

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

C.P. No.125 of 2014  
(T.P. No.01 of 2019)  
U/Ss 433 (e) & (f), 434 and 439  
of Companies Act, 1956 &  
U/s 7 of IBC, 2016  
R/w Rule 4 of I&B (AAA) Rules, 2016

**In the matter of:**

M/s. The Bank of Nova Scotia  
Head Office: Ground Floor,  
Mittal Tower, 'B' Wing, Nariman Point,  
Mumbai – 400 021.

**Branch Office Address:**

No.1110, 11<sup>th</sup> Floor, Raheja Towers,  
East Wing, 26-27, MG Road,  
Bangalore – 560 001.

- Petitioner/Financial Creditor

**Versus**

M/s. Opto Infrastructure Limited  
No.S-11, Second Floor,  
Gem Plaza, Infantry Road,  
Bangalore – 560 001.

- Respondent/Corporate Debtor

**Date of Order: 25<sup>th</sup> July, 2019**

**Coram:** Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

**Parties/Counsels Present:**

For the Petitioner : Shri Arun Kumar with Shri Shubhang Setlur

For the Respondent : None

**ORDER**

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

1. C.P. No.125 of 2014 (T.P. No.01 of 2019) is initially filed by M/s. The Bank of Nova Scotia (hereinafter referred to as 'Petitioner') before the Hon'ble High Court of Karnataka, under Sections 433 (e) and (f), 434



- and 439 of the Companies Act, 1956, by inter alia seeking to wound-up M/s.Opto Infrastructure Limited (hereinafter referred to as 'Respondent') for the grounds mentioned in the Company Petition.
2. Subsequent to the filing of the above C.P., the Petitioner has filed an Application, vide C.A. No.48 of 2019 by praying the Hon'ble High Court of Karnataka to transfer the Company Petition No.125 of 2014 to this Tribunal, by virtue of proviso inserted under Section 434(1)(c) of the Companies Act, 2013 on August 17, 2018 with retrospective effect from June 06, 2018. Accordingly, the Hon'ble High Court of Karnataka, vide order dated 18.06.2019 disposed of the C.A. No.48 of 2019 by transferring C.P. No.125 of 2014 to this NCLT to proceed in accordance with law, with directions to Respondent to appear before NCLT on 10.07.2019 without expecting any notice and the NCLT was directed to proceed in accordance with law. Accordingly, the case is listed before the Adjudicating Authority on 10.07.2019, 23.07.2019 and 25.07.2019. After transfer, the Petitioner has complied with extant provisions of Code and filed Form I, U/s 7 of Code R/w Rule 4 (1) of I &B (AAA) Rules, 2016, by inter alia seeking to initiate CIRP in respect of M/s. Opto Infrastructure Limited, the Corporate Debtor, on the ground that it has committed default for a total amount of Rs.213,67,42,263.02/- (Rupees Two Hundred and Thirteen Crores Sixty Seven Lakhs Forty Two Thousand and Two Hundred and Sixty Three Only) as on 31.07.2018.
3. Brief facts of the case, as mentioned in the Company Petition, are as follows:
- (1) M/s. The Bank of Nova Scotia (hereinafter referred to as 'Petitioner/Financial Creditor') is an International Bank incorporated with limited liability in Canada. The present Petition is being filed through its Manager, Mr.P.Srinivas Rao, who is fully empowered and authorised to sign, verify and



institute the present proceedings for and on behalf of the Petitioner.

(2) M/s. Opto Infrastructure Ltd. (hereinafter referred to as 'Respondent/Corporate Debtor') was incorporated on 28.09.2007 under the name and style of 'Opto Infrastructure Limited' with the Registrar of Companies, Karnataka under the Companies Act, 1956 with CIN: U70102KA2007PLC044004 and having its registered office at S-11, Gem Plaza, Infantry Road, Bangalore-560001. The Authorised Share Capital of the Company is Rs.100,00,00,000/- (Rupees One Hundred Crores Only) divided into 10,00,00,000 (Ten Crore) Equity Shares of Rs.10/- (Rupees Ten Only) each and Paid-up Share Capital of the Company is Rs.20,67,44,940/- (Rupees Twenty Crores Sixty Seven Lakhs Forty Four Thousand Nine Hundred and Forty Only). The main objects of the Respondent Company in brief are to carry on the business of developers, builders, maintainers, up keepers, designer, service contractors, consultants and to undertake turnkey projects in all kinds of infrastructural development projects, buildings, group housing projects, construction of roads, bridges, canals, apartments, industrial complexes, etc.

(3) It is stated that the Petitioner Company is an International Bank incorporated with limited liability in Canada and having its Executive Office at 44, Kings Street West, Toronto, Ontario, Canada and one of its branches inter alia located at SN Towers, 25/2, MG Road, Bangalore-560001 and carrying on the business of Banking in India under a license issued to it by the Reserve Bank of India (RBI) under Section 22 of the Banking Regulation Act, 1949. It is also stated that the RBI has notified the Petitioner as a 'scheduled bank' under the RBI

Act, 1934 and also been granted a license to conduct business at Bangalore.

- (4) It is stated that the Opto Circuits had approached the Petitioner for availing Credit Facilities. It is stated that after discussions between the parties a Facility Letter dated 28.11.2012 proposing to make certain Credit Facilities available to Opto Circuits, was forwarded by the Petitioner and the same was duly signed and accepted by the Respondent and Opto Circuits and returned to the Petitioner on 10.12.2012.
- (5) It is stated that as per the terms of the Facility Letter the Petitioner was to provide Opto Circuits with certain Credit Facilities subject to the agreed terms and conditions. The Credit Facilities offered comprised inter alia of the following:

Sl. No.	Type	Amount and Purpose
1.	Overdraft	Up to a maximum of INR 1,000,000,000 (Rupees One Billion Only). For working capital requirements.
1A.	Short Term Working Capital (Maximum Tenor up to 180 days)	Up to a maximum of INR 1,000,000,000 (Indian Rupees One Billion Only). For working capital requirements.
1B.	Bills Discounting (Local) (Maximum Tenor up to 180 days)	Up to a maximum of INR 1,000,000,000 (Indian Rupees One Billion Only). For working capital requirements.
1C.	Bank Guarantees for availment of Buyers Credit (Maximum Tenor up to 180 days)	Up to a maximum of INR 1,000,000,000 (Indian Rupees One Billion Only) or its equivalent in other major currencies acceptable to the bank. For working capital requirements.
1D.	Export Packing Credit (Maximum Tenor up to 180 days)	Up to a maximum of INR 1,000,000,000 (Indian Rupees One Billion Only) or its equivalent in other major currencies acceptable to the Bank. To finance exports.
1E.	Export Bills Discounting (Maximum Tenor up to 180 days)	Up to a maximum of INR 1,000,000,000 (Indian Rupees One Billion Only) or its equivalent in other major currencies acceptable to the Bank. To finance export receivables.
1F.	Letters of Credit (Maximum usance 180 days; Maximum Tenor not exceeding 270 days)	Up to a maximum of INR 250,000,000 (Indian Rupees Two Hundred and Fifty Million Only) or its equivalent in other



		major currencies acceptable to the bank. To establish L/Cs for the purchase/import of raw materials, machinery and equipment.
1G.	Bank Guarantees (Maximum Tenor 30 months, including claim period)	Up to a maximum of INR 100,000,000 (Indian Rupees One Hundred Million Only) For issuance of performance/customs/central excise/sales tax guarantees.

- (6) It is stated that the aggregate amount under all the above facilities was not to exceed Rs.1,000,000,000/- (Rupees One Billion Only) at any point of time. It is stated that pursuant to the execution of the Facility Letter the Petitioner had from time to time provided Credit Facilities as requested by Opto Circuits up to the maximum amount of Rs.1,000,000,000/- (Rupees One Billion Only).
- (7) It is stated that the Respondent had guaranteed the Credit Facilities provided by the Petitioner to Opto Circuits by executing a Deed of Corporate Guarantee ('Guarantee') dated 12.12.2012 in favour of the Petitioner. It is further stated that the Respondent offered the Petitioner its landed property situated in Hassan, which was allotted to the Respondent by the Karnataka Industrial Areas Development Board ('KIADB') on a lease cum sale basis, as security by depositing the lease deeds with the Petitioner as evidenced by the execution of a Memorandum of Entry recording deposit of title deeds dated 12.12.2012.
- (8) It is stated that Opto Circuits executed a document dated 14.05.2013 acknowledging the debt and security with reference to the Credit Facilities provided by the Petitioner and secured by corporate guarantee documents executed by the Respondent in favour of the Petitioner. Opto Circuits had admitted the correctness and confirmed and acknowledged that a sum of Rs.6,077,365.63/- (Rupees Six Million Seventy Seven Thousand Three Hundred Sixty Five and Sixty Three

Paise Only) in the form of overdraft and USD 18,150,000 (US Dollar Eighteen Million One Hundred and Fifty Thousand Only) in the form of Packing Credit Facility, was due and outstanding as on 31.03.2013. It is further stated that Opto Circuits had acknowledged that subsequent charges, interest and expenses were also due and payable to the Petitioner. It is further stated that Opto Circuits assured the Petitioner that the securities offered were in good condition and that the relative documents, agreements, securities and obligations were to remain in full force until repayment of the liabilities were made in full.

- (9) It is further stated that the outstandings had exceeded the sanctioned credit limits by Rs.35,878,252/- (Rupees Thirty Five Million Eight Hundred Seventy Eight Thousand Two Hundred Fifty Two Only) as on 31.05.2013 and the Petitioner had called upon Opto Circuits, vide its letter dated 03.06.2013, to immediately fund the account and to operate the accounts within the sanctioned limits. It is also stated that vide letter dated 13.06.2013 Opto Circuits had requested the Petitioner for additional time for repayment of dues that were outstanding. It is stated that Opto Circuits also sought for extension of time for a further period of 90 days to submit pari passu letters from other secured lenders.
- (10) It is stated that the Petitioner in good faith agreed to the same and executed an addendum to the Facility Letter dated 12.06.2013, subject to certain terms and conditions, foremost among them was the prompt payment of interest by Opto Circuits. It is further stated that the addendum also clearly stated that failure to comply with the terms and conditions contained in the addendum by Opto Circuits would result in the immediate termination of the Credit Facilities, upon which

the entire outstanding amount would become immediately due and payable to the Petitioner by Opto Circuits or by the Respondent. It is stated that the aforesaid addendum was accepted by the Respondent and Opto Circuits.

- (11) It is stated that despite the extension of time granted by the Petitioner, Opto Circuits failed to meet the repayment commitments and due to the continued default in meeting their payment obligations (comprising both the principal amount and the interest accumulated thereon) and their failure to comply with the conditions mentioned in the Facility Letter and the addendum to the Facility Letter, the Petitioner issued a letter dated 12.09.2013 (hereinafter referred to as the 'Recall Letter') to Opto Circuits and to the Respondent recalling all the Credit Facilities and calling upon Opto Circuits and the Respondent to discharge their liabilities and pay the outstanding amounts due to the Petitioner.
- (12) It is stated that in response to the letter dated 12.09.2013, Opto Circuits vide letter dated 07.10.2013 acknowledged that Rs.120.41 Crores was due and payable to the Petitioner; however they expressed difficulties in meeting its repayment commitments on account of alleged rupee depreciation and their inability to raise additional working capital facilities from other banks. The Respondent mentioned that they were working on various plans and options to bring in additional funds and regularize the Credit Facilities with the Petitioner. Opto Circuits requested for an additional period of 180 days to meet their obligations or in the alternative, requested the outstanding amounts be treated as a Term Loan with a 1 year moratorium and a 3 year repayment schedule while extending the same assets and corporate guarantee as securities for the same. Opto Circuits further reassured the Petitioner that they



were exploring other avenues and working on several options to repay the outstanding amounts at the earliest.

- (13) It is stated that based on the assurances given by Opto Circuits and having given due consideration to the business challenges faced by Opto Circuits the Petitioner in good faith forwarded a second Addendum to the Facility Letter dated 25.10.2013 (hereinafter referred to as 'Addendum 2') wherein subject to certain additional conditions to be fulfilled by the Opto Circuits, time for repayment of the outstanding principal and interest was extended up to 22.01.2014. The Petitioner once again reiterated that failure on the part of the Opto Circuits to comply with the terms and conditions of the Addendum 2 would result in the entire outstanding becoming immediately due and payable by Opto Circuits.
- (14) It is further stated that despite the Petitioner repeatedly granting Opto Circuits additional time for repayment of the Credit Facilities and payment of interest and for compliance with their obligations, Opto Circuits was unwilling to meet the terms and conditions of Addendum 2. It is stated that Opto Circuits sent a letter dated 06.11.2013 claiming that they were unable to meet the conditions under Addendum 2 on account of various alleged business challenges and claimed that it was extremely difficult to mobilise funds at short notice. It is stated that Opto Circuits requested the Petitioner to reconsider the Term Loan option (with a 1 year moratorium and a 3 year repayment schedule) that was suggested in the letter dated 07.10.2013 and further Opto Circuits assured the Petitioner that the interest arrears amounting to Rs.2.07 Crores up till 14.10.2013 would be cleared by the end of the month of November, 2013.





- (15) It is stated that as there was no commitment on the part of Opto Circuits for making payment of future interest as and when due, and in view of the continuing default on the part of Opto Circuits to meet its repayment obligations, the Petitioner was unwilling to provide additional time for repayment of the Principal sum and interest arrears as all the assurance given by the Opto Circuits proved to be false and misleading. In the circumstances, the Petitioner had no option but to forward a Recall Letter dated 10.02.2014 calling upon both Opto Circuits and the Respondent to jointly and severally pay the sum of Rs.1,174,106,416.72/- (Rupees One Billion One Hundred and Seventy Four Million One Hundred and Six Thousand Four Hundred and Sixteen and Seventy Two Paise Only) comprising of Rs.1,125,321,639/- (Rupees One Billion One Hundred and Twenty Five Million Three Hundred and Twenty One Thousand Six Hundred and Thirty Nine Only) towards Principal and Rs.48,784,777.72/- (Rupees Forty Eight Million Seven Hundred and Eighty Four Thousand Seven Hundred and Seventy Seven and Seventy Two Paise Only) towards interest calculated due as on 10.02.2014, at the Petitioners Base Rate from time to time, plus 4% per annum.
- (16) It is further stated that the Petitioner vide letters dated 12.09.2013 and 10.02.2014 called upon the Respondent to pay the amount due from the Respondent under the terms of the aforementioned corporate guarantee despite which the Respondent has failed to make payment of the outstanding amounts to the Petitioner.
- (17) The Petitioner, being seriously aggrieved over the amounts that were still due to them from the Respondent issued a legal notice dated 06.03.2014, under Section 434 of the Companies Act, 1956 to the Respondent, at their registered office in

Bangalore, through Speed Post with Acknowledgement due, through its Advocates, Markos & Co., Advocates, Bangalore, calling upon the Respondent and Opto Circuits to make payment of the outstanding dues of Rs.1,185,354,412.70/- (Rupees One Billion One Hundred and Eighty Five Million Three Hundred and Fifty Four Thousand Four Hundred and Twelve and Seventy Paise Only) comprising of Rs.1,125,381,639/- (Rupees One Billion One Hundred and Twenty Five Million Three Hundred and Eighty One Thousand Six Hundred and Thirty Nine Only) towards Principal and Rs.59,972,773.70/- (Rupees Fifty Nine Million Nine Hundred and Seventy Two Thousand Seven Hundred and Seventy Three and Seventy Seven Paise Only) towards interest accrued up to 06.03.2014 alongwith further interest at Petitioner's Base Rate plus 4 % per annum till the date of payment of the aforesaid amount, failing which the Respondent would be deemed to be unable to pay its debts due to the Petitioner.

- (18) In view of the facts explained hereinabove and the inability of the Respondent to clear its liability towards the Petitioner, it is evident that the Respondent is not in a position to pay its debts and further in various correspondences with the Petitioner, Opto Circuits has clearly admitted its liability to the Petitioner and yet has failed to make payment of the outstanding dues owed to the Petitioner and in these circumstances the Respondent having executed the Deed of Corporate Guarantee was liable to pay the outstanding amounts to the Petitioner which they are unable to do, hence the Respondent is liable to be wound up. It is just and necessary that the Respondent is wound up at this stage itself, so as to save the situation from getting worse, and to save the other creditors.



4. The Respondent has filed Statement of Objections dated 14.09.2015 before the Hon'ble High Court of Karnataka, by inter alia contending as follows:

- (1) It is stated that the instant Petition is not maintainable either on facts or on law and is an abuse of process and ought to be dismissed *in limine* with costs and the same is frivolous, vexatious and filed with sole intent of harassing the Respondent. It lacks *bonafides* and ought to be dismissed *in limine* for this reason alone. The Respondent denies all statements, averments and contentions in the instant Petition, save and except those which are specifically admitted therein. All averments in the Petition which are not specifically admitted are hereby denied and nothing shall be deemed to be admitted for want of specific traversal.
- (2) The Respondent is a Company incorporated under the Companies Act, 1956. The Respondent is a Public Limited Company and the main objects of the Company is to develop specialized infrastructure projects such as Special Economic Zones (SEZs), Industrial parks, Health care establishments, Hospitality related projects, Townships and other challenging infrastructure projects. The Company has robust growth plans ably supported by a strong team of professionals.
- (3) It is stated that the Petitioner herein vide Facility Letter dated 28.11.2012 assured to provide Credit Facilities to Opto Circuits (India) Limited ('Opto Circuits'), a sister concern of the Respondent, up to an overdraft limit of Rupees One Billion. Opto Circuits upon due deliberations on the terms and conditions duly executed the Facility Letter. As per the Facility Letter one of the conditions for grant of the credit facilities was the furnishing of securities by the Respondent. The Petitioner offered to provide credit facilities to Opto Circuits provided the



Respondent herein created an unconditional and irrevocable guarantee in favour of the Petitioner. It is stated that in furtherance to the aforementioned clause in the Facility Letter, a Letter of Guarantee was executed by the Respondent on 12.12.2012 to an extent of Rupees One Billion only.

- (4) It is stated that the Respondent further in order to secure payment from Opto Circuits created a mortgage by deposit of title deeds on the industrial converted land situated at Plot Nos.2A1, 2A2, 2A3, 2A3(P3), 2B1, 2B2, 2C1, 2C2, 3, 4, 5, 6, 7, 8, 9 and 10 in several survey numbers in the Hassan Industrial Area within the limits of Shantigramma Hobli, Hassan Taluk, Hassan District admeasuring an extent of 250 acres. It is also stated all the credit facilities thus advanced by the Petitioner to Opto Circuits is secured by the industrial converted land measuring 250 acres and the title deeds of the immovable property vest with the Petitioner.
- (5) It is further stated that the Facility Letter had fallen in arrears due to the depreciation in the value of the 'Rupee', which resulted in an unexpected increase in the aggregate value of imports. Such factors had significantly interfered with Opto Circuits ability to perform its repayment obligations in a timely manner. However, despite the critical circumstances, the Opto Circuits had adopted various remedial measures and even obtained additional facilities from IndusInd Bank vide sanction letter dated 14.08.2013 which inter alia provided for issuance of stand-by letter of credit for an approximate value of United States Dollars Twenty Seven Million (USD 27,000,000). Opto Circuits had also indicated to the Petitioner, then, of its willingness to indemnify and sell some of its properties to generate immediate cash which could be applied to the overdue interest.



- (6) It is also stated that as recounted all the aforementioned measures were adopted by Opto Circuits in order to make good the liabilities arising out of the Facility arrangement and further the additional security over the industrial converted land admeasuring approximately two hundred and fifty (250) acres, located at Hassan was also created by the Respondent in favour of the Petitioner herein. The land was ear-marked for development as a Special Economic Zone of a total value of Rupees One Hundred Crores Only. Thus, the security provided to the Petitioner in terms of the Facility Letter has not dissipated in its value and continues to adequately cover the entire exposure under the Facility Letter.
- (7) It is stated that Opto Circuits had further in lieu of the interest overdue upto December, 2013, paid an aggregate sum of Rs.2,77,91,065/- (Rupees Two Crore Seventy Seven Lakhs Ninety One Thousand and Sixty Five Only) to the Petitioner between 17.10.2013 and 31.12.2013. The Petitioner has applied arbitrary interest rates to the credit facilities availed by Opto Circuits in violation of the prescribed RBI norms and intends to unjustly pressurize the Respondent to make good arbitrary sums which the Petitioner is not entitled to.
- (8) It is stated that the Respondent is a fully solvent, listed Company with a viable business and cannot be deemed to be 'unable to pay its debts' in terms of Section 434 of the Companies Act, 1956. It is stated that the credit facilities extended by the Petitioner is secured by the industrial converted land situated at Hassan. The Petitioner hence through the instant Petition is merely seeking to utilise the provisions of the Companies Act as a debt recovery/collection process.



- (9) It is also stated that the Petitioner has initiated the instant proceedings merely as an oppressive and damaging tactic to recover disputed sums of money from the Respondent. The Petitioner in order to threaten and thwart various stakeholders who have invested significantly in the Respondent has initiated the instant proceedings.
- (10) It is further stated that the allegation that the Respondent is wilfully neglecting to honour its commitment to the Petitioner despite having the capacity to do so is wrongful and entirely false. The Respondent though is fully solvent seriously disputes the amounts claimed by the Petitioner. The Respondent here is a mere guarantor and has created a mortgage by title deeds to secure payment. Such being the facts and circumstances of the case when the very amount due is in question a Petition for winding up is not maintainable. It is settled principle of law that to raise a presumption of inability to pay, it is not enough merely to show that the Company has omitted to pay the debt despite service of statutory notice, but it is incumbent to demonstrate that the Company omitted to pay without reasonable excuse. The Petitioner in the instant case has failed to demonstrate that a condition of insolvency in the commercial sense exists.
- (11) It is stated that a Petition for winding up is a remedy of last resort and should be allowed only in compelling circumstances. Winding up is not matter of course and a Petition for winding up is to be allowed only in such circumstances when it is proven that the existing and probable assets of a Company are insufficient to meet the existing liability. It is further stated that the Respondent is a solvent Company which is capable of carrying on its day to day business activities. The Petitioner merely intends to abuse the



process of law and has failed to make out a case for winding up.

5. The case is transferred from the Hon'ble High Court of Karnataka vide its letter dated 06.07.2019 along with the copy of the order dated 18.06.2019 by disposing of C.A. No.48/2019 by directing the Respondent to appear before the NCLT on 10.07.2019 without expecting any notice, and thereafter NCLT is directed to proceed in accordance with law. Accordingly, the case is taken on the record of the Adjudicating Authority and posted on 10.07.2019. However, only the Counsel for Petitioner is present and none appeared for the Respondent and thus the case is posted to 23.07.2019 and 25.07.2019. On the above dates also, none appeared for the Respondent.
6. As stated supra, on transfer, the Petitioner has filed an Application/Company petition, in Form-1 under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on 19.07.2019 duly complying with the provisions of the Code by inter alia seeking to initiate the Corporate Insolvency Process (CIRP) in respect of the Respondent-Corporate Debtor namely M/s. Opto Infrastructure Limited on the ground that it has committed default for a total amount of Rs.213,67,42,263.02/- (Rupees Two Hundred and Thirteen Crores Sixty Seven Lakhs Forty Two Thousand and Two Hundred and Sixty Three Only) as on 31.07.2018 and duly suggesting a qualified Resolution Professional namely, Shri Vedagiri Venkata Krishnamurthy.
7. Heard Shri Arun Kumar, learned Senior Counsel for the Petitioner. None appeared for the Respondent even though the case is listed on 10.07.2019, 23.07.2019 and 25.07.2019, and thus failed to adhere to the direction given by the Hon'ble High Court of Karnataka vide

order dated 18.06.2019 passed in C.A. No.48/2019 as referred supra. The Cause List of the Adjudicating Authority is also displayed promptly on the website of the Adjudicating Authority every previous day for the cases to be heard on next day. However, the Respondent failed to avail the opportunity. Therefore, I am deciding the matter basing on the materials available on record.

8. Shri Arun Kumar, learned Senior Counsel for the Petitioner by pointing out various averments made in the Company Petition, and also in the gist of cases filed along with the Petition, has further submitted that the Petitioner on transfer of the Company Petition from the Hon'ble High Court of Karnataka has complied with the provisions of the Code and the debt and default is not in dispute and a qualified Resolution Professional is suggested namely Shri Vedagiri Venkata Krishnamurthy bearing Registration No.IBBI/IPA-001/IP-P00905/2017-2018/11505, who has also filed written communication in Form 2 dated 17.07.2019, by inter alia declaring that he is eligible to be appointed as resolution professional in respect of the Corporate Debtor and there are no disciplinary proceedings pending against him with the Board of Indian Institute of Insolvency Professionals of ICAI. Therefore, the Company Petition is eligible to be admitted by initiating CIRP in respect of the Corporate Debtor.
9. The Respondent has already filed their Statement of Objections in the main Company Petition, as briefly stated supra. The Respondent has prima facie has not disputed availing the credit facilities offered by the Petitioner and the mortgage in respect of the properties of the Company executed in favour of the Petitioner. However, due to the business failures, they are not able to pay the outstanding amount and expressed their willingness to identify and sell some of its properties to generate immediate cash to pay to the Petitioner. The





security provided to the Petitioner has not dissipated in its value and continues to adequately cover the entire exposure under the Facility Letter. Therefore, the debt and default is not in dispute. Therefore, the defense raised by the Respondent is not at all tenable so as to initiate CIRP in respect of the Corporate Debtor namely M/s. Opto Infrastructure Limited.

10. So far as the law with regard to initiation of CIRP is concerned, Hon'ble NCLAT vide order dated 15<sup>th</sup> May, 2017 passed in Company Appeal (AT) (Insolvency) No.1 & 2/2017 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'."*

The Hon'ble Supreme Court has also upheld the above judgement in Civil Appeal Nos.8337-8338 of 2017 vide judgment dated 31<sup>st</sup> August, 2017. The Hon'ble Supreme Court has adverted to 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."*

11. In view of the above facts and circumstances of the case, I am of the considered opinion that the instant Company Petition is filed strictly in accordance with the provisions of the Code and the debt and default is established beyond doubt and a qualified Resolution Professional namely Shri Vedagiri Venkata Krishnamurthy bearing Registration No.IBBI/IPA-001/IP-P00905/2017-2018/11505 is suggested, who has filed his written consent dated 17.07.2019 and therefore the Insolvency Professional is prima facie eligible to be appointed as IRP, and the defense raised by the Respondent is not at all tenable and thus it is a fit case to admit the case to initiate the CIRP in respect of the Corporate Debtor by appointing IRP, imposing moratorium, etc. The Petitioner has also filed a Certificate under the Bankers Book of Evidence Act, 1891 dated 17.07.2019.

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

- (1) C.P. No.125 of 2014 (T.P. No.01 of 2019) is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of the Respondent-Corporate Debtor namely M/s.Opto Infrastructure Limited;

(2) **Shri Vedagiri Venkata Krishnamurthy** bearing **Registration No.IBBI/IPA-001/IP-P00905/2017-2018/11505**, is hereby appointed as Interim Resolution Professional, in respect of the Corporate Debtor to carry on the functions as mentioned under the Insolvency and Bankruptcy Code, 2016 and the Rules framed by the IBBI from time to time;

(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;



- g. The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;
- (4) The Board of Directors and all the staff of the Respondent-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) The IRP is further directed to take expeditious steps so as to complete the process of CIRP within stipulated time. And he is also directed to file progress reports from time to time to Adjudicating Authority about the steps taken in pursuant to the CIRP.
- (6) Post the case for report of the IRP on **26<sup>th</sup> August, 2019**.

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

Krishna