

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(Through Physical Hearing / VC Mode (Hybrid))

C.P (IB) No.65/BB/2023

Under Section 7 of Insolvency & Bankruptcy Code, 2016
Read with Rule 4 of the Insolvency and Bankruptcy Code
(Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

Bank of Baroda

(Through Authorised Representative Mr. Durgesh Chandra Roy)

Zonal Stressed Asset Recovery Branch,

7th Floor, Vijaya Towers,

41/2 MG Road,

Bengaluru -560001

Financial Creditor/Petitioner

Versus

M/s. Virginia Developers Private Limited

No.2981, 3rd Floor,

12th Main, HAL 2nd Stage,

Indiranagar, Bangalore -560008

Corporate Debtor/Respondent

Order delivered on: 16th July, 2024

Coram:

1. Hon'ble Shri K. Biswal, Member (Judicial)

2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri C.K. Nandakumar, Sr. Counsel with
Shri Vignesh Shetty

For the Respondent : Shri B.K. Sanjay

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed on 24.02.2023 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity '**IBC/Code**'), read with Rule 4 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 by **Bank of Baroda** (for brevity "Financial Creditor/Petitioner") *inter alia* seeking Corporate Insolvency Resolution Process in respect of **M/s Virginia Developers Private Limited** (hereinafter referred as "Corporate Debtor/Respondent") for defaulting an amount of Rs.374,96,90,005.74/- due and payable by the Corporate Debtor.
2. The Corporate Debtor, namely, M/s Virginia Developers Private Limited is a Company incorporated on 29.11.2010 with CIN: U70102KA2010PTC056046 having its registered office at No.2981, 3rd Floor, 12th Main HAL 2nd Stage, Indiranagar, Bangalore -560008 which falls within the territorial jurisdiction of this Adjudicating Authority. The Company is engaged in the Commercial Real Estate. The Authorised Share Capital of the Respondent/Corporate Debtor is Rs. 96,850,008/- and Paid-Up Share Capital is Rs.90,850,008/-.
3. On the perusal of the incumbent application, the following facts are relevant to the issue in question and is produced herein:
 - a) The present petition is filed by the Financial Creditor Bank against the Corporate Debtor in respect of the default amount of Rs. 374,96,90,005.74/- as on 12.01.2023 together with interest, further interest, & penal interest at the contractual rates with effect from 13.01.2023 payable to the Financial Creditor. The loans were granted by Vijaya Bank which was subsequently merged with the Bank of Baroda vide notification dt.02.01.2019.
 - b) The Corporate Debtor has entered into eight Loan Agreements with the Financial Creditor between the years 2014 to 2019 for availing loan facilities of a total amount of Rs.3,06,15,00,000/- secured vide memorandum of Deposit of Title Deeds. The details of the secured loan

facilities are given below as per Part IV of Form No.1 filed with the petition on 24.02.2023 as under:

PARTICULARS OF FINANCIAL DEBT

1.	Total Amount of debt Granted and Date of Disbursement	Amount: 3,06,15,00,000(Rupees Three Hundred and Six Crores and Fifteen Lacs Only)		
		Nature and type of facility	Sanctioned Limit (Rs.)	Sanction Letter Ref. No. and Date
		Term Loan-I (FRR) (A/c. No.89240600000393)	1,17,00,00,000/-	INDR/CD/HLCC:1020:2014-15 dated 18.12.2014
		Term Loan-II (FRR) (A/c.no: 89240600000395)	40,00,00,000/-	INDR/CD:HLCC353/15-16 dated 29.06.2015
		Term Loan -III (FRR) (A/c. no: 89240.600000396)	25,50,00,000/-	INDR/CD:HLCC-62/15-16 dated 08.02.2016
		Term Loan -IV (FRR) (A/c. no: 89240.600000388)	30,00,00,000/-	CBB:SM:AJ:1019:2016-17 dated 19.12.2016
		Term Loan -V (FRR) (A/c. no: 89240.600000386)	15,65,00,000/-	CBB:VB:193:2017 dated 19.03.2018
		Term Loan — VI (FRR) (A/c.no: 89240600000394)	11,50,00,000/-	CD/HLCC/490/18/19 dated 27.09.2018
		Term Loan — VII (FRR) (A/c.no: 89240600000391)	23,50,00,000/-	2 -140 dated 21.03.2019
		Term Loan — VIII (ML) I (A/C No: 89240600000399)	43,00,00,000/-	CD:RL:851:2018 dated 27.11.2018
	Total Loan Amount	3,06,15,00,000/-		

		Dates of Disbursement: 18.12.2014, 29.06.2015, 08.02.2016, 19.12.2016, 19.03.2018, 27.09.2018, 27.11.2018, 21.03.2019.
2.	Amount claimed to be is Default and the Date on which the Default occurred	<p>Rs.374,96,90,005.74/- (Rupees Three Hundred Seventy Four Crores Ninety Six Lakhs Ninety Thousand Five and paise Seventy Four Only) as on 12.01.2023 together with interest, further interest & penal interest at the contractual rates with effect from 13.01.2023 payable to the Financial Creditor.</p> <p>Date of Default: Declared Corporate Debtor as NPA on 24.12.2020</p>

- c) The Letter of Guarantee was executed by the guarantors M/s. DBRS Realty Dream Private Limited, Ms. Banu Ramaswamy and Mr. Lakshmana Kumar and date of all execution for all loan accounts are 23.12.2014, 31.12.2014, 30.06.2015, 10.02.2016, 19.12.2016, 20.03.2018, 27.09.2018, 28.11.2018 and 21.03.2019 respectively.
- d) It is submitted that the Corporate Debtor has failed to adhere to the terms and conditions of the aforesaid Loan Agreements despite repeated opportunities and have continued to remain in wilful default of payment

obligations, due to which the Financial Creditor classified the account of CD as Non-Performing Asset (NPA) on 24.12.2020.

- e) It is submitted that the CD has acknowledged the current outstanding loan amount owed to the Financial Creditor vide a Letter of Acknowledgement issued by the CD to the petitioner on 19.01.2021 confirming the loan amount. To that effect, the petitioner moved under Section 13(2) of the SARFAESI Act, 2002 and issued a Demand Notice dated 13.09.2021 calling upon the CD to discharge the acknowledged loan facilities/debt amount along with the security interests created for such liability.
- f) On 22.11.2022, the Petitioner issued Possession Notice to the CD as per Section 13(4) of the SARFAESI Act, notifying the CD its failure to discharge the liability and took symbolic possession of secured properties. Thereafter, as per the provisions of IBC, the petitioner issued a Demand Notice to the CD dt.3.12.2022 for the repayment of debt to rectify/remedy the 'event of default' within the time period of 14 days from the date of receipt of the notice.
- g) Thus, the Petitioner has preferred the present petition in light of non-rectification of default by the corporate debtor and non-payment of principal outstanding amount along with all contractual interest and charges that are due and payable under the Channel Finance Facility of the Financial Creditor.
- h) Along with the petition, the Petitioner has filed the Record of Default in Form-D issued by the Information Utility for all the eight loan accounts at Page 648 onwards. It is noticed from the Form-Ds filed for all these 8 loans that all have been duly 'Authenticated' as per the NeSL report and the date of Authentication is 06.02.2023 for all these 8 loans. The summary of all these Form-D issued by the NeSL are as under:

<u>Term Loan</u>	<u>Default amount as per Form-D - NeSL report</u>	<u>Date of Sanction</u>	<u>Date of Default</u>	<u>Status of Authentication</u>	<u>Date of Authentication</u>
Term Loan-I (A/c No.89240600000393)	1,36,48,55,431	18.12.2014	24.12.2020	Authenticated	6.02.2023
Term Loan-II (A/c No. 89240600000395)	49,80,82,915	29.06.2015	24.12.2020	Authenticated	6.02.2023
Term Loan-III (A/c No. 89240600000396)	30,63,33,385	08.02.2016	24.12.2020	Authenticated	6.02.2023
Term Loan-IV(A/c No. 89240600000388)	36,33,55,844	19.12.2016	24.12.2020	Authenticated	6.02.2023

Term Loan-V A/c No. 89240600000386	20,94,96,026	19.03.2018	24.12.2020	Authenticated	6.02.2023
Term Loan-VI(A/c No. 89240600000394	14,74,55,617	27.09.2018	24.12.2020	Authenticated	6.02.2023
Term Loan-VII(A/c No. 89240600000391)	31,37,17,704	21.03.2019	24.12.2020	Authenticated	6.02.2023
Term Loan-VIII (A/c No. 89240600000399)	54,63,93,085	27.11.2018	24.12.2020	Authenticated	6.02.2023

4. On 20.06.2023, the Learned Senior Counsel appearing for the Petitioner sought liberty to file a revised Form-1, since in the Form-1 filed with the C.P against the date of default, NPA date was mentioned and the same date was also mentioned in the Form-D received from the NeSL. This Tribunal allowed them to file the revised Form-1 accordingly. In compliance to the same the revised Form-1 was filed vide Dy.No.3406 dated 27.06.2023 which was taken on record. It is noticed that in this revised Form-1 at Part-IV the date of default was altered for 7 out of 8 loans by the Petitioner and the same is re-produced below:

PART-IV PARTICULARS OF FINANCIAL DEBT						
1.	Total Amount of debt Granted and Date of Disbursement	Amount: ()	Nature and type of facility	Sanctioned Limit (Rs.)	Sanction Letter Ref. No. and Date	Date of Default
			Term Loan-I (FRR) (A/c. No.89240600000393)	1,17,00,00,000/-	INDR/CD/HLCC:1020:2014-15 dated 18.12.2014	31.03.2021
			Term Loan-II (FRR) (A/c.no: 89240600000395)	40,00,00,000/-	INDR/CD:HLCC35 3/15-16 dated 29.06.2015	31.03.2021
			Term Loan -III (FRR) (A/c. no: 89240.600000396)	25,50,00,000/-	INDR/CD:HLCC-62/15-16 dated 08.02.2016	24.12.2020
			Term Loan -IV (FRR) (A/c. no: 89240.600000388)	30,00,00,000/-	CBB:SM:AJ:1019:2016-17 dated 19.12.2016	31.03.2021
			Term Loan -V (FRR) (A/c. no: 89240.600000386)	15,65,00,000/-	CBB:VB:193:2017 dated 19.03.2018	31.03.2021

		Term Loan — VI (FRR) (A/c.no: 89240600000394)	11,50,00,000/-	CD/HLCC/490/18 /19 dated 27.09.2018	31.03.2021
		Term Loan — VII (FRR) (A/c.no: 89240600000391)	23,50,00,000/-	2-140 dated 21.03.2019	31.03.2021
		Term Loan — VIII (ML) I (A/C No: 89240600000399)	43,00,00,000/-	CD:RL:851:2018 dated 27.11.2018	31.03.2021
		Total Loan Amount	3,06,15,00,000/-		
		Dates of Disbursement: 18.12.2014, 29.06.2015, 08.02.2016, 19.12.2016, 19.03.2018, 27.09.2018, 27.11.2018, 21.03.2019.			
2.	Amount claimed to be is Default and the Date on which the Default occurred	<p>Rs. 394,84,43,989.08(Rupees Three Hundred Ninety Four Eighty Lakhs Forty Three Thousand Nine Hundred Eighty Nine and Eight Paise only) as on 26.06.2023 together with interest, further interest & penal interest at the contractual rates with effect from 27.06.2023 payable to the Financial Creditor.</p> <p>Date of Default: Date of default for Loan A/c No.89240600000395,89240600000394,89240600000393,89240600000391,89240600000388,89240600000386,89240600000399 is 31.03.2021 and Date of default for Loan A/c No. 82240600000396 is 24.12.2020.</p>			

5. Further, the Petitioner filed another set of NeSL report in Form-D for all the 8 loans vide Dy.No.4256 dated 16.08.2023. It is noticed from this set that the Date of Default in the revised set of Form-D has been mentioned as 31.03.2021 for all loan amounts except one for which it was shown as 24.12.2020 and the date of Authentication for all these Records of Defaults in Form-D is stated to be 08.08.2023. The summary data/information given in the second set of NeSL reports in Form-D filed in 8 loans are reproduced below:

<u>Term Loan</u>	<u>Default amount as per Form-D - NeSL report</u>	<u>Date of Default</u>	<u>Status of Authentication</u>	<u>Date of Authentication</u>
Term Loan-I	1,36,48,55,431	31.03.2021	Authenticated	08.08.2023
Term Loan-II	49,80,82,915	31.03.2021	Authenticated	08.08.2023
Term Loan-III	30,63,33,385	24.12.2020	Authenticated	08.08.2023
Term Loan-IV	36,33,55,844	31.03.2021	Authenticated	08.08.2023
Term Loan-V	20,94,96,026	31.03.2021	Authenticated	08.08.2023
Term Loan-VI	14,74,55,617	31.03.2021	Authenticated	08.08.2023
Term Loan-VII	31,37,17,704	31.03.2021	Authenticated	08.08.2023
Term Loan-VIII	54,63,93,085	31.03.2021	Authenticated	08.08.2023

6. Accordingly vide Order dated 11.10.2023, the Petitioner was specifically asked to clarify the change made in the date of default in the revised Form-1 as well as in the second set of Record of Default in Form-D as compared to

the first set of Record of Default in Form-D enclosed in the C.P ; and Form-1. It was noted that the date of completion of Authentication was 06.02.2023 in the first set of Form-D, i.e., just prior to the filing of the C.P. In compliance to the same, a memo was filed on 01.11.2023 explaining that the provisions of Section 10A were not applicable in respect of the Petitioner's case, since the Petitioner had accepted the OTS offer made by the Respondent vide sanction letter dated 14.02.2022. Subsequently, the first instalment as per OTS offer due and payable on 31.03.2022 was not paid, due to which OTS was liable for automatic termination. The Corporate Debtor sought extension, but vide letter dated 10.05.2022, the Petitioner informed the Corporate debtor that since it has failed to deposit an amount of Rs.5 crores which was primary condition for considering the request of extension of time for the OTS, it had defaulted again. Therefore, it is contended by the Petitioner that the revised 'date of default' would be 10.05.2022 according to this argument.

7. The Respondent filed its statement of objections vide Diary No. 5088 filed on 04.10.2023, and subsequently Written Submissions vide Diary No.6318 filed on 15.12.2023. In the reply, the respondent *inter alia* contends that the Petition is not maintainable as the date of default as per NeSL report in Form-D and also in Form-1 filed with the C.P are shown as 24.12.2020, which falls under the period covered by section 10A of the IBC, 2016. The Respondent/CD also asserted that the petitioner has filed the present petition while ignoring and violating the RBI Guidelines which prohibits the NPA classification during the Covid-19 pandemic and in turn the petitioner has retrospectively declared the CD's account as NPA from 24.12.2020 which was communicated to the Respondent only on 07.06.2021.
8. The Respondent/Corporate Debtor in its written submissions/ objections also contends that it had filed a suit in the City Civil Court against the petitioner in O.S. No. 2180 of 2023 along with the application for temporary injunction under Order 39 Rule 1 and 2 of CPC. The Order of the City Civil Court restrained the financial creditor from holding any forensic audit in the precincts of schedule property, declaring corporate debtor as a wilful defaulter, showing the status of plaintiff's account as substandard or red flagged in its records or in its website and alienating the suit schedule

properties and also interfering with the plaintiff's possession over the suit schedule property. The Respondent contend that the petitioner have not informed this Tribunal about the pendency of the prior litigation.

9. As per order dt.1.12.2023, the Learned Counsel for the Respondent submitted that two different sets of NeSL Reports have been filed by the Petitioner to evade the suspension period under section 10A of IBC, 2016, and further there is a pre-existing dispute pending before the City Civil Court pertaining to NPA declaration, therefore, the petition is not maintainable. Vide order dated 12.01.2024, further the petitioner was directed to explain the limitation period for each loan agreement along with event of default for each loan account, copy of NPA order for each loan account and copy of ledger for the eight loans since the date of disbursement till the end of the year 2022. In response, the Learned Counsel for the Petitioner has filed an affidavit along with document vide Diary No.917 dt.09.02.2024 and synopsis vide diary no.1202 on 22.02.2024.
10. The Petitioner vide Diary No. 5178 filed rejoinder on 9.10.2023, and subsequently, Written Submissions vide Diary No.6320 on 15.12.2023. In the written submissions, it is contended that the Corporate Debtor failed to make payment of the principal amount with interest in respect of the loan and therefore the Financial Creditor classified the account of the Corporate as NPA on 24.12.2020 as per the RBI guidelines. Subsequently, the Corporate Debtor proposed One-Time Settlement (OTS) on 18.11.2021 which was rejected by the Petitioner. Another OTS proposal dated 11.02.2022 was made which was accepted and the conditions regarding upfront payment and instalment payable on different dates were stipulated. While the Petitioner made the upfront payment of Rs.3 crores, repayment schedule of the payable amount by 31.03.2022 was not adhered to.
11. Another request for extension of the OTS was made vide letter dated 29.04.2022 on which the condition regarding upfront payment of Rs. 5 crores was made. On non-fulfilment of the same, the Petitioner issued a letter dated 10.05.2022 to inform the Corporate Debtor regarding this non-payment. Due to this default, the Petitioner has contended that the date of default should be taken as 10.05.2022. Accordingly, it was argued that the provisions of

Section 10A would not be attracted on the account that the Petitioner accepted the OTS and on non-fulfilment of the condition given in the OTS, default has occurred, and this new date of default of 10.05.2022 should accordingly to be taken.

- 12. Thus, it is noted that three different sets of 'date of default' has been claimed by the Petitioner, the first being 24.12.2020 for all eight loans in accordance with the Form-1 enclosed with the C.P filed on 24.02.2023 and the Record of Default issued by the Information Utility in Form-D enclosed with the C.P which were all authenticated on 06.02.2023. The second claim in respect of the 'date of default' has been made in the amended Form-1 filed vide Dy.No.3406 dated 27.06.2023, which is produced above at Para-4. In this set the 'date of default' as per Part-IV of the amended Form-1 were claimed to be 31.03.2021 for 7 out of 8 loans, while 24.12.2020 was retained in respect of Term Loan No.3. Simultaneously, separate set of 8 RoDs in Form-D issued by NeSL was also filed on 16.08.2023; with the date of authentication being 08.08.2023; and the dates of default was altered to be identical to the revised Form-1 filed on 27.06.2023. However, now with the compliance memo dated 01.11.2023, third claim in respect of 'date of default' has been mentioned as 10.05.2022, which was also reiterated in the Written submissions filed vide Dy.No.6320 dated 15.12.2023.**

ANALYSIS AND CONCLUSION:

- 13.** Heard the Learned Senior Counsel for the Petitioner and the Counsel for Respondent, and perused the pleadings.
- 14.** The main issue in respect of this petition is regarding the occurrence of default during the period specified under Section 10A of the I & B Code, 2016. It is noticed from the C.P filed on 24.02.2023 that in Part-IV of Form-1, at Para-2 against the 'Date of Default', it is stated that '*Declared Corporate Debtor as NPA on 24.12.2020*'. Along with the petition, at Page-648 onwards the Record of Default (RoD) in Form-D issued by the Information Utility was also attached in respect of the 8 different loans

resulting in the total default amount of Rs.374,96,90,005/- mentioned in Part-IV of the Form-1. In all these 8 RoDs, the 'date of default' is stated to be 24.12.2020; along with the fact of it being 'Authenticated'.

- 15.** Section 10A of the I & B Code, 2016 was introduced on 23.09.2020, w.e.f 05.06.2020; in which it has been provided as under:

Section 10A:

Suspension of initiation of corporate insolvency resolution process:

Notwithstanding anything contained in Sections 7, 9 and 10, no application for incitation of corporate insolvency resolution process of a corporate debtor shall be fixed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding on every 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."

- 16.** The period specified in Section 10A of the Code was subsequently extended by Government Notification upto 24.03.2021 vide Notification number S.O 4638 (E) dated 22nd December, 2020. Therefore, in accordance with this Section, no proceedings under Section 7, 9 and 10 of the IBC can be initiated against the Corporate Debtor for the default which has occurred between the period from 25.03.2020 till 24.03.2021. The legislative intent is reflected in the Proviso to Section 10A of the Code which stipulates that "*no application shall ever be filed.....*" for initiation of the CIRP "*for the said default occurring during the said period*". It is **abundantly** clear that the intention of the legislature is to completely bar the institution of any application **ever** for initiation of CIRP for the default having occurred during the period 25.03.2020 till 24.03.2021.
- 17.** Since in the Form-1 filed with the petition, the NPA date of 24.12.2020 was mentioned as 'date of default', the Petitioner sought liberty to file amended Form-1. Accordingly, in the amended Form-1 filed on 27.06.2023 vide Dy.No.3706, the Petitioner changed the 'date of default' in respect of 7 out of 8 loans stating as under:

Amount claimed to be is Default and the Date on which the default occurred	Against Column No.2 of Part-IV the 'Date of Default': Date of Default for Loan A/c No.89240600000395, 89240600000394,89240600000393, 89240600000391, 89240600000388, 89240600000386, 89240600000399 is 31.03.2021 and date of default for Loan A/c No.82240600000396 is 24.12.2020.
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- 18.** Therefore, the 'date of default' has been changed in respect of 7 out of 8 loans from the earlier declared date of **24.12.2020** to **31.03.2021**; which is also reiterated in the Part-IV of the revised Form-1 filed on 27.06.2023 at Page 20 and 21. However, no justification or any reasons whatsoever for specifying the 'date of default' as 31.03.2021 for 7 out of 8 loans was furnished. Moreover, the Petitioner also did not explain as to why the date of default was retained at 24.12.2020 in one out of these eight Loan accounts; and what was the distinguishing feature in respect of this particular Loan account. The Petitioner also proceeded to file fresh NeSL reports in Form-D in respect of all the above 8 loans on 16.08.2023, in which the new date of completion of Authentication was mentioned as 08.08.2023 as against the Authentication completed on 06.02.2023 in respect of the same loans when the NeSL issued the first set of 8 RoDs in Form-D for these very Loan-ids.
- 19.** Since it was consequent to the query raised by this Tribunal regarding the 'date of default' falling within the period specified under Section 10A of the IBC, the Petitioner was asked to explain this change in the 'date of default' from the 'date of default' mentioned as 24.12.2020 in the Form-1 filed with the C.P; which was also backed by the first set of Form-D issued by the NeSL report with authentication completed on 06.02.2023; enclosed with the C.P.
- 20.** The Petitioner has submitted its response regarding the above query vide its letter filed on 01.11.2023 and 15.12.2023 which has been discussed in the pleadings. **Strangely enough, the Petitioner has now gone ahead to make an entirely new claim of the 'date of default' being**

10.05.2022 for all the above 8 loan accounts; as the third alternative plea regarding the 'date of default'. In the submissions dated 15.12.2023, it was stated that the account of the Corporate Debtor was declared as NPA on 24.12.2020 as per RBI guidelines. Subsequently, the Corporate Debtor proposed One-Time Settlement (OTS) offer on 18.11.2021 which was rejected by the Petitioner. Another OTS offer dated 11.02.2022 was accepted, however, since the instalment granted of Rs.5 crores was not paid, therefore the OTS was cancelled and the information to this effect was given by the Petitioner to the Corporate Debtor vide its letter dated 10.05.2022. **Thus, the 'date of default' is now claimed to be 10.05.2022 on this basis.** This is the third set of claim for all 8 loan accounts involved in the C.P.

21. Thus, it is seen that the Petitioner had tried to shift the 'date of default' on being confronted with the situation that the 'date of default' declared in the C.P filed on 24.02.2023 being 24.12.2020 was hit by the provisions of Section 10A of the IBC Code. **However, one essential element of Section 10A of the Code is the proviso, according to which no application shall ever be filed for initiation of CIRP of the Corporate Debtor for the default occurring during the said period i.e. 25.03.2020 to 24.03.2021.** By making various alternative submissions, the Petitioner has just tried to wriggle out of the restriction imposed under Section 10A of the Code and to overcome this statutory requirement which cannot be permitted in view of the proviso to Section 10A of the Code. It is also noticed that in the subsequent submissions filed on 15.12.2023 when the claim of the 'date of default' being shifted is made, even the claim made in the revised Form-1 to be 31.03.2021 for 7 out of 8 loans has been abandoned. This date of 31.03.2021 is now mentioned as 'Initial date of default' in the submissions filed on 15.12.2023. **Infact, even the mentioning of 31.03.2021 as a revised 'date of default' in the amended Form-1 filed on 27.06.2023, was not backed with any explanation or justification. Nor it was explained as to why the Date of Default was retained at 24.12.2020 for one out of the eight Loan accounts and what was the distinguishing factor for this particular**

Loan Account, as against the other seven. Therefore, it is amply clear that the date of default as 31.03.2021 was just mentioned on an adhoc basis, to take it out from the embargo imposed under section 10A of the IBC, which was ending on 24.03.2021. It is pertinent to note here that Section 10A of the Code (Second Amendment) Act 2020 was introduced in the statute on 23.09.2020 with retrospective effect from 05.06.2020. Thus, it was already existing on the statute for a considerable period of time when the C.P was filed on 24.02.2023. Therefore, the declaration of date of default in the original Form-1 filed with the C.P on 24.02.2023 was made in the normal and natural course. The Petitioner had adequate time to realise about the existence of this Section in the Code and its implication at that stage.

- 22.** It is not out of place to mention here that the Form-1 to be filed with the Application under Section 7 is a mandatory requirement in accordance with the provisions of Section 7 (2) of the Code read with Regulation 4(1) of the IBBI (Application to Adjudicating Authority) Rules, 2016. In Part-IV of the Form-1 there is a specific column wherein the '*Amount claimed to be in default and the date on which the default occurred*' have to be clearly mentioned in Item No.2. Thus, the Form-1 is a statutory form and the declarations made in the columns are the most relevant and the starting point for the initiation of the CIRP. The Hon'ble Apex Court in the case of ***Ramesh Kymal vs. Siemens Gamesa Renewable Power Private Limited (2021) 3 SCC 224 dated 09.02.2021*** has underlined the significance of the declaration of the specific date of default in the statutory notice under Section 8 (1) for a petition under Section 9 of the IBC. It was held that once the Appellant has specified the date of default in the demand notice under Section 8 (1) of the IBC, 2016 it cannot be allowed to be changed subsequently, as was argued in that particular case. It was further held as under:

“This attempt to set back the date of default to either 21 January 2020 or 23 March 2020 is plainly untenable for the reason that it is contrary to the disclosure made by the Appellant in the demand notice which has been issued in pursuance of the provisions of Section 8 (1) and

Section 9 of the IBC. The demand notice triggers further actions which are adopted towards the initiation of the insolvency resolution process.”

Thus, the Hon’ble Apex Court has categorically emphasised the sanctity of the Date of Default as stated in the Application and the statutory notice, and rejected the attempt to prepone it just to get over the embargo imposed by provisions of Section 10A of the Code.

- 23.** Therefore, considering that in Part-IV of the Form-1 there is a specific mention of the date of default as 24.12.2020, it is held that the default occurred within the period which has been categorically excluded under the provisions of Section 10A of the IBC 2016. Though the above referred judgement of the Hon’ble Apex Court was delivered in the context of the petition under Section 9 of the IBC, the same principal will be equally applicable for the petition filed under Section 7 of the IBC 2016 by the Financial Creditor for initiation of the CIRP.
- 24.** Moreover, the third alternative claim of the Petitioner made vide Compliance Memo filed on 01.11.2023, and the written submissions dated 15.12.2023 regarding the ‘date of default’ as 10.05.2022 is not tenable in law. In the Form-1 filed with the C.P, ‘the ‘date of default’ was mentioned as 24.12.2020 on the basis of the declaration of the Corporate Debtor’s account as NPA. Accordingly, it is relevant to examine the significance of NPA which is taken as the ‘date of default’ originally. A perusal of the Reserve Bank of India Master Circular on Prudential norms on Income Recognition Asset Classification and Provisioning pertaining to Advances, reveals that the definition of NPA is given as under:
- “2.1.2 A non-performing assets (NPA) is a loan or an advance where;**
- i. Interest and/or instalment of principal remains overdue for a period of more than 90 days in respect of a term loan,*
 - ii. The account remains ‘out of order’ as indicated at Paragraph 2.2 below, in respect of an Overdraft/ Cash Credit (OD/ CC),*
 - iii. The bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted.*
-”*

Further, in Para 2.2 of the Master Circular, it is stated that an account could be treated as 'out of order' if the outstanding balance remains continuously in excess of the sanctioned limit/drawing power for 90 days, or there are continuously no credits for 90 days etc. Therefore, it is clear that as per the RBI Guidelines, when the interest or the principal remains unpaid or overdue for a period of 90 days in respect of the term loans, it becomes NPA and thus the Date of declaration as NPA is determined. In other words, the 'date of default' for the Principal and Interest would be 90 days prior to the Date of NPA and if it remains unpaid for 90 days, it is declared as NPA.

25. We further proceed to refer to the recent decision of the *Hon'ble NCLAT, Principal Bench, New Delhi dated 25.04.2024*, in the case of "***Milind Kashiram Jadhav versus State Bank of India and another in Company Appeal (AT) (Insolvency) NO.1589 of 2023, [Case citation (2024) ibclaw.in 273 NCLAT]***, in which the issue regarding the NPA date being taken as 'date of default' was examined extensively and it was observed as under:

51.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. ...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 the 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.... 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.

....

...

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. *Considering 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 categorised 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 interest and maintain liquidity.*

...

...

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.***

....

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.

...
...

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

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 regularised; 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...

...
...

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.

[Emphasis Supplied]

Thus, the Hon'ble NCLAT has concurred with the argument of the Financial Creditor, being State Bank of India, in this regard.

- 26.** We have carefully considered the RBI Master Circular on Prudential norms as well as the above referred judgment of Hon'ble NCLAT in the case of *Milind Kashiram Jadhav versus State Bank of India and another* (supra), in which it is held that the date of classification of NPA is a valid and appropriate determination of the occurrence of default and also the 'date of default' on the part of the Corporate Debtor. Therefore, in this case also the 'date of default' being the date of declaration as NPA i.e., 24.12.2020, was correctly mentioned in the Form-1 filed with the C.P along with RoD filed by the NeSL in Form-D for all the 8 loans. As an alternative, in accordance with the RBI prudential norms, if the principal/interest of the debt remains outstanding for 90 days then the declaration of the NPA is made. Therefore, the default in such case would have occurred initially 90 days prior to the date of classification as NPA which becomes 25.09.2020 in this case, which also falls within the suspension period prescribed under Section 10A of the Code.
- 27. The above judgement of the Hon'ble NCLAT also make it amply clear that neither any subsequent payments after the occurrence of the default makes any difference to the 'date of default' which has already occurred, nor any subsequent OTS proposal made on behalf of the CD and consideration thereof make any difference to the "date of default". Moreover, in accordance with the same judgement of Hon'ble NCLAT (supra), any recall notice or SARFEASI Notice issued subsequently to the default already having taken place would not enable the shifting of the 'date of default' to such date of recall of loan or issue of SARFAESI Notice.**
- 28.** In the Written submissions vide Dy.No.6320 dated 15.12.2023, the Petitioner had gone at length to explain the basis of claim regarding the 'date of default' **to be 10.05.2022 as the third option**, as against the first two options given in the Form-1 filed with the C.P on 24.02.2023, and the amended Form-1 filed on 27.06.2023 vide Dy.No.3406. The

entire basis of these claims is that on the communication of the failure on the part of the Corporate Debtor to pay the first instalment of the OTS extension by the Financial Creditor, vide letter dated 10.05.2022; this date of 10.05.2022 becomes the **new 'date of default'**. This claim is legally invalid and untenable in law. It is not the case of the Petitioner that the default did not occur on 24.12.2020; but the claim is that on non-payment of the instalment granted vide the approved OTS proposal dated 11.02.2022; the default date has shifted to the date of the communication of this non-payment. Thus, the default has already occurred in this case on 24.12.2020, in accordance with the declaration made in Form-1 filed with the petition. **Any subsequent development like part payment or consideration of OTS proposal or loan recall notice/SARFEASI notice would not change the default which had already occurred. It is also clear from the above referred order of Hon'ble NCLAT (supra) that once the default has occurred in the period specified under Section 10A of the Code, it cannot get shifted to the later date which is outside the specified period because of any part payment or any OTS proposal. The Hon'ble NCLAT in the above referred case has accepted the explanation furnished with justification by the Respondent/Financial Creditor, being the State Bank of India that the date of declaration of NPA could be validly considered as the 'Date of Default' for the purposes of the Code.**

- 29.** At the cost of repetition, **it is reiterated that if such an interpretation as claimed by the Petitioner is made, the provisions of Section 10A of the Code would become meaningless and redundant. If such an argument is allowed to be accepted, in every such case where the default has occurred during the period specified under Section 10A, the Financial/Operational Creditor would issue a legal notice as per their will and convenience, or consider an OTS proposal by a Corporate Debtor and attempt to shift the 'date of default', which would enable them to defeat the provisions of Section 10A of the Code read with its proviso.** In view of this proviso, once a default has already occurred during the said period, there is no way that later any notice

under any legal provisions can be issued to restore the right of the Petitioners to file an application for initiation of CIRP. Nor a consideration of a fresh proposal of OTS and approval/rejection thereof can give rise to a fresh default or a new date of default. Since the Corporate Debtor has not yet repaid the loan amount, it is bound to give such proposals and make correspondences with the Financial Creditor, but the consideration of the same cannot revive the right due to a complete bar imposed by the Proviso. **The interpretation of a statutory enactment cannot be allowed to be made in such a manner which acts towards making it meaningless and redundant. Therefore, the contention of the Petitioner, which would have the effect of negating the legislative bar under Section 10A of the Code against the filing of an application for initiation of CIRP cannot be treated to be legally tenable, and accordingly is liable to be rejected.**

30. In this connection, it would not be out of place to mention certain other decisions which are as under:

- (i) *The Hon'ble NCLAT in the matter of "SLB Welfare Association v. PSA Impex Limited and others, C.A (AT) (INS) NO.905/2022 order dated 04.11.2022 held that "the reason given by Adjudicating Authority for rejecting argument of Section 10A was based on alleged acknowledgement letter dated 03.06.2021 received from Corporate Debtor when the 'date of default' given by Operational Creditor in Section 9 Application is 31.03.2020, the mere fact that acknowledgement has been given by Corporate Debtor on 03.06.2021 accepting the debt, shall not change the 'Date of Default'. We, thus, do not agree with the reasons given by the Adjudicating Authority that since acknowledgement is dated 03.06.2021, the 'date of default' will become 0306.2021. **The date of default and acknowledgement are two different events and date of default is not dependent on acknowledgement of debt".***
- (ii) *The coordinate Bench of NCLT, New Delhi vide order dated 31.10.2023 in the case of "M/s. DB Power Limited v Kreate Energy (I) Private Limited, in CP (IB) No. 521/ND/2022 has held that "**the submissions of the applicant that the dates of acknowledgement of liability***

towards the operational debt, the date of the last part payment, the date of issuance of cheque, the date of dishonour of the said cheque the date of sending the demand notice, and consequential failure of the Respondent to pay the operational debt, having fallen after the period stipulated under Section 10A of the Code ie., after 24.03.2021 and each of the said event gave rise to a fresh cause of action, being new date of default on the part of the Corporate Debtor to pay the operational debt to the Applicant, for preferring the present proceedings under Section 9 of the Code, 2016 cannot be accepted.”

[Emphasis Supplied]

- 31.** In this case, the Petitioner has continued to make alternative claims; the first alternative claim of the ‘date of default’ being 31.03.2021 in respect of 7 out of 8 loans was made in the amended Form-1, which was filed on 27.06.2023. For this alterative claim, no basis or explanation whatsoever was given by the Petitioner and it appears that this was merely mentioned as 31.03.2021 to somehow get over the cut-off date of 24.03.2021 under Section 10A of the Code. The Petitioner also went ahead and obtained a new set of NeSL reports in Form-D with a new Authentication date of 08.08.2023 in respect of same loan-ids, for which there appears to be no basis. However, subsequently the Petitioner promptly abandons the claim of 31.03.2021 being the date of default also and without any reasonable basis again made an altogether new claim relying on the OTS proposal submitted by the Corporate Debtor on 18.11.2021/11.02.2022; which is much after the occurrence of the default on 24.12.2020. The date of rejection of the OTS proposal by the Petitioner which is 10.05.2022, was now selected as new ‘date of default’. If such a claim is allowed, it would lead to a direct infringement of the proviso to Section 10A of the IBC, which is reproduced below again for the sake of convenience:

“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.”

If the argument made by the Petitioner is allowed to be accepted, the phrase or the wordings, **“No application can ever be filed”** in the proviso to Section 10A will be rendered meaningless. Therefore, such an interpretation cannot be made legally; which causes this proviso and therefore Section 10A to become totally redundant.

32. The facts of this case clearly establish that the default had already occurred in the period specified under Section 10A, and therefore no application for initiation of CIRP can ever be filed in respect of this default.

33. Two Sets of reports issued by NeSL for the same loan accounts- This is another issue which requires to be looked into:

33.1. As discussed above, the first set of RoDs in Form-D issued by NeSL with the Authentication date being 06.02.2023 was filed for all 8 term loan accounts by the Petitioner with the C.P filed on 24.02.2023 which are reproduced below:

<u>Term Loan</u>	<u>Default amount as per Form-D - NeSL report</u>	<u>Date of Sanction</u>	<u>Date of Default</u>	<u>Date of Authentication</u>
Term Loan-I (A/c No.89240600000393)	1,36,48,55,431	18.12.2014	24.12.2020	6.02.2023
Term Loan-II (A/c No. 89240600000395)	49,80,82,915	29.06.2015	24.12.2020	6.02.2023
Term Loan-III (A/c No. 89240600000396)	30,63,33,385	08.02.2016	24.12.2020	6.02.2023
Term Loan-IV(A/c No. 89240600000388)	36,33,55,844	19.12.2016	24.12.2020	6.02.2023
Term Loan-V A/c No. 89240600000386	20,94,96,026	19.03.2018	24.12.2020	6.02.2023
Term Loan-VI(A/c No. 89240600000394	14,74,55,617	27.09.2018	24.12.2020	6.02.2023
Term Loan-VII(A/c No. 89240600000391)	31,37,17,704	21.03.2019	24.12.2020	6.02.2023
Term Loan-VIII (A/c No. 89240600000399)	54,63,93,085	27.11.2018	24.12.2020	6.02.2023

33.2. During the course of hearing by the Tribunal the Petitioner was confronted with the fact that the ‘date of default’ in respect of 8 loans accounts fell squarely within the period specified under Section 10A of the Code. In response, the Petitioner sought liberty to file amended Form-1 which was filed on 27.06.2023 and the

second set of NeSL reports in Form-D was also obtained for the same Term loan accounts and filed vide Dy.No.4256 dated 16.08.2023, with the revised date of authentication being 08.08.2023. The same is given as under:

<u>Term Loan</u>	<u>Default amount as per Form-D - NeSL report</u>	<u>Date of Default</u>	<u>Date of Authentication</u>
Term Loan-I	1,36,48,55,431	31.03.2021	08.08.2023
Term Loan-II	49,80,82,915	31.03.2021	08.08.2023
Term Loan-III	30,63,33,385	24.12.2020	08.08.2023
Term Loan-IV	36,33,55,844	31.03.2021	08.08.2023
Term Loan-V	20,94,96,026	31.03.2021	08.08.2023
Term Loan-VI	14,74,55,617	31.03.2021	08.08.2023
Term Loan-VII	31,37,17,704	31.03.2021	08.08.2023
Term Loan-VIII	54,63,93,085	31.03.2021	08.08.2023

33.3 The Form-‘D’ issued in respect of the RoDs by the Information Utility i.e. NeSL has been specified in the Code as a valid document for determining the amount of debt and the ‘date of default’. Section 7 (3) (a) of Code 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;.....”**. Considering the issuance of two sets of Form-‘D’ for the same set of 8 loans accounts having the same unique Debt-Ids; it was decided to ascertain the reasons of the same from NeSL by seeking clarification. It was clarified by the NeSL that the Financial Creditor viz., Bank of Baroda had made the Default Submission in 8 unique debt ids against the Corporate Debtor M/s. Virginia Developers Private Limited, two times, first set through Submission ID No.1 on 21.01.2023 and Second Set through Submission ID No.2 on 19.07.2023.

33.4. Further, the NeSL has explained that its functioning of the issuance system of Record of Default and the Authentication of the debt is on electronic platform; therefore the submission of the default information, authentication, categorization and issuance of the RoD happens electronically without any manual intervention. It was further clarified that when the Financial Creditor submitted the first set of submission for 8 unique debt id (loan accounts) on 21.01.2023, one set of RoD was issued; with the Authentication made on 06.02.2023. Subsequently, the second set was submitted by the Financial Creditor on 19.07.2023; and therefore NeSL proceeded to issue the second set of Form-D for the same loan accounts with date of authentication changed to 08.08.2023. It is admitted that there is no change of liability outstanding or the amount in default in all these eight loans from first submission to the second submissions (loan unique debt ids were also the same); and only the date of default has been modified. Thus, it is stated that due to two sets of applications/submissions made by the Financial Creditor for the same loans, two different sets of RoDs had been generated giving two different sets of dates of default, and since it was electronic/automated system, no manual invention or verification is carried out for the issuance of the RoD.

34. In view of the discussions, it is clear that there is no basis for changing the 'date of default' of 24.12.2020 given in the original Form-1 filed with the C.P on 24.02.2023; and also in the first set of RoDs issued by the NeSL. The Petitioner has also failed to explain as to why the Date of Default for seven out of eight loans was altered to 31.03.2021 from 24.12.2020; while it was retained for one of them, when the revised Form-1 was filed on 27.06.2023. Instead of explaining this alteration in the date of default stated in the revised Form-1 from that declared in the Form-1 filed with the C.P; the Petitioner proceeded to abandoned this alternative claim of Date of default also. Instead of 31.03.2021; in the submissions filed on 01.11.2023 and 15.12.2023, the Petitioner has made an altogether new claim of date of default being 10.05.2022; being the

third alternative, which is liable to be rejected as discussed above. As clarified by NeSL also, the RoDs were issued by the NeSL electronically based on the information given by the Financial Creditor itself. It is only at the raising of the query by this Tribunal regarding the date of default in Form-1 falling under Section 10A of the Code, the Petitioner has come up with the different alternative claims, to somehow wriggle out of the embargo imposed by Section 10A of the Code.

- 35.** As discussed above, in the recent order of the Hon'ble NCLAT in the case of *Milind Kashiram Jadhav versus State Bank of India and another* (supra) it is held that the date of declaration as NPA was a valid 'date of default'; and **any subsequent part payment or recall notice or OTS proposal from the Corporate Debtor would not go towards altering this date, when the default has already occurred during the period specified under Section 10A of the Code.**
- 36.** Accordingly, we are of considered opinion that the instant petition filed under Section 7 of the IBC 2016 is in respect of the default which has occurred during the period stipulated under Section 10A of the Code and therefore the petition filed for initiation of the CIRP is not maintainable and not tenable in law. Therefore, the C.P bearing **C.P (IB) No.65/BB/2023 is liable to be dismissed as not maintainable and is accordingly dismissed.** However, it is made amply clear that this will not come in any other legal remedies for the recovery of the debt if so advised, and the Petitioner is free to pursue all modes of recovery permissible under law.

Sd/-
MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-
K. BISWAL
MEMBER (JUDICIAL)