NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 359 of 2024

IN THE MATTER OF:

Inakshi Sobti And Ors. **....Appellants**

Vs.

Starlight Systems (I) Pvt. Ltd. & Anr. **...Respondents**

For Appellants: **Mr. Krishnendu Datta, Sr. Advocate with Mr. Lzafeer Ahmad and Rahul Gupta, Advocates.**

For Respondents: **Mr. Arun Kathpalia, Sr. Advocate with Mr. Samit Shukla, Mr. Himanshu Vij, Mr. Rohan Pajnigar, Mr. Aditya Dhupar, Ms. Saman Ahsan, Mr. Aayush Jain, Mr. Arjit Oswal, Advocates.**

J U D G M E N T
(3rd July, 2024)

Ashok Bhushan, J.

1. This Appeal has been filed challenging the order dated 05.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-VI by which IA No.5054 of 2023 filed by the Appellants for amendment in Section 7 application has been rejected. By the same order, Section 7 application filed by Appellant rejected as barred by Section 10A of the IBC. Aggrieved by the aforesaid order dated 05.01.2024, this appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:-

2.1. Appellants have purchased flat from 'Signia Pearl Co-operative Housing Society' and entered into Agreement for Sale by the Corporate Debtor- 'Starlight Systems (I) Pvt. Ltd.', the developer. Appellants claim to have paid amount of Rs.30,00,000/- towards maintenance/ corpus fund and management charges. Under Clause 9 of the Agreement for Sale, the Corporate Debtor was under an obligation to transfer the unutilized amount out of the aforesaid sum of Rs.30,00,000/- paid by Appellant No.1 to the Association of Unit Holder. On 04.09.2020, Appellant registered a Society before Dy. Registrar, Co-operative Societies H-East Ward. On 05.01.2021, Appellant Society claim to have sent a legal notice to the corporate debtor calling upon to take requisite steps to assign and the remainder of the amount to the said Society. Respondent have failed to make the payment. Appellant entered into informal discussion with the Corporate Debtor which did not fructify. Civil Suit (L) No. 196 of 2020 was filed by the Appellant before the Bombay High Court praying for grant of conveyance of the land/ building and certain other reliefs. Appellant filed Section 7 application before the Adjudicating Authority dated 06.07.2023 for initiation of the CIRP against the Corporate Debtor for a default of Rs.7,65,00,000/-. Date of default mentioned in Part IV was 05.09.2020. An application IA No.5054 of 2023 was filed by the Appellant seeking amendment of Section 7 application. Amendment application as well as Company Petition came for consideration before the Adjudicating Authority. After hearing counsel for the Appellant as

well as Counsel for the Corporate Debtor, Adjudicating Authority vide impugned order rejected amendment application and dismissed Section 7 application as barred by Section 10A. By amendment application, appellant sought to amend the date of default 05.09.2020 to 01.04.2021. Adjudicating Authority took the view that financial creditor has already been stated in Part-IV the date of default as 05.09.2020. Amendment application is attempt to change the date of default. Challenging the order of the Adjudicating Authority, this appeal has been filed.

3. We have heard Shri Krishnendu Datta, Learned Senior Counsel appearing for the Appellants and Shri Arun Kathpalia, Learned Senior Counsel appearing for the Respondent.

4. Counsel for the Appellant challenging the order of the Adjudicating Authority submits that the Appellant had every right to amend the Section 7 application. It is submitted that the pleadings in the application was that the Corporate Debtor till date has defaulted in transferring of amount. As per Clause 8 of the Agreement to Sale, it is clearly mentioned that there was continuous cause of action in favour of the Appellant. There being continuous cause of action, date of default was sought to be changed from 05.09.2020 to 01.04.2021 i.e. the first day after the close of financial year 2020-2021. It is submitted that the amendment application is always permissible and applicant is entitled to withdraw any admission made in the pleadings by means of amendment application. Corporate Debtor was under obligation to make payment i.e. refund of the amount. Adjudicating

Authority hence committed error in rejecting the amendment application as well as rejecting Section 7 application.

5. Counsel for the Respondent replying the submission of the Appellant submits that the date of default having clearly pleaded in Part IV of Section 7 application which date of default fell within bar under Section 10 A of the IBC, the Appellant cannot be allowed to change the date of default to defeat the law which bars any application for default committed during 10A period. It is submitted that by amendment no fresh cause of action can be introduced by the appellant. By the amendment application, the Appellant is seeking to change the cause of action which is total inconsistent of the case as set out in Section 7 application. Amendment cannot be allowed when it is intended to overcome statutory bar. Judgment relied by Counsel for the Appellant in support of the submissions are all distinguishable and no amendment seeking change in Section 10A period can be permitted.

6. Counsel for the parties have placed reliance on various judgment of the Hon'ble Supreme Court which we shall refer to by considering the submissions in detail.

7. Part IV of Section 7 application filed by the Appellant is as follows:-

"PART-IV

Particulars of the Financial Debt		
1.	*Total Amount of Debt granted Date(s) of Disbursement*	*Rs.7,65,00,000/- (Rupees Seven Crores Sixty Five Lakhs Only) and particular details are provided in*

		tabular form annexed and marked as ***Exhibit 'B'.***
2.	*Amount Claimed to be in default and the date on which the default occurred (Attach the working for computation of amount and days of default in tabular form)*	*Total default:* *Rs.7,65,00,000/-* *Date of Default:* *5 September 2020*

8. Under Part V of the application, the Appellant had given particulars of financial debt (documents, records and evidence of default). It is useful to notice pleadings and para 8, 9, 10 of Part-V:-

"PART-V

Particulars of the Financial Debt (Documents, Records and Evidence of Default)		
		8. On 4 September 2020, the said Society was registered before the Dy. Registrar, Co-operative Societies H-East Ward vide Serial No. Serial No. MUM/WHE/HSG(TC) 16162/2020-21/ Year 2020. *9. On 5 January 2021, the said Society through its Advocates sent a legal notice to the Corporate Debtor and called upon the Corporate Debtor to take requisite steps to assign and convey the remainder of the lease to the said Society. However, the Corporate Debtor failed to take any steps.* *10. The Corporate Debtor has till date defaulted in transferring the amount as per Clause 8 which was collected towards corpus fund to the said Society and is therefore liable to return the same to the Financial Creditors. The amount so collected was far in excess of the required sum and upon formation of the Society on*

		4 September 2020, the said amount as per Clause 8 became due which was not repaid by the Corporate Debtor.

9. In paragraph 9 of Part-V, Appellant has referred to notice dated 05.01.2021 given by the Appellant to the corporate debtor. When the appeal was heard, appellant took liberty to file an additional affidavit to bring notice dated 05.01.2021 on record. On 27.03.2024, following order was passed:-

> *"**27.03.2024**: As prayed by Appellant, list this Appeal on 02.04.2024.*
>
> *Learned counsel for the Appellant seeks liberty to file an Additional Affidavit bringing notice dated 05.01.2021 on record. He may do so."*

10. Subsequently, statement was made by the appellant that notice dated 05.01.2021 was not preserved and appellant submitted that arguments to be heard without bringing the said notice on record. The said statement was recorded on 24.04.2024 in this appeal which is to the following effect:-

> ***"24.04.2024:** Learned counsel for the Appellant submits that the Appellant has not preserved the notice dated 05.01.2021, hence, the same could not be brought on the record. Learned counsel for the Appellant submits that he may advance submission without bringing the said notice on record.*
>
> *List this Appeal on 01.05.2024."*

11. The amendment application being IA No. 5044 of 2023 was filed by the Appellant where Part-IV of the application was sought to be amended in following manner:-

"SCHEDULE

(Schedule for Amendment)

In Part IV- Particulars of the Financial Debt

The following second row to be substituted in place of the existing second row Part IV at Page 30 of the captioned petition.

1.	*Amount Claimed to be in default and the date on which the default occurred (Attach the working for computation of amount and days of default in tabular form)*	*Total default:* *Rs.7,65,00,000/-* *Date of Default:* *1 April 2021* *(Society was formed in September 2020, and thus till the end of financial year 2020-2021, the Petitioners have waited and the default would start from the 1st day of next financial years)*

12. The date of default which was mentioned as 05.09.2020 is now sought to be changed as 01.04.2021. In paragraph 7 of the application, following has been pleaded by the appellant:-

> *"7. Pursuant to the litigation and legal action (details of which are stated in the captioned petition) taken against the said Respondent, Respondent and Petitioners informally entered into settlement discussions which did not fructify. Pursuant to the said settlement discussions, the Petitioners had agreed to wait till end of March 2021 being the end of financial year in which a Society was formed."*

13. The above pleadings indicate that Appellant's case is that they entered into informal settlement between the corporate debtor and the petitioner had agreed to wait till end of March 2021 being the end of financial year in which society was formed. The pleadings of the appellant themselves is that settlement discussion did not fructify. When settlement discussion did not fructify, there is no occasion to change of date of default. Date of default could have been changed only when any settlement took place between the parties. The mere fact that appellants themselves stated that they will wait till March 2021 shall not stop the consequence of default which took place on 05.09.2020 as pleaded by the appellants themselves in Section 7 application. The default as pleaded by the appellant in Section 7 application is return of the excess amount from the amount which was deposited by the appellants with the corporate debtor towards maintenance/ corpus fund. The pleading further indicate that Civil Suit (L) No.196 of 2020 has already been filed by the Appellants before the Bombay High Court seeking various reliefs against the corporate debtor. Adjudicating Authority by the impugned order found that the date of default as mentioned by the appellant in Section 7 application fell between 10A period and by amendment now financial creditor are intended to introduce new plea. In paragraphs 4.3, 4.4 and 4.5, Adjudicating Authority returned following:-

> *"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 Secon 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."

14. The submission of the Counsel for the Appellant is that the appellant is entitled to make amendment in Section 7 application as per the law laid down by the Hon'ble Supreme Court in ***"C Shivkumar Reddy v. Dena Bank***

(2021) 10 SCC 330". Counsel for the Appellant has relied on paragraph 142 of the judgment which is as follows:-

> *"142. There is no bar in law to the amendment of pleadings in an application under Section 7 IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 IBC in Form 1. In the absence of any express provision which either prohibits or sets a time- limit for filing of additional documents, it cannot be said that the adjudicating authority committed any illegality or error in permitting the appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay. the adjudicating authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the adjudicating authority to entertain and/or to allow the request of the appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal."*

15. The Hon'ble Supreme Court in the above case 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. There cannot be no quarrel to the above preposition of law laid down by the Hon'ble Supreme Court in the above case. Present is a case where application which was filed by the

appellant and date of default mentioned therein clearly fell in Section 10A period and no satisfactory explanation was given by the appellant to permit amendment in the date of default in the application. Counsel for the Appellant has relied on an order of this Tribunal dated 28.02.2024 passed in ***"Company Appeal (AT) (Insolvency) No.380 of 2024- M/s. SE Transstadia Pvt. Ltd. vs. Bank of Baroda"*** that amendment was allowed by the Adjudicating Authority in Section 7 application which was upheld by this Tribunal where date of default is permitted to be amended. The above judgment indicates that the amendment was allowed which amendment was allowed as per the date of NPA claim in the application. In paragraphs 4, 5 and 6 of the judgment, following was held:-

> *"4. When we look into the table of amendment which was sought to be allowed, in place of 02.06.2018 now amended date of default is 29.09.2018 which is in accord with the date of NPA as was mentioned in the original Form- 1 i.e. 31.12.2018. Learned Counsel for the Appellant submits that even date of default is not acceptable and is not according to the RBI Circular.*
>
> *5. We have considered the submissions of the Learned Counsel for the parties and perused the record.*
>
> *6. The amendment which has been allowed is amendment as per the date of NPA claimed in the application under Section 7. It is true that there is no reason given in the order of the Adjudicating Authority but we have looked into the amendment proposed and amendment allowed and we are of the view that it is not a fit case for the Appellate Court to exercise its*

> *jurisdiction to interfere with the impugned order. Adjudicating Authority has already given liberty to the Corporate Debtor to raise all issues, including the issue of limitation. It shall be open for the Appellant to raise the question of date of NPA and the date of default as well"*

16. This Tribunal has noted that in the original form itself the date of NPA was mentioned as 31.12.2018, hence, as per the RBI Circular, date of default was permitted to be changed to 29.09.2019. The above judgment of this Tribunal is thus clearly distinguishable and does not render any help to the appellant. Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***"Gautam Sarup vs. Leela Jetly and Ors.- (2008) 7 SCC 85"*** wherein paragraphs 28 and 29, Hon'ble Supreme Court laid down following:-

> *"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.*
>
> *29. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed."*

17. The above judgment of the Hon'ble Supreme Court itself has laid down that categorical admission cannot be resiled but in a given case, it may be explained or clarified. The present is not a case where any clarification or explanation is sought to be offered for date of default 05.09.2020 mentioned in Section 7 application. The date of default in itself is sought to be changed as 01.04.2021 without there being any reason or cause. As noted above, Appellant themselves has stated that after registration of society of the appellant on 04.09.2020, the corporate debtor was liable to refund the amount to the appellants which default took place on 05.09.2020. In the application as pleaded that they entered into informal talks with the corporate debtor which did not fructify. Appellant themselves has stated that in the formal talks proceeded to take time till financial year of the corporate debtor. Firstly, according to the case of the appellant, informal talk did not fructify, hence, there was no settlement with regard to date up to which amount has been paid. Date of default cannot be permitted to be changed. Appellants themselves cannot change the date of default by stating that they give more time to the corporate debtor. When the default has been committed by the corporate debtor all consequences shall ensue. Counsel for the appellant has also relied another judgment of the Hon'ble Supreme Court in ***"Ram Niranjan Kajaria and Ors. vs. Sheo Prakash Kajaria and Ors.- (2015) 10 SCC 203"*** in which judgment in paragraphs 24 and 25, following was laid down by the Hon'ble Supreme Court:-

> *"24. We agree with the position in Nagindas Ramdas (supra) and as endorsed in Gautam Sarup (supra) that a categorical admission made in the pleadings*

cannot be permitted to be withdrawn by way of an amendment. To that extent, the proposition of law that even an admission can be withdrawn, as held in Panchdeo Narain Srivastava (supra), does not reflect the correct legal position and it is overruled.

25. However, the admission can be clarified or explained by way of amendment and the basis of admission can be attacked in a substantive proceedings. In this context, we are also mindful of the averment in the application for amendment that:

> *11. Mahabir Prasad Kajaria died at age of 24 years on 7th May, 1949 when the Defendant No. 5 was only 2 years and the Defendant No. 12 was only 21 years. Till the death of Mahabir and even thereafter, the Petitioners had been getting benefits from income of the joint properties. The Defendant No. 5 and his two sisters, namely, Kusum and Bina were brought up and were maintained from the income of the joint family properties. The Petitioners after the death of Mahabir, they continued to live in the joint family as members and till now members of the joint family. In the marriage of the two sisters of the Defendant No. 5 Kusum and Bina (now after marriage Smt. Kusum Tulsian and Smt. Bina Tuisian) the expenses were wholly borne out from the incomes of the joint family properties. The said facts are well known to all the family members and their relations."*

18. The above judgment also clearly laid down that categorical admission made in the pleading cannot be made to be withdrawn by way of amendment. What has been said by the Hon'ble Supreme Court is that admission can be clarified or explained by way of amendment. Present is not a case where amendment i.e. amendment of date of default is being clarified or explained. Section 10A which was inserted in the IBC with object to give relief to the corporate debtor against initiation of the insolvency proceeding when default committed comes within the period of Section 10A. Section 10A is as follows:-

> *"**10A. Suspension of initiation of corporate insolvency resolution process**. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*
>
> *Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*
>
> *Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."*

19. Section 10A is a beneficial provision to extend certain protection to the corporate debtor during the COVID period. The said benefit cannot be allowed to be taken away indirectly, in event the appellant is permitted to amend the date of default which amendment is not supported by any justifiable cause or reason. Adjudicating Authority did not commit any error in rejecting the application of the appellant for change in date of default. After rejection of application of amendment, the Adjudicating Authority did not commit any error in rejecting Section 7 application as barred by Section 10A. In Section 7 application, date of default was mentioned as 05.09.2020 which fell within the prohibited period under Section 10A. Section 10A clearly mandated that no application can ever be filed with regard to default which has committed during 10A period. Counsel for the Appellant further sought to contend that default is a continuous default and hence, application under Section 7 could not have been said to be barred by Section 10A.

20. When we look into Part-IV of Section 7 application as extracted above, Part-IV of the application did not plead that there is no date of default and it is continuous default on the part of the corporate debtor even in the amendment application Part IV date of default is sought to be amended as 01.04.2021. There is no pleading of continuous date of default in Part-IV, hence, arguments advanced by Counsel for the Appellant that there was continuous default under Part-IV is only to save the petition as barred by Section 10A which cannot be accepted.

21. In view of the foregoing discussions, we are satisfied that the Adjudicating Authority has after considering all the aspects of the matter has rightly refused the amendment application and rejected Section 7 application filed by the appellant. There is no merit in the appeal. The appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi
Anjali