

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH, NEW DELHI****Company Appeal (AT) (Ins) No. 357 OF 2024****IN THE MATTER OF:****Rolta Pvt. Ltd.****...Appellant****Versus****Varanium Cloud Ltd.****...Respondent****Present:**

For Appellant: Mr. Abhijeet Sinha, Sr. Advocate, Mr. Priyambada Mishra, Ms. Hina Kochar, Mr. Aditya Shukla, A. Kochar, Advocates.

For Respondent: Ms. Renu Kallan, Mr. Anuj Agarwal, Mr. Nilesh Kumar, Mr. K. Mehra, Advocates.

J U D G M E N T**Per: Justice Rakesh Kumar Jain:**

This appeal is directed against the order dated 03.01.2024 by which the National Company Law Tribunal, Mumbai Bench (in short Tribunal') has dismissed CP (IB)/883/MB/2023 filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') and allowed I.A. No. 5367 of 2023 filed by the Respondent.

2. Facts of this case are that the Appellant disbursed a loan of Rs. 1.5 Cr. to the Corporate Debtor / Respondent in three tranches of Rs. 50 Lac each on 11.07.2019, 15.07.2019 and 30.07.2019 respectively.

3. The Appellant filed CP (IB) No. 270/MB/2023 against the Respondent on 06.03.2023 claiming the amount of Rs. 1.50 Cr. with interest of Rs.

1,34,73,905/-, total outstanding amount of Rs. 2,84,73,905 as on 20.02.2023. The said application was filed in terms of Rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') on printed form 1 in which following averments were made in part IV, which read as under:-

PART - IV				
PARTICULARS OF FINANCIAL DEBT				
1.	TOTAL AMOUNT OF DEBT GRANTED	<p>INR 1,50,00,000 (Indian Rupees One Crore Fifty Lakhs)</p> <p>The total principal amount disbursed/ granted by the Financial Creditor to the Corporate Debtor in the form of short-term loan is INR 1,50,00,000 (Indian Rupees One Crore Fifty Lakhs) ("Short Term Loan").</p>		
2.	DATES OF DISBURSEMENT	<p>The Short Term Loan amount of INR 1,50,00,000 (Indian Rupees One Crore Fifty Lakhs) was disbursed by the Financial Creditor to the Corporate Debtor in three tranches of INR 50,00,000 (Indian Rupees Fifty Lakhs) each on 11th July, 2019, 15th July, 2019 and 30th July, 2019.</p> <p>The relevant extract of the bank account statement of the Financial Creditor demonstrating disbursement of funds to the Corporate Debtor by the Financial Creditor is annexed hereto as <u>Exhibit "H"</u>.</p>		
3.	AMOUNT CLAIMED TO BE IN DEFAULT (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT IN TABULAR FORM)	<p>As on 20th February, 2023, INR 2,84,73,905 (Indian Rupees Two Crore Eighty Four Lakhs Seventy Three Thousand Nine Hundred and Five only).</p> <p>The break - up of the amounts claimed in default as on 20th February, 2023 along with interest calculated at 18% per annum, is as below:</p> <table border="1" data-bbox="669 1871 1373 1917"> <thead> <tr> <th>Particulars</th> <th>Amount (INR)</th> </tr> </thead> </table>	Particulars	Amount (INR)
Particulars	Amount (INR)			



PARTICULARS OF FINANCIAL DEBT			
		Principal	1,50,00,000
		Interest Outstanding	1,34.73,905
		Outstanding Balance as on 20 th February, 2023	2,84,73,905
		A detailed break-up of the interest claimed at the rate of 18% is attached herewith as <u>Exhibit "I"</u> .	
4.	DATES ON WHICH THE DEFAULTS OCCURRED (ATTACH THE WORKINGS FOR DAYS OF DEFAULT IN TABULAR FORM)	<p>The Financial Creditor, on 30th January, 2021, issued a demand notice to the Corporate Debtor <i>inter alia</i> recalling the Short Term Loan along with interest calculated at 18% per annum from 1st August, 2019 till date. By way of the said demand notice, the Corporate Debtor was given 5 (five) days to remit the principal amount, along with interest. A copy of the said email is annexed herewith as <u>Exhibit "J"</u>. However, no payment was received from the Corporate Debtor.</p> <p>The Financial Creditor, again, issued a Demand Notice on 25th January, 2022 recalling the entire outstanding principal amount of the Short Term Loan immediately on receipt of the Demand Notice by the Corporate Debtor. A copy of the Demand Notice is annexed herewith as <u>Exhibit "K"</u>. However, no payment has been received from the Corporate Debtor till date. Thereafter, several follow up communications were addressed as detailed herein below.</p> <p>In light of the above, the date on which the default first occurred was 4th February, 2021 i.e. 5 days after 30th January, 2021.</p>	

NOTARY

Dr. SURESH C. SHARMA

Q. No. 1000/2019

Notary Public for Andhra Pradesh

Since 10.12.2019



4. It is categorically averred in the above application that the default first occurred on 04.02.2021 i.e. 5 days after 30.01.2021. This application was dismissed by the Tribunal, vide its order dated 10.04.2023, on the ground that since the date of default mentioned as 04.02.2021 in part IV falls within the cut off period provided under Section 10A, therefore, the petition was not maintainable. The order dated 10.04.2023 is reproduced as under:-

1. Mr. Nitin Kaskar i/b Adv. Akash Menon, Ld. Counsel for the Financial Creditor present.

2. This is a Petition filed by Rolta Private Limited (Financial Creditor) under Section 7 of the IBC against Varanium Cloud Limited (Corporate Debtor) for initiation of Corporate Insolvency Resolution Process (CIRP).

3. Upon perusal of the Petition, the Bench observed that the Financial Creditor has chronologically mentioned in the synopsis of the Petition as to how the Corporate Debtor owed to pay the sum demanded by the Financial Creditor, which states that -

a) 11.07.2019: Upon requests made by the Promoter and Managing director of the Corporate Debtor, an amount of ₹50,00,000/- (Rupees Fifty lakh only) was disbursed by the Financial Creditor to the Corporate Debtor in the form of a "Short Term Loan"

b) 15.07.2019: An amount of 50,00,000/- (Rupees Fifty lakh only) was again disbursed by the Financial Creditor to the Corporate Debtor in furtherance to the amount disbursed earlier.

c) 30.07.2019: Last tranche of the Short Term Loan of ₹50,00,000/- (Rupees Fifty lakh only) was disbursed by the Financial Creditor to the Corporate Debtor.

d) 17.06.2020; Vide email sent on behalf of the Financial Creditor to the Promoter and Managing Director of the Corporate Debtor, the Financial Creditor requested the Corporate Debtor to return inter alia the amount of the Short Term Loan of ₹1,50,00,000/-,

e) 23.06.2020: The Financial Creditor, once again by way of email, conveyed to the Corporate Debtor that it was awaiting the return of the Short Term Loan by 07.07.2020. However, no payment was received.

4. The date of default stated in the Part-IV of the Petition is 4th February, 2021. However, as per email dated 23.06.2020, the date of default shall be 08.07.2020. Both the dates fall under the period specified under Section 10A of the Code, which bars initiation of any proceeding u/s 7, 9 or 10 of the Code.

5. Counsel for the Petitioner submitted that the Financial Creditor had issued two demand notices i.e. on 30.01.2021 and on 25.01.2022 and pleaded that the latest date of default should be taken as date of last Demand Notice i.e. 25.01.2022 and this date falls outside 10A period. We feel that the date of default is that when the debt become dues and is not paid. In this case, the date of default is stated as 04.02.2021 as per Part-IV. Alternatively, as per email of the Applicant, it is 08.07.2020. The date of default cannot be shifted merely because another Demand Notice was served later on the Corporate Debtor. Accordingly, we find that this Petition is not maintainable in terms of Section 10A of the Code. Therefore, Petition

C.P.(IB)/270(MB)/2023 is hereby dismissed as not maintainable.

5. The Appellant challenged the order dated 10.04.2023 by way of an appeal filed under Section 61 of the Code but it was withdrawn by the Appellant on 12.07.2023. The order dated 12.07.2023 passed by this Court in CA (AT) (Ins) No. 773 of 2023 is reproduced as under:-

This appeal has been filed against the order dated 10.04.2023 by which application under Section 7 filed by the appellant was dismissed as not maintainable in terms of Section 10A.

2. Adjudicating Authority in paragraph 5 has given the reason for dismissing the application as barred by Section 10A.

3. Learned Counsel for the Appellant submitted that apart from the default mentioned in the application there was default prior to Section 10A period and also subsequent to Section 10A period.

4. However, Learned Counsel for the Appellant submits that the appellant does not intent to contest the impugned order on merits and he be permitted to withdraw the appeal with liberty to file a fresh application on appropriate materials.

5. We make it clear that we are not expressing any opinion on the merits of the claim of the appellant, the Respondent shall be at liberty to raise all pleas including the bar of Section 10A in proceeding, if any.

6. With these observations, we permit the appellant to withdraw the appeal with liberty aforesaid.

6. The Appellant then filed a fresh petition bearing CP (IB) No. 883 of 2023 on printed form 1, as prescribed in Rule 4(1) of the Rules and made the following averments in Part IV of the said application, which read as under:-

PART - IV

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED	<p>INR 1,50,00,000 (Indian Rupees One Crore Fifty Lakhs)</p> <p>The total principal amount disbursed/ granted by the Financial Creditor to the Corporate Debtor in the form of short-term loan is INR 1,50,00,000 (Indian Rupees One Crore Fifty Lakhs) ("Short Term Loan").</p>
2.	DATES OF DISBURSEMENT	<p>The Short Term Loan amount of INR 1,50,00,000 (Indian Rupees One Crore Fifty Lakhs) was disbursed by the Financial Creditor to the Corporate Debtor in three tranches, viz.:</p> <p>a) Amount of INR 50,00,000 on 11th July 2019 ("First Tranche");</p> <p>b) Amount of INR 50,00,000 on 15th July 2019 ("Second Tranche");</p> <p>c) Amount of INR 50,00,000 on 30th July 2019 ("Third Tranche").</p> <p>The relevant extract of the bank account statement of the Financial Creditor demonstrating disbursement of funds to the Corporate Debtor by the Financial Creditor is annexed hereto as Exhibit "H".</p>
3.	AMOUNT CLAIMED TO BE IN DEFAULT (ATTACH THE WORKINGS FOR COMPUTATION)	<p>The amount in default as on 15th July 2023 is INR 3,05,84,009/- (Indian Rupees Three Crores Five Lakhs Eighty Four Thousand and Nine Only).</p>



PARTICULARS OF FINANCIAL DEBT										
	OF AMOUNT IN TABULAR FORM)	<p>The break – up of the amounts claimed in default as on 15th July 2023 along with interest calculated at 18% per annum, is as below:</p> <table><tr><th>Particulars</th><th>Amount (INR)</th></tr><tr><td>Principal</td><td>1,50,00,000</td></tr><tr><td>Interest Outstanding</td><td>1,55,84,009</td></tr><tr><td>Outstanding Balance as on 15th July 2023</td><td>3,05,84,009</td></tr></table> <p>A detailed break-up of the interest claimed at the rate of 18% is attached herewith as Exhibit "I".</p>	Particulars	Amount (INR)	Principal	1,50,00,000	Interest Outstanding	1,55,84,009	Outstanding Balance as on 15th July 2023	3,05,84,009
Particulars	Amount (INR)									
Principal	1,50,00,000									
Interest Outstanding	1,55,84,009									
Outstanding Balance as on 15th July 2023	3,05,84,009									
4.	DATES ON WHICH THE DEFAULTS OCCURRED (ATTACH THE WORKINGS FOR DAYS OF DEFAULT IN TABULAR FORM)	<p>The Corporate Debtor failed to repay the amount of Short Term Loan of INR 1,50,00,000 disbursed by the Financial Creditor on the due date, i.e. 31st July 2019. Accordingly, the date of default of the Short Term Loan is <u>1st August 2019</u>.</p> <p>After 1st August 2019, i.e. the date on which the default first occurred, the Corporate Debtor has also committed subsequent defaults on the following dates, with respect to the Short Term Loan:</p> <p>i. 26th February 2020; ii. 8th July 2020; iii. 4th February 2021; and iv. 27th January 2022.</p> <p>This is further particularised in the Affidavit in Support accompanying the present Petition.</p>								

7. In this application, the Appellant claimed the same principal amount of Rs. 1.50 Cr. but the component of interest was claimed as Rs. 1,55,84,009 calculated as on 15.07.2023 against the interest calculated earlier as on 20.02.2023 and thus the total amount of Rs. 3,05,84,009 was claimed.

8. In this application, the Appellant has mentioned four dates of default i.e. 26.02.2020, 08.07.2020, 04.02.2021 and 27.01.2022.

9. The Respondent did not file reply to the Application filed under Section 7 rather filed an application bearing 5367 of 2023 to challenge the maintainability of the application filed under Section 7 of the Code and also stated before the Tribunal that averments made in I.A. No. 5367 of 2023 be treated as reply to the application filed under Section 7 of the Code.

10. In the application bearing L.A. No. 5367 of 2023, the Respondent took the plea that the application filed under Section 7 is not maintainable in view of Section 10A of the Code. It was alleged that the Appellant in the first application bearing CP (IB) No. 270/MB/2023 has alleged that the default took place on 04.02.2021 as the CD failed to pay the outstanding dues within a period of five days from 30.01.2021 when the recall notice was issued but the said application was dismissed vide order dated 10.04.2023 and the appeal against the said order was withdrawn, therefore, the order dated 10.04.2023 which was not set aside by the Appellate Tribunal attained finality between the parties.

11. The Tribunal has allowed the application bearing L.A. No. 5367 of 2023 and held that the date of default once mentioned by the Appellant as 04.02.2021 in the first round cannot be shifted or changed and has made a reference to the law laid down by this Court in the case of Ramdas Datta (Suspended Director of Saraju Flour Mill Pvt. Ltd. Vs. IDBI Bank and Anr., 2023 SCC Online NCLAT 1306 and a decision of the Hon'ble Supreme Court in the case of Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd. 2021 (3) SCC 224. It was also held that the date of default 04.02.2021 was coming in between 22.03.2020 to

25.03.2021 the period provided under Section 10 A of the Code as per which no proceeding under Section 7, 9 or 10 can ever be initiated. It is also observed that in the present petition in part IV, the date of default has been claimed as 01.08.2019 whereas the last tranche was disbursed on 30.07.2019, therefore, the date of default cannot be just one day after the date of disbursement especially when there is no written agreement between the parties regarding the terms and condition of the loan more particularly the repayment schedule. The Tribunal has also dismissed the application on the ground that it is barred by order 2 Rule 2 of the CPC as well as Section 11 of the CPC as the matter on the same set of facts ie. in respect of the same financial debt which has already been upheld because the appeal filed by the appellant was withdrawn and the order 10.04.2023 by which the first application was dismissed was not set aside.

12. Aggrieved against the impugned order passed by the Tribunal, the present appeal has been filed by the Appellant.

13. Counsel for the Appellant has submitted that in July, 2019 the director/representative of the CD and of Streamcast Education Services Pvt. Ltd. (Streamcast) approached the executive Chairman of the Appellant for two short term loans totalling Rs. 3 Cr. It is alleged that the said amount was disbursed to the CD as well as Streamcast in two short term loans which were to be entirely repaid by the CD and Streamcast by 31.07.2019 and 01.08.2019 respectively.

14. It is alleged that the Appellant disbursed Rs. 1.5 Cr. to the Respondent in three tranches of Rs. 50 lac each on 11.07.2019, 15.07.2019 and 30.07.2019

and Rs. 1.5 Cr. to stream cast in three tranches of Rs. 50 lac each on 11.07.2019, 15.07.2019 and 01.08.2019.

15. It is further submitted that the Respondent/Streamcast failed to repay the short-term loans on their respective due dates i.e. 31.07.2019 and 01.08.2019 and Streamcast committed a default on 01.08.2019 and 02.08.2019 respectively.

16. The Appellant filed two petitions under Section 7 of the Code before the Tribunal bearing CP (IB) No. 270/MB/2023 against the Respondent and CP (IB) No. 259/MB/2023 against Streamcast. It is submitted that inadvertently in Part IV in both the applications the Appellant had mentioned the date of default as 04.02.2021. The Tribunal, vide order dated 10.04.2023, dismissed CP (IB) No. 270/MB/2023 which order was challenged by way of an appeal bearing CA (AT) (Ins) No. 773 of 2023 which was withdrawn with permission to file afresh petition keeping all the contentions open and accordingly petition bearing CP (IB) No. 883/MB/2023 was filed but the same has been dismissed illegally by the Tribunal.

17. It is also submitted that in the petition filed against the Streamcast by the Appellant, the same bench of the Tribunal passed the order on 16.07.2024 allowing the Appellant's application i.e. IA (IB)/3541/MB/2023 to amend the petition against Streamcast. In this regard, the order dated 16.07.2024 is reproduced as under:-

1. The present application is being filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Rule 11 of the National Company Law Tribunal Rules, 2016 by the Applicant/

Financial Creditor above named herein seeking amendment to the captioned Petition.

2. The captioned Petition has been filed under Section 7 of IBC against the Corporate Debtor with respect to the short-term loan disbursed by the Financial Creditor to the Corporate Debtor, the principal amount of which aggregates to INR 1,50,00,000 (Indian Rupees One Crores Fifty Lakhs Only). The amount of INR 1,50,00,000 was disbursed by the Financial Creditor to the Corporate Debtor in three tranches, viz. (i) INR 50,00,000 on 11th July 2019 ("First Tranche"), (ii) INR 50,00,000 on 15th July 2019 ("Second Tranche") and (iii) INR 50,00,000 on 01 August 2019 ("Third Tranche").

3. The payments which were made in the First Tranche and Second Tranche during the month of July 2019 were due and payable on 31 July 2019. Since the Corporate Debtor failed to repay the amounts on due date, the amounts with respect to the First Tranche and the Second Tranche stood defaulted on 1 August 2019. The Third Tranche disbursed by the Financial Creditor was to be repaid on the same day, i.e. 1st August 2019. However, the Third Tranche was not repaid on the said date and accordingly, the Third Tranche stood defaulted on 2nd August 2019. In the alternative and in the event the Corporate Debtor denies for any reason that the Third Tranche was due and payable on 1st August 2019, it is stated that on 19th February, 2020 the parties had agreed that the Third Tranche would be repaid, within a week from 19th February 2020, i.e. on or before 26th February 2020. This is borne out from email dated 17th June 2020 exchanged between the Financial Creditor and the Corporate Debtor. The said, email dated 17th June 2020 records the understanding between the parties that the Corporate Debtor will repay the amount of INR/3,00,00,000 (which includes the Third Tranche of the Short Term Loan) within 7 days from 19th February 2020 i.e. on or before 26th /February 2020.

4. Since the Corporate Debtor failed to repay the amounts of the First Tranche and Second Tranche by 31st July 2019, the said Tranches first stood defaulted on 1 August 2019. The Third Tranche was not repaid either on 2 August 2019 or on 26th February 2020, and the same also stood defaulted on the said dates. None of the Tranches of the Short-Term Loan have been repaid by the Corporate Debtor till date.

5. It is trite law that once default occurs, the date of such default does not shift and such date is the date of default for the purposes of IBC. As stated above, the date of default in the present matter first occurred on 1st August 2019 for the First and Second Tranche. The Third Tranche also stood defaulted on 2nd August 2019, or in the alternative on 26th February 2020. In light of the foregoing, the date of default mentioned at Sr. No. 4 in Part IV of the Petition i.e. 4th February 2021 ought to be construed in the light of the above facts, and circumstances and should be amended to reflect the correct position in terms of the schedule of amendments annexed herewith. The dates of default are a matter of record. It would be thus in the interest of justice that the true and correct facts, in consonance with the provisions of IBC are placed on record before this Tribunal.

6. The present Application is made bona fide and in the interest of justice. This Tribunal has the jurisdiction to adjudicate upon the present Application. No harm or prejudice will be caused to the Corporate Debtor if the present application is allowed, especially since the Corporate Debtor has not filed a response to the captioned Petition till date. As per the law laid down by Hon'ble Supreme Court, a Petition filed under Section 7 of the IBC can be amended any time prior to admission of such Petition. The balance of convenience is therefore in favour of the Applicant herein. Hence the application.

Reply filed on behalf of the Respondent:-

7. In reply, the Respondent/Corporate Debtor has denied all allegations and/or contentions and/or submissions made by the Petitioner in the Petition which are inconsistent with and/or contrary to what has been stated herein. Further, nothing shall be deemed to have been admitted for the reasons of non-traverse.

8. It is submitted that the Amendment Application filed by the Financial Creditor deserves to be rejected because it fails to demonstrate any substantial cause or compelling reason to amend the Petition. In fact, a perusal of the Amendment Application evinces that the Financial Creditor does not seek to correct any typographical error or clarify an ambiguous statement, but rather to fundamentally alter the nature and substance of the Petition to circumvent Section 10A Code of the Code.

9. It is further submitted that the Amendment Application has been filed by the Financial Creditor after the Corporate Debtor objected to

the maintainability of the Petition owing to Section 10A in the Code. The Financial Creditor, therefore, under the guise of Amendment Application seeks to change the 'date of default' in order to fall outside the period prescribed under Section 10A of the Code.

10. It is submitted that the Financial Creditor, by attempting to change the date of default, is attempting to position its claim outside the ambit of Section 10A. It is not a mere clarification or correction of an error in the original petition, but a substantial alteration that changes the very basis of the claim. The Respondent states that such an attempt to manipulate the right to amendment to one's advantage is a clear abuse of the process of law. The law does not permit parties to alter their claims in such a manner that fundamentally changes the nature and substance of the original petition.

11. It is further submitted that the Financial Creditor's attempt to change the date of default is not based on any new evidence or material facts and is based on the same set of documents that form part of the Petition. The Financial Creditor instead of relying on the alleged date of default after the 'recall notice' seeks to fabricate a new set out of cause of action on piecemeal 'text messages' exchanged before the alleged loans were even disbursed, in order to circumvent Section 10A of the Code. The Financial Creditor cannot be permitted to alter the nature of the Petition based on the same facts and documents in order to undermine the case of the Corporate Debtor and the Amendment Application ought to be rejected. Moreover, The Financial Creditor's claim is based on an alleged 'oral' loan agreement. However, it is a well-established principle of law that in the case of oral agreements, the date of repayment is considered to be from the date of demand unless otherwise reduced to writing by the parties.

12. It is submitted that the demand for repayment was made during the period when Section 10A of the Insolvency and Bankruptcy Code, 2016 was operational. Section 10A was introduced as a temporary measure to prevent the initiation of insolvency proceedings for defaults arising during the COVID-19 pandemic. Therefore, in accordance with the law, no insolvency proceedings can be initiated based on a demand made during this period.

13. In the end, the Respondent/Corporate Debtor has prayed for the dismissal of the Interlocutory Application.

Analysis and Findings:-

14. We have heard the Counsel for the parties and gone through the record.

15. During the course of arguments, Counsel for the Applicant/Financial Creditor has argued that the law with regard to the amendment of pleading. is quite liberal and, therefore, the proposed amendment should be allowed. In support of his contention, Counsel for the Applicant has relied upon *Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others*, (2006), 4 SCC 385 whereby the Hon'ble Supreme Court has held that the court should not go into correctness or falsity of the case in the amendment, nor record a finding on the merits of the amendment at the stage of considering the prayer for amendment. Counsel for the Applicant has further relied upon *North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das* (2008) 8 SCC 511, whereby it has also been held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real question in controversy between the parties. It was further held that amendments should be refused only when the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

16. On the other hand, Counsel for the Respondent/Corporate Debtor has argued that the proposed amendment cannot be allowed as by way of the amendment, the Applicant is seeking to change the date of default which is not permissible under law. Counsel for the Respondent has further contended that the present application has been filed by the Applicant to wriggle out of the rigors of Section 10A of the Insolvency and Bankruptcy Code, 2016 and, therefore, the same deserves to be dismissed. In support of his contentions, Counsel for the Respondent/Corporate Debtor has relied upon *Modi Spinning & Weaving Mills Co. Ltd and Another Vs. Ladha Ram & Co.* (1976) 4 SCC 320, whereby it was held by the Hon'ble Supreme Court that inconsistent pleas cannot be made in pleadings and further that if such amendment are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants.

17. We have thoughtfully considered the contentions raised by the Counsel for the parties and have also perused the case law cited by the Counsel for the parties in support of their respective contentions.

18. It is well settled that the law with regard to the amendment of pleading is quite liberal. By way of the proposed amendment, the Applicant seeks to amend the Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 to add and explain certain facts with regard to the alleged transaction of loan executed between the parties on the basis of which, the date of default has to be ascertained. There is no written contract with regard to the loan transaction executed between the parties. Therefore, in our considered view, if the proposed amendment is allowed, no prejudice is likely to be caused to the Respondent. Even otherwise, the Hon'ble Supreme Court in *Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others*, (2006), 4 SCC 385 whereby it has been held by the Hon'ble Supreme Court that at the stage of the amendment, the court should not go into correctness or falsity of the case in the amendment. Therefore, the admissibility of the Petition under the provisions of the Insolvency and Bankruptcy Code, 2016 shall be determined at the final stage of hearing. Similarly, the point as to whether the Petition is barred under Section 10A of the Insolvency and Bankruptcy Code, 2016 would be decided at the time of admission on the basis of material placed on record. That being so, at this stage, the Applicant cannot be precluded from pleading certain new facts. However, the veracity of such newly pleaded fact will be adjudged at the appropriate stage. Accordingly, we are of the view that the proposed amendment will not cause any prejudice to the Respondent. Therefore, we deem it appropriate to allow the proposed amendment sought by the Applicant.

19. As a result of the above discussion, the IA No. 3541/2023 for amendment in C.P.(IB) No. 259/2023 is allowed.

18. Counsel for the Appellant has further submitted that once the liberty was granted by the Appellate Tribunal vide order dated 12.07.2023 to file a fresh petition, the Tribunal should not have dismissed the application on the ground that it is barred by res judicata and order 2 rule 2 of the CPC. He has referred to a decision of the Hon'ble Supreme Court in the case of *K. Shivaramaiah Vs.*

Rukmani Ammal (2004) 1 SCC 471. It is also submitted that the first petition was not dismissed by the Tribunal on merit rather it was dismissed on the ground that it is barred in view of Section 10A of the Code, therefore, the principle of res judicata will not apply.

19. Counsel for the Appellant has further argued that the Tribunal has committed an error in dismissing the application though the default was committed on 01.08.2019, prior to Section 10A period and has violated the order of this Court passed in Vishal Agarwal Vs. ICICI Prudential Real Estate Aif-1, CA (AT) (Ins) No. 1016 of 2022.

20. He has further submitted that the NCLAT order granting liberty has remained unchallenged, therefore, has attained finality.

21. Counsel for the Appellant has also referred to a decision of this Court in the case of Small Industries Development Bank of India Vs. Sambandh Finserve Pvt. Ltd. CA (AT) (Ins) No. 784 of 2023 to contend that if the default had occurred prior to the 10A period and the subsequent defaults had thereafter occurred during and even after the 10A period then the application filed under Section 7 is maintainable on the basis of fresh default occurred outside the 10A period. It is argued that in the present case the first default had occurred 01.08.2019 and the subsequent defaults had occurred during and even after the 10A period, therefore, the application is maintainable. He has also submitted that in the case of SIDBI(Supra) a similar liberty was granted by this Tribunal as has been granted in the present case to file a fresh petition.

22. On the other hand, it is the contention of the Respondent in its reply that the date of default has been explicitly set out in Part IV as 04.02.2021 because of which the first petition was dismissed by the Tribunal on 10.04.2023 on the ground that the application was hit by Section 10A of the Code. It is further alleged that in the appeal the order dated 10.04.2023 was challenged but counsel for the Appellant made a specific statement that he does not intend to contest the impugned order on merits and he may be permitted to withdraw the appeal, meaning thereby, the order dated 10.04.2023 by which the first petition was dismissed remained unchallenged. It is further alleged that the Appellant only sought liberty to file fresh application on appropriate materials which though were not disclosed to the Court but in any case, the Appellate Tribunal observed that it was not expressing any opinion on the merits of the claim of the Appellant and also gave liberty to the Respondent to raise 10A if any. It is submitted that the liberty granted to the Appellant vide order dated 12.07.2023 to file a fresh application does not mean that the order dated 10.04.2023 was set aside because the said order was not challenged on merits and was even not set aside by the Appellate Tribunal as the appeal was withdrawn. It is further alleged that the Appellate Tribunal has granted liberty to the Respondent to raise the plea of Section 10A and in this regard, the Respondent has alleged that it is barred by order 2 rule 2 of the CPC because the second petition against the same financial debt was filed and the documents which were annexed were also available with the appellant when the first petition was filed. It is further contended that the Appellant has in fact sought to change the date of purported default as well as provide five dates of purported default whereas no effort was made by the

Appellant to amend the first petition while it was pending before the Tribunal in respect of the date of default which has been done by it in respect of company petition filed against Streamcast. It is further submitted that no effort was made by the Appellant even to seek amendment of the date of default in the appeal though it is not so available because in the case of Dena Bank Vs. C. Shivakumar Reddy & Anr. (2021) 10 SCC 330 the Hon'ble Supreme Court has held that there is no bar to amendment of the pleadings in an application under Section 7 or to file the additional document apart from those initially filed alongwith application filed under Section 7 on Form 1 but instead of seeking amendment of the pleadings either before the Tribunal or the Appellate Tribunal, the Appellant withdrew the appeal alleging that it is not being contested on merit and took liberty to file a fresh one to its own peril and it does not amount to an opportunity having been given by the Appellate Tribunal to the Appellant of file a petition with a new date of default in part IV. It is also submitted that principle of res judicata is a matter of public policy to put rest to the litigation between the same parties on the same subject matter and in the present case the parties are same and the subject matter was also same but after losing the case before the Tribunal on the ground that the date of default does not permit the Appellant to file the application under Section 7, the Appellant has filed the fresh application with the fresh date of default which cannot be allowed in view of the decision of the Supreme Court in the case of Ramesh Kyamal (Supra).

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

24. The Appellant has supported its case with a decision of this Court in the case of Small Industries Development Bank of India (SIDBI) (Supra) because

his contention is that the application under Section 7 is maintainable on the basis of afresh default occurred outside the 10A period.

25. In order to appreciate the contention of the Appellant it would be relevant to refer to the facts of the case of SIDBI (Supra), which in our opinion, are altogether different from the facts of the present case.

26. In the case of SIDBI (Supra), the Corporate Debtor, namely, Sambandh Finserve Pvt. Ltd. was sanctioned two term loans of Rs. 20 Cr. and 30 Cr. on 21.02.2019 and 23.10.2019. The loan agreements were executed on 26.02.2019 and 25.10.2019 in respect of the said loan amounts.

27. The terms and conditions were duly outlined and the CD hypothecated all its book debts, revenues, receivables and claims as security for the loans and a charge was successfully created and registered with the registrar of companies.

28. The CD was obligated to repay the full principal amount within 36 months from the date of disbursement with installments due on the 10th of each month. The CD committed default after November 2020 and thus the account was classified as NPA on 15.12.2020.

29. The SIDBI consequently filed an application under Section 7 of the Code on 14.09.2022 bearing CP (IB) No. 42/CB/2022 in which the date of NPA was recorded as the date of default as 15.12.2020 which was hit by Section 10A of the Code and the application was thus dismissed.

30. The appeal filed by the SIDBI before this Court bearing CA (AT) (Ins) No. 28 of 2023 was also dismissed holding that date of default in part IV of the application has been mentioned as 15.12.2020 which is a period during which

Section 10A was operative and thus there is no error found in the impugned order but liberty was granted to the SIDBI to file a fresh application in accordance with law without expressing any opinion on the merits of the case.

31. SIDBI, thereafter, filed afresh application under Section 7 of the Code bearing CP (I) No. 27/CB/2023 in which the date of default was changed from 15.12.2020 to 10.07.2021 but the said application was dismissed by the Tribunal on the ground that earlier CP filed for the same debt against the same CD was already dismissed, therefore, a new application is not maintainable. In this regard, the Tribunal relied upon a decision in the case of Ramesh Kymal (Supra).

32. The case set up before this Court by the SIDBI was that the date of default as 10.07.2021 was mentioned in the second application because of the default of the CD in non-payment of installment and interest which gave fresh cause of action. It is alleged that the defaults continued to occur on 10.04.2021, 10.05.2021, 10.06.2021 and 10.07.2021 amounting to more than Rs. 1 Cr, therefore, 10.07.2021 was chosen as the date of default for filing the subsequent application. It was alleged that every missed installment constituted a fresh default which has been noticed by this Court and it has been found that in terms of the GCC dated 25.10.2019, which governs the loan agreement dated 26.02.2019 and 25.10.2019, the loan was repayable in 36 equal monthly installment and that default to pay the principal or interest amount at each installment amounted to a separate default.

33. Thus, in these circumstances, this Court held that each default of the CD in non-payment of installment and interest thereon amounts to a fresh

cause of default as per the General Conditions of the loan agreement and it could be a sufficient ground to file fresh application.

34. It is well settled that every case has to be decided on its own facts, therefore, the facts of the case of SIDBI (Supra) relied upon by the Appellant are altogether different from the facts of the present case because in the present case, firstly there is no written agreement between the parties for the advancement of the loan and the amount of loan was not to be paid in instalment with interest as it was stipulated in the case of SIDBI (Supra) giving a separate cause of action to the Financial Creditor in the present case, to avail the date of default with every failure of payment of instalment, secondly, the entire loan was payable on demand for which the Appellant had served a notice on 30.01.2021 by which Respondent was called upon to pay/clear the outstanding dues within 5 days i.e. up to 04.02.2021 and since no payment was made, therefore, the first application was filed under Section 7 of the Code with the date of default as 04.02.2021 which is hit under Section 10A and as a result of which the first application was dismissed as not maintainable.

35. Merely the fact that the liberty was given to the Appellant by this court and he failed to pursue the first appeal filed against the order dated 10.04.2023 does not mean that the Appellant can change the date of default at its convenience alleging that after default occurred on 04.02.2021, the Appellant had served reminder to the Respondent.

36. Moreover, unlike the case of Streamcast, which too had been filed by the Appellant, the Appellant never tried to amend the pleadings before the Tribunal

and had rather pursued the application filed initially with the date of default as 04.02.2021 knowing fully well that it would fall within the cutoff period provided under Section 10A and shall render the application filed under Section 7 as not maintainable.

37. Thus, in view of the aforesaid discussion, there is no quarrel with judgment in the case of SIDBI (Supra) which is based on its own facts but the said decision is not applicable to the facts of the present case.

38. Therefore, keeping in view the facts and circumstances of the present case, we do not find any reason to interfere with the well-considered order of the Tribunal, therefore, the present appeal is without merit and the same is hereby dismissed though without any order as to costs.

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

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

New Delhi
21st May, 2025
Sheetal