

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) Insolvency No. 850 of 2023**

**IN THE MATTER OF:**

**IDBI Trusteeship Services Limited,**

A company incorporated under the Companies Act, 1956, and having its Registered Office at: Ground Floor, Universal Insurance Building, Sir Phirozshah Mehta Road, Fort, Bazargate, Mumbai – 400001, Maharashtra

Also at:

Asian Building, Ground Floor, 17, R. Kamani Marg, Ballard Estate, Mumbai 400001.

Maharashtra

**...Appellant**

**Versus**

**Direct Media Distribution Ventures Private Limited,**

Registered Office:

C-606, Gaurav Woods, Phase-II, C Wing, Near Kankia Close to Mayor Bungalow, Mira Road, East, Thane – 401107, Maharashtra

Also at:

18<sup>th</sup> Floor, A Wing, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai – 400013, Maharashtra

**...Respondent**

**Present:**

**For Appellant** : Mr. Ramji Srinivasan, Sr. Advocate with Mr. Vikram B. Trivedi, Mr. Sachin Chandarna and Mr. Kartik Nagarkatti, Advocates.

**For Respondent** :

## **J U D G M E N T**

### **ASHOK BHUSHAN, J:**

1. This Appeal by Financial Creditor has been filed against the Order dated 16<sup>th</sup> May, 2023 passed by National Company Law Tribunal, Mumbai Bench, Court- IV (hereinafter referred to as “**The Adjudicating Authority**”) by which Section 7 Application filed by the Appellant has been dismissed as barred under Section 10A of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘**The Code**’).

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

- i. Essel Infraprojects Limited (hereinafter referred to as “**Essel**”) proposed to issue 425 rated, unlisted, redeemable, non-convertible debentures (hereinafter referred to as “**NCD**”) in two series being series No. I-Debentures and series No. II-Debentures having face value of Rs. 1 crore each aggregating nominal value of Rs. 425 Crores.
- ii. The Appellant agreed to act as Debenture Trustee for the benefit of the Debenture Holders on 22<sup>nd</sup> May, 2015. A share pledge agreement was also executed on 22<sup>nd</sup> May, 2015. A corporate guarantee was also executed on 22<sup>nd</sup> May, 2015 by the Corporate Debtor, Direct Media Distribution Venture Pvt. Ltd. and another Guarantor namely Cyquator jointly irrevocable and unconditional guaranteed obligation of Essel with respect to debentures as well as to make payments under Debenture Trust Deed.

- iii. On 22<sup>nd</sup> May, 2015, Debenture Holders subscribed to 200 debentures under the first series and on 24<sup>th</sup> June, 2015 subscribed to 225 debentures under the second series. Debenture trustee deed was amended by virtue of supplemental and amended debenture trustee deed dated 25<sup>th</sup> June, 2019. 74 out of 425 NCDs were redeemed by Essel in September, 2019. On 22<sup>nd</sup> May, 2020, 351 NCDs fell due for redemption. Essel failed and neglected to pay to the Debenture Holders the principal amount and the redemption premium on the said NCDs. Financial Creditor vide Notice dated 12<sup>th</sup> June 2020, invoked the share pledge agreement calling upon them to pay outstanding obligations in respect of the balance 351 NCDs aggregating to Rs. 616,09,48,616/-. Financial Creditor vide notice dated 12<sup>th</sup> June, 2020 invoked the corporate guarantee dated 22<sup>nd</sup> May, 2015 furnished by the Corporate Debtor and Cyquator in respect of NCDs aggregating to Rs. 616,09,48,616/-. Financial Creditor in the said notice recorded the event of default and asked the corporate guarantor to make payment within two business days. Pledge invocation dated 12<sup>th</sup> June, 2020 was challenged in Hon'ble High Court of Delhi under Section 9 of the Arbitration and Conciliation Act, 1996 which petition were dismissed by the Delhi High Court. On 22<sup>nd</sup> September, 2020, Financial Creditor informed the Essel that as per instruction of the Debenture Holders, Financial Creditor has realized Rs. 923,461,401/- from the sale of 43,47,500 Zee Entertainment Enterprises Ltd shares.

- iv. On 13<sup>th</sup> May, 2022, Demand Notice was addressed by the Financial Creditor to Corporate Debtor calling upon to make payment of Rs.591,81,92,216/- as on 09<sup>th</sup> May, 2022 along with 12% interest.
- v. On 12<sup>th</sup> July, 2022, Appellant Financial Creditor filed Section 7 Application of the Code. The Corporate Debtor was served notice and filed its Reply opposing the Section 7 Application. The Adjudicating Authority heard the parties and by Impugned Order dated 16<sup>th</sup> May, 2023 has dismissed the Application holding that Corporate Guarantee having been invoked on 12<sup>th</sup> June, 2020 i.e. during Section 10A period the Application is barred by Section 10A. Submission of Appellant that default occurred in 2019 was also repelled.
- vi. Aggrieved by the order dated 16<sup>th</sup> May, 2023 rejecting Section 7 Application this Appeal has been filed by the Financial Creditor-IDBI Trusteeship Services Limited.

**3.** Mr. Ramji Srinivasan, Learned Sr. Counsel appearing for the Appellant submits that Corporate Guarantee given by the Respondent is a continuing guarantee. Guarantee also includes amount due as a result continuous obligation. It is submitted that Financial Creditor has realized certain amount by sale of shares in September, 2020 hence after giving credit of realized amount, a notice has been issued to the Appellant on 13<sup>th</sup> May, 2022 which notice is the basis of filing of Section 7 Application. Date of Default in Section 7 Application was claimed as 15<sup>th</sup> May, 2022 which is consequent to default in making the payment in pursuance of notice dated 13<sup>th</sup> May, 2022. It is submitted that the Adjudicating Authority committed error in rejecting the Application as barred by Section 10A. Section 10A did

not apply to the default occurring post suspension period. Embargo under Section 10A did not apply to the default occurring post suspension period. It is submitted that date of default does not necessarily be singular default, subsequent event can rise to fresh cause of action. Cause of action accrued subsequent to the sale of shares and after giving credit of the amount, notice dated 13<sup>th</sup> May, 2022 was issued. It is submitted that the Adjudicating Authority committed error in rejecting Section 7 Application.

4. We have considered the submissions of Learned Sr. Counsel for the Appellant and perused the record.

5. The Application under Section 7 having been dismissed on the ground that Application is barred by Section 10A, the only question to be considered is as to whether Section 7 Application is barred by Section 10A of the Code.

6. Section 10A provides:

***“Section 10A: Suspension of initiation of corporate insolvency resolution process.***

*10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

*Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”*

**7.** The Application under Section 7 filed by the Appellant was for default of Rs. 599,05,69,179/- payable on 20<sup>th</sup> June, 2022. The Application under Section 7 was filed on 12<sup>th</sup> July, 2022. Part-IV of the Application under Section 7 deals with particulars of financial debt, amounts claimed and date on which the default occurred. Part-IV, Item No. 2 of Section 7 Application is as follows:

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKING FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<p>The Total Amount of default is Rs. 599,05,69,179/- (Rupees Five Hundred and Ninety Nine Crores Five Lakh Sixty Nine Thousand One Hundred and Seventy Nine Only) due and payable on 20<sup>th</sup> June, 2022 by the Corporate Debtor in its capacity as a Corporate Guarantor.</p> <p><b>Continuous Default:</b></p> <p>i. The Defendant failed to maintain security cover from January 2019.</p> <p>ii. On 22<sup>nd</sup> May, 2020, as per the terms of issue, balance 351 NCDs fell due for redemption and Essel defaulted in making payment of the principal amount and redemption premium on the said NCDs in terms of the obligations under the DTD (defined</p>
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		<p>hereinbelow). Notice for Redemption of Debentures dated 12<sup>th</sup> June, 2020 addressed by Financial Creditor to Essel calling upon Essel to redeem the said NCDs as per the contractual terms and repay in full the outstanding obligations with redemption premium and the default interest in respect of the said NCDs aggregating to an outstanding amount of Rs. 616,09,48,616/-.</p> <p>iii. Pledge Invocation Notice dated 12<sup>th</sup> June, 2020 thereby invoking the pledged shares under the Share Pledge Agreement to recover the amounts due and payable by Essel.</p> <p>iv. Invocation of Corporate Guarantee Notice dated 12<sup>th</sup> June, 2020 addressed by the Financial Creditor to the Corporate Debtor for an amount of Rs. 616,09,48,616/- with a demand to comply with the requisition as contained therein. However, the Corporate Debtor has failed to make good the default committed by Essel and defaulted in making payment of the outstanding amount.</p> <p>v. Pursuant thereto, in furtherance of the Invocation of pledge by the</p>
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		<p><i>Financial Creditor, the Financial Creditor sold the pledged shares of ZEEL in open market in various tranches and realized a sum of Rs. 92,34,61,401/- and was accordingly appropriated towards outstanding dues pertaining to the said NCDs.</i></p> <p><i>vi. In furtherance of the Invocation of pledge by the Financial Creditor, 6,25,11,000 pledged shares of DTIL were sold by the Financial Creditor in November and December 2020 in open market and total amount of Rs. 160,34,27,533/- (including Rs. 92,34,61,401/- mentioned above) was realized and appropriated towards outstanding dues pertaining to the said NCDs.</i></p> <p><i>vii. Demand Notice dated 13<sup>th</sup> May, 2022 was addressed by the Financial Creditor to the Corporate Debtor for an amount of Rs. 591,81,92,216/- with a demand to comply with the requisition as contained therein. However, the Corporate Debtor has failed to make good the default committed by Essel and defaulted in making payment of the Outstanding Amount.</i></p>
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		<p><b><i>Date of Default 15<sup>th</sup> May 2022.</i></b></p> <p><i>The Corporate Debtor failed to comply with the requisitions and make payment of the amounts as per the Demand Notice dated 13<sup>th</sup> May, 2022.</i></p> <p><i>The Computation of Claim Amount has been annexed herewith at <b>Annexure – “D”</b>.</i></p>
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8. The Part-IV, Item 2, as noted above indicates that 22<sup>nd</sup> May, 2020 was a date when balance 351 NCDs fell due for redemption and Essel defaulted in making payment of the principal amount and redemption premium. Invocation of Corporate Guarantee was made by Notice dated 12<sup>th</sup> June, 2020 which has been specifically pleaded in the Part-IV of the Application. We may first look into the contents of the Notice dated 12<sup>th</sup> June, 2020 invoking the corporate guarantee, as has been filed along with Section 7 Application. Subject of the Notice is “Sub: Invocation of Deed of Guarantee dated 22<sup>nd</sup> May, 2015 (“Deed”) executed by Guarantors No. 1 & 2 in favour of IDBI Trusteeship Services Limited.”. Notice was addressed to Corporate Debtor and Cyquator Media Services Pvt. Ltd. another Corporate Guarantor. The notice from paragraph 11 to end is as follows:

*“11. Admittedly, the balance 351 NCDs were due for redemption on 22<sup>nd</sup> May, 2020. However, the issuer company defaulted in payment of principal amount of NCDs, and redemption premium thereon.*

*12. In terms of said Deed of Guarantees instructed by ITSL, we hereby call upon the Guarantors jointly or severally to pay ITSL, a sum of Rs. 616,09,48,616/-*

*(Rupees Six Hundred and Sixteen Crore Nine Lakh Forty Eight Thousand Six Hundred and Sixteen) outstanding as on 5<sup>th</sup> June 2020 along with further interest thereon as per the particulars of claim appended herein, within a period of 2 (Two) business days from the date of receipt of this notice failing which ITSL will be constrained to adopt appropriate legal proceedings against you as may be advised.*

13. ITSL hereby confirms that demand made herein relates to the obligation of the Issuer Company under and in relation to the Transaction Documents and other related documents. Needless to state that this notice is without prejudice to, and does not impair or affect, the rights of ITSL or the Debenture Holders. This notice does not and shall not be construed as waiver of any rights or remedies, accruing to ITSL or the Debenture Holders whether presently or in the future, under any applicable law or in equity and does not bar Trustee or the Debenture Holders of any legal action, that may be taken by them, against you in relation to the amounts, due, payable under the said Transaction documents.

*(Capitalized terms used but not defined hereunder shall have the meaning assigned to them under the Debenture Trust Deed/other security and/or financing documents in relation to the Debenture Trust Deed.)*

#### PARTICULARS OF CLAIM

<i>Heading</i>	<i>Amount (Rs.)</i>
<i>Principal Outstanding</i>	<i>3,51,00,00,000/-</i>
<i>Redemption Premium Outstanding</i>	<i>2,64,62,26,032/-</i>
<i>Default Interest</i>	<i>47,22,584/-</i>

<i>outstanding as on 5<sup>th</sup> June, 2020</i>	
<i>Total outstanding</i>	<i>616,09,48,616/-</i>

*Please deposit the said amount in the following account  
and in the proportion set out below:*

*Account Number: 002909968042*

*Account Name: CORPORATE ACTION PROCESS A/C*

*Bank Name; HSBC*

*IFSC Code: HSBC0400002*

*Yours Faithfully,*

*M/s. Manilal Kher Ambalal & Co.*

*...”*

**9.** The above notice clearly indicates that by the said notice dated 12<sup>th</sup> June, 2020, guarantors were called upon to pay a sum of Rs. 616,09,48,616/- outstanding as on 05<sup>th</sup> June, 2020 along with further interest within two business days. Amount after invocation of guarantee became due on 16<sup>th</sup> June, 2020 after expiry of 2 business days. In part-IV of the Application, the Applicant has mentioned date of default as 15<sup>th</sup> May, 2022 and has referred to Demand Notice dated 13<sup>th</sup> May, 2022 which was addressed to the Corporate Debtor for an amount of Rs. 591,81,92,216/-. Notice dated 13<sup>th</sup> May, 2022 is the basis of Section 7 Application. Notice dated 13<sup>th</sup> May, 2022 has been issued to the Corporate Debtor, Cyquator another Corporate Guarantor and Essel Infraprojects Limited. Subject of the Notice dated 13<sup>th</sup> May, 2022 as is addressed to the Corporate Debtor is as follows:

*“sub: (i) Demand Notice in respect of the Outstanding  
Amount of Rs. 591,81,92,216/- as on 9<sup>th</sup> May 2022,  
arising out of and in respect of the default committed*

*under the Corporate Guarantee dated 22<sup>nd</sup> May 2015 (after sale of pledged shares).*

*(ii). Continuing default on your part.”*

**10.** The notice after mentioning the sequence of the events with effect from 22<sup>nd</sup> May, 2015 refers to the notice dated 12<sup>th</sup> June, 2020 and further states that after notice dated 12<sup>th</sup> June, 2020, certain sum was realized and appropriated towards outstanding dues of Rs. 616,09,48,616/-. It is useful to extract paragraph 5, 8 and 9 of the Notice which is as follows:

*“5. Pursuant thereto, in furtherance of the invocation of pledge by ITSL/our client, pledged shares of DTIL and ZEEL were sold by ITSL/our client in the open market in various different tranches. As a result thereof, ITSL/our client realised a sum of Rs. 160,34,27,533/- which should be appropriated towards the then outstanding amount of Rs. 616,09,48,616/-. Post the adjustment and after realization of the part payment against the total debt, an amount of Rs. 591,81,92,216/- is now due and payable as on 9<sup>th</sup> May 2022 by the issuer Company to ITSL/our client. Accordingly, you in your capacity as a Corporate Guarantor are jointly and severally liable to make payment of the said amount of Rs. 591,81,92,216/- inclusive of interest @12% per annum along with other contractual charges.*

*.....*

*8. In these circumstances, we hereby call upon you to make payment of the balance sum of Rs. 591,81,92,216/- inclusive of interest @12% per annum with all other costs, charges and expenses under the corporate guarantee dated 22<sup>nd</sup> May, 2015, to ITSL/our client with further interest as per the particulars of claim appended hereunder within 2 business days of the receipt of this*

*notice, failing which ITSL/our client shall be constrained to adopt appropriate proceedings in Law as advised including but not limited to the insolvency and bankruptcy code, 2016, which proceedings shall be entirely at your cost and consequence thereof.*

*9. Needless to say that this shall not be construed and/or deemed as waiver in any manner whatsoever of any rights or remedies, accruing to ITSL/our client or the Debenture Holders whether presently or in the future, under any applicable law or in equity and does not bar Trustee or the Debenture Holders of any legal action, that may be taken by them, against you in relation to the amounts due, payable under the said Transaction documents in accordance with law.”*

**11.** The Adjudicating Authority in the Impugned Order after noticing the clauses of Deed of Guarantee returned a finding that notice of invocation of guarantee having been given on 12<sup>th</sup> June, 2020 and date of default quo corporate guarantee was 16.06.2020 which is a period prohibited under Section 10A, the Application is barred by Section 10A. In paragraph 5.2 to 5.4 of the Judgment has been observed:

*“5.2. Clause 7.1 and Clause 7.2 of Schedule I to the Debenture Trust Deed dated 22.05.2015 specifies the tenure of series one debenture and series two debentures ending on May 22, 2020. Further clause 9 and 10 provides for put option and call option. In the present case, neither put option nor call option has been exercised before the tenure of the Debentures.*

*5.3. On a combined reading of clause 4 & 6 of guarantee agreement and clause 7 of the debenture trust deed, it follows that the debenture had fallen due for payment on 22.05.2020 and the liability of guarantor arises only upon*

*service of notice in the form given in schedule II of the guarantee agreement. It is not in dispute that the said notice was given only on 12 .06.2020, which makes the Corporate Debtor liable to pay the amount in default within two business days. Accordingly, the date of default qua corporate guarantor is 16.06.2020 as 13 and 14.06.2020 was a holiday.*

*5.4. As regards plea of continuing default and occurrence of event of default in 2019, this bench is of the view that default takes place when an obligation to pay arises. The obligation to pay cannot said to have arisen on occurrence of event of default unless notice in the form given in schedule II of the guarantee agreement is served on the guarantor. Further, it is settled legal proposition that date of default does not shift.”*

**12.** Before we proceed further it is relevant to notice certain clauses of the Deed of Guarantee dated 22<sup>nd</sup> May, 2015. Clause 4, 5, 6 and Clause 15 of the Guarantee Deed is as follows:

*“4. For the purposes of invoking the guarantee Issued in terms hereof, the Debenture Trustee shall, either upon (a) \_the occurrence of an Event of Default In terms of the Transaction Documents or (b) failure to deposit the Outstanding Amounts in the Designated Account, upon the exercise of Put Option or Call Option (as the case may be), 5 (Five) Business Days before the Put Option or Call Option date (as the case may be) or (c) upon any default in making Payments, issue a notice to the Guarantors In writing, in the form given in Schedule II hereto {Notice of Demand'} upon the receipt of which the Guarantors agrees and undertakes that the Guarantors shall, without any demur or protest and on first demand, make payment of the amount demanded thereunder within 2 (Two} Business*

*Days of receipt of the Notice of Demand, which payment shall be made for the amount mentioned in the Notice of Demand without any deduction whatsoever. The Guarantor consents that 2 (Two) Business Days is a just and reasonable time to arrange for the funds in case of an Event of Default.*

5. *In the event the Guarantors fail to make payment of any amount due under this Guarantee, the Guarantors shall be liable to make payment of the Default Interest for the period commencing from the date on which such payment was due and expiring on the date on which such payment is made by the Guarantors: Provided, however that there shall be no liability on the Guarantors to make payment of any default Interest over and above the obligation of the Company to make payment of Default Interest (i.e., Default Interest shall not be counted twice).*

6. *The Guarantors hereby, Jointly and severally, Irrevocably and unconditionally undertake to act only upon a Notice of Demand of the Debenture Trustee or any nominee of the Debenture Trustee as may be designated by the Debenture Trustee.*

....

15. *The obligations of the Guarantors to the Debenture Trustee under this Guarantee shall not be discharged, released or impaired or otherwise be affected by reason of any of the following events or circumstances:"*

**13.** The case set up by the Applicant in Part-IV of Section 7 Application was that as per Debenture Trust Deed dated 22<sup>nd</sup> May, 2015 tenure of series one debenture and series two debenture were ending on 22<sup>nd</sup> May, 2020. Present is a case where put option and call option was not exercised before the tenure of debentures. With regard to the liability of the Corporate

Guarantor to make payment and the date of default qua the guarantor came for consideration before this Tribunal in C.A. (AT) Ins. No. 329 of 2023, **Pooja Ramesh Singh Vs. State Bank of India & Anr.** where this Tribunal in paragraph 24 laid down that guarantors' liability depend on terms of the contract. In paragraph 24 and 32, following has been laid down:

*“24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed. When default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression ‘due’ occurring in Section 3(11) uses two additional expressions i.e “payable” and “is not paid by the debtor or corporate debtor”. The expression ‘is not paid by the debtor’ has to be given some meaning. As laid down by the Hon’ble Supreme Court in **“Syndicate Bank vs. Channaveerappa Beleri & Ors.” (supra)**, a guarantor’s liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor’s liability has to be read from the Deed of Guarantee.*

..



32. In view of the foregoing discussion, we arrive at following conclusions:

(i) The Corporate Guarantee Deed dated 17.05.2019 is on demand guarantee deed and the default shall arise on the part of the Guarantor only when demand notice is issued as contemplated in the Deed of Guarantee. When the State Bank of India invoked the guarantee vide notice dated 01.10.2020, demand on the part of the Corporate Guarantee shall arise only subsequent to the notice dated 01.10.2020 i.e. non-payment of the amount within seven days i.e. default arise on 08.10.2020.

(ii) Default on the part of the Guarantor having arisen on 08.10.2020 i.e. within the period which is covered as prohibited period under Section 10A, application under Section 7 was clearly barred by Section 10A. Issues No. II, III and IV are answered accordingly.

(iii) The Adjudicating Authority in the impugned order has not adverted to the relevant clauses of the Deed of Guarantee as noted above. The date of default on part of the Guarantor being subsequent to 01.10.2020 when guarantee was invoked, the application was barred by Section 10A and the Adjudicating Authority committed error in admitting the Section 7 application.”

**14.** The submission which has been pressed by Mr. Ramji Srinivasan to get out from the bar of Section 10A is that after issuance of notice dated 12<sup>th</sup> June, 2020, Financial Creditor realised certain amount by sale of shares and notice was issued on 13<sup>th</sup> May, 2022 demanding sum after adjusting the amount realised hence there will be date of default on 15<sup>th</sup> May, 2022 after issuance of notice from 13<sup>th</sup> May, 2022 which was date beyond 10A prohibition. We have already noticed both the notices dated 12<sup>th</sup> June, 2020

as well as 13<sup>th</sup> May, 2022, what is added in 13<sup>th</sup> May, 2022 is adjustments of the amount which was realised from the Corporate Debtor in September, 2020 by sale of the shares. The default with regard to amount which became due on 22<sup>nd</sup> May, 2020 for an amount of Rs. 616,09,48,616/- continues on the part of the corporate guarantors which fell due as per invocation notice dated 12<sup>th</sup> June, 2020. The mere fact that the said amount is reduced by certain amount realised in September, 2020 cannot change the default which occurred on 16<sup>th</sup> June, 2020 consequent to invocation of the corporate guarantee by notice dated 12<sup>th</sup> June, 2020. The submission of Mr. Ramji Srinivasan that since by subsequent events certain amount was realised which has been given due credit in the total outstanding the date of default has to be treated subsequent date i.e. 15<sup>th</sup> May, 2022 cannot be accepted. The notice dated 13<sup>th</sup> May, 2022 at best is in continuation of the invocation of corporate guarantee notice dated 12<sup>th</sup> June, 2020 demanding the outstanding amount from Corporate Guarantor after adjusting the amount realised in September, 2020. Subsequent realization of part amount by sale of share and giving credit to said amount in outstanding amount which fell due on 16<sup>th</sup> June, 2020 cannot take out the Application under Section 7 out of prohibition under Section 10A. The submission of Mr. Ramji Srinivasan that Application is not barred by Section 10A cannot be accepted.

**15.** Learned Counsel for the Appellant has relied on Judgment of this Tribunal in “**Ramji Power Construction Ltd. Vs. M/s. Jharkhand Urja Sancharan Nigam Ltd.**” C.A.(AT) Ins. No. 596 of 2020 which was a case where this Tribunal has examined the contention regarding the limitation

for filing Section 9 Application. In the above case, there was an arbitral award dated 14.02.2008 which was a date mentioned as a date of default in Section 8 Notice. This Tribunal noticed that the arbitral award was challenged and ultimately dismissed on 06.10.2018. The award was implemented and there was fresh default arose. In paragraph 10 to 12, following was held:

*“10. The part payment made on 31.03.2016 further extends the ‘date of default’ keeping in view the facts and circumstances of the attendant case on hand. The challenge to the Arbitral Award was dismissed on 06.10.2018. The recovery made in 2016 was provisional, subject to the challenge against the Arbitral Award, which got dismissed on 06.10.2018 and the same was not challenged further. The Application was filed on 04.06.2019 which is within three years of this date.*

*11. The contention of the Learned Sr. Counsel appearing for the Respondents that the Arbitral Award was dated 14.02.2008 and this date was mentioned as a ‘date of default’ in both the Section 8 Notice as well as in part IV of the Application under Section 9 of the Code, and therefore only that date should be considered as the ‘date of default’, is unsustainable, keeping in view that the same Award was challenged and got dismissed on 06.10.2018; that the Award dated 14.02.2008 was also implemented with cheque dated 10.05.2008; a fresh default arose on 31.03.2016, caused by the reversal/deduction from other bills, the knowledge of accrual of the ‘Right to Issue’ was on 06.08.2016 (when the Appellant received information under RTI); Section 9 Application was filed on 04.06.2019 which is well within the Limitation of three years.*

*12. The Hon'ble Supreme Court in 'Dena Bank (now Bank of Baroda)' (Supra) has noted that once a recovery certificate is issued authorising the Creditor to realise its decretal dues, a fresh right accrues to the Creditor to recover amount of the final Judgement/Order/decreed. In the instant case, the challenge to the Arbitral Award was dismissed on 06.10.2018, and hence has attained finality, the part payment was made on 31.03.2016 and therefore we are of the considered view that the Application filed on 04.06.2019 is not barred by Limitation."*

**16.** The facts of the above case are based on entirely different circumstances and has no application on the issue arising in the present appeal.

**17.** Learned Counsel for the Appellant has next relied on Judgment of Hon'ble Supreme Court in "**M/s. Next Education India Pvt. Ltd. Vs. K12 Techno Services Private Limited**" C.A. No. 1175 of 2021. Hon'ble Supreme Court in the aforesaid case, Section 9 Application was dismissed on the ground that Application was barred by time. Hon'ble Supreme Court in the Appeal noticed that large number of invoices were issued between 12.03.2011 to 30.06.2017, NCLAT considering the starting point of limitation as 12.03.2011 dismissed Section 9 Application as barred by time. Hon'ble Supreme Court held that NCLAT ought to have considered the invoices at least for period preceding three years from the date of application under Section 9 rather than considering the starting point. Hon'ble Supreme Court set aside the Order and remanded the matter for consideration before NCLT. The Judgment of the Hon'ble Supreme Court was on the facts of the case where application was filed based on large number of invoices and

Hon'ble Supreme Court was of the view that Adjudicating Authority ought to have considered the invoices at least preceding three years from the date of filing of Section 9 Application. The Above judgment does not in any manner help the Appellant in the present case.

**18.** After having heard and perusing the record, we are satisfied that liability of corporate guarantor to make the outstanding payment arose only when Corporate Guarantee was invoked vide Notice dated 12<sup>th</sup> June, 2020 as per the notice invoking the corporate guarantee. 16<sup>th</sup> June, 2020 was date on which default was committed which is a date admittedly covered by Section 10A prohibition. The Adjudicating Authority did not commit any error in rejecting Section 7 Application as barred by Section 10A.

We thus do not find any merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Barun Mitra]**  
**Member (Technical)**

**New Delhi**  
**12<sup>th</sup> September, 2023**

*Basant B.*