

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

IA 5054/2023 IN CP (IB) No. 778/MB-VI/2023

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

Inakshi Sobti & Ors.

Flat No. 2, Signia Pearl Co-operative
Housing Society Limited, G-Block, Near Amercian
Consulate, Bandra-Kurla Complex, Bandra (East)
Mumbai 400051.

...Applicant(s) / Financial Creditor(s) (FCs)

Vs

Starlight Systems (I) Private Limited

[CIN- U45201MH2011PTC223573]

Registered Office: 5th Floor, Sunteck Centre, 37-40
Subhash Road, Vile Parle (East) Mumbai -400057.

...Respondent/ Corporate Debtor (CD)

Pronounced: 05.01.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Applicant(s)/FCs : Adv. Apoorva Kulkarni i/b SSB Legal and Advisory

Respondent/CD : Sr. Adv. Gaurav Joshi a/w Adv. Nausher Kohli, Adv.
Rohaam & Adv. Anuj Savla i/b DSK Legal

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. Background


1.1 This Interim Application bearing IA No. 5054/2023 (IA) in CP(IB) No. 778/MB-VI/2023 (Main Application) has been filed by Smt. Inakshi Sobti for herself and representing 27 other housing unit holders, the Applicants / Financial Creditors (FCs), under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) for changing the date of default in the Main Application. The Applicants / FCs are the flat purchasers in the building, namely, Signia Pearl Co-operative Housing Society, which is an association of housing unit holders (Housing Society) and the Corporate Debtor (CD), is the developer of the housing project. The purported debt amounting to Rs. 7,65,00,000/- is in relation to a corpus fund to which the individual housing unit holders have deposited respective amounts out of this deposit with the CD. The CD was supposed to transfer the unutilised amounts to the Housing Society. Instead of filing different applications, 27 Applicants / FCs have given their consent to support the Main Application filed by Smt. Inakshi Sobti for initiating Corporate Insolvency Resolution Process (CIRP) in respect of the CD as the default and amounts outstanding are identical.



2 Contentions of FCs

2.1 The FCs state that the CD had executed various Sale Agreements with each housing unit holder, under which 13 of them had paid the CD sum of Rs. 30,00,000/- (Thirty Lakh Rupees) each and another 15 housing unit holders had paid Rs. 25,00,000 (Twenty-five Lakh Rupees) respectively, aggregating to Rs. 7,65,00,000/- (Seven Crore Sixty-five Lakh Rupees) towards maintenance / corpus fund and management charges, and, therefore, the CD was under obligation to transfer the unutilised amounts from the said Rs. 7,65,00,000/- to the Housing Society. In fact, the Housing Society was to be promoted / got registered by the developer i.e., the CD. According to the FCs, the amounts so collected were far in excess of the required sum and upon formation of the Housing Society on 07.09.2020, the said amounts, as per Clause 8 of the said identical Sale Agreements, became due but were not paid by the CD. The Housing Society was registered *vide* Serial No. MUM/WHE/HSG(TC) 16162/2020-21/2020, according to the FCs.


2.2 Further, Civil Suit (L) No. 196 of 2020 was filed before the Hon'ble Bombay High Court seeking, *inter alia*, grant of conveyance of the land / building as well as directions against the CD from constructing additional floors over and above the 20th floor of the building. The FCs submit that pursuant to the legal action taken against the CD, both parties informally entered into settlement discussions which, however, did not fructify. Further to the



said settlement discussions, the Applicants / FCs agreed to wait till the end of March 2021, being the end of financial year in which a Housing Society was formed, to precipitate legal action against the CD.

2.3 The Housing Society through its Advocate sent a legal notice to the CD and called upon it to take requisite steps to assign and convey the remainder of the lease to the Housing Society. However, the CD failed to take any steps. The FCs further submit that in view of these circumstances and as the default enumerated above is a continuous one, the liability of the CD to the amounts collected from the FCs towards maintenance of the flats continued. According to them, since the default of the CD continued at the end of the financial year of 2020-21, the date of default would be 01.04.2021. This IA is thus filed for amending Part IV of the Main Application to change the date of default from 05.09.2020 to 01.04.2021.

2.4 The Ld. Counsel for the FCs argued that the decision of the Hon'ble Supreme Court in *Dena Bank V. C. Shivakumar Reddy & Anr.* [Civil Appeal No. 1650/2020] has direct application in the instant matter, wherein it was held that there is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with an application under Section 7. Hence, the present IA is only to be allowed, according to the Ld. Counsel for the FCs, permitting them to amend the Main Application to change the date of default.




2.5 The Ld. Counsel for the FCs further submitted that the nature of amendment does not alter the underlying cause of action which is in favour of the FCs. Though the default would have commenced upon the formation of the Housing Society on 07.09.2020, the CD could have remitted the amount by the end of the said financial year 2020-21, i.e., by March, 2021.

3 Contentions of CD

3.1 The CD has not disputed the individual Sale Agreements with the housing unit holders and the amounts paid by the FCs towards the corpus fund which is meant for the management and maintenance of the building developed by them. However, the CD states that it has not committed default of Rs. 7,65,00,000/- and that the date of default as stated in Part IV of the Application is 05.09.2020, which falls under the suspension period of filing applications for initiating CIRP under Section 10A of the IBC. Section 10A categorically barred filing of applications for initiating CIRP in respect of every default which occurred on or after 25.03.2020, initially for a period of six months which was extended up to 24.03.2021.

3.2 Ld. Sr. Counsel for the CD submitted that the present IA to amend Part IV of the Main Application has been filed with the sole motive to revise / alter the date of default to escape the rigour of law brought by way of insertion of Section 10A in the IBC. According to him, the present contention raised by the FCs that there was continuous default on the part of the CD is only




to suit their revised stand and is an afterthought. He further submits that such a contention was not taken in the Main Application and that the IA fails to disclose any justifiable reason for seeking such belated amendment to alter the date of default i.e., 05.09.2020 as pleaded in the Main Application.

3.3 Ld. Sr. Counsel for the CD further argued that the FCs had categorically stated in Part IV of the Main Application that the date of default and the cause of action arose on 05.09.2020 and that they cannot pull out now from their own admission by way of an amendment. According to him, judicial admissions i.e., admissions made in pleadings stand on a higher footing than evidentiary admissions. Ld. Sr. Counsel also brought to our attention various jurisprudence evolved in support of his arguments.


4 Analysis & Findings

4.1 We have perused all the documents submitted by both the sides and considered the arguments advanced by both the Ld. Counsel for the FCs and the CD. Since we are only addressing the prayers in this IA, the entire Main Application is not considered on merits. We have also analysed various decisions of Courts / Tribunals to understand the legal position as to whether amendment to the pleadings is to be allowed automatically or on appreciation of various facts and circumstances before doing so. Ordinarily, a party to the litigation is entitled to seek amendments of its pleadings in order to correct mistakes or to bring in clarity of facts and




figures or to add or omit certain facts or circumstances to advance its case. However, the question that this Adjudicating Authority needs to consider in the present matter is whether the FCs are attempting to correct any error or omission or bringing new facts or revised cause of action. We are also required to test whether the amendment as sought for in this IA, if allowed and incorporated in Part IV of the Main Application, would be prejudicial to the opposite side and would take away any of their legal defence.

- 4.2 A plain reading of the proviso to Section 10A of the IBC makes it abundantly clear that no application for initiation of CIRP “*shall ever be filed*” for any default arising on or after 25th March, 2020. This suspension of CIRP was initially for a period of six months which was extended to another six months, i.e., up to 24.03.2021. The FCs have clearly stated in Part IV of the Main Application that the date of default was 05.09.2020. By the present IA, the attempt of the FCs is to shift the date of default from 05.09.2020 to 01.04.2021 by stating that the Housing Society was formed in September, 2020, and thus till the end of financial year 2020-21, the Applicants / FCs had waited for the CD to transfer the unutilised maintenance / corpus fund to the Housing Society, so the default would start from the 1st day of April, 2021. From the above pleading, it can be inferred that the FCs are attempting to introduce a new plea that the default was one of continuing in nature and that it was in pursuance of certain ‘informal’ settlement that the Applicants / FCs had waited till end



of March 2020, being the end of financial year in which a Housing Society was formed. However, the Applicants / FCs have not provided any document along with the present IA to suggest that there existed such a settlement process between the parties except a mere statement that there were “informal settlements” with the CD.

4.3 Let us now consider the probable effect of the amendments as sought for by the FCs in Part IV of the Main Application. If the amendment is allowed to be made, it would certainly make the Main Application prima facie maintainable as it would allow the FCs to get away from the full legal bar of Section 10A of the IBC. It would also have the effect of curtailing a valid defence of the CD. Hence, it may not be appropriate to allow the IA for amendment of the date of default without any valid justification, especially when the amendments as sought for would give rise to a fresh cause of action, by validating the cause of action already admitted by the FCs. The attempt of the FCs is otherwise hit by the statutory prohibition under Section 10A. Hence, we find that this new plea of the FCs is to alter the date of default mentioned in the Main Application as the alleged date of default fell during the suspension period. If we allow this IA, it would have the effect of negating the legislative bar against filing applications for initiation of CIRP during the COVID-19 pandemic period. Further, we are conscious of the settled proposition of law that an amendment of pleading cannot be allowed which takes away the valuable defence available to the opposite side. This Adjudicating Authority cannot cause irretrievable



prejudice to one of the parties, especially when the amendment sought has the effect of nullifying a statutory mandate.

4.4 The contention of the FCs that they did not file application for amendment immediately after filing the application because of certain settlement talks with the CD is not convincing as the FCs admit that the so-called settlement talks were merely 'informal' in nature and there is no record to suggest that any such informal settlement talks ever took place. The prayer in the present IA for changing the date of default has been characterised by the FCs as being continuous default by the CD. We are of the considered opinion that it shall not be a right in law for an applicant under Section 7 of the IBC to change the date of default. We need to be cautious if the change of date of default cuts the very root of maintainability of the Main Application.

4.5 Amendment of date of default in an application under Section 7 is not to be allowed for mere asking. The Hon'ble Supreme Court in *Dena Bank Vs. Shivakumar Reddy* (supra) also observed that amendment of pleading should be allowed depending on the facts and circumstances of each case. Mentioning date of default as 05.09.2020 in Part IV of the Main Application cannot be construed as mere error but a conscious admission. Allowing the amendment as prayed for in this IA would defeat the very purpose of Section 10A of the IBC and would render it redundant, amounting to abuse and misuse of the process of law. We hold that no amendment to an application under Section 7 of the IBC nullifying a

statutory mandate can be allowed by the Adjudicating Authority. Accordingly, we are of the considered view that the above IA is only to be dismissed.

ORDER

As found above, this Interim Application bearing **IA 5054/2023, in CP (IB) No. 778/MB-VI/2023**, filed under Section 60(5) of the IBC by the FCs for changing the date of default in Part IV of the Main Application is **dismissed**. Since the date of default, viz., 05.09.2020 as stated in Part IV of the Main Application falls within the CIRP suspension period under Section 10A of the IBC, C.P.(IB)-778(MB)/2023 is not maintainable, and, hence, stands **rejected** and disposed of accordingly. Rejection of this C.P. does not have bearing on any right individually or collectively available to the FCs.

Ordered accordingly.

The Registry is directed to serve copy of the order on the parties.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

// Akshata //