

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI**

Company Petition No. (IB) - 937 (PB)/2018

**Under Section 7 of the Insolvency and Bankruptcy Code,
2016**

In the matter of:

Corporation Bank

Applicant/Financial Creditor

Vs

M/s Unitech Machines Limited

Respondent/Corporate Debtor

Judgment delivered on: 01.03.2019

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MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT

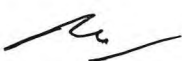
MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)

For Applicant:

Mr. Alok Kumar with Somyadava Advs.

For Respondent:

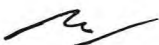
Mr. Jaideep Maheshwari, Mr. Ajit Pratap Singh,
Ms. Ankita Chandra Advs.



ORDER

S. K. Mohapatra, Member

1. Corporation Bank has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s Unitech Machines Limited referred to as the corporate debtor.
2. The Respondent Company M/s Unitech Machines Limited (CIN No. U34300 DL1986 PLC023498) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 28.02.1986 having its registered office at 806, Devika Tower – 6, Nehru Place, New Delhi - 110019. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of




Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It is appropriate to mention that the applicant Corporation Bank is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 having its Registered Office at Mangaladevi Temple Road, Pandeshwar, Mangalore, Karnataka - 575001.
4. Mr. Debraj Bag authorized representative and working as Assistant General Manager of the applicant bank, has preferred the present application on behalf of the applicant for initiation of corporate insolvency resolution process against the respondent corporate debtor in terms of the provisions of the Code.
5. The applicant has proposed the name of Mr. Vivek Raheja, for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P00055/ 2017-18 / 10133 resident of JD 2C, 2nd Floor, Pitampura, New Delhi - 110034 with email-



id vivek@vpgs.in. Mr. Vivek Raheja has agreed to accept the appointment as the interim resolution professional and has signed a communication dated 21.07.2018 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. He has enclosed the copy of Certificate of Registration dated 30th May, 2017 issued by IBBI. In addition, further necessary disclosures have been made by Mr. Vivek Raheja as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

6. It is the case of the applicant that applicant bank had granted credit facilities to the Respondent company pursuant to the Working Capital Consortium Agreement dated 18.04.2009. Further the said credit facilities were extended by way of Second Supplemental Working Capital Consortium



Agreement dated 05.06.2012. Thereafter the credit facilities were further extended through the Third Supplemental Working Capital Consortium Agreement dated 21.01.2014. The Respondent executed various other documents with respect to the credit facilities availed by it whereby acknowledging and admitting the Debt.

7. It is submitted that the respondent sent a Revival Letter dated 27.12.2016 to the Petitioner wherein the Respondent company acknowledged the liability to repay the outstanding amount to the Petitioner by virtue of all the security documents executed earlier with respect to the credit facilities availed from the Petitioner.
8. Subsequently the Petitioner bank vide Sanction Letter dated 24.02.2017, sanctioned to the Respondent certain credit facilities of different nature and extended the credit facilities to the Respondent. In furtherance to the credit facilities, the Respondent jointly (along with other Guarantors) and severally executed security documents. The said loan facilities

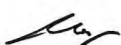


continued to be availed by the Respondent in terms of the Sanction letter dated 30.01.2017.

9. In order to secure the credit facilities availed by the Respondent, the following security documents over the properties were executed.

a. Pari passu first charge on inventory cum book debts/current assets of the company with other working capital lenders.

b. Pari passu first charges on office premises admeasuring 3105 sq. ft. of super build up area in fourth floor "Jamal Chambers" with 1/4 share of undivided share i.e. 2250 sq. feet of land in that piece and parcel of land and building of an extent of 9000 sq. feet as per document (8929 sq. feet as per Patta) comprised in T.S. No. 79 and 86/I, Block No. 8, Adyar Division, Manbalam-Guindy Taluk bearing present Door no. 49/5 (Old Door No. 26) Mound Road, Saidapet, Chennai - 600015 with the Working Capital credit facilities.



c. The Working Capital limits are collaterally secured by pari passu 2nd charge on the Fixed Assets of the Company.

d. Second pari passu charges on all fixed assets of M/s UM Autocomp Pvt. Ltd. (except exclusive finance) with working capital lenders under consortium of Unitech Machines Limited.

e. The Term Loan Pari passu first charge on Fixed 11 Assets of the company with other term lenders.

f. The Term Loan limits are collaterally secured by pari passu second charge on the current Assets of the respondent Company.

10. It is also the case of applicant that the last repayment by the Respondent corporate debtor was made on 30.08.2017. Thereafter the account of the Respondent Company became irregular and the Respondent failed to service the Debt in terms of the Loan Agreement. Consequently, the account of the Respondent was classified as Non-Performing Asset (NPA) on 26.09.2017.



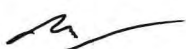
11. The Petitioner had sent Recall Notice dated 19.05.2018 to the Respondent. However, despite the recall notice, it is alleged that the Respondent failed to regularize the account or repay the Debt.

12. The applicant has relied upon the following securities and other loan related documents executed between the parties in respect to the financial facilities sanctioned to the respondent corporate debtor:

- *Renewal Sanction Letter cum Reduction in existing credit facility dated 30.01.2017.*
- *Balance Confirmation Certificate as on 30.06.2018.*
- *Fourth supplemental Working Capital consortium agreement dated 06.09.2017.*
- *Fourth Supplemental Joint Deed of Hypothecation dated 06.09.2017.*
- *Inter se Agreement dated 06.09.2017.*
- *Guarantee Agreement dated 06.09.2017.*
- *Omnibus Courter Guarantee.*



- *Memorandum of Entry for creation of Equitable Mortgage dated 08.01.2018.*
- *Trustee Agreement dated 06.09.2017.*
- *Undertaking / Declaration dated 06.09.2017.*
- *Undertaking related to MCLP Agreement dated 06.09.2017.*
- *Declaration as willful defaulter on non-payment under guarantee dated 06.09.2017.*
- *Letter of Authority to the lead bank date 06.09.2017.*
- *Power of Attorney of Corporate Debtor dated 06.09.2017.*
- *Original Copy of the Certificate u/s 2(a) of Bankers Book Evidence Act where the entries have been maintained in Banker's Book in accordance with bankers Book Evidence Act, 1891 for the period from 01.01.2017 to 30.06.2018.*
- *Copies of Statement of Account in the books of Petitioner for various credit facilities sanctioned to Respondent.*



13. It is stated in the application that as on 30.06.2018 the total outstanding amount including interest due to the respondent corporate debtor comes to Rs. 163,92,88,242.90 Paise. The details of the various Credit facilities sanctioned have been enumerated at part IV of the application as below:

S. No.	Nature of Facility	Amount Sanctioned (In Crores)	Date of First Disbursement
1.	Cash Credit cum WCDL	41.00 (Rupees Forty One Crore)	09.12.2012
2.	Import / Inland LC cum BG	Rs. 119/- (Rupees One Hundred and Nineteen Crore)	N.A.
3	Term Loan	Rs. 18.50 Crores (Rupees Eighteen Crores and Fifty Lakhs only)	24.09.2012

14. The respondent corporate debtor has filed its reply on 05.11.2018. Rejoinder to the reply was filed by applicant on 15.11.2018.

15. We have heard the learned counsel for the parties and have perused the case records.



16. Various objections raised by the respondent corporate debtor are discussed below.

17. Respondent has raised an objection that the credit facilities were granted by consortium of banks and therefore the applicant bank does not have the requisite legal authority to move against the corporate debtor without approval of other lenders. It is stated that no amount can be claimed by the Applicant individually from the Respondent. Respondent has emphasized that the applicant Bank alone cannot file the present application without specific consent of the other consortium banks and without impleading them in the proceedings.

18. In this connection applicant has replied in the rejoinder that through the present Application, the Applicant is seeking to recover the loan amount individually extended by it to the Respondent. It is claimed that there is no obligation to make other members of the consortium a party and consent of other members are not required under the Code.




19. It is pertinent to note here that Section 7 (1) of the Code provides that a financial creditor either by itself or jointly with other financial creditors may file an application for initiating Corporate Insolvency Resolution Process against a corporate debtor when a default has occurred. Therefore, there is no obligation on the part of applicant bank to join the consortium of Banks. Inter-se agreement between the financial creditors cannot override the express provisions of the Code nor can take away the right of any creditor to file application under Section 7 of the Code. Accordingly, applicant bank individually has a clear right to file application under the Code in case of default in repayment of its dues. Besides in view of the overriding effect given to the provisions of Section 238 of the Code, anything inconsistent therewith contained in any instrument cannot take away the right of the applicant bank as financial creditor to file application alone under Section 7 of the Code.




20. Hon'ble NCLAT in the matter of Asian Natural Resources (India) v. IDBI Bank Limited in its order dated 11.08.2107 passed in Company Appeal (AT) (Insolvency) No. 60 of 2017 has observed that:

“The Inter-se Agreement between different banks is not binding in nature, the 'Corporate Debtors' not being signatories cannot derive advantage of such Inter-se Agreement. This apart, the 'financial creditors' having right to file application under Section 7 of the I&B Code, individually or jointly on behalf of other 'financial creditors' as quoted below, the Inter-se Agreement between the 'financial creditors' cannot override the said provision, nor can take away the right of any Financial Institution to file application under Section 7 of the I&B Code.”



- 21.** Respondent corporate debtor has raised another objection that the petition is defective and the applicant has not filed relevant and necessary documents along with the petition.
- 22.** In this connection it is appropriate to mention that the present application under Section 7 of the Code for initiative Corporate Resolution Insolvency Process has been filed by the petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with required information, documents and records as prescribed under the Rules. The form has been duly filled in along with required details and evidence of default.
- 23.** The applicant has annexed copy of sanction letters, loan agreements, security documents, revival letters, Statement of accounts and balance confirmation certificates along with certificate under Section 2(A) of the Bankers Book Evidence Act etc. It is thus reiterated that the Form-1 filed in the present case under Section 7 of the Code read with Rule 4 of



the Rules is complete in all respect and there is no infirmity in the same.

24. The corporate debtor has also alleged that excess interest has been charged by the banks and the amount claimed is incorrect. It is pertinent to mention in this regard that dispute over the quantum of default, cannot be a ground for rejection of an application under Section 7 of Code as the determination of quantum of financial debt is not within the domain of the Adjudicating Authority. In the present proceeding the Tribunal is not supposed to ascertain the quantum of amount of default or to pass a decree as to how much is actually due to the applicant financial creditor. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application.

25. Needless to say, that an application under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence or



existence of default. What is material is that the default is for at least Rs.1 Lakh. In view of Section 4 of the Code, the moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable. The corporate debtor has failed to show that there is no debt or default in existence so as to avoid the provisions of the Code.

- 26.** As regards allegation of excessive charging of interest, applicant has stated in its rejoinder that the interest has been charged in accordance with the terms of sanction letter from time to time. It is stated that the Corporate Debtor since 01.04.2013 till the date of declaration of the account as a Non Performing Asset account, continuously violated the terms of the sanction letter in relation to maintaining the account within the drawing limit/ sanctioned limit and by non-submission of stock statement. It is submitted that the amount claimed in Part-IV of the petition is based on the statement of Account maintained by the



Bank in its ordinary and usual course of business and in accordance with the banking systems.

- 27.** Respondent corporate debtor has further alleged that the account of the corporate debtor has been wrongly declared as NPA.
- 28.** While dealing with application under Section 7 of the Code, it is immaterial to see as to when the account was declared as NPA. In Section 7 application, it is only to be considered as to whether there is a debt due in law and facts and whether there has been a default in paying the financial debt.
- 29.** Hon'ble National Company Law Appellate Tribunal in the Case of *Ranjit Kapoor Versus Asset Reconstruction Company (India) Limited*, in company appeal (AT) (Insolvency) no. 410 of 2018 has held that "the provision of NPA relates to SARFAESI Act, 2002 and has nothing to do with Code." Therefore, the objection of the respondent that applicant has not acted in terms of circular and guidelines of RBI and determined the account as NPA illegally; cannot be a ground to reject the application preferred by the



financial creditor under Section 7 of the Code, there being default in payment of financial debt.

30. Respondent has raised another objection that the present application is not maintainable as applicant bank can only act through its authorized representative. It is alleged that there is no Board resolution authorizing Mr. Debraj Bag, Asst. General Manager to file the present petition on behalf of the applicant bank.

31. In this regard applicant bank in its rejoinder filed on 06.06.2018 has affirmed that Mr. Debraj Bag, AGM of the bank was duly authorized to sign and verify the present application. It is alleged in the rejoinder that the respondent company had taken irrelevant and unnecessary objections.

32. Hon'ble NCLAT in the case of Palogix Infrastructure Pvt. Ltd. Vs. ICICI Bank Limited in Company Appeal (AT) (Insolvency) Nos.30, 37 &54 of 2017 at para 38 has held that:

“ If an officer, such as senior Manager of a Bank has been authorised to grant loan, for recovery of loan or to initiate a proceeding for



'Corporate Insolvency Resolution Process' against the person who have taken loan, in such case the 'Corporate Debtor' cannot plead that officer has power to sanction loan, but such officer has no power to recover the loan amount or to initiate 'Corporate Insolvency Resolution Process', in spite of default of debt.'

33. In the present case Applicant bank has filed the amended petition through Sh. Debraj Bag, authorized representative and Assistant General Manager of the applicant bank. Admittedly Sh. Debraj Bag is working in a senior post in Scale-V as Asst. General Manager of the applicant bank and has preferred the present application on behalf of the applicant bank. In the facts there is no doubt that Sh. Debraj Bag not only has been authorized but is also competent to file the present application on behalf of the applicant bank.

34. Respondent corporate debtor further asserted that it had requested the consortium of banks for more financial facility/ restructure / compromise, but due to arbitrary, illegal and non-helping approach of the applicant the same was not done. In Para 12 of



the rejoinder the petitioner has responded that the respondent company has never forwarded or proposed any one time settlement scheme.

35. In this regard it is pertinent to note that in financial transactions, adjustments and compromise are to be left to the parties to settle the matter in their best interest or exigencies of the business. However, in the absence of any binding compromise agreement/ debt restructuring approval, it is beyond the powers of the Adjudicating Authority to defer the prayer of applicant financial creditor for admission of the petition filed under Section 7 of the Code.

36. Needless to say that time is the essence of the Code. A far strict time frame is expected to be followed by the Adjudicating Authority at every stage of the proceedings. When despite demand there is default in repayment of the loan amount, the applicant gets right to move under the Code. The application under Section 7 is maintainable once the default is more than one lakh, in view of Section 4 of the Code.



37. Similarly, the objection on the ground of discrepancies in the amount of claim cannot sustain. The variance in the amount of default is mainly on account of difference of dates. Be that as it may the corporate debtor would be entitled to raise objection of mismatching of dues before the resolution professional/ committee of creditors. Adjudicating Authority is only to ascertain the existence of a default and not the exact amount due. Mere mismatch of the figures will ipso facto not estop the admission of corporate insolvency resolution process under Section 7 of the Code.

38. The materials on record and the loan documents clearly depict that the loan was sanctioned, disbursed and the loan agreements were properly executed. Respondent company utilized and enjoyed the loan facility. The applicant has placed on record several balance and security confirmation letters duly signed by the respondent in acknowledgement of the debt. That apart the applicant has relied upon the letter of



respondent company confirming creation of mortgage by deposit of title deeds in order to secure the loan.

- 39.** In addition, the applicant bank has filed the statement of accounts duly certified in accordance with Banker's Books Evidence Act, 1891 as per the requirement of Form 1 part V column 7 of the application. Certified copy of statement of account submitted by applicant bank pertaining to various loan facilities, kept during the course of banking business, basing on which the claim has been raised, can be termed as sufficient evidence of default in repayment of the financial debt.
- 40.** It is thus seen that the applicant bank has placed on record voluminous and overwhelming evidence in support of the loan facilities as well as to prove the default in its repayment.
- 41.** It is pertinent to mention here that the Code requires the Adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. The material on record clearly goes to



show that respondent had availed the loan facilities which was duly disbursed and has committed default in repayment of the outstanding loan amount.

42. It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

a) Financial creditor

b) Operational creditor, and

c) Corporate debtor itself.

43. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the “Financial Creditor” is delineated under Section 7 of the Code, wherein only “Financial Creditor” / “Financial Creditors” can file an application. As per Section 7(1) of the Code an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors.

44. The expressions “Financial Creditor” and “Financial debt” have been defined in Section 5 (7) and 5 (8) of the Code and precisely “Financial debt” is a debt along



with interest, if any, which is disbursed against the consideration for time value of money.

45. In the present case the applicant bank had sanctioned and disbursed the loan amount recoverable with applicable interest by entering into loan agreements with the corporate debtor. The corporate debtor had borrowed the credit facility against payment of interest as agreed between the parties. The loan was disbursed against the consideration for time value of money with a clear commercial effect of borrowing. Moreover the debt claimed in the present application includes both the component of outstanding principal and interest. In that view of the matter not only the present claim comes within the purview of '*Financial Debt*' but also the applicant can clearly be termed as '*Financial Creditor*' so as to prefer the present application under Section 7 of the Code.

46. The application filed by the applicant financial creditor under sub-section 5 (a) of Section 7 of the code, has to be admitted on satisfaction that:




- i. *Default has occurred.*
- ii. *Application is complete, and*
- iii. *No disciplinary proceeding against the proposed IRP is pending.*

47. Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited V. Kirusa Software Private Limited reported in AIR 2017 SC 4532 at Para 19 has observed that:

*“Once the adjudicating authority / Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. **The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application.**”*

(Emphasis given)



- 48.** An application of financial creditor under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence of existence of default. It is reiterated that the material on record clearly goes to show that respondent had availed the loan facilities and has committed default in repayment of the huge outstanding loan amount.
- 49.** In the aforesaid factual background, it is seen that the applicant bank clearly comes within the definition of Financial Creditor. The material placed on record further confirms that applicant financial creditor had disbursed various loan facilities to the respondent corporate debtor and the respondent has availed the loan and committed default in repayment of the outstanding financial debt. On a bare perusal of Form – I filed under Section 7 of the Code read with Rule 4 of the Rules shows that the form is complete and there is no infirmity in the same. It is also seen that there is no disciplinary proceeding pending against the proposed IRP. Applicant has placed on record voluminous and overwhelming evidence in support of



the disbursement as well as to prove the default. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim for the outstanding financial debts from the corporate debtor and that there has been default in payment of the financial debt by the respondent corporate debtor.

50. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

51. Mr. Vivek Raheja, for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P00055/ 2017-18 / 10133 resident of JD 2C, 2nd Floor, Pitampura, New Delhi - 110034 with email - id vivek@vpgs.in Mr. Vivek Raheja has agreed to accept the appointment as the interim resolution professional.

52. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the



IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

53. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(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 Securitization 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.”

54. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

55. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and



strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.




56. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

Sd/-
(M.M. KUMAR)
PRESIDENT

Sd/-
1/3/2019
(S. K. MOHAPATRA)
MEMBER (T)

Pronounced today under Rule 151 of the NCLT Rules 2016 as Hon'ble President, Chief Justice (Rtd.) Sh. M.M. Kumar, is not holding Court today.


01/3/19
(Nirmala Vincent)
Court Officer

Shammy