

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 328 of 2024

[Arising out of order dated 09.02.2024 passed by the Adjudicating Authority
(National Company Law Tribunal, Mumbai Bench – V), in CP No.775/(IB)-
MB-V/2021]

IN THE MATTER OF:

Mr. Bhavit Sheth

(Through Authorised Representative Ms. Nikita Mehta)

Suspended Board of Director
Sporta Technologies Private Limited
502 Manju Mahal, 35, Nargis Dutt Road, Pali Hill,
Bandra West Mumbai 400052.

...Appellant

Versus

1. Mr. Madan Bajrang Lal Vaishnawa

Interim Resolution Professional of
Sporta Technologies Private Limited
1801, Peninsula Business Park, Tower B
Off. Senapati Bapat Marg,
Lower Parel, Mumbai 400 013.

...Respondent No. 1

2. Mr. Piyush Jani

Resolution Professional of
Reward Business Solutions Private Limited
A-413, Floor 4, Plot – 711, A,
Byculla Service Premises,
Industrial Estate, D.K. Road,
Ghodapdeo, Byculla
Mumbai – 400 027.

...Respondent No. 2

Present:

For Appellant : Mr. Arun Kathpalia, Sr. Advocate alongwith Mr. Gopal Jain, Mr. Karan Malhotra, Ms. Anuja Jhunjhunwala and Mr. Ayush Pratap Singh, Advocates.

For Respondents : Mr. Abhijeet Sinha, Sr. Advocate alongwith Mr. Anirudh Sharma, Mr. Aishwary Vikram, Mr. Abhaid Parekh, Mr. Ritwik and Ms. Heena Kochar, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by suspended Director of the Corporate Debtor has been filed challenging the order dated 09.02.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – V), admitting Section 9 application filed by Operational Creditor.

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

- i. The Leave and License Agreement was entered on 27.12.2019 between the Reward Business Solutions Private Ltd and the Sporta Technologies Private Limited for two units situated at 8th Floor of Tower B in Peninsula Business Park, Lower Parel – Mumbai.
- ii. Leave and license was for a period from 27.12.2019 to 26.12.2024.
- iii. There was rent free period for a period of three months from license commencement date. The lease amount was fixed in Leave and License Agreement.
- iv. The email dated 29.05.2020 was received from Director of the Reward Business Solutions Private Limited to the Corporate Debtor that Operational Creditor has taken loan from Mangalam which was in turn secured by the mortgage of licensed premises and the Mangalam has taken over the licensed premises and draft Tripartite Agreement was shared with the Appellant.
- v. On 18.06.2020, the Corporate Debtor asked for certain clarifications. Mangalam sent an email dated 19.06.2020 by their Advocate that the amount be deposited in the Bank Account provided by them.

- vi. Corporate Debtor received provisional attachment order dated 27.11.2020, from Directorate of Enforcement provisionally attaching the licensed premises.
- vii. On 18.02.2021, NCLT Mumbai initiated Corporate Insolvency Resolution Process (CIRP) in respect of Reward Business Solutions Private Limited.
- viii. IRP of the Operational Operational Creditor issued a notice dated 22.03.2021, calling upon the Corporate Debtor an amount of ₹7,62,08,246/- as a license fee for a period 27.03.2020 to April 2021.
- ix. Notice was replied by the Corporate Debtor. The Interim Resolution Professional (IRP) of Reward Business Solutions Private Ltd. filed Section 9 application being C.P. No.775/(IB)-MB-V/2021 for initiating CIRP against the Corporate Debtor for Operational Debt of ₹7,61,08,246/-.
- x. Corporate Debtor has also sent a Reply to Demand Notice dated 30.04.2021 and also filed the Reply to Section 9 application.
- xi. Another demand notice dated 23.01.2023 was sent by IRP where the date of default was mentioned as 01.05.2021.
- xii. An application dated 09.01.2023 was filed by the Operational Creditor, seeking permission of the Adjudicating Authority to withdraw the C.P. (IB) 770/MB-V/2021. The application for withdrawal, however, not proceeded any further and an Amendment Application dated 11.04.2023 was filed seeking amendment in C.P. (IB)/775/MB-V/2021.
- xiii. The Amendment Application came to be heard and rejected by the Adjudicating Authority vide order dated 22.12.2023. Adjudicating

Authority noticed that Company Petition is barred by Section 10A and is not maintainable. Amendment Application was rejected.

xiv. The Appellant did not peruse his application to withdrawal and the Section 9 application came to be heard by the Adjudicating Authority and by order dated 09.02.2024, the Adjudicating Authority admitted the Section 9 application, aggrieved by which order this Appeal has been filed.

3. We have heard Sh. Arun Kathpalia Learned Sr. Counsel appearing for the Appellant and Sh. Abhijeet Sinha, Sr. Counsel appearing for the Respondent.

4. In this Appeal, we have passed the Interim Order on 14.02.2024, which is as follows:

“Learned counsel for the Appellant submits that the application filed by the Operational Creditor was barred by 10A and application for amendment was rejected but the Adjudicating Authority has not considered 10A bar in the impugned order. Learned counsel for the Respondent submits that after filing of the Application under Section 9, the Respondent has also issued fresh notice under Section 8 on 23.01.2023 and had also filed an application for withdrawal of the Section 9 petition to enable the Respondent to file fresh application, on which application no order could be passed. Submission needs scrutiny.

Issue notice. Learned counsel for the Operational Creditor accepts notice. Let notice be issued on Respondent No.1.

Learned counsel for the Respondent prays for one week time to file an Additional Affidavit.

Learned counsel for the Respondent may file Reply/Additional Affidavit within one week.

List this Appeal on 23.02.2024.

In the meantime, the order impugned shall remain stayed. No steps, till the next date shall be taken by the IRP in the CIRP.”

5. Sh. Arun Kathpalia Learned Counsel for the Appellant submits that Section 9 application filed by the Operational Creditor was barred by Section 10A since the date from which debt fell due was mentioned as March 2020. An amount claimed in Demand Notice of ₹7,61,08,246/- was for the period from March 2020 to April 2021. There being three months period which was free rent period, the payment of rent could begin only from 27.03.2020. The entire amount claimed in the Section 9 application was of the 10A period except for the month of April 2021. No application could have been filed by the Operational Creditor for default committed during 10A period and the application filed by Operational Creditor was hit by Section 10A. It is submitted that Adjudicating Authority in the impugned order itself has noted in paragraph 5 that amount fall within the period stipulated under Section 10A of the Insolvency and Bankruptcy Code, 2016, (for short 'the Code') but failed to advert to the 10A provision while considering the application and admitted the application despite it being barred under Section 10A. It is submitted that in the order rejecting the Amendment Application, Adjudicating Authority itself has observed that Company Petition is barred by Section 10A. Disregarding its earlier order rejecting the Amendment Application, Adjudicating Authority proceeded to admit Section 9 application which was clearly barred by Section 10A. It is submitted that although Operational Creditor has filed an application to withdraw the Company Petition which application was not proceeded with and a fresh Demand Notice was also issued by the Operational Creditor on 23.01.2023, where the date of default was mentioned in 01.05.2021. It is submitted that Section 9

application being clearly barred by 10A, Adjudicating Authority ought not to have admitted Section 9 application.

6. Sh. Abhijeet Sinha Learned Sr. Counsel appearing for the Respondent refuting the submission of the Counsel for the Appellant submits that present is the case where no lease rent has been paid by the Corporate Debtor. Although, it enjoyed the property, no lease rent has been paid even after March 2021. The Corporate Debtor is enjoying the assets without making payment of any lease rent. It is submitted that the Demand Notice dated 20.04.2021 was sent, the default took place after 10 days which default continues.

7. Learned Counsel for the parties placed reliance on various Judgments in support of their submissions which shall be considered while considering the submission in detail. The main submission advanced by the Appellant is that Section 9 application filed by Operational Creditor was barred by Section 10A. We need to notice the pleadings and claim as contained in Section 9 application. Part IV of the application mentioned the details amount of debt as ₹7,61,08,246/- and debt fell due since March 2020. Part IV of the application is as follows:

PART-IV		
PARTICULARS OF OPERATIONAL DEBT		
1	TOTAL AMOUNT OF DEBT,	<u>Total Amount of Debt:</u> Rs.7,61,08,246/- [Rupees Seven Crores Sixty-One Lacs Eight Thousand Two Hundred and Forty-Six]
	DETAILS OF TRANSACTIONS ON ACCOUNT OF	<u>Details of Transaction:</u> The transactions in question pertain to a Leave and License Agreement dated 27 th December

	<p><i>WHICH DEBT FELL DUE</i></p> <p><i>AND THE DATE FROM WHICH SUCH DEBT FELL DUE.</i></p>	<p>2019, for Unit Nos. 801 and 802, Tower B, Peninsula Business Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013;</p> <p>As per the terms of the Leave and License Agreement, a monthly license fee of Rs. 49,83,636/- for the first three [3] years and Rs. 57,31,181/- for the remaining two [2] years;</p> <p>Corporate Debtor has not paid the monthly license fee date. However, since March 2020, Corporate Debtor has failed to pay the license fee in spite of repeated reminders. Therefore, till date of filing of this Petition an amount of Rs.7,61,08,246/- is outstanding and payable. Annexed hereto and marked as <u>Annexure – ‘H’</u> is the Particulars of Claim.</p> <p><u>Date from Which Debt fee due:</u></p> <p>Since March 2020, Corporate Debtor has failed to pay the license fee in spite of repeated reminders. The computation [Annexure C hereto] set out is the computation of debt.</p>
2	<p><i>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH DEFAULT OCCURRED.</i></p>	<p>Demand notice were issued for a total sum of Rs. [7,61,08,246/-] [Rupees Seven Crores Sixty-One Lac Eight Thousand Two Hundred and Forty-Six]. A copy of all the invoices raised on the Corporate Debtor and ledger copies of the corporate debtors are annexed and marked as <u>Annexure – ‘A’</u> and <u>Annexure – ‘C’</u> respectively.</p>

8. In the Annexure-A alongwith the Section 9 application the statement showing particulars of the claims have been annexed which is at page 185 of the Appeal Paper Book which is as follows:

STATEMENT SHOWING PARTICULARS OF CLAIMS

Sr. No.	Particulars	Amount
01	Amount of Outstanding Lease Rental Due till 17 th Feb 2021	6,38,30,703/-
02	Lease Rent from 18 th Feb 2021 to 28 th Feb 2021	23,10,271/-
03	Lease Rent for the Month of March 2021	49,83,636/-
04	Lease Rent for the Month of April 2021	49,83,636/-
	TOTAL AMOUNT RECEIVABLE	7,61,08,246/-

9. The copy of the Lease Deed has been brought on the record according to which as per Clause 1 rent free period was three months. The lease was executed on 27.12.2019 and for the period till 26.12.2024 hence the rental obligation commenced only with effect from 27.03.2020. 3 months free rent period came to be end on 26.03.2020.

10. Section 10A of the Code provides as follows:

“Section 10A: Suspension of initiation of corporate insolvency resolution process.

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.”

11. Section 10A of the Code prohibited filing an application under Sections 7, 9 & 10 for any default arising on or after 25.03.2020. The prohibition continues for one year from 25.03.2020 i.e., upto 24.03.2021. When we look into the Part IV of the application as well as the statement showing particulars of claim it is clear that apart from lease rental from April 2021, all claim was within the 10A period. For lease rental of April 2021, no CIRP can be commenced since it did not fulfil the threshold.

12. It is relevant to notice that application for amendment was filed by the Appellant seeking amendment in Company Petition. The Amendment Application came to be heard and rejected by Adjudicating Authority vide its order dated 22.12.2023. Adjudicating Authority by rejecting the application in paragraphs 9 to 13 following was held:

“9. It was in response to this reply to the Demand Notice that the present application is filed for seeking an amendment in the Company Petition. The case of the Respondent is that the Applicant being conscious of the fact that the disputes have arisen between the parties, hence a subsequent petition may not be maintainable. Thus the Applicant being conscious of the fact that he cannot file the fresh Company Petition and also in view of the fact that the earlier petition was statutorily barred under Section 10A of the Code seems to be making an attempt to get over the defaults by seeking the amendment in the CP by the present IA.

10. After having appreciated the above stated facts and circumstances, we deem it appropriate to considered the factual position which has been clearly enumerated in the above stated paras. The perusal of the same, makes it abundantly clear that the C.P.(IB)/ 775(MB)2021 falls within the realm of Section 10A, thus, being not maintainable.

11. The rights under Section 10A which have been provided under the statute to the parties cannot be allowed to be abused or trampled over by allowing the

amendment of the petition in a surreptitious manner so as to ride over the period so stated under the statute. 12. Section 10A is a beneficial Section granting certain relief in view of the outbreak of pandemic. The beneficial legislation/the Section cannot be allowed to be done away with by allowing any amendment which in fact leads to doing away with the benefit having been granted under the statute and accrued to the party.

13. Keeping above stated in mind, we deem it appropriate not to grant the amendment in C.P.(IB)/775(MB)2021. The observations made above may not be taken as an observation on the merits of the case of the Applicant on the pending petition or with respect to the debt due from the Respondent if any.”

13. The above order clearly indicates that the Adjudicating Authority was of the view that Company Petition is hit by Section 10A and not maintainable. Despite the above observation, the Adjudicating Authority proceeded to admit Section 9 application by the impugned order. It is further relevant to notice that in paragraph 5 of the order dated 09.02.2024, Adjudicating Authority noted the Operational Creditor’s admission, that amount falls within a period stipulated in Section 10A of the Code. However, the Applicant has submitted that this objection has not been taken by the Corporate Debtor in the Reply. Para 5 of the order is as follows:

“5. The Petitioner fairly admits the fact that pending amount falls within the period stipulated under Section 10A of the Code however this objection had not been taken by the Corporate Debtor in its reply. Also, no amount has been paid by the Corporate Debtor pursuant to the Demand Notice sent by the Operational Creditor and up to the time the premises were vacated by it.”

14. Section 10A came to considered by the Hon’ble Supreme Court in **‘Ramesh Kymal’ Vs. ‘Siemens Gamesa Renewable Power (P) Ltd.’**, reported in **(2021) 3 SCC 224**, Hon’ble Supreme Court after noticing

the legislative scheme noticed that Section 10A provides that no application for initiation of CIRP can be initiated for a default occurring on or after 25.03.2020. The Hon'ble Supreme Court held that the expression "*shall never be filed with the clear indicator that the intent of legislature is to bar the institution of any application*". In paragraph 27 of the Judgment following has been held:

"27. Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10-A. The onset of the Covid-19 Pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25-3-2020 as the cut-off date. The proviso to Section 10-A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25-3-2020 for a period of six months, extendable up to one year as notified. The Explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25-3-2020."

15. When there is a bar of initiation of an application, the mere fact that in the Reply filed of the Corporate Debtor no plea of the Bar was taken is in consequential. Further, Adjudicating Authority itself is aware of plea of Section 10A and has rejected the Amendment Application filed by the Operational Creditor on the ground that Company Petition is barred by Section 10A. Adjudicating Authority committed an error in proceeding to admit Section 9 application without adverting to the bar under Section 10A.

Although in paragraph 5 itself the bar of Section 10A was noted which was admission of the Operational Creditor itself.

16. Learned Counsel for the Respondent has also raised one submission that default in the case shall be after 10 days from the Demand Notice dated 20.04.2021, i.e., from 01.05.2021. Learned Counsel for the Respondent has relied on the Judgment of the Hon'ble Supreme Court in **(2022) 7 SCC 164**, in the matter of '**Consolidated Construction Consortium' Vs. 'Hitro Energy Solutions Private Ltd.'**, reliance has been placed on paragraph 32 of the Judgment which is as follows:

“32. In accordance with Section 9(1), an operational creditor can file the application under Section 9 after ten days from the date of delivery of the notice under Section 8, if no payment or notice of an existing dispute is received. Section 9(3)(a) requires the application to be accompanied by a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor. This again highlights that it could be either one of the two i.e. an invoice or a demand notice.”

17. In para 32 of the Judgment, Hon'ble Supreme Court noticed the scheme under Section 9 sub-Section (1). Section 9 sub-Section (1) provides:

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

18. We need to notice Section 8 also which contemplates that the Operational Creditor may on the occurrence of default deliver a Demand Notice. Section 8 sub-Section (1) thus clearly contemplates default has to be

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prior to the delivery of the Demand Notice. Section 9 sub-Section (1) which provides that if after expiry of period of 10 days from the date of delivery of Notice or invoice demanding payment, the Operational Creditor does not receive payment from the Corporate Debtor or notice of dispute, Operational Creditor may file the application before the Adjudicating Authority. Section 9 sub-Section (1) does not refer to period of date of default rather it empowers the Operational Creditor to file the application if payment is not received from service of Demand Notice within 10 days. The purpose and object of Section 9 sub-Section (1) & Section 10A is entirely different. The scheme of the Sections 8 & 9 clearly indicate that Demand Notice can be issued only when there is a default, thus default has to be prior to Demand Notice. In the present case Demand Notice was issued dated 20.04.2021 and the default in the Part IV mentions from March 2020. The lease rental period which was claimed in the Part IV was from March 2020 till April 2021.

19. As noted above, even if the lease rental of April 2021 is excluded, the entire claim of Operational Debt falls within 10A period and no application ever could have been filed for the default of the lease rental during the 10A period.

20. We, thus are satisfied that application filed by the Operational Creditor was clearly hit by Section 10A and ought not to have been admitted. Adjudicating Authority committed error in admitting Section 9 application disregarding the bar under Section 10A.

21. Now coming to the submission of the Counsel for the Appellant that Appellant has filed an application for withdrawal of the Company Petition which was also not allowed. It is true that Operational Creditor has filed an

application for withdrawal dated 09.01.2023, but after filing the Withdrawal Application, Operational Creditor filed an Amendment Application wherein it was clearly noted that Withdrawal Application has been filed but now the Appellant does not wish to pursue the application. Said averments have been made in paragraph 11 of the Amendment Application which is as follows:

*“11. On 7th July, 2022, Respondent handed over vacant possession of the Subject Property however refused to comply with the demand raised under the letter dated 6th July 2022. Therefore, Applicant on preferred Interim Application on preferred Interim Application bearing Diary No.2709138002192023 [**“IA for Withdrawal”**] seeking to withdraw the said Application and file a consolidated claim for an amount of Rs. 22,32,04,557/- [Twenty-Two Crores Thirty-Two Lacs Four Thousand Five Hundred and Fifty-Seven], towards outstanding license fee and CAM Charges from 28th March 2020 to 30th September 2022. However, in view of the changed circumstances, Applicant does not wish to pursue the said Application.”*

22. The above clearly indicates that Withdrawal Application filed by the Applicant, Operational Creditor was never pressed and what was pressed was amendment which was rejected. It is well settled that for any default which is committed by a Corporate Debtor subsequent to 10A period application under Section 9 is fully maintainable. It is thus open for the Operational Creditor to file a fresh application under Section 9 for the default which is committed after the expiry of 10A period.

23. In view of our forgoing discussions and conclusions, we are of the view that the application filed by the Operational Creditor under Section 9 was clearly barred by Section 10A, and the Adjudicating Authority committed an error in admitting Section 9 application by the impugned order dated 09.02.2024.

24. In result, the Appeal is allowed the order dated 09.02.2024 is set aside. The Corporate Debtor is freed from CIRP. The IRP fee and expenses as fixed by the Adjudicating Authority in the impugned order i.e., ₹2,00,000/- shall be paid by Operational Creditor to the IRP if not already paid. As observed above, Operational Creditor is at liberty to file a fresh application for default committed by Corporate Debtor subsequent to 10A period and shall have also liberty to seek appropriate remedy for their dues in accordance with law.

The Appeal is allowed subject to liberty as above.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

18th April, 2024

himanshu