IN NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT- V

C.P. 1155/IB/MB/2022

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

STCI Finance Limited

A/B, 1-802, A-Wing, 8th Floor, Maharashtra Innova, Marathon Nextgen Compound, Off Ganpatrao Kadam Marg, Lower Parel (W), Mumbai 400013

..... Financial Creditor/ Petitioner

Vs

Essel Corporate Resources Private Limited

18th Floor, A Wing, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai 400013

..... Corporate Debtor

Order Dated: 13.08.2024

Coram:

Hon'ble Reeta Kohli, Member (Judicial)

Hon'ble Madhu Sinha, Member (Technical)

Appearances: -

For the Petitioner: Adv. Ferzana Behramkamdin (PH)

For the Respondent: Ld. Counsel Ashish Pyasi a/w Adv. Avinash Khanokar a/w Adv. Surekha Yadav (PH)

ORDER

Per: Reeta Kohli, Member (Judicial)

The above Company Petition is filed by **STCI Finance Limited** hereinafter called as the ("**Financial Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **Essel Corporate Resources Private Limited** hereinafter referred to as the ("**Corporate Debtor**") on **18.10.2022** by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code (hereinafter called "**Code**") read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Financial Debt of Rs. 107,59,58,558**/-** (Principal amount of Rs. 71,57,70,194/- plus interest of Rs. 36,01,88,364/- charged at the rate of 14.5% and 2% penal interest). The Date of Default is **01.01.2020**.

Brief Facts of the Case and Submissions by the Financial Creditor

1. Pursuant to the application of the Respondent dated 7th December, 2017, the Petitioner sanctioned a Corporate Loan of Rs.125,00,00,000/-("**Loan**"). Accordingly, a Letter of lntent **("LOI")** dated 1st March, 2018 was issued in favour of the Respondent wherein the terms and conditions of the sanction of the said Loan were set out. The relevant and important clauses (Clauses 1 to 8 and Clause 23) are reproduced here under:-

1.	**Nature of Facility**	Corporate Loan against collateral of Liquid Securities

2.	**Loan Amount**	Rs. 125 crore (Rupees One Hundred Twenty Five Crores)
3.	**Purpose of Loan**	General Corporate Purpose
4.	**Rate of Interest**	9.25% per annum payable quarterly Interest charged for the quarter shall fall due for payment on the first day of succeeding quarter
5.	**Payment of Interest**	Quarterly by way of RTGS/NEFT/ECS to be remitted on the first day of succeeding quarter
6.	**Tenor of Loan**	36 months from the date of first disbursement
7.	**Processing Fee**	Nil
8.	**Put/Call Option**	STCI shall have the right to call back the loan and Borrower shall have the right to repay the loan at the end of every 12 months from the date of its disbursement by giving 15 business days prior written notice of intention to exercise the option.
9.	**Repayment of Loan**	Bullet repayment at the end of 3 years from the date of first disbursement or put/call option date by way of RTGS/NEFT/ECS
	……	

		.....
23.	**Prepayment Charges**	2% of prepaid amount • No prepayment charges if prepayment is on account of: • To the extent of margin call • Exercise of put/call option • Non-acceptance of interest reset on put/call option date • If group is sanctioned any other loan facility by STCI

Thus, it is evident that total of Rs. 125 crores was sanctioned with bullet repayment after 36 months from the date of first disbursement and interest charged at 9.25% per annum payable quarterly. Additionally, the LOI also contained other terms and conditions. The relevant ones are reproduced here under -

> *"...17. In case of default committed in servicing the interest or repayment of principal, STCI shall have the right to recall the loan and initiate recovery proceedings as per terms of Sanction at the cost and consequence of the borrower.*
>
> *.....*
>
> *19. STCI reserves the right to recall the entire loan or any part thereof at once, in addition to non-disbursement of the undisbursed portion of loan, if any, if the Borrower has violated any of the terms and conditions of sanction...."*

2. The Petitioner disbursed the sum of Rs. 50 crores to the Respondent on 19th March, 2018 and balance Rs. 75 crores on 31st March, 2018 making the total aggregate loan amount of Rs.125,00,00,000/-.

3. In terms of LOI, Share Pledge Agreements were executed by Third Party Security Providers on 14th March, 2018 and charges in respect thereof registered with the Registrar of Companies.

4. There was an admitted failure on the part of the Respondent to maintain the Asset cover as provided in the LOI read with Facility Agreement **("FA").** As the asset cover had fallen below the prescribed limits, the Petitioner called upon the Respondent to create further security in order to make up the said deficiency. The Respondent accordingly caused the Mortgagor, Mr. Subhash Chandra **("Mortgagor")** to create an exclusive charge in the form of an Equitable Mortgage by deposit of title deeds over his property to secure the dues of the Financial Creditor. Accordingly, a Memorandum of Entry Recording Creation of Mortgage by Deposit of Title Deeds dated 29th November, 2018 has been executed by Petitioner.

5. On 7th January 2019, a Supplemental LOI was executed. The Supplemental LOI records that the Petitioner had by Notice dated 3rd January, 2019 exercised its call option. However, pursuant to request by the Respondent, the Petitioner was agreeable to continue the loan facility at the increased rate of interest to 12.5% per annum from 9.25% per annum, payable quarterly with effect from 16th March, 2019. The said Supplemental LOI has been duly accepted by the Respondent.

6. Notices were also issued for remitting the overdue interest. The interest payable in the account of the Respondent had also become overdue since 1st April, 2019. A perusal of the Statement of Account reflects four entries all dated 30th March, 2019 which is in respect of the interest for the March, 2019 quarter which fell due on 1st April, 2019, which aggregates to Rs.3,03,49,376/-. Even thereafter, there were various margin call defaults in respect of which, notices were issued

by the Petitioner to the Respondent since 3rd April, 2019 with regard to the margin shortfall of the securities. In view of the fact that there was depreciation in the security cover as also interest overdue as on 1st April, 2019 of the said sum of Rs.3,03,49,376/-, the Petitioner invoked the remedy provided under the LOI and FA and issued notice for event of default and recall of loan dated 13th May, 2019. Vide the said notice, the Respondent was called upon to pay the entire outstanding Principal and Interest Amount along with miscellaneous charges, totalling to Rs. 130,04,32,256/-

7. It is pertinent to note that immediately after the receipt of the said notice, the Respondent made four payments on 17th May, 2019 and 22nd May, 2019 aggregating to the sum of Rs.3,03,49,376/-from its own funds which were adjusted towards the interest which was overdue as on 1st April, 2019.

8. On 1st July, 2019 interest for the June quarter aggregating to Rs.3,96,27,769/- again fell due which is reflected in the four entries dated 1st July, 2019 appearing in the Statement of Account. It is pertinent to note that two of the entries dated 1st July, 2019 were for CGST for Rs. 51,276/-and SGST for Rs. 51,276/-which were subsequently reversed on 25th September, 2019 as reflected in the two entries dated 25th September, 2019 as shown in the Statement of Account.

9. Thereafter, to repay the interest overdue as on 1st July, 2019 and with a view to reduce the principal amount outstanding, the Respondent decided to sell / consent to the Petitioner's selling the pledged shares. Accordingly, on 30th July, 2019, a sum of Rs.11,56,27,769/-was credited to the account of the Respondent maintained with the Petitioner. Out of this sum of Rs.11,56,27,769/-, a sum of Rs.3,96,27,769/-was adjusted towards the interest overdue as on 1st July, 2019 and the balance of Rs.7,60,00,000/-was adjusted towards principal as per the express understanding with the Respondent.

10. The Respondents thereafter sold/consented to sell further pledged shares by stake sale and/or otherwise. Accordingly, the following amounts were received and credited to the account of the Respondent maintained with the Petitioners:

Date	**Amount Credited**
31.07.2019	Rs. 10,87,60,296.71
01.08.2019	Rs. 1,86,09,222.80
02.08.2019	Rs.12,68,60,286.87
09.09.2019	Rs.13,20,00,000.00

All the aforesaid amounts received between 31st July, 2019 and 2nd August, 2019 were adjusted towards the principal outstanding and the same was communicated to the Respondent through email dated 09.08.2019. The agreement of the Corporate Debtor to the above stated apportionment can be traced from the email dated 26.08.2019 wherein the Corporate Debtor duly acknowledges the appropriation of amount towards Principal by the Financial Creditor. The excerpts of the above stated emails dated 31.07.2019, 09.08.2019 and 26.08.2019 are reproduced, respectively, herein under:-

> *"Sub:*
>
> *Request to share the appropriation details of the proceeds of share sale."*
>
> *"Sub:*
>
> *Attached is the detail"*
>
> *"Sub: Invocation and Sale of Shares*
>
> *There is a minor mismatch of Rs. 134,832 between details as shared by you and total appropriation of sales proceeds amongst Jayneer and ECRPL.*
> *Can you please adjust the figures so that the other charge are allocated in a manner that they match with the sales proceeds."*

11. The appropriation of Rs. 13,20,00,000/- towards Principal can further be evidenced in the email dated 19.09.2019 addressed from the petitioner to the Corporate Debtor categorically stating adjustment towards Principal Amount. The above stated email is reproduced here in under:

"Sub: Essel Group- Principal Outstanding Dues

As per stake sale agreement STCI received Rs. 13.20 Crs each in Essel Corporate Resources Pvt. Ltd. & Jayneer Infrastructure and Multiventures Pvt. Ltd. and the same has been adjusted towards principal repayment. The present principal outstanding in both the account as under:

Essel Corporate Resources Pvt Ltd	*Rs. 78,77,70,194/-*
Jayneer Infrastructure and Multiventures Pvt. Ltd.	*Rs. 78,77,70,194/-*

Let us know future plan of action for repayment of the entire outstanding in both the account."

12. On 26th September, 2019, a sum of Rs.10,37,77,794.50 was credited to the account of the Respondent maintained by the Petitioner pursuant to sale of pledged shares by the Petitioner with the consent of the Respondent.

13. Interest fell due for the September quarter as is reflected by the two entries dated 30th September, 2019. The interest for the September quarter aggregated to Rs.3,17,77,794.50. The said interest amount was adjusted from the earlier credit received on 26th September, 2019 of Rs.10,37,77,794/-, the balance amount of Rs.7,20,00,000/-lying after adjustment of the interest due for the September quarter was adjusted towards principal as per the agreement between the

Petitioner and the Respondent as evidenced in the emails dated 7th January, 2020 and 30th June, 2020. The above stated emails are reproduced below respectively:

> *"Sub: Appropriation of amount vide sale of Pledged Shares*
>
> *Kindly refer attached email, whereby we have intimated that payments made to STCI Finance Ltd. vide sale of shares have been appropriated towards Principal."*
>
> *"Sub: Appropriation of Payment vide sale of Pledged Shares- ECRPL and Jayneer Loans*
>
> *We are accounting all payments made to STCI Ltd. for ERCPL and Jayneer loans, vide sale of Pledged Shares, as an adjustment towards Principal."*

14. The Corporate Debtor had not raised any objections to the said emails in any manner at that time.

15. Interest of Rs.2,25,51,664/-once again fell due on 1st January, 2020 in respect of the December quarter as reflected in the Statement of Account.

16. The Respondent however, thereafter once again defaulted in making payment of the interest which fell due on 1st January, 2020. No payment had been received thereafter. As a result thereof, the said date had been declared as a date of default by the Petitioner and the same is reflected in the NESL Report dated 15th February, 2022.

17. As the interest of December quarter remained overdue for a period of three months, the Petitioner as per the Master Direction of RBI No. DNBR.PD.008/03.10.119/2016-17 updated as on 17th October,

2016, required to declare the account of the Respondent as a Non Performing Asset.

18. It is pertinent to note that sale of the pledged shares and the appropriation done towards principal were with the express agreement between the Petitioner and the Respondent. The same is evidenced by a perusal of the emails dated 26th August, 2019, 19th September, 2019, 7th January, 2020 and 30th June, 2020 addressed by the Respondent to the Petitioner.

19. In view of the aforesaid, it is evident that the notice of event of default and recall was given on 13th May, 2019. However, as the overdue interest as on 30th March, 2019 was repaid immediately after the notice was issued and further payments were also made towards interest which fell due for June quarter and September quarter and payments were also made towards principal as per agreement between the Petitioner and Respondent so as to meet the margin shortfall. However, no payments were made for the December 2019 quarter and hence 1st January, 2020 is clearly the Date of Default. The Account of the Respondent was declared as *"Non Performing Asset"* on 31st March, 2020 in accordance with RBI Master Directions.

20. The petitioner submitted that the Respondent had attempted to mislead this Hon'ble Tribunal in terms of the actual value of shares and OCD's pledged with the Financial Creditor. The value of such OCD's was 125 cr as on date of sanction of the loan. However, due to market fluctuations and poor performance of the third party pledger companies, the value of the shares had been constantly depreciating and as a consequence the asset cover (as mandated by LOI) was constantly falling. The same is also evident from the various margin call notices issued by the petitioner to the respondent. It is pertinent to note that the Respondent had deliberately suppressed the fact of the repeated margin call notices issued by the petitioner to the respondent and the fact that the sale of pledged shares effected between 31.07.2019 and 02.08.2019 and appropriation towards

principal was to meet the interest outstanding and margin shortfall as per the agreement. Further, the OCD's of Pan India Infraprojects Private Limited held by petitioner as security in the loan account have no value as on date as Pan India Infraprojects Private Limited was admitted to CIRP vide order dated 16.07.2020 and recently admitted to liquidation vide Order dated 04.10.2023. Additionally, this security is apportioned to two loans of Rs. 125 crores granted to the Respondent as well as to the group company viz. Jayneer Infrapower and Multi Ventures Private Limited. It is submitted that the shares are not sufficient to meet the dues of the two above stated loans.

21. It is submitted that the date of default is significant for the purposes of determining whether the Section 7 Company Petition has been filed within the period of limitation or not. It is further submitted that Section 7 does not require the Petitioner/Financial Creditor to give a Demand Notice to the Respondent/Corporate Debtor. There is a clear distinction between Section 7 and Section 8 of the Insolvency & Bankruptcy Code ("Code"). It is only under Section 8 of the Code that a Demand Notice is a prerequisite to the filing of a Section 9 Petition. This is a settled position in law. In the circumstances, it is submitted that no fresh Demand and/or Recall Notice is required. Furthermore, for the purpose of filing Section 7 petition, the Date of Default need not be that of the first default. In order to substantiate the above stated contention, the petitioner relies on the following judgements:

- *India Bulls Housing Finance Limited Vs. Revital Realty Private Limited* ***2022 Law Suit (NCLT) 445***

  "It is not necessary for the 'Appellant' to file an application under Section 7 of the Code, on the happening of first default of amount due and it is discretion of the 'Financial Creditor' to decide filing an application under Section 7 as per the facts and his legal rights"

"For every default there is a fresh period of limitation."

- *Koncentric Investments Limited Vs. Standard Chartered Bank, London and Anr* ***(2022) SCC Online NCLAT*** *wherein the Hon'ble NCLAT held as follows*

"The default may be of different nature on some default the entire amount may become due like when Account is declared NPA…….IBC does not comprehend that on first default committed by any debtor, all creditors should rush to IBC……Where debtor is unable to pay a fraction of debt which becomes due there is no presumption that Debtor has become insolvent and in an event the Creditor awaits for some time like default by non-payment of first instalment or entire due as in the present case the right of creditor shall not be foreclosed…..We are thus not persuaded to read an additional word "First" before the expression "Default" under sub section 1 of Section 7 as contended by Learned Senior Counsel for the Appellant"

22. In view of the said defaults as also the creation of mortgage, the Financial Creditor, in exercise of the powers conferred in terms of Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") issued a notice dated 8th January, 2021 to the Respondent as also the Mortgagor calling upon them to jointly and severally pay Rs. 83,66,25,128/-(Rupees Eighty Three Crores Sixty Six Lakhs Twenty Five Thousand One Hundred and Twenty Eight only) within 60 days from the date of the said notice. The Petitioner thereafter sought to take further action under the SARFAESI Act, but could not do so,

owing to the fact that there were several proceedings going on against the Mortgagor including Company Petition (IB) No. 97 of 2022 and Company Petition (IB) No. 98 of 2022 filed before the Hon'ble NCLT, Delhi under section 95 of IBC, as a result whereof the interim moratorium was in force. Resultantly, the Petitioner was rendered remediless as regards the remedies available under the SARFAESI Act. It is also pertinent to note that remedy under this Code is joint and several qua other remedies.

23. As per Section 7 of the Code, Limitation Period is calculated up to 3 years from the date of default i.e. 1st January 2020. The Petition has been filed on 14th October 2022 well within the period of limitation.

24. In any event and without prejudice to the aforesaid it is submitted that the Respondent had on 25th May 2021 made a One Time Settlement Proposal ("OTS") which was a composite proposal for both Essel Group companies viz the Respondent and Jayneer Infrapower and Multi Ventures Private Ltd. In the OTS the Respondent has clearly acknowledged both the debt and security due to the Petitioner. The said OTS clearly extends period of limitation. The Petitioner relies on the following judgement to substantiate his contention:

- *Dena Bank Vs. C. Shivkumar Reddy and Anr* ***(2021) 10 SCC 330*** *wherein the Hon'ble Supreme Court held as follows*

  "Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of one time settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgement to attract Section 18 of the Limitation Act."

25. The petitioner also submitted that the Rejoinder filed by it, on being permitted by this Hon'ble Bench NCLT Mumbai, Court V, is only explanatory in nature in respect of the facts already stated in the

petition. No new facts have been pleaded. Further, the rejoinder also seeks to answer the frivolous issues raised by the Respondent in the Reply. It is to answer such issues that documents have been annexed to the rejoinder.

Submissions by the Corporate Debtor

26. It is the preliminary objection of the Corporate Debtor that this Petition has been wrongfully filed and ought to be dismissed on the sole ground of absence of any cause of action. There was no cause of action as there was no default on date of filing this petition. The total of interest for the three quarters Apr – June, July – Sept and Oct-Nov was Rs. 9,39,57,227.5/- whereas amount received by Financial Creditor from sale proceeds of pledged shares is Rs. 50,18,57575.38/- (substantiated by Statement of Account maintained by Financial Creditor). The sales proceeds were appropriated towards the outstanding interest for the first two quarters but due to their inappropriate allocation towards the outstanding Principal component of debt they resultantly could not be appropriated towards the outstanding Interest amount of Rs. 2,25,51,664 for the quarter of Oct-Dec 2019. Thus it is clearly evident that the sale proceeds of pledged shares were much greater than the interest due and payable and could be appropriated successfully towards the Interest amount thereby leaving no scope of default.

27. Considering the fact that the Sanction Letter and Loan Agreement expressly provide that the Principal was only repayable on 18.03.2021 (36 months after the date of first disbursement i.e. 19.03.2018), the Financial Creditor could not have appropriated this sum towards the Principal Amount without there being an agreement in writing between the Petitioner and Respondent as per stipulated clause 21.7 in Facility Agreement executed between the parties. The above stated clause is reproduced here in under:-

"Amendment

No amendment of any term or provision hereof shall be effective unless made in writing and signed by both parties hereto"

In order to substantiate this contention, the Corporate Debtor relies on the following judgements:-

- Rock Advertising Ltd. v. MWB Business Exchange Centres Ltd. **[2018] 4 All ER 21** in which the Supreme Court of United Kingdom held as follows:

  "….Oral variation which Judge Moloney found to have been agreed in the present case was invalid for the reason that he gave, namely want of the writing and signatures prescribed by clause 7.6 of the license agreement…."

- Joshi Technologies International Inc. v. Union of India **(2015) 7 SCC 728** in which the Supreme Court of India held as follows:

  "…43. We have already noted that Article 32.2 categorically provides that this Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the parties, which shall state that the date upon which the amendment or modification shall become effective. In continuation to what has been observed by us while answering point no. (ii) above, it becomes apparent that the question of any intention to the contrary between the parties does not arise. It is because of the reason that Article 32 of the Agreement

specifically supersedes any understanding between the parties prior to the effective date of this contract.

....54....Not only prior understanding between the parties stood suspended as mentioned in Article 32.1, Article 32.2 which is crucial to answer this question, bars any amendment, modification etc. to the said contract except by an instrument in writing signed by all the parties...."

28. The Financial Creditor has failed to bring on record any such amendment /agreement and hence mala fide conduct on the part of the Petitioner is reflected. Additionally, under Clause 23 of the Sanction Letter, it is provided that in the event of pre-payment, a fee of 2% is to be charged thereon. However, no such charge had been levied by the petitioner.

29. It is the further case of the Corporate Debtor that the actions of the Petitioner are bad and illegal. This is because the Petitioner rejected the OTS offer which was given by the Respondent on considering underlying value of shares. However, after the aforesaid act of rejection of the OTS, the Petitioner has not sold shares as yet and have proceeded only to invoke and keeping those shares in their custody. If the petitioner was really interested in its resolution, then it ought to have either sold the shares if the value was higher or accepted the OTS proposal however the petitioner is not interested in resolution.

30. It is pertinent to state that the Petitioner has not sold the securities well in time. It is pertinent to state that the value of OCDs issued by one Pan India Infraprojects Pvt. Ltd., which are available with the Petitioner as a security was at least Rs. 125 crores at the time loan was given, as per sanctioned terms. However, if the Petitioner as stated earlier is actually interested in resolution then it ought to have disposed of the abovementioned OCD's as well much ahead in time.

However, the Petitioner is still holding the said OCDs. It is pertinent to note that in order to arm twist the Respondent, the Petitioner arbitrarily increased rate of interest from 9.25% to 12.50% in January 2019 (with effect from 16.03.2019) within 9 months from sanction by invoking call option and then revoking it. After it was increased, the call option was withdrawn as the intention once again was to arm twist the Respondent and not look at resolution. Additionally, it is pertinent to state that the Petitioner has allegedly invoked provisions of the SARFAESI Act, 2002. However after issuing the notice under section 13 (2) it has not taken any further steps. It is also pertinent to state that the Value of properties mentioned in the Petition is much higher as per the records of STCI. However the Petitioner in order to usurp the properties of the Respondent group is only showing value of properties as approx. Rs. 11 crores in the petition.

31. It is the further case of the Corporate Debtor that recall of loan is bad and has been duly waived. The loan was recalled in May 2019, then account could not have been made NPA in March 2020 with date of default being 1st Jan 2020. As per RBI circulars, account becomes NPA in 90 days from first date of default.

32. It is pertinent to state that sufficient consideration was received by the Petitioner from sale of shares in September and November of 2019, through coordinated sale of shares of Zee Entertainment Enterprises Ltd. Therefore, the Petitioner is estopped from proceeding further on the basis of such a recall when the same was waived by it.

33. Further, the loan was sanctioned for period of 3 years with bullet repayments at the end of 3 years. Significant consideration was received by the Petitioner from sale of shares which could have been appropriated towards interest payments as no principal payment were due in year 2019, and thus account could not be made NPA in March 2020. Improper appropriation of amounts has been done to avoid section l0A bar, since loan was sanctioned for 3 years and repayment date could have fallen only in March 2021 during the period of l0A. It

is evident that the present petition has been filed as an afterthought to protect l0A issue in year 2022. If the first disbursement was on 19.3.2018 then the default, if any, would have taken place on or after 19.3.2021 and as the term of loan was 3 years with bullet repayment from the date of first disbursement. Therefore, the date of default and repayment both fall under section 10A period which has been purposely suppressed by the Petitioner.

34. It is also pertinent to state that the Principal overdue as on 31st March 2020 is incorrect as loan recall itself on 13.05.2019 was defective. The Petitioner raised enough funds from sale of pledged shares and appropriated the same towards the due default. The net effect of the action of the petitioner was deemed recall of the notice dated 13.05.2019. It is also pertinent to state that no fresh loan recall notice was issued by the Petitioner before filing the present petition. Therefore, the previous action becomes waived and anything pursuant thereto cannot be pursued further.

35. In respect of the date of default, the recall notice was dated 13.05.2019, and therefore, the account could have become NPA in the month of August 2019 i.e. within 90 days period. However, in the Petition the Date of Default is mentioned as 01.01.2020, thus evidencing the fact that the said recall of loan on 13.05.2019, was duly waived and the date of default is not correct.

*It is a settled law that the date of default cannot be shifted as "the right to sue accrues" when a default occurs i.e. on the original cause of action as held by the Hon'ble Supreme Court in the matter of BK Educational Services Pvt. Ltd. v. Parag Gupta and Associates (**2019) 11 SCC 633**.*

Apparently the Petitioner has carried out an amendment in the Petition and date of default was changed from 31.1.2020 to bring the same out of the IBC suspension period. It is settled position of Law that the Financial Institution cannot change date of default as per its convenience and therefore, this Petition is not maintainable in the eyes of Law. In order to substantiate its contention, the Respondent places

reliance on the following judgment of this Hon'ble Tribunal namely *Inakshi Sobti v. Starlight Systems Pvt. Ltd.* ***(IA No. 5054 of 2023 in CP (IB) No. 778 of 2023)*** wherein it was held that a financial creditor under Section 7 of IBC does not have a right to change the date of default.

36. Petitioner has stated Date of Default as 01.01.2020 without any supporting to that effect that how the Petitioner has arrived at such date. Further, even if for assumption it is considered that the loan account is in default since 01.01.2020 then in respectful submissions of the Respondent the entire loan did not become due and payable as on 01.01.2020 since the said date would be a date of an quarterly interest.

However, the said date being intimated as date of default in the Petition; it creates an impression that the whole loan amount is due and payable w.e.f. 01.01.2020 whereas the date of NPA is 31.03.2020. And it is settled position of Law that until and unless the Loan account is declared as NPA, the whole loan amount cannot be recalled.

37. But in the Petition the amount claimed is the entire amount which is allegedly in default. Therefore, the said amount cannot be claimed to be in default w.e.f. 01.01.2020. However, since the account is declared as NPA w.e.f. 31.03.2020 the said date is clearly covered under the provisions of Section 10A of the Code which envisages that no Petition can be filed under provisions of the Code for a default occurred after 24.03.2020 till operation of Section 10A. lt is also noteworthy that the provisions of S. l0A were applicable up to 23.03.2021 and therefore since the date of NPA of the loan account in question clearly falls in this intervening period of S. l0A the Petition is not maintainable and liable to be dismissed. As the first disbursement was 19.3.2018 then the default would have taken place only on 19.3.2021 and not before or afterwards as the term of loan was 3 years with bullet repayment from the date of first disbursement. Therefore, the date of default and

repayment both fall under Section 10A period which has been purposely suppressed by the Petitioner.

38. Further the initial default qua interest has occurred in the year 2019 itself when the Loan was recalled by the Petitioner. Therefore, the first cause of action arose, qua the Petitioner to file the present Petition, on 13.05.2019 itself. There is no document on record to demonstrate that the Petitioner has revoked the said letter dated 13.05.2019. Accordingly, the period of Limitation as prescribed by the provisions of S. 238A of the Code got exhausted on 12.05.2022. However, the present Petition is filed on 18.10.2022 by the Petitioner which got registered on 31.10.2022. Accordingly, the Petition is clearly time barred and the Petitioner has not made any averment seeking condonation of delay to the present Petition. Therefore, on this ground alone the Petition is not maintainable and liable to be dismissed.

39. It is also to be noted that time and again through various Judgements/ Orders passed by this Hon'ble Tribunal and / or by the Appellate Authority and/ or by the Apex Court the position of Law is made clear that to initiate an Insolvency Proceedings against any Corporate Debtor there should be a specific authority to that effect. However, if we peruse the Power of Attorney annexed with the Petition then it can be seen that the said document provides for general powers to the signatory to represent the Company i.e. the Petitioner and the said document nowhere provide any authority to initiate Insolvency Proceedings against the Respondent.

40. The Petitioner is secured against the Loan with the Shares of entities like Zee Entertainment, Dish TV, Zee Media. As on date the value of the said Shares and mortgaged properties is to the tune of 100 Crores whereas the Principal amount claimed through the Petition is 71 Crores. Further, the Petitioner continues to hold the OCD's which were given to it at the time of loan sanction for the reasons best known it. Accordingly, it is clear that the Petitioner can recover the Loan by

realising its Security which is provided by the Respondent and there is no reason for the initiation of lnsolvency qua the Respondent.

41. Furthermore, without prejudice, during this interregnum period the Petitioner has also sold some of the pledged Shares which were lying as Security against the borrowings. By this sale transactions, as on 26.09.2019, the Petitioner has realised/ appropriated an amount of Rs. 26,24,47,859.87/-. However the same is not reflecting in the ledger annexed with the Petition. Further, the Respondent Company has also sought clarity on appropriation. No such clarity is evident from the record. In this regard the copies of E-mails for appropriation of the said amounts, the consideration / sale transfer receipt issued, both are annexed to the Reply.

42. The Corporate Debtor also states and submits that the OTS Letter dated 25.05.2021 was issued by Jayneer Infrapower & Mutiventures Pvt. Ltd. and not by the Corporate Debtor. It was not signed by the Corporate Debtor and in fact does not even mention its name anywhere and hence it cannot tantamount to an acknowledgement of liability.

43. Furthermore, the intention of the Legislation behind enactment of the Code is to seek revival of the Corporate Debtor and the Petitioner / Creditor shall not approach the Tribunal with a motive to recover the amount due. Therefore, when the Respondent is ready and willing to pay the outstanding amounts to the Petitioner and furthermore, the securities lying with the Petitioner are sufficient to meet the debt owed then in that case there is no need to initiate an Insolvency Resolution Process as against the Respondent, which is a solvent entity. The Respondent relies upon the following judgements to substantiate his case:-

- *Transfer Appeal (AT) 227 I 2021 (Company Appeal (AT) (Ins) No. 326 I 2020 wherein the Hon'ble NCLAT has held as follows*

  "Regarding whether Section 9 Application can be entertained against a Solvent Company, the

scope and objective of the Code has to be kept in mind before admission of such an Application. The spirit of the Code is maximization of the assets and Resolution and not Recovery. The Hon 'ble Supreme Court in the matter of 'Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Anr." (Supra) has held that "the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors."

44. It is the further case of the Corporate Debtor that the petitioner had pleaded an entirely new case and brought on record new documents in rejoinder, which was filed after the matter was part heard on 3 occasions. The apportionment of sales proceeds of pledged shares towards Principal amount is a new fact brought on record of this Hon'ble Tribunal through a Rejoinder by the Petitioner which is impermissible. In order to substantiate this contention, the Corporate Debtor relies on the decision of the Hon'ble NCLAT in *SBI v. India Power Corporation Limited [Company Appeal* ***(AT) (CH) (Ins) No. 87 OF 2023]*** in which it was held as follows:-

"….We have heard counsel for the parties in this regard and are of the considered opinion that when the Appellant/Petitioner sets up a case in the application filed either under Section 7, 9 or 10 of the Code then as per Rule 41 of the Rules, the Respondent shall specifically admit, deny or

rebut the facts stated by the Applicant in his petition or application and state such additional facts as may be found necessary in his reply whereas it is provided in Rule 42 of the Rules that where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply pertaining to those additional facts but it cannot set up a new case altogether which has not been set up by the Applicant in the main Application as it would again require a reply by the Respondent and further rejoinder by the applicant and the process will go on and shall never come to an end. In any case, the petitioner cannot enlarge the scope of the petition by adding a new ground in the rejoinder as the purpose of a rejoinder is not fill in the gaps left by the petitioner in their pleadings…"

Therefore, the Corporate Debtor submitted that the present petition deserves to be dismissed not only on account of cause of action but also on account of date of default. The attempt of the Petioner to bring on record additional facts through Rejoinder deserve no consideration.

Findings

45. From the perusal of the above stated facts and documents placed on record by the contesting parties and after appreciating the contentions of both the Ld. Counsels, it is pertinent to note that the present case has been filed by the petitioner for the default of amount of Rs. 125 Cr. The date of default stated to be in the present case is 01.01.2020. It deserves to be appreciated that as per the Letter of Intent dated

01.03.2018 placed on record, the loan amount sanctioned was Rs. 125 Cr. and the tenure of loan was 36 months from the date of first disbursement i.e. 19.03.2018. The payment of interest was stated to be made quarterly. The petitioner had the right to call back the loan and the respondent/corporate debtor had the right to repay the loan at the end of every 12 months from the date of its disbursement by giving 15 business days prior written notice of intention to exercise the option after payment of penal interest @ 2%. The repayment of loan was stated to be bullet repayment at the end of 3 years from the date of 1st disbursement.

46. In the present case, the date of 1st disbursement is 19.03.2018. The quarterly payment of interest was stated to be remitted on the first day of succeeding quarter. It was also stated that in the case of the default committed in the repayment in quarterly interest, the petitioner shall have the right to recall the loan.

47. From the stated facts, it is evident that the present case has been filed on the default of due quarterly interest as otherwise with respect to the principal amount the default if any had to be on or after 18.03.2021 i.e. 3 years from the date of 1st disbursement, which is 19.03.2018. The case of the petitioner is that till March-2019, the respondent paid the quarterly interest but started defaulting thereafter. It is stated that the respondent had pledged shares with the petitioner as security. On the default of quarterly payment in interest on the part of the respondent, the petitioner sought the consent from the respondent to dispose of the pledged shares. The consent was granted by the respondent vide emails dated 07.01.2020 and 30.06.2020. With the consent of the respondent, the petitioner disposed of the said pledged shares and raised the following amounts.

Date	**Amount received from sale of Pledged Shares**
30.07.2019	Rs. 11,56,27,769

31.07.2019	Rs. 10,87,60,296.71
01.08.2019	Rs. 1,86,09,222.80
02.08.2019	Rs.12,68,60,286.87
09.09.2019	Rs.13,20,00,000.00 **<u>Total</u>- 50,18,57575.38**

48. From the perusal of the above, it is evident that from July-2019 to September-2019, the amount in the hands of the petitioner was more than Rs. 50 Cr. It is the case of the petitioner that the quarterly interest was due, and the default happened from April-2019 onwards. Thus due to this default on the part of the Corporate Debtor formerly recalled on 13.05.2019 pursuant to default in payment of interest in the quarter ending March 2019. Thus, for the sake of appreciation even if the case of the petitioner is taken on its face value, then also the following amounts would be due on the date of the recall of the entire loan amount i.e. 13.05.2019

Interest for the Quarter of	**Corresponding Amount**
Apr-June 2019	Rs.3,96,27,769
July-Sept 2019	Rs.3,17,77,794.50
Oct-Dec 2019	***Rs. 2,25,51,664*** **<u>Total</u>- 9,39,57,227.50**

49. From the perusal of the above two tables, it is evident that the contention of the petitioner that the present petition is filed due to default in payment of quarterly interest of Oct-Dec 2019 which was stated to be Rs. 2,25,51,664/- whereas as per their own admission, the amount in the hands of the petitioner from the sale proceeds of the pledged share was

501857575.38. Thus the amount in the hands of the petitioner is much more than the liability of the Corporate Debtor. Hence, there was no occasion for the petitioner to file the present petition. As is evident from above that the amount in the hands of the petitioner was much more than the liability of Respondent. Thus there was no cause of action. The petition deserves no consideration on this sole ground itself.

50. The case of the petitioner further is that after the sale of the pledged shares, a consent was sought from the respondent vide an email dated 07.01.2020 and 30.06.2020 seeking the permission from the respondent to adjust the excess consideration received from sale of pledged shares towards the principal amount which in terms of the loan agreement was due after a period of 3 years. The case of the petitioner is that in view of the consent having been obtained from the respondent/corporate debtor after adjusting the amount towards the quarterly interest payment the remaining consideration was adjusted towards the principal amount.

51. On the other hand, the case of the respondent is that this act on the part of the petitioner to adjust the excessive amount in their hands towards the principal was unreasonable, arbitrary and illegal as both the parties had entered into a contractual agreement dated 01.03.2018 stipulating the terms and conditions of the said contract. The terms agreed upon was that the principal amount is to be paid after a period of 3 years and the mode of the payment was bullet payment. Thus, this part adjustment towards the principal amount is itself inappropriate on the part of the petitioner. Further, the case of the respondent is that in view of the fact that both parties were bound by the written terms of contract, it was inappropriate on the part of the petitioner to have altered the said terms merely on the strength of emails dated 07.01.2020 and 30.06.2020. The reliance was also placed on the Facility Agreement clearly stating that no amendment be made except unless in writing and signed by both the parties. Thus on appreciation of this document also it is evident that the conduct of the petitioner has not been in terms of the contractual agreement signed between the parties.

52. Reliance on the judgment of the Hon'ble Supreme Court in *Joshi Technologies International Vs. Union of India 2015(7) SCC 728* has further substantiated the contention of the Corporate Debtor that the contract cannot be modified or varied except by an instrument in writing signed by the parties., which has already been taken note of in the pleadings of the respondent. The Ld. Counsel also relied upon the judgement in *Rock Advertising Ltd. v. MWB Business Exchange Centres Ltd. [2018] 4 All ER 21*.

53. Keeping in view the above stated judgments and also on due appreciation of the documents placed on record and the contentions of the Ld. Counsel, we deem it appropriate to hold that the contract cannot be amended or modified except in writing and signed by the same parties. In the present case, if at all, the petitioner intended to alter the terms of the contract, the same could not have been done in any other manner but by a written contract between the same parties as was done at the time of disbursement of loan amount.

54. It further deserves to be taken note of that during the course of arguments when the counsel for the respondent brought the fact of having paid much more than the amount due towards quarterly interest, the counsel for the petitioner sought time to seek appropriate instructions. Subsequently, taking permission from the Bench, the Ld. Counsel for the petitioner filed the rejoinder in the present case explaining the above adjustment of the excess amount received. The Counsel for the respondent took a serious objection to the rejoinder having been placed explaining the adjustment of the excess consideration towards the principal amount whereas the default is stated to be of the quarterly interest due towards petitioner. To substantiate his argument, the Ld. Counsel placed reliance upon the judgment of Hon'ble NCLAT in the matter of *SBI vs. India Power Corporation Limited [Company Appeal (AT) (CH) (Ins) No. 87 OF 2023]* wherein the Hon'ble NCLAT has categorically held that the petitioner cannot be permitted to set up a new case by filing a rejoinder. The rejoinder

is only to place on record such additional facts as may be necessary for the just decision of this case.

55. On appreciation of the facts of the present case, we are of the opinion that the petitioner has made an attempt to justify the adjustment of the excess amount received from sale of pledged shares by stating as under in the Rejoinder:

> *"ix……Out of this sum of Rs.11,56,27,769/-, a sum of Rs. 3,96,27,769/- was adjusted towards the interest overdue as on 1st July, 2019 and the balance of Rs. 7,60,00,000/- was adjusted towards principal as per the express understanding with the Respondent."*
>
> *……*
>
> *"xiii Interest fell due for the September quarter as is reflected by the two entries dated 30th September, 2019 at page 115 of the Company Petition. The interest for the September quarter aggregated to Rs. 3,17,77,794.50. The said interest amount was adjusted from the earlier credit received on 26th September, 2019 of Rs. 10,37,77,794/-, the balance amount of Rs. 7,20,00,000/- lying after adjustment of the interest due for the September quarter was adjusted towards principal as per the agreement between the Petitioner and the Respondent."*
>
> *……*
>
> *"xxi The Petitioner has also sold some of the pledged shares and appropriated the amounts so received towards the*

outstanding dues in both loan accounts of the Respondent and of the group Company Jayneer Infrapower and Multi ventures Private Limited……"

56. In view of the above stated facts and the settled law, we are not inclined to appreciate the contention of the petitioner in the present case.

57. Taking the totality of the circumstances in consideration and appreciating the facts and circumstances of the present case, it is evident that if the proceeds from sale of pledged shares were adjusted fairly towards the quarterly interest due, no default of the interest would have happened. If after a period of 3 years on non-payment of principal amount, the default had to happen, the same would have happened on or after 18.03.2021 which would have fallen under Section 10A. Thus, making the case non-maintainable.

58. Therefore, taking the totality of the circumstances in consideration, we deem it appropriate to reject the present **C.P. 1155/IB/MB/2022.**

Sd/-
Madhu Sinha
Member (Technical)

Sd/-
Reeta Kohli
Member (Judicial)

//VLM//