

**NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH  
COURT NO.1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
BENGALURU BENCH, BENGALURU, HELD ON 30.08.2018.

PRESENT: 1.Hon'ble member (J) **Shri Rajeswara Rao vittanala,**  
2.Hon'ble member (T) **Dr. Ashok Kumar Mishra**

CP/CA No	Purpose	Section	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB) No.66/ BB/ 2017	For pronouncement of order	Sec 7 of I&B code	Axis Bank Ltd	Cyril Amarchand Mangaldas	Lotus Shopping Centres Pvt. Ltd.	Thiru&Thiru, Advocates

SL. NO.	NAME (IN CAPITAL) & PHONE NUMBER	REPRESENTATION TO WHOM	SIGNATURE
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PETITIONER/s :

SHARAN A. KUKREJA  
SIDDHARTH TIWARY.

APPLICANT/  
PETITIONER.

RESPONDENT/s :

**ORDER**

Heard Shri Sharan A. Kukreja & shri Siddharth Tiwary, learned Counsels for Petitioner; None appeared for Respondent/

C.P is disposed of vide separate order.

  
MEMBER (T)  
MEMBER (J)

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No. 66/BB/2017  
U/s 7 of IBC r/w Rule 4 of I & B  
(Application to Adjudicating Authority) Rules, 2016

**In the matter of**

**Axis Bank Limited,**

Corporate Banking Branch,  
2<sup>nd</sup> Floor, Express Building,  
No.1, Queens Road,  
Bengaluru-560001.

... Petitioner/Bank/Financial Creditor

**Versus**

**Lotus Shopping Centres Private Limited,**

Door No. 15-8-441/50, Shop No.46,  
1<sup>st</sup> Floor, Yenepoya Mall, Kadri Road,  
Mangalore-575003,  
Karnataka.

- Respondent/Corporate Debtor

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

**Date of Order: 30<sup>th</sup> August, 2018**

For the Petitioner(s): Shri Udaya Holla, Senior Advocate.

For the Respondent: Shri B.C.Thiruvengadam, Advocate.

Per: **Rajeswara Rao Vittanala, Member (Judicial)**

**O R D E R**

1. The Company Petition(Application) bearing C.P (IB) No. 66/BB/2017, is filed under u/s 7 of the Insolvency and Bankruptcy Code, 2016 R/w Rule 4 of I & B (Application to Adjudicating Authority) Rules, 2016, by **Axis Bank Limited**, herein after called as Petitioner/Financial creditor, by inter-alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of **Lotus Shopping Centres Private Limited** (Respondent/ Corporate Debtor), under the provisions of IBC, 2016.

2. Brief facts of the case, which are relevant to the issue in question, are as follows:

- a) **Axis Bank Limited**, Petitioner/Financial Creditor was incorporated on 3<sup>rd</sup> December 1993 under the Companies Act, 1956 having PAN No. AAACU2414K, and it is carrying on banking business under the Banking Regulation Act, 1949.
- b) **Lotus Shopping Centres Private Limited** (Respondent Corporate Debtor) was incorporated on 30<sup>th</sup> November 2007, having CIN No. U45209KA2007PTC044541, with the Registrar of Companies, Karnataka. Its Authorised Share Capital of the Corporate Debtor Company is Rs 3,19,46,000/- and the paid-up share capital is Rs 2,91,70,030/-.
- c) On 2<sup>nd</sup> January 2013, a term loan agreement ("**Original TL Agreement**") was entered into between the Financial Creditor and the Corporate Debtor, and the same was subsequently amended by an Amendment Agreement dated 8<sup>th</sup> February 2015 (**Supplemental TL Agreement**), read with general undertaking/indemnity for letters of credit dated 2<sup>nd</sup> January 2013 ("**LC Undertaking**") and counter-indemnity for buyers credit dated 2<sup>nd</sup> January 2013 ("**Buyers Credit Indemnity**") together with the Original TL Agreement & Supplemental TL Agreement, LC Undertaking and Buyers credit Undertaking, the "**TL Agreements**", each having been entered into between, the Corporate Debtor and Axis Bank, and sanction letters dated 4<sup>th</sup> December 2012 and 27<sup>th</sup> December 2012 bearing reference No. AXISB/BNG/CB-MC/GK/419/2012-13, and AXISB/BNG/CB-MC/465, respectively (collectively "**Original TL Sanction Letter**") and sanction letter dated 15/01/2015 bearing reference No. AXIS/BNG/CCG-MC/568 ("**Supplemental TL Sanction Letter**",

together with Original TL Sanction Letter, the “**TL Sanction Letters**”); and a short term loan agreement dated 26<sup>th</sup> April 2017 (“Short TL Agreement”, together with the TL Agreements, the “Loans Agreements”), read with sanction letter dated 25<sup>th</sup> April 2017 bearing reference No. AXIS/BNG/CCG-MC/19 (“**Short TL Sanction Letter**”)

d) Under the Loan Agreements, Axis Bank’s exposure to the Corporate Debtor, are as follows:

- i. Facility 1 (Term Loan), details of which are set out in the Original TL Agreement, the Supplemental TL Agreement, the LC Undertaking, Buyers Credit Indemnity and the TL Sanction Letters, in respect of which the principal amount extended by Axis Bank is Rs 150,00,00,000/- (Rupees One Hundred and Fifty Crores only) (referred to as “Axis Bank Facility 1”) and
- ii. Facility 2 (Short Term Loan), details of which are set out in the Short TL Agreement and the Short TL Sanction Letter, in respect of which the principal amount extended by Axis Bank is Rs 55,00,00,000/- (Rs. Fifty Five Crores only) (referred to as “Axis Bank Facility 2”, together with Axis Facility 1, “Axis Facilities”)

e) The following are the debt and default, in respect of Axis Facility 1

- i. Total amount of debt (including the default amounts reported under the application) is Rs 147,78,03,498/- (Rs. One hundred Forty Seven Crores Seventy Eight Lakhs Three Thousand Four Hundred Ninety Eight only). The defaulted amount, under the Axis Facility 1 as on 15<sup>th</sup> July 2017 is Rs 8,22,01,069/- (Rs. Eight Crores Twenty Two Lakhs One Thousand Sixty Nine only); and the initial date of default by

the Corporate Defaulter with respect to Axis Facility 1 is 15<sup>th</sup> April 2017.

- ii. In respect of Axis Facility 2: The total amount of debt (including the default amounts reported under this application) is Rs 53,75,62,371/- (Rs. Fifty three Crores Seventy five Lakhs Sixty two Thousand and three Hundred seventy one). The defaulted amount under the Axis Facility 2 as on 30<sup>th</sup> June 2017 is Rs 94,60,455/- (Rs. Ninety four lakhs Sixty Thousand and Four Hundred Fifty Five only); and the initial date of default by the Corporate Defaulter with respect to Axis Facility 2 is 30<sup>th</sup> April 2017.

f) Corporate Guarantee are as follows: Each of Lotus Three Developments limited ("Lotus Three"), G-Corp Lotus Mall Private Limited ("G-Corp"), and Lingamaneni Landmarks Developments Private Limited ("Lingamaneni") have, subject to the monetary limits set out therein, guaranteed the obligations of the Corporate Debtor in respect of Axis Facility 1, under the TL Agreements pursuant to separate guarantee agreements dated 15<sup>th</sup> February 2013 ("Lotus Three Guarantee Agreement"), 20<sup>th</sup> February 2013 ("G-Corp Guarantee Agreement") and 23<sup>rd</sup> April 2014 (read with modification letter dated 8<sup>th</sup> September 2015) (collectively "Lingamaneni Guarantee Agreement"), respectively (collectively, the "TL Corporate Guarantee Agreements").

g) Mortgage – first charge by way of mortgage over:

- i. Land, buildings and all immovable properties being a portion of the undeveloped industrial converted Survey No. 15/2 of Kenchanahalli Village, MO No. BDS. In ALN SR 3675, Kengeri Hobli, Bangalore South, thereof an extent of 2 Acres; undeveloped commercially converted survey No.15/2 (Page-14)

of Kenchanahalli Village, vide order No. ALN SR (S) 27/2001-02, Kengeri Hobli, Bangalore South, thereof an extent of 3 Acres of 18 Guntas; Sy.No.16 of Kenchanahalli Village, Kengeri Hobli, Bangalore South, of extent of 6.6 Guntas (1/8<sup>th</sup> share in extent of 1 Acre 13 Guntas) converted for industrial use vide order No. ALN (S) SR (K):125/07-08; and Sy.No.16 of Kenchanahalli Village, Kengeri Hobli, Bangalore South, of extent of 1 Acre 6.4 Guntas converted for industrial use vide order No. ALN (S) SR (K):125/07-08 (Collectively "**Immovable Properties**"- **Bengaluru**");

- ii. Land, buildings and non-agricultural immovable properties located at Padavu Village, Mangalore Taluk within Mangalore City Corporation and bearing R.S No. 127/5, 194/2, 127/4, 194-2(P), 194-2A1A admeasuring 6.01 acres ("**Immovable Properties - Mangalore**");
- iii. Immovable properties located at D.No. 386/1 and D.No. 387/1, Atmakuru Village, Mangalagiri Mandal, Guntur admeasuring 21446.524 sq. yards ("**Immovable Properties-Guntur**").

h) In addition to the above, the particulars of the Security interest available to Axis Bank in respect of each of the Axis Facilities ("Common Security") (including the principal amount, interest, default interest and all amounts owing there under) are set out below:

- a) First charge by way of hypothecation over the Corporate Debtors entire fixed assets both present and future, consisting of plant, machinery, spares, tools and accessories, fixtures, implements, fittings and other installations, furniture, vehicles, computer and all other articles etc.,



- b) First charge by way of hypothecation over the whole of the current assets of the Corporate Debtors namely, stock in trade, both present and future, consisting stock including raw materials, tock in process, finished goods, cash etc.,
- c) Estimated value of the security given by the Corporate Debtor is approximately Rs 452,33,00,000/- (Rs. Four hundred fifty two Crores thirty three lakhs only).

3. The Respondent/Corporate Debtor, by opposing the Company petition, filed reply dated 2<sup>nd</sup> November 2017, by inter-alia stating/contending as follows:

- a) WP No. 37729/2017 is filed challenging the constitutional validity of the IBC, 2016 and the jurisdiction of this Tribunal, and another WP No. 45041/2017 filed by seeking a writ of Mandamus to cancel the license of the Axis Bank, and also filed Civil Suit (O.S No. 5553/2017) claiming damages of about Rs 101 Crores from the Bank before the X Additional City Civil and Sessions Judge, Bengaluru, and the all these legal proceedings are pending before the respective courts. Therefore, Adjudicating Authority (Tribunal) does not have jurisdiction, as it is not a Court of Record within the meaning of Section 41 of the Indian Evidence Act, 1872 and this Tribunal cannot pass a Judgement in Rem declaring any entity as insolvent.
- b) Axis Bank has filed the present Petition/Application by suppressing several material facts with malafide intention and ulterior motives. The Bank has violated various regulations of RBI and issued several letters by committing several illegalities.
- c) The Respondent Company has been started to establish a shopping mall project in Mangalore, the Company has land to the

extent of about 6 Acres in Mangalore City, and the market value as on date is not less than Rs 73 Crores, which was much more valuable four years ago. The investor's equity in addition to the land value is Rs 141 crores. The Bank wanted to fund the project on a debt equity ratio of 0.9:1 however, delayed the funding for more than 10 months and sanctioned Rs 150 crores, but released only Rs 102 Crores. A request for additional funding of Rs 70 Crores was not being considered for no rhyme or reason even though the debt equity ratio was considerably in favour of the Respondent Company for the reason that the value of the project land and equity was almost Rs 225 Crores compared to the funding of Rs 102 Crores. In addition, the Respondent had furnished collateral security in Bangalore and Vijayawada properties valued at Rs 123 Crores, apart from corporate guarantees. The understanding, then was that the commercial operations, the date of the project was initially kept as 31/09/2014, and once EMI were to be collected by Bank, the corporate guarantees would automatically get discharged. The Bank indulged in shoddy appraisals and evaluations and unilaterally suspended funding of the sanction limit of Rs 150 crores. The Bank made untenable demands resulting in the project, which had progressed, substantially came to a grinding halt. Thereafter, the Bank started indulging in the manipulation of the statement of account in order to maximize its revenue by way of interest and to fleece the Respondent.

- d) The Account of the Respondent Company became NPA on 31/08/2015. According to the statement of the Bank, the late payment was affected on 28/09/2015 and as per the NPA norms of RBI, the account was overdue by 3 months and ought to have



been classified as NPA. Respondent released a sum of Rs 5.17 Crores on 28/09/2015 as against their original sanctioning. Once again the account became NPA on 15/01/2016, but the Bank did not classify the account with malafide intention to charge interest and make profit. They have raised several contentions with regard to the declaration of NPA. It is alleged that the Bank has manipulated various documents using blank signatures by pointing out various legalities of documentation process by the Bank.

- e) The Reserve Bank of India, has in the recent past penalized the Bank for fraudulent money laundering practices by the officials of Bank during the demonetization program launched by the Hon'ble Prime Minister of India, the penalty being a paltry sum of Rs 5,00,00,000/-. It is stated that the Respondent Company is to set up shopping malls in the name of "Lotus Shopping Centres". The Respondent Company has investment under Foreign Direct Investment (FDI) by two substantial shareholders one from Cyprus and the other from Mauritius. Therefore, the Company has business proposal identifying land measuring 05 Acres 85 Guntas situated at # 2-16/139, NH-13 Main Road, Kulshekar, Mangalore-575005. The proposed project was to be developed by the Respondent investing huge amount investment, and it attracted lot of attention especially from banking companies and financial institutions and offered to lend money to the Company for the purpose of development and construction activities in the schedule property.
- f) Mr. Gireesh K, Deputy Vice President of Axis Bank approached the Directors of the Respondent and persuaded to give a proposal for an application for a loan of Rs 163,00,00,000/- with a promise

they would take complete responsibility to get the sanctioned amount within a period of one month from the date of application. Subsequently, Mr. Gireesh K. on 19/06/2012 has informed that loan would be sanctioned subject to creation of exclusive charge of the assets funded by the Bank including equitable mortgage on the schedule land and the building that was to be put up on it thereon and 100% charge on any unencumbered commercial property to be furnished as collateral security.

- g) In pursuant to the compliance, the Bank already communicated in-principle vide letter dated 13/08/2012 by sanctioning Rs 150,00,00,000/-, finally after processing the case. The Bank vide its communication letter dated 04/12/2012 finally sanctioned the amount with an inordinate delay of six months. Accordingly, the Board of Directors of the Respondent Company approved and accepted the sanction of the loan and also authorized Mr. Ajantha Jayaram Shetty to execute the necessary documents. The Respondent Company also resolved to request two other Companies, viz., Lotus 3 Developers; G-Corp Lotus Mall Private Limited to extend corporate guarantees to the Bank for the said loan. The Bank has released the first tranche of payment of Rs 10,00,00,000/- on 27/02/2013 i.e., more than 10 months from the time of application. The original estimated cost of the project was Rs 302,00,00,000/-. As against this project, the investors of the Respondent Company have invested altogether, a sum not less than 104,00,00,000/- as on 31/03/2013 for the purpose of the project.
- h) It is stated that there has been a delay of seven months in the sanction of loan, two months delay in documentation and releasing the first tranche of funds. The Respondent has relied

upon the Master Circular issued by the RBI on Lending by Banks and financial Institutions Circular No. RBI/2012-13/79:DBOD. No.Dir:BC.4/13.03.00/2012-13 dt. 2<sup>nd</sup> July 2012. para:2.5.2(i) c:

“Banks/financial institutions should verify the loan applications within a reasonable period of time. If additional details/documents are required, they should intimate the borrowers immediately”.

- i) As against the sanction limit of Rs 150,00,00,000/- the Bank has released a sum of Rs 102,00,00,000/- and the promoter contribution was not less than Rs 115,00,00,000/- and land worth Rs 72,00,00,000/- and collateral worth Rs 120,00,00,000/- The Bank ought to have fulfilled the obligation of Rs 48,00,00,000/- as per the norms.
- j) On 2<sup>nd</sup> July 2014, the Respondents submitted the project update to the Bank by seeking enhancement of the limit by another Rs 70,00,00,000/-. They have realised that the officials of the Bank have hatched a conspiracy to defraud Respondent and to make wrongful gain. They have cited that the Term Loan Agreement dated 8<sup>th</sup> January 2015, whereas the date of embossment of stamp is 5<sup>th</sup> February 2016. Similarly, the term loan agreement dated 18<sup>th</sup> April 2017 whereas the date of embossment of stamp is 26<sup>th</sup> April 2017.
- k) Therefore, they have contended that documents made by the Bank is improper and illegal. They have relied upon various Reserve Bank of India (RBI) Circulars including Master Circular dated 1<sup>st</sup> July 2014 to contend that the Bank has to follow guidelines in sanctioning loans. On account of high handed attitude of the Bank, the project came to a grinding halt. Due to non-payment of bills the vendors and contractors stopped their work and started to demobilize from the site. More than 80% of the employees were

laid off, thus causing additional expenditure on the Respondent Company by way of terminal benefits to such employees.

- l) The Bank refused to revalue the collateral and refused to release the balance of Rs 48,00,00,000/- sanctioned limit and refused to restructure the loan by enhancing the limit. The present valuation of the land along as per the Respondent's approved valuer is Rs 72,60,00,000/- which is on the conservative side. Taking into consideration the Revaluation Reserve alone is Rs 69,47,51,880/- Therefore, the debt Equity ratio is lopsided in favour of the Respondent viz., about 1:1.5.
- m) The action of the Bank to enhance the limit by Rs 20,00,00,000/- was nothing but a sham on part of the Bank, and it was a mere attempt to do window/door dressing of the Books of Accounts to ensure that the account is not classified as NPA for the year ending March 2015.
- n) It is further contended that, if the Bank had been prompt in sanctioning the additional loan in time, the project in question would have completed in time. The Bank has not only refused to sanction to additional funding and also stopped disbursement of the balance sanctioned of money. The Term Loan 1 (TL 1) had sanction limit of Rs 150,00,00,000/-. In the guise of sanctioning Term Loan 2 (TL2) i.e., a sum of Rs 20,00,00,000/-, the limit of TL1 has been restricted from Rs. 150,00,00,000/- to Rs 120,00,00,000/-, continued to show as Rs 150,00,00,000/- and the EMI shall be repaid in 99 monthly instalments commencing from October, 2015.
- o) As against Rs 120,00,00,000/- sanctioned, Rs 102,00,00,000/- had already been disbursed by the Bank and availed by the Respondent. But releasing of unutilized additional amount of Rs

30,00,00,000/- , the Bank has put a condition on the respondent to bring in corresponding equity capital or deposits or should be funded by any other or financial institution.

- p) It is alleged that the Bank vicariously liable for the fraudulent acts of omission and commissions committed by its employees and thus the Respondent has suffered huge loss on account of forced illegal borrowing from Shriram and Piramal. Therefore, the Respondent was constrained to initiate legal action by seeking damages towards abnormal interest levied by Shriram Finance and Piramal, on account of economic duress situation created by the Bank. The estimated damages according to the Respondent is not less than Rs 300,00,00,000/- however the Respondent has restricted this claim in the suit in O.S No. 5553/2017 to about Rs 101.77 Crores (Rupees Hundred and One Crores and Seventy Seven Lakhs). It is stated that Shri K.S Somayyaji (former General Manager of State Bank of India was engaged by the Respondent to evaluate the complaints of the Respondent Company in a neutral manner, and to render his opinion. Accordingly, the said expert rendered his opinion on 29<sup>th</sup> July 2017 by concluding that the Bank has committed serious irregularities, and is liable to pay damages to the Respondent.
- q) It is alleged that the Insolvency and Bankruptcy Code, 2016 appears to render this Tribunal powerless and incompetent to look into serious acts of violation, illegality and fraud, the petitioner as an entity of India is hapless, when an adjudicating authority, which is not empowered to look into serious allegations of fraud, misfeasance and illegality. It is unfortunate, that such an infirmity has been brought in the said Code by design and not by default. The Respondent has filed WP No. 45041-45042/2017

before the Hon'ble High Court of Karnataka by inter-alia seeking a writ of Mandamus to the Reserve Bank of India for cancellation of the banking license of the 2<sup>nd</sup> Respondent.

- r) It is contended that relying on the judgement of Hon'ble High Court in the matter of Mobilox Innovations Private Limited Vs Kirusa Software Private Limited is an attempt made by the Petitioner Bank to mislead and pressurize the Tribunal, and it is contended that IBC is a mere procedural code and the Hon'ble Supreme Court in number of cases has held that procedural law are more hand maids of justice. The Respondent has also relied in the case of Sushil Kumar Sen Vs State of Bihar (1975) 1 SCC 774. And reliance made by Bank on judgement of Innoventive Industries Limited Vs ICICI Bank and another is misconceived and misleading. The code is contrary to the judgement of the Supreme Court rendered in the case of Union of India Vs R. Gandhi (2010) 11 SCC 1.
- s) Therefore they sought to dismiss the Company Petition by declaring to initiate insolvency proceedings as a malicious one in accordance with Section 65 (1) of the Insolvency and Banking Code with a penalty of Rs One Crore on the Bank.

4. Heard Shri Udaya Holla, the Learned Senior Counsel for the Petitioner/ Financial Creditor; Shri B.C.Thiruvengadam, learned Counsel for the Respondent/Corporate Debtor. We have carefully perused all the pleadings made by both the parties along with documents filed in their support. .

5. Shri Udaya Holla, the learned Senior Counsel for the Petitioner/Financial Creditor, while referring various documents filed in support of the Company petition, has further pointed out that term loan agreement dated 2<sup>nd</sup> January 2013 was executed between Axis Bank

Limited (Petitioner/Financial Creditor) and Lotus Shopping Centres Private Limited (Respondent/Corporate Debtor), which contains several terms and conditions for sanction of the loan and disbursement. Some of the terms, which are relevant to the issue are as follows:-

- a) Borrower agrees to borrow the loan from the Axis Bank on the terms and conditions as fully contained in the Agreement.
- b) The Axis Bank shall, unless otherwise agreed between the Borrower and the Bank, disburse the Loan in lump sum or in suitable instalments to be decided by the Bank, or in the name of the Borrower (s) or in the name of the previous financier towards the repayment of the previous loan to be taken over by utilising this Loan.
- c) The Bank shall have an unconditional right to cancel the undrawn/unavailed/unused portion of the Loan at any time during the subsistence of the Loan, without any prior notice to the borrower, for any reason whatsoever. In the event of any such cancellation, all the provisions of this Agreement and all other related documents shall continue to be effective and valid and the Borrower shall repay the outstanding dues under the loan duly and punctually as provided herein.
- d) The Borrower agrees to pay interest on the Loan as per the Schedule to this agreement and the interest rests shall be calculated at the rates more particularly described in the Schedule.
- e) The Borrower shall repay to the Bank the amount in terms of the instalments as mentioned in the Schedule as shall remain due and owing to the Bank.
- f) The Axis Bank may by a written notice to the Borrower, declare all sums outstanding under the Loan (including the principal, interest, charges, expenses) to become due and payable forthwith

irrespective of any agreed maturity forthwith and enforce the security created in favour of the Bank for the Loan upon the occurrence (in the sole decision of the Bank) of any one or more of the following:

- i. The Borrower commits any default in the payment of interest, principal, other charges or any obligation and in the payment of any other amounts to the Bank when due and payable;
  - ii. The Borrower fails to pay to any person other than the Bank any amount when due and payable or any person other than the Bank demands repayment of the loan or dues or liability of the Borrower to such person ahead of its repayment terms as previously agreed between such person and the Borrower;
  - iii. The Borrower defaults in performing any of its obligations under this Agreement or breaches any of the terms or conditions of this Agreement or any other security documents, undertakings etc., executed in favour of the Bank;
  - iv. Any of the information provided by the Borrower to avail the Loan or any of his Representations, Warranties herein being found to be or becoming incorrect or untrue;
- g) In the event of any default as above the Bank shall have the right, to recover the entire dues of the Loan; to suspend any withdrawal to be effected in the Loan account; take possession of the security so created whether by itself or through any of the Recovery Agents or Attorneys as may be appointed by the Bank; take any other action as it may deem fit for recovery of its dues and enforcement of the securities.
- h) The Borrower shall pay any deficiency, forthwith to the Bank. The Bank shall also be entitled to adjust and a right of set-off on all monies





belonging to the Borrower standing to his credit in any account whatsoever with the Bank, towards payment of such deficiency. Nothing contained in this clause shall oblige the Bank to sell, hire or deal with the properties and the Bank shall be entitled to proceed against the Borrower independent of such other security. The Borrower agrees to accept the Bank's accounts in respect of such sale, hire, dealing or otherwise as conclusive proof of the correctness of any sum claimed to be due from the Borrower. In case of any deficit, the deficit amount shall be recovered by the Bank from the Borrower.

i) The borrower also agrees, undertakes and confirms as under:

The Borrower understands that as a precondition relating to the grant of and/or continuing the grant of Credit Facility to the Borrower, the Bank requires the Borrower's consent for the disclosure by the Bank of information and data relating to the Borrower, of the Credit Facility availed by the Borrower, in discharge thereof.

Accordingly, the Borrower hereby agrees and gives consent for the disclosure by Bank of all or any such:

- a) information and data relating to the Borrower;
- b) the information of data relating to its Credit Facility availed of/to be availed by the Borrower and
- c) default, if any, committed by the Borrower, in discharge of the Borrower's such obligation; as the Bank may deem appropriate and necessary, to disclose and furnish to Credit Information Bureau (India) Limited {"CIBIL"} and any other agency authorised in this behalf by Reserve Bank of India.

j) Repayment Schedule: The loan amount of Rs 150.00 Crores shall be repaid in 99 Equated Monthly Instalments (EMIs) commencing from 20<sup>th</sup> Month from the date of first disbursement.

The EMI is proposed to be stepped-up over the tenor of the loan, in line with increase in rental income. The proposed instalments for repayment of term loan are given as under:

(Rs. In Crores)

Instalments	EMI
1 <sup>st</sup> to 36 <sup>th</sup>	2.05
37 <sup>th</sup> to 72 <sup>nd</sup>	3.00
73 <sup>rd</sup> to 99 <sup>th</sup>	3.22

The company shall pay the actual interest applied during the construction period (initial 19 months) from internal accruals/promoter contribution and the same shall be payable at monthly rests.

k) The Axis Bank has conveyed sanction of term loan of Rs 150.00 Crores vide letter reference No. AXISB/BNG/CB-MC/GK/419/2012-13 dated 04/12/2012, towards part-funding construction of "Shopping Mall with Multiplex & Hotel at Kulashekara, Mangalore", which is subject to terms and conditions Annexed to this letter.

l) Term Loan tenor is proposed to be 118 months including moratorium. The disbursement of the term loan is linked to percentage of Letter of Intent (LOI) tied up by the company for leasing the shopping mall, multiplex and hotel. The disbursement schedule base on the signed LOI is given as under:

LOI tied up	Maximum Permissible Loan Disbursement
Less than 10%	15.00%
10% - 20%	35.00%
20% - 30%	55.00%
30% - 40%	65.00%
40% - 50%	75.00%
50% - 60%	80.00%
60% - 75%	90.00%
Above 75%	100%

m) The loan amount of Rs 150.00 crores shall be repaid in 99 Equated Monthly Instalments (EMIs) commencing from 20<sup>th</sup> Month from the date of first disbursement.

The EMI is proposed to be stepped up over the tenor of the loan, in line with increase in rental income. The proposed instalments for repayment of term loan are given as under:

(Rs. In Crores)

Instalments	EMI
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37 <sup>th</sup> to 72 <sup>nd</sup>	3.00
73 <sup>rd</sup> to 99 <sup>th</sup>	3.22

The company shall pay the actual interest applied during the construction period (initial 19 months) from internal accruals/promoter contribution and the same shall be payable at monthly rests.

n) The cost of the project as above shall be financed by way of internal accruals/funding from promoter (including CCD) Rs 151.39 crores and term debt of Rs 150 crores.

Any overrun in the project cost shall be financed by unsecured interest free funds from the promoters of the borrower. Any funds, from the promoter would be subordinate to credit facilities availed of from the Bank.

o) Subsequently, the terms and conditions as mentioned in the original sanctioned letter dated 4<sup>th</sup> December 2012 were modified vide letter Ref. No. AXISB/BNG/CB-MC/465 dated 27<sup>th</sup> December 2012.

m) The Axis Bank again sanctioned additional Term Loan of Rs 20.00 Crores vide letter No. AXISB/BNG/CCG-MC/568 dated 14<sup>th</sup> January 2015, it is termed as Term Loan –II as part funding construction of “Shopping Mall with Multiplex & Hotel at Kulashekara, Mangalore”.

m) The repayment schedule is also modified.

p) Another short term loan dated 25<sup>th</sup> April 2017 for Rs 55,00,00,000/- vide Agreement dated 26<sup>th</sup> April 2017 was sanctioned, vide letter dated 25<sup>th</sup> April 2017 and the tenure of loan is 12 months.

q) The total disbursement of loan till 15<sup>th</sup> July 2017 is Rs 150 Crores. Details of the Axis Facility 1 (Account No. 913060010883069) is

mentioned as below:

Total disbursed amount till 15 <sup>th</sup> July 2017 (in INR)	Total Principal repaid till 15 <sup>th</sup> July 2017	Total interest & default interest charged and not paid as on 15 <sup>th</sup> July 2017	Total debt outstanding as on 15 <sup>th</sup> July 2017 (A+B+C)
(A)	(B)	(C)	
150,00,00,000/-	8,56,44,580/-	6,34,48,078/-	147,78,03,498/-

Details of the Axis Facility 2 (Account No. 917060034308081) is mentioned as below:

Total disbursed amount till 30 <sup>th</sup> June 2017 (in INR)	Total Principal repaid till 30 <sup>th</sup> June 2017	Total interest & default interest charged and not paid as on 30 <sup>th</sup> June 2017	Total debt outstanding as on 30 <sup>th</sup> June 2017 (A+B+C)
(A)	(B)	(C)	
52,81,01,916/-	0.00	94,60,455/-	53,75,62,371/-

#### Axis Facility 1 Default

Sl. No.	Facility	Overdue at 15 <sup>th</sup> July 2017 for Axis Facility 1 (INR)				Initial Date of Default	Days of Default as on 15 <sup>th</sup> July 2017
		Defaulted principal amount	Defaulted scheduled interest payment	Default Interest	Total overdue		
1	Axis Facility 1 (As on 15 <sup>th</sup> April 2017)	46,14,964	1,58,85,036	0	2,05,00,000	15 <sup>th</sup> April 2017	92
2	Axis Facility 1 (As on 15 <sup>th</sup> May 2017)	50,41,648	1,54,58,352	32,575	2,05,32,575		
3	Axis Facility 1 (As on 15 <sup>th</sup> June 2017)	43,53,359	1,61,46,641	68,521	2,05,68,521		
4	Axis Facility 1 (As on 15 <sup>th</sup> July 2017)	47,43,020	1,57,56,980	99,973	2,05,99,973		
Total		1,87,52,991	6,32,47,009	2,01,069	<b>8,22,01,069</b>		

## Axis Facility 2 Default

Sl. No.	Facility	Overdue at 30 <sup>th</sup> June 2017 for Axis Facility 2 (INR)				Initial Date of Default	Days of Default as on 15 <sup>th</sup> July 2017
		Defaulted principal amount	Defaulted scheduled interest payment	Default Interest	Total overdue		
1	Axis Facility 1 (As on 30 <sup>th</sup> April 2017)	NIL	5,78,742/-	0.00	5,78,742/-	30 <sup>th</sup> April 2017	77
2	Axis Facility 1 (As on 31 <sup>st</sup> May 2017)	NIL	44,90,164/-	983/-	44,91,147/-		
3	Axis Facility 1 (As on 30 <sup>th</sup> June 2017)	NIL	43,82,2234/-	8,332/-	43,90,566/-		
Total			94,51,140/-	9,315/-	<b>94,60,455/-</b>		

The Statement of Account of the Corporate Debtor for the period from 26/02/2013 to 16/07/2017 is filed at page Nos. 258 to 263 alongwith the Company Petition. The Closing Balance as per the statement is Rs 147,78,03,498/-

The Banking Certificate under the Bankers Book Evidence Act, 1891 and/or The Information Technology Act, 2000 is also enclosed to the Statement of Account of the Corporate Debtor.

q) The Axis Bank has also addressed a letter to Mr. Ajantha Shetty, Director of the Corporate Debtor vide letter No. AXIS/CO/ CCD/BT/ 2017-18/23490 dated 23<sup>rd</sup> June 2017 by inter-alia stating that, the Bank is governed by RBI guidelines on project funding. Any additional funding (without matching promoters' equity contribution) would have changed debt/Equity ratio. which would have rendered the project as substandard. The project cost overrun funding also attracts RBI

regulations. While banking Project finance, as per its commercial decisions, the sole responsibility of completion of the project, within the framework of mutually agreed terms, lies with the Borrower. It is also intimated that the account was irregular with an amount of Rs 6.66 Crores with effect from 15<sup>th</sup> April 2017, and they were advised to regularize the account immediately as there has been repeated irregularities in the records. It is further informed that no additional credit facility would be extended by the Bank, and additional funding requirement, if any, is to be met from their own sources/alternate funding arrangements.

r) The Bank has also issued another reply dated 17<sup>th</sup> July 2017 to the Director of the Corporate Debtor and Copy to the Company by inter-alia intimating that the Corporate Debtor remains in default of repayment obligations since 15<sup>th</sup> April 2017 under the Facility 1 and 30<sup>th</sup> April 2017 for facility 2. As the total amount of Rs 9,16,61,524/- have become due and payable by them, under the facilities on an immediate basis. They have also denied the allegations made in the Borrower Notice dated 28<sup>th</sup> June, 2017 issued through Advocate Thiru & Thiru by reiterating of all the disbursements decisions in relation to the Facilities in question were made as per the accepted terms of the sanction of the Facilities. It is also intimated that no obligation to fund any cost overrun relating to the Project.

s) The Corporate Debtor has acknowledged the debt by letter dated 26<sup>th</sup> April 2017.

6. The Learned Sr. Counsel for Petitioner has also filed a summary of submissions dated 21.08.2018, by inter-alia contending as follows:

- a. Axis Bank (Applicant) has sanctioned a loan of Rs. 150 Crs. towards the Respondent for part funding of the Respondent's project vide sanction letter dated 04.12.2012. As per accepted sanction terms, no additional was required to be provided and

further that any cost over-run would be funded by the Promoters of the Respondent. Subsequently, certain terms and conditions of sanction were modified for release of loan which was accepted by the Respondent vide modified sanction terms through letter dated 27.12.2012;

- b. Vide sanction letter dated 14.01.2015, certain terms and conditions of the original term loan agreement were revised for the benefit of the Respondent including last date of draw down and revision of the repayment schedule;
- c. The defaults committed by Respondent in repayment of Axis Bank Loan-I as on 15.07.2017 was to the tune of Rs. 8,22,01,069/- and there was no payment made after 15.04.2017. In so far as the Axis Bank Loan-II is concerned, the default as on 30.06.2017 was to the tune of Rs. 94,60,455/- and no repayment was made after 30.04.2017.
- d. It is contended that there is a clear default committed by the Corporate Debtor/Respondent, as stipulated under the Code, and default continues to be in existence as on date. They have relied upon the judgement of Hon'ble Supreme Court in the case of Innoventive Industries Vs. ICICI Bank & Anr. (AIR 2017 SC 4084). Wherein it is inter-alia held that once the default in question has been proved by the Petitioner, the Tribunal is bound to admit an application u/s 7 of the Code, and it is not open to the Tribunal to conduct a trial into the matter, in order to determine the reasons of such default.
- e. It is also contended that the Respondent by its undertaking dated 26.04.2017, has confirmed and acknowledged its indebtedness to the Respondent for a sum of Rs. 143,02,40,456/-. Therefore, the disputes now raised are just a moonshine with a sole intention to delay the present proceedings. It is stated that the Respondent has already instituted a Civil Suit being OS 5553/2017 in the City Civil Court, Bangalore and the City Civil Court will conduct a full trial into all the alleged factual disputes that have been agitated by the Respondent. Therefore, the issue before the City Civil Court is in no manner affected by the moratorium to be imposed u/s 14 of the Code, which operates only against the





suits filed against the Corporate Debtor, and thus the Respondent is not prejudiced in any manner.

- f. The Respondent has filed IA No.239/2018 with an intention to delay the proceedings. Moreover, Section 2 of the Code is not applicable to an application filed u/s 7 of the Code.
- g. It is also contended that the Respondent has attempted to confuse the issue by placing reliance on the decisions, which define insolvency under the erstwhile Companies Act, 1956, and relied upon the decisions of the Hon'ble Supreme Court in Pradeshiya Industrial and Investment Corporation of UP Vs. North India Petrochemicals Limited reported in 1994 SCC (3) 348, Calcutta High Court in Om Prakash Mohta Vs. Steel Equipment and Construction Company Limited reported in (1968) 38 Comp Cas 82 and the decision of Karnataka High Court in Airwings Private Limited Vs. Viktoria Air Cargo GmbH reported in ILR 1994 Kar 2560 for the definition the term 'insolvency'. These provisions are not applicable to the present case as the issue to be considered is under the provisions of IBC and not under the provisions of Companies Act, 1956.
- h. The main test of insolvency under the Code is 'default' i.e. non-payment of debt. Therefore, whether the Corporate Debtor has sufficient assets or it has ability to pay debts cannot be considered under the provisions of the Code. The entire purport of the Code is to save the Corporate Debtor from insolvency and subsequent liquidation.
- i. The contention of the Respondent that the application/petition deserves to be dismissed u/s 65 of the Code as the Bank has alleged to have indulged in fraudulent and malicious practices is without any basis. As per the provisions of u/s 65 of the Code, one of the ingredients is that the Respondent needs to establish that the Applicant/Financial Creditor has initiated the insolvency application fraudulently or with malicious intention for any purpose other than for the resolution of insolvency. Therefore, it is clear that the intention of the legislation is that fraud or malicious prosecution have to be for a reason other than for resolution of insolvency and the interpretation is further fortified by absence of a comma after malicious intent the words following till or liquidation in the said section of the



Code. They relied upon the following judgements in support of their claim as laid down in the cases of West Bengal State Electricity Vs. Dilip Kumar Ray reported in (2007) 14 SCC 568 (relevant paragraph 15), Ravindra Singh Vs. Sukhbir Singh reported in (2013) 9 SCC 245 (relevant paragraph 21-24), Ms. Kirthana Vs. Mrs. Vinaya Krishnan reported in 2017 SCC Online Mad 10224 (relevant paragraph 21, 24 and 28), Upinder Singh Lamba Vs. Ramindner Singh reported in 2012 SCC Online P&H 1735 (relevant paragraph 9-12 and 17), Gulabchand Vs. NTC Bombay reported in 2007(3) Mh. L.J. (relevant paragraph 10), Major Gian Singh Vs. Shri S.P. Batrar reported in AIR 1973 P&H 400 (relevant paragraph 13 and 15) and Amar Singh Vs. Smt. Bhagwati reported in 2000 SCC Online Raj 61 (relevant paragraph 28), in support of its case. The Respondent has failed to establish that the Bank has filed the present proceedings for reasons for malice and malicious prosecution;

- j. It is denied that there is any delay in sanctioning of loan. As stated supra, that the test for admission u/s 7 of IBC is whether there is any non-payment of debt due. Having availed the loan, the Corporate Debtor cannot refuse to pay the instalments having accepted the original sanction term and modified sanction terms.
- k. There is no delay in disbursement of loan in question. It is stated that there is no restriction under law preventing a Bank from granting loan to a Creditor even if another loan account is in default. Further, there is no prohibition under law that once default occurs, a Bank cannot fund such account further. Moreover, the RBI Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances – projects under Implementation dated 14.08.2014 clearly provides that Banks may fund additional interest during construction, which may arise on account of delay in completion of project. This has also been incorporated in Paragraph 13.3 of RBI Master Circular; Banks discretion as set out in the Master Circular on Income Recognition, Asset Classification and provisioning pertaining to Advances dated 01.07.2015

*“17.1.14 Any restructuring done without looking into cash flows of the borrower and assessing the viability of the projects/activity financed by banks would be treated as an attempt at ever greening a weak credit facility and would invite supervisory concerns/action. Banks should accelerate the recovery measures in respect of such accounts. The viability should be determined by the banks based on the acceptable viability benchmarks determined by them, which may be applied on a case-by-case basis, depending on merits of each case.”*

- l. Moreover, the allegation that an account that interest cannot be charged on an account that is classified as an NPA is absolutely baseless and contrary to RBI's Master Circular. It is stated that RBI's Master Circular in paragraph 3.4 provides that *“On an account turning NPA, banks should reverse the interest already charged and not collect by debiting Profit and Loss account, and stop further application of interest. However, Banks may continue to record such accrued interest in a Memorandum account in their books. For the purpose of computing Gross Advances, interest recorded in the Memorandum account should not be taken into account.”*
- m. With regard to the allegation that the term loan agreement has been stamped on 26.04.2017 while the agreement is dated 18.04.2017 is false and misleading. It is clear that the date of agreement is 26.04.2017 and that 18.04.2017 is the date of Board resolution. However, there has been inadvertent error with regard to the link agreement wherein it was inadvertently mentioned that 08.02.2015 instead of 08.02.2016;
- n. It is denied that Civil Court has ordered for security to be furnished by the Bank. Mere filing of a Civil Suit for damages against the Bank will not be a 'debt due' against the Bank since a claim for damages only becomes a 'debt due' only when the Court awards damages. This has been held by the High Court of Karnataka in the case of Greenhills Exports (P) Ltd and Ors. Vs. Coffee Board reported in ILR 2001 KAR 2950;
- o. The Respondents have filed Writ Petition No. 37729 of 2017 before the Hon'ble High Court of Karnataka. Though the High Court initially passed an interim order not to pass any adverse order against the respondent by this Tribunal, it was vacated



vide order dated 08.11.2017. Though the Writ Petition is pending, the Adjudicating Authority is empowered to decide the question of admission. They have relied upon the judgement as laid down by Hon'ble Supreme Court in KS Venkataraman & Co. (P) Limited Vs. State of Madras reported in AIR 1966 SC 1089 at Paragraph 23 as held "*But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof where under it functions. It must act under Act and not outside it.*"

- p. Hon'ble Supreme Court has upheld the Constitutional validity of NCLT and NCLAT in the case of Madras Bar Association Vs. Union of India (2015) 8 SCC 583), and has further validated the vesting of the jurisdiction of the Civil Courts with the NCLT.

7. Shri B.C.Thiruvengadam, after making elaborate arguments, has also filed written submission dated 21.08.2018 giving his gist of arguments, which are briefly stated as under:

- a. It is stated that objections dated 23.11.2017 filed by the Bank to IA filed u/s 65 of the Code is vague and without any specific denial. It is settled position of law that when specific averments are not specifically denied, it amounts to admission and in its support, he relied upon decision given in Badat and Co. Vs. East India Trading Co. AIR 1964 SC 538, at page 546 para 11 (Sl. No. 1 Compilation of Citations Volume 2);
- b. It is contended that the term insolvency has not been defined in the Code. The Code is applicable only at the instance of insolvency and in relation to the insolvency that has already occurred; not for an impending or looming insolvency, which may or may not occur. Section 7 of the Code cannot be pressed into service unless and until a Corporate Debtor is commercially insolvent. They have proven that they are commercially solvent at the time of filing this Company Petition. In support of this contention, he has filed details of Balance Sheet, Certificate issued by Chartered Accountant and details of employment and contracts, along with IA 239/2018;
- c. Proceedings u/s 7 of IBC before this Tribunal are summary in nature. This Tribunal is not a Court of record and cannot record evidence u/s 42 of the Evidence Act. Therefore, the



question of pressing into service Section 4 of the Bankers Book Evidence Act is erroneous. The Accounts relied upon by the Applicant Bank does not create any prima facie evidence in the proceedings in the instant case. They relied upon decision of Honble Delhi High Court passed in JK Aggarwal Vs. Bank of India ILR (2009) II Delhi 751 (Sl. 7 Compilation Vol.2) and Chandhradhar Goswami & Ors. Vs. Gauhati Bank Ltd. 1967 SC 221 (Sl.No.8 Compilation Vol.2).

- d. It is contended that Hon'ble Apex Court do not have the benefit of analyzing the constitutional validity of the Code and the observations are more in the nature of an obiter.
- e. They have denied the contentions of the Bank that loan, default and interest are admitted as these are grossly unfounded for the reason that the statement of accounts from pages 254-272 are untrue and incorrect. The loan was suspended after funding Rs. 101 Crores after the sanction limit of Rs. 150 Crores.
- f. The loan of Rs. 5.17 Crores to set off the interest amount to nothing but falsification of accounts to show the account is regular even though it had become NPA. The additional loan in order to set off the interest in nothing but ever greening. It is not only fraud but also a violation of RBI guidelines 3.11, page 456 of Volume II. Therefore, they contended that disputed debt stems out of fraud and manipulation;
- g. It is also stated that Hon'ble High Court of Karnataka in the case of Lotus Shopping Malls Pvt. Ltd. Vs. Axis Bank, vide order dated 08.11.2017 in WP No. 37729/2017, held that IBC proceedings u/s 7 of the IBC Code are adversarial in nature. Lotus can urge all its defences and NCLT should give ample time to the parties to argue on issues of malice. The report given by former General Manager, SBI, indicts the Applicant Bank and its officials of malafide and illegal conduct contravening various regulations of RB. It is contended that the Account of Corporate Debtor had become NPA, the Bank chose not to classify it as one, in order to hoodwink RBI and with an intent to book more income as interest;

- h. It is alleged that the present application has been filed with an ulterior motive and malicious intent to pre-empt the threat for damages;
- i. It is alleged that the acknowledgement of debt was obtained under duress and a suit bearing O.S No. 8046/2017 was also filed by seeking for declaration of documents as illegal and void;
- j. Obtaining signature on blank papers and back date, is illegal and opposed to the law. They relied upon the judgement of the Hon'ble High Court of Karnataka in Canara Bank Vs. Vara Trading Company AIR 2006 Kar 88 (Sl. No. 17 Spiral Compilation Vol. 1);
- k. It is alleged that the Applicant Bank is guilty of manipulation of records and made false submissions and approached this Tribunal with unclean hands. They have relied upon the judgement rendered in the case of Dalip Singh Vs. State of Uttar Pradesh & Others, (2010) 2 SCC 114;
- l. The Respondents have relied upon the following judgements to establish malice and fraud on the part of Applicant Bank:
  - i) State of Haryana Vs. Bhajan Lal, 1992 Supp (1) SCC 335 Page 379, Paragraph 102(7);
  - ii) BP Singh & Anr. Vs. State of Bihar & Anr., Patna High Court Criminal Miscellaneous No. 44855 of 2011, High Court of Patna dated 22.09.2014, Page 8, Para 2;
  - iii) Jyoti Lonkar Vs. Maharashtra State Board of Secondary and Higher Secondary Education and Anr., AIR 1988 Bom 176, 1987 SCC Online Bom 166;
  - iv) Kumaon Mandal Vikas Nigam Ltd. Vs. Girija Shankar Pant, (2001) 1 SCC 182.
- m. It is alleged that the Applicant Bank, by way of fraud, has taken away Crores of rupees as interest by way of manipulation, thus causing immense injury to the Respondent.
- n. It is also contended that there is no need to react to a notice that has not been sent through the due process of law.



8. The case is listed before this Tribunal on various dates viz., 01/08/2017, 07/08/2017, 16/08/2017, 28/08/2017, 25/09/2017, 09/10/2017, 16/10/2017, 03/11/2017, 08/11/2017, 15/11/2017, 23/11/2017, 27/11/2017, 29/11/2017, 12/12/2017, 13/12/2017, 12/01/2018, 18/01/2018, 02/02/2018, 12/02/2018, 07/03/2018, 19/03/2018, 10/04/2018, 25/04/2018, 14/06/2018, 04/07/2018, 19/07/2018, 20/07/2018, 01/08/2018, 02/08/2018, 07/08/2018, 08/08/2018, 13/08/2018, 14/08/2018 & 21/08/2018. The case is adjourned on those due to various reasons including filing of several I.As and also filing Writ Petition before the Hon'ble High Court of Karnataka.

9. The Respondent has filed Writ Petition No. 37729/2017 before the Hon'ble High Court of Karnataka by inter-alia challenging the proceedings of IBC, 2016. The Hon'ble High Court of Karnataka, while ordering notice to the Respondent, has passed an interim-order dated 23/08/2017, by directing the Tribunal that "Pending consideration of the petition no adverse orders shall be passed against the Petitioner in the present Company Petition. Subsequently, the interim order dated 23/08/2018, was vacated by order dated 08/11/2017. Accordingly the case was taken up for hearing.

10. I.A No. 159/2017 was filed by Lotus Three Developments Limited and Kakosi Limited by inter-alia seeking to implead them as Respondent Nos. 2 & 3 to the main Company Petition. The Tribunal vide its order dated 25<sup>th</sup> April, allowed I.A No. 159/2017 by directing the Petitioner to implead them as Respondent Nos. 2 and 3 and to file an amended Company Petition. And this Order was questioned before the Hon'ble NCLAT by filing Company Appeal (AT) (Insolvency) No.246/2018. The Hon'ble NCLAT has allowed the Company Appeal (AT) (Insolvency)

No.246/2018 by an order dated 31/07/2018, by setting aside the order of this Tribunal with a direction to the Tribunal to decide the case, in terms of the observations made by the Hon'ble Supreme Court in M/s Innoventive Industries Ltd., (Supra)" preferable within a period of two weeks by hearing only the Corporate Debtor.

11. As stated supra, the instant Company Petition bearing C.P (IB) No. 66/BB/2017 is filed under u/s 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of I & B (Application to Adjudicating Authority) Rules, 2016, by **Axis Bank Limited** by inter-alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of **Lotus Shopping Centres Private Limited** (Corporate Debtor), under the provisions of IBC, 2016. As detailed supra, the basic factors with regard to disbursement of loans in question; debt and default, are not in dispute except with regard to delay in disbursement of loan in question, further funding etc. Therefore, the Adjudicating Authority has to examine, whether the instant Company Petition is filed in accordance with the provisions of 7 of the Insolvency and Bankruptcy Code, 2016 or not. In order to minimise the issue in question, we may advert to the order dated 15<sup>th</sup> May 2017 of Hon'ble NCLAT passed in Company Appeal (AT) (Insolvency) No.1 & 2/2017 wherein the Hon'ble NCLAT, New Delhi has dealt the issue of admission of a case filed under Section 7 of the Code , under Paras 55 to 58, which are extracted below:

"55) Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I & B Code. As per sub-section (1) of Section 7 of the I & B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including:





- i. "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;
- ii. the name of the resolution professional proposed to act as an interim resolution professional; and
- iii. any other information as may be specified by the Board.

56. The procedure once an application is filed by the financial creditor with the Adjudicating Authority is specified in sub-section (4) of Section 7 to sub-section (7) of Section 7 of the Code. As sub-section (4) of Section 7 of the I & B Code:

"(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), **ascertain** the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3)".

57) Sub-section (5) of Section 7 of the I & B Code provides for admission or rejection of application of a financial creditor. Where the Adjudicating Authority is satisfied that.....the documents are complete or incomplete.

58) The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'."

12. The Hon'ble Supreme Court has also upheld the above judgement in Civil Appeal Nos. 8337-8338 of 2017 vide judgement dated 31<sup>st</sup> August, 2017 The Hon'ble Supreme Court has adverted to the Section 7, at para 28 , which reads as under:

“28. When it comes to financial Creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1) , a default is in respect of a financial debt owed to any financial creditor of the Corporate Debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the Corporate Debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7 (5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

13. In the light of provisions of Section 7 of Code, and law as declared by the Honble NCLAT and Hon”ble Supreme Court as extracted above, the Adjudicating Authority/ Tribunal has to examine the instant case with regard to default, Application/petition is complete/incomplete, such

default is supported by evidence; and has named Interim Resolution Professional. As explained above, the instant Company Petition is filed by Axis Bank (Financial Creditor) strictly in accordance with provisions of Section 7 of Code by interalia producing record of default as per the Bank Statement; suggested Mr. Sundaresh Bhat, as Interim Resolution Professional, who has filed Written Communication, under Rule 9 of I & B(AAA) Rules, 2016 by interalia declaring that he is a qualified Insolvency Resolution Professional Registered with IBBI/IPA-001/IP-P00077-18/10162 and he is not undergoing any disciplinary proceedings, expressing willingness to act as such etc. As stated above, the total amount of debt including the defaulted amounts reported under this application under Axis Facility 1 is Rs 147,78,03,498/- (One Hundred Forty Seven Crores Seventy Eight Lakhs Three Thousand and Four Hundred Ninety Eight Rupees) And under Axis Facility 2, total amount of debt is Rs 53,75,62,371/- and the total outstanding amount is Rs. 201,53,65,869/- (Two hundred one Crore Fifty Three Lakh Sixty Five Thousand Eight Hundred Sixty Nine Rupees).

14. So far as the contention of the Shri B.C.Thiruvengadam, learned Counsel for Respondent that I.A No. 164/2017 filed under Section 65 of Code, has to be decided first before deciding the main company petition is concerned, it is to be stated here that the Adjudicating Authority, has, in the first instance, has to see whether the main Company petition is filed in accordance with law satisfying the Tribunal for admission or not. If the Adjudicating Authority come to a conclusion that a case under examination is fit case to admit, then question of malicious, fraudulent initiation will not arise to examine an application filed under section 65 of the IBC, 2016.

15. The Hon'ble High Court of Karnataka has also directed the Tribunal to give required opportunity to the Respondent to substantiate its claim before deciding the issue. In order to give full opportunity to the Respondent, and to see whether any scope is there to avoid to initiate

CIRP, the Tribunal by order dated 8<sup>th</sup> August 2018 directed the Corporate Debtor whether it was willing to pay the defaulted amount with interest which is under Axis Facility 1, as on initial date of default i.e., 15<sup>th</sup> April 2017 is Rs 8,22,01,069/- and under Axis Facility 2 as on 30<sup>th</sup> June 2017 is Rs 94,60,455/-. In pursuant to the above directions of the Tribunal, the Respondent has filed I.A No. 239/2018 to prove that Corporate Debtor is commercially solvent by inter alia stating that the Corporate Debtor has on its roll 9 employees incurring a monthly expenditure of Rs 5,64,440/- per month, and the project was completed and based on carpet area would result in more employment approximately to 1400 peoples. It is also stated that, as per unaudited Balance Sheet as at 31/03/2018 there are surplus assets over liabilities to the extent of about Rs 129 Crores and Reserves and Surplus is Rs 126 Crores and thus the Company is commercially solvent. However, the Corporate Debtor has not come forward to pay at least defaulted payment as stated supra. Therefore, the Tribunal is left with no other alternative except to initiate Corporate Insolvency Resolution Process in respect of Corporate Debtor. For the reasons stated supra, the Adjudicating Authority is satisfied that the instant Company Petition is filed by complying with the provisions of Section 7 of IBC, 2016 and also suggested Mr. Sundaresh Bhat, BDO Restructuring Advisory LLP, Level 9, the Ruby, NW Wing, Senapati Bapat Marg, Dadar (West) Mumbai-400028. Registration No. **IBBI/IPA-001/IP-P00077/2017-2018/10162** as IRP, who is competent to be appointed to as such and he is not undergoing any disciplinary proceedings. Therefore, we are of the considered opinion that the instant Company petition deserves to be admitted in consonance with ratio as laid down by the Honble NCLAT and the Hon"ble Supreme Court as mentioned supra.

16. Since the Tribunal has admitted the main Company Petition, I.A No. 164/2017 filed under section 65 of Code is not maintainable, and even prima facie case is not made out to entertain it. In support of this application, the learned Counsel for the respondent was mainly relying on damage suit and Writ petition filed against Financial Creditor. As explained above, the suit in question is with regard to damages alleged to have suffered by delay in disbursement of sanctioned loans by Bank.

Moreover, it is settled position of law as of now that the Adjudicating Authority is Competent to decide an application/petition filed under Section 7 of the Code. Therefore, I.A No. 164 of 2017 is liable to be rejected.

17. When the case was reserved for orders on 14/08/2018, the learned Counsel for Respondent has filed a Memo dated 29/08/2018 by enclosing a copy of the order dated 20/08/2018 of Hon'ble High Court of Karnataka, passed in I.A No.01/2018 in W.P No. 37729/2017, which reads as under:

"I.A No.1/2018 though filed seeking clarification of the order dated 08/11/2017 in the circumstances as stated therein, learned Counsel for the Petitioner would submit that subsequent thereto the NCLT has provided them an opportunity of being heard and as such, the prayer in I.A No. 1/2018 is not pressed. Accordingly, I.A No.1/2018 is disposed of.

List this matter before the roster Court in usual course".

When the case is pending, the Respondent have filed the said I.A No.1/2018, was filed under section 151of CPC, 1908 by inter-alia seeking for clarification of the order dated 08/11/2017 passed by the Hon'ble High Court of Karnataka in W.P, would prevail over observations made by Hon'ble NCLAT vide order dated 31/07/2018.

18. In view of the above facts and circumstances of case, and by exercising powers conferred on this Adjudicating Authority, U/s 7(5)(a) and other extant provisions of IBC, 2016, the following orders are passed:-



- 1) The Company Petition bearing C.P (IB) No. 66/BB/2018 is hereby admitted by initiating CIRP in respect of Corporate Debtor;
- 2) Mr. Sundaresh Bhat, BDO Restructuring Advisory LLP, Level 9, the Ruby, NW Wing, Senapati Bapat Marg, Dadar (West) Mumbai-400028. Registration No. **IBBI/IPA-001/IP-P00077/2017-2018/10162** is hereby appointed as Interim Resolution Professional, in respect of the Corporate Debtor to carry on the functions as mentioned under the Insolvency & Bankruptcy Code.2016 ;
- 3) The following moratorium is declared prohibiting 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;
  - (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;
  - (e) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;
  - (f) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator as also not applicable to surety.
  - (g) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;



- (h) The IRP should follow all extant provisions of IBC, 2016 and the rules including fees rules as framed by IBBI. The IRP is hereby directed to file his report in the Tribunal from time to time.
- 4) The Board of Directors and all the staff of Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.
  - 5) IRP is further directed to strictly adhere time schedule as mentioned under the Code. And he is directed to file progress reports from time to time to the Tribunal.
  - 6) I.A No. 164 of 2017 is hereby rejected as not maintainable and also lacks merits. I.A No. 239 of 2018 is disposed of.

  
**(ASHOK KUMAR MISHRA)**  
**MEMBER, TECHNICAL**

  
**(RAJESWARA RAO VITTANALA)**  
**MEMBER, JUDICIAL**

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