

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

Company Appeal (AT) (Insolvency) No. 1016 of 2022

IN THE MATTER OF:

**Vishal Agarwal
Erstwhile Director of Gagan I-Land
Township Pvt. Ltd.**

...Appellant

Versus

ICICI Prudential Real Estate AIF-I & Anr.

...Respondents

Present:

For Appellant: Mr. Rudreshwar Singh, Mr. Diwakar Singh, Mr. Aayush Agarwala and Mr. Saurabh Jain, Advocates.

**For Respondents: Mr. Arind Nayar, Sr. Advocate with Mr. Shahan Ulla and Mr. Akshay Joshi, Advocates for R-1.
Mr. Manish Paliwal and Ms. Megha Yadav, Advocates for R-2.**

ORDER

23.01.2023: Heard learned counsel for the Appellant as well as learned counsel appearing for the Respondent. Learned counsel for the Resolution Professional has also appeared. This Appeal has been filed against the order dated 27.07.2022 passed by the Adjudicating Authority by which application filed under Section 7 by the Financial Creditor has been admitted. On several occasions, when the appeal was taken up, learned counsel for the Appellant submitted that he will approach the Respondent Financial Creditor for One Time Settlement and the adjournment was sought on 24.08.2022, 26.09.2022, 01.11.2022 and lastly on 25.11.2022.

2. Today, when the Appeal was taken, learned counsel for the Appellant submitted that he has already sent One Time Settlement proposal. Learned counsel for the Financial Creditor submits that proposal as submitted as on date is not acceptable to the Financial Creditor. Learned counsel for the Appellant thereafter proceeded with his submission on the merit challenging the impugned order.

3. The principal submission which was pressed by learned counsel for the Appellant is that as per Annexure 3 to the Debenture Subscription Agreement, clause 6, the date of default for repayment occurs on 31.08.2020, which was during the prohibitory period under Section 10A of the I&B Code. Hence, the application itself was not maintainable and the Adjudicating Authority ought to have rejected the application. He further submitted that the Corporate Debtor could not file his reply and thereafter an application was filed before the Adjudicating seeking liberty to file reply, which was not considered.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant contends that before the Adjudicating Authority, during the hearing, it was clearly admitted on behalf of the Corporate Debtor that claim is admitted and further in the letters which was written by the Corporate Debtor on 09.09.2021 it was categorically mentioned that he admit default in payment of interest as on quarter ending September 2019 and December, 2019. Hence, the submission which is sought to be raised by learned counsel for the Appellant cannot be permitted to be raised. The Corporate Debtor admitted the debt and default in writing as well as orally.

He admitted the default and it was stated that due to COVID, he could not make payment in time and prayed for certain further relief.

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. The Adjudicating Authority in its order impugned has dealt with the submission raised by learned counsel for the Appellant on the ground of application being barred by 10A and in Para b(vii) following has been observed by the Adjudicating Authority:

“(vii) It is submitted that:

- (a) Admittedly, the default in payment of interest as aforesaid occurred on September 30, 2019 and December 31, 2019 viz. the last day of the quarters.*
- (b) Any default in payment of interest is an express event of default under the terms of the DSA.*
- (c) The period covered under section 10A of the IBC is March 25, 2020 to March 25, 2021. Clearly the default committed by the Corporate Debtor does not fall within the period prescribed under section 10A of the IBC. In the instant case the default was committed by the Corporate Debtor in September 2019, i.e., prior to the outbreak of the COVID – 19 pandemic. Therefore, it cannot be considered as a default during COVID period.”*

6. The Adjudicating Authority while noticing the submission of the parties have noted the relevant clauses and other materials on the record. While noticing the sequence of events and facts in Para 4 (xvii) the Adjudicating Authority noted as follows:

“(xvii) By a letter dated September 9, 2021, the Corporate Debtor itself has admitted that he has failed to pay Interest for the quarters ending September 2019 and December 2019 thus acknowledging that it has defaulted in servicing its obligations under the DSA. Under the said letter, the Corporate Debtor requested the Petitioner to restructure the debt, capitalise and reduce the interest rate and to waive penal IRR on account of the pandemic. A copy of the letter dated September 9, 2021 is annexed to the Petition.”

7. The submission of the learned counsel for the Appellant that as per Annexure-3 clause 6, the date of repayment of instalment is 31.08.2020 only is not acceptable. There being clear admission on behalf of the Appellant in default in payment of interest for the quarters ending September 2019 and December 2019, Appellant cannot be permitted to contend that default was committed only on 31.08.2020. Insofar as application being barred by 10A, benefit under Section 10A can be claimed by the application only when there is clear default during the prohibited period. The said benefit cannot be claimed by the Appellant by ignoring the admission of default which was prior to 25.03.2020. There being clear admission in the present case, in letter dated September 9, 2021 where the Corporate Debtor itself has admitted that he has

failed to pay interest for the quarters ending September 2019 and December 2019 thus acknowledging that it has defaulted in servicing its obligations under the DSA.

8. We, thus, are of the view that the Adjudicating Authority has after considering all relevant facts and after finding debt and default has admitted the application. The fact that before this Tribunal, the Appellant has taken four adjournments for proposing OTS and get settle with the Bank itself indicate that debt and default is not disputed. We, thus, are of the view that there is no merit in the Appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

Archana/nn