

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
SINGLE BENCH, CHENNAI**

CP/678/IB/2018 filed under Section 7  
of the Insolvency and Bankruptcy  
Code, 2016 r/w Rule 4 of the  
Insolvency and Bankruptcy  
(Application to Adjudicating Authority)  
Rules, 2016

**Mrs. Anita Kumaran & Anr.**

*... Financial Creditors*

-vs-

**M/s. KGS Developers Limited**

*... Corporate Debtor*

Order delivered on 3<sup>rd</sup> January, 2019

CORAM:

**CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)**

*For Financial Creditors : Mr. P.H.Arvind Pandian, Senior Counsel*  
*For Corporate Debtor : M/s. Nithyaesh Nataraj, Counsel*

ORDER

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

1. Under adjudication is CP/678/IB/2018 that has been filed by Mrs. Anita Kumaran and Mr. K. Kumaran (hereinafter referred to as '**Financial Creditors**') under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w

Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s. KGS Developers Limited (hereinafter referred to as '**Corporate Debtor**'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. Heard the Learned Counsels for the Financial Creditors and the Corporate Debtor, and perused the pleadings including the documents placed on file.

3. The Financial Creditor(s) have claimed principal amount of Rs.19,00,00,000/- (Rs.16,00,00,000/- plus Rs.3,00,00,000/-) interest @ 15% p.a., totaling Rs.20,21,10,959/- as outstanding against the Corporate Debtor, which the Corporate Debtor has failed to pay.

4. The case of the Financial Creditors is that an agreement dated 07.02.2016 was entered into between the

2<sup>nd</sup> Applicant/Financial Creditor viz., Mr. K. Kumaran, Mr. P. V. Sanmugam, Mr. Gigi George and other group of companies for division of assets and liabilities and their shareholdings in the group of Companies. As per clause 2.1 of the said agreement, the 2<sup>nd</sup> Applicant/Financial Creditor was to exit the Corporate Debtor by transferring his shares to G. Georg and P.V. Sanmugam and it was also agreed that the property owned by the 1<sup>st</sup> Applicant/Financial Creditor that was given as collateral security (by way of mortgage) to ICICI Bank against the credit facilities sanctioned in favour of the Corporate Debtor would be released by P. V. Sanmugam on or before 30.06.2016 as has been mentioned in Clause 8 of the Agreement, copy of which is placed at pages 60 to 100 of the typed set filed with the Application. The relevant parts of the agreement dated 07.02.2016 are extracted below:-

*2.1 KK would transfer and sell his Existing Shareholding in KDL, KAIAL, KIL, KCL, BBB, KHL and SRPL to PVS and GG or their respective nominees, for a*

total consideration of Re.1 so that PVS and GG would assume complete ownership of the shareholding of the above mentioned companies. KK shall resign from Directorship of the above companies.

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“8. The parties hereby acknowledge that KK’s wife (“Mrs. KK”) had executed a Power of Attorney in favour of PVS in respect of her immovable property admeasuring 11 Acres situated at Karasangal, morefully described in Schedule-6, and PVS had provided the Karasangal Property to ICICI Bank as collateral facility for the credit facilities being enjoyed by KDL. In the light of KK’s exit from shareholding and Board of KDL and PVS and GG assuming complete control of the same, KDL, PVS and GG hereby agree that **they shall secure release of the Karasangal Property from ICICI Bank on or before 30.06.2016** or such other extended period as may be mutually agreed in writing between the Parties Pursuant to the transfer of shares amongst the Parties herein, GG would hold approximately 30% of the equity shareholding of KDL and KAIAL. Till the release of the Karasangal Property is secured from ICICI Bank, the



*Parties have agreed to create the following security mechanism.*

- (i) The documents relating to the shares of KDL, namely Original Share Certificates and Executed Transfer forms, which are being transferred by KK under Clause 2.1 above shall be handled over by KK to M/s. Guru & Ram, Chartered Accountants.*
- (ii) The documents relating to the shares of KAIAL, namely Original Share Certificate and Executed Transfer forms, which are being transferred by KK under Clause 2.1 above shall be handed over by KK to M/s. Guru & Ram.*
- (iii) PVS and GG shall cause KDL to create a registered simple mortgage over 14 acres of Paddapai Property in favour of KK, morefully described in Schedule-7.*
- (iv) PVS and GG shall cause KAIAL to provide the original title documents of 285 Acres of KAIAL's property, out of the 335 Acres morefully described in Schedule-8, and shall create a mortgage by deposit of title deeds in favour of KK, to be kept in*

*escrow, for the benefit of KK with M/s. Guru & Ram.*

*M/s. Guru & Ram shall hold the above documents in escrow for the benefit of KK. In the event, Karasangal Property is not released on or before 30.06.2016 or such other extended period mutually agreed in writing between the parties, M/s. Guru & Ram shall deliver all the documents held in escrow as mentioned above to KK. KK shall be entitled to resume ownership of the shares of KDL and KAIAL covered by the Original Share Certificates, kept in escrow with M/s. Guru & Ram and shall also have the right to point 1 (one) nominee as director on the Board of KDL and KAIAL. KK shall be entitled to exercise the rights of a Mortgagee as regards 14 Acres of Paddapai Land and 285 acres of KAIAL land. KK shall be permitted to sell 14 acres of Padappai Property and/or 285 acres of KAIAL's property and use the proceeds to pay ICICI Loan in order to release the Karasangal Property. PVS and GG hereby agree that they shall cause KAIAL and KDL to do all such acts as may be necessary to enable KK to sell the said properties. If after sale of the 14 acres of Padappai Property and/or the 285 acres of KAIAL Property, the amounts are not sufficient to repay ICICI Bank to release the Karasangal Property, then PVS and GG hereby agree that they shall cause KDL to pay the shortfall to ICICI Bank*

*and get the Karasangal Property released from ICICI Bank. Further, along with the execution of this Agreement, the Parties hereby agree that PVS shall execute a Deed of Cancellation of Power of Attorney with Mrs. KK wherein the rights / powers conferred upon PVS under the original Power of Attorney shall stand cancelled. Further, PVS and GG hereby agree that they shall not offer the Karasangal Property as additional collateral security for any further borrowings which they propose to make either in KDL or in any other entity, from ICICI Bank or any other lender.”*

5. The Corporate Debtor has failed to honour the commitments made as per the above mentioned agreement. Consequently, the ICICI Bank has initiated SARFAESI proceedings i.e., issued Demand Notice under Section 13(2) followed Possession Notice under Section 13(4) of the SARFAESI Act, 2002 and has taken possession of the property of the 1<sup>st</sup> Applicant/Financial Creditor. In the said Possession Notice, the amount has also been mentioned. The Possession Notice provides that the borrower failed to repay the amount and the Notice is being given to the mortgagor/1<sup>st</sup> Financial Creditor. Subsequent to the same,

the 1<sup>st</sup> Applicant/Financial Creditor has stepped in and paid an amount of Rs.16 Crores to the ICICI Bank as reflects from the Letter dated 07.12.2017 which clearly provides that the transactions were made on 11.09.2017, 30.09.2017 and 07.12.2017 for an amount of Rs.1 Crores, Rs.3 Crores and Rs.12 Crores respectively, grand total amounting to Rs.16 Crores.

6. It has been submitted by the Learned Sr. Counsel for the Financial Creditors that the Letter dated 07.12.2017 reflects that the money has been paid by M/s. Radiance Realty Developers India Limited on behalf of the 1<sup>st</sup> Applicant/Financial Creditor which were receivables by the Financial Creditors from the said entity.

7. The Learned Sr. Counsel for the Financial Creditors referred to the document placed at page 121 of the typed set filed with the Application which clearly shows the transactions with regard to the payments of Rs.3 Crores more which was paid to ICICI Bank through Indian Bank



[total payments have become 19 crores] and the same is being mentioned under Para 10 at page B7 of the Application.

8. The Counsel for the Corporate Debtor has submitted that the 1<sup>st</sup> Applicant/Financial Creditor is a shareholder and the 2<sup>nd</sup> Applicant/Financial Creditor is a Director/Promoter of the Corporate Debtor till today. The Counsel for the Corporate Debtor has referred to the judgements dated 09.02.2018 and 19.12.2018 passed by Hon'ble NCLAT in *Company Appeal (AT) (Insolvency) No. 142 of 2017 titled **Sh. Neeraj Bhatia -vs- Davinder Ahluwalia & 2 Ors.*** and in *Company Appeal (AT) (Insolvency) No. 164 of 2018 titled **Lalit Mishra & Ors -vs- Sharon Bio Medicine Ltd & Ors.,*** and submitted that the issue involved in the matters is as to whether the shareholder and Director/Promoter can be treated as Financial Creditor as per Sections 5 (7) r/w 5(8) of the I&B Code, 2016. The answer given by the Hon'ble Appellate Tribunal is in

negative. However, as seen the facts and circumstances of the present case and the facts and circumstances of the cases titled **Sh. Neeraj Bhatia -vs- Davinder Ahluwalia & 2 Ors., and Lalit Mishra & Ors -vs- Sharon Bio Medicine Ltd & Ors.**, are different and distinguishable for the reason that the collateral security (by way of mortgage) has been given by the 1<sup>st</sup> Applicant/Financial Creditor in favour of the ICICI Bank, on the basis of which the Corporate Debtor had availed the facility of loan. The loan taken by the principal borrower/Corporate Debtor carries the element of time value of money and payment thereto by the Financial Creditors is also against the time value of money of the loan taken by the principal borrower i.e. Corporate Debtor. The interpretation that has been placed by the Learned Counsel for the Corporate Debtor is that the money that has been paid by the Applicants/Financial Creditors is not having an element of time value of money is not convincing and the same stands rejected. The Applicants/Financial Creditors being Shareholder and

Director/Promoter have made payments of the loan taken by the Corporate Debtor from ICICI Bank. Therefore, a Shareholder, Director/Promoter can also be a Financial Creditor when he makes repayment of the loan that has been advanced by the Bank(s) to the principal borrower. If the interpretation made by the Learned Counsel for the Corporate Debtor is taken into consideration, the same will take away the effect of the definitions of “*Financial Creditor*” and “*Financial Debt*” given under Sections 5 (7) and 5 (8) of the I&B Code, 2016. The settled principle of interpretation is that an interpretation must give effect to the provisions of the statutes and not to render them otiose. This view is based on the well-established maxim of *interpretation* which says ‘*ut res magis valeat quam pereat*’. This Latin maxim of interpretation when translated into English means that it is better for a thing to have effect than to be void. In order to strengthen the above view, a reference may be made to the principle of interpretation evolved by Hon’ble Apex Court in **Gurudevdatla VKSSS Maryadit Vs State of Maharashtra,**

reported in AIR 2001 SC 1980, wherein the Hon'ble Apex Court has laid down as under:-

*“It is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law given. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute.”*


9. The intention of the legislature does not appear to have excluded the Shareholders and Directors/Promoters from the purview of definition of the ‘Financial Creditor’ or ‘Financial Debt’, who might have given loan to the Corporate

Debtor or repaid the loan on behalf of the Corporate Debtor. It is not out of place to mention that this Authority vide its Order dated 09.07.2018 passed in CP18/2018 has held that the Director of the Corporate Debtor who has repaid the loan on behalf of the Corporate Debtor from his personal accounts is a Financial Creditor. The Order has been challenged before Hon'ble NCLT<sup>A</sup> in Company Appeal (AT) (Insolvency) No.387/2018. The Hon'ble NCLAT vide its Order dated 08.08.2018 has upheld the Order of this Authority by observing that a Director paid amount from his personal account on behalf of the Corporate Debtor, he comes within the meaning of Financial Creditor of the Corporate Debtor. Therefore, the contention raised by the Learned Counsel for the Corporate Debtor that the shareholder and promotor/director of corporate debtor do not fall within the purview of the definition of the financial creditors stands rejected.

10. The Learned Counsel for the Corporate Debtor has further submitted that the 1<sup>st</sup> Applicant/Financial Creditor

is not a signatory to the Agreement dated 07.02.2016. However, the 2<sup>nd</sup> Applicant/Financial Creditor is a signatory to the said agreement. It has further been stated by the Learned Counsel for the Corporate Debtor that the property of the 1<sup>st</sup> Applicant/Financial Creditor has been given to the Corporate Debtor for the purpose of development by executing Power of Attorney dated 05.01.2007 under joint development agreement. The Counsel has submitted that the said Power of Attorney has been unilaterally cancelled and the Corporate Debtor has spent some money as far as the development of the land is concerned. However, these are the separate issues. The Corporate Debtor is not remediless. The said Power of Attorney has been cancelled on 30.05.2017 but till date no legal remedy has been availed by the Corporate Debtor to challenge the same.

11. The Learned Sr. Counsel for the Financial Creditors has rebutted the contentions made by Learned Counsel for the Corporate Debtor in relation to the continuation of the 2<sup>nd</sup> Applicant/Financial Creditor as Director of the

Corporate Debtor. He has submitted before this Bench the copy of the resignation letter dated 30.06.2017 by which the 2<sup>nd</sup> Applicant/Financial Creditor has resigned from the Corporate Debtor. The Learned Sr. Counsel for the Financial Creditors has referred to the provisions of Section 168 (1) of the Companies Act, 2013 which provide that a director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed. It has further been submitted by the Learned Sr. Counsel for the Financial Creditors that as per the proviso to Section 168 of the Companies Act, 2013, the copy of the resignation has also been sent in Form-11 to the Registrar of Companies. Therefore, it is clearly established that the 2<sup>nd</sup> Applicant/Financial Creditor is not the Director of the Corporate Debtor as of now. 

12. In order to rebut the contentions of the Learned Counsel for the Corporate Debtor that the 1<sup>st</sup> Applicant/Financial Creditor is not signatory to the Agreement dated 07.02.2016, the Learned Sr. Counsel for the Financial Creditors has referred to Clause 8 of the said Agreement, which clearly provides that KK's wife ("Mrs. KK") had executed a Power of Attorney in favour of PVS in respect of her immovable property admeasuring 11 Acres situated at Karasangal, morefully described in Schedule-6, and PVS had provided the Karasangal Property to ICICI Bank as collateral security ( by way of mortgage) for the credit facilities being enjoyed by KDL (Corporate Debtor). The Corporate Debtor, PVS and GG agreed that they shall secure release of the Karasangal Property from ICICI Bank on or before 30.06.2016, which they failed to do so. Thus, there was a breach of the conditions stated under Clause 8 of the Agreement, due to which the Financial Creditors have paid Rs.19 Crores to ICIC Bank, which has to be paid by

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the Corporate Debtor to the Financial Creditors, but the Corporate Debtor failed to pay the same.

13. The Counsel for the Corporate Debtor has referred to other terms and conditions of the Agreement dated 07.02.2016 and has submitted that there is a dispute with M/s Reliance Capital Limited, and the subject matter is being dealt with by the Arbitral Tribunal. The dispute between the Corporate Debtor and Reliance Capital is a separate issue, which has no relevance with the matter on hand.

14. The Learned Counsel for the Corporate Debtor has also disputed the Agreement dated 07.02.2016 and stated that the Arbitral Tribunal has already framed an issue in relation to the validity of the said Agreement. However, it is made clear that having any clause for arbitration in the said Agreement, the Financial Creditors are not barred from filing the Application under Section 7 of the I&B Code, 2016, against the Corporate Debtor for initiating the CIRP.

15. The Learned Counsel for the Corporate Debtor as a last resort has submitted that he is not canvassing the issue as to whether the Shareholder and Director/Promoter can be a Financial Creditor or not, but for the purpose of evidence that neither the debt has been assigned in favour of the Financial Creditors nor they have shown that the money has been paid for time value to the ICICI Bank and has prayed to reject the Application. However, in view of the observation made in the preceding paragraphs, the defence taken by the Corporate Debtor is devoid of merits and has already been rejected.

16. The Learned Sr. Counsel for the Financial Creditors in his reply has submitted that the facts contained in **Sh. Neeraj Bhatia** case are different from the facts involved in the case on hand and further submitted that the 1<sup>st</sup> Applicant/Financial Creditor is not guarantor but a mortgagor as reflects from the Possession Notice dated 05.09.2017. The Learned Sr. Counsel for the Financial

Creditors has referred to the judgement dated 13.07.2018 passed by Hon'ble NCLAT in *Company Appeal (AT) (Insolvency) No. 61 of 2018 titled **Andhra Bank Vs. F.M. Hammerle Textile Ltd.***, wherein under Paras 13, 14 and 15, it has been observed that the Corporate Debtor has counter indemnity obligation in respect of guarantee given by it to the Andhra Bank and it was held that the Andhra Bank comes within the definition of 'Financial Creditor' as defined under Sections 5 (7) r/w 5 (8) of the I&B Code, 2016.

17. The Learned Sr. Counsel for the Financial Creditors has referred to Section 5 (8) (h) of the I&B Code, 2016 which provides as under: -

**8. "Financial Debt"** means *a debt along with interest, if any, which is disbursed against the consideration for time value of money and includes-*

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....



- (f) .....
- (g) .....
- (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) .....

Based on the above definition, it has been contended that since the 1<sup>st</sup> Applicant/Financial Creditor has given collateral security (by way of mortgage) to the ICICI Bank which falls within the purview of the term, “*any other instrument*”. Therefore, the case of the Financial Creditors is being covered under Section 5 (8) (h) of the definition of the “*Financial Debt*” of I&B Code, 2016.

18. Learned Sr. Counsel for the Financial Creditors further referred to the definition of ‘claim’ as has been provided under Section 3 (6) (a) of the I&B Code, 2016 i.e., ‘claim’ means a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured. The Counsel further referred to the definition of ‘*creditor*’ given under Section



3(10) of the I&B Code, 2016, which means any person to whom a debt is owed and includes a Financial Creditor, an Operational Creditor, a Secured Creditor, an Unsecured Creditor and a Decree-holder. The Learned Counsel also referred to Clause (11) of Section 3 which defines the term '*debt*' which means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. The submissions made by the Learned Sr. Counsel for the Financial Creditors are plausible, the debt claimed clearly falls under the definition of '*Financial Debt*' given under Section 5 (8) of the I&B Code, 2016.

19. The documentary evidence placed on the case file is sufficient in order to ascertain the existence of a default on the part of the Corporate Debtor. Therefore, in the light of the facts and circumstances and the legal position stated above, the Financial Creditors have fulfilled all the requirements of law, for admission of the Application filed under Section 7 of the I&B Code, 2016 and has proposed

the name of the IRP after seeking his consent in Form-2. Therefore, the Application stands **admitted**. The commencement of the Corporate Insolvency Resolution Process is ordered, which ordinarily shall get completed within 180 days, reckoning from the day this order is passed.

20. Mr. Kannan Sambasivam, is hereby appointed as IRP <sup>✓</sup> as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as reflects from Form-2. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of I&B Code, 2016, within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.

21. The moratorium is hereby declared which shall have effect from the date of this Order till the completion of

Corporate Insolvency Resolution Process, for the purposes referred to in Section 14 of the I&B Code, 2016. It is hereby ordered to prohibit all of the following, namely:

- (a) 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;
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) 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 Act, 2002 (54 of 2002);
- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

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22. The supply of essential goods or services of the Corporate Debtor/Guarantor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

23. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of I&B Code. The Directors of the Corporate Debtor, its promoters or any person associated with the Management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under Section 19, so that he could discharge his functions under Section 20 of the I&B Code, 2016.

24. The Financial Creditors and the Registry are directed to send the copy of this Order with immediate effect to IRP, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of I&B Code, 2016. The address details of the IRP are as follows: -



**Mr. Kannan Sambasivam,**

Reg. No. IBBI/IPA-001/IP-P00755/2017-2018/11287

“Sky Line Castle”,

27, Abdul Razack Street,

Saidapet, Chennai – 600 015

Email ID: [charitarthkannan@gmail.com](mailto:charitarthkannan@gmail.com)

25. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor with immediate effect.

26. The Order is dictated and pronounced in open Court in the presence of the Learned Counsels for the Financial Creditors and the Corporate Debtor.

P.ATHISTAMANI

  
[CH.MOHD SHARIEF TARIQ]  
MEMBER (JUDICIAL)