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CAN THE BENEFIT OF SECTION 10A OF THE IBC BE EXTENDED TO PERSONAL GUARANTORS - AMIT JAIN VS. SIEMENS CASE STUDY

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1. Introduction

1.1 Chapter II under Part II of the Insolvency and Bankruptcy Code, 2016 (IBC) deals with Corporate Insolvency Resolution Process (CIRP). Sections 7 and 9 provide for initiation of CIRP against a corporate debtor by financial creditor and operational creditor respectively. Section 10 provides for initiation of CIRP by the corporate applicant itself. Where a default has been committed, persons or entities have the statutory remedy available under the respective sections of the IBC.

1.2 March 2020 witnessed the onset of Covid-19 pandemic across the world which led to a complete national lockdown wherein individuals and businesses suffered huge losses and defaults were expected to be a common occurrence.

1.3 To ensure that entities are protected from CIRP proceedings while suffering the economic downfall of the pandemic, the legislature introduced a temporary suspension of Sections 7, 9 and 10 of the IBC during the period affected by the pandemic.

1.4 Section 10A was introduced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020. It stated that no application for initiation of CIRP of a corporate debtor shall be filed in matters of defaults arising on or after 25.03.2020. The bar on filing was to remain applicable for a period of six months and was extended for another six months.

1.5 It stood clear that Section 10A was applicable to corporate debtors, however, questions arose as to whether such protection could be extended to personal guarantors when the amendment did not expressly mention so.

1.6 Similar question arose before the National Company Law Appellate Tribunal (NCLAT) in *Amit Jain vs. Siemens Financial Services Pvt. Ltd.* (2022 SCC OnLine NCLAT 347).

2. Brief Facts

2.1 The Financial Creditor (Respondent) and the Corporate Debtor (Principal Borrower) entered into a loan agreement where the Appellant (Amit Jain) stood as the Personal Guarantor. The Principal Borrower defaulted in repaying the loan amount in 2020. The account of the Principal Borrower was declared as NPA on 11.09.2020 (when the bar on initiation of CIRP against corporate debtors was still subsisting).

2.2 The Respondent filed an application under Section 95 of the IBC before the National Company Law Tribunal (NCLT) against the Personal Guarantor (Appellant) for initiation of CIRP. NCLT admitted the application and ordered initiation of moratorium and issued notice upon the Appellant.

2.3 Under Part III of the IBC, insolvency proceedings can be instituted against personal guarantors in case of default committed by the corporate debtor.

2.4 Aggrieved by the decision of the NCLT, the Appellant filed an appeal before the NCLAT. The NCLAT adjudicated on the issue of whether the benefit of Section 10A could also be claimed by personal guarantors thus enforcing the bar in cases under Section 95 of the IBC as well for defaults arising between 25.03.2020 to 24.03.2021.

3. Arguments/ Submissions

3.1 The Appellant argued that a personal guarantor only becomes liable in case of default on the part of corporate

debtor and thus the interpretation given to Section 10A must be such that it protects the personal guarantors also.

3.2 When the default of corporate debtor is covered under Section 10A, it must also necessarily imply that it covers personal guarantors since they are not the principal borrower in effect.

3.3 The Respondent argued that the provision of Section 10A is clear and unambiguous in so far as it applies to Sections 7, 9 and 10 and not to Section 95 of the IBC. Sections 7, 9 and 10 deal with procedure of initiation of CIRP against corporate debtors while Section 95 relates to insolvency proceedings against personal guarantors.

4. Observations

4.1 The NCLAT observed that the object of insertion of Section 10A of the IBC was to insulate the corporate debtors from the threat of insolvency resolution process in relation to defaults committed during the lockdown.

4.2 Relying on the provisions of IBC the NCLAT also observed that Section 10A relates to CIRP under Sections 7, 9 and 10 of the IBC and that no corresponding amendment to such effect was made in Part III (in relation to Section 95) of the IBC which explains the intent of the legislature to make such provision/protection applicable only to corporate debtors.

4.3 The NCLAT relied on principles of statutory interpretations which is that when the words of the statute are clear and unambiguous, literal interpretation has to be given to such words irrespective of the consequences.

4.4 In *Lalu Prasad Yadav vs. State of Bihar* (2010) 5 SCC 1, the Supreme Court held that the words of the statute must be interpreted according to the intent of the Parliament which enacted the provisions. The Court must refrain from literal interpretation only in cases where the plain meaning of the language leads to anomaly, injustice or absurdity. The Supreme Court relied on *Qubec Railway vs. Vandry* which held that it is not permissible for courts to add words to a statute or repair an omission in the Act except under special circumstances that justify the same.

4.5 In *Nemai Chandra Kumar vs. Mani Square Ltd.* (2015) 14 SCC 203, it was clarified that the golden rule of interpretation is to resort to the plain/literal meaning of the words used in the statute.

5. Decision

5.1 On a plain reading of Section 10A of the IBC, the NCLAT held that such provision is capable of only one meaning, i.e., the suspension on initiation of CIRP is only applicable in case of corporate debtors. The protection provided by the legislature cannot be extended to personal guarantors.

5.2 The decision of whether personal guarantors should be protected in respect of defaults committed during the pandemic is a policy decision which falls within the domain of the legislature. Had the legislature intended to suspend the provisions of Section 95 as well, the same would have been clarified or a similar amendment would have been made under Part III of the IBC.

5.3 The NCLAT also held that the statutory scheme does not contain any indication that the protection must be extended to personal guarantors. Thus, the contention of the Appellant was rejected.

6. Conclusion

6.1 The provision under Section 10A of the IBC maybe an example of legislative unfairness since the financial impact of the pandemic was faced equally by both individuals as well as entities alike and hence excluding the personal guarantors from the scope of protection under Section 10A may not be based on rational reasoning. However, the wisdom of the legislature has till date not been challenged before the Hon'ble Courts.

6.2 The interpretation of Section 10A provided by the NCLAT in *Amit Jain* case falls in line with the decision of the Supreme Court in *Mahendra Kumar Jajodia vs. State Bank of India* wherein it was held that personal guarantors can be made liable even before any action is taken against the corporate debtor under the IBC.

6.3 This clarifies that the liability of the personal guarantor is co-extensive with the principal borrower and the recovery in respect of a default may be made from either of the parties. Thus, the vulnerability of personal guarantors continues even after introduction of Section 10A of the IBC.

A copy of the judgment is annexed hereto at **page 3 to 7**.

2022 SCC OnLine NCLAT 347

In the National Company Law Appellate Tribunal[±]
(BEFORE ASHOK BHUSHAN, CHAIRPERSON, M. SATYANARAYANA MURTHY, MEMBER (JUDICIAL)
AND BARUN MITRA, MEMBER (TECHNICAL))

Amit Jain ... Appellant;
Versus

Siemens Financial Services Pvt. Ltd. Through its authorized
representative Mr. Vaibhav Priyadarshi ... Respondent.

Company Appeal (AT) (Insolvency) No. 292 of 2022[±]

Decided on August 23, 2022

Advocates who appeared in this case:

Mr. Simran Jyot Singh and Mr. Sahil Yadav, Advocates for the Appellant;

Mr. Ashwini Kr. Singh, Advocate for the Respondents.

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.:— This Appeal has been filed against the order dated 03.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench IV in an application under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') filed by the Respondent against the Appellant - the Personal Guarantor. By impugned order the Adjudicating Authority ordered to initiate interim moratorium under Section 96 and further appointed Mr. Amit Ojha as Resolution Professional. Notice was issued to the Appellant by the same order. Aggrieved by the order dated 03.02.2022 this Appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

(a) The Respondent - Financial Creditor sanctioned loan cum hypothecation amounting to Rs. 1,59,00,000/- and Rs. 71,00,000/-, respectively to CMI Ltd. (Corporate Debtor/Principal Borrower). The Appellant stood as Personal Guarantor to the said transaction. Two Master Finance Agreements dated 13.02.2020 were executed by and between the Corporate Debtor, the Appellant - Personal Guarantor and the Respondent - Financial Creditor.

(b) The Corporate Debtor/Principal Borrower defaulted in paying the EMI in 2020.

(c) A Company Petition (IB) No. 707/ND/2021 was filed under Section 95 of the I&B Code by the Respondent in November, 2021, where amount in default has been mentioned as Rs. 2,44,57,796/-. The application mentions the date on which account was declared NPA as 11.09.2020. The application was relisted before the Adjudicating Authority on 03.02.2022 on which date impugned order was passed by the Adjudicating Authority issuing notice to the Appellant and appointing Resolution Professional.

3. Learned counsel for the Appellant challenging the impugned order raises following two submissions:

i. It is submitted that in the I&B Code Section 10A was inserted by Ordinance which subsequently became Act 17 of 2020 providing that no application for initiation of Corporate Insolvency Resolution Process (CIRP) of a Corporate Debtor shall be filed for any default on or after 25.03.2020 for a period of six months, which was subsequently extended for further period till 24.03.2021. It is submitted that since there is bar from initiation of CIRP against the Corporate Debtor, no CIRP can be initiated against the Personal Guarantor also. Section 10A has to be given

interpretation to protect the Personal Guarantor also, failing which the provision will become discriminatory. The condition precedent for invoking insolvency resolution process is default on part of the Principal Borrower. When the default of Principal Borrower is covered by Section 10A, no insolvency resolution process can be initiated against the Personal Guarantor. By necessary implication the protection which is provided to the Corporate Debtor must also be provided to the Personal Guarantor.

- ii. Secondly, it is submitted that the Adjudicating Authority did not follow the procedure established by law and no notice was issued before appointing the Resolution Professional. Learned counsel for the Appellant has also relied on the judgment of this Tribunal in "*Ravi Ajit Kulkarni v. State Bank of India, Company Appeal (AT) (Ins.) No. 316 of 2021*".

4. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant contends that the Section 10A prohibited initiation of CIRP only against the Corporate Debtor. Section 10A cannot be extended to an application under Section 95(1) since provision of Section 10A is clear and unambiguous. Insofar as limited notice to the Appellant is concerned, demand notice in Form-B was also served on the Personal Guarantor before filing Section 95 Application and further by order dated 03.02.2022 notice has been issued to the Appellant and Appellant has appeared before the Adjudicating Authority on 29.03.2022 and prayed for 14 days' time to file Reply.

5. We have considered submissions of learned counsel for the parties and perused the record.

6. The first question to be considered is as to whether the benefit of Section 10A can also be claimed by a Personal Guarantor and an application under Section 95 shall be barred for a default which has arisen on or after 25.03.2020 till 24.03.2021?

7. Section 10A is to the following effect:—

"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 notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation.—For 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."

8. Section 10A begins with non-obstante clause. The section contains a prohibition against initiation of CIRP of a Corporate Debtor for any default arising on or after 25.03.2020. Object of insertion of Section 10A is well known. The whole country was gripped with corona virus COVID-19 and to extend the protection to Corporate Debtor and to ensure that insolvency resolution process may not be initiated against the Corporate Debtor for any default during the currency of the aforesaid period was with object to permit Corporate Debtor to carry on their activities and they be insulated from threat of insolvency resolution process.

9. When we look into the scheme of I&B Code, Chapter II of Part II deals with Corporate Insolvency Resolution Process. Section 6 of the Code provides as follows:—

"6. Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter."

10. Section 7 contains provision for initiation of CIRP by a Financial Creditor. Section 9 provides for an application for initiation of CIRP by an Operational Creditor. Section 10 provides for initiation of CIRP by Corporate Applicant.

11. Section 95 of the Code is in Part III of the Code which contains 'Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms'. Under Part III, Chapter III deals with insolvency resolution process of which chapter Section 95 is part. Section 95(1) is as follows:—

"95(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application"

12. When Section 10A was inserted in Chapter II of Part I no corresponding amendment was made in Chapter III of Part III of the Code. Had the legislature intended to prohibit filing of application under Section 95(1) by a creditor against the Personal Guarantor for any default committed on or after 25.03.2020, a provision akin to Section 10A could have very well be inserted in Chapter III Part III of the Code.

13. The principles of statutory interpretations are well established. The basic principle of statutory interpretation is that when a word of statute is clear, plain and unambiguous the courts are bound to give effect to that meaning irrespective of consequences. Justice S.R. Das in "*Commissioner of Agricultural Income Tax, West Bengal v. Keshab Chandra Mandal*, AIR 1950 SC 265" observed:—

"Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute or the rules."

14. Hon'ble Supreme Court in "*Lalu Prasad Yadav v. State of Bihar*, (2010) 5 SCC 1" reiterated the same basic principle of statutory interpretation in Paras 23 and 24:—

"23. In Sussex Peerage⁶, the House of Lords, through Lord Chief Justice Tindal, stated the rule for the construction of Acts of Parliament that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature.

24. A Constitution Bench of this Court in Union of India v. Hansoli Devi⁷, approved the rule expounded by Lord Chief Justice Tindal in The Sussex Peerage's case⁶ and stated the legal position thus : (Hansoli Devi case⁷, SCC p.281, para 9)

"9. ... It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In Kirkness v. John Hudson & Co. Ltd.⁸ Lord Reid pointed out as to what is the meaning of "ambiguous" and held that : (AC p.735)

"A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, C.J. in the case of Aswini Kumar Ghose v. Arabinda Bose⁹, had held that it is not a sound principle of construction to brush aside words in a statute as being

inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In Quebec Railway, Light Heat & Power Co. Ltd. v. Vandry¹⁰ it had been observed that the legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective....."

15. Hon'ble Supreme Court in "*Nemai Chandra Kumar v. Mani Square Ltd.*, (2015) 14 SCC 203" in paras 32 and 33 laid down following:—

"32. Ordinarily, the Court resorts to the plain meaning rule (also known as literal rule) for statutory interpretation. The said rule emphasizes that the starting point in the statutory interpretation is statute itself and if the language of statute is clear and unambiguous there is no need to look outside the statute.

33. The intention of the legislature is primarily to be gathered from the language used in the statute, "thus paying attention to what has been said as also to what has not been said" as observed by his Court in Dental Council of India v. Hari Prakash⁷. Relevant part of which is quoted hereunder:

"7. The intention of the legislature is primarily to be gathered from the language used in the statute, thus paying attention to what has been said as also to what has not been said. When the words used are not ambiguous, literal meaning has to be applied, which is the golden rule of interpretation."

16. On the basic principle of statutory interpretation, the provision of Section 10A is capable of only one meaning that is suspension of initiation of CIRP was only for a Corporate Debtor. Had the legislature intended suspension of initiation of CIRP against the Personal Guarantor also, similar amendment was also required to be made in Chapter III of Part III of the Code. The legislature is presumed to be aware of consequences of statutory provision especially consequences of amendment made in the statute. Whether the suspension of insolvency resolution process has to be for Corporate Debtor and also for individuals including Personal Guarantor is the legislative policy which policy has to be looked into from the amendment brought in the Code by insertion of Section 10A.

17. We are, thus, unable to accept the submission of learned counsel for the Appellant that suspension of CIRP shall also to be accepted for Personal Guarantor as was provided for Corporate Debtor. The statutory scheme does not contain any indication that CIRP shall also remain suspended for Personal Guarantor for any default between 25.03.2020 to 24.03.2021, therefore, submission of learned counsel for the Appellant cannot be accepted.

18. Now, we come to the second submission of the learned counsel for the Appellant that no notice was issued to the Appellant by the Adjudicating Authority. Application under Section 95(1) was filed by serving advance notice to the Appellant in Form-B and the Adjudicating Authority issued notice by order dated 03.02.2022 to the Personal Guarantor. The Personal Guarantor also appeared on 29.03.2022 on which date the Adjudicating Authority passed following order:—

"ORDER

Learned Counsel for the Respondent Mr. Amit Jain Advocate appeared and stated that he wants to file a reply. Let the same be filed within 14 days.

List the matter for 20.04.2022."

19. In so far as interim moratorium under Section 96 is concerned, the same shall automatically commence on the date of application filed under Section 95. The purpose of limited notice as has been laid down by this Tribunal in "*Ravi Ajit Kulkarni*" (Supra) is to give opportunity to the Personal Guarantor to participate in the proceedings under Section 95 to object the application filed under Section 95(1) including report of the Resolution Professional. Personal Guarantor is entitled to raise all his pleas for opposing admission of Section 95 application at the time the Adjudicating Authority passes order under Section 100. In the present case, stage of Section 100 has not yet arisen. We by our order dated 31.03.2022 has directed that "*the Adjudicating Authority may proceed with the proceedings, however, no orders as contemplated under Section 100 be passed till the next date*". The Appellant still have opportunity to file his reply opposing the Section 95 application as well as of filing objection to the report filed by the Resolution Professional, if not already filed.

20. In view of the foregoing discussion, we do not find any ground to interfere with the order dated 03.02.2022. The Appeal is dismissed subject to the observations as made above.

† Principal Bench at New Delhi

† Arising out of Order dated 03.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court IV in C.P. (IB)-707/ND/2021

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