16	277.16	52.92
2016-17	207.07	41.73
2017-18	72.81	30.54
2018-19	45.76	20.13
2019-20(Prov)		

*Shankar Singh*

*Chakraborty*

- 11) In view of the above explanation given under section 240A of the Code, wherein Section 7 of the Micro, Small and Medium Enterprise Development Act, 2006 has specifically formed the Corporate Debtor eligible to file Scheme of Arrangement. For the sake of convenience Section 7 of the Micro Small and Medium Enterprise Development Act, 2006 explanation is reproduced herein below:

*Explanation- For the purpose of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.*

- 12) On such amendment in the criteria of MSME, the Corporate Debtor/Applicant claiming himself to be covered under the criteria/classification of MSME and as such is eligible to file Scheme and seeking direction upon the Liquidator to accept the Scheme of the Corporate Debtor.
- 13) While going through the amendment notification dated 01.06.2020, it prima facie appears prospective one, as the date of its effect is given as 01.07.2020. For the sake of convenience, the notification is reproduced herein below:

**MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES  
NOTIFICATION**

*New Delhi, the 1st June, 2020*

**S.O. 1702(E).**—*In exercise of the powers conferred by sub-section (1) read with sub-section (9) of section 7 of the 'Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) and in supersession of the notification of the Government of India, Ministry of Small Scale Industries, dated the 29th September, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section(ii), vide S.O. 1642(E), dated the 30th September 2006 except as respects things done or omitted to be done before such supersession, the Central Government, hereby notifies the following criteria for classification of micro, small and medium enterprises, namely:—*

*Shankar Singh*

*Shankar Singh*

- (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;*
- (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.*

*This notification shall come into effect from 01.07.2020.....*

On plain reading of the notification, it shows that though it is notified on 01.06.2020, however, its effect has expressly been given on and from 01.07.2020 i.e. prospectively. That itself has drawn line of its effective date.


- 14) It is to be mentioned herein that, on the date of filing of application under section 10 of the Insolvency and Bankruptcy Code and on the initiation of CIRP i.e. 11.01.2018, the Corporate Debtor does not fall under the criteria of classification of MSME, however, in view of amendment made vide notification dated 01.06.2020, as said herein above, the Corporate Debtor filed this application so as to take the benefit of amendment in MSME criteria by giving a retrospective effect.
- 15) It is well established principle of interpretation that no statute can be given retrospective effect unless statute so directs either expressly or by necessary implication. Nor can a power be exercised retrospectively, unless the statute expressly so provided.
- 16) It is fundamental rule of construction that no statute shall be so construed to have retrospective operation unless such a construction appears very clear in the terms of the Act or arises by necessary and distinct implication. Thus, cardinal principle of construction that every statute is "prima-facie"

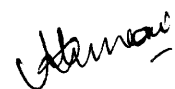
*Shachin Singh*

*Chamran*

prospective, unless it is expressly or by necessary implication made to have retrospective operation as observed by Hon'ble Supreme Court in Keshoram Vs State of Bombay AIR 1951 SC 128. There is presumption of prospectively articulated in the legal maxim, "*nova constitutio futuris formam debet imponere, right non praeteritis*", i.e. 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.

- 17) The general rule that all statutes other than those which are merely declaratory or which related only to matters of procedure or of evidence, are *prima facie* prospective and retrospective effect is not to be given to them unless, by express words or necessary implication.
- 18) It is admitted position that instant amendment came during pending action (lis pedence). It is also established principle that in the case of pending actions, the law is that the right of the parties is decided according to the law as it existed when the action was commenced unless a clear intention to the contrary is found in the new statute, as the *cause of action* is the demarcation line for initiating any proceeding and/or any application. In the present case, when application was filed and CIRP initiated, the Corporate Debtor was not falling in the criteria/classification of MSME, hence, the amendment benefit cannot be availed by the Corporate Debtor, when it is under the stage of liquidation by giving retrospective effect.
- 19) It is established principle that parties are governed by law in force at the date when a suit or proceeding is initiated, unless expressly laid down or by necessary implication inferred.

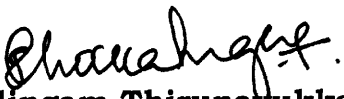


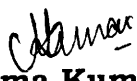


- 20) It is settled law that, if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In general, when law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute and/or any notification shows a clear intention to vary such right.

While going through the notification dated 01.06.2020 of Government of India, it is clearly spelled that, it has to come into effect from 01.07.2020. Further, if there is nothing about retrospective effect in the notification, then its effect will be from the date of its issuance, however, in this notification effective date is clearly mentioned as 01.07.2020, however, sometime it is given retrospective effect, but to cure the defect or would be clarificatory in nature and hence retrospective.

- 21) Under the facts and circumstances, as discussed herein above, the Corporate Debtor at this stage cannot claim to be fall under the classification of MSME and take the benefit of MSME, in view of amendment vide notification issued on 01.06.2020, w.e.f. 01.07.2020, by having its retrospective effect when admittedly on the date of filing application under section 10 of the Insolvency and Bankruptcy Code Corporate Debtor does not fall under the criteria of MSME, therefore, the Application is bad in the eye of law, hence, rejected.

  
**Chockalingam Thirunavukkarasu**  
**Adjudicating Authority**  
**Member (Technical)**

  
**Manorama Kumari**  
**Adjudicating Authority**  
**Member (Judicial)**