

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

Company Appeal(AT)(Insolvency) No. 147 of 2021

IN THE MATTER OF:

MR. ASEEM SRIVASTAV

S/o Sh. Krishamohan S Srivastav,
R/o 203, Lotus Flower Valley Apartment,
Wanawadi Pune City,
Pune, Maharashtra

...Appellant

Versus

1.ICICI BANK LIMITED

A Company Incorporated under
The Companies Act, 1956
And having its registered office
At ICICI Bank Tower, Near Chaki Circle,
Old Pandra Road, Vadodara, Gujarat.

...Respondent No. 1

2. MC NALLY SAYAJI ENGINEERING LIMITED

Through Mr. Jitendra Lohia
Interim Resolution Professional of
The Mc Nally Sayaji Engineering Limited
A Company incorporated under the
Companies Act, 1956
And having its registered office at
Campus 2B, Ecospace Business Park,
11f/12, Rajarhat, Newtown, Kolkata – 7002256

... Respondent No. 2

Present:

For Appellant : **Mr. Ramji Srinivasan, Sr. Adv. Ms. Eshna Kumar,
Mr. Aditya Maheshwari, Ms. Santosh Kumari and
Mr. Prithvi Jamwal, Advocates.**

For Respondents : **Mr. Arun Kathpalia, Sr. Advocate with Mr. Anand
Shankar Jha, Mr. Girish Bhardwaj, Mr. Shubham
Tripathi Advocates for Respondent No. 1**

**Mr. CA Jitendra Lohia, Ms. Manju Bhuteria
Advocates for Respondent No. 2- RP**

With

Company Appeal(AT)(Insolvency) No. 378 of 2021

IN THE MATTER OF:

KOTAK MAHINDRA BANK LTD.

Having its office at:

1st floor, Jewel Pavani Tower,
6-3-1109/1, Raj Bhawan Road,
Somajiguda, Hyderabad 500082

...Appellant

Versus

1.ICICI BANK LIMITED

A Company Incorporated under
The Companies Act, 1956
And having its registered office
At ICICI Bank Tower, Near Chaki Circle,
Old Pandra Road, Vadodara, Gujarat.

...Respondent No. 1

2. MC NALLY SAYAJI ENGINEERING LIMITED

Through Mr. Jitendra Lohia
Interim Resolution Professional of
The Mc Nally Sayaji Engineering Limited
A Company incorporated under the
Companies Act, 1956
And having its registered office at
Campus 2B, Ecospace Business Park,
11f/12, Rajarhat, Newtown, Kolkata – 7002256

... Respondent No. 2

Present:

For Appellant : **Mr. Suresh Dutt Dobhai, Mr. Shikhar Kumar and
Mr. Nirmal Goenka, Advocates.**

For Respondents : **Mr. Arun Kathpalia, Mr. Anand Shankar Jha and
Mr. Arpit Gupta, Advocates for Respondent No. 1**

**Mr. CA Jitendra Lohia, Ms. Manju Bhuteria
Advocates for Respondent No. 2- RP**

J U D G M E N T

Jarat Kumar Jain: J.

These Appeals are preferred against the order dated 11.02.2021 passed by Ld. Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) in CP(IB) No. 131/KB/2020. Whereby, admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) filed by ICICI Bank Limited Financial Creditor (Respondent No. 1) and initiated Corporate Insolvency Resolution Process (CIRP) against Mc Nally Sayaji Engineering Limited Corporate Debtor (Respondent No. 2).

2. The Appellant “Mr. Aseem Srivastav” Suspended Director of the Corporate Debtor Company has filed CA (AT) (Ins) No. 147 of 2021, whereas one of the Financial Creditor “Kotak Mahendra Bank Limited” has filed CA (AT) (Ins) No. 378 of 2021 against the impugned order dated 11.02.2021. In this Appeal for the sake of convenience the ICICI Bank Limited (Respondent No. 1) and Mc Nally Sayaji Engineering Limited (Respondent No. 2) are referred as Financial Creditor and the Corporate Debtor respectively.

3. Brief and relevant facts of these Appeals are that ICICI Bank Limited (Financial Creditor) had granted and disbursed Rupee Term Loan facility and Working Capital facility to the Corporate Debtor as under:-

- (i) Rupee Term Loan facility of Rs. 25 Crores “Rupee Term Loan facility I”; and date of disbursement dated June 18, 2015.
- (ii) Rupee Term Loan facility of Rs. 25 Crores “Rupee Term Loan facility II”; and date of disbursement dated June 27, 2015.
- (iii) Working Capital facility, which was renewed from time to time. It is stated that the total amount in default in facility I as on 31st December, 2019 is Rs. 14,50,49,15.39 and the date of default is January, 31st, 2019.

(iv) The amount of default under facility II as on December, 31st 2019 is 14,50,75,502/- and the date of default is January 31, 2019.

(v) The amount of default under the Working Capital Facility as on December 31, 2019 is Rs. 45,84,41,659.02 and the date of default is January 28, 2019.

4. The Corporate Debtor had executed various documents by way of securities in favour of the Financial Creditor against the aforesaid facilities granted to the Corporate Debtor. The Corporate Debtor has committed the default. Therefore, the Financial Creditor (ICICI Bank Limited) has filed an Application under Section 7 of the IBC for initiation of CIRP against the Corporate Debtor. A summarised computation of amount of default on the part of the Corporate Debtor and days of default are as under:-

Sl. No.	Facility	Total Overdue at December 31, 2019 (Rs.)			Date of Default	No. Of days of default till December, 31, 2019.
		Principal	Interest	Total		
1	Rupee Term Loan I	125,000,000.00	2,00,49,157.39	14,50,49,157.39	January, 31, 2019	334
2	Rupee Term Loan 2	125,000,000.00	2,00,75,502.00	14,50,75,502.00	January 31, 2019	334
3	Case Credit	23,23,64,561.78	3,79,09,345.00	27,02,73,906.78	January, 28, 2019	337
4	Letter of Credit	14,65,75,511.22	2,69,02,250.26	17,34,77,761.48		
5	Bank Guarantee	1,16,84,511.76	30,05,479.00	1,46,89,990.76		
	Total	64,06,24,584.7	10,79,41,733.65	7485,66,318.41		

5. Ld. Adjudicating Authority after considering the material on record admitted the Application filed by the Financial Creditor "ICICI Bank Limited" and initiated CIRP against the Corporate Debtor. The moratorium is declared and Mr. Jitendra Lohia was appointed as IRP.

6. Being aggrieved with the order the Ex-Director of the Corporate Debtor “Mr. Aseem Srivastav” filed the present Appeal, mainly on the ground that the Financial Debt is not payable in fact and in law, the debt is time barred and there are misjoinder of cause of action as dates of default are different. Another Appeal is filed by the “Kotak Mahindra Bank Limited” on the ground that 5 Banks i.e. Kotak Mahindra, ICICI, DBS, IDBI and State Bank of India had advanced loan to the Corporate Debtor. Ld. Adjudicating Authority failed to appreciate that more than 50% Members of lenders of consortium had opposed the initiation of CIRP, as they were considering the restructuring of loan outside the scheme of the IBC. According to them the restructuring of loan is more beneficial to the creditors as they were not taking the haircut. In the eventuality of a resolution plan being implemented or liquidation process being initiated, the Financial Creditors including the Appellant “Kotak Mahindra Bank Limited” will have to take a haircut.

7. Both the Appeals are resisted by the ICICI Bank Limited (Respondent No. 1) on variety of grounds.

Submissions in CA (AT) (Ins) No. 147 of 2021.

8. Ld. Sr. Counsel for the Appellant representing Mr. Aseem Srivastav submitted that Section 7 Application was filed for alleged debts for different agreements and different dates of default (28th & 31st January, 2019) cannot be clubbed together as the cause of action is being separate. For this purpose, he cited the Judgment of this Appellate Tribunal in the case of “International Road Dynamics South Asia Pvt. Ltd. Vs. Reliance

Infrastructure Limited” CA (AT) (Ins) No. 72 of 2017. In which it is held that two different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate. Therefore, the Section 7 Application is not maintainable and is liable to be dismissed. Ld. Adjudicating Authority has not dealt with the ground of misjoinder of cause of actions raised by the Appellant.

9. It is further submitted that the date of default specified in Section 7 Application is incorrect. The Financial Creditor in Para 9 of its Reply to the Appeal has stated that the Corporate Debtor had failed to abide by the repayment schedule of two Term Loans and hence the account of the Corporate Debtor was classified as Non-Performing Asset (NPA) on 31.03.2019, whereas in Para 53 (b) of the same Reply the Financial Creditor has admitted that there are separate dates of default for each facility. The Financial Creditor had issued a recall notice dated 03.01.2020 to the Corporate Debtor recalling the entire amount in respect of the facilities. In the notice the Financial Creditor has admittedly mentioned 31.03.2019 as date of default. The Financial Creditor itself categorise the account of Corporate Debtor as NPA on 15.12.2016. Hence, date of default in such a case has to be 15.12.2016. The Application under Section 7 of the IBC is defective/incomplete and hence, the Application is liable to be sent back to the Adjudicating Authority for removal of discrepancy. This Appellate Tribunal in the case of Bank of India Vs. Coastal Oil Gas Infrastructure Pvt. Ltd. CA (AT) (Ins) No. 1448 of 2019 held that if there is any discrepancy

found in the Application relating to date of default being wrongly pleaded by the Financial Creditor, the Adjudicating Authority may ask the Financial Creditor to rectify the same.

10. Ld. Sr. Counsel for the Appellant further submitted that the alleged debt was not due and payable in fact as the repayment dates under the agreements whereof a date later than the alleged debt of default i.e. 31.01.2019. The Application under Section 7 of the IBC included an amount which is not due and payable in fact. For this purpose, he drew our attention towards the repayment schedule Annexure A-18 (At Pg. 301). It is submitted that the amount not due would be due and payable/ in default on or after 25.03.2020 for such amount, an Application for initiation of CIRP can never be filed as provided in Section 10A of the IBC. In support cited Judgment of the Hon'ble Supreme Court in the case of Ramesh Kymal Vs. M/s Siemens Gamesa Renewable Power Pvt. Ltd. Civil Appeal No. 4050 of 2020 decided on 09.02.2021. Thus, there can be no default under the IBC and the alleged debt includes an amount not due and payable in fact. Therefore, the Application under Section 7 of the IBC is not maintainable.

11. Ld. Sr. Counsel for the Appellant further submitted that date of default for Working Capital facility was 17.12.2015 which was more than three years prior to the date of filing of the Section 7 Application i.e. 08.01.2020. Thus, the Application under Section 7 of the IBC is time barred. For this proposition of law, he placed reliance on the Judgment of Hon'ble Supreme Court in the case of Babulal Vardharaji Gurjar Vs. Veer Gurjar

Aluminium Industries Pvt. Ltd. Civil Appeal No. 6347 of 2019 and B. K Educational Services Pvt. Ltd. Vs. Parag Gupta (2019) 11 SCC 633.

12. It is submitted that the letter dated 26.10.2018 will show that there is only an acknowledgement of debt which at best can be considered as a liability of the Corporate Debtor to pay. The Financial Creditor has also admitted that such acknowledgement was only in respect of debt and not in respect of default. An acknowledgement of debt cannot be understood as an acknowledgement of default for the purpose of IBC. He placed reliance on the decision of Hon'ble Supreme court in Swiss Ribbons Pvt. Ltd. Vs. Union of India (2019) 4 SCC 17 (Para 64). Therefore, in the absence of specific acknowledgement of default, the period of limitation for an Application under Section 7 of the IBC shall not get extended. Therefore, the impugned order dated 11.02.2021 is liable to be set aside.

13. Per contra, Ld. Sr. Counsel for the Financial Creditor (Respondent No. 1) submitted that the Corporate Debtor had filed two replies in Section 7 application, first on 07.12.2020 and second on 15.12.2020. None of the grounds raised in the Appeal were agitated before the Adjudicating Authority. The account of the Corporate Debtor was classified as NPA on 31.03.2019 (Pg. 391 Vol. II) and loan recall notice was issued on 03.01.2020 (Pg. 390 to 392 Vol. II) on 26.10.2018 a letter of acknowledgement of debt in respect of Working Capital was issued by the Corporate Debtor (Pg. 439 to 440 Vol. II) and Section 7 Application was filed on 09.01.2020. Thus, the Application is filed within three years from the date of acknowledgement.

The Corporate Debtor also admitted its liability in the balance sheet for the year ending 31.03.2019.

14. Ld. Sr. Counsel for the Respondent No. 1 (Financial Creditor) further submitted that Ld. Adjudicating Authority in the impugned order has rightly summarised the position of outstanding principal and interest and also dates of default. Thus, there is no substance in the argument of Ld. Counsel for the Appellant that the claim is barred by limitation.

15. Ld. Sr. Counsel for the Financial Creditor (Respondent No. 1) submitted that Section 10A of the IBC is not applicable to any default committed prior to 25.03.2020. In respect of Working Capital facility default took place on 28.01.2019 whereas in respect of Rupee Term Loan default took place on 31.01.2019 the account of Corporate Debtor was classified as NPA on 31.03.2019. The Loan recall cum demand notice was issued on 03.01.2020. No reply was issued to the demand notice by the Corporate Debtor. The Application for initiation of CIRP under Section 7 was filed on 09.01.2020. Thus, the Section 10A of the IBC has no application to the present matter. Ld. Adjudicating Authority has satisfied itself regarding existing of debt, default and completeness of the Application and no denial was made in this regard in the replies filed by the Corporate Debtor on 07.12.2020 and 15.12.2020. It is submitted that the Judgment of International Road Dynamics (Supra) was passed in relation to an Application under Section 9 of the IBC filed by the Operational Creditor having clubbed claims under separate and different contracts. Whereas the present the Application was filed under Section 7 of the IBC, the provisions

of Section 7 of the IBC are so wide that a joint Application on behalf of the Financial Creditors can be filed under Section 7 of the IBC. Thus, the Application does not suffer from misjoinder of cause of actions. It is notable that no such objection has been raised by the Corporate Debtor before the Adjudicating Authority. Thus, the Appeal is liable to be dismissed.

Submission in CA (AT) (Ins) No. 378 of 2021.

16. Ld. Counsel for the Appellant representing “Kotak Mahindra Bank Limited” submitted that the impugned order has resulted into causing great harm and prejudice, not only to the Appellant but also to other members of Lender’s Consortium who are trying their level best to recover the maximum amount of their outstanding dues from the Corporate Debtor. The outstanding dues of Corporate Debtor amounting to Rs. 237,20,00,000/-. Whereas on 30.09.2019 the Liquidation value of the assets of the Corporate Debtor came to be only Rs. 72,11,51,000/- Therefore, under no circumstances lenders can recover the outstanding dues without taking a huge haircuts, either under any resolution plan, or in the eventuality of liquidation. In this background all lenders except ICICI Bank of unanimous opinion that the restructuring of the debt must be done outside the scheme of IBC.

17. Ld. Counsel for the Appellant also submitted that the ICICI has unilaterally filed the Application under Section 7 of the IBC, during the pendency of deliberations in the Joint Lenders Meeting on restructuring of account of Corporate Debtor. Even after 11 months of filing of Application

under Section 7, the ICICI while agreeing that restructuring outside the purview of IBC, is a much better option and on 23.11.2020 proposed the name of M/s Abhiksha Enterprises as an investor for restructuring. However, the investor i.e. Vishwa Group for the purpose of restructuring made a better proposal before the Joint Lenders Meeting, who even deposited amount of Rs. 2 Crores in no lien account with the lead consortium member i.e. SBI. The ICICI has taken an isolated action against the interest of all other lenders and refused to even consider better plans for other investors and decided to pursue the Application under Section 7 IBC. As per the restructuring proposal, all the lenders, apart from getting certain upfront amounts, would also receive remaining outstanding dues amounting to Rs. 237,20,00,000/- by way of restructuring. However, Ld. Adjudicating Authority ignored the aforesaid facts and circumstances mechanically passed the impugned order. Ld. Counsel for the Appellant submitted that in view of the facts and circumstances, the Appeal may be allowed and set aside the impugned order.

18. Per contra, Ld. Sr. Counsel for the Respondent No. 1 (ICICI) submitted that the Appellant has no locus standi to file the present Appeal. The Appellant is one of the Financial Creditors to the Corporate Debtor. The Appellant was aware about the pendency of Section 7 Application from the very inception, however, no impleadment/intervention Application was filed before the Adjudicating Authority. The Appellant does not fall within the phrase any aggrieved person under Section 61(1) of the IBC. Thus, at the instance of Kotak Mahindra Bank the present Appeal is not

maintainable. The Appeal is filed at the behest of the Corporate Debtor, raising frivolous ground that a resolution plan for the Corporate Debtor was under consideration. The Appellant has not raised any challenge to the existence of debt, default and completeness of the Application filed by the ICICI (Financial Creditor). The CIRP is not adversarial to the interest of the Corporate Debtor or its creditors. On the other hand, IBC is a beneficial legislation for equal treatment to the creditors and to revive the Corporate Debtor. For this proposition placed reliance on the Judgment of Hon'ble Supreme Court in the case of Dena Bank (Now Bank of Baroda) Vs. C. ShivaKumar Reddy and Anr. Civil Appeal No. 1650 of 2020 decided on 04.08.2021 Para 85 to 87. The decision taken by the ICICI (Financial Creditor) is evident from the minutes of the meeting dated 07.01.2021 (Annexure A- 18 Pg. 353 - 354 Vol. II) email dated 08.01.2021 (Annexure A- 19 Pg. 355 Vol. II) and minutes of meeting dated 11.01.2021 (Annexure A-20 Pg. 356 Vol. II). It has unequivocally been stated in the aforesaid minutes of meeting and email that the purported resolution plan for the Corporate Debtor is not acceptable to ICICI (Pg. 357 - 358 of the Appeal Vol. II). ICICI had rejected the resolution plan by an investor namely Vishwa Group. The decision was duly communicated to all the lenders (including the Appellant Bank) vide email dated 08.01.2021. In view of the aforesaid facts, it is prayed that the Appeal is liable to be dismissed.

19. After hearing Ld. Counsels for the parties, we have gone through the record.

20. The following issues arose for our consideration:-

In CA (AT) (Ins) No. 147 of 2021

- (i) Whether there is misjoinder of cause of actions?
- (ii) Whether the debt is not payable in fact?
- (iii) Whether the debt is barred by limitation?
- (iv) Whether, the Application under Section 7 of the IBC is not maintainable as a bar has been created by the provisions of Section 10A.

In CA (AT) (Ins) No. 378 of 2021

- (v) Whether filing of an Application under Section 7 of the IBC despite opposition by all other creditors and during pendency of the restructuring proposal is unsustainable in law?
- (vi) Whether impugned order is against the very spirit of IBC as the Adjudicating Authority fails to consider that restructuring outside the purview of the IBC would be beneficial to the Financial Creditors?
- (vii) Whether Kotak Mahindra Bank can maintain the Appeal under Section 61(1) of the IBC?

Issue No. (i).

Whether there is misjoinder of cause of actions?

21. Ld. Counsel for the Appellant has raised a plea in regard to misjoinder of cause of actions. The Financial Creditor(ICICI) has sanctioned three loans i.e. Working Capital facility under the agreement dated 21.12.2009, Rupee

Term Loan facility I under the agreement dated 15.06.2015 and Rupee Term Loan facility II, under the agreement dated 26.06.2015. For these loans the dates of default are 28.01.2019, 31.01.2019 and 31.01.2019. For these defaults the Financial Creditor (ICICI) sent a loan recall/demand notice dated 03.01.2020 to the Corporate Debtor in which it is mentioned that the account of the Appellant was classified as NPA on 31.03.2019. According to the Ld. Counsel for the Appellant the claims arising out of different agreements having different dates of default, there being a separate cause of actions, cannot be clubbed together. For this purpose, they have placed reliance on the Judgment of this Appellate Tribunal in the case of International Road Dynamics South Asia Pvt. Ltd. (Supra).

22. We have gone through the cited Judgment in this case the claim arising out of different agreements or work order, having different amount and different dates of default, therefore, it was held that different dates of default cannot be clubbed together in one Application under Section 9 of the IBC and such application is defective and is not maintainable.

23. In the present case, we are dealing the Application under Section 7 of the IBC. There is a difference between the claim under Section 7 & under Section 9 of the IBC. Whether different dates of default can be clubbed together in an Application under Section 7 of the IBC. For this, we would like to refer the Section 7 of the IBC, which is as under:-

7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

.....

.....

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

24. Section 7 provides that a Financial Creditor either by itself or jointly with other Financial Creditors or any other person on behalf of the Financial Creditor may file an Application for initiating CIRP against the Corporate Debtor before the Adjudicating Authority when a default has occurred. The explanation appended to section 7(1) of the IBC provides that for the purpose of this sub-Section, a default includes a default in respect of Financial Debt owed not only to the Applicant Financial Creditor but to any other Financial Creditor of the Corporate Debtor.

25. With the aforesaid, it is apparent that more than one Financial Creditor can file joint Application and the dates of default may be different. There is no such provision in Section 9 of the IBC. Therefore, the ratio of the Judgment in the case of International Road Dynamics South Asia (Supra) is not applicable to the facts of present case.

26. Now, we have considered whether in the present Application under Section 7 of the IBC different cause of actions have been clubbed. Hon'ble Supreme Court in the Case of Gaurav Hargovind Bhai Dave Vs. Asset Reconstruction Company (India) Limited & Anr. (2019) 10 SCC 572 held that the date on which the bank declared the account of Corporate Debtor NPA is the date of default. In the present case, the account of the Corporate Debtor was classified as NPA on 31.03.2019. We can say that the cause of

action accrued on 31.03.2019, the date of NPA. In such circumstances, we are unable to convince with the argument of Ld. Sr. Counsel for the Appellant that there is misjoinder of cause of action in the Application under Section 7 of the IBC.

Issue No. (ii)

Whether the debt is not payable in fact?

27. According to the Ld. Counsel for the Appellant the repayment schedule of term loan I and term loan II specified dates as and when instalments become due and payable under the agreement. It is evident from the repayment schedule two such instalments could have been due and payable on 17.06.2020 and 17.12.2020 respectively. In the Application the date of default is 31.01.2019 whereas the aforesaid two instalments were not due and payable.

28. Section 3(12) of the IBC defines “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor as the case may be”. With the aforesaid definition, it is clear that the two instalments i.e. dated 17.06.2020 and 17.12.2020 were not due and payable even though the earlier instalments were become due and payable and the Corporate Debtor had committed default. Therefore, it cannot be said that the Corporate Debtor has not committed any default in respect of the aforesaid loans and the debt is not payable in fact.

Issue No. (iii)

Whether the debt is barred by limitation?

29. According to Ld. Sr. Counsel for the Appellant the date of default for a part of alleged debt amount outstanding towards the Working Capital facility was 17.12.2015, whereas, Application under Section 7 filed on 09.01.2020. Thus, the Application is filed after three years. Therefore, debt is barred by limitation.

30. In reply to the Appeal, the Financial Creditor has clarified that the Appellant has placed reliance on its letter dated 17.12.2015 (Annexure – 15) to contend that date of default is 17.12.2015. Actually this letter is a balance confirmation which is issued by the Corporate Debtor to the Financial Creditor, similar letters acknowledging debt were issued from time to time, lastly on October, 26, 2018 to the Financial Creditor (Annexure R2 filed with reply to the Appeal).

31. We have gone through the aforesaid letter dated 26.10.2018. In this letter, the Corporate Debtor has specifically acknowledged the debt. The Application under Section 7 of the IBC is filed on 09.01.2020. The Application is filed within three years from the date of acknowledgement. Thus, we find no force in the argument of Ld. Sr. Counsel for the Appellant that the debt is barred by limitation.

Issue No. (iv)

Whether, the Application under Section 7 of the IBC is not maintainable as a bar has been created by the provisions of Section 10A.

32. According to the Appellant, the Section 7 Application is barred in view of Section 10 A inserted in the IBC, vide Insolvency and Bankruptcy Code (2nd Amendment) Act, 2020. Section 10 A provides that no Application under Section 7 9 & 10 for initiation of CIRP of a Corporate Debtor shall be filed for any default arising on or after 25.03.2020 for a period of 6 months or such further period not exceeding one year from such date. In the present case, the Corporate Debtor has committed default for Rupee Term Loan I, Rupee Term Loan II and cash credit on 31.01.2019, 31.01.2019 and 28.01.2019 respectively and the account of the Corporate Debtor was classified as NPA on 31.03.2019 i.e. prior to insertion of Section 10A. Therefore, provision of Section 10A is not attracted to the present Application under Section 7 of the IBC.

Issue No. (v)

Whether filing of an Application under Section 7 of the IBC despite opposition by all other creditors and during pendency of restructuring proposal is unsustainable in law?

33. According to the Appellant Kotak Mahindra Bank one of the Financial Creditor of the Corporate Debtor submitted that five banks including Financial Creditor (ICICI Bank) and Kotak Mahindra Bank advanced the loan to the Corporate Debtor and in the joint lenders meeting, there was a deliberations on the restructuring proposal, such proposal is more beneficial to the all the lenders, however, Financial Creditor (ICICI Bank) has taken a isolated action against the interest of all other lenders and decided to pursue

the Application under Section 7 of the IBC. Such Application is unsustainable in law.

34. The Financial Creditor (ICICI Bank) submitted that they had rejected the restructuring proposal and vide email dated 08.01.2021 the decision was communicated to all the lenders.

35. Ld. Counsel for the Appellant unable to convince us that during the pendency of restructuring proposal outside the purview of IBC, the Application under Section 7 of IBC is unsustainable in law. On the other hand, The Appellant has candidly admitted in Para 10 of Written Submission that none of the judgments passed by the Hon'ble Judicial Forums have dealt with a situation like the present one, wherein the financial interest of other Financial Creditors have been damaged due to the isolated and unilateral action of one the Financial Creditor.

Issue No. (vi)

Whether impugned order is against the very spirit of IBC as the Adjudicating Authority fails to consider that restructuring outside the purview of IBC would be beneficial to the Financial Creditors.

36. It is submitted by the Appellant that all the members of lenders consortium were deliberating upon the restructuring proposal in the joint lenders meeting. The lenders (except ICICI) also opined that a deferment Application for proceedings of Section 7, be filed before the Adjudicating Authority, however, the same could not be filed. It is stated that restructuring proposal outside the purview of the IBC is under

consideration, this fact was brought to knowledge of the Adjudicating Authority by the corporate Debtor as evident from Paras 10, 12 & 13 of the impugned order. However, Ld. Adjudicating Authority chose to ignore the above facts and circumstances and in mechanical manner passed the impugned order.

37. With the aforesaid, it is clear that the consortium of the lenders have not filed any Application for deferment of the proceedings before the Adjudicating Authority. The Adjudicating Authority in Para 10, 12 & 13 of the impugned order, while discussing the defence of Corporate Debtor mentioned that according to the Corporate Debtor a resolution plan dated 14.08.2020 which was discussed by the lenders amongst themselves in September, 2020 would be sent to the Corporate Debtor for further consideration and clarification and Financial Creditor has been actively involved in negotiating with the Corporate Debtor alongwith all lenders.

38. Ld. Adjudicating Authority in Para 16 of the Impugned order held that the Corporate Debtor has raised all vague grounds which cannot stand the test of reasonableness or any justification.

39. There is no duty cast on the Adjudicating Authority that no sooner Adjudicating Authority gets information that outside the purview of IBC any restructuring proposal is under consideration before the consortium of lenders then he should defer the proceedings for initiation of CIRP. On the other hand, Section 7(4) of the IBC provides that the Adjudicating Authority shall within 14 days of receipt of the Application ascertain the existence of

default from the records of an information utility or on the basis of other evidence furnished by the Financial Creditor passed an order under Section 7(5). Section 7 (5) provides that where the Adjudicating Authority is satisfied that a default has occurred and the Application is complete and there is no disciplinary proceedings pending against the proposed Resolution Professional, it may by order admit such application. In the present case, the Corporate Debtor committed default and the Application is complete and there is no disciplinary proceedings pending against the Resolution Professional. Therefore, the Adjudicating Authority has no option except to admit the Application under Section 7 and to initiate the CIRP.

40. We find that the Adjudicating Authority was not obliged to consider that restructuring outside the purview of IBC would be beneficial to the Financial Creditors.

Issue No. (vii)

Whether Kotak Mahindra Bank can maintain the Appeal under Section 61(1) of the IBC?

41. Ld. Counsel for the Respondent No. 1 representing Financial Creditor raised an objection that under Section 61(1) of the IBC any person aggrieved by the order of the Adjudicating Authority may prefer an Appeal. It means such Appeal can be filed only on valid grounds. The Appellant Kotak Mahindra Bank has no valid ground to challenge the impugned order and failed to point out any legal or factual flaw in the impugned order. The Appellant has no locus standi to file this Appeal. Thus, the Appellant is not

come within the purview of “aggrieved person”. Hence, the Appellant Kotak Mahindra Bank cannot maintain the Appeal. It is also pointed out that the Appellant was well aware of the proceedings under Section 7 before the Adjudicating Authority, however, the Appellant chose not to participate in the proceedings. Therefore, the Appeal at the instance of Kotak Mahindra Bank is not maintainable.

42. We are convinced with the argument of Ld. Sr. Counsel for the Respondent No. 1 and hold that the Appellant has no locus standi to file this Appeal.

43. With the aforesaid discussion, we are of the view that no interference is called for in the impugned order. Thus, the Appeals are dismissed. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
29th November, 2021.
SC