

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

**Company Appeal (AT) (Insolvency) No.444 of 2023**

[Arising out of order dated 30.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in I.A. No. 34/2022 in C.P. (IB) No.1147/MB/C-IV/2022]

**IN THE MATTER OF:**

**NuFuture Digital (India) Limited**

Having registered office at:  
Knowledge House, Shyam Nagar, JVLR,  
Jogeshwari East, Mumbai (MH)- 400060.

**...Appellant**

**Vs.**

**Axis Trustee Services Ltd.**

Having registered office at:  
Axis House, Bombay Dyeing Mills Compound,  
Pandurang Budhkar Marg,  
Worli, Mumbai (MH) - 400025.

**...Respondent**

**Present:**

**For Appellant: Mr. Ritin Rai, Sr. Advocate with Mr. Petrushka Dasgupta, Ms. Pallavi Pratap, Mr. Akshay Singh, Mr. Harsh Moorjani, Ritika Sinha, Krishna Baruah, Advocates.**

**For Respondents: Mr. Krishnendu Dutta, Sr. Advocate with Ms. Suchitra Valjee, Mr. Kartik Nagarkatti, Ms. Neha Agarwal, Advocates.**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal has been filed against order dated 30.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court IV rejecting I.A. No. 34/2022 filed by the Appellant (the Respondent before the Adjudicating Authority) by which the Company Petition filed under

*Cont'd.../*

Section 7 by the Financial Creditor was prayed to be dismissed as barred by Section 10A. The Adjudicating Authority by the impugned order dated 30.03.2023 rejected the application I.A. 34/2022 holding that the Section 7 application is not barred by Section 10A. Aggrieved by the said order this Appeal has been filed. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- i. The Appellant to meet the company's requirement issued 2500 secured, unlisted, rated, redeemable, Non-Convertible Debentures (NCDs) each having a face value of Rs.10 Lakhs in five series viz. Series A, Series B, Series C, Series D and Series E.
- ii. A Debenture Trust Cum Mortgage Deed was executed on 06.12.2018 between the Appellant – Corporate Debtor and the Respondent – Axis Trustee Services Ltd. (Financial Creditor). Details of the debentures in five series with the details of principal repayment date, tenure and redemption details were mentioned in Schedule V of the Debenture Trust Cum Mortgage Deed.
- iii. The Appellant on 13.04.2020 wrote to the Debenture Holder seeking a moratorium of five months of repayment of dues. By letter dated 27.04.2020, the Financial Creditor granted three months moratorium for all payments obligations due between 01.04.2020 to 30.06.2020.
- iv. The Financial Creditor issued notice dated 22.10.2020 to the Appellant pointing out breaches and default on part of the Appellant. The Notice called upon the Appellant to confirm full

payment of all dues pertaining to the Debentures from the proceeds of any transaction between the Future Group and Reliance Retail Ventures Ltd. and or any other prospective investor by January, 31, 2021.

- v. On 01.07.2022, the Financial Creditor issued a notice calling upon the Appellant to make payment of Rs.322,00,09,322/- due and payable as on 20.05.2022, failing which the Financial Creditor was to take appropriate legal action including initiation of proceedings under the I&B Code. The notice dated 01.07.2022 was replied by the Appellant on 07.07.2022. The Financial Creditor issued a Rejoinder on 21.07.2022.
- vi. On 21.10.2022, the Respondent – Financial Creditor instituted the Company Petition being CP (IB) No. 1147 of 2022 under Section 7 of the I&B Code claiming default amount of 275,43,28,128/-. The date of default was mentioned as 31.03.2021.
- vii. On 29.12.2022, the Appellant filed I.A. No. 34 of 2022 seeking dismissal of the Company Petition for being barred by Section 10A of the I&B Code. The Financial Creditor filed affidavit in Reply to the I.A. No. 34/2022 on 23.02.2023. The Adjudicating Authority passed an order on 30.03.2023 rejecting the I.A. No. 34/2022.

2. We have heard Shri Ritin Rai, learned senior counsel for the Appellant and Shri Krishnendu Datta, learned senior counsel appearing for the Respondent.

3. Shri Ritin Rai, learned senior counsel appearing for the Appellant submits that the Adjudicating Authority failed to appreciate that the Financial Creditor vide notice dated 22.10.2020 demanded full payment by 31.01.2021 and that the default as claimed in the notice dated 22.10.2020 was default which occurred during the period as contained in Section 10A. The Financial Creditor having recalled its entire facility by its notice dated 22.10.2020 cannot seek to create a new date of default by subsequent notice dated 01.07.2022. By notice dated 22.10.2020, the Financial Creditor has exercised mandatory prepayment option under Clause 12 of the Debenture Trust Deed. The event of default under Section 13.1 was mentioned in the notice and consequent to issuance of said notice which clearly mentioned in Debenture Trust Deed that the Financial Creditor elected to issuing notice under Clause 13.1(a), the secured obligations immediately became due and payable. Event of default occurred as per notice dated 22.10.2020 and the entire amount became due and payable. The date of default which was fully covered under 10A period could not have been changed by any subsequent notice and the application filed under Section 7 was barred by Section 10A. The Adjudicating Authority committed error in rejecting I.A. No. 34/2022. Relying on the judgment of Hon'ble Supreme Court in **"Ramesh Kymal versus Siemens Games Renewable Power Private Ltd., (2021) 3 SCC 224"**. It is submitted that embargo contained in Section 10A must receive purposive construction

which was sought to be achieved by enacting the provision. Once a default takes place, the right to file application accrues and it is not discretion of the Tribunal to accept one date or the other. Learned counsel for the Appellant placed reliance on judgment of this Tribunal in **“Next Education vs. K12 Techno Services, Company Appeal (AT) (Ins.) No. 98 of 2019”**.

4. Shri Krishnendu Datta, learned senior counsel appearing for the Respondent refuting the submissions of learned counsel for the Appellant submits that the Financial Creditor vide notice dated 22.10.2020 did not exercise its right to accelerate repayment and expressly reserved its right to do so. The notice dated 22.10.2020 cannot be read to be notice for mandatory prepayment. Emphasis on Para 16 of the notice has been laid by learned counsel for the Appellant is baseless. By the notice, the Corporate Debtor was called upon to confirm that it would repay amount from the proceeds of such deal by 31.01.2021. The notice was in relation to the transaction which the Corporate Debtor was proposing to enter into. It is an admitted position that neither did the transaction entered between Future Group and Reliance Group fructify nor did the Corporate Debtor provided any confirmation as called by notice dated 22.10.2020. The application under Section 7 which was filed by the Appellant was on the basis of date of default i.e. 31.03.2021 and in the application the debt claimed was debt which was consequent to default dated 31.03.2021 and thereafter. Section 10A does not bar any proceeding by Financial Creditor on the basis of default which occurs subsequent to the period covered under Section 10A. Section 7 application

being based on default on 31.03.2021 and thereafter, there is no occasion to accept the submission that application was barred by 10A.

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

6. The submission advanced by learned counsel for the Appellant hinge around the Debenture Trust Deed, notice dated 22.10.2020, notice dated 01.07.2022 and the application filed under Section 7. We before proceeding to consider the rival submission need to notice relevant part of the above. The Debenture Trust Deed dated 06.12.2018 is part of Section 7 application filed by the Financial Creditor. Clause B of the Debenture Trust Deed read as under:

*“B. With a view to meet the Company's requirements for the Purpose (as hereinafter defined), the Company, being duly empowered by its memorandum of association and articles of association and pursuant to the authority granted by the resolution passed by the Board of the Company at its meeting held on September 12, 2018 and the resolution passed by the shareholders' of the Company at the extraordinary general meeting of the shareholders of the Company held on September 24, 2018, had issued 2500 (Two Thousand Five Hundred) rated unlisted secured redeemable non-convertible debentures each having a face value of Rs. 10,00,000/- (Rupees Ten Lakhs only) in 5 (Five)*

Series, being Series A, Series B, Series C, Series D and Series E each of an amount and tenor as set out in Schedule V hereto, of the aggregate value of Rs. 250,00,00,000/- (Rupees Two Hundred and Fifty Crores only) (hereinafter referred to as the "**Debentures**"), for cash, at par on a private placement basis in dematerialised form ("**Issue**") to the persons more specifically identified in Schedule I hereto. The Company had also issued a disclosure document, dated September 27, 2018 ("**Disclosure Document**") and a private placement offer cum application letter, dated September 27, 2018, in the form and manner provided for in the Companies (Prospectus and Allotment of Securities) Rules, 2014 ("**Offer Letter**") setting out the broad terms on which the Debentures were issued;"

7. Schedule V is referred to in above Clause B is as follows:

**"SCHEDULE V**  
**PRINCIPAL REPAYMENT DATES**

Coupon Type	Fixed subject to any revision in terms of paragraph 2.2(c) of Schedule II of this Deed.				
Day Count Basis	Actual/Actual				
Issue Price	Rs.10,00,000/- per Debenture				
Face Value	Rs.10,00,000/- per Debenture				
Issue Amount	Rs.250,00,00,000 The Issue Amount is of Rs.250,00,00,000 and has been structured in 5 series (Series A – Series E)				
<b>Series</b>	<b>Series-A</b>	<b>Series-B</b>	<b>Series-C</b>	<b>Series-D</b>	<b>Series-E</b>
<b>Series Amount (Rs. In Cr)</b>	<b>6.20</b>	<b>25.00</b>	<b>50.00</b>	<b>75.00</b>	<b>93.80</b>
Tenure of Days	367	733	1,098	1,463	1,828
Coupon	12.80%	12.80%	12.80%	12.80%	12.80%

Frequency of coupon payment	Monthly		Monthly		Monthly		Monthly		Monthly	
Date of Coupon Payments	On last day of every month and on redemption		On last day of every month and on redemption		On last day of every month and on redemption		On last day of every month and on redemption		On last day of every month and on redemption	
Redemption Details	Date (dd/mm/yy)	Amt. (Rs. In cr)	Date (dd/mm/yy)	Amt. (Rs. In cr)	Date (dd/mm/yy)	Amt. (Rs. In cr)	Date (dd/mm/yy)	Amt. (Rs. In cr)	Date (dd/mm/yy)	Amt. (Rs. In cr)
	30-Apr-19	1.033	31-Oct-19	2.0625	31-Oct-20	4.1667	31-Oct-21	6.2500	31-Oct-22	7.8167
	31-May-19	1.033	30-Nov-19	2.0833	30-Nov-20	4.1667	30-Nov-21	6.2500	30-Nov-22	7.8167
	30-Jun-19	1.033	31-Dec-19	2.0833	31-Dec-20	4.1667	31-Dec-21	6.2500	31-Dec-22	7.8167
	31-Jul-19	1.033	31-Jan-20	2.0833	31-Jan-21	4.1667	31-Jan-22	6.2500	31-Jan-23	7.8167
	31-Aug-19	1.033	29-Feb-20	2.0833	29-Feb-21	4.1666	29-Feb-22	6.2500	29-Feb-23	7.8167
	30-Sep-19	1.033	31-Mar-20	2.1043	31-Mar-21	4.1667	31-Mar-22	6.2500	31-Mar-23	7.8167
			30-Apr-20	2.0833	30-Apr-21	4.1667	30-Apr-22	6.2500	30-Apr-23	7.8167
			31-May-20	2.0833	31-May-21	4.1667	31-May-22	6.2500	31-May-23	7.8167
			30-Jun-20	2.0833	30-Jun-21	4.1667	30-Jun-22	6.2500	30-Jun-23	7.8167
			31-Jul-20	2.0833	31-Jul-21	4.1667	31-Jul-22	6.2500	31-Jul-23	7.8167
			31-Aug-20	2.0833	31-Aug-21	4.1667	31-Aug-22	6.2500	31-Aug-23	7.8167
			30-Sep-20	2.0834	30-Sep-21	4.1666	30-Sep-22	6.2500	30-Sep-23	7.8167

8. Now we come to the notice dated 22.10.2020 on which much reliance has been placed by counsel for the Appellant. The reference and subject of the notice dated 22.10.2020 is as follows:



*“Reference: Debenture Trust Cum Mortgage Deed dated 6 December, 2018 executed between NuFuture Digital (India) Ltd. and Axis Trustee Services Ltd. (“Deed”).*

*Sub: Breaches under the Transaction Documents (as defined in the Deed) resulting in occurrence of Event of Default under Clause 13 of the Deed.”*

9. Paras 7 to 19 of the notice dated 22.10.2020 are as follows:

*7. Per the Transaction Documents, the Company made a representation and confirmed that the Debentures have been rated 'BWR A+ (SO)' by the Rating Agency namely Brickwork Ratings India Pvt. Ltd. It was covenanted between the Company and our client that in the event the credit rating assigned by the Rating Agency is revised due to any reason, the Company shall promptly intimate, in writing, to our client and each of the Debenture Holders of such revision.*

*8. The Transaction Documents contemplate that in the event, and during the tenor of the Debentures, the credit rating assigned to the Debentures by the Rating Agency is lower than the Original Rating, the Coupon Rate applicable to the Debentures shall be revised upwards by 25 bps (Twenty Five basis points) for each level of downgrade from the Original Rating. Furthermore, it has been agreed that all interest on the Debentures along with all other monies shall, in case the same is not paid on the respective due dates, carry further interest at the rate of 2% per annum over and above the Coupon Rate for the defaulting period.*

9. *The Coupon and Default Interest accruing on the face value of the Debentures shall accrue from day to day and be calculated on the basis of the actual number of days elapsed at the applicable rate and rounded off to the nearest Rupee.*

10. *It has to the knowledge of our client that the Original Rating of the Debentures has been downgraded during the period March, 2020 through August, 2020, Whilst the Original Rating of the Company at the time of issuance of the Debentures was BWR A+ (SO), the present Original Rating by Brickwork Ratings India Pvt. Ltd. is BWRD (CE). The Company has also failed to inform our client of the downgrading of the Original Rating. As a result, a clear breach has arisen on part of the Company, s consequence of which the Coupon Rate has been revised in terms of the Transaction Documents. The Company is, therefore, liable to make payment of the accrued Coupon computed at the revised Coupon Rate.*

11. *The Debenture Holders have also informed our client that the Company has failed to adhere to the financial obligations by committing defaults in payment of the scheduled amounts on the due date, which is another breach by the Company of the Transaction Documents. Consequently, the Default Interest has also now accrued, and is required to be factored in the amounts payable by the Company as per the terms stipulated under the Transaction Documents.*

12. Further, per the Transaction Documents, in the event the rating of the Debentures, at any point in time till Final Settlement date, falls to or below BBB+, each of the Debentures Holders shall be entitled to exercise the Mandatory Prepayment Options and the Company shall be obligated to comply with the Mandatory Prepayment Notice. Considering the present rating of the Debentures at D(CE) level which is below the Mandatory Prepayment Option Threshold, and which entitles our client to trigger the Mandatory Prepayment Option, and our client reserves its rights to exercise the same, as and when required.

13. From the foregoing, it is manifest that the Company has committed several breaches under the Transaction Documents and failed to make payment of the scheduled amounts on the due dates. Our client is compelled to record that the above breaches are continuous, subsisting and un-remedied till date.

14. In view of what is stated hereinabove, the Event of Default has occurred under the Deed and our client, in accordance with the terms of the terms of Transaction Documents, reserves its right to accelerate the redemption of the Debentures.

15. Our client finds it pertinent to point out that by email dated 31<sup>st</sup> August 2020, Mr. Akhilesh Kalra, on behalf of the Issuer and Future group, had confirmed that all the amounts due and payable by the Company shall be paid off upon completion of the ongoing transaction between Future Group and Reliance Retail Ventures Ltd. The Company is,

*therefore, obligated to honor its commitment to our client in respect of the Debentures.*

*16. In light of the above, our client hereby calls upon you to confirm full repayment of all dues pertaining to the above Debentures from the proceeds of any transaction between Future Group and Reliance Retail Ventures Ltd, and/or any other prospective investor, or by January 31, 2021, whichever is earlier, time being the essence hereof.*

*17. Additionally, our client also hereby calls upon you to forthwith furnish the certificate of the independent Chartered Account certifying the adherence of the financial covenants by the Company as on 31<sup>st</sup> March, 2020.”*

10. In the above notice, after narrating certain clauses on transaction document it was stated that company has committed certain breaches in transaction document and failed to make payment. In Para 14, it was clearly stated that the Event of Default has occurred under the Deed and the Financial Creditor in accordance with the terms of the Transaction Documents, reserves its right to accelerate the redemption of the Debentures. The above clause makes it clear that exercise to accelerate redemption of debentures was not done by the notice itself rather right was reserved.

11. Para 15 and 16 of the notice are relevant. What was called upon from the Appellant in the notice is clearly mentioned in Para 16. Para 16 was in reference to Clause 15, where email dated 31.08.2020 was sent by one Mr. Akhilesh Kalra, on behalf of the Issuer that all the amounts due and payable

by the Company shall be paid off upon completion of the ongoing transaction between Future Group and Reliance Retail Ventures Ltd. Para 16 clearly stated that the Corporate Debtor is called upon **“to confirm full repayment of all dues pertaining to the above Debentures from the proceeds of any transaction between Future Group and Reliance Retail Ventures Ltd, and/or any other prospective investor, or by January 31, 2021”**.

12. The notice dated 22.10.2020, thus, neither accelerated the redemption of debentures nor notice was mandatory prepayment notice. Notice only required confirmation of full payment. It is admitted fact that neither the transaction as mentioned in Para 15 took place nor any confirmation was sent by the Appellant.

13. The notice dated 01.07.2022 was issued by the Respondent – Financial Creditor, in which reference and subject is as follows:

*“Re: 1) 2500 Secured Unlisted Rated Redeemable Non-Convertible Debentures in 5 Series Aggregating to Rs. 250,00,00,000 (Rupees Two Hundred Fifty Crores only) (hereinafter referred to as "NCDs").*

*2) Debenture Trust Cum Mortgage Deed dated 6 December 2018 executed between NuFuture Digital (India) Ltd. and Axis Trustee Services Ltd.;*

*3) Event of Default Notice dated 22nd October 2020 bearing Ref. No. VBT/ST/AT/1845 (hereinafter referred to as the "EOD Notice");*

*Sub: Continuing breaches culminating into occurrence of subsequent Event of Default under the Debenture Trust Cum Mortgage Deed dated 6<sup>th</sup> December 2018.”*

14. The notice mentions that Appellant has failed to adhere to the financial obligations by committing defaults in payment of the scheduled amounts. Reference of notice dated 22.10.2020 was also mentioned. It was stated that the Debenture Holders are still awaiting payment of their rightful and legally enforceable dues. By the notice, the Appellant was called upon to make repayment of the amount due and default as on 20.05.2022, failing which the Financial Creditor shall be compelled to take appropriate legal action under I&B Code. After notice dated 01.07.2022, the application under Section 7 has been filed by the Financial Creditor. Part IV of the Section 7 application is as follows:

***Part-IV***

<b><i>PARTICULARS OF FINANCIAL DEBT</i></b>		
<i>1</i>	<i>TOTAL AMOUNT OF DEBT GRANTED</i>	<i>Rs. 250,00,00,000/- (Rupees Two Hundred Fifty Crores Only)</i>  <i>[With respect to 2500 (Two Thousand Five Hundred) rated, unlisted, secured, redeemable Non-Convertible Debentures each having a face value of Rs. 10,00,000/- (Rupees Ten lakh only) in 5 series viz. Series A, Series B, Series C, Series D, Series E aggregating to Rs. 250,00,00,000/- (Rupees Two Hundred Fifty Crores Only)]</i>

	DATE(S) OF DISBURSEMENT	<b>Purpose:</b> For general corporate purposes including without limitation the acquisition of movable assets and repayment of existing borrowings. <b>Date of Disbursement/ Subscription of NCDs:</b> 28 September 2018
2	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	<b>A. <u>Default Amount:</u></b> Total amount payable as on 27 <sup>th</sup> September 2022 is Rs. 275,43,28,128/- (Rupees Two Hundred Seventy-Five Crores Forty-Three Lakhs Twenty-Eight Thousand One Hundred Twenty-Eight)
3	(ATTACH THE WORKING FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<b>B. <u>Date of Default:</u></b> 31 <sup>st</sup> March 2021 [when Debentures were to be redeemed as per the Debenture Trust Cum Mortgage Deed dated 6 <sup>th</sup> December 2018]. The Computation of Claim Amount has been annexed herewith at <b><u>ANNEXURE 5.</u></b>

15. Now we come to the I.A. No. 34/2022, which was file by the Appellant seeking the rejection of Company Petition as barred by Section 10A. In the application it was pleaded that as per the Financial Creditor default have occurred in October, 2020, hence, claim of the Financial Creditor is clearly hit by Section 10A. Reliance on the notice dated 22.10.2020 was made in application. In Para 4, 5 and 7 of the application following has been pleaded:

*“4. It is stated that it is the case of the Financial Creditor itself that the Financial Creditor has issued Notice dated 22 October 22, 2020, seeking full repayment of all dues pursuant to ‘event of default’. Such alleged event of default has been stated to have occurred due to the Original Rating of the Debentures being downgraded during the period from March 2020 through August 2020. In view of the same, the Financial Creditor vide its notice dated 22 October, 2020 has sought for Mandatory Prepayment as provided for in the Transaction documents, seeking ‘full repayment of all dues’ pertaining to all the debentures. Thus, such alleged default falls under the purview of Section 10A of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) and accordingly the Financial Creditor could not have initiated proceedings under the Code.*

*Hereto annexed and marked as Exhibit B is a copy of the notice dated 22<sup>nd</sup> October, 2020 issued by the Respondent.*

*5. It is stated that the Financial Creditor, being well aware of and despite admitting in the present Company Petition, that the default period is within the purview of Section 10A of the Code as mentioned hereinabove, has made a contradictory reference to the date of default as 31 March, 2021 in Part IV of the same Company Petition. It is stated that the Financial Creditor upon seeking full repayment for the event of default as stated by them in the notice dated 22 October, 2020 and in effect invoking the mandatory prepayment clause, cannot now take a stand that the payments became due and payable in March, 2021.*



*This clearly is a mischief played on the part of the Financial Creditor to circumvent Section 10A of the Code.*

*7. In the above circumstances, wherein it is the case of the Financial Creditor itself that the defaults have occurred around October 2020, it is submitted that the claim of the Financial Creditor is clearly hit by section 10A of the Insolvency and Bankruptcy Code, 2016. A reference can be made to the notice dated 22nd October, 2020 which states that Event of Default has occurred as on that date and thus the Default Period falls under the period contemplated by section 10A of the Code, which starts from 25th March 2020. The relevant extract of Section 10A is reproduced hereinbelow-*

*“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 25 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 25 March, 2020.”*

16. The Financial Creditor has replied the I.A. No. 34/2022. Paras 5 to 8 of the Reply are relevant which are to the following effect:

“5. Part IV of the Petition states that the total amount payable as on September 27, 2022 is Rs.275,43,28,128/-, which includes a principal sum of Rs.210,46,66,250 and interest on such principal of Rs.49,31,58,621/-. Whilst the total claim would be higher, the present Petition is filed only with respect to the default committed after the 10A period was over i.e. for the default on 31<sup>st</sup> March 2021 and the consequence following such default. The present Petition does not pertain to any amounts falling within the period covered under section 10A of the Code.

6. By a letter dated April 13, 2020 the Corporate Debtor requested the Financial Creditor to approve a moratorium for a period of 5-months for the principal repayment and interest obligations towards the NCDs. The Financial Creditor vide letter dated April 27, 2020 agreed to grant a moratorium between 1<sup>st</sup> April 2020 to 30<sup>th</sup> June 2020. Copy of the Letters dated April 13, 2020 and April 27, 2020 are annexed as **Annexure B & C respectively.**

7. Accordingly, each repayment date from April 2020, under Schedule 5 of the DTD, stood shifted by 3 months. The calculation of the Principal Amount of Rs.210,46,66,250 as per the revised schedule provided in the Letter dated 27<sup>th</sup> April 2020 (**the Schedule**) is set out below for convenience.

<b>Sr.</b>	<b>Date</b>	<b>Amount (in Rs.)</b>	<b>Status of payment</b>
1.	31 March 2021	4,16,66,875	Not paid

2.	30 April 2021	4,16,66,875	Not paid
3.	31 May 2021	4,16,65,625	Not paid
4.	30 June 2021	4,16,66,875	Not paid
5.	31 July 2021	4,16,66,875	Not paid
6.	31 August 2021	4,16,66,875	Not paid
7.	30 September 2021	4,16,66,875	Not paid
8.	31 October 2021	4,16,66,875	Not paid
9.	30 November 2021	4,16,66,875	Not paid
10.	31 December 2021	4,16,65,625	Not paid
11.	31 January 2022	6,25,00,000	Not paid
12.	28 February 2022	6,25,00,000	Not paid
13.	31 March 2022	6,25,00,000	Not paid
14.	30 April 2022	6,25,00,000	Not paid
15.	31 May 2022	6,25,00,000	Not paid
16.	30 June 2022	6,25,00,000	Not paid
17.	31 July 2022	6,25,00,000	Not paid
18.	31 August 2022	6,25,00,000	Not paid
19.	30 September 2022	6,25,00,000	Not paid
20.	31 October 2022	6,25,00,000	Not paid
21.	30 November 2022	6,25,00,000	Not paid
22.	31 December 2022	6,25,00,000	Not paid
23.	31 January 2023	7,81,66,667	Not paid
24.	28 February 2023	7,81,66,667	Not paid
25.	31 March 2023	7,81,66,667	Not paid
26.	30 April 2023	7,81,66,667	Not paid
27.	31 May 2023	7,81,66,667	Not paid
28.	30 June 2023	7,81,66,667	Not paid

29.	31 July 2023	7,81,66,667	Not paid
30.	31 August 2023	7,81,66,667	Not paid
31.	30 September 2023	7,81,66,667	Not paid
32.	31 October 2023	7,81,66,667	Not paid
33.	30 November 2023	7,81,66,667	Not paid
34.	31 December 2023	7,81,66,667	Not paid

8. *Given the default committed on March 31, 2021, the Financial Creditor by a notice dated July 01, 2022, called upon the Corporate Debtor to make repayments of amounts due under the NCDs. Copy of the notice dated July 01, 2022, is annexed as **Annexure-D.***

17. We have noticed the relevant part of the notice dated 22.10.2020 and the pleading in the I.A. No. 34/2022 and its reply by the Financial Creditor. Now we proceed to consider the rival submissions of the parties, whether application filed by the Financial Creditor under Section 7 was barred by Section 10A. Section 10A provides as follows:

*"10A. 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 25<sup>th</sup> 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 25<sup>th</sup> March, 2020."*

18. The Hon'ble Supreme Court in "**Ramesh Kymal versus Siemens Games Renewable Power Private Ltd.**" (*supra*) had noticed the objects and purpose of enactment of Section 10A. In the case before the Hon'ble Supreme Court in "**Ramesh Kymal versus Siemens Games Renewable Power Private Ltd.**", the application under Section 9 was filed by the Operational Creditor on 11.05.2020. An ordinance was passed on 05.06.2020 by which Section 10A was inserted in the I&B Code. The Corporate Debtor sought dismissal of Section 9 application by filing an application which was allowed by the Adjudicating Authority which order was also affirmed in appeal. Appellant's case in appeal before the Hon'ble Supreme Court was that since the application was filed on 11.05.2020 i.e. before insertion of Section 10A on 05.06.2020, the application is not hit by Section 10A, although the default was dated 30.04.2020. The said argument was rejected by the Hon'ble Supreme Court. In Para 19 and 24 following has been laid down:

*"19. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP of a corporate debtor "for the said default occurring during the said period". The explanation which has been inserted for the removal of doubts clarifies that Section 10A shall not apply to any*

*default which has been committed under Sections 7, 9 and 10 before 25 March 2020.*

*24. The substantive part of Section 10A adverts to an application for the initiation of the CIRP. It stipulates that for any default arising on or after 25 March 2020, no application for initiating the CIRP of a corporate debtor shall be filed for a period of six months or such further period not exceeding one year "from such date" as may be notified in this behalf. The expression "from such date" is evidently intended to refer to 25 March 2020 so that for a period of six months (extendable to one year by notification) no application for the initiation of the CIRP can be filed. The submission of the appellant is that the expression "shall be filed" is indicative of a legislative intent to make the provision prospective so as to apply only to those applications which were filed after 5 June 2020 when the provision was inserted. Such a construction cannot be accepted."*

19. Hon'ble Supreme Court further in Para 27, 28 and 29 laid down following:

*"27. Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no*

*application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25 March 2020.*

28. *The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection because the application was filed before 5 June 2020.*

29. *We have already clarified that the correct interpretation of Section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the*

*extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.”*

20. Present is a case where date of default is claimed as 31.03.2021 in Part IV of the application and the application is filed including the default amount as per the Debenture Trust Deed, Schedule V, the default from 31.03.2021 onwards. We have noticed Para 5 of Reply to the application where it was clearly stated that while the total claim would be higher, the present Petition is filed only with respect to the default committed after the 10A period was over i.e. for the default on 31st March 2021 and thereafter. What is prohibited by Section 10A is that no application shall ever be filed for the default which occurred during the period of Section 10A i.e. from 25<sup>th</sup> March, 2020 to 25<sup>th</sup> March, 2021. Section 10A has no application when an action is initiated for default which occurred subsequent to 10A period. Section 7 application as well as Reply filed to I.A. No. 34/2022 clearly indicate that Section 7 application which was filed by the Financial Creditor was confined to the default committed by the Appellant on 31.03.2021 and thereafter. In Para 7 of the Reply total calculations have been mentioned for arriving at the default amount of Rs.210,46,66,250/-. The defaulted amount included for the calculation are the defaulted amount beginning from 31.03.2021 till end of December, 2023. No defaulted amount included in the



Section 7 application is for the period covered by Section 10A, hence, there is no occasion to hold that Section 7 application is barred by Section 10A.

21. We have already noticed the contents of the Notice dated 22.10.2020 which Notice although noted that Appellant has committed default but by the said Notice rights were reserved to take proceedings and the Notice only asked for confirmation from the Appellant, as noted in Para 16 of the Notice. The Notice dated 22.10.2020 in no manner can affect the right of the Financial Creditor to file Section 7 application, which was based on default committed on 31.03.2021 and thereafter. The fact is that it was not open for the Financial Creditor to exercise its right for initiating action under I&B Code on defaults, which were committed during the period prohibited by Section 10A and in fact no such rights were exercised nor any action initiated for default which was during the 10A period. The notice dated 22.10.2022 cannot be a fetter in exercising the rights as conferred under the Debenture Trust Cum Mortgage Deed to call for repayment as per the Debenture Trust Cum Mortgage Deed.

22. The judgment of this Tribunal in ***“M/s Next Education India Pvt. Ltd. vs. M/s K12 Techno Services Pvt. Ltd., Company Appeal (AT) (Ins.) No. 98 of 2019”***, was a case where Section 9 application was rejected on the ground of pre-existing dispute and being time barred. The question which came for consideration before this Tribunal in the above case has been noticed in Para 13 of the judgment, which is as follows:

“13. Whether the ‘Operational Creditor’ can change the ‘date of default’ by confining the invoices to a later period, when the Demand Notice under Section 8 includes all the invoices from the date of default and the ‘debt amount’ is crystallized based on the invoices?”

23. In the above case, the question which was up for consideration was question of limitation as to regarding payments within three years from the date when the right to apply accrues. In the present case, there is no issue pertaining to limitation in Section 7 application raised, hence, judgment of this Tribunal in **“M/s Next Education India Pvt. Ltd. vs. M/s K12 Techno Services Pvt. Ltd.”** has no relevance while we are considering the claim of the Appellant on the basis of Section 10A.

24. In view of the foregoing discussion, we are fully satisfied that the Adjudicating Authority did not commit any error in rejecting I.A No. 34/2022 filed by the Appellant. We hold that the application under Section 7 filed by the Financial Creditor was not hit by Section 10A. There is no error in the impugned order passed by the Adjudicating Authority. There is no merit in the Appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]**  
**Chairperson**

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

**NEW DELHI**

**9<sup>th</sup> May, 2023**

*Archana*