

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

IBA/04/KOB/2020

(Under Section 7 (4) of the IBC,2016)

Order delivered on 20.11.2020

Coram:

Shri Ashok Kumar Borah, Member (Judicial)

Applicant/Financial Creditor

Union Bank of India, (Erstwhile Corporation Bank)
Having Central Office at
239, Vidhan Bhavan Marg,
Nariman Point, Mumbai-400 021
Having regional office at Thukalakkat Building,
Thammanam Road, Palarivattom,
Kochi-682025 and Branch at Edapally.

Versus

Respondents/Corporate Debtor

M/s Mathstraman Manufacturers
and Traders Private Limited,
Plot No.71/72, Major Industrial Estate
South Kalamassery, Ernakulam,
Kochi-682109

Parties/Counsels Present (through Video Conferencing):

For Applicant : Mr. VA Ajaikumar, Advocate
For Respondent : Shri P.V.George Puthiyedom, Advocate

The Applicant Corporation Bank Ltd (hereinafter called as 'Financial Creditor/ the Bank') has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('hereinafter called as Rules) in the capacity of "Financial Creditor" by invoking the provisions of Section 7(4) of the

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Insolvency and Bankruptcy Code ('hereinafter called as Code') against M/s Mathstraman Manufacturers and Traders Private Limited ('hereinafter called as 'Corporate Debtor') before this Tribunal on 06.01.2020.

2 On 03.07.2020 the Financial Creditor filed an Interlocutory Application numbered as **IA/81/KOB/2020** to substitute the Financial Creditors name of Bank as Union Bank of India instead of Corporation Bank and the learned counsel for the Financial Creditor has stated that the Corporation Bank is amalgamated with another entity namely Union Bank of India, having its Central Office at 239, Vidhan Bhawan Marg, Nariman Point, Mumbai – 400 021 and, inter alia, a Branch at Edappally, Ernakulam with effect from 01.04.2020 under the Scheme of Amalgamation notified as per Government of India Gazette Notification namely General Statutory Rules (GSR) 154(E) dated 04.04.2020 published in the Gazette of India. The Corporate Debtor filed counter against the Application and stated that as per by Annexure A46 notification Union Bank of India is not permitted to continue in this Application and the Application itself barred by limitation. Subsequently heard the both parties and passed an order on 13.08.2020 as under: -

“On a perusal of the said Government Notification, it appears that by Extra Ordinary Gazette Notification dated 04.03.2020 under Section 9 of the Banking Companies Act, 1970 and Section 9 of the Banking Companies Act, 1960, the Central Government after consultation with the Reserve Bank of India notified Amalgamation of Andhra Bank and Corporation Bank into the Union Bank of India, which came into force with effect 01.04.2020. In implementation of this Government Notification with effect from 01.04.2020, the Corporation Bank has been merged with Union Bank of India. Paragraph 9 of the said Notification makes its clear that any cause of action, suit,

decrees, recovery certificates, appeals or other proceedings of whatever nature in relation to any business of the undertakings which have been transferred under paragraph 3, is pending by or against the Transferor Banks before any Court or Tribunal or any other authority, the same shall not abate, be discontinued or be, in any way prejudicially affected by reason of the transfer of the undertakings of the Transferor Banks or of anything contained in this scheme but the suit, appeal or other proceedings may be continued, prosecuted and enforced by or against the transferee Bank. Hence, this Application deserves to be allowed IA/81/KOB/2020 is Allowed.”

3. In the application, under the head "Particulars of Financial Debt" it is stated that the total amount of debt granted is Rs.10,75,00,0000/- and the amount claimed to be in default is Rs.27,23,83, 119.44 (Rupees Twenty-Seven Crores Twenty-Three Lakhs Eighty-Three Thousand One Hundred Nineteen and Paise forty-Four Only) as on 20.12.2019.

4. The Financial Creditor submitted that in the year, 2009, the Corporate Debtor, which was enjoying Cash Credit Limit of Rs. 100 Lakhs from Standard Chartered Bank approached the erstwhile Corporation Bank for availing enhanced credit facilities including takeover of the existing credit facilities sanctioned by the Erstwhile Corporation Bank to the Corporate Debtor, inter alia, by hypothecation of movables, stocks, receivables and mortgage of M/s. Malayalam Industries Ltd, a Public Limited Company and personal properties of Directors of Corporate Debtor as per sanction letter dated 01.09.2009 issued by the Financial Creditor.

5. The Financial Creditor further submitted that Mr. Thomas George was the Managing Director of both Corporate Debtor and Corporate Guarantor Companies,

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while seeking financial assistance from Financial Creditor by way of take-over of the existing financial facility and enhancement and now in the same category and on their application the Financial Creditor on 01.09.2009 sanctioned the credit facilities. The facilities were availed by the Corporate Debtor on hypothecation of movables, stocks, receivables of the Corporate Debtor and Corporate Guarantee of Public Limited Company M/s Malayalam Industries Ltd having its Registered Office at Mermaid Complex, Kaniampuzha Road, Vytilla, Ernakulam 682 019 and on the personal guarantee of the Directors of Corporate Guarantor namely Mr. Thomas George and Mrs. Asha Mary Thomas, who are also the Directors of Corporate Guarantor and on the equitable mortgage of the personal immovable properties belonged to the guarantors admeasuring 16.05 Ares in Re. Sy. No. 114/9, 114/10, 123/18 (Old Sy. No. 250/1, 250/2) of Maradu Village belonged to the Guarantors Mrs. Asha Mary Thomas and 17.02 Ares and the residential building situated therein comprised in Re. Sy. Nos. 114/9, 114/12, 114/17 (Old Sy. No. 250/1) of Maradu Village belonged to Mrs. Thomas George.

6. It is further stated that 92% equity shares of Corporate Guarantor are owned by Mr. John Mathew who is also a 50% shareholder in the Corporate Debtor Company. 7.75% of equity shares of Corporate Guarantors owned by Mr. Thomas George and Asha Mary Thomas who are the 50% equity shareholders of Corporate Debtor. Thomas George, who is having 50% shareholding in the Corporate Debtor Company. In consideration of the same, the Financial Creditor granted the aforesaid credit facilities amounting to Rs 1075 Lakhs, and being security for the same, Corporate Debtor on 18.09.2009 executed loan security documents in favour of the Financial Creditor and in consideration of the Financial Creditor having granted the aforesaid credit facilities totalling to Rs.1075 lakhs to the Corporate Debtor, Corporate Guarantor

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M/s. Malayalam Industries Limited extended Corporate Guarantee to secure the facilities and created equitable mortgage in respect of the immovable properties belonging to Corporate Guarantor admeasuring 31.78 Ares (78.528 cents) comprised in Sy No.1126/1 (Re Sy No.244) of Thrikkakkara North Village, Kanayanur Taluk, Ernakulam District and the building therein covered under Patta No.T-16142 dated 04.10.2001 issued by the Tahsildar, Kanayanur Taluk issued in favour of Corporate Guarantor.

7. The Financial Creditor further submitted that the Cash Credit Limit of Rs.400 lacs which was enjoyed by the Corporate Debtor was drawn over since 31.01.2011 against the terms and conditions of sanction and the account became irregular. Although principal portion of Term Loan was paid by the borrower, the interest payment was in arrears. Thus, the Cash Credit and Term Loan accounts are classified as Non-Performing Assets (NPA) on 30.06.2011. Therefore, to tide over the financial exigencies, on the request made by the Corporate Debtor, the Financial Creditor rescheduled the facilities on 29.06.2011 as under: -

- i. Cash Credit Limit of Rs.300 lacs (existing limit was reduced from Rs.400 lacs to 300 lacs) with A/c No. CC90002.
- ii. Term Loan of Rs. 254.69 lakhs with A/c No. TLS 9001.
- iii. Working Capital Term Loan of Rs. 100 lakhs (converted from C.C. limit of Rs. 400 lakhs) with A/C No. WCTL 110 003.
- iv. Working Capital Term Loan of Rs. 127.50 lakhs (Devolved L. C. 0 with A/c No. WTCL 110 004.
- v. Bank Guarantee for Rs. 75 lakhs (Protested Bill) with A/c No. PRTBL 110 004

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8. The Financial Creditor further stated that they re-scheduled the credit facilities, on 29.06.2011 and the Corporate Debtor executed the loan security documents in favour of the Financial Creditor. Despite the rescheduling of the facilities granted, the Corporate Debtor did not adhere to the terms and conditions of the facilities and the account was again classified as NPA on 28.09.2011 and interest charged for the month of June, July and August 2011 was reversed. The inspecting officials of the Reserve Bank of India during the course of Annual Financial Inspection (AFI) for the year ended 31.03.2012 have observed divergence in Asset Classification of the Account and on the direction of the Reserve Bank of India officials, classification based on repayment schedule as applicable to pre-re- structuring period is considered and NPA date is changed to 31.12.2010, and the interest charged in the account from October 2010 till May 2011 was reversed.

9. The Financial Creditor stated that, even after the said accounts were rescheduled, it remained in the NPA category since the instalment or interest were not serviced as per the terms and conditions of said sanction and also, in terms of Circulars and Guidelines issued by the Reserve Bank of India. The Corporate Debtor has repeatedly defaulted in making payments of instalments and has failed to adhere to the terms of the Loan as per Hypothecation and the Agreements and thus violated the terms and conditions.

10. The Financial Creditor further submitted that they immediately filed OA No. 407/2012 before the Debts Recovery Tribunal within a period of 3 years, after the accounts were classified as NPA on 31.12.2010, wherein the Corporate Debtor had admitted the financial facilities availed and the debt due. Before that, SARFAESI Demand Notice dated 08.11.2011 was also issued to the Corporate Debtor, which resulted in filing SA No. 104/2012 before the Debts Recovery Tribunal by the

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Corporate Debtor and on technical grounds the said SA was finally disposed of by the Debts Recovery Tribunal on technical grounds vide order dated 27.09.2016. Again, SARFAESI Demand Notice dated 12.04.2016 was issued to the Corporate Debtor which was challenged by the Managing Director of Corporate Debtor on technical grounds by filing SA No. 308/2016 before the Debts Recovery Tribunal and the said Demand Notice was withdrawn by the Financial Creditor with liberty to file fresh proceedings as per the order of the DRT. In view of the above developments the claim of the Financial Creditor is not barred by law of limitation as contended by the Corporate Debtor.

11. The Financial Creditor further submitted that the Board Resolution dated 12.12.2017 passed by the Board of Directors of the Applicant Bank resolved that all officers in the Scale IV and above of the Bank are competent to sign, seal, verify and file application before this Tribunal on behalf of the Bank as part of provisions of Insolvency Resolution Process under IBC. The present application has been filed by the Chief Manager, who is an officer of the Applicant Bank in the Rank of Scale IV and above under Authorization letter dated 01.01.2020 issued by the Assistant General Manager of Applicant Bank. Hence the contention taken by the Corporate Debtor has no legs to stand. The other two contentions of the Corporate Debtor that the Application is bad for non-joinder of necessary parties and application is hit by res-judicata are made out without any application of mind as those defences are not applicable to IBC proceedings, for the reason that the provisions of the Code of Civil Procedure are not applicable to IBC proceedings. Insolvency proceedings against Corporate Debtor can be initiated only under the provisions of IBC and not by any other statute, and as such invocation of res judicata seems only an ignorance of the provisions of law. Insolvency proceedings can be initiated even against the guarantor alone even before initiating action against the borrower. In this connection the

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Financial Creditor referred to the decision of the National Company Law Tribunal in ***Dr. Vishnukumar Agarwal Vs Piramal Enterprizes Ltd, (Company Appeal (AT) (Insolvency) No. 346 of 2018)*** in which it is stated that there is no bar under the statute for initiating two separate proceedings simultaneously against the borrower and the guarantor.

12. They have further refuted the contention of the Corporate Debtor that there was no demand made by the Financial Creditor before filing the application, and stated that before invoking Section 7 of IBC, a Demand Notice is required. Demand Notice required only when an application is filed under Section 9 by the Operational Creditor.

13. After substitution of Union Bank of India as Applicant, the Corporate Debtor has filed an additional counter/reply statement dated 26.08.2020, wherein it is stated that the application is barred by limitation. It is stated by the Financial Creditor that the plea of limitation is a mixed question of fact and law, which should have been raised/pleaded in the counter/ reply statement dated 10.02.2020 and should have been proved by the Corporate Debtor. Since, the cause of action for the application is the default made by the Corporate Debtor, which is a continuing cause of action and that on every demand made by the Financial Creditor, default committed by the Corporate Debtor and acknowledgment of debt and admission of liability in the reply statement dated 10.02.2020 would extent the period of limitation, if any, as per the order of the Hon'ble NCLAT in ***Ashishkumar Vs Mr. Vinodkumar Pukhraj Ambavat and another (CA (AT) (Ins) No. 1411 of 2019)***

14. The Financial Creditor further submitted that this Tribunal directed the Corporate Debtor to produce its Annual Financial Statements for the past three years as per the order dated 27.02.2020 to verify whether the debt due to the Financial Creditor is shown and acknowledged in the said statements. However, Corporate

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Debtor did not produce the same. The Corporate Debtor is deliberately and purposefully not producing the Financial Statements as those statements would prove the debt due to the Financial Creditor and which can be treated as Acknowledgement of Debt as per law.

15. Their further contention is that the Corporate Debtor had filed an Affidavit dated 11.09.2020 before this Tribunal stating that it has lastly filed Audited Balance Sheet before the Registrar of Companies till 2014-2015 and thereafter the Company did not file the Balance Sheets and, therefore, the Company is not able to produce the Audited Balance Sheets for the immediate past three years as directed by this Tribunal. The Financial Creditor had obtained copy of the Audited Balance Sheet filed by the Directors for the year 2014-2015 from ROC site, which reveals that the same is signed by the Directors of the Corporate Debtor on 20.02.2017. In the said Audited Balance Sheet, the Directors of Corporate Debtor Company acknowledged the liability of the Financial Creditor Bank. Corporate Debtor had admitted in the affidavit that they have already filed Balance Sheets till 2015, regularly and after 2014-2015, they have not filed the Balance Sheet. The present Application has been filed before this Tribunal on 03.01.2020. Since, the Corporate Debtor has acknowledged the debt due from the Corporate Debtor to the Financial Creditor in every Balance Sheet filed by them till 2014-2015 and acknowledged the liability lastly on 20.02.2017, even according to the recent decisions of the Hon'ble Apex Court, the present Application is filed within 3 years from the date of last acknowledgement of liability on 20.02.2017. Therefore, the present Application is not barred by law of limitation.

16. To fortify this argument the learned counsel for the Financial Creditor referred the following case laws of the Hon'ble NCLAT:-

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- ***Yogesh Kumar Vs Indian Overseas Bank*** (Company Appeal (AT) No. 236 of 2020)
- ***Bishal Jaiswal Vs Asset Reconstruction Company (India) Ltd*** (Company Appeal No. 385 of 2020)

Submission by the Corporate Debtor

17. The Corporate Debtor filed a counter and submitted that the Application filed by the Corporation Bank, the original applicant before this Tribunal on 03.01.2020 was only against the Corporate Debtor Company. The person who verified, signed and presented the IBA is not authorized to file the Application. He has not produced any document to show that he is authorized and competent to verify, sign and present the Application before this Tribunal and the Financial Creditor had produced authorization letter stating that the signatory is authorized to file the above Application by virtue of a Power of Attorney. As per the records, the Financial Creditor has not mentioned any Power of Attorney or even, he has not given the number of Power of Attorney. So, the Application has been filed by an unauthorized person. After substitution of Union Bank of India, another person is representing Union Bank of India and he has not produced any document to show that he is authorized or competent to represent Union Bank of India.

18. They have further submitted that the above Application is barred by limitation and also submitted that in this Application the Financial Creditor has no case that the Application is filed within the limitation period. In the Application the Financial Creditor stated that *“since the Financial Creditor has already filed OA No. 407/2012 in the Debt Recovery Tribunal-I, Ernakulam on 04.09.2012 for recovery of debt due from the Corporate Debtor and Corporate Guarantor within 3 years from the date availing the facility and the said O.A. is pending before the Debt Recovery Tribunal, the claim of*

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the financial creditor and debt due from the Corporate Debtor is not barred by the law of limitation. By virtue of Section 60(6) of Insolvency and Bankruptcy Code, 2016 notwithstanding anything contained in Limitation Act, 1963 or any law for the time being in force in computing the period of limitation, any application, any suit against the Corporate Debtor the period with which is outstanding is exempted". The Financial Creditor in the said paragraph quoted Section 60(6) of Insolvency and Bankruptcy Code, 2016 wrongly with malafide intention to mislead this Tribunal.

19. The Corporate Debtor further submits that the Application was filed on 03.01.2020. In the Application the Financial Creditor stated that the loan account of the Corporate Debtor is declared as N. P. A on 30.06.2011 and in page number 24 of the Application, it is stated that the accounts were classified as N. P. A on 28.09.2011 and in page number 331 of the Application, it is stated that the loan accounts were declared as N. P. A. on 31.12.2010. Hence, the Financial Creditor gave three dates 31.12.2010, 30.06.2011 and 28.09.2011. An Application under Section 7 of the IBC has to be filed within 3 years from the date of N. P.A. The above Application has been filed on 06.01.2020 seeking initiation of CIRP against the Corporate Debtor with specific assertion of the date of NPA as 31.12.2010, 30.06.2011 and 28.09.2011 is clearly barred by limitation having been filed much later than the period of three years from the date of N. P. A as stated in the Application. Hence, the Application is liable to be dismissed in- limine for the reason that the above Application is barred by limitation.

20. The learned counsel for the Corporate Debtor argued that the Financial Creditor filed this Application only against the Company. The Guarantors and Corporate Guarantor are not made parties to this Application. Hence, proceedings under the provisions of IBC cannot be ordered against them. He has further argued

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that Corporate Debtor further submitted that Annexures A13 and A15 documents are documents by the then officers of Corporation Bank. It is stated that Mr. Thomas George deposited the original title deed No. 4691/2003 dated 27.11.2003 of Maradu S R O and title deed No. 3029/2003 dated 31.07.2003 of Maradu S R O on 23.09.2009 within the Corporation Bank, and that there is only one original for those documents. The originals of one document cannot be deposited by two persons on different dates.

21. His further argument is that during the course of argument in earlier occasion, this Tribunal directed the Corporate Debtor to produce the financial statements of last 3 years before this Tribunal. In fact, the Corporate Debtor Company is not functioning after 31.03.2015 due to the indifferent attitude of officers of the Corporation Bank in not permitting to operate the Bank accounts. Hence, after 31.03.2015, the accounts were not audited and financial statements were not prepared and submitted to the statutory authorities. Hence, the Corporate Debtor is not in a position to produce those documents before this Tribunal. The Corporate Debtor lastly submitted the financial statement to the statutory authority for the Financial Year 2014-2015 only. For that reason, only the Managing Director of the Corporate Debtor Company filed a notarized affidavit before this Tribunal stating his inability to produce the documents.

22. The Corporate Debtor further stated that after hearing this matter in part, the Financial Creditor filed additional argument note raising an entirely new ground which is not pleaded in the Application and the learned counsel further submitted that the Financial Creditor raised a new ground of acknowledgement of debt and hence Financial Creditor is entitled to get the benefit of Section 18 of the Limitation Act. The contention of the Corporate Debtor is that it is a matter to be pleaded and proved by the, Financial Creditor and that the Financial Creditor is not entitled to get the benefit of Section 18 of the Limitation Act.

23. Section 18(1) of the Limitation Act is reproduced below: -

“Where before the expiration of the prescribed period for a suit or application in respect in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability afresh period of limitation shall be computed from the time when the acknowledgement was so signed”.

24. To fortify the above arguments the learned counsel for the Corporate Debtor, he has referred to the following case laws: -

- **S. F. Mazda Vs Durga Prasad** (AIR 1961 SC 1236).
- **Valliamma Vs Sivathanu** (AIR 1979 SC 1937).
- **Kalpna Trading Co Coimbatore Vs Executing Officer, Town Panchayath Tiruchirapalli and another** (1999 KHC 3548).
- **V. Padmakumar Vs Stressed Assets Stabilization Fund and another** Company Appeal (AT) (Insolvency) No. 385/2020.
- **National Insurance Company Ltd Vs Pranay Sethi and Other** 2017 (5) KHC. 350.
- **Sandhya Educational Society and Another Vs Union of India and Others** 2014 (7) SCC 701.

25. The learned counsel for the Corporate Debtor argued that the Corporate Debtor produced the copies of Form 20B submitted before the Ministry of Corporate Affairs for the Financial Years ending on 31.03.2013, 31.03.2014 and 31.03.2015, and that the AGM convened and passed the Audit Report and which was submitted before the ROC on 09.12.2013 for the Financial Year ending on 31.03.2013. It is further stated that the AGM convened on 18.02.2017 passed the Audit Report and which was submitted to the ROC on 07.10.2017 for the Financial Year ending on 31.03.2014. Even if the same is admitted as acknowledgement for argument sake, it is after 3 years of signing the records of 31.03.2013, which is beyond the period of limitation. Hence, it is not a valid acknowledgement as per Section 18 of Limitation Act and that since the Financial Statements of the year ending on 31.03.2014, 31.03.2015 are barred by limitation, the Financial Statement of the year ending 31.03.2015 submitted 15.11.2017 is also barred by limitation. In the above circumstances this Application is barred by limitation and is liable to be dismissed with costs of the Corporate Debtor.

Findings

26. The points to be considered and decided are as under:
- i. Whether the Application has been filed by an Authorized person?
 - ii. Whether this Application is barred by the law of limitation?
 - iii. Whether the Application is bad for non-joinder of necessary parties and hit by res judicata?
 - iv. Whether there is default on the part of the Corporate Debtor and whether there is scope for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor?

27. **Point No (i):** - On perusal of the records this Tribunal found that the Chief Manager of the Financial Creditor is competent to file this Application and the objection raised by the Corporate Debtor is merely incongruous, and therefore, holds no water. Moreover, the Chief Manager of the Financial Creditor had signed the application as an authorised person of the Financial Creditor in the specific authorization to file the Insolvency Application before this Bench. Moreover, since the amalgamation of the Banks were carried out by order of the Government of India, the question of signing the Application by the Union Bank of India officers will not arise. Hence, the technical objection raised on the ground of maintainability rejected.

28. **Point No (ii):** - The Corporate Debtor committed default in repayment of the loan amount to the Financial Creditor, and hence its Loan account was declared as NPA. SARFAESI proceedings were also initiated by the Financial Creditor in respect of the same debt, and the Demand Notice was withdrawn by the Applicant with liberty to file fresh proceedings. 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 a petition under Section 7(4) of the I&B Code. To get further clarity on this issue, this Tribunal had gone through **Annexures A41, A44, A45** and found that the OA No. 407/2012 was filed before the DRT within a period of 3 years, after the accounts were classified as NPA on 31.12.2010, wherein the Corporate Debtor had admitted the financial facilities availed and the debt due. Before that, SARFAESI Demand Notice dated 08.11.2011 was issued to the Corporate Debtor, which resulted in filing SA No. 104/2012 before the Debts Recovery Tribunal by the Corporate Debtor. On Technical grounds the said SA was finally disposed of by the Debts Recovery Tribunal by judgment on technical grounds. Again, SARFAESI Demand Notice dated 12.04.2016 was issued to the Corporate Debtor which was

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challenged by the Managing Director of Corporate Debtor on technical grounds by filing SA No. 308/2016 before the Debt Recovery Tribunal and the said Demand Notice was withdrawn by the Financial Creditor with liberty to file fresh proceedings as per the order of the Debts Recovery Tribunal. Hence, the claim is not barred by law of limitation as contended by the Corporate Debtor. In this aspect, the relevant paragraph of the decision of the Hon'ble Supreme Court in the case of ***Mobilox Innovations Private Ltd Vs Kirusa Software Private Ltd (Civil Appeal No. 9405 of 2017)*** is quoted below: -

“29. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which “the existence of a dispute” alone is mentioned. Even otherwise, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”. If read as “and”, disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do

not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties”.

29. Point No (iii): - In the light of the above discussion this Tribunal is not agreeable with the submissions made by the Corporate Debtor, that the Application is bad for non-joinder of necessary parties and that application is hit by res-judicata. Those contentions are made without any application of mind as those defences are not applicable to IBC proceedings for the reason that the provisions of the Code of Civil Procedure are not applicable to IBC proceedings. Insolvency proceedings against Corporate Debtor can be initiated only under the provisions of IBC and not by any other statute. As such invocation of res judicata seems only an ignorance of the provisions of law. Insolvency proceedings can be initiated even against the guarantor alone even before initiating action against the borrower. In this connection the decision of Hon'ble NCLAT in the case of ***Dr. Vishnukumar Agarwal Vs Piramal Enterprizes Ltd,(Company Appeal (AT) (Insolvency) No. 346 of 2018)***, may be referred to. The relevant paragraph of the order reads as under: -

“32. There is no bar in the ‘I&B Code’ for filing simultaneously two applications under Section 7 against the ‘Principal Borrower’ as well

as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company".

30. There is no bar under the statute for initiating two separate Applications simultaneously against the borrower and the guarantor.

31. **Point No (iv):** - This Tribunal found that this is a fit case to initiate CIRP against the Corporate Debtor as there is default on the part of Corporate Debtor in owning their commitment under the provision of IBC to the Financial Creditor and that the Financial Creditor approached this Tribunal within the period prescribed under the IBC.

32.. I have heard the learned counsel for both the parties through video conferencing and perused the whole case records including the documents and annexures appended with the case records. This application is filed by the Financial

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Creditor under the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor to protect the interests of the stakeholders. Accordingly, the application **IBA/04/KOB/2019** is **ADMITTED** and the following order has been passed.

ORDER

- (I) The Financial Creditor has suggested the name of **Mr., K. EASWARA PILLAI, FCA, IP**, Chartered Accountant and Insolvency Professional, **M/s Vijayakumar & Easwaran Chartered Accountants, VIth Floor, Amrita Trade Towers, Pallimukku, Kochi – 682 016**, E-mail id: vkande@gmail.com, Registration Number: **IBBI/IPA-001/IP00448/2017-18/10791** for appointment as Interim Resolution Professional (IRP). He has filed a declaration in Form-2 (As per Rule 9 Sub-Rule (1) of the I & B (Application to Adjudicating Authority) Rules, 2016). On verification of the IBBI site it is seen that there is a mistake in the IBBI Registration Number and e-mail address of the IRP provided by the Applicant. Hence, the correct IBBI Registration Number and E-mail ID is provided by this Tribunal.
- (II) Accordingly the IRP proposed by the Financial Creditor, **Mr., K. EASWARA PILLAI**, with Registration Number **IBBI/IPA-001/IP-P00448/2017-18/10791**, keaswaran@gmail.com, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process. The Insolvency Resolution Professional is directed to submit the copy of AFA (Authorization for Assignment) issued by the Insolvency Professional Agency within 2 days from the date of receipt of this order. The fee payable to IRP or as the case may be to RP shall comply with such

regulation/circular and direction as may be issue 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.

- (III) 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.
- (IV) However, the supply of essential services to the “Corporate Debtor” shall not be terminated during the 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 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.
- (V) 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 appointment, as per the provisions of the Code.
- (VI) 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 Corporate Insolvency Resolution Proceedings 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.
- (VII) The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order of admission.

IBA/04/KOB/2020

(VIII) The Registry is directed to communicate this order to the Financial Creditor, Corporate Debtor and Interim Resolution Professional through E-mail and speed post.

Dated this the 20th day of November, 2020

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