"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

WEDNESDAY, THE 10TH DAY OF AUGUST 2022 / 19TH SRAVANA, 1944

WP(C) NO. 7444 OF 2022

PETITIONER/S:

MANGO MEADOWS AGRICULTURAL PLEASURE LAND (PVT. LTD.)
A COMPANY INCORPORATED UNDER THE PROVISIONS OF INDIAN COMPANIES ACT,2013, HAVING ITS REGISTERED OFFICE AT BUILDING NO.XV/175A, MANGO MEADOWS, AYAMKUDY P.O., KADATHURUTHI, KOTTAYAM-686 613, REPRESENTED BY ITS MANAGING DIRECTOR N.K.KURIAN

BY ADVS.
GEORGE POONTHOTTAM (SR.)
NISHA GEORGE
JOMON.K.CHACKO

RESPONDENT/S:

1 UNION OF INDIA
MINISTRY OF ENVIRONMENT & FOREST, 2ND FLOOR, AGNI BLOCK, INDIRA PARYAVARAN BHAWAN, JORBAGH ROAD, NEW DELHI-110 003, REPRESENTED BY ITS SECRETARY.

2 STATE OF KERALA,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001, REPRESENTED BY CHIEF SECRETARY

3 KERALA STATE BIO-DIVERSITY BOARD,
BELHAVEN E ST, BELHAVEN GARDEN, NANTHANCODU, THIRUVANANTHAPURAM-695 003, REPRESENTED BY ITS CHAIRMAN

4 M.G UNIVERSITY,
PRIYADARSHINI HILLS, ATHIRAMPUZHA, KOTTAYAM-686 560, REPRESENTED BY ITS REGISTRAR

5 KERALA FORESTS AND WILDLIFE DEPARTMENT,
HEADQUARTERS, VAZHUTHACAUD, THIRUVANANTHAPURAM-695 014 REPRESENTED BY THE SECRETARY

6 KERALA FINANCIAL CORPORATION,

VELLAYAMBALAM, THIRUVANANTHAPURAM-695 033, REPRESENTED BY CHAIRMAN/MANAGING DIRECTOR

7 DEPARTMENT OF FINANCE FIRST FLOOR, MAIN BLOCK, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001, REPRESENTED BY THE SECRETARY

8 KADUTHURUTHY GRAMAPANCHAYATH, KADUTHURUTHY , KADUTHURUTHY P.O., KOTTAYAM-686 604, REPRESENTED BY ITS SECRETARY

9 KOSAMATTOM FINANCE LTD, (NON-BANKING FINANCING COMPANY), KOSAMATTAM MATHEW K, CHERIAN BUILDINGS, MARKET JUNCTION, KOTTAYAM-686 001, REPRESENTED BY ITS MANAGING DIRECTOR

10 NATIONAL COMPANY LAW TRIBUNAL, KOCHI BENCH, COMPANY LAW BHAVAN, BMC ROAD, THRIKKAKARA P.S., KAKKANAD, KOCHI-682 021, REPRESENTED BY THE OFFICE MANAGER

BY ADVS.
SHRI.JOSEPH RONY JOSE, CGC
ADV. VENUGOPAL.M.R
SHRI.JUSTINE JACOB, SC, KADUTHURUTHY GRAMA PANCHAYATH
JOLLY JOHN
DHANYA P.ASHOKAN(K/001671/2000)
S. MUHAMMAD ALIKHAN(K/000644/2020)
LIZA MEGHAN CYRIAC
IRENE BABU

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLLY HEARD ON 27.06.2022, THE COURT ON 10.08.2022 DELIVERED THE FOLLOWING:

"CR"

JUDGMENT

Dated this the 10th day of August, 2022

The petitioner Company is conducting an Agricultural Theme Park in Ayamkudi in Kottayam District. For the purpose of its business, the company had availed loans from the 9th respondent. Thus, an amount of Rs.4 Crores was taken as loan in the year 2015, Rs.8 Crores in 2016 and Rs.2 Crores in 2017. From the sanctioned amount, the 9th respondent adjusted Rs.4 Crores towards interest. During the initial period, the loans were repaid on a regular basis, but with the spread of Covid-19 pandemic, resultant lockdown and related issues, the business suffered huge setback and it became impossible for the Company to remit the instalments on time. Without heeding to the Company's request for

granting time to augment its business, the 9th respondent initiated SARFAESI proceedings and took symbolic possession of the immovable property given as security for the loans. Petitioner challenged the proceedings before the Debts Recovery Tribunal by filing Securitisation Application No.174 of 2019 and the DRT granted a stay on 21.05.2019, subject to remittance of a portion of the amount. While so, the 9th respondent filed Ext.P7 application before the National Company Law Tribunal under Section 7 of the Insolvency and Bankruptcy Code, 2016 [IBC] r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. This writ petition is filed seeking a declaration that Section 7 of the IBC and the Form appended thereto are unconstitutional. The challenge is on the premise that no power is conferred on the 'adjudicating authority' to

adjudicate on any issues on the filing of an application Under section 7 by a financial creditor, and the adjudicating authority is under statutory compulsion to appoint a Resolution Professional. While admitting the writ petition, this Court granted an interim order staying all further proceedings pursuant to Ext.P7.

2. Adv.Jolly John, learned Counsel appearing for the 9th respondent, urged that the question of maintainability of the writ petition should be heard immediately since the interim order is causing extreme prejudice to his client. It is contended that, as per order dated 25.01.2018 in SLP(C) No.1740 of 2018 ***[Shivam Water Treaters Pvt Ltd v. Union of India (UOI) others] [2018 SCC OnLine SC 3708]***, the Honourable Supreme Court has requested the High Courts not to enter into the debate pertaining to the

validity of the Insolvency and Bankruptcy Code, 2016 or the Constitutional validity of the National Company Law Tribunal. Further, all issues mooted in the writ petition are settled by the decisions of the Apex Court in ***Swiss Ribbons (P) Ltd v. Union of India [(2019) 4 SCC 17].***

3. Adv.George Poonthottam, learned Senior Counsel appearing for the petitioner, put forth the following contentions;

The very objective of IBC is to ensure revival and continuation of the corporate debtor. The petitioner Company is the world's first agricultural theme park spread across 30 Acres of land. The park has more than 4800 species of plants including 700 species of trees, 900 species of flowering plants, 1900 species of medicinal and aromatic plants and 180 varieties of vegetables. Trees and plants associated with Christian and Hindu religious beliefs are

showcased in the biodiversity park developed over a period of 20 years. There is a bird sanctuary with different species of local and migratory birds. The park also has an animal husbandry wing with cows, goats, rabbits and ducks. The biodiversity park has acquired international standards due to the untiring efforts of the Managing Director and his love for nature. Each plant and tree was grown over the years under his personal care and attention. After extensive pilgrimages through the whole of South India, an exact replica of the traditional serpent grove (sarpakkavu) has been developed in the park. Therefore, unlike other companies, the petitioner company cannot survive if its conduct is entrusted to strangers. Unfortunately, the scheme of IBC, particularly Section 7, does not provide for any such consideration by the adjudicating authority. Going by the plain language of the

provision, once a proper application is filed under Section 7 along with requisite documents and the adjudicating authority finds the corporate debtor to be in default, the application has to be admitted, upon which the resolution process gets triggered. As such, the role of the adjudicating authority is mechanical, without any element of discretion. Adjudication is a process that requires consideration of the claims of rival parties before arriving at a decision. The absence of such a process in Section 7 militates against fundamental rights guaranteed under Article 14 of the Constitution. Section 7 also discriminates between 'financial creditors' like the 9th respondent and the claims of 'operational creditors' dealt with under Section 8 of IBC. The prayer in the writ petition being for a declaration that Section 7 is ultra vires the Constitution, the objection against

maintainability is liable to be rejected. The order in ***Shivam Water Treaters Pvt Ltd*** (*supra*) was rendered in the context of that particular case, which was filed against an order passed by the Gujarat High Court, repelling the challenge against the maintainability of a petition assailing the constitution and composition of the NCLT Ahmedabad Bench.

4. Learned Counsel for the 9th respondent reiterated the contention based on ***Shivam Water Treaters Pvt Ltd*** *(supra)* and pointed out that the position canvassed by the Senior Counsel is no longer *res integra* in view of the exhaustive judgment rendered in ***Swiss Ribbons (P) Ltd*** upholding the constitutional validity of the IBC provisions, including Section 7. The Apex Court has made it clear that the IBC is a beneficial legislation and the resolution process is not adversarial, but, in fact, protective of the

interests of the corporate debtor

5. As the petitioner is challenging the constitutional validity of a statutory provision, it is only appropriate to consider the guidelines indicated by the Apex Court as to the manner in which such a challenge is to be dealt with. The legal position categorically laid down by the precedents is to the effect that the presumption should always be in favour of constitutional validity of a statutory provision and courts should lean in favour of the view that would sustain validity. In order to sustain the presumption of maintainability, courts may take into consideration matters of common knowledge, matters of common import and the history of the times. The Court must therefore adjudge the constitutionality of a legislation by the generality of its provisions and not by its crudities, inequities or possibilities of the

abuse of any of its provisions. It has to be presumed that the legislature understands and correctly appreciates the needs of its own people and the discrimination, if any, is based on adequate grounds. In this context, the following paragraphs in ***Subramanian Swamy v. CBI [(2014) 8 SCC 682]*** *assumes relevance;*

> *"49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering*

legislation invalid are now well recognised and these are : (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

6. Applying the principles laid down in the precedents to the challenge against constitutional validity of Section 7 of IBC, it will have to be unhesitatingly held that the challenge is without merit. Ample support for arriving at such conclusion is available from the

decisions in ***Innoventive Industries Ltd v. ICICI Bank [(2018) 1 SCC 407]*** and ***Swiss Ribbons (P) Ltd*** *(supra).*

7. Having carefully gone through the decisions rendered, after surgical analysis of the objects, scheme and provisions of IBC, I find that the challenge against Section 7, based on the contention that it has no space for adjudication, is misplaced. It is pertinent to note that, over a period of time, the Supreme Court has analysed and interpreted Section 7 and held that Section 7(5)(a) confers the adjudicating authority with the discretion to decide whether to admit the application or not, after considering all relevant aspects. The scope and ambit of Section 7 had come up for consideration in ***Innoventive Industries Ltd*** *(supra)*. Therein, after elaborate consideration of the scheme of IBC and the purpose of Section

7, it was held as under;

> *"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.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of

a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing— i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

From the above discussion, it is seen that the Apex Court had taken note of the difference in procedure with respect to the claims raised by financial creditors and operational creditors. The Court also opined about the limited scope of adjudication on an application under Section 7 filed by a financial creditor.

8. This position was further clarified in ***Swiss Ribbons (P) Ltd*** *(supra)*. There, the court considered the role of the adjudicating authority more elaborately and in relation to Section 4(3) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and the National Company Law Tribunal Rules, 2016. After such analysis, the court reached the conclusion that, at the stage of Section 5 of IBC, the corporate debtor has the opportunity to file a reply before the adjudicating authority and the corporate debtor has to be heard before admitting

the application under Section 7. The contention that the Code is discriminatory in the matter of adjudication of claims filed by financial creditors *qua* operational creditors was also dealt with and a categoric finding rendered that there is an intelligible differentia between the two, which has a direct relation to the objects sought to be achieved by the Code. The contextually relevant portion of the judgment in ***Swiss Ribbons (P) Ltd*** (*supra*) reads as under;

> *"50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is*

different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will

suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

58. Rules 11, 34 and 37 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) state as follows:

"11. Inherent powers.—Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

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34. General procedure.—(1) In a situation not provided for in these Rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT 1 with attachments thereto accompanied by Form No. NCLT 2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT 1 accompanied by such attachments thereto along with Form No. NCLT 3.

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT 6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT 5.

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37. Notice to Opposite Party.—(1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record."

A conjoint reading of all these Rules makes it clear that at the stage of the adjudicating authority's satisfaction under Section 7(5) of

the Code, the corporate debtor is served with a copy of the application filed with the adjudicating authority and has the opportunity to file a reply before the said authority and to be heard by the authority before an order is made admitting the said application.

9. The role of the adjudicating authority was further emphasised in ***Indus Biotech (P) Ltd v. Kotak India Venture (Offshore) Fund [(2021) 6 SCC 436]***, *the relevant portion of which is extracted hereunder;*

> *"26. The underlying principle, therefore, from all the above noted decisions is that the reference to the triggering of a petition under Section 7 of the IB Code to consider the same as a proceedings in rem, it is necessary that the adjudicating authority ought to have applied its mind, recorded a finding of default and admitted the petition. On admission, third-party right is created in all the creditors of the corporate debtors and will have erga omnes effect. The mere filing of the petition and its pendency before admission, therefore, cannot be*

> *construed as the triggering of a proceeding in rem. Hence, the admission of the petition for consideration of the corporate insolvency resolution process is the relevant stage which would decide the status and the nature of the pendency of the proceedings and the mere filing cannot be taken as the triggering of the insolvency process."*

Recently, in ***Vidarbha Industries Power Ltd v Axis Bank [2022 SCC OnLine SC 841]***, the Apex Court clearly delineated the legal position and declared that the adjudicating authority should examine the expediency of initiating the Corporate Insolvency Resolution Process after taking into account all relevant facts and circumstances, including the overall financial help and viability of the corporate debtor. The relevant paragraphs of the judgment containing the discussion regarding the procedure for considering the application filed by the financial creditor under Section 7 of IBC is

extracted hereunder for easy reference;

> *"60. There can be no doubt that a Corporate Debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the Corporate Debtor are not extraneous matters.*
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> *XXXXX*
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> *63. As pointed out by Mr. Gupta, the Legislature has, in its wisdom, chosen to use the expression "may" in Section 7(5)(a) of the IBC. When an Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application of a Financial Creditor is complete and there are no disciplinary proceedings against proposed resolution professional, it may by order admit the application. Legislative intent is construed in accordance with the language used in the statute.*
>
> *64. The meaning and intention of Section 7(5)(a) of the IBC is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC. This Court would have to consider the effect of the provision being construed as directory or discretionary.*
>
> *65. Ordinarily the word "may" is directory.*

The expression 'may admit' confers discretion to admit. In contrast, the use of the word "shall" postulates a mandatory requirement. The use of the word "shall" raises a presumption that a provision is imperative. However, it is well settled that the prima facie presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.

66. XXXXX

77. The fact that Legislature used 'may' in Section 7(5)(a) of the IBC but a different word, that is, 'shall' in the otherwise almost identical provision of Section 9(5)(a) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the

Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

78. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expediency of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.

79. The Legislature has consciously differentiated between Financial Creditors and Operational Creditors, as there is an innate difference between Financial Creditors, in the business of investment and financing, and Operational Creditors in the business of supply of goods and services. Financial credit is usually secured and of much longer duration. Such credits, which are often long term credits, on which the operation of the Corporate Debtor depends, cannot be equated to operational debts which are usually unsecured, of a shorter duration and of lesser amount. The financial

strength and nature of business of a Financial Creditor cannot be compared with that of an Operational Creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an Operational Creditor than on a financial creditor.

80. As observed above, the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same. If it does not, CIRP must be commenced. In the case of a financial debt, there is a little more flexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if

its dues continue to remain unpaid.

81. The IBC, as observed above, is intended to consolidate and amend the laws with a view to reorganize Corporate Debtors and resolve insolvency in a time bound manner for maximization of the value of the assets of the Corporate Debtor.

82. The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.

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85. The judgment of this Court Swiss Ribbons (supra), which was rendered in the context of a challenge to the vires of the IBC, does not consider the question of whether Section 7(5)(a) of the IBC is mandatory or discretionary. It is well settled that a judgment is a precedent for the question of law that is raised and decided. The language used in a judgment cannot be read like a statute. In any case, words and phrases

in the judgment cannot be construed in a truncated manner out of context.

87. Even though Section 7 (5)(a) of the IBC may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

88. Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition.

89. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do

so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/Decretal amount is incapable of realisation. The example is only illustrative."

The legal position emanating from the above decisions leaves no room for doubt that the adjudicating authority is vested with the discretion and is legally bound to consider all relevant aspects, including the financial health and viability of the corporate debtor, while taking a decision on the application filed by the financial creditor. As such, the contention that Section 7 is a draconian provision loaded against the corporate debtor, cannot be countenanced. Therefore, the challenge against constitutional validity of section 7 of IBC on the ground that the provision is arbitrary and discriminatory, is liable to be rejected.

It is hence clear that the petitioner has the right to file objections against Ext.P7

application and in such event, the adjudicating authority is bound to consider the objection on merits and take a decision on the admissibility or otherwise of Ext.P7 application after considering all relevant aspects, including those urged in this writ petition.

The writ petition is accordingly dismissed, with the above directions.

Sd/-

V.G.ARUN
JUDGE

Scl/

APPENDIX OF WP(C) 7444/2022

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY OF THE CERTIFICATE ISSUED BY VATSALA KAUL BANERJEE, EDITOR LIMCA BOOK OF RECORDS DATED DECEMBER 2018
Exhibit P2	TRUE COPY OF THE CERTIFICATE ISSUED BY URF WORLD RECORD IN THE YEAR 2018
Exhibit P2A	TRUE COPY OF THE CERTIFICATE ISSUED TO THE PETITIONER BY OPEN INTERNATIONAL UNIVERSITY DATED 25.11.2018
Exhibit P2B	TRUE COPY OF THE WORLD CONGRESS PARTICIPATION CERTIFICATE ISSUED TO THE PETITIONER BY OPEN INTERNATIONAL UNIVERSITY FOR COMPLEMENTARY MEDICINE IN THE YEAR 2018
Exhibit P2C	TRUE COPY OF THE STAR OF ASIA WARD ISSUED TO THE PETITIONER DATED NIL
Exhibit P3	TRUE COPY OF THE CERTIFICATE 'VANAMITHRA", AWARD ISSUED BY THE FOREST DEPARTMENT ACKNOWLEDGING OF PETITIONER'S EFFORT TO CONSERVE NATURE AND NATURAL RESOURCES
Exhibit P4	TRUE COPY OF THE LETTER ISSUED BY THE VICE-CHANCELLOR OF THE 4TH RESPONDENT UNIVERSITY TO THE HON'BLE CHIEF MINISTER OF KERALA DATED 05.07.2021
Exhibit P4A	TRUE COPY OF THE CERTIFICATE ISSUED BY THE CHIEF CONSERVATOR OF FORESTS (WILDLIFE) OF THE 5TH RESPONDENT DATED NIL
Exhibit P5	TRUE COPY OF THE NEWSPAPER REPORT PUBLISHED IN MALAYALA MANORAMA DAILY DATED 29.06.2018
Exhibit P5A	TRUE COPY OF THE NEWSPAPER REPORT PUBLISHED IN' THE HANS INDIA' DAILY DATED 12.02.2022
Exhibit P5B	TRUE COPY OF THE NEWSPAPER REPORT PUBLISHED IN 'NEW INDIAN EXPRESS ' DAILY DATED 21.03.2018
Exhibit P5C	TRUE COPY OF THE NEWSPAPER REPORT

	PUBLISHED IN 'NEW INDIAN EXPRESS' DAILY DATED 27.07.2021
Exhibit P5D	TRUE COPY OF THE NEWSPAPER REPORT PUBLISHED IN 'THE HINDU', DAILY DATED 27.07.2020
Exhibit P6	TRUE COPY OF THE NEWSPAPER REPORT PUBLISHED IN 'NEW INDIAN EXPRESS',DAILY DATED 29.06.2018
Exhibit P7	TRUE COPY OF THE COMPANY APPLICATION FILED BY THE 9TH RESPONDENT BEFORE THE NATIONAL COMPANY LAW TRIBUNAL WITH ANNEXURES DATED 23.12.2021
Exhibit P8	TRUE COPY OF THE RESOLUTION/DECISION DATED 27.06.2016 TAKEN BY THE 8TH RESPONDENT GRAMAPANCHAYAT
Exhibit P9	TRUE COPY OF THE MEMORANDUM DATED 27.07.2021 SUBMITTED BY THE PETITIONER COMPANY TO THE CHIEF MINISTER OF KERALA
Exhibit P10	TRUE COPY OF THE RELEVANT PAGES OF THE RECORDS OF LEGISLATIVE ASSEMBLY DATED 02.08.2021
Exhibit P11	TRUE COPY OF THE RECEIPT ISSUED BY THE STATE BANK OF INDIA DATED 18/07/2019 EVIDENCING THE PAYMENT OF RS.10 LAKHS
Exhibit P11(A)	TRUE COPY OF THE RECEIPT ISSUED BY THE STATE BANK OF INDIA DATED 15/07/2019 EVIDENCING THE PAYMENT OF RS.40,02,000/-
Exhibit P12	TRUE COPY OF THE JUDGMENT IN O.P(DRT) 133/2019 DATED 05/08/2019 PASSED BY THIS HONOURALE COURT