

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.235/2023
(IA Nos.757 & 758/2023)

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 20.07.2023 in
CP(IB) No.132/BB/2022, passed by the ‘Adjudicating Authority’
(National Company Law Tribunal, Bengaluru Bench)

In the matter of:

Malavika Hedge,
Suspended Director of Coffee Day Global Limited **... Appellant**

V

Indusind Bank Ltd. & Anr. **...Respondents**

Present :

For Appellant : Mr. P.H. Arvinth Pandian, Sr. Advocate.
For Respondents : Ms. Chithra Nirmala, Advocate for R-1.

ORDER

1. On 28.07.2023, the following order was passed by this Court, which is as under:-

“This Appeal has arisen from the Order dated 20.07.2023, by which an Application filed by the Indusind Bank Ltd. (Financial Creditor) under Section 7 of the Insolvency and Bankruptcy Code, 2016, (for short ‘The Code’) for Resolution of the sum of Rs.94,01,79,117.26/- has been admitted only qua sum of Rs.50,78,54,032/- of the Loan Account No.603014030038 about which the ‘date of default’ has been mentioned by the Applicant Bank as 28.02.2020.

2. Counsel for the Appellant has argued that the ‘date of default’ in ‘Form- I’, ‘Part-IV’ is specifically mentioned as 30.04.2020 and even in the Rejoinder filed by the Bank it is mentioned that the ‘date of

default' has been backdated from 30.06.2022 to 30.04.2022 as 30.06.2022 is the date of NPA. It is thus submitted that the date of default has never been 28.02.2020 but it has been brought on record during the pendency of the Application before the NCLT and has been relied upon by the Tribunal. On the contrary, Counsel appearing on behalf of the bank, on Caveat, has submitted that the 'date of default' dated 28.02.2020 has been uploaded on 'Form-D' in terms of an Order of the NCLT dated 03.04.2023. It is submitted that 28.02.2020 is uploaded in the Information Utility i.e., NeSL after giving six opportunities to the Appellant to respond.

3. We have briefly heard Counsel for the Parties and are of the opinion that it would be fair to the both the Parties if they submit their Short Written Submissions of three pages each at this stage in order to decide as to whether the present Appeal deserves to be admitted or not. The arguments of Indusind Bank Ltd. is heard on the issue of admission of the Appeal and the 'Judgement is Reserved'."

2. The Suspended Director of M/s Coffee Day Global Limited (Corporate Debtor) has challenged the order dated 20.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') bearing CP (IB) No. 132/BB/2022 by Indusind Bank Ltd. (Financial Creditor) for the resolution of an amount of Rs. 94,01,79,117.26/-, calculated as on 30.04.2020 has been admitted, moratorium in terms of Section 14 of the Code is declared and Shailendra Ajmera is appointed as Interim Resolution Professional (in short 'IRP').

3. In brief, the case set up by the Financial Creditor is that the Corporate Debtor has availed various credit facilities vide sanction letter dated 24.04.2018.

The credit facilities are tabulated as under:-

Nature of limit	Limits sanctions (Amt. in crs.)
Overdraft	25.00
EPC/PSFC/PCFC/FBD/FBP	40.00
Bank Gurantee-1	0.50
Bank Guarantee -2 (sub-limit of EPC and BG Limit for takeover limit)	(40.50)
Total Fund Based + Non Fund Based Exposure	65.50
Forward Cover/Derivative Limit (Regular)	(25.00)
PFE	(2)
MTM	1.25
Forward Cover/Derivative Limit (Regular)	(90)
PFE	(7.2)
MTM	4.50
Total exposure	71.25

4. The aforesaid facilities were availed by the Corporate Debtor after executing Master General Terms Agreement and multi-facility Loan Agreement on 02.05.2018 and hypothecated all its current assets through deed of hypothecation executed in favour of the Financial Creditor (Bank).

5. The Financial Creditor stated that the Corporate Debtor requested for short term loan of Rs. 115 Crores on 20.02.2019 which was considered by the Financial Creditor and the existing facilities were renewed, short-term loan of Rs. 115 Crores was granted with the facilities amounting to Rs. 186.25 Crores and the

sanction was communicated on 26.02.2019 against a term loan agreement dated 27.02.2019.

6. It is further stated that in November, 2019, the Corporate Debtor asked for continuation of existing facilities by renewal and enhancing the existing limit from Rs. 180.50 Crores to 190.50 Crores which was granted by the Financial Creditor to limit of Rs. 130.59 Crores in view of which the Corporate Debtor executed a supplementary memorandum of entry on 02.12.2019 extending the mortgage of the property belonging to M/s Classic Coffee. The Corporate Debtor and the Guarantor also executed a letter of acknowledgement of debt confirming the outstanding payable by them as on 04.12.2019.

7. It is stated that on account of continuous default on the part of the Corporate Debtor, its account was declared as Non-performing Asset (NPA) on 30.06.2020 in terms of prudential guidelines of the Reserve Bank of India on income recognition and asset classification dated 01.07.2015. The Financial Creditor subsequently issued a demand cum loan recall notice on 07.12.2020 calling upon the Corporate Debtor and the Guarantor to make the payment within 15 days but no payment was made, therefore, the amount of Rs. 94,01,79,117.26/- was found due as on 06.04.2022 with interest @ 11.25% per annum with monthly rests from 07.04.2022 apart from penal interest of 2% till repayment of the entire amount.

8. The application under Section 7 of the Code was filed on 08.04.2022. The Financial Creditor, in its application filed under Section 7 of the Code has averred in Part IV of Form I that the amount in default calculated as on 06.04.2022 is Rs. 94,01,79,117.26 and the date of default is 30.04.2020 whereas date of NPA is 30.06.2020.

9. The Corporate Debtor contested the application, inter alia, on the ground that the application filed by the Financial Creditor is hit by Section 10A of the Code in terms of ordinance dated 05.06.2020. It is submitted that the date of default (30.04.2020) occurs during the period from 25.03.2020 to 25.03.2021, therefore, the petition could not ever have been filed.

10. The Adjudicating Authority, however, did not agree to the contention of the Corporate Debtor and proceeded to admit the application filed under Section 7 of the Code, after recording following reasons at Paras 17, 18, 19 & 20, which are reproduced as under:-

“17. The date of default as mentioned in the Form-1 is 30.04.2020. However, on perusal of the Form-D of NeSL report filed by the Financial Creditor vide Dy. No. 2740 dated 26.05.2023, the dates of default for the different tranches of loans are as under:

No.	Unique Debt Identifier NO.	Date of Default	Amount
1	AAACI1314G_822014038424	30.04.2020	1404784.00
2.	AAACI1314G_603014030038	28.02.2020	50,78,54,032.00
3.	AAACI1314G_516003441349	01.05.2020	6,53,87,702.00
4.	AAACI1314G_890000026854	30.04.2020	7,57,01,402.90

18. Therefore, as per the NeSL report Form-D produced by the Financial creditor, the one particular date of default for Sl. No.2 above is 28.02.2020 which is prior to the beginning of the period specified under Section 10A of IBC. The amount in default pertaining to this loan tranche is Rs.50,78,54,032.00/- (Rupees Fifty Crores, Seventy Eight Lakhs Fifty Four Thousand and Thirty Two only). Therefore, this Bench is of the view that, since the default in payment by the Corporate Debtor for this particular loan is well above the threshold limit of Rupees One Crore, the threshold requirement is met; and this particular loan is not hit by the provision of Section 10A of the Code.

19. The Respondent in its reply has contended only that the present petition is not maintainable under Section 10A of the IBC, since the default occurred during the period or suspension of the IBC petition. But it has nowhere disputed the default amount, nor contended in its submissions regarding the date of default mentioned in the Nesl report. Therefore, there is a 'Debt' and a 'Default'.

20. The date of default mentioned as per NeSL report for this loan amount of Rs.50,78,54,032.00/- (Rupees Fifty Crores, Seventy Eight Lakhs Fifty Four Thousand and Thirty Two only) is 28.02.2020; and the instant Company Petition has been filed on 18.04.2022, which is within the period of limitation”

11. Counsel for the Appellant has submitted that the Adjudicating Authority has committed a patent error in respect of the Loan Account No. 603014030038 of Rs. 50,78,54,032.00/- by changing the date of default from 30.04.2020 to 28.02.2020, for taking it out from the purview of Section 10A of the Code.

12. Counsel for the Appellant has submitted that in respect of Account No.603014030038 of Rs.50,78,54,032.00/-, the averment made by the Financial Creditor, in Part IV of Form I, is that the date of NPA of this account is 30.06.2020 and the date of default is 30.04.2020 and has also made an averment in Para 11 of its rejoinder that “and as of 30.04.2022, the amount in default with the Financial Creditor by the Corporate Debtor was more than 94.00 Crores.

Hence, for the purposes of compliance of provisioning norms of RBI, the date of default and date of NPA was backdated to 30.04.2020 and 30.06.2020”.

13. He has also referred to record of default dated 12.04.2022 of the National E-Governance Services Limited (in short ‘NeSL’) in which date of default in the default information is mentioned as 30.04.2020. He has further submitted that the Adjudicating Authority has committed an error in accepting the revised date of default submitted by the Financial Creditor which indicate the date of default as 28.02.2020. It is further submitted that the said report was generated on 25.05.2023 whereas the application under Section 7 of the Code was filed on 08.04.2022 in which the date of default is mentioned as 30.04.2020 which cannot be changed as per the convenience of the Financial Creditor and in this regard, reliance has been placed on a decision of the Hon’ble Supreme Court in the case of *Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd. (2021) 3 SCC 224* and has also referred to an interim order passed by this Tribunal in the case of *Uma Maheswari Vs. UCO Bank, CA (AT) (CH) (Ins) No. 136 of 2023* dated 17.05.2023 on the basis of the aforesaid judgment of the Hon’ble Supreme Court.

14. On the other hand, Counsel appearing on behalf of the Financial Creditor has submitted that when the application under Section 7 of the Code was originally filed on 08.04.2022, the Financial Creditor produced the record of default dated 12.04.2022 in part A and B which was then issued by the NeSL-IU

in which the record of default pertaining to all the loan accounts was shown as the date of default 30.04.2020.

15. It is further submitted that subsequently on 14.06.2022, Regulation 20(1A) was inserted in the IBBI (Information Utilities) Regulation, 2017 vide notification no. IBBI/2022-23/GN/REG085. The said Regulation 20(1A) is as under:-

“20. Acceptance and receipt of information.

[(1A) (Before filing an application to initiate CIRP under Section 7 or 9, as the case may be, the creditor shall file the information of default, with the information utility and the information utility shall process the information for the purpose of issuing record of default in accordance with regulation 21.)”

16. It is submitted that in pursuance of the aforesaid notification, the Joint Registrar, NCLT, New Delhi issued an order dated 03.04.2023 in file no. 25/02/2023-NCLT directing all the applicants under Section 7 and 9 to comply with the aforesaid Regulation and produce the record of information utility in Form D. The letter dated 03.04.2023 of the NCLT is reproduced as under:-

Order

It is brought to the attention of all stakeholders that Regulation 20(1A) has been inserted in the Insolvency and Bankruptcy Board of India (Information Utilities) Regulation, 2017 vide notification no. IBBI/2022-23/GN/REG085, dated 14th June, 2022. It reads as follows:-

20. Acceptance and receipt of information

[(1A) (Before filing an application to initiate CIRP under Section 7 or 9, as the case may be, the creditor shall file the information of default, with the information utility and the information utility shall process the information for the purpose of issuing record of default in accordance with regulation 21.)”

2. In view of the aforesaid, all the Petitioner(s) of Section 7 and 9 under the Insolvency and Bankruptcy Code, 2016 are requested to comply with the above Regulations and produce the record of information utility (NeSL certificate) at the earliest for effective hearing of their cases.

This issues with the approval of Hon'ble President, NCLT.”

17. It is submitted that the Financial Creditor procured fresh record of default on 26.05.2023 vide diary no. 2740 and as per the said record of default dated 25.05.2023, the date of default in respect of Account No.603014030038 is 28.02.2020. From D (record of default) issued by NeSL is also reproduced as under:-

“NeSL NATIONAL E-GOVERNANCE SERVICES LIMITED
India's First Information Utility

FORM D
RECORD OF DEFAULT(ROD)

(Issued By information utility under sub-regulation (4) of regulation 21 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017)

This Record of Default is issued to the Financial Creditor M/s INDUSIND BANK LTD in respect of the default of debt as per details given below-

- (a) Name of the Submitter: M/s INDUSIND BANK LTD
(b) Schedule-2 Bank (Y/N): Y
(c) Name of Corporate Debtor: M/S COFFEE DAY GLOBAL LIMITED
(d) Unique Debt Identifier Number: AAACI1314G_516003441349
(e) Registered Address: 425 DB MARG, LAMINGTON ROAD, MUMBAI
(f) Total Outstanding Amount: 65387702.00
(g) Default Amount: 65387702.00
(h) Date of Default: 01-05-2020
(i) Status of Authentication of Default: AUTHENTICATED

Filing of Default (Submission ID No.)	Submitted on 16-04-2023 11:58:26	Status of Authentication (Authenticated	Authentication completed on 03-05-2023 10:20:05
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(40)		/Disputed/Deemed to be authenticated) AUTHENTICALED Colour Code :GREEN	
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NeSL is authorized to issue this record of default and has accordingly affixed its digital signature, as per the provisions of the Insolvency and Bankruptcy Code, 2016 read with Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, Guidelines for Technical Standards for Performance of Core Services and Other Services and the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2017.

Registered Office : Gresham Assurance House, 4th Floor, Sir P.M. Road, Fort, Mumbai-400001.”

18. It is further submitted that the statement of account also reflects the last date of payment was on 27.02.2020 of sum of Rs. 50,00,000/-, therefore, the date of default is fixed as 28.02.2020 and the record of default then was generated on 12.04.2022 and filed the application on 08.04.2022.

19. It is further submitted that the NeSL-IU, on receipt of submission from the Financial Creditor, issued a mail to the Corporate Debtor on 17.04.2023. Mail was though delivered but the Corporate Debtor did not respond to it. Consequently, information utility ad sent three reminders on 21.04.2023, 24.04.2023 & 29.04.2023, though mail dated 21.04.2023 which was opened at 10:58:48 AM but not responded. All these details have been captured in ROD by the IU and the said details are given in a tabulated form which is reproduced as under:-

Email category	Mail Type	Requested on	To Address	Mail Status	Acknowledgement Date / Time
Form C-Alternate	Initial	17 April 2023 Monday 09:01:14 AM	SUNDAR@COFFEEDAY.COM	Mail Delivered to Addressee	17 April 2023 Monday 09:02:38 AM
Form C-Primary	Initial	17 April 2023 Monday 09:01:14 AM	sadananda@abccoffeeday.com	Mail Delivered to Addressee	17 April 2023 Monday 09:02:37 AM
Form C-Alternate	Remin der-1	21 April 2023 Friday 10:24:07 AM	SUNDAR@COFFEEDAY.COM	Mail Delivered to Addressee	21 April 2023 Friday 10:26:28 AM
Form C-Primary	Remin der-1	21 April 2023 Friday 10:24:07 AM	sadananda@abccoffeeday.com	Mail Delivered and Opened by Addressee	21 April 2023 Friday 10:58:48 AM
Form C-Alternate	Remin der-2	25 April 2023 Tuesday 03:44:07 AM	SUNDAR@COFFEEDAY.COM	Mail Delivered to Addressee	25 April 2023 Tuesday 04:37:47 AM

Form C-Primary	Remin der-2	25 April 2023 Tuesday 03:44:07 AM	sadananda@abccoffeeday.com	Mail Delivered to Addressee	25 April 2023 Tuesday 04:37:48 AM
Form C-Alternate	Remin der-3	29 April 2023 Saturday 02:46:31 AM	SUNDAR@COFFEEDAY.COM	Mail Delivered to Addressee	29 April 2023 Saturday 02:52:21 AM
Form C-Primary	Remin der-3	29 April 2023 Saturday 02:46:31 AM	sadananda@abccoffeeday.com	Mail Delivered to Addressee	29 April 2023 Saturday 02:52:22 AM

20. Counsel for the Financial Creditor has further submitted that the process of categorising the submitted information as authenticated, rejected and disputed by NeSL-IU is referred to as time norms for IU services, which is reproduced as under:-

Time Norms for IU Services

Nature of Service	Time Norm
1)User Registration 1. For Entities 2. For Individuals 3. Insolvency Professionals	For non-Individual categories, submission of Documents for User Registration on NeSL-IU Portal is on-line. Upon successful submission, the NeSL will scrutinize the details and approve the User Registration within 30 minutes, if the submission is made between 10.00 Hrs and

	<p>18.00 Hrs on NeSL Working Days. For submissions made outside the above working hours, approval by NeSL will happen on the next working day.</p> <p>The process of registration for Individuals is online upon receipt of link from NeSL inviting the individual to verify and authenticate the financial information filed in respect of them.</p>
2) Issuance of Annual Certificate to the Registered Users	NeSL-IU will issue an Annual Statement to every Registered User, as per Reg 25 of IBBI Regulations of all information pertaining to the User at the completion of one year within a period of 15 days
3) Issuance of Record of Default, in Default Reported Loans	<p>1.The norms for obtaining authentication of information of default and issuance of Record of Default by the Information Utility are governed by Regulation 21 of IBBI (IU) Regulations, 2017.</p> <p>2.On Reporting of the Default by a Creditor (both Financial & Operational) NeSL-IU expeditiously undertakes the process of authentication of information of default, by sending system generated e-mail intimation to the other parties to the Debt inviting them to verify and authenticate the information by affixing digital signature.</p> <p>3.On completion of the process of authentication, NeSL records the status of authentication of information of default in its database and issues Record of Default (RoD) in Form D.</p> <p>4.Therefore, the process of categorization of authentication status and readiness of Record of Default from NeSL-IU System is dependent upon the promptness of response of the Debtor in completing the authentication of information of default.</p> <p>5.Issuance of RoD, by NeSL under different scenarios is narrated here below:</p> <p>Scenario 1 - The e-mail id of Debtor furnished by Creditor in Form C is a valid e-mail id and Debtor promptly authenticates the information of Default, immediately on receiving the e-mail from NeSL: The RoD would be available in IU system instantly, within 1 day. This is the minimum time taken for issuance of RoD by NeSL-IU System.</p>

	<p>Scenario 2 - The e-mail id of Debtor furnished by Creditor in Form C is a valid e-mail id and Debtor is not responding to the first Authentication invitation e-mail received from NeSL:</p> <p>(a) In such cases, the Debtor is reminded by e-mails at least 3 times for confirmation of information of default, by allowing three days each time for Debtor to respond.</p> <p>(b) If the Debtor does not respond, in authenticating the information of default, in spite of all the 4 e-mails, after allowing 3 days time after the 3rd Reminder, the authentication status would be categorized as “Authenticated” for Financial Creditors which are Banks appearing in the Second Schedule of RBI Act and “Deemed to be Authenticated” for other Financial Creditors and Operational Creditors.</p> <p>(c) NeSL tracks the delivery of e-mails sent to the Debtor and records it in its database.</p> <p>(d) In such Cases, Record of Default would be ready in 16 days from the date of reporting default to NeSL-IU.</p> <p>Scenario 3 - The e-mail id of Debtor furnished by Creditor in Form C may not be a valid one (or) NeSL-IU is not able to reach the Debtor by e-mail for any reason, in delivering the information of default:</p> <p>(a) On noticing that e-mail attempt to reach the Debtor has failed, NeSL sends the Authentication Invitation Request Letter to the postal address of the Debtor by India Posts ”Registered Post Acknowledgement due”.</p> <p>(b) In case the Debtor does not respond, NeSL reminds the Debtor 3 times by way of reminders letter/s sent by India Posts, by allowing 3 days each time for the Debtor to respond.</p> <p>(c) If the Debtor does not respond, in authenticating the information of default, in spite of all the 4 letters sent as above, after allowing 3 day’s time, after the 3rd Reminder, the authentication status would be categorized as “Authenticated” for Financial Creditors which are Banks appearing in the Second Schedule of RBI Act and “Deemed to be Authenticated” for other Financial Creditors and Operational Creditors.</p>
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	<p>(d)NeSL tracks the delivery of the RPAD letter sent to the Debtor and records it in its database.</p> <p>(e) In such Cases, Record of Default would be ready in 18-19 days from the date of reporting default to NeSL-IU.</p> <p>Scenario 4: In cases, where the attempts of NeSL-IU to reach the Debtor, by e-mails or RPAD letter for authentication of information of default, fail, the authentication status in such cases remains as “ To be presented” category; and RoD would not be available.</p> <p>6.General:</p> <p>The process of issuance of RoD from IU System is automated and once the process of authentication categorization is completed, the Registered User of the Creditor using his login credentials can download the RoD from IU system on his own, without the intervention of officials of NeSL.</p> <p>The procedure for downloading the RoD in a default reported loan is published in our Website: https://nesl.co.in/ > IU Service > Financial Creditors (or Operational Creditors) > Reports > Record of Default.</p>
4) Issuance of Other Certificates	<p>NeSL-IU will issue a Certificate confirming that no record of dispute raised in relation to an operational debt has been filed by any person at IU (in applicable cases), within a period of 1 working day of receiving such a request from an Operational Creditor.</p>

21. It is further submitted that the date of default has now been authenticated, the Corporate Debtor need not dispute the date of default though it had opportunity to do so as it had opened the mail also, therefore, it cannot dispute the date of default of the Account No. 603014030038.

22. In the end, it is argued that the data submitted by the Financial Creditor for generation of Form D corroborates with the statement of accounts because last payment was made on 27.02.2020 and thus, the date of default is 28.02.2020, the information was shared with the Corporate Debtor by the NeSL-IU which was not disputed by them, therefore, the date of default is 28.02.2020 which has rightly been taken into account by the Adjudicating Authority while admitting the application filed under Section 7 of the Code.

23. Counsel for the Financial Creditor has argued that the judgment in the case of Ramesh Kymal (Supra) is altogether on different facts and the interim order passed by this Tribunal cannot be treated as a precedent.

24. We have heard Counsel for the parties.

25. From the resume of the facts and the respective contentions, the issue arises for our consideration is as to whether the date of default once mentioned in Part-IV by the Financial Creditor can be changed in view of a decision of the Hon'ble Supreme Court in the case of Ramesh Kymal (Supra) and as to whether the Financial Creditor (Bank) who has already furnished ROD can change the date of default by a subsequent ROD on the basis of circular dated 03.04.2023 issued by the NCLT.

26. Since, we have found that there are arguable points involved in this appeal, therefore, we issue a formal notice to the Respondents who is already on caveat, enabling it to file its reply.

27. Let the reply be filed within two weeks i.e. up to 25th August, 2023 and rejoinder, if any, be filed by the Appellant within two weeks thereafter i.e up to 14th September, 2023. List for hearing on **20th September, 2023**.

In the meanwhile, till the next date of hearing, operation of the impugned order shall remain stayed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mrs. Shreehsa Merla]
Member (Technical)

New Delhi
11th August, 2023

Sheetal