

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

CP(IB)/CHE/55/2023

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of
the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,
2016)*

Along with

IA(IBC)/2027(CHE)/2023 in CP(IB)/CHE/55/2023

*(filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11
of NCLT Rules, 2016)*

In the matter of M/s. Jayabheri Properties Private Limited

M/s. Asia (Chennai) Engineering Company Pvt. Ltd,
3rd Floor, Rukmani Towers, 2-11-30,
Paigah Colony, S.P.Road, Begumpet,
Secunderabad – 500 003,
Represented by its Vice President,
Mr. S.Dharmaraj.

... Applicant/Operational Creditor

-Vs-

M/s. Jayabheri Properties Private Limited,
184-187, Ground Floor, 4th Block,
Temple Steps, Little Mount, Anna Salai,
Chennai – 600 015.

... Respondent/Corporate Debtor

Order pronounced on 19th February 2024

CORAM :

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

For Applicant : Mr. E.Omprakash, Senior Counsel

For Respondent : Mr. T.K.Bhaskar, Counsel

COMMON ORDER

(Heard through physical hearing)

M/s. Asia (Chennai) Engineering Company Pvt. Ltd,
Applicant/Operational Creditor herein has filed this application under
Section 9 of Insolvency & Bankruptcy Code, 2016 (IBC), for initiating
Corporate Insolvency Resolution Process (CIRP) against the
Respondent / Corporate Debtor, M/s. Jayabheri Properties Private
Limited.

2. Part – I of the application sets out the details of the Operational
Creditor. It has its registered office at Secundrabad. Part-II of the
application sets out the details of the Corporate Debtor. It was
incorporated on 25.11.1994 and its registered office is at Anna Salai,
Chennai, Tamil Nadu. In part – IV of the application, the applicant has
given the debt amount of Rs. 6,50,96,708.00 along with 18% interest per

annum and the date of default as 24.01.2022. Part-V of the application contains the particulars of documents, records and evidence of default.

3. It is alleged that the Respondent / Corporate Debtor had issued tender for the construction of high-rise residential project at Kunchanapalli, Guntur District, Andhra Pradesh comprising of Five Blocks, EWS and Clubhouse. The applicant participated in the tender and the Respondent accepted the tender offer given by the Operational Creditor / Applicant. It entered into a contract dated 30.07.2016 (Annexure – A6) and issued the work order (Annexure – A7). The Corporate Debtor subsequently placed three work orders and revised the work order (Annexure – A8). It is stated that the applicant duly completed the works and raised 39 RA Bills for tender works (Shell & Core), 2 RA bills for non-tender works (Elevation Band Chipping), 10 RA bills towards non-tender works (Podium waterproofing) and 4 RA Bills towards non-tender works for (Podium hard scape works) (Annexure – A9). Subsequently the Corporate Debtor/ Respondent issued a virtual completion certificate on 04.02.2022 for the works completed certifying that all the defects listed by the Corporate Debtor have been rectified by the Operational Creditor (Annexure – A10).

4. It is stated that upto the 27 RA bills raised by the Operational Creditor, the Corporate Debtor paid an amount of Rs.60,33,06,274.00 to the Operational Creditor for the work Shell and Core. Some additional payments were made towards TDS, electrical consumption bill, wastage and other expenses as Annexure – A11. It is alleged that thereafter, no payments were made towards the remaining amounts.

5. It is alleged that the Operational Creditor sent mails on 05.03.2020, 09.04.2020, 02.06.2020, 17.06.2020, 25.12.2020, 27.01.2020, 11.02.2021, 11.03.2021, 05.04.2021, 03.06.2021, 14.06.2021, 27.06.2021, 01.07.2021, 13.07.2021, 20.09.2021, 05.10.2021 and 24.01.2022 to the Corporate Debtor for payments of the due amount. It is stated that though the Corporate Debtor admitted the amounts as claimed vide mails dated 05.03.2020, 22.06.2020, 03.06.2021, 01.07.2021, 05.10.2021 and letter dated 27.01.2022 (Annexure – A12) but it instead offered residential flats in the project in proportionate to the outstanding amount payable by it (Annexure – A13). It is stated that as per the ledger (Annexure – A14), the total debt as on date of filing became Rs.6,50,96,708.00. It is stated that on 28.02.2022, the applicant issued a

statutory demand notice in Form 3 for payment of Rs.6,85,09,831.00 as Annexure – A15. However on verification it was found that the actual amount of debt was Rs.6,50,96,708.00 and the amount mentioned in the demand notice was a computational error. Accordingly a corrigendum notice was issued on 02.08.2022 mentioning the actual debt amount as Rs.6,50,96,708.00 (Annexure – A16). It is alleged that the Corporate Debtor in reply dated 12.03.2022 denied the claims and disputed the amounts in the demand notice vide annexure – A17.

6. It is stated that the last bill which fell due was raised on 19.06.2020 and last payment received was on 26.11.2020. It is alleged that the Corporate Debtor did not follow the agreed terms and defaulted in payments against the bills. It is stated that the debt had fallen due on 24.01.2022. A tabulation towards calculation of defaults is annexed as Annexure – A18.

7. On getting notice of the application, the Respondent filed the reply / counter alleging that the application is not maintainable. It is alleged that the documentary records imply the fact that disputes had arisen between the applicant and the respondent as the works, in

respect of which, the bills were raised, were left incomplete and in unsatisfactory condition. It is stated that the applicant was engaged as a contractor and the respondent issued the five work orders for a total value of Rs.59,91,38,412/-. The applicant raised the running account bills for the works done under the work orders from time to time. It is stated that as per Clause – 4 of the work order dated 30.07.2016 (Main work order), works were to be completed in all respects within a period of 21 months from the date of PCC, i.e., on or before 16.08.2018 but due to lack of skilled workmen, substandard quality, the project could not be completed within the stipulated schedule. It is stated that between 25.11.2016 to 19.06.2020, multiple running account bills were raised by the applicant on the respondent in respect of the work orders. Running account No. 35 and final dated 19.06.2020 was raised by the applicant under the work order dated 30.07.2016 and as per clause – 5, final bill was to be paid within 97 working days of the submission of the bill. It is alleged that on 19.06.2020, the applicant left the worksite with the works incomplete and defective as pointed out in the Respondent's mail dated 09.01.2021. It is stated that the date of purported default, if any, in respect of the amount alleged to be in default is 24.09.2020 which is 97th day from 19.06.2020 which is the date

of the last running bill / final bill raised by the applicant but in the application, the applicant arbitrarily stated the date of default as 24.01.2022. It is stated that as per Section 10A of IBC, 2016, any default which occurred in the period intervening 25.03.2020, till 24.03.2021, cannot form the cause of auction on the basis of which an application for initiation of CIRP can be filed. It is stated that the present application falls within the ambit of Section 10A of IBC and is not maintainable. It is alleged that on 15.03.2020, the Respondent had raised two debit notes for the defects / damages at the project site for Rs.59,58,417/- and Rs.11,66,125/- respectively as Annexure-R1 and therefore there existed a pre-existing dispute between the parties. It is stated that the Respondent had raised another debit note for Rs.21,12,730/- for the unfinished works dated 16.07.2020 as Annexure – R2 but the applicant vide reply dated 18.07.2020 disputed the debit notes and refused to acknowledge the same. It is alleged that on 18.07.2020, the respondent sent a mail to the applicant stating that respondent was forced to engage additional manpower to complete the unfinished works as Annexure – R3 and it again vide mail 03.01.2021 informed the applicant about the substandard works. It is stated that on 09.01.2021, it sent another mail that the applicant

abruptly left the worksite unfinished. It is alleged that in the letter dated 27.01.2022, the respondent raised the dispute with regard to the delay but to its utter surprise, it received the demand notice dated 28.02.2022 which it responded vide reply dated 12.03.2022. It is alleged that the applicant has not paid the GST in respect of the bill to the tune of Rs.1,05,41,288/-.

8. The applicant has filed the rejoinder wherein it denied the averments made in the reply/counter. It is stated that the applicant had raised the running bills for the works done by it under the work orders. After the completion of work, it raised the bill on the Project Management Consultant (PMC) who conducted physical verification of works completed and issued the payment certificate. It is stated that every payment certificate was signed by the PMC. It is stated that clearance of bill within 97 working days was confined only to the final bill and not to the other running account bills which were payable within 7 days from the date of issuance of PMC. It is stated that the final / running account bill was raised on 19.06.2020 for the work order dated 30.07.2016. Final running account bill for the work order dated 30.10.2019 was raised on 31.12.2019, final / running account bill for the

work order dated 30.11.2019 was raised on 18.05.2020 and the final / running account for the work order dated 06.01.2020 was raised on 18.05.2020, therefore the final bills under each work order were raised on different dates which were to be paid as per clause 5 of the work order dated 30.07.2016. It is stated that Section 10A does not bar any application to be filed under Section 9 of the Code for any default committed before 25.03.2020. It is stated that only 4 bills were raised during the 10A period. It is stated that the Corporate Debtor had issued the virtual completion certificate specifically stating that the Operational Creditor has attended to all major defects listed by the Corporate Debtor. Whenever the Corporate Debtor raised the debit notes, the same were accepted and were the part of the payment certificates raised by the PMC. It is stated that the Corporate Debtor never issued any independent or individual debit notes. Instead all the amounts to be debited were included in the payment certificates issued by the PMC. It is stated that the debit note dated 15.03.2020 was never served on the Operational Creditor. It is stated that the alleged debit notes dated 15.03.2020 refers to RA bill No. 35 which were only raised on 19.06.2020. It tabulated the details of all the amounts already agreed to be debited at para 12 of the rejoinder. It is stated that the debit notes

do not constitute a pre-existing dispute as portrayed by the Corporate Debtor. The Corporate Debtor never intimated to the Operational Creditor at the time of issuance of work completion certificate about any balance work or debiting of an amount of Rs.21,12,730/- and the same was intimated only vide mail dated 16.07.2020. It is stated that the scope of work under the work order dated 27.02.2023 is not related to the scope of work allotted to the Operational Creditor. It is stated that the Corporate Debtor never disputed the pending amount of Rs.6.85 crores in the mails dated 01.07.2021 and 13.07.2021 nor raised any dispute with regard to the amount due in the mail dated 11.03.2021 nor raised the issue of non payment of GST on the subject bills until the issuance of statutory demand notice under IBC and raised all these issues for the first time in reply to the demand notice.

9. Thereafter, the applicant filed IA(IBC)/2027(CHE)/2023 under Rule 11 of NCLT Rules, 2016 r/w Section 60(5) of IBC, 2016 seeking the following reliefs.

To permit the Applicant / Petitioner to amend the date of default of Form-5 application filed u/s 9 of the IBC and further permit to file an amended copy of the Form-5 application dated 19.10.2022 by making the following amendments to the main application.

S.No.	Place where amendment is sought	Content mentioned	Amendment sought (in strikeout text)	Proposed content after amendment
1	Part-IV S.No.1 of the Form-5 at page 12 of the application	The debt has fallen due on 24.01.2022	The debt has fallen due on 21.06.2019, 02.08.2019, 23.08.2019, 06.09.2019, 25.10.2019, 20.11.2019, 26.05.2020, 24.09.2020, 13.12.2019, 14.01.2020, 09.07.2019, 09.08.2019, 28.08.2019, 21.10.2019, 05.11.2019, 09.12.2019, 14.01.2010, 10.03.2020, 23.08.2020, 06.09.2019, 26.01.2020, 10.03.2020, 24.01.2022	The debt has fallen due on 21.06.2019, 02.08.2019, 23.08.2019, 06.09.2019, 25.10.2019, 20.11.2019, 26.05.2020, 24.09.2020, 13.12.2019, 14.01.2020, 09.07.2019, 09.08.2019, 28.08.2019, 21.10.2019, 05.11.2019, 09.12.2019, 14.01.2010, 10.03.2020, 23.08.2020, 06.09.2019, 26.01.2020, 10.03.2020
2	Part-IV S.No.2 of the Form-5 at page 12 of the Application	Date of default: 24.01.2022	Date of default: 21.06.2019, 02.08.2019, 23.08.2019, 06.09.2019, 25.10.2019, 20.11.2019, 26.05.2020, 24.09.2020, 13.12.2019, 14.01.2020, 09.07.2019, 09.08.2019, 28.08.2019, 21.10.2019, 05.11.2019,	Date of default: 21.06.2019, 02.08.2019, 23.08.2019, 06.09.2019, 25.10.2019, 20.11.2019, 26.05.2020, 24.09.2020, 13.12.2019, 14.01.2020, 09.07.2019, 09.08.2019, 28.08.2019, 21.10.2019, 05.11.2019,

			09.12.2019, 14.01.2010, 10.03.2020, 23.08.2020, 06.09.2019, 26.01.2020, 10.03.2020, 24.01.2022	09.12.2019, 14.01.2010, 10.03.2020, 23.08.2020, 06.09.2019, 26.01.2020, 10.03.2020
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10. It is stated that during the pendency of the application, it was noticed that the date on which the debt fell due / date of default was inadvertently mentioned as 24.01.2022 which is the date of e-mail correspondence between the applicant and the respondent whereby the respondent had acknowledged the debt. It is stated that Form 3 contains a tabulation of bills under various work orders which were defaulted by the respondent. It is stated that as per clause 5 of the work order, 60% of the running account bill was to be paid within 7 working days and the balance within 7 working days from the receipt of the payment certificate and final bill within 97 working days of the completion. It is stated that the correct date of defaults as per each bill and the date from which the debt fell due are stated in para 6 of the application and the date of defaults are stated in para 7 of the application. It is stated that the said error is neither intentional nor deliberate but due to inadvertence. It is stated that the applicant seeks

leave of this Tribunal to make the amendments in Form 5 in the main company petition as detailed in para 9.

11. In reply to the IA-2027 of 2023, it is stated that the application has been filed at a belated stage after the entire pleadings in the application under Section 9 of IBC, 2016 are completed as early in July 2023. It is stated that before filing of this application, the main application was adjourned on multiple times, however, the issue raised in the application for amendment was never brought during the course of hearings. It was only when the respondent raised an objection that the application is barred under Section 10A of IBC, 2016, the applicant filed the application. It is stated that in the rejoinder also which was filed on 11.07.2023, the applicant did not take a plea that the date of default mentioned in Form 5 was a mistake on the part of the applicant. It is stated that for any proceeding under the IBC, debt and date of default are mandatory and sacrosanct. It is stated that in Form 3 demand notice, the default was mentioned as 07.06.2019 but later in Form 5, the date of default is mentioned on 24.01.2022. It is stated that the applicant itself is not sure as to when the debt became due and payable. It is stated that the last running account bill was raised by the

applicant on 19.06.2020 and the date of purported default is 24.09.2020, which date falls within the 10A period. It is stated that in the rejoinder, the limited response of the applicant to the said ground was that only 4 of the bills raised on 12.05.2020, 19.06.2020, 18.05.2020 and 18.05.2020 would be hit by Section 10A. It is stated that the courts have time and again held that the pleadings cannot be amended at a belated stage.

12. We have heard Ld. Counsels for the parties.

13. Ld. Counsel for the applicant reiterated what has been stated in the application and the rejoinder. Ld. Counsel submitted that in the application, the date of default as mentioned in Form3 is 07.06.2019. The computation sheet mentions various bills dates which are sought to be added in the amendment. Therefore, the information which is sought to be brought, is neither new nor something which the respondent is unaware of. It is purely procedural and does not change the substance of the dispute. It is stated that there are only 4 bills which come under Section 10A period and the amount involved in respect of the said bills is Rs.94,08,588/-, however total outstanding is Rs.6,50,96,708/-. The amount excluding the bills relating to 10A period

comes to Rs.5,56,88,120/- which exceeds the threshold limit of Rs.1.00 crore as provided under Section 4 of the IBC. Ld. Counsel submitted that the respondent has admitted the outstanding in the various e-mails starting from 05.03.2020 to 05.10.2021 and the letter dated 27.01.2022. Ld. Counsel submitted that fresh timeline of limitation commences from the date of acknowledgement or part-payment. Ld. Counsel submitted that amount payable under each running bill becomes due as per the payment terms agreed between the parties.

14. Ld. Counsel for the Respondent per contra argued on the lines of the reply to the main application and the application for amendment. Ld. Counsel submitted that the amendments as sought for are highly belated with a view to set up an altogether new case. Ld. Counsel submitted that the application is barred under Section 10A of IBC as the purported date of default falls within the period stipulated in the said provision. It was held in the case of *Visvas Promoters Private Limited v The Mahalakshmi Textile Mills Limited* (2023 SCC Online NCLAT 2249; *Winntus Scaffolding Private Limited v Aishwarya Business Corporation Private Limited* (2023 SCC Online NCLT 139); *Oncquest Laboratories Pvt Ltd v M/s. Sanya GIC Imaging Pvt Ltd* (Judgment of NCLT,

Delhi Bench-V, dated 24.08.2023 in IB-808-ND-2022), that no petition under the IBC can be filed in respect of a debt which was defaulted during the period prescribed under Section 10A of IBC. Ld. Counsel submitted that the application for amendment has been filed to defeat a valid defence taken by the respondent. Ld. Counsel submitted that by seeking to split the cause of action by introducing the multiple dates of default, the applicant is attempting to revive a claim which is barred under Section 10A of IBC. The Hon'ble Supreme Court in the case of *Ramesh Kymal v Siemens Gamesa Renewable Power Private Limited (2021) 3 SCC 224*, in the specific context of a petition under Section 9 of IBC, has disallowed an attempt to alter the date of default originally stated in a petition in order to avoid the bar under Section 10A of IBC which decision has been followed by the Hon'ble NCLAT in the case of *Yatra Online Limited v Ezeego One Travel and Tours Limited (2023 SCC Online NCLAT 1356)*. Ld. Counsel submitted that the case of *Raj Television Network Limited v Thaicom Public Company Limited (Judgement of NCLAT, Chennai Bench, dated 11.10.2023 in CA(AT)(CH)(Ins) No. 325 of 2023)* relied upon by the applicant is to be understood in the factual context. In that case, the date of default was sought to be amended on the basis that it was a typographical error but in the present case the date of

24.01.2022 was mentioned not due to typographical error but it was a date on which the respondent purportedly admitted its liability to the applicant. Ld. Counsel submitted that the applicant cannot be permitted to split the dates on which cause of action arose. Reference is made of the case of *Ashok Parshad v Mahalaxmi Sugar Mills Co Ltd (2013 SCC Online Del 3629)*, to contend that the cause of action for all the items delivered is single down to the date of last delivery. Ld. Counsel submitted that the default if any in the present case arose only after the issuance of RA Bill No.35 / final bill on 19.06.2020. Ld. Counsel submitted that the applicant cannot be permitted to consolidate multiple instances of default in a single petition.

15. We have considered the arguments and perused the records and the case laws *supra*.

16. It is not in dispute that the Corporate Debtor had issued work order to the Operational Creditor by entering into a contract on 30.07.2016 for carrying out the works – Shell & Core etc of 5 Blocks, EWS and Club House. Subsequently, it placed three work orders for non tender items on 16.04.2019, 30.04.2019, 30.01.2019 respectively. It

also issued a revised work order on 06.01.2020 for podium hardscape works for the same project. It is also not a dispute that the Operational Creditor raised the bills in respect of the above work orders from time to time. Against the first work order i.e., Shell and Core, the Respondent made the payments up to the 28 RA bills till 07.06.2019 and thereafter did not make the payment. The final bill was raised on 19.06.2020 which was not paid within 97 working days of submission of the bill in terms of clause 5 of the work order / contract. In respect of the work order relating to non tender works i.e., Elevation Bank Chipping, part payment was made. Last bill was raised on 31.12.2019 and total outstanding against the same was Rs.7,82,859.00. This bill was raised prior to the 10A period. In respect of the work order relating to podium waterproofing, 10 bills were raised. Last bill was raised on 18.05.2020 and the total outstanding was Rs.23,85,275/-. In respect of the work order relating to podium Hardscape works, total 4 bills were raised and no payments were made against the bills. Last bill was raised on 18.05.2020 and total outstanding was Rs.1,23,73,375.00.

17. Records show that out of the final bills raised in respect of the above works, except the bill relating to Elevation Bank Chipping for Rs.7,82,859.00, all the bills were raised during the 10A period i.e., the period intervening 25.03.2020 to 24.03.2021.

18. It is to note that in the demand notice, the date of default was stated as 07.06.2019 while in the petition, the date of default is stated as 24.01.2022 when the Corporate Debtor acknowledged the debt. The applicant did not state any reason on what basis the date of default was taken as 24.01.2022 in the petition. There was an acknowledgement of debt on 24.01.2022 by the Corporate Debtor but the said date, in no terms, can be said to be the date of default. The said date can be considered as acknowledgement of debt for the purpose of limitation and not as the date of default. Though the applicant has sought amendment in the dates of default, citing that it was a typographical error but facts and circumstances show that it was not a typographical error but the dates were on the basis of the bills raised by the Operational Creditor from time to time in respect of the works against the different work orders. It is not in dispute that the applicant raised the RA bills from time to time in respect of the works carried out

by it against which on account payments were made till such time, the works were completed. In such a scenario, the cause of action in respect of a default in payment of such RA bills would arise on a single occasion i.e., the last date of delivery of services by the applicant which in the present case was 19.06.2020 on which date, the applicant raised the RA and final bill No.35. We are in agreement with the contention of the Ld. Counsel for the Respondent that the date of default in this case has to be construed with reference to that date alone and not in respect of each date on which invoices / RA Bills were raised by the applicant. In the case of *Ashok Parshad supra* it was held that the cause of action for all the items delivered is single down to the date of last delivery and where the parties were transacting under a RA, the deliveries got united with one another and formed one continuous demand and thus it all formed one cause of action and could not be divided. In the case of *Bharath Skins Corporation supra*, it was held that in a case of running and non mutual account between the buyer and the seller, when the buyer defaults to make balance payment, the seller's action is not for the price of goods sold and delivered but for the balance due at the foot of an account as the entries are made in the debit column and credit column and the difference always remains till the accounts are

settled. In the present case also, the parties were maintaining the running and non mutual accounts so splitting the cause of action is impermissible.

19. In the instant case, except one work order, the last bills raised by the applicant in respect of different work orders come within the 10A period. The amount involved in the single work order, which is not covered under the 10A period is well below the threshold limit of Rs.1.00 crore for initiating CIRP against the Corporate Debtor as provided under Section 4 of the IBC, 2016. Section 10A clearly provides that no petition can be maintained if the date of default falls within the period from 25.03.2020 till 24.03.2021. In the case of *Viswas Promoters Pvt. Ltd supra* also it was held that if the default had occurred during the above period, no application under Sections 7, 9 and 10 of IBC, 2016 can be filed.

20. In the case of *Winntus Scaffolding Pvt. Ltd supra*, the above proposition was reiterated. It was held that no petition under Sections 7, 9 and 10 of IBC, 2016 can be filed for the defaults between 25.03.2020 to 24.03.2021 in view of the specific bar provided in first proviso to

Section 10A of IBC, 2016 read with Notification S.O.4638(E) dated 22.12.2020.

21. In the present case, after the reply / counter filed by the Respondent, the applicant filed an application for amendment seeking to incorporate different date of defaults in respect of different bills raised by the Operational Creditor stating that the date of default was inadvertently mentioned as 24.01.2022 which is the date of correspondence between the applicant and the respondent when the respondent acknowledged the debt. It was stated that Form 3 contains a tabulation of bills under the various work orders which were defaulted by the respondent. The payment against the bills were to be made within 7 working days or 97 working days as the case may be and the correct dates of defaults are to be taken as per each bill i.e., the date from which the debt fell due. This contention has already been answered in the above paras as the date of default in case of running payments where the running bills / final bills were raised will be the date on which the last RA bill / final bill was raised or the time provided for the payment against the RA bill / final bill. The date of

default cannot be said to be individual bill wise in case of such like works.

22. We may mention that this application for amendment has been filed after the entire pleadings in the petition are completed. The rejoinder was filed on 11.07.2023 and at that time the applicant / petitioner did not take a plea that the date of default mentioned in Form 5 was a mistake on the part of the applicant. In this case, in Form 3 demand notice the date of default was stated as 07.06.2019 but in Form 5 the date of default is stated as 24.01.2022. It is well settled law that amendment can be allowed to avoid multiplicity of proceedings provided the amendment does not result injustice to the other side or where the amendment is sought to introduce an additional or a new fact or the amendment changes the nature of the suit or the cause of action. In the case of *Ramesh Kymal supra* it was held that an attempt to set back the date of default to either 21.01.2020 or 23.03.2020 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. It was however made clear 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.

23. In the case of *Yatra Online Limited v Ezeego One Travel and Tours Limited* supra it was held that

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.

24. It is true that the Respondent vide letter dated 27.01.2022 had acknowledged the debt and promised to settle the dues shortly but it had also stated that the Operational Creditor was obligated to complete the project in all respects on or before 16.08.2018 however it caused abnormal delay for completion for the reasons best known to it despite their timely payments. If the project is completed within the agreed period, they would have made out their market and sell the flats to their customers who were willing to acquire the property at that time but on account of delay, the customers chose their alternative option as a result they suffered from cash flow. It is seen from the record that the Corporate Debtor time and again made correspondences made with the Operational Creditor as to the rectification of defects. It had raised the disputes that the Operational Creditor left works incomplete and in unsatisfactory condition. It engaged another contractor to complete the works for which it raised the debit notes. The Operational Creditor never disputed the raising of some debit notes by the Corporate Debtor, it submitted that the debit notes were the part of payments approved by the PMC. Considering

above facts, the possibility of their being pre-existing disputes between the parties, cannot be ruled out.

25. In **Mobilox Innovation V Kirusa Software Pvt Ltd**, *supra* the Hon'ble Supreme Court held as under:

40. It is clear, therefore, that once the Operational Creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the Operational Creditor the 'existence' of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore all that the adjudicating authority is to see at this stage is whether there is plausible contention which requires further investigation and that 'the dispute' is not a potently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from chaff and to reject the spurious defence which is mere buster. However, in doing so, the Court does not need to be satisfied that defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.'

26. In **Invent Asset Securitisation And Reconstruction Pvt Ltd** *Supra*, Hon'ble Supreme Court held as under:

' Time and again, it has been expressed and explained by this court that the provisions of the Code are essentially intended to bring the Corporate Debtor to its feet and are not of money recovery proceedings as such. The intent of the appellant had only been to invoke the provisions of the Code so as to enforce recovery against the Corporate Debtor. We find no fault in the Tribunal and the Appellate Tribunal have declined the prayer of the appellant.'

27. In **Amrop India Pvt Ltd V The Hitech Gears Ltd NCLAT (2023)**

ibclaw.in 663, it was held as under:

'For a pre-existing dispute, to be a ground to nullify the application filed under Section 9 of IBC, dispute must be truly existing at the time of filing a reply to the demand notice as contemplated under Section 8(2) of IBC or at the time of filing the Section 9 application.'

28. On a consideration of facts and circumstances in totality and the law laid down in the cases supra, we are of the view that the Application / petition filed under Section 9 of IBC, 2016 is not maintainable. The proper course available for the Applicant / Petitioner is to file a suit for recovery before the appropriate forum. In the light of the above discussion, we **dismiss** the application for amendment as well as the petition filed under Section 9 of IBC, 2016 with no orders as to costs.

29. IA(IBC)/2027(CHE)/2023 and CP(IB)/55(CHE)/2023 are **disposed** of accordingly.

30. The file of main petition as well as the application be consigned to records room.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)