

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) Insolvency No. 914 of 2023**

**IN THE MATTER OF:**

**RAGHAVENDRA JOSHI,**

Director of M/s. Khadkeshwar Hatcheries Ltd.  
Apoorva, B-10, Indraprastha Enclaves,  
Jyoti Nagar, Aurangabad – 431003,  
Maharashtra.

**...Appellant**

**Versus**

**1. AXIS BANK LIMITED,**

A Company Incorporated under The Companies Act,  
1956 and a Banking Company within the meaning of  
The Banking Regulation Act, 1949.  
Registered Office at Trishul, 3<sup>rd</sup> Floor, Opp.  
Samartheshwar Temple,  
Near Law Garden, Ellis Bridge,  
Ahmedabad, 380 006,  
Gujarat

**2. MR. AMIT CHANDRASHEKAR PODDAR,**

Interim Resolution Professional of M/s. Khadkeshwar  
Hatcheries Ltd.  
IBBI Registration No. IBBI/IPA-001/ IP- P0049/2017-  
18/ 10792,  
Residing at Akshat, 7 Vijay Nagar, Katol Road, Near  
Durga Mata Mandir, Opp. NCC Office,  
Nagpur – 400013,  
Maharashtra

**...Respondents**

**Present:**

**For Appellant** : Mr. Sudhir Makkar, Sr. Advocate with Mr. Sandeep  
Bajaj, Mr. Vipul Jai and Mr. Mayank Biyani,  
Advocates.

**For Respondents** : Mr. Arjun Krishnan, Advocate for R-1.

**J U D G M E N T**

**ASHOK BHUSHAN, J:**

1. This Appeal by a suspended director of the Corporate Debtor has been  
filed challenging the Order dated 20<sup>th</sup> June, 2023 passed by the National

Company Law Tribunal, Court No. III, Mumbai Bench (hereinafter referred to as **“The Adjudicating Authority”**) by which order Section 7 Application filed by the Axis Bank Limited-Respondent (herein) has been admitted.

**2.** Brief facts of the case are:

- i. The Corporate Debtor-M/s. Khadkeshwar Hatcheries Limited took financial assistance from the Financial Creditor between 2004 and 2016. On account of default committed by the Corporate Debtor, the Account was classified as NPA on 19<sup>th</sup> July, 2016. On 15<sup>th</sup> December, 2016, recall notice was issued for outstanding amount of Rs. 8,65,76,698/-. Notice under Section 13(2) of SARFAESI Act, 2002 was issued on 28<sup>th</sup> February, 2017.
- ii. An OTS proposal was submitted by the Corporate Debtor vide Letter dated 04.12.2019. OTS proposal submitted by the Corporate Debtor was sanctioned by the Bank vide Letter dated 14.02.2020 for outstanding dues of Rs. 12,80,11,496/-. Bank agreed to settle the outstanding dues at Rs. 5 Crores. Corporate Debtor on 13<sup>th</sup> March, 2020 sought for modification of repayment schedule. Corporate Debtor subsequently vide its letter dated 25<sup>th</sup> January, 2021 withdrew its OTS Proposal.
- iii. Section 7 Application was filed by the Financial Creditor for outstanding amount of Rs. 15,55,87,365/-. A reply was filed by the Corporate Debtor raising various defences. The Adjudicating Authority by the Impugned Order held that date of default as per Information Utility is 26.09.2019. The Adjudicating Authority held that Corporate Debtor has acknowledged the debt in its financial

year 2018-19, 2019-20 and 2020-21. Defence raised by the Corporate Debtor on the basis of Section 10A was also repelled holding that date of default being 26.09.2019 which is prior to 25<sup>th</sup> March, 2020, Section 10A is not attracted. The Adjudicating Authority by the Impugned Order admitted Section 7 Application.

iv. Aggrieved by the said order, this Appeal has been filed.

**3.** Mr. Sudhir Makkar, Learned Sr. Counsel appearing for the Appellant challenging the Impugned Order contends that even though NPA was declared on 19<sup>th</sup> July, 2016 but the Corporate Debtor's OTS was sanctioned on 14.02.2020 under which OTS, default was committed during Section 10A Period hence the default under the OTS being under Section 10A period, Section 10A was attracted and the Adjudicating Authority committed error in rejecting Section 7 Application. Learned Counsel for the Appellant has also relied on the Judgment of Hon'ble Supreme Court in Civil Appeal No. 4050/2020, "Ramesh Kymal Vs. M/s. Siemens Gamesa Renewable Power Pvt. Ltd."

**4.** Learned Counsel for the Respondent refuting the submissions of Learned Counsel for the Appellant submits that in the present case, the Adjudicating Authority has rightly repelled the defence of Section 10A since admittedly the default was committed much prior to Section 10A period. The Defaults have been acknowledged in financial year 2018-19, 2019-20 and 2020-21. The OTS which was approved on 14.02.2020 having also been withdrawn subsequently by the Corporate Debtor on 25<sup>th</sup> January, 2021, no benefit can be claimed by the Appellant regarding OTS Proposal.

5. We have considered the submissions of Learned Counsel for the parties and have perused the record.

6. Section 10A of the I&B Code, 2016 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<sup>2</sup> 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.”*

7. The law of Section 10A is well settled. The Hon’ble Supreme Court in Civil Appeal No. 4050 of 2020, “**Ramesh Kymal Vs. M/s. Siemens Gamesa Renewable Power Pvt. Ltd.**” laid down following in Paragraphs 22,23 and 24:

*“22 The language of the provision is not always decisive to arrive at a determination whether the provision is applicable prospectively or retrospectively. Justice G.P.*

Singh in his authoritative commentary on the interpretation of statutes, *Principles of Statutory Interpretation*, has stated that:

*“In deciding the question of applicability of a particular statute to past events, the language used is no doubt the most important factor to be taken into account; but it cannot be stated as an inflexible rule that use of present tense or present perfect tense is decisive of the matter that the statute does not draw upon past events for its operation. Thus, the words “a debtor commits an act of bankruptcy” were held to apply to acts of bankruptcy committed before the operation of the Act. The words “if a person has been convicted” were construed to include anterior convictions. The words “has made”, “has ceased”, “has failed” and “has become”, may denote events happening before or after coming into force of the statute and all that is necessary is that the event must have taken place at the time when action on that account is taken under the statute.....And the word “is” though normally referring to the present often has a future meaning and may also have a past signification in the sense of “has been. The real issue in each case is as to the dominant intention of the Legislature to be gathered from the language used, the object indicated, the nature of rights affected, and the circumstances under which the statute is passed.”*

*(emphasis supplied)*

23 Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. 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 March 2020 as the cut-off date. The proviso to Section 10A 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 March 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 March 2020. The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of

*protection because the application was filed before 5 June 2020.*

*24 We have already clarified that the correct interpretation of Section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.”*

**8.** In Ramesh Kymal’s Case, the Appellant had filed an Application under Section 9 on 11<sup>th</sup> May, 2020 on the ground of default. The ordinance No. 09/2020 was promulgated by the President of India on 05<sup>th</sup> June, 2020 by which Section 10A was inserted into the I&B Code, 2016. An Application was filed by the Corporate Debtor for dismissal of Section 9 Application, the Section 9 Application was dismissed on the ground of Section 10A. Challenging the order of the Adjudicating Authority as well as Appellate Tribunal, Appeal was filed in the Supreme Court. Argument which was advanced before the Hon’ble Supreme Court was that Section 10A having been inserted in the statute book with effect from 05<sup>th</sup> June, 2020, it shall not apply on the Applications filed prior to the said date, which argument was rejected by the Hon’ble Supreme Court and relevant observations have been made in Paragraphs 22,23 and 24 as has been noted above. The Hon’ble Supreme Court affirmed the Order of the Adjudicating Authority holding that default in Section 9 Application being on 30<sup>th</sup> April, 2020 it

being covered by Section 10A, Application was rightly rejected. The above judgment of the Hon'ble Supreme Court has laid down that if the default is after 25<sup>th</sup> March, 2020, the Application is hit by Section 10A. The object as was indicated in the ordinance for bringing Section 10A in the statute book is relevant to notice which is to the following effect:

*“AND WHEREAS a nationwide lockdown is in force since 25<sup>th</sup> March, 2020 to combat the spread of COVID-19 which has added to disruption of normal business operations:*

*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.”*

**9.** Thus the focus of the law which was brought by Section 10A was that when the Corporate Debtor suffers default on account of Covid-19, they should be protected from the filing of any Insolvency Application in the default committed during the said period.

**10.** Section 10A never intended to cover the default which is continuing before Section 10A period. The present is a case where admittedly default has been committed by the Corporate Debtor since 2016. Admittedly NPA was declared on 19<sup>th</sup> July, 2016. Learned Counsel for the Respondent has rightly referred to acknowledgement made by the Corporate Debtor in its *Company Appeal (AT) Ins. No. 914 of 2023*



balance sheets for the financial year 2018-19, 2019-20 and 2020-21 where the dues were clearly acknowledged. Thus, the present is the case where default was committed prior to commencement of Section 10A period.

**11.** The submission which has been pressed by the Learned Counsel for the Appellant is that since consequent to approval of the OTS on 14<sup>th</sup> February, 2020, the Corporate Debtor committed another default during the Section 10A period, it is entitled to benefit of Section 10A period. The OTS dated 14.02.2020 has been brought on record at page 592. Paragraph 2 of the Order of the Bank dated 14.02.2020 is as follows:

*“2. Bank agrees to settle the aforesaid outstanding dues at Rs. 5,00,00,000/- (Rupees Five Crore) subject to satisfactory payment in accordance with the terms and conditions as follows;*

- a. Upfront payment of Rs. 0.25 crore.*
- b. Rs. 0.25 crore within one week of this letter.*
- c. Rs. 0.50 crore on or before 29.02.2020.*
- d. Remaining amount in 6 monthly instalments of Rs. 0.50 crore each starting from March 2020 and last instalment of Rs. 1 crore on or before 30.09.2020 plus interest @12% from 01.04.2020 on unpaid settlement amount on reducing balance basis.”*

**12.** Immediately after OTS Approval, Corporate Debtor on 13<sup>th</sup> March, 2020 wrote for proposing a different timeline for repayment of OTS which was not in accordance with the OTS Proposal. Subsequent letters were given by the Corporate Debtor seeking extension of timeline for repayment of OTS Payment. Corporate Debtor on 25<sup>th</sup> January, 2021 itself has withdrawn OTS

Offer. In the Letter dated 25<sup>th</sup> January, 2021, Corporate Debtor wrote following to the Bank:

*“If the bank would have extended its timely support by accepting our OTS proposals in 2019, the company would not have landed in the present situation for which your bank is solely responsible; and by this time you would have recovered the entire OTS amount and the hanging sword of wilful default on us would have cleared off. Now in the current situation of closure of major activities of the company, though your bank has not accepted our request to revise payment of balance OTS of Rs. 420 lacks upto Mar-22, and abruptly withdrawn the OTS; the company from its side also withdraws the OTS alongwith its request for revision in payment of balance OTS. Since the company will not be in a condition to honour the balance OTS payment, hence it is withdrawn.*

*This is for your kind information.*

*Yours faithfully,*

*For Khadkeshwar Hatcheries Ltd.”*

**13.** The OTS was accepted prior to commencement of Section 10A Period. From the letter which was given by the Corporate Debtor on 13<sup>th</sup> March, 2020 which has been brought on record along with the Appeal, it is clear that Corporate Debtor committed default of the OTS even before 25<sup>th</sup> March, 2020. The Letter dated 13<sup>th</sup> March, 2020 of the Corporate Debtor is as follows:

*“To,*

*Mr. Nitin Arora,*

*Senior Vice President – Structured Assets Group,*

*Axis Bank Limited,*

*Worli,*

Mumbai – 400025

Reg: One Time Settlement of Khadkeshwar Hatcheries Ltd.

Dear Sir,

This has reference to our Company, Khadkeshwar Hatcheries Ltd. (KHL) for which we you had proposed an OTS scheme based on key inputs from our management.

Further, based on the interactions that our advisor, SAFIRE Capital Advisors I Pvt Ltd represented by Mr. Ayush Bagla and Mr Albert da Costa, had with your goodself, we would like to state as under:-

- a. Due to external circumstances we were not being able to take forward the OTS scheme in the form that had been discussed and proposed in February 2020. It's a fact that there is a near force majeure situation in the Poultry Industry due to a sudden demand and price shrinkage, in light of the misinformation and unwarranted knee jerk reactions to the COvid-19 outbreak. KHL is a victim of such extremely adverse market sentiments and actions and we are incurring unprecedented losses on a daily basis.
- b. in light of this sudden negative business situation, our cash flows as a group are not what we had estimated around two months back when we had discussed the proposed OTS with your Bank. The sudden outbreak of Corona fear was not understood properly. We therefore request your consideration of the OTS scheme with a timeline that we can adhere to and honour.
- c. We propose the following OTS pay outs schedule:

S.	Timeline	Amount (Rs. Lacs)
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No.		
1	<i>Before 31<sup>st</sup> March 2020</i>	<i>50.00</i>
2	<i>30<sup>th</sup> April 2020</i>	<i>10.00</i>
3	<i>31<sup>st</sup> May 2020</i>	<i>10.00</i>
4	<i>30<sup>th</sup> June 2020</i>	<i>40.00</i>
5	<i>31<sup>st</sup> July 2020</i>	<i>40.00</i>
6	<i>31<sup>st</sup> Aug 2020</i>	<i>50.00</i>
7	<i>30<sup>th</sup> Sept 2020</i>	<i>50.00</i>
8	<i>31<sup>st</sup> Oct 2020</i>	<i>50.00</i>
9	<i>30<sup>th</sup> Nov 2020</i>	<i>100.00</i>
10	<i>31<sup>st</sup> Dec 2020</i>	<i>100.00</i>
	<i>Total</i>	<i>500.00</i>

**Note** – *The above schedule has been very deeply thought out before being proposed to your bank. We expect the Poultry market to stabilize by June 2020, by which time we expect to come back to achieving positive cash flow at the group level.*

*d. KHL will give Post-dated cheques (PDCs) for each of the proposed instalments.*

*e. We request that the above payout schedule be accepted and that the carry interest be considered at 10% p.a. (payable monthly)*

*...”*

**14.** Thus, even the default of the OTS Approval dated 14<sup>th</sup> February, 2020 was committed by the Corporate Debtor before 25<sup>th</sup> March, 2020, the present is thus a case where default was committed by the Corporate Debtor

much before Section 10A period as noted above. Even OTS as accepted by the Bank on 14.02.2020 was also not complied with by the Corporate Debtor.

**15.** The submission that since default was also committed by the Corporate Debtor during the Section 10A period of the OTS amount which ultimately withdrawn on 25<sup>th</sup> January, 2021, the Application should be barred by Section 10A does not commend us. There being categorical default by the Corporate Debtor prior to Section 10A period, the Appellant was not clearly entitled for the benefit of Section 10A Period.

**16.** Learned Counsel for the Respondent has rightly relied on Judgment in **“Company Appeal (AT) Ins. No. 1016 of 2022, Vishal Agarwal Vs. ICICI Prudential Real Estate AIR-I & Anr.”** where this Tribunal has held that when default was committed prior, application shall not be barred. In paragraph 7 and 8, following have been held:

*“7. The submission of the learned counsel for the Appellant that as per Annexure-3 clause 6, the date of repayment of instalment is 31.08.2020 only is not acceptable. There being clear admission on behalf of the Appellant in default in payment of interest for the quarters ending September 2019 and December 2019, Appellant cannot be permitted to contend that default was committed only on 31.08.2020. Insofar as application being barred by 10A, benefit under Section 10A can be claimed by the application only when there is clear default during the prohibited period. The said benefit cannot be claimed by the Appellant by ignoring the admission of default which was prior to 25.03.2020. There being clear admission in the present case, in letter dated September 9, 2021 where the Corporate Debtor*

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*itself has admitted that he has failed to pay interest for the quarters ending September 2019 and December 2019 thus acknowledging that it has defaulted in servicing its obligations under the DSA.*

*8. We, thus, are of the view that the Adjudicating Authority has after considering all relevant facts and after finding debt and default has admitted the application. The fact that before this Tribunal, the Appellant has taken four adjournments for proposing OTS and get settle with the Bank itself indicate that debt and default is not disputed. We, thus, are of the view that there is no merit in the Appeal. Appeal is dismissed.”*

**17.** In view of the foregoing discussions, we do not find any merit in the contention of Learned Sr. Counsel for the Appellant that Application under Section 7 of I&B Code, 2016 was barred by Section 10A. The Adjudicating Authority did not commit any error in admitting Section 7 Application. There is no merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**New Delhi  
18<sup>th</sup> August, 2023  
Basant B**