

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1419 of 2023

IN THE MATTER OF:

**Sandip Narendrakumar Patel (Promotor/Ex- ...Appellant
Director) Yours Ethnic Foods Pvt. Ltd.**

Versus

Svakarma Finance Pvt. Ltd. & Anr.

...Respondent

Present:

For Appellants : Mr. Atul Sharma, Kuldeep, Shivanshu Kumar,
Adv.

For Respondent : Mr. Himanshu Chaubey, Saumitra Chaturvedi,
Adv.

Mr. Anoop Prakash Awasthi, Parthvi Ahuja,
Prapti Singh, Adv. R2

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

The Appellant is the Promotor/Director of Yours Ethnic Foods Pvt. Ltd. (Corporate Debtor) who has assailed the validity of the order dated 09.10.2023, passed by the National Company Law Tribunal, Ahmedabad (in short 'Tribunal'), admitting CP (IB) No. 322/NCLT/AHM/2022, filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code').

2. The brief facts of this case are that Svakarma Finance Pvt. Ltd. (Financial Creditor), vide its letter dated 18.07.2019, sanctioned working capital term loan to the CD, pursuant to which a loan agreement (in short 'Agreement') was executed on 25.07.2019 between the Financial Creditor and the Corporate Debtor. The loan was granted for a period of three years starting from 20.08.2019 to 20.07.2022 which was repayable at the rate of 14% p.a. The amount was disbursed by the Financial Creditor to the Corporate Debtor by way of two instalments, namely, Rs. 83,70,200 was given to the CD and Rs. 25,00,000 to a supplier of the CD. The aforesaid amount was given on the basis of the terms and conditions of the loan agreement.

3. As per the Financial Creditor, the repayment was to be made in terms of clause 5 of the agreement. Clause 5.1.1 of the agreement is relevant which read as under:-

“5.1.1. The amounts repayable on the facility together with all interest and commission thereon and all actual legal and other costs, increased cost as mentioned in clause 3.7, charges payments re-imburements and expenses relating thereto and payable hereunder and incidental to the facility as on the due date (herein collectively referred to as 'said date') may, if not demanded earlier by the Lender as mentioned in terms of his Term Loan Agreement, be repaid by the Borrower on such dates as more particularly described in the attached Schedule 1 (the due dates). If the due date is not a

business day, the borrower shall be liable to make the payment or discharge of such other obligations on the previous business day”

4. Clause 18 of schedule 1 defines the due dates i.e. as per repayment schedule with schedule 2. Schedule 2 is also relevant which is reproduced as under:-



Installment Number	Due Date	Principal Amount	Interest	Penalty	Total
1	20-08-2019	3,75,954.00	2,66,255.00	1,09,699.00	1,07,33,745.00
2	20-09-2019	3,75,954.00	2,48,325.00	1,27,629.00	1,04,85,420.00
3	20-10-2019	3,75,954.00	2,55,300.00	1,20,654.00	1,02,30,120.00
4	20-11-2019	3,75,954.00	2,54,314.00	1,21,640.00	99,75,806.00
5	20-12-2019	3,75,954.00	2,61,164.00	1,14,790.00	97,14,642.00
6	20-01-2020	3,75,954.00	2,60,445.00	1,15,511.00	94,54,191.00
7	20-02-2020	3,75,954.00	2,63,540.00	1,12,414.00	91,90,659.00
8	20-03-2020	3,75,954.00	2,73,724.00	1,02,230.00	89,16,935.00
9	20-04-2020	3,75,954.00	2,69,928.00	1,06,026.00	86,47,007.00
10	20-05-2020	3,75,954.00	2,76,454.00	99,500.00	83,70,553.00
11	20-06-2020	3,75,954.00	2,76,425.00	99,529.00	80,94,128.00
12	20-07-2020	3,75,954.00	2,82,816.00	93,138.00	78,11,312.00
13	20-08-2020	3,75,954.00	2,83,074.00	92,880.00	75,28,238.00
14	20-09-2020	3,75,954.00	2,86,440.00	89,514.00	72,41,798.00
15	20-10-2020	3,75,954.00	2,92,624.00	83,330.00	69,49,174.00
16	20-11-2020	3,75,954.00	2,93,325.00	82,629.00	66,55,849.00
17	20-12-2020	3,75,954.00	2,99,366.00	76,588.00	63,56,483.00
18	20-01-2021	3,75,954.00	3,00,373.00	75,581.00	60,56,110.00
19	20-02-2021	3,75,954.00	3,03,944.00	72,010.00	57,52,166.00
20	20-03-2021	3,75,954.00	3,14,177.00	61,777.00	54,37,989.00
21	20-04-2021	3,75,954.00	3,11,294.00	64,660.00	51,26,695.00
22	20-05-2021	3,75,954.00	3,16,962.00	58,992.00	48,09,733.00
23	20-06-2021	3,75,954.00	3,18,764.00	57,190.00	44,90,969.00
24	20-07-2021	3,75,954.00	3,24,277.00	51,677.00	41,66,692.00
25	20-08-2021	3,75,954.00	3,26,410.00	49,544.00	38,40,282.00
26	20-09-2021	3,75,954.00	3,30,291.00	45,663.00	35,09,991.00
27	20-10-2021	3,75,954.00	3,35,565.00	40,389.00	31,74,426.00
28	20-11-2021	3,75,954.00	3,38,209.00	37,745.00	28,36,217.00
29	20-12-2021	3,75,954.00	3,43,318.00	32,636.00	24,92,899.00
30	20-01-2022	3,75,954.00	3,46,312.00	29,642.00	21,46,587.00
31	20-02-2022	3,75,954.00	3,50,430.00	25,524.00	17,96,157.00
32	20-03-2022	3,75,954.00	3,56,664.00	19,290.00	14,39,493.00
33	20-04-2022	3,75,954.00	3,58,838.00	17,116.00	10,80,655.00
34	20-05-2022	3,75,954.00	3,63,519.00	12,435.00	7,17,136.00
35	20-06-2022	3,75,954.00	3,67,427.00	8,527.00	3,49,709.00
36	20-07-2022	3,53,733.00	3,49,709.00	4,024.00	0

5. According to the aforesaid repayment schedule, the due date for repayment of each monthly instalment was 20th of each month, failing which interest at the rate of 14% was applicable.

6. It is alleged by the Appellant that the amount of Rs. 3,75,954/- paid by the CD on 18.02.2020 was towards the monthly instalment for the month of January that too without additional interest which was to be paid by the CD at the rate of 3% per month, therefore, the CD was in default right from the month of January, 2020 and had also failed to pay the instalment which fell due on 20.02.2020 which is evident from the email dated 12.03.2020 sent by the Financial Creditor to the Corporate Debtor.

7. It is also the case of the Financial Creditor that the full payment of instalment of the month of January, 2020 and no payment of the instalment of February, 2020 was made as is evident from the letter dated 07.02.2020 and email dated 12.03.2020 addressed by the Financial Creditor to the Corporate Debtor.

8. It is also the case of the Financial Creditor that it has been provided in clause 10.1(ii) of the agreement pertaining to events of default that “if the borrower fails to pay either partly or fully any payment of principal or interest on the said dues or any obligation of the borrower to the lender under this facility or any other facility

for a continuous period of five days after the same is due and payable”

9. The Financial Creditor issued a loan recall notice dated 06.11.2020 in terms of clause 10.3 of the loan agreement owing to the continuous default towards repayment of loan. Clause 10.3 of the loan agreement is as under:-

“On the occurrence of any of the event(s) of default, the Lender’s commitment to advance any undrawn balance of the facility shall cease and all the amounts due under the facility will become repayable forthwith on demand in writing being made by the lender at any time.”

10. On the basis of these facts, the Financial Creditor filed the application under Section 7 of the Code alleging therein that the default has been committed on 20.02.2020.

11. Despite various opportunities alleged to have been granted, the Corporate Debtor did not file the reply to the application filed under Section 7, therefore, right to file reply was closed on 28.04.2023 by the Tribunal.

12. The Tribunal found debt and default in this case and ultimately admitted the petition, appointed the IRP and imposed Section 14 of the Code.

13. In this appeal, filed under Section 61 of the Code, the precise grievance of the Appellant is that the Financial Creditor has given

various dates of default i.e. in column II of Part IV the date of default has been mentioned as 20.02.2020 and in the same column it is mentioned that the default has been committed since January, 2020. It is also the case of the Appellant that the recall notice was issued on 06.11.2020, granting a period of 15 days, which expired on 21.11.2020 which means that the default had occurred only on 21.11.2020 when the period granted by the FC for repayment of loan amount was not adhered to. It is the case of the Appellant that the date 21.11.2020 falls within the period of 25.03.2020 to 25.03.2021, therefore, the application filed under Section 7 is hit by Section 10A of the Code. In this regard, he has relied upon a decision of this Court, rendered in the case of Plus Corporate Ventures Pvt. Ltd. Vs. Transational Growth Fund Ltd., CA (AT) (Ins) No. 1270 of 2022, in which the application under Section 9 of the Code having been filed on the basis of default committed from 16.09.2020 to 28.02.2021, falling within the period of Section 10A, which provides that “no application under Section 7, 9 or 10 would be filed for initiation of CIRP of the CD for any default arising on or after 25.03.2020 for a period of six months or such further period, not exceeding one year from such date as may be notified in this behalf.”

14. On the other hand, Counsel for the Financial Creditor has submitted that the application filed under Section 7 is not hit by Section 10 A because Section 10A provides that if the default occurs between the period from 25.03.2020 to 25.03.2021 only then initiation of CIRP is not permissible whereas in the present case it is alleged that the default occurred on 20.01.2020 because the Corporate Debtor was to pay monthly instalment and if it was not paid on the due date then the CD was liable to pay penal interest. It is alleged by the Financial Creditor that the CD deposited the instalment in Feb, 2020 without penal interest whereas it has been provided in the agreement itself that loan can be recalled if the instalment or even a part of it is not paid. The default was committed by the CD in Jan, 2020 itself and it did not pay anything in respect of instalment of Feb, 2020 which was due, therefore, the default, if any, occurred either in Jan, 2020 or Feb, 2020 but the Financial Creditor chose the date of default as 20.02.2020 which is prior to 25.03.2020.

15. It is also submitted that the date of default defined in Section 3(12) of the Code provides that “non-payment of debt which has become due and payable whether in whole or any part and is not paid by the CD”. It is submitted that the loan recall notice is not hit by Section 10A because it only recalls the loan which became

due in the month of Feb, 2020 and Section 10 A does not debar the action for a default committed prior to the 10A period. It is submitted that had it been a case of the default having occurred during the cut off period of 10A then the matter would have been altogether different but it is a case where the default had occurred prior to applicability of Section 10A, therefore, the recall notice having been issued during the period of 10 A will not affect the petition filed under Section 7 of the Code to bring it within the purview of Section 10A. As regards the decision, in the case of Plus Corporate Ventures Pvt. Ltd. (Supra), relied upon by the Appellant is concerned, it is submitted that the said order is pertaining to an application filed under Section 9 and the FC had exercised its right in terms of the loan agreement which occurs prior to Section 10A period making the Appellant liable to pay the complete loan amount. It is also submitted that on the one hand, the CD or the Appellant herein is denying its liability and on the other hand the amount of 75 lacs has been paid against the financial debt for which the proceeding under Section 7 was initiated, therefore, the Appellant cannot be allowed to blow hot and cold in the same breath.

26 We have heard Counsel for the parties and perused the record with their able assistance.

27. The only issue involved in this appeal is as to whether the recall notice dated 06.11.2020 by which a period of 15 days was given to the CD to pay off the defaulted amount has to be considered to be the date of default as 21.11.2020 to hold that the application filed under Section 7 is hit by Section 10A of the Code?

28. As we have already mentioned that the loan was advanced by the FC to the CD in two tranches, based on the agreement to which both the parties were bound, Clause 5.1.1 of the agreement deals with the dues to be repaid by the CD in which schedule 1 of the agreement states that due date shall be as per the repayment schedule and schedule 2 and repayment schedule in schedule 2 reproduced hereinabove, clearly shows the due date of the amount of instalment etc. There is no dispute that the amount of instalment was to be paid on monthly basis. The CD did not pay the monthly instalment from Jan, 2020 which was due to be paid on 20th Jan, 2020 rather it was paid in month of Feb, 2020 but without the penal interest, therefore, the entire amount due was not paid. It is also not in dispute that the monthly instalment of Feb, 2020 which fell due on 20.02.2020 was not paid at all, therefore, the CD had committed the default in not paying the instalment alongwith penal interest in Jan, 2020 and no instalment at all of the month of Feb, 2020 and thereafter did not

pay the instalments which means that the default had occurred either in the month of Jan, 2020 or at the most in the month of Feb, 2020, therefore, the FC has taken the date of default as 20.02.2020 in column 2 Part IV of Form 1 of the Application filed under Section 7 of the Code. The CD cannot be permitted to take advantage of the fact that the FC had issued a notice of recall dated 06.11.2020, giving 15 days time, to the CD to pay the same and to calculate the date of default as 21.11.2020 which falls within the cut off period of Section 10A because issuance of recall notice, in pursuance of the clause 10.3 of the agreement, was on the occurrence of any of the events of default, which had already occurred in the month of January or at the most February. It does not mean that the default has occurred with the issuance of recall notice as the notice was a consequence of the occurrence of default and it was a procedural step for recalling of the entire loan amount. In such circumstances, the argument raised by the Appellant has no legs to stand because the default had occurred in the month of Jan, 2020 partly when the amount of penal interest was not paid and fully when the entire amount was not paid in Feb, 2020. Section 10 A postulates that the CIRP cannot be initiated either under Section 7, 9 or 10 if the default occurs during the cut of period i.e. 25.03.2020 to 25.03.2021. In the present case, Section

10A would not apply because the date of default occurred much prior to 25.03.2020.

29. In so far as the Judgment relied upon by the CD is concerned, the same is not applicable to the facts of this case because in that case the date of default was from 16.09.2020 to 28.02.2021 which was very well within the cut off period of Section 10A and is thus distinguishable on its facts.

30. No other point has been raised by the Appellant.

31. In view of the aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
05th November, 2024

Sheetal