IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA

IA No. 175/KOB/2020
In
IBA/34//KOB/2020

(Under Rule 11 of the NCLT Rules, 2016)

Order delivered on: 1ST December, 2020

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)

M/s Tharakan Web Innovations Pvt. Ltd. … Applicant/Corporate Debtor

Versus

Cyriac Njavally … Respondent/Operational Creditor

Parties/Counsel present (through video conference)

For applicant : Shri Joseph Kodianthara, Sr.Advocate
For Respondent : Shri Akhil Suresh, Advocate

ORDER

This IA/175/KOB/2020 has been filed by the Corporate Debtor in IBA/34/KOB/2020 under Rule 32 of the NCLT Rules, 2016 for the following relief: -

> *"Pass an order directing that IBA/34/KOB/2020 is not maintainable in the light of Annexure A2 Notification"*

Submissions by the Applicant/ Corporate Debtor.

2. Form 3 Demand Notice dated 25.02.2020 under Rule 8 of the Insolvency and Bankruptcy Code 2016 has been filed by the Applicant/Corporate Debtor only on 02.03.2020. Obviously, the

Applicant/Corporate Debtor had time till 12.03.2020 to file its reply disputing the demand and / or making good the same. An Application under Section 9 becomes maintainable only after the expiry of the period of 10 days from the date of delivery of Form 3 Notice on the Corporate Debtor. The said period of 10 days is neither optional nor elective but is mandatory in nature.

3. Section 9 of the Companies Act, 2013 is reproduced below: -

"Section 9. Application for initiation of corporate insolvency resolution process by operational creditor.

"(1)After the expiry of the period of ten days from the date of delivery of notice or invoice demanding payment under Sub-Section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under Sub-Section (2) of Section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under Sub-Section (1) shall be filed in such form and

manner and accompanied with such fee as may be prescribed.

*(3) The operational creditor shall along with the application furnish_*

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor,

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [by the corporate debtor, if available;]

[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed;

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of

*the application under sub-section (2), by an order_*

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if_,

(a) the application made under sub-section (2) is complete;

(b) there is no [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

*(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if_*

(a) the application made under sub-section (2) is incomplete;

(b) there has been 3 [payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor,

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e)any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section".

4. To fortify his argument the Applicant relied upon the case law of Hon'ble Supreme Court in *(AIR 2015 SC 157)* in ***Yogendra Pratap Singh Vs Savitri Pandey***, that was a case under Section 138 of Negotiable Instruments Act, 1881. In that case the complaint was filed before expiry of 15 days mandated ie , 15 days from the date on which notice has been served on the accused. In that case the Hon'ble Supreme Court held as under: -

> *"42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (i) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be*

> *permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly".*

Relying on this decision the Hon'ble Himachal Pradesh High Court in ***Rajeev Gupta Vs. Prem Singh*** *(Cr. MMO No. 219 of 2017)* held that no cause of action can arise before the expiry of the said 15 days.

5. The learned counsel for the Applicant stated the scheme of the IBC is also similar, if not identical in nature. In so far as an application under Section 9 is concerned the Operational Creditor could under no circumstances have maintain a complaint on 07.03.2020 when the notice under Section 8 of the code was received by the Applicant/Corporate Debtor only on 02.03.2020. The mandatory period of 10 days to object to the notice or repay the alleged debt had not elapsed. Therefore, making the application under Section 9 is not an application at all in the eyes of law.

6. It is also stated that it is settled law that the adjudicating authority (in this case this Tribunal) has to decide on the jurisdiction as well as maintainability based on the averments in the Application. The learned senior counsel has referred to Page 6 of the Application filed by the Operational Creditor, which reads: -

> *"That on 25.02.2020, the Demand Notice as in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 demanding payment of Rs.31,33, 595/- (Thirty-one lakh thirty-three thousand five hundred ninety-five only) was sent to the Corporate Debtor at its registered office through speed post.*

That no reply raising any dispute has been received by the Applicant within the stipulated period of ten days. It is therefore evident that despite the expiry of ten days from the date of service of the demand notice no dispute nor repayment of the due amount has been brought to the notice of the Applicant, which clearly shows that the Corporate Debtor is not able to pay its debts taken in the normal course of business and had thus become insolvent. Thus, the Applicant is taking steps under the Insolvency and Bankruptcy Code,2016 for initiation of Corporate Insolvency Resolution Process."

6. The learned counsel states that the Applicant has made a false averment as the Applicant has not satisfied the mandate under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 because the ten days period has not been expired on 07.03.2020, when the application was filed.

7. The Applicant further stated that the initial copy of the 1B Application which was served on the Applicant was received on 12.06.2020 was one containing blank dates and was incomplete in many scores. It is thereafter a filled in copy of the Application was served to the Counsel for the Applicant in which the date of the Application is shown as 7th March 2020. An incomplete application, according to Section 9 of the IBC, is only to be dismissed, without going into the merits.

8. It is further stated that on a verification from the Registry of this Tribunal, it is learnt that even though the application is dated 07.03.2020, the same was filed on 25.09.2020. It is the said date therefore that would have to be considered as 'initiation date' for the purpose of Section 5(11) of the Insolvency and Bankruptcy Code.

9. They have further referred to Section 4 of the Code which reads as under: -

> ***"Section 4**. Application of this Part*
> *(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:*
> *PROVIDED that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."*

10. The said provision was modified vide Notification No. S. O. 1205(E) dated 24.03.2020 by the Ministry of Corporate Affairs enhancing the minimum amount of default as Rs.1crore with effect from 24.03.2020. Therefore, the date of initiation of the proceedings on the part of the Operational Creditor now having been admittedly being 25.09.2020 (the date of filing in this Registry) and the claim herein being only to the tune of Rs.25 lakhs, this Application is clearly hit by Section 4 of the Insolvency and Bankruptcy Code as the minimum amount of debt required to file an application now stands enhanced to Rs.1 crore, and that the application is to be dismissed in limine.

11. The Applicant stated that the date on which the cause of action arose cannot have any bearing as far as Section 4 of the Insolvency and Bankruptcy Code is concerned, as part of the Insolvency and Bankruptcy Code would only be attracted in the event the minimum amount of default is Rs.1 crore. The averments of the Operational Creditor that the same would amount to a violation of his fundamental rights for the fact that he had accrued the vested right to sue from the date on which the cause of action arose is absolutely untenable. Even if a right accrues from a date on which could have been prior

to the notification dated 24.03.2020, a vested right, assuming there is one, cannot under any stretch of imagination be viewed as an exclusive right to sue under this legislation. A right to sue vests with the Operational Creditor to sue the Applicant/ Corporate Debtor, but he cannot claim that the same has to be mandatorily under the provisions of the IBC, as his right to sue under other laws still remains wide open.

12. It is further argued that the right to sue / initiate proceedings under Section 9 of the Insolvency and Bankruptcy Code did not and cannot accrue as there can be no cause of action till the expiry of the mandatory period of 10 days as is enshrined under Section 9 of the Insolvency and Bankruptcy Code, 2016, because the date of initiation of the proceedings being only 25.09.2020, as has been discussed above, the date on which the cause of action arose having no significance, as the ten days mandatory notice period under Section 9 has not been observed by the Operational Creditor. Hence, the IBA filed by the Operational Creditor is premature in nature and is not maintainable.

Submissions by the Respondent/ Operational Creditor.

13. On the other hand, the Respondent/Operational creditor submitted that the Application under Section 9 of the Code has been filed before this Tribunal after 24.03.2020, however the same is maintainable for the fact that the notification dated 24.03.2020 is applicable only prospectively. If a Corporate Debtor has already defaulted on any debts prior to the Notification. i.e. before 24.03.2020, initiation of CIRP under Section 9 of the I & B Code will be valid.

14. Their further contention is that the intention of the notification can be reasonably interpreted as constituting a relief-oriented measure to protect Corporate Debtors from the deleterious impact of the Covid-19 pandemic upon their businesses. The said notification docs not result in any general relaxation or waiver of the provisions of the Code and does not change or in any manner affect what happens after a default is committed (both of which, in any event, cannot be done under the guise of the proviso to Section 4). The notification only enhances the limit of what constitutes a default.

15. It is also contended that the above facts do not save the Applicants/Corporate Debtors from the trigger of insolvency especially in cases where defaults towards creditors have taken place before the pandemic and the resultant financial crisis. Such an interpretation would be contrary to the intention of the executive in exercise of its powers of delegated legislation. Thus if the intention was to provide for a blanket protection to Corporate Debtors from being dragged to the NCLT irrespective of when or what extent a default has taken place, it would necessarily require a legislative amendment, and that a mere issuance of the Notification would not suffice. The Code does not prescribe any timeline, either for filing an application for insolvency before the NCLT after commission of a default, or for issuance of an insolvency notice after a default has taken place. Neither is there any stipulation that an application must be filed by an Operational Creditor within a specified time after delivery of Form 3 Demand notice. Therefore, the right to sue has accrued to an applicant when an application is filed well beyond the period of ten days and within the period of 3 years as prescribed under the Limitation Act, 1963. Therefore, in an application filed subsequent to the

notification, if a creditor satisfies the NCLT that the default has taken place prior to the notification, such an application may be entertained.

16. It is further contended that it is settled principle of law that an amendment by way of delegated legislation that affects the substantive rights of parties can only be prospective and cannot act retrospectively unless made retrospective, either expressly by necessary implication or intention. A law relating to forum and limitation is procedural in nature, whereas law relating to right of' action and right of appeal even though remedial is substantive in nature. The time at which a right to file an appeal vests in the Operational Creditor is relevant in the instant case or the fact that such right had already been accrued to the Operational Creditor after the expiry of 10 days from the date of filing of the demand notice. The Notification is not an amendment of the Code. but an instance of delegated legislation simply increasing the limits set out under Section 4 of the Code. It affects substantive rights of the stakeholders. However, even in case of delegated legislation, the Hon'ble Supreme Court has held that change through a delegated legislation can only be prospective and not retrospective, unless the rule making authority has been vested with the power under the statute to make rules or amendments thereto with retrospective effect and such power has been exercised.

17. To fortify the above arguments the learned counsel for the Respondent/Operational Creditor, has referred to the following case laws: -

- ***DIRECTOR GENERAL OF FOREIGN TRADE AND ANOTHER VS. M/S. KANAK EXPORTS AND ANOTHER*** in (*Civil Appeal No. 554 of 2006)* dated 27.10.2015.
- ***DR. INDRAMANI PYARELAL GUPTA VS. W.R. NATH & ORS***., April 11, 1962*, (AIR 1963 SC 274).*

- ***BAKUL CASHEW CO. & ORS.' VS. 'SALES TAX OFFICER & ANR. QUILON***, March 12, 1986, *1987 AIR 2239, 1986 SCR (1) 610.*

18. The Respondent/Operational Creditor stated that he cannot be deprived of filing an application under Section 9 of the Code to initiate Corporate Insolvency Resolution Process against a defaulting Corporate Debtor for a debt that has occurred prior to the Notification. It is further stated that this would amount to a differential treatment between a petitioning creditor who has filed an insolvency petition prior to the Notification, and the one who has not filed, although the date of default in both cases is prior to the date of the Notification, and the amounts of default are similar. This is in clear violation of the Principles of Equality and equal treatment before law enshrined under Article 14 of the Constitution of India. The differential treatment is not only to the similarly placed Operational Creditor, but also extends to Corporate Debtors who are similarly placed. In the instant case, if the benefit of the Notification is extended to Corporate Debtor who has defaulted in the year 2019, then all the applications admitted by the Tribunal, where the default has occurred during the same period should also be reviewed and recalled with the same benefit of the Notification extended to them. Such an interpretation would be preposterous and would go contrary to the intention of the legislature. Hence, the notification can only be interpreted in such a way that it applies only to debts where the date of default is prior to 24.03.2020.

19. The power to increase the minimum amount of default is vested with the Central Government by way of delegated legislation. A delegated legislation passed by the executive unlike an Ordinance passed by the

Legislature does not have an object clause or any scope for stating reasons which reflect the intention of the Legislature in its action. Hence, it is pertinent to bring on record the Ordinance 9/2020 dated 05.06.2020 wherein the legislature while suspending Section 7,9 and 10 of the 1&B Code, 2016 made the following clear:

a) The pandemic has impacted business, financial markets and economy all over the world, including India, and created uncertainty and stress for business for reasons beyond their control;
b) Nationwide Lockdown is in force since 25.03.2020 to combat the spread of COVID-19 which has added disruption of normal business operations;
c) It was further made clear that Section 10A of the Code applies only to those defaults arising on or after 25.03.2020 for a period of 6 months

20. From the reading of the above makes it clear that the intention of the Government in passing the Ordinance and the Notification was to prevent large-scale insolvencies, especially against the MSMEs, as a result of the financial stress caused by COVID-19 pandemic. Both the Ordinance as well as the Notification come into force with effect from 25.03.2020 which makes it clear that the object of the increased threshold is also in line with the object of the Ordinance. The Ordinance further makes it clear that it applies only to those defaults arising on or after 25.03.2020.

21. The Respondent/ Operational Creditor further submitted that the amendment to Section 7 of the Act further makes it clear that the legislature has exercised the power of retrospective application in cases where it was necessary to do so. When provisions of Section 7 of the Act were abused by the Homebuyers, the legislature made the amendment applicable to those cases which are pending admission as well those which are yet to be filed. If

that was the intent of the legislature, nothing prevented them from passing the impugned Notification/ Ordinance/Amendment making it applicable to cases where the debt became due prior to 24.03.2020. The right of action, that is, a right to sue or a right to apply etc., is a vested right. Hence, in the present case, a right to apply for initiating Insolvency Resolution Proceedings under the IBC became a vested right when the condition precedent of issuing a Demand Notice under Section 8 of the Act was satisfied.

22. I have meticulously heard the arguments advanced by the learned senior counsel for the Applicant and the learned counsel for the Respondent. The Notification dated 24.03.2020 was issued by the Ministry of Corporate Affairs, stating that "In exercise of the powers conferred by the proviso to Section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said Section".

23. To get further clarity on this issue, I have gone through Section 4 of the Companies Act, 2013 which may be referred to, which: -

> ***"Section 4****. Application of this Part*
> *(1) This Part shall apply to matters relating to the insolvency and*
> *liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:*
> *PROVIDED that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."*

24. The Hon'ble NCLAT in its Order in ***Madhusudhan Tantia VS. Amit Choraria and Anr.*** in *Company Appeal (AT) (Insolvency) No. 557 of 2020* dated 12.10.2020 held that: -

"56. As far as the present case is concerned, this Tribunal, after carefully and with great circumspection, ongoing through the contents of the notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Government of India, whereby and where under the minimum amount of default limit was specified as Rs. One crore (obviously raising the minimum amount from Rs. one lakh to one crore) unerringly comes to a definite conclusion that the said notification is only Prospective in nature' and not a retrospective' one because of the simple reason the said notification does not in express term speaks about the applicability of retrospective or 'retroactive' operation. Suffice it for this Tribunal to point out that from the tenor, spirit and the plain words employed in the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, one cannot infer an intention to make or make it retrospective as in this regard, the relevant words are conspicuously absent and besides there being no implicit inference to 35 Company Appeal (AT) (Insolvency) No. 557 of 2020 be drawn for such a construction in the context in issue. That apart, if the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is made applicable to the pending applications of IBC (filed earlier to the notification in issue) it will create absurd results of wider implications/ complications.

57. In view of the upshot and also this Tribunal, on careful consideration of respective contentions advanced on either side and considering the facts and circumstances of the instant case in a conspectus fashion holds unhesitatingly that the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is prospective in nature and it is not retrospective or retroactive in nature. Further, the said notification will not apply to the pending applications filed before the concerned Adjudicating Authority (Authorities). under 1BC (waiting for admission), prior to the issuance of the aforesaid notification, as opined by this Tribunal.

Viewed in the above prospective, the conclusion arrived at by the 'Adjudicating Authority' in the impugned order to the effect that the notification dated 24.03. 2020 of the Ministry of Corporate Affairs, Government of India, shall be considered as prospective and not retrospective and the finding that there was no payment on the side of "Corporate Debtor' after receipt of Demand Notice, no pre- existing dispute also alleged or proved and ultimately admitting the application filed by the 2nd Respondent Operational Creditor are fee from legal infirmities."

25 In this context, this Tribunal refers to another judgement of Hon'ble Supreme Court in ***New India Co. ltd Vs Smt. Shanti Misra*** reported in *1976 SCR (2) 266,* the relevant portion is as follows: -

"On the plain language of Sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is well established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away, Otherwise the general rule is to make it retrospective.…

……. (2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally, the law of limitation which is in vogue on the dale of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of Limitation".

26. On a perusal of the documents placed on record, it is seen that the Notification dated 24.03.2020 does not save the Applicant/ Corporate Debtor from the initiation of insolvency especially in cases where defaults towards creditors have taken place before the pandemic and the resultant financial crisis. Such an interpretation would be contrary to the intention of the executive in exercise of its power of delegated legislation. Thus, if the intention was to provide for a blanket protection to Corporate Debtors from being dragged to the NCLT irrespective of when or what extent a default has taken place, it would necessarily require a legislative amendment, and that a mere issuance of the notification would not suffice.

27. In the instant application filed under Section 9 of IBC, the debt has become due on 06.07.2019. That on 25.02.2020, the Demand Notice in Form 3 under Rule 5 of the Insolvency and Bankruptcy Code, 2016 demanding payment of Rs. 31,33,595/- (Rupees Thirty-One Lakhs Thirty-Three Thousand Five Hundred and Ninety-Five Only) was sent to the Corporate Debtor at its Registered Office through speed post. However, no reply raising any dispute has been received by the Respondent/Operational Creditor within the stipulated period of ten days from 25.02.2020. It is therefore, evident that despite the expiry of 10 days from the date of service of the demand notice, neither dispute nor repayment of the due amount has been brought to the notice of the Operational Creditor. This would clearly show that Applicant/Corporate Debtor is not able to pay its debts taken in the normal course of business. Since, the Demand Notice in Form 3 has been sent by the Operational Creditor to the Corporate Debtor and after waiting for 10 days

form that date only, Operational Creditor filed the application, the contention of the Applicant/ Corporate Debtor has no legs to stand.

28. Therefore, since the application IBA/34/KOB/2020 has been filed by the Applicant after exhausting the remedy by issuing the statutory notice, the application is in order. Hence, **IA/175/KOB/2020** challenging the maintainability of the Application is dismissed.

Dated the 1st day of December, 2020

Sd/-
(Ashok Kumar Borah)
Member (Judicial)