

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.124/2022

(IA Nos. 289, 290, 291 & 941/2022)

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 07.02.2022 in

CP(IB) No.207/7/HDB/2021, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad)

In the matter of:

Carissa Investments LLC

1st Floor, Wing A

Cyber Tower 1,

Ebene Cybercity, Mauritius

... Appellant

Versus

1. Indu Techzone Pvt. Ltd.

through its RP Mr. Krishna Komaravolu

Registered Office:

INDU FORTUNES FIELDS

1009, 13th Phase, Kukatpally,

Hyderabad 500072

2. Prudent ARC Limited

611, D Mall, Plot No. A1,

Netaji Subhash Place, Pitampura

New Delhi - 110034.

3. Krishna Komaravolu

RP OF Indu Techzone Pvt. Ltd.

Hyderabad – 500 016

(Amended as per Order dated 01.07.2023)

...Respondents

Present :

For Appellant : Mr. E. Om Prakash, Senior Advocate
For Ms. Ashwini Vaidialingam, Advocate

For Respondents : Mr. P.H. Arvindh Pandian, Advocate
For Mr. Anirudh Krishnan, Advocate, For R2

J U D G M E N T

(Physical Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Challenge in this Company Appeal (AT) (Ins) No.124 of 2022 is to the impugned order passed by the Adjudicating Authority in CP(IB)No. 207/7/HDB/2021 filed by M/s. Prudent ARC Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as the 'Code']. The Adjudicating Authority had admitted Section 7 Application formulating the following issues: -

“1. Whether this Tribunal, under its residuary power contained in Section 60(5)(C) of I&B Code, entertain the plea of legality or otherwise of the assignment of debt in favour of the Petitioner?”

2. Whether the documentary evidence furnished with application show that a debt is due and payable and has not been paid by the corporate debtor?”

The Learned Adjudicating Authority while giving its finding in the first issue observed as follows: -

“8. At the outset it may be stated that, this being a petition filed under Section 7 of IBC at the behest of the financial creditor for initiation of CIRP against the Respondent/Corporate Debtor herein, as regards scope of enquiry in this petition, we refer to the authoritative ruling of the Hon'ble Supreme Court of India, in re, Mobilox, where in it was held that,

“On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of

the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may eject an application and not otherwise.” (Emphasis is ours)

9. A mere perusal of the counter filed by the corporate debtor, especially para 9 reveals that corporate debtor in categorical and unambiguous terms admitted availing of term loan of Rs. 60 Crores from M/s.IDFC Ltd. the native lender, which is also the assignor of the subject debt in favour of the applicant herein. That apart, owing to non-payment of the outstanding dues, the loan account of Corporate Debtor was declared as Non-Performing Asset (NPA) on 13.10.2013. Further, EARC filed OA No.721 of 2015 before the Debts Recovery Tribunal, against the corporate debtor herein for the recovery of Rs.49,12,33,998/- plus interest thereto.

10. It is further stated that, while the OA was pending before DRT, EARC and the corporate debtor Indu Tech Zone entered into a Settlement of Financial Assistance on 12.03.2018 vide Edel ARC/3875/2017-18 (settlement letter), wherein the Corporate Debtor was to pay Rs.15,00,12,830/- which includes outstanding debt of Rs.40,64,61,066/- plus applicable interest at 15.5% originally owed to IDFC, in three tranches as under:-

(iv) First Instalment of Rs.4,25,12,830/- and Rs.25,00,000/- by 27.03.2018.

(v) Second instalment of Rs.50,00,000/- by April, 2018.

(vi) Third instalment of Rs.7,40,18,345/- and Rs.2,59,81,655/- by 31.03.2020.

*11. The settlement letter was filed with the DRT, and the same was record with the following clause. **“In the event of any default of payment of the amounts in accordance with the settlement letter, the settlement shall sand terminated automatically, without any further notice to Indu (Corporate Debtor) and EARC shall be entitled to recover the IDFC outstanding amount”.***

Therefore, it is as clear as crystal, that the financial debt in this case stands admitted.”

2. Regarding the second issue, the Adjudicating Authority has observed that the debt was ‘due and payable’ in the light of the fact that on the strength of the very same Agreement, the Assignee ‘Financial Creditor’ herein, has moved the Debts Recovery Tribunal, Hyderabad for recovery of his dues against the same Corporate Debtor which had agreed to pay the debt in three tranches but had instead breached the Agreement.

3. Succinctly put, the facts in this case are that the Appellant, shareholder and the Corporate Debtor had executed a share subscription, share purchase and shareholders agreement with M/s. Indu Projects Ltd. on 02.10.2007. A Rupee Loan Agreement was executed between IDFC and the Corporate Debtor on 08.09.2008 for disbursement of loan of Rs.60 Crores and a sum of Rs.45 Crores was disbursed by IDFC on 11.09.2008. A Common Loan Agreement was executed between the Corporate Debtor, IDFC, IFCI, Andhra Bank and other Banks on 27.02.2009. A ‘Lender Creditor Agreement’ was also executed between

the Corporate Debtor and IDFC, IFCI, Andhra Bank and others. On 13.10.2013, the loan account of the Corporate Debtor was declared as NPA which then transferred its right under the Loan Documents to EARC vide an Assignment Agreement dated 24.12.2013.

4. The Learned Senior Counsel for the Appellant submitted that since the date of default, being the same as the date of declaration of the loan account of the Corporate Debtor as NPA, was 13.10.2013, the alleged limitation to initiate any fresh proceeding to enforce the lenders' rights under the 'Loan Documents' had expired on 13.10.2016 itself. It is submitted that one of the Lenders of the Consortium, being IFCI, filed Petition under Section 7 of the Code bearing No. CP(IB)/26/7/HDB/2018 titled IFCI Ltd. versus Indu Tech Zone Pvt. Ltd.. On 12.03.2018, simultaneously, a Settlement Agreement was executed between the Corporate Debtor and EARC, in which the Corporate Debtor undertook to pay Rs.15,00,12,830/- to EARC as a full and final settlement towards the alleged debt owed to EARC in three tranches ending on 31.03.2020. Subsequently, the Section 7 Petition filed by IFCI Ltd. was admitted by the Adjudicating Authority on 08.11.2019. This order dated 08.11.2019 was challenged before the National Company Law Appellate Tribunal vide *Company Appeal No. (AT) Ins No.1491 of 2019* titled '*M/s. Gradient Nirman Private Ltd. v. M/s. IFCI Ltd.*' and the National Company Law Appellate Tribunal Principal Bench had set aside the order dated 08.11.2019 holding that the debt was time barred. A Civil Appeal No.

3509 of 2020 filed challenging the Judgment was also dismissed by the Hon'ble Apex Court on 25.01.2021.

5. It is the case of the Appellant that EARC assigned its right vide Settlement Agreement to the 2nd Respondent i.e. M/s. Prudent ARC Ltd. by way of an Assignment Agreement on 04.09.2020 and on 23.12.2020, it had issued a letter to the Corporate Debtor to pay the amount defaulted under the Settlement Agreement. It was informed by the Corporate Debtor to M/s. Prudent ARC Ltd. on 18.01.2021, that as per the terms of ICA, a new lender was required to execute a 'Deed of Adherence' as per clause 7.6 of the ICA. On 03.07.2021, Prudent ARC filed Section 7 Petition invoking the rights under the aforesaid Assignment Agreement and the underlying Loan Documents. It is the case of the Appellant that any default arising between 25.03.2020 to 25.03.2021 has been excluded from the purview of the Code through the introduction of Section 10-A. As per the Application filed by M/s. Prudent ARC Ltd., the alleged default had occurred on 31.03.2020 and therefore, the initiation of CIRP on the basis of the default which occurred on 31.03.2020 is in direct contravention of Section 10-A.

6. The Learned Senior Counsel contended that the second respondent had suppressed prior CIRP proceedings against the Corporate Debtor which was based on the same loan documents, which was set aside by the National Company Law Appellate Tribunal and upheld by the Hon'ble Apex Court. It is further contended by the Learned Senior Counsel that the present proceedings are barred by

limitation as the default goes back to the final date of declaration of NPA i.e. 13.10.2013 and that the three years period had expired on 13.10.2016 itself whereas this petition was filed only in June 2021.

7. The Learned Senior Counsel drew our attention to the findings given by the National Company Law Appellate Tribunal, Principal Bench in the prior CIRP proceedings vide its Judgment dated 22.05.2020, whereby and whereunder it was observed as follows:-

“14. ...In the instant case, the date of default as mentioned in part IV of the Application is 15.10.2013. It is the Respondent’s case that the date of default is to be taken at 30.06.2014 as observed by the Adjudicating Authority.

15. We observe from the letter dated 02.07.2014, that the date of default is 30.06.2014 though the date of default mentioned in Part IV of the Application, is 15.10.2013. In this case the ‘right to sue’ accrues on 30.06.2014 and 3 years limitation period ends on 29.06.2017, whereas the Application was filed on 08.11.2017.

16. Therefore, the contention of the Learned Counsel that the Financial Creditor has also initiated proceedings under DRT and under SARFAESI Act, 2002, and therefore this period should be excluded, cannot be sustained”.

Based on the above findings, which are confirmed by the Hon’ble Apex Court vide Judgment dated 25.01.2021, it is the Appellant’s case that this debt which is based on the same loan documents, is also barred by limitation.

8. The Learned Senior Counsel appearing for the 2nd Respondent/M/s. Prudent ARC Limited submitted that a Common Loan Agreement was entered into

between the Corporate Debtor, IFCI, SREI and Andhra Bank, for which IDFC was the confirming party. In pursuance of this Common Loan Agreement, the Corporate Debtor, IDFC, Andhra Bank, IFCI and SREI entered into a 'Lender Creditor Agreement' dated 27.02.2009. It is submitted by the Learned Counsel that these Loan Agreements are distinct and separate and that the first assignment Agreement was executed between EARC and IDFC and that the Corporate Debtor had committed default of their payment obligations under this loan agreement. Vide Assignment Agreement dated 24.12.2013 IDFC had assigned its debt to EARC, together with all the incidental rights and therefore, EARC became the absolute legal owner to receive these payments.

9. It is submitted by the Learned Senior Counsel for the Respondent that on account of the NPA, the Creditor initiated proceedings before the Debts Recovery Tribunal, Hyderabad, and during the pendency of these proceedings, the Corporate Debtor entered into a Settlement Agreement vide letter dated 12.03.2018, whereby the Corporate Debtor was under obligation to pay the amounts in three tranches ending on 31.03.2020.

10. It is the case of the Respondent that the Settlement letter specified that in the event of default by the Corporate Debtor, EARC could unilaterally revoke the settlement. It is also submitted that the Corporate Debtor had cleared two tranches of payments under the Settlement Letter but the third tranche was due and payable. Subsequently, the debt was assigned by Edelweiss to Prudent ARC who is deemed

to be to be the lender. It is submitted by the Learned Senior Counsel that for a default occurring on or after 25.03.2020, embargo is in place for a period for six months and is extendable up to one year from 25.03.2020 and therefore, the said restriction does not prevent the initiation of CIRP against the Corporate Debtor in the event that the default continues even after the period of one year from 25.03.2020. It is further submitted that the limitation issues raised by the Appellant is a non-starter and a compromise memo was entered into on 03.05.2020 and the Section 7 Application was filed in June 2021 and therefore, the Section 7 Petition, is not barred by limitation.

ASSESSMENT:-

11. It is seen from the Impugned Order that the earlier CIRP Proceedings initiated against the same Corporate Debtor, which was held to be barred by limitation and also upheld by the Hon'ble Apex Court in Civil Appeal bearing No. 3509 of 2020 vide order dated 25.01.2021, was not brought to the notice of the Adjudicating Authority. Factually, one of the lenders of the consortium, IFCI Limited filed Petition under Section 7 of the Code, bearing No. ***CP(IB)/26/7/HDB/2018*** titled '***IFCI Ltd. versus Indu Tech Zone Pvt. Ltd.***'. This Petition was admitted by the Adjudicating Authority on 08.11.2019. The National Company Law Appellate Tribunal, Principal Bench, had set aside this order dated 08.11.2019 holding that the debt was time barred, against which order a Civil Appeal was filed and the same was dismissed by the Hon'ble Apex Court. It is

reiterated that this aspect was not brought to the notice of the Bench and therefore, the Adjudicating Authority did not have an opportunity to examine as to whether the loan documents pertain to the same loan which was said to be ‘due and payable’ in the previous Section 7 Petition filed by IFCI Ltd.

12. Be that as if may, the main issue which arises for consideration in this Appeal is whether the date of default admittedly being 31.03.2020, is in direct contravention to Section 10-A, which in no uncertain terms prohibits an Application from being filed in respect of any default within a period of one year, i.e., from 25.03.2020 to 24.03.2021.

13. A perusal of Part IV of the Section 7 Application shows the date of default as 31.03.2020. For ease of reference, Section 10(A) of the Code is reproduced as hereunder: -

“10A. Suspension of initiation of corporate insolvency resolution process. – 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)

In the instant case, it is an admitted fact and also recorded in the ‘Impugned Order’ that as per the Settlement Agreement entered into between the Corporate Debtor and the Lenders, the third instalment of the payment was ‘due and payable’ on 31.03.2020.

14. The contention of the Learned Senior Counsel appearing for the 2nd Respondent that Section 10-A is not applicable to the facts of this case, has to be decided on the touchstone of the Judgment of the Hon’ble Apex Court in the matter of ‘*Ramesh Kymal versus M/s. Siemens Gamesa Renewable Power Pvt. Ltd.*’ reported in *Civil Appeal No.4050 of 2020* wherein discussing the applicability of Section 10-A, the Hon’ble Apex Court has held as follows: -

“8. *The issue which falls for determination in this appeal is whether the provisions of Section 10A stand attracted to an application under Section 9 which was filed before 5 June 2020 (the date on which the provision came into force) in respect of a default which has occurred after 25 March 2020. Before proceeding to discuss the rival submissions, it is necessary to preface the discussion with reference to three significant dates which have a bearing on the present proceedings:*

- *30 April 2020 – date of default as set up in Form 3;*
- *11 May 2020 – date of institution of the application under Section 9; and*
- *5 June 2020 – date on which Section 10A was inserted in the IBC.*

9. *The date of default is crystalized as 30 April 2020 in the demand notice issued by the appellant in Form 3, which is prescribed under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The statutory form provides for a disclosure of the particulars of the operational debt. The disclosure which has been made by the appellant includes the amount claimed in default and the date of default, as tabulated below:*

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED [ATTACH THE WORKINGS FOR COMPUTATION OF -*DEFAULT IN TABULAR FORM]	INR 104,28, 76,479/- (Indian Rupees One Hundred and Four Crores Twenty Eight Lakhs Seventy Six Thousand Four Hundred and Seventy Nine only) as on 30.04.2020 along with interest @ 18% (eighteen percent) p.a. till the date of realisation of entire payment.
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16. *Section 10A is prefaced with a non-obstante provision which has the effect of overriding Sections 7, 9 and 10. Section 10A provides that:*

- (i) no application for the initiation of the CIRP by a corporate debtor shall be filed;*
- (ii) for any default arising on or after 25 March 2020; and*
- (iii) for a period of six months or such further period not exceeding one year from such date as may be notified in this behalf.*

The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP of a corporate debtor "for the said default occurring during the said period". The explanation which has been inserted for the removal of doubts clarifies that Section 10A shall not apply to any

default which has been committed under Sections 7, 9 and 10 before 25 March 2020.

17. Section 10A makes a reference to the initiation of the CIRP. Clauses (11) and (12) of Section 5 of the IBC define two distinct concepts, namely:

- (i) the initiation date; and*
- (ii) the insolvency commencement date.*

18. The “initiation date” is defined in Section 5(11) in the following terms:

“5(11) “initiation date” means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process;”

The expression “insolvency commencement date” is defined in Section 5(12) in the following terms:

“5(12) “insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be:”

19. Section 5(11) stipulates that the date on which a financial creditor, corporate applicant or operational creditor makes an application to the adjudicating authority for initiating the CIRP is the “initiation date”. Distinguished from this is the “insolvency commencement date”, which is the date on which the application for initiating the CIRP under Sections 7, 9 or 10, as the case may be, is admitted by the Adjudicating Authority.

20. The substantive part of Section 10A adverts to an application for the initiation of the CIRP. It stipulates that for any default arising on or after 25 March 2020, no WWW.LIVELAW.IN LL 2021 SC

72 12 application for initiating the CIRP of a corporate debtor shall be filed for a period of six months or such further period not exceeding one year "from such date" as may be notified in this behalf. The expression "from such date" is evidently intended to refer to 25 March 2020 so that for a period of six months (extendable to one year by notification) no application for the initiation of the CIRP can be filed. The submission of the appellant is that the expression "shall be filed" is indicative of a legislative intent to make the provision prospective so as to apply only to those applications which were filed after 5 June 2020 when the provision was inserted. Such a construction cannot be accepted.

21. xxx

22. The language of the provision is not always decisive to arrive at a determination whether the provision is applicable prospectively or retrospectively. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, *Principles of Statutory Interpretation*, has stated that:

"In deciding the question of applicability of a particular statute to past events, the language used is no doubt the most important factor to be taken into account; but it cannot be stated as an inflexible rule that use of present tense or present perfect tense is decisive of the matter that the statute does not draw upon past events for its operation. Thus, the words "a debtor commits an act of bankruptcy" were held to apply to acts of bankruptcy committed before the operation of the Act. The words "if a person has been convicted" were construed to include anterior convictions. The words "has made", "has ceased", "has failed" and "has become", may denote events happening before or after coming into force of the statute and all that is necessary is that the event must have taken place at the time when action on

*that account is taken under the statute.....And the word “is” though normally referring to the present often has a future meaning and may also have a past signification in the sense of “has been. **The real issue in each case is as to the dominant intention of the Legislature to be gathered from the language used, the object indicated, the nature of rights affected, and the circumstances under which the statute is passed.**”*

(emphasis supplied)

23. Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period" ...”

15. The Hon’ble Apex Court concluded that the embargo in Section 10-A must receive a purposive construction which will advance the contention of the Learned Senior Counsel for Respondent No.2 that though the date of default is on 31.03.2020, Section 10-A will not be applicable is unsustainable in the light of the observations made by the Hon’ble Apex Court in the aforementioned Judgment.

16. The object of the legislation was to suspend the operation of Sections 7, 9 and 10 in respect of defaults arising on or after March 25th 2020 when the lockdown was disrupting normal business operation. This Tribunal is of the considered view that the ‘Explanation’ removes any doubt by clarifying that the

provisions of the Section shall not apply in respect of any default committed prior to 25.03.2020.

17. In the instant case, admittedly, the date of default is 31.03.2020 and the ratio of the Hon'ble Apex Court in '*Ramesh Kymal versus M/s. Siemens Gamesa Renewable Power Pvt. Ltd.*' reported in *Civil Appeal No.4050 of 2020* regarding Section 10-A of the Code the object of which was sought to be achieved by enacting the Provision, is squarely applicable to the facts of this case.

18. For the foregoing reasons this 'Appeal' is allowed and the Impugned Order dated 07.02.2022 in CP (IB) No.207/7/HDB/20201 is set aside and consequently the admission of the Section 7 Petition is also set aside. The 3rd Respondent has filed the Status Report. The 'Adjudicating Authority' shall proceed in accordance with law. No order as to costs. All connected pending Interlocutory Applications, if any, shall stand 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

08.08.2023
SE/TM