

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

**IBA/17/KOB/19**

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

**Order delivered on 09.10.2020**

**Coram:**

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

**In the matter of**

1. Urvashi Dilip Kamath  
Flat No.501/504, B Wing,  
Sabari Ashiana, Inside Tiss,  
Deonar Farm Road, Mumbai-400 088
  
2. Dilip Gopal Kamath,  
Flat No.501/504, B Wing,  
Sabari Ashiana, Inside Tiss,  
Deonar Farm Road, Mumbai-400 088

**.. Financial Creditor/Applicants**

**Vs.**

M/s Moonriver Resorts Private Limited  
No.55,Riverside Building, Yatch Club Enclave,  
Konthuruthy, Kochi-682013.

**. Corporate Debtor/Respondent**

For Financial Creditor/Applicants : M/s Vis Legis Law Practice through Ms.Anagha  
Mhatre

For Corporate Debtor/Respondent : Advocate Pradeep Joy

**ORDER**

The present Application is filed by M/s Urvashi Dilip Kamath and Dilip Gopal Kamath (hereinafter referred to as 'Applicants/Financial Creditors'), who has furnished Form No.1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

Authority) Rules, 2016 (hereinafter referred to as 'Rules') in the capacity of "Financial Creditors" on 12.03.2020 by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') for initiation of Corporate Insolvency Resolution Process (CIRP) against Moonriver Resorts Private Limited (hereinafter referred to as 'Corporate Debtor'). The registered office of the Corporate Debtor is at No.5, Riverside Building, Yacht Club Enclave, Konthuruthy, Kochi- 682 013.

2. In the application under the head "Particulars of Financial Debt", the total amount of debt granted by them is ₹ 31,15,000/-. The amount of ₹ 1,92,000/- was disbursed on 21.08.2015 via Bank Transfer. Another amount of ₹ 10,00,000/- was also disbursed on 01.12.2015 via bank transfer. The amount of ₹ 19,15,000/- was disbursed on 21.03.2016 via cash payment, along with an amount of returns as per clause 5.3 of the agreement dated 17.08.2015. Therefore, the amount claimed to be in default is ₹39,56,050/-. The Date of Default is stated to be 31.06.2016.

**Brief History of the Case of Financial Creditors:**

3. The Corporate Debtor approached the Financial Creditors to invest in developing a project known as "Moonriver Resorts and Spa" (hereinafter referred to as "Resort") in Pallivasal Village and offered attractive returns on the sums that would be invested by the Financial Creditors. Pursuant thereto the Financial Creditors entered into an Agreement dated 17.08.2015 with the Corporate Debtor wherein the Financial Creditors agreed to purchase the ownership of 1/6 undivided share in the Resort. Based on the representation of the Corporate Debtor the Financial Creditors paid an amount of Rs.31,15,000/- (Rupees Thirty-one Lakhs Fifteen Thousand) towards total consideration/investment of the said purchase of suite. The Corporate

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

Debtor failed to repay the said loan amount. Hence, the applicants have filed this IBA for recovery of an amount of ₹ 39,56,050/-.

3. The Financial Creditors submitted that as per clause 5.1 of the schedule of the said Agreement, the Corporate Debtor agreed to pay the Financial Creditors 1/6<sup>th</sup> of the rental pool income. As per clause 5.2 of the schedule of the said Agreement, the Corporate Debtor undertook that if the rental pool income of an accounting year is less than 9% of the total consideration, the Corporate Debtor shall pay 9% of the total consideration as a rental pool income for the initial four years.

4. It is further stated that despite the abovementioned investment made by the Financial Creditors, the Corporate Debtor has failed to give possession of the said purchase suite, and have therefore, miserably failed to Comply with the contractual, legal and moral obligations as per the said agreement. Moreover, the Corporate Debtor has failed to construct the said Resort. The learned counsel for the Financial Creditors stated that the Corporate Debtor has made commitments to the Financial Creditors to clear the outstanding payments but till date they have not adhered to the said commitments without any just and appropriate reason.

5. The Financial Creditor further argued that the petition is complete in all respects and the debt due from the Corporate Debtor is a "Financial Debt" within the meaning of Section 5(8) of the Insolvency and Bankruptcy Code, 2016, which has been paid against the consideration for the value of money. However, the Corporate Debtor is not making the payment. It is stated that they have complied with all the procedural formalities. In view of the aforesaid reason, they prayed that this Application may be Admitted and CIRP may be initiated against the Corporate Debtor.

**Submissions by the Corporate Debtor:**

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

6. The Corporate Debtor has raised the issue of maintainability of this Application on the ground that this application does not fall under the provisions of the Code and Rules framed thereunder. It is also submitted that the proceedings initiated are nothing but misuse of the provisions of the Code. The action to initiate Corporate Insolvency Proceedings against the Corporate Debtor through the present Application is to prejudice the business of the Corporate Debtor, and nothing but an effort to defame and make the Corporate Debtor and its promoters/directors suffer the trauma of a legal process.

7. The counsel appearing for the Corporate Debtor submitted that the Application is barred by limitation. In Part IV, item number 2 (2) of the Application, it is stated that the debt has become due from 31.06.2016. Accordingly, on 30.06.2019, the three years period has been elapsed, and, therefore, the present Application is barred by limitation in terms of Section 238A of I&B Code read with Section 3 of the Limitation Act, 1963. Therefore, the Corporate Debtor prayed that this Application has to be dismissed on that ground alone without considering any other aspects of the case. Further, it is stated that the Honourable Supreme Court of India in several cases set aside the proceedings initiated after three years due to limitations being accrued barring such proceedings under I&B Code. To fortify this argument, the learned counsel relied on the following judgements :

- i. Gaurav Harigovind bhai Dave Vs. Asset Reconstruction Company India Ltd & Another in Civil Appeal Number 4952 of 2019.
- ii. B.K. Educational Services Private Limited Versus Parag Gupta And Associates, Civil Appeal No. 23988 of 2017.
- iii. Jignesh Shah & Anr Vs. Union of India & Anr in Writ Petition (Civil) No 455 of 2019.

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

8. Without prejudice to the question of limitation raised as above, the learned counsel for the Corporate Debtor further contended as follows:
  - a. The Applicants are claiming to be Financial Creditors as an "allottee" based on the Agreement dated 17.08.2015. Before commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("I&B Amendment 2020") any such application of Financial Creditors who are allottees under a real estate project, an application for initiating Corporate Insolvency Resolution Process against the Corporate Debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less.
  - b. It is also evident that there is no financial debt, and hence there arises no question of default by the Corporate Debtor. Interest was assured on the amount in question, but there is no evidence to show that there is time value of money and thus the claim made by the Financial Creditors is not maintainable under Section 7 of the Code. It is also stated that there is no agreed "interest rate" or "time value of money" which is required for terming a debt/obligation (if any) as a "Financial Debt" under the provisions of the Code. Without the debt being a Financial Debt, the present Application filed under Section 7 is not maintainable and, is, therefore liable to be dismissed.
  - c. There are no documents for the borrowings and lending made between the Applicants/ Financial Creditors and Corporate Debtor. The Agreement dated 17.08.2015 does not reflect any such arrangement.

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

- d. Applicant has also not produced its Income Tax return, which states and records accrual of revenue as interest-based on the claim made by the Applicants/ Financial Creditors in the Application.

8. The learned counsel for the Corporate Debtor finally submitted that there is no record of default furnished with the information utility by the Applicants/ Financial Creditors in regards to the Respondent and on this count also, the Application is liable to be dismissed.

9. The Financial Creditors have filed affidavit of rejoinder on 14<sup>th</sup> September 2020 reiterating most of their contentions, refuting the reply of Corporate Debtor.

**Findings:**

10. On hearing the arguments of both sides and on perusal of the documents and evidences placed on record, this Bench finds it necessary to deal with each issue separately. The contention can be divided into two:

- (i) The primary question which arose in this case is regarding the maintainability of this application and whether the debt is time barred and hit by limitation?
- (ii) Whether the applicants are Financial Creditors and the debt due is a Financial Debt?

11. Regarding the maintainability of this application and whether it is time barred, the issue is now well settled in view of the decision of Hon'ble Supreme Court in **B.K. Educational Services Private Limited v. Parag Gupta & Associates (2018 SCC Online SC 1921)**, that Section 238A of the IBC is applicable from the commencement of the Code i.e. 01.12.2016 irrespective of the fact that this Section has been added in the second amendment to the code on 06.06.2018, wherein, it is held as follows:

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

*"It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, 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, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application".*

12. Respectfully following the above decision, this Bench is of the view that the provisions of Limitation Act applies to the application filed under Section 7 and 9 of the Code, but it is necessary to verify whether this applies to the Application in hand. As per the contention of the Financial Creditors, the date of default was 31.06.2016 and that it is evident that the Code came into force only on 01.12.2016 and the application is time barred after completion of 01.12.2019. However, the Hon'ble Supreme Court in the case of *Innovative Industries Limited Versus ICICI Bank and Another, (2018) 1 SCC 407, held as under:*

*" 30. ....in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself*

*that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

13. For further clarification, this Tribunal relies on the judgment of the Hon'ble Supreme Court in the case of *ITC Limited Vs Blue Coast Hotels Ltd. & Ors 2018 SCC OnLine SC 237* in which it is held as under:

*"Letter of Undertaking 'Without Prejudice'*

*33. Much was sought to be made of the words "without prejudice" in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer's case as pointed out by Mr. Harish Salve,*

*"as a rule the debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure." (AC p. 526)*

*It was argued in a subsequent case that an acknowledgment made "without prejudice" in the case of negotiations cannot be*

*used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows: (WLR p.2072, para 16)*

*“16. ....But when a statement is used as acknowledgement for the purpose of Section 29 (5), it is not being used as evidence of anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement.”*

*Therefore, the “without prejudice” rule could have no application.”*

14. In view of the law laid down by the Hon'ble Supreme Court in ITC Limited (supra), we hold that the WhatsApp communication dated 23.05.2019 annexed by the Financial Creditor along with the rejoinder constitutes an acknowledgement of liability, where the debtor who sent such a message has no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure and falls within the meaning of Section 18 of the Limitation Act, 1963. Therefore, this Tribunal holds that the Application filed by the Financial Creditor is within the limitation period.

15. Now the question comes as to whether the Applicants are 'Financial Creditors' and the debt due is a 'Financial Debt'. In this connection, it is to verify whether the amount disbursed by the Financial Creditor comes within the meaning of 'financial debt' having disbursed against the consideration for time value of money. Section 5(8) of the 'I&B Code' defines 'financial debt', which reads as follows:

***“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 nonrecourse basis;***
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;***
- (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-clauses (a) to (h) of this clause;”*

16. From a reading of the above provision, it is clear that a 'financial debt' is a debt along with interest which is disbursed against the consideration for the time value of money and may include any of the events enumerated in sub-clause (a) to (i). Therefore, this Tribunal is to see whether the amount paid by the Applicants to the Corporate Debtor, fulfil the other condition of "disbursement against consideration of time value and money", in order to come within the definition of "Financial Creditor."

17. On a careful reading of the Agreement dated 17.08.2015 between the parties, where the Financial Creditors, who were referred to as 'purchasers' disbursed the amount and the 'Corporate Debtor' has raised the amount with an object of having economic gain or commercial effect of borrowing. It is also found that the Financial Creditors agreed to invest in the project and purchased 1/6th undivided interest in the Resort. The Corporate Debtor was supposed to complete the Resort and to hand over the purchaser's suite as per the terms of the said agreement on or before 31.03.2016

and also the condition for compensating the purchasers for delay beyond three months from the scheduled date of completion or extended date. As per Clause 5(1) of the agreement the Corporate Debtor agreed to pay to the Applicants 1/6th of the rental pool income generated for the accounting year. It is stated that as per Clause 5(2) of the agreement, the Corporate Debtor also agreed that if the Rental Pool Income for an accounting year is less than 9% of the total consideration paid by the Purchaser under the agreement, the Corporate Debtor shall pay 9% of the total consideration paid by the Financial creditors under the Agreement as Rental Pool Income for the initial four years, irrespective of the actual Rental Pool income and this will be calculated only during last quarter of the Accounting Year. At the end of five years, the Corporate Debtor undertakes to buy back the fraction at 140% of the original sale price. This can be termed as an element of 'time value of money', particularly, when one of the conditions related to "sharing the revenue from the renting of the said Suite" as per Clause 3 of the Agreement. Therefore, this Tribunal holds that the amount paid by Mrs. Urvashi Dilip Kamath and Mr. Dilip Gopal Kamath comes within the meaning of 'Financial Debt', as the Corporate Debtor raised the amount

through a transaction of agreement having commercial effect of a borrowing (Section 5(8)(f)).

18. From the aforesaid discussion it reveals that there is a 'Financial Debt' as defined in Section 3(11) of IBC; there is a default within the meaning of Section 3(12) of IBC. Therefore, the application filed by the Financial Creditors is complete in all respects as required by the law. Therefore, the default stands established and there is no reason to deny the admission of the application. Hence, this Adjudicating Authority Admits this Petition and orders initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

19. The Financial Creditors have proposed CA. Baskar Gopal Shetty, B.G. Shetty & Co., C-77, Shanti Shopping Centre, MIRA Road (East), Mumbai- 401 107, as the Interim Resolution Professional (IRP) in the matter. However, due to the present situation of Covid-19 pandemic, the learned counsel for the Financial Creditors prayed that, this tribunal may appoint any other Insolvency Professional as Interim Resolution Professional. This prayer is accepted. Hence, this Tribunal ordered as follows: -

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

- (a) The Application bearing No. IBA/17/KOB/2020 filed by M/s URVASHI DILIP KAMATH AND DILIP GOPAL KAMATH, the Financial Creditors, under Section 7 of the IBC read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against MOONRIVER RESORTS PVT. LTD. [CIN: U55101KL2009PTC024173], the Corporate Debtor, is admitted.
- (b) There shall be a moratorium under Section 14 of the IBC, regarding the following:
- i. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority;
  - ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
  - iii. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and

**Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;**

iv. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium, the following are also to be strictly followed:-

(i) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of Sub-Section (1) of Section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

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

(e) Public announcement of the CIRP shall be made immediately as specified under Section 13 of the IBC read with Regulation 6 of

the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

- (f) This Tribunal appoints Mr. K T Mathew, holding Registration No. IBBI/IPA-001/IP-P-01522/2019 -2020/12464, residing at Kuruvanthanathu, Kolani P.O., Thodupuzha, Kerala-685608, to carry out the functions as mentioned under the IBC. 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 & Bankruptcy Board of India (IBBI). The IRP/ RP shall carry out his functions as contemplated by Sections 15, 17, 18, 19, 20 and 21 of the IBC. The IRP is further directed to submit the copy of AFA (Authorisation for Assignment) issued by Insolvency Professional Agency within two days from the date of receipt of this Order.
- (g) 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 a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

IBA/17/KOB/2020 (Urvashi Dilip Kamath & Anr).

- (h) The IRP/RP shall submit periodical reports to this Adjudicating Authority indicating the progress of the CIRP.
- (i) The Registry is directed to communicate this Order to the IRP, Financial Creditors and the Corporate Debtor by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) A copy of this Order be sent to the Registrar of Companies, Kerala, 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.

Dated this the 9<sup>th</sup> day of October, 2020.

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