



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI, COURT III**

**IA-1547/2023**  
**in**  
**IB-359(ND)/2021**

Under Section 60(5) (c) of IBC, 2016

**IN THE MATTER OF:-**

PHL Fininvest Private Limited

..... **Financial Creditor**

**Versus**

Kay Jay Leasing Limited

..... **Corporate Debtor**

**And**

**IN THE MATTER OF: -**

Piramal Enterprises Limited

.....**Applicant**

**Versus**

Kay Jay Leasing

.....**Respondent**

**Pronounced on 05.12.2023**

**CORAM:-**

**SHRI ATUL CHATURVEDI  
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS  
MEMBER (JUDICIAL)**

**PRESENT:-**

For the Applicant : Mr. Krishnendu Datta, Sr. Adv.  
For the Respondent : Mr. Vikas Dutta. Adv.

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

**BRIEF BACKGROUND:-**

1. IB-359/ND/2021 was filed by M/s. PHL Fininvest Private Limited, the Applicant/Financial Creditor under Section 7 of IBC, 2016 read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process against M/s. Kay Jay Leasing Limited, the Respondent/Corporate Debtor. The said application was filed/registered on 06.07.2021.



2. M/s. PHL Fininvest Private Limited (PFPL), is a wholly owned subsidiary of Piramal Enterprises Limited and is engaged in various financial services businesses. It provides both wholesale and retail funding across sectors.

**The case of the Financial Creditor:-**

3. A Facility Agreement dated 20.07.2017, was entered into between M/s. Hema Engineering Industries Limited (HEIL)/(Borrower) and M/s. Piramal Finance Limited. M/s. Piramal Finance Limited and M/s. Piramal Capital Limited merged with M/s. Piramal Housing Finance Limited and the company was renamed as Piramal Capital and Housing Finance Limited. The Facility Agreement was subsequently assigned by M/s. Piramal Capital and Housing Finance Limited to M/s. PHL Fininvest Private Limited i.e. the Applicant/Financial Creditor by way of an assignment dated March, 22, 2019.
4. Pursuant to the Facility Agreement, the Applicant/Financial Creditor extended the facility of term loan to HEIL, pursuant to which HEIL availed the term loan facility of Rs. 400,00,00,000/- (Four Hundred Crores) from the Applicant/Financial Creditor which was fully disbursed as indicated in the following table:-

S. No.	Date	Amount (Rs.)
1.	31.07.2017	235,00,00,000
2.	21.08.2017	135,00,00,000
3.	30.11.2017	5,00,00,000
4.	14.09.2018	15,00,00,000
Total		400,00,00,000

5. The loan facility provided under the Facility Agreement had to be repaid over a period of 7 years in quarterly instalments in the manner prescribed under the Facility Agreement. The interest rate as agreed under the Facility Agreement was 13.25% per annum which was later on revised to 14.01%.
6. It is submitted that the Corporate Debtor and HEIL have defaulted and failed in fulfilling its payment obligations under the Facility Agreement and has



committed a default in terms of Clause 14(a) of the Facility Agreement. The Corporate Debtor has also breached Clause 3 of the Corporate Guarantee. The Applicant has therefore stated that the Corporate Debtor is liable to pay the following outstanding amount as on April, 5, 2021:-

<b>Particulars</b>	<b>Amount (Rs)</b>
Principal (including capitalized interest during Covid related moratorium granted from March 2020 to August 2020)	401,03,28,367
Overdue interest (Net of TDS)	31,39,37,251
Interest accrued but not due (net of TDS)	71,19,706
Penal interest (net of TDS)	1,39,74,140
TDS not deposited	8,82,62,263
<b>Total</b>	<b>443,36,21,727</b>

7. The Applicant/Financial Creditor has sent demand letter dated 24.10.2020 to HEIL calling upon them to clear the outstanding amounts along with interest. Thereafter, the Applicant/Financial Creditor sent a recall notice dated 24.02.2021 to the Corporate Debtor and HEIL and others recalling the entire loan amount in accordance with the Facility Agreement.
8. It is also submitted that CIRP have been initiated against Hema Engineering Investment Limited (HEIL) in an application by M/s. P.R. Rolling Mills Private Limited on 05.04.2021.
9. Subsequently, the present application under Section 7 of IBC, 2016 bearing IB-359/ND/2021 was filed on 06.07.2021.

**IA-1452/2023 & IA-1547/2023:-**

10. During the pendency of the matter, the Respondent/Corporate Debtor filed IA-1452/2023 on 13.03.2023 seeking dismissal of the Company Petition No. IB-



359/2021 on the ground that the petition is barred by Section 10A of IBC, 2016. Thereafter, the Applicant, filed IA-1547/2023 on 14.03.2023 seeking rectification on the date of default. The said Interlocutory Applications were heard together on 28.07.2023.

**IA-1547/2023: -**

- 11.** It is a case of the Applicant that the Corporate Debtor has been in default of its payment obligations under the Loan Agreement and the said defaults are continuing in nature. Further, the defaults committed by the Corporate Debtor have occurred even after the period prescribed under Section 10A of the Code expired. It is submitted that in Part IV of Section 7 application, the Applicant has mentioned that the date of defaults committed by the Corporate Debtor were continuing in nature and one of the defaults had occurred on 30.09.2020. Further, various defaults also occurred even after the said date of 30.09.2020. Therefore, the Applicant seeking rectification of the date of default i.e., 30.09.2020 as mentioned in Part IV of the Section 7 application. In this regard, the Applicant has placed reliance on the statement of accounts, repayment schedule to the Loan Agreement to demonstrate that the date of default is of a continuing nature. It is further submitted that as per the repayment schedule to the Loan Agreement, the date of maturity of the first tranche of the Term Loan was July, 31, 2024 and the date of maturity of the second Tranche of Term Loan is 31<sup>st</sup> January, 2025. The Applicant has therefore submitted that grave prejudice will be caused in case the rectification is not allowed and the date of default is not permitted to be altered.
- 12.** The Respondent filed reply affidavit to the Application for rectification of date of default filed by the Applicant raising objections. It is submitted that the date 05.04.2021 cannot be the date of default in the instant case in as much as 05.04.2021, is the date on which the CIRP of the Principal borrower was initiated. The Respondent referred to Clause 14 of the Facility Agreement which provides that an event of default is said to have occurred in case the Obligors, which includes the Borrowers was admitted into insolvency vide order dated 05.04.2021 of this Hon'ble Tribunal.



13. The Respondent relying upon the definition of default provided under Section 3(12) of IBC, 2016 which says “*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*” has submitted that the date of initiation of CIRP cannot be the date of default for initiation of Section 7 Application. The Respondent further submitted that as per Clause 3 of the deed of guarantee dated 05.06.2020, the obligation of the guarantor was to pay if there is a default on the part of the borrower in payment/repayment of the outstanding amounts. Therefore, the provisions of the deed of guarantee dated 05.06.2020 cannot be invoked based on the initiation of CIRP of the Principal borrower. The Respondent has further submitted that the Applicant issued a demand notice dated 24.02.2021 to the Respondent by which it recalled the loan and directed the Respondent to make the payment of the outstanding amounts as on 23.02.2021. However, the Applicant has not made any demand based on the initiation of CIRP with respect to the principal borrower and in case, the Applicant makes a demand based on the CIRP of the principal borrower in that event the present application will not be maintainable. The Respondent has also contended that the Applicant is seeking to plead new additional grounds for maintaining the present application under Section 7 of IBC, 2016 which were not available earlier and were not part of the pleadings on the basis of which this Tribunal had issued notice to the Respondent. Therefore, in case, the rectification is allowed, it would tantamount to a review of the earlier order passed by this Tribunal. It is further submitted by the Respondent that the obligation of the guarantor arises only on the non-payment by the principal borrower. Since, the CIRP of the Principal borrower has been initiated vide order dated 05.04.2021, the principal amount is estopped under the law to make any payment to the Applicant as the entire management has vested in the hands of the IRP/RP and therefore, there cannot be any question of non-payment by the principal borrower. Therefore, it cannot be said that there was any default on part of the principal borrower and there cannot be any default on the part of the guarantor as well. The Respondent has therefore prayed for dismissal of the present



application as being not maintainable. Since, the Applicant seeks to bring new facts which were not pleaded earlier.

14. We have heard the submissions made by the Learned Counsel appearing for the parties and perused the documents and records.
15. Mr. K. Datta, Learned Senior Counsel appearing for the Applicant submitted that determining the date of default in Section 7 application is a mixed question of fact and law. The Applicant can choose the date of default depending on the facts of a particular case. He further submitted that the Respondent/Corporate Debtor has been in default of its payment obligations under the Loan Agreement and the said defaults are continuing till date. Further, the interest payment under the Facility Agreement were to be made monthly and the principal was required to be paid quarterly with the maturity of the first tranche being 31<sup>st</sup> July, 2024 and the maturity of the second tranche being 31 January, 2025 and non-payment of either of the above on their respective due dates will amount to an event of default giving rise to fresh cause of action on each respective dates.
16. Mr. K. Datta, Learned Senior Counsel submitted that the liability of the borrower and of a guarantor is co-extensive or co-terminus as provided in Section 128 of the Indian Contract Act, 1872. In support of his contention, he relied upon the judgment passed by the Hon'ble Supreme Court of India in the case of **Laxmi Pat Surana versus Union Bank of India reported AIR 2021 SC 1707**, wherein it has been held that a default is deemed to have been committed by the guarantor itself. If the Borrower fails to discharge its obligation in respect of the amount of debt and as a consequence of such default, the status of the Guarantor metamorphoses into a Corporate Debtor under the Code.
17. Mr. K. Datta, Learned Senior Counsel has also relied upon a judgment passed by the Hon'ble NCLAT in the case of "***Koncentric Investments Limited and Another versus Standard Chartered Bank, London and Another (Company Appeal (AT) (INS) No. 911 of 2021***)" submitted that it is not mandatory for the Applicant/Financial Creditor to rush to file Section 7 application whenever first default is committed in the payment of interest. The Applicant/Financial Creditor



may await and give more time to Corporate Debtor to find out as to whether actually the Corporate Debtor has become insolvent.

18. Mr. K. Datta, Learned Senior Counsel has also relied upon a judgment of the Hon'ble Apex Court in the case of ***Dena Bank (Bank of Baroda) versus C. Shivakumar Reddy and Another (2021 10 SCC 330)*** wherein it has been held as follows: -

*"144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form- 1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal."*

19. On the contrary, the Ld. counsel for the Respondent has submitted that the default falls within the Section – 10A IBC, and therefore, the present application should be rejected.

20. We find force in the contention raised by Mr. K. Datta. We are of the considered view that, the Respondent/Corporate Debtor has been in default of its payment obligations under the Loan Agreement and the said defaults are continuing in nature. The interest payment under the Facility Agreement were to be made monthly and the principal was required to be paid quarterly with the maturity of the first tranche being 31<sup>st</sup> July, 2024 and the maturity of the second tranche being 31 January, 2025 and non-payment of either of the above on their



respective due dates will amount to an event of default giving rise to fresh cause of action on each respective dates. It is the settled law that, the amendment of pleadings in an Application filed under Section – 7 IBC, can be done at any stage of the matter as laid down in various judgements which have been cited by the Applicant. In view of the above said position we direct that the date of default be treated as 05.04.2021 as prayed for by the Applicant.

**21. IA-1547/2023 filed by the Applicant seeking amendment of date of default is *allowed*.**

**22. List the main matter for further orders on 16.01.2023**

**SD/-**

**SHRI ATUL CHATURVEDI  
MEMBER (TECHNICAL)**

**SD/-**

**SHRI BACHU VENKAT BALARAM DAS  
MEMBER (JUDICIAL)**





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**PRESENT:-**

For the Applicant : Mr. Vikas Dutta. Adv.

For the Respondent : Mr. Krishnendu Datta, Sr. Adv.

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

**IA-1452/2023**

The instant application i.e. IA-1452/2023 filed by the Corporate Debtor seeking dismissal of the Company Petition No. IB-359/2021 on the ground that the petition is barred by Section 10A IBC, 2016 is *dismissed*.

**SD/-**

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