

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1157 of 2022 &
I.A. No. 3484 of 2022

IN THE MATTER OF:

Shapoorji Pallonji and Company Pvt. Ltd.

....Appellant

Vs.

Black Canyon SEZ Pvt. Ltd.

....Respondent

Present:

For Appellant: Ms. Aakanksha Kaul, Mr. Aman Sahani, Mr. Manek Singh, Mr. Pranav Gupta and Ms. Simran Gill, Advocates.

For Respondent: Ms. Misha, Mr. Vaijayant Paliwal, Ms. Charu Bansal and Ms. Megha Khandelwal, Advocates

ORDER

02.11.2022: Heard Learned Counsel for the Appellant as well as Learned Counsel appearing for the Respondent.

2. This appeal has been filed against the order dated 10.06.2022 passed by the Adjudicating Authority by which an application filed under Section 9 by the Appellant has been rejected. The Appellant has issued a notice under Section 8 on 13.01.2022 after the said notice under Section 8, application under Section 9 was filed claiming an amount of Rs. 5,59,81,925/-.

3. The application came for consideration before the Adjudicating Authority, Adjudicating Authority choose not to issue notice on the application and dismissed the application holding it to be barred under Section 10A.

4. A perusal of the materials brought on the record indicates that there was settlement agreement dated 24.07.2020 between the parties. It is submitted that in the settlement there was table prescribed for payment and the part IV gives the details of payments at page 79 & 80.

5. The payments from July 2020 to October, 2021 has been referred. It has been further stated that debt became payable has been appearing since July 2020 in terms of the settlement agreement with regard to default at page 81 following has been mentioned:

“However, BCSPL failed to make the remaining payments in terms of the Settlement Agreement. Thus, the debt payable to the SPCPL by BCSPL has been accruing since July 2020 in terms of the Settlement Agreement.

- i. The default first occurred in July 2020 when BCSPL failed to make the complete payment of the EMI in terms of the Settlement Agreement and thereafter, on every date when BCSPL failed to make the complete payment of the EMI to the SPCPL in terms of the Settlement Agreement.*
- ii. The default further occurred when BCSPL failed to pay to the SPCPL the amount payable towards the Final Bill and material cost.*
- iii. The default further occurred on 31.03.2021 when BCSPL failed to release the retention amounts as agreed to vide the Settlement Agreement.*

iv. The default further occurred in October 2021 when despite assurances, BCSPL paid only Rs. 2 Crores and not the remaining amount outstanding.”

6. Adjudicating Authority by the impugned order has held that part IV of the application refers to default occurred from July 2020 during which period initiation of CIRP was suspended, hence, the application is barred by Section 10A.

7. Learned Counsel for the Appellant challenging the order contends that a perusal of the part IV of the application does indicate that the default and due payments were not only confined to the period covered by Section 10A.

8. Referring to page 81 as extracted above it has been mentioned that default was claim to be occurred on 31.03.2021 as well as 21.10.2022 which dates were obviously beyond the period covered by Section 10A.

9. It is submitted that Adjudicating Authority ought to have examined the matter and at least could have proceeded to consider the application for the period which was not covered under Section 10A.

10. Learned Counsel for the Appellant also sought to contend that under Section 10A the embargo was only limited for period of one year and after one year the appellant was entitled to file application even for the default which occurred during the prohibited period, since the default was continuing default. She has relied on Judgment of Hon'ble Supreme Court (2021) 3 SCC 224 in *Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd.*

11. We have considered submission of the Learned Counsel for the Appellant as well as Learned Counsel appearing for the Respondent.

12. When we look into the part IV of the application it is true that the default which was mentioned in the application also were default during the period July 2020 to December 2020 which period were covered under Section 10A.

Section 10A is as follows:

“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 notified 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 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.”

13. However, as observed above the default which is referred to in Part IV were default also of the period subsequent to prohibited period i.e. of March 2021 and October, 2021. A complete reading of the Part IV indicates that claim in the application was both for the period which was covered under the prohibition under Section 10A as well as the period which was beyond the said period.

14. Now coming to the submission of the Learned Counsel for the Appellant that the embargo for initiation of application under Section 7 & 9 was only for period of one year. The reliance has been placed on the judgment of *Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd.* paragraph 27 & 28 has been referred which are as follows:

“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 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.”

15. The aforesaid Judgment had occasion to consider the expression ‘shall ever be filed’ and the submission which was made by Learned Counsel for the Appellant on Section 10A was expressly rejected by the Hon’ble Supreme Court.

16. The submission which was made by the Learned Counsel for the appellant before the Supreme Court has been captured in the paragraph 13 & 14 of the Judgment which is to the following effect:

13. Mr. Neeraj Kishan Kaul submits that:

13.1. Section 10-A creates a bar to the “filing of applications” under Sections 7,9 and 10 in relation to defaults committed on or after 25-3-2020 for a period of six months, which can be extended up to one year.

13.2. The Ordinance and the Act which replaced it do not provide for the retrospective application of Section 10-A either expressly or by necessary implication to applications which had already been filed and were pending on 5-6-2020.

13.3. Section 10-A prohibits the filing of a fresh application in relation to defaults occurring on or after 25-3-2020, once Section 10-A has been notified (i.e. after 5-6-2020).

13.4. Section 10-A uses the expressions “shall be filed” and “shall ever be filed” which are indicative of the prospective nature of the statutory provision in its application to proceedings which were initiated after 5-6-2020.

13.5. The IBC makes a clear distinction between the “initiation date” under Section 5(11) and the “insolvency commencement date” under Section 5(12).

14. On the above premises, it has been submitted that Section 10-A will have no application. Mr. Kaul also urged that in each case it is necessary for the court and the tribunals to deduce as to whether the cause of financial distress is or is not attributable to Covid -19 Pandemic. In the present case, it was asserted that the onset of Covid-19, which was the reason for the insertion of Section 10-A, has nothing to do with the default of the respondent to pay the outstanding operational debt of the appellant, which owes its existence even before the onset of the pandemic. Hence, it has been submitted that the event of default (30-4-2020) in the notice of demand cannot be read in isolation.

17. The period of six months or such further period not extending one year from such date as referred to in Section 10A was period during which the protection was to be extended by the statute from initiation of CIRP under Section 7, 9 & 10.

18. There is no support to the submission from the Section 10A that the prohibition from initiation of CIRP was limited for six months or one year and

after expiry of that period an application can be filed for period covered by Section 10A also. The use of the expression in the proviso that no application shall ever be filed is clearly clarificatory of legislative intendment as contained in Section 10A.

19. If, we accept the submission of the appellant that the provision shall come to end after six months or one year that will be against the purpose and object for which Section 10 A was brought in.

20. Prohibition during the said period was brought in when industries and Corporate Debtors were unable to function due to COVID-19 and it cannot be assumed that after expiry of period of six months or one year those defaults shall again be revived and permitted to be basis for initiation of Section 7, 9 and 10.

21. We thus are not agreeable with the submissions of counsel for the appellant that the provision shall come to an end after six months or one year.

22. We thus are of the view that for the default which was committed during the period covered under the Section 10A no application could ever be filed. However, for any default which is committed prior to or subsequent to prohibited period, an application can be filed under Section 7,9,10.

23. In the facts of the present case we are of the view that since in the application which was filed by the appellant the period was also default for the

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period subsequent to prohibited period. Ends of justice be served in giving liberty to the appellant to file a fresh application after giving notice under Section 8. We further observe that any of the observation made in the impugned order shall not come in the way while considering the fresh application which is to be filed by the appellant.

24. We make it clear that we are not expressing any opinion on any of the issue which may be raised in the application except what we have held above.

25. The defence which may be available to the Corporate Debtor are the questions which can be pressed before the Adjudicating Authority and we are not required to express any opinion with regard to that in this appeal.

26. The appeal is disposed of accordingly.

**[Justice Ashok Bhushan]
Chairperson**

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

sa/nn