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Critique of the NCLT Judgment on Corporate Debtor not being eligible to be treated as an MSME in view of the notification issued on 01.06.2020

This article critiques the judgment in the case of *POSCO India Pune Processing Center Pvt Ltd vs. Dhaval Jitendrakumar Mistry RP for Poggenamp Nagarsheth Powertronics Pvt Ltd* *(2021) ibclaw.in 01 NCLT**[1]***, where the Hon'ble NCLT Ahmedabad Bench ruled that a Corporate Debtor which was not an MSME on the date of initiation of CIRP, cannot assume itself to be one later due to change in MSME classification norms vide notification dated 01.06.2020.

1. Grounds for the NCLT's judgment

1.1 No statute can be given retrospective effect unless the statute so directs either expressly or by necessary implication. Nor can a power be exercised retrospectively unless the statute expressly so provided[2].

1.2 The fundamental rule of construction, that no statute shall be so construed to have retrospective operation unless such a construction appears very clear in the terms of the Act or arises by necessary and distinct implication. Thus, the cardinal principle of construction that every statute is "prima facie" prospective, unless it is expressly or by necessary implication made to have retrospective operation as observed by Hon'ble Supreme Court in *Keshoram vs. State of Bombay* AIR 1951 SC 128.[3]

1.3 "*Nova constitution futuris formam imponere debet, right non praeteritis*" i.e., a new law ought to regulate what is to follow, not the past, and this presumption operates unless shown to the contrary by express provision in the statute or is otherwise discernible by necessary implication.[4]

1.4 The settled law that, if the enactment is expressed in a language which is capable of either

interpretation, it ought to be construed as prospective only. When law is altered during pendency of action, the rights of parties are decided according to the law as it existed when action was begun, unless the new statute and/or any notification shows a clear intention[5].

1.5 Section 25 of I&B Code, 2016 does not give power to RP to change the nature of the Corporate Debtor and in the present case, the RP was silent when instead he was supposed to object the change in the nature of the Corporate Debtor[6].

2. Analysis

2.1 Arguments relating to Interpretation

a. It appears that the Hon'ble NCLT has applied the principles of statutory interpretation in a mechanical way. In holding that a statute is primarily prospective unless the statute expressly mentions that it can be applied retrospectively or through necessary implication, the Hon'ble NCLT ignored the fact that the MSMED Act, 2006 is a beneficial legislation[7].
b. Even in the absence of a specific provision warranting retrospective application, if a law is enacted for the benefit of a community, the statute may be held to be retrospective in nature[8].
c. The same was done in *Boucher Pierre Andre vs. Superintendent, Central Jail, Tihar, New Delhi & Anr*[9],where the Hon'ble Supreme Court set off the detention period from the term of imprisonment, even though the term of imprisonment had already commenced before an amendment was introduced offering the offsetting possibility.
d. Moreover, the Supreme Court in the case of *Ramji Purshottam v. Laxmanbhai D. Kurlawala**[10]*** while dealing with the question of retrospective application of the Bombay Municipal Corporation and Bombay Rent Hotel and Lodging House Rates Control (Amendment) Act, 1975, relied on the following passage of Justice G.P. Singh in Principles of Statutory Interpretation (9th Edn., 2004, at p. 462)—

> *"[T]he fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts does not necessarily make the provision retrospective. ... **the rule against retrospective construction is not always applicable to a statute merely 'because a part of the requisites for its action is drawn from time antecedent to its passing**'."*[11]

e. The Supreme Court in the case of *Ramesh Kymal vs. M/s Siemens Gamesa Renewable Power Pvt Ltd. (2021) ibclaw.in 08 SC **[12]***, while dealing with the question of retrospective operation of section 10A of the I&B Code, 2016, observed that the real issue of the dominant intention of the Legislature in each case is to be gathered from[13]:

i. The language used,
ii. The object indicated,
iii. The nature of the rights affected, and
iv. The circumstances under which the statute is passed.

f. It becomes visibly clear from the above that the nature of rights affected, and circumstances do form a base in understanding intent of the Legislature. In the present case, the classification of MSMEs was changed due to the Covid-19 pandemic and it was a conscious

thought of the Legislature to ensure that businesses were not pushed into liquidation. Therefore, retrospective application of the classification norms is in no way illegal[14].

2.2 Role of RP and AA in the Present Matter

a. In the present case, the Hon'ble NCLT remarked that the "*RP never objected in getting change the nature of the Corporate Debtor, on the contrary he remained silent.*"***[15]***
b. It is most respectfully submitted that the Hon'ble NCLT did not have to dwell into who obtained the MSME registration and whether the parties involved were silent or not. In the matter of *Amit Gupta vs. Yogesh Gupta Resolution Professional of M/s Varanasi Auto Sales Pvt Limited (2019) ibclaw.in 465 NCLAT* ***[16]***, the Hon'ble NCLAT made it clear that "***The Resolution Professional cannot be going into investigations and enquiries and findings whether or not a Corporate Debtor falls under the classifications of MSME and Adjudicating Authority is also not expected to make such investigations, enquiries on such evidence or give findings on such issues, which may not be accurate without assistance of an opposite side or Government Counsel bringing forth which or the other Notification etc. applies under the sections of MSME Act. Even if getting memorandum certificate for a given enterprise may be optional, if advantage is to be taken of the MSME Act, the applicant must take the pains to get the Memorandum Certificate to seek benefits under IBC.***"[17]
c. In the instant case as well, the applicant had taken the pains of getting an MSME certificate and the AA or the RP is not expected to dwell into it since proper adjudication without a government representative would not be possible. When all parties are not heard before a judgment is pronounced, such a judgment would be unfair and unjust.

3. Conclusion

3.1 The ILC Report of 2018 sought exemptions of MSMEs from Section 29A(c) and 29A(h) of the Code and their rationale for doing so read as follows[18]:

> *"27.4 Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency.* ***The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants."***

3.2 The Hon'ble Supreme Court in the matter of *Swiss Ribbons,* also observed that the "*rationale for excluding such industries [MSMEs] from the eligibility criteria laid down in Section 29A(c) and 29A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation. Following upon the Insolvency Law Committee's Report, Section 240A has been inserted in the Code with retrospective effect from 06.06.2018…*"[19]

3.3 The apex court went on to further state that "*It can thus be seen that when the Code has worked hardship to a class of enterprises, the Committee constituted by the* ***Government****, in overseeing the working of the Code,* ***has been alive to such problems, and the Government in turn has followed the recommendations of the Committee in enacting Section 240A. This is an important instance of how the executive continues to monitor the application of the Code and exempts a class of enterprises from the application of some of its provisions in deserving cases****. This and other amendments that are repeatedly being made to the Code, and to subordinate legislation made thereunder, based upon Committee Reports which are looking into the working of the Code, would also show that the legislature is alive to serious anomalies that arise in the working of the Code and steps in to rectify them.*"[20]

3.4 The Covid-19 period has also witnessed another example where the executive has been alive to the problems of various companies and therefore, an amendment was introduced to the notification dated 01.06.2020. In holding that the Corporate Debtor cannot avail the benefits of the amendment read with the provisions of the Code, the judgment of the Hon'ble NCLT does more harm than good. During the pandemic, it was already established that chances of finding resolution applicants was going to be increasingly difficult and therefore, certain changes were also introduced to the Code[21]. It can be safely concluded that the notification eases the burden of resolution of companies by easing the restrictions under section 29A(c) and 29A(h), thereby promoting resolution over liquidation – which is in consonance with the spirit of the Code. Under these circumstances, the judgment passed by the Hon'ble NCLT may be less than conducive to protecting both the industry and the spirit of the Code.

Reference

[1] (2021) ibclaw.in 01 NCLT
[2] Para 8, *Ibid.*
[3] Para 9 *Supra note 1.*
[4] *Ibid.*
[5] Para 13 *Supra note 1.*
[6] Para 4 *Supra note 1.*
[7] Godwin Construction Private Limited v. Tulip Contractors, Judgment dated 05.02.2020 in W. P. (C) 10573/2019.
[8] Vijay vs. State of Maharashtra & Ors, Civil Appeal 3164 of 2006, Supreme Court of India, Judgment dated 26/07/2006.
[9] *Ibid.*
[10] (2004) 6 SCC 455.
[11] Avinash Krishnan Ravi, "*IBC Amendment Ordinance, 2020: Some Questions and (Possible) Answers*", available at https://www.barandbench.com/columns/ibc-amendment-ordinance-2020-some-questions-and-possible-answers
[12] (2021) ibclaw.in 08 SC
[13] Para 22, Page 14, *Ibid.* (Reference made to G.P. Singh, Principles of Statutory Interpretation 1st Edition, Lexis Nexis 2015).
[14] The NCLT's logic of statutes being prospective in the absence of a specific provision warranting retrospective application is further defeated by the Hon'ble Supreme Court's retrospective interpretation of section 10A Ordinance.

[15] Para 5, *Supra note 1.*
[16] (2019) ibclaw.in 465 NCLAT
[17] Para 18, *Ibid.*
[18] Available at https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf , page 71, 27.4.
[19] Swiss Ribbons Pvt Ltd & Anr. Vs. Union of India & Ors. [2019] ibclaw.in 03 SC, Page 142, Para 80.
[20] Swiss Ribbons Pvt Ltd & Anr. Vs. Union of India & Ors.[2019] ibclaw.in 03 SC, Page 144, Para 81.
[21] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, June 5, 2020.

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