NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (Ins) No.95/2024
(IA Nos.262, 263 & 264/2024)

In the matter of:

Mr. Sudhir Bobba, Suspended Director of
M/s. Servomax Ltd.
H No 8-3-678, New Pragathi Nagar
Green Bawarchi Road, Yousuf Guda
Hyderabad – 500045
Email : sudhirbobba@gmail.com **…Appellant**

V

M/s. TVN Enterprises, Rep by its Partner
Mr. Tadapalli Venkata Ramesh
3-47-189, Plot No. 158,
Second Floor, Mahalakshmi Nivas,
Old Vasavi Nagar Colony,
Karkhana, Secunderabad – 500015. **…Respondent No. 1**

M/s. Servomax Limited
Represented by the IRP
Mr. Sridhar Nookala
6-3-252/A/8 & 9, F No. 203,
Mount Castle Apts, Erramanzil Colony,
Nr Taj Deccan Hotel, Erramanzil,
Somajiguda,
Hyderabad – 500082. **…Respondent No. 2**

Present :

For Appellant : Mr. R Venkatavaradan, Advocate
For Mr. Saai Sudharsan, Advocate
For Respondents : Ms. Himangini Sanghi, Advocate, For R1

JUDGMENT
(Hybrid Mode)

[Per: Jatindranath Swain, Member (Technical)]

1. The instant **Company Appeal (AT) (CH) (Ins) No.95/2024** has been preferred by the Appellant, the suspended Director of the Corporate Debtor, M/s Servomax Limited, under Section 61 of I & B Code, 2016, being aggrieved by the Impugned Order dated 22.02.2024 passed by the Hon'ble NCLT, Hyderabad Bench – I in CP(IB) No.361/09/HDB/2022, by virtue of which the Ld. Adjudicating Authority admitted the Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 by the Operational Creditor TVN Enterprises, Respondent herein, against the Corporate Debtor, M/s Servomax Limited.

2. **Brief Facts of the Case:**

   The Corporate Debtor (CD), M/s Servomax Limited, being the company incorporated under the provisions of the Companies Act, 2013 on 08.11.2017, is engaged in the Business of manufacturing transformers. The Respondent No.1 M/s TVN Enterprises, the Operational Creditor (OC) is a Registered Partnership firm and has also been registered as an MSME (Micro, Small, and Medium Enterprises) Unit. As per the averments made, the Operational Creditor is engaged in the purchase and sale of merchandise goods including the supply of spare parts for transformers and related goods. Owing to a longstanding business relationship between them, the Corporate Debtor had issued various purchase orders to the Operational Creditor for the supply of goods including copper conductors and core assembly units till 15.09.2020. The Operational Creditor had also made the supply of goods as per the purchase orders issued by the Corporate Debtor and had raised invoices for such supply. The Corporate Debtor had also made payments to the Operational Creditor from time to time against such invoices. During the course of such transactions, it was found that a sum of Rs.1,00,49,270/- (Rupees One Crore and Forty-Nine Thousand and two Hundred and Seventy only) remained unpaid to the Operational Creditor.

3. The Respondent No.1 / Operational Creditor, had recorded on 11.09.2022, the particulars of the amount of Rs.1,00,49,270/- (Rupees One Crore and Forty-Nine Thousand and Two Hundred and Seventy only) pending from the Corporate Debtor with NeSL, records as on 29.09.2022. Further, he issued a demand notice dated 28.09.2022 to the Corporate Debtor under Section 8 of the I & B Code, 2016. Subsequently, the 1st Respondent filed the Application under Section 9 of the Code before the Ld. NCLT, Hyderabad, which came to be numbered as CP(IB)No.361/09/HDB/2022, seeking initiation of CIRP against the Corporate Debtor, Ld. NCLT vide

its order dated 22.02.2024 had allowed the said Application and ordered initiation of CIRP against the Corporate Debtor.

4. The Ld. Adjudicating Authority has admitted the Section 9 application of the Respondent / Operational Creditor on following premises:

   a. On the date of filing of Section 9 petition, that is, 11.11.2022, the operational debt claimed as due and in default, was Rs. 1,00,49,270/- (Rupees One Crore Forty-Nine Thousand Two Hundred and Seventy) which satisfies the threshold limit of Rs 1 Crore as stipulated in Section 4 of the I & B Code, 2016.

   b. The claim of the Appellant of there being pre-existing dispute about the dues to be paid by him is not maintainable.

   c. Though a part of invoices raised by the Operational Creditor became due within the period 25.03.2020 – 25.03.2021, that is, the period of operation of Section 10 A of the Code, Section 10A of the Code will not be applicable to the case at hand and the amount covered by these invoices will be included in the debt due, on grounds of (i) the default being in existence prior to 25.03.2020, since the date of default is 14.03.2020, (ii) the default was continuing during the period covered by operation of Section 10 A and further beyond it, (iii) the Appellant acknowledging the quantum of debt due post 25.03.2021 in the form of the statement of accounts for the financial year 2021-2022, the letter of confirmation of the debt dated 05.01.2022 and the issuance of 3 cheques to the Operational Creditor for a total amount of Rs. 39.94 Lakhs, which got dishonoured later.

The Appellant's Contentions:

5. The Appellant has contended that the order of Ld. NCLT is erroneous because the debt due will not cross the threshold of Rs. 1 crore, once the invoices falling due for payment are for the period between 25.03.2020 to 25.03.2021, which should have been excluded from the total debt due on account of the stipulation of Section 10 A of the Code. He has contended that out of 28 invoices totalling Rs.1,00,49,270/- (Rupees One Crore Forty-Nine Thousand and Two Hundred and Seventy Rupees), which has been cited by the Respondent 1/ Operational Creditor, as it stood pending for payment by the Corporate Debtor, only one invoice raised on 13.02.2020 was for an amount of Rs. 2,86,994/- (Rupees Two Lakh Eighty-Six Thousand and Nine Hundred and Ninety-Four) which fell due in pre-Section 10 A period.
6. He has further contended that he has raised the dispute with the Operational Creditor with respect to the quality of the material supplied several times and got compensation of Rs. 30,00,000/- (Rupees Thirty Lakh) from the Operational Creditor, that he has reported the details of the dispute in NeSL IU portal , that the Respondent has also filed a Commercial Original Suit

COS No.1 of 2023 before the Commercial Court, Hyderabad seeking a relief for recovery of Rs.2,31,52,631/- (Rupees Two Crore Thirty-One Lakh and Fifty Two Thousand and Six Hundred and Thirty One) with interest payable on it and that the Respondent had once agreed to accept Rs.69,00,000/- (Rupees Sixty Nine lakhs) as full and final settlement, which shows that the quantum of dues is disputed and hence Section 9 application should not have been admitted.

7. He has further stated that a bare perusal of the proviso to Section 10 A of the Code, would lead to a conclusion that no application shall ever be filed for initiation of CIRP of a Corporate Debtor for the default occurring during the period between 25.03.2020 to 25.03.2021 and this has been affirmed by the Hon'ble Apex Court as reported in ***2021 124taxmann.com 226 (SC) in the matter of Ramesh Kymal V. Siemens Gamesa Renewable Power Private Limited (2021)*** in Para 20 of the Judgment. He has contended that the same view has been further affirmed by the decision of the Hon'ble NCLAT as reported in ***2022 ibclaw.in 884 NCLAT in the matter of Plus Corporate Ventures Private Limited V. Transnational Growth Fund Limited (2022)***.

8. He has further contended that the alleged acknowledgment of debt on 05.01.2022 cannot give a fresh cause of action to shift the date of default by the Corporate Debtor for the purpose of initiating Section 9 proceedings, and this has been confirmed by the decision of the Hon'ble NCLAT, principal bench as reported in 2023 ***146 taxmann.com 93 (NCLAT-New Delhi) in the matter of SLB Welfare Association V. PSA Impex Private Limited (2023).***

Summarising his contentions, he has stated that most of the defaulted amount since falls within the Section 10 A period and no CIRP proceedings can be initiated, that there is a pre-existing dispute, that pre-section 10 A period default does not meet the threshold of Section 4 of the I & B Code, and hence the order of the Ld. Adjudicating Authority should be set aside.

The averments of the Respondent:

9. The Respondent No. 1/ Operational Creditor has stated that he used to supply goods as per requirements of the Corporate Debtor against the purchase orders and has raised invoices for the supplies made since 2019, that the credit period for each invoice is 30 days and it is mentioned in the invoices and that the Corporate Debtor started defaulting on payment against the invoices raised from 13.02.2020 onwards. He has further stated that it is the practice that he will issue the statement of account to Corporate Debtor at the end of every financial year for confirmation and that the Corporate Debtor will confirm and acknowledge the same, that the amount falling due to be paid on 01.04.2021 to 31.03.2022 by the Corporate Debtor to him was Rs. 1,00,49,270/- (Rupees One Crore Forty-Nine Thousand and

Two Hundred and Seventy only) and the same has not been disputed by the Corporate Debtor. Further, the date of default being 14.03.2020 as mentioned by the Operational Creditor in NeSL portal has not been disputed by the Corporate Debtor till the CIRP proceedings were commenced.

10. He has further stated that as the date of default is 14.03.2020, his Section 9 application is not covered by the provisions of Section 10 A of the I & B Code, 2016. He has also contended that even though some of the invoices raised by him are pending for payment, would fall within the period covered by Section 10 A of the Code, acknowledgment of the debt by the Corporate Debtor, and its confirmation by his Statement of Account together post 25.03.2021, will show that the default, arising prior to 25.03.2020 continued during Section 10 A period and it continued thereafter and hence invoices that fell due during Section 10 A period will not be barred under Section 10 A of the Code and can be added to the total debt due so as to enable the filing of an application under Section 9 of the Code. He has cited the Judgments of the principal bench of this Appellate Tribunal in the matters of ***Narayan Mangal V. Vatsalya Builders, Raghavendra Joshi V. Axis Bank, Beetel Teletech V. Arcelia IT Services, and Vishal Agarwal V. ICICI Prudential Real Estate AIF*** to make his point that the aim of Section 10 A of the Code was to protect a Corporate

Debtor from insolvency proceedings in case of default during Covid 19 period and that it was never intended to cover any default which occurred prior to it and continued thereafter. He has further contended that in such cases, if the creditor is entitled to initiate CIRP proceedings and that it will apply to his case also, as the default started on 14.03.2020, and it had continued through the Section 10A period, and continued even thereafter as evidenced by the acknowledgments given by the Corporate Debtor. He has also cited the judgment of the Hon'ble Apex Court in the matter of Ramesh Kymal (Supra), to submit that the bar imposed by Section 10 A does not extinguish the debt or the right of the creditor to recover it.

11. With regard to the alleged dispute, the Respondent has stated that the Corporate Debtor has raised the same in order to escape CIRP proceedings, and that the Corporate Debtor never returned the goods claimed as defective to him with a credit note, that he raised it for the first time as a reply to his registering the debt in NeSL and that the claim of a pre-existing dispute should be dismissed. With this assertion, the Respondent has gone on to conclude that the debt due is undisputed, and it fell due on 14.03.2020, the default was continuing throughout Section 10 A period and thereafter, and therefore the invoices that fell due and were defaulted on, during this period will not be barred by the provisions of Section 10 A Code, that the debt due and defaulted was more than Rs. 1 Crore and

therefore the Ld. Adjudicating Authority is correct in allowing the Section 9 application and admitting the Corporate Debtor into CIRP proceedings.

Analysis and Findings:

12. It is seen that the Ld. Adjudicating Authority has framed 3 points for determination:-

> *i. Whether an operational debt of a sum exceeding rupees one crore due and payable by the respondent to the petitioner exists as on the date of filing of this petition? If so, whether the respondent defaulted in repayment of the same?*
>
> *ii. Whether there is a pre-existing dispute as to the subject debt between the parties? If so, whether the petition is maintainable?*
>
> *iii. Whether the initiation of Corporation Insolvency Resolution Process (CIRP) against the respondent is barred under section 10A of the Insolvency &Bankruptcy Code, 2016? If so, whether the Company Petition is maintainable?*

On the first point, that is, whether there exists a debt due and payable by the Corporate Debtor on 11.11.2022 being the date of filing of Section 9 petition, the answer is unequivocally yes because admittedly by as per the statement of account of the financial year 2020-2021 and financial year 2021-2022, the due at the end of respective financial year is shown as Rs.1,00,49,270/- (Rupees One Crore Forty Nine Thousand and Two Hundred and Seventy only). Further, it is seen that the debt due is not hit by limitation as the date of default being 14.03.2020, as claimed by the Operational Creditor, or, 15.12.2020 as the demand notice falls within 3 years of the filing of application.

The second point is whether there exists a pre-existing dispute with regard to the debt. That has also been dealt with correctly by the Ld. Adjudicating Authority by holding that the Corporate Debtor has accepted the supplies made by the Operational Creditor without any goods being returned and without raising any issues, that since the payment for supplies are to be made within 30 days from the date of invoice, he should have raised disputes if any for each supply within such or reasonable period, that no record have been placed by the Appellant before the Ld. Adjudicating Authority to show that he has raised quality complaints as per the general practice in the business and therefore the claim of a pre-existing dispute with respect to the debt cannot be accepted for the purpose of rejecting the Section 9 application of the Operational Creditor.

Thus the basic issue of contention which boils down is as to whether the dues arising out of invoices raised within the Section 10 A period, that is between 25.03.2020 to 16.09.2020, are to be included in the total debt, due and in default, for the purpose of initiating CIRP proceedings under Section 9 of the Code. This has been dealt with by the Ld. Adjudicating Authority in para 27-31 of the impugned order, wherein the Ld. Adjudicating Authority has held that even though the application states the date of default to be 15.12.2020, as per records of NeSL the date of default is 14.03.2020, the same has to be taken as the date of default and hence the default in the instant case is a default committed prior to the Section 10 A period which is continuing during Section 10A period and therefore it will not attract the provisions of Section 10 A of the Code.

Section 10 A of the Code is extracted below:

> *"Section 10A.*
>
> *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."*
>
> *(*The prohibited period was extended to 25.03.2021 vide MCA Notifications)"*

This has been further elaborated by the Hon'ble Apex Court in its Judgment in Civil Appeal No.4050 of 2020, ***Ramesh Kymal v. M/s Siemens***

Gamesa Renewable Power Private Limited. The relevant extraction is reproduced below:

> *"20. The substantive part of section 10A adverts to an application for the initiation of the CIRP. It stipulates that for any default arising on or after 25 March 2020, no application for initiating the CIRP of a corporate debtor shall be filed for a period of six months or such further period not exceeding one year "from such date" as may be notified in this behalf. The expression "from such date" is evidently intended to refer to 25 March 2020 so that for a period of six months (extendable to one year by notification) no application for the initiation of the CIRP can be filed…*
>
> *23. ….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 March 2020 for a period of six months, extendable up to one year as notified….."*

This clearly states that for any default arising on or after 25.03.2020 till 25.03.2021, no application shall ever be filed for initiation of CIRP for the said default arising during the said period.

In the present case, the debt which due remained to be paid on 11.11.2022 was Rs.1,00,49,270 (Rupees One Crore Forty Nine Thousand and Two Hundred and Seventy only), consisting of the amounts relation to in 28 invoices that were raised by the Operational Creditor and were not paid by the Corporate Debtor within the period of 30 days of raising of each invoice till the date of filing of the Section 9 application. Out of these 28 invoices, 27 invoices fell due for payment and were defaulted on, in the period 25.03.2020 to 25.03.2021, that is Section 10 A period, if we add 30 days to the date of raising of each invoice. Thus, clearly the debt due on these 27 invoices will attract the provision of Section 10 A of the Code.

Further the statement of account for the financial year 2020-2021, which has been prepared by the Operational Creditor and acknowledged by the Corporate Debtor and which is not in dispute, it is seen that the opening balance of due to be paid by the Corporate Debtor as on 01.04.2020 is Rs. 1,05,08,583/- (Rupees One Crore Five Lakhs and Eight Thousand and Five Hundred and Eighty Three only), the Corporate Debtor has received supplies worth (Rs.1,80,04,243 - Rs.1,05,08,583) Rs. 74,95,660/- during the said financial year, he has paid a sum of Rs. 79,54,973/- to the Operational Creditor in the same period and there is a balance of Rs.1,00,49,270/- due to be paid. It is further seen that after 16.09.2020 no supplies have been made by the Operational Creditor to the Corporate Debtor.

It is to be seen that this is a running account of goods received and payments made by the Corporate Debtor and though the payments have not been made invoice-wise it is clear that the Corporate Debtor has cleared about

Rs. 74.95 lakhs out of Rs.1,05,08,583/- being the opening balance of the dues to be paid as on 01.04.2020 and that the amounts pending to be paid pertain to invoices that were raised during Section 10 A period, that is during the period 25.03.2020 to 25.03.2021.

The Ld. Adjudicating Authority has held that these 27 invoices represent a continuing default, starting from 14.03.2020, that the Corporate Debtor has acknowledged the debt post 25.03.2021 (the date from which Section 10 A stopped operating) and therefore CIRP proceedings can be initiated for the dues against these invoices. The Ld. Adjudicating Authority placed reliance on the judgment of the Hon'ble NCLAT dated 23 January 2023 in ***Vishal Agarwal V. ICICI Prudential Real Estate AIR-I & Anr*** in Company Appeal (AT) (Ins) 1016 /2022. The relevant portion is extracted below:

> *" Insofar as application being barred by 10A, benefit under Section 10A can be claimed by the application only when there is clear default during the prohibited period. The said benefit cannot be claimed by the Appellant by ignoring the admission of default which was prior to 25.03.2020. There being clear admission in the present case, in letter dated September 9, 2021 where the Corporate Debtor itself has admitted that he has 5 Company Appeal (AT) (Insolvency) No. 1016 of 2022 failed to pay interest for the quarters ending September 2019 and December 2019 thus acknowledging that it has defaulted in servicing its obligations under the DSA."*

The said ratio may not be applicable because in the present case, there is a clear default during the prohibited period. If we take out the amounts covered in the 27 invoices that fell due and were defaulted during the Section 10 A period, the remaining amount of default that fell due in pre-section 10 A period is only Rs.2,86,762/-, representing the amount claimed in the invoice of Operational Creditor dated 13.02.2020. This being the case, the case of the Operational Creditor will be hit by Section 4 of the Code, which stipulates that the amount due should be at least Rs. 1 Crore to move the application for CIRP.

The Operational Creditor has cited 4 judgments of the Principal Bench of the Hon'ble NCLAT to contend that the amount falling within the period covered by Section 10 A of the Code. The first one in the Judgment dated 18 August 2023 in the matter of ***Narayan Mangal V. Vatsalya Builders & Developers in CA AT(Ins) No. 294/2023*** where the principal bench allowed the interest accrued during the Section 10 A period to be added while computing the threshold of the default. The second one is the Judgment dated 18 August 2023 in the matter of ***Raghavendra Joshi V. Axis Bank Ltd in CA (AT)(Ins) No. 914/2023*** where the Section 10 A benefit was denied on ground of these being a categorial default by the Corporate Debtor prior to the Section 10 A period concerning an OTS settlement. The third one is the Judgment dated 11 September 2023 ***Beetel Teletech Ltd V. Arcelia IT Services Pvt Ltd in CA (AT) (Ins) No. 1459/2022*** where the amount due on the invoice raised on 31.12.2019 was Rs.1,32,45,904 which was more than the 1 crore threshold, thus the Section 10A was not obliviated and the appeal was allowed. The fourth one is the Judgment dated 23 January in the matter of ***Vishal Agarwal V. ICICI Prudential Real Estate AIR-I & Anr***., where it was held that having defaulted in payment of interest prior to 25.03.2020 the Appellant cannot be permitted to contend that default was committed only on 31.08.2020 and hence benefit under the Section 10 A cannot be claimed, unless there is a clear default in the prohibited period. It may be borne in mind that in three cases as stated above, the matter relates to Section 7 applications where there is a financial debt and interest accrued during the 10 A period are sought to be added, only in the matter of Beetel Teletech, the dues are in nature of operational debt but the threshold of Rs.1 crore was already reached prior to 25.03.2020. However, in the instant case, each unpaid invoice gives rise to a distinct & separate default. Further, only Rs.2,86,762/- is the amount that is in default from the pre-section 10A period. Even though the Corporate Debtor has acknowledged the debt that has accumulated in the period 25.03.2020 to 16.09.2020, it cannot be taken as a continuation of the default claimed to have been committed on 14.03.2020, for the reason being that the Corporate Debtor had repaid a total of Rs.79,54,973/- of the amount due as on 01.04.2020 during the period of 01.04.2020-31.03.2021. Thus there will be a bar on including the amount involved in the 27 invoices that fell due during the Section 10 A period to the total debt due for the purpose of initiating CIRP as per the proviso to

Section 10 A of the Code. Accordingly, the threshold limit of Rs. 1 crore as stipulated in Section 4 will not be met and as a result, the order of the Ld. Adjudicating Authority admitting the Corporate Debtor into CIRP will have to be set aside.

At the same time, we have no hesitation in saying following the decision of the Hon'ble Apex Court in the matter of Ramesh Kymal, that the amount represented by these 28 invoices will remain a debt due and that they will not be extinguished but they cannot be used as a basis to initiate CIRP proceedings.

The relevant para is extracted below:

> *"24. We have already clarified that the correct interpretation of Section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it."*

Accordingly, the Respondent will continue to have the right to recover the said dues by all the means available to him including approaching commercial courts except resorting to proceedings under the I & B Code.

Accordingly, the **Company Appeal (AT) (CH) (Ins) No.95/2024** is 'allowed' and the Impugned Order is 'set aside'. All pending interlocutory Applications will also be 'closed'.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

14.02.2025
GKJ/TM/MS