IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH, KOCHI

CP(IBC)/38/KOB/2023

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

In the matter of:

M/s. Jomer Properties and Investments Private Limited.

Memo of parties: -

State Bank of India, Stressed Assets Management Branch- (SAMB), 1112, Raja Plaza, Avinashi Road, Coimbatore- 641 037. Email: sbi.16454@sbi.co.in.

... Financial Creditor.

-Versus-

M/s. Jomer Properties and Investments Private Limited, Jomer Arcade, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016. Email:- accounts@jomerproperties.com.

... Corporate Debtor.

Order delivered on: 16.02.2024

Coram:

Hon'ble Member (Technical)	Hon'ble Member (Judicial)
Shyam Babu Gautam	TMT. Justice (Retd.) T. Krishna Valli

Appearances:

For the Financial Creditor : Mr. Vinod P.V., Adv.

For the Corporate Debtor : Mr. Jinan K.R., Adv.

O R D E R

Under consideration is Petition No. CP(IB)/38/KOB/2023 filed by the Financial Creditor State Bank of India against the Corporate Debtor M/s. Jomer Properties and Investments Private Limited., invoking Section 7 of the Insolvency and Bankruptcy Code, 2016 to initiate the Corporate Insolvency Resolution Process for the total default amount of **Rs. 12,47,44,334/- (Rupee Twelve Crore Forty-Seven Lakhs Forty-Four Thousand Three Hundred and Thirty-Four Only).**

2. The facts as narrated in the application and explained by the Financial Creditor are summarized hereunder:

i. The Corporate Debtor is a private limited company incorporated under the provisions of the Companies Act, 1956 having its registered office at Ernakulam, which is within the jurisdiction of this Tribunal. The Corporate Debtor was engaged in the business of construction / real estate and availed credit facilities from the erstwhile State Bank of Travancore ("SBT") for completion of the interiors, plumbing and electrical works of a building called "Jomer Symphony" at Vyttila, Ernakulam. SBT sanctioned a Term Loan of Rs. 9,00,00,000/- (Rupees Nine Crore Only) vide sanction letter dated 21.03.2015 with interest @14.10% per annum with monthly rests. The corporate Debtor executed the required loan documents on 23.03.2015 viz, Term Loan Agreement, Deed of Hypothecation. The term loan was repayable in eight quarterly installments of Rs. 1,12,50,000.00/-(Rupees One Crore Twelve Lakhs Fifty Thousand Only), with the first instalment payable after the moratorium period of one year, i.e., on 30.06.2016. As a security towards the credit facilities, the Corporate Debtor has created the first *pari passu* charge by way of hypothecation over the entire movable assets of the Corporate Debtor in favour of the Financial Creditor. The Corporate Debtor has also created an equitable mortgage of 15889 sq. feet of commercial unit in the building Jomer Symphony with 1476/ 29090 undivided share in 59.95 Ares of land. Further, the Directors of the Corporate Debtor namely Mr. Jose M. M. and Mrs. Merin Jose have executed a Deed of Guarantee, guaranteeing the repayment of the entire principal sum together with interest, cost and charges in the event of default committed by the Corporate Debtor.

ii. It is stated that upon the merger of State Bank of Travancore with State Bank of India on 31.03.2017, the account of the Corporate Debtor was transferred to SBI and presently maintained at State of Bank of India, Stressed Assets Management Branch, at Coimbatore.

iii. It is stated that the Corporate Debtor committed default in the repayment of the credit facilities and thereby the accounts became irregular and it was classified as Non-Performing Asset on 31.07.2017 in terms of the guidelines issued by the Reserve Bank of India. A demand notice under Section 13(2) of the SARFAESI Act was issued demanding to pay the then outstanding of Rs.7,64,60,471/-. Subsequently, the Applicant took possession of the secured assets and put the property in the auction on 28.02.2018, 23.03.2018, 29.05.2018 and 30.06.2018, however, the auction was unsuccessful.

iv. It is stated that the Applicant has filed Original Application being OA No 505/2017 before the DRT on 23.10.2017 for recovery of the dues of Rs.8,01,18,147/- as on 18.10.2017. During the pendency of the OA, the Corporate Debtor has requested a compromise and agreed to settle the entire dues for an amount of Rs.5,33,98,149.00/- on or before 04.04.2019. Based on the same a compromise petition was filed before the DRT and the DRT passed a decree on 31.12.2018 recording the settlement. In terms of the decree, in the event of default committed by the Corporate Debtor, Applicant shall be entitled to realize the entire principal due with interest and cost as claimed in the OA from the Corporate Debtor and the Guarantors. It is stated that the Corporate debtor remitted Rs. 1,06,79,630/- and failed to pay the balance due of Rs. 4,27,18,149/- before 04.04.2019 as agreed. Accordingly, the Applicant intimated to the Corporate Debtor on 01.06.2019 that the OTS offered for compromise stands failed.

v. It is further stated that the Corporate Debtor was offered with a scheme for One Time Settlement (OTS) vide Applicant's letter dated 19.10.2020 for OTS amount of Rs.3,41,84,362/- under SBI OTS 2020. The Corporate Debtor accepted the OTS offer and paid Rs.17,10,000/- on 20.11.2020 towards a 5% upfront payment. Accordingly, an OTS Sanction letter was issued to the CD on 30.11.2020 and thirty days were granted till 30.12.2020 to pay another 10% of the sanctioned OTS amount (i.e. Rs. 34,18,436/-) as 1st installment and another 10% of OTS amount by 30.01.2021 as 2nd installment and the remaining amount on or before 31.07.2021. The Corporate Debtor has paid only the upfront amount and 1st installment, cumulatively 15% of the sanctioned OTS amount i.e. Rs. 52,10,000/- and failed to pay the 2nd installment of Rs. 34,18,436/- on or before 30.01.2021 as agreed. Accordingly, the Applicant intimated to the Corporate Debtor on 01.02.2021 that the OTS was treated as cancelled.

vi. It is stated that the Corporate Debtor on 02.08.2022 further requested a compromise settlement and made a proposal to settle dues for Rs.4.50 Crores revising its earlier offers, however, the Applicant vide letter dated 21.01.2023, informed the Corporate Debtor that the amount proposed is low and advised to improve the offer. The Corporate Debtor vide letter dated 06.03.2023 informed the bank, that no further improvement can be made and advised to refund the upfront amount deposited in the no lien account towards considering the OTS proposal. The Financial

Creditor vide letter dated 29.03.2023 rejected the proposal since the amount proposed was low and refunded the upfront payment.

vii. The Corporate Debtor is unable to pay its debt despite granting various opportunities and hence the present application is filed for initiating the corporate insolvency resolution process against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016.

3. The Corporate Debtor filed its reply statement on 15.12.2023 and stated that the amount which is claimed by the Financial Creditor to be at default by the Corporate Debtor is Rs 12,47,44,334 (Rupees Twelve Crore Forty-Seven Lakh Forty-Four Thousand Three Hundred and Thirty-Four Only) as on 30.06.2023. The Financial Creditor wrongly instituted this company petition before this Tribunal based on erroneous and misleading calculations and statements and no such debt is owed by the Corporate Debtor to the Financial Creditor. That when as per the filings done by the Financial Creditor in the information utility the debt that is shown is only Rs. 4,03,69149 (Rupees Four Crore Three Lakh and Sixty-Nine Thousand Forty-Nine Only).
4. It is stated that during the pendency of the SARFAESI application the Financial Creditor simultaneously moved an application before DRT seeking the recovery of dues for an amount of Rs. 8,01,18,147 as on 18.10.2017. The said petition was compromised vide decree dated 31.10.2018 wherein the Corporate Debtor was to have paid Rs.

4,27,18,149 with the Corporate Debtor having paid Rs. 1,06,79,630 out of the original amount of Rs. 5,55,98,149. As per the compromise decree the amount was to have been paid by 04.04.2019 which the Corporate Debtor could not do so on account of certain home buyers not paying their share. The compromise decree not having worked out, the remedy of the applicant was to approach the DRT seeking modification or execution however despite the same no action has been taken by the Financial Creditor. The limitation period would be three years from the last date of the financial year previous to the declaration of NPA, which in the present case would start on 30.10.2016 thus the present application having been filed belatedly is liable to be dismissed. [As per Reserve Bank guidelines NPA is to be declared after 3 consecutive defaults, and therefore, the Limitation period is to start from the date of default is 31.10.2016] Furthermore no recovery certificate has been issued to the Financial Creditor and thus no claim on limitation can be made out.

5. It is stated that the Financial Creditor has no consistency in regards to the date of default for filing an application under Section 7 of the Code. Since the applicant has failed to prove the exact date of default, the cause of action accrued in the given case can be taken as 30.10.2016, which is 90 days before the date of NPA 30.01.2017. This application is barred by law of limitation and the mortgage described in the petition is a simple mortgage falls under Section 58(b) and therefore the applicant is not a secured financial creditor as alleged in regards the immovable properties.

6. It is stated that as per the proposal for a one-time settlement letter dated 30.11.2020, the Corporate Debtor was to pay a total amount of Rs. 3,41,84,362 only and upon payment of Rs. 52,10,000/- by the Corporate Debtor an amount of Rs.2,89,74,362 remained to be paid with the Corporate Debtor acknowledging that the liability to be paid was Rs. 2,55,55,926 is paid by 31.01.2021 as clear from the letter dated 05.01.2021. Despite the part payments the applicant refused to relinquish the proportionate security and it was informed that as regards the remaining payments though the respondent was ready to comply with the OTS proposal it was informed to the respondent the applicant bank that even if the loan account of the respondent was fully settled the same would not lead to the release of security on account of the pending loans to the related entity being ITMA Hotels India Pvt. Ltd.
7. It is stated that after the COVID-19 pandemic subsided, the Corporate Debtor again approached the Financial Creditor bank with a proposal to settle the dues of the Financial Creditor for Rs. 4.5 crores. The said proposal was made on 02.08.2022 and was a crore more than the amount earlier accepted by the Financial Creditor as due and Rs. 1.90 crores more than the due to be paid on 31.01.2021. Despite the said offer the Financial Creditor took a similar stand and stated that they would not be able to release the securities of the Corporate Debtor on account of the outstanding amounts seen due in ITMA Hotels India Pvt. Ld. The said stand was made out in an e-mail sent on 25.08.2022. Despite this being the real reason for not accepting the dues from the

Corporate Debtor, is that the Financial Creditor sent a belated reply to the Corporate Debtor wherein it was stated that the valuation by the Corporate Debtor was not up to the mark.

8. It is stated that the Financial Creditor has been refusing to settle the dues of the Corporate Debtor despite the Corporate Debtor being fully ready to do so and based on the same the Financial Creditor has filed the present petition instead of seeking to push the Corporate Debtor into an insolvency proceeding whereby the scrupulous parties can take over the Corporate Debtor at a negligible amount as attempted in the case of ITMA Hotel-India Pvt. Ltd. In light of the refusal of the Financial Creditor to accept the dues from the Corporate Debtor despite being much more than the dues as stated by the Financial Creditor there cannot be said to be any default on the part of the Corporate Debtor and thus no case was invocation of Section 7 is made out.

FINDINGS: -

9. We have heard the learned counsel for both parties and perused the entire case records/documents. We have also gone through the evidence on record. On hearing both sides and with an appreciation of the documents produced, the following four issues are framed: -

   i. Whether the Petition maintainable under Section 7 of IBC?
   ii. Whether the application is barred by limitation?

iii. Whether there is a Creditor-Debtor relationship between the Financial Creditor and Corporate Debtor herein?

10. **Issue No. i.** We have gone through Part IV of the Petition wherein the date of default is mentioned as 04.04.2019 and the total default amount is shown as Rs. **12,47,44,334/- (Rupee Twelve Crore Forty-Seven Lakhs Forty-Four Thousand Three Hundred and Thirty-Four Only)**. In the circumstances mentioned above, we have gone through the settled law decided by the Hon'ble NCLAT in its order in ***Mr. Manmohan Singh Jain Vs. M/s. State Bank of India & another*** *(Company Appeal (AT) (CH) (INS) No. 97 of 2021)* wherein the Hon'ble NCLAT held that: -

> *52) Further the Learned Counsel for the Appellant relied upon the Judgment of the Hon'ble Supreme Court in Surendra Trading Co. v Juggilalkamlapat Jute Mills Co., 2017 85 taxmann.com 372 SC to show that the timelines under Section 7(5) of the Insolvency and Bankruptcy Code are not mandatory however the defect has still to be removed.* ***As stated above, the Respondent/Financial Creditor had stated the date of default in the pleadings and in other documents which the Corporate Debtor has received and acknowledged, therefore as held supra the non-mentioning of the date of default in Col. IV is not fatal to the application and on the sole ground, the application cannot be rejected mere taking a technical impediment***

as held by the Hon'ble Supreme Court that 'it is only a directory'.

11. In the judgement of the Hon'ble Supreme Court in ***Dena Bank vs. C. Shivakumar Reddy and Ors.*** *(Civil Appeal No. 1650 of 2020) (2021 SCC OnLine SC 543)*, the Hon'ble Supreme Court held as under: -

142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

*143**. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process**, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor,* *under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.*

12. In the aforementioned cases the Apex Authorities clearly stated that Section 7 IBC cannot be rejected due to technical snags. Therefore, the contention of the Corporate Debtor regarding NPA and date of default has no legs to stand.
13. **Issue no: ii.** To arrive at a definitive conclusion, concerning this issue, we have gone through Section 238A of the IBC, 2016 which defines "Limitation": -

    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

137. Any other application for which no period of limitation is provided	*Three years*	*When the right to apply accrues.*

elsewhere in this Division.		

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 a 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 the 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 the limitation in filing this application.

16. As far as the issue before us, on perusal of the records, we found that the Financial Creditor filed this Company Petition on 20.10.2023. We also found that there is a One Time Settlement letter sent by the Corporate Debtor on 02.08.2022. Therefore, there is a continuous

cause of action and we could come to a conclusion that the Company Petition has been filed within the prescribed period of limitation. Hence the contention taken by the Corporate Debtor regarding limitation has no force.

17. **Issue 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. 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.

18. 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 applying for 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.

19. The application made by the Financial Creditor is complete in all respects as required by law, and it clearly shows that the debt has not been paid by the Corporate Debtor. So, we are of the considered opinion that the present application of the Petitioner/Financial Creditor may be admitted under Section 7 of the IBC, 2016 and CIRP initiated against the Corporate Debtor.

20. In view of the aforesaid observations, we hereby pass the following Orders.

i. The petition bearing CP (IBC) No. 38/ KOB /2023, filed by State Bank of India, the Financial Creditor, under Section 7 of Insolvency and Bankruptcy Code 2016 for initiating CIRP against the Corporate Debtor M/s. Jomer Properties Investments Private Limited is **ADMITTED**.

ii. There shall be a moratorium under Section 14 of the Code.

iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until the Adjudicating Authority approves the Resolution Plan under Sub-Section (1) of Section 31 of IBC or passes an order for liquidation of Corporate Debtor under Section 33 of the Code, as the case may be.

iv. Public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations 2016.

v. The Financial Creditor has proposed the name of one **Mr. Kizhakkekkara Kuriakose Jose** having Registration Number: **IBBI/IPA-001/IP-P00445/2017-2018/10788** as Interim Resolution Professional (IRP) and written communication in the format prescribed under Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 along with valid authorization has been filed by the proposed IRP, who is appointed as the IRP to take forward the process of Corporate Insolvency Resolution of the Corporate Debtor. The designated IRP must take any additional actions in this regard that are mandated by the law, more specifically specified in Sections 15, 17, and 18 of the Code. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP concerning the Corporate Debtor in terms of the provisions of IBC, 2016. The fee payable to IRP or as the case may be, the RP shall comply with such Regulations, Circulars and Directions as may be issued by the Insolvency and Bankruptcy Board of India (IBBI). The IRP shall carry out its functions as contemplated by Sections 15 and 21 of the Code.

vi. During the CIRP period the management of the Corporate Debtor shall vest with 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 one week from the date of receipt of this order, in default of which coercive steps will follow.

vii. The IRP/RP shall submit to this Adjudicating Authority periodical reports as per Regulations/Rules concerning the progress of the CIRP in respect of the Corporate Debtor.

viii. The Financial Creditor shall deposit a sum of Rs.2,00,000/- (Two Lakhs Only) with the IRP to meet the expenses arising out of issuing publication and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (CoC).

ix. In terms of Section 7 (5)(a) of the Code, the Registry is hereby directed to communicate a copy of this Order to the Financial Creditor, the Corporate Debtor and IRP by Speed Post & e-mail immediately, and in any case, not later than two days from the date of this order.

x. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, Kerala, by all available means 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.

SHYAM BABU GAUTAM Digitally signed by SHYAM BABU GAUTAM Date: 2024.02.16 15:03:48 +05'30'

SHYAM BABU GAUTAM

(MEMBER TECHNICAL)

T.KRISHNAVALLI Digitally signed by T.KRISHNAVALLI Date: 2024.02.16 15:02:10 +05'30'

T KRISHNA VALLI

(MEMBER JUDICIAL)

Signed on this 16th day of February, 2024.

Rajasree R. Nair/LRA