NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1198 of 2023

(Arising out of Order dated 25.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP (IB) No.1029/MB/-IV/2022)

IN THE MATTER OF:

Pratik Jiyani,
Suspended Director,
Rite Developers Private Limited,
Shop No.27, 1st Floor,
Rite Bliss Kandivali Dattatray CHSL,
Dhanukarwadi, Kandivali West,
Mumbai – 400067. ... Appellant

Vs

1. Pirmal Capital & Housing Finance Limited
   Piramal Tower, 4th Floor,
   Paninsula Corporate Park,
   Ganapatrao Kadam Marg, Lower Parel,
   Mumbai – 400013.

2. Mr. Amit Vijay Karia,
   IRP, Rite Developers Private Limited,
   405, Hind Rajasthan Building,
   Dadasaheb Phalke Road,
   Gautam Nagar, Dadar (East),
   Mumbai 400014. ... Respondents

Present:

For Appellant: **Mr. Prakhar Tandon, Mr. Anuj Tiwari, Mr. Swankit Nanda and Ms. Arashi Pal, Advocates.**

For Respondents: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Gaurav Juneja, Ms. Swastika Chakravarti and Mr. Soorya B., Mr. Kartik Pandey, Ms. Namrata Sarogi, Advocates for R-1.**

With

Company Appeal (AT) (Insolvency) No.1199 of 2023

(Arising out of Order dated 25.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP (IB) No.1023/MB/-IV/2022)

IN THE MATTER OF:

Pratik Jiyani,
Suspended Director,
Rite Builtec Private Limited,
Shop No.27, 1st Floor,
Rite Bliss Kandivali Dattatray CHSL,
Dhanukarwadi, Kandivali West,
Mumbai – 400067. … Appellant

Vs

1. Pirmal Capital & Housing Finance Limited
Piramal Tower, 4th Floor,
Paninsula Corporate Park,
Ganapatrao Kadam Marg, Lower Parel,
Mumbai – 400013.

2. Mr. Amit Vijay Karia,
IRP, Rite Developers Private Limited,
405, Hind Rajasthan Building,
Dadasaheb Phalke Road,
Gautam Nagar, Dadar (East),
Mumbai 400014. … Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Mr. Swankit Nanda and Ms. Arashi Pal, Advocates.**

For Respondents: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Gaurav Juneja, Ms. Swastika Chakravarti and Mr. Soorya B., Mr. Kartik Pandey, Ms. Namrata Sarogi, Advocates for R-1.**

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeals have been filed against the order dated 25.08.2023 passed by National Company Law Tribunal, Mumbai Bench-IV

admitting Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") by Respondent – Piramal Capital & Housing Finance Limited in CP (IB) No.1029/MB-IV/2022 and CP (IB) No.1023/MB-IV/2022 respectively. The Suspended Director of the Corporate Debtor aggrieved by the order of admission of Section 7 Application has filed these Appeals.

2. Facts and issues raised in these two Appeals being common, it shall suffice to refer to the facts in Company Appeal (AT) (Insolvency) No.1198 of 2023 for deciding both the Appeals.

3. Dewan Housing Finance Corporation Limited ("**DHFL**"), the predecessor in interest of Piramal Capital & Housing Finance Limited had sanctioned a project term loan of Rs.60 crores to Rite Builtec Private Limited, the Corporate Debtor in No.CP (IB) No.1023/MB-IV/2022 – Rite Builtec Private Ltd. was Borrower and Rite Developers Pvt. Ltd. was Co-borrower, who is the Corporate Debtor in CP (IB) No.1029/MB-IV/2022. The repayment of loan along with interest was to be made in 24 Equated Monthly Installments (EMIs) commencing after 36 months from the date of first disbursement. Sanctioned order, however, contemplate payment of interest from the date of first disbursement. The Loan Agreement dated 06.05.2018 between Rite Builtec Pvt. Ltd.; Rite Developers Pvt. Ltd. and Dewan Housing Finance Corporation Ltd. was entered, providing Clauses for Repayment of loan, Rate of interest, Additional interest in case of default etc. etc. The Corporate Debtor defaulted in making payment of the interest from June 2018. There was default in payment of Pre-Equated Monthly

Installments (PEMI). The default continued and till February 2020, the defaulted amount was approximately Rs.10,51,94,998/-. Even after February 2020 Corporate Debtor defaulted in making payment of PEMI. Out of the sanctioned loan, a total sum of Rs.52.25 crores were disbursed between June 2018 – to January 2019. As per Loan Agreement, interest payment of the loan was required to be paid on the 15th day of each month in advance for the respective month. The Financial Creditor issued a loan recall notice dated 28.08.2020 to the Corporate Debtor, Co-Borrower and the Personal Guarantors, recalling and demanding repayment of Rs.68,82,64,595/-. Despite recall notice, no payments were made. A notice under Section 13(2) of SARFAESI Act on 24.09.2020 was also issued. Default having been continued, the Financial Creditor filed an Application under Section 7, both against the Borrower (Rite Builtech Pvt. Ltd.) and Co-borrower (Rite Developers Pvt. Ltd.) in July 2022. An Application for amendment was filed by the Financial Creditor seeking to amend Part-IV of Section 7 Application, which was allowed by the Adjudicating Authority on 12.05.2023. Reply to Section 7 Applications were filed by the respective Corporate Debtors. The Adjudicating Authority by the impugned order admitted Section 7 Applications, i.e. CP (IB) No.1029/MB-IV/2022 and CP (IB) No.1023/MB-IV/2022. Aggrieved by which order, these Appeals have been filed.

4. We have heard Shri Abhijeet Sinha and Shri Prakhar Tandon, learned Counsel appearing for the Appellants; and Shri Ramji Srinivasan, learned Senior Counsel appearing for Financial Creditor.

5. Learned Counsel for the Appellants, challenging the impugned order submits that as the loan recall notice dated 20.08.2020 fell within the period of Section 10A of the Code, the Application under Section 7 was barred. The Financial Creditor had filed the petition under Section 7 for the entire loan amount, whereas as per provision of Section 10A, the Financial Creditor is barred from filing any petition under the IBC Code for the debt, which is for default committed during 10A period. As per Clauses of the Loan Agreement, it was mandatory to issue notice in case of default, hence, it cannot be said that default on non-payment of interest would automatically lead to recall of the entire loan. The Financial Creditor cannot split the cause of action. The Financial Creditor could not have filed one consolidated petition for entire loan amount for two split causes of action. According to Respondent's own case, one cause of action arose until the default was only till the extent of interest, whereas, the second cause of action arose on 20.08.2020, when the loan recall notice was issued by the Financial Creditor. The Financial Creditor could not have filed petition for both interest component as well as the entire loan amount. There cannot be multiple date of defaults. Bar under limitation is different from statutory bar.

6. Shri Ramji Srinivasan, learned Senior Counsel appearing for the Financial Creditor submits that the default was committed by the Corporate Debtor in regard towards interest payment obligation, i.e. PEMI with respect to loan of Rs.60 crores availed by the Corporate Debtor from the Financial Creditor. The loan was liable to be repaid jointly and severally

by the Corporate Debtor and Co-borrower. The default before 10A period, i.e. up to February 2020 was Rs.10,51,94,998/- crores, which has been noted in paragraph 1.3 of the impugned order. Thus, default having been committed prior to 10A period, filing of the Application under Section 7 is not barred by Section 10A. It is further submitted that entire loan fell due on account of non-payment of PEMI for two consecutive months as per Clause 8.1 . Hence, the entire loan became due prior to 10A period. Default had occurred even prior to issuance of notice dated 28.08.2020, hence, the Application under Section 7 was fully maintainable. In any event of the matter, admittedly default having prior to 10A period for the amount, which is more than rupees one crore, there is no infirmity in the order admitting Section 7 Application. Present is not a case where default has occurred during 10A period. Default having occurred prior to 10A period, the Application was fully maintainable. Date of default mentioned in Part-IV of the Application was 11.07.2018, which is much before the commencement of 10A period. The Corporate Debtor has been in continuous default even much before the 10A period and mere issuance of recall notice during the 10A period is insignificant. Each event of default in payment of PEMI, created a separate cause of action to recall the entire loan amount. The learned Senior Counsel for the Respondent has relied on Clause 8.1 of the Loan Agreement, according to which two consecutive default in the payment of interest constitutes an event of default, upon the occurrence of which the whole of the loan was to become forthwith due and payable.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. Before we proceed to examine the rival contentions of the parties, it is relevant to notice certain clauses of the Loan Agreement dated 06.06.2018. Clause 3 deals with 'Repayment of loan'. Clause 3.1 deals with 'Period of Repayment', which is as follows:

> *"**3.1 Period of Repayment:***
>
> *The Borrower agree to repay the said Loan together with interest accrued thereon at the rate & manner stipulated in the Schedule I hereunder written. The interest payment to be made by the 15th day of each month in advance for the respective month. It will be payable monthly from the date of first disbursement."*

9. Clause 4.2 provided 'Additional interest in case of default'. Clause 8 deals with 'Event of default'. Clause 8.1, (a), (b) and (c) is as follows:

> *"**8.1(a)** If there is a default in payment of any of interest or principal for two consecutive months; or*
>
> *b) If there is any breach or violation of any of the terms of sanction of the said Loan; or*
>
> *c) Any default in the performance of any covenants, conditions or agreements on the part of the Borrower under this agreement or any other agreement or document/ security documents executed/ to be executed between the Borrower/ Mortgagors and DHFL pursuant to this Agreement and such default shall have continued over a*

period of 30 days after notice thereof shall have been given to the Borrower by DHFL; or"

10. Clause 8.3, on which reliance has been placed by the Appellant, provides as follows:

> *"**8.3.** If any event of default or any event which, after the notice or lapse of time or both would constitute an event of default shall have happened, the Borrower shall forthwith give to DHFL a notice thereof in writing specifying such event of default or such event."*

11. We may also notice Part-IV of the Application under Section 7. In Column 2 of Part-IV, which relate to 'Amount claimed to be in default and the date of default', following has been stated:

"2.	Amount claimed to be in default and the date on which the default occurred (Attach the workings for computation of amount and days of default in tabular form)	**Amount in Default:** The outstanding amount under the Loan, payable by the Corporate Debtor to the Financial Creditor, being the total outstanding amount due in respect of Loan as on 31.05.2022 is INR 88,32,06,244 (Indian Rupees Eighty Eight Crores Thirty Two Lakhs Six Thousand Two Hundred and Forty Four) **Date of Default:** 11 July 2018 In term of the Loan Agreement, the first instalment of the pre-equated monthly installment interest was required to be paid by the Corporate Debtor on 30 June 2018. However, the

		Corporate Debtor and/ or the Co-Borrower have failed to honor their obligations in respect of the instalment due on 30 June 2018. In the event of failure to make payment of the pre- equated monthly installment interest, a cure period of 10 days is provided under the Loan Agreement. Accordingly, the Corporate Debtor defaulted in its payment obligations on 11 July 2018. The date of default of 11 July 2018 is also duly recorded with the Information Utility as is reflected in the report dated 7 June 2022 provided by the information utility. National E-Governance Services Limited. Vide order dated 10 January 2022 passed by the Hon'ble Supreme Court in Suo moto Writ Petition (C) No 3 of 2020 (read with previous orders dated 23 March 2020, 8 March 2021 and 23 April 2021) the limitation period will expire on 20 July 2023. The Corporate Debtor has committed default of its payment obligations under the Sanction Letter and the Loan Agreement on consecutive occasions, which default continues as on date. Vide order dated 10 January 2022 passed by the Hon'ble Supreme Court in Suo moto Writ Petition (C) No 3 of 2020 (read with earlier orders dated 23 March 2020, 8 March 2021 and 23 April 2021) the period between 15 March 2020 to 28 February 2022 was excluded from the computation of limitation period. Further, in cases where the limitation period was expiring

		during the aforesaid period of 15 March 2020 to 28 February 2022, a period of 90 days or the balance period of limitation (after exclusion of the aforesaid period), whichever is greater, would be available from 1 March 2022."

12. The Adjudicating Authority in the impugned order has clearly noticed the dates of default committed by the Corporate Debtor, which is not refuted by the Appellant. Paragraph 1.3 of the impugned order passed by the Adjudicating Authority is as follows:

> "***1.3*** *The date of Default is stated as "In terms of the loan agreement, the first instalment of the pre-equated monthly instalment interest was required to be paid by the Corporate Debtor on 30.06.2018. However, the Corporate Debtor and/or the Co-Borrower have failed to honour their obligations in respect of the instalment due on 30.06.2018. In the event of failure to make payment of pre-equated monthly instalments interest, a cure period of 10 days is provided under the loan agreement. Accordingly, the Corporate Debtor first defaulted in its payment of PEMI/interest on 11.07.2018." Thereafter, the Corporate Debtor has committed default of its payment obligations towards PEMI/interest under the Sanction Letter and the Loan Agreement on consecutive occasions, which default continues as on date. The subsequent dates on which the Corporate Debtor has committed default are as follows:*

Month	*PEMI Interest*	*PEMI Interest received/ Creditor*	*Closing PEMI O/s*
July 2018	*3,44,150*	*0*	*1*
July 2018	*2,37,625*	*0*	*58,20,775*
August 2018	*42,41,308*	*4241309*	*58,22,774*
September 2018	*29,48,324*	*0*	*87,69,098*
October 2018	*46,88,810*	*0*	*1,34,57,908*
November 2018	*48,12,188*	*5310*	*1,82,64,786*
December 2018	*48,56,438*	*23121224*	*0*
January 2019	*52,49,734*	*0*	*52,49,734*
February 2019	*57,34,438*	*-23121224*	*3,41,05,396*
March 2019	*57,34,438*	*39839834*	*0*
April 2019	*58,86,833*	*0*	*5,75,00,333*
May 2019	*58,86,833*	*-39839834*	*5,16,13,500*
June 2019	*58,86,833*	*0*	*5,75,00,333*
July 2019	*58,86,833*	*0*	*63,38,71,166*
August 2019	*58,86,833*	*0*	*6,92,73,999*
September 2019	*58,86,833*	*0*	*7,51,60,832*
October 2019	*58,86,833*	*-60001*	*8,16,47,666*
November 2019	*58,86,833*	*0*	*8,75,34,499*
December 2019	*58,86,833*	*0*	*9,34,21,332*
January 2020	*58,86,833*	*0*	*9,93,08,165*
February 2020	*58,86,833*	*0*	*10,51,94,998*
March 2020	*58,86,833*	*0*	*11,10,81,831*
April 2020	*58,86,833*	*0*	*11,69,68,664*
May 2020	*58,86,833*	*0*	*12,28,55,497*
June 2020	*58,86,833*	*0*	*1,287,42,330*
July 2020	*58,86,833*	*0*	*13,46,29,163*
August 2020	*58,86,833*	*0*	*14,05,15,996*
Total			***163,96,56,425***

13. The main contention raised by the learned Counsel for the Appellant is bar on account of Section 10A. Section 10A of the Code is as follows:

> ***"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."*

14. When we look into the date of default as mentioned in paragraph 1.3 of the impugned order, it is clear from the Table that till February 2020, admitted amount in default was Rs.10,51,94,998/-. The emphasis made by learned Counsel for the Appellant is on the notice dated 28.08.2020, which is loan recall notice. The submission of learned Counsel for the Appellant is that loan recall notice having been issued on 20.08.2020, the entire loan became due only consequent to loan recall notice, which loan recall notice having been issued on 20.08.2020, i.e., during 10A period, the application was clearly barred. Loan recall notice dated 28.08.2020 was addressed to Corporate Debtor as well as the Personal Guarantor. The contention advanced by the learned Counsel for the Financial Creditor to

counter the above submission is on the basis of Clause 8.1 of the Loan Agreement. The Respondent's case is that on occurring of two consecutive defaults in the payment of interest, it will constitute an event of default and the whole of the loan shall become forthwith due and payable by the Borrower. The above Clause clearly contemplates that on occurring of event of default, the whole of the loan shall become forthwith due and payable, and even the principal amount of the loan shall become due when event of default occurs. There is no dispute between the parties that there is admitted default in payment of interest for two consecutive months prior to 10A period, which is apparent from the Chart as extracted in paragraph 1.3 of the impugned order. Even if, no notice dated 28.08.2020 was issued by the Financial Creditor, the principal amount also became due on occurring of event of default as per Clause 8.1.

15. The learned Counsel for the Appellant has relied on Clause 8.3 and submits that giving a notice was necessary, if any event of default occurs. Clause 8.3 of the Loan Agreement as extracted above, clearly indicates that obligation to give notice under Clause 8.3 is on the Borrower, which is clear from expression "*The Borrower shall forthwith give to DHFL a notice thereof in writing specifying such event of default or such event*". Clause 8.3 of the Loan Agreement, thus, cannot be read to fasten any liability on the Financial Creditor to give notice of event of default. We thus, do not find any substance in the submission of the Appellant relying on Clause 8.3 of the Loan Agreement.

16. The bar under Section 10A, does not apply when the default is committed prior to 10A period. The learned Counsel for the Respondent has rightly placed reliance on the judgment of this Tribunal in ***Narayan Manga vs. Vatsalya Builders & Developers Pvt. Ltd. – Company Appeal (AT) (Ins.) No.294 of 2023*** decided on 18.08.2023 where after noticing the Section 10A and the judgment of the Hon'ble Supreme Court in ***Ramesh Kymal v. siemens Gamesa Renewable – Civil Appeal No.4050 of 2020***, following has been observed in paragraph 8, 9 and 10:

> *"**8.** The object and purpose of Section 10A has been explained in the ordinance by which Section 10A was brought on record as well as the Hon'ble Supreme Court in the Judgment of "Ramesh Kymal vs. M/s Siemens Gamesa Renewable [Civil Appeal No. 4050 of 2020]". In the Judgment delivered today by this Tribunal on 18.08.2023 in Company Appeal (AT) (Ins.) No. 914 of 2023, we have occasion to notice the object of Section 10A. We have referred to the objects and reason as given in the ordinance in paragraph 8 of the Judgment which is as follows:*
>
> > *"8. In Ramesh Kymal's Case, the Appellant had filed an Application under Section 9 on 11th May, 2020 on the ground of default. The ordinance No. 09/2020 was promulgated by the President of India on 05th June, 2020 by which Section 10A was inserted into the I&B Code, 2016. An Application was filed by the Corporate Debtor for dismissal of Section 9 Application, the Section 9 Application was dismissed on the ground of Section 10A. Challenging the order of the*

Adjudicating Authority as well as Appellate Tribunal, Appeal was filed in the Supreme Court. Argument which was advanced before the Hon'ble Supreme Court was that Section 10A having been inserted in the statute book with effect from 05th June, 2020, it shall not apply on the Applications filed prior to the said date, which argument was rejected by the Hon'ble Supreme Court and relevant observations have been made in Paragraphs 22,23 and 24 as has been noted above. The Hon'ble Supreme Court affirmed the Order of the Adjudicating Authority holding that default in Section 9 Application being on 30th April, 2020 it being covered by Section 10A, Application was rightly rejected. The above judgment of the Hon'ble Supreme Court has laid down that if the default is after 25th March, 2020, the Application is hit by Section 10A. The object as was indicated in the ordinance for bringing Section 10A in the statute book is relevant to notice which is to the following effect:

> *"AND WHEREAS a nationwide lockdown is in force since 25th March, 2020 to combat the spread of COVID-19 which has added to disruption of normal business operations:*
>
> *AND WHEREAS it is considered expedient to suspend under Sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 to prevent corporate persons which are experiencing distress on account of unprecedented situation, being pushed into*

insolvency proceedings under the said Code for some time;

AND WHEREAS it is considered expedient to exclude the defaults arising on account of unprecedented situation for the purposes of insolvency proceeding under this Code."

9. *In the present case the question which has to be answered is as to whether if the interest payments accrued during the Section 10A period whether the said interest amount is to be deducted while computing the threshold. Present is not a case where bar of Section 10 A has been pressed rather present is the case where submission is that the interest amount which is occurring during the Section 10 A period should be excluded from computation of threshold.*

10. *The Section 10 A provides that no application/proceedings under Section 7,9 & 10 is to be initiated for a default which is committed during Section 10A period. What is bar is initiation of proceedings when Corporate Debtor commits default in Section 10 A period. If the default is committed prior to Section 10A period and continues in the Section 10 A period the initiation of proceeding is not barred."*

17. We, thus, are of the view that Application filed by the Financial Creditor under Section 7 was not hit by Section 10A. Furthermore, it is admitted case of the parties that prior to commencement of 10A period, the default upto February 2020 was approximately Rs.10,51,94,998/-, which is much beyond the threshold provided for Section 7 Application. We, thus,

do not find any good ground to interfere with the impugned order of the Adjudicating Authority admitting Section 7 Application. There are no merits in both the Appeals, both Appeals are dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

NEW DELHI

6th November, 2023

Ashwani