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One lakh minimum threshold limit for defaults prior to 24.03.2020 - NCLT

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In a recent judgment in *BLS Polymers Limited v. M/s RMS Power Solutions Private Limited*, the National Company Law Tribunal, New Delhi (“NCLT”) has held that for defaults prior to 24.03.2020, the threshold amount to trigger insolvency proceedings shall be one lakh rupees, and Notification No. CG-DL-E-24032020 dated 24.03.2020 (“Notification”) enhancing the threshold amount to one crore rupees will not apply.

Under the Insolvency and Bankruptcy Code, 2016 (“the Code”), the minimum amount of default to initiate insolvency proceedings against a defaulting entity was one lakh rupees. To tackle large scale insolvencies as a result of the economic downturn during the Covid 19 pandemic, the Ministry of Corporate Affairs issued the Notification and enhanced this minimum default amount to one crore rupees.

BLS Polymers Limited (“BLS Polymers”), an operational creditor of RMS Power Solutions Private Limited (“RMS Power”), filed an application to initiate insolvency proceedings against RMS Power on a default of Rs. 35,74,942.00. The default occurred prior to the date of issuance of the Notification i.e., 24.03.2020 and the statutory demand notice was also served on RMS Power prior to the Notification date. However, the

application to initiate the insolvency proceedings was filed after the Notification came into force. RMS Power argued that as the insolvency application filed against it had been filed after the Notification date, the enhanced limit of one crore rupees was applicable and the alleged default amount being lower, BLS Polymers' application was not maintainable.

The first issue for determination was whether a right that had already accrued to a party could be taken away by way of a subsequent notification. The NCLT examined the meaning of 'default' under the Code, which is defined as, "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." It was observed that as per the invoices, the amounts were due and payable prior to the issuance of the Notification and therefore the default had occurred prior to 24.03.2020. It was held that the right to file an application for insolvency under the Code, whether by an operational creditor or a financial creditor, arises only when a default has occurred. Once the default occurs, a creditor has three years under the statute of limitation¹, to initiate action for recovery of its dues. Therefore, where the legislation has made provision for a party to initiate action within three years from the date the right accrues, the argument that that right has been taken away by executive action was not maintainable.

The NCLT also observed that the Notification could only have a prospective effect and had the executive intended for it to have a retrospective effect, it would have made a specific stipulation to that effect. In support, the Tribunal relied on the judgment in *Madhusudan Tantia v. Amit Choraria & Anr.*², where the National Company Law Appellate Tribunal had observed that it was well settled that if the date of enforcement/ effectiveness of law is not stated in the notification, it shall have prospective effect.

The second issue before the NCLT was that whether an insolvency application would be maintainable where the default had occurred prior to the date of Notification, but the statutory demand notice by the operational creditor was sent after the issuance of the Notification. The NCLT clarified that an aggrieved creditor was vested with the right to file an application against a defaulting entity *only* on the occurrence of a default. Though an operational creditor is mandated to send a ten days' demand notice under the Code and it is only after the expiry of ten days that the operational creditor can file the insolvency application, this requirement was merely procedural and did not dilute the substantive right of the operational creditor to initiate action on the occurrence of default.

Following this judgment, it becomes clear that the Notification is applicable only in case of defaults occurring on or after 24.03.2020, and the minimum default amount enhanced to one crore rupees under the Notification of 24.03.2020 will *not* apply where:

- i. in the case of an operational debt, the default has occurred prior to 24.03.2020, but the demand notice was sent after 24.03.2020;
- ii. in the case of an operational debt, the demand notice has been delivered to the corporate debtor prior to 24.03.2020, but the application is filed after 24.03.2020;

¹ Article 137 of the Limitation Act, 1963

² Company Appeal (AT) (Insolvency) 557/2020 - In this case, the NCLAT held that the Notification dated 24.03.2020 was prospective and had upheld the NCLT order which had allowed a pending application filed prior to the Notification date, with a default amount of less than one crore rupees

- iii. in the case of financial debt, the default has occurred prior to 24.03.2020;
 - iv. the application for insolvency has been filed prior to 24.03.2020, but not admitted against the corporate debtor.
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