

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(Appellate Jurisdiction)**

**Comp. Appeal (AT) CH (INS) No.88 of 2023
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016**

**(Arising out of Impugned Order dated 25.01.2023, in CP/(IB)/06/KOB/2022
passed by the Adjudicating Authority (National Company Law Tribunal,
Kochi Bench, Kerala)**

In the matter of:

N.K. Kurian,
S/o Kuriakose,
Suspended Managing Director,
M/s Mango meadows Agricultural Pleasure Land (P) Limited,
Residing at Building No.XV/175A,
Ayamkudy PO, Kaduthuruthy,
Kottayam-686613.

... Appellant

V

Kosamattom Finance Ltd.,
Kosamattam Mathew K.Chcrian Buildings,
Market Junction, Kottayam-686001.
Represented by its Managing Director

... Respondent

Present:

For Appellant : Mr.P.H.Arvinth Pandian, Senior Advocate
For Mr. Harikumar G Nair,
Mr.Akhil Suresh,
Mr.Jerin Asher Sojan,
Ms.Lilly Francis, Advocates

For Respondent : Mr.Dhananjaya Sud, Advocate

JUDGMENT
(Physical Mode)

Justice M.Venugopal, Member (Judicial)

Comp. Appeal (AT) CH (INS) No.88 of 2023:

Introduction:

1. The Appellant/ Suspended Managing Director of M/s Mango Meadows Agricultural Pleasure Land (P) Limited ('Corporate Debtor') has focused the instant Comp. Appeal (AT) CH (INS) No.88 of 2023 before this 'Appellate Tribunal', as an 'Aggrieved person', on being dissatisfied with the Impugned Order dated 25.1.2023 in CP (IB)/06/KOB/2022 passed by the 'Adjudicating Authority'/ 'National Company Law Tribunal, Kochi Bench, Kerala'.

2. Earlier 'Adjudicating Authority'/ 'National Company Law Tribunal, Kochi Bench' while passing an Impugned order on 25.1.2023 at Paragraph No.17, had observed the following:

Para 17“ Coming to CP(IB)/06/KOB/2022, 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 Mango Meadows Agricultural Pleasure Land (P) 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' and the failure to repay the Loan”.

and admitted the Application/Petition by initiating ‘CIRP’ against the ‘Corporate Debtor’/ Company, declared ‘Moratorium’ and appointed an ‘Interim Resolution Professional’ etc.,

Appellant’s Submissions:

3. The Learned Senior Counsel for the Appellant, submits that the ‘Adjudicating Authority’/ ‘Tribunal’, on an erroneous appreciation of the ‘Facts and Law’ had proceeded to admit the Section 7 Application filed by the Respondent/Petitioner/‘Financial Creditor’ after dismissing the IA/IBC/285/KOB/2022 (Filed by the M/s Mango Meadows Agricultural Pleasure Land (P) Limited, Kottayam, Kerala, under Section 65 of the I & B Code, 2016)

4. The Learned Counsel for the Appellant, takes a stand that the ‘Adjudicating Authority’/ ‘Tribunal’ came to an incorrect conclusion that the entries in ‘Books of Accounts’/ ‘Balance Sheets’ of ‘Corporate Debtor’ constitute an acknowledgement of ‘Debt’, when the voluminous documents, produced by both parties reflect fraudulent action by the Respondent/ ‘Financial Creditor’/ ‘Petitioner’ in initiating the Application under Section 7 of the I & B Code, 2016, according to the Appellant, the total sum of debt granted was Rs.10/- crores and Rs.8/- crores only was through ‘Sanction Letter’ dt.24.02.2016 and agreement to

loan dt.01.03.2016. In fact Rs.2/- crores was sanctioned, as per 'Sanction Letter' dt.13.2.2017 and 'Agreement to Loan' dt.16.02.2017.

5. The Learned Counsel for the Appellant, points out that, due to successive disasters from the year 2018 onwards, the floods of 2018 and 2019 Nippah and 'Covid Pandemic' put the appellant in deep crisis and due to lock down declared by the 'State Government', Mango Meadows was closed for two years and hence there was a decline in the influx of tourists and visitors adversely affecting the functioning of the Mango Meadows.

6. It is the version of the Appellant, as against the 'Sanctioned Loan' of Rs.8/- crores, the Appellant, was in immediate need of only Rs.4/- crores and that the Appellant, was informed by the Respondent, that since the total of Rs.8/- crores was sanctioned any fresh request for a lesser sum, would require time for processing and approvals. Hence, the Respondent/ 'Financial Creditor' has suggested that Rs.7/- crores could be availed and Rs.4/- crores to be repaid into the loan account by the Appellant, on the same day. Indeed, the Appellant had proceeded to avoid a loan of Rs.7/- crores and the Appellant/Company availed a sum of Rs.7/- crores, which was transferred by the 'Respondent'/'Financial Creditor' on 01.03.2016 into the Companies Account, South Indian Bank, Kallara, Kottayam.

7. It is the stand of the Appellant, that on the same day i.e. 01.03.2016, a sum of Rs.4/- crores was repaid by issuing a cheque to the Respondent for reducing the 'Loan Liability' of the Appellant. Another sum of Rs.2/- crores was advanced by the Respondent and a sum of Rs.1.25/- crores was returned to the Respondent by the Appellant on the same day. But the same was not reflected in the Accounts of the company.

8. The clear cut stand of the Appellant, is that in spite of repayment of a whopping sum by the company on the same day 'Respondent'/'Financial Creditor' had not accounted the same, in the 'Loan Account.' In reality the said amounts were diverted to some other account without an Authority, so as to increase the dues of the company with the ill motive of taking over the assets of the company.

9. In short, the plea of the Appellant, is that even the repayments made by the Appellant company are not fully and correctly reflected in the Main Petition. As a matter of fact, neither the payments are effected by the company nor the dates of actual payments tally with the statement produced by the Respondent/'Financial Creditor'.

10. The Learned Counsel for the Appellant, bring to the notice of this 'Tribunal' that the Appellant/Applicant filed an IA No. 285/2022 in Main CP(IB)/06/2022 (under Section 65 of the I & B Code, 2016) seeking for a

declaration that the main Company Petition (IB)/06/KOB/2022 was initiated by the Respondent/ 'Financial Creditor' fraudulently and with a malicious intent, for purposes, other than for Resolution of the Insolvency, and of 'Corporate Debtor' and for levying 'Penalty' on 'Respondent'/'Financial Creditor' and to dismiss the main 'Company Petition' preferred by the 'Respondent'/'Financial Creditor'.

11. The Learned Counsel for the Appellant, points out that as per the statement produced by the 'Respondent'/'Financial Creditor', only a sum of Rs.11,08,333 was recorded to have been repaid by the Appellant, when for the Financial Year ending 31.03.2016, the Appellant had repaid a sum of Rs.4,17,67,965/-. That apart, numerous repayments effected by the Appellant, for the later period was not reflected in the Bank statement produced by the Respondent before the 'Adjudicating Authority'/'Tribunal'

12. The Learned counsel for Appellant submits that the Respondent/'Financial Creditor' had charged an exorbitant rate of interest, penal interest and other charges and even contrary to the 'Terms and Conditions'. Besides this, the Respondent/ 'Financial Creditor'/Petitioner and its officials were pressurising the IA No.285/2022 in CP (IB)/06/KOB/2022 for payment of more sums and in fact the applicant in IA No.285/2022 in CP(IB)/06/KOB/2022 was constrained to allow the Respondent for management participation by appointing

an Accounts Manager, from the respondent to look after, supervise and coordinate all accounts of the applicant, with full control over all its accounts on a daily basis, a cost of applicants' company by paying a monthly salary not exceeding 30,000/- and granting permission to the respondent withdraw 50 % of the total collection less the maintenance of Theme Park etc.,

13. On behalf of the Appellant, it is pointed out before this Tribunal an Account Manager was deputed, for supervising the Day to Day Affairs since 1.8.2018 and 58% of the collection from the 'park', was taken over by the Respondent, a substantial sum, so collected was realised by the Respondent/'Financial Creditor', from the income, from the project.

14. The Learned counsel for the Appellant, adverts to the Appellant filing of a Writ Petition Civil) No.7444 of 2022 praying, among other things on account of Non Disclosure of material facts under sec 7 of I and B Code, 2016 and that the proceeding, are liable to be rejected. The Hon'ble High Court of Kerala had rejected the challenge against the constitutional validity of Sec 7 of I and B Code, 2016 as an arbitrary and discriminatory one.

15. The contention of the 'Appellant' is that inspite of an offer, from the 'Appellant', to settle the dues, to the 'Respondent', in the form of a Take over of Loan by the Kerala Financial Corporation, the Respondent has not communicated

‘any decision’. Further, the intention of the Respondent/ ‘Financial Creditor’ is to destroy the Appellant and not to recover the ‘amounts due’ and the ‘Default sum’, can be settled by the Appellant, in the event of the take over of the ‘Loan’ by the ‘Kerala Financial Corporation’.

16. The ‘Respondent’/‘Financial Creditor’/‘Petitioner’ had claimed a sum of Rs.18,48,84,627/- and interest from 01.12.2021, a sum of Rs.5,09,49,391/-. In all the amount claimed to be in default was Rs.23,58,34,018/- and the same is outstanding. The date of default was on 18.07.2019, when the last remittance of Rs.9,99,976.40/- paise was received by Respondent/Petitioner.

17. It is averred in the ‘Form 1 under part IV of the Application (filed under Section 7 of the I & B Code 2016, R/w Rule 4 of Insolvency and Bankruptcy application to ‘Adjudicating Authority’) rules 2016’, by the Respondent/‘Financial Creditor’/Petitioner that the ‘Corporate Debtor’/‘Company’ had acknowledged its financial debt on 2.12.2020 in the balance sheet 31.3.2020, amounting to Rs.37,09,70,242.23 as long term liability, which is including the term loan availed from the ‘Financial Creditor’.

18. According to the Respondent/Petitioner/‘Financial Creditor’ the ‘Corporate Debtor’ had made only some part payments which were too meagre compared to the committed repayment obligations and under the last payment

received from the ‘Corporate Debtor’, amounting to Rs.9,99,976.40/- paise, was received by the Financial Creditor’ on 18.7.2019 and added further, no further repayments were received by Respondent/ ‘Financial Creditor’ and also that the date of ‘Corporate Debtor’, was registered with NeSL information utility Board dt.23.11.2021.

Appellant’s Citation:

19. The Learned counsel for the Appellant, seeks in aid of the order dated 19.9.2022 in Comp. Appeal AT CH (INS) No.1005 of 2022 between Reliance Commercial Finance Limited v Darode Jog Builder Pvt. Ltd. wherein at para 14 it is inter alia observed as under

“para 14..... The proceeding under Section 7 are proceeding for resolution of the insolvency of the ‘Corporate Debtor’. We do not find any error in the course adopted by the Adjudicating Authority to ascertain as to whether the ‘Corporate Debtor’ can comply to deposit the entire defaulted amount in the Bank Account of the Financial Creditor”.

Respondent’s Pleas:

20. According to the Respondent/‘Corporate Debtor’, the main CP/IB/06/2022 is not maintainable and that its operations as a going concern

cannot be diluted by changing the management because of its unique and distinct environmental peculiarity. Also that the Managing Director of the 'Corporate Debtor'/Respondent, had remitted a sum of Rs.11,00,000/- to the account of the Financial Creditor and that the amount paid was not taken into account while preferring the application under form 1 of I and B code. Therefore, the main company petition being a defective one and is liable to be dismissed in the initial stage itself.

I & B Code 2016:

21. The object of the I & B Code, 2016, is to 'Resolve an Insolvency', which cannot be achieved unless a petition is admitted. It is not the property which is at the base of the I & B Code, 2016 but it is the 'Cash Liquidity', which is the cementing platform for triggering the 'Corporate Insolvency Resolution Regime'.

22. Under the Insolvency and Bankruptcy Code, 2016, the shift is from inability to pay, to the existence of a Default. A mere 'Dispute' about the quantum of payment, does not infringe the right of a 'Financial Creditor', to prefer an Application under Section 7 of the I & B Code. Even though a 'Debt' is disputed, if it is more than Rs.1/- crore (after Amendment to the Code) and where the minimum sum of Default is one lakh (prior to Amendment), the Application

/Petition filed by the concerned party/entity/organization/Bank etc., is to be admitted and there is no escapade on that, as opined by this Tribunal.

23. It is aptly pointed out by this Tribunal, that the circumstance under which the 'Corporate Debtor', is not able to repay the 'Financial Debt', need not be taken as a 'Defence', in a proceeding under the Code. The reason for incapacity/inability of a 'Corporate Debtor', to pay its 'Debt', is not required to be gone into/looked into by an 'Adjudicating Authority'/ 'Tribunal', in the considered opinion of this 'Tribunal'.

An Acknowledgement :

24. An 'Acknowledgement', is to reflect an 'Acknowledgment' of an 'existing liability', as per decision Rangasami V Thangavelu 42 Mad 637. An 'Acknowledgment' of the Debt' must involve an admission of a subsisting relationship of 'Debtor' and 'Creditor', and an intention to continue it until it is lawfully determined must also be evident.

25. Be it noted, that when a 'Debtor', makes an acknowledgment of its liability to pay a Debt, it will ordinarily mean that he was admitting a subsisting liability to pay as per decision in Tulshi Ram V Nek Ram reported in AIR 1945 All 224. Also, that the plea of an 'Acknowledgment' need not include the exact nature of a Liability, as per decision of the Hon'ble Supreme Court of India in

Lakshmiratan Cotton Mills Company Ltd., V Aluminium Corporation of India Ltd., reported in AIR 1971 SC page 1482.

26. An Acknowledgment', will not create any new right, but it 'elongates, the Limitation period', as per decision, in P.Sridevi V P.Appu AIR 1991 Ker 76. Ofcourse, the burden fall upon the head of the Creditor, to establish that the acknowledgment was made within time as per decision in Gur saran V Shib Singh AIR 1943 All 393 (FB).

27. No wonder, An 'Acknowledgment', must be concerned with a definite/certain Liability in the considered opinion of this Tribunal. It cannot be lost sight of that an 'Entry', in the Balance Sheet pertaining to a debt is undoubtedly an 'Acknowledgment of Debt' and further that an acknowledgment need not be specific' but the person acknowledging must be alive and conscious by his liability and commitment ought to be made to that Liability.

Assessment:

28. It transpires that the 'Respondent'/'Petitioner'/'Financial Creditor', had granted Debt of a total sum of Rs.10/- crores (Rs.8/- crores was sanctioned through sanction Letter dt.24.2.16 and Rs.2/- crores was given as per Sanction Letter 13.2.2017 and Agreement to loan dt.16.2.2017. The total of Rs.23,58,34,018/- was the amount, claimed to be in default by the 'Corporate Debtor'/Company and

according to the 'Respondent'/'Financial Creditor', the last payment of 9,99,976.40/- paise was received by it, from the 'Corporate Debtor', on 18.7.2019.

29. Because of the 'Corporate Debtor'/Mango Meadows Agricultural Pleasure Land (P) Limited's failure to effect the repayment of the sums advanced by the Respondent'/'Financial Creditor'/Petitioner, the main CP/IB)/06/KOB/2022 was filed before the 'Adjudicating Authority'/'Tribunal'.

30. In the present case, there is no dispute, as to the 'Loan', availed but according to the Respondent/'Financial Creditor', the 'Corporate Debtor' had paid only a sum of Rs.9,99,976.40/- paise and this was given credit to. But the 'Corporate Debtor', before the 'Adjudicating Authority' came out with a version that a sum of Rs.11,00,000/- paid by it, was not given credit to.

31. Be that as it may, it is a crystalline fact that the exact quantum of amount to be paid by a party is not a decisive one, especially, in an application filed under sec 7 of the I and B code 2016 by the Petitioner/'Financial Creditor'. If the amount claimed is more than the threshold limit as per the section 4 of the I & B Code 2016, the petition can be admitted.

32. On going through the Impugned Order dt.25.1.2023 in CP/(IB)/06/KOB/2022, on the file of the 'Adjudicating Authority'/'Tribunal' it is evident that 'Corporate Debtor' side took some time to pay the admitted default but

not paid any sum. Also that, the debt sum, payable by the ‘Corporate Debtor’ as on 11.11.2022, was more than Rs.2 crores and the fact of the matter, is that the I and B code 2016 can be pressed in to service from the time the default is more than Rs.1 crore. If an ‘Adjudicating Authority’/Tribunal is subjectively satisfied that a ‘Default’ took place and in fact when the ‘Debt’ was admitted, the petition filed by the ‘Financial Creditor’, is to be admitted, subject to the condition that the Petition/Application is complete in all respects.

33. As far as the present case is concerned because of the default committed by the ‘Corporate Debtor’ relating to the repayment of the loan amount due to be paid by Respondent/Financial Creditor, the loan amount, was declared as ‘Non Performing Asset’. There is no simmering doubt that the main CP/IB)/06/KOB/2022 was filed by the Respondent/Petitioner as ‘Financial Creditor’ as per definition Section 5 (7) of the I & B Code, 2016.

Glimpse of I &B Code, 2016:

34. Section 5 (8) of the Code speaks of ‘Financial Debt’, meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money including (a money borrowed against the payment of interest etc.,)

35. Section 3 (6) of the I & B Code, defines claim meaning a) a right to payment whether or not is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured etc.,”.

36. Section 3 (8) of the I & B Code, defines 'Corporate Debtor', meaning a 'Corporate person' owes a debt, to any person Section 3 (10) defines creditor meaning any person to whom a debt is owed includes a 'Financial Creditor', Operational Creditor, a secured creditor and an unsecured creditor decree holder

37. Section 3 (11) of the I & B Code, 2016 defines 'Debt' meaning a liability or obligation in respect of a claim which is due from any person and includes a 'Financial Debt' and 'Operational Debt'

38. Section 3 (12) of the Code, defines 'default' meaning non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 'paid' by the debtor or the 'Corporate Debtor', as the case may be.

39. It cannot be gainsaid that, even if a portion of the debt due and payable is tacitly admitted by a 'Corporate Debtor'/company and it comes within the threshold sum of the default of Rs.1 crore, as per (Section 4 (1) of I & B code, 2016 vide chapter 1 preliminary part 2) then, the Adjudicating Authority/Tribunal, is endowed with a subjective discretion, to admit the Section 7 Application filed by a party under the I & B Code, 2016 once the 'Debt and Default' are proved, to its satisfaction.

40. A ‘moonshine’ or an ‘illusory’ defence, cannot be put forward by a party, and the same can be brushed assigned by an ‘Adjudicating Authority’/ ‘Tribunal’ in a given case, and even the term ‘claim’,(as per Section 3(6) of the code) points out ‘a right to payment, despite the fact the same is controverted/disputed’.

41. In the light of foregoing detailed discussions and this ‘Tribunal’, keeping in mind a prime fact that the Insolvency resolution process commences when a default takes place, and in the instant case ‘Debt and Default’ having been established to its subjective satisfaction, comes to a consequent conclusion that the Adjudicating Authority’/ ‘National Company Law Tribunal, Kochi Bench’ had rightly admitted the Main CP/IB/06/KOB/2022 preferred by Respondent/ ‘Financial Creditor’/Petitioner and the same is free from any legal flaws. Viewed in that perspective the instant ‘Appeal’ sans merits.

Result:

In fine, the instant Comp. Appeal (AT) CH (INS) No.88 of 2023 is dismissed, No costs. The connected pending IA No.316 of 2023 is closed.

**[Justice M. Venugopal]
Member (Judicial)**

**[Ms.Shreesha Merla]
Member (Technical)**

13/4/2023

TM

Comp. Appeal (AT) CH (INS) No. 88 of 2023