

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

IBA/31/KOB/2020

(Under Section 7 (4) of Insolvency and Bankruptcy Code 2016)

Order delivered on 21st April, 2021

Coram:

Hon'ble Shri Ashok Kumar Borah, Member (Judicial)

In the matter of

1. Tom K.Thomas, S/o late Thomas, aged 55 years
34/2602-C, Bhagyathara Nagar,
Palarivattom PO, Kochi-682025.
2. Dr.Thomas Mattathil, residin g at
Ginesterweg, 1,29378 Wittingen, Germany
Represented by their authorised representative and
Power of Attorney Holdr Shri Mathews J Aykara, aged 47 years,
S/o Joseph, Aykara House, Puliyanloor, Pala-686573.
3. Smt. Marykutty Mattathil, residing at
Ginesterweg, 1,29378 Wittingen, Germany
Represented by their authorised representative and
Power of Attorney Holdr Shri Mathews J Aykara, aged 47 years,
S/o Joseph, Aykara House, Puliyanloor, Pala-686573.
4. M/s Davidroots LLP, XXXI/185G, Davids Arcade
AM Road, Kothamangalam-686691
Represented by its Managing Partner Sri Arun David
Aged 42 years, S/o CP David, Chembakottukudiyil,
Thrikkariyoor PO, Kothamangalam-686692.
5. Mr. Lalu Samuel, S/o K.C. Samuel, aged 61
Residingat Chitra Sadanam, Kadampanad PO,
Pathanamthitta District represented by their authorised
Representative and Power of Attorney Holder Sri George
Mathew, aged 68 years, S/o late PG Mathew, residing at
Plamoottil, S-58m JP Nagar, Stage 2, Railway Station PO
Tiruvalla, Pathanamthitta District-691111.
6. Mr.Manayil Kandoth Ali Koya, S/o C.P.Koyotty
Residing at Arfana, Seethi Sahib Road,
Thalassery, Kannur-670104.

7. Smt. M.U.Vijayalakshmi, aged 56 years
D/o C.Unneri, residing at Makam, St.Alberts High School Lane,
Banerji Road, Ernakulam, Kochi-682035.
8. M /s R.I.International Private Limited, Regd. Office
21/7, Ravi Industrial Estate, CMTI, 4th Main Road,
2nd stage, Tumkur Road, Bangalore-560 022, Administrative
Office =, 4th floor, Kannankeri Estate,
Shanmugham Road, Marine Drive, Ernakulam
Cochin-682031 represented by its Director Sri John Valooran,
Aged 62 years, S/o late Mathunni Valooran, residing at
Valooran House, Njarackal-682505.

..... **Applicants/Financial Creditors**

Vs.

M/s Kerala Chamber of Commerce and Industry,
Registered Office at XXXVII/801, Shanmugham Road
Kochi, Ernakulam, Kerala-682031, India,

.....**Respondent/Corporate Debtor**

Parties/Counsel present (through video conferencing)

For the Financial Creditors	: Shri Aswin Gopakumar, Advocate
For the Corporate Debtor	: Smt.Marian GM Tharakan, Advocate

ORDER

This is an application filed by Adv. Tom K. Thomas & 7 others (hereinafter called "Financial Creditors") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against The Kerala Chamber of Commerce and Industry (hereinafter called "Corporate Debtor") invoking the provisions of Section 7 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter called as "Rules").

2. In the Application it is stated that it is a joint Application filed by Adv. Tom K Thomas and 7 others. They have mentioned the default amounts but the default date is not mentioned in most of the cases.

3. It is stated that 11.12.2003, the Respondent had entered into a Joint Venture agreement with M/s Cherupushpam (landowner), to construct and develop the Kerala Trade Centre project. Subsequently, the parties of the Joint Venture entered into multiple Agreements for Sale, and thereafter executed Sale Deeds with various allottees, including the 8 Applicants herein under, promising them timely delivery of specific units in the project.

4. It is further stated that because of various violations of the approved building plan during the construction of the project, the Respondent failed in securing essential requirements such as an electricity connection, water connection and even possession certificates for the various units in the project as on the promised dates of delivery as per the Agreements for Sale and Sale Deeds executed with the Applicants.

5. Thereafter, due to surfacing of certain allegations of misappropriation of money committed by the officials of the Respondent, the landowner, M/s Cherupushpam Films (P) Ltd, revoked the Power of Attorney executed in favour of the Respondent for the execution and completion of the Project as per the Joint Venture Agreement. Owing to such reasons, coupled with the failure to conduct timely elections for the appointment of its office bearers, the Respondent has failed miserably at regularising the unauthorised construction made or securing the necessary government approvals.

6. The Applicants further stated that they suffered huge losses, including the sums of money paid as consideration for the transfer of title at the time of executing Sale Deed and also the potential rent that they could have earned. On account of such reasons and, more importantly, the vexatious and indifferent attitude adopted by the Respondent, the Applicants have lost faith in the Respondent's earnestness in upholding their commitments and hence, no other alternative but to file this Application under Section 7 of the I&B Code, 2016.

7. The Corporate Debtor filed its reply and raised the following contentions:
Objections with respect to maintainability of the Application.

- a. The instant Application has been filed on the strength of Applicants being 'decree holders' and not as allottees in a real estate project. In this connection, they referred to a decision in **Sh. Sushil Ansal V. Ashok Thripathi & Ors., CA (AT) (Insolvency) No. 452 of 2020** wherein it was held that while a decree holder covered by the definition of a creditor under Section 3(10) of the I&B Code, 2016, a decree holder does not fall within the class of creditors classified as Financial Creditors and they cannot initiate CIRP under Section 7 of the I&B Code, 2016. Hence an Arbitral Award can be enforced as a decree of the court under Section 36 of Arbitration and Conciliation Act, 1996. Thus the Applicants 1 to 8 with the Arbitral Award in their favour should pursue it under Section 36 of Arbitration and Conciliation Act, 1996.
- b. Applicants approached this Tribunal only with a view to execute the decree in the nature of an Arbitral Award and to recover the amount. In this connection the Corporate Debtor referred to a decision in **G. Eswara Rao V. Stressed Assets Stabilisation Fund and Ors [Manu/NL/0092/2020]** wherein it is held that: -

"26. By filing an application under Section 7 of the I&B Code, a Decree cannot be executed. In such case, it will be covered by Section 65 of the I&B Code, which stipulates that the insolvency resolution process or liquidation proceedings, if filed, fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, attracts penal action."

The Code is a beneficial legislation which puts the Corporate Debtor back on its feet, not being a mere recovery legislation for creditors. It envisages resolution of insolvency and not a recovery proceeding to recover the dues of the creditors. Thus, the act of the Applicants in the present case clearly makes them liable to be penalised under Section 65 of the Code for filing the

Application with a fraudulent and malicious intent for the purpose other than the resolution of insolvency.

- c. It is further stated that the right to sue accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the Application, the Application would be barred under Article 137 of the Limitation Act. Hence, if the default has been occurred by breach of Agreement of Sale, then the date of default will be the date on which the Corporate Debtor failed to deliver possession. In terms of Clause 13 of Agreement of Sale, the period of default starts from the expiry of two weeks after the notice has been issued by the Applicants. Since it is a joint Application filed by Applicants, the whole Application under Section 7 is liable to be dismissed for being barred by Limitation and with no requisite of proof of default against the Corporate Debtor. In this connection they have referred to the decision in **Ashish Kumar V. Vinod Kumar [CA(AT) (Insolvency) No. 1411 of 2019]** stating that the cause of action can only be extended when there is an acknowledgement of liability. Here, the Corporate Debtor never acknowledged the debt and, therefore, the period of limitation has not been extended at any point of time.
- d. It is also stated that M/s. Cherupushpam Films Pvt Ltd has obstructed the day to day maintenance of the building and delayed the execution of sale deeds of all the Applicants, the adversarial possession taken by M/s. Cherupushpam Films Pvt Ltd at every turn caused the delay in completing the statutory formalities. Furthermore, the Power of Attorney in favour of the Corporate Debtor was revoked by M/s. Cherupushpam arbitrarily. No wilful default on the part of the Corporate Debtor to deliver possession of the building. Therefore, Corporate Debtor could not be made liable to pay liquidated damages as stipulated in Clause 13 of Agreement of Sale with the Applicants. Therefore, no default has been occurred on the part of the Corporate Debtor, as per Section 3(12) and Section 7 (3) of the I&B Code, 2016.

- e. It is further stated that Section 7 Application by allottees is compulsory Class Action as per proviso to Section 7 inserted vide the I&B Code, 2020. There should be a minimum 100 in numbers or at least 10% of total allottees under the same real estate project.
- f. It is further stated that an Application will not be maintainable against joint venture partners. On 18.12.2003 Corporate Debtor and M/s. Cherupushpam Films (P) Ltd entered into a joint venture agreement for construction of a multi-storied building under the name and style 'Kerala Trade Centre'. The Parties to the Agreement decided to construct and complete the multi-storied building in a fully finished condition with joint investments of both the parties by raising funds through the sale of constructed areas to third parties or by availing loans from financial institutions or by mortgaging the property of 43 cents, where the construction is proposed. Both enjoy the ownership of the land and building on 50:50 basis. Power of Attorney was also executed in favour of the Corporate Debtor by M/s Cherupushpam which authorised the Corporate Debtor to award contract for building after intimation to M/s. Cherupushpam Films (P) Ltd. It is also stated that all expenses for construction and completion of the building was treated as joint investment of both parties. M/s. Cherupushpam Films (P) Ltd agreed to sign all papers for getting the building permit, to get the plan approved and getting sanction from all authorities for which already power of attorney was executed. Both parties were to raise loan jointly, separate books of accounts shall be kept for the entire construction and accounts to be audited by the Auditor approved by both sides. The Corporate Debtor has to accept advance and remit the same in building construction account in a Nationalised Bank and to be operated jointly. In the agreement, the condition was that the net income will be apportioned in the ratio of 40:60 between the Corporate Debtor and M/s Cherupushpam Films (P) Ltd. The validity of the Agreement has not been disputed by the parties. Since both parties are joint venture

partners, they were directed to cooperate with each other to act according to the Agreement.

- g. It is further stated that the Applicants herein have evidently entered into an agreement of sale with both M/s. Cherupushpam (Land Owner) and Respondent (Builder) and not the Respondent alone. Furthermore, the agreements have been signed by the authorised signatory of Kerala Trade Centre and not the representative of Respondent alone. By virtue of this joint venture agreement, an application under Section 7 will be maintainable only against both of them jointly and not individually against one or other. In a decision of the NCLAT in **Mrs. Mamatha v. AMB Infrabuild Pvt. Ltd. & Ors., [CA(AT) (Insolvency) No. 155/2018 dated 30.11.2018]**, it was clarified that both the 'Developer' and the 'Land Owner, should be jointly treated to be one for the purpose of Corporate Insolvency Resolution Process against them.
- h. It is also stated that a debt may not be due, if it is not payable in law or in fact as held in the decision in the matter **Innoventive Industries Limited v. ICICI Bank & another, Civil appeal nos. 8337-8338 of 2017**.
- i. Further it is to be considered whether there is existence of a default and the default has occurred. In this connection they referred to the judgement of **M/s. State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd, [CP (1B) No.17/7/NCLT/AHM/2017]**, wherein the section 7 Application has been rejected stating:

"The Adjudicating Authority need not be carried away by the documents filed by the Financial Creditor alone in all cases, but in a given case it shall consider the relevant bonafide pleas of Corporate Debtor in earlier proceedings in order to satisfy about the existence of default or occurrence of default."

Furthermore, the Arbitrator has completely overlooked Clause 23 of the Agreement of Sale, which states that the Respondent will not be liable for any damages if the handing over of the construction is delayed on account of any government authority. Clause 24 has also been overlooked by the Arbitrator which exclude service connections (electrical, water, sewage and others) from the scope of 'Handing over of Possession of the constructions. Hence, there is no debt that is payable in law or in fact by the Respondent and hence, no default has taken place. The Respondent cannot be termed as a "Corporate Debtor" under Section 3(8) of the Code since no debt is owed.

- j. It is further stated that to initiate CIRP the Applicant, has to file Form-1 referred under the Adjudicating Authority Regulation. Entry 5 &6 of Form No.1 mandate the Financial Creditor to submit application on its behalf. The authorisation letter is to be enclosed. In the present Application no authorisation letter has been attached by Sri. Mathews J. Aykaraand and Sri. George Mathew who are the authorised representatives and power of Attorney Holder of 3 Applicants. In this context the Corporate Debtor referred to the following decisions: -

- (i) Palogix Infrastructure Private Limited V. ICICI Bank Ltd [Company Appeal (AT) (Insolvency) No.30 of 2017]
- (ii) Innoventive Industries Limited V. ICICI Bank and another [Appeal Nos. 8337-8338 of 2017]

- k. It is also stated that the joint Application filed by Applicants under Chapter II of Part II of the Code and the I&B (Application to Adjudicating Authority) Rules, 2016 is incomplete and needs to be rejected u/s 7(5)(b) of the Code. The following defects were also there in the Application: -
- i. Since the application is made jointly by Applicants, a copy of authorisation to a financial creditor to file and act on this

application has not been attached as per Annexure IV in Form 1 of I&B (Application to Adjudicating Authority) Rules, 2016.

- ii. Identification Number of 3 Applicants have not been provided in Form 1 (Clause 3)- Tom K Thomas, Lalu Samuel, Manyil Kandoth Ali Koya.
- iii. Authorisation letters have not been enclosed by the Power of Attorney Holders as required under Form 1 (Clauses 5 &6).
- iv. In Part IV of Form 1, Particulars of Financial Debt is incomplete, the date on which default occurred has not been mentioned for any of the Applicants. Furthermore, the workings for computation of amount is inadequate and improper and stated as under: -

For the Applicant, Manayil Kandoth Ali Koya, the Arbitral Award AR 79 of 2016 was Rs. 1,43,97,600 for loss of rent in 2015-16 and monthly compensation at Rs. 6,85,600 per month from 2016 till the building is numbered. The claim for interest was denied However, the Applicant has computed an exorbitant amount in the Application and has gone beyond the award with no basis.

The arbitral award AR 2 of 2015 passed in favour of Applicant, RI International is Rs. 97,73,500 as damages on amount paid from 2011 to 2017. However, the Applicant has miscalculated the amount in the Application.

The calculation of amount due to Tom K Thomas is untenable and imaginary. The arbitral award AR 82 of 2018 was passed in favour of Applicant has awarded a

completely different amount as compared to the table of computation

v. The workings for computation of amount and statement of facts have not been attached for the following Applicants:

- (i) Thomas Mattathil,
- (ii) Marykutty Matathil,
- and
- (iii) M/s Davidroots LLP.

vi. The arbitral award of Applicants Manayil Kandoth Ali Koya and Tom K Thomas have not been attached in the documents with Form 1 Application.

8. They have further referred suppression of material facts, as under: -

- the sale deed had to be executed by M/s Cherupushpam as per the Agreement of Sale with the Applicants. Even in Arbitral Award AR 31/2016 dated 26.02.2018, it was held that M/s Cherupushpam is bound to execute the sale deed.
- A meeting was held on 15.07.2019 for investors of Kerala Trade Centre with representatives of both the joint venture partners, Respondent and M/s Cherupushpam. The applicants Arun David of M/s Davidroots LLP, Mathews Avkara, R1 International, Lulu Samuel and other investors were present. The investors themselves suggested a Settlement Deed between the two joint venture partners and their representatives agreed to settle their disputes.
- Subsequently one of the applicants Lulu Samuel has also sent an e mail to Respondent on 16.08.2019 stating that he would aid in regularisation of the building if M/s Cherupushpam and

Respondent enter into an irrevocable agreement registered and legalised resolving all existing disputes.

- Thereafter, a binding and enforceable Settlement Deed was entered into between the Respondent and M/s Cherupushpam on 05.08.2020 through which the parties therein decided to permanently settle amongst themselves all their disputes on the basis of mutual trust and good faith. Furthermore, the Hon'ble High Court of Kerala in I.A. 1/20 of WP (C) 15765/2019 has recorded the Settlement Deed/compromise vide its order dated 20.08.2020.
- The Applicants have very well acknowledged the inter se disputes between the partners but still concealed this material fact from this Tribunal. The Applicants herein have invoked the insolvency resolution process under the Code fraudulently, with malicious intent only against the Respondent.
- The Arbitral awards in favour of the Applicant have been challenged by both M/s Cherupushpam and Respondent through separate petitions under S. 34 of Arbitration and Conciliation Act before the Hon'ble District Court, Ernakulam. One of the main grounds raised is that the Arbitrator's award is in direct and irreconcilable conflict with the agreement between the parties (buyer and vendors).
- The Applicants have suppressed material information including the terms of the agreement of sale and liability of M/s Cherupushpam for non-execution of Sale Deed which has consequently delayed the process. The Applicants have approached this Hon'ble Tribunal concealing the material

facts and with unclean hands and as such this Insolvency petition is liable to be dismissed.

9. In the rejoinder filed by the Applicants they have rebutted the allegations raised by the Corporate Debtor and stated that the Applicants have filed this Application being allottees under Section 7 as Financial Creditors and not as decree holders. This is bolstered by the following points: -

- I&B Code, 2016 amendment dated 06.06.2018 added explanation to sub clause (f) of Section 5(8), wherein Allottees of a real estate project are treated as Financial Creditors under Section 5 (7) of the I&B code, 2016. The validity of amendment was upheld in **Rajendra Kumar Saxena Pvt Ltd Earth Gracia Buildcon [(AT) Insolvency) No.187/2018]**. It is further stated that the amount was paid by the Applicants for transfer of titles of allotted units in the Kerala Trade Centre Project of the Respondent by executing Sale Deed as agreed under the Sale Agreement. Therefore, the consideration given by the Applicants, were Financial Credits having commercial effect of borrowing.
- The amount paid to the Corporate Debtor at the time of executing the sale agreement and sale deed is a financial debt which is disbursed by the Applicants against consideration of time value of money and this is a part and parcel of I&B Code. Thus, the facts at the present case are clearly distinguishable from the decision in **Sh. Sushil Ansal [supra]**. The Applicants do not seek to establish that defaults were committed by the Respondent by non-adherence to arbitral awards, but the Application seeks to establish the Corporate Debtor failed to deliver the Apartments as undertaken through the sale agreements and sale deed individually executed in favour of the Applicants. Therefore, the Applicants are seeking to discover the Financial Credit that was extended for the purpose of the real estate project which has not been realised to the contract extended. In

this connection the Applicants has referred to a decision in **Annapurna Infrastructure Pvt ltd & another V. Soril Infra Resources Ltd, [CA (AT) (insolvency) No.32 of 2017]** in which it is held that an Arbitral Award concludes the disputes between parties and is a valid record of default under the I&B Code,2016.

- Respondent has stated that the claims of the Applicants are barred by limitation and that the minimum threshold is not met. This is effectively put to rest as a bare perusal of Clause 13 of the Sale Agreement, which would reveal that a default is said to occur under the said Agreement only on the expiry of a period of two weeks from the date the allottees gave due notice to the Respondent. It is further stated that it is an admitted fact that there are extant arbitral proceedings, most of which have already reached their conclusions, which fact is not denied by the Respondent at any juncture. Moreover, the Application for initiating CIRP under Section 7 of IBC Code, 2016 was filed well within the limitation period provided thereof.
- It is further contended that Respondent is not contesting that there was a delay in delivery of the projects as promised under the Sale Agreement and Sale Deed. The various events occurred are as under: -

- (a) The replies filed by the Respondent in various court proceedings amount to "Acknowledgement" of debt mentioned under Section 18 of the Limitation Act, 1963. Explanation (a) of Section 18 reads as follows: -

"(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or

is addressed to a person other than a person entitled to the property or right;"

(b) The Respondent has made averments before various Arbitral Tribunals and judicial forums that it is not liable to pay any damages and also denied responsibility in delivering the projects on time to the allottees by citing various reasons such as lack of co-operation of its partner and delays in governmental approval. The alleged delay in 'governmental approval are solely due to defects and omissions in the construction plan submitted by the Respondent. In the case of **Asset Reconstruction Company (India) Ltd. vs. Dagcon (India) Private Limited**, [Order dated **20/11/2019 in CP(IB) No.1198/KB/2018**], the Tribunal held that:

"11. Coming to the aspect of limitation, we are of the view of averment made before a court of law or any statutory authority cannot be constituted as an acknowledgment of debt then that would render such averment meaningless. Legally such averment bind party making them. Doctrine of estoppel applies without any restriction in commercially and legally. Accordingly, we hold that such statement constitute acknowledgment. In this regard, we further take the assistance of the provision of explanation (a) of Sec. 18(1) of Limitation Act, 1963 wherein scope of acknowledgment has been given in a widest possible manner."

- It is further stated that there is a wilful default on the part of the builder. It is trite that the documents submitted by the Respondents makes it apparent that it is solely due to the fault of the builder that the project remains not completed till now. It is further submitted that the materials filed before this Tribunal makes it abundantly clear the buildings were not even numbered as per the regulations laid down by the Kerala Municipality Building Rules 1999 on the promised date of delivery to the allottees. This

very fact forms clear evidence that there are deliberate acts of negligence and indifference on the part of the builder which would constitute a default, amounting to breach of Sale Agreement. It is also stated that the failure to even number the buildings is not merely an accident or a mistake but is a wilful act of indifference amounting to default. Moreover, without appropriate regularisation of the units of the building, the allotted real estate projects cannot be considered to have been delivered or even usable.

- Clause 21 of Annexure A9 Settlement Deed submitted by the Respondent, which was executed between M/s. Cherupushpam and KCCI, amounts to an acknowledgement of the existence of debt on the part of the Respondent with respect to the construction of Kerala Trade Centre project.
- It is further stated that the Joint Venture entered into by M/s. Cherupushpam Films (P) Ltd and the Corporate Debtor have got all the elements of a partnership. Moreover the Applicants, who are financial creditors, are at the liberty to file a joint application against both the partners or to file separate applications to initiate CIRP against each of partners for their Joint liability as held by the Hon'ble NCLAT in **Vishnu Kumar Agarwal VS. Piramal Enterprises Ltd. [(08.01.2019 NCLAT): MANU/NL/0003/2019]**
- It is further stated that the arbitral awards passed in favour of the Applicants, constitutes comprehensive and valid proof of the default on the part of the Respondent and thus there is existence of debt. Additionally, Clause 21 of Annexure A9 submitted by the Respondent also acknowledges the existence of debt towards the Applicants.
- The contention of Corporate Debtor in para 2.E and para 2.F are baseless and illogical because the Application has already been scrutinized by the Registrar and was found to be complete under Insolvency & Bankruptcy

(Application to Adjudicating Authority) Rules, 2016, and it is only after such scrutiny this Application has been accepted.

- The Applicants stated that they are seeking to recover their hard earned money, which was paid to the Respondent as a financial debt against the consideration of time value of money, which is in the nature of a commercial borrowing as per Part II, Section 5(8)(f) of the IBC.

FINDINGS

10. I have heard Learned counsel for both the parties and perused the whole case records including documents and photocopies appended with the case records.

11. In the decision of Hon'ble NCLAT in the matter of **Innoventive Industries V. ICICI Bank & another [Company Appeal((AT) (Insolvency) No.182 of 2017]**, it is held that: *“for initiation of CIRP under Sub Section 4 of Section 7 of the Code, 2016, the adjudicating authority’ on receipt of application under Sub Section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by Financial Creditor under Sub Section 3. Under Sub Section 5 of Section 7, the ‘adjudicating authority’ is required to satisfy-*

- (a) Whether a default has occurred;
- (b) Whether the application is complete; and
- (c) Whether any disciplinary proceeding is pending against the proposed Insolvency Resolution Professional.

Therefore, while dealing the admission of Section 7 Application filed under the IBC, the two points required for adjudication is (i) whether there is an existence of ascertainable “debt” and (ii) whether there is an existence of “default”

11. Taking into consideration the following issues are framed for taking a decision in the matter: -

- I. Whether the Application was filed under Section 7 of I&B Code, 2016 by the Applicants in the capacity of Allottees of Apartments or on the basis of Arbitral Award as Decree Holders?
 - II. Whether the Application is barred by limitation?
 - III. Whether the Application is maintainable against the Corporate Debtor/builder alone since the project is a joint venture by the Corporate Debtor and M/s. Cherupushpam Films (P) Ltd?
12. This Tribunal is considering the issues framed in the light of respective stand taken by the parties, submissions made on their behalf and the insolvency jurisprudence evolved till date.

Issue No.1

13. The Applicant contends that they entered into an agreement with the Corporate Debtor and M/s. Cherupushpam Films (P) Ltd to purchase the Apartment. In pursuance to this agreement the Corporate Debtor and M/s. Cherupushpam Films (P) Ltd executed a sale deed in favour of the Applicants. The Applicants paid the total consideration of the sale. The Corporate Debtor also acknowledged the entire sale consideration. Per contra the Respondent stated that instant Application filed by the Applicants being 'decree holders' and not as 'allottees' in a real estate project.

14. The question arose for consideration is whether a decree-holder, though covered by the definition of 'Creditor', does fall within the definition of a 'Financial Creditor' across the ambit of Section 5(7) of the 'I&B Code'. Section 5(7) defines 'Financial Creditor' as under:

"5. Definitions. - (7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to"

On a plain reading of this provision, it comes to fore that 'Financial Creditor' encompasses any person to whom a financial debt is due. Assignees and

transferees of financial debt are also covered under the definition of ‘Financial Creditor’. It would, therefore, be relevant to ascertain the nature of debt styled as ‘financial debt’ within the ambit of Section 5(8) of the ‘I&B Code’ which reads as under: -

“5. Definitions. - (8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes— (a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; [Explanation. -For the purposes of this subclause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause”

15. Sub-clause (f) of Sub-Section (8) of Section 5 provides that any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing would fall within the ambit of ‘financial debt’ and the explanation added to Sub-Section by Act No. 26 of 2018 provides that any amount raised from an allottee under a Real Estate Project shall be deemed to be an amount having the commercial effect of a borrowing. Thus, the relevant consideration for determination of ‘financial debt’ would be whether the debt was disbursed against the consideration for the time value of money which may include amount raised from an allottee under a Real Estate Project, the transaction deemed to be amount having the commercial effect of a borrowing.

16. In order to understand the transaction has the contours of a borrowing as contemplated under Section 5(8) (f) of the ‘I&B Code,2016 this Tribunal examines Clause 13 of the Agreement entered into between the Applicant and Corporate Debtor& M/s. Cherupushpam (P) Ltd.

13. That is owing to any wilful act and /or default of the BUILDER, the possession of the Schedule C property is not given to the ALLOTTEE within six weeks from the commitment period as per these

presents (save delays due to reasons specified elsewhere in these presents), and in spite the ALLOTTEE having paid all the sums to be paid by him, as per these presents, the ALLOTTEE shall be entitled to give notice in writing to the BUILDER and if the BUILDER further fails to deliver possession within two weeks from the date of receipt of such notice, the ALLOTTEE shall become entitled to receive @ Rs. 25/- per Sq.ft for every two months delay therefrom, for the area described in Schedule C & D hereto as liquidated damages till the date of actual handing over of possession from the expiry of the two weeks' time after the notice as stipulated herein.

17. From the above clause it is clear that if the builder fails to deliver the possession of the real estate project, they agreed to pay penalty of Rs. 25/- per square feet to the Applicants. Here, the debt was disbursed against the consideration for the time value of money which includes an amount raised from an allottees under a real estate project, and this transaction has the commercial effect of a borrowing.

Issue No.2

18. The Corporate Debtor contends that as per Clause 13 of the Agreement of Sale, the period of default starts from the expiry of two weeks' time after the notice has been issued by the Applicants. Moreover, the Corporate Debtor has never acknowledged the debt and, therefore, the period of limitation has never been extended. Hence, the Application is liable to be dismissed based on limitation. The Applicants failed to produce any proof to share the date of default against the Respondent. In reply to this contention the Applicants stated that Clause 13 of the sale Agreement would reveal that a default is said to occur only on the expiry of a period of two weeks from the date of the allottees gave due notice to the Corporate Debtor.

19. In order to establish the default an allottee would need to prima facie show a default by developer and for that purpose they would need to refer to the Agreement to sell as well as the information as registered with RERA.

20. The date of default according to the Allottees based on Clause 13 of the Agreement of Sale is “***the ALLOTTEE shall be entitled to give notice in writing to the BUILDER and if the BUILDER further fails to deliver possession within two weeks from the date of receipt of such notice, the ALLOTTEE shall become entitled to receive @ Rs. 25/- per Sq.ft for every two months delay therefrom, for the area described in Schedule C & D hereto as liquidated damages till the date of actual handing over of possession from the expiry of the two weeks’ time after the notice as stipulated herein.***” . it is also pertinent to note that the Corporate Debtor has not produced any documents on record to show that the Corporate Debtor has ever offered possession of the real estate property and that the occupation certificate was applied for within the stipulated time of handing over possession. When the Corporate Debtor failed to complete the Construction and could not deliver the possession, the default was committed. This is also evident from the minutes of the meeting of Investors of Kerala Trade centre and the representatives of KCCI and M/s. Cherupushpam Films Pvt Ltd held on 15.07.2019. The Corporate Debtor failed to deliver the possession of the real estate property even after the receipt of the notice issued by the allottees. In the notice it is particularly stated that if the Corporate Debtor fails to concur with the appointment of Sole Arbitrator within 30 days from date of receipt of the notice, the Allottees will proceed with the Arbitration. Therefore, this Tribunal constrained to consider the clause 13 of the Agreement of Sale to ascertain the default date. Even though considering this as the ‘default date’ it is clear that the notice issued by the Applicants are only to proceed with the Arbitration in accordance with provisions of the Arbitration and Conciliation Act, 1996. At this moment, this Tribunal refers to the judgement of the Hon’ble Supreme Court in

Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. And others. [(2019) 152 CLA 309 (SC), where it is observed and held as under:

*“Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that Company Appeal (AT)(INS) No.1011 of 2019 8 it would not apply to suits. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned Counsel appearing on behalf of the Appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time barred. So far as Mr. Banarjee’s reliance on para 7 of the B.K. Educational Services Private Limited (Supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that **the intent of the Code could not have been to give a new lease of life of debts which are already time-barred**”.*

21. The Applicants have entered into an Agreement of Sale and subsequently sale deed was also executed, which has occurred over three years prior to the date of filing of this Application. In the present case, the Corporate Debtor has not delivered the possession of the real estate property. The default has committed only when possession was scheduled to be delivered. Since the default had occurred over three years before the date of filing of Section 7 Application, the Application is a time barred Application.

Issue No.3

22. Respondents contended that the Applicants herein have evidently entered into an Agreement of Sale with both M/s. Cherupushpam (Land Owner) and Respondent/Corporate Debtor (Builder) and not the Respondent alone. Furthermore, the agreements have been signed by the authorised signatory of Kerala Trade Centre and not the representative of Respondent/Corporate Debtor alone. By virtue of this joint venture agreement, the application under Section 7 will not be maintainable against Respondent/Corporate Debtor alone. The

Applicants refuted this contention and stated that it is the sole discretion of the Applicants to proceed against any one of the partners of the joint venture since, the joint venture Agreement was entered between Corporate Debtor and M/s. Cherupushpam Films Pvt Ltd. In this scenario they have referred to the following judgements: -

(1) Continental Construction Ltd. Vs. State of Gujarat and Anr. [AIR 1987 Guj 66, (1986) 2 GLR 884] wherein it is stated as follows: -

"Each partner of a Joint Venture is jointly and severally liable to its creditors."

(2) Vishnu Kumar Agarwal us. Pirama1 Enterprises Ltd. [(08.01.2019 - NCLAT): MANUNL/0003/2019]it is stated as follows: -

"the Applicants, who are financial creditors, are at the liberty to file a joint application against both the partners or to file separate applications to initiate CIRP against each partner for their Joint Liability"

23. At this juncture this Tribunal look into the legal definition of ‘joint venture as quoted in NCLAT judgement of **M/s. Vipul Limited V. M/s. Solitaire Buildmart Pvt. Ltd. [Company Appeal (AT) (Insolvency) No.550 of 2020]. The Joint Venture means: - An association of two or more individuals or companies engaged in a solidary business enterprise for Profit without actual partnership or incorporation.**

24. At the outset, this Tribunal refers to the relevant clauses of the Agreements entered into between the Corporate Debtor and M/s. Cherupushpam Films Pvt Ltd to determine the nature of relationship and transactions, which is necessary to ascertain the nature of ‘debt’.

25. Clause 7, 8, 9 and 12 of the Agreement of sale state as follows: -

(7) The First Party shall co-operate with the Second Party for availing Project loans and do all required formalities including any documents for the said purpose. Both Parties will join in raising loans from financial institutions and if so required, including by mortgaging/charging, the said property as security.

(8) Both the parties agree that separate Books of Accounts shall be kept for the entire construction and the said accounts will be subject to Audit by a qualified Chartered Accountant approved by both the parties.

(9) The First Party will allow the Second Party to market and accept advance from prospective buyers and lessees of the Said building and to remit the same to the Building construction account which will be opened at a Nationalised/Scheduled Bank jointly and shall be operated jointly.

10) That the constructed area will be allotted to interested parties for lease for 99 years or outright sale by the Second Party with the consent of the First Party.

12) "that the net income after deducting the expenses for the construction of the building complex including the actual expenses, costs, repayment of loan etc., incurred, after the allotment of constructed area to the parties and the balance shall be shared in the proportion of 60:40 manners, i.e. first party will share 60% and second party shall get 40% of the net income of the fully finished constructed area".

26. From a reading of the above clauses it is clear that both the parties would be jointly responsible for and participate in the construction or development. The terms and conditions with respect to institutional areas and common areas also reflect that the cost would be shared between both the parties at the rate of 60 and 40 substantiates that it is a 'Joint Venture' Agreement. Thus the Agreement entered between the Corporate Debtor and M/s. Cherupushpam Films Pvt Ltd dated 08.12.2003 reflects a commercial transaction in the nature of a 'Joint Venture' wherein there is division of profits.

27. It is pertinent to mention that while dealing with a Joint Venture in a real estate Project, Hon'ble NCLAT in **Mamatha V/s. AMB Infrabuild Pvt. Ltd. and Others [CA(AT) (Insolvency) No. 155/2018]** has held as follows: -

'14. If the two 'Corporate Debtors' collaborate and form an independent corporate unity entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one or other.'

28. In view of the above Principle, this Tribunal observe that in such kind of a Joint Venture Project, both the parties, if they are a Corporate should be jointly treated to be one for the purpose of initiation of CIRP.

Conclusion

29. In view of the detailed discussion on all the three issues framed, it is clear that the Applicants have failed to succeed in this Application. Hence, the **IBA/31/KOB/2020 is dismissed** being devoid of merit.

Dated the 21st day of April, 2021

Sd/-

(Ashok Kumar Borah)
Member (Judicial)