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

**Comp. App. (AT) (Ins) No.938 of 2024 & I.A. No. 3418, 3419 of 2024**

**IN THE MATTER OF:**

**Devika Resources Pvt. Ltd.**
**(Formerly Known as Kalinga Enterprises Pvt. Ltd.) ...Appellant(s)**

**Versus**

**MAA Manasha Devi Alloys Pvt. Ltd. ...Respondent(s)**

**Present:**

**For Appellant :** Mr. Akshay Goel, Mr. Kanishk Khetan, Mr. Harsh Jadon, Advocates.

**For Respondents :** Mr. Shreyas Vaghe, Advocate.

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

**Per: Justice Rakesh Kumar Jain:**

This appeal is directed against the order dated 06.03.2024 by which the Tribunal has dismissed the application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the Appellant on the ground of lack of threshold.

2. The case set up by the appellant is that the Respondent used to purchase Iron Ore from it but failed to make due payment, therefore, the Appellant served a demand notice dated 04.04.2022 under Section 8 of the Code for payment of operational debt of Rs. 1,16,25,583/- which included principal operational debt of Rs. 1,10,81,333/- and interest of Rs. 4,61,229.

3. Notice was replied by the Respondent. Thereafter, the Appellant filed the application under Section 9 of the Code on 20.05.2022 in respect of the defaulted amount of Rs. 1,16,25,583/-.

4. The application was admitted on 31.10.2022 and CIRP proceedings were commenced. However, the Respondent challenged the order dated 31.10.2022 by way of CA (AT) (Ins) No. 209 of 2023 before the Appellate Tribunal which was allowed on 19.10.2023 solely on the ground that the Tribunal did not grant opportunity of being heard to the Respondent.

5. Apropos, the application filed under Section 9 of the Code was remanded back to the Tribunal with a direction to hear the matter afresh and to decide the same.

6. During the pendency of the proceedings before the Tribunal but after the completion of the pleadings, the Appellant received an email from the Respondent by which the Appellant was informed that the Respondent had deposited Rs. 20 Lakhs sou moto in the account of the Appellant by way of cheque towards part payment of the outstanding operational dues.

7. It is the case of the Appellant that the amount of Rs. 20 Lakh was deposited by the Respondent without its permission and the Appellant was ready and willing to return the same, however, the Tribunal while concluding that there is debt and default on the part of the Respondent in payment of the dues of the Appellant, rejected the application filed under Section 9 on the ground that since the amount of Rs. 20 lakh was paid during the pendency of the application before the Tribunal, effecting reduction of the total defaulted amount below the threshold limit of Rs. 1 Cr. provided under Section 4 of the Code, the application was found to no more maintainable and could not have been admitted.

8. Aggrieved against the dismissal of the application by the impugned order, the present appeal has been filed in which the only issue involved is as to whether the threshold has to be seen at the time of filing of the application or at the time of admission of the application?

9. Counsel for the Appellant has submitted that the date of initiation of CIRP as per Section 5(11) of the Code is the date on which the application is made by the Operational Creditor or the Financial Creditor as the case may be and insolvency commencement date is the date of admission of the application for initiation of CIRP as provided under Section 5(12) of the Code.

10. Counsel for the Appellant has relied upon the decisions of the Hon'ble Supreme Court in the case of Rajamundry Electric Supply Corporation Limited Vs. A Nageshwara Rao & Ors., (1995) 2 SCR 1066, Manish Kumar Vs. Union of India, (2021) 5 SCC 1 and a decision of this court in the case of Hyline Medoconz Pvt. Ltd. Vs. Anandaloke Medical Centre Pvt. Ltd., CA (AT) (Ins) No. 1036 of 2022 decided on 20.09.2022 in support of his contention that the threshold has to be considered at the time of filing of the application and not at the time of the admission. It is submitted that when the application under Section 9 was filed, the Appellant had crossed the threshold of Rs. 1 Cr. as provided under Section 4 of the code, however, during the pendency of the application, the Respondent, against the wishes of the Appellant, deposited Rs. 20 lakh, there by reducing the amount from 1 Cr. which do not has any impact on the application which was filed after crossing the threshold.

11. On the other hand, Counsel for the Respondent, while narrating the aforesaid facts, which are not in dispute about the filing of the petition and order of remand and that deposit of Rs. 20 Lakh in the account of the Appellant which was reduced the amount from the threshold of Rs. 1 Cr., has submitted that the threshold has to be seen at the time of the admission of the application and not at the time of filing of the application. It is submitted that judgments relied by the Appellant in the cases of Rajamundry Electric Supply Corporation Ltd. (Supra), Manish Kumar (Supra) and Hyline Mediconz Pvt. Ltd. (Supra) are not applicable to the facts of this case. It is also submitted that the proceedings under the Code cannot be substituted to a recovery forum, the object of the Code is to effect resolution of the CD and to bring the company out of distress.

12. We have heard Counsel for the parties and perused the record.

13. Section 4 of the Code provides the threshold of Rs. 1 Cr. for the purpose of maintaining an application under Section 9 of the Code. Before amendment brought by S.O 1205(E) dated 24.03.2020, the threshold was Rs. 1 lakh but with the amendment it has been raised to Rs. 1 Cr. In this regard, Section 4 needs to be referred to which is reproduced as under:-

> "**Section 4: Application of this Part.**
>
> ***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[1], specify the minimum amount of default of higher value which shall not be more than one crore rupees.

> [2][Provided further that the Central Government may, by notification[3], 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.]"

14. There is no dispute that when the application under Section 9 was filed by the Appellant it had crossed the threshold of Rs. 1 Cr. because the amount at that time was Rs. 1,16,25,583/- as principal but during the pendency of the application, the Respondent deposited Rs. 20 lakh towards the outstanding dues because of which it reduced to less than Rs. 1 Cr.

15. In the case of Rajamundry Electric Supply Corporation Ltd. (Supra) the Hon'ble Supreme Court has categorically held that the threshold has to be seen at the time of filing of the application and in this regard made the following observations:-

> "Excluding the names of the 13 persons who are stated to be not members and the two who are stated to have signed twice, the number of members who had given consent to the institution of the application was 65. The number of members of the Company is stated to be 603. If, therefore, 65 members consented to the application in writing, that would be sufficient to satisfy the condition laid down in section 153-C, subclause (3)(a) (i). But it is argued that as 13 of the members who had consented to the filing of the application bad, subsequent to its presentation, withdrawn their consent, it thereafter ceased to satisfy the requirements of the statute, and was no longer maintainable. We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its

presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed with the application or the jurisdiction of the court to dispose of it on its own merits."

16. In the case of Manish Kumar (Supra) the Hon'ble Supreme Court has observed as under:-

"THE POINT OF TIME TO COMPLY WITH THE THRESHHOLD REQUIREMENTS

178. The question, then arises, as to the alleged lack of clarity about the point of time, at which the requirements of the impugned provisos, are to be met. Is it sufficient, if the required number of allottees join together and file an application under Section 7 and fulfil the requirements, at the time of presentation? Or, is it necessary that the application must conform the numerical strength, under the new proviso, even after filing of the application, and till the date, the application is admitted under Section 7(5)? There can be no doubt that the requirement of a threshold under the impugned proviso, in Section 7(1), must be fulfilled as on the date of the filing of the application. In this regard, we find support from an early judgment of this Court, which was rendered under Section 153-C of the Companies Act, 1913. Section 153-C is the predecessor to Sections 397 and 398 read with Section 399 of the Companies Act, 1956. Its most recent avatar is contained in Sections 241 and 242 of the Companies Act, 2013 read with Section 244. In fact, Section 399 (3) of the Companies Act, 1956, read as follows:

"399(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of

them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

179. In the decision of this Court in Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao and others 51, the provision in question, viz., Section 153-C of Companies Act, 1913 dealt with the power of the Court to Act, when the Company acts in a prejudicial manner or oppresses any part of its members. It, inter alia, provided that no application could be made by any member, in the case of a company having a share capital unless the member has obtained consent, in writing, of not less than one hundred in number of the members 51 AIR 1956 SC 213 of the company or not less than one-tenth in number of the members, whichever is less. There was also an alternate requirement, to which, resort could be made in regard to company, not having share capital. There was another mode of fulfilling the threshold requirement. In the facts of the said case, the number of the members of the company were 603. Sixty-five members consented to the application. The problem, however, arose as it was contended that 13 of the members who had consented, had, subsequent to the presentation of the application, withdrawn their consent.

181. In the matter of presentation of an application under Section 7, if the threshold requirement, under the impugned provisos, stands fulfilled, the requirement of the law must be treated as fulfilled.

The contention, relating to the ambiguity and consequent unworkability and the resultant arbitrariness, is clearly untenable and does not appeal to us. If an allottee is able to, in other words, satisfy the requirements, as on the date of the presentation, the requirement of the impugned law is fulfilled."

17. In the case of Hyline Mediconz Pvt. Ltd. this Tribunal has held that :-

"11. The initiation date is thus the date on which financial creditor, corporate applicant or operational creditor makes an application to the Adjudicating Authority. Part II of the Code is applicable only when minimum amount of default of Rupees One Crore is fulfilled after 24.03.2020. Thus, right to initiate the CIRP after 24.03.2020 is only on the condition that minimum default is of Rupees One Crore. There is no right to initiate CIRP after 24.03.2020 when minimum default is not Rupees One Crore.

13. When we look into the scheme of the Code, provision of Section 4, 6, 7, 8, 9 and 10 indicate that the provisions which provides for initiation of Corporate Insolvency Resolution Process and Part II of the Code applied to matters relating to insolvency Resolution Process for Corporate Debtor, where minimum default is Rupees One Crore (as on 24.03.2020). Thus, Part II of the Code is applicable only when default is of Rupees One Crore or more. There is no right to initiate an application under Section 9 on 24.03.2020 or thereafter if the minimum default of Rupees One Crore is not fulfilled. Thus, crucial date to find out applicability of the threshold is the date when application to initiate CIRP is made. If we accept the submission of learned counsel for the Appellant that date of default or date of demand notice under Section 8 is to be taken and if default is less than Rupees One Crore which occurred prior to 24.032020 right should be given to the applicant to initiate the CIRP after 24.03.2020, it will be clearly contrary to the scheme of the Code as delineated by Section 4, 6, 7, 9 and 10. When the legislative scheme indicate that application for CIRP can be filed only after fulfilling the minimum threshold limit applicable w.e.f. 24.03.2020, no other interpretation of Section 4 can be given. When Section 4 empowers the Central Government to specify the minimum amount or higher value upto Rupees One Crore and power under Section 4 proviso has been exercised vide

Notification dated 24.03.2020, the legislative intent is clear that threshold of Rupees One Lakh shall not apply henceforth i.e. 24.03.2020 and if initiation be made for an default, it should fulfil the minimum threshold of Rupees One Crore.

24. The Hon'ble Supreme Court further held that requirement of compliance with the threshold as introduced by second proviso to Section 7 has to be fulfilled as on the date of the filing of the application. In Para 178 following has been held:-

> "178. The question, then arises, as to the alleged lack of clarity about the point of time, at which the requirements of the impugned provisos, are to be met. Is it sufficient, if the required number of allottees join together and file an application under Section 7 and fulfil the requirements, at the time of presentation? Or, is it necessary that the application must conform the numerical strength, under the new proviso, even after filing of the application, and till the date, the application is admitted under Section 7(5)? There can be no doubt that the requirement of a threshold under the impugned proviso, in Section 7(1), must be fulfilled as on the date of the filing of the application."

25. The law laid down by the Hon'ble Supreme Court in the above case lend support to our conclusion that threshold of Rupees One Crore has to be fulfilled by an applicant under Section 9 on the date of filing of the application. The fact that default was committed prior to 24.03.2020 and notice under Section 8 was issued and served prior to 24.03.2020 are not determinative or material although they are condition precedent for initiating an application under Section 9. We have noticed the provision of Section 6 which provides that 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. Thus, a default is a condition precedent. Part II of the Code becomes applicable only when default is Rupees One Crore or more w.e.f. 24.03.2020 and an Operational Creditor can initiate Corporate Insolvency Resolution Process against the Corporate Debtor after 24.03.2020 when default is more than Rupees One Crore. No application can be initiated after 24.03.2020 irrespective of the date of default if the threshold of Rupees One Crore is not fulfilled."

18. It has been held in the aforesaid cases that the threshold has to be seen at the time of filing of the application and not at the time of the admission of the application.

19. On the other hand, Counsel for the Respondent has not referred to any judgment to the contrary except for arguing that the aforesaid judgments relied upon by the Appellant are not applicable.

20. However, in our considered opinion, the ratio laid down in the aforesaid decisions relied by the Appellant squarely covers the case of the Appellant. Consequently, there is no hitch on our part to hold that the Tribunal has committed a patent error in dismissing the application.

21. As a result of the aforesaid discussion, the present appeal is allowed and the impugned order is hereby set aside. CP (IB) No. 31/CB/2022 is hereby restored. The matter is remanded back to the Tribunal to decide the application filed under Section 9 of the Code by the Appellant in accordance with law. The parties are directed to appear before the Tribunal on **28th May, 2025**

22. It is made clear to the parties as well as the Tribunal that while deciding the aforesaid issue of law we have not made any observation on the merit of the case.

I.As, if any, pending are hereby closed.

**[Justice Rakesh Kumar Jain]**
**Member (Judicial)**

**[Naresh Salecha]**
**Member (Technical)**

**New Delhi**
**14th May, 2025**
*Sheetal*