IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH, KOCHI

CP (IB)/ 22/KOB/2022

(Under Section 7 of Insolvency and Bankruptcy Code, 2016)

Order delivered on 23 .06.2022

Coram:

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

Kerala State Industrial Development Corporation Ltd
T C 11/266, Keston Road,
Kowdiar, Trivandrum
Kerala – 695 003 - **Financial Creditor**

Vs.

Kumarakom Aqua Serene Private Limited
Building No.4/ 125 Vettoor House,
Kudavechoor P O Vaikom,
Kottayam,
Kerala- 686 144. - **Corporate Debtor**

Parties/Counsels Present (through Video Conferencing):

For Financial Creditor	:	Mr. Sandeep Kumar S, Ms. Midhuna K C, PCSs
For Corporate Debtor	:	Mr. Pradeep Joy, Mr. Prathap Pillai, Advocates

O R D E R

Per: Ashok Kumar Borah, Member (Judicial)

1. This Application has been filed by the Applicant/ Financial Creditor - Kerala State Industrial Development Corporation Limited (Bearing CIN—U45309KL19618GC001937) to initiate Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor- Kumarakom Aqua Serene Private Limited (Bearing CIN —U55101KL2004PTC016902), under the Insolvency and Bankruptcy Code, 2016.
2. The applicant stated that the Corporate Debtor, approached the Applicant/ Financial Creditor for availing a Term Loan of Rs. 496.90 Lakh towards part financing the project cost for setting up a resort at Kumarakom, Kottayam District. Pursuant thereto the Applicant/Financial Creditor sanctioned a Term Loan of Rs 496.90 Lakh (Rupees Four Crore Ninety-Six Lakh and Ninety Thousand Only) to the Corporate Debtor, subject to the covenants specified in the Sanction Letter No. KSIDC/TVM/SCY 8/2010/1580 dated 05.08.2010 and Loan Agreement dated 12.08.2010.
3. The Applicant stated that the Corporate Debtor commenced soft run of the project during the month of January 2012, but it was not able to complete the facilities of the resort. The Corporate Debtor was able to complete only part of the project within the stipulated period. Thereupon considering the request of the Corporate Debtor, the Applicant/ Financial Creditor at its 284th Board Meeting held on 31.07.2013, agreed to reschedule the term loan to be paid in 20 equal quarterly instalments w.e.f. April 2014.
4. The Ld. PCS for the applicant argued that the Corporate Debtor, further approached the Applicant / Financial Creditor for availing an Additional Term

Loan of Rs.298.00 Lakh, for meeting the overrun in their existing Project at Kumarakom, Kottayam District. Pursuant thereto the Financial Creditor sanctioned an Additional Term Loan of Rs. 298 Lakh (Rupees Two Crore Ninety Eight Lakh Only) by way of modification of existing term loan to the Corporate Debtor, subject to the covenants specified in the Sanction Letter No. KSIDC/TVM/SCY 8 /284 BM / 2013 /1717 dated 09/09/2013 and Loan Agreement dated 03.10.2013. He has further argued that the aforementioned Term Loan amount of Rs.496.90 Lakh (Rupees Four Crore Ninety Six Lakh Ninety Thousand Only) was released to the Corporate Debtor in 8 tranches and an additional term loan of Rs. 298.00 Lakh was released in 5 tranches.

5. As per the terms of the loan agreements executed by the Corporate Debtor in favour of the Applicant/ Financial Creditor, the Corporate Debtor had agreed to repay the loan in instalments commencing after the moratorium period prescribed and also agreed to pay interest as prescribed per annum, compounded quarterly or such rate as may be fixed by the Applicant/ Financial Creditor.

6. The applicant submitted that the Corporate Debtor committed serious breach and default in repaying the above loans together with interest due thereon within the stipulated time. It is further submitted that several repayment demands were initiated by the Applicant/ Financial Creditor but the Corporate Debtor showed an apparent unwillingness to repay the due amount.

7. The Financial Creditor extended various directions / concessions / reliefs to the promoters of the Corporate Debtor and based on this, balance amount of Rs 146 Lakh out of the additional term loan of Rs. 298 Lakh was further released to the Corporate Debtor on 01.10.2016, which was pending for disbursement

due to delay in implementation of the Projects as well as the default in repayment of principal and interest demands in respect of already disbursed loan amount. While releasing the said amount, among other conditions the Applicant/Financial Creditor had stipulated that the promoters should pledge their 100% shares held in the Corporate Debtor. In compliance with the said condition, the promoters pledged their 100% shares held in the Corporate Debtor with the Applicant/ Financial Creditor on 10.05.2016.

8. The learned PCS for the applicant argued that the Corporate Debtor became fully operational during December, 2016. However, they committed serious breach and default in repaying the above loans together with interest due thereon. It is further argued that in view of the extensive loan outstanding, the Applicant/ Financial Creditor held a default review meeting on 15.12.2018 and the promoter of the Corporate Debtor agreed to remit an amount of Rs. 10,000/- on a daily basis from 22.12.2018 onwards in order to clear the dues towards the Applicant/Financial Creditor.

9. The applicant stated that the Corporate Debtor approached the Applicant/Financial Creditor for settling the loan account through One Time Settlement (Hereinafter referred to as OTS). Based on the representation, the Applicant/Financial Creditor sanctioned an OTS as per the COVID Amnesty Scheme amounting to Rs.11,45,40,370/— (Eleven Crores Forty Five Lakh Forty Thousand Three Hundred and Seventy only) subject to the terms and conditions stipulated in its Letter No.KSIDC/TVM/SCY 8/320 BM/2249 dated 11th February,2021. As per the said OTS sanctioned, the OTS shall be valid till 31.03.2021 and 10% of the OTS amount to be remitted within One month from the date of sanction. However, the Corporate Debtor failed to remit 10% of the

OTS amount within ONE month from the date of OTS sanction nor concluded the OTS within the stipulated time frame of 31.03.2021 and expressed its unwillingness to fulfill its pecuniary obligations. The Applicant / Financial Creditor was, therefore, constrained to cancel the OTS sanctioned to the Corporate Debtor Vide its letter No.KSIDC/TVM/SCY/8/320dated 11th February, 2021.

10. The Applicant / Financial Creditor sanctioned another OTS as per the COVID Amnesty Scheme amounting to Rs.11,49,l7,2l9/- (Eleven Crore Forty Nine Lakh Seventeen Thousand Two Hundred and Nineteen only) subject to the terms and conditions stipulated in its Letter No.KSIDC/TVM/SCY 8/323 BM/1190 dated 31st August,202l. As per the said OTS, the OTS shall be valid till 31.12.2021 and 10% of the OTS amount to be remitted within One month from the date of sanction. However, the Corporate Debtor again failed to remit 10% of the OTS amount within One month from the date of OTS sanction nor concluded the OTS within 31.12.2021 and expressed its unwillingness to fulfill its pecuniary obligations. The Applicant / Financial Creditor was, therefore, constrained to cancel this OTS. Advance intimation was given regarding cancellation of OTS Vide its letter No. KSIDC/CHN/REC/2021/822 dated 24.11.2021.

11. The learned PCS for the applicant argued that as of the date of filing this Application, the Corporate Debtor has an outstanding default amount of Rs. 20,81,37,531/- Rupees Twenty Crores Eighty-One Lakh Thirty-Seven Thousand Five Hundred and Thirty-One Only).

12. The applicant stated that the Corporate Debtor has not only failed and neglected to discharge its debt towards the Applicant/Financial Creditor, but

also has demonstrated that the affairs of the Corporate Debtor are at a commercial standstill and can be described to be commercially insolvent. Further, the Corporate Debtor company has clearly committed ‘default” as per Section 3 (12) of the Insolvency Bankruptcy Code, 2016, and hence it is necessary to initiate the Corporate Insolvency Resolution Process against them.

13. The Corporate Debtor filed a counter statement stating that based on the letter dated 24.02.2022, they have paid Rs. 1,14,54,037/- (One Crore Fourteen Lakh Fifty-Four Thousand and Thirty-Seven Only) being the 10 percent of the OTS amount by way of demand draft on 30.0.32022 and same was received by the Financial Creditor. It is further stated that the Corporate Debtor invoked the equity jurisdiction of the Hon’ble High Court of Kerala as the second condition in the letter dated 24.02.2022 to settle the entire balance amount also before 31.03.2022 by way of post-dated cheques, which was unfair and unreasonable under the backdrop of two long years of Covid impacts. The Hon’ble High Court issued directions to consider the reinstatement of the OTS Vide Order dated 28.03.2022 in WP (C) No. 8230 of 2022.

14. The learned counsel for the Corporate Debtor during the course of hearing on 08.06.2022 submitted that he has no allegation on the default claimed.

FINDINGS:

15. We have heard the submissions made by the learned PCS for the applicant Shri. Sandeep Kumar and learned counsel for the Respondent Shri. Pratap Pillai through video conferencing and perused all the records. As per the direction of this Tribunal, the learned PCS for the applicant filed the record of

default of NeSL website, from which it is clear that the Corporate Debtor has committed default in repayment of its credit facilities availed from the Financial Creditor by way of various credit facilities sanctioned, granted and disbursed by the Applicant. The record produced by the applicant received from the Information Utility shows as “Deemed to be Authenticated”. The status of authentication as “Deemed to be Authenticated” is prima facie evidence for smooth admission under Section 7 of the IBC.

16. It is relevant to note that Hon’ble Supreme Court of India in the case of ***Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407***, has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC.

In the above case, Hon’ble the Supreme Court has held that;

> “*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.

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 a reading of the above order makes it clear that to admit an application filed under Section 7 of IBC, the Adjudicating Authority is to be satisfied that a default has occurred; that the Corporate Debtor is entitled to point out that 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.**

17. The Hon'ble the Supreme Court of India in ***Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17 : 2019 SCC OnLine SC 73,*** held as under***:***

"54. It is clear from these sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (Information Utilities Regulations), are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.

55. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:

(a) Particulars of security held, if any, the date of its creation, its estimated value as per the Creditor;

(b) Certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company);

(c) Order of a court, tribunal or arbitral panel adjudicating on the default;

(d) Record of default with the information utility;

(e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;

(f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;

(g) A record of default as available with any credit information company; (h) Copies of entries in a banker's book in accordance with the Bankers Books Evidence Act, 1891.

64. The trigger for a financial creditor's Application is nonpayment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. **Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial Creditor to prove, based upon solid documentary**

evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation."

Given the law laid down in Swiss Ribbon case (supra), it becomes clear that rather than the "inability to pay debts", it is the "determination of default" that is relevant for allowing or disallowing an Application filed under Section 7, 9 or 10 of IBC. The said shift enables the Financial Creditor to prove by solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed to fulfill its obligation. Therefore, to allow the application filed under Section 7, it is not relevant to see the inability of the Corporate Debtor to pay the debt.

18. The Financial Creditor has proposed the name of Mr. Francis Mathew, Registration No. IBBI/IPA-001/IP-P00995/2017-2018/11642, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written consent in Form 2 as required under Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration. However, he has not produced the Authorisation for Assignment (AFA) issued by Insolvency Professional Agency as per Regulation 2(aa) of the IBBI (Insolvency Professional) Regulations, 2016.

19. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of the minimum amount stipulated under Section 4(1) of the IBC. Therefore, the debt and default stand established and there is no reason to deny the admission of the Petition.

20. It is, accordingly, ordered as follows: -

(a) **The petition bearing CP (IB) 22/KOB/2022 filed by Kerala State Industrial Development Corporation, the Financial Creditor, under Section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against Kumarakom Aqua Serene Private Limited [CIN: U55101KL2004PTC016902], the Corporate Debtor, is admitted.**

(b) There shall be a moratorium under Section 14 of the IBC, with regard to the following:

(i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium:

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) As the Interim Resolution Professional proposed by the applicant did not produce the AFA and on verification of the AFA available in the IBBI website (AA1/11642/02/210422/102529), it is seen that the authorisation in respect of Shri. Francis Mathew is valid only up to 21.04.2022. Hence, we appoint **Mr. Embrammadam Padmanabhan Madhusudhanan, Registration No. IBBI/IPA-002/IP-N01163/2021-2022/13856, having address at Embram Madam, ,Near Siva Temple, Nettoor PO, ,Ernakulam,Kerala ,682040**, [email: epmadhusudhanan@gmail.com] [Mobile: +91 8089359964], whose name appears in the IBBI Panel for the period January 1,2022 to June 30,2022, as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC Regulations. The fee payable to IRP or, as the case may be, the RP shall be complied with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of Rs.2,00,000/- (Rupees Two Lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (CoC) and that this amount may not be construed as the fee paid to the IRP.

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) IRP is directed to send a copy of this Order to the Registrar of Companies, Kerala, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Tribunal within seven days from the date of receipt of a copy of this order.

Dated this the 23rd day of June,2022.

Sd/- Sd/-

ASHOK KUMAR BORAH Digitally signed by ASHOK KUMAR BORAH Date: 2022.06.24 11:09:40 +05'30'

(Anil Kumar B)
Member (Technical)

(Ashok Kumar Borah)
Member (Judicial)

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