IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IA/395/2020 in **IBA/215/2020** filed under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of ***M/s. Siemens Gamesa Renewable Power Private Limited***

M/s. SIEMENS GAMESA RENEWABLE POWER PVT. LTD.
(formerly known as Gamesa Wind Turbine Pvt. Ltd.)
CIN: U74991TN2006PTC079179
No.334, Futura IT Park, B Block,
8th Floor, Old Mahabalipuram Road,
Sholinganallur,
Chennai – 600 119

... Applicant

Vs

RAMESH KYMAL
S/o. Late P.K. Kymal,
5/82, Blue Beach Road,
Neelangarai,
Chennai – 600 041

... Respondent

Order Pronounced on ***9th July, 2020***

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Applicant : *Mr. Gopal Jain, Senior Advocate*
For Samudra Sarangi, Law Offices of Panang & Babu

For Respondent : *Mr. Arvindh Pandian, Senior Advocate*
For Jeevanandham Rajagopal,
S. Aravindan & Varsha Raghavan,
Advocates, Fox Mandal & Associates

ORDER

Per: **R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. While the proceedings are pending before this Tribunal in relation to the main Company Petition in IBA/215/2020 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short "**I&B Code, 2016**") by the Operational Creditor, namely Mr. Ramesh Kymal against the Corporate Debtor, namely M/s. Siemens Gamesa Renewable Power Pvt. Ltd., this Application in the interregnum has been moved by the Corporate Debtor (referred to hereinafter as "the Applicant") provoked by the Promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (No.9 of 2020) published in the Gazette of India on 05.06.2020 whereby a new Section, namely Section 10A, of which alone we are presently concerned, has been inserted after Section 10 of the Principal Act which reads as follows:-

> ***Section 10A Suspension of initiation of corporate insolvency resolution process***
>
> *"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***" *(emphasis supplied)*

2. In the light of the insertion of Section 10A to I&B Code, 2016 as extracted above, it is averred in the Application to the effect that *prima facie* from the Application (i.e. IBA/215/20) it is evident even as per the statement made by the Operational Creditor in Form 5 filed on 11.05.2020 before this Tribunal making a claim of INR 104.11 Crore against the Applicant/Corporate Debtor, the date of alleged default of the claim amount is stated to be 30th April 2020 and since the stated case of the Respondent/Operational Creditor itself being a date subsequent to that dealt with by Section 10A of the I&B Code, 2016 wherein the suspension of proceedings

are made applicable *"for any default arising on or after 25th March 2020"* and in the circumstances given the Promulgation of the Ordinance and taking into consideration the intent as can be gathered from the objects and reasons behind the Ordinance whereby Section 10A of the I&B Code, 2016 has been newly inserted, the Corporate Insolvency Resolution Process (CIRP) cannot be initiated against the Applicant in furtherance to the main Petition and hence the said Petition filed by the Operational Creditor/Respondent under Section 9 of the I&B Code, 2016 is to be disposed of in terms of Section 10A of the I&B Code, 2016.

3. The main petition IBA/215/2020, it must be noted to have a perspective, has been filed by the respondent as a person in or had been in employment with the applicant/corporate debtor and during the course of such employment as the Chairman and Managing Director of the applicant/corporate debtor and in terms, inter alia of Employment Agreement, Incentive Agreement and other documents the claim as made in the petition remains unsatisfied and that there has been a default on the part of

the applicant in this regard of an Operational Debt in terms of Section 8 read with Section 9. However the claim is being contested by the Applicant/Corporate Debtor as can be gathered from the reply sent to the demand notice as well as the reply/counter filed by it.

4. In view of an urgent Application filed in I.A.No.394 of 2020 by the Applicant herein for taking up the above Application in I.A.No.395 of 2020, as the main Company Petition itself was posted for completion of pleadings in the said Petition as well as other Applications filed including the application filed by the Applicant herein under Section 65 of I&B Code and all of them were posted for arguments on 15.06.2020, the instant Application was taken up for consideration first and for its disposal as specifically recorded in the Order dated 15.06.2020. Perusal of the said Order dated 15.06.2020 also specifically shows that Ld. Senior Counsel Mr. Arvindh Pandian, who appeared on behalf of the Respondent in the instant Application has sought to resist the Application based on the plea of demurrer and stated that the Respondent was hence not inclined to file a counter to the

Application and in the circumstances the hearing in the instant Application alone was taken up and the arguments of the Ld. Senior Counsels of both the parties were heard in detail taking into consideration the important development which had taken place by way of promulgation of an Ordinance (No.9 of 2020) inserting Section 10A to I&B Code as noted above. The parties, it must be noted, were also given an opportunity to file their written submissions, if any, and such opportunity, it is seen, seems to have been availed by both parties as can be gathered from the records of the Tribunal.

5. Upon a combined consideration of the respective oral as well as written submissions of the parties and from the averments made by the Applicant in the application under consideration as well as for the limited purpose of dealing with the application on hand of the petition filed by the respondent, it is evident that while the applicant canvasses for the suspension of the proceedings in the main petition in IBA No.215 0f 2020 on the ground that the default even as per the admission of the Respondent/Petitioner is stated to be

of the date 30.04.2020 as can be gathered from the following records pointed out in paragraph 8 of the application under consideration, namely:-

> 8. The Applicant has made numerous statements in relation to the date of alleged default being 30 April, 2020. An overview of the same is set out hereinbelow:
>
> a. Insolvency Application @ Pages 18 and 19 of the Insolvency Application): Under the headings *"and the date from which such debt fell due"* and *"the date on which the default occurred"*, the Applicant has stated 30 April 2020 to be the said date.
>
> b. Demand Notice dated 30 April 2020 @ Page 35 and 40 of the Insolvency Application): Under the heading *the date from which the debt fell due"*, the Applicant has stated 30 April 2020. Similarly, at the later portion of the Demand Notice, under the heading *"date from which such debt fell due"* the Applicant has again mentioned the same to be 30 April 2020.
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> c. Resignation Letter dated 21 January 2020 @ page 128 of the Insolvency Application): In the letter of resignation dated 21 January 2020, the Applicant has stated that *'On my last day of my working notice period (i.e., April 30, 2020), all amounts payable by SGRE India including not limited to the following should be forthwith paid without deductions...."*
>
> d) *Email dated 5 March 2020 @ page 133 of the Insolvency Application):* In another correspondence issued by the Applicant dated 5 March 2020, the Applicant himself once again

states that *"certain amounts of money are due to be paid to me by SGRE India in the last day of working notice period with the company on 30th April 2020*

6. Since the date of default from the above documents, more so as prima facie evident, it is claimed, from both the Application (i.e main petition) as well as from the Demand Notice dated 30.04.2020, to be that of 30.04.2020 and which date is posterior to the date from which the Ordinance was made retrospectively applicable on and from 25th March 2020, even though it came to be published in the Gazette of India only on 05th June 2020. The Ordinance, it is submitted, was promulgated taking into consideration the extraordinary situation prevalent all over the world, including India impacting the business, financial markets and economy which had created uncertainty and stress for business for reasons beyond the control of corporate persons, this Tribunal is hence required to suspend the proceedings forthwith by virtue of Section 10A of I&B Code, 2016 as amended irrespective of any default has been allegedly committed or not and whether being admitted or not, without prejudice to the contentions on the part of the applicant that

no default has been committed by the Applicant/Corporate Debtor.

7. To draw support for the submissions as above, Ld. Senior Counsel for the Applicant heavily places reliance on the Objects and reasons for the promulgation of the Ordinance published on 05.06.2020 and as can be gathered from it, as well as by dissecting the provisions of Section 10A minutely to demonstrate the situations under which the suspension of the proceedings under Sections 7, 9 and 10 of I & B Code for triggering an insolvency process on the part of a creditor to a default occurring on the part of the Corporate Debtor can be invoked or otherwise taking into consideration, so to say the relevant date i.e. 25.03.2020 . To better appreciate the submissions made on the part of the Applicant, it will be first necessary to consider the arguments in opposition made by Learned Senior Counsel appearing for the respondent.

8. Interpreting the newly inserted Section 10A of I&B Code, Learned Senior Counsel for the respondent endeavours to draw a distinction in relation to already filed

applications/petitions under either of the provisions falling under Section 7, 9 and 10 of I& B Code, 2016 on or before the date when the amendment ordinance was promulgated, namely 05.06.2020, in relation to the defaults arising prior to it on the one hand, and in relation to yet to be filed or ever to be filed applications/petitions in relation to defaults arising during the period of default falling on or after 25.03.2020 and within the relevant period of 6 months or 1 year as the case may be. Learned Senior Counsel for the respondent in this regard seeks to draw a parallel between provisions of Section 7 of I&B Code as it stood amended with effect from 28.12.2019 in construing the meaning of the term `shall be filed' used in both Section 10A as well as the first two provisos to Section 7(1) of I&B Code as compared to the term `has been filed' used in 3rd proviso to Section 7(1) of I&B Code, thereby pointing out that the legislature being conscious and essentially drawing a distinction between application/petitions already filed and those to be filed while its usage in the same statute. Hence in so far as the instant case is concerned, it is the contention on the part of the respondent that since the petition has already been filed on

11.05.2020, and heard twice on 19.05.2020 and 26.05.2020 and adjourned for final hearing thereafter, all well before the Promulgation of the Ordinance on 05.06.2020, the proceedings are required to continue in IBA 215 of 2020 and not to be suspended as sought for by the applicant trying to take shelter under the newly inserted Section 10A of I&B Code. In any case, it is further contended that the filing of this application in effect in itself demonstrates the admission of default on the part of the applicant in relation to the claim and in the circumstances it warrants in effect for IBA 215/2020 to be admitted and consequentially to initiate the Corporate Insolvency Resolution Process as well, in relation to the applicant/corporate debtor.

9. Further, in any case it is also contended on the part of the respondent that if there was no financial distress arising out of COVID pandemic, however there has been a default on the part of the Corporate Debtor, then the protection of the newly inserted Section 10A will not come into play as it is evident from the intention in promulgating the Ordinance that the benefit of the newly inserted Section 10A is to be available

only to those who have in effect committed a `default' in the context of Section 7 or Section 9 of I&B Code and such a default arises out of the financial distress due to the COVID pandemic being prevalent. In this connection it is pointed out by the respondent that the applicant in effect has admitted to the liability to pay to the respondent/Operational Creditor vide communication dated 27.03.2020 filed in page No.142 of the typed set filed along with the petition and has also admitted vide communication dated 02.04.2020 filed in page No.144 of the typed set to the petition that COVID situation is not having any impact in relation to the arrangement with the respondent/Operational Creditor.

10. To draw support to the submissions made by Learned Senior Counsel for the Respondent, the following case laws as listed in the written submissions and of which full extracts have also been provided as are sought to be relied on, namely:-

i) **Gokuldas Pagaria vs Parmanand Chaurasia Manu/MP/0081/1967**

Right to continue a proceeding already instituted is in the nature of a vested or substantive right and

cannot be taken away except by clear indication of intention to that effect by an express provision or clear indication in the Statute.

ii) Chandrasingh Manibhai vs. Surjit Lal Ladhamal Chhabda, AIR 1951 SC 199

For the proposition that the term `shall be filed' is to be construed as construed by the Hon'ble SC in the above decision in relation to suits which may be instituted after the Act comes into force. It cannot apply to suits which were already pending when the Act was put on the statute book. In effect Section 10A can have only prospective application and not retrospective applicability.

iii) Arrowline Organic Products Pvt Ltd vs. Rockwell Industries Ltd., IA/341/2020 in IBA 1031/2019

Again, to draw support to the proposition that by virtue of a Notification issued by the Central Government therein, pending proceedings as held in the said case will not be affected since it has been filed prior to the date of Notification; in the instant case the Ordinance promulgated on

05.06.2020. More so, when proceedings also have been conducted, in the circumstances, the vested or substantive right which had accrued to the respondent cannot be taken away by the amendment to the I&B Code by insertion of Section 10A.

11. This Tribunal is well aware that it cannot be considered as a `Civil Court', leave alone a Constitutional Court which alone has the power to judicially review any legislation, irrespective of its nature and in the circumstances the contours are quite clear within which this Tribunal can traverse in relation to the interpretation of Section 10A newly inserted by virtue of the recently promulgated Ordinance with effect from 05.06.2020, however having a retrospective application which precisely seems to be the bone of contention as between the parties as to its scope as can be deduced from the submissions made ably by the Learned Senior Counsels for the respective parties and culled out as above.

12. It is to be seen that the power to promulgate Ordinances thereby in effect to legislate on the part of the Executive, even though normally it is the function of the Legislature to enact legislation, is enshrined in Article 123 of our Constitution in relation to the Union and being of importance to the context on hand is reproduced below:-

Article 123 of the Indian Constitution

123. Power of President to promulgate Ordinances during recess of Parliament

(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance

(a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President

Explanation Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause

> *(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.*

13. A similar power to legislate in relation to the States of the Union has been vested with the Executive of the State under Article 213 of our Constitution, however subject to certain restrictions as contained in the proviso to the said Article 213(1). Both the Articles, namely Article 123 as well Article 213 of our Constitution lay down that the Ordinances promulgated under these Articles shall have the same force and effect as an Act of the Legislature, in the case of the former as to that of the Parliament, and in relation to the latter as to that of the State Legislature concerned. However, the difference between the Legislative power of the Legislatures on the one hand as compared to that of the Executive on the other by way of promulgation of an Ordinance as in the instant case has been brought about succinctly by the Apex Court in **Dr. D.C. Wadhwa & Ors. V. State Of Bihar & Ors.** reported in *(1987) 1 SCC 798 as follows:*

> "The power conferred on the Governor to issue Ordinances is in the nature of an emergency power which is

> vested in the Governor for taking immediate action where such action may become necessary at a time when the Legislature is not in Session. The primary law making authority under the Constitution is the Legislature and not the Executive but it is possible that when the Legislature is not in Session circumstances may arise which render it necessary to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the Legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate Ordinances. .....
>
> ....." It is contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the Ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the Legislature.

Even though **D.C.Wadhwa & Ors's** case quoted *supra*, was decided in the context of the power of the Executive of a State to re-promulgate an Ordinance repeatedly without adhering to the compliance of the conditions laid down in the relevant Article in placing it before the Legislature concerned, however the above observations made and extracted generally in relation to the Ordinance making power of the Executive and the circumstances compelling to make it, are of relevance, which can also be equally applied to Article 123 to that of the Ordinance promulgated by the Executive of the Union conferred on the President of India. It is required to be

noted which is of great relevance to the case on hand for interpreting the provisions of the Ordinance in relation to its applicability of the newly inserted Section 10A to I&B Code is the compelling circumstance necessitating the Executive to take such immediate action to subserve the interest of the public arising out of the inability of the Legislature (i.e. the Parliament) to make the law since its not being in session; however in order to meet an emergent situation.

14. This is best explained by the introductory portion of the Ordinance itself promulgated on 05.06.2020 giving out the Objects and reasons for the promulgation of the said Ordinance which is extracted as below:

> *An Ordinance further to amend the Insolvency and Bankruptcy Code, 2016.*
>
> *WHEREAS the entire ecosystem for implementation of the Insolvency and Bankruptcy Code, 2016 is in place;*
>
> *AND WHEREAS the provisions relating to corporate insolvency resolution process and liquidation process for corporate persons under the Code are in operation;*
>
> *AND WHEREAS COVID-19 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****;*
>
> *AND WHEREAS a nationwide lockdown is in force since 25th March, 2020 to combat the spread of COVID-19 which has added to disruption of normal business operations;*

AND WHEREAS it is difficult to find adequate number of resolution applicants to rescue the corporate person who may default in discharge of their debt obligation;

AND WHEREAS it is considered expedient to ***suspend*** *under sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 to prevent corporate persons which are experiencing distress* ***on account of unprecedented situation, being pushed into insolvency proceedings under the said Code for some time****;*

AND WHEREAS it is considered expedient ***to exclude the defaults arising on account of unprecedented situation*** *for the purposes of insolvency proceeding under this code;*

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of Article 123 of the Constitution, the President is pleased to promulgate the following Ordinance

(emphasis supplied)

15. From a careful reading of the Objects and reasons for bringing out the Ordinance, it is manifest that the Executive was concerned about the COVID – 19 pandemics being all over the world including India and:

i) In relation to the impact it will have on the business, financial markets and economy as a whole including India;

ii) The likely stress and uncertainty it will create for businesses beyond their control;

iii) The disruption to the business created in view of the nationwide lock down which is in force since 25th March 2020 ;

iv) Difficulty in finding adequate number of resolution applicants to rescue the corporate persons in case of default under the circumstances;

v) In view of the factors mentioned in (i) to (iv) above with a view to prevent the corporate persons already experiencing distress on account of unprecedented situation being pushed into insolvency proceedings, **to suspend** Section 7, 9 and 10 of I&B Code;

vi) In view of the unprecedented situation, **to exclude** the defaults arising on account of the said unprecedented situation for the purpose of insolvency proceedings;

vii) Since Parliament being not in session and the President being satisfied as to the necessity for immediate action, in exercise of the powers conferred by clause(1) of Article 123, the promulgation of the Ordinance with a view to amend the Principal Act, namely I&B Code by insertion of Section 10A in order to achieve the above objects.

16. Thus the intendment of the Executive in the promulgation of the Ordinance has been explicitly spelt out in clear terms arising out of the prevalent pandemic and the extra ordinary situation it has created in not only seriously affecting the businesses as a whole by creating a stress and also additionally causing disruption due to nationwide lock down to the businesses all of which leading to likely defaults on the part of the corporate persons thereby enabling it to be taken under the relevant provisions of Section 7, 9 and 10 of I&B Code as the case may be and with a view to prevent such a situation from happening and thereby pushing the businesses to the insolvency proceedings, having the said sections suspended for a period of six months in relation to defaults arising on or after 25th March 2020.

17. The Executive, as manifest from the Objects and reasons, seems to have also been concerned about proper suitors being available for the resolution of insolvency of corporate persons if pushed into insolvency in relation to defaults, arising on or after 25th March 2020, as the avowed object of I&B Code is for the resolution of insolvency of

corporate persons in a time bound manner by maximizing the value of the assets available with the Corporate Debtor by balancing the interest of all the stakeholders concerned which may not happen; this appears to be the apprehension of the Executive under the prevailing situation prompting it to exclude the default arising on or after 25.03.2020 as a `default' itself giving rise to the filing of an application seeking for the initiation of the CIRP.

18. Armed with objects and reasons, now turning our attention to the express provisions of Section 10A of I&B Code in order to ascertain as to there being a scope for interpretation at all or the words in Section 10A of the Ordinance convey explicitly and expressly the meaning it wants to convey without any ambiguity, it is seen that apart from the main section, a proviso as well as explanation clauses are also to be found in Section 10A of I& B Code.

19. The main provision it is seen, opens with a non-obstante clause thereby overriding the provisions of Section 7, 9 and 10 initially for a period of six months with a saving for a further extension of the said period not exceeding one year

from such date as may be notified in this behalf, in relation to filing of an application seeking for the initiation of CIRP of a corporate debtor in relation to default arising on or after 25th March 2020.

20. In the circumstances, a question arises as to what will happen to those cases where the date of default is anterior to the relevant date as specified in the main provision of Section 10A, namely 25.03.2020. This doubt is sought to be clarified by way of an Explanation provided at the foot of Section 10A itself stating that the provisions of Section 10A shall not apply to the defaults which had arisen in relation to a corporate debtor prior to the relevant date of 25.03.2020 and hence the creditors of such a corporate debtor or the corporate debtor as a corporate applicant are not restrained to move this Tribunal under the relevant provisions, as may be applicable, seeking for the initiation of CIRP under such circumstances as they are not prevented from doing it as compared to the bar which had been put up for the defaults committed on or after the relevant date of 25.03.2020.

21. While the main provision of Section 10A taken together with the Explanation makes it clear that a `Lakshman Rekha', so to say, has been demarcated by providing the relevant date of 25.03.2020 in relation to a `default' and for filing an application for the initiation of CIRP against the corporate persons for the defaults occurring on or thereafter, however it must be noted that the Insolvency and Bankruptcy Code (Amendment) Ordinance,2020 (No.9 of 2020) inserting Section 10A was in itself notified only on 05.06.2020 in the Gazette of India, even though, pegging the disability to file an application for initiation of CIRP to the defaults arising on or after 25th March 2020.

22. At this juncture, it will be essential to understand as to why the relevant date has been fixed as 25th March 2020 and not some other date in between 25th March 2020 and the date of notification or for that matter the date of notification itself, namely 05.06.2020. This can be best explained again by looking into the objects and reasons for promulgation of the Ordinance (No.9 of 2020) wherein it seen that the relevant date, namely 25.03.2020 happens to be the date when the

nation-wide lockdown came into force to combat the spread of COVID-19. Thus, while the prevalence of the global pandemic caused uncertainty and stress for business for reasons beyond their control, the lockdown which came into force additionally caused a disruption to the normal business operations. It can thus be seen that in so far as businesses are concerned, a paradoxical situation had arisen at the relevant point, not only because of the prevalence of the pandemic being the cause for stress, but also the cure in relation to the efforts taken to combat the spread of pandemic by enforcing a lock down in itself causing disruption to the normal business operations.

23. In the circumstances, a question arises as to what will happen to those cases which had been filed during the interregnum of the relevant date of 25.03.2020 and the date of promulgation of Ordinance (No.9 of 2020) i.e.05.06.2020 as in the present instance, as this Tribunal based on the Office Order/Notification issued by the Competent Authority had been entertaining urgent applications, both under the provisions of the Companies Act, 2013 as well as under I& B

Code, 2016, one such application being the petition filed by the respondent herein seeking for listing of IBA215/2020 in order to obtain urgent orders. The application was allowed to be listed in the cause list in view of the decision of Hon'ble NCLAT passed in **NUI Pulp and Paper Industries (P) Ltd -vs- Roxel Trading GMBH in** *Company Appeal (AT) (INS) 664 of 2019* for entertaining such applications filed. At this stage a mention of dates in relation to the instant case becomes crucial as evident from the records of this Tribunal:

11.05.2020	-	Date of filing the petition along With urgent application seeking For interim directions filed in Application No.342 of 2020.
19.05.2020	-	Listed for the 1st time. Interim Directions not given in IA/342 Of 2020. For Completion of pleadings in the Application as well as main CP/ IBA/215/2020. Adj to 26.05.20
26.05.2020	-	Counter filed by the respondent /CD-Applicant herein. Application under Section 65 of I&B Code also filed by the CD/Applicant Herein against the OC/Respdt. For completion of pleadings and for arguments posted to 15.6.20.

In between 26.05.2020 and the next date of hearing fixed thereafter, namely, 15.06.2020 the Executive of the Union of India chose to promulgate the Ordinance (No.9 of 2020) inserting inter alia Section 10A to I&B Code published on 05.06.2020 which already seen in the opening paragraph of the instant order has provoked the Applicant/Corporate Debtor to file this Application seeking for the main petition in IBA/215/2020 to be dealt with accordingly in terms of the newly inserted provision.

24. Thus, the question effectively posed before this Tribunal is as to whether the Ordinance (No.9 of 2020) will have applicability to the main petition in IBA/215/2020 or otherwise, taking into consideration the facts and circumstances more fully delineated in the preceding paragraphs.

25. In relation to contention of its non-applicability, already this Tribunal has dealt with the same in paragraphs supra as raised by the Respondent. Now turning to the submissions of the Applicant in more detail as projected by Learned Senior Counsel Mr. Gopal Jain, Advocate followed up with the

written submissions, all of which were only touched upon briefly in the earlier paragraphs in relation to the applicability of Section 10A of I&B Code to the instant case on hand. While countering the arguments of the respondent to be myopic, in so far as construction of the term `shall be filed' as used in the main provision of Section 10A is sought to be given confining its applicability in effect only to those applications which are sought to be filed on or after 05.06.2020 divorced to the legislative intent and the object expressed in the objects and reasons itself for the promulgation of the Ordinance to be effective from the date which is specifically mentioned therein, namely to those defaults arising on or after 25.03.2020 and in the circumstances the contentions raised by the respondent as to non-applicability of Section 10A to the instant case, the same having been filed prior to 05.06.2020 is untenable. On the other hand, the Suspension period it is submitted commences from 25.03.2020 itself. However, additionally, it is submitted on the part of the applicant which is of significance and which this Tribunal has not dealt with in detail hitherto in relation to Section 10A in this order apart from a passing reference, is the proviso

provided under the main section of 10A which is sought to be interpreted as follows as evident from paragraph 2.6.3 of the written submissions filed by the Applicant, namely:-

> *2.6.3 The proviso, however, specifically contemplates two separate scenarios in relation to the defaults which have occurred or will occur during the Suspension Period – (i) the intervening time period between 25 March 2020 and 5 June 2020, when insolvency applications may have been filed; and (ii) post the suspension period, ie 24 September 2020 (or 24 March 2021, as the case maybe), when insolvency application filings may resume. Therefore, with a view to ensure that the legislative intent was clear and covers the entire gamut of possible scenarios, the word "ever" was incorporated in the proviso.*

26. Laying particular emphasis on the term 'ever' as contained in the proviso to Section 10A, it is submitted on the part of the applicant that the said term has been inserted to cover both the pending application filed in relation to defaults which have occurred on or after 25th March 2020 or the future applications that may be filed, post the period of suspension in relation to defaults arising during the said period. It is further submitted, failure on the part of the Tribunal to construe the provisions of Section 10A taken as a whole, in particular the proviso as construed on the part of Applicant, will

lead to absurdity and irrationality by subjecting similarly placed corporate debtors and creditors to different treatment without any cogent basis for the same and in the circumstances the date of filing cannot determine the rights of the parties in view of the prevalent extra-ordinary situation which will wholly defeat the object of the promulgation of the Ordinance in protecting the interest of the corporate persons.

27. Further on facts, in relation to date of default to be anterior to the relevant date of 25.03.2020, as contended belatedly by the respondent for which certain correspondences have been pointed out, it is submitted on the part of the applicant that the said position is a paradigm shift on the part of the respondent/operational creditor made in the rejoinder only as compared to the stated position at the time of filing the application, namely IBA/215/2020 and the documents annexed therewith, all made with a view to give self-serving interpretation as sought to be given presently clutching on to a straw with a view in effect to wriggle out of the

operation of Section 10A as newly inserted. The Applicant to lay emphasis on its part to buttress the interpretation as sought to be given by it has relied on the following judgements, namely:-

i) ***Anuj Jain v. Axis Bank Limited [2020 SCC Online SC 237]:***

For the proposition that the look back period of two years can be anterior to the date when I&B Code came into effect in the year 2016 in relation to Section 43 and 44 of I&B Code and this position will not make the I&B Code retrospective in its operation in particular keeping in view the objects of I&B Code in the maximization of the value of the assets and to balance the interest of the stake holders.

ii) ***Zile Singh v. State of Haryana [2004 (8) SCC 1]:***

For the proposition 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

iii) **Afcons Infrastructure Limited v. Cherian Varkey Construction Co. (P) Ltd. [Civil Appeal No. 6000 of 2010]:**

For the proposition that literal rule should apply while interpreting a statue by the Courts, where the words of the statue are clear and unambiguous and recourse to other principles of interpretation can be applied only in exceptional cases when faced with an apparently defective provision in the statute and where such defective or anomaly may make the literal compliance of the provision impossible or absurd or so impractical as to defeat the very object of the provision.

iv) **Bharat Singh v. Management of New Delhi Tuberculosis Centre [1986 (2) SCC 614):**

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.

Having laid bare the rival submissions of the parties in somewhat greater detail in relation to the question framed as to whether the provisions of newly inserted Section 10A of the Ordinance (No.9 of 2020)

promulgated on 05.06.2020 will have its applicability to the instant case on hand or not, we proceed to answer the same as follows:-

28. **ON THE ASPECT OF RETROSPECTIVE APPLICATION OF A STATUTE**:

28.1. Firstly, from the list of citations relied on by the respondent it is seen that the respondent had chosen to cite a decision by this Tribunal passed in **Arrowline Organic Products Pvt Ltd vs. Rockwell Industries Ltd., IA/341/2020 in IBA 1031/2019,** wherein one of us sitting singly (R.Varadharajan) had delivered the judgement to the effect that the Central Government Notification dated 24.03.2020 enhancing the minimum pecuniary limits from Rs 1 Lakh to Rs.1crore in order to maintain a petition before this Tribunal by virtue of the power delegated by the Legislature while enacting I&B Code, 2016 under Section 4 of the Code can be only prospective and not retrospective after citing several authorities in relation to the same and at paragraph 30 of the said order it has

been observed essentially drawing a distinction between the exercise of the power of the Central Government as delegate under a Statute to that of the power of the Parliament granted to it under the Constitution and within the constitutional limits provided therein in enacting a legislation as follows:

> 30. However, from the catena of decisions cited across the bar in relation to the applicability of a law retrospectively, it is discernable there from that Courts in India including the Apex Court, have sought to draw a distinction in relation to the legislative competence of a Legislature while enacting or amending the law, namely an Act in relation to its retrospective operation as compared to the power available to a delegate acting under such law/enactment which empowers it to make a delegated / subordinate/ conditional legislation. The distinction between the powers available to the Legislature on the one hand and that of the delegate on the other is succinctly brought out by the Hon'ble Supreme Court in ***Dr. Indramaniyarelal Gupta v. W. R. Nath*** *AIR 1963 SC 274* as follows:-
>
> > *"Learned counsel for the respondents contends that, as the legislature can make a law with retrospective operation, so too a delegated authority can make a bye-law with the same effect. This argument ignores the essential distinction between a legislature functioning in exercise of the powers conferred on it under the Constitution and a body entrusted by the said legislature with a power to make subordinate legislation. In the case of the legislature, Article 246 of the Constitution confers a plenary power of legislation subject to the limitations mentioned therein and in other provisions of the*

Constitution in respect of appropriate entries in the Seventh Schedule. This Court, in Union of India v. Madan Gopal Kabra held that the legislature can always legislate retrospectively, unless there is any prohibition under the Constitution which has created it. But the same rule cannot obviously be applied to the Central Government exercising delegated legislative power, for the scope of their power is not coextensive with that of Parliament. This distinction is clearly brought out by the learned Judges of the Allahabad High Court in Modi Food Products Ltd. v. Commissioner of Sales Tax, U.P. wherein the learned Judges observed: "A legislature can certainly give retrospective effect to pieces of legislation passed by it but an executive Government exercising subordinate and delegated legislative powers, cannot make legislation retrospective in effect unless that power is expressly conferred."

28.2. However, in the instant case, unlike the **Arrowline's case** where a Notification was issued by the Central Government as a delegate, here we are confronted with an Ordinance promulgated by the Executive in exercise of the power vested to it under Article 123 of the Constitution of India which, from a reading of the said Article extracted in paragraph supra for ready reference taken together with the observations relating to Ordinances as made by the Hon'ble SC in D.P.Wadhwa's case also extracted in paragraph supra clearly establishes that, save the time limit of its validity,

for all other intents and purposes it is required to be treated at par with a piece of legislation as may be enacted by the Legislature, namely the Parliament. Thus, this essential distinction is required to be kept in mind and in the circumstances, the respondent cannot seek to rely on the decision as passed by this Tribunal in Arrowline's case rendered in an altogether different context.

28.3. Proceeding further to the other two cases cited by the respondent, namely **Chandrasingh Manibhai vs. Surjit Lal Ladhamal Chhabda, AIR 1951 SC 199** and **Gokuldas Pagaria vs Parmanand Chaurasia Manu/MP/0081/1967** following **the ratio of Chandrasingh' case** cannot also be relied on by the respondent, as it is seen that the propositions laid down in the said decisions and in those cases, the learned Judges therein were concerned with the interpretation of sub-sections (2) and (3) of Section 12 of the respective concerned Act only, which, as the word of those sub-sections then existing would show, was clearly prospective, and in the circumstances seems to have

been distinguished by the Hon'ble SC by a later judgment of Hon'ble Supreme Court (5 judge bench) on the same issue in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha (1962 2 SCR 159), ruling at paragraph 13 of the said judgement that *"while it was the 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. This is more so, when Acts are passed to protect the public against some evil or abuse."*

28.4. In any case, the decision cited by the respondent also recognizes that an Act, by express provision contained therein or by necessary implication or intendment is capable of making the law retrospective in its operation. The decisions cited in this regard by the Applicant, for sake of brevity are not required to be gone into as the case has been cited to canvass support for the above proposition and to establish that the main

provision of Section 10A taken together with objects reasons resulting in the promulgation of Ordinance (No.9 of 2020) demonstrates that it is to be made applicable retrospectively to the defaults arising on or after 25th March 2020.

29. **WHETHER SECTION 10A, NEWLY INSERTED IN I&B CODE BY THE PROMULGATION OF THE ORDINANCE (NO.9 OF 2020) HAS A RETROSPECTIVE APPLICABILITY AND RETROACTIVE EFFECT:**

29.1. Having seen that a legislation can have a retrospective application affecting even in relation to substantive or vested rights accrued, now the question falls for consideration is as to whether Section 10A as newly inserted by the Amendment Ordinance (No.9 of 2020) can be applied retrospectively and as to whether there is an express provision or clear implication contained in the legislation itself to this effect or even if the above is not to be found in the legislation (i.e. Ordinance (No.9 of 2020) whether there is an existence of the intention of the Executive to make it apparent as to its retrospective operation by looking into the

circumstances attendant in promulgating the Ordinance (No.9 of 2020).

29.2. From a plain reading of the main provision of Section 10A of I&B Code it is clear that in relation to defaults arising on or after 25th March 2020, no application for initiation of CIRP shall be filed for a period of six months or such further period not exceeding one year as may be notified in this behalf. The duration of suspension in relation to filing of application initially is pegged at six months extendable to a further period not exceeding one year. It is to be noted that in relation to Sections 7, 9 and 10 it is the 'default' on the part of the Corporate Debtor to pay the debt due which can trigger the filing of a petition and not otherwise. Where there is no debt as defined in Section 3(11) of the Code which is due and payable and no default as defined under Section 3(12) of the Code which had occasioned in it is payment, there is no question of any cause for a creditor to invoke the provisions of I&B Code seeking for the initiation of CIRP. Thus, in the

normal run of Section 7, 9 and 10 it is a *sine qua non* for the existence of a debt and its default and if both stand established this Tribunal is required to initiate the CIRP of the corporate debtor. This is evident from the judgements rendered by the Hon'ble SC in **Innoventive Industries –Vs- ICICI Bank & Anr** *(2018) 1 SCC 407* in relation to a `financial debt' and its `default' and in **Mobilox Innovations –Vs- Kirusa Software Private Limited** *(2018) 1 SCC 353* in relation to an `Operational Debt' and its `default'. It is worth recalling paragraph 30 of the Hon'ble SC from ***Innoventive Case*** which sums up it neatly for the purpose of admitting or rejecting an application filed by a creditor in relation to a financial debt and its default under Section 7 of the Code as under: -

> ***Para 30****: On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable* ***unless interdicted by some law*** *or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the*

*satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise. (**emphasis supplied**)*

29.3. Similarly, in relation to an Operational Debt and its default, the Hon'ble SC while dealing with its admission or rejection by this Tribunal when confronted with an application under Section 9 of the Code has held in ***Mobilox Case*** as follows: -

24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational

creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the

*application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso (Section 9(5)(ii)(a)). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b)), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c)). It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility (Section 9(5)(ii)(d)). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected (Section 9(5)(ii)(e)). (**emphasis supplied**)*

25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.*

* *Presently stands enhanced to Rs.1 Crore on and from 24.03.2020 by virtue Notification issued by the Central Government in this regard by virtue of the*

power granted in the statue itself i.e I&B Code, 2016

29.4. The reckoning of the date of default even though a factual aspect in relation to a financial debt and an operational debt, however, the procedure to approach by this Tribunal differs in relation to a financial debt as compared to an operational debt as can be seen from a comparison of the Scheme of the Code in relation to it brought forth by the Apex Court of the land. What the Ordinance (No.9 of 2020) seeks to do by insertion of Section 10A and the main provision contained therein is to interdict in approaching this Tribunal seeking for the initiation of CIRP by way of an application in relation to a default occurring on or after 25.03.2020, initially for a period of six months with an option to extend not exceeding one year. Thus, for the time being the hands of the clock have been stopped in relation to defaults occurring on or after 25.03.2020, all in view of the objects and reasons stated in the Ordinance itself, which at the cost of repetition arising out of the prevalence of the pandemic throughout the

world including India, causing a stress to the businesses, financial markets and economy and further the lockdown enforced from 25.03.2020 disrupting additionally the normal business operations.

29.5. The proviso to main provision of 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 the term `**no application shall ever be filed'** for initiation of CIRP of a corporate debtor for the said default arising during the said period.

29.6. The main provision of Section 10A taken in tandem with the proviso thereunder seems to have given scope for differing interpretation as the main provision specifies a restricted period of suspension and uses the term `shall be filed' whereas the proviso specifies a permanent suspension by the usage of the term `**shall ever be filed**' as above noted. However, endeavour of the

Ordinance in relation to the main provision seems to define the `Lock Down' period due to the prevalence of the pandemic, however, uncertain it may be, which came to be enforced on 25.03.2020 as stated in the objects and reasons and which explains the said date being specified as the relevant date for reckoning the exclusion of default. This period of lock down enforced, it must be noted is in itself uncertain as to how long it is going to be in vogue as its curtailment or extension depends upon the status on the ground for the arrest of the pandemic and seems to be also fluid in relation to individual States as well, thereby interrupting business activity for ***reasons beyond their control,*** the said term as used in the objects and reasons itself of Ordinance (No.9 of 2020). Thus endeavoring to define the relevant period in the main proviso initially for a minimum fixed period of six months commencing from 25.03.2020, the main provision leaves it open to the Executive to either limit it to the six months period ending on 25.09.2020 or cause it to be extended for a further period not exceeding one year i.e. till 25.03.2021.

29.7. 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 Lock Down 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.

29.8. In this connection it is to be noted that by virtue of a speech made by the Hon'ble Finance Minister and as reported in several leading newspaper and magazines, based on the representation made by industry representatives, in relation to government contractors having been affected by supply chain

disruptions arising from corona virus related issues and consequent delays of government contracts, the Ministry of Finance had chosen to issue an office memorandum directing all ministries to treat disruption due to virus outbreak as case of natural calamity and the disruptions due to corona virus may be treated as *'force majeure'* events.

29.9. Since each and every word used in a piece of legislation is to be presumed as relevant and no part of the statute is required to be considered as superfluous or made without any purpose, the proviso to the main provision of Section 10A as pointed out by the counsels for the parties to canvass for their respective positions is also required to be considered by this Tribunal in order to ascertain the role of the said proviso in the scheme of Section 10A as newly inserted. The role of a proviso to a main section has been generally delineated by the Apex Court in several of its judgments, one being that of **Laxminarayan R. Bhattad & Ors. V. State Of Maharashtra & Anr.** in *Civil Appeal No.6345 of 2001*

rendered on 04.04.2003 and *Reported in SpotLaw 2014 = (2003) 3 S.C.R. 409 and paragraph 51 of the said judgment reads as follows:-*

> *51. A proviso, as is well-known, may serve different purpose;*
>
> *(i) qualifying or excepting certain provisions from the main enactment;*
>
> *(ii) it may entirely change the very concept or the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;*
>
> *(iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (iv) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.*
>
> *(See S. Sundaram Pillai, etc. vs. V.R. Pattabiraman reported in AIR 1985 SC 582)*

29.10. With a view to explain the role of a proviso, in the matter of M. Vetri Selvan V. High Court of Judicature at Madras, represented by the Registrar General, High Court of Madras, Chennai-600 104 in W.P.No.21542 of 2013, Chief Justice Sanjay Kishan Kaul

as he then was of the High Court of Judicature of Madras had gone in depth into the aspect extracting extensively from several citations of the Apex Court in this regard including the above cited case of Laxminarayan R.Bhattad's case as well as that of S.Sundram Pillai's mentioned in Laxminarayan R.Bhattad's case and at paragraph no.38 of the M.Vetri Selvan's judgement had observed that a perusal of the aforesaid shows that the normal functioning of a proviso is to except something out of the enactment or to qualify something which, but for the proviso, would be within the purview of the enactment.

29.11. Applying the above principles enunciated by the Apex Court as well as by the High Court of Judicature at Madras it is seen that even though, both the main provision and the proviso operate in the same field in as much as the aspect of filing an application arising out of a default on the part of Corporate Debtor on and from 25.03.2020, while the former suspends the filing of an application only for a specified period,

however, the proviso by the usage of the words "no application shall ever be filed" thereby providing an exception from all together filing an application in relation to the defaults arising on and from 25.03.2020 till the said period as may be specified in the main provision. Thus in the absence of the proviso, the suspension of filing of an application under Section 7, 9 and 10 in relation to defaults arising on and from 25.03.2020 would have been applicable only for a period of six months i.e. up till 25.09.2020 or at the utmost until a year i.e.25.03.2021 taking into consideration the main provision of Section 10A of I & B Code as amended. However, the insertion of the Proviso makes the suspension in the filing of an application as envisaged in the main provision in relation to `defaults' falling within the specified period forever by the use of the term *shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor*

29.12. In this connection, it must be noted in relation to the facts of the present case, the respondent contended that even according to the admission of the

applicant, being by way of an email communication dated 02.04.2020 taken together with email dated 27.03.2020, COVID situation is not having any impact in relation to the arrangement with the respondent/Operational Creditor. However, what is required to be noted in this regard is that the Ordinance (No.9 of 2020) promulgated is intended to shield and protect the entire body of Corporate Debtors, irrespective of the reasons attributable to such default arising during the said period commencing from 25.03.2020 in relation to an Operational Debt or Financial Debt whether they are admitted or not by the concerned debtors, as otherwise the inclusion of Corporate Debtor itself as a Corporate Applicant under Section 10 would not have been included within the ambit of the main provision.

29.13. At this stage it will be appropriate to also refer to the decision of the Hon'ble Supreme Court rendered in **B. K. Educational Services Private Limited –Vs- Parag Gupta** *(2018) SCCOnline SC 1921* case dealing with the

applicability of the Law of Limitation to I&B Code in relation to financial and operational debts and its default. Since it also deals with the reckoning of dates to ascertain whether a debt is capable of being enforced in law, the observations made by the Hon'ble SC can also be applied effectively to the instant case as well taking into consideration the following observations: -

> The definition of "default" in Section 3(12) uses the expression "due and payable" followed by the expression "and is not paid by the debtor or the corporate debtor.....". "Due and payable" in Section 3(12), therefore, only refers to the whole or part of a debt, which when referring to the date on which it becomes "due and payable", is not in fact paid by the corporate debtor. The context of this provision is therefore actual non-payment by the corporate debtor when a debt has become due and payable.
>
> 23. Section 7 applies to a financial creditor who may file an application for initiating a corporate insolvency resolution process against a corporate debtor when a "default" has occurred. The same expression is used when it comes to an operational creditor, who may on the occurrence of a "default" under Section 8, deliver a demand notice as may be prescribed. What throws considerable light on the expression "default" is Section 8(2)(a) which reads as follows:
>
> "8. Insolvency resolution by operational creditor. — xxx xxx xxx (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor— (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;" It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within

a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a "dispute". We have seen that "dispute" as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice. ***It is clear therefore, that at least in the case of an operational creditor, "default" must be non-payment of amounts that have become due and payable in law. The "dispute" or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3(12) of the Code, they refer to a "default" which is non-payment of a debt that is due in law, i.e., that such debt is not barred by the law of limitation***. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see Bhogilal Chunilal Pandya v. State of Bombay, 1959 Supp. (1) SCR 310 at 313-314). It is thus clear that the expression "default" bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred.

29.14. The most important aspect which is required to be noted in ***B.K. Educational's case*** apposite in relation to the present context is the observation of the Hon'ble Supreme Court to the effect that the "dispute" or pendency of a suit or arbitration would necessarily bring

in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be rejected. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3(12) of the Code, they refer to a "default" which is non-payment of a debt that is due and payable in law, i.e., that such debt is not barred by the law of limitation. Similarly going by the objects and reasons as given for the insertion of Section 10A in the Ordinance (No.9 of 2020) because of stress arising due to global pandemic to the businesses beyond their control and consequent lock down from 25.03.2020 and as seen already, recognizes the doctrine of frustration in relation to avoidance of contract in itself, akin to that of the aspect of limitation being a ground for dispute in relation to a suit or arbitration. Hence looking from the said angle also it becomes evident as to why the Ordinance had chosen to provide by way of proviso to Section 10A that no application shall ever be filed for initiation of CIRP of a corporate debtor arising during the said period for the said default with a view to save the precious time

of this Tribunal, exercising only a summary jurisdiction and the process in itself being time bound under I&B Code, in going into the question of causes of `default' occasioned on or after 25.03.2020 as to whether such default arose because of pandemic coupled with the lock down enforced or otherwise and the defence/dispute which can be put forth in this regard by a corporate debtor that the default, if any had occurred only due to the pandemic as well as the attendant lock down imposed thereby frustrating the performance on its part inviting the application of doctrine of frustration.

29.15. This Tribunal is hence of the view that Section 10A relates back to the date of 25.03.2020 in reckoning the date of default for the reasons above noted, even though the Ordinance got Promulgated only on 05.06.2020 and published in the Gazette of India, 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 I&B 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.

29.16. Thus, having dealt with the power of the Executive to promulgate laws having retrospective effect based on decided case laws and also answering the question posed in relation to the retrospectivity of the applicability of Section 10A by relating it back to 25.03.2020 being the relevant date to be reckoned in relation to suspension of filing of application seeking for initiation of CIRP in the affirmative, it is only required of this Tribunal to ascertain as to whether the date of default falls within or outside the `Lakshman Rekha',

namely 25.03.2020 drawn by the legislation by way of the Ordinance (No.9 of 2020) promulgated on 05.06.2020 in the present case.

30. **WHETHER THE DATE OF DEFAULT FALLS PRIOR TO OR ON OR AFTER 25.03.2020 TO DETERMINE WHETHER THE APPLICATION IS TO BE PROCEEDED ANY FURTHER OR ALTERNATIVELY THIS TRIBUNAL IS TO RESTRAIN ITSELF FROM THE EXERCISE OF ITS JURISDICTION AVAILABLE TO IT UNDER SECTION 9 DUE TO THE APPLICABILITY OF SECTION 10A**:-

30.1. As already seen while dealing with the averments made in the instant application by the Applicant, it is the submission of the applicant that since the respondent himself had reckoned the date of default in relation to Operational Debt to have arisen on 30.04.2020, it is not necessary to look any further. In support of the said submission, reference, inter alia, is drawn to the Notice of Demand issued in Form 3 to the Applicant by the respondent as well as subsequently followed up with the Application (IBA/215/20) filed in Form 5 before this Tribunal. The instant application filed by the applicant seeking for the invocation of Section

10A in relation to the main petition IBA/215/2020 is somewhat akin to an application that may be filed by a defendant under Order 7 Rule 11 of CPC seeking for the rejection of a plaint under clause (d) that the suit appears from the statement in the plaint to be barred by any law. In this case, the bar in filing an application under Section 9 of I&B Code in relation to a default occurring on or after 25.03.2020 stems from the said Code itself, according to the applicant/corporate debtor in the form of the newly inserted Section 10A by the Ordinance (No.9 of 2020). While considering the ambit and scope of Order 7 Rule 11 CPC, particularly in relation clause (a) and (d) thereunder in the matter of **Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others, reported in (2004) 3 SCC 137** the Apex Court has observed as follows:

> *Before dealing with the factual scenario, the spectrum of Order VII Rule 11 in the legal ambit needs to be noted.*
>
> *In Saleem Bhai and Ors. v. State of Maharashtra and Ors. (2003 (1) SCC 557) it was held with reference to Order VII Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can*

exercise the power at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order VII Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant.

30.2. However, though rejection of the plaint under Order VII Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13 thereof, in the case of I&B Code, 2016 in view of the express terms of proviso to Section 10A of the Code the same may not be possible. Be that as it may, what is material to be noted is that in relation to the rejection of a plaint the focus of the Civil Court is required to be in relation to the plaint and its averments and the written statement, if any filed by the defendant is relegated to irrelevancy.

Further the stage at which the suit is pending is also not material and that 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 used the onus is on the court to perform its obligations in case of an infirmity in rejecting the plaint. Similarly, in view of the provisions of Section 10A of the Code, in filing an application there is a bar/interdiction as per the proviso to Section 10A as the phrase '**shall ever be filed**' is used in relation to the period specified in the main provision in relation to the default occurring during the said period. If the averments made in the petition being germane and manifestly point out that the default has occurred during the specified initial period of six months or as may be further specified not exceeding one year commencing on and from 25.03.2020, this Tribunal is not required to look any further and the counter statement/reply statement and the pleadings contained therein in this regard become wholly irrelevant. As pointed out by the Hon'ble Supreme Court, for the

compliance which are required to be adhered to by an Operational Creditor seeking to initiate CIRP against the Corporate Debtor and in this regard is required to follow a sequence of procedure including the issue of a demand notice or invoice demanding payment as contemplated under Section 8 of I&B Code in Form 3/Form 4 as the case may be and as prescribed under the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity referred to hereinafter as `AAA Rules') and on failure to either pay or demonstrate a dispute within a period of 10 days upon receipt of Demand Notice, is required to prefer it must be noted in the specified form, namely Form 5, as prescribed again under the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It is seen that while issuing Form 4 of the AAA Rules, necessarily Form 3 being the Invoice demanding payment is also required to be issued. In Form 3 of the AAA Rules it is significant to note that under the caption `Particulars of Operational Debt', it is required of the Operational Creditor to

specifically give particulars in relation to the Operational Debt under Clause (1) and Clause (2) as follows: -

Clause 1.	**Total amount of debt, details of transactions On account of which debt fell due, and the Date from which such debt fell due**
Clause 2.	**Amount claimed to be in default and the Date on which such default occurred**

30.3. It is important to note that the above mentioned details are again required to be reflected in Form 5, being the form of application to be preferred by an Operational Creditor after due compliance of all the formalities as are required and more fully enunciated by the Hon'ble Supreme Court in ***Mobilox's case*** as extracted. Part IV of Form 5 seeks from the Operational Creditor the particulars of an Operational Debt, again under clause 1 and 2 of Part IV which are to the following effect:

Clause 1.	**Total amount of debt, details of transactions On account of which debt fell due, and the Date from which such debt fell due**
Clause 2.	**Amount claimed to be in default and the date on which such default occurred**

30.4. In the present case as rightly pointed out by the Applicant, the respondent/operational creditor in both Form 3 annexed to the typed set at pages no. 34 to 43 as well Form 5 annexed to the typed set at page nos. 7 to 29 which includes an affidavit as well swearing to the contents of the application explicitly mention as follows:-

Form 3

Form of Demand Notice demanding payment under the Insolvency and Bankruptcy Code , 2016

1. Total amount of debt, Details of Transactions On account of which debt fell due, and the date from which such debt fell due	**Total amount of Debt**: INR 104,28,76,479 (Indian Rupees Hundred Four Crores Twenty Eight Lakhs Seventy Six Thousand Four Hundred Seventy Nine only) as on 30.04.2020 Along with interest @ 18% (eighteen percent) p.a. till the Date of realization of entire Payment. **Details of Transactions on account of which debt fell due**: Xxxxxxxxxxxxx **Date from which such debt fell due:** **30.04.2020**
2. Amount claimed to be in default and the date on which the default occurred	INR 104,28,76,479 (Indian Rupees Hundred Four Crores Twenty Eight Lakhs Seventy Six Thousand Four Hundred Seventy Nine only) as on 30.04.2020 Along with interest @ 18% (eighteen percent) p.a. till the Date of realization of entire payment.

Form 5

Part IV

Particulars of the Operational Debt

1. Total amount of Debt	TOTAL AMOUNT OF DEBT: INR 104,11,76,479 (Indian Rupees Hundred Four Crore Eleven Lakhs Seventy Six Thousand Four Hundred Seventy Nine) as on 30.04.2020 Along with interest @ 18% (eighteen percent) p.a. till the date of realization of entire payment.
Details of transactions on account of which debt fell due	Xxxxxxxxxxxxxxxxxxxx
And the date from which such debt fell due	**Date from which such debt fell due:** 30.04.2020
2. Amount claimed to be in Default	The total amount due from the Corporate Debtor is a sum of INR 104,11,76,479 (Indian Rupees Hundred Four Crore Eleven Lakhs Seventy Six Thousand Four Hundred Seventy Nine) as on 30.04.2020 Along with interest @ 18% (eighteen percent) p.a. till the date of realization of entire payment.
And the date on which such Default occurred	30.04.2020

30.5. It is required to be noted that correlating with the date on which the operational debt fell due and the

date of default, both being disclosed as 30.04.2020, the details of transactions on account of which the debt fell due, for sake of brevity not repeated, consistently asserts the said date to be the date of default even according to the averments made by the respondent/operational creditor germane for the consideration of the present application filed by the applicant/corporate debtor. Hence the endeavour on the part of the Operational Creditor/respondent, after the promulgation of the Ordinance fixing the cut off or relevant date as 25.03.2020 and to portray as if the default had occurred even prior to the relevant date of 25.03.2020 and in the circumstances the petition in IBA/215/2020 should be proceeded with, cannot be accepted as the petitioner who approaches this Tribunal should be consistent in his pleadings and cannot be allowed to resile from it in order to suit his convenience.

31. Taking into consideration the above discussions, we are of the considered view that the Executive in the Promulgation of the Ordinance to meet an extra-ordinary situation and to avoid causing further stress to the already

beleaguered businesses due to the prevalence of COVID pandemics throughout the world, including India and also in addition affected by the lock down enforced by the Union as well as the States of the Union, all beyond their control have chosen to suspend filing of any application in relation to defaults arising on or after 25.03.2020 under Section 7, 9 and 10 of I&B Code for a period of six months extendable by a further period not exceeding one year as per the main provision of Section 10A newly inserted and further by virtue of proviso thereunder to the main provision of Section 10A has further qualified the main proviso that in relation to default arising on or after 25.03.2020 (incidentally the date on which the lock down came into force) and during the said period to be correlated with the main provision of Section 10A which for the time being is specified as six months extendable up to a year, no application shall ever be filed thereby both the main provision as well as the proviso making it amply clear that the suspension in filing the application in relation to defaults arising on or after 25.03.2020 is to be made applicable retrospectively from the said date. The Explanation given under Section 10A only reinforces the retrospectivity in

the applicability of Section 10A in as much as providing that the defaults which had occurred prior to the date of 25.03.2020, Section 10A will not apply thereby clearly demarcating defaults arising on or after 25.03.2020 and till such period as may be extended as given in the main provision of Section 10A not exceeding a year, as a class in itself due to the prevalence of the extraordinary situation as stated in the objects and reasons leading to the promulgation of the Ordinance.

32. Thus, as a consequence of the applicability of the newly inserted Section 10A of the I&B Code to the instant case, in view of the alleged default if any, had occurred even according to the own admission of the respondent/operational creditor as to be that of 30.04.2020, both in the petition/main application filed in Form 5 in IBA/215/2020 as well as the demand notice issued prior to it in Form 3, both forms statutorily prescribed under the AAA Rules and as required to be completed and filed by an Operational Creditor while approaching this Tribunal, this Tribunal cannot proceed any further in relation to the petition in IBA/215/2020 due to the

bar created by law, namely, the newly inserted Section 10A of I&B 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, coming into force at once and in the circumstances this Tribunal is constrained to **allow** the instant application viz. IA/395/2020 and thereby **reject** the main application viz. **IBA/215/2020** by the respondent/operational creditor. All the connected applications stands closed. There shall be no order as to costs.

-SD-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-SD-
(R.VARADHARAJAN)
MEMBER (JUDICIAL)

P. Athistamani