

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

CP(IB)/08/KOB/2021

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

Date of Order: - 24th March, 2022

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Anil Kumar. B, Member (Technical)

The Federal Bank Limited,
Federal Towers, P.B. No. 103,
Alwaye, Ernakulam,
Kerala- 683 101.

... Financial Creditor

Versus

M/s. Foodco Delicacies India Private Limited,
XI/46R, Trichattukulam P.O.,
Cherthala, Alappuzha,
Kerala- 688 526.

... Corporate Debtor

Parties/Counsel present (through video conference)

For Financial Creditor ... Shri., K.N. Sivasankaran, A. Sunil Shankar, Advocates.
For Corporate Debtor ... Shri. C. K. Karunakaran, Balachandran R.B., Advocates.

Per: Ashok Kumar Borah, Member (Judicial)

This CP(IB)/08/KOB/2021 has been filed by the Federal Bank Ltd., Federal Towers, P.B. No. 103., Alwaye, Ernakulam, Kerala- 683 101. (hereinafter called as '**Financial Creditor**') on 31.03.2021 by invoking the provisions of Section 7(4) of the Insolvency and Bankruptcy Code (hereinafter called as '**Code**') against M/s Foodco Delicacies India Private Limited, XI/46R, Trichattukulam P.O., Cherthala, Alappuzha, Kerala- 688 526. (hereinafter called as '**Corporate Debtor**') stating that the total

amount of debt due from the Corporate Debtor is Rs. 11,08,25,240.20/- (Rupees Eleven Crore Eight Lakh Twenty-Five Thousand Two Hundred and Forty and paisa Twenty Only) as on 28.03.2021.

The brief facts of the case are as under: -

2. It is stated that the Corporate Debtor availed various Term Loan Facilities and Working Capital Facilities from the Financial Creditor and the Corporate Debtor defaulted in repayment of the facilities and their accounts were classified as NPA on 05.06.2018. But, later on the accounts were upgraded manually considering relaxation under MSME benefits. As the Corporate Debtor did not clear the arrears as assured by them, on 17.9.2018 the accounts were again classified as NPA with effect from 05.06.2018; the original date of classification as NPA.
3. It is stated that the securitisation measures were initiated vide demand notice dated 4.12.2018 which was subsequently withdrawn. WP(C) No. 5550 of 2019 had been filed challenging securitisation measures, and the same was disposed off recording the withdrawal of demand notice. The Corporate Debtor was directed to approach the Bank for restructuring and moratorium. After withdrawal of demand notice dated 04.12.2018, the Financial Creditor issued demand notice dated 08.05.2019. It is stated that the demand notice dated 08.05.2019 and consequent measures were challenged before the Hon'ble High Court in WPC No. 20602 of 2019, which was disposed off vide judgment dated 16.8.2019 directing consideration of the request of the Petitioner in accordance with the RBI Circulars. Pursuant thereto, the restructuring request of the Respondent was considered. Several meetings were held. The Corporate Debtor was directed to submit proposals for restructuring and they submitted restructuring proposal dated 20.11.2019, 23.12.2019, 12.2.2020

(proposing payment over a time period of 8 years), revised proposal dated 18.6.2020 (proposing repayment over a time period of 7 years commencing from July, 2020) and revised proposal dated 14.7.2020 (proposing payment schedule of 6 years). In the meeting held on 11.11.2020, the Respondent Corporate Debtor agreed to remit Rs. 38 Lakh (which was the amount due in November 2020, under the restructuring proposal dated 14.07.2020). However, that payment was not made. In view of non-payment, the restructuring proposal was rejected. The said rejection was challenged before the Hon'ble High Court in WPC No. 10015 of 2021, which was done after the receipt of the notice in IBC application.

4. It is further stated that during the pendency of this IBC application, WP(C) No. 10015 of 2021 was disposed of by judgment dated 28.09.2021 directing the RBI to take decision in the matter, and stayed the proceedings before this Tribunal pending the decision of the RBI. The RBI vide order dated 10.11.2021 disposed of the representation finding that decision of the Committee cannot be held to be incorrect. Further, since a decision was already taken by the Committee, the RBI did not consider it necessary to reopen the issue. The RBI found that admittedly the Corporate Debtor had till date not made payment of amounts towards outstanding dues, as communicated to them. *The RBI held that the IBC provides a statutory mechanism for resolution of borrowers, and that the corporate Debtor can utilize the said opportunity to put forth its proposals in accordance with the Code.* The RBI disposed of the representation, stating that it is not considered necessary to issue any direction to the Bank at this stage as sought by the Corporate Debtor in the representation.

5. Since, the Corporate Debtor has failed to comply with its obligations under various facilities extended by the Financial Creditor as mentioned above, the present application has been filed by the Financial Creditor to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under Section 7(4) of Insolvency and Bankruptcy Code, 2016.

Submission by the Corporate Debtor

6. The Respondent/ Corporate Debtor filed objection/ reply stating that there is discrepancy in the amounts alleged to be due from the Corporate Debtor. The Financial Creditor had given different figures in its application before the DRT and in the instant Application. Even in this Application, the amounts shown as allegedly due in Part IV of Form 1 varies and does not tally with the particulars provided in the Information Utility. It is further stated that the date of classification as NPA viz., 05.06.2018 as shown in the Application (Part IV, Sl. 2) is not correct even by the admission by the Financial Creditor. Financial Creditor has claimed various NPA dates as 28.05.2018, 05.06.2018 and 17.09.2018. The RBI has found that the earliest date when the account could have been classified as NPA was 17.09.2018. Despite the objection by the Corporate Debtor, the Financial Creditor has not rectified the error.
7. It is stated that Rule 3 of I&B (Application to Adjudicating Authority) Rules, 2016 (Rule 3) prescribes that the Application under Section 7 IBC shall be in Form 1, accompanies with documents and records required in Form 1 and as specified in IBBI (Insolvency and Resolution Process for Corporate Persons) Regulations, 2016. Form 1 is a statutory form prescribed and it is mandatory that the requirements are fully complied with by the Financial Creditor. It is also stated that the reasons for mandating a Form are for the Financial Creditor to clearly present its case before

the NCLT, and also put the Corporate Debtor to notice and also to facilitate the said party to place on record its objections and to defend against the claim. This is all the more important as Section 7 does not prescribe a prior notice to Corporate Debtor. In this case, the requirements of Form 1 have not been complied with and incomplete details have been provided.

8. It is stated that the amount in OA allegedly filed before the DRT on 28.05.2021 is shown as Rs. 9,74,63,314.25/-, while the amount claimed in the Section 7 application is Rs. 11,08,25,240.20/- as on 28.03.2021. This gross discrepancy is neither explained, nor corrected. It is further stated that the date of classification as NPA on 05.06.2018 was wrongly shown in Form 1, while the statements of accounts produced would show otherwise. The Financial Creditor has itself shown the date of NPA differently in the documents filed by them. The RBI, which regulates the mode of classification as NPA has found that the date of NPA is not 05.06.2018. It is also stated that the amounts shown in the copy of report of NeSL (Information Utility) do not tally with the claim of the Financial Creditor.
9. It is further stated that the Financial Creditor did not file the Certificate of Charges issued by the Registrar of Companies before this Tribunal and that the Application was originally filed by a Power of Attorney Holder (POA). The POA having been issued prior to the IBC Code 2016, could not have been relied on for filing the Application. This was objected to by the Corporate Debtor and consequently the Order dated 05.01.2022 came to be passed directing production of the Board Resolution. It is stated that the Board Resolution was not produced, and instead only a letter was produced. This letter would not confer any authority on the person presenting the application.

10. It is also stated that it is well settled that IBC is a complete code in itself, and the provisions and procedures of other statutes cannot be imported into adjudication under IBC. When a summary procedure is provided by the legislature, each party has to present the evidence within the time frame provided in the statute. This is especially crucial in the case of IBC proceedings which are time bound. If a Board Resolution has indeed been passed by the Board of Directors, the Financial Creditor, with the infrastructural and manpower at its disposal, could have produced the same within the time stipulated. The Financial Creditor cannot be permitted to take a casual approach or be given any extra accommodation which in any case would be contrary to the statutory provisions. A Bank has no special privilege in IBC matters, and the provisions are as much applicable to a Bank as to any other Financial Creditor. It is also stated that the security document sought to be relied on by the Financial Creditor to sustain this Application is dated 28.03.2017. These are the documents relied by the Financial Creditor in the O.A. filed before the DRT. The IBC Application is presented before this Tribunal during 2021, after the period of limitation has set in. Filing of OA will not revive the period of limitation. Classification of the account as NPA alone will not revive limitation, as the classification is a unilateral act by the Financial Creditor, and is only for the purpose of income recognition and asset classification as mandated by RBI. If any renewal of the loan documents had been done after 28.03.2020, the same would have been produced by the Financial Creditor. No such document has been produced. Communication exchanged while attempting settlement etc. will not give a fresh lease of life when limitation has already set into a time barred debt.
11. Even though the Respondent/ Corporate Debtor made submissions on various counts regarding the maintainability of this application, they have not refuted the

contention that the Corporate Debtor has failed to honour their commitment to make the payment of amount borrowed by them.

FINDINGS

12. We have heard Shri. K.N. Sivasankaran, the learned counsel for the Financial Creditor and Shri. C.K. Karunakaran the learned counsel for the Corporate Debtor who appeared through video conferencing and perused the whole case records including documents appended thereto. On perusal of the documents and hearing the arguments advanced by both the sides, this Bench finds it necessary to deal with each issue separately.

- i. Whether the application is barred by limitation?*
- ii. Whether this application is filed by a competent person?*
- iii. Whether there is a Creditor-Debtor relationship between the Financial Creditor and Corporate Debtor herein?*

13. **Point No (i):** We have gone through Part IV of the application; wherein it is clearly stated that the loan accounts were classified as NPA and the date of occurrence of default for the purpose of IBC is considered as 05.06.2018.

Section 238A of the IBC, 2016 defines "Limitation" which is as under:

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.*

14. 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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15. 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 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 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 limitation in filing this application.
16. As far as the issue before us, on perusal of the records, we found that the Financial Creditor has filed this application on 31.03.2021. The application has been filed within the prescribed period of limitation. Hence the contention taken by the Corporate Debtor regarding limitation has no force.

17. From a reading of Part IV of the application and the documents annexed thereto; wherein it is clearly stated that the loan accounts of the Corporate Debtor in the Federal Bank Limited became NPA on 05.06.2018 and the date of default is also same. In this respect we had gone through the decision of the Hon'ble National Company Law Appellate Tribunal in **Jagdish Prasad Sarada Vs. Allahabad Bank** (Company Appeal (AT) (Insolvency) No. 183 of 2020) wherein the Hon'ble NCLAT has held that: -

"10. The Hon'ble Supreme Court has already observed in Civil Appeal No. 439, 436, 3137, 4979, 5819 & 7289 of 2018 in B.K.Educational Services Pvt. Ltd Vs. Parag Gupta and Associates dated 11.10.2019 that the limitation period for application under section 7 of the Code is 3 years as provided by Article 137 of the Limitation Act, 1963 which commences from the date of default and is extendable only by application of section 5 of Limitation Act, 1963 if any case for condonation of delay is made out. The view taken by the Hon'ble Apex Court in 'B.K.Educational Services Private Limited Vs. Parag Gupta and Associates' (Company Appeal (AT) (Insolvency) No. 183 of 2020) that the limitation period for application under Section 7 of the I&B Code is three years as provided by Article 137 of the Limitation Act, which commences from the date of default and is extendable only by application of Section 5 of the Limitation Act, 1963 if any case for condonation of delay is carved out, has again been reiterated in the latest pronouncement of Hon'ble Apex Court in 'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. (Civil Appeal No.6347 of 2019) decided on 14th August, 2020. It is therefore manifestly clear that date of default will be the date of declaration of account as NPA and such date of default would not shift."

From the aforementioned order it is clear that this Application is maintainable before this Tribunal.

18. **Point No. (ii).** To arrive at a definitive conclusion, with regard to this issue, we have gone through the Power of Attorney dated 21.06.2005 issued to Smt. Kochurani G. Etil, Assistant Vice President (Legal) by the Chairman and Chief Executive Officer of the Federal Bank Limited. In this respect we had gone through Clause 10 of the Power of Attorney which is quoted hereunder: -

"To, appear before any Judicial or Quasi-Judicial body including an Court of law, Forum, Tribunal and Banking Ombudsman, institute Suit or Appeal or applications or other proceedings either Civil or Criminal, defend Suit or Appeal or applications or other proceedings either Civil or Criminal filed against Bank, sign Vakalathnama or Plaints or Petitions or written Statements or Affidavits or appeal memorandums suits or appeals for applications or other proceedings either Civil or Criminal filed by or against Bank, receive documents-or copies of documents from Courts, Government Offices or other offices in connection with Civil or Criminal matters, complaints filed by or against Bank, give evidence or execute decrees or surrender or reassign insurance policies, receive amounts. from courts or Forums or Tribunals or Ombudsman or from any Judicial or quasi-judicial body or Land Acquisition Boards or State and Central Government Offices or Life Insurance Corporations of India or, other Insurance Companies and from any other offices."

19. We had also gone through the Authorization dated 15.03.2021 in favour of Smt. Kochurani G. Etil issued by the Assistant General Manager, Loan Collection and Recovery Department of the Federal Bank Limited. In this respect, we have gone through the decision of the Hon'ble NCLAT in **Sh. Rajendra Narottamdas Sheth & Anr. Vs Sh. Chandra Prakash Jain & Ors** (Company Appeal (AT) (Insolvency) No. 621 of 2020) wherein it was held as under: -

"11. Coming to the question of authorization, the Application under Section 7 (Annexure A6 page 93 at page 101) shows that the Application under Section 7 was filed under the signature of Chief Manager of the Union Bank of India, Nanpura Branch, Surat, namely Sh. Praveen Kumar Gupta. The document

objected to by the Learned Counsel for the Appellant has been filed with Annexure A7 of the Appeal Paper Book. Annexure A7 (Colly) is Reply which the Corporate Debtor filed before the Adjudicating Authority. The Document at Page 123-127 is the General Power of Attorney given by the Bank to said Sh. Praveen Kumar Gupta. Clause 12 of the said General Power of Attorney in general terms, inter alia, has given powers to the said Sh. Praveen Kumar Gupta to commence, prosecute, endorse, defend, answer and/ or oppose any suit or "other legal proceedings" including any Civil or Criminal Proceedings in any Courts or Tribunals and any demand touching any matters in which the Bank may or may hereafter be interested or concerned and also, if the said Attorney shall think fit, compromise, etc. It is all comprehensive paragraph which has conferred powers to this Chief Manager. We do not find any substance in the argument that as such General Power of Attorney was executed before coming into force of Insolvency and Bankruptcy Code hence, the said Chief Manager did not have authority. In our view, it is General Power of Attorney and not confined to any particular Act or Acts. We do not find any defect on this account with the Application under Section 7 of IBC."

20. On perusal of the record, we found that the Financial Creditor has the proper authority to file the present application through the Power of Attorney Holder, and the objection raised by the counsel for the Corporate Debtor is merely incongruous, and therefore, holds no water. Moreover, the Assistant Vice President of the Financial Creditor had signed the application as an authorised person of the Financial Creditor with specific authorization letter to file Insolvency Application before this Bench. Hence, the technical objection on the ground of maintainability is only for the sake of objecting and hence stands rejected.

21. **Point No. (iii)** From the records produced, we could find that there is a Creditor-Debtor relationship between the Financial Creditor and the Corporate Debtor, since the Corporate Debtor admitted that they received money from the Financial Creditor through various documents produced before this Tribunal and the Corporate Debtor has no case that they have repaid the money received from the Financial Creditor. After the direction of Hon'ble High Court to the Applicant to consider the grievances of the Petitioners therein (Corporate Debtor herein), in accordance with the RBI Circulars, the restructuring request

of the Corporate Debtor was considered and several meetings were held. The Corporate Debtor thereafter submitted the proposal for restructuring on 20.11.2019, 23.12.2019, 12.02.2019, 18.06.2020, 14.07.2020, 11.11.2020 and 14.07.2020. However, the Corporate Debtor failed to honour the conditions in the restructuring proposal, and thus the restructuring proposal was rejected. From the above it is clear that the Corporate Debtor is not willing to make any payment, instead they want to prolong the payment by filing various cases.

22. 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 filing an application under Insolvency and Bankruptcy Code. By mentioning various technical snags, the Corporate Debtor cannot wash its hands in repaying the amount borrowed, which is a financial debt owed by them. Hence, there is a Creditor-Debtor relationship with them.

23. Therefore, we are of the considered view that the application filed in the capacity as a 'Financial Creditor' for a 'financial debt' which is recoverable from the Corporate Debtor viz., **M/s. Foodco Delicacies India Pvt. Ltd.** is a fit case for admission and initiation of CIRP against the Corporate Debtor. The documents produced on record prove the disbursement of various loan facilities by the Financial Creditor to the Corporate Debtor and their failure to honour the payment even after approval of the restructuring proposal.

24. The Corporate Debtor committed default in repayment of the loan amount to the Financial Creditor, and hence its Loan Account was declared as NPA. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the

Financial Creditor as a major constituent for admission of an application under Section 7(4) of the I&B Code.

25. The Application under Sub-Section (4) of Section 7 of I&B Code, 2016 is complete in all respects. Accordingly, the application for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor deserves to be admitted. Hence, the Application No. **CP(IB)/08/KOB/2021 is admitted** and the following order has been passed: -

ORDER

- i. Having admitted the Application, the provisions of **moratorium** as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order shall be applicable by prohibiting institution of any suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc.
- ii. The name of the Insolvency Professional Shri. Vinod Padinhare Veetil, suggested by the Financial Creditor is not available in the panel of IPs issued by the IBBI for the period 01.01.2022 to 30.06.2022, for Kochi Bench. In these circumstances, this Bench hereby appoints **Mr. Ramachandran Thekkumkat Madathil** having Registration No. **IBBI/IPA-002/IP-N01071/2021-2022/13715**, email id: iamramantm@gmail.com residing at **24-53/2, Flat B, Inscape Illam ,Ragamaligapuram, Kottappuram, Near Kottappuram Railway Gate ,Thrissur, Kerala – 680 004** whose name appears in the panel of IPs for appointment as Interim Resolution Professional for the period 01.01.2022 to 30.06.2022 for Kochi Bench, as an Interim Resolution Professional to carry out the functions as mentioned under IBC.
- iii. The fee payable to IRP/RP shall comply with the IBBI Regulations/ Circulars/ Directions issued in this regard. The proposed IRP is directed to submit his consent along with copy of AFA issued to him in the prescribed format within 2 days from the date of receipt of this order.
- iv. The Financial Creditor shall deposit an amount of Rs. 2,00,000/- (Rupees Two Lakhs Only) with the IRP to meet the initial expenses towards issue of public

notice and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (CoC). It is made clear that this amount cannot be construed as the fee paid to the IRP.

- v. The fee payable to IRP or as the case may be to RP shall comply with such regulation/circular and direction as may be issued by the IBBI and the IRP shall carry out his duties as contemplated by Section 15, 17, 18, 19, 20 and 21 of the IBC.
- vi. The supply of essential services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code, by the Adjudicating Authority.
- vii. That as prescribed under Section 13 of the Code on declaration of moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on receipt of this order, as per the provisions of the Code.
- viii. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the C.I.R.P. and the compliance of the directions of this Order within 30 days to this Bench. Liberty is granted to intimate even at an early date, if need be.
- ix. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order of Admission.
- x. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP in terms of Section 17 of the IBC. The Directors/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 a period of one week from the date of receipt of this Order, in default coercive steps will follow.
- xi. The Registry is directed to communicate this order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and e-mail within two days from the date of this Order.

- xii. A copy of this Order be sent to the Registrar of Companies, Kerala, for updating the Master Data of the Corporate Debtor, who shall send a compliance report in this regard to the Registry of this Tribunal within seven days.

26. We have also gone through the IA(IBC)/149/KOB/2021 which has been filed by the Corporate Debtor to take on record of the additional objections and to consider the same during the adjudication of the Application under Section 7 of IBC. IA(IBC)/150/KOB/2021 has been filed by the Corporate Debtor questioning the maintainability of this application and IA(IBC)/12/KOB/2022 has been filed by the Financial Creditor to accept the additional document and grant time to produce the Certificate of Registration of Charge. Thereafter they have produced the Certificate of Registration of Charge which has been accepted by this Tribunal vide order dated 11.02.2022.

27. While preparing the final order, we have considered the additional documents including the Certificate of charges and objections filed by the parties and also the maintainability of the CP(IB)/08/KOB/2021. Hence, no further orders are necessary in these IAs. They are disposed of accordingly.

Dated this the 24th day of March, 2022

Sd/-
(Anil Kumar. B)
Member (Technical)
RRN

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