NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 274 of 2023

IN THE MATTER OF:

Shilpi Asthana ...**Appellant**

Versus

Indusind Bank Ltd. & Anr. ...**Respondents**

Present:

For Appellant : **Mr. Vikram Nankani, Sr. Adv. and Mr. Krishnendu Datta, Sr. Adv. with Mr. Shubham Saigal & Gaurika Sood, Advocates.**

For Respondents : **Mr. Diwakar Maheshwari, Mr. Karun Mehta, Pratiksha Mishra, Mr. Shreyas Edupuganti, Ms. Kaarunya Lakshmi, Advocates for Advocates for R1**

Mr. Anmol Mehta, Advocates For RBL Bank

Mr. Abhinav Vasisht, Sr. Adv., Mr. Manmeet Singh, Mr. KP Singh, Anjali Devedi, Mr. Manav Sharma, Mr. Vishal, Advocates for R3

Mr. Vishal Bijlani, Advocates for Axis Bank Ltd.

Mr. Aseem Chaturvedi, Mr. Siddhant Kumar, Ms. Pragya D., Ravitej C., Advocates for Aditya Birla Finance Limited.

Mr. Manpreet Singh, Ms. Shivani Sharma, Advocates for R9

Mr. Sanchar Anand, Mr. Apoorv Singhal, Ms. Sumbul Ausaf, Md. Ashfaq, Advocates for impleadment

Mr. Karan Mehra, Kunal Malhoitra, Advocates for R6

O R D E R

Per: Justice Rakesh Kumar Jain:

10.08.2023 Appellant is the Suspended Director of Siti Networks Limited (Corporate Debtor) who is aggrieved against the order dated 22.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – III) by which an application filed under

Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') by the Indusind Bank Limited (Financial Creditor) bearing CP No. 690/IBC/MB/2022 for the resolution of an unresolved financial debt of Rs. 1,48,82,90,236.22/- has been admitted, Corporate Insolvency Resolution Process (in short 'CIRP') was initiated, moratorium was imposed and Rohit Mehra was appointed as an Interim Resolution Professional (in short 'IRP').

2. In brief, the Corporate Debtor is a multi-system operator and provides television services across India. It availed Term Loan Facility-I of sanction limit of Rs. 250,00,00,000/- and Term Loan Facility-II of Rs. 150,00,00,000/- , total exposure of Rs. 400 Crores from the Financial Creditor vide sanction letter dated 29.06.2018. As per the repayment schedule, provided in the sanction letter dated 29.06.2018, the repayment under Facility-1 was on half yearly basis as per following schedule from the date of first disbursement.

Repayment Schedule	Facility 1: Principal repayment under facility on half yearly basis to be as per following schedule from date of first disbursement						
	Timeline	31-Dec-18	30-Jun-19	31-Dec-19	30-Jun-20	31-Dec-20	30-Jun-21
	Repayment (INR Cr)	10.0	25.0	25.0	50.0	50.0	90.0

3. Whereas the repayment of Facility – II was in eight quarterly principal instalments of Rs. 18.75 Crores starting from September 30, 2021 and ending in June 30, 2023. There was one-time financial bank guarantee limit of up to Rs. 95 Cr. in Facility-II about which it was provided that the bank guarantee

outstanding will reduce in line with disbursement of term loan under Facility II towards closure of buyer's credit facility of Rs. 95 Crores availed from the IDBI.

4. Although, the term loan facility -I was sanctioned for Rs. 250 Crores but Rs. 72,96,02,313.00 was disbursed by the Financial Creditor and in respect of term loan facility-II of Rs. 150 Crores, Rs. 83,08,00,000/- was disbursed.

5. Shorn of unnecessary details, the Financial Creditor filed an application on Form 1 and averred in Para 2 of Part IV that "**Amount of Default:** The total amount of default in respect of both the facilities in INR 1,48,82,90,236.22 as on 31.03.2022. The default amount under Term Loan 1 is INR 53,95,41,386.22 as on 31.03.2022. The Default amount under Term Loan 2 is INR 94,87,48,850/- as on 31.03.2022. The statement of account of the Financial Creditor in respect Term Loan I and Term Loan II is annexed herewith as Exhibit GG. Date of Default: 30.06.2021 for term loan I and 01.11.2020 for Term Loan II."

6. The Application was contested by the Appellant by filing a reply in respect of term loan II on the ground that since the default had occurred on 01.11.2020, therefore, it would be hit by Section 10A of the Code. The averment made in Para 5 in this regard is reproduced as under:-

> "Further, it is claimed by the Financial Creditor that the alleged default for Term Loan 2 has occurred on 1st November, 2020. Hence, the present petition being filed for a default that has occurred on 1st November, 2020 is hit by Section 10A of the Code, which provides that no Petition under Section 7, 9 and 10 of the Code can ever be filed against a Corporate Debtor for any default occurring between the period 25th March, 2020 and 24th March,

> 2021 (period of suspension). Therefore, the present petition under Section 7 of the Code is not maintainable against the Corporate Debtor since the purported debt squarely falls within the cut-off date as per Section 10A of the Code”

7. It is pertinent to mention that other than challenge to term loan II being hit by Section 10A of the Code, the term Loan I was not challenged on the issue that it too is hit by Section 10A of the Code. In this regard, the Adjudicating Authority recorded its finding in Para 5 of the impugned order, which is reproduced as under:-

> “5. The next plea is with regard to Section 10A of the code. It is the contention of the Corporate Debtor that the default for term loan-2 has occurred on 1st November 2020 during Covid period and therefore no Company Petition can be filed basing on such default as per law laid down by the Hon'ble Supreme Court in Ramesh Kaymal Vs. M/s Siemens Gamesa Renewable Power Pvt. Ltd. In this context it is appropriate to mention here that the present Company Petition is filed not only in respect of term loan-II but also in respect of term loan-I which default occurred on 30.06.2021. It is also appropriate to mention here that there was overdue amount of Rs. 1.40 cores towards interest for July and August 2019 in terms loan-2 which also constitutes a default and which empowers the financial creditor to claim entire amount in the event of default of either the interest or the principal amount and therefore the default in respect of term loan-2 is from September 2019 onwards till date. In this regard it is also appropriate to mention here that the Financial Creditor filed another Company Petition bearing CP No 221/2022 against Zee Entertainment Enterprises Ltd. who is the guarantor on behalf of Corporate Debtor herein i.e. Siti Network Ltd. in respect of term loan-2 basing on DSRA guarantee dated 24.08.2018 executed by Zee Entertainment Enterprises Ltd which was also admitted today along with the present company petition against Zee Entertainment Enterprises Ltd observing that date of default in respect of term loan-2 is September 2019 and therefore the above plea of the corporate debtor in this case with regard to term loan- 2 is also not legally sustainable.”

8. It is pertinent to mention that in the present case there is no dispute about Term Loan II rather the dispute has been raised in respect of Term Loan I, inter alia, on the ground that the application filed under Section 7 of the Code could not ever have been filed.

9. The Appellant has challenged the maintainability of the application filed under Section 7 of the Code in respect of term loan I on the ground that the date of default mentioned in Para 2 of Part IV in Form 1 is not correct because the default occurred on 30.06.2020 on account of non-payment of instalment which was due and payable which falls within the two dates i.e. 25.03.2020 to 24.03.2021 during which no application either under Section 7, 9 or 10 could have ever been filed. In this regard, Counsel for the Appellant has drawn our attention to a chart prepared by her in respect of calculation of repayment of disbursed amount based on sanctioned repayment schedule for Term Loan 1, which is reproduced as under:-

Calculation of Repayments of Disbursed Amount based on sanctioned repayment schedule for Term Loan I						
	31.12.2018	30.06.2019	31.12.2019	30.06.2020	31.12.2020	30.06.2021
Repayment to be done as prorated to be disbursed amount vis-à-vis the sanctioned repayment schedule as shown above	2.92	7.30	7.30	14.59	14.59	26.27
Cumulative repayment to be done	2.92	10.21	17.21	32.10	46.69	72.96

10. The case set up by the Appellant is that the amount of instalment of Rs. 14.59 Cr. was due on 30.06.2020 which was not paid by the Corporate Debtor, the amount of instalment dated 31.12.2020 of Rs. 14.59 Cr. was also not paid and similarly the amount of instalment dated 30.06.2021 of Rs. 26.27 Cr. was also not paid but the Respondent has taken the date of default from 30.06.2021 and not from 30.06.2020 when the right to file application under Section 7 of the Code first accrued.

11. On the other hand, Counsel for the Respondent has submitted that as per Section 3(12) of the Code, the term default means non-payment of debt as a whole or any part or instalment of the amount of debt which has become due and payable and is not paid by the debtor. It is submitted that Section 7(1) of the Code provides that a financial creditor either by itself or jointly with other financial creditors or any other person on behalf of the financial creditor as may be notified by the Central Government, may file an application for initiating CIRP against a corporate debtor before the Adjudicating Authority when a default has occurred. It is submitted that the word first default is conspicuous by its absence in this provision. In support of his submission, he has relied upon a decision of this Tribunal in the case of *'Koncentric Investments Ltd. & Anr. Vs. Standard Chartered Bank, London and Anr., 2022 SCC Online NCLAT 1254* and pressed paras 17 to 21 which are reproduced as under:-

> "17. Now, we may notice certain provisions of the Code in regard to above. Section 3(11) of the Code defines 'Debt' and Section 3(12) defines 'Default' which are as follows:
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> "3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
> 3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;"
>
> 18. Section 7 (1) of the Code provides that a Financial Creditor may file an Application for initiating 'Corporate Insolvency Resolution Process' against the Corporate Debtor before the Adjudicating Authority when a default has occurred. The definition of Debt under Section 3(12) of the Code the expression used is 'Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid'. Default as statutorily defined to mean non-payment of debt when:

a. Whole or any part or instalment of the amount of debt has become due thus default shall be there within the meaning of Section 3(12) when either or whole or any part or instalment has not been paid.

In the present case, non-payment of amount of interest on 30th June, 2015 was non-payment of part of debt since interest was also part of debt. We thus agree with the submissions of Learned Sr. Counsel for the Appellant that there was default when interest was not paid on 30th June, 2015. Now question is as to when a Financial Creditor has not filed the Application on first default i.e. payment of interest whether he is precluded to file Application for subsequent defaults i.e. when default is committed for an instalment or for whole debt when it becomes due.

19. The Application under Section 7 of the Code can be filed when a default has occurred. Thus, Application could have been filed by Financial Creditor on default of payment of interest on 30th June, 2018 but the mere fact that Financial Creditor did not choose to file Section 7 Application on committing of default with interest whether the Financial Creditor is precluded to file an Application when first instalment was due or when whole amount was due is the question to be answered. In the present case, as noted above, the first instalment of repayment became due only on 30th November, 2015 and even before that on 24th November, 2015 the bank had written to Reserve Bank of India seeking permission to accelerate the facility which permission was given in the form of 'No Objection Certificate' issued by Reserve Bank of India on 07.12.2016. The Acceleration of Facility was done by letter dated 05.01.2017 of the Bank and thereafter the entire amount became due. The Application filed on 28th November, 2018 was well within three years as per below:

a. Well within first instalment became due on 30th November, 2015 and;

b. When entire loan became due after notice acceleration dated 05.01.2017

The Application under Section 7 is well within three years from above two defaults i.e. default of instalment and default for whole.

20. The Application under Section 7 is to be filed in Form-1 as per sub- rule 1 of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority Rules) 2016 Part-IV requires Particulars of Financial Debt that Company Appeal (AT) (Insolvency) No. 911 of 2021 specifically requires "amount claimed to be in default and the date on which default occurred" if an application is filed within three years from the date on which default occurred the amount

claimed shall be amount due and payable if the said Application is filed within three years from the date of default.

21. The Insolvency and Bankruptcy Code including rules and regulations, does not indicate that it is mandatory for the Financial Creditor to rush to file Section 7 Application whenever first default is committed in payment of interest. Although it had liberty to file an application even if there is default in payment of interest. Section 7 (1) of the Code uses the expression when a default has occurred there is no indication under Section 7 of the Code that unless an Application is filed on first default committed, no application can be filed when subsequent defaults are committed. The Financial Creditor is at liberty to file Section 7 Application but is neither mandatory nor necessary that on first default Financial Creditor should rush to the Insolvency Court. Financial Creditor may await and give more time to Corporate Debtor to find out as to whether actually the Corporate Debtor has become insolvent and unable to repay the debt and even Financial Creditor ignores non-payment of interest when the Corporate Debtor first defaulted it shall not lose its right to file Application under Section 7 of the Code when default of instalment or whole amount became due. The only statutory requirement is that default as claimed in the Application under Section 7 should be within three years from the date when application is filed under Section 7 of the Code because any default of amount committed before three years of filing of the Application Company Appeal (AT) (Insolvency) No. 911 of 2021 shall become time barred debt and cannot be said to be payable and due within the meaning of Section 3(11) and Section 3(12) of the Code."

12. He has further referred to a decision of this Tribunal rendered in the case of *'Indiabulls Housing Finance Limited Vs. Revital Realty Pvt. Ltd., 2023 SCC Online NCLAT 219* and referred to Paras 20 and 22, which are also reproduced as under;-

"20. We also acknowledge that law of limitation is sacrosanct and cannot be allowed to be breached. As per the law, legal remedy is required to be taken within three years from the date when default takes place and any violation of the timeline will render such claims as time barred. The position has been upheld in catena of the judgments by the Hon'ble Supreme Court of India as well as this 'Appellate Tribunal'. This 'Appellate Tribunal' had occasion to examine all such issues in the case of Koncentric Investments Ltd. & Anr. Vs. Standard Chartered Bank & Anr. (Company Appeal (AT) (Insolvency) No. 911 of 2021) and detailed judgment was rendered covering all such issues and clearly establishing the fact that it is

> not the first date of default which need to be reckoned as only date for counting limitation period. It is also settled law that every subsequent default gives fresh right and counting of limitation period.
>
> 22. The 'Financial Creditor' gets rights for filing an Application under Section 7 of the Code when the right to apply against default accrues and for every default there is a fresh period of limitation. It seems that the 'Adjudicating Authority' has taken the date of 09.05.2016 as the date of default presuming that the first instalment was due, payable and not paid and therefore date of default became 09.05.2016. We take note from the 'List of Dates' which has been filed along with the present appeal that 09.05.2016 is the date when entire loan was disbursed by the 'Appellant' to the 'Corporate Debtor'. It seems that the 'Adjudicating Authority' has further wrongly presumed that it is the first default which is only relevant date for counting limitation period and has ignored the subsequent defaults which give fresh and new cause of default / defaults."

13. We have considered the respective arguments of Counsels for the parties in this regard.

14. No doubt that as per schedule of payment, provided in the sanction letter, the repayment was to be made in respect of term loan 1 on half yearly basis, as per schedule provided in the sanction letter on the basis of which, as per chart prepared by the Appellant and reproduced hereinabove, 4th instalment was to be paid on 30.06.2020 of an amount of Rs. 14.59 Cr. but the same was not paid. Similarly, 5th instalment was to be paid on 31.12.2020 again of an amount of Rs. 14.59 Cr. which was also not paid and lastly 6th instalment was to be paid on 30.06.2021 of Rs. 26.27 Cr. which too was not paid.

15. In these circumstances, the question that has been raised by the Appellant is that the amount of debt became due and payable by the Respondent on 30.06.2020, therefore, it should have been the date of default whereas according to the Respondent, there is no concept of first date of

default because the word first is not deliberately used by the legislature in Section 7 of the Code as a prefix with the word default and if the limitation of three years is counted from 30.06.2020 even then the application has been filed within the period of limitation. In this regard, the judgments relied upon by the Respondent both in the case of *'Koncentric Investments Ltd. & Anr.' (Supra)* and *'Indiabulls Housing Finance Limited (Supra)* covers the argument raised by him and hence the first argument raised by the Appellant on the basis of date of default dated 30.06.2020 is hereby rejected.

16. Next argument of Counsel for the Appellant is that since the notice of demand was issued on 01.10.2020, therefore, the date of default has to be treated as such, which could not have been 30.06.2021 as has been projected by the Respondent in order to wriggle out of the vigours of Section 10A of the Code. It is submitted that the reference to facility is pertaining to both term loans I and II, therefore, the notice of demand or recall notice is about term loan I whereas Counsel for the Respondent has submitted that the said notice was issued both to the Corporate Debtor and the Guarantor and was essentially pertaining to term loan -II regarding which a specific averment has also been made about the amount of Rs. 83,08,00,000/- which was disbursed by the Financial Creditor to the borrower (corporate debtor). It is submitted that though the sanction letter is one but it deals with the terms and conditions pertaining to both term loans separately in regard to the tenure, repayment schedule and the DSRA etc. It is thus submitted that the Appellant has articulatingly referred to the demand notice dated 01.10.2020 to relate it with term loan I for the purpose of brining the case of the Respondent within the ambit of Section 10A of the Code.

17. We have considered the arguments of both Counsels for the parties in this regard and are of the considered opinion that the submissions made by Counsel for the Appellant cannot be accepted because term loan I has been provided to the Corporate Debtor in which there is no bank guarantee which is there in term loan II and the notice dated 01.10.2020 has been issued both to the Corporate Debtor and the Guarantor making specific reference to term loan II, highlighting the amount, which was disbursed in that account.

18. Third and last argument raised by the Appellant is about the date of NPA.

19. In this regard, the Appellant has made an averment in the appeal about the certificate of NPA which was issued by the Respondent in respect of all the accounts of Term Loan I and II. The said certificate dated 09.05.2022 is reproduced as under:-

NPA Certificate

> This is to certify that the A/c No. (s) 512003483136, 512003482658, 512003482566, 512003482108 for term loan II and A/c No. (s) 512003482238, 512003482573 for Term loan I of M/s Siti Networks Limited maintained by us with our Noida branch has been classified as Non-Performing Assets (NPA) on 28.12.2020 as per RBI Guidelines.
>
> Dated this 09th day of May, 2022
>
> Your faithfully
>
> For Indusind Bank Limited
>
> Authorised signatory

20. Counsel for the Appellant has argued that the date of NPA is the date of default, therefore, the date of default mentioned by the Respondent in Part

IV as 30.06.2021 cannot be taken into consideration. It is further submitted that if the date of NPA is 28.12.2020 then again it would fall within that period of 25.03.2020 to 24.03.2021. In this regard, he has also referred to Section 10A of the Code, which is reproduced as under:-

> **"Section 10A: Suspension of initiation of corporate insolvency resolution process.**
> 1[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.]"

21. There is no dispute that if the date of NPA is taken as the date of default then it would definitely come within the aforesaid period during which no petition under Section 7 could have ever been filed.

22. Counsel for the Appellant in support of his arguments has relied upon a decision of the Hon'ble Supreme Court in the case of *Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (I) Limited and Anr., (2019) 10 SCC 572* and contended that in this case the NPA was declared on 21.07.2011 and the same date was mentioned as a date of default in Part IV of Form 1. It is further submitted that in the said case, the Hon'ble Supreme Court has held that limitation would start from 21.07.2011 i.e. the date of NPA treating it to be the date of default. He has further relied upon another judgment of the Hon'ble Supreme Court in the case of *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr., (2020) 15 SCC 1* to contend that the

date of NPA in this case was projected as date of default and was accepted as such. He has also relied upon another decision of the Hon'ble Supreme Court in the case of *Laxmi Pat Surana Vs. Union Bank of India & Anr. (2021) 8 SCC 481* on the same issue where the date of NPA was mentioned as the date of default and accepted as such.

23. On the other hand, while refuting the argument of Counsel for the Appellant, it is submitted by Counsel for the Respondent that firstly, the issue of certificate of NPA cannot be raised by the Appellant because it does not form part of the record. It is submitted that the Adjudicating Authority reserved the judgment on 02.02.2023. Counsel for the Appellant (Corporate Debtor) mentioned the matter orally on 10.02.2023 and on 14.02.2023 requested to take on record an additional affidavit alongwith some documents and rehear the matter which was rejected. Order in this regard was passed on 14.02.2023, which is reproduced as under:-

> "C.P. (IB) – 690(MB)/2022
>
> The above matter is already reserved for orders but listed on board today on mentioning made by the counsel appearing or the Corporate Debtor in the open court on 10.02.2022. The Counsel appearing for the Corporate Debtor orally requested to take an additional affidavit alongwith some documents and rehear the matter which is not permissible on oral request. Hence request is rejected. Matter is reserved for order."

24. It is submitted by the Respondent that this order was not challenged by the Appellant by way of an appeal before this Tribunal and has attained finality. In this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of *Bagai Construction through its Proprietor Lalit Bagai Vs. Gupta Building Material Store, (2013) 14 SCC 1* and referred to Para 14 and 15, which are reproduced as under:-

"11) The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial Court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words "at any stage" occurring in Order XVIII Rule 17 casually set aside the order of the trial Court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of CPC, the plaintiff cannot be permitted.

12) After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only

> thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC."

25. Besides the aforesaid contention, it is also submitted that even in this appeal, the Appellant has not filed any application, seeking permission from this Tribunal, to bring on record the additional documents much less the record of DRT alongwith certificate of NPA. Therefore, these documents cannot be looked into being not a part of the record.

26. Besides, this technical objection raised by the Respondent, he has submitted that the judgment relied upon by the Appellant, firstly, in the case of *Gaurav Hargovindbhai Dave (Supra)* is no more an available as a precedent in view of the fact that in Review Petition No. 800 of 2020, the judgment in the case of *Gaurav Hargovindbhai Dave (Supra)* has been recalled vide order dated 06.12.2022. Secondly, it is submitted that the judgment relied upon by the Appellant both in the case of *Babulal Vardharji Gurjar (Supra)* and *Laxmi Pat Surana (Supra)* are on their own facts and are not applicable to the facts of the present case because in the said cases the date of NPA was the date of default pleaded by the Financial Creditor which is not the present case. He has further submitted that the decision in the case of *Babulal Vardhrji Gurjar (Supra)* has been held to be a judgment rendered in the particular facts of that case in *Dena Bank Vs. Shiva Kr. Reddy, Civil Appeal No.1650 Of 2020*. He has rather relied upon a decision of this Tribunal in the case of *Mr. Abhay Narendra Lodha Vs. Bank of Baroda, CA (AT) (Ins) No. 997 of 2022* and pressed Paras 27 to 29, which are reproduced as under;-

“27. Section 7 deal with Initiation of Corporate Insolvency Resolution Process by Financial Creditor sub-section (1) thereof read thus:

“A Financial Creditor either by itself or jointly with (other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government,) may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.”

28. In view of the above provision of law, the Application under Section 7 can be initiated when a default has occurred and there is no such provision that the occurrence of default can be taken into account from the date of NPA. The argument of the Appellant is negated with respect to the contention that the date of NPA is to be treated as date of default. In this regard, the word default has been defined under Section 3(12) of the I&B Code, 2016 “means a non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be.”

29. The Hon’ble Supreme Court in various decisions has categorically held that Trigger for Initiation of CIRP by a Financial Creditor is the date of “default” on the part of the Corporate Debtor i.e. actual non-payment of debt repayable by the Corporate Debtor when a debt has become due and payable and not the date of NPA. With regard to the aforesaid finding, a beneficial reference is drawn in the matter of Laxmipat Surana Vs. Union Bank of India (2021) SCC Online SC 267 para 42, 43, 49 whereby the Hon’ble Supreme Court held that the date of default is to be reckoned for the purpose of Initiation of CIRP and not the date of NPA.

“42. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Section 18 of the Limitation Act reads thus:

43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 IBC. However, Section 7 comes into play when the corporate debtor commits “default”. Section 7, consciously uses the expression “default” — not the date of notifying the loan account of the corporate person as NPA. Further, the expression “default” has been defined in Section 3(12) to mean non−payment of “debt” when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the

> principal borrower commits default due to non− payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 IBC. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 IBC.
>
> 49. Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.””

27. He has also relied upon another decision of this Tribunal in the case of *Ramdas Dutta vs. IDBI Bank Limited, CA (AT) (Ins) No. 1285 of 2022* in which a similar view has been taken that the date of NPA cannot be date as a date of default for the purpose of limitation and in this regard Para 19 is required to be mentioned, which is reproduced as under;’-

> “19. The first question is as to whether the date of default can be changed by the Bank? In this regard, it has been held by the Hon’ble Supreme Court in the case of ‘Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd., (2021) 3 SCC 224’ that the date of default cannot be changed. It has also been held in the case of Laxmi Pat Surana (Supra), Babulal Vardharji Gurjar (Supra), B.K Educational Services Pvt. Ltd. (Supra) and Jignesh Shah (Supra) that the period of limitation would be attracted from the date when the default occurs and not from the date of declaration of NPA.

> Therefore, the date of NPA cannot be taken to be the date of default for the purpose of limitation."

28. In this view of the above, even the third contention raised by the Appellant, to take the date of NPA as the date of default, cannot be accepted.

29. As a consequence of the aforesaid discussion, all the points raised by the Appellant, in order to bring the date of default within the ambit of Section 10A of the Code fails and as a result thereof, all the contentions of the Appellant are hereby rejected.

30. No other point has been raised.

31. In view of the aforesaid facts and circumstances, the present appeal is found to be without any merit and the same is hereby dismissed, though, without any order as to costs.

With the dismissal of the appeal, all the pending applications in this appeal are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sheetal