

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

IBA/826/2020

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of ***M/s. JBM Shelters Private Limited***

LICHFL Trustee Company Private Limited

in its capacity as the Trustee of LICHFL Urban Development Fund
a contributory trust formed a Scheme of a
trust known as "LICHFL Fund"
Acting through its investment Manager LICHFL Asset Management
Company Limited, Bombay Life building,
2nd Floor, 45/47,
Veer Narima Road, Mumbai – 400 001

... Financial Creditor

-Vs-

M/s. JBM Shelters Private Limited

JBM Enclave, No.47, Bazar Road,
Pallavaram,
Chennai – 600 043

...Corporate Debtor

Present

For Financial Creditor : *R. Shankaranarayanan, Senior Advocate
For Vinod Kumar, Advocate
M.D. Srinivasan, Advocate*

For Corporate Debtor : *Avinash Krishnan Ravi, Advocate*

Order Pronounced on 7th September 2021

CORAM :

**R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**



ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

Under Adjudication is an Application that has been filed by **M/s. LICHFL Trustee Company Private Limited** (hereinafter referred to as '*Financial Creditor*') under Section 7 of the Insolvency & Bankruptcy Code 2016 (in short, 'I&B Code, 2016') r/w Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **M/s. JBM Shelters Private Limited** (hereinafter referred to as '*Corporate Debtor*'), to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out about the Financial Creditor from which, it is evident that the Financial Creditor is a Trustee of LICHFL Urban Development Fund, a contributory trust formed as a Scheme of trust known as "LICHFL Fund". Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN:U45200TN2006PTC060909 was incorporated on 08.08.2006 and the Registered Office of the Corporate Debtor as per the Application is stated to be situated at JBM Enclave, No.47 Bazar Road, Pallavaram, Chennai – 600 043. As per Part III of the



application, the Financial Creditor has proposed the name of one Mr. Tharuvai Ramachandran Ravichandran, as the Interim Resolution Professional, who has also filed his consent in Form – 2.

3. From Part-IV of the Application, it is seen that a sum of Rs.68,64,47,800/- (Rupees Sixty Eight Crore Sixty Four Lakh Forty Seven Thousand Eight Hundred only) is being claimed by the Financial Creditor as the Financial debt. The date of default is mentioned as 27.09.2018. Part – V of the Application discloses the details of the documents which have been filed by the Financial Creditor in order to prove the 'Financial debt', which are as follows;

- a) Share Subscription cum Debenture Subscription and Shareholders Agreement dated 23.03.2015
- b) Debenture Trust Deed dated 23.03.2015
- c) Debenture trustee appointment agreement dated 23.03.2015
- d) Debenture certificates issued by the Corporate Debtor to the Financial Creditor along with OFCDs allotment forms filed by the Corporate Debtor with RoC.
- e) First supplementary agreement dated 24.03.2018
- f) Second supplementary agreement dated 24.07.2018
- g) Deed of Corporate guarantee executed by the Corporate Debtor dated 09.04.2015 along with authorizing board resolution.
- h) Ledger account statements of the Corporate Debtors account maintained by the Financial Creditor.
- i) Audited financial statement of the Corporate Debtor as on 31.03.2019 along with form AOC 4 filed with RoC.



- j) Notice of demand invoking corporate guarantee dated 12.03.2020 issued by Applicant to the Corporate Debtor.

4. The Learned Counsel for the Financial Creditor submitted that the Corporate Debtor herein stood as a Corporate Guarantor for JBM Homes Private Limited (*hereinafter referred to as "Principal Borrower"*) towards the amount invested in the form of Debentures by the Financial Creditor. It was submitted by the Learned Counsel for the Financial Creditor that the Principal borrower along with the promoters had entered into a Share Subscription cum Debenture Subscription and Shareholders Agreement (*hereinafter referred to as "Agreement"*) on 23.03.2015. As per the recitals found in the said Agreement dated 23.03.2015, it is seen that the Principal Borrower is engaged in the business of developing and constructing real estate projects and is in the process of developing and constructing residential projects together with infrastructure in Chennai. Further, it is stated in the said Agreement that the following persons are the Promoters and shareholders of the Principal borrower viz. (1) Mr. B. Kamlesh Kumar, (2) Mr. B. Nirmal Kumar, (3) Mr. B. Anand Kumar, and (4) Mrs. N. Rekha.

5. Further, it is stated in the said Agreement that the Principal borrower proposes to develop 3 residential projects on the land



total admeasuring about 8.26 acre in Vandalur, Pammal and Anakaputhur and the project land comprises of;

(i) 1.61 acres held by the Promoters and their relatives in their individual capacities at Anakaputhur Village admeasuring 0.92 acres (Anakaputhur Project 1) and admeasuring 0.69 acres and consisting of about 50,348 sq.ft. of FSI (Pammal Project) on the basis of a joint development agreement entered into with the Company;

(ii) 1.03 acres at Vandalur village consisting of about 1.31.320 sq. ft. of FSI (Vandalur Project) held by JBM Shelter Private Limited through a power of attorney, with whom the Corporate Debtor has entered into an agreement for development and construction of residential project and an agreement for sale entered into with the owner/s of the Vandalur Project Land through the power of attorney holder being JBM Shelter Private Limited;

(iii) 5.63 acre at Anakaputhur Village (Anakaputhur Project 2) is proposed to be developed by the Corporate Debtor on a joint development basis (71 % area share to the Corporate Debtor and 29% area share to the landowner) by entering into a joint development agreement with the landowners.

6. Further, it is stated in the said Agreement dated 23.03.2015 that the Principal borrower and the promoters have represented to the Financial Creditor that the Principal borrower is in need of funds for the purpose of Infrastructure development of the above



mentioned projects and have therefore approached the Financial Creditor with a request to invest in the Principal borrower by subscribing to Equity Shares, Optionally Convertible Preference Shares and Optionally Fully Convertible Debenture (OFCDs) of the Corporate Debtor.


7. After due discussions and representations, the Financial Creditor has agreed to invest in the Company of the Principal borrower in the following three tranches;

- (i) In the first tranche by subscribing to 2,492 Equity shares of face value of Rs.10/- each per Equity Share, amounting to Rs.24,920/- and 7328 Optionally Convertible Preference Shares of Face Value of Rs.10/- each per Share for an aggregate consideration of Rs.73,280/- and 99,90,180 Optionally Fully Convertible Debenture of face value of Rs.10/- each for an aggregate amount of Rs.9,99,01,800/-.
- (ii) In the second tranche, subject to the conditions set out in this Agreement, by subscribing to 40,00,000 Optionally Fully Convertible Debenture of face value of Rs.10/- each for an aggregate consideration of Rs.4,00,00,000/-.
- (iii) In the third tranche, subject to the conditions set out in this Agreement, by subscribing to 1,10,00,000 Optionally Fully Convertible Debenture of face value of

Rs.10/- each for an aggregate consideration of Rs.11,00,00,000/-.

8. In pursuance to the same, it is also seen from the records that the Corporate Debtor herein had executed a Deed of Corporate Guarantee on 09.04.2015 in and by which the Corporate Debtor herein stood as a surety / guarantor for the liabilities of the Principal Borrower viz. JBM Homes Private Limited.

9. It is seen from the documents filed along with the Application that the parties here to have entered into a First Supplementary Agreement on 24.03.2018 and it is stated in the said Agreement dated 24.03.2018 that the Principal borrower had vide their letter dated 21.03.2018 represented to the Financial Creditor that due to decline in velocity of sales in the Vandalur Project coupled with delay in initiation of Pammal Project and Anakaputhur Project, the cash flow of the Principal Borrower has been adversely affected due to which the Principal Borrower is unable to provide an exit to the Financial Creditor. Hence the Principal Borrower and its promoters have requested the Financial Creditor to extend the tenure of its investment in the Company and that the Financial Creditor has agreed to extend the tenure of its investment in the Principal Borrower by six months.



10. Thereafter, it is seen that the parties hereto have entered into a Second Supplemental Agreement dated 24.07.2018 and it is stated in the said Agreement that as on 24.07.2018, the Financial Creditor has invested in aggregate a sum of Rs.11,00,00,000/- in two tranches and as per the conditions subsequent to the second closing, the Principal Borrower was required to *inter alia* (a) execute and register Joint Development Agreement and Power of Attorney in relation to the Anakaputhur Project 2 land within 45 days of Second closing; and (ii) obtain all statutory approvals required to commence construction and commence the construction, launch and sales of Pammal Project. However, the Principal Borrower had purchased 2.68 acre of Anakaputhur 2 land. For the balance portion of 2.95 acre of Anakaputhur Project 2 land, execution and registration of Joint Development Agreement and Power of Attorney is yet to be completed. Further, it is stated in the said Agreement dated 24.07.2018 that the Corporate Debtor and its promoters are in discussion with the Financial Creditor in relation to the delay in receipt of the statutory approvals for the Pammal Project and the delay in execution of the Joint Development Agreement and Power of Attorney for Anakaputhur Project 2 land and hence the third closing has not occurred. Thus, in partial modification of the same, the Financial Creditor has agreed to invest Rs.4,40,00,000/- out of the agreed Third Tranche of the Optionally Fully Convertible Debentures Amount of

Rs.11,00,00,000/- as the third tranche investment and on receipt of certain approvals invest the remaining Rs.6,60,00,000/- as the fourth tranche investment.

11. The Corporate Debtor has filed Counter and the Learned Counsel for the Corporate Debtor prima facie contended that the present Applicant deserves to be dismissed *in limine*, since the material facts have not been pleaded in the Application. Further, it was contended that there is no pleading in relation to the nature of transaction, the amounts already paid, the amount due and the date of default for arriving at the said date and nothing has been furnished by the Financial Creditor.

12. The Learned Counsel for the Corporate Debtor submitted that the relationship between the Financial Creditor and the Principal Borrower is in the nature of a Joint developer in a real estate project, which is evidenced by the fact that the Financial Creditor herein is a shareholder in the Corporate Debtor and has been holding equity shares constituting 19.95% of the shares of the Corporate Debtor, as per Clause 3.5 of the Agreement dated 23.03.2015. Further, the Learned Counsel for the Corporate Debtor in support of his contention, has pressed into service, the decision of the Hon'ble NCLAT in the matter of **Vipul Ltd. -Vs- Solitaire Buildmart Pvt. Ltd.**; *Company Appeal (AT)(Ins) No. 550 of 2020*,

wherein it has been held that the joint venture partners, being in the nature of shareholders in the Corporate Debtor in a real estate project, cannot sue another as Financial Creditor under Section 7 of IBC, 2016. Reliance was also placed upon the judgment of this Tribunal in the matter of **Ashok Sachdev -Vs- Call Express**, wherein Bench - I of this Tribunal has held that the shareholder of the Corporate Debtor, being in the nature of a partner of the business, who is entitled to share in the profits cannot file an application under Section 7 of IBC, 2016.

13. The Learned Counsel for the Corporate Debtor further submitted that the instant Application is barred by limitation as per the Judgment of the Supreme Court in the matter of **B.K. Educational Services Pvt. Ltd. -Vs- Paras Gupta & Associates, AIR 2018 SC 5601; Vashedo R. Bhojwani -Vs- Abhyudaya Co-operative Bank Ltd., (2019) 9 SCC 158; Gaurav Hargovindbhai Dave -Vs- Asset Reconstruction Company (India) Ltd., (2019) 10 SCC 572; Jignesh Shah and Anr. -Vs- Union of India, 2019 SCC Online 1254**; since as per Section 7 of IBC, 2016, the period of limitation for filing an Application is 3 years from the date on which the cause of action first arose and in the present case where there are reciprocal obligations, the date on which the contractual obligation is breached by a party is deemed to be the date on which cause of action arose.

14. Further, the Learned Counsel for the Corporate Debtor submitted that a perusal of the default clause as contained in Clause 21 of the Agreement dated 23.03.2015 would show that any material breach in the terms and conditions would deem to be an event of default and that clause 3.15(vi) manifests that all approvals should have been obtained within 60 days of the first closing and it was submitted that since the said approvals were not obtained within the said date, the default has occurred on 25.05.2015 and hence the cause of action for the Financial Creditor arose on 25.05.2015 and the same lapses on 25.05.2018, however the instant Application was signed on 31.07.2020 and hence, it is barred by limitation. Thus, it was contended that by the Learned Counsel for the Corporate Debtor that the present Application is liable to be dismissed.

15. It was also contended by the Learned Counsel for the Corporate Debtor that the Corporate Guarantee executed by the Corporate Guarantor is void *ab initio* in light of Section 23 of the Indian Contract Act, 1872 read with Section 186 of the Companies Act, 2013. It was submitted that a special Resolution from the members / shareholders of the Corporate Debtor would be required where the guarantee exceed 60% of its paid - up share capital, free reserves or 100% of its free reserve and it was submitted that the paid up share capital of the Corporate Debtor is

Rs.1,02,15,600/- whereas the amount of debt for which the guarantee is issued is Rs.18,39,01,800/- which is above the threshold limit prescribed under Section 186 of the Companies Act, 2013 and hence it was contended that the 'financial contract' as entered into between the parties is void *ab initio* and hence cannot be enforced by the Financial Creditor under the provisions of IBC, 2016.

16. The Financial Creditor has filed rejoinder and the Learned Counsel for the Financial Creditor, in reply to the contentions raised by the Corporate Debtor has submitted that it is not right on the part of the Corporate Debtor to state that there is no pleading in the Application in relation to the nature of transaction, the amounts already paid, the amount due and the date of default, since Part – IV of the Application clearly identifies the date of disbursement i.e. investments in debentures, principal amount and the redemption amount as per the Agreement dated 23.03.2015 and also the calculations made thereunder are attached as Annexure I(3) to the Application. Hence, it was submitted that the allegations made by the Learned Counsel for the Corporate Debtor in this regard are required to be brushed aside.

17. The Learned Counsel for the Financial Creditor submitted, the fact that the Financial Creditor being a shareholder does not have

any bearing on the liability of the Corporate Debtor to redeem the debentures, since the documents enclosed along with the Application clearly indicate the obligations of the Corporate Debtor to redeem the debentures at an agreed guarantee returns and the said fact clearly evidences the subsistence of a 'financial debt'. Further, it was submitted that the present Application has been filed solely in the capacity of the debenture holder of the Corporate Debtor and the Applicant is merely a financier for the projects which was made through several routes of investments such as preference shares, debentures and equity shares. Also it was submitted by the Learned Counsel for the Financial Creditor that apart from financing the development of the real estate projects of the Corporate Debtor, the Financial Creditor did not provide any services in relation thereto or share any of the obligation of the Corporate Debtor.

18. The Learned Counsel for the Financial Creditor submitted that the judgments relied on by the Corporate Debtor do not have any bearing on the present case and that the facts of the present case are not the same.

19. In relation to the aspect of limitation, the Learned Counsel for the Financial Creditor submitted that the non – exercise of its right to call upon the Corporate Debtor to cure the default in

obtaining necessary approvals for the project will not disentitle the Financial Creditor from proceeding against the Corporate Debtor, for the financial defaults committed by it. Also it was submitted that the debentures in respect of which the present application has been filed were subscribed by the Financial Creditors on 27.03.2015, 31.03.2015 and 26.07.2018 and the tenure of investment for the debentures were originally 36 months from the first tranche investment, which was to expire on 26.03.2018, which was subsequently extended till 26.09.2018. Thus, it was submitted that the starting point of limitation for claiming the amount is 27.09.2018 and the Application is filed before this Tribunal on 07.08.2020 and hence it is not barred by limitation. Further, reliance was also placed on the Statutory Audit of the Corporate Debtor for the year ended 31.03.2017, wherein under the heading Long Term borrowings, the debenture to the tune of Rs.13,99,01,800/- is admitted and it has been stated that the debenture carries interest at the rate of 22% and repayable in 4 years from 27.03.2015 and hence it was submitted that the present Application is filed well within the period of limitation.

20. In relation to the aspect of Corporate Guarantee, the Learned Counsel for the Financial Creditor in reply submitted that the shareholders of the Corporate Debtor in their Extra – Ordinary General Meeting held on 16.03.2015 and 09.04.2015 has passed a

Resolution approving provisions of Corporate guarantee to the debts of the Principal Borrower and hence it was contended that the guarantee provided by the Corporate Debtor is in compliance with the provisions of the Companies Act, 2013.

21. Heard the submissions made by the Learned Counsel for both the parties. From the averments made in the pleadings and also from the submissions made by Learned Counsel for both the parties, it becomes imperative for this Tribunal to frame the following issues;

- (i) *Whether the claim of the Application qualifies to be a 'financial debt' and as a consequence whether the Application can be treated as a 'financial creditor' in respect of the Corporate Debtor;*
- (ii) *Whether the Application as filed by the Financial Creditor is barred by limitation*

ISSUE NO. (I)

22. In so far as the issue No. (i) is concerned, it is to be noted that the main contention of the Learned Counsel for the Corporate Debtor is that the relationship between the Financial Creditor and the Corporate Debtor is in the nature of a Joint developer in a real estate project, and that the Financial Creditor herein is a shareholder in the Corporate Debtor and has been holding equity shares constituting 19.95% of the shares of the Corporate Debtor,

as per Clause 3.5 of the Agreement dated 23.03.2015. Further, as per the decision of the Hon'ble NCLAT in the matter of **Vipul Ltd.** (*supra*) a joint venture partners, being in the nature of shareholders in the Corporate Debtor in a real estate project, cannot sue another as Financial Creditor under Section 7 of IBC, 2016. Further, the judgment of this Tribunal in the matter of **Ashok Sachdev** (*supra*), has held that the shareholder of the Corporate Debtor, being in the nature of a partner of the business, who is entitled to share in the profits cannot file an application under Section 7 of IBC, 2016.

23. In order to address the said contention it is necessary to refer to the Judgment rendered in the matter of **Vipul Ltd.** (*supra*). In the said case, as per the terms of the Master Development Agreement, the Financial Creditor is required to pay certain amount towards its share in the project. However as to the facts of the case on hand the Financial Creditor is a debenture holder and has a right to redeem the debenture.

24. As per the definition of the expression 'financial debt' in sub-section 8 of Section 5 of IBC, 2016 which is as follows:-

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-



- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;

25. Thus, it is seen from the above definition that any amount raised pursuant to the debentures would partake the character of a

'financial debt'. Just because the Financial Creditor is also equity shareholder in respect of the Corporate Debtor would not debar the Financial Creditor from initiating the Corporate Insolvency Resolution Process against the Corporate Debtor. In this context it significant to refer to the decision of the Hon'ble NCLAT in the matter of **India Power Corporation Limited -Vs- Meenakshi Energy Limited and Others** in *Company Appeal (AT)(Ins) No. 1220 of 2020* has held that eventhough a financial creditor became a shareholder of the Corporate Debtor, the same will not bar the financial creditor cum shareholder to file an application to initiate CIRP against the corporate debtor so long as a financial debt is owed.

26. Also the Hon'ble Supreme Court in the matter of **Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India;** (2019) 8 SCC 416 by referring to several earlier judgments including **Innoventive Industries Ltd. Vs. ICICI Bank Ltd;** (2018) 1 SCC 407 and **Swiss Ribbons Pvt. Ltd. And Anr. Vs. Union of India and Others;** (2019) 4 SCC 17 held that even individuals who were 'debenture holders' and fixed deposit holders could also be financial creditors who could initiate the Corporate Insolvency Resolution Process.



27. Thus, the contentions raised by the Learned Counsel for the Corporate Debtor by referring to the decision of the Hon'ble NCLAT is very much discernable to the facts of the present case and hence, this Tribunal holds that the claim of the Application qualifies to be a 'financial debt' and the Applicant can be treated as 'financial creditor' in respect of the Corporate Debtor.

ISSUE NO. (II)

28. In so far as the issue of limitation is concerned, it was the contention of the Learned Counsel for the Corporate Debtor that as per default clause in Clause 21 of the Agreement dated 23.03.2015, any material breach in the terms and conditions would deem to be an event of default and that clause 3.15(vi) manifest that all approvals should have been obtained within 60 days of the first closing and the said approvals were not obtained within the said date and hence the default has occurred on 25.05.2015, therefore, the cause of action for the Financial Creditor arose on 25.05.2015 and the same lapses on 25.05.2018.

29. In order to address the said issue, it is necessary to set out the facts correctly. It is seen that the parties have entered into a First Supplementary Agreement on 24.03.2018 and it is stated in the said Agreement that due to decline in velocity of sales in the Vandalur Project coupled with delay in initiation of Pammal Project

and Anakaputhur Project, the cash flow of the Corporate Debtor have been adversely affected due to which the Corporate Debtor is unable to provide an exit to the Financial Creditor.

30. Further, the parties hereto have entered into a Second Supplemental Agreement dated 24.07.2018 and it is stated in the said Agreement that the Corporate Debtor and its promoters are in discussion with the Financial Creditor in relation to the delay in receipt of the statutory approvals for the Pammal Project and the delay in execution of the Joint Development Agreement and Power of Attorney for Anakaputhur Project 2 land and hence the third closing has not occurred. Hence, in partial modification of the same, the Financial Creditor has agreed to invest Rs.4,40,00,000/- out of the agreed Third Tranche of the Optionally Fully Convertible Debentures Amount of Rs.11,00,00,000/- as the third tranche invest and on receipt of certain approvals invest the remaining Rs.6,60,00,000/- as the fourth tranche investment.

31. Also in relation to the aspect of Corporate Guarantee it is apt to refer to the decision of the Hon'ble Supreme Court in the matter of **Laxmi Pat Surana -Vs- Union Bank of India & Anr.** in Civil Appeal No. 2734 of 2020 wherein it was held that the liability of the Corporate Guarantor is co extensive with that of the Principal

Borrower and that acknowledgment given by the Principal Borrower also binds the Corporate guarantor;

27. In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor. The definition of "corporate guarantor" in Section 5(5A) of the Code needs to be so understood.

28. A priori, we find no substance in the argument advanced before us that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stands answered against the appellant.

38. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.

41. The appellant was at pains to persuade us that the intention behind the communication dated 08.12.2018 sent to the financial creditor by the corporate guarantor (corporate debtor) is a triable matter, as it was sent without prejudice. We are not impressed by this submission. The fact that the principal borrower had availed of credit/loan and committed



default and that the (corporate) guarantor/corporate debtor had offered guarantee in respect of the loan account is not disputed. What is urged by the appellant is that the acknowledgment of liability to pay the amount in question was by the principal borrower and that acknowledgment cannot be the basis to proceed against the corporate guarantor (corporate debtor). Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. 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 acknowledgment of liability and failure of both to discharge that liability.

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

32. Thus, from the facts which are borne on record, as narrated above, would show that the 'debt' is not barred by limitation and the submissions made by the Learned Counsel for the Corporate Debtor that the cause of action for the Financial Creditor arose on 25.05.2015 and the same lapses on 25.05.2018, is factually incorrect, since by virtue of the Second supplemental agreement, the Financial Creditor has invested Rs.4,40,00,000/- Optionally Fully Convertible Debentures. Hence, in all respects the 'debt' as

claimed by the Financial Creditor is well within the period of limitation.

33. Further, from the Annexure – B to the Independent Auditor Report for the Financial year ended 31.03.2019, it is stated as follows;

(viii) In our opinion and according to the information and explanations given to us, the Company does not have any borrowing from banks and the Company has not defaulted in the repayment of loans or borrowings to financial institutions and dues to debenture holders except as under;

PARTICULARS	AMOUNT OF DEFAULT OF REPAYMENT OF DUES (₹)		PERIOD OF DEFAULT
	PRINCIPAL	INTEREST	
Due to Debenture holders	183,901,800	Nil (Refer paragraph 1 of the Basis for qualified opinion in the auditor report)	The debentures were due with interest on 07.10.2018. However, the Company has not yet repaid the debentures as at March, 31 2019.

34. It is to be noted here that the figures as reflected in the above tables are the excerpts from the Annual Accounts and Statutory Auditors Report duly approved in the Annual General Meeting concerned. Further, it is also seen from the typed set filed along with the rejoinder, that the Corporate Debtor has given an offer for One Time Settlement to the Financial Creditor on 18.02.2021 and the said letter is captured hereunder;

Annexure - F

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February 18, 2021

To

M/s. LICHFL Asset Management Company Ltd
304, 3rd Floor, Vibgyor Towers,
BandraKurla Complex, Bandra (East)
Mumbai - 400 051

Dear Sir

SUB: OFFER FOR ONE TIME SETTLEMENT - WITHOUT PREJUDICE

In furtherance to our conversations for settling the loans availed from your good self, we hereby offer a sum of INR 18.40 crores, being the total principal amount due from us to you, as one time settlement. We propose to pay the said sum within a span of one year from the date of acceptance of this offer, whereby an upfront payment of INR 2 crores shall be paid by us before 31.03.2021. The remaining 16.40 crores shall be paid in 4 equal installments, on or before 30.06.2021; 30.09.2021; 31.12.2021 and 31.03.2022 respectively.

We look forward to hearing from you in this regard and we hope that you would give us an opportunity to discuss this offer with you, in person at your convenience.

Thanking You.

Yours Sincerely,

For JBM HOMES PVT LTD


DIRECTOR

JBM Homes Pvt. Ltd.,

JBM Enclave, # 47 Bazaar Road, Pallavaram, Chennai-600043 | Ph: 044-22640666, 22640754
e mail : jbmshelters@gmail.com



35. The above referred two documents would show that the Principal Borrower has committed 'default' in the repayment of the debentures issued by the Financial Creditor for a sum of Rs.18.40 Crore. Also, the date on which the above two documents are referred would further show that the Application filed by the Financial Creditor is not barred by limitation. Under the said circumstances, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

36. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that this Application as filed by the Applicant – Financial Creditor is required to be admitted under Section 7 (5) of the IBC, 2016

37. The Financial Creditor has proposed the name of one **Mr. THARUVAI RAMACHANDRAN RAVICHANDRAN** having Registration Number **[IBBI/IPA-002/IP-N00241/2017-2018/10692]** (*email id:- trravichandran@yahoo.com*) 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 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 Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. 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 Debtor in terms of the provisions of IBC, 2016.

38. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

- a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization



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 respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

39. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) 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.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the

value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

- (3) The provisions of sub-section (1) shall not apply to
- (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
 - (b) a surety in a contract of guarantee to a corporate debtor.

40. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

41. Based on the above terms, the Petition stands **admitted** in terms of Section 7 of the Code and the Moratorium shall come into effect as of this date. A copy of the order shall be communicated to the Petitioner as well as to the Respondent above named by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Further, the IRP above named be also furnished with copy of this order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

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(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond