

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

**IBA/27/KOB/2020**

*(Under Section 9 of Insolvency and Bankruptcy Code, 2016 read with  
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating  
Authority) Rules 2016)*

Order delivered on: 06/01/2022

Coram:

**Hon'ble Mr. Ashok Kumar Borah Member (Judicial)**  
**Hon'ble Mr. Shyam Babu Gautam Member (Technical)**

M/s Johnson Lifts Private Limited,  
No.1 East Main Road,  
Anna Nagar Western Extension,  
Chennai- 600 101

**... Operational Creditor**

Versus

M/s Jewel Homes Private Limited,  
Casagrants Building,  
2<sup>nd</sup> Floor, Opp. TVS Showroom,  
Deshabhimani Junction, Kaloor,  
Kochi, Kerala- 682 217.

**... Corporate Debtor**

**Appearance (through video conferencing)**

For Operational Creditor ...Shri.Rony Jose, Advocate.  
For Corporate Debtor ... Shri.Liza Meghan, Advocate (Represented  
Mr. K.R Vinod, Advocate)

**Per: Shyam Babu Gautam, Member (Technical)**

This IBA/27/KOB/2020 has been filed by M/s Johnson Lifts Private Limited (**'Operational Creditor'**) on 19.06.2020 by invoking the provisions of Section 9(6) of the Insolvency and Bankruptcy Code (hereinafter called as **'Code'**) against M/s Jewel Homes Private Limited (**'Corporate Debtor'**). The

Operational Creditor stated that the total amount of debt due from the Corporate Debtor is Rs. 21,25,382/- (Rupees Twenty-One Lakh Twenty-Five Thousand Three Hundred and Eighty-Two Only) along with interest @ 18% from 04.02.2020 till realisation. The date of default is taken as the date of Arbitration Award i.e., 09.10.2019.

The brief facts of the case are as under: -

2. The Operational Creditor is a Company registered under the Companies Act, 1956 and has been doing its business of installation, maintenance, servicing and repair of elevators and escalators.

3. It is stated that the Corporate Debtor signed a contract dated 23.06.2009 with the Operational Creditor for the supply of material, installation, commissioning and handing over of 16 lifts with work orders No: L- C7901 to L -C7916. There are 12 separate Annual Maintenance Contracts for service and maintenance contracts entered into between them for maintenance of the lifts.

4. It is stated that as per the terms of the agreement dated 23.06.2009, the Corporate Debtor was required to pay 30% of the contract value as advance, 40% against the material delivery, 20% on completion of erection and balance 10% upon commissioning the lifts. The Operational Creditor had completed all the works as per the terms of the agreement in respect of the work orders No: L-C7901 to L-C7905, L-C7907 to L- C7912 & L-C7915 and subsequently invoices were raised for the work carried out as also towards the Annual Maintenance Contract.

5. It is further stated that the Corporate Debtor has made part payment towards the invoices raised, however the entire payments were not made and

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a balance amount of Rs.20,10,377/- (Rupees Twenty Lakhs Ten Thousand Three Hundred and Seventy-Seven Only), excluding interest was due to the Operational Creditor. Hence, the Operational Creditor initiated legal proceedings against the Corporate Debtor, filing arbitration proceedings as per the terms of the agreement and finally they had obtained an Arbitral Award dated 09.10.2019 against the Corporate Debtor wherein it was directed to pay an amount of Rs.20,10,377/- (Rupees Twenty Lakhs Ten Thousand Three Hundred and Seventy-Seven Only) along with 18% interest from the date of award till its realisation. The award had become final as no appeal has been filed against the same even after expiry of the statutory period. Since there was no compliance of the Award, the Applicant has issued the statutory demand notice in Form 3, under Rule 5 of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules of 2016 on 04.02.2020 demanding payment of Rs. 21,25,382/- (Rupees Twenty-One Lakh Twenty-Five Thousand Three Hundred and Eighty-Two Only). Since there was no response from the Corporate Debtor, the present application has been filed by the Operational Creditor to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under Section 9(6) of Insolvency and Bankruptcy Code, 2016.

#### **Submission by the Corporate Debtor**

6. The Corporate Debtor filed a counter stating that as per Notification, dated 24.03.2020 issued by the Ministry of Corporate Affairs, the Central Government has specified Rs. 1 Crore as the minimum amount of default for the purpose of Sec. 4 of the Insolvency and Bankruptcy Code, 2016. Section

4 of the Code applies to matters relating to Insolvency and liquidation of Corporate Debtors. Since the 1 Crore stipulation is not complied in this application the application is not maintainable before this Tribunal.

7. It is stated that the Corporate Debtor has already initiated proceedings to set aside the ex-parte award much before the initiation of proceedings before this Tribunal by the Operational Creditor. Hence the present proceedings are not at all maintainable before this Tribunal. It is well settled that a creditor cannot approach this Tribunal seeking to initiate Corporate Insolvency Resolution Process against the Corporate Debtor on the basis of default in payment of the Arbitral Award when the Award has been challenged before the statutory forum.

8. It is stated that the Corporate Debtor is a real estate developer engaged in the business of construction of residential apartments and homes across Kerala. The Corporate Debtor was in need of 16 lifts for its projects at Kakkanad, Aluva in Ernakulam district and another project at Kottayam District. On submission of quotation by the Operational Creditor, a Memorandum of Understanding was signed and executed between the Corporate Debtor and the Operational Creditor whereby the Operational Creditor had agreed to provide 16 numbers of lifts strictly in accordance with the lift specifications appended with the Memorandum of Understanding. It is stated that altogether 16 MOUs have been executed between the Corporate Debtor and the Operational Creditor with respect to the 16 lifts being erected/ installed by the Operational Creditor in the project site of the Corporate Debtor and the Operational Creditor has installed only 14 lifts. It is also stated that 10 lifts do not have Lift License as mandated by law. The

Operational Creditor, by repeatedly ignoring the reasonable request of the Corporate Debtor to provide statutory license to the lifts those were already installed has started to demand the payment of whole amount from the Corporate Debtor, without performing its part of contract. In the aforementioned circumstances, the Corporate Debtor had already filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitral Award passed ex-parte on 9/10/2019.

### **FINDINGS**

We have heard the learned counsel for both the parties and perused the case records including documents and its photocopies appended with the case records. We have also gone through the evidences on record.

8. The Operational Creditor has established that he had completed the works on the terms of the agreement as per the work orders and that he was entitled to receive a balance amount of Rs. 20,10,377/- (Rupees Twenty Lakh Ten Thousand Three Hundred and Seventy-Seven only) and interest at the rate of 18% amounting to Rs. 1,15,005/- (Rupees One Lakh Fifteen Thousand and Five only) totalling Rs. 21,25,382/- (Rupees Twenty-One Lakh Twenty-Five Thousand Three Hundred and Eighty-Two only) and that a default of payment had occurred. Even though the respondent Corporate Debtor had not refuted the above facts, their contention is that the license has not been provided by the Operational Creditor. These contentions of the Corporate Debtor was not supported by any documentary evidence and that they could not produce any evidence to show that there is a “pre-existing dispute” in the instant case. Moreover, even though the Respondents stated that they have

filed an appeal against the Arbitration Award, no records produced to show that any Appeal is pending with the Appellate Authority.

9. In order to decide the question of maintainability, we have gone through Part IV of the application; wherein it is clearly stated that the date of default is 09.10.2019. To get further clarity on this issue, we have gone through the decision of the Hon'ble Supreme Court in **Laxmi Pat Surana vs Union Bank Of India** (Civil Appeal No. 2734 of 2020) wherein it is held that: -

*“42. Suffice it to conclude that there is no substance even in the second ground urged by the appellant regarding the maintainability of the application filed by the respondent financial creditor under Section 7 of the Code on the ground of being barred by limitation. Instead, we affirm the view taken by the NCLT and which commended to the NCLAT — that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application under Section 7 of the Code filed on 13.02.2019 is within limitation.*

*43. As no other issue arises for our consideration — except the two grounds urged by the appellant regarding the maintainability of the application for initiating CIRP by the financial creditor (Bank) under Section 7 of the Code, we dispose of this appeal leaving all “other grounds” and contentions available to both the sides open to be decided in the pending proceedings before the NCLT. The same be decided uninfluenced by any observation(s) made in the impugned judgment or in the present judgment.”*

10. In this matter, there is an Arbitral Award passed on 9/10/2019 which was not complied with by the Corporate Debtor. Hence, we cannot agree with

the submissions made by the Corporate Debtor regarding limitation for filing this application.

11. We have also gone through the case law ***Madhusudan Tantia Vs Amit Choraria & Ors*** (Company Appeal (AT) (Insolvency) No. 557 of 2020) decided by the Hon'ble NCLAT on the question whether the Notification issued by the Ministry of Corporate Affairs dated 24.03.2020 having retrospective effect or not. The Hon'ble NCLAT held that: -

*“56. As far as the present case is concerned, this Tribunal, after carefully and with great circumspection, ongoing through the contents of the notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Government of India, whereby and whereunder the minimum amount of default limit was specified as Rs. one crore (obviously raising the minimum amount from Rs. one lakh to one crore) unerringly comes to a definite conclusion that the said notification is only ‘Prospective in nature’ and not a ‘retrospective’ one because of the simple reason the said notification does not in express term speaks about the applicability of ‘retrospective’ or ‘retroactive’ operation. Suffice it for this Tribunal to point out that from the tenor, spirit and the plain words employed in the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, one cannot infer an intention to take or make it retrospective as in this regard, the relevant words are conspicuously absent and besides there being no implicit inference to 35 Company Appeal (AT) (Insolvency) No. 557 of 2020 be drawn for such a construction in the context in issue. That apart, if the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is made applicable to the pending applications of IBC (filed earlier to the notification in issue) it will create absurd results of wider implications / complications.*

*57. In view of the upshot and also this Tribunal, on a careful consideration of respective contentions advanced on either side and*

*considering the facts and circumstances of the instant case in a conspectus fashion holds unhesitatingly that the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is prospective in nature and it is not retrospective or retroactive in nature. Further, the said notification will not apply to the pending applications filed before the concerned 'Adjudicating Authority' (Authorities), under IBC (waiting for admission), prior to the issuance of the aforesaid notification, as opined by this Tribunal. Viewed in the above prospectives, the conclusion arrived at by the 'Adjudicating Authority' in the impugned order to the effect that the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, shall be considered as prospective and not retrospective and the finding that there was no payment on the side of 'Corporate Debtor' after receipt of Demand Notice, no pre-existing dispute also alleged or proved and ultimately admitting the application filed by the 2nd Respondent / Operational Creditor are free from legal infirmities. Resultantly, the instant Appeal fails."*

12. Considering the facts and circumstances, in our opinion the nature of the Debt is an 'Operational Debt' as defined under Section 5 (21) of the Definitions under the Code. There is a "Default" as defined under Section 3 (12) of the Code on the part of the Corporate Debtor and that it is a fit case to be admitted and order initiation of CIRP against the Corporate Debtor.

13. The application made by the Operational Creditor is complete in all respects as required by law, and it clearly shows that the operational debt has not been paid by the Corporate Debtor. Moreover, in the counter the Corporate Debtor admitted that some of the pending bills could not be paid by them to the Operational Creditor, for the reason of non-production of licence etc by the Operational Creditor. They have not disputed that the amount in question is not pending to be paid by them to the Operational Creditor.

14. The Operational Creditor has not proposed the name of any Resolution Professional to be appointed as the Interim Resolution Professional. Hence, we have decided to appoint an IRP from the panel for Kochi Bench during the period 1/1/2022 to 30/6/2022.

15. The Application under Sub-Section (6) of Section 9 of I&B Code, 2016 is complete in all respects. Accordingly, the application filed under Section 9 of the Insolvency and Bankruptcy Code for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor is to be admitted with the following orders: -

### **ORDER**

1. **Application No. IBA/27/KOB/2020** is **admitted** in terms of Section 9(5) of IBC, 2016 and moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor prohibiting all of the following,

- a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

2. It is further directed that the services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The moratorium shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a Corporate Debtor.

a) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33 as the case may be.

b) That the public pronouncement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of IBC.

3. This Bench hereby appoints **Mr. Easwara Pillai Kesavan Nair** having Registration No. **IBBI/IPA-001/IP-P00448/2017-2018/10791**, email id:- **keaswaran@gmail.com** office at **Vijayakumar & Easwaran Chartered Accountants, 6th Floor, Amrita Trade Towers S.A Road Pallimukku, Kochi, Kerala-682016** 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 Interim Resolution Professional to carry out the functions as mentioned under IBC. The fee payable to IRP/RP shall comply with the IBBI Regulations/ Circulars/ Directions issued in this regard. The proposed IRP is directed to submit his consent along with copy of AFA issued to him in the prescribed format within 2 days from the date of receipt of this order.

4. We direct the Operational Creditor to deposit a sum of Rs. 2 lakhs (Rupees Two Lakhs Only) within three days from the date of receipt of this order with the Interim Resolution Professional to meet out the initial expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This amount, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

5. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.

6. 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 6<sup>th</sup> day of January, 2022.

**Sd/-**  
**(Shyam Babu Gautam)**  
**Member (Technical)**

**Sd/-**  
**(Ashok Kumar Borah)**  
**Member (Judicial)**

Rajasree