



सत्यमेव जयते

National Company Law Tribunal



Advocates
& Solicitors

M/s Siemens Gamesa Renewable Power Pvt. Ltd. vs. Ramesh Kymal

CITATION IA/395/2020 in IBA/215/2020

DATE 09 July 2020

BENCH The National Company Law Tribunal, Division Bench-I, Chennai

CORAM R. Varadharajan, Anil Kumar B

BRIEF FACTS:

- In the present case, Mr. Ramesh Kymal (“**Operational Creditor/Respondent**”) filed a petition on 11.05.2020 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) against M/s Siemens Gamesa Renewable Power Pvt. Ltd. (“**Corporate Debtor/ Applicant**”) making a claim of INR 101.11 Crore against the Corporate Debtor.
- However, during the pendency of the proceedings, Ordinance (No. 9 of 2020) was promulgated on 05.06.2020 thereby inserting section 10A to the Code, which suspended initiation of Corporate Insolvency Resolution Process (“**CRP**”) under Section 7, 9 and 10 of the Code for any default arising on or after 25.03.2020 for a period of six months (extendable up to one year).
- Thereafter, provoked by this ordinance, the Corporate Debtor filed an Application before National Company Law Tribunal, Chennai (**Hon’ble Tribunal**) seeking to dispose of the main petition filed by the Operational Creditor/Respondent under Section 9 of the Code on the ground that as the date of default is 30.04.2020, hence the initiation of proceedings under Section 9 are suspended by virtue of Section 10A.

CONTENTIONS OF THE APPLICANT:

- It is clear from the main application and Demand Notice dated 30.04.2020 that the date of the default, committed by the Corporate Debtor, is 30.04.2020, which is posterior to the date from which the Ordinance was made retrospectively applicable i.e. 25.03.2020.
- Reliance was placed on *Zila Singh v State of Haryana [2004 (8)SCC 1]* wherein it has been held that it is open for the legislature to enact laws having retrospective operation which can be achieved by express intendment or by necessary implication from the language employed.
- Further Reliance was placed on *Afcons Infrastructure limited v Cherian Varkey Construction Ltd. [Civil Appeal No. 6000 of 2010]* wherein the Court held that literal rule should apply while interpreting a statute by courts where the words of statute are clear and unambiguous. It is only in exceptional cases when faced with an apparently defective provision in the statute, recourse to other principles of interpretation can be applied.
- Reliance was also placed on *Bharat Singh v Management of New Delhi Tuberculosis Centre [1986 (2) SCC 614]*, where Supreme Court has held that retrospective effect to a statute can be given even to pending proceedings or even when the awards have been passed by the tribunals a couple of days prior to the enactment of the statute.
- The term ‘shall be filed’ used in the main provision of section 10A is intended to cover both the pending application filed in relation to defaults which occurred on or after 25th March 2020 or the future application that may be filed.

CONTENTIONS OF RESPONDENT:

- As the petition was already filed on 11.05.2020 and heard twice on 19.05.2020 and was adjourned for final hearing before the promulgation of the ordinance on 05.06.2020 so the proceedings should continue in IBA 215 of 2020 and not to be suspended as sought by the Applicant trying to take shelter under Section 10A of the Code.
- Filing of this Application itself demonstrates the admission of default on the part of Applicant in relation to the claim hence, IBA 215 of 2020 should be admitted and consequently CIRP should be initiated against the Corporate Debtor.

- Section 10A is available only to those who have in effect committed a default in the context of section 7 or section 9 of IBC Code and such default arises out of **financial distress** due to the COVID Pandemic being prevalent. The financial distress in the present case didn't arise out of COVID.
- Reliance was placed on *Gokuldas Pagaria v. Parmanand Chaurasia* [AIR 1967 MP 265] to emphasise on the fact that a right to continue a proceeding already instituted is in the nature of vested or substantive right and cannot be taken away except by clear indication of intention to that effect by an express provision in the statute.
- Reliance was also placed on the case of *Chandrasinghmanibhai v Surjit Lal Ladhamal* [AIR 1951 SC 199] wherein the Supreme Court held that the term 'shall be filed' is to be construed in relation to suits which may be instituted after the Act comes into force. It cannot apply to already pending suits.
- The case of *Arrowline Organic Products Pvt Ltd v Rockwell Industries Ltd*, [I A/341/2020 in IBA 1031/2019] was also cited to state that the substantive right which had accrued to the respondent cannot be taken away by the amendment to the Code by insertion of Section 10A.

FINAL ORDER:

- The Hon'ble Tribunal held that as the date of default is 30.04.2020, which is after the relevant date (25.03.2020) provided under the Ordinance by which bar has been created for initiation of CIRP under Section 7, 9 and 10, hence no proceedings can be initiated against the Corporate Debtor.
- In this regard, the Hon'ble Tribunal observed that the provisions of section 10A taken together with the explanation makes it clear that a '**Lakshman Rekha**' has been demarcated by providing a relevant date of 25.03.2020 in relation to a default and for filing an application for initiation of CIRP against the Corporate persons for the default occurring on or thereafter. It was observed that the date of 25.03.2020 was chosen because it happens to be the same day when the **nation-wide lockdown** was implemented to combat the spread of COVID -19.
- The Hon'ble Tribunal held that **Section 10A relates back to the date of 25.03.2020** in reckoning the date of default, even though the Ordinance got Promulgated only on 05.06.2020 , and in case the default had occurred on or after 25.03.2020 then this Tribunal should desist from entertaining such an application, even though filed between the date of 25.03.2020 and 05.06.2020 that too both the dates being within the six month period initially specified under Section 10A and in view of the interdiction imposed by the Code itself in relation to filing a Section 7,9 and 10 application ever in relation to defaults arising on or after 25.03.2020 for a period of six months therefrom extendable up to a period of one year by virtue of the newly inserted Section 10A in the Code and the words and terms of the statute leave no doubt and expressly provide for the same and there is no ambiguity in this regard.
- Deciding on issue of retrospective application of a statute, the Hon'ble Tribunal observed that none of the cases cited by the Respondent can be relied upon. Reliance was placed on *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v Subbash Chandra Sinha* (1962 2 SCR 159) wherein the Supreme Court held that while it was ordinary rule that substantive rights should not be held to be taken away except by express provision or clear implication, many acts, though prospective in form, have been given retrospective operation, if the intention of the legislature is apparent. There is more so,

when Acts are passed to protect the public against some evil or abuse. Therefore, it was held that a legislation can have retrospective application affecting even in relation to substantive or vested rights accrued.

- The Hon'ble Tribunal observed that the proviso to the main provision to section 10A makes it abundantly clear that the hands of the clock were not required to be temporarily frozen for a period of six months or such further period not exceeding one year but are required to be permanently interdicted in relation to defaults occurring on or after 25.03.2020 by the use of “**no application shall ever be filed**’ for initiation of CIRP of a corporate debtor for the said default arising during the said period.
- It was observed that the proviso on the other hand to Section 10A is in recognition of the **doctrine of frustration** of a contract or obligation arising out of the pandemic coupled with the Lockdown enforced on and from 25.03.2020 which makes the performance under the agreement to do an act, namely pay the debt due of which default had arisen, not possible being the presumption of law made and in the circumstances, even though there is a default in terms of either Section 7 or Section 9 of the Code committed on the part of the Corporate Debtor, however should not be allowed to be the ground for the initiation of the CIRP upon filing of an application forever by a creditor in relation to the period specified in the main provision of Section 10A.
- It was further observed that the Ordinance is intended to shield the entire body of Corporate Debtors, irrespective of the reasons attributable to such default arising during the said period commencing from 25.03.2020. Hence the contention of the Respondent that the COVID situation didn't have any impact in relation to the arrangement with the Respondent has no relevance in the instant case.
- With respect to the date of default, it was observed that the application filed by the Applicant seeking for the invocation of Section 10A in relation to the main petition is somewhat akin to an application that may be filed by defendant under **Order 7 Rule 11 of CPC** seeking for a rejection of plaint under clause (d) that the suit is barred by law. The Tribunal relied on **Sopan Sukhdeo Sable and others V. Assistant Charity Commissioner and others** (2004) 3 SCC 137 wherein the Apex Court, discussing the scope of Order 7 rule 11 CPC, held that the stage at which the suit is pending is not material and the defendant is entitled to challenge the maintainability of a suit at any stage before the conclusion of the trial. In view of the mandatory language of ‘shall’ being the onus is on the court to perform its obligations in case of an infirmity in rejecting the plaint.
- Hence, the Hon'ble Tribunal held that similarly, it is not required to look any further and the counter statement/reply statement and the pleadings contained therein becomes irrelevant on the basis of the proviso to section 10A which contains the phrase ‘shall ever be filed’.
- Finally the Hon'ble Tribunal held that it cannot proceed any further in relation to the petition in IBA/215/2020 due to the bar created by law, namely section 10A of the Code by virtue of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 promulgated by the Executive and published in the Gazette of India on 05.06.2020. Therefore, the Hon'ble Tribunal allowed the application viz. IA/395/2020 and rejected the main application IBA/215/2020 filed by the Respondent/Operational Creditor.