

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**KOCHI BENCH, KOCHI**

**CP(IBC)/33/KOB/2023**

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

***In the matter of:***

M/s. Air Travel Enterprises India.

**Memo of parties: -**

Union Bank of India, Chalai Bazar Branch, Chalai, Thiruvananthapuram, Kerala- 695 036. Having registered office at 239, Vidhan Bhavan Marg, Nariman Point, Mumbai- 400 021. **... Financial Creditor.**

**-Versus-**

M/s. Air Travel Enterprises Indian Ltd., 1<sup>st</sup> Floor, New Corporation Building, Palayam, Thiruvananthapuram, Kerala- 695 033. **... Corporate Guarantor.**

**Order delivered on: 22.12.2023**

***Coram:***

**Hon'ble Member (Technical)**

**Shyam Babu Gautam**

**Hon'ble Member ( Judicial)**

**TMT. Justice (Retd.) T. Krishna Valli**

***Appearances:***

For the Financial Creditor : Mr. C.P. Anil Raj, Adv.

For the Corporate Guarantor : Dr. K.S. Ravichandran, PCS.

## **ORDER**

### **Per: Coram**

1. Under consideration is Petition No. CP(IBC)/33/KOB/2023 filed by the Financial Creditor, Union Bank of India Ltd against the Corporate Debtor M/s. Air Travel Enterprises India Ltd., invoking Section 7 of the Insolvency and Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process for the total default amount of **Rs. 42,87,27,148/- (Rupees Forty-Two Crore Eighty-Seven Lakh Twenty-Seven Thousand One Hundred Forty-Eight Only)** in respect of credit facility availed by them from the Financial Creditor.
2. The facts as narrated in the application and explained by the Financial Creditor are summarized hereunder:
  - i. The Corporate Debtor is a company registered under the Companies Act, 1956 having its registered office at Trivandrum. The Corporate Debtor was incorporated for development and implementation of a Five Star Deluxe Resort Hotel at Bekal, Kasaragod. The Resort is being developed in land, consisting on an area of 55.43 Acres, which was acquired by Bekal Resorts Development Corporation Limited ("BRDC"), a Kerala Government undertaking and leased in favour of the Corporate

Debtor. The license for development of the land was originally granted by BRDC in favour of Air Travel Enterprises India Ltd. ("Air Travel"), a parent company of the Corporate Debtor, which was then holding more than 51% shareholding in the Corporate Debtor. Corporate Debtor was incorporated as a special purpose vehicle for implementation of the resort and after its incorporation, BRDC transferred the license in favour of the Corporate Debtor on 16.10.2010.

- ii. It is stated that for the project, the Corporate Debtor has availed various credit facilities from the Financial Creditor, Union Bank of India sanctioned Term loan of Rs.25 Crores on 12.06.2010. It is submitted that the security for sanctioning the above credit facility was paripassu first charge on the entire fixed assets (movable and immovable) of the Corporate Debtor, personal guarantee of Mr. E. M. Najeeb, Ellias Muhammed, Mr. Sahadulla M I, Mr. E Iqbal and Mr. Zaheer E.N and Corporate Guarantee of Air Travel Enterprises India Limited.
- iii. The Corporate Debtor had executed Demand Promissory Note, Term Loan Agreement, Agreement of Hypothecation of Movables, Guarantee Agreement etc. in favour of the Financial Creditor to realize the term loan amount with interest and costs/and all other receivable charges or including proceedings against the mortgaged property and hypothecated assets. The

Corporate Debtor has also executed necessary demand promissory note for Rs. 25 Crores in favour of the financial Creditor on 12.06.2010, 29.09.2012, 24.02.2014, 12.01.2015 and 01.07.2016. Further, M/s. Air Travel Enterprises India Ltd. represented by its Chairman had executed Corporate Guarantee and other directors gave Personal Guarantee on 2.7.2010, 29.9.2012, 24.2.2014 & 12.1.2015 for the outstanding debt. After availing the loan facility there was no proper repayment in spite of repeated requests made by the financial creditor. The account was classified as NPA on 30.9.2015 and the Corporate Debtor was called upon to repay the debt. But the same was not done. The debt is secured through equitable mortgage upon which paripassu charge is available to the Financial Creditor. Hypothecation of goods also is available.

- iv. Initially, IBA/01/KOB/2020 as filed under Section 7 of the IBC and an admission was granted by this Tribunal on 15.10.2020 and thereafter the matter was taken up in appeal and by the order dated 09.09.2021, the Hon'ble NCLAT had set aside the admission of the Section 7 application and thereafter directed the Corporate Debtor to settle the account within 6 months from the date of the appellate order. The amount as directed by the Appellate Tribunal was not paid by the corporate debtor and even now amount is remaining outstanding in the loan account. Even though the corporate debtor came up with a proposal for

settlement after the Hon'ble NCLAT judgment, the same, being not viable was not entertained by the Financial Creditor. The Personal Guarantor, who is the Corporate Guarantor herein is liable to repay the amount due to the financial creditor for the default committed by the Corporate Debtor.

- v. It is stated that since the borrower has defaulted in the repayment of the debt and the corporate guarantor is unable to pay the debt of Rs. 42,87,27,148/- as on 30.06.2023, the Financial Creditor has decided to initiate resolution process against the Corporate Guarantor under the Insolvency and Bankruptcy Code. It is stated that the Financial Creditor has invoked the Corporate Guarantee of the Corporate Guarantor on 29.12.2017 and the Corporate Guarantor to the Corporate Debtor failed to repay the debt to the Financial Creditor. Hence it is stated that this Company Petition requires to be admitted for commencing insolvency resolution process against the Corporate Guarantor.
- vi. It is stated that the Financial Creditor has served copy of the application to the Corporate Guarantor, Corporate Debtor and also to the proposed Resolution professional. The Financial Creditor also furnished the consent of the Proposed Resolution Professional.

3. On 01.11.2023, the Corporate Guarantor filed its reply statement and stated that the letters of Guarantee, last executed by the Corporate Guarantor is of 24th February 2014. No letter of guarantee is executed on behalf of/ by the Corporate Guarantor, as on 12th January 2012. The letters of Guarantee have been signed by the Corporate Guarantor on 02<sup>nd</sup> July 2010, 29<sup>th</sup> September 2012 and 24<sup>th</sup> February 2014. After which, there has not been any single acceptance or admission on the part of the Corporate Guarantor or any case initiated against the Corporate Guarantor.
4. It is stated that no guarantee is legally and validly subsisting, even without considering the aspect of the breach on the part of the Financial Creditor in providing timely financial aid as per the loan agreements.
5. It is stated that even assuming that the Guarantee has been invoked, it is a clear case of expiry of the period of limitation, specified under Section 137 of the Limitation Act, 1963. Moreover, when a joint action was authorised which includes this Applicant also and State Bank of India closed the matter under One-Time Settlement with the M/s. Green Gateway Leisure Limited ('Corporate Debtor') and all such developments/correspondences/proceedings/actions are not within the knowledge of this Corporate Guarantor, it can only be said that nothing is remaining live or enforceable, as far as this Corporate Debtor is concerned.

6. It is stated that the document dated 12.01.2015 was not executed by the Corporate Guarantor. Therefore, this Application, is the first application, in relation to this Corporate Guarantor initiated by this Financial Creditor on the basis of a guarantee dated 24.02.2014.
  
7. It is stated that the Financial Creditor had taken out IBA/01/KOB/2020, which resulted in ordering CIRP against the Corporate Debtor on 15.10.2020 and a perusal of the said Order will be clearly establishing that vide an Order dated 24.02.2020 passed in pursuance of IA(IBC)/46/KOB/2020, this Corporate Guarantor was specifically impleaded in the action by this Financial Creditor. While CIRP was ordered against the Corporate Debtor, no relief was granted against the Corporate Guarantor. Subsequently an Appeal filed against the Order dated 15.10.2020, which resulted in the decision of the Hon'ble NCLAT dated 09.09.2021. Therefore, no fresh action can again be brought against this Corporate Guarantor and the Order of this Adjudicating Authority and the Hon'ble NCLAT having become final, this Financial Creditor cannot bring a fresh action and therefore, this Application is untenable, invalid and not legally enforceable.
  
8. It is stated that even after the aforesaid decision of the Hon'ble NCLAT this Financial Creditor had once again brought another Application under Section 7 being CP(IBC)/46/KOB/2022 and it will

be useful to note that this particular application was directed only against the Corporate Debtor, as per the Order dated 25.01.2023.

9. It is further stated that the date of default is always prior to the date of classification of the account of Corporate Debtor as NPA. Since, the date of NPA is mentioned as 30.09.2015, if there is any legal right, as against the Corporate Guarantor, it starts from the date of default.
10. It is stated that Section 13(2) SARFAESI notice does not acknowledge any liability on the part of this Corporate Guarantor and it serves no purpose, neither to fasten liability on this Guarantor nor to serve as extending time for any legal action.
11. It is stated that the Financial Creditor has placed its reliance once again on OTS letter issued by the Corporate Debtor; which cannot extend the period of limitation, even for the purposes of pursuing case against the Corporate Debtor, not to speak about overcoming the limitation aspect for invoking Section 7 Application as against the Corporate Guarantor.

**FINDINGS: -**

12. We have heard the learned counsel for both parties and perused the entire case records/documents. We have also gone through the

evidence on record. On hearing both sides and with an appreciation of the documents produced, the following four issues are framed: -

- i. Whether the Petition maintainable under Section 7 of IBC?
- ii. Whether the application is barred by limitation?
- iii. Whether there is a Creditor-Debtor relationship between the Financial Creditor and Corporate Debtor herein?

13. **Issue No. i.** We have gone through Part IV of the Petition wherein the total days of default is 04.07.2023 and the total default amount is shown as Rs. **42,87,27,148/- (Rupees Forty-Two Crore Eighty-Seven Lakh Twenty-Seven Thousand One Hundred Forty-Eight Only)**. In the aforesaid circumstances, we have gone through the settled law decided by the Hon'ble NCLAT in its order in ***Mr. Manmohan Singh Jain Vs. M/s. State Bank of India & another (Company Appeal (AT) (CH) (INS) No. 97 of 2021)*** wherein the Hon'ble NCLAT held that: -

*52) Further the Learned Counsel for the Appellant relied upon the Judgment of the Hon'ble Supreme Court in Surendra Trading Co. v Juggilalkamapat Jute Mills Co., 2017 85 taxmann.com 372 SC to show that the timelines under Section 7(5) of the Insolvency and Bankruptcy Code are not mandatory however the defect has still to be removed. As*

*stated above, the Respondent/Financial Creditor had stated the date of default in the pleadings and in other documents which the Corporate Debtor has received and acknowledged, therefore as held supra the non-mentioning of the date of default in Col. IV is not fatal to the application and on the sole ground, the application cannot be rejected mere taking a technical impediment as held by the Hon'ble Supreme Court that 'it is only a directory'.*

14. In the aforementioned case the Hon'ble NCALT clearly stated that Section 7 IBC cannot be rejected due to technical snags. Therefore, the contention of the Corporate Debtor regarding NPA and date of default has no legs to stand.

15. **Issue no: ii.** To arrive at a definitive conclusion, with regard to this issue, we have gone through Section 238A of the IBC, 2016 which defines "Limitation": -

**Section 238A: Limitation.**

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

16. To get further clarity on this issue, we have gone through Article 137 of the Limitation Act, 1963 which reads as under:

**PART II—OTHER APPLICATION**

<i>137. Any other application for which no period of limitation is provided elsewhere in this Division.</i>	<i>Three years</i>	<i>When the right to apply accrues.</i>
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17. It is settled law as decided by the Hon'ble NCLAT in its order in ***Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.*** (Company Appeal (AT) (Insolvency) No. 44 of 2017) that, those provisions of the IBC cannot be shackled by the Limitation Act. It was observed that: "There is nothing on record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the appellant also failed to lay a hand on any of the provisions of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I&B Code, 2016 is not an Act for recovery of money claim, it relates to the initiation of the Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having a continuous cause of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted." We, therefore, are not agreeable with the submissions made by the Corporate Debtor regarding the limitation in filing this application.

18. Thereafter we have gone through the Judgment of Hon'ble Supreme Court in ***Laxmi Pat Surana Versus Union Bank of India & Anr.***

*(CIVIL APPEAL NO. 2734 OF 2020)*, wherein the Hon'ble Supreme Court held that the financial creditor has not only the right to recover the outstanding dues by filing a suit but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledge of liability and failure of both to discharge that liability and 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.

19. As far as the issue before us, on perusal of the records, we found that the IBA/01/KOB/2020 was initiated against the Corporate Debtor/Principal Borrower on 15.10.2020 by this Tribunal. Subsequently, the Corporate Debtor filed an appeal Hon'ble NCLAT and as per the order dated 09.11.2021, the Hon'ble NCLAT granted 6 months' time period for settling the entire liability between the Financial Creditor and Corporate Debtor. It is also seen that the Corporate Debtor filed OTS proposals admitting the liability on 14.01.2022 and 19.03.2022 and sought time for settlement. But the Corporate Debtor did not comply with the direction of the Hon'ble NCLAT and due to the same reason, the Financial Creditor approached this Tribunal by filing CP(IBC)/46/KOB/2022 which was admitted by this Tribunal vide order dated 25.01.2023. Therefore, there is a continuous cause of action and we could come to a conclusion that the

Company Petition has been filed within the prescribed period of limitation. Hence the contention taken by the Corporate Debtor regarding limitation has no force.

20. **Issue no. iii.** As there is a default in the payment of the financial debt, which has been confirmed by them in the counter affidavit that the Financial Creditor paid the money to the Corporate Debtor, we are of the view that the present application filed by the Financial Creditor satisfies all the definitions of “Financial Creditor”, “Default” and “Financial Debt” and qualifies for applying for Insolvency and Bankruptcy Code. By mentioning various procedural hurdles, the Corporate Debtor cannot wash off its hands in repaying the amount borrowed, which is a financial debt owed by them. Hence, there is a Creditor-Debtor relationship with them.

21. It is seen from the letters of guarantee dated 02.07.2010, 29.09.2012, 24.02.2014 and 12.01.2015 the application made by the Financial Creditor is complete in all respects as required by law, and it clearly shows that the debt has not been paid by the Corporate Guarantor. So, we are of the considered opinion that the present application of the Petitioner/ Financial Creditor may be admitted under Section 7 of the IBC, 2016 and CIRP initiated against the Corporate Guarantor.

22. In view of the aforesaid observations, we hereby pass the following Orders.

- i. The petition bearing CP (IBC) No. /33/ KOB /2022, filed by M/s. Union Bank of India, the Financial Creditor, under Section 7 of Insolvency and Bankruptcy Code 2016 for initiating CIRP against the Corporate Guarantor M/s. Air Travel Enterprises India Limited., is **ADMITTED**.
- ii. There shall be a moratorium under Section 14 of the Code.
- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until the Adjudicating Authority approves the Resolution Plan under Sub-Section (1) of Section 31 of IBC or passes an order for liquidation of Corporate Debtor under Section 33 of the Code, as the case may be.
- iv. Public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations 2016.
- v. The Financial Creditor has proposed the name of one **Mr. CA Rajmohan R.** having Registration Number: **IBBI/IPA-001/IP-P02331/2020-2021/13517** as Interim Resolution Professional (IRP) and a written communication in the format prescribed under Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 along with valid authorization has been filed by the proposed IRP, who is appointed as the IRP to take forward the process of Corporate

Insolvency Resolution of the Corporate Guarantor. The designated IRP must take any additional actions in this regard that are mandated by the law, more specifically specified in Sections 15, 17, and 18 of the Code. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Guarantor in terms of the provisions of IBC, 2016. The fee payable to IRP or as the case may be, the RP shall comply with such Regulations, Circulars and Directions as may be issued by the Insolvency and Bankruptcy Board of India (IBBI). The IRP shall carry out its functions as contemplated by Sections 15 and 21 of the Code.

- vi. During the CIRP period the management of the Corporate Guarantor shall vest with the IRP or, as the case may be the RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow.
- vii. The IRP/RP shall submit to this Adjudicating Authority periodical reports as per Regulations/Rules concerning the progress of the CIRP in respect of the Corporate Guarantor.
- viii. The Financial Creditor shall deposit a sum of Rs.2,00,000/- (Two Lakhs Only) with the IRP to meet the expenses arising out of

issuing publication and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (CoC).

- ix. In terms of Section 7 (5)(a) of the Code, the Registry is hereby directed to communicate a copy of this Order to the Financial Creditor, the Corporate Guarantor and IRP by Speed Post & e-mail immediately, and in any case, not later than two days from the date of this order.
- x. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, Kerala, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Tribunal within seven days from the date of receipt of a copy of this order.

**SHYAM BABU  
GAUTAM** Digitally signed by  
SHYAM BABU GAUTAM  
Date: 2023.12.22  
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**SHYAM BABU GAUTAM  
(MEMBER TECHNICAL)**

**T.KRISHNAV  
ALLI** Digitally signed by  
T.KRISHNAVALLI  
Date: 2023.12.22 14:01:03  
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**T KRISHNA VALLI  
(MEMBER JUDICIAL)**

Signed on this 22<sup>nd</sup> day of December, 2023.

Rajasree R. Nair/LRA