IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE T.R.RAVI

TUESDAY, THE 1ST DAY OF FEBRUARY 2022 / 12TH MAGHA, 1943

WP(C) NO. 27636 OF 2020

PETITIONER:

M/S. THARAKAN WEB INNOVATIONS PVT. LTD.
EP/XII 492A EZHUPUNNA P.O., ALAPPUZHA,
KERALA-688 548, REPRESENTED BY ITS DIRECTOR
MR.SHAMEEM PALYKANDY JALEEL.

BY ADVS.
SRI JOSEPH KODIANTHARA (SR.)
SRI.ISAAC THOMAS
SHRI.SHARAD JOSEPH KODANTHARA

RESPONDENTS:

1 NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, COMPANY LAW BHAVAN, BMC ROAD,
THRIKKAKARA, KAKKANAD, KOCHI-682 021,
REPRESENTED BY ITS DEPUTY REGISTRAR.

2 CYRIAC NJAVALLY,
NJAVALLY HOUSE, CHITTETHUKARA,
KAKKANAD, CSEZ P.O.,
ERNAKULAM-682 037.

BY ADVS.
SHRI.S.MANU, ASG OF INDIA
SRI.G.HARIKUMAR (GOPINATHAN NAIR)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 10.11.2021, THE COURT ON 01.2.2022 (ALONG WITH WPC.14158/2021) DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE T.R.RAVI

TUESDAY, THE 1ST DAY OF FEBRUARY 2022 / 12TH MAGHA, 1943

WP(C) NO. 14158 OF 2021

PETITIONERS:

CYRIAC NJAVALLY,
AGED 37 YEARS
NJAVALLIL HOUSE, CHITTETHUKARA,
KAKKANAD, CSEZ P.O.,
KOCHI-682 037.

BY ADVS.
G.HARIKUMAR (GOPINATHAN NAIR)
AKHIL SURESH

RESPONDENTS:

1 UNION OF INDIA,
THE MINISTRY OF CORPORATE AFFAIRS,
REPRESENTED BY ITS SECRETARY, "A" WING,
SHASTRI BHAWAN, RAJENDRA PRASAD ROAD,
NEW DELHI-110 001.

2 M/S. THARAKAN WEB INNOVATIONS PVT.LTD.,
ALAPPUZHA, KERALA-688 548,
REPRESENTED BY ITS DIRECTOR.

BY ADVS.
R1 BY SRI S.MANU (ASGI)
R2 BY SRI JOSEPH KODIANTHARA (SR.)
SRI ISAAC THOMAS
SRI SHARAD JOSEPH KODANTHARA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03.08.2021, THE COURT ON 01.02.2022 (ALONG WITH WPC 27636/2020) DELIVERED THE FOLLOWING:

"CR"

T.R.RAVI,J.

W.P.(C)Nos.27636 of 2020 & 14158 of 2021

Dated this the 1st day of February, 2022

JUDGMENT

The issues involved in these writ petitions are intrinsically connected and the parties are also same. The writ petitions are hence heard and disposed of together. The reference to the parties and exhibits is, as they appear in W.P.(C)No.27636 of 2020.

2. Heard Sri Joseph Kodianthara, learned Senior Advocate instructed by Sri Isaac Thomas on behalf of the petitioner in W.P.(C)No.27636 of 2020 and Sri Hari Kumar G.Nair, learned counsel for the petitioner in W.P.(C)No.14158 of 2021, who is the 2nd respondent in W.P.(C)No.27636 of 2020.

THE DISPUTE IN BRIEF

W.P.(C)No.27636 of 2020

3. This writ petition has been filed challenging the order of the Adjudicating Authority under the Insolvency and Bankruptcy

Code (hereinafter referred to as 'IBC'). The facts that will be relevant for deciding the case are as follows;

4. The petitioner is a Private Limited Company engaged in the activities of developing software and promoting advancement in the field of Information Technology. The 2nd respondent has filed IBA/34/KOB/2020 before the 1st respondent claiming to be an operational creditor and arraying the petitioner as a corporate debtor under the provisions of the IBC. The case of the 2nd respondent is that amounts due to the 2nd respondent have not been paid by the petitioner. According to the petitioner, the petition is not maintainable before the 1st respondent. The petitioner has disputed the alleged debts in their counter statement filed before the 1st respondent. According to them, amounts are actually due from the 2nd respondent to the petitioner. It is submitted that the 2nd respondent is a former Director and shareholder, who had sold the entirety of the shares after stepping down as Director and the application has been filed only as a disgruntled Director seeking to discredit the company and its shareholders. The petitioner preferred I.A.No.175/KOB/2020 under Rule 32 of the National Company Law

Tribunal Rules ('NCLT Rules' for short) praying that the maintainability of the application may be considered as a preliminary issue. Ext.P4 is the application. Reliance was placed on notification No.S4/1205 (E) dated 24.3.2020 published by the Ministry Corporate Affairs, Government of India, whereby Section 4 of the IBC was amended and the minimum amount of default was increased to Rs.1 Crore. It is submitted that unless the application relates to a default of an amount of more than Rs.1 Crore, the same will not be maintainable before the 1st respondent. The National Company Law Tribunal ('NCLT' for short) has on 01.12.2020 issued Ext.P7 order in I.A.No.175/KOB/2020 finding that the application filed by the 2nd respondent is maintainable. It can be seen from Ext.P7 order that the reasoning of the 1st respondent is that the notification under Section 4 will not save the petitioner from the initiation of insolvency proceedings with respect to defaults which had taken place before the pandemic and the resultant financial crisis. According to the petitioner, on 25.9.2020 on which date the application which is seen dated 7.3.2020 was filed before the 1st respondent, the Government order dated 24.03.2020 has already

come into force and the amount claimed in the application is less than Rs.1 Crore. It is pointed out that the Form 3 notice contemplated under Sections 8 and 9 of the IBC was served on the petitioner only on 02.03.2020 and the complaint could have been filed only after the mandatory period of 10 days after receipt of the Form 3 notice. It is submitted that even if the date on the complaint is to be taken as the relevant date, the complaint could not have been filed on 07.03.2020, which is not after the 10 days stipulated in the statute. Several other defects are also pointed out. However, the main issue revolves around the question whether Ext.P5 which is the amendment of Section 4 will be applicable to cases where the default had occurred prior to the date of amendment.

W.P.(C)No.14158 of 2021

5. The prayer in this writ petition is for a declaration that the notification dated 24.03.2020 whereby the minimum amount of default was specified as Rs.1 Crore is prospective and would apply only to cases where the default occurred on or after 24.3.2020. There is also a prayer for a declaration that the notification will not apply to cases where mandatory notice under Section 8 of the IBC

has been issued by the operational creditor and the stipulated 10 days' period had elapsed prior to the date of notification.

RELEVANT STATUTORY PROVISIONS

6. The Code has undergone several amendments after it came into force. The provisions of the Code prior to Ext.P5 and after Ext.P5, which are relevant for the purpose of deciding the above writ petitions are extracted below. Section 4 prior to Ext.P5 reads thus;

> "4. (1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:
> Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."

7. After Ext.P5 and some other amendments, Sections 4, 5, 6, 7, 8, 9, 10 and 10A read thus:

> **"4. Application of this Part.—**(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one Crore rupees:
> Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees:
> Provided further that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for

matters relating to the pre-packaged insolvency resolution process of corporate debtors under Chapter III-A.

5.Definitions.—In this Part, unless the context otherwise requires,**—**

(1) to (4) xxxxxxx xxxxxxx xxxxxxx xxxxxxx

(5) "corporate applicant" means—

(*a*) corporate debtor; or

(*b*) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process or the prepackaged insolvency resolution process, as the case may be, under the constitutional document of the corporate debtor; or

(*c*) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(*d*) a person who has the control and supervision over the financial affairs of the corporate debtor;

(6) xxxxxxx xxxxxxx xxxxxxx xxxxxxx

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

xxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxx

(11) "initiation date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process or pre-packaged insolvency resolution process, as the case may be;

(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be:

xxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxx

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

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

7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred:

Provided that for the financial creditors, referred to in clauses (*a*) and (*b*) of sub-section (6-A) of Section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(*a*) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(*b*) the name of the resolution professional proposed to act as an interim resolution professional; and

(*c*) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3):

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.

(5) Where the Adjudicating Authority is satisfied that—

(*a*) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(*b*) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (*b*) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(*a*) the order under clause (*a*) of sub-section (5) to the financial creditor and the corporate debtor;

(*b*) the order under clause (*b*) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

8. Insolvency resolution by operational creditor.—(1) An operational creditor may, on the occurrence of a default, deliver

a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(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;

(*b*) the payment of unpaid operational debt—

(*i*) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(*ii*) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

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.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(*a*) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(*b*) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(*c*) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(*d*) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(*e*) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(*i*) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(*a*) the application made under sub-section (2) is complete;

(*b*) there is no payment of the unpaid operational debt;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(*e*) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(*ii*) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(*a*) the application made under sub-section (2) is incomplete;

(*b*) there has been payment of the unpaid operational debt;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(*d*) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(*e*) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (*a*) of clause (*ii*) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

10. Initiation of corporate insolvency resolution process by corporate applicant.—(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

[(3) The corporate applicant shall, along with the application, furnish—

(*a*) the information relating to its books of account and such other documents for such period as may be specified;

(*b*) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and

(*c*) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

(*a*) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional; or

(*b*) reject the application, if it is incomplete or any disciplinary proceeding is pending against the

proposed resolution professional:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

10-A. 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."

60. Adjudicating Authority for corporate persons.—(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation

proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of —

(*a*) any application or proceeding by or against the corporate debtor or corporate person;

(*b*) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(*c*) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in

force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

61. Appeals and Appellate Authority.—(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

(3) An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely —

(*i*) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(*ii*) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(*iii*) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(*iv*) the insolvency resolution process costs have not

> been provided for repayment in priority to all other debts; or
>
> (*v*) the resolution plan does not comply with any other criteria specified by the Board.
>
> (4) An appeal against a liquidation order passed under Section 33, or subsection (4) of Section 54-L, or sub-section (4) of Section 54-N, may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.
>
> (5) An appeal against an order for initiation of corporate insolvency resolution process passed under sub-section (2) of Section 54-O, may be filed on grounds of material irregularity or fraud committed in relation to such an order.

QUESTIONS POSED

8. The questions that arise for decision on the basis of the contentions raised on either side are as follows:

(a) Whether Ext.P1 application which relates to a defaulted amount less than Rs.1 crore can be filed after 24.3.2020, on which date Ext.P5 amendment to Section 4 was introduced ?

(b) Whether the prospectivity of Ext.P5 has to be decided on the basis of the defaulted amount or on the basis of the date of default ?

(c) Whether Ext.P7 order of the NCLT can be challenged in a proceedings under Article 226 or should

the petitioner be relegated to the appellate remedy?

GIST OF THE ARGUMENTS

9. The Senior Counsel appearing for the petitioner submits that the application was filed before the 1st respondent on 25.09.2020, while the amendment had come into effect on 24.03.2020. As such the petitioner cannot be treated as coming within the definition of 'defaulter' and cannot be treated as having become insolvent; which alone can be the basis for an application of the provisions of the IBC. Only if the debt is more than Rs.1 Crore, a person can be treated as having become insolvent under the IBC and an application can be filed before the 1st respondent. It is further pointed out that the 2nd respondent is not a financial creditor, but only an operational creditor. The counsel referred to Section 5(7), which defines a 'financial creditor' and Section 5(20) which defines an 'operational creditor'. Reference is made to Section 7 which deals with initiation of Corporate Insolvency Resolution process by the Financial Creditor, Section 8 which deals with that initiated by operational creditor and Section 9 which deals with the application for initiation of Corporate Insolvency Resolution process

by an operational creditor. As far as Section 7 is concerned, a financial creditor can initiate a proceeding when a default has occurred. In the case of an operational creditor, on the occurrence of a default, he has to deliver a demand notice of unpaid operational debt in such form and manner as may be prescribed in the rules. Section 8(2) says that a corporate debtor shall within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor the existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute or the payment of unpaid operational debt. It is only after the expiry of a period of 10 days after the delivery of the notice under sub-section (1) of Section 8, and, if the operational creditor does not receive payment or notice of a dispute, that he may file an application before the Adjudicating Authority, as can be seen from Section 9. Section 9(5) requires the Adjudicating Authority to either admit or reject the application within 14 days. Section 9(6) says that the Corporate insolvency resolution process shall commence from the

date of admission of the application. It is the case of the petitioner that the petition was filed even before the expiry of 10 days and that the debt itself is disputed. It is submitted that the above contentions are on the merits of the claim and even otherwise the application cannot be maintained owing to the fact that the debt involved is less than Rs.1 Crore and application has been filed after Ext.P5 amendment was introduced in Section 4 of the IBC.

10. In the case on hand, Ext.P1 would show that the application was signed on 07.03.2020. According to the 2nd respondent, the amounts were due as early as on 06.07.2019. On 25.02.2020 a demand notice in Form 3 was sent to the petitioner. Admittedly, the petition was filed before the NCLT only on 25.09.2020. If the petition had been filed before 24.03.2020, there can be no doubt regarding its maintainability, since on that day the amendment has not come into force. It is in this background that Ext.P4 I.A.No.175/KOB/2020 was filed by the petitioner under Rule 32 of the NCLT Rules praying that the maintainability of the application may be considered as a preliminary issue.

11. Senior counsel referred to Section 10 of the Act which

deals with applications filed by the Corporate Applicant, which also contains provisions similar to Section 9. Even under Section 10, the Adjudicating Authority shall within a period of 14 days from the receipt of an application, by an order admit the application, if it is complete. It is pointed out that going by Section 10(5), the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of the Section. Thus it can be seen that a corporate insolvency resolution process, whether initiated at the instance of a financial creditor or a corporate creditor or a corporate applicant, shall commence only on the date on which the application is admitted. In this respect, the counsel points out Ext.P2, which is the first order passed by the 1st respondent. In Ext.P2 the Tribunal has clearly stated that notice was issued on 25.02.2020 and hence cause of action arose on 25.03.2020. What is omitted to be noticed was that, a mere reading of the provisions of the IBC will show that in all cases where there is a cause of action for demanding an amount, a petition for insolvency cannot be filed. Only those debtors who can be stated to be in default as per Section 4 can be proceeded against under Part II of

the IBC. A proceeding under Part II of the IBC could have been initiated against debtors whose defaulted amount is Rs.1 lakh or more, prior to 24.3.2020. After Ext.P5 such proceedings can be initiated only if the default is of an amount of Rs.1 Crore or more. The counsel also points out that even in Ext.P1 petition, the 2nd respondent has only stated that on 25.02.2020 notice was sent. The signature in the petition was affixed on 07.03.2020 before the 10 days' period after issuance of the notice elapsed and within 5 days of the receipt of the notice by the petitioner. It is submitted that the date of signing need not be looked into, since the petition was filed only in September, 2020 and it cannot relate back to 07.03.2020 by any known legal principle. The counsel points out the difference between proceedings initiated at the instance of a financial creditor and an operational creditor and submits that as far as operational creditors are concerned, their right to approach the Adjudicating Authority does not commence immediately on the occurrence of a default. In order to ripen into a right to approach the Adjudicating Authority, a demand notice has to be delivered to the corporate debtor showing the unpaid operational debt in such form and

manner as may be prescribed and thereafter 10 days should have elapsed, during which time the corporate debtor has to bring to the notice of the operational creditor the existence of a dispute in relation to such debt or pay the unpaid operational debt in the manner stated in Section 8. An application under Section 9 can be filed only after the expiry of the 10 days from the date of delivery of the notice or invoice demanding payment, stipulated in Section 8. It is pointed out that the application shows that a notice was sent on 25.2.2020 and the same was received by the corporate debtor on 2.3.2020. The application and the affidavit of service are seen to have been signed on 7.3.2020, within 10 days. However, it was not filed before the date on which the notification, whereby the minimum default amount was increased to Rs.1 Crore was issued. It is further pointed that the affidavit in support of the application as required under the IBC has been verified by the Advocate and Notary on 17.3.2020. The counsel pointed out that the affidavit of service which has been annexed to Ext.P1 application which shows the date of signing by the deponent as 7.3.2020 is clearly defective since the affidavit could not have been dated prior to the date on

which the affidavit in support of Ext.P1 application was verified before the Notary. The counsel also pointed out that the date on which the application was despatched is 12.6.2020. The counsel pointed out that going by Section 9(5) of IBC, the Adjudicating Authority has to admit the application within a period of 14 days from the date of the application by an order or reject the application and it is only on admission of the application, the corporate insolvency resolution process shall commence, as is seen from Section 9(6). On the basis of the statutory provisions, the counsel submits that the maintainability of a petition under the IBC has to be determined on the basis of the date on which the corporate insolvency resolution process commences. It is submitted that the first order of the Tribunal is dated 28.9.2020 and hence, at best, the date of commencement can only be 28.9.2020 and could not have been a date prior to Ext.P5 notification.

12. Section 10A of the IBC was brought into force as per an amendment brought in on 5.6.2020. As per Section 10A, no application can be filed for any default arising on or after 25.3.2020 for a period of six months or such further period not exceeding one

year from such date as may be notified in that behalf. By way of an explanation to Section 10A, it has been clarified that the provisions of the Section will not apply to any default committed before 25.3.2020. Since Ext.P5 amendment was brought in before Section 10A, the default referred to in Section 10A can only be relating a minimum amount of default of Rs.1 Crore. The Senior Counsel pointed out that while amending Section 4 to expand the amount of default as Rs.1 Crore, the Legislature did not think it necessary to add any explanation in lines of the one coming under Section 10A. It is hence submitted that wherever the Legislature thought it necessary, the word 'default' has been circumscribed by the date of the default. It is hence submitted that as far as Section 4 is concerned, what is material is the date on which the application is filed and not the date of default.

13. Another instance pointed out by the Senior Counsel is a subsequent amendment which was brought in on 13.3.2021, whereby a proviso has been added in Section 7 above the Explanation, to the effect that where an application filed by a financial creditor but awaiting admission by the Adjudicating

Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply further requirements of the first and second provisos which had also been added by the said amendment, within 30 days of the commencement of the Act, failing which the application shall be deemed to have been withdrawn before its admission. It is contended that the Legislature has made it clear that even in cases where the application is filed and not admitted as required under Section 10(4), the application has to be amended in terms of the amendment of the Statute in order to make it maintainable.

14. On the question whether an alternate remedy of appeal is available against Ext.P7 order issued by the Tribunal regarding the maintainability, it is submitted that the orders have been issued by the Tribunal under Rule 32 of the NCLT Rules, 2016 and it cannot be treated as an order appealable under Section 61 of the Code. It is submitted that the order is only an order on an interlocutory application. Reliance is placed on the judgments in **Bomin Private Limited v. Union of India [1981 (8) ELT 18 (Guj.)]**, **Ram and**

Shyam Company v. State of Haryana & Ors. [(1985) 3 SCC 267] and **Calcutta Discount Co.Ltd. v. Income-tax Officer, Companies District I, Calcutta & Anr. [AIR 1961 SC 372]** to submit that a writ petition is maintainable in such circumstances and even if there is an alternate remedy, it will not be a bar. It is submitted that an appeal is not provided in clear terms and what is provided is an appeal under the NCLT Rules. Moreover, since the question relates to the inherent bar of jurisdiction and a total absence of the jurisdictional facts required for exercise of power by the Tribunal, the writ petition is maintainable. It is further submitted that the only question to be decided is a pure question of law as to whether Section 4 as amended is to be applied in cases of defaults which had occurred prior to the date of the amendment, whether or not an application has been filed before the Tribunal.

15. Sri Hari Kumar G. Nair, appearing for the 2nd respondent submitted that a writ petition cannot be maintained in the light of specific alternate remedy which has been prescribed in the Statute. It is further submitted that as held in **Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors.** reported

in **[(2020) 13 SCC 308]**, the question to be considered is whether it is a case of lack of jurisdiction on the part of NCLT or a mere wrongful exercise of a recognised jurisdiction like asking a wrong question or applying a wrong test or granting a wrong relief. The counsel submits that Ext.P7 order can at best be considered as a case of wrong exercise of jurisdiction and not as an order which is issued without any jurisdiction. On the above contention, the counsel submits that the petitioner cannot maintain a writ petition. The counsel also referred to the Objects and Reasons for the amendment of IBC, which according to the counsel was brought in only to safeguard the rights of the debtors, in the light of the spread of the Covid 19 pandemic. It is submitted that it is only to prevent large scale insolvencies due to the financial stress caused by the pandemic, the Government notified the minimum amount of default as Rs.1 Crore instead of Rs.1 Lakh. It is hence submitted that the amendment was not brought in to save cases where the default had occurred much prior to the Covid 19 pandemic, and where notice had also been issued prior to the lock down imposed by the Government and before 24.3.2020 from which day alone the

amendment can be effective. The counsel further contends that a writ petition under Article 226 cannot be maintained against the order of NCLT. Reference is made to the judgment of a Division Bench of this Court in **Sulochana Gupta v. RBG Enterprises in W.A.1083 of 2020**. It is also contended that the Legislature has in Section 60(5)(c) conferred jurisdiction on the NCLT to decide any question of law or facts arising out of or in relation to insolvency resolution. It is submitted that the word used is "insolvency resolution" and not "insolvency resolution process" which commences on the admission of the petition. The contention is that the question of maintainability is one which comes within the parameter of question of law relating to insolvency resolution and when an order is issued by the Tribunal on such question by a process of interpretation, an appeal is maintainable under Section 61. Reliance is placed on the decision in **M/s Doypack Systems Private Ltd. v. Union of India [(1988) 2 SCC 299]**. Another contention that is advanced is that application of the literal rule of interpretation will defeat the object of the legislation and the intention of the Executive in issuing Ext.P5 notification. It is

contended that if a notification is capable of two interpretations and the Tribunal has taken one possible view, the same cannot be corrected by issuance of a writ of certiorari. Reliance is placed on the judgment of this Court in **George v. District Munsiff, Kanjirapally [1965 KLT 819]** and that of the High Court of Calcutta in **Kolkata Municipal Corporation and Anr. v. Union of India WPA No.977 of 2020**.

16. The counsel for the 2nd respondent further contends that the phrase "amount of default" occurs only in Section 8 and not under Section 9, which according to the counsel is only consequential. Once a default has occurred and notice has been issued under Section 8 the right has crystalized; is the contention. It is also contended that the law on the date of accrual of the right has to be applied. It is also contended that where it is necessary to have retrospective application, the legislature has exercised its power to state so, as can be seen from the amendment to Section 7 and since no such date of coming into force has been mentioned in the Section, it should be treated as prospective, so as to affect cases where the default occurred after 24.3.2020.

ANALYSIS AND CONSIDERATION OF THE CONTENTIONS

17. I will first deal with the question of maintainability of the writ petition under Article 226 of the Constitution of India, to challenge Ext.P7 order of the Tribunal. It is well settled by a catena of decisions that exercising or not exercising jurisdiction under Article 226 on issues where an alternate remedy is available, it is more a rule of self restraint. It has been consistently held that alternate remedy will not be a reason for not exercising jurisdiction when the issue relates to enforcement of the fundamental right or violation of principles of natural justice or where the proceedings challenged are without jurisdiction or in cases where the validity of a Statute is challenged. Recently the Hon'ble Supreme Court has in the decision in **Ghnashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.** reported in [**(2021) 9 SCC 657]** held in para.137 as follows;

> "137. As held by this Court in a catena of cases including in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Muzaffarnagar [Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Muzaffarnagar, (1969) 1 SCR 518 : AIR 1969 SC 556], Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1] , Nivedita Sharma v. COAI [Nivedita Sharma v. COAI, (2011) 14 SCC 337 :

> (2012) 4 SCC (Civ) 947] , Embassy Property Developments (P) Ltd. v. State of Karnataka [Embassy Property Developments (P) Ltd. v. State of Karnataka, (2020) 13 SCC 308] and recently in Kalpraj Dharamshi [Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401 : 2021 SCC OnLine SC 204] , that non-exercise of jurisdiction under Article 226 is a rule of self-restraint. It has been consistently held that the alternate remedy would not operate as a bar in at least three contingencies, namely,
>
> (1) where the writ petition has been filed for the enforcement of any of the fundamental rights;
>
> (2) where there has been a violation of the principle of natural justice; and
>
> (3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

It is hence not necessary to deal with all the decisions that have been cited at the Bar on the issue. The only question that has to be looked into is whether the Tribunal had jurisdiction to entertain Ext.P1 application in the light of Ext.P5 amendment.

18. Coming to the question of jurisdiction, the National Company Law Tribunal has been made the Adjudicating Authority for the purpose of the IBC by provisions of a Statute. Since the Adjudicating Authority is a creature of the Statute, its jurisdiction is only that which has been statutorily defined, recognised and conferred. The Adjudicating Authority as a body owing its existence to the Statute must abide by the nature and extent of its jurisdiction

as defined in the Statute itself (See **Pratap Technocrats (P) Ltd. v. Reliance Infratel Ltd. (Monitoring Committee)** reported in **[(2021) 10 SCC 623].** The corporate insolvency resolution process gets triggered the moment there is a default as mentioned in Section 4 of the IBC. The triggering can be at the instance of the corporate debtor itself or a financial creditor or an operational creditor. As far as an operational creditor is concerned, going by the statutory provisions, apart from the occurrence of a default, there is requirement of delivering the demand notice and a passage of 10 days thereafter during which time the corporate debtor is required to either bring to the notice of the operational creditor the existence of a dispute or to make payment of operational debt in the manner prescribed. The above statutory requirement has been noticed by the Hon'ble Supreme Court in the judgment in **Kay Bouvet Engg. Ltd. v. Overseas Infrastructure Alliance (India) (P) Ltd.** reported in **[(2021) 10 SCC 483]**. In the case on hand, a notice as required under Section 8 had been issued prior to the coming into force of Ext.P5 amendment. Since the amount is less than Rs.1 Crore, if an application had been filed before 24.3.2020, it would

have conformed with the minimum default which had been prescribed at that point of time. However, admittedly, the application was filed six months after the amendment. It is in these circumstances that the 2nd respondent has raised a claim that for the purpose of setting in motion a corporate insolvency resolution process, what is required is the occurrence of a default of more than Rs.1 lakh prior to 24.3.2020. Since no time limit has been prescribed for preferring an application after the delivery of notice, it is submitted that the date of filing of application is not the material aspect that has to be looked into.

19. The Hon'ble Supreme Court has in its recent decision in **Manish Kumar v. Union of India** reported in **[(2021) 5 SCC 1]** considered the constitutionality of the amendments made to Section 7(1) and Section 11 of the IBC and the introduction of Section 32A in the IBC by Insolvency and Bankruptcy Code (Amendment) Act, 2020. The Hon'ble Supreme Court considered the scope and purpose of several provisions of the IBC. Confronted with the above judgment, the counsel for the 2nd respondent submitted that the judgment in **Manish Kumar (supra)** does not in any way affect the

maintainability of Ext.P1 application. It is submitted that applications under Section 7 and Section 9 stand on different footings and the judgment deals with applications by financial creditors and does not consider the maintainability of an application under Section 9 by an operational creditor. It is submitted that the Apex Court was considering a case of class action while as far as operational creditors are concerned, it is not a class action and every operational creditor, to maintain an application, has to comply with the conditions required under Section 8 and Section 9. Reference is made to paragraphs 203 and 135 of the judgment to show that the Apex Court was dealing with "default" in cases of applications filed by financial creditors. It is further contended that as far as financial creditors are concerned, it is the occurrence of a default, while in the case of an operational creditor, it does not stop with that and further actions are required on the part of the operational creditor like sending notice as contemplated in Section 8. It is pointed out that the word occurrence of default is mentioned only in Section 8 and not in Section 9 and hence it can only be understood to mean that the default should be as on the date of the demand. It is contended

that Section 9 permits action if the amount demanded in the notice under Section 8 is not paid within 10 days and hence action is only regarding the amount demanded. It is further contended that the Apex Court has found that in case of allottees even if they fail to satisfy the threshold criteria they have alternate remedies, but there is no such alternate remedy for recovery of the amounts for the operational creditor. It is further contended that the decision of the Supreme Court supports the contention of the 2nd respondent that wherever the Statute intended to give retrospective operation, it has done so and it is conspicuously absent in Section 4. Another contention raised is that the Hon'ble Supreme Court has held that subsequent repeal will not affect vested right and hence accrued right of the 2nd respondent cannot be taken away by the amendment. Reference is made to paragraphs 274, 275 and 346 of the judgment. It is contended that there is a complete ouster of jurisdiction of the NCLT by the amendment to Section 4 and hence it can only be understood to mean that the default should be determined solely on the basis of its occurrence with reference to the date of issuance of the mandatory demand notice under Section

8 of IBC.

20. The contentions put forward by the counsel for the 2nd respondent, though attractive at the first blush, do not appear to be fully correct. The Hon'ble Supreme Court while considering the scope of the IBC has considered Section 4 of the Code as amended by Ext.P5. Paras.161 and 168 of the judgment are extracted below;

> "**161**. In this context, it is necessary to recapture Section 4 of the Code. It reads as follows:
>
> > "4. Application of this Part.—(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:
> >
> > Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."
>
> **The amount is now fixed at Rs 1 crore.**
>
> xxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxx
>
> **168.** It is, therefore, clear that the requirement of the Code in regard to an application by a financial creditor does not mandate that the financial debt is owed to the applicant in terms of the Explanation. This is for the reason that apparently that the CIRP and which, if unsuccessful, is followed by the liquidation procedure is in all a proceeding, in rem. The law giver has envisaged in the Code, an action, merely for setting in motion the process initially. **The litmus test on the anvil of which, the adjudicating authority will scrutinise the matter, is only the existence of the default, as defined in Section 4 of the Code. As on date,**

> **the amount of default is pegged at Rs 1 crore.** Present a financial debt which has not been paid, the doors are thrown open for the processes under the Code to flow in and overwhelm the corporate debtor. The further barrier is limitation, no doubt, as noticed in B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528] ." (emphasis supplied)

21. Even though the Apex Court was referring the financial debt, it can be seen that the Hon'ble Supreme Court has clearly held that the existence of a default as defined in Section 4 of the Code is the litmus test on the anvil of which, the Adjudicating Authority gets jurisdiction to entertain an application. The litmus test cannot change depending on whether the application is filed under Sections 7 or 9 or 10. The litmus test is the test for the applicability of the entire Part II. Since applications under Sections 7 or 9 or 10 are all part of the resolution process contained in Part II, the litmus test necessarily applies to applications filed by the financial creditor, operational creditor and the corporate debtor themselves. The Hon'ble Supreme Court in the said decision also considered the effect of amendments of vested rights. The Hon'ble Supreme Court was considering the amendment of Section 7, where, by addition of

three provisos, vested rights were taken away. Prior to the amendments that were in question, an application under Section 7 could have been filed by financial creditor on his own or along with others with regard to a default that had occurred not only as against the applicant alone. By addition of the provisos 1 and 2, certain restrictions were made as to the number of financial creditors who should join in the application. By the third proviso, it was made clear that even in case of applications that had been filed and are pending admission, the requirements of provisos 1 and 2 have to be complied with, failing which the applications shall be deemed to have been withdrawn. The result was that an applicant who had already approached the NCLT would face with a situation of the application being withdrawn, if he does not comply with the amended provision. The above aspect was considered by the Hon'ble Supreme Court. The Apex Court held that the proviso is in effect retrospective. It was held in paragraph 404 of the judgment that every sovereign legislature is clothed with competence to make retrospective laws. It is open to the legislature, while making retrospective law, to take away vested rights. It is further held that if a vested right can be

taken away by a retrospective law, there can be no reason why the Legislature cannot modify the vested rights. The Court further held in paragraph 406 that if the existing right is modified or taken away and it is to have operation only from the date of new law, it would obviously have only prospective operation and it would not be a retrospective law. The above observations were made by the Hon'ble Supreme Court after noticing that even the right of action should conditions otherwise exist, can also be a vested right. The Court upheld the amendments. However, it was held that the withdrawal of the application which is the effect of a statutory provision, will not take away the right to approach the Tribunal again, after complying with the requirements of provisos 1 and 2. While holding so, the Apex Court also made clear in paragraph 435 that what is relevant for deciding the maintainability is the law which was in force at the time of filing the application. Paragraph 435 is extracted below.

> **"435.** This is a case where the law giver has not left anything to speculation or doubt. We have already indicated about the effect of the proviso mandating the compulsory withdrawal of the application. We are of the view that this is a case, where the law, in question, is retrospective, in that, contrary to the requirement in the law, at the time, when the application was filed, a new requirement is placed, even though, it is sought to be done by

> superimposing this condition, not at the time, when the application was filed, which really is the relevant time to determine the question of maintainability of the application, with reference to what the law provided in regard to who can move the application but at the stage of the new law."

22. The contention that the operational creditors will be left with no alternate and efficacious remedy also is not correct. As held by the Hon'ble Supreme Court in **Manish Kumar (supra)**, the IBC is not enacted to provide for a manner of recovery of debts by the creditors. It is to provide for insolvency resolution. The purpose of the IBC is to protect the rights of the debtors as well as the creditors. It is in the above background that the provisions relating to the IBC have to be understood. By providing for insolvency resolution in case of corporate debtors whose debt is above a specified amount, it can be seen that the very purpose is not to include cases where the debt is lesser than the said amount. None of the rights available to a creditor as against a debtor are taken away in the process. So also the contention that in **Manish Kumar (supra)**, the Apex Court has held that a right accrued cannot be taken away does not appear to be correct, in view of the findings regarding the manner in which a vested right can be modified.

23. In the case on hand, the petitioner could have filed an application before the Tribunal before 24.3.2020. But, after 24.3.2020, the right to approach the Tribunal stood modified and it is only when there is minimum default of Rs.1 Crore, an application can be filed. As such, Ext.P1 could not have been filed after Ext.P5 amendment. Since Section 4 deals with applicability of the provisions of Part II, it is necessarily a provision which gives jurisdiction to the Adjudicating Authority. Once the application of Part II is taken away for debts more than Rs.1 Crore, there is no further jurisdiction available under the Statute to the NCLT to act as an Adjudicating Authority under the IBC. It is hence a clear case of total want of jurisdiction.

24. In Ext.P9 order, the Tribunal has held that the notification dated 24.03.2020 is prospective in nature and it is not retrospective or retro-active in nature. It is further stated by the Tribunal that notification will not apply to pending applications before the concerned Adjudicating Authority under the IBC prior to the issuance of the aforesaid notification. Ext.P9 was an order of the Tribunal at New Delhi and the issue was concerning an application which had

been filed and was pending before the Tribunal. The order of the National Company Law Appellate Tribunal, Principal Bench, New Delhi in Company Appeal (AT) (Ins) No.813 of 2021 was placed before the Court in which the order Ext.P9 was also considered. The Appellate Tribunal found that on facts, in the case considered in Ext.P9 demand notice under Section 8 was issued on 31.7.2019 and the application under Section 9 was filed on 5.9.2019 which were both before 24.3.2020, on which date the threshold limit was increased to Rs.1 Crore. The Tribunal hence found that the said decision cannot be relied upon to decide whether a petition can be maintained for an amount of less than Rs.1 Crore after 24.3.2020. The Appellate Tribunal went on to hold that the threshold limit will be applicable for applications filed under Section 7 or Section 9 on or after 24.3.2020, even if the debt is on a date earlier than 24.3.2020. The above view of the Tribunal is in consonance with the decision of the Hon'ble Supreme Court in **Manish Kumar (supra)**.

25. Even otherwise, the Tribunal has in my opinion, gone wrong in its interpretation of Section 4 of the Act. Section 4, after amendment on 24.3.2020 clearly says that Part II of the IBC shall

apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of default is Rs.1 Crore. As per Section 3(12) of the IBC, "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. What is to be noted is that Corporate debtors who are in default of less than Rs.1 lakh prior to the amendment and Rs.1 Crore after the amendment, also are defaulters. However, whether a proceeding for insolvency or liquidation of such corporate debtor should be initiated would depend on the amount in default. It is only if the Corporate debtor has incurred a default of at least the minimum amount stated in Section 4 that a proceeding under the provisions of the IBC under Part II can be initiated. The minimum amount of default is statutorily fixed, with power available to the Government to refix, upto a sum of Rs.1 Crore. Once the Government has exercised the said power by issuance of a notification fixing the minimum amount of default as Rs.1 Crore, the Section will have to be read by replacing the words "one lakh rupees" by "rupees one crore". **As such, from the date**

of amendment, Part II of the IBC can apply only to matters relating to insolvency and liquidation of corporate debtors, where the minimum amount of default is Rs.1 Crore. (emphasis supplied). Once that is the position, the application of Part II itself is taken away with effect from 24.03.2020 as far as defaults less than Rs.1 Crore are concerned and hence no application can be filed after 24.03.2020 regarding an amount where the default is less than Rs.1 Crore. By application of Section 10A, even in cases where the default is more than Rs.1 Crore, an application cannot be filed for a period of six months from 24.3.2020. There can be no other understanding of the statutory provisions, as there is no ambiguity in the language. It is well settled that the grammatical and ordinary sense of the words of the Statute should be adhered to, unless that would lead to absurdity, or some repugnance or inconsistency with the rest of the provisions of the statute. In the words of **Viscount Simon L.C.** "The golden rule is that the words of a statute must prima facie be given their ordinary meaning..... Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in

construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction" (see **Nokes v. Doncaster Amalgamated Collieries Ltd., [(1940) AC 1014 (HL)], Chandvarkar Sita Ratna Rao v. Ashalata S.Guram [(1986) 4 SCC 447]** and **B.Parmanand v. Mohan Koikal [(2011) 4 SCC 266)]**. The above observations are fully supported by the judgment of the Apex Court in **Manish Kumar (supra)**, wherein the Hon'ble Supreme Court categorically held that the litmus test is whether there exists a default as defined in Section 4 of IBC, on the date of the application.

26. In the light of the view taken above regarding the jurisdiction of the Tribunal, the writ petition under Article 226 is maintainable and there is no necessity or purpose for relegating the petitioner to the alternate remedy. Nor is it necessary to decide on the question whether an appeal is maintainable under the IBC against the order of the Tribunal on a preliminary issue regarding

jurisdiction.

27. In the result, W.P.(C)No.27636 of 2020 is allowed. Ext.P7 order of the NCLT is set aside and it is declared that Ext.P1 application cannot be entertained by the 1st respondent in the light of Ext.P5 amendment to Section 4. W.P.(C)No.14158 of 2021 is dismissed, since the declaration sought for cannot be granted in view of the finding that the litmus test on the anvil is whether there exists a default as defined under Section 4 of the IBC, which if answered in the affirmative alone will give rise to a petition under Sections 7, 8, 9 and 10 of the IBC.

Sd/-

T.R.RAVI
JUDGE

dsn

APPENDIX OF WP(C) 27636/2020

PETITIONER EXHIBITS

EXHIBIT P1	TRUE COPY OF IBA/34/KOB/2020 DATED 07.03.2020 FILED ON 25.09.2020 BY THE 2ND RESPONDENT BEFORE THE 1ST RESPONDENT.
EXHIBIT P2	TRUE COPY OF INTERIM ORDER DATED 28.09.2020 PASSED BY THE 1ST RESPONDENT IN IBA/34/KOB/2020.
EXHIBIT P3	TRUE COPY OF COUNTER STATEMENT DATED 08.10.2020 FILED BY THE PETITIONER IN IBA/34/KOB/2020.
EXHIBIT P4	TRUE COPY OF IA 175/KIB/2020 WITHOUT ANNEXURES FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT IN IA/34/KOB/2020.
EXHIBIT P5	TRUE COPY OF NOTIFICATION NO.SO 1205(E) DATED 24.03.2020 PUBLISHED BY THE MINISTRY OF CORPORATION AFFAIRS, GOVERNMENT OF INDIA, IN THE GAZETTE OF INDIA.
EXHIBIT P6	TRUE COPY OF ARGUMENT NOTE DATED 23.11.2020 FILED ON BEHALF OF THE PETITIONER BEFORE THE 1ST RESPONDENT IN IA 175/KOB/2020 IN IBA/34/KOB/2020.
EXHIBIT P7	TRUE COPY OF ORDER DATED 01.12.2020 PASSED BY THE 1ST RESPONDENT IN IA 175/KOB/2020 IN IBA/34/KOB/2020.
EXHIBIT P8	TRUE COPY OF ORDER DATED 16.03.2020 OF THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL IN COMPANY APPEAL (AT)(INSOLVENCY) NO.429 OF 2020 IN THE CASE OF KERALA AYURVEDA LTD. VS. GLOBAL BEVERAGES LTD.
EXHIBIT P9	TRUE COPY OF DECISION OF THE HON'BLE NATIONAL COMPANY LAW APPELLATE TRIBUNAL IN CA(AT) (INSOLVENCY) NO.557 OF 2020.
EXHIBIT P10	TRUE COPY OF ORDER DATED 23.06.2020 PASSED BY THE HON'BLE DELHI HIGH COURT IN WPC NO.3685 OF 2020.
EXT.R2(A)	TRUE COPY OF THE JUDGMENT IN WA No.1083/2020 DT.9.9.2020 OF THIS COURT.

APPENDIX OF WP(C) 14158/2021

PETITIONER EXHIBITS

Exhibit P1	A TRUE COPY OF THE DEMAND NOTICE AS IN FORM 3 UNDER RULE 5 DATED 25.02.2020.
Exhibit P2	A TRUE COPY OF THE IBA 34/KOB/2020 DATED 07.03.2020 FILED BY THE PETITIONER ON 25.09.2020.
Exhibit P3	A TRUE COPY OF THE NOTIFICATION NO.SI 1205 (E) DATED 24.03.2020 PUBLISHED BY 1ST RESPONDENT.
Exhibit P4	A TRUE COPY OF THE EXTRACT OF PRESS RELEASE ISSUED BY THE MINISTRY OF FINANCE, GOVERNMENT OF INDIA DATED 24.03.2020.