NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 1409 of 2024
&
I.A. No. 5117 of 2024

(Arising out of the Order dated May 22, 2024 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Mumbai Bench in CP(IB)/483/MB/2023)

IN THE MATTER OF:

Samrat Restaurant
10A, Raj Kutir
3rd Road, Khar (West)
Mumbai – 400054 **...Appellant**

Versus

Brewcrafts Microbrewing Private Limited
First Brewhouse, The Corinthians Club
Mohammadwadi Pune
Maharashtra – 411060
suketu@brewcraftsindia.com **...Respondent**

Present:

For Appellant : Mr. Ramchandra Madan, Advocate

For Respondent :

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The Appellant, M/S Samrat Restaurant, a registered partnership firm, through its Managing Partner, Mr Paramjit Singh Ghai, i.e. the Operational Creditor, against the Impugned Order dated 22.05.2024 passed in Company Petition bearing CP (IB)/483/MB/2023 by the Ld. National Company Law Tribunal, Mumbai Bench, ("Adjudicating Authority") whereby the Ld. Adjudicating Authority dismissed the Application filed by the Appellant,

under Section 9 of the Code for initiation of the Corporate Insolvency Resolution Process ("CIRP"), the Appellant herein is constrained to prefer the present Appeal.

Brief facts:

2. The Respondent and the Appellant entered into a leave & license agreement ("L&L agreement") dated 4th May 2017. The term of the L&L agreement was from 15th June 2017 to 30th April 2022.

3. The Appellant issued a statutory demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), and thereafter filed a Section 9 IBC Application for initiation of CIRP against the Respondent, claiming alleged default of Rs 5,22,95,571/- (rupees five crores, twenty-two lakhs, ninety-five thousand, five hundred and seventy-one only) for the unpaid license fees under the L&L agreement, wrongfully raised reimbursements, and interest on the unpaid license fees.

4. The Section 9 Petition filed by the Appellant was at the very outset declared to be non-maintainable by the Hon'ble NCLT Mumbai, as the default amount claimed by the Appellant was inflated by inclusion of defaulted license fees amounts, interest, purported reimbursements and default amounts which fell due and payable during the prohibited period under Section 10A of IBC.

5. The Adjudicating Authority excluded a license fee of Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only)

finding that the same fell due and defaulted during the prohibited period, in terms of Section 10A of the IBC. The Adjudicating Authority did not consider the 'OTS' letter dated 31.03.2023 wherein it is claimed that the Corporate Debtor had not only admitted that they were liable to pay a sum of Rs 1,06,00,000/- (rupees one crore and six lakhs only) along with interest at the rate of 18% pa, but had also agreed to pay the sum by 31.03.2023. Resultantly, it is claimed that the default occurred only on 31.03.2023 and not during the period prohibited under Section 10A of the IBC. This exclusion led to the debt falling below the Rs 1 crore threshold. However, established law states that if a default is committed prior to the Section 10A period and continues into the Section 10A period, the initiation of proceedings is not barred.

Submissions of the Appellant:

6. The Corporate Debtor, Brewcrafts Microbrewing Pvt Ltd, is a registered company under Companies Act, 1956, having its registered office at First Brewhouse, The Corinthians Club, Mohammadwadi, Pune MH 411060 IN.

7. The Operational Creditor, M/S Samrat Restaurant, is a partnership concern having its office at 10A, Raj Kutir, Plot E854, 3rd Road, Khar (West), Mumbai-400054. That the Operational Creditor is the exclusive owner of the building known as Hotel Samrat, 10A, Raj Kutir, 3rd Road, Khar (West), Mumbai- 400054.

8. The Corporate Debtor approached the Operational Creditor for carrying on the business of Restaurant for making and selling beverages and eatables and merchandise from the property of the Operational Creditor under the name and style ‘doolally’.

9. The Corporate Debtor and the Operational Creditor agreed to enter into a L&L agreement dated 04.05.2017 (hereinafter 'the Agreement'), for a period of 58.5 months commencing from 15.06.2017 30.04.2022, whereby the Operational Creditor would give the Corporate Debtor leave and license to carry on its business activities, more specifically defined in the Agreement, from '218 sq meters area on ground floor and 115 sq meters area on 1st floor known as Harmony and Symphony Hall, terrace area of 126 sq meters, common guest toilets of ladies and gents of 30 sq mts and common lobby area on 1st floor of approx 10 sq meters' (hereinafter 'the premises').

10. The Corporate Debtor agreed to pay the Operational Creditor monthly payments in the form of license fee along with GST on or before the 7th day of the month. The license fee payable was agreed to be the following for the respective years:

Year	**Escalation**	**License Fees per Month**
15.06.2017 - 30.04.2018	NA	Rs 11,33,000
01.05.2018 - 30.04.2019	7%	Rs 12,12,310
01.05.2019 - 30.04.2020	7%	Rs 12,97,172
01.05.2020 - 30.04.2021	5%	Rs 13,62,030
01.05.2021 - 30.04.2022	5%	Rs 14,30,131

11. In addition to the above the Corporate Debtor was also liable to pay utility dues on time for the duration of their possession of the premises. As part of the responsibilities in the aforesaid Agreement, the Operational Creditor was required to provide the aforesaid premises along with floorings, fittings and fixtures including the air conditioners installed. The Operational Creditor duly complied with all its obligations under the Agreement and peacefully handed over the possession of the premises to the Corporate Debtor. That despite the property being utilised by the Corporate Debtor towards running of its business without let or hinderance from the Operational Creditor, the Corporate Debtor started defaulting on making timely payments towards the license fee as determined under the Agreement.

12. As a result of the default committed by the Corporate Debtor, the Operational Creditor was constrained to issue notice dated 16.11.2018 for non-payment of license fees and dues to the Corporate Debtor, whereby the Operational Creditor called upon the Corporate Debtor to make payment of the outstanding amount of Rs 99,85,540/- (rupees ninety-nine lakhs, eighty-five thousand, five hundred and forty only).

13. Despite repeated acknowledgements, the Corporate Debtor failed to clear the outstanding dues of the Operational Creditor. Resultantly, the Operational Debtor was again constrained to issue notice dated 06.02.2019, whereby the Operational Creditor called upon the Corporate Debtor to clear

the outstanding debt amounting to Rs 1,04,06,031/- (rupees one crore, four lakhs, six thousand and thirty-one only).

14. Despite repeated assurances over WhatsApp, that the Corporate Debtor would clear all dues and make timely payments in the future, the complete outstanding dues of the Operational Creditor were never cleared. The Corporate Debtor, made repeated requests for extension of time and would, from time to time, make part payments of the outstanding debt, thereby acknowledging the same. Pertinently, at no point in time did the Corporate Debtor ever dispute the notices sent by the Operational Creditor or claim that it was not liable to make the aforesaid payments.

15. On March 2020, a sum of Rs 52,50,000/- (rupees fifty-two lakhs and fifty thousand only) remained outstanding and payable to the Operational Creditor by the Corporate Debtor.

16. In March 2020, on account of COVID-19, and the resulting lockdowns, the Corporate Debtor made representations to the Operational Creditor that its business was badly affected and requested the Operational Creditor to reduce the license fees. The Corporate Debtor further made representations that if the license fee was reduced, they would not only clear past dues but also make sure all future payments are made on time.

17. On the aforesaid clear understanding, the Operational Creditor modified the license fee from time to time. It was further understood that in

case the Corporate Debtor defaulted on making payments, the Operational Creditor would be entitled to claim the entire amount of the license fee in terms of the Agreement.

18. Resultantly on the aforementioned understanding, the Operational Creditor agreed to reduce the license fee to 50% from April 2020 to January 2021; and Rs 8 lakhs per month from February 2021 to March 2021; Rs 4 lakhs per month for April 2021 to May 2021; Rs 6 lakhs per month from June 2021 to 15.08.2021; Rs 8 lakhs from 15.08.2021 to March 2022; Rs 9 lakhs from March 2022 till 30.11.2022 and Rs 13 lakhs for December 2022.

19. It is pertinent to point out that the Corporate Debtor again acknowledged its dues by way of undertaking dated 29.08.2021, whereby the Corporate Debtor agreed to clear its outstanding dues of Rs 1,18,82,400/- (rupees one crore, eighteen lakhs, eighty-two thousand and four hundred only) along with GST to the Operational Creditor on or before 31.03.2023 in equal monthly instalments.

20. Again, despite giving an undertaking to clear all past dues, the Corporate Debtor failed to clear its dues. Resultantly, the Operational Creditor was again constrained to issue a notice dated 10.03.2023 whereby the Corporate Debtor was put to notice and called upon to pay Rs 1.06 crores along with 18% interest that continued to be outstanding. Most crucially, the contents of this notice were duly acknowledged and admitted by the Corporate Debtor.

21. Despite the fact that the Corporate Debtor agreed to clear all dues of the Operational Creditor on 10.03.2023, shockingly, in a surreptitious manner the Corporate Debtor, through about 25 people illegally entered the premises in the middle of the night on 27.03.2023 and removed all furniture and fittings committing theft and causing damage to the premises amounting to Rs 25 lakhs. The Operational Creditor has filed a complaint against the Corporate Debtor and its directors vide Complaint dated 27.03.2023, and reserves the right to pursue criminal remedy against the Corporate Debtor and its directors.

22. Shockingly on 27.03.2023, at around 1:27 PM, the Corporate Debtor sent an email to the Operational Creditor stating that the Corporate Debtor had vacated the premises and '*removed loose furniture and other items that belong to us.*' The Corporate Debtor also stated that they had handed over the keys to the reception staff of the Operational Creditors Hotel and would be meeting with the Operational Creditor to 'close other formalities.' It is pertinent to point out that the Corporate Debtor has till date not reached out to the Operational Creditor, nor cleared the dues.

23. Since the Corporate Debtor failed to make the payment of outstanding amounts on 31.03.2023 in terms of its undertakings dated 10.03.2023 and 29.08.2021, the Operational Creditor was constrained to send a notice under Section 8 of the IBC. However, the Corporate Debtor did not respond to the said notice. Since the Corporate Debtor failed to reply to the demand notice

sent in terms of Section 8 of the IBC, the Appellant was constrained to file CP (IB)/483/MB/2023, an Application under Section 9 of the IBC to initiate CIRP against the Corporate Debtor.

24. By way of Order dated 22.05.2024 the Adjudicating Authority dismissed the Appellant's Application, despite recognising that the Respondent defaulted for an amount of Rs 1,04,33,299/- (rupees one crore, four lakhs, thirty-three thousand, two hundred and ninety-nine only). The license fee of Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only) was found to fall due and defaulted during the prohibited period, in terms of Section 10A of the IBC finding that the same, it was excluded. The Adjudicating Authority failed to consider that by way of the 'OTS' letter dated 31.03.2023, the Corporate Debtor had not only admitted that they were liable to pay a sum of Rs 1,06,00,000/- (rupees one crore and six lakhs only) along with interest at the rate of 18% pa, but had also agreed to pay the sum by 31.03.2023. Resultantly, the default occurred only on 31.03.2023 and not during the period prohibited under Section 10A of the IBC. This exclusion led to the debt falling below the Rs 1 crore threshold. However, established law states that if a default is committed prior to the Section 10A period and continues into the Section 10A period, the initiation of proceedings is not barred.

25. The Authority ought to have recognised that the 'one-time settlement' (OTS) is a clear admission of debt by the Corporate Debtor and constitutes an

acknowledgment of debt as well as an understanding to pay the same at a later date. The Authority should have noted that the Respondent acknowledged the debt payable to the Appellant through letters/undertakings dated 29.08.2021, 21.11.2022, and OTS dated 10.03.2023, including debt incurred during the prohibition period, which is not barred by Section 10A. In the light of the OTS dated 10.03.2023, the Respondent acknowledged the outstanding debt, making the date of default 31.03.2023 and, thereby, no part of the claim/debt is barred by Section 10A. The Adjudicating Authority should have considered that it is well-established law that defaults during the Section 10A period, continuing after it, make a CIRP Petition maintainable. Continuous default means the debt does not fall under the 10A period. The Authority erred by not appreciating that, in this case, the default is continuous, occurring before, during, and after the prohibition period imposed by Section 10A. Thus, the debt during this period is not barred by Section 10A. The Authority erred in disallowing the interest on outstanding license fees amounting to Rs 1,66,56,022/- (rupees one crore, sixty-six lakhs, fifty-six thousand and twenty-two only) despite settled law that charging interest is an actionable claim if properly agreed upon by the parties. Despite noting that the license fee was reduced under an arrangement dated 10.03.2023, the Authority should have relied on this letter, recognising the agreed upon 18% interest rate for delayed payments. The Authority erred in noting that, in the event of a breach of settlement, the license fees would not revert to those stipulated in the original L&L agreement dated 04.05.2017.

The Authority should have applied the Doctrine of 'Accord and Satisfaction' to the settlement dated 10.03.2023. The Authority failed to follow settled law regarding the Doctrine of Accord and Satisfaction and erred in concluding that the license fee reduction was not temporary, denying the Operational Creditor's right to the entire license fee per the original agreement. The Authority should have appreciated that, due to the failure to meet the accord's conditions, the Appellant retained its rights under the original L&L agreement.

Submissions of the Respondent:

26. The Respondent submits that the Impugned Order dated 22nd May 2024 is based on settled law, and the present Appeal preferred by the Appellant needs to be outright rejected.

27. The Appellant's contention in the present Appeal that the letters/ correspondences dated 29th August 2021 and 10th March 2023 should be considered as a one-time settlement and the default date for the purposes of its Section 9 Application be considered as 31st March 2023 is baseless and contrary to own pleaded case before the Hon'ble NCLT.

28. The letters dated 29th August 2021 and 10th March 2023 were issued by the Appellant as reminders of allegedly unpaid license fees amounts. The letters were never intended to be one-time settlement arrangement of any sort whatsoever offered by the Appellant. None of the purported OTS letters included any statement where the Appellant has provided any settlement

option to the Respondent, the letters simply were issued as reminders/follow ups to the pending license fees amounts under the L&L agreement. The Appellant had in fact submitted to the Hon'ble NCLT that its letter dated 10th March 2023 was just a stopgap arrangement, thus, such stop-gap arrangement cannot be considered to be an OTS of any sort whatsoever.

29. The Appellant in its Section 8 notice and in its Section 9 Application, has made no reference to the amounts mentioned in purported OTS letters and instead computed its default amount basis the terms of the L&L agreement. Under the L&L agreement's clause VI (D), the license fees was to be paid by the Respondent to the Appellant on a monthly basis. Thus, the default date for the license fees was calculated on monthly basis by the Appellant itself when it claimed the defaulted amount from the Respondent. The Hon'ble NCLT in its Order has correctly relied on this factual position to decide that a sum of Rs 69,30,442/- (rupees sixty-nine thousand, thirty thousand, four hundred and forty-two only) became due only during the prohibited period as the obligation to pay license fees arises every month including during the prohibited period.

30. The Appellant's Section 9 Application was based on the L&L agreement, and thus the same was correctly rejected by the Hon'ble NCLT, Mumbai, for the same being based on an inflated default amount filed with the sole malafide intent of meeting the threshold amount required to initiate proceedings under the IBC against the Respondent.

31. Furthermore, the law has already been settled by this Tribunal in ***SLB Welfare Assn. vs PSA IMPEX (P) Ltd (2022 SCC OnLine NCLAT 1584)***, that the date of default does not change basis an acknowledgement. The decision of ***Rubra Buildwell Constructions Pvt Ltd vs PSA Impex (Company Petition No. IB-11/ND/2022)*** relied upon by the Appellant in its Appeal has been overruled by this Tribunal in SLB Welfare Assn. vs PSA IMPEX (P) Ltd.

32. As per the provisions of Section 10A of IBC, no Application for initiation of Corporate Insolvency Resolution Process ("CIRP") under Sections 7, 9 or 10, can be filed for any debt arising during the period of 25th March 2020 to 25th March 2021. The Appellant has segregated the dues payable by the Respondent on a yearly basis in his computation of the default amount for the year 2020-2021. Therefore, the Appellant ought to have excluded the amounts that fell due for the 'prohibited period' under Section 10A of IBC from its Section 8 notice as well as from the Section 9 Application. The Appellant, in its Section 8 notice and in its Section 9 Application, has computed its default amount basis the terms of the L&L agreement. Under the L&L agreement's clause VI (D), the license fees was to be paid by the Respondent to the Appellant on monthly basis. Thus, the default date for the license fees was calculated on monthly basis by the Appellant itself when it claimed the defaulted amount from the Respondent. The Hon'ble NCLT in its Order has already correctly distinguished the case of ***Narayan Mangal vs Vatsalya Builders & Developers Pvt Ltd (CA AT Ins No. 294 of 2023),*** which was relied upon by the Appellant by correctly applying the factual

position of the matter to decide that a sum of Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only) became due only during the prohibited period as the obligation to pay license fees arises every month including during the prohibited period.

33. The Hon'ble NCLAT has also in the case of ***Bhavit Sheth vs Madan Bajrang Lal Vaishnawa and Anr (CA AT Ins No 328 of 2024)***, wherein license fees payment under a L&L agreement was in question clearly held that since the claim of operation debt fell within 10A period no Application ever could have been filed for the default of the lease rental during the 10A period.

34. The Appellant in its computation of default has arbitrarily charged interest on the total defaulted amount at the rate of 18% pa, which in the absence of any clause within the L&L agreement could not have been included in the computation of default by the Appellant. It has been expressly established in the case of ***Krishna Enterprises vs Gammon India Ltd (2018 SCC Online NCLAT 360)*** that 'claim' includes 'debt'. However, 'debt' cannot be said to include 'interest' in all cases. It shall include interest only when the same has been agreed by the parties, otherwise, only the principal amount shall fall within the definition of 'claim' for the purpose of calculating default amount under Section 4. Despite there being no provision for the Application of interest in the L&L agreement, the Appellant in its Section 8 notice and Section 9 Application has claimed interest in its computation on the license fees as set out in the L&L agreement. The Appellant now, as an afterthought,

claims that the interest will be applicable on the amount as agreed in the letters which it claims to be purported OTS. Without prejudice to the contentions above, even if the purported OTS letters are taken into consideration to calculate interest over the so-called defaulted amount, the letter fails to set out to the manner in which the interest was agreed to be calculated, and/or agreed default date for the calculation of interest. Thus, it cannot be considered as an agreement between the parties for payment of interest.

35. It is further submitted that the Appellant has failed to provide a proper computation of interest considering purported OTS letters. The computation of interest provided by the Appellant as part of Annexure D of its Section 9 Application was thus completely incorrect, and no proper and actual revised computation of interest has been put forth by the Appellant.

36. Thus, the Hon'ble NCLT, after having duly considered the purported OTS letters, has correctly excluded the wrongfully included interest amount of Rs 1,66,56,022/- (rupees one crore, sixty-six lakhs, fifty-six thousand and twenty-two only) from the default amount claimed by the Appellant.

37. The Hon'ble NCLT has correctly held that the Appellant had included wrong license fees amount included by it in the Section 9 Petition and has gone ahead and calculated the actual and correct license fees amount which was also admitted by the Appellant during the course of the hearing. The Hon'ble NCLT correctly reached the conclusion that the license fees claimed

by the Appellant were inflated as the defaulted unpaid license fees amount which the Appellant could have claimed was Rs 1,04,33,299/- (rupees one crore, four lakhs, thirty-three thousand, two hundred and ninety-nine only) and not Rs 5,22,95,571/- (rupees five crores, twenty-two lakhs, ninety-five thousand, five hundred and seventy-one only). The Hon'ble NCLT incorporated a thorough analysis and computation table in its Order setting out the correct computation of the maximum possible defaulted unpaid license fee amount.

38. The Appellant in its computation of default before the Hon'ble NCLT had included an arbitrary and unsubstantiated claim of 'other expenses reimbursement receivable from Brewcrafts Microbrewing Pvt Ltd as on 31.03.2023', amounting to Rs 47,01,629/- (rupees forty-seven lakhs, one thousand six hundred and twenty-nine only). The Hon'ble NCLT in its Order has considered the veracity of such arbitrary reimbursement amounts and considered them to be without any actual basis and, thus, under a detailed analysis held that the Appellant had failed to establish its claim for the reimbursement of expenses.

39. The Appellant had wrongfully inflated its claim by including so-called other expenses/reimbursements, interest, wrongfully claimed license fees in the total defaulted amount which was mutually revised (as admitted by the Appellant), and license fees that fell due during the prohibited period of Section 10A of IBC. By means of these intentional wrongful additions to the

default amount, the Appellant had attempted to meet the required threshold for the maintainability of its Petition. The Appellant had indulged in suppression of material facts and had included interest in order to bring subject claim under the threshold of IBC, and to arm twist the Respondent to pay the claim as made.

40. Under the thorough analysis of the submissions raised by both the parties before the Hon'ble NCLT, the Tribunal rightly held that the sum of Rs 5,22,95,571/- (rupees five crores, twenty-two lakhs, ninety-five thousand, five hundred and seventy-one only), as claimed by the Appellant to have defaulted sum to be wrong and inflated, and thus correctly dismissed the Section 9 Application.

41. The Tribunal had correctly relied on the revised actual agreed rental amounts which was agreed between the parties for the period of Covid 19 - which the Appellant in its computation of default in the Section 9 Application had failed to take into account of which led to an outstanding license to be Rs 1,04,33,299/- (rupees one crore, four lakhs, thirty-three thousand, two hundred and ninety-nine only); the Tribunal further went on to correctly exclude the amount of Rs 1,66,56,022/- (rupees one crore, sixty-six lakhs, fifty-six thousand and twenty-two only) which was wrongly claimed by the Appellant towards interest, the amount of Rs 47,01,629/- (rupees forty-seven lakhs, one thousand, six hundred and twenty-nine only) towards arbitrary and unsubstantiated reimbursements, and an amount of Rs 69,30,442/-

(rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only) was excluded which fell due during the 'prohibited period' under Section 10A of IBC. Consequentially, the total amount of default that the Appellant has against the Respondent stands at Rs 35,02,857/- (rupees thirty-five lakhs, two thousand, eight hundred and fifty-seven only), which is below the threshold limit of INR 1 crore prescribed under Section 4 of IBC, making the Section 9 Petition filed by the Appellant not maintainable.

42. It is submitted that considering the above submissions, no notice needs to be issued for the instant Appeal and the same is fit to be rejected with imposition of exemplary costs.

Analysis:

43. Heard the counsel of the Appellant and also perused all the records.

44. In nutshell, this Appeal arises from the Order of the National Company Law Tribunal (NCLT), dated May 22, 2024, dismissing the Appellant's Application under Section 9 of the Insolvency and Bankruptcy Code (IBC), 2016. The Appellant had sought to initiate the Corporate Insolvency Resolution Process (CIRP) against the Respondent (Corporate Debtor). The NCLT held that a portion of the debt claimed by the Appellant fell within the period protected by Section 10A of the IBC and that the remaining debt did not meet the mandatory threshold of Rs 1 crore for initiating CIRP. This Appeal challenges the findings of the NCLT and seeks to admit the Corporate Debtor into CIRP.

45. The Appellant had entered into a L&L agreement with the Respondent on May 4, 2017. Over time, the Respondent defaulted on its payment obligations under this agreement, and the Appellant sent several notices demanding payment of overdue amounts. On February 6, 2019, the Appellant sent a demand notice for Rs 1.04 crores.

46. The Appellant filed an Application under Section 9 of the IBC, but the NCLT rejected the Application, holding that part of the debt fell within the Section 10A period, thus disqualifying the total debt from meeting the Rs 1 crore threshold.

47. The Appellant has raised several arguments challenging the NCLT's decision:

a) The NCLT wrongly excluded part of the defaulted amount that was covered by Section 10A, leading to the incorrect conclusion that the total debt did not meet the Rs 1 crore threshold.
b) The parties had entered into agreements that extended the payment obligations until after the Section 10A period. Therefore, the subsequent default occurred outside the scope of Section 10A.
c) The legislative intent behind Section 10A was to provide temporary relief, not to allow companies to avoid paying their debts indefinitely. The Respondent's acknowledgment of the outstanding amount of Rs 1.06 crores as of March 10, 2023, confirms that the default was not frozen under Section 10A.

48. The Respondent has defended the NCLT's Order on the following grounds:

a) The Appellant's claim was inflated, and the NCLT rightly recalculated the actual unpaid amount, which fell below the Rs 1 crore threshold.

b) A significant portion of the default, amounting to Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only) occurred during the Section 10A period, which cannot be included in the calculation of default for initiating CIRP.

c) The Appellant included interest at an inflated rate of 18% pa, despite no agreement to this effect in the L&L agreement, further inflating the claimed amount.

d) The OTS agreement did not alter the date of default, and the default during the Section 10A period remained protected under law.

49. With respect to the interest claimed by the Appellant, the matter has been analysed by the Adjudicating Authority, and which is extracted as follows:

> "13. We now turn our attention to the matter of interest. The Operational Creditor asserts a claim of Rs 1,66,56,022/- against the Corporate Debtor, representing interest at a rate of 18% per annum on the outstanding license fees. Upon reviewing the registered Leave and License Agreement dated May 4th, 2017, submitted by the Operational Creditor, it is evident that no provision exists within the agreement for the imposition of interest on delayed payments. Furthermore, there is no other

agreement/understanding on record demonstrating mutual consent between the parties regarding the imposition of interest by the Corporate Debtor in the event of non-payment or delayed payment of license fees. The Hon'ble NCLAT had observed in Krishna Enterprises vs Gammon India Ltd (Citation: 2018 SCC Online NCLAT 360 at Para 4) as follows:

> *"4. It is submitted that the 'debt' includes the interest, but such submission cannot be accepted in deciding all claims. If in terms of any agreement, interest is payable to the Operational or Financial Creditor then debt will include interest, otherwise, the principal amount is to be treated as the debt which is the liability in respect of the claim which can be made from the Corporate Debtor."*

Therefore, in the light of observations made by the Hon'ble NCLAT in the above-mentioned case and in the absence of any contractual agreement in the given case pertaining to interest on outstanding license fees, the sum of Rs 1,66,56,022/-, claimed as interest, cannot be considered a valid component of the claim."

(emphasis supplied)

50. Reliance is placed by the Respondent on ***Krishna Enterprises (supra)*** in which it was held that 'debt' cannot be said to include 'interest' in all cases. It shall include interest only when the same has been agreed by the parties, otherwise, only the principal amount shall fall within the definition of 'claim' for the purpose of calculating default amount. Despite there being no provision for the Application of interest in the L&L agreement, the Appellant in its Section 8 notice and Section 9 Application claimed interest in its computation on the license fees as set out in the L&L agreement. We do not find any infirmity with the above analysis of the Adjudicating Authority and

do not find merit in the claim of the Appellant for the interest of Rs 1,66,56,022 (rupees one crore, sixty-six lakhs, fifty-six thousand and twenty-two only).

51. Now we move on to examine the applicability of Section 10A of IBC in the facts of the instant case. Section 10A of the IBC, introduced to provide relief to businesses affected by the COVID-19 pandemic, prohibits the initiation of CIRP for defaults that occurred between March 25, 2020, and March 25, 2021. Section 10A of the Code provides as follows:

> "**Section 10A: Suspension of initiation of corporate insolvency resolution process.**
>
> 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."
>
> ***(emphasis supplied)***

52. Applicability of the prohibited period of 10A has been clearly noted in the findings by the Adjudicating Authority and is extracted as follows:

> "14. Another contention raised by the Corporate Debtor is that the claim of the Operational Creditor includes the period prohibited under Section 10A of the Code and in any event, it is less than Rs1 crore, which is the minimum threshold for initiation of any action before this Tribunal. On the other hand, the Applicant submitted

that section 10-A will not apply to the present case as the date of default stated in the application is 31st March 2023 which does not fall within the period covered u/s 10A of the Code. The Counsel further contends that Section 10A of the Code has no application when the default occurred before the period mentioned in Section 10A and the same is continued even after the Prohibited Period. To buttress the above argument, the Counsel for the Applicant has relied upon the judgment of Hon'ble NCLAT in Narayan Mangal vs Vatsalya Builders & Developers Pvt Ltd; Company Appeal (AT) (Ins.) No. 294 of 2023(supra) wherein it was held that if the default is committed prior to the Section 10A period and continues, there is no prohibition in initiating proceedings under Section 7. It is however noticed that in the aforesaid case, the default occurred prior to the Section 10A period and interest was only charged during the Prohibited Period, but in the present case, the obligation to pay the license fee arises every month including during the Prohibited Period. Thus, the decision of Narayan Mangal (supra) is not applicable in the facts of the present case. The objective of Section 10A of the Code was to protect a corporate debtor from the filing of any insolvency application against it for any default committed during the period when Covid pandemic was prevailing and the records reveal that the business of the Corporate Debtor suffered due to Covid Pandemic and major defaults are relating to the license fee fallen due during the lockdown period. This fact was even acknowledged by the Applicant resulting in the reduction of license fees. Considering the above, the Corporate Debtor is entitled to seek exclusion of the license fee which fell due and defaulted by the Corporate Debtor during the Prohibited Period, for the purpose of this Petition. It is noticed that the license fee payable for the Prohibited Period was Rs 97,07,042/- and the Corporate Debtor paid an amount of Rs 27,76,600/- during the period. Thus, the defaulted amount during the Prohibited Period amounts to Rs 69,30,442/-."

(Emphasis supplied)

53. Reliance is also placed by the Respondent on this Tribunal's judgement in the case of ***Bhavit Sheth (supra)***, wherein the license fees payment under an L&L agreement was in question and it was held that since the claim of operation debt fell within 10A period, no Application ever could have been filed for the default of the lease rental during the 10A period.

54. The Adjudicating Authority in our view correctly interpreted that any default falling within this period cannot form the basis for initiating CIRP. In this case, a portion of the default claimed by the Appellant clearly falls within the protected period under Section 10A. We find that the Corporate Debtor is entitled to seek exclusion of the license fee of Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only), which fell due and defaulted by the Corporate Debtor during the prohibited period.

55. The Appellant also argues that the subsequent agreements, including the OTS agreement, shifted the date of default to March 31, 2023. Thus, the default falls outside the Section 10A period. The Appellant contends that the letters/correspondence dated 29.08.2021 (@96-97 APB) and 10.03.2023 (@98-99 APB) be considered as a one-time settlement and due to this, the default date for the purposes of Section 9 Application gets shifted to 31.03.2023. Per contra, the Respondent contends that these are just reminders of unpaid licence fees amount and they were never intended to be one-time settlement arrangements of any sort. It was just a stop gap arrangement and cannot be considered as OTS.

56. We have gone through these letters from @ 96-99 APB and we do not find them to be one-time settlement arrangements by any stretch of the imagination. It has been held in ***SLB Welfare Assn. (supra)*** that the date of default and acknowledgment are two different events. The date of default is not dependent on the date of acknowledgement. The Appellant has relied upon the purported OTS letters dated 29.08.2021 and 10.03.2023, which attempt to change the date of default. In fact, the repayment is governed by L&L agreement. OTS agreements and rent reductions due to Covid, only reflect a temporary modification of payment terms, but they do not extinguish the original default that occurred during the Section 10A period. The purpose of Section 10A was to prevent companies from being pushed into insolvency due to temporary financial distress caused by the COVID-19 pandemic. The Appellant's interpretation that subsequent agreements should nullify the protection offered by Section 10A would undermine the legislative intent and open the door for Creditors to circumvent the protections offered by law. The Tribunal cannot accept an interpretation that erodes the protection that Section 10A was specifically designed to offer. The argument of the Appellant that if a default is committed prior to the Section 10A period and continues into the Section 10A period, the initiation of proceedings is not barred and is applicable in the instant case. But the facts of the case as discussed in the case speak otherwise. This is a gross misrepresentation of the facts.

57. It is argued by the Appellant that the default is continuous, occurring before, during and after the prohibited period under Section 10A and

therefore, the CIRP petition is maintainable. Looking at the facts in the case, we find that the date of default is proposed to be changed to 31.03.2023 as per the purported settlement agreement vide letters dated 29.08.2021 and 10.03.2023 which shifts the date of default for the purposes of Section 9 to 31.03.2023. As has been noted by us in other parts of this judgment, the date of default could not have been shifted and part default was occurring in the Section 10A period and the total default amount which could have been considered is less than the threshold amount. It noticed by us that continuous default is being artificially created by inflating claims, omitting to take into account the revised license fees during the COVID period, arbitrary and unsubstantiated claim of 'other expenses reimbursement and incorrectly claiming interest on default in payments. Therefore, the argument that it is a continuous default cannot be accepted.

58. We further note that the Appellant, in its calculation of the default amount forming part of its Petition, has omitted to take into account the revised license fees amount agreed to by the parties after the onset of lockdown caused by the COVID-19 pandemic. During the lockdown period, the parties made mutual reductions and adjustments to the license fees payable under the L&L agreement. This has been recorded in the Appellant's letter dated 10th March 2023. However, the Appellant has failed to consider those revised and reduced license fee amounts when computing its defaulted sum in the Section 9 Petition. This has been duly noted by the Adjudicating

Authority in its findings while recalculating the amounts of licence fee payable by the Respondent. We do not find any infirmity in these calculations.

59. We also note that the Appellant in its computation of default had included an arbitrary and unsubstantiated claim of 'other expenses reimbursement receivable from Brewcrafts Microbrewing Pvt Ltd as on 31.03.2023', amounting to Rs 47,01,629/- (rupees forty-seven lakhs, one thousand six hundred and twenty-nine only). The Adjudicating Authority has considered the veracity of such arbitrary reimbursement amounts and found them to be without any actual basis and, thus, under a detailed analysis held that the Appellant had failed to establish its claim for the reimbursement of expenses. The relevant extract is as follows:

> "In accordance with the recitals of the registered Leave and License Agreement executed between the involved parties on May 4th, 2017, the licensee (i.e. the Corporate Debtor) assumed the responsibility to cover and settle all charges related to electricity consumption, water, and other utilities within the licensed premises. This obligation is extended to promptly paying the bills submitted by the licensor on or before their due date or within three days of bill receipt, whichever occurred earlier. It is duly noted that the Applicant provided debit notes as evidence for reimbursement of certain charges, as outlined in the preceding table, through a rejoinder. However, there exists no record of electricity, water, or drainage bills, along with corresponding payment receipts, indicating that these bills were indeed settled by the Operational Creditor and subsequently claimed for reimbursement from the Corporate Debtor. The Corporate Debtor, in its reply affidavit, explicitly denied any outstanding bills of such nature having been paid by the Applicant.
>
> Furthermore, it strains credulity to accept the contention that these bills remained unpaid since the financial year 2017-18 and that the Operational Creditor consistently assumed responsibility for their payment throughout the license period, seeking reimbursement

from the Corporate Debtor, despite the explicit terms of the Leave and license Agreement dictating the Corporate Debtor's obligation to cover such expenses. Additionally, there exists no evidence to demonstrate that the debit notes annexed to the Applicant's affidavit in- rejoinder were duly served upon the Corporate Debtor. In the present case, the Applicant has invoked debit notes to claim reimbursement for expenses, yet has failed to furnish substantiating evidence establishing that said expenses were indeed incurred by the Applicant. Consequently, based on the aforementioned reasons, we find that the claim for reimbursement of expenses as asserted by the Applicant/Operational Creditor has not been established/substantiated and thus, it cannot be considered for the purpose of determining the amount of outstanding operational debt in default by the Corporate Debtor for the purpose of computing the threshold limit."

(emphasis supplied)

Looking at the analysis by the Adjudicating Authority we don't find any infirmity in this exclusion of the claim of other expenses.

60. For clarity, the above analyses are summarised as follows:

S. No.	Description	Amount in Rs.	Explanation
1.	**PARTICULARS OF OPERATIONAL DEBT** As per Part IV of Form 5 application by Operational Creditor to initiate Corporate Insolvency Resolution Process under chapter II of part II of the Code. (Under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)	Rs 5,22,95,571/- with date of default being 31st March 2023	Rs 3,56,39,549/- along with interest @ 18% p.a. as on 19.04.2023 being Rs 1,66,56,022/-
2.	Total license fees payable (after reducing during Covid period as per mutual agreement)	7,96,79,522/-	@ 66 APB
3.	Security (to be deducted)	39,65,000/-	
4.	Rent Paid by the CD (to be deducted)	6,52,81,223/-	

5.	Outstanding License fees [2-3-4]	1,04,33,299/-	
How was the Appellant's claims treated by the Adjudicating Authority?			
6.	Interest @ 18%	1,66,56,022/-	No such prior agreement for interest @18% for delayed payments. Held to be wrongly claimed.
7.	Other Expenses	47,01,629/-	Arbitrary and unsubstantiated reimbursements and were rejected by the AA and we concur.
8.	Amount payable under 10A period	69,30,442/-	Was excluded as fell due during the "prohibited period" under Section 10A of IBC
9.	**Total license payable [5-8]**	**35,02,857**	**Less than threshold of Rs 1 crore.**

61. Overall, we find that Adjudicating Authority has correctly excluded the following amounts:

- Rs 1,66,56,022/- (rupees one crore, sixty-six lakhs, fifty-six thousand and twenty-two only), which was wrongly claimed by the Appellant towards interest,

- Rs 47,01,629/- (rupees forty-seven lakhs, one thousand, six hundred and twenty-nine only) towards arbitrary and unsubstantiated reimbursements,

- Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only) was excluded which fell due during the 'prohibited period' under Section 10A of IBC.

62. After examining the facts of the case, it is noted by the Adjudicating Authority that the outstanding license fees should have been Rs 1,04,33,299/- (rupees one crore, four lakhs, thirty-three thousand, two hundred and ninety-nine only), which gets further reduced by Rs 69,30,442/- which fell due during the "prohibited period" under the Section 10A of IBC.

63. Consequentially, the total amount of outstanding default that the Appellant has against the Respondent stands at Rs 35,02,857/- (rupees thirty-five lakhs, two thousand, eight hundred and fifty-seven only), which is below the threshold limit of Rs 1 crore prescribed under Section 4 of IBC, making the Section 9 Petition filed by the Appellant not maintainable. The IBC mandates that for a Corporate Debtor to be admitted into CIRP under Section 9, the defaulted amount must meet the threshold of Rs 1 crore. In recalculating the actual unpaid amount, excluding the portion protected under Section 10A and the improperly calculated interest and reimbursements, the NCLT correctly determined that the outstanding default amounted to Rs 35,02,857/- (rupees thirty-five lakhs, two thousand, eight hundred and fifty-seven only), far below the threshold requirement. This finding is legally sound and consistent with established principles of insolvency law.

64. In conclusion we find that:

a) A significant portion of the default, amounting to Rs 69,30,442/- (rupees sixty-nine lakhs, thirty thousand, four hundred and forty-two only) occurred during the Section 10A period, which cannot be included in the calculation of default for initiating CIRP.

b) The Appellant included interest at an inflated rate of 18% pa, despite no agreement to this effect in the L&L agreement, further inflating the claimed amount.

c) The OTS agreement did not alter the date of default, and the default during the Section 10A period remained protected under law.

d) The Appellant's claim was inflated, and the Adjudicating Authority rightly recalculated the actual unpaid amount, which fell below the Rs 1 crore threshold.

65. We find that the Appellant's inclusion of inflated interest rates, unsubstantiated reimbursements, and amounts that fall under the Section 10A period demonstrates a deliberate attempt to manipulate the figures to meet the threshold for initiating CIRP. This constitutes an abuse of the insolvency process, and the Adjudicating Authority was right in dismissing the Section 9 Petition.

Conclusion

66. For the above-noted reasons, this Tribunal finds that the Adjudicating Authority correctly interpreted and applied Section 10A of the IBC and rightly

concluded that the outstanding default did not meet the Rs 1 crore threshold. We, therefore, find the Appeal to be devoid of merit and deserves to be dismissed.

Order

67. The Appeal is hereby dismissed. All related IAs pending, if any, are closed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi.
September 25, 2024.

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