

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))

CP (IB) No. 152/BB/2023
Application U/s. 7 of the IBC, 2016
R/w Rule 4 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

IDBI Trusteeship Services Limited

Ground Floor, Universal Insurance Building,
Sir Phirozshah Mehta Road,
Fort, Bazargate
Mumbai – 400001
Through its Authorised Signatory
Shri M. Manohar

... Financial Creditor/Petitioner

VERSUS

Coffee Day Enterprises Limited

Having its registered office at:
No. 23/2, Coffeeday Square,
Vittal Mallya Road,
Bangalore- 560001

... Respondent/Corporate Debtor

Order delivered on: 08.08.2024

Coram: Hon'ble Mr. K. Biswal, Member (Judicial)
Hon'ble Mr. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Sr. Adv Srinivasa Raghavan (Sr Adv).
Adv. Shri Sankeerth V & Shri Krishnavarna
For the Respondent : Adv. Chithra Nirmala

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed on 08/09/2023, under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016'/Code), read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 (for brevity 'Rules'), by IDBI Trusteeship Services Limited (for brevity 'Financial Creditor/Petitioner')

inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of Coffee Day Enterprises Limited (for brevity 'Corporate Debtor/Respondent') for a total outstanding default amount of Rs. 2,284,574,180/-, In Part IV of Form No.1 filed with application, the following information is given:

3	Amount claimed to be in Default and dates on which the Defaults occurred (Attach the workings for computation of amount and days of Default in Tabular Form)	As on 31/08/2023, total outstanding amount of Rs 2,284,574,180/- Event of Default: 30/09/2019
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The NESL Record of Default is annexed at Page 1747, which reflects 30/09/2019 as the Date of Default. The Applicant is a Debenture Trustee, and has filed on behalf of the financial creditor 'Credit opportunities II Pte.Ltd,' the N.C.D Holders of the Corporate Debtor.

2. The facts of the case are discussed below:
 - a) The Corporate Debtor is the parent company of the Coffee Day Group, and it owns and operates a resort, renders consultancy services and is also engaged in the sale and purchase of coffee beans. The Corporate Debtor, primarily through its subsidiaries, associates and joint venture companies, is engaged in conducting business in multiple sectors such as Coffee-retail and exports, leasing of commercial office space, financial services, integrated multimodal logistics, hospitality and informational technology/enables services.
 - b) The Corporate Debtor proposed to issue an aggregate of 2000 unlisted, unrated, secured, redeemable non-convertible debenture ("NCDs") of nominal value of Rs 10,00,000 each, aggregating to Rs 200,00,00,000/- in not more than two tranches, through private

placement. The Corporate Debtor obtained the requisite authority to issue the NCD's vide its resolution passed by the Board of Directors, dated 27/09/2018 and EGM of the shareholder of the Corporate Debtor dated 27/09/2018.

- c) Pursuant thereto, the Corporate Debtor issued two offer letters in Form PAS-4 to the Financial Creditor, offering to issue and allot up to 2000 & further 500 unlisted, unrated, redeemable NCDs of nominal value of Rs 10,00,000 each, on a private placement basis. Subsequently, the Corporate Debtor executed and entered into a debenture trust agreement dated 22/03/2019 with the Applicant, agreeing to appoint it as the Debenture Trustee for the benefit of the debenture holders subscribing to the NCDs.
- d) Thus, accepting the Corporate Debtor's invitation to subscribe to the NCDs under the Offer Letter, the Financial Creditor submitted its application to subscribe to 1,000 NCDs in the private placement issue and paid a sum aggregating to Rs 1,000,000,000 towards the subscription of the NCDs.
- e) In lieu of the subscription money raised, the Corporate Debtor covenanted to pay the Financial Creditor certain amounts in accordance with the terms of the Debenture Trust Deed. Under the terms of the Debenture Trust Deed, the amounts have been cumulatively referred to as Debt.
- f) In contravention of the terms of Clause 4.2 (a) and paragraph 5 (a) Schedule 1 of the Debenture Trust Deed, the Corporate Debtor has defaulted in paying the accrued aggregate Coupon Payments for the respective Coupon Periods ending on the following Coupon Payment Dates- 30/09/2019, 31/12/2019, 31/03/2020 and 30/06/2020. Each of such non-payment constitutes an independent Event of Default under Clause 7.1 of the Debenture Trust Deed.
- g) Consequently, the Debenture Trustee, on behalf of all the Debenture-holder, issued a notice of default and acceleration dated 28/07/2020 ("Notice of Default and Acceleration") to the Corporate Debtor, the pledgers under the Pledge Agreement and V.G Siddhartha (as personal guarantor under the Deed of Personal Guarantee). Under the Notice of

Default and Acceleration, the Debenture Trustee notified the Corporate Debtor about the occurrence of such Event of Default. Further, it stated that in accordance with Clause 7.23 of the Debenture Trust Deed, the Corporate Debtor is due and liable to pay the Debentureholder (including the Financial Creditor), Debt aggregating to an amount of Rs 2,489,083,155,18/- as on that dat.

3. Learned counsel for the Respondent filed objection vide diary No:513, dated: 24/01/2024 inter alia submitting that,
 - a) At the outset it is submitted that the Applicant IDBI Trusteeship Services Limited (hereinafter referred as IDBITSL in brief) is not authorised to initiate CIRP, as the Debenture Trustee Agreement and Debenture Trust Deed both dated 22/03/2019 do not grant powers to IDBITSL to initiate CIRP, since the Applicant has not seeked written instructions from the Debenture Holder and only upon receipt of relevant instructions from the Majority Debenture Holders (i.e. debenture holders holding an aggregate amount representing not less than 51% of the value of the nominal amount of the Debentures) is the Debenture Trustee entitled to exercise its rights and perform its duties and obligations, as mandated under Sub.Para 10.1 of the Trust Deed.
 - b) Further, the Board Resolution of IDBITSL has resolved that approval of the Board is given to issue Power of Attorney in favour of the Constituted Attorneys for execution/ discharge of various documents/ duties including security documents on behalf of the Company. The Board Resolution nowhere states that the Constituted Attorney is authorised to file an application seeking CIRP against the Corporate Debtor. Nor there is any general power granted to initiate any proceedings before any court. The applicant Mr.Manohar, submits that he has been empowered under the Power of Attorney dated06.03.2019 issued pursuant to the said Board Resolution dated 05.03.2019 to file the present application. However, the said Power of Attorney cannot grant powers more than what is envisaged under the Board Resolution dated 05.03.2019. Hence, the Power of Attorney dated 06.03.2019 relied upon by Shri.M.Manohar is ultra vires the Board Resolution

dated 05.03.2019 and accordingly the said application filed by Mr. M.Manohar is beyond his powers and unauthorised.

- c) The application has been filed by IDBITSL on 07.09.2023. Admittedly the Date of Default is 30.09.2019. And hence, the time period of application from date of default falls on 29.09.2022. However, the application has been filed almost a year later, and hence the application is filed beyond limitation. The Corporate Debtor has been served with a memo by the IDBITSL on 23.01.2024, wherein it has claimed that it is entitled to seek exemption from 15.03.2020 to 28.02.2022 by virtue of the Order of the Hon'ble Supreme Court dated 10.01.2022 in Suo Moto Writ petition NO.03 of 2020. The exemption period granted under the said judgment will only apply to cases, where the limitation period would have expired during the period between 15.03.2020 till 28.02.2022. In the present case it is not so. The limitation for the applicant considering the Date of Default being 29.06.2019 would have fallen on 29.09.2022, much beyond the extension period granted under the Order of the Supreme Court.
- d) Further, the Debentures were issued by the Corporate Debtor inviting investment by the investors., by way of an Offer document dated 22.03.2019. And pursuant to application by the prospective Debenture holders, the Corporate Debtor allotted the Debentures, and the coupon payments were to be made on 30.09.2019. The applicant also has admitted that the Date of Default falls on 30.09.2019. The obligation to pay cannot be said to have arisen on occurrence of event of default unless the Debenture Trust Deed specifies that the Date of event of Default is also the day when the cause arises after a Demand for payment is defaulted. In the present case, the Debenture Trustee had issued the Notice of Default and Acceleration on 28.07.2020 and issued Notice of Sale of Shares on 01.03.2021 to the Corporate Debtor. Thus, the said notices of default have been issued during the suspension period provided for under Sec.10A of the I & B Code, 2016.
- e) As per Sec.3(12) of the code, "default" means non-payment of debt when whole or any part of the debt is not paid after a demand is made. In the present case, 30.09.2019 is the date when the coupon payments

had to be made, and hence the Date of Default has been fixed at 30.09.2019 by the Debenture Trustee. **Whereas the Default had occurred on non-payment of the Demand made on 28.07.2020. Thus Default falls within the Suspension Period prescribed under Sec.10A of the Code, and the cause of action has occurred during the Suspension Period.** In view of the same, the application, where the cause of action falls within the Sec.10A period is not maintainable and inadmissible at the very threshold.

- f) The default amount is calculated by applying Penal Interest and WHT.(withholding tax). That, **neither the Debenture Trust Deed nor any of the other transaction documents, has provided for imposition of Penalty Interest or the WHT.** Claim of Penal Interest and WHT by IDBITSL is illegal, when there is no express provision in the financial documents entered into between the Parties for making payment of Penal Interest of WHT. Moreover, while the computation speaks of Penal Interest and Default Interest, the application speaks of Penal Interest. Hence, the computation cannot be taken to be a working of the Interest claimed in the Form I. The said variance, disqualifies the amount claimed in the Form I.
- g) It is further submitted that under the Debenture Trust Deed Para 7.23, the Creditor ought to comply with the Remedies upon the event of Default, however IDBITSL has failed to invoke such remedies.
- h) At the time of issuance of the Debentures, the Corporate Debtor had granted security by way of Pledge of Shares. Corporate Debtor has pledged 2,37,67,000 shares of Coffee Day global limited shares. The Personal Guarantor Late V G Siddhartha has pledged 7,29,000 shares of CDEL I.e., the Corporate Debtor. The applicant IDBITSL is required to provide particulars of the security held and the estimated value of the said securities as the pledged shares is far more valuable than the debt. The IDBITSL has restrained from valuing the entire pledged shares, with an ulterior motive of projecting that the security granted is not sufficient to satisfy the claims of the Debenture Holders.
- i) the IDBITSL as empowered under the Debentures Trust Deed, should have enforced the pledge of shares and realized the entire Debentures

redemption amount, coupon rate, interest payable etc., even on the Date of Default which is 30.09.2019, which is in the best interests of the Debenture Holders. However, IDBITSL has failed to do so. The cause for non enforcement of the pledge is fatal, since the liabilities of the Corporate Debtor has mounted up, inspite of the debts being secured by valuable securities.

- j) It is submitted that the Corporate Debtor, has vast businesses, and is a solvent company with subsidiaries and joint ventures. In this connection we refer to the Annual Report for the year ending 31.03.2023 of the Corporate Debtor, where the Debt to Equity ratio is 0.16 as on 31.03.2023 (Volume 10 Page 1655 of the application), which depicts that the Corporate Debtor Coffee Day Enterprises Limited is a HIGHLY SOLVENT COMPANY. **The IDBITSL has purposefully restrained from realising the securities which had become enforceable immediately on occurrence of default, in terms of the Debenture Trust Deed.**

4. The Learned Counsel for the Petitioner filed its Rejoinder vide Diary No: 933, dated: 12/02/2024, and written submission vide Diary No: 1084 dated 16/02/2024 and stated as under:

- a) As per Clause 7.23 of the Debenture Trust Deed, which provides for remedies upon an Event of Default, and under Clause 10.1 of the Debenture Trust Deed which grants authority for certain actions, the Applicant/Debenture Trustee may exercise its rights as a debenture trustee under Applicable Law. It is clear that Clause 10.1(a) (iv) does not require any specific authorization from the Debenture Holders for the Applicant to exercise its rights under the Applicable Law. The Applicable Law, under the Debenture Trust Deed, includes the IB Code and the rules and notifications made thereunder, and also the provisions of the Companies Act, 2013. The Central Government, *vide* Notification No. S.O. 1091 (E) dated 27.02.2019 has permitted debenture trustees to file applications under Section 7 (1) of the IB Code. Reliance is placed on;

- i. The Hon'ble NCLT, Principal Bench, in the Applicant's own case in *IDBI Trusteeship Services Limited v. Shipra Estate Limited*, bearing Company Petition No. (IB) 513 of 2022 *vide* Order dated 24.01.2024.
- ii. Similarly, the Hon'ble NCLT Mumbai Bench in the case of *IDBI Trusteeship Services Limited v. Ornate Spaces Pvt Ltd*, bearing Company Petition (IB) 4469 OF 2019 *vide* Order dated 06/10/2023

Moreover, Clause 10.1 (b) of the Debenture Trust Deed envisages a covenant created for the benefit of the Financial Creditor, and more specifically, created *inter-se* the Applicant and the Financial Creditor. Given that the Financial Creditor has not signified any objection to the initiation of the present proceedings by the Applicant on its behalf (and in fact, has approved and ratified the act of the Applicant *vide* the Board Resolution dated 2 February 2024 passed by its Board of Directors), the Corporate Debtor cannot seek to invoke Clause 10.1 (b) to question the validity of the authority conferred upon the Applicant to file the Application. Further, the non-existence of an inter-creditors' agreement between the debenture holders in the instant case, clearly demonstrates the intention of the debenture holders to not prevent/restrain either of the debenture holders from exercising their rights, including their right to initiate legal proceedings in respect of the NCDs, independent of the other debenture holder.

- b) The Power of Attorney dated 06 March 2019, which is executed in furtherance of the Board Resolution dated 05 March 2019, enumerates the duties that have been referred to in the Board Resolution. The recital to the Power of Attorney shows that, to discharge its obligations (*i.e.*, duties), it is required to execute various documents. One of the duties specified at Clause 9 is the power to file affidavits, counter affidavits, petitions, written statements, rejoinders etc., before any tribunal, court etc.
- c) The date of the first default in payment in the instant case is 30 September 2019, when the Corporate Debtor was required to, and

failed to pay an amount of INR 2,81,70,830 in terms of Schedule 1 Clause 5 read with Schedule 13 of the Debenture Trust Deed. Under Article 137 of the Limitation Act, 1963 the time limit period for filing of an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 is 3 (three) years from the date of default. That as per the Order dated 10 January 2022 of the Hon'ble Supreme Court of India in *Suo Moto Writ Petition No. 03 of 2020*, on account of the COVID-19 pandemic, the period from 15 March 2020 to 28 February 2022, is to be excluded in computing limitation. Reliance is placed on the judgement of *Prakash Corporates vs. Dee Vee Projects*, (2022) 5 SCC 112.

- d) The date of the first default in payment in the instant case is 30 September 2019, when the Corporate Debtor was required to and failed to pay an amount of INR 281,70,830 in terms of Schedule I Clause 5 read with Schedule 13 of the Debenture Trust Deed. Thus, there is a 'debt' in accordance with Section 3(11). The Applicant has nowhere denied that it has failed to make the payment as required on 30 September 2019. There is evidently also a 'default' in accordance with Section 3(12) of the IB Code, in as much as there has been 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 corporate debtor. This default is continuing till date. The Hon'ble Apex Court in the case of *Laxmi Pat Surana v. Union Bank of India and Anr.*, (2021) 8 SCC 481 has held that Section 7 of the IB Code comes into play when a debtor commits a "default", *i.e.*, when there is non-payment of "debt" when whole or any part of or instalment of the amount of debt has become due and payable, and not the date on which any overt act is undertaken by the creditor.
- e) Similarly, the Hon'ble Apex Court in *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited and Anr.*, (2020) 15 SCC 1, after examining the law and the previous judgments of the Supreme Court has held that a default referred to in the IB Code is that of actual non-payment by the Corporate Debtor when a debt has become due and payable. Therefore, the ground that the default only occurred on

non-payment of the demand made on 28.07.2020 is wholly erroneous. However, it is pertinent to note that the Corporate Debtor does admit to non-payment and consequent occurrence of default. As stated supra, an Event of Default as per Clause 7.1 of the Debenture Trust Deed occurs immediately on non-payment on the due date by the Corporate Debtor. The Debenture Trust Deed does not require any overt act by the Applicant for triggering such Event of Default. Hence, the ground that the Event of Default has only occurred on 28.07.2020 and that accordingly the Corporate Debtor is to be granted relaxation under the 10 A period, is liable to be rejected.

- f) In the face of these statutory definitions, it is surprising that the Corporate Debtor has taken the stand that the debenture holders are not “creditors” and are not “financial creditors”. The offer documents dated 22.03.2019 referred to by the Corporate Debtor at Annexure IV -Term Sheet clearly discloses (at page 84 of Volume I) that the upon acceptance of the offer, and on issuance of the NCDs, there is an obligation on the Corporate Debtor to re-pay the amounts subscribed along with interest. Hence, this document clearly shows that a debenture holder is nothing but a Financial Creditor. Reliance is placed in the following judgements; *Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India and Ors.*, (2019) 8 SCC 416, *Mr. Zubin Bharucha v. Reliance AIF Management Company Ltd. & Ors.*, 2023 SCC OnLine NCLAT 167 and *Neelkanth Township & Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.*, 2017 SCC OnLine NCLAT 860. It is contended that the reliance placed by the Corporate Debtor on *Vistra ITCL (India) Ltd v Dinkar Venkatasubramanian* (2023) 7 SCC 324 was misplaced.
- g) In the Written submissions dated 16.02.2024, the Petitioner has also placed reliance upon Annual Reports of F.Y 2019-2020 to F.Y 2022-2023 which were placed as various Annexures of the petition to contend that the outstanding amounts in the name of the Financial Creditor was clearly reflected in the Balance Sheet on these years; which show the acknowledgement of the debt. The Petitioner has also contested the other arguments of the Corporate Debtor regarding

incomplete valuation of the securities and other remedies under Debenture Trust Deed not exhausted by the Financial Creditor, including the failure to realise the pledged securities. In this regard, it is explained that this was a discretionary right and not an obligation of the Financial Creditor in accordance with the Debenture Trust Deed, and there was no obligation to exhaust other remedies before invoking the provisions of Section 7 of the IBC 2016. With regard to the claim in the objection that there was a failure to mention the amount realized, it has been explained that the application discloses the true default amount including the pledged shares already realized, and the details of the calculation was also provided along with the rejoinder.

- h) Further, Corporate Debtor was required to pay default interest under Clause 4.4. of the Debenture Trust Deed. Also, Clause 22.1 of the Debenture Trust Deed imposes an obligation on the Corporate Debtor to bear all taxes required to be paid / levied on such Debenture Holders or unit holders of any Debenture Holder, on account of, or in connection with, the investment in or holding of redemption of the whole or part of the Debentures.
5. Further, the Learned Counsel for Petitioner have Field Memo of Citation vide Diary No 909, dated 09/02/2024 and the same is taken on record.
 6. Heard both Ld. Counsels for the parties and perused the records.
 - a) The main contention of the Corporate Debtor herein is that the present Application is not maintainable as the same has been filed without compliance of the Debenture Trust Deed that species under Clause 10 that in the event of Default the Trustee shall obtain a express consent from the debenture holders. It is settled law that in case of default in payment money due on debentures either of debenture holder or debenture Trustee can proceed against the defaulting party. The Petitioner has also cited Orders of Co-ordinate bench of NCLT New Delhi and Mumbai (supra). Further, notification dated 27.02.2019 released by the Ministry of Corporate Affairs, provides for the provision

authorising Debenture Trustee to file an application under Section 7 of the Code 2016. Therefore, the contention of the respondent with regard to the authority of the applicant cannot sustain.

- b) Further, it is the allegation of the Corporate Debtor that the Debenture Holders are the “Investors” and cannot be held as “Financial Creditors”. In this connection Section 5 (8) of the Code is reproduced below for perusal:

5. Definitions

(1) **

(2)**

(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) **any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;**

Firstly, as per the definition under Section 5(8)(c) of the IBC the debt which exists pursuant to the debenture is also a ‘financial debt.’ It is settled principle from judgment of Hon’ble Supreme Court in the matter of **‘New Okhla Industrial Development Authority v. Anand Sonhadra, (2023) 1 SCC 724’** wherein the prerequisites for being eligible for Section 5(8) of the IBC are outlined, including the need for a debt and the payment of the Financial Debt to the Corporate Debtor. As has been held by the Hon’ble Supreme Court in the matter of **‘Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors [(2019) 8 SCC 416]’** Debenture Holders are considered Financial Creditors and therefore, Debenture Holders holding a Financial Debt is covered within the meaning of Section 5(8) of the IBC. Hence the allegation of the Corporate Debtor regarding the Debenture Holder not being Financial Creditor is not tenable.

- c) The date of default is clearly stated in part IV as 30/09/2019, which is further 'Authenticated' by the information utility report issued by the NESL. The Applicant has submitted that the Corporate Debtor failed to make payment, in accordance with the terms of the Debenture Trust Deed and has determined date of default accordingly. There is no dispute that the Corporate Debtor has committed default in payment of debt. However, on perusal of the documents it is seen that Financial Creditor has issued a loan recall notice dated 28/07/2020, hence it is the contention of the Corporate Debtor that the default only occurred on non-payment of the demand made on 28/07/2020, which is under the garb of 10A period.
- d) On perusal of the Debenture Trust Deed dated 22/03/2019, clause 7.1 defines 'Event of Default' to be as follows:

7 Event of Default

7.1 Non Payment

"Any obligor does not pay on the due date any amount payable pursuant to any transaction document to which it is a party at the place at and in the currency in which it is expressed to be payable."

- e) As per the terms of Clause 4.2(a) and paragraph 5 (a) of Schedule I of the Debenture Trust Deed the Corporate Debtor has defaulted in paying the accrued coupon amount as on 30/09/2019. Hence the allegation that the Loan Recall Notice dated 28/07/2020 constitutes, "event of default" is not tenable. In fact, in the objections filed by the Corporate Debtor vide Diary No 513 dated 24/01/2024; they have categorically admitted at multiple places regarding the Date of Default being 30/09/2019. For example at para 12 it is stated by the Corporate Debtor "*Admittedly, the Date of Default is 30/09/2019.*" The same has been repeated at Para 14 also. Thus now they cannot make an alternative claim that the date of default should be reckoned from the Loan Recall notice dated 28/07/2020; merely because the

Corporate Debtor wants to advance a claim that the default falls under the exclusion period Under Section 10A; which is not correct.

- f) In this connection reliance is placed on the judgement of Hon'ble Apex Court in the matter of ***Innoventive Industries Ltd. v. ICICI Bank and Anr., in Civil Appeal Nos. 8337-8338 of 2017, dated 31 Aug 2017,*** in which it was observed that,

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed.” Thus, in this judgement of the Hon'ble Apex Court it is clearly laid down that the default under Section 3 (12) of the IBC occurs on non-payment of the due instalment of the debt or even a part thereof.

- g) Further, the recent judgement of 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,*** relates to a similar issue in which the Financial Creditor had specified the Date of Default as 27.09.2019 when the debt became due and the default had occurred. However, the Corporate Debtor contended that the date of Loan Recall notice dated 11.08.2020 should be considered as Date of Default, thus it fell under the excluded period provided under Section 10A of the Code. Relying on the provisions of the Section 3 (12) of the IBC, the Hon'ble NCLAT held that the default occurs on non-payment of the whole or a part of the instalment of the debt when it is due and payable; and therefore the date of 27.09.2019 was correctly taken as the 'Date of Default'; and it cannot be shifted to a later date because of any Loan Recall notice or any Part payment of the debt subsequently. Thus, the

decision of the Hon'ble NCLAT in this case is on similar facts as in this present case before us. Even in the ROD issued by the NESL in Form No.D, the date of Default is clearly specified as 30/09/2019.

- h) Now the question is whether the present petition satisfies the Limitation period of 3 years from the date of default being 30/09/2019. As per the decision of Hon'ble Apex Court in the case of *Dena Bank v. C. Shivakumar Reddy (2021) 10 SCC 330*,

"It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act."

The Financial Creditor herein has filed the Annual Reports of the Corporate Debtor for the FY 2019-2020, 2020-21, 2021-22 and 2022-23 (Annexed from page 888 onwards), wherein it depicts that the Corporate Debtor is in default of repayment of interest of INR 14.24 crores, which is a clear acknowledgement of debt and hence the issue of limitation is duly taken care of. Specifically, in the Annual Report F.Y 2020-21 in the balance sheet as on 31.03.2021 mentioned at Annexure-22, at Page- 888 of Volume-VI of the C.P it clearly show that there was an entry of outstanding amount pertaining to debentures in the name of "Credit Opportunities II Pte. Ltd." the Debenture Holder, amounting to Rs. 117.19 crores as on 31.03.2021. Thus, this is a clear cut acknowledgement of the debt in the name of Debenture Holder and satisfies the requirement of the acknowledgement of the debt for the purposes of determining the fulfilment of limitation.

- i) It is observed that the Corporate Debtor has objected to the amount claimed in default in Part IV of the application i.e Rs 228,45,74,180 as on 31/08/20023, on the basis that the penal interest and WHT (Withholding tax) was not mutually agreed upon. Even otherwise, the amount of default as on the date of default i.e 30/09/2019 was 2,81,70,830/-, which is above the threshold as provided under Section 4 of the IBC.

- j) With respect to the claims of the Corporate Debtor regarding the failure to invoke other remedies upon default, valuation of pledged shares, We do not find it pertinent to examine these aspects, as it is clear from the various judgments of Hon'ble Apex court that this Adjudicating Authority should only be convinced on the existence of the 'Debt' and 'Default,' which is clearly established in this case. Further, we agree with the explanation given by the Financial Creditor that the Debenture Trust deed only provided this Applicant discretionary rights, and not an obligation to enforce other alternative remedies; before recourse to provision of Section 7 of the IBC.
7. In view of the above discussion, we are of the considered opinion that there is a 'Debt' and 'Default' existing in this case; and the Petition is filed within the limitation period. The threshold requirement is also fulfilled. Hence the present petition **CP (IB) No. 152 of 2023 is admitted** and moratorium is declared in terms of Section 14 of the Code. As a necessary consequences of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:
- a. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - c. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - d. The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor;

- e. It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
 - f. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
 - g. The order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of Section 31 or passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;
8. In Part III of the Form 1, the name of *Shri Ashish Chhawchharia* Registration No. IBBI/IPA-001/IP-P00294/2017-118/10538; Contact No: 9030088112, e-mail: ashish.chhawchharia@in.gt.com as Interim Resolution Professional to carry the functions as mentioned under the IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Section 15,17,18,19,20,21 of the IBC. The IRP shall file his written consent within one week from today.
9. The Financial Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakhs Only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors.
10. The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from

the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.

11. A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send the copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

-Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd/-

**(K BISWAL)
MEMBER (JUDICIAL)**