

**NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH  
COURT NO.1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
BENGALURU BENCH, BENGALURU, HELD ON 18.03.2020

**CAUSE LIST**

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala  
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB)No. 199/BB/2018	For pronouncement of order	Sec 7 of I&B code 2016	M/s ICICI Bank	Trilegal	M/s OPTO Circuits (India) Limited	Sandeesh Shetty, advocate

ADVOCATE FOR PETITIONER/s: MS. ANURADHA AGNIHOTRI 9702433593  
i/by TRILEGAL  
anuradha

ADVOCATE FOR RESPONDENT/s: Sandeesh Shetty 9845417771  
Sandeesh Shetty

**ORDER**

CP (IB) No 199/2018 is admitted by separate order.  
Shri Paalsaj Srivastava, is appointed as IRP. This order may be communicated to IRP also by the Registry.  
Post the case on 20.04.2020 for IRP Report.

  
member (T)

  
member (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No. 199/BB/2018  
U/s. 7 of the IBC, 2016  
R/w Rule 4 of the I&B (AAA) Rules, 2016

**Between:**

**ICICI Bank Limited**

Near Chakli Circle, Old Padra Road,  
Vadodra - 390 007

India

Represented by

Ms. Abhipsa Nayak (POA)

- Petitioner/Financial Creditor

**And**

**M/s. OPTO Circuits (India) Limited,**

No. 83, Electronics City,

Bangalore South,

Bengaluru, 560100

- Respondent / Corporate Debtor

**Date of Order: 18<sup>th</sup> March, 2020**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present:**

For the Petitioner : Ms. Anuradha Agnihotri with  
Ms. Mihika Gupta  
Trilegal

For the Respondent : Mr. Vivek Reddy,  
Senior Counsel with  
Mr. Sandesh Shetty

**ORDER**

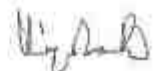
**Per:** Rajeswara Rao Vittanala, Member (Judicial)

1. C.P.(IB) No.199/BB/2018 is filed by ICIC Bank Limited ('Petitioner/Financial Creditor') U/s 7 of the Insolvency and Bankruptcy Code, 2016, R/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by

inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of **M/s. Opto Circuits (India) Limited**, on the ground that it has committed default for total amount of INR 1,078,559,340.96 (Rupees One Hundred and Seven Crore Eighty Five Lakh Fifty Nine Thousand Three Hundred and Forty point Nine Six) which includes interest levied from time to time.

2. Brief facts of the case, as mentioned in the Company Petition and rejoinder, which are relevant to the issue in question, are as follows:

- (1) ICICI Bank Limited (herein after referred as Petitioner/Financial **Creditor**), incorporated on 5<sup>th</sup> January 1994 under the Companies Act, 1956 bearing CIN: L65190GJ1994PLC021012, having its Registered office at Near Chakli Circle, Old Padra Road, Vadodara 390007.
- (2) M/s. OPTO Circuits (India) Limited (herein after referred to as Company/Corporate Debtor) was incorporated on 8<sup>th</sup> June, 1992, bearing CIN No. L85110KA1992PLC013223 having its registered office at Plot No.83, Electronics City, Bangalore-560100.
- (3) It is stated non-fund based working capital facilities of a Stand by Letter of Credit (SBLC Facility) by way of Credit Arrangement Letters (CALs) executed between the Corporate Debtor and the Applicant. On 9<sup>th</sup> December 2010 by way of a CAL bearing No. 01/S11BLR/30010, the Respondent availed non-fund based facility for an overall limit of INR 117,50,00,000 (Rupees One Hundred and Seventeen Crore Fifty Lakh). The purpose of the CAL was to provide a financial guarantee for the obligations of Jolt Acquisition Company (JAC) or Cardiac Science Corporation (CSC) or Opto Cardiac Care Limited (OCC). The validity of the CAL was until 29.11.2011. On 05.05.2011, the Respondent entered into an Amendatory Credit Arrangement Letter bearing CAL No. 12/S11BLR/33651 to provide financial guarantees for obligations of JAC or CSC only.



(4) On 18.05.2011, the Respondent entered into a Facility Agreement to avail from the Petitioner various working capital facilities (Facilities) including the CALs executed previously. The Facility Agreement along with the General Conditions applicable to the Facilities. The relevant portion of Clause 3(i) of Article X Part B of the General Conditions pertaining to default is extracted below:

*If the Bank is called upon to pay or pays, all or any of the monies in pursuance of the BGs, the Borrower shall, without questioning the reasonableness or validity or otherwise of any payment made or required to be made by the Bank under the BGs, forthwith pay to the Bank, all amounts payable or as the case may be, paid by the Bank, including without limitation, all costs, charges and expenses whatsoever payable or paid, suffered or incurred by the Bank in respect of or in relation to or arising out of the obligations undertaken under the BGs (collectively, the "Defaulted Amounts-BGs") and until such payment by the Borrower, the same shall unless otherwise agreed to by the Bank, be deemed to be on demand loans to the Borrower carrying interest at the rate specified in the CAL.*

(5) The Respondent also entered into a Deed of Hypothecation dated 18<sup>th</sup> July, 2011 whereby the Corporate Debtor hypothecated its current assets by way of first charge ranking paripassu in favour of certain other banks and hypothecated receivables by way of first charge ranking paripassu with the charges created in favour of certain other banks. The value of the current assets including receivables of the Corporate Debtor is INR 1,567,071,548, as per financial statements for F.Y. 2016-17. By way of further security on 5<sup>th</sup> March 2014, Criticare Systems (M) Sdn. Bhd, a company incorporated under the laws of Malaysia has executed a guarantee

in favour of the Petitioner, towards all money payable by the Corporate Debtor in respect of the Facilities provided by the Applicant and has guaranteed to the Petitioner due and punctual performance of all the obligations of the Respondent under the agreements. Criticare has also executed a Charge over Designated Account and a Charge over Moveable and Current Assets dated 5<sup>th</sup> March 2014 whereby the Criticare hypothecated its moveable, current assets and designated accounts by way of exclusive charge in favour of Applicant.

(6) On 19<sup>th</sup> September 2011, pursuant to the Facility Agreement and the CALs, and at the request of the Respondent, the Petitioner provided SBLC No. 002SB00000812 to U.S. Bank National Association (US Bank) (US Bank SBLC) for USD 10,000,000 (US Dollars 10 million) against which credit facility has been provided by US Bank to CSC. As per the US Bank SBLC, the Petitioner undertaken to remit proceeds on the first demand of US Bank and states that such payment will be made without any contestation or protest or delay. The validity of the US Bank SBLC was until 18<sup>th</sup> September 2014. The US Bank SBLC was extended on 04.09.2014 until 18<sup>th</sup> September 2015 and further extended on 31<sup>st</sup> August 2015 until 31<sup>st</sup> March 2016. 04.01.2013 the SBLC Facility was amended.


(7) It is stated that the limit of the non-fund based working capital facilities of an SBLC payable on demand sanctioned on December 09, 2010 to the Respondent was reduced to an overall limit of INR 600,000,000 (Rupees Sixty Crores) by the Petitioner through a CAL bearing No. 23/CBGBLR/51954. The purpose of the CAL was to provide a financial guarantee to be utilised for raising working capital resources of CSC (a 100% subsidiary of the Corporate Debtor). The validity of the CAL was until 26.12.2013. On 15<sup>th</sup> May 2014, the Respondent acknowledged the Debt for the SBLC



Facility of INR 600,000,000 (Rupees Six Hundred Million) under the Facility Agreement and Deed of Hypothecation.

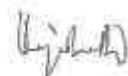
(8) On 27<sup>th</sup> August 2014, a letter of amendment, amending the Facility Agreement with effect from 26<sup>th</sup> December 2013 was executed between the Petitioner and Respondent. Further, on the same date, a non-fund based working capital facilities of an SBLC payable on demand of an overall limit of USD 10,000,000 (US Dollars Ten Million) was extended by the Petitioner through a CAL bearing No. 45/CBGBLR/73415. Additionally, pursuant to the transaction documents, Respondent undertaken to repay the Facilities in six monthly instalments and six post-dated cheques were provided to the Petitioner for a total amount of INR 61,00,00,000 (Rupees Sixty One Crore) and the Respondent has also issued a declaration dated 3<sup>rd</sup> September 2014. All the cheques were presented and were returned with the endorsement "*insufficient funds*". The Petitioner initiated criminal proceedings in the courts at Bangalore under Section 138 of the Negotiable Instruments Act, 1881 for five cheques, in proceedings bearing C.C. No. 17177 of 2015; C.C. No. 22503 of 2015; P.C.R. No. 14593 of 2015; P.C.R. No. 14588/2015; and P.C.R. No. 14597/2015, which are pending.

(9) On 27<sup>th</sup> August 2015, the Facilities provided by the Facility Agreement and the CAL No. 45/CBGBLR/73415 dated 27 August 2014 at the request of the Respondent were renewed for a further period until 11<sup>th</sup> August 2016. On 7<sup>th</sup> October 2015, the US Bank SBLC was irrevocably invoked by US Bank for USD 10,000,000 (US Dollars Ten Million) along with a payment fee of USD 200 (US Dollars Two Hundred) citing that the obligation of CSC are due and payable. Further on 12<sup>th</sup> October 2015, the Petitioner wrote letter to the Respondent ICBK/BLR/OCIL/2015-16/125 asking the Corporate Debtor to fund their current account with the



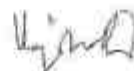
Petitioner for the amount demanded by US Bank, but the Respondent failed to fund their current account. On 19<sup>th</sup> October 2015, in pursuance of the SBLC invocation the Petitioner remitted the amount of INR 651,413,028 (Rupees Sixty Five Crores Fourteen Lakhs Thirteen Thousand and Twenty Eight) (INR equivalent of USD 10 million) to the US Bank.

- (10) Since the Respondent failed to make payment still, on 20<sup>th</sup> October 2015, the Petitioner wrote a letter to the Respondent bearing No. ICBK/BLR/OCIL/2015-16/126 informing the Respondent that the Petitioner has remitted the amount of INR 651,413,028 (Rupees Sixty Five Crores Fourteen Lakhs Thirteen Thousand and Twenty Eight) (INR equivalent of USD 10 million) pursuant to the invocation of the US Bank SBLC by US Bank and requested the payment of such amount to the Applicant.
- (11) On 30<sup>th</sup> May 2018, the Petitioner issued a notice of default by way of letter bearing No. ICBK/BLR/OCIL/2018-19/010 (Notice) demanding payment of INR 103,79,56,016.96 (Rupees One Hundred and Three Crore Seventy Nine Thousand Fifty Six Lakh and Sixteen point Ninety Six) which is an aggregate of the overdues consisting of instalments of the principal amount together with other charges and costs payable in relation to the Facilities as on 30 May 2018. The Notice states that pursuant to the terms of the transaction documents, the Respondent is obligated to pay/repay the principal and interest in relation to the Facilities with other charges and costs to the Applicant in accordance with the terms of the transaction documents. It notes that despite repeated reminders and requests made, the Respondent has failed and neglected to make payment/repayment of principal, interest, other charges and costs overdue in respect of the Facilities. On 2<sup>nd</sup> June 2018, the Respondent responded to the Notice denying its liability to make payments stating as follows:



- i. That the SBLC Facility was availed of for the purpose of working capital requirements of CSC (ownership of which was acquired by the Corporate Debtor in 2010).
- ii. That CSC had borrowed from DBS Bank in 2011 and that in December 2014, the Corporate Debtor was coerced by DBS Bank to sign and pledge 100 % shares of CSC in favour of DBS Bank.
- iii. That they understand that in September 2015, DBS sold the entire debt and the shares to Aurora Resurgence.
- iv. That CSC has been transferred to a new entity name CFS0915, a wholly owned subsidiary of Aurora Resurgence.
- v. That CSC has been put into Chapter 11 proceedings under the US Bankruptcy Laws.
- vi. That the Corporate Debtor has lost control of CSC and has initiated action in various legal forums and the matter is sub judice.
- vii. That therefore since the invocation of the SBLC was initiated post the hostile takeover of CSC, when the Corporate Debtor had no control over CSC, the Corporate Debtor cannot be made liable for the same.

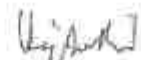
(12) On 18<sup>th</sup> June 2018, the Petitioner responded to the letter dated 2<sup>nd</sup> June 2018 reiterating that the unconditional obligation of the Respondent to repay the amounts. On 24 November 2017, the Hon'ble Karnataka High Court has passed an order in winding up petitions filed by HDFC Bank Limited (bearing Co.P. No.273/2014) and the Bank of Nova Scotia (bearing Co.P. No.124/2014), concluding that the Respondent is unable to pay its debts and is required to be ordered to be wound up. However, the appointment of the liquidator and publication of the order of winding up has been deferred at the request of the Respondent. No payments have been made by the Respondent till date. The total default amounting to INR 1,078,559,340.96 (Rupees One Hundred and Seven Crore Eighty Five Lakh Fifty Nine Thousand Three Hundred and Forty point Nine Six) are due and payable along with



applicable interests and charges in terms of the Facility Agreement and the transaction documents is due from the Respondent. The acknowledged debt became due and payable when the Petitioner informed the Respondent that US Bank had irrevocable invoked the US Bank SBLC. No payment has been received till date. Further as on 31<sup>st</sup> August 2018, there is total default amounting to INR 1,078,559,340.96 (Rupees One Hundred and Seven Crore Eighty Five Lakh Fifty Nine Thousand Three Hundred and Forty point Nine Six) which includes interest levied from time to time at the applicable rate of interest. Hence the petition.

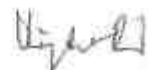
3. The Respondent has filed the statement of objections dated 11.06.2019 by inter alia stating as follows:

- (1) The instant Petition is misconceived and liable to be dismissed in-limine. The Petitioner Bank entered into counter indemnity of letter of guarantee/indemnity/bond/Letter of Credit with M/s. Cardiac Science Corporation, situated in Wisconsin, United State of America on 02.04.2015 and in the said agreement M/s Cardiac Science Corporation have undertaken to indemnify the Respondent in respect of the loan secure to the tune of Ten Million Dollars from U.S. Bank. It is true that the Respondent Company have undertaken to the Petitioner by virtue Facility Agreement dated 18.05.2011, whereby Respondent Company agreed to the Petitioner to indemnify, in the event of default in repayment by M/s. Cardiac Science Corporation, to the U.S. Bank. In the meantime, the Petitioner has given the letter of credit to the U.S. Bank by virtue of agreement with M/s. Cardiac Science Corporation to repay the loan if M/s. Cardiac Science Corporation commits default. By the virtue of the agreements, it is clear that the Respondent Company has undertaken to indemnify the



Petitioner, if the Petitioner repays the loan amount of M/s. Cardiac Science Corporation to the U.S. Bank.

- (2) It is stated that, the Petitioner on 30/5/2018 sent a letter to the Respondent Company demanding it to indemnify the Petitioner in respect of the loan amount paid to the U.S. Bank for a sum of 10 Million Dollars, since the Petitioner has paid 200 Million U.S. Dollars to the U.S. Bank, due to default on the part of M/s. Cardiac Science Corporation. The said letter also reveals that, the Petitioner has invoked the Facility Agreement entered with the Respondent Company and made such other demands with the Respondent Company to initiate proceedings before the appropriate Forums. Further, the Respondent made a reply to the demand of the Petitioner supra on 6/6/2018, whereby refuted the contentions of the Petitioner Bank. The Respondent has, at no point of time, received any letter or documents in respect of the payments made by the Petitioner Bank to the U.S. Bank, in respect of the loan availed by M/s. Cardiac Science Corporation. The loan availed by the M/s. Cardiac Science Corporation was 10 Million Dollars, on the contrary the Petitioner has claimed they have incurred U.S. Dollars 200 Million in the repayment made to the U.S. Bank. By the said conduct itself, it can be ascertained that the Petitioner has not approached this Hon'ble Authority with clean hands.
- (3) It is asserted that the Agreements entered between the Parties i.e. three organisations has to be read in totality, while coming to the conclusion in the above referred petition. The Petitioner without exhausting the remedy of recovering loan amount at the threshold from M/s. Cardiac Science Corporation, have resorted recovery from the Respondent, which is contrary to the facility agreement and stand by Letter of Credit, which



entered with the Respondent Company. On the said score also, the petition preferred by the Petitioner/Petitioner is liable to be dismissed.

- (4) The cause of action for the Petitioner arises only in the event the Petitioner proves that M/s. Cardiac Science Corporation has committed default in the repayment of loan to the U.S. Bank. Before resorting to any action against the Respondent, the Petitioner needs to furnish all the relevant documents pertaining to the default committed by M/s. Cardiac Science Corporation. The claim of the Petitioner that they have repaid 200 Million U.S. Dollars to the U.S. Bank is apparently misconceived and it is Petitioner duty bound to intimate the Respondent while making the repayment by virtue of agreement with U.S. Bank. The above foregoing events clearly reflect that the Petitioner Bank has made this petition without revealing factual state of affair of the loan. Further, the Respondent initiated civil proceedings before the City Civil Court, Bangalore, vide O.S. No.4399/2018 against ICICI Bank (the Petitioner herein) by seeking Perpetual injunction restraining defendant or its agents etc from conducting forensic Audit ; to restrain it from declaring Plaintiff (Respondent as Red flag. And the issue of suit has posted to 21<sup>st</sup> January, 2020 for Mediation and Reconciliation. So that the issue raised in the instant Petition would likely to be settled. So the instant Petition cannot be adjudicated by the Adjudicating Authority.
4. Heard Ms. Anuradha Agnihotri, learned Counsel for the Petitioner, and Shri Vivek Reddy, learned Senior Counsel for the Respondent. We have carefully perused the pleadings of both the parties and the extant provisions of the Companies Act, 2013, and the Rules made thereunder and the Law on the issue.



5. Ms. Anuradha Agnihotri, learned Counsel for the Petitioner, while reiterating various averments already placed on record, as briefly stated supra, has also filed Written Arguments by inter alia stating as follows:

(1) At the request of the Corporate Debtor, the Facilities in question were provided by the Facility Agreement and the CAL No. 45/CBGBLR/73415 dated 27 August 2014 were renewed for a further period until 11 August. The US Bank irrevocably invoked the SBLC for USD 10,000,000 along with payment fee of USD citing that the obligation of CSC are due and payable. The Petitioner thus became obliged to make payment to the US Bank without demur.

(2) The Petitioner wrote to the Corporate Debtor by way of a letter ICBK/BLR/OCIL/2015-16/125 asking the Corporate Debtor to fund its current account with the Petitioner for the amount demanded by US Bank. In pursuance of the SBLC invocation, the Petitioner remitted an amount of INR 651,413,028 (Rupees Sixty Five Crores Fourteen Lakh Thirteen Thousand and Twenty Eight) (INR equivalent of USD 10 million) to the US Bank on 19<sup>th</sup> October, 2015. Since the Respondent failed to make payment, the Petitioner wrote to the Corporate Debtor by way of letter bearing No. ICBK/BLR/OCIL/2015-16/126 informing the Corporate Debtor that the Petitioner has remitted the amount of INR 651,413,028 (Rupees Sixty Five Crores Fourteen Lakh Thirteen Thousand and Twenty Eight) (INR equivalent of USD 10 million) pursuant to the invocation of the US Bank SBLC by US Bank and requested the payment of such amount to the Petitioner. The Petitioner issued a notice of default (Notice) demanding payment of INR 1,037,956,016.96 (Rupees One Hundred and Three Crore Seventy Nine Thousand Fifty Six



Lakh and Sixteen point Ninety Six) which is an aggregate of the overdue consisting of instalments of the principal amount together with further interest and other chargers in relation to the Facilities as on 30 May 2018.

- (3) It is stated that the defence raised by the Respondent is totally frivolous and mala fide since the borrower was the Corporate Debtor alone and the SBLC Facility was availed of by the Corporate Debtor. The events relating to the Corporate Debtor's subsidiary in the US are absolutely irrelevant to obligations of the Corporate Debtor to the Petitioner. Under the terms of the SBLC, the Petitioner was required to pay the US Bank on demand and under the terms of the CALs and the Facility Agreement, the Corporate Debtor was required to pay the Petitioner. The Corporate Debtor however failed to pay and has thus defaulted in its obligations. The documents in question admittedly are not in dispute.
- (4) It is stated that as per Section 7 of the Code, a financial creditor may file an application for initiating CIRP against a Corporate Debtor once a default has occurred. Default has been explained as a default in respect of a financial debt owed. The expressions financial creditor and financial debt have been defined in Section 5 (7) and Section 5 (8) of the Code. Financial debt is a debt along with interest, if any, which is disbursed against the consideration for time value of money and expressly includes a documentary letter of credit issued by financial institutions, such as the SBLC. In the present case the contractual rights and obligations between the Petitioner and Respondent are set out primarily in the Facility Agreement dated 18 May 2011 read with the CAL, as amended from time to time. Pursuant to these documents, the Respondent availed of the SBLC Facility from the Petitioner in terms of which the



Petitioner issued an irrevocable SBLC to a bank based in the United States of America. Under the SBLC, the Petitioner was required to make payment upon demand. In the event the Petitioner was called upon to make such payment, the Respondent was obliged to repay the Petitioner on demand. In light of the same, the debt is a financial debt. Since the Corporate Debtor has failed to make payment to the Petitioner, a default has occurred and continues. Hence, the Petition should be admitted as prayed for.

- (5) It is stated that suit bearing OS No. 4399 of 2018 was filed by the Respondent, before City Civil Court, Bangalore, by praying to it grant permanent injunction restraining the Defendant (the Financial Creditor) and its henchman or anybody or agent or representatives, any other person/persons through or under it from:(i) by conducting forensic audit at the Premises of the plaintiff;(ii) Restraining the defendant from declaring the Plaintiffs as red flag."Therefore, it is contended that it has no bearing on the issue.
- (6) It is further stated that on 24<sup>th</sup> November 2017, the Hon'ble High Court of Karnataka (High Court) passed an order in winding up petitions filed by HDFC Bank Limited (bearing Co.P. No.273/2014), the Bank of Nova Scotia (bearing Co.P. No.124/2014) and the same was later extended to the petition filed by CIMB Bank Berhad (bearing Co.P No.297/2015), (collectively, Petitioning Creditors) concluding that the Respondent was unable to pay its debts and was required to be ordered to be wound up (Winding up Order). However, Respondent has filed an application for the recall of the winding up order.



(7) The Learned Counsel for the Petitioner has also relied upon the following judgements/case laws:

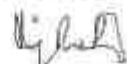
- 1) *M/s. Union Bank of India v. Era Infra Engineering Limited* (2018 SSC Online NCLT 813) on 16.02.2018 passed by NCLT, Principal Bench, New Delhi
- 2) *M/s. Punjab National Bank v. Hanung Toys and Textiles Limited* in CP (IB) No. 953 (PB)/2018 by NCLT, Principal Bench, New Delhi
- 3) *M/s. Jaipur Metals & Electricals Employees Organisation v. Jaipur Metals & Electricals Limited* (2018 SCC Online SC 2801) by Hon'ble Supreme Court of India
- 4) *M/s. Forech India Limited v. Edelweiss Assets Reconstruction Co. Limited* (2019 SCC Online SC 87) by Hon'ble Supreme Court of India, New Delhi
- 5) *Jotun India Private Limited and others v. PSL Limited* (Single Judge) 2018 (1) BomCR 524 by Hon'ble High Court of Bombay on 5<sup>th</sup> January 2018
- 6) *M/s. Jotun India Private limited and others v. PSL Limited* (Division Bench) [(2019) 213 Comp Cas 61] passed by Hon'ble High Court of Bombay on 26<sup>th</sup> July 2018
- 7) *Forech India Private limited v. Edelweiss Assets Reconstruction Company Limited* in Company Appeal (AT) (Insolvency) No. 202 of 2017 passed by Hon'ble National Company Law Appellate Tribunal on 23.11.2017
- 8) *Unigreen Global Private Limited v. Punjab National Bank and others* in Company Appeal (AT) (Insolvency) No. 81 of 2017 by Hon'ble NCLAT on 01.12.2017
- 9) *Innoventive Industries Limited v. Kumar Motors Private limited* in C.A (AT) (Insolvency) No. 181 of 2017 by Hon'ble NCLAT on 09.02.2018
- 10) *State Bank of India v. Shakti Bhog Foods limited* in C.A (AT) (Insolvency) No. 181 of 2017 by Hon'ble NCLAT on 12.03.2018
- 11) *Indiabulls Housing Finance Limited v. Shree Ram Urban Infrastructure Limited* in C.A (AT) (Insolvency) No. 252 of 2018 on 30.05.2018 by Hon'ble NCLAT



*12) HDFC Bank Limited v. Opto Circuits (India) Limited in COP  
No. 273/2014 on 22.03.2019 by Hon'ble High Court of  
Karnataka*

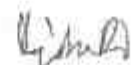
6. Shri. Vivek Reddy, learned Senior Counsel for the Respondent, after arguing the case, has also filed his written list of Arguments dated 12<sup>th</sup> March, 2020 followed by another Addl Written Arguments dated 13<sup>th</sup> March, 2020, by inter alia contending as follows:

(1) The Respondent, has, at no point of time, received any letter or documents in respect of the payments made by the Petitioner bank to the U.S. Bank, in respect of the loan availed by M/s. Cardiac Science Corporation. The loan availed by the M/s. Cardiac Science Corporation was 10 Million Dollars, on the contrary, the Petitioner has claimed they have incurred U.S. Dollars 200 Million in the repayment made to the U.S. Bank. By the said conduct itself, it can be ascertained that the Petitioner has not approached this Tribunal with clean hands. M/s. Cardiac Science Corporation's assets were taken over by Aurora Resurgence, which is the U.S. Company. The DBS Bank upon selling of Portfolio to Aurora Resurgence, sold the pledge of shares and transfer of the company to an entity, named 'CFS 0915', a subsidiary Company of Aurora Resurgence. Contrary to the R.B.I. Regulations, the said Aurora Resurgence had taken 100% control of the shares of Cardiac Science Corporation. Consequently, the Respondent has lost control over Cardiac Science Corporation. Further, the Petitioner did not confirm regarding the condition of issue / renewal of SBLC between U.S. Bank and Cardiac Science Corporation, continued to be enforceable at the time of invocation of SBLC. It did not inform the claims made against the Cardiac Science Corporation or its successors, including DBS /Aurora



Resurgence / CFS 0915 / or under Chapter 11 of the Bankruptcy Proceedings in U.S. Therefore, it is alleged that the Petitioner has committed breach of terms of contract in question. All the Agreements in question should be read in totality, while coming to the conclusion in the above referred petition. The Petitioner without exhausting the remedy of recovering loan amount at the threshold from M/s. Cardiac Science Corporation, have resorted recovery from the Respondent, which is contrary to the facility agreement and stand by Letter of Credit, which entered with Respondent. On the said score also, the petition is liable to be dismissed.

- (2) It is further stated that the Hon'ble High Court of Karnataka by virtue of its order dated 27/11/2017 was pleased to pass winding up order against the Company, in COP No.273/2014, instituted by HDFC Bank Ltd. Consequently, Liquidator was appointed. Further, the Respondent Company filed applications to recall the order of winding up and for pursuing settlement with the said Bank / Creditor. Further, the winding up order passed against the Respondent was recalled on 13/9/2019 by the Hon'ble High Court of Karnataka, after appreciating the bona-fides of the Respondent, which settled the dues through a time-frame agreement with three Banks, which includes HDFC Bank Ltd., CIMB Bank, Malaysia, Bank of Nova Scotia. The total tune of loan in the above referred settlement was to the tune of Rs. 150 Crores. Further, during the pendency of instant Petition also, the Respondent has paid Rs.3,30,00,000/- to the Petitioner Bank. The Petitioner Bank scuttled the effort of Respondent by contending that there are RBI guidelines to settle the loan due within three months, however, without,



furnishing those guidelines. The Respondent is not the principal borrower.

- (3) It is further contended when winding up proceedings before the High Court's under the Companies Act, Section 238 operates and thus either the winding up petition can be transferred to the NCLT, and it may be treated as application under Section 7 of the IBC or a fresh application can be preferred to the NCLT under Section 7 of the IBC. It is clear that when a Company is wound up, parallel proceedings under Section 7 of the IBC to appoint RP, would not be permissible under law and would amount to overriding the power vested with the High Courts. Section 238 of IBC has overriding effect only in respect of pending proceedings.
- (4) The instant Petition/Application was filed by ICICI Bank reply by its MD in the month of June, 2018, when in fact the MD of Respondent went into non-existence and limbo on 24.11.2017 when the Hon'ble High Court passed liquidation order. There the instant Petition filed against non-existing MD is liable to be dismissed on this ground alone. Moreover, the Hon'ble High Court, while recalling the order of winding in question, has observed that the Creditors have right to revoke the recalling order if the Respondent commits default in its re-payments as scheduled. Therefore, the Hon'ble High court has still power to pass appropriate orders, in case, the Respondent failed to adhere to re-payment schedule and thus the Adjudicating Authority lacks jurisdiction over the claim made in the instant Petition.
- (5) He has also relied upon the following judgements in support of his case:



- a. *Employees Organisation vs. Jaipur Metals and electrical Limited (2019) 4 SCC 227 by Hon'ble Supreme Court of India*
- b. *Super Express Pvt Limited vs. Topworth Steel & Power Pvt Limited (2018) SCC Online NCLT 3817 by National Company Law Tribunal.*
- c. *In 2019 (SCC Online SC 87) Forech India Ltd vs Edelwiss assets reconstruction Co. Limited by Hon'ble Supreme Court of India*

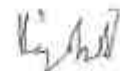
7. In the light of rival contentions of respective Parties, as detailed supra, the analysis and finding of Adjudicating Authority over the issue is detailed in the subsequent paras of this order.
8. In first instance, we would like to refer Section 7 of the Code as the instant Company Petition/Application is instituted under this section. Section 7 reads as under:

7 (1) A financial creditor either by itself or jointly with <sup>1</sup>[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] 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.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—



- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- (b) the name of the resolution professional proposed to act as an interim resolution professional; and
- (c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

*<sup>3</sup>Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.*

(5) Where the Adjudicating Authority is satisfied that—

- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
- (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

**Provided** that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.



(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor,

within seven days of admission or rejection of such application, as the case may be.

9. In the light of requisite conditions mentioned in the above section, the Adjudicating Authority, has to examine broadly, whether Financial Creditor has filed an Application/Petition in prescribed form, with requisite fee; furnished record of default recorded with Information Utility or such other evidence in support; suggested name of Resolution Professional, against whom , there is no disciplinary proceedings pending etc,
10. The Hon'ble Supreme Court, in the case of Innoventive Industries, after considering various provisions of Code, has laid down parameters to be fulfilled in an Application/Company Petition filed, U/s 7 of the Code, apart from other Sections. Therefore, it is relevant to refer the judgment of Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank and Anr. - (2018) 1 SCC 407*", relevant portion of which is extracted below: -

*"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which*



includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part

*IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."*

11. In the light of settled position of law with regard to issues to be considered in an Application/Company Petition filed U/s 7 of Code, as detailed supra, the material facts in question, admittedly are not in dispute. The following Agreements , which are basis for the claim made in the instant Petition , admittedly are not in dispute:

- a. Facility Agreement dated 18.05.2011
- b. General Conditions dated 18.05.2011 and
- c. Deed of Hypothecation to secure charge on Current Assets of Opto Circuits (India) Limited dated 18.05.2011



In this regard, it is relevant to refer the Letter of Respondent dated 15.05.2014 addressed to the Relationship Manager, ICICI Bank Limited, No.1 Sobha Pearl, Commissariat Road, Bangalore by accepting the liability, which reads as under:

"Dear Sirs:

Re : (i) Our SBLC bearing No. 002SB00000812 for an amount Rs. 600.0 million (USD 10.0 million).

We confirm having executed the following documents and having created the following securities in favour of the Bank for due repayment by us of the amounts under the aforesaid loan/credit facilities:

- d. Facility Agreement dated 18.05.2011
- e. General Conditions dated 18.05.2011 and
- f. Deed of Hypothecation to secure charge on Current Assets of Opto Circuits (India) Limited dated 18.05.2011

The debit balance (s) due as on the 29<sup>th</sup> day of April, 2014 at the foot of the account (s) corresponding to the respective credit facility is/are as given below:

Sl. No.	Type of Credit facility	Balance due (Rs)
1.	Stand-by letter of credit	600,000,000.00 (USD 10.0 million)

After verifying the statements of our said account(s) furnished by you to us from time to time and the cheques/vouchers shown therein, we confirm the correctness of the said debit balances and acknowledge our indebtedness in the said amount(s) to the Bank under the balance confirmation certificate with a view to extend the period of limitation for legal action for recovery as provided by Section 18 of the Limitation Act, 1963, and to enable you to defer legal action against us. We also acknowledge the Bank's charge on the properties and assets belonging to us which are mortgaged and charged to the Bank as security in terms of the aforesaid documents or otherwise for similarly extending the period of limitation".




12. When the Respondent committed default of loan/Credit availed, the Petitioner(ICICI Bank Limited) has addressed a letter to the Respondent vide Ref No. ICBK/BLR/OCIL/2018-19/010, dated 30.05.2018 by interalia stating as follows:

**Para 7** :“Under the aforementioned circumstances, we hereby call upon the Borrower to pay to ICICI Bank, within a period of three (d) days from the date of notice, the overdues consisting of instalments of the principal amount together with those of interest, along with other charges and costs payable in relation to the said facility, which aggregate to Rs. 1,037,956,016.96 (Rupees One Billion Thirty Seven Million Nine Hundred Fifty Six thousand Sixteen and Ninety Six Hundred only) as on May 30, 2018 which are payable to ICICI Bank together with further interest and other charges thereon at the contractual rates until payment/relation (overdue amounts)

**Para 8**:In the event of failure of the Borrower to pay the Overdue Amounts within the timelines as mentioned above, ICICI Bank may be constrained to initiate necessary action (including legal action) against the Borrower and other relevant third parties, including but not limited to any or more of the following:

- a. Initiating recovery or other proceedings in courts/tribunals;
- b. Enforcement of security and of any other agreements and documents relating to the securing of the facility
- c. Initiating a resolution plan in accordance with RBI circular dated February 12, 2018;
- d. Initiation of winding up proceedings or corporation insolvency resolution process under the Insolvency and Bankruptcy code, 2016
- e. Conducting forensic audit on the Borrower and/or
- f. Declaring the Borrower as Red flag account



13. In pursuance to the above Bank letter dated 30.05.2018, the Respondent replied vide its letter dated 02.06.2018 to the ICICI Bank, Bangalore, which is relevant to extract herein :

*Dear Sir,*

*We refer to your Bank letter dated May 30, 2018 received by us on 2<sup>nd</sup> June 2018. We bring the following facts to your kind consideration*

*(a) Opto Circuits (India) limited (Opto) is a listed entity in BSE & NSE with its registered office at Bengaluru.*

*(b) Opto acquired ownership/control of Cardiac Science Corporation, USA (CSC) in 2010, Necessary approvals and filing was done by Opto with India Regulatory Authorities when this company was made subsidiary.*

*(c) Cardiac Science Corporation (CSC) was a private company headquarters in Waukesha, Wisconsin, United States of America.*

*(d) For its working capital requirements, CSC approached US Bank for Working Capital facilities which was funded by US Bank to CSC in USA, based on the irrevocable SBLC by ICICI Bank amounting to USD 10 million in May 2011 through a facility agreement between ICICI Bank of Opto. This SBLC limits were renewed every year and that last such renewal took place in August 2015 for a period of one year (date of expiry August 2016)*

*(e) CSC had borrowed from two other banks, one of which is DBS Bank in 2011. Pursuant to the supplementary amended and restated agreements executed in December 2014, Opto was Coerced by DBS Bank Limited to sign and pledge 100% shares of its wholly owned subsidiary CSC, USA with DBS Bank Limited knowing fully that such 100% pledge of shares is invalid as per FEMA Regulations India*

*(f) In September 2015, we reliably understand that DBS bank sold the entire debt and CSC Assets at an undisclosed price to Aurora Resurgence. We have intuted action in various legal forums to recover the excess money received by DBS Bank.*

*(g) DBS Bank Limited upon selling the loan portfolio to Aurora Resurgence sold the Pledge of shares and transferred the company to anew entity names CFS0915, a wholly owned subsidiary of Aurora Resurgence.*

*(h) Contrary to RBI Regulation, Aurora used an amended and rested pledge agreement executed December 2014 to take full control of 100% of CSC's shares, replaced the entire board of directors, installed entirely new management and forcibly put the company into Chapter 11*

*proceedings under the US Bankruptcy laws etc., Opto lost control of its wos, CSC.*

*(i) Opto has filed a claim with DBS Bank and reported the same to the Regulatory Authorities in India including RBI & Debt Recovery Tribunal and the matter is sub-judice.*

*(j) Since Opto's wos, viz CSC has been sold through Hostile takeover through DBS Banks actions as explained any claim on CSC by ICICI through the sbic route/mechanism needs to be claim from DBS Bank/ Aurora/ CFS0915*

*(k) ICICI Bank did not inform the circumstances under which the US Bank invoked the said SBLC. ICICI also did not confirm that all the conditions of issue/renewal of SBLC, interalia, between US Bank and CSC, continued to be enforceable at the time of invocation of SBLC*

*(l) ICICI Bank has not communicated/informed the details of secured assets of CSC acquired through US Bank. Further ICICI Bank has not informed the details of the claim made against CSC or its successors including DBS/ Aurora Resurgence/ CFS 0915/ or under Chapter 11 of the Bankruptcy proceedings in US.*

*(m) The invocation of the sbic by ICICI was initiated post the hostile takeover of CSC by DBS action, where Opto had no management control of its wos, CSC, hence cannot be made liable for the same as the entire assets and the company were sold to Aurora as stated above.*

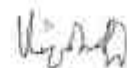
*Under the above circumstance sand in view of the facts placed before, any such claim by ICICI rests with DBS Bank Limited/ Aurora Resurgence/ CFS 0915*

*(2) Financial statements & related query/information*

*(a) Opto has both secured and unsecured loans/liability to various banks & we have made adequate disclosures of the same in our Audited Financial statements and reports.*

*(b) Due to consistent losses suffered in the previous three financial years, vizfy 2014-15, 2015-16, & 2016-17 we were unable to service the bank dues/liability. Bankers have classified our account as irregular & NPA except one bank*

*(c) During the financial year 2017-18, we were able to general small cash surplus, which is entirely used for meeting the past statutory dues, & part of secured financial liability/debt.*



14. In response to the above letter, the Petitioner Bank has issued another Reply Ref: No. ICBK/BLR/OCIL/2018-19/015 dated 18.06.2018 by interalia stating as follows:

"We regret to inform that the Borrower, till date, has not made any payment towards the overdue amount as mentioned in our letter dated May 30, 2018. ICICI Bank will now be constrained to initiate necessary action (including legal action) against the Borrower and other relevant third parties as informed in our letter dated May 30, 2018.

We also wish to inform that paragraph 5 in our letter no. ICBK/BLR/OCIL/2018-19/010 dated May 30, 2018 is to be read as".

15. It is also relevant to point out here that the Respondent had undertaken to repay the facilities availed in question, in six monthly settlements, and thus provided post-dated cheques to the Petitioner for total amount of INR 61 crores, vide declaration dated 03.09.2014 by interalia declaring that Bank present those cheques towards reduction of SBLC Facility and the can be presented irrespective of whether or not there is an invocation of SBLCs issued under SBLC facility. When those cheques were returned with endorsement "insufficient funds", the Petitioner has initiated criminal proceedings U/s 138 Negotiable Instrument Act, 1881 for five cheques vide C.C No. 17177 of 2015; C.C No. 22503 of 2015; P.C.R No. 14593 of 2015; P.C.R No. 14588/2015; and P.C.R No. 14596/2015, which are pending.

16. So far as the proof in respect of default in question is concerned, Petitioner has also filed a certificate, under Section 2A Bankers Book Evidence Act, 1891, which reads as under:

"1. The access to computer system and the data stored thereon is controlled by defined authorised roles exercise through unique user-id and the associated passwords. Only the concerned users know the password and the use of ID with

- password establishes his identity and accountability. Changes to the data are controlled through application level checks and controls;
2. Physical access to computers/server room is prevented by locking the server room and branch after office hours. Detection of any authorised changes in the data after day end and before day begin activity is carried through cheque-sum procedure which is built into the applicable program;
  3. In case of system failure that data is retrieved from the backup kept on the tape/floppy/cartridge/hard disk, which is under control of system administrator/designated employee of the branch;
  4. Back up is verified by the system during the process of transfer of data to backup media and logical labels identify the data storage media;
  5. Back up devices and media are kept under lock and key which are in custody of designated staff members; and
  6. Physical and logical access controls are in place as safeguards against tampering of the system.
17. Therefore, the above facts and circumstances established that the debt and default in question are admittedly not in dispute, except raising some untenable defence by the Respondent.
18. So far as the defence raised by Respondent that by time, the instant Company petition is filed, there was already winding up petitions pending before the Hon'ble High Court of Karnataka, vide COP No. 273/14 and COP No. 124/14 filed by the HDFC Bank Limited and Bank of Nova Scotia against the Respondent u/s 433 (e) & (f) of the Companies Act, inter alia seeking to windup M/s. Opto Circuits (India) Limited (Respondent herein) under the provisions of the Companies Act, 1956 and thus the Petition is not maintainable is concerned, the same is not tenable and baseless. As stated supra, the Hon'ble High Court of Karnataka passed



aCommon Order dated 24<sup>th</sup> November, 2017 in both Company petitions, has interalia passed the following order:

**Para 5** "Though in the normal circumstances this Court requires the Official Liquidator to take over the affairs of the Respondent Company and also direct the Petitioner to publish the order of winding up, keeping in view the submission made earlier that a settlement would be worked out and also since the learned counsel for the respondent at this stage would submit that the Respondent would make an attempt to pay the amount to the petitioners, the said process is deferred till 04.01.2018 with a clear indicating that if the amount is not repaid by the Respondents to the Petitioner herein before the said date, the formality of directing the Official Liquidator to take over the affairs would be made through the order to be passed on the said date. Considering that this Court has already arrived at a conclusion that the respondent Company is to be wound up these petition are allowed in the above terms." However, the advertisement and taking over of the affairs by the Official Liquidator is deferred till 04.01.2018.

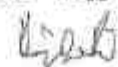
19. Subsequently, OPTO Circuits (India Limited) (the Respondent herein) has filed C.A. No. 37/2019 in CoP No. 273/2014, and C.A. No. 222/2019 in CoP No. 124/14 by filing an affidavit by Shri Somadas G.C, Managing Director of OPTO Circuits (India) Limited (Respondent herein) stating as follows:

1. The Respondent Company is a Public Limited Company, registered under the Companies Act, 1956, having its Corporate Office is situated as mentioned in the cause title. The Respondent Company engaged in inter-alia development and manufacture of technologically advanced Medical Equipments and Devices for modern Health Care Practices. The Respondent Company has authorised Share Capital for a tune of Rs.3,00,00,00,000/- (Rupces Three Hundred Crores only). As on the date, there are 95,000 Share Holders who



have invested in the Respondent Company. There are as many as 200 Employees, who have expertise in the Medical Equipment manufacturing, are employed. The Respondent Company is exporting Medical Equipment to many countries.

2. The Respondent Company / Applicant have availed loan facility from the Petitioner in December, 2012 by virtue of Corporate Guarantee, pursuant to the Facilities Letter dated November 28, 2012, for Working Capital for a tune Rs.100 Crores and also Respondent / Applicant has mortgaged property situated in Doddabasavanahalli and Chikkabasavanahalli Village, Shanthigramahobli, Hassan Taluk, Hassan District, measuring to the extent of 250 Acres in Plot No.2A1, 2A2, 2A3 (P3), 2B1, 2B2, 2C1, 2C2, 3, 4, 5, 6, 7, 8, 9 and 10. Consequently, Certificate Registration of charge was also made. Further, the Respondent / Applicant has created a Charge by way of deposit of title deeds. The Petitioner Bank by virtue of its letter dated 30<sup>th</sup> May 2018 has classified the Respondent / Applicant as willful defaulter and also alleged that the Respondent / Applicant has failed to repay the credit secured and also interest accrued upon. Consequently, the Petitioner Bank instituted the above referred Winding Up Petition.
3. This Hon'ble Court after adjudication of the above referred Winding Up Petition was pleased to pass its order on 24/11/2017, whereby wound up the Respondent / Applicant Company. Consequently, the Respondent Company has preferred an Application to recall the order of winding up in COP No.273/2014, which is pending for adjudication. It is further stated that, the above two petitions were connected. In the meantime, this Hon'ble Court has provided opportunity to settle the dues with the creditors. The Respondent / Applicant Company had entered into settlement with two Banks. On 29/8/2019, by virtue of negotiations with the above referred Petitioner Bank, the Respondent Company has entered a Settlement Agreement to repay the dues. At this point of time, the Respondent / Applicant Company has entered into



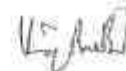
settlement agreements with all the Banks connected with above referred petitions.

4. I state that, under the circumstances, appreciating the bonafides of the Respondent Company, it is just and necessary to recall the order of winding up dated 24/11/2017, whereby permit the Respondent Company to settle dues accordingly. If the application is not allowed, the Respondent Company will be put to great hardship, apart from that, the subsidiary Companies will also be put to great hardship, and huge number of employees' livelihood would be jeopardised. On the contrary, the Petitioner Bank will not be put to any greater hardship.

20. Accordingly, the Hon'ble High Court of Karnataka, allowed the above two C.A. No. 37 of 2019 and C.A No. 222 of 2019, vide separate even orders dated 13.09.2019 by recalling the winding up order dated 24.11.2017 passed in the respective cases. Therefore, it is clear that even though Winding up proceedings were initiated by other Financial Creditors (Banks), they were ended in withdrawing those proceedings. Hence, the contention of Respondent that there is no Corporate Debtor in existence by the time, the instant Petition is filed, is not tenable and the same is baseless. The Respondent was not wound up and liquidated as contended by it. Moreover, the Petitioner is not a party to the Wind up Petition filed before High Court. As stated supra, an Application/Company Petition filed U/s 7 of Code, is to be treated an independent proceedings and it has to be adjudicated in terms of extant Provisions of Code and the law on the issue. Therefore, the instant Company Petition is maintainable and the Adjudicating Authority is competent to decide it. The cases relied upon by the Respondent in this regard Viz *Employees Organization v. Jaipur Metals & Electricals Limited*<sup>1</sup> passed by Hon'ble Supreme Court of

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<sup>1</sup>C.A No.120123 of 2018



*India and Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.* would be no relevancy to the facts and circumstances of instant Case. So far as Forech India Ltd is concerned, it arise from anOperational Creditor's appeal to continue with a winding up petition that has been filed by the Creditor way back in 2014. Wherein, winding up petition being No.42 of 2014 was filed by the Appellant namely Forech India Ltd. before the High Court of Delhi on 10.01.2014 against Respondent No.2-Company. The Company also referred to the BIFR. Subsequently, another petition was filed before the NCLT under Section 7 of the Code in May/June 2017, and the same was admitted on 07.08.2017. Against the aforesaid order, an appeal was filed by the Appellant i.e. Forech India Ltd. which was dismissed by the Appellate Tribunal on the ground that there was no winding up order passed by the High Court. And the present Appeal was disposed of by the Hon'ble Supreme Courtwith following directions/observations under paras 20 to 24, which are extracted below for ready reference :

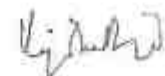
**“ Para 20 :** This judgment was upheld by a Division Bench of the Bombay High Court. We may hasten to add that the law declared by this judgment has our approval.

**Para 21:**The resultant position, therefore, is that we agree with the learned counsel for the appellant that the Appellate Tribunal's reasoning is not correct. Section 11 of the Code specifies which persons are not eligible to initiate proceedings under it. In particular, Section 11(d) reads as follows:

“11. Persons not entitled to make applications- The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:-

xxxxxxxxxx

(d) a corporate debtor in respect of whom a liquidation order has been made.



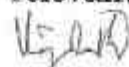
Explanation - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.”

**Para 22:** This Section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor’s application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.

**Para 23** Though, we are not interfering with the Appellate Tribunal’s order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code”.

In the instant case as stated supra, the facts are quite different and distinct and thus the above relied case has no relevancy.

21. So far in the case of Jaipur Metals and Electricals Employees Organization is concerned, it is relevant to point out that the Appeal was filed by Employees Union challenging the judgement the judgment of Hon’ble Rajasthan High Court, Jaipur Bench dated 01.06.2018, wherein the High Court refused to transfer the winding up the proceedings before it, to NCLT and set aside the order dated 13.04.2018 passed by the NCLT, through which the petition filed by the Financial Creditor under Section 7 of the Code was admitted. The Hon’ble Supreme Court, after various discussions and relevant

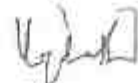


provisions of the Companies Act, and the Code has allowed the Appeal and set aside the order of Hon'ble High Court with the following observations under para 20, which is extracted for ready reference :

**Para 20** : *Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment".*

Therefore, the Hon'ble Supreme Court upheld the order of admission passed by NCLT by setting aside the impugned judgement. It is not understood as to how it would support the case of Respondent.

22. With regard to contention of Respondent that they are not aware of the transaction took in the affairs of its subsidiary namely M/s. Cardiac Science Corporation with US Bank and subsequent



proceedings initiated against it in U.S etc, are not relevant to instant issue, as detailed supra. Under the terms and conditions of Agreements made by the Petitioner and Respondent, it is clearly under condition purpose, as unconditional and irrevocable financial guarantees to be utilised for raising working capital resources of Cardiac Science corporation a company incorporated in United States of America ( a 100 % subsidiary of OPTO Circuits(India) Limited.

23. So far, as solvency of the Respondent is concerned, as state supra, admittedly, three winding up Petitions have been filed by HDFC Bank and Bank of Nova Scotia and out of three two cases have been settled and the orders of winding up and liquidations have been recalled by the Hon'ble High court of Karnataka. It is also relevant to point out herethat Bank of Nova Scotia has filed Co.P.Nos.124 of 25 of 2014 against the Respondent, which was settled. However, the other case VizCo.P No. 125 of 2014, which is filed against M/s OPTO Infrastructure Limited , which is sister concern of OPTO Circuits(India) Limited , stand transferred to the Tribunal , which is numbered as TP No. 01 of 2019. In this OPTO Infrastructure Ltd. has committed default of Rs.213,67,42,23.02/-Subsequently, the Tribunal admitted the case by initiating CIRP, appointing IRP ,imposing moratorium etc vide order dated 25.07.2019. Now it is under CIRP.So far as the filing of O.S.No.4399/2018 before the City Civil Court, Bangalore is concerned, it is nothing to do with instant case and the Adjudicating Authority is fully empowered to deal with the instant case in accordance with provisions of Code, and the rules made thereunder.
24. It is relevant to point out here before initiating CIRP respect of Respondent, the Adjudicating Authority has extended several opportunities to the Respondent at its request to settle the issue. However, the Respondent has paid a mere Rs.2,69,00,000/- total

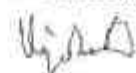


defaulted amount of INR 1,078,559,340.96/ The Respondent has filed a Memo dated 05.11.2019 , which reads as under:

"In the above matter, the Respondent Company in pursuant to the settlement with the Petitioner Bank has already paid Rs.2 Crores and the same is acknowledged by the Petitioner Bank. Subsequently, the Company has sent the proposal of the settlement and the same is under consideration. The Respondent Company on 4th November 2019 has paid Rs.31 Lakhs towards the amounts due to the Bank. Further, the Respondent Company and the Petitioner Bank would file settlement letter to this Hon'ble Authority as and when final settlement agreement is executed. The said agreement would be executed at the earlies. The copy of the letter of payment made to the Petitioner Bank dated 04.11.2019 is herewith enclosed to this Memo. The same may be taken on record in the interest of justice."

In the light of failure on the part of Respondent, the Petitioner is insisting the Adjudicating Authority by strongly opposing adjournments being sought by the Respondents on one pretext and the other.

25. The above facts and circumstances clearly established that debt and default in question. And the instant Company Petition is filed strictly in accordance with provisions of Section 7 of Code, a qualified Resolution Professional namely Shri Pankaj Srivastava with **Regn. No. IBBI/IPA-001/IP-P00245/2017-18/10474**, GO2, Kundur Park, Amruthalli Jakkaur Main Road, Bangalore, email: [rpal@paisri.com](mailto:rpal@paisri.com) is proposed as to act Interim Resolution Professional. He has filed his written Communication dated 14<sup>th</sup> September, 2018 by interalia declaring that he is qualified Resolution Professional , not suffering any disciplinary proceedings, he is willing to accept the assignment if the Adjudicating Authority initiates CIRP in respect of Corporate Debtor and appointed him. Therefore, we are of the considered view that said Resolution



Professional is eligible to be appointed as IRP and the instant case is a fit case to admit by initiating CIRP in respect of OPTO Circuits (India) Limited (the Respondent herein) by appointing IRP, imposing moratorium etc.

26. In the result, by exercising powers conferred on this Adjudicating Authority under provisions of Section 7 and other extant provisions/sections of Code and the rules made thereunder, C.P. (IB) No.199/BB/2018 is hereby admitted with the following consequential directions:

- (1) We hereby appointed **Shri Pankaj Srivastava** with **Regn.No.IBBI/IPA-001/IP-P00245/2017-18/10474**, as the Interim Resolution Professional (IRP) to conduct the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor namely M/s. OPTO Circuits (India) Limited, to carry out the functions as mentioned under the I&B Code, 2016 and the Rules framed by the IBBI from time to time.
- (2) The following moratorium is declared prohibiting all of the following, namely:
  - 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 of 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;

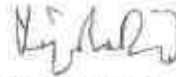
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
  - e. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.
  - f. The provisions of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial regulator.
  - g. The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process.
- (3) The IRP is directed to follow all extant provisions of the IBC, 2016 and the Rules including fees rules as framed by the IBBI from time to time.
- (4) The Board of Directors and all the staff of the Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by the IBBI.
- (5) The IRP is directed to file his progress reports to the Tribunal from time to time about the steps taken in pursuant to the CIRP. The IRP is further directed to take expeditious steps so as to complete the process of CIRP well before stipulated time.



(6) Post the case for report of the IRP on **20<sup>th</sup> April, 2020**



**ASHUTOSH CHANDRA  
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA  
MEMBER, JUDICIAL**