NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 1589 of 2023

(Arising out of the Impugned Order dated 14.09.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench-VI in Company Appeal (IB) No. 417/ND/2021]

IN THE MATTER OF:

Milind Kashiram Jadhav
Suspended Director of Jabalpur MSW Pvt. Ltd.
Resident of Sai Leela Apartment
Manvelpada Road
Near Manvelpada Riksha Stand
Manvelpada Gaon, Vasai,
Virar East Thane,
Maharashtra - 401305 **...Appellant**

Versus

1. **State Bank of India**
   Through Mr. Hari Singh Dalodia,
   Authorized Representative
   State Bank Bhavan, Madame Cama Marg,
   Mumbi, 400021

   BRANCH OFFICE:
   Stressed Assets Management Branch,
   Plot No. 1, First Floor, Area Hills,
   Bhopal, Madhya Pradesh – 462011 **...Respondent No.1**

2. **Mr. Sajjan Kumar**
   Resolution professional of
   M/s Jabalpur Msw Private Ltd.
   25, Globus Fab City, Kolar Road,
   Chuna Bhatti, Near Suyash Hospital,
   Bhopal Madhya Pradesh – 462016
   E-mail: sajjan suman@hotmail.com **...Respondent No.2**

Present:

For Appellant : Ms. Ritwika Nanda, Advocate

For Respondent : Mr. Siddharth Sangal and Mr. Chirag Sharma, Advocates for R-1/SBI

Mr. Vinod Chaurasia and Mr. Sajjan Kumar Dokania, Advocates for RP

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

[Per: Arun Baroka, Member (Technical)]

The present Appeal has been preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ("IBC Code") against the Impugned Order dated 14.09.2023 (hereinafter referred to as "Impugned Order") passed by the Hon'ble National Company Law Tribunal (NCLT), New Delhi – Bench-VI in the matter titled as "State Bank of India Vs. Jabalpur MSW Pvt. Ltd." [CP (IB) No. 417/ND/2021], inter alia, admitting the Application filed by the Respondent No. 1 i.e. State Bank of India under Section 7 of the IBC Code (hereinafter referred to as "Section 7 Application") against Jabalpur MSW Private Limited (hereinafter referred to as "Corporate Debtor"). The Appeal has been filed by Mr. Milind Kashiram Jadhav, the Suspended Director of the Corporate Debtor: Jabalpur MSW Private Limited.

Brief facts of the case

2. The Respondent, a Financial Creditor, filed an Application with the NCLT seeking insolvency proceedings against the Appellant, a Corporate Debtor, alleging a default exceeding Rs. 46.80 crores. The Respondent argued that the default date was September 27, 2019, when the loan became classified as a Non-Performing Asset (NPA) and issued the recall notice on 11.08.2020.

3. The Appellant contested this, asserting that the default occurred on August 18, 2020, after receiving a loan recall notice. They further argued this

fell within a period where initiating insolvency proceedings was barred under the IBC under Section 10A.

4. The Respondent No. 2 is the Interim Resolution Professional of the Corporate Debtor appointed by the Adjudicating Authority vide the Impugned Order and confirmed as the Resolution Professional vide the order dated 27.10.2023.

Submissions of the Appellant / Milind Kashiram Jadhav
Suspended Director of Jabalpur MSW Pvt. Ltd.

5. The total amount due, as stated in Part IV of Form-I, was approximately Rs. 46.80 crores as of 28.02.2021, consistent with the amount mentioned in the recall notice.

6. Considering the Corporate Debtor's consistent payments of interest and other amounts between 27.09.2009 and the date of recall, the date of default should be deemed as the date of the recall notice. If 11.08.2020 is considered the date of default, it falls under Section 10A, rendering Section 7 inadmissible.

7. The loan sanction letter outlines events of default and provides for a cure period, which was not afforded to the Corporate Debtor. Examination of these default events and remedies under the agreement suggests that a cure period was mandatory, and the loan could not be accelerated from the declaration of NPA date.

8. Without going into the details of past lending history we are focussing on relevant current lending history which caused the debt and default. On

04.08.2014, the Financial Creditor issued a Sanction Letter to the Corporate Debtor, sanctioning credit facilities of Rs. 54,00,00,000/- for part-financing the Municipal Solid Waste (MSW) treatment plant of 580 TPD capacity for Waste To Energy (WTE) conversion at Jabalpur on Design, Build, Own, Operate, and Transfer (DBOOT) basis. The contractual terms between the Corporate Debtor and the Financial Creditor are governed by the terms of this sanction letter dated 04.08.2014.

9. Clause 16 of the sanction letter outlines the conditions constituting "Events of Default" concerning the Corporate Debtor's obligations as per the Sanction Letter. In the event of any remediable default occurrence, a suitable cure period shall be provided from the date of such event.

10. The relevant part of the Clause 16 is reproduced herewith:

"**Events of Default** -

Each of the following shall, inter alia, constitute an Event of Default under the Financing Documents:

a) Payment Default: The Borrower does not pay on the due date any amount payable by it under any Financing Documents;

b) Breach of obligations: The Borrower does not comply with any material provision of the Financing Documents or Material Project Documents;

c) Misrepresentation: A representation, warranty or statement made or repeated in or in connection with any Financing Documents or Material Project Documents or in any document delivered by or on behalf of the Borrower is incorrect

d) Inadequate security and insurance;

e) Breach of any undertaking furnished by Sponsor,

f) Cross default of the Borrower under any of the Material Project Documents;

g) Utilization of facility for purposes other than for which they have been granted;

h) Change on control of the Borrower without the prior written approval of the Lenders;

i) Default with respect to any Material Project Documents which may have a material adverse effect;

j) Revocation, termination or suspension of a material contract;

k) Insolvency/winding-up or dissolution of Borrower;

1) Compromise by Borrower with creditors generally;

m) Cessation/threat of cessation of business of Borrower,

n) Sale/transfer of assets which in reasonable opinion of Lenders has/shall have Material Adverse Effect, and

The above are indicative and shall be defined in detail in the Facility Agreement Including consequence oy event of default. Upon the occurrence of any of the Events of Default mentioned in clauses that is capable of remedy, a suitable cure period shall be provided from the date of the occurrence of such event".

11. It's clear that in the event of a default, the Corporate Debtor must be given a cure period to rectify any alleged default.

12. Additionally, Clause 16 of the Sanction Letter outlines "Remedies for Events of Default," specifying that if a default persists after any provided cure period, the Lenders may take appropriate actions, including accelerating the maturity of the Facility. The relevant excerpt of Clause 16 is provided below:

"**Remedies for Event of Default:**

If an Event of Default has occurred and continues even after cure period provided for, if any, the Lenders may among others, take one or more of the following actions:

a) Accelerate the maturity of the Facility;

b) Enforce the security Interests under the security documents;

c) Declare the commitments to be cancelled or suspended,

d) Issue notion regarding the payment of proceeds of any insurance or compensation;

e) Issue a notice to the designated bank for the purposes of drawing on the balance in the TRA;

Appoint one Nominee Director on the Board of Directors of the Borrower

g) Convert the outstanding Facility in to Equity of the Borrower,

h) Take steps to exercise all rights as may be available to Lenders under the Financing Documents and Material Project Documents; and

i) Exercise of any other rights of the Lenders under applicable law."

13. From a bare reading of the aforementioned, it is evident that in case any event of default had occurred, a suitable cure period notice had to be given and if the default is not cured within the period stipulated in the cure period notice, then and only then, the Financial Creditor may elect the Remedies for event of default including but not limited to the acceleration of the maturity of the Facility.

14. Till the time the acceleration of the maturity of the Facility in terms of the Sanction Letter does not occur, the entire outstanding amount as per the Facility/Loan Agreement does not become due and / or payable by the Corporate Debtor to the Financial Creditor. And if the entire loan outstanding is not due and payable, a default of debt cannot arise.

15. In the instant case, the Financial Creditor, in utter breach of the terms of the Sanction Letter, had failed to issue an intimation of Event of Default and had failed to provide any period of cure to the Corporate Debtor.

16. Specifically speaking on 11.08.2020, the Financial Creditor issued a Loan Recall Notice to the Corporate Debtor. It is by way of this Loan Recall Notice that the Financial Creditor accelerated the repayment of the loan facility/ recalled the entire outstanding loan amount to be payable within 7

days from the receipt thereof. Thus, at best, considering the date of the Loan Recall Notice, the total outstanding due amount under the Sanction Letter fell due and payable on 18.08.2020 i.e. 7 days from the Loan Recall Notice and any failure to pay the outstanding dues on 18.08.2020 would constitute as a default.

17. In the aforementioned Loan Recall Notice, the Financial Creditor had mentioned that the Corporate Debtor had availed and utilized the aforesaid credit facilities but had been highly irregular in its repayment. Therefore, the loan accounts, pertaining to the aforesaid have been classified as Non-Performing Assets by the Financial Creditor on 27.09.2019 in accordance with the directions/ guidelines of the Reserve Bank of India. It is further stated that by way of the aforementioned Loan Recall Notice, the Financial Creditor had called upon the Corporate Debtor to repay the outstanding dues of Rs. 47,32,54,888/- (Rupees Forty Seven Crores Thirty Two Lakhs Fifty Four Thousand Eight Hundred and Eighty Eight Only), together with the future interest, calculated at the contractual rate, w.e.f. 01.08.2020 till the date of final repayment, within 7 days from the date of receipt of the aforementioned Loan Recall Notice which is dated 11.08.2020.

18. The Loan Recall notice dated 11.08.2020 should have been preceded by an Event of Default notice specifying a Cure Period in terms of the "Event of Default" as specified under the aforementioned Sanction Letter. However, the Financial Creditor has failed to provide the same as per the terms of the Sanction Letter. Even if the Loan Recall Notice is considered to the be the Event of Default notice, then the date of default would only be after 7 days

from the receipt of the Loan Recall Notice dated 11.08.2020, i.e., sometime in the month of August, 2020 at the best.

19. The mere classification of an account as a Non-Performing Asset does not accelerate the maturity of the Facility or make the Corporate Debtor liable to make the payment the entire outstanding dues under the Facility. It is submitted that on a conjoint reading of the terms of the Sanction Letter and the Loan Recall Notice, the date of default for payment of the entire outstanding dues of Rs. 47,32,54,888/- (Rupees Forty Seven Crores Thirty Two Lakhs Fifty Four Thousand Eight Hundred and Eighty Eight Only) can at best be after 7 days from the receipt of the Loan Recall Notice dated 11.08.2020 by the Corporate Debtor which in no event can be any day before 18.08.2020.

20. Appellant submits that from the Statement of Accounts appended with the Application, it shall be evident that the Corporate Debtor made substantial payments even after being classified as a "Non – Performing Asset" on 27.09.2019 and default, if any, stood cured on such payments being made.

21. Appellant submits that the event of default, if any, as per the terms of the Sanction Letter and the Loan Recall Notice, has arisen in the month of August, 2020, i.e., 7 days after the receipt of Loan Recall Notice dated 11.08.2020 by the Corporate Debtor, which clearly falls between the period of 25.03.2020 to 24.03.2021 for which the initiation of corporate insolvency resolution process was statutorily barred under Section 10A of the IBC, 2016 and therefore, no Application could ever be filed for initiation of Corporate

Insolvency Resolution Process against the Corporate Debtor. Alleged "Debt" of Rs. 46,79,88,297.64 at best arose on 11.08.2020 when the loan was recalled vide the Loan Recall Notice dated 11.08.2020 and "Default" in respect thereof arose, at best, on 18.08.2020 and proceedings in respect thereof is barred in terms of Section 10A IBC.

22. The IBC Code, 2016 clearly defines the default date as the date of occurrence of event of default but the Adjudicating Authority has incorrectly relied on the date of NPA declaration by the Financial Creditor. "Default" has to be considered in terms of the Sanction Letter/ terms and conditions agreed upon by the parties.

23. Further, Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [IB(AAR), 2016] inter alia, provides the form and manner in which an Application under Section 7 of the IBC is to be preferred, reproduced as under:

> "4. Application by Financial Creditor.- (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016."

24. Thus, as per Section 7(3) (a) of the IBC read with Rule 4 of IB(AAR), 2016 read with Reg. 2A of IB(IRPCP), 2016, the following records/evidence of default is required to be filed with the Application, as under:

Sl. No.	**Record/ Evidence of Default**	**Relevant law/rule/ regulation**	**Relevant Entry in Form 1 IB(AAR)**	**Whether provided with the Section 7 Application by Respondent**

				No. 1 and status
1.	Record of the default recorded with the information utility	Section 7(3)(a) of IBC	Sl. No. 3 Part V	Not filed/No such record maintained [NB: see Sl. No. 3 Part V of Application]
2.	certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891)	Section 7(3) (a) of IBC read with Reg. 2A of IB(IRPCP), 2016 read with Rule 4 of IB(AAR), 2016	Sl. No. 7 Part V	Not filed
3.	An order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.	Section 7(3)(a) of IBC read with Reg. 2A of IB (IRPCP), 2016 read with Rule 4 of IB(AAR), 2016	Sl. No. 2 Part V	Not filed/Not applicable
4.	Record of default as available with any credit information company	Rule 4 of IB(AAR), 2016	Sl. No. 6 Part V	CRILIC Report dt. 22.06.20218 (Annex) with the Section 7 Application) NB: See Sl. No. 6 Part V of the Section 7 Application; The said document does not bear out any "default" and also classifies the account of the CD as "Standard"

25. Thus, it is stated that the Section 7 Application did not establish a "Default" as is sought to be alleged by the Respondent No. 1. At Sl. No. 6 of

Part V of the Section 7 Application, the Respondent No. 1 had annexed the CRILIC Report dt. 22.06.20218. The said document does not bear out any "default" and also classifies the account of the CD as "Standard".

26. Appellant claims that Date of NPA is not equivalent to "Default" as per IBC and the records of the Respondent No. 1 establishes payments by the Corporate Debtor even after the date NPA.

27. As per the Statement as filed by the Respondent No. 1, it shall be evident that the Corporate Debtor has been duly making payment, as under:

Alleged Interest Due and Penal Interest (as on 28.02.2021)	**Payment made (as on 28.02.2021)**
Rs. 7,15,01,164.39	Rs. 9,43,88,000.00
Rs. 1,40,31,623.25	Rs. 1,90,31,977.00

Thus, it is stated that SOA with the Section 7 Application was grossly incorrect and fabricated.

28. Corporate Debtor was a going concern and that the Respondent No. 1 had been appropriating payments / monies even till the filing of the written submissions in the matter.

Submissions of Respondent- Financial Creditor- State Bank of India

29. As per the RBI Circular in regard to NPA/Income Recognition, once the debt continues to be in default for a period of 90 days, the loan account is classified as NPA, therefore, in other words, the defaulter/borrower gets 90 days to cure the default of payment of the loan instalment, failing which the loan accounts are classified as NPA and the default for the entire outstanding

is complete. In the present case, the payment of the loan instalment was due on 30.06.2019 which was not paid, thus, on the 90th day i.e. 27.09.2019 the loan accounts were classified as NPA.

30. 90 days is provided for an account to be declared as NPA. There are various stages before that i.e. SMA0, SMA1, SMA2 and then NPA. NPA declaration was done on 27.09.2019.

31. For the period prior to 90 days, only arrears of interest and principal, if any, being the loan instalments are due. However, once the loan accounts are classified as NPA, the entire outstanding amounts including the principal and interest outstanding becomes due and payable. Thus, the Banks/FCs are within their rights to expect the payment of the said entire outstanding amounts including the principal and interest outstanding from the defaulter/borrower. Therefore, when the statutory Demand Notice under Section 13 (2) of SARFAESI Act, 2002, if any, or a Loan Recall Notice, if any, is issued post the NPA, the entire outstanding amount, including the principal and interest, is demanded.

32. Post the classification of the loan accounts of CD as NPA, the said loan accounts were never regularized by the Appellant/Corporate Debtor. Thus, as long as the loan accounts continued to remain NPA, the default continued.

33. Appellant has tried to argue that certain payments were made after the date of the NPA, thus, the date of NPA cannot be taken as the date of default as the default was cured. In this regard, first, even if certain payments were

made, the loan accounts were never regularized but continued to be 'NPA', thus, the date of NPA never shifted and the default continued.

34. Adjudicating Authority is only required to see whether there exist a debt and default and whether the Section 7 IBC Application was filed within 3 years from the Date of Default, which in the present case was done by the Adjudicating Authority.

35. The entire case of the Appellant is that the date of NPA of 27.09.2019 is mentioned as date of default and no 'Cure Period' Notice was given for Event of Default and the Loan Recall Notice was issued only on 11.08.2020 in which 7 days' time was given for payment, thus, 18.08.2020 could only be a date of default which date falls within the Section 10A period.

36. Once the default of payment of loan/debt/instalment continues for 90 days the loan accounts are classified as NPA on which the entire loan outstanding becomes due. Thus, the default commenced 90 days prior and the entire outstanding became due and payable on the date of NPA on 27.09.2019. Therefore, the Respondent No. 1-Bank was within its rights to take further recourse for resolution of the Corporate Debtor under the IBC, 2016 on the strength of the default which was evidenced by the date of NPA.

37. The Loan Recall Notice dated 11.08.2020 was issued only to provide the CD with one more chance to make payment of all the outstanding dues, and was rather issued because the loan accounts of the CD were classified as NPA on 27.09.2019. Thus, the NPA Date of 27.09.2019 was true and correct date of default for all intents and purposes including the Section 7 IBC

Application. Sufficient time and opportunity were granted to the CD for making payment of the outstanding debt.

38. Even after filing of the Section 7 petition, the CD sought time to settle the matter and multiple adjournments were granted, however, the parties failed to settle the matter. One-Time-Settlement offered by the CD, twice, were rejected by the consortium, thus, the liability and the factum of debt and default stood admitted by the CD, already.

39. To initiate CIRP under Section 7 IBC the Applicant is required to establish existence of financial debt and that default has been committed in respect of financial debt. The material on record clearly shows that there was a debt and the CD has committed a default in the repayment of the outstanding debt amount which was admitted by the CD.

40. Date of NPA is totally and completely an acceptable 'Date of Default. 'Adjudicating Authority has accepted the date of NPA (Non- performing Asset) of the loan accounts of the CD i.e. 27.09.2019 as the 'Date of Default' while the Appellant states that the Date of NPA could not be a 'Date of Default', which stand of the Appellant is incorrect and liable to be rejected on the strength of the judicial pronouncements of the Hon'ble Apex Court rendered in ***Laxmi Pat Surana v. Union Bank of India, (2021) 8 SCC 481 and Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330*** as also the judgment of the NCLAT, dated 24.09.2023, *i.e.* ***Jagdish Prasad Sarada v. Allahabad Bank, Company Appeal (AT) (Ins.) No. 183 of 2020.***

41. Immediately after the account turning NPA, the balance principal outstanding in Loan A/c No. 34331864441 stood at Rs. 42,03,30,833/- and even after adjusting the amounts credited in the said loan a/c post 30.09.2019, the balance outstanding in the said loan A/c stood at Rs.39,74,43,997.39 as on 28.02.2021. Also, as on 30.09.2019 i.e. immediately after the account turned NPA, the balance principal outstanding in the other Loan A/c No. 61257831245 stood at Rs.7,55,44,654/- and even after adjusting the amounts credited in the said loan a/c post 30.09.2019, the balance outstanding in the said loan a/c stood at Rs. 7,05,44,300.25 as on 28.02.2021. Thus, even after adjusting the alleged amounts paid by the CD post 30.09.2019, the balance outstanding amounts/debt due from the CD as on 28.02.2021 stood at a whopping Rs. 46,79,88,297.64 (Rupees Forty-Six Crores Seventy-Nine Lakhs Eighty-Eight Thousand Two Hundred and Ninety-Seven and Paise Sixty-Four Only), much above the threshold required under the IBC.

42. Once the loan is taken by the CD, it was fully aware that it has to service the interest as per the loan documents, thus, the said obligation of the CD need not be reminded or intimated to the CD. The CD was a party to the loan documents. It has to be aware of its obligations under the said documents.

43. The account of the CD was changed to 'in default' twice before classifying the account as NPA on 27.09.2019. Further, even if the failure of the CD in payment of the loan instalment is construed as an 'Event of Default', the Sanction Letter or even the loan documents nowhere postulate that the Bank has to intimate such default to the CD, because the CD is in

fact already aware of his obligation of making payments and is also aware of the consequences of non-payment of loan instalments.

44. CD offered OTS twice to the consortium also goes to show that the CD was fully aware of its default.

45. Since the non-payment of the loan instalment may be an 'event of default', the CD ought to have been given a cure period notice by the Bank which was not given, the CD was to service the interest/loan instalment every month, thus, if the CD failed to service the said interest/loan instalment in any month, the Sanction Letter or even the loan documents nowhere postulate any 'notice' to be given by the Bank for the alleged 'cure period'; Sanction Letter talks about the cure period for those events of default which are capable of remedy, however, the default in payment of interest/loan instalment intentionally and deliberately is not capable of remedy from the end of the Bank but only at the end of the CD which was not done. Moreover, the loan accounts of the CD were classified as NPA on 27.09.2019 after 90 days of continued default on the part of the CD to service interest/loan-instalment/debt. Thus, the CD already got a cure period of 90 days to make payment of the debt but failed to service the interest/debt even after 90 days, thus, the Bank was within its rights to proceed further with seeking the resolution of the CD.

46. In any case, the loan accounts were classified as NPA on 27.09.2019 whereas the Section 7 IBC Application has been filed only on 30.03.2021 or so. Thus, it is an admitted position that the default continued even until the

filing of the Section 7 IBC Application and no default was cured by the CD, else there was no necessity for the Bank to seek resolution of the CD under the IBC.

47. Once the loan accounts of the CD were classified as NPA on 27.09.2019, the CD was liable to make payment of the entire outstanding amounts including interest to the Bank. However, the CD made payment of only some partial amounts towards the outstanding debt. Due to which the loan accounts continued to be NPA or in other words the default continued. Therefore, the loan recall notice dated 11.08.2020 was issued to the CD despite the fact that it was not required under law at all, to let it know that since the loan accounts are already NPA the CD needs to make the payment of the entire outstanding debt including up to date interest instead of making partial payments, for which the Bank gave him 7 days. Thus, the said loan recall notice was only in furtherance to the already committed default on the part of the CD, by which the loan accounts were classified as NPA on 27.09.2019, which default continued even on the date of loan recall notice. Thus, it is wrong to suggest, on the part of the Appellant that since 7 days' period from loan recall notice dated 11.08.2020 expired on 18.08.2020, the date of default shall be 18.08.2020. The loan accounts were classified as NPA on 27.09.2019 which default continued; thus, the date of default is correctly posted as 27.09.2019 in the Section 7 IBC Application.

48. Section 3(12) of the IBC deals with the expression 'Default' to mean non-payment of debt when whole or any part of instalment of the amount has become due and payable, thus, when on the loan accounts being classified as

NPA the whole of the debt is due and payable - it is a 'Default' under the IBC, thus, the date of NPA can be taken as the date of default.

49. Allegations of the Appellant are only technical in nature to divert the attention which have no bearing on the Section 7 IBC Application.

Appraisal:

50. Heard counsels of rival parties and also perused documents placed before us.

51. Briefly speaking, Appellant's main arguments are that the date of default should be the date of the Loan Recall Notice (August 11, 2020) because they made payments between the NPA declaration (September 27, 2019) and the Recall Notice. Also the Financial Creditor (State Bank of India) should have provided a cure period notice before the Loan Recall Notice, as stipulated in the loan agreement. And in such a situation the default would have fallen within the period of March 25, 2020 to March 24, 2021 and the proceedings would have been barred under Section 10A of IBC.

52. On the other hand, Respondent's (Financial Creditor's) main arguments are that the date of NPA declaration (September 27, 2019) is the default date because prior to this date the loan remained unpaid for more than 90 days. Loan Recall Notice is an additional opportunity to pay, not a requirement for establishing default. And also cites Hon'ble Supreme Court judgements ***(Laxmi Pat Surana v. Union Bank of India & Dena Bank v. C. Shivakumar Reddy)*** to support their stance on NPA classification being a valid default date. It also acknowledges some payments after the NPA

declaration but argues they weren't enough to regularize the account and the default continued. And even highlights the rejection of the Corporate Debtor's One-Time Settlement (OTS) proposals as an admission of debt and default.

53. The **main issues** which emerge for our consideration are as follows:

a) Whether the Adjudicating Authority was correct in admitting the Bank's application for initiating CIRP against the Company.

b) Whether September 27, 2019 (NPA classification date) or August 18, 2020 (loan recall notice date) constitutes the "date of default" under the IBC.

54. It is an admitted fact that the Corporate Debtor owes Rs. 46.80 crores to the financial creditor, though the Appellant has been claiming that as per the Statement Of Account (SOA) the Financial Creditor has attached incorrect and fabricated SOA. Without going into the exact amount of the debt, it is an admitted fact that the debt was Rs.46.80 crores as on the date of declaration of NPA i.e. 27.09.2019. This amount is more than the threshold of Rs.1 crore and is enough for initiating proceedings. There is no requirement to calculate and fix the exact amount of repayment, this has been held by this Tribunal as under:

> "14. In so far as the facts included in the Section 7 application in Form 1 application is concerned, the Financial Creditor has to provide information about the debt which is due and payable and also the date and record of default. **There is no requirement in the adjudication of Section 7 application to calculate and fix the exact amount of debt in default of repayment.** It is only to be seen whether the amount in default is more than the minimum or threshold value that is prescribed in Section 4(1) of the IBC."
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> ***[Company Appeal (AT) (Ins.) No. 662-663 of 2022: Suzlon Synthetics Ltd. v. Stressed Asset Stabilization Fund (2022) 145 taxmann.com 594 (NCLAT-New Delhi)]***
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> *[Emphasis supplied]*

55. The only other major issue is with respect to the date of default whether the date of NPA declaration (September 27, 2019) or the date of Loan Recall Notice (August 11, 2020) constitutes the default date, which is examined in next few paragraphs.

56. In adherence to Reserve Bank of India (RBI) regulations, the classification of Non-Performing Assets (NPAs) serves as a pivotal measure for maintaining the financial health and stability of the banking sector. When a borrower defaults on loan payments for a stipulated period, typically 90 days, the loan account is rightfully classified as an NPA. This classification isn't arbitrary; it's a well-defined threshold indicating a lapse in repayment obligations.

57. Consider the scenario at hand: a loan instalment due on June 30, 2019, remains unpaid. Following the regulatory protocol, on September 27, 2019, marking the 90th day of default, the loan account was rightly categorized as an NPA. This classification is not an arbitrary punishment but rather a consequence of a fundamental breach of repayment terms.

58. Upon classification as an NPA, the entirety of outstanding dues, encompassing both principal and accrued interest, becomes immediately due and payable. This measure is imperative for banks and financial institutions to safeguard their interests and maintain liquidity.

59. Following the classification of the loan accounts of the Corporate Debtor as Non-Performing Assets (NPA), there was a glaring absence of efforts on the part of the Appellant/Corporate Debtor to rectify the situation and

regularize the accounts. This default persisted as long as the loan accounts remained classified as NPAs.

60. Crucially, the onus lies on the borrower to rectify the default and regularize the loan account. Unfortunately, in this instance, the borrower, despite ample opportunity, failed to address the defaulted payments, thus perpetuating the default status. Such inaction cannot be condoned or overlooked.

61. In the light of these considerations, the bank is well within its rights to pursue its options for the outstanding amounts owed by the borrower.

62. Section 3(12) of the IBC deals with the expression 'Default' to mean non-payment of debt when whole or any part of instalment of the amount has become due and payable, thus, when on the loan accounts being classified as NPA the whole of the debt is due and payable - it is a 'Default' under the IBC, thus, the date of NPA can be taken as the date of default. In fact, the default has been persisting prior to 90 days of NPA declaration date.

63. Hon'ble Apex Court in the ***"B.K. Educational Services Private Limited Vs. Parag Gupta and Associates" [(2019) 11 SCC 633]*** had observed as under:

> "..... It is thus clear that since the Limitation Act is applicable to applications filed Under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. **"The right to sue", therefore, accrues when a default occurs.** If the default has occurred over three years prior to the date of filing of the application, the application would be barred Under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."
>
> *[Emphasis supplied]*

64. And in the instant case the default was occurring 90 days prior to the NPA declaration (September 27, 2019). It is difficult to accept the argument of the Appellant that this date should not be treated as the date of default.

65. Now we briefly examine the contention of the Appellant that the date of default should align with the recall notice date which is 11.08.2020, asserting that the provisions of the loan agreement were violated by the Financial Creditor's failure to provide a cure period notice as stipulated in the Sanction Letter.

66. Corporate Debtor (CD) relies on a Sanction Letter dated 04.08.2014, which is issued well before the enactment of the Insolvency and Bankruptcy Code (IBC) 2016. The events of default outlined in this letter aim primarily at recovery of amounts owed, rather than seeking the 'resolution' of the CD under the IBC. It's crucial to note that the CD was afforded a statutory period of 90 days from the date of the first irregularity in the loan account to rectify the default. Despite this opportunity, the CD failed to cure the irregularity, leading to the classification of the loan accounts as Non-Performing Assets (NPA) after 90 days of continued default. Furthermore, the remedies stipulated for events of default in the Sanction Letter primarily focus on the acceleration of maturity and the enforcement of security interest, such as filing a Recovery suit before the Debt Recovery Tribunal (DRT) and enforcing security interest under the SARFAESI Act, 2002. Notably, there is no mention of resolution under the IBC. Hence, relying on events of default and their corresponding remedies outlined in the Sanction Letter does not bolster the CD's case and we cannot rely on this line of argument.

67. Once the CD defaulted and the loan accounts were classified as NPAs, a legal recourse was well within the Bank's statutory rights. Pursuing resolution under the IBC 2016, which serves as a specialized law governing the resolution of distressed entities, was a legitimate course of action for the Bank.

68. The doubts would be further cleared in the judgement of Hon'ble Apex Court as extracted below:

> "**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 of the Code. 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 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action Under Section 7 of the Code.
>
> ***[Laxmi Pat Surana vs. Union Bank of India and Ors. (26.03.2021 - SC) (2021) 8 SCC 481]***
>
> *[Emphasis supplied]*

69. Default event is also elucidated by another judgement of Hon'ble Apex Court as extracted below:

> "The scheme of the IBC is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the Corporate Insolvency Resolution Process begins. Where any corporate debtor commits default, a financial creditor, an operational creditor or the corporate debtor itself may initiate Corporate Insolvency Resolution Process in respect of such corporate debtor in the manner as provided in Chapter II of the IBC."
>
> ***[Dena Bank vs. C. Shivakumar Reddy and Ors. (04.08.2021 - SC) (2021) 10 SCC 330.]***
>
> *[Emphasis supplied]*

70. Appellant's arguments to treat the recall date as the date of default therefore cannot be sustained, in the abovementioned background.

71. Consequently, the reliance on the date of NPA declaration (27.09.2019) by the Adjudicating Authority instead of the date of recall (18.08.2020), is therefore correct and also supported by the judicial precedents and also the facts in the instant case. And as the date of recall [11.08.2020] cannot be taken as the date of default, therefore Appellant cannot get any advantage of the10A period under IBC.

72. The Appellant/Corporate Debtor's attempt to refute this by highlighting certain payments made subsequent to the NPA classification is flawed on multiple fronts. Firstly, despite any payments made, the crucial fact remains that the loan accounts were never regularized; they continued to remain in the NPA category. Thus, the mere existence of partial payments does not absolve the Corporate Debtor from the default status. In the light of these incontrovertible facts, the argument put forth by the Appellant/Corporate Debtor holds no merit. The absence of concerted efforts to rectify the default

and the sustained classification as NPAs unequivocally establish the perpetuation of the default. Consequently, the bank is well within its rights to assert its claims based on the continued default status of the loan accounts.

73. Furthermore, the Bank has diligently presented evidence of default through NESL Certificates, submitting them before the National Company Law Tribunal (NCLT) along with comprehensive Written Arguments dated 09.03.2023. NESL Certificates stand as concrete manifestations of default, providing a clear and indisputable record of the debtor's failure to meet its financial obligations. Section 7(3)(a) states that ***"the Financial Creditor shall, along with the application furnish – (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; ....."*** and in this case record of default with the information utility was filed and is on record. In such a case there is no relevance of other documents as claimed by the Appellant and Admission cannot be disallowed on this ground.

Conclusions:

74. The loan accounts of the Corporate Debtor were officially classified as Non-Performing Assets (NPA) on September 27, 2019, following 90 days of non-payment, thereby triggering a default event. Despite subsequent partial payments made by the borrower, the NPA status and default persisted, indicating a continuous state of default. Consistent with established judicial precedents and the specific circumstances of the case, the date of NPA classification serves as the valid "Date of Default" for initiating insolvency

proceedings. Even after the NPA classification, the borrower remained in default. Consequently, September 27, 2019, the date of NPA classification, stands as the "date of default" under the Insolvency and Bankruptcy Code (IBC), superseding any subsequent events, such as the loan recall notice issued on August 18, 2020. The Adjudicating Authority's decision to admit the Bank's application for initiating Corporate Insolvency Resolution Process (CIRP) against the Company was apt and in accordance with the provisions of the IBC. There are no discernible flaws in the orders issued by the Adjudicating Authority; hence, they are upheld without any alteration. Appeal is dismissed. No costs are imposed in this matter.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

25th April, 2024

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