

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA**

CP(IB)/33/KOB/2021

*(Under Section 7 of Insolvency and Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules 2016)*

Order delivered on:2022

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Anil Kumar. B, Member (Technical)

M/s Phoenix ARC Private Ltd,
Trustee of Phoenix Trust FY17-8,
5th Floor, Dani Corporate Park,
158, CST Road, Kalina, Santacruz,
Mumbai- 400 098.
(Assignee of The South Indian Bank)
Versus

... Financial Creditor

Kerala Chamber of Commerce and Industries,
Chamber Corner, Shanmugham Road,
Ernakulam- 682 031.

... Corporate Debtor

Appearance (through video conferencing)

For Financial Creditor
For Corporate Debtor

...Shri.A.V. Thomas,Advocate.
...Smt. Marian G. M. Tharakan,Advocate.

Per: Ashok Kumar Borah, Member (Judicial)

This CP(IB)/33/KOB/2021 has been filed by M/s Phoenix ARC Private Ltd, Trustee of Phoenix Trust FY17-8, 5th Floor, Dani Corporate Park, 158, CST Road, Kalina, Santacruz, Mumbai- 400 098.('Financial Creditor')against M/s Kerala Chamber of Commerce and Industries, Chamber Corner, Shanmugham Road, Ernakulam- 682 031.('Corporate Debtor')invoking the provisions of Section 7(4) of the Insolvency and Bankruptcy Code (hereinafter called as '**Code**'). On 05.11.2021 the Financial Creditor filed an

CP(IB)33/KOB/2021

Interlocutory Application No. IA(IBC)/165/2021 for amending Part IV of CP(IB)/33/KB/2021 and on 11.11.2021 this Tribunal allowed the Amendment Application. Thereafter on 16.11.2021 the Financial Creditor carried out the amendment in Part IV of the application and filed amended application stating that there is a total amount of Rs. 8,60,00,000/- (Rupees Eight Crores Sixty Lakhs Only) due from the Corporate Debtor to the Financial Creditor.

The brief facts of the case are as under: -

2. The Kerala Chamber of Commerce and Industries availed various credit facilities from South Indian Bank, Market Road Branch, Ernakulam for their business purposes. On 15.09.2010, South Indian Bank sanctioned a loan of Rs. 110 Lakhs for the purchase of Passenger Elevators and Generators on the basis of the application dated 17.04.2010. In addition to the hypothecation of the items purchased, equitable Mortgage of 43.95 cents of land with building thereon in Survey No.843, Ernakulam Village, Kannayannur Taluk in the name of M/s Cherupushpam Films Pvt. Ltd was done. The Guarantee of Cherupushpam Films Pvt. Ltd was also offered. The borrower/ guarantor had executed necessary documents with the Bank.
3. It is stated that again on 30.12.2010, another loan was sanctioned for an amount of 500 Lakhs for the construction of a Residential-cum-Commercial Building with Equitable Mortgage of same property mentioned above. Further on 01.01.2013, another loan of 250 Lakhs was sanctioned to the Corporate Debtor to purchase and install AC Units in the building M/s. Kerala Trade Centre.

4. It is stated that the Corporate Debtor had vide acknowledgement of Debt dated 01.01.2013 executed in favour of Assignor Bank i.e., South Indian Bank (now Applicant herein), confirmed and acknowledged the indebtedness of its liability. In reply to the Section 13(2) Notice dated 16.12.2013, the Corporate Debtor did not dispute the liability, thereby admitted the indebtedness in favour of the Assignor Bank i.e., South Indian Bank. Subsequently, the Corporate Debtor vide Balance Sheet as on 31-03-2015 acknowledged by Directors on 14.01.2016, Balance Sheet as on 31.03.2017 duly acknowledged by Directors on 19.10.2017 and Balance Sheet as on 31.03.2018 duly acknowledged by Directors on 21.06.2019 had acknowledged the indebtedness of its liability in favour of the Applicant.
5. Hence, the present application has been filed by the Financial Creditor to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under Section 7(4) of Insolvency and Bankruptcy Code, 2016.

Submission by the Corporate Debtor

6. The Corporate Debtor filed a counter stating the Applicant who has filed this application under Section 7 of the IBC is not a financial creditor of the Corporate Debtor, but is an assignee of the debt in question. There is a bar of limitation, since the right to sue accrues when a default occurs. However, if the default occurs over 3 years prior to the date of filing of the application, it would be barred under Article 137 of the Limitation Act as has been upheld in ***B.K. Educational Services Pvt Ltd. Vs. Parag Gupta & Associates (2019) 11 SCC 633.***
7. It is stated that the Corporate Debtor has applied for the loan in respect of a joint venture agreement to construct a multi-storied building under the name

and style Kerala Trade Centre ("KTC") involving itself and Cherupushpam Films Pvt. Ltd. ("Cherupushpam"). M/s. Cherupushpam Films offered the landed property as collateral security on which said KTC is to be constructed. The joint venture partner has reneged on its promises as per the joint venture agreement and has brought the KTC project to a standstill after the construction works and installations are complete, save for the obtaining of the Local Body Approvals from the Corporation of Cochin such as Completion Certificate etc to secure door numbers, electricity connection, water connection and other utilities. Thus, the default and non-repayment of the loan occurred purely due to the scheming of the Corporate Guarantor. Several litigations are pending in the courts on these issues. Thus, the Corporate Guarantor is liable for the defaults of the Corporate Debtor. As such both the lender and the assignee ought to have proceeded against the collateral security guarantor of the KTC building which is worth more than Rs.100 Crores at a conservative estimate. Instead, they are moving ahead for liquidation of the corporate borrower and its debts when already cases have been filed against it in other fora.

8. It is further stated that the liquidation of the corporate debtor which is a Section 8 company with negligible assets would fail to meet the defaulted loan dues under any circumstances. The object of Section 31 of the Code is not to allow guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt. As such even if there was a moratorium in force, it would only apply to the debt and not to the debtor and Cherupushpam is a debtor within the meaning ascribed in the Code.

9. It is stated that as per the terms of the joint venture agreement and as per various documents confirming deposit of title deeds to properties comprised of 17.79 Ares equivalent to 43.95 Cents together with commercial-cum-residential buildings constructed therein i.e., KTC having approximately 15138.22 Sq.m with all the rights therein situated in Sy.No.843/17 of Ernakulam Village of Kananyannur Taluk, Ernakulam District belonging to the Corporate Guarantor viz. Cherupushpam would be their contribution. The Corporate Debtor done the role of builder and has assisted the joint venture partner in the construction of a multi-storeyed building KTC on property belonging to Cherupushpam. The Corporate Debtor therefore used their good offices in the matter to apply for building permit and organise the construction works and in return is entitled to a profit-sharing ratio of 60: 40 - i.e., 60% Cherupushpam and 40% to the Corporate Debtor. It is further stated that the entire construction works were overseen by a KTC construction committee consisting of persons from both the Joint Venture companies. The M.D. of the Cherupushpam and the representatives of the Corporate Debtor made up the KTC Building Committee. No other persons other than the KTC Committee had knowledge the dealings of the day-to-day operations or its progress.
10. It is stated that the interest rates and penal interest rates charged by the Financial Creditor is excessive and in any case the inability to repay rests squarely on the Corporate Guarantor alone due to non-co-operation raising baseless and untenable and unsubstantiated allegations against the Corporate Debtor. It is also stated that the entire loan is sanctioned to construct the KTC building on land belonging to the Corporate Guarantor. The entire land and building are in the custody of the Corporate Guarantor alone. The Corporate

Guarantor is solely responsible for the loss that is caused to the Applicant. The Corporate Debtor is a Section 8 charitable company and has no share capital, resources or funds. The reserves of the company built up over more than 50 years of existence was provided as a loan to start a TV Channel which turned out to be a non-starter and hence recovery proceedings are being initiated to recover loan granted to the TV Channel and is the subject matter of pending proceedings before this Tribunal in T.C.P.22/2019.

11. It is stated that a guarantee is treated as a financial debt under Section 5(8)(i) of the Code, 2016. It states that the amount of any liability with respect to the indemnity or guarantee for any of the items that is referred in sub-clauses 'a' to 'h' of this clause. The Corporate Debtor stated that the only entity that has benefitted from the entire loan transaction related to the construction of the KTC multi-storeyed building put up on the landed properties belonging to the Corporate Guarantor himself and release the Corporate Debtor from the burden of debt.

The Learned Counsel for the Corporate Debtor has also argued that the lender has advanced the loan for a purpose or object not warranted by the object clause enshrined in the Memorandum of Association and sought to apply the Doctrine of ultra vires in order to escape from the liability to repay the loan.

FINDINGS

12. We have heard the learned counsel for both the parties and perused the documents appended with the case records. On perusal of the documents and hearing the arguments advanced by both the sides, the following issues are framed:-

- i. Whether the application is maintainable?*

- ii. *Whether there is a Creditor-Debtor relationship between the Financial Creditor and Corporate Debtor herein and whether this Tribunal can initiate CIRP against the Corporate Debtor?*

13. **Point No (i):** We have gone through Part IV of the application and the documents annexed thereto; wherein it is clearly stated that the loan accounts of the Corporate Debtor in Phoenix Arc Private Limited Trustee of Phoenix Trust FY17-8 became NPA on 30.09.2013 and the date of default is also same. It is also seen from the records that the Corporate Debtor acknowledged the debt in its Audited Financial Statements duly signed by the Directors until 2019. In this respect we had gone through the decision of the Hon'ble National Company Law Appellate Tribunal in **Jagdish Prasad Sarada Vs. Allahabad Bank** (Company Appeal (AT) (Insolvency) No. 183 of 2020) wherein the Hon'ble NCLAT has held that: -

"10. The Hon'ble Supreme Court has already observed in Civil Appeal No. 439, 436, 3137, 4979, 5819 & 7289 of 2018 in B.K.Educational Services Pvt. Ltd Vs. Parag Gupta and Associates dated 11.10.2019 that the limitation period for application under section 7 of the Code is 3 years as provided by Article 137 of the Limitation Act, 1963 which commences from the date of default and is extendable only by application of section 5 of Limitation Act, 1963 if any case for condonation of delay is made out. The view taken by the Hon'ble Apex Court in 'B.K.Educational Services Private Limited Vs. Parag Gupta and Associates' (Company Appeal (AT) (Insolvency) No. 183 of 2020) that the limitation period for application under Section 7 of the I&B Code is three years as provided by Article 137 of the Limitation Act, which commences from the date of default and is extendable only by

application of Section 5 of the Limitation Act, 1963 if any case for condonation of delay is carved out, has again been reiterated in the latest pronouncement of Hon'ble Apex Court in 'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. (Civil Appeal No.6347 of 2019) decided on 14th August, 2020. It is therefore manifestly clear that date of default will be the date of declaration of account as NPA and such date of default would not shift."

14. In this respect, we have considered the contention regarding the limitation of this application. In order to obtain clarity on this issue, we have gone through Section 238A of IBC, 2016 wherein "limitation" has been defined which is as under: -

Section 238A: Limitation.

238A. *The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, as the case may be.*

15. To get further clarity on this issue, we have gone through the Section 18 of the Limitation Act, 1963 which reads as under:

Section 18 of The Limitation Act, 1963

18. *Effect of acknowledgment in writing. —*

(1) *Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person*

through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received. Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

16. Article 137 of the Limitation Act, 1963 reads thus: -

Article 137 is a residual provision, and provides for a limitation period for any application for which no period of limitation is provided in any of the Articles in the Schedule to the Limitation Act. It provides for a **period of limitation of 3 years from the date** when the right to apply.

17. We have gone through the Judgment of the Hon’ble National Company Law Appellate Tribunal in **G.S. Buildtech Pvt. Ltd. Vs. Ardee Infrastructure Venture Pvt. Ltd.** (Company Appeal (AT) (Insolvency) No. 388 of 2021) wherein the Hon’ble NCLAT held that: -

“5. The Balance Sheet for the Financial Year 2016-17 having been signed on 01.09.2017 and the above Application having been filed on 20.03.2020, it is well within three years’ period from acknowledgment of debt as claimed by the Appellant. It is now well settled that acknowledgment in the Balance Sheet is sufficient acknowledgment under Section 18 of the Limitation Act, 1963.”

18. In the recent judgement of the Hon’ble Supreme Court in **Dena Bank vs. C. Shivakumar Reddy and Ors.** (Civil Appeal No. 1650 of 2020), the Hon’ble

Supreme Court reiterated that Section 18 of the Limitation Act, 1963 is fully applicable to proceedings under 'I&B Code' and entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. The Hon'ble Supreme Court in paragraph 118, held as under: -

"118. It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In Asset Reconstruction Company (India) Limited v. Bishal Jaiswall and Anr. (supra) authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff ,¹⁸ ["Bengal Silk Mills"] and in Re Pandem Tea Co.¹⁹ Ltd., the judgment of the Delhi High Court in South Asia Industries (P) Ltd. v. General Krishna Shamsheer Jung Bahadur Rana²⁰ and the judgment of Karnataka High Court in Hegde Golay Ltd. v. State Bank of India ²¹ and held that an acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt."

19. As far as the issue before us, on perusal of the records, we found that the Financial Creditor has filed this application on 01.09.2021, which is within 3 years of the date of last acknowledgment by the Directors in Annexure 37 financial statement signed on 21.06.2019. Hence the contention taken by the Corporate Debtor regarding limitation has no force. The application has been filed within the prescribed period of limitation. The technical objection regarding

limitation has been raised only for the sake of objecting and hence stands rejected. The application is maintainable before this Tribunal.

20. **Point No. (ii)** From the records produced, we could find that there is a Creditor-Debtor relationship between the Financial Creditor and the Corporate Debtor, since the Corporate Debtor admitted that they received money from the assignee bank South Indian Bank of the Financial Creditor through various documents produced before this Tribunal and the Corporate Debtor has no case that they have fully repaid the money received from the South Indian Bank.

21. As there is a default in the payment of the financial debt, which has been confirmed by them in the counter affidavit that the assignee bank South Indian Bank of the Financial Creditor paid the money to the Corporate Debtor. We are of the view that the present application filed by the Financial Creditor satisfies all the definitions of “Financial Creditor”, “Default” and “Financial Debt” and qualifies for filing an application under the Insolvency and Bankruptcy Code. By pointing out various technical snags, the Corporate Debtor cannot wash its hands in repaying the amount borrowed, which is a financial debt owed by them. Hence, there is a Creditor-Debtor relationship with them.

22. The Corporate Debtor committed default in repayment of the loan amount to the Financial Creditor, and hence its Loan Account was declared as NPA. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Financial Creditor as a major constituent for admission of an application under Section 7(4) of the I&B Code.

23. On 02.02.2022 when the matter taken up for hearing the learned counsel for the Corporate Debtor stressed upon *the Doctrine of Ultra Vires* stating that the Corporate Debtor Company is a Section 8 Company and has not acted upon

with the powers for purchase of passenger elevators and Generators, install A/C Units and also for the construction of Residential Cum Commercial Building in respect of which finance was availed. Subsequently, this Tribunal directed the learned counsel for the Corporate Debtor to submit the Memorandum of Association of the Corporate Debtor. The Corporate Debtor submitted the same before this Tribunal on 07.02.2022. We have gone through the Memorandum of Association of the Corporate Debtor in which in paragraph 3, the object for which the chamber is established has been mentioned. To arrive at a definitive conclusion as regard to this issue, we have gone through clauses j, k, l, n of the Memorandum of Association of Corporate Debtor and also reproduced hereunder: -

“j) To sell, improve, manage, develop, exchange, lease or let on lease or sub-let, mortgage, dispose or turn to account or otherwise deal with all or any part of the property of the Chamber:

k) To construct upon any premises acquired for the purpose of the Chamber any building or buildings and to alter, to add, or remove any building upon such premises:

l) To invest moneys of the Chamber, in such securities as may from time to time be thought fit, to open and operate banking accounts and to execute, transfer, endorse and negotiable instruments or other instruments or securities in such manner and to such extent as may be necessary for the purpose of this Chamber:

n) To borrow or raise any moneys for the purpose of the Chamber by the issue of bonds, debentures or other securities or in such other manner as the Chamber may think fit and for the purpose, to create any mortgage or charge on all or any part of the property and assets of the Chamber;"

On perusal of the Memorandum of Association, we are of the firm view that the Memorandum of Association of a company is the basic charter of the company. It is a binding document which describes the scope of the company among other things. If a company departs from its Memorandum of Association such an act is ultra vires. From the plain reading of the Memorandum of Association of the Corporate Debtor Company, we are of the conclusion that the clauses of the Memorandum of Association contain ____ provision to borrow money for the purpose of construction of building which in the present case is Kerala Trade Centre prescribe the process to be followed under Section 8 Company for availing loan from the Financial Institutions. We therefore, are not inclined to accept with the argument submitted by the learned counsel for the Corporate Debtor in this regard. In the light of the above discussions, we are of the considered view that the act done by the Corporate Debtor is *Intra Vires*.

24. On a reading of the objects of the Memorandum of Association we cannot accept the contention of the learned counsel for the Corporate Debtor that the company being a Section 8 charitable company and has no share capital, resources or funds. The Respondent Corporate Debtor has not refuted the contention of Applicant that the Corporate Debtor owes money to the Applicant. The documents produced on record prove the disbursement of various loan

facilities by the Financial Creditor to the Corporate Debtor. The only contention is that the Corporate Guarantor is responsible for return of the money. Hence, we are of the considered view that the application filed in the capacity as a 'Financial Creditor' for a 'financial debt' which is recoverable from the Corporate Debtor viz., **M/s Kerala Chamber of Commerce & Industry** is a fit case for admission and initiation of CIRP against the Corporate Debtor.

25. The Application under Sub-Section (4) of Section 7 of I&B Code, 2016 is complete in all respects. Accordingly, the application for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor deserves to be admitted. Hence, the Application No. **CP(IB)/33/KOB/2021 is admitted** and the following order has been passed: -

ORDER

- i. Having admitted the Application, the provisions of **moratorium** as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order shall be applicable by prohibiting institution of any suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc.
- ii. The Financial Creditor has suggested the name of **Shri.K. Parameswaran Nair**, an Insolvency Professional for appointment as Interim Resolution Professional (IRP).Accordingly, this Tribunal appoints **Shri. K. Parameswaran Nair** having Registration No **.IBBI/IPA-001/IP-P01773/2019-2020/12702**, residing at**37/1736E, Kripasagaram, K Murali Road, Kadavanthara, Ernakulam, Kerala- 682020, email id: -cakpnair@gmail.com** whose name appears in the panel of IPs for appointment as Interim Resolution Professional for the period 01.01.2022 to 30.06.2022 for Kochi Bench, as the Interim Resolution

Professional to carry out the functions as mentioned under IBC.

- iii. The fee payable to IRP or as the case may be to RP shall comply with such regulation/circular and direction as may be issued by the IBBI and the IRP shall carry out his duties as contemplated by Section 15, 17, 18, 19, 20 and 21 of the IBC.
- iv. The Financial Creditor shall deposit an amount of Rs. 2,00,000/- (Rs. Two Lakhs Only) with the IRP to meet the initial expenses towards issue of public notice and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (CoC) and that this amount cannot be treated as the fee paid to the IRP.
- v. The supply of essential services to the “Corporate Debtor” shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code, by the Adjudicating Authority.
- vi. That as prescribed under Section 13 of the Code on declaration of moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on receipt of this order, as per the provisions of the Code.
- vii. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the C.I.R.P. and the compliance of the directions of this Order within 30 days to this Bench. Liberty is granted to intimate even at an early date, if need be.
- viii. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order of Admission.
- ix. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP in terms of Section 17 of the IBC. The Directors/Officers and Managers of the Corporate Debtor shall

provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default coercive steps will follow.

- x. The Registry is directed to communicate this order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and e-mail within three days from the date of this Order.
- xi. A copy of this Order be also sent to the Registrar of Companies, Kerala, for updating the Master Data of the Corporate Debtor, who shall send a compliance report in this regard to the Registry of this Tribunal within seven days.

Dated this the _____ day of February, 2022



(Anil Kumar. B)
Member (Technical)

RRN

(Ashok Kumar Borah)
Member (Judicial)