

CP(IB)29/KOB/2021

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

CP(IB)/29/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)*

Free Copy U/R 50 of NCLT Rules, 2016

Order delivered on: 21.12.2021

Coram:

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

M/s IDBI Bank Limited,
IDBI Tower, WTC Complex,
Cuffe Parade,
Mumbai- 400 005.

... Financial Creditor

Versus

M/s Tip Top Furniture Private Limited,
4/704 FF, N H Kottakkal,
Edarikkode P.C.,
Malappuram, Kerala- 676 501.

... Corporate Debtor

Appearance (through video conferencing)

For Financial Creditor
For Corporate Debtor

...Shri. A.G. Satyanarayana, Advocate.
... Shri. Babu Karukapadath, Advocate.

Per: Ashok Kumar Borah, Member (Judicial)

This CP(IB)/29/KOB/2021 has been filed by M/s IDBI Bank Limited, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai- 400 005. (hereinafter called as **'Financial Creditor'**) on 07.07.2021 by invoking the provisions of Section 7(4) of the Insolvency and Bankruptcy Code (hereinafter called as **Code**) against M/s Tip Top Furniture Private Limited, 4/704 FF, N H Kottakkal, Eradikkode P.O., Malappuram, Kerala- 676 501. (hereinafter called as **'Corporate**



Debtor) stating that the total amount of debt due is Rs. 9,50,10,000/- against takeover of facilities from HDFC Bank sanctioned on 14.03.2015. The amount claimed to be in default as on 01.04.2021 is Rs. 11.68 Crores. The date of occurrence of default for the purpose of IBC is considered to be 12.04.2019, the date of issue of notice invoking Corporate Guarantee.

The brief facts of the case are as under: -

2. It is stated that the Corporate Debtor availed loan facility from the Financial Creditor vide sanction letter dt. 18.03.2015 and the same was renewed on 02.03.2017. The Corporate Debtor defaulted in repayment of loan sanctioned by the Financial Creditor. Consequently, the Corporate Debtor loan account was classified as NPA with effect from 01.05.2018.
3. It is stated that the Financial Creditor has issued letter dated 27.02.2019 calling upon the Corporate Debtor to settle the loan outstanding of Rs. 950.10/- Lakhs towards the loan facilities sanctioned by the Financial Creditor. It is also stated that the Financial Creditor has issued Demand Notice under Section 13 (2) of the SARFAESI Act, 2002 to Corporate Debtor on 12.04.2019. However, till date Corporate Debtor failed to repay the loan. Thus, the date of occurrence of default for the purpose is to be considered as 12.04.2019, the date of issue of demand notice. Further to that the Financial Creditor has also filed an OA No. 148 of 2020 before the DRT, Ernakulam.
4. It is further stated that the Financial Creditor has also reported the default of the Corporate Debtor to the Information Utility portal called as NeSL. It is also stated that the Corporate Debtor committed default in repaying the Financial Debt due to the Financial Creditor to the tune of



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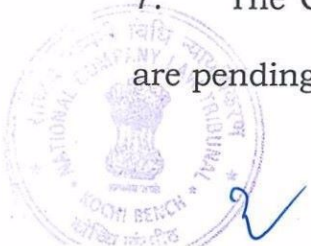
Rs.11.68 Crores, and that the present application filed under Section 7 of the IBC, 2016 against the Corporate Debtor is within the period of limitation. It is also stated that the Corporate Debtor in their Balance Sheet as on 31.03.2019 shown the Financial Creditor Debt which is nothing but an Acknowledgement of the Corporate Debtor as per one of the recent Judgement of the Hon'ble Supreme Court in **Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal** (15 April 2020, Civil Appeal No 323 of 2021) and related matters, wherein it was held that for the purpose of Insolvency and Bankruptcy Code, 2016 (IBC), Balance Sheet entries could constitute an acknowledgment of debt under Section 18 of the Limitation Act, 1963.

5. It is also stated that the Hon'ble Supreme Court in **Innoventive Industries Ltd. Vs. ICICI Bank Ltd & Anr** (Civil Appeal Nos. 8337-8338 of 2017) and also in various decisions observed that after being satisfied on the existence of debt and default, the Adjudicating Authority shall admit the Section 7 application and initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

6. Since, the Corporate Debtor has failed to comply 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

7. The Corporate Debtor stated that the disputes between these parties are pending before the Debts Recovery Tribunal. It is further stated that this



application is barred by limitation. The Information Utility Reports submitted by the Financial Creditor do not disclose true facts, details and figures. It can only be the reproduction of certain data furnished by the Financial Creditor. It is further stated that, the period of limitation as provided under Article 137 of the Limitation Act to prefer an application is 3 years from the date on which the right to apply accrues. So, the claim of the Financial Creditor is barred by limitation. There is no basis for the statement of the Financial Creditor that the date of occurrence of default for the purpose of IBC is to be considered as 12.04.2019. The Financial Creditor's contention is that the loan accounts were classified as NPA on 01.05.2018. That would indicate that, the claims/amounts, if any, became due and payable long back and the right to apply accrued long back before 01.05.2018. As the application is incomplete and defective in material and relevant particulars and it is barred the limitation, the application is liable to be dismissed at the threshold.

8. It is also stated that there is no basis for the claim of the Financial Creditor that a sum of Rs. 7.30 Crores towards the principal amount and sum of Rs. 4.30 Crores (sic) towards the interest and as such a total sum of Rs. 11.68 Crores is due to the applicant is totally incorrect. Though, a statement is made to the effect that the calculation of the interest from the date of default is attached as Annexure, it is also not seen provided by the Financial Creditor. The details of the amount and other relevant matters including the rate and method of interest adopted by the Financial Creditor are also not known.

9. The Corporate Debtor stated that the person who has filed the application is not at all competent or authorized to file the application on behalf of the Financial Creditor or to initiate CIRP in the matter. The person



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who has signed and verified the application has no acquaintance with the facts and the statements and allegations are made in the application against the respondent without any basis.

10. The Corporate Debtor had agreed to clear the actual amount due to the applicant Bank as One Time Settlement. The amounts claimed by the Financial Creditor were far in excess of the amount actually due to it. In order to put a quietus to the issues the Corporate Debtor agreed to pay some amount in excess, but requested the Financial Creditor to release at least some of the properties offered as security for the purpose of sale to clear the debt. It is also stated that, the Corporate Debtor has furnished the properties worth several crores which would worth several times the actual amount due to the Financial Creditor. However, the Financial Creditor illegally declined to accept even the same with a view to run the respondent to great hardship. It is also stated that the Corporate Debtor provides job opportunities directly to around 100 employees and it provides job to more than 500 persons. The proceedings now initiated by the Financial Creditor is likely to lead the respondent to closure of the business and deprivation of livelihood to more than 500 persons who are earning their livelihood from the business of the Corporate Debtor.

11. On 12.11.2021 when the matter was taken up for hearing, the learned counsel for the Financial Creditor appeared through VC and stated that he proposed the name of an Interim Resolution Professional Shri. C.A. Mahalingam Suresh Kumar in Part III of the application. The learned counsel for the Financial Creditor also submitted that the IRP's current assignments are completed and 5 Resolution Plans are pending before



Chennai Bench. It is also submitted that in 3 IBC cases the proposed IRP is performing as Liquidator. The learned counsel also submitted that the IRP's name is in the IBBI Panel of IPs for Chennai Bench. Since Shri C.A. Mahalingam Suresh Kumar is having about 8 assignments, even though some of them awaiting approval of the Adjudicating Authority and that his name is not in the Panel of IPs for Kochi Bench, we have decided to appoint an IRP from the IBBI Panel the period 01.07.2021 to 31.12.2021 in respect of the Kochi Bench of NCLT, to which the learned counsel for Financial Creditor has not made any objections.

FINDINGS

12. We have heard the learned counsel for the parties and perused the whole case records including documents appended with the case records. 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 maintainable?*
- ii. *Whether this application will come in the purview of multiple proceeding with respect to the same debt?*
- 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; there it is clearly stated that the loan accounts were classified as NPA on 01.05.2018 and the date of occurrence of default for the purpose of IBC is considered as 12.04.2019.

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



Section 238A: Limitation.

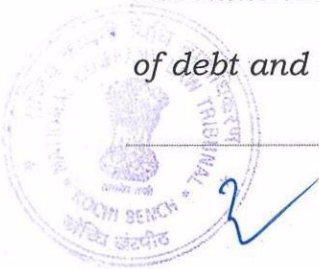
238A. *The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, as the case may be.*

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

<p>137. Any other application for which no period of limitation is provided elsewhere in this Division.</p>	<p>Three years</p>	<p>When the right to apply accrues.</p>
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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) held that, those provisions of the IBC cannot be shackled by the Limitation Act. It observed that: *"There is nothing on the 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 provision 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 course 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 for filing this application.

16. On perusal of the records, we found that the Financial Creditor has the proper authority to file the present application, and the objection raised by the counsel for the Corporate Debtor is merely incongruous, and therefore, holds no water. Moreover, the Deputy General Manager of the Financial Creditor had signed the application as an authorised person of the Financial Creditor and a specific authorization letter to file Insolvency Application before this Bench. Hence, technical objection raised on the ground of maintainability is only for the sake of objecting and hence stands rejected.

17. **Point No. (ii).** On perusal of the records, we found out that Section 7 of the Code propounds the manner in which Corporate Insolvency Resolution Process (CIRP) is to be initiated by the “financial creditor” against a “corporate person being the corporate debtor”.

18. The Hon'ble National Company Law Appellant Tribunal (“NCLAT”) in various judgments has held that pendency of actions under the SARFAESI Act or actions under RDB Act does not create obstruction for filing an application under of IBC on the ground that provisions under IBC shall have overriding effect over any provisions inconsistent therewith contained in any other law for the time being in force.

19. In this connection the decision of the Hon'ble NCLAT in **Rakesh Kumar Gupta v. Mahesh Bansal & Ors.**, (Company Appeal (AT) (Insolvency) No.

1408 of 2019) order dated on 20.02.2020, may be referred to.



20. Further on 26.02.2020, in the matter of **Punjab National Bank v. M/s Vindhya Cereals Pvt. Ltd.**, (Company Appeal (AT) (Insolvency) No. 854 of 2019) the question that arose before the Hon'ble NCLAT was whether subsequent to initiation of proceedings under the SARFAESI Act, a financial creditor can be precluded from filing an application under Section 7 of the Code, as the Hon'ble NCLAT held such proceedings are fraudulent or malicious against the Corporate Debtor. The Hon'ble NCLAT held that simply because the financial creditor had initiated a parallel proceeding against a corporate debtor under SARFAESI Act as well as under the Code, it cannot be called malicious. The Hon'ble NCLAT further opined that Section 238 of Code provides that the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Therefore, this non-obstante clause of the Code will prevail over any other law for the time being in force. Hence, the contention regarding maintainability will not stand for scrutiny and is to be 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.



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, this Tribunal is 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 Tip Top Furniture Private Limited 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.

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



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deserves to be admitted. Hence, the Application No. **CP(IB)/29/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. This Bench hereby appoints **Mr. C.J. Davis** having Registration No. **IBBI/IPA-003/IP-N00343/2020-2022/13660**, email id: davistheip@gmail.com residing at **House No 23/1223, Chandy House, Golden Gate, Rareeram Road, Anchangady, East Fort ,Behind Selex Mall ,Thrissur, Kerala ,680 005** whose name appears in the panel of IPs for appointment as Interim Resolution Professional for the period 01.07.2021 to 31.12.2021 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/- (Rs. 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).

- 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.



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- 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 also 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.

Dated this the 21st day of December, 2021

Sd/-

(Anil Kumar. B)
Member (Technical)

Rajasree

Sd/-

(Ashok Kumar Borah)
Member (Judicial)

Certified to be True Copy
Ashok Kumar Borah
Deputy Registrar
National Company Law Tribunal
Kochi Bench
23/12/2021

Free Copy U/R 50 of NCLT Rules, 2016

Memo No. CP(IB)/29/KOB/2021/.....

Date: 23.12.2021

To

1. Shri AG Sathyanarayana, Advocate, No.92, R.K. Salaim Chennai-4. Tamilnadu (**Counsel for the financial creditor**).
2. Mr. Babu Karukapadath, Advocate, M/s Karukappadath Law Chambers, 1st floor, Empire Building, Near High Court, Op. Central Police Station, Ernaiulam-682018 (**Counsel for the corporate debtor**)
3. Mr. C.J. Davis residing at House No 23/1223, Chandy House, Golden Gate, Rareeram Road, Anchangady, East Fort, Behind Selex Mall, Thrissur, Kerala, 680 005 (**Interim Resolution Professional**).

