

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

IBA/55/KOB/19

(Under Section 7 of Insolvency and Bankruptcy Code, 2016)

Order delivered on 27.02.2020

**Coram: Hon'ble Shri Ashok Kumar Borah, Member (Judicial)
Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)**

In the matter of

Kerala State Industrial Development
Corporation Limited, Registered
Office at TC/11/266, Keston Road,
Kowdiar, Trivandrum,
Kerala-695 003.

.. Financial Creditor/Applicant

Vs.

M/s Sanchez Healthcare Private Limited
XII/581, Sanchesz Hills,
Panniyankara,
Palakkad District-678683

. Corporate Debtor/Respondent

For Financial Creditor/Applicant : M/s KSR & Co. Secretaries LLP

For Corporate Debtor/Respondent : Mr.Jthin Saji Issac, Advocate

1. The Financial Creditor/Applicant viz. Kerala State Industrial Development Corporation Limited (hereinafter called as '**Financial Creditor/ the Bank**') has furnished Form No. 1 on 26.12.2019 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter called as **Rules**) in the capacity of "Financial Creditor by invoking the provisions of Section 7(4) of the Insolvency and Bankruptcy Code (hereinafter called as **Code**) against Sanchez Healthcare Private Limited ' (hereinafter called as '**Corporate Debtor**').

2. In the requisite Form under the head "Particulars of Financial Debt" the amount claimed to be in default is ₹6,91,87,975/-
3. The Corporate Debtor is a private limited company incorporated on 18.08.1998, having CIN No. U85199KL1998PTCO12446. The registered office of the Corporate Debtor is at XIII/581, Sanchesz Hills, Panniyankara, Palakkad, Kerala 678 683. The Authorised Capital of the Corporate Debtor is ₹11,00,00,00 and Paid up Capital is ₹10,63,50,00/-

Submissions by the Financial Creditor:

4. The counsel for the Financial Creditor/ Bank submitted that the Financial Creditor had sanctioned two term loans of ₹ 175 Lakhs and ₹ 50 Lakhs to the Corporate Debtor by way of sanction letters dated 16.01.2008 and 10.11.2009 respectively. The loans were granted to close the loan amount of the Corporate Debtor with South Indian Bank, to settle the term loan account with Federal Bank Ltd by way of One Time Settlement and to meet the margin money requirement of fresh working capital sanctioned by Federal Bank Ltd. The Corporate Debtor created charge on its movable assets in favour of Financial Creditor and also created equitable mortgage by deposit of the title deeds of the Corporate Debtor's property with the Financial Creditor. The Financial Creditor's loans have been further secured by creating equitable mortgage by deposit of title deeds of collateral security property owned jointly by, two of the promoter directors of the Corporate Debtor.
5. The counsel for the Financial Creditor stated that the Corporate Debtor had defaulted in payment of the principal and the interest in spite of repeated reminders from the Financial Creditor. As a result, the Financial Creditor sent Revenue Requisition (hereinafter referred to as RR) notice under Section 29

of the State Financial Corporation Act, 1951. Thereafter, the Financial Creditor issued RR requisition as per requisition No. RR/2012/3914/9 dated 04.04.2012. Against the requisition, the Corporate Debtor approached the Hon'ble High Court of Kerala by filing WP (C) No. 12046/2012 and the Hon'ble High Court, as per its judgement dated 20.11.2012, directed recovery proceedings to be kept in abeyance for 2 months from the date of judgment and clarified that, in case the Corporate Debtor does not settle the liability within the period, the Financial Creditor will be free to continue with the RR proceedings.

6. The counsel for the Financial Creditor further submitted that two of the guarantors of the Corporate Debtor, jointly filed another Writ Petition before the Hon'ble High Court of Kerala, (WP (C) No. 27300/2012) against the recovery action. The Hon'ble High Court, as per its judgement dated 19.11.2012 held that, as the Corporate Debtor and its Managing Director had already mortgaged their properties, the properties of the guarantors (Applicant in the case) should be excluded from the recovery proceedings and that it can be included only if the sale proceeds of the properties already available is insufficient to satisfy the dues of the Corporate Debtor.
7. The Counsel for the Financial Creditor further stated that again another WP (C) No. 13433/2012 was also filed by another three guarantors against the recovery action. The Hon'ble High Court, as per judgment dated 20.11.2012, disposed off the petition under WP (C) No. 27300/2012 as it was already clarified that the Petitioners therein will be entitled to the benefit of the judgment in WP (C) No.27300/2012. Even after the extended time period granted by the

Hon'ble High Court, the Corporate Debtor did not settle the debts whereby the Financial Creditor requested the RR Authorities to proceed with the RR action.

8. The Financial Creditor submitted that against the action, again four other guarantors filed a Writ Petition before the Hon'ble High Court of Kerala in WP(C) No.15654/2013. The Hon'ble Court as per judgment dated 15.07.2013, disposed off the petition with the observation that the petitioners can move a representation before the Financial Creditor and that the Financial Creditor can consider the representation and pass orders.
9. The counsel for the Financial Creditor also stated that two other Writ Petitions were filed before the Hon'ble High Court of Kerala, in WP (C) No. 30389 and WP (C) NO. 4809/2014, by the Corporate Debtor and the guarantors. An interim order dated 26.02.2014 was passed by the High Court in the case, staying the proceedings for a period of 3 months and the case is pending before the Hon'ble High Court of Kerala.
10. The counsel for the Financial Creditor further submitted that during this period, Federal Bank, the pari passu charge holder, transferred their right to M/s J. M. Financial Asset Reconstruction Company (hereinafter referred to as JMFARC). With the consent of the Financial Creditor, JMFARC initiated steps under the SARFAESI Act, 2002. This was stayed by the DRT in OA No. 48/2011.
11. The counsel for the Financial Creditor stated that the Corporate Debtor has not taken any steps to repay the principal and the interest amount till date. Therefore, the present application has been filed by the Financial Creditor to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under Section 7 of Insolvency and Bankruptcy Code, 2016.

Submissions by the Corporate Debtor

12. The Learned Counsel for the Corporate Debtor submitted that the present application is clearly barred by limitation and the said application cannot be admitted by this Bench. It was further submitted that this Bench does not have jurisdiction to proceed with the claim of the Financial Creditor as the application is barred by the law of limitation. The counsel further submitted that the provisions of the Revenue Recovery Act are available to recover only such amounts which are due from a person on account of any loan advanced by that Bank under various development schemes or for priority sector advances. The loans availed by the Corporate Debtor does not fall within the development scheme or to priority sector.
13. The counsel for the Corporate Debtor stated that after the Recovery of Debts due to Banks and Financial Institutions Act, 1993 came into force, the debt defined under Section 2(g) can be recovered by a financial institution as per the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. As Kerala Revenue Recovery Act is not saved as per Section 34(2) of the Recovery of Debts due to Banks and Financial Institutions, the proceedings initiated under the Revenue Recovery Act is illegal.
14. The counsel for the Corporate Debtor stated that the application is not filed by a competent person. The Financial Creditor has not produced any resolution authorizing Deputy Manager to represent them as the authorized signatory, even if supported by any documents is hit by the principle of '*delegatus non potest delegare*'.
15. The counsel for the Corporate Debtor further stated that the Sanchez Healthcare Private Limited denies that the Company is a Corporate Debtor of

the Financial Creditor. There is no legally recoverable debt due from the Corporate Debtor to the Financial Creditor. It was denied that the Corporate Debtor created charge on its movable assets in favour of KSIDC and also created equitable mortgage by deposit of title deeds of the Corporate Debtor's property with the Financial Creditor. The counsel further submitted that the documents do not show that the execution thereof has been witnessed by anybody nor in the common seal of the company shown to have been affixed in the document, despite the fact that it is stated the parties have put their respective hands and seals on the day and year mentioned in the document.

16. The counsel for the Corporate Debtor submitted that the debt as claimed by the Financial Creditor is not due as it is not payable in law or in fact and is disputed. The applicant has not even filed a statement of accounts along with the application and the details of the debt stated by the Financial Creditor as due from the Corporate Debtor.

17. The counsel for the Corporate Debtor stated that the application filed by the Financial Creditor under Section 7 of the IBC is not complete as it is not supported by the document mandated under the IBC, especially under Section 7. The Financial Creditor submits that as per Section 7(3), the Financial Creditor shall furnish a 'record of default' recorded with the information utility or such other documents that may be specified. At present, to the knowledge of the Corporate Debtor, there is no other alternative documents specified and therefore, the only record of default is the record maintained by the Information Utility. The whole basis for deciding whether an application has to be admitted or rejected by the Adjudicating Authority is the authenticated documents

instead of the mere statement of account produced by the Financial Creditor.

Therefore, the application is incomplete and the same to be rejected

18. Under these circumstances, the Corporate Debtor prayed for dismissing the application to initiate Corporate Insolvency Resolution Process.

Rejoinder by the Financial Creditor:

19. The counsel for the Financial Creditor filed rejoinder and submitted that the present application is not barred by limitation. The Corporate Debtor is clearly trying to mislead this Bench by pointing out irrelevant facts. It is submitted that just because the loan documents are of the year 2008 and 2009 does not mean that the limitation period begins from the said point of time. As already held by the Hon'ble Supreme Court, in ***B. K. Educational Services Private Limited Vs Parag Gupta and Associates,MANU/SC/1160/2018*** the limitation period begins from the date of default, not from the date of document .

20. The counsel for the Financial Creditor further submitted that a look at the financial statements of the Corporate Debtor from the year 2012 will clearly defeat their objections. In each of the Balance Sheet filed by the Corporate Debtor from the year 2012 to 2019, the amount due to the Financial Creditor is acknowledged. In support of his averments the learned counsel quoted the following judgment of the Hon'ble High Court of Delhi ***“Zest Systems Pvt. Ltd Vs Centre for Vocational and Entrepreneurship Studies and Ors (MANU/DE/4093/2018)*** :

“6. In view of the legal position spelt out in judgements noted above, the acknowledgement of debt in the balance sheet extends the period of limitation. The acknowledgment is as on

31.03.2015. This suit is filed in 2017. The suit is clearly within limitation. The present application is allowed”

While delivering the above judgment the Hon'ble High Court of Delhi referred the judgement in **Shahi Exports Pvt. Ltd Vs CMD Buildtech Pvt. Ltd (supra)** where it was held:

“7. It is hardly necessary to cite authorities in support of the well-established position that an entry made in the company’s balance sheet amounts to an acknowledgement of the debt and has the effect of extending the period of limitation under Section 18 of the Limitation Act, 1963. However, I may refer to only one decision of the learned single judge of this Court (Manmohan,J.) in Bhajan Singh Samra Vs Wimpy International Ltd. MANU/DE/6688/2011:185 (2011) DLT 428 for the simple reason that it collects all the relevant authorities on the issue, including some of the judgments cited before me on behalf of the petitioners. This judgment entirely supports the petitioners on this point”

21. The counsel for the Financial Creditor stated that against the Revenue Recovery notice and requisition several Writ Petitions were filed by the Corporate Debtor and its guarantors before the Hon'ble High Court of Kerala to obtain stay against the RR action initiated by the Financial Creditor. It was further stated that various request, were made by the Directors of the Corporate Debtor and its guarantors regarding settlement of the dues. Copy of the letters

dated 26.07.2013 sent by the Directors and Guarantors of the Corporate Debtor are annexed with the application.

22. The counsel for the Financial Creditor submitted that the Board issued Resolution dated 05.08.2019 authorising Deputy Manager, (Legal) of the Financial Creditor to represent the Financial Creditor before NCLT, NCLAT, Supreme Court, IRP/RP, Liquidator or such other forum and to sign and execute Vakalathnama, Affidavits, Applications etc. as may be required from time to time. It is on the basis of this Board Resolution that Deputy Manager, (Legal) of the Financial Creditor had executed the Power of Attorney dated 24.08.2019 in favour of M/s KSR & Co. Company Secretaries LLP, Coimbatore, The Vakalathnama, Memorandum of Appearance and the Power of Attorney are all annexed with the application.

23. The Counsel further stated that the Corporate Debtor is unable to show any proof regarding the preliminary objection. In all the loan documents, especially the Loan Agreements and the Deeds of Hypothecation that the Corporate Debtor is challenging herein, the Common Seal of the Corporate Debtor is affixed and two Directors had also signed the same. It is the practice of the Financial Creditor to keep all documents in the form of soft copy available, the signatures and the common seal were not clear. It was also stated that this do not led to the conclusion that the documents were not executed by the Corporate Debtor and its guarantors. Apart from the above, there is no other justification on the part of the Corporate Debtor to prove the non-existence of debt.

Findings:

24. The main objections made by the Corporate Debtor in his arguments are as follows:

- i. Application filed by the Financial Creditor is not filed by a competent person;
- ii. The alleged debt in the application is a disputed debt and it is not 'due';
- i. Application filed by the Financial Creditor under Section 7 of Insolvency and Bankruptcy Code, 2016 is barred by limitation;
- ii. The respondent Corporate Debtor is not a Corporate Debtor as there is no legally recoverable debt.

Further, the learned counsel for the Corporate Debtor pointed out that in the absence of any authenticated certificate regarding the evidence of default from a regulated body, the adjudicating authority cannot rely upon the figures furnished by the Financial Creditor and entertain the application.

We have examined the main objections raised by the Corporate Debtor taking into account the averments made by both the counsels. Our findings are as under:

25. As regard to Point No.(i), on perusal of the record, we found that the Financial Creditor has the proper authority to file the present application, and the objection raised by the counsel for the Corporate Debtor is merely incongruous, and therefore, holds no water. Moreover, the Financial Creditor has annexed the Board Resolution dated 05.08.2019 authorising Deputy Manager (Legal) to represent the Financial Creditor before various forums from time to time. We find no merit in the argument made by the Corporate Debtor in this connection.

26. As regard to Point No.(ii), it is settled law as decided by the Hon'ble NCLAT in its order in ***Vinayaka Exports and Anr Vs M/s Colorhome Developers Pvt. Ltd (Company Appeal (at) (Insolvency) No.06 of 2019 dated 23rs***

September 2018) (in para 7 & para 12) the existence of dispute is not relevant for Financial Creditor. Therefore, we did not find any merit in the contention raised by the Corporate Debtor.

27. As regard to Point No.(iii), we have gone through the judgment of Hon'ble High Court of Delhi in **Zest Systems Pvt. Ltd v Centre for Vocational and Entrepreneurship Studies and Ors (MANU/DE/4093/2018)**. It is now a settled case law that the acknowledgement of debt in the balance sheet of the Corporate Debtor extends the period of limitation as stated in Para 6 of the above judgment. From the records it is observed that the Corporate Debtor from 2012 to 2019 made entries in the Balance Sheet about the amount due to the Financial Creditor. We are of the view that this amounts to acknowledgement of debt and, therefore, the application is not barred by the limitation.

28. As regard to the Point No.(iv), the contention of the Corporate Debtor is that the debt is not legally recoverable debt to the Financial Creditor due to the objection raised and therefore cannot be termed as Corporate Debtor is not based on any sound principle of law. It is evident that the Corporate Debtor defaulted in repaying the loan, Revenue Recovery notice and requisition was initiated by the Financial Creditor against the Corporate Debtor and its guarantors in the year 2012. Against the said action, several Writ Petitions were filed by the Corporate Debtor and its guarantors to obtain stay against the RR action initiated by the Financial Creditor. Even otherwise, it is trite and a well settled law that pendency of proceedings before other forums is not a bar to initiation of Corporate Insolvency Resolution Process under Section 7 of the Insolvency and Bankruptcy Code, 2016. The Hon'ble Principal Bench of National Company Law Tribunal in **M/s India Overseas Bank Vs Pixion Media Private Limited**

(C.P.No. (IB)-438 (pb)/2018), (Para 26), held that proceedings before DRT is not an impediment to file an application under Section 7 of IBC. Similarly, in **Bank of India Vs Basic India Limited (C.P. No. (IB)-397(PB)/2018) (Para 20)** the Hon'ble Principal Bench of NCLT ordered that the proceedings under SARFAESI is not a bar to CIRP proceedings under Section 7 of the Code. We observe that the Financial Creditor is trying to recover his dues through various legal actions which was being contested by the Corporate Debtor at every stage .In the absence of any adverse order in the above proceedings and after thoroughly perusing the documents executed by the Corporate Debtor with the Financial Creditor, we are of the opinion that the debt in question is legally recoverable debt and therefore reject the contention that respondent company is not a Corporate Debtor as there is no legally recoverable debt.

29. In the light of the above findings, we are of the view that, the present application filed by the Financial Creditor is satisfying all the definitions of "Financial Creditor", "Default" and "Financial Debt" and qualifies for filing an application under Insolvency and Bankruptcy Code. We therefore, are of the opinion that the Application under Sub-Section (4) of Section 7 of I&B Code, 2016 is complete and deserves to be admitted for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

ORDER

30. This application is filed by the Financial Creditor under the Insolvency and Bankruptcy Code,2016 for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor to protect the interests of the stakeholders. Accordingly, the application **IBA/55/KOB/2019** has been admitted under CIRP and the following order has been passed.

31. 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.

32. The Financial Creditor has suggested the name of **Mr. Sankar P. Paniker**, **IBBI/IPA-003/IP-N00037/2017-2018/10300**, email id: sankarpaniker@gmail.com, address : **Paniker and Paniker, Advocates, 64/768, Jaikunj, Chittoor Road, Ernakulam, Kerala 682 035** for appointment as Interim Resolution Professional (IRP). He has filed a declaration in Form-2 (As per Rule 9 sub-rule (1) of the I & B (Application to Adjudicating Authority) Rules, 2016).

33. Accordingly, the IRP proposed by the Financial Creditor, **Mr. Sankar P. Paniker, IBBI/IPA-003/IP-N00037/2017-2018/10300**, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process. The Insolvency Resolution Professional is directed to submit the copy of AFA (Authorization for Assignment) issued by the Insolvency Professional Agency within 2 days from the date receipt of this order.

34. However, 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.

35. 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 appointment, as per the provisions of the Code.

36. 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 Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

37. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order of admission

Dated this the 27th day of February, 2020

Sd/-

(Veera Brahma Rao Arekapudi)
Member (Technical)

Sd/-

(Ashok Kumar Borah)
Member (Judicial)