NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 387 of 2023

IN THE MATTER OF:

Yatra Online Limited **...Appellant**

Versus

Ezeego One Travel and Tours Limited
Through Resolution Professional. **...Respondent**

Present:

For Appellant: **Mr. Gopal Jain, Sr. Advocate Mr. Krishnendu Datta, Sr. Advocate Mr. Dheeraj Nair, Ms. Anjali.A, Mr. V.Sahni, Ms. Ridhima Sharma, Advocates**

For Respondent: **Mr. Ritin Rai, Sr. Advocate Ms. Malak Bhatt, Ms. Tanishka Khatana, Ms. Neha Nagpal, Advocates**

O R D E R

Per : Justice Rakesh Kumar Jain (Oral)

31.03.2023- This appeal is directed against the order dated 17.03.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench), by which the Adjudicating Authority has dismissed an application bearing I.A. No. 1046 of 2022 in CP(IB) No. 180 of 2022filed under Section 60(5) of the 'Insolvency and Bankruptcy Code, 2016'(in short 'Code'), for dismissal of the Company Petition filed under Section 9 of the Code by the Operational Creditor on the ground that the application is not maintainable in view of Section 10A of the Code.

2. Shorn of unnecessary details, the present litigation started by issuance of a Demand Notice under Section 8 of the Code on 30.11.2021 on the prescribed Form-3 by 'Gaurav Ashok Adukia, Resolution Professional for Ezeego One Travel & Tours Limited' to 'Yatra Online (P) Limited' (Appellant herein), in which the particulars of the operational debt have been mentioned in column-2 as follows:

> "*2. AMOUT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAUTL OCCURRED (ATTAHCED THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM –*
>
> *INR 2,15,98,83/-*
>
> *Date – October 30, 2020"*

3. Thereafter, the application under Section 9 of the Code was filed in prescribed Form-4 in which the averments in regard to the date of default has been made in para –IV (particulars of the Operational debt) to the effect that "*Amount claimed to be in default andDate ondefault occurred in tabular form:*

Amount claimed to be in default:INR 3,15,47,313/- Date on which default occurred : 30 October, 2020 Computation: (In Rs.)	
Principal Outstanding	*2,15,98,832/-*
Interest @18% p.a.	*99,48,481/-*
Total amount payable as on 21.01.2022	*3,15,47,313/-*

4. While the petition bearing CP(IB) No. 180 of 2022filed under section 9 of the Code, was pending before the Adjudicating Authority, the Appellant filed an application bearing IA No. 1046 of 2022 on 22.04.2022 under Section 10A of the Code for dismissal of the application on the ground that the date of default has been mentioned as 30.10.2020 whereas it has been provided under Section 10A that no petition is maintainable if it is filed between two cutoff dates i.e. between 25.03.2020 to 24.03.2021. In the said application, the Respondent filed the reply and categorically averred in para 9(i) to the effect that *"Pertinently, in the absence of additional information being made available by the Corporate Debtor, the Resolution Professional was hard pressed for the date of default, which was inadvertently mentioned as 30.10.2020, being the date of issuance of a demand notice by the erstwhile management of the Operational Creditor. However, as can be witnessed from the ledger statements shared by the Corporate Debtor itself, the defaults had started accruing from 01.04.2019 onwards, while the amount of Rs. 2,15,98,832/- was calculated and crystallized as on 30.10.2020."*

5. The case of the Appellant before the Adjudicating Authority is that the date of default is 30.10.2020 which has not only been mentioned in the demand notice but also in the application filed under section 9 of the Code which cannot be changed but the Adjudicating Authority relied upon the date given in the reply filed by the Respondent, that the default has allegedly occurred in the month of July, 2019 when the 'Bank Confirmation Agreement' was terminated.

6. Counsel for the Appellant has argued that there is a serious error in the approach of the Adjudicating Authority in dismissing the application as it has taken the date of default as July, 2019 instead of 30th October, 2020 which has been categorically mentioned not only in the demand notice but also in the application filed before the Adjudicating Authority. In support of his contention he has relied upon a judgment of Hon'ble Supreme Court in the case of 'Ramesh Kymal Vs. Siemens Games a Renewable Power Private Limited (2021) 3 SCC 224'. Para 11 read as under:-

> *"Under Section 9(1), the operational creditor may file an application before the Adjudicating Authority for initiating the Corporate Insolvency Resolution Process ("CIRP"), after the expiry of a period of ten days from the date of delivery of the notice (or invoice demanding payment) under sub-Section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or a notice of the dispute under sub-Section (2) of Section 8. The appellant having specified 30 April 2020 as the date of default, this appeal must proceed on that basis. It is necessary to make this clear at the outset because an attempt has been made during the course of the submissions by Mr Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the appellant, to submit that though the demand notice mentions the date of default as 30 April 2020, the "actual first date of default" was 21 January 2020 when the letter of resignation was tendered and that the "second date of default' was 23 March 2020 when the sixty days' notice period from the letter of resignation submitted by the appellant concluded. This attempt to set back the date of default to either 21 January 2020 or 23 March 2020 is plainly untenable for the reason that it is contrary to the disclosure made by the appellant in the demand notice which has been issued in pursuance of the provisions of Section 8(1) and Section 9 of the IBC. The demand notice triggers further actions which are adopted towards the initiation of the insolvency resolution process."*

7. After referring to the aforesaid paragraph, it is contended that in the said case also, an application under Section 9 of the Code was filed and the date of default was sought to be changed from the date which was given in the Application as date of default but it has been held by the Hon'ble Supreme Court that "*This attempt to set back the date of default to either 21 January 2020 or 23 March 2020 is plainly untenable".* He has further submitted that it would be a travesty of justice if July, 2019 is taken as the date of default in the presence of date of default i.e. 30.10.2020 appearing not only in the demand notice but also in the application filed under Section 9 of the Code. He has, thus, submitted that had it been a case of the Respondent that the date of default has been inadvertently given as 30.10.2020 then it was open for the Respondent to file an appropriate application for amendment in the application filed in Form -4 which is permitted in view of the decision in the case of '*Dena Bank (Now Bank of baroda) V. C.Shivakumar Reddy & Anr. (2021 10 SCC 330'* and then it could have filed additional documents to prove it. It is also argued that no evidence beyond pleadings can be looked into and the Respondent cannot take different stands before the Adjudicating Authority in the applications filed as an Operational Creditor under Section 9 of the Code and the application filed under Section 10-A of the Code because if the date of default is taken as 30.10.2020 then it will come within the two cutoff dates i.e 25.03.2020 to 24.03.2021 and the application filed by the Respondent under Section 9 of the Code would not have

been found maintainable by the Adjudicating Authority. Therefore, the Respondent has changed its stand for its convenience.

8. On the other hand, counsel for the Respondent has vehemently argued that the law permits the Respondent to file additional documents during the pendency of the proceedings and in this regard he has relied upon a decision of the Hon'ble Supreme Court in Dena Bank (supra) and has referred to para 142 which read as under:

> *"142. 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 application under Section 7 of the 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."*

9. He has also relied upon a decision of Hon'ble Supreme Court in the case of Rajendra Narottamdas Sheth and Anr. Vs. Chandra Prakash Jain and Anr. (2022) 5 SCC 600and has referred to para 24 which read as under:

> *"24.There can be no doubt that it is the responsibility of the financial creditor to give all particulars relating to the debt due and the date of default, along with the requisite documents, at the time of filing of an application under Section 7 of the Code. A plain reading of Section 7, Rule 4 of the 2016 Rules and Form 1 makes it clear that the Adjudicating Authority may admit an application under Section 7 only if he is satisfied that a default has occurred. The definition of 'default' under Section 3 (12) of the Code refers to non-payment of debts which are "due and payable" in law, meaning thereby that an application under Section 7 of the Code is maintainable only with respect to debts that are not time-barred. (See: B.K. Educational Services Private Limited v. Parag Gupta and Associates 6) The primary obligation of making out a prima facie case of default is on the financial creditor. There is no necessity for the corporate debtor to provide any information at the stage of admission of the application under Section 7 of the Code, as the burden of showing non-payment of a legally recoverable debt, which is not time-barred, is on the financial creditor. At the same time, it is clear from the judgments of this Court in Asset Reconstruction (supra) and Dena Bank (supra) that non-furnishing of information by the financial creditor at the time of filing an application under Section 7 of the Code need not necessarily entail in dismissal of the application. An opportunity can be provided to the financial creditor to provide additional information required for satisfaction of the Adjudicating Authority with respect to the occurrence of the default."*

10. He has further relied upon a decision of Hon'ble Supreme Court in the case of Kotak Mahindra bank Limited Vs. Kew Precision Parts Pvt. Ltd. and Ors. (2022) 9 SCC 364and has referred to para 61 which read as under:

> *"61.The judgment in Babulal Vardharji Gurjar (supra) was rendered in the facts and circumstances of that case where there were no pleadings at all. As held by this Court in Dena Bank (supra), an application under Section 7 of the IBC in statutory form which requires filling in of particulars cannot be judged by the same standards as a plaint or other pleadings in a court of law. Additional affidavits filed subsequent to the filing of the application, by way of additional affidavits or applications would have to be construed as pleadings, as also the documents enclosed with or relied upon in the application made in the statutory format. Furthermore, pleadings can be amended at any time during the pendency of the proceedings."*

11. Counsel for the Respondent has also argued that the date of default has been changed from 30.10.2020 to 19.07.2019 on the basis of evidence before it i.e. Ledger. Therefore, there is no error either on the part of the Respondent to plead a new date of default or on the part of the Adjudicating Authority for taking the said date into consideration for the purpose of dismissing the application filed under Section 10A of the Code by the Appellant.

12. We have heard Counsel for the parties and perused the record with their able assistance.

13. Before we proceed further, it would be relevant to refer to Section 10A of the Code which read as under:

> *"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 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.]"*

14. The aforesaid provision provides that no application either in Sections 7, 9 and 10 would be maintainable for the purpose of initiation of CIRP of a Corporate Debtor if any default has arisen on or after 25th March, 2020 for a period of six months or for a period not exceeding one year. If we take the period of one year from 25.03.2020 then it would come to end on 24.03.2021 and according to Section 10A of the Code, if any application is filed with the date of default falling within these two dates then the application cannot be filed much less entertained by the Adjudicating Authority.

15. Admittedly, the application under Section 9 has to be filed after a notice under Section 8 of the Code is delivered. Meaning thereby notice under Section 8 of the Code is a *sine qua non* to maintain an application under Section 9 of the Code. Section 8 of the Code provides that the Operational Creditor shall deliver a demand notice upon the Corporate Debtor who may within a period of 10 days of the receipt of the demand notice either raise the issue of an existing dispute or bring to notice of the Operational Creditor that the payments have been made / paid of operational debt and an application under Section 9 of the Code could be filed only after the expiry of period of 10 days from the date of

delivery of notice. The Resolution Professional who was appointed on 09.03.2021 and is familiar with the provisions of the Code mentioned the date of default as 30.10.2020 in the notice and after the notice, the application under Section 9 of the Code too contained the date of default as 30.10.2020. Thus, the positive case before the Adjudicating Authority, at the instance of the Resolution Professional, was that the date of default is 30.10.2020 and not July 2019 but while contesting the application filed under Section 10A the RP conveniently changed the date of default from 30.10.2020 to July, 2019 in order to wriggle out of the rigorus of Section 10A of the Code.

16. In the background of the aforesaid facts and circumstances of the case, the question thus would arise as to whether the date of default, mentioned in the demand notice as well as in the application filed under Section 9 of the Code, which has not been amended even if it was allegedly wrongly mentioned, can be changed in the litigation which arises from a miscellaneous application?

17. In this regard, this case is squarely covered by the decision of the Hon'ble Supreme Court rendered in the case of *Ramesh Kymal (supra)* in which it has been held that the date of default cannot be changed. But in the case of *Dena Bank (Supra)* the Hon'ble Supreme court has found that there are situation when either the Operational Creditors or the Corporate Debtor may commit a mistake in the pleadings, therefore, it provided a window to the parties for amendment of their pleadings. The said window was also available to the present Respondent if the date of default has been inadvertently mentioned as 30.10.2020 in the demand notice as well as in the application filed on Form-4

but the Respondent did not seek the amendment of the said date and has rather brought out a new date while contesting the miscellaneous application filed under Section 10A of the Code. It is also worthwhile to mention that the judgment which has been relied upon by the Respondent are on the application filed under Section 7 of the Code whereas the judgment in the case of Ramesh Kymal (Supra) is in regard to the application filed under Section 9 of the Code.

18. In view of the aforesaid discussions, we are totally satisfied that there is an error in the approach of the Adjudicating Authority in allowing the Respondent to bring a new date of default dehors the fact that another date of default is still existing in the pleadings which were filed at the inception of the litigation and has not yet been amended. Thus, the present appeal has been found meritorious and the same is hereby allowed, the impugned order is set aside and as a result thereof, the application filed under Section 9 of the Code is also dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Barun Mitra]
Member (Technical)

[Mr. Naresh Salecha]
Member (Technical)

Raushan/RR