NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 557 of 2020

[Arising out of Order dated 20.05.2020 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No.1735/KB/2019].

IN THE MATTER OF:

Madhusudan Tantia
4, Sarat Chatterjee Avenue,
Kolkata – 700029. **...Appellant**

Versus

Amit Choraria
14/2, Old China Bazar Street,
4th Floor, Room No. 401,
Kolkata – 700001. **.....Respondent No. 1**

Foseco India Limited
Ghat Nos. 922 & 923,
Sanaswadi, Taluka Shirur,
Pune – 412208. **.....Respondent No. 2**

Present:

For Appellant: **Mr. Jishnu Saha, Sr. Advocate with Mr. Dhirendra Nath Sharma, Mr. Sanjay Ginodia and Mr. Ishan Saha, Advocates**

For Respondent: **Mr. H.M. Choraria, Advocate for R-1**
Mr. Anjan Kumar Roy, Advocate for R-2
Mr. Amit Choraria, IRP

J U D G M E N T

Venugopal M. J

Introduction

The Appellant has preferred the instant Company Appeal (AT) (Insolvency) No. 557 of 2020 as an 'Aggrieved Person' being dissatisfied with the Impugned order dated 20.05.2020 passed by the Adjudicating Authority 'National Company Law Tribunal', Kolkata Bench, Kolkata in C.P. (IB) No.1735/KB/2019.

2. The 'Adjudicating Authority' ('NCLT') Kolkata Bench, Kolkata while passing the Impugned order dated 20.05.2020 in C.P. (IB) No.1735/KB/2019 had observed the following: -

> *"The Central Government by notification dated 24.03.2020 enhanced the minimum amount of default limit from one lakh to 1 crore for initiating CIRP as against small and medium scale industries. So, question raised by the learned counsel is that whether notification is under section 4 of the Code raising the*

minimum default limit be applicable to the applications pending for admission? It is a well settled law that a statute is presumed to be prospective unless it is held to be retrospective, either expressly or by necessary implication. When the amendment to Section 4 of IBC was inserted a proviso enhancing the pecuniary jurisdiction for filing applications as against small and medium scale industries nowhere in the notification mentioned that its application will be retrospective. Therefore, it appears to me that the amendment shall be considered as prospective and not retrospective. The facts in the cited decisions are not at all similar to the facts in the case in hand and hence not helpful to strengthen the said submission on the side of the CD. In view of the matter, I do not find any illegality in

pronouncing the order on today through VC.

This is an application filed u/s 9 of IB Code for initiation of Corporate Insolvency Resolution Process against the Company who is dealing with business of manufacturing and supply of chemicals and allied products related to foundry and steel industries, such as, resins, coating for ferrous and non-ferrous foundries, sleeves, fluxes, metal treatment products of foundries.

According to the Ld. PCS for the operational creditor, since the corporate debtor failed to pay the amount, it is entitled to claim the amount due to the tune of Rs. 90,00,919.10. None of the invoices contains the terms stipulating the corporate debtor to pay interest for the delayed payment of the amount found due to the operational creditor. The corporate debtor having not disputed its liability, the amount

as claimed by the operational creditor towards the material cost less the interest is found due and payable by the corporate debtor.

The Ld. P CS for the operational creditors further submits that despite repeated demands, the corporate debtor failed to pay the operational debt and therefore a demand notice under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) 2016 was issued and the corporate debtor was in receipt of the demand notice. The CD neither sent a reply nor paid the amount found due to the operational creditor and not raised any dispute. The claim is also not barred by the law of limitation. Accordingly, the claim of the operational creditors is found sustainable under the law.

In compliance of Sec. 9(3)(b) if IB Code the applicant has produced an affidavit and a statement of bank a/c also seen produced

on the side of operational creditor in compliance of section 9(3)(c) therefore, all the requirements are made out in the case in hand. The operational creditor has also proposed the name of Resolution Professional, Shri Amit Choraria, Registration No. IBBI/IPA-001/IP-P01345/2018-2019/12129. Written communication under Form 2 reveals that there is no disciplinary proceedings pending against the proposed IRP. That being so, the operational creditor succeeds in proving that the application under sub-sec. (2) of sec. 9 of IB Code 2016 is complete; that there is no payment of the unpaid operational debt and that there is a service of demand notice with invoices. Despite receipt of the demand notice, there is no payment on the side of the corporate debtor, no pre-existing dispute also alleged or proved. The Ld. Counsel for the CD not raised any dispute at the time of hearing, other than his request for time to settle the matter. There is no disciplinary

proceedings against the RP proposed under sub-sec. (4) of sec. 9 of IB code, 2016 and accordingly this application is complete and therefore, liable to be admitted."

and resultantly admitted the application for CIRP against the 'Corporate Debtor' and further declared a moratorium etc.

Resume of Facts

3. According to the Appellant he is a majority shareholder and one of the Directors on the 'Suspended Board of Directors' of the 'Corporate Debtor' and he is affected and prejudiced by the Impugned Order in admitting the application and initiating 'Corporate Insolvency Resolution Process' as against the 'Corporate Debtor' (Om Boseco Rail Products Ltd., Bengal).

4. During September, 2019, the 2nd Respondent / Operational Creditor projected an application against the 'Corporate Debtor' under section 9 of the 'I&B' Code being C.P. (IB) No.1735/KB/2019 before the 'Adjudicating Authority' ('NCLT') Kolkata Bench, Kolkata and that the said application was taken up for consideration by the 'Adjudicating Authority'. As a matter of fact, the matter was proceeded 'Ex-Parte', since the 'Corporate Debtor' was not represented. After coming to know of the fact that the 'Corporate Debtor' was proceeded ex-parte, an application was filed by the 'Corporate Debtor' in CA No. 107/KB/2020

praying for setting aside the direction given by the 'Adjudicating Authority' whereby among other things, the matter was marked *'ex-parte'*.

5. The Learned 'Adjudicating Authority' after hearing the submissions made in CA No. 107/KB/2020 passed an order on 17.01.2020 by permitting the 'Corporate Debtor' to file its 'Reply Affidavit' on payment of cost of Rs. one lakh to the 2nd Respondent / 'Operational Creditor'. On 03.02.2020, for further consideration, the matter was taken up for consideration and the application of the 'Corporate Debtor' bearing CA No. 107/KB/2020 was dismissed. Although, as directed, the 'Corporate Debtor' had paid the cost, the 'Corporate Debtor' could not file a 'Reply Affidavit' within the time specified by the 'Adjudicating Authority' and no further extension of time in this regard was granted. On 13.03.2020, the matter was fixed for final hearing, in the absence of any 'Reply Affidavit' of the 'Corporate Debtor'.

6. The matter was taken up on 13.03.2020 and the 'Order' was ***'Reserved'***. On behalf of the 'Corporate Debtor' it was submitted that there was a possibility to settle the matter *'Out of Court'*, if some further time was granted and that the parties might arrive at a settlement. In reality, during the pendency of the application, the 'Corporate Debtor' had paid a sum of Rs. 17,80,831 only to the 'Operational Creditor'. Still the 'Adjudicating Authority' proceeded to record that hearing was concluded and order was 'Reserved'. However, it was observed by the 'Adjudicating Authority' that the order was likely to be pronounced after seven days and in the event, settlement was arrived at between the parties during

such period, the same should be reported at once for the purpose of recording *'closure of the proceeding'.*

7. After the hearing was over on 13.03.2020, the 'Corporate Debtor' on 17.03.2020, sent an e.mail to the 'Operational Creditor' giving its proposal for settling the matter out of court. However, soon thereafter because of the COVID-19 pandemic, the lockdown was declared by the Central Government w.e.f. March 25th, 2020 and regular functioning of all 'Courts' and 'Tribunals' all over the country was disrupted.

8. Because of the closure of the 'Adjudicating Authority' ('NCLT') Kolkata Bench since March 23rd, 2020, the matter had not appeared in the '*Cause List*' till May, 20th and that in the meantime, the 'Operational Creditor' had through e.mail dated 01.04.2020 reverted to the 'Corporate Debtor's' e.mail dated 17.03.2020 declining the settlement proposal forwarded by the 'Corporate Debtor' and suggesting an alternative proposal instead.

9. On 16.05.2020, the Learned Counsel on record for the 'Corporate Debtor' received a call from the registry of the 'Adjudicating Authority' wherefrom the 'Corporate Debtor' came to learn that the said application filed by the 'Operational Creditor' would be appearing on May, 20th, 2020 for pronouncement of order by video conferencing. When the said application was taken up on 20.05.2020 through video conferencing the Learned Counsels representing the 'Operational Creditor' and the 'Corporate Debtor' made submissions and that on behalf of the 'Corporate Debtor' to judicial precedents in support of the proposition that amendment to Section 4 of the 'I&B' Code ought to be given a

retrospective application were relied upon. However, the 'Adjudicating Authority' on 20.05.2020 pronounced the impugned order whereby and whereunder the said application was admitted.

Appellant's Contentions

10. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' while passing the impugned order had committed an error in Law and on facts by failing to appreciate that by reason of the amendment to Section 4 of the 'I&B' Code, the application was no longer maintainable in Law and was barred by Law and hence the Authority should have dismissed the application because of the simple reason that the amendment in issue is having retrospective effect.

11. The Learned Counsel for the Appellant submits that in the application, the total claim of the 'Operational Creditor' is Rs. 90,009,19.10 (Rupees ninety lakhs nine hundred and nineteen and ten paise only) which is below the threshold limit of Rs. one crore as the minimum amount of default for the purpose of preferring an application under Sections 7 or 9 and 10 of the 'I&B' Code.

12. The Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had failed to appreciate the ratio of the decision in CP (IB) No. 615/KB/2018 dated 15th November, 2018 (Re: Shri Munisuvrata Agri International Limited) which was affirmed by this Tribunal in Company Appeal (AT)(Ins.) No. 84/2019 dated 24.01.2020. Furthermore, the impugned order was passed by the 'Adjudicating Authority' on the basis of erroneous assumption,

surmises and conjectures apart from that, the 'Adjudicating Authority' had exceeded its jurisdiction wrongly and in fact the application filed by the 'Operational Creditor' under Section 9 of the Code is *per-se* not maintainable, in Law.

13. The Learned Counsel for the Appellant proceeds to point out that the Ministry of Corporate Affairs (MCA) notification of 24.03.2020 specifying the minimum amount of default to be Rs. 1 crore renders the entirety of part II including not only the filing of applications u/s 9(1) of the Code but also their admission u/s 9(5) (i) as inapplicable in respect of defaults below the minimum value of 1 crore, and, therefore, the effect of notification is that any application where the default is less than Rs. 1 crore cannot be admitted, cannot result in appointment of an IRP, cannot result in declaration of moratorium, etc.

14. The Learned Counsel for the Appellant contends that in the decisions of **Hon'ble Supreme Court in 'Thirumalai Chemicals Ltd.' v. 'UOI & Ors.' reported in (2011) 6 SCC at page 739 and 'B.K. Educational Services(P) Ltd.' (2019) 11 SCC 633** that the right conferred on an applicant to file an application under the Code may be a substantive right but the requirement to be meted out for initiating CIRP process upon filing an application under the Code is procedural in nature.

15. It is represented on behalf of the Learned Counsel for the Appellant that a primary duty of the court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in

aid to find that intention and relies on the decisions of **Hon'ble Supreme Court (i) 'Union of India' V. 'Deoki Nandan Aggarwal' (1992) Supplement (1) SCC 323(para 14); (ii) 'Nasiruddin & Ors.' V. 'Sita Ram Agarwal' (2003) 2 SCC page 577 (para 37; and (iii) 'Satheedevi' V. 'Prasana & Anr.' (2010) 5 SCC page 622 (para 12,13).**

16. The Learned Counsel for the Appellant takes a plea that interpretation that language in certain statute cannot be regarded as strictly accurate is not permitted and refers to the decision of **Hon'ble Supreme Court 'Avtar Singh' V. 'State of Punjab' AIR 1965 Supreme Court page 666 para 6.** Further, it is the stand of the Appellant that no part of a statute can be considered to be a surplus age as per decision of **Hon'ble Supreme Court 'Hardeep Singh' V. 'State of Punjab' (2014)3 SCC page 92 (paras 44,45).**

17. The Learned Counsel for the Appellant refers to the decision of **Hon'ble Supreme Court 'Rafiquennessa' V. 'Lal Bahadur Chetri' AIR 1964 Supreme Court page 1511** wherein at paragraph 9 it is observed as under: -

> *".....It is not disputed by him that the legislature is competent to take away vested rights by means of retrospective legislation similarly, the legislature is undoubtedly competent to make laws which over ride and materially affect*

the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the legislature by adopting suitable words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law, no objection can be taken to them. Mr. Chatterjee has relied upon the well-known observations made by Wright, J in Re Athlumney Ex Parte or Wilson (1898) 2 Q.B.D. at page 547, when the learned judge said that it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions do not affect them. He added that there was

one exception to that rule namely that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights. In order to make the statement of the law, relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retrospective operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retrospective either when it is so declared by expressed terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur."

18. The Learned Counsel for the Appellant emphatically projects an argument that the ambit of Section 4 is not confined only to filing of applications u/s 9(1) of the Code, but extends to all matters under part II including the admission of such applications u/s 9(5)(i) is clear from the use of expression *'relating to the Insolvency & Liquidation of Corporate Debtors'* and refers to the decision of **Hon'ble Supreme Court 'Renusagar Power Company Ltd.' V. 'General Electric Company' (1984), 4 SCC page 679 (para 25), followed in 'Govind Prasad Sharma' V. 'Doon Valley Officers Cooperative Housing Society Limited' (2018) 11 SC 501 (para 4); 'Thyssen Stahlunion GMBH' V. 'SAIL (1999) 9 SCC 334 (para 23,24); 'Mansukhlal Dhanraj Jain' V. 'Eknath Vithal Ogale (1995) 2 SCC 665; 'Dhanrajmal Gobindram' V. 'Shamji Kalidas & Co.' AIR 1961 SC 1285; 'Navin Chemicals' V. 'Collector of Customs'-(1993) 4 SCC 320.**

19. Advancing his arguments, the Learned Counsel for the Appellant contends that the advent of notification of 24.03.2020 divests the Learned 'Adjudicating Authority' of jurisdiction in respect of pending applications u/s 9(1) pertaining to the minimum default complained of, which is less than Rs. one crore and there is no vested right in pending proceedings. In this connection, the Learned Counsel for the Appellant refers to the decision of **Hon'ble Supreme Court 'Durga Hotel Complex' V. 'Reserve Bank of India' reported in (2007) 5 SCC page 120 (vide paragraphs 12 to 14)** wherein it was held that the Banking 'Ombudsman' was divested of jurisdiction upon a proceeding being filed before

the 'Debt Recovery Tribunal' although the complaint made before him was prior at point of time.

20. The Learned Counsel for the Appellant cites the decision **'Sefali Roy Chowdhury' V. 'A.K.Dutta' 1976 (3) Supreme Court Cases at page 602** at special page 606 wherein at paragraph 6 it is among other things observed as follows:-

> *".....According to him the suit must continue to be governed by the 1950 Act even after its repeal in view of Section 40 unaffected by the provisions of the 1956 Act. Section of 40 of the 1956 Act keeps alive a proceeding pending on the date when the 1950 Act was repealed as if it is still in force and has not been repealed. This however, does not mean that even if the 1956 Act created a new right in favour of the sub-tenant, he would be denied this right because a suit for ejectment was pending against him when the Act came into*

force. 'Tenant' as defined in Section 2(h) of the 1956 Act includes a person continuing in possession after the termination of his tenancy until a decree or order for eviction has been made against him. A sub-tenant is also a tenant and when the order under Section 16(3) was made no decree or order for eviction had been passed against him. That being so, we do not see why he should not be entitled to the benefit conferred by Section 16(3). The intention of the legislature which is paramount, is clear – to upgrade the sub-tenant and make him a tenant directly under the superior landlord. This is a new right given to the sub-tenant and though the pending proceeding may continue to be regulated by the repealed statute in view of Section 40, there is nothing in that section

to suggest that sub-tenant against whom a suit was pending will be denied this additional right. The High Court has held that effect of the order under Section 16(3) must be considered in the suit. Thus the suit may continue inspite of the repeal of the 1950 Act, but the right acquired by the sub-tenant under the 1956 Act has to be given effect to and the suit decided accordingly. It must therefore be held that the relationship of landlord and tenant ceased between the parties on the date when the order under Section 16(3) was made."

21. Also, on behalf of the Appellant, the following decisions are referred to: -

(a) In the decision **'Rao Shiv Bahadur Singh' V. 'State of 'Vindhya Pradesh' AIR 1953 Supreme Court at page 394** wherein at paragraph 10 and 24 it is interalia observed as under: -

"10.....It cannot therefore be doubted that the phrase "law in force" as

used in Article 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of legislature to pass retrospective laws it follows that if the appellants are able to substantiate their contention that the acts charged as offences in this case have become such only by virtue of Ordinance 48 of 1949 which has admittedly been passed subsequent to the commission thereof, then they would be entitled to the benefit of Article 20 of constitution and to have the convictions set aside etc."

"24. As regards the amendments in the Criminal Procedure Code brought about by Ordinances 15 of 1948 dated 31st December, 1948, and 27 of 1949 dated 3rd May, 1949, no detailed consideration is necessary in view of what has been

held at the outset that the constitutional objection under Article 20 does not apply to a change in procedure or change of code. Items 62 and 63 of Section 2 of Ordinance 15 of 1948 would seem to indicate that the jurisdiction which the criminal courts of Vindhya Pradesh previously had to tried extra-territorial offences was probably lost thereby. If so, the jurisdiction was restored under Ordinance 27 of 1949 by the amendment thereby of the said items 62 and 63 thus bringing it into line with section 188 of the Criminal Procedure Code, with a requisite adaptation. Hence, the power of the Vindhya Pradesh courts to hold trials for extra-territorial offences which was probably interrupted from 31st December, 1948 was restored on 3rd May, 1949, before the trial in this case, commenced with retrospective operation i.e. as from the date of the prior Ordinance i.e. 31st December, 1948."

22. In the decision of Hon'ble Supreme Court '**Securities and Exchange Board of India' V. 'Classic Credit Ltd.' (2018) 13 Supreme Court Cases at page 1** at special page 3 wherein it is observed as follows: -

> *"Procedural amendments are presumed to be retrospective in nature, unless the amending statute expressly or impliedly provides otherwise. Generally change of "forum" of trial is procedural, and normally following the above proposition, it is presumed to be retrospective in nature unless the amending statute provides otherwise. Change of "forum" being procedural, the amendment of the 'forum' would operate retrospectively irrespective of whether the offence allegedly committed by the accused was committed prior to the amendment."*

23. The Learned Counsel for the Appellant submits that Section 6 of the General Clauses Act does not confer any vested right in pending legal proceeding and that Section 6 only relates to the effect of repeal of provisions and the omission of the minimum default specified in Section 4 of the 'I&B' Code earlier to the notification of 24.03.2020 is not a repeal one and refers to the decisions of **Hon'ble Supreme Court (a) 'Rayala Corporation' V. 'Directorate of Enforcement' (1969) 2 SCC 412; (b) 'Kolhapur Canesugar Works Ltd.' V. 'UOI' (2000) 2 SCC 536; 'General Finance Co.' V. 'Assistant Commissioner of Income Tax' (2002) 7 SCC 1 (para 4).**

24. It is the contention of Learned Counsel for the Appellant that Section 6 of the General Clauses Act provides for the effect of the Appeal unless a contrary 'intention appears' and further that the contrary intention in the instant case is apparent from the language of Section 4 of the Code itself which relates to the entirety of part II of the Code. Besides this, it is the submission of the Learned Counsel for the Appellant that even if it be held that no different intention appears, section 4 of the Code being procedural in nature, the notification of 24th March, 2020 must have '*Retrospective Operation'*.

25. The Learned Counsel for the Appellant contends that Laws are made justly for the benefit of individuals and the community as a whole may relate to a time antecedent to their commencement and that the presumption against retrospectivity may in such cases be rebutted by necessary implication from the

language employed in the statute as per decision of the **Hon'ble Supreme Court in 'Mithilesh Kumari' V. 'Prem Bihari Khare' (1989) 2 SCC page 95.**

26. Apart from that, an argument is advanced on behalf of the Appellant that the presumption against retrospective operation is not applicable to curative or declaratory statutes as per decision of the **Hon'ble Supreme Court 'Zile Singh' V. 'State of Haryana' (2004) 8 SCC 1 (para 14).** Also that, a plea is projected on the side of the Appellant that a new Law is made to cure and acknowledge evil for the benefit of community as a whole and in short from a holistic reading of Section 4 coupled with Section 9(1) and Section 9(5)(i) of the 'I&B' Code and together with the rules of statutory interpretation, there can be no modicum of doubt that it is the intendment of the Ministry of Corporate Affairs, Govt. of India for the notification of 24.03.2020 to have retrospective operation barring the admission of pending applications which alleged default below the minimum threshold of Rs. 1 crore.

27. The Learned Counsel for the Appellant submits that the impugned order passed by the 'Adjudicating Authority' is not sustainable pursuant to the notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Govt. of India.

Pleas of 1st Respondent

28. Section 12 of the 'I&B' Code prescribes that within 330 days whole process of CIRP has to be completed and the period of 330 days includes the period of

litigations also and already 54 days had gone by any further extension may go against smooth completion of CIRP to maximizing the value for the stakeholders. Moreover, Regulation 27 provides that *'Valuers'* have to be appointed within 47 days of commencement of CIRP. In fact, Regulation 36(1) provides for release of IM with 54 days and Regulation 36A provides for publication of form G by the IRP within 75 days of CIRP commencement and any further extension of stay to hold the meeting of 'Committee of Creditors' to ensure various compliances and some peculiar and regular issues are required to be taken up by the 'Committee of Creditors'.

Submissions of 2nd Respondent

29. The Learned Counsel for the 2nd Respondent submits that the notification dated 24.03.2020 cannot have retrospective effect because of the fact that Section 9 of the 'I&B' Code provides substantive right to file an application to initiate CIRP which cannot be taken away on a future date with retrospective effect.

30. The Learned Counsel for the 2nd Respondent submits that a statute which normally changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation unless otherwise provided, either expressly or by necessary implication as per decisions **(i) 'Hitendra Vishnu Thakur & Ors.' V. 'State of Maharashtra & Ors.' 1995 CRI LJ 517 (ii) 'Shyam Sunder' V. 'Ram Kumar & Anr.' (2001) 8 SCC 24 (iii) 'Janardan Reddy' V. 'The State' (1950) 1 SCR 940.**

31. It is represented on behalf of the Learned Counsel for the 2nd Respondent that under *'Delegated Legislation'* could not issue a 'Notification' with retrospective effect or to deprive the rights already accrued to the parties at the time of filing of the petition and refers to the **Hon'ble Supreme Court decisions (1) Dr. Indramani Pyarelal Gupta V. 'W.R. Nath & Ors.', April 11, 1962, AIR 1963 SC 274 (ii) 'Bakul Cashew Co. & Ors.' V. 'Sales Tax Officer & Anr.' Quilon, March 12, 1986, 1987 AIR 2239, 1986 SCR (1) 610.**

32. The Learned Counsel for the 2nd Respondent brings it to the notice of this Tribunal that in the present case multiple defaults took place in 2018 and that the 'Demand Notice' was issued on 31.07.2019 and that the petition or application was filed in form 5 on 05.09.2019. In this connection, the Learned Counsel for the 2nd Respondent comes out with an argument that a conjoin reading of the definition of the term *'Default'* together with the provisions of Section 4, 8 and 9 of 'I&B' Code would show that an 'Operational Creditor' acquires the right to come under the provisions of the Code by issuing a 'Demand Notice' u/s 8 on the occurrence of default.

33. The Learned Counsel for the 2nd Respondent takes a stand that the scheme of Section 9 would exhibit that once an application or petition has been filed u/s 9(1) of the Code, the same must be admitted, if the conditions are satisfied as per Section 9(5) r/w Section 9(2) to Section 9(4). Added further, the expression in Section 4 of the 'I&B' Code that this section shall apply to part II of IBC, 2016 refer to the machinery of the statute and the provisions as applicable at the time

of filing the application or petition would continued to be applied inspite of subsequent amendment as the right of action being a substantive right cannot be affected as per decision of **Hon'ble Supreme Court in 'Govind Das & Ors.' V. 'Income Tax Officer & Ors.' reported in AIR 1977 Supreme Court page 552.**

34. The Learned Counsel for the 2nd Respondent submits that the 'Adjudicating Authority' had admitted the C.P. (IB) No.1735/KB/2019 after ensuring:- (i) That there were defaults by the Corporate Debtor in payment of the Operational Debt, (ii) That Demand Notice was duly served on the corporate debtor, (iii) Application/petition under Section 9 of IBC 2016 was in accordance with section 9 and was complete, (iv) The propose IRP does not have any pending disciplinary cases (v) Notice was served on the corporate debtor by post and by email, (vi) Corporate debtor submitted at NCLT that the notice was received by post but the director overlooked it. It was also submitted that the email at which notice was mailed is not in use even though the said email is as per the records of the Ministry of Corporate Affairs, (vii) That the Corporate debtor failed to submit any reply even after liberty to file within extended time was granted.

Appellant's Reply

35. According to the Learned Counsel for the Appellant, the proviso to Section 4 of the Code clearly gave power to the Central Government to make such notification and as the said proviso is not incompatible with or contrary to any

specific provision of the 'I&B' Code, the Central Government was well within its right to make the notification '*Retrospective'* in its operation.

36. The Learned Counsel for the Appellant points out that in the decision of **Hon'ble Supreme Court 'Dr. Indramani Pyarelal Gupta V. 'W.R. Nath & Ors.', April 11, 1962, AIR 1963 SC 274** at paragraph 14 it is observed that – "What we are here concerned with is whether it is legally competent to vest a particular power in a statutory body, and in regard to this, the proper rule of interpretation of this would be that unless the nature of the power is such as to be incompatible for the purpose for which the body is created, or unless the particular power is contra-indicated by and specific provision of the enactment bringing the body into existence, any power which would further the provisions of the act could be legally conferred on it".

37. Apart from that, in the aforesaid decision at paragraph 27 "it is clear law that a statute which could validly enact a law with retrospective effect, in expressed terms validly confer upon a rule making authority a power to make a rule or frame a byelaw having retrospective operation."

38. It is the stand of the Appellant that the proviso to Section 4 of the 'I&B' Code clearly gave the Central Government power to make such notification and that the Central Government is well within its rights to make the notification retrospective in its operation, because of the fact that the said proviso is not contrary to any specific provision of the 'I&B' Code.

Legal Scenario

39. Be it noted, that a 'Statute' is an edict of Legislature. Further, a 'Statute' is to be construed according to the intent of those that make it as per decision **'Stock' V. 'Frank Jones Tipton Ltd.' (1978) All ER 948, 951.** As a matter of fact, the duty of '*Judicature'* is to act based on the true intention of the legislature – the mens or sententia legis.

40. It must be borne in mind that the correct interpretation is one that best harmonises the words with the object of the 'Statute'. If two interpretations are quite possible, the Court / Tribunal is to prefer that which advances the remedy and suppress the mischief as the legislature envisaged. Further, a construction giving rise to anomalies should be avoided as per decision of the **Hon'ble Supreme Court 'Veluswami Thevar' V. 'G.Raja Nainar' reported in AIR 1959 Supreme Court p 422 at 427, 428.** Also, that in the decision 'Grundy' V. 'Pinniger' (1852) 1 De GM & G 502 it is observed that *'to adhere as closely as possible, to the literal meaning of the words used" according to Lord Cranworth (when Lord Justice) a 'Cardinal Rule from which if he depart', we launch into a sea of difficulties which it is not easy to fathom."*

41. At this stage, this Tribunal worth recalls and recollects the decision of **Hon'ble Supreme Court 'Atlas Cycles Industries Ltd.' V. 'State of Haryana' AIR (1977) Supreme Court p.121** wherein it is observed that the word *'Notification'* is normally employed in the context of conditional legislation e.g. to bring into operation the enabling Act or to grant exemptions from its provisions or to extend its operation to the new persons or objects. It is to be pointed out that

just because a *'Notification'* substitutes something in an earlier notification, the substitution cannot have retrospective operation.

42. It is to be remembered that the aim oriented approach, however, is not to be carried to the extent of causing violence to the plain language used by re-writing the section or substituting the words in place of the actual words employed by the Legislature. According to Viscount Simon L.c. the Golden rule is that the words of 'Statute' must Prima facie be given their ordinary meaning as per decision 'Nokes' V. 'Doncaster Amalgamated Collieries Ltd.' (1940) A.C. 1014.

43. In the words of Lord Brougham, the rule of construction is *'to take the words as the Legislature have given that and to take the meaning which the words naturally imply, unless the construction of those words is either by the preamble or by the context of the words in question controlled or altered'* as per decision **'Crawford' V. 'S Pooner' (1846) 4 MIA 179 at 181.**

Analysis

44. Before the 'Adjudicating Authority' the 2nd Respondent / Applicant / Operational Creditor (Foseco India Ltd.) filed an application for commencing the 'Corporate Insolvency Resolution Process' as per Section 9 of 'I&B' Code r/w Rule 6 of the Insolvency & Bankruptcy(Application to Adjudicating Authority) Rules, 2016 in the form 5 filed by the 2nd Respondent / Operational Creditor in part-IV S.No. 1, the total amount of debt is mentioned as 'Principal amount of debt: Rs. 78,52,663.00 (Rupees seventy-eight lakhs fifty-two thousand six hundred and sixty-three only) plus interest upto 31st July, 2019 @ PLR + 1%: Rs. 11,48,256.10 (Rupees eleven lakhs forty-eight thousand two hundred and fifty-six ten paise

only). The total debt was mentioned as Rs. 90,00,919.10 (Rupees Ninety Lakh Nine Hundred Nineteen and Ten Paisa only). According to the 2nd Respondent / Operational Creditor the total debt as on August 26th, 2019 was Rs. 90,68,563.96.

45. In fact, the dates of default were (i) 11.4.2018, 28.4.2018 and 17.6.2018 the date of demand notice was on 31.07.2019. The Section 9 Application was filed before the 'Adjudicating Authority' on 5.9.2019. The date of first hearing was on 17.10.2019 and on 20.12.2019 an Ex-parte order was passed. The 'Corporate Debtor' was provided with an opportunity to project its reply on 17.01.2020 and prayed for further time on 03.02.2020 etc. Further, 'order' was reserved on 13.03.2020 and the same was pronounced on 20.05.2020.

46. A mere glance of the letter dated 17.03.2020 of the Director of the 'Corporate Debtor' addressed to the 2nd Respondent / Operational Creditor merely points out that the business of the Company was severely affected and that the 'Bank Account' of the Company became 'NPA' and further that out of the total dues of Rs. 60,71,832/-, starting 1st April, 2020 it would like to pay of the remaining amount in 15 monthly instalments, wherein the 1st three instalments will be of Rs. 2,00,000/- each and the 4th to the 14th instalment will be of Rs. 5 lakh each and the 15th instalment will be Rs. 4,71,832/- thus liquidating the total dues. Also, in the said letter it was mentioned that the 'Corporate Debtor' would hand over the first PDC for Rs. 2,00,000/- to the Operational Creditor on or before 27th March, 2020 and the remaining instalments would be paid through RTGS and such transfer would be done by 15th of every month.

47. In the instant case on hand, it is crystalline clear that the 'Corporate Debtor' had accepted and agreed to make payment of the outstanding debt, as rightly observed by the 'Adjudicating Authority' in the impugned order. In short, no iota of any dispute / controversy was raised by the 'Corporate Debtor'. The 2nd Respondent / Operational Creditor issued a Demand Notice to the 'Corporate Debtor' owing to the failure in effecting payment of the outstanding debt. In reality, the Demand Notice was served on the 'Corporate Debtor' on 01.08.2019, which is not disputed. For the Demand Notice in issue, the 'Corporate Debtor' had not given any reply to the 2nd Respondent / Operational Creditor. Although, adequate opportunities were provided to the 'Corporate Debtor' by the 'Adjudicating Authority' no endeavor was made to make payment in respect of the outstanding debt.

48. The 2nd Respondent / Operational Creditor before the 'Adjudicating Authority' had produced the statement of 'Bank Account' and also an Affidavit and as such the 2nd Respondent / Operational Creditor had fulfilled the requirements as per the ingredients of 'I&B' Code. To put it succinctly, there was no payment made on the part of the 'Corporate Debtor' after receipt of Demand Notice from the 2nd Respondent / Operational Creditor. Hence, this Tribunal without any haziness comes to a consequent conclusion that the 'Adjudicating Authority' had rightly admitted the application and in this regard, there is no legal flaw, as opined by this Tribunal.

49. Dealing with the aspect of as to whether the notification issued by the Jt. Secy. of Ministry of Corporate Affairs, Govt. of India dated 24.03.2020 in Section

4 of the 'I&B' Code has a retrospective or prospective effect, at this juncture, this Tribunal makes a useful reference to the said notification which runs to the effect **"S.O. 1205(E).- In exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section".**

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50. The plea taken on behalf of the Appellant is that the amendment which was introduced in Section 4 of the 'I&B' Code was retrospective in nature and would apply to the date of commencement. *Per contra*, the stand of the 2nd Respondent / Operational Creditor is that Section 9 of the Code provides substantive right to file an application in triggering the 'Corporate Insolvency Resolution Process' which cannot be taken away on a future date with retrospective effect. Further, the Learned Counsel for the 2nd Respondent points out that when a 'Statute' which changes not only the procedure but also confers / creates new rights and liabilities, the same shall be construed to be prospective in operation unless otherwise provided, either expressly or by necessary implication.

51. It is significant to point out that the 'Duty of Judges' is to expound and not to legislate is a primordial rule. Moreover, the transience of justice at the hands of Law troubles a judge's conscience. It is an axiomatic principle in Law that a judgement / an order of a Court of Law / Tribunal is to be written after much travail and productive disposition. As a matter of fact, the judicial key to

the construction is the composite perception of the *'Deha'* and the *'Dehi'* of the provision as per decision of **Hon'ble Supreme Court reported in 'Chairman, Board of Mining Examination and Chief Inspector of Mines' V. 'Ramjee' AIR 1977 Supreme Court page 965, 968.**

52. According to the Learned Counsel for the 2nd Respondent in respect of the pending proceedings the *'state of affairs'* remains unaffected by the changes in Law, when they pertain to the determination of substantive rights. Further, in the absence of clear indication of a contrary intention in the notification issued on 24.03.2020 by the Ministry of Corporate Affairs, Government of India, then the substantive rights of individuals to an action is to be decided by the Law that existed when the action was initiated / commenced as the case may be.

53. Indeed, in the present case, notwithstanding the fact, the Central Government is delegated with a power to quantify the amount of default at any time after the enactment of the 'I&B' Code, this power will not deprive / deny the right which had already accrued to the concerned stakeholders, (including the 2nd Respondent / Operational Creditor) at the time of projecting the C.P. (IB) No.1735/KB/2019 before the 'Adjudicating Authority'.

54. Section 3(12) of the 'I&B' Code defines *"default"* meaning non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not (paid) by the debtor or the corporate debtor, as the case may be. Section 4 of Chapter I preliminary speaks of 'Application of this Part' [Part III]. Section 8 of the Code deals with 'Insolvency resolution by operational

creditor'. Section 9 pertains to 'Application for initiation of corporate insolvency resolution process by operational creditor'.

55. It is to be remembered that on the occurrence of default, the operational creditor gets the right to trigger the 'CIRP' process. Section 9(1) of the Code confers a substantive right to file and to initiate 'CIRP' against the corporate debtor. It is needless for this Tribunal to point out that upon an application / petition being filed by the concerned person in terms of the ingredients of Section 9(1) of the Code and the default sum is quite in tune with Section 4 of the Code, the application / petition is to be admitted by the 'Adjudicating Authority', of course subject to the ingredients of Section 9(2) to Section 9(5) of the Code.

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 whereunder 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 take or make it retrospective as in this regard, the relevant words are conspicuously absent and besides there being no implicit inference to

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 a 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 IBC (waiting for admission), prior to the issuance of the aforesaid notification, as opined by this Tribunal. Viewed in the above prospectives, 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 free from legal infirmities. Resultantly, the instant Appeal fails.

Result

In fine the present Appeal is dismissed. No Costs.

All pending Interlocutory Applications are closed. However, the Appellant is directed to file the certified copy of the impugned order dated 20.05.2020 of the 'Adjudicating Authority' within one week from today.

[Justice Venugopal. M]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI

12th October, 2020

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