

NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

IA 5367 of 2023 in CP (IB) 883 (MB)2023

And

CP (IB) 883 (MB)2023

IA 5367 of 2023

Under section 60(5) of the Insolvency and
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Varanium Cloud Limited

... Applicant

V/s.

Rolta Private Limited

... Respondent

CP (IB) 883 (MB)2023

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

IN THE MATTER OF

Rolta Private Limited

211, 21st Floor, Maker Towers, Co-op.
Society "F", Cuffe Parade, Mumbai -
400005.

... Financial Creditor

V/s.

Varanium Cloud Limited

3rd Floor, Plot No. 244-A RDP 2, CTS
1374/B, Vill. Versova SVP Nagar, Four
Bungalows, Mumbai – 400053.

... Corporate Debtor

Order delivered on :- 03.01.2024

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Financial Creditor : Adv. Ankit Lohia

For the Corporate Debtor : Adv. Feroze Patel a/w Siddharth Bafna
and Rinu Kallan

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. The present Petition has been filed by the above-named Petitioner/Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process on account of default on part of the Respondent/Corporate Debtor to repay the short-term loan amount of Rs. 1,50,00,000/- in three tranches.
2. It is the case of the Petitioner that short terms loan of Rs. 1.5 crore was granted and disbursed to the Corporate Debtor in three tranches of Rs. 50 lakh each on 11.07.2019, 15.07.2019 and 30.07.2019 respectively. The Corporate Debtor committed default in the repayment of the loan and a sum of Rs. 3,05,84,009/- was outstanding as on 15.07.2023. According to the Financial Creditor, the due date for repayment of the loan was 31.07.2019. An email dated 17.07.2020 was sent to Mr. Sabale, a Director of the Corporate Debtor, to repay the loan. Another email was sent on 30.01.2021 and, therefore, the short-term loan stood

defaulted on 01.08.2019. Thereafter, a demand notice dated 30.01.2021 was issued to the Corporate Debtor calling upon to return the outstanding loan amount along with the interest at the rate of 18 percent calculated from 01.08.2019.

3. It is further stated that discussions took place between the Financial Creditor and the Corporate Debtor whereby the latter sought additional time to repay the loan facility. Accordingly, the Financial Creditor address an email dated 25.01.2022 calling upon the Corporate Debtor to repay the amount by 27.01.2022.
4. It is further stated that the Financial Creditor filed a Petitioner u/s 7 of the IB Code, 2016 i.e. CP(IB) 270(MB)2023 in respect of the aforesaid short-term loan which was dismissed summarily on the ground that the Petition is barred u/s 10A of the Code, 2016 as the date of default was either 04.02.2021 or 08.07.2020.
5. Despite several follow ups and reminders by the Financial Creditor, the Corporate Debtor failed to repay the outstanding amount to the Financial Creditor. Hence the present Petition.

Submissions of the Corporate Debtor: -

6. The Corporate Debtor has not filed any reply. Instead, the Corporate Debtor has preferred to file an Application bearing no. IA 5367 of 2023 challenging the maintainability of the present Company Petition filed u/s 7 of the IB Code, 2016. During the course of hearing on 24.11.2023, the Counsel for the Corporate Debtor stated that IA 5367 of 2023 be treated as reply on behalf of the Corporate Debtor.
7. It is stated in the IA that the Petition is barred under Section 10A of

the Code. It is the definite case of the Petitioner that the default took place on 04.02.2021 as the Corporate Debtor failed to pay the outstanding dues within a period of five days from 30.01.2021 when the recall notice was issued, as claimed in the previous petition filed by the Financial Creditor. Therefore, the Petition is not maintainable and is also barred by res-judicata. In the end, the Corporate Debtor has prayed for the dismissal of the Petition.

Finding

8. We have heard the Counsel for the parties and have gone through the records.
9. During the course of arguments, it has been contended by the Counsel for the Petitioner that the Petitioner advanced a short-term loan of Rs.1.5 crore to the Corporate Debtor in three tranches and the Corporate Debtor committed default in its repayment on 15.07.2023. The Counsel for the Petitioner has further pointed out that previously also, a Petition was filed u/s 7 of the Code, 2016 which was dismissed by NCLT, Mumbai bench Court-IV vide order dated 10.04.2023, being not maintainable u/s 10A of the Code, 2016. The Counsel for the Petitioner has further pointed out that an appeal was preferred before the Hon'ble NCLAT against the order dated 10.04.2023 and the Hon'ble NCLAT vide its order dated 12.07.2023 disposed of the appeal permitting the Petitioner to file a fresh Application on appropriate material.
10. The Counsel for the Petitioner has further argued that since a demand notice was issued in respect of the short-term loan, the date of default is 31.07.2019 when the debt was due and thereafter the Corporate

Debtor subsequently committed default on 26.02.2020, 08.07.2020, 04.02.2021 and 27.01.2022 and as such, the second Petition lies and the same is liable to be admitted.

11. On the other hand, the Counsel for the Corporate Debtor has argued that the present Petition is nothing but a gross abuse of the process of law and is barred under the principle of Res-judicata as the previous Petition was dismissed on merits. The Counsel for the Corporate Debtor has further argued that it is a settled proposition of law that date of default cannot be changed/shifted and, therefore, the new Petition cannot be maintained by changing the date of default in respect of the same financial debt once a Petition has already been dismissed.
12. We have thoughtfully considered the contentions raised by the Counsel for the parties and have carefully gone through the records.
13. Perusal of the records reveals that in the Petition previously filed by the Petitioner u/s 7 of the Code, 2016 on the same set of facts, the date of default was claimed as 04.02.2021 or 08.07.2020. The said Petition was dismissed being barred under Section 10A of the Code, 2016 as the said dates of default were covered under the said Section. In the present Petition, in Part IV the date of default is claimed as 01.08.2019. It has further been claimed in Part IV that default was also committed on 26.02.2020, 08.07.2020, 04.02.2021 and 27.01.2022. It is a settled proposition of law that date of default cannot be shifted or changed. In this regard, reference can be made to law laid down in *Ramdas Datta (Suspended Director of Saraju Flour Mill Pvt. Ltd. vs. IDBI Bank and another 2023 SCC Online NCLAT 1306*, whereby it has been held that date of default cannot be changed. In this very case, a reference has been made to the law laid down in *Ramesh Kymal vs. Siemens Gamesa*

Renewable Power Pvt. Ltd. 2021 (3) SCC 224 whereby also it was held that date of default cannot be changed or shifted. Apparently, the instant Petition has been filed in respect of the same financial debt by changing the date of default which as per the law laid down in the afore-cited cases cannot be changed or altered at the will of the Petitioner. Therefore, in our considered view, the Petition deserves to be dismissed on this score alone. In this context a reference can further be made to *Small Industries Development Bank of India vs. Sambandh Finserve Pvt. Ltd. MANU/NC/3256/2023* whereby it was held that once the date of default falls within the period set out in section 10A of the Code, 2016, the initiation of CIRP is totally barred forever. In the cited case also, the previous Petition was filed on the same debt as is the case in the instant Petition and it was held that the Petitioner cannot be permitted to circumvent the situation by adopting the novel method of fixing/shifting the date of default on its own to suit its convenience which is not permissible under the law.

14. The Counsel for the Petitioner has relied upon *Narayan Mangal vs. Vatsalya Builders and Developers Pvt. Ltd. (Company Appeal (Ins.) No. 294 of 2023 decided on 18.08.2023)* whereby it has been held by the Hon'ble NCLAT that Section 10A provides that no Application/proceedings u/s 7, 9 and 10 are to be initiated for a default which is committed during Section 10A period. It is further observed that if the default is committed prior to Section 10A period and continues in the said period, the initiation of proceedings is not barred. On the strength of this, the Counsel for the Petitioner has argued that since the initial default took place on 01.08.2019 which was prior to the 10A period, the Petition must be admitted.

15. Having thoughtfully considered the aforesaid contention, we are of the considered view that the same is not tenable. In the previous Petition, which was filed subsequent to 01.08.2019, the date of default was not claimed as 01.08.2019. Even otherwise the date of default cannot be 01.08.2019 as the last tranche was disbursed on 30.07.2019 and the date of default cannot be just one day after the date of disbursement especially when there is no written agreement between the parties with regard to the terms and condition of the loan, more particularly the repayment schedule. As stated above, the date of default cannot be changed at the whim and fancy of the Petitioner. Even otherwise the Petitioner is barred under the provisions of order 2 Rule 2 CPC as well as under Section 11 CPC as the matter on the same set of facts in respect of the same financial debt has already been finally decided in the previous Petition and the Petitioner is barred from taking any new plea in the subsequent litigation which was available to him in the first bout of litigation.
16. As a result of above discussion, we find that the Petition is not maintainable and deserves to be **dismissed**. It is ordered accordingly and **CP.(IB)883(MB)2023** is **dismissed** while **IA.No.5367/2023** is **allowed**. There shall, however, be no order so as to costs.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)

ANKIT