BENCH-I

NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

For Order

CA(IB)No.807/KB/2018
CA(IB)No.365/KB/2018
Misc.A.No.220/KB/2018
Misc. A. No.674/KB/2018
in C.P.No.173/KB/2017

Present: Hon'ble Member (J), Shri Jinan K.R.

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING ON 22th OCTOBER, 2018, 10:30 A.M.

Name of the Company	Berger Paints India Ltd.-Versus-Precision Engineers & Febricators Pvt.Ltd.
Under Section	8 & 9 IBC

Sl. No.	Name & Designation of Authorized Representative (IN CAPITAL LETTERS)	Appearing on behalf of	Signature with date
1.	Snehashis Sen, Adv.	For L&T Finance Limited	Sen 22/10/18
2.	Anirban Ray, Adv. Debraj Sahu, Adv.	For Resolution Applicant	D. Sahu 22.10.18.
1	RAMESH CHANDRA PRUSTI, ADV.	UBOI Financial creditor	Manekabi Adv 22/10/2018
2)	MANINI KABI, ADV.		

ORDER

Ld. Counsel for the Financial Creditors as well as Ld. Counsel for the Resolution Applicant is present.

At the juncture of pronouncing the orders in the applications listed on today, Ld. Counsel for the L & T Finance Ltd. submits that, talk of settlement is going on with Corporate Debtor and submits that his submission is to be recorded. Accordingly recorded.

It is submitted on the side of the Resolution Professional that due to his ill health, he may be replaced with another Resolution Professional to continue with the Liquidation process. It is recorded.

Common order in **CA(IB) Nos.807 and 365/KB/2018 and Misc. A. No. 220/KB/2018** is pronounced vide separate sheet. Order in **Misc. A. No. 674/KB/2018** is pronounced vide separate sheet.

Urgent certified copy of the orders be issued, if applied for, upon compliance with all the requisite formalities.

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(Jinan K.R.)
Member (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CA (IB) NO. 674/KB/2018

IN

CP (IB) No.173KB/2017

Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

IN THE MATTER OF:

An application under Section 60 (5) (C) of the Insolvency and Bankruptcy Code, 2016 read with Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

IN THE MATTER OF:

UNION BANK OF INDIA

..Petitioner/Financial Creditor

And

IN THE MATTER OF:

BERGER PAINTS INDIA LIMITED, a limited Non-Government Company, limited by shares registered under the provisions of the Companies Act, 2013 and having its registered office at 129 Park Street, Kolkata 700 017 in the state of West Bengal under the aforesaid jurisdiction.

.. **Petitioner**

VERSUS

IN THE MATTER OF:

PRECISION ENGINEERS & FABRICATORS PRIVATE LIMITED a private limited Non-Government Company, limited by shares registered under the provisions of the Companies Act, 2013 and

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having its registered office at 1166B Shyama Prasad Mukherjee Road, Flat No.3D Merlin Link, Kolkata 700 026 in the state of West Bengal under the aforesaid jurisdiction & Ors.

.. **Respondents**

Counsels on Record:

1.	Ms. Ishani Sengupta, Advocate	] For the L & T.
		] Finance Ltd.
1.	Mr. Wrishik Ganguly, Advocate	] For the Ex. R.P.
1.	Mr. Abhrajit Mitra, Sr. Advocate	] For the
2.	Mr. Anirban Ray, Advocate	] Resolution
3.	Mr. Debraj Sahu, Advocate	] Applicant
4.	Mr. Rajesh Upadhyay, Advocate	]
1.	Mr. Ramesh Ch. Prusti, Advocate	] For the Union Bank
2.	Mr. Balaram Pandit, Advocate	] of India
1.	Mr. Joy Saha, Sr. Advocate	] For the
2.	Ms. Manju Bhuteria, Advocate	] Axis Bank
3.	Ms. Urmila Chakraborty, Advocate	]
4.	Mr. S. K. Banerjee, Advocate	]

Date of pronouncement of the order: 22nd October 2018.

ORDER

1. This is an application filed by Union Bank of India praying for recalling the Order of Admission passed under Section 31(1) of the Insolvency & Bankruptcy Code, 2016 (in short the I & B Code) alleging that the Corporate Debtor / Resolution Applicant, who is a promoter director of the Corporate Debtor has suppressed material facts regarding the winding up proceedings pending before the Hon'ble High Court at

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Calcutta. It is contended by the Union Bank that one Operational Creditor, namely, Berger Paints India Limited filed the CP (IB) No.173/KB/2017 for initiating CIRP process as against the Corporate Debtor, namely, Precision Engineers & Fabricators Private Limited. Vide Order dated 4th April 2017, the adjudicating authority admitted the application filed by Berger Paints India Limited and the Resolution Plan submitted by a promoter director of the Corporate Debtor has been approved by the Committee of Creditors (CoC) and thereafter it has been approved by the adjudicating authority on 1st February 2018. The applicant contends that the Resolution Applicant submitted the Resolution Plan without disclosing the pendency of the winding up petition i.e. C.P. No.487 of 2016 before the Hon'ble High Court at Calcutta. If the Hon'ble Tribunal would have been aware of such a winding up proceeding pending against the Corporate Debtor, the Order of Admission would not have been passed by this Tribunal under Section 31(1) of the I&B Code.

2. Subsequent to the approval of the Resolution Plan, there has been non-compliance of the terms and conditions of the said Resolution Plan and the Resolution Applicant has been continuously violating the terms and conditions of the Resolution Plan and an amount of Rs.15,74,51,442.08 (Rupees Fifteen Crore Seventy-four lakh Fifty-one thousand Four hundred Forty two and eight paise only) with accrued interest till the settlement /repayment is due from the Corporate Debtor and the applicant Bank has the first charge over the secured assets of the Corporate Debtor. Upon the said contentions, the applicant, Union Bank of India, prays for recalling the order of this Tribunal.

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3. The Corporate Debtor objected this application and challenged its maintainability. According to the Ld. Sr. Counsel appearing for the Corporate Debtor, the adjudicating authority has no right to recall an order of admission passed for the reason of alleged suppression of material facts. To strengthen the said argument, he cited **Company Appeal (AT) (Insolvency) No.95 of 2017 dated 13.07.2017, NCLAT New Delhi. (*Lokhandwala Kataria Construction Pvt. Ltd. v. Nisus Finance k& Investment Manager LLP.*)** and **Company Appeal (AT) (Insolvency) No.295 of 2017, dated 30.011.2017 , NCLAT New Delhi (*Amod Amladi Vs. Mrs. Sayali Rane & Anr.*)**

4. It has been held in *Amod Amladi* that "***In absence of any power of review or recall vested with the Adjudicating Authority, we hold that the Adjudicating Authority rightly refused to recall the order of admission dated 2nd May 2017."***

5. In *Lokhandwala Kataria Construction Pvt. Ltd*, the Hon'ble NCALT has taken a view that "*t**he inherent power could not be so utilised to allow a compromise before it by the parties after admission of the matter.***"

6. The proposition above referred is squarely applicable in the instant case. In this case, resolution plan was approved. However, applications were seen filed by some of the financial creditors alleging contravention of the provisions of the resolution plan. It is at this juncture this application is seen filed for recalling the order of admission dated 4th April, 2017. Ld. Counsel appearing for the applicant submits

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that the Hon'ble High Court at Calcutta admitted a winding up petition filed as against the corporate debtor and by an order dated 23rd March, 2017 and thereafter by order dated 7th February, 2018 passed an order to wind up the Company by directing the Official Liquidator to take possession of the assets of the company. It is also submitted that application has been filed before the Hon'ble High Court at Calcutta for recalling the winding up order. These facts being suppressed by the Corporate Debtor, an order of admission passed by this Adjudicating Authority is illegal, argued by the ld. Counsel for the applicant.

7. It is significant to note here that alleging non-compliance of the provisions of the Resolution Plan, two of the financial creditors, i.e. Axis Bank and L&T Finance Limited filed two separate applications praying for passing an order of Liquidation under section 33(3) of the Code. Vide separate common order, those applications are allowed.

8. CA (IB) No.220/KB/2018 and CA (IB) No.365/KB/2018 being allowed by ordering liquidation and being found that this Adjudicating Authority has no power to recall or pass an order invoking inherent power under Rule 11 of NCLT Rules, on the bare allegation of suppression of material facts, I am of the view that this application is not maintainable and hence requires no consideration.

9. Ld Sr. Counsel for the Corporate Debtor at this juncture submits that the order of winding up was stayed in an application filed by the Corporate Debtor and showed willingness to run the Company in operation provided some more time is given to repay the debt as

stipulated in the resolution plan. The said request was considered in the above referred two applications and hence not dealt with again here. However, the order of stay brought to my notice shows two parallel proceedings are evidently going on in two different forums. One before Hon'ble High Court at Calcutta and one before this Tribunal. The Hon'ble High Court at Calcutta, passed the winding up order dated 7th February, 2018 as against the very same corporate debtor and is pending for consideration. This Adjudicating Authority passed an order of Liquidation of the very same Company on today due to failure on the side of the Resolution Applicant in fulfilling the terms in the Plan within time.

10. A reference to the order of Hon'ble High Court at Calcutta in CA 90 of 2018 in CP 487 of 2016, it is understood that a scheme of settlement was arrived at for implementation and if the Company failed in fulfilling the repayment as stipulated in the order, the order of winding up shall revive. The effect is that the Official Liquidator again has to take possession of the assets of the Company. So there is every chance of conflict in the process of liquidation to be initiated by the liquidator appointed by this Adjudicating Authority and with the official Liquidator to be appointed in the above referred CP in case of failure on the side of the Company. If the Hon'ble High Court ordered to resume the winding up order on failure, if any, on the side of the Company in repayment of debt as agreed, any one of the proceedings is to be stayed permanently. The applicant has the liberty to move such an application before the appropriate forum if such a contingency arises.

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11. In view of the above said discussions, it appears to me that this application CA (IB) No.674/KB/2018 in CP (IB)No.173/KB/2017 is not maintainable and therefore, liable to be dismissed.

12. In the result, this C.A. Is dismissed. No order as to cost.

Let the certified copy of the order be issued upon compliance with requisite formalities.

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22/10/18

(Jinan K.R.)
Member (J)

Signed this 22nd Day of October, 2018.

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In the National Company Law Tribunal
Kolkata Bench
Kolkata

Before Shri Jinan K.R., Hon'ble Member (J)

Common Order

C.A. (IB) Nos. 807 & 365/KB/2018

Misc. A. No. 220/KB/2018

In C.P. No. 173 of 2017

In the matter of:

An application u/s. 8 and 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the matter of:

An application u/s. 33(3) of the Insolvency & Bankruptcy Code, 2016;

In the matter of:

Axis Bank Ltd.;

... ... **Applicant**

-And-

In the matter of:

L & T Finance Ltd.;

... ... **Applicant**

-And-

Sd

In the matter of:

M/s. Berger Paints India Limited;

... ... **Applicant/Operational Creditor**

-Versus-

Precision Engineers & Fabricators Pvt. Ltd.

... ... **Respondent/Corporate Debtor**

Counsel appeared:

1.	Ms. Ishani Sengupta, Advocate	] For the L & T.] Finance Ltd.
1.	Mr. Wrishik Ganguly, Advocate	] For the Ex. R.P.
1.	Mr. Abhrajit Mitra, Sr. Advocate	] For the
2.	Mr. Anirban Ray, Advocate	] Resolution
3.	Mr. Debraj Sahu, Advocate	] Applicant
4.	Mr. Rajesh Upadhyay, Advocate	]
1.	Mr. Ramesh Ch. Prusti, Advocate	] For the Union] Bank
2.	Mr. Balaram Pandit, Advocate	] of India
1.	Mr. Joy Saha, Sr. Advocate	] For the
2.	Ms. Manju Bhuteria, Advocate	] Axis Bank
3.	Ms. Urmila Chakraborty, Advocate	]
4.	Mr. S. K. Banerjee, Advocate	]

Order pronounced on 22/10/2018

ORDER

1. CA (IB) No. 365/KB/2018, CA(IB) No. 807/KB/2018 and Misc. A. No. 220/KB/2018 are taken together for

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convenience and for avoiding repetition of facts and since the questions for determination are similar in nature.

2. C.P. No. 173/KB/2017 was filed by Berger Paints India Ltd./ operational creditor u/s. 9 of the Insolvency and Bankruptcy Code, 2016 (In short, **I & B Code, 2016**) for initiating Corporate Insolvency Resolution Process (In short, **CIRP**) as against the Precision Engineers & Fabricators Pvt. Ltd./corporate debtor.

3. By an order dated 04/04/2017, the application of the operational creditor was admitted and Resolution Professional was appointed. On successful completion of CIRP, at the instance of the Resolution Professional, Mr. S. M. Gupta, Resolution Plan submitted by one Mr. Gurdeep Singh Sahni, a Promoter Director and shareholder of the corporate debtor has been approved by the Committee of Creditors (In short, **COC**) and in turn approved by the Adjudicating Authority vide order dated 01/02/2018.

4. The Resolution Applicant, who has taken over the assets of the corporate debtor on the strength of the Resolution Plan, allegedly did not comply with the terms stipulated in the Plan and failed in performing his part of the obligation. It is alleged that despite repeated reminders made by the applicant, Axis Bank, in CA (IB) No. 220/KB/2018, the Resolution Applicant did not comply with the terms which should have been complied with within 30 days of the date of approval of Resolution Plan, and thereby CA (IB) No. 220/KB/2018 was filed u/s. 33(3) of the I & B Code, 2016.

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5. The applicant alleged that the Resolution Applicant/corporate debtor acted in contravention of the Resolution Plan. According to the Ld. Sr. Counsel appearing for the Axis Bank, despite assuring to provide margin for Bank Guarantee to the applicant/Axis Bank, the corporate debtor has failed and neglected to provide the same and has not taken any steps for implementation in terms of the approved Resolution Plan and according to him the Resolution Plan is not likely to be implemented by the corporate debtor and the Resolution Applicant has no means to pay all the debt as per the terms and prays for passing an order of liquidation.

6. The applicant in CA (IB) 365/KB/2018 is one of the financial creditors, L & T Finance Ltd. The L & T Finance Ltd. has contended that Rs.28,76,08,127/- is the admitted amount due to the applicant. As per the terms in the Resolution Plan, the applicant agreed to receive Rs. 9 Crores (Rupees Nine Crores) only from Resolution Applicant. As per the terms agreed between the applicant and the Resolution Applicant, an upfront payment of Rs. 2 Crores was to be paid to the applicant immediately after approval of the Resolution Plan and further payment of Rs. 7 Crores was to be made on deferred basis. However, after the expiry of more than 30 days, since the approval of the Resolution Plan, the corporate debtor made payment of only a sum of Rs. 25 Lakhs but failed and neglected to make payment of the remaining amount. Despite demand for payment of the balance amount, the corporate debtor has only paid an additional amount of Rs. 15 Lakhs, thereby a sum of Rs.

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1.60 Crores still remains due and payable towards agreed upfront payment of a sum of Rs. 2 Crores, thereby the corporate debtor failed to make the payment as per the approved Resolution Plan. Upon the said contentions, the applicant also joints with the Axis Bank, contends that the corporate debtor would not perform his part of obligation even if further time is granted and prays for initiating liquidation proceeding against the corporate debtor.

7. The respondent / corporate debtor/resolution applicant contends that all the applications are not maintainable and according to the corporate debtor, the Resolution Plan submitted to the Committee of Creditors, approved by 100% vote share and thereafter approved by the Adjudicating Authority is absolutely binding on all the stakeholders involved in the Resolution Plan and that the corporate debtor could not perform certain part of obligations only because of breach of terms by one of the creditors, i.e., Phoenix ARC Private Ltd., who has committed breach in performing its part of obligation as per terms of the Resolution Plan and thereby unable to pay off the debt agreed to be paid to the Axis Bank.

8. According to the Ld. Counsel appearing for the corporate debtor, Phoenix ARC Private Ltd. has not taken over the agreed debt of Axis Bank of Rs. 9.5 Crores in spite of being obliged to do so under the approved Resolution Plan and according to him, the Resolution Applicant is taking all the necessary steps to enforce the obligations of Phoenix ARC Pvt. Ltd. and has filed an interim application u/s. 74(3) of the Code.

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9. The respondent also contends that the corporate debtor has already provided 100% cash margin for continuance of live Bank Guarantees lying with the applicant and that the only obligation he, allegedly could not perform is the non-payment of debt due to the Axis Bank due to the fault on the side of the Phoenix ARC Private Ltd. According to the corporate debtor, the breach is committed by the Phoenix ARC Pvt. Ltd. and not by the corporate debtor as such and that the corporate debtor is trying to comply with the terms as agreed in the Resolution Plan and the applications are liable to be dismissed.

10. Heard Mr. Joy, Saha, the Ld. Sr. Counsel, appearing for the Axis Bank, Ms. Ishani Sengupta, the Ld. Counsel for the L & T Finance Ltd., Mr. Abhrajit Mitra, the Ld. Sr. Counsel for the Resolution Applicant/Corporate Debtor. Perused the records.

11. The applicants, Axis Bank and the L & T Finance Ltd. contend that in terms of the agreement entered into between the Resolution Applicant and the Bank, the amount agreed to be paid to the Axis Bank is to the tune of Rs. 9.5 Crores, which is to be paid by the Phoenix ARC Pvt. Ltd. by taking over the debt of Axis Bank and in respect of L & T Finance Ltd., the applicant agreed to pay Rs. 9 Crores and out of that debt an upfront payment of Rs. 2 Crores was to be paid immediately upon the approval of the Resolution Plan and the balance amount to be paid on deferred basis as per clause no. C (14) (iv) of the Executive Summary of the Resolution Plan.

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12. Admittedly, the Phoenix ARC Pvt. Ltd., though agreed to take over the debt to the tune of Rs. 9.5 Crores of the Axis Bank, did not take over the same. According to the Ld. Sr. Counsel for the Corporate Debtor, it is why the Corporate Debtor failed to pay the upfront amount of Rs. 2 Crores as agreed to be paid to the L & T Finance Ltd. When the applications were heard on 09/10/2018, it was submitted that subsequent to the filing of these applications, some amount has also been paid by the corporate debtor to L & T Finance Ltd., and the total amount so far paid was Rs. 75 Lakhs, leaving a sum of Rs. 1.25 Lakhs due, which would have been paid within 30 days of the approval of the Resolution Plan. Further, at the time of arguments, Ld. Sr. Counsel appearing for the corporate debtor submits that if one month's time is granted, the corporate debtor should pay the remaining balance amount payable to the L & T Finance Ltd. However, he is silent regarding the agreed amount to be payable to Axis Bank to the tune of Rs. 9.5 Crores. According to the Ld. Sr. Counsel appearing for the corporate debtor, that amount could not be paid only because of the failure on the side of the Phoenix ARC Pvt. Ltd., who has agreed to take over the debt and since as per the terms of the Resolution Plan, the obligations on the side of the Phoenix ARC Pvt. Ltd. is not performed, as such the Resolution Applicant has filed an interim application u/s. 74(3) of the I & B Code, 2016 against Phoenix ARC Pvt. Ltd. Upon the said contentions the Ld. Sr. Counsel appearing for the corporate debtor sought dismissal of all the applications and attempted to show that the Resolution Applicant is ready and willing to perform his part of obligations.

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According to him, all the stakeholders, who are participants in the Resolution Plan, are also statutorily liable for performing their part of the obligation and to see that the Resolution Plan is to be enforced so as to see that the corporate debtor is a going concern. According to him, Resolution Applicant may be given one more opportunity to try his level best to perform his part of the obligation.

13. The Ld. Sr. Counsel appearing for the Axis Bank has objected the very same submissions and submits that the Resolution Applicant failed in complying with the terms in the Resolution Plan and is not showing any deliberate attempt on his side, other than providing the Bank Guarantee and hence giving one more opportunity may not serve any purpose.

14. As described earlier, upon successful completion of Corporate Insolvency Resolution Process (CIRP), the application was admitted as per order dated 4th April, 2017. Mr. S.M. Gupta has been appointed as Resolution Professional. The Committee of Creditors has been formed (the voting ratio has been amended subsequently, Ref. COC Meeting minutes dated 29.10.2017) with Axis Bank (42.83%), Union Bank of India (20.90%) and L&T Finance (36.27%). A Resolution Plan was approved by 100% vote share of the members of the CoC.

15. This resolution is based on the premise that one of the ARC has expressed its interest to take over the debts of Axis Bank at One Time Settlement amount of Rs.9.50 Crores and Rs.0.50 Crores additional funding towards working capital.

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As such the resolution applicant has incorporated plan for One Time Settlement of liabilities of Axis Bank by the ARC while preparing this resolution plan.

16. In the above said background, let me see what are the terms agreed to be fulfilled by the Resolution Applicant. To understand the terms, it is good to read the relevant terms agreed between the Creditors and the Resolution Applicants. The relevant terms summarized in the Resolution Plan under the head "**Executive Summary**" read as follows:

Union Bank

17. The outstanding liability to Union Bank has been agreed upon to be continued through part restructuring and settlement.

18. Total repayment period is taken as 10 years including 2 years interest and instalment moratorium whereby the Company will serve the interest of fund based loans and instalments of FITL 1, FITL 2 and interest of FITL 3.

19. There will be single rate of interest of 9% for all the facilities. 11% Margin for all Non Fund based facilities with 1% processing charges.

20. The interest payable on the Cash Credit, Term Loan and WCTL during the 2 years moratorium period and the overdue amount of cash Credit and invoked Bank Guarantee amount of Rs.0.27 Crore invoked and already paid by the Bank will be converted to fresh FITL 3 and the Company will serve interest during first 2 years on the same.

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Axis Bank

21. The liabilities of the Axis Bank will be settled through One Time Settlement payments of Rs.9.50 Crores by an ARC. Loan taken over as such along with additional funding to the tune of Rs.0.50 crores would be converted into Term Loan of Rs.10 Crores.

22. All the live Bank Guarantees should be replaced before implementation of the plan or it may continue against 100% cash margin. The approximate amount of live Bank Guarantees with the Bank if Rs.42 lakh. Present margin lying will be adjusted.

L&T Finance Limited

23. L&T Finance is an unsecured creditor and in the event of liquidation no amount is due to them as the liquidation value is not enough to serve the admitted claims of the secured creditors. L&T Finance holds more than 35% of share in voting power of the CoC. As such in the interest of resolution of the Corporate Debtor and to save the job/ livelihood of more than 300 employees, resolution applicant proposes to pay Rs.9 crores to L&T Finance through a yearly payment of Rs.2.33 crores starting from the year 2018-19 upto the year 2020-21 after an initial payment of Rs.2.00 crore immediately after approval of Resolution Plan. No other payments towards interest or otherwise will be paid apart from the amount proposed as above.

24. The Axis Bank and L&T Finance Limited are the Financial Creditors who came forward with the above

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referred applications alleging contravention of the above stated terms by the Resolution Applicant and despite demands to discharge the upfront amounts, the Resolution Applicants did not act upon the demands and did not fulfil its part of obligations and according to the Ld. Counsels appearing for the applicants, there is no likelihood of acting in accordance with the terms of Resolution Plan by the Resolution Applicant.

25. The admitted amount due to the Axis Bank come to Rs.33.96 crores, to the Union Bank of India, Rs.16.56 crores and to the L&T Finance Limited comes to Rs.28.76 Crores. As per the mutual understanding, the Axis Bank agreed to settle through one time settlement by way of take over of debt by Phoenix ARC by payment of Rs.9.50 crores. The amount of dues have been primarily settled in between the Axis Bank and the Resolution Applicant referred to above. Regarding the L&T Finance Limited, the settlement comes as per the following terms:

26. The only argument advanced on the side of the Corporate Debtor is that regarding the debt accrued to be paid to the L&T, it needs further time and that if one month's time is further provided, he will pay the agreed amounts to be paid to L&T Finance Limited. According to the Ld. Counsel appearing for the L&T Finance Limited, an amount of Rs.75 lakhs alone so far is received and it showed unwillingness to grant further time to pay the balance amount. So the balance upfront amount without interest due to L&T Finance Limited is about 1.25 Crores. The said circumstances do not at all satisfy me that even if time is

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granted, the Corporate Debtor can raise fund and pay off the liability as per the terms in the Resolution Plan.

27. The Resolution Plan was approved on 1st February 2018. Seven months have lapsed from the date of approval of the Resolution Plan and till date, he was not in a position to pay the upfront amount to the tune of Rs.2 crores to the L&T Finance Limited. Not even half of the amount is seen tendered or paid. Therefore, the request for granting further time also would not serve any purpose. In the above said circumstances, I do not find any justifiable reasons to grant further time to discharge the debt as agreed between the Resolution Applicant and the L&T Finance Limited and, therefore, the prayer for granting further time is not accepted.

28. In respect of discharge of liability as agreed between Axis Bank and the Resolution Applicant, the objection raised on the side of the Corporate Debtor/Resolution applicant is that the Corporate Debtor/Resolution Applicant has filed an application under Section 74 Sub-Section 3 of the Code alleging that the Phoenix ARC Limited who is bound by the terms of the Resolution Plan knowingly and wilfully contravened the terms agreed into by way of take over of debt to the tune of Rs.9.50 crores due to Axis Bank. Stressing the filing of the said application, Ld. Sr. Counsel for the Corporate Debtor submits that non-payment of agreed amount to Axis Bank is not a fault of the Corporate Debtor and since he has taken action against the defaulting creditor who has agreed to take over the debt, it cannot be held that he had contravened the terms as alleged.

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29. The remedy available to the Resolution Applicant as against the defaulting creditor who agrees to take over the debts of Axis Bank cannot be an assurance to be accepted from the side of the Resolution Applicant that he will fulfil the terms provided the alleged defaulting creditor would perform his part of the obligation. It is not a valid ground that can be taken in a case of this nature. The Corporate Debtor has not only defaulted the terms as agreed with the Axis Bank but also defaulted the terms agreed between L&T Finance Limited and Union Bank of India. Union Bank of India too filed CA (IB) No. 674/KB/2018 alleging default of the terms and conditions of the Resolution Plan and sought for a recall of the order. According to the Union Bank Of India, the Corporate debtor suppressed material facts regarding a winding up petition admitted by the Hon'ble High Court at Calcutta in C.P.No.487 of 2016 and hence admission of the CP(IB) No.173/KB/2017 is bad in law and illegal and on the said ground it applied for recalling the order of admission. That CA being heard separately, I am not going to discuss the facts in issue in the said application in this application. However, the Union Bank of India also alleged that the Corporate Debtor violated the terms and conditions of the Resolution Plan. The default alleged by the Union Bank of India also was not denied by the corporate Debtor.

30. It is significant to note here that CP 487 of 2016 filed before the Hon'ble High Court at Calcutta for initiating winding up proceedings as against the Corporate Debtor was admitted by an order dated 23rd March, 2017 and

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thereafter by an order date 7th February, 2018, the Corporate Debtor Company was ordered to be would up and the Official Liquidator was directed to take possession of the assets of the company. These facts truly were not brought to the notice of this Adjudicating Authority by any one of the parties inclusive of Union Bank Of India who filed a belated application for recall of the order of admission dated 4th April, 2017. At this juncture, Ld. Sr. Counsel for the Corporate Debtor has submitted that the order dated 7th February, 2018 was stayed by the Hon'ble High Court at Calcutta by order dated 18th May, 2018 in CA 90 of 2018 in CP 487 of 2016.

31. A reference to the order referred to above, it is understood that the Hon'ble High Court at Calcutta considered the approval of the resolution plan and the undertaking offered to repay the debt due to the petitioners/creditors in the said CP, permitted the Corporate Debtor to apply for recalling the order subject to honouring its payment obligations as agreed to between the parties in the scheme of settlement. If it failed, the order dated 7th February, 2018 should revive. No data is seen available to show that the Corporate Debtor has fulfilled the terms so as to enable it to recall the order of winding up.

32. It is also significant to note that both L&T Finance Limited and Axis Bank had more than 50% haircut so as to provide the opportunity to the Resolution Applicant to take over the assets of the Corporate Debtor and to run it as a Company of its own. Being failed in its attempts to repay the agreed amount as agreed in the Resolution Plan and as

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agreed in the scheme referred to in the above referred CP 487 of 2017, it appears to me that extending time to pay the defaulted amounts in violation of the terms of the Resolution Plan will not fulfil any purpose.

33. At this juncture, one another argument was advanced on the side of the Corporate Debtor / Resolution Applicant that Axis Bank has no *locus standi* to file an application of this nature under Section 3 sub-section 30 of the Code because the interest of the Axis Bank is not at all prejudicially affected for the alleged default on the side of the Resolution Applicant. According to him, the debt due from the Corporate Debtor to the Axis Bank limited to the OTS agreed to be taken over by the Phoenix ARC and Phoenix ARC is the defaulter and, therefore, the applicant Axis Bank has no cause of action against the Corporate Debtor. The said contentions raised on the side of the Corporate Debtor seems to have no force at all because Axis Bank is the creditor to whom the amount is due and found payable, as on the date of CIRP which comes to Rs.33.96 crores. However, the creditor agrees to settle the liability through one time settlement within the stipulated period fixed in the Resolution Plan. Therefore, in case of failure on the side of another creditor who has agreed to take over the debts, the Corporate Debtor is obliged to discharge the debt, otherwise the purpose of settlement will be defeated. Therefore, the contention that Axis Bank has no *locus standi* to file an application of this nature is found devoid of any merit.

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34. The above said discussions lead to a conclusion that the Corporate Debtor / Resolution Applicant has contravened the provisions of the Resolution Plan. Being satisfied that the provisions of the Resolution Plan have been contravened, and being convinced that granting time would not fulfil any purposes so as to see that the Corporate Debtor is continued as a going concern, it appears to me that I have no other alternative other than to pass liquidation order as referred to under Sub Clause (I) (ii) and (iii) of Clause (b) of Sub-Section (1) of Section 33 of the I&B Code. Accordingly, I am doing so.

35. It is submitted on the side of the Resolution Professional that due to ill health, he may be replaced with any other resolution professional for continuing liquidation process. Accordingly, he is relieved subject to his right to claim his remuneration and resolution cost as on the date of relieving the charge as a Resolution Professional in accordance with the provisions of the Code and Regulations. Hence, Mr. Rasik Singhania is to be appointed. He is directed to submit his willingness along with Form 2 with written communication within one week of the date of acceptance of the appointment as a Liquidator. The starting period of Liquidation is to be counted from the date of acceptance of the order of appointment issued to him.

36. Accordingly, the order of liquidation is passed upon the following orders:

Sd

ORDER

37. Mr. Rasik Singhania, Registration No. IBBI/IPA-001/IP-P00390/2017-18/10708, E-mail: rasik.singhania@gmail.com, Telephone no. 94331 46020 is appointed as the Liquidator in CP (IB) No.173/KB/2017.

38. Mr. Rasik Singhania is directed to issue public announcement in one of the leading English newspapers as well as in one vernacular newspaper having wide circulation where the registered office of the corporate debtor is situated as per section 33(1)(b)(ii) of the Code read with Regulation 12(1) of IBBI (Liquidation Process) Regulations, 2016.

39. The Registry is directed to communicate this order to the Registrar of Companies, West Bengal and to the Insolvency and Bankruptcy Board of India (IBBI), New Delhi.

40. An Order of Moratorium is hereby passed under Section 33(5) of the Code.

41. This order is deemed to be a notice of discharge to the officers, employees and the workmen of the Corporate Debtor as per Section 33(7) of I & B Code, 2016.

42. The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of the Insolvency and Bankruptcy Code, 2016.

43. Upon proceeding with the liquidation, the Liquidator shall file a ***preliminary report*** as per Regulation 5 read with Regulation 13 of the IBBI (Liquidation Process)

Sd

Regulations, 2016 at the Registry within 75 days from the liquidation commencement date and continue to file ***progress reports*** as per Regulation 15(1) within 15 days after the end of the quarter in which he is appointed.

44. The fee payable to the Liquidator shall form part of the liquidation cost as provided under Reg. 4(1) of the IBBI (Liquidation Process) Regulations, 2016.

45. All the CAs and Misc. Application along with the CP is closed accordingly.

46. The copy of this order is to be sent to the Liquidator, financial creditor and corporate debtor for information and for taking necessary steps.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

Sd
22/10/18
(Jinan K.R.)
Member (J)

Signed on this, the 22nd day of October, 2018.

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