

**NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

C.P. (IB) 43/KB/2022.

*A petition 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*

In the matter of:

IL&FS Financial Services Limited, a company within the meaning of Companies Act, 2013 having CIN: U65990MH1995PLC093241 and having its registered office at The IL&FS Financial Centre, 8th Floor, Plot C- 22 G Block, Bandra Kurla Complex, Bandra (East), Mumbai- 400021, Maharashtra.

..... *Financial Creditor/ Petitioner*

-versus-

Attivo Economic Zone (Mumbai) Private Limited, a company within the meaning of Companies Act, 2013 having CIN U45400WB2008PTC224115 and having its registered office at IPCL Building, Plot No. X-1, 2 & 3 Block – EP, Sector – V, Salt Lake City, Kolkata - 700091, West Bengal.

..... *Corporate Debtor/ Respondent*

Date of Pronouncement of the order: 09 June 2023

Coram:

Rohit Kapoor, Member (Judicial)

Balraj Joshi, Member (Technical)



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Appearances (via video conferencing/physical):

For the Financial Creditor:

Mr. Rishad Medora, Adv.
Ms. Ramya Hariharan, Adv.
Ms. Asmita Rakhecha, Adv.
Mr. Soumyajit Saha, Adv.

ORDER

Rohit Kapoor, Member (Judicial):

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code”) by **IL&FS Financial Services Limited**, hereinafter referred to as “*Financial Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Attivo Economic Zone (Mumbai) Private Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 19 December 2008. The authorized share-capital of the company ₹10,00,000/- and the paid-up share capital of the company is ₹2,05,000/-.
4. The total amount claimed to be in default by the Financial Creditor, is ₹5,04,90,34,231/- (Rupees Five Hundred Four Crore Ninety Lakh Thirty-Four Thousand Two Hundred Thirty-One Only). The date of default is 01 October 2018.
5. The Financial Creditor has relied on the various documents in support of its claims, including:
 - a) Loan Agreement dated 04 August 2017, annexed as Exhibit “A”;

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- b) Loan Agreement dated 22 March 2018, annexed as Exhibit “J”;
- c) Demand Notice dated 30 October 2018, annexed as Exhibit “Q”;
- d) Reply to the demand notice dated 02 November 2018, annexed as Exhibit “R”.

6. Averments contained in petition filed by Financial Creditor are summarized as under:

- 6.1 Corporate Debtor and the Financial Creditor executed a loan agreement dated 11 August, 2017 whereby a term loan facility of a sum of upto ₹1,50,00,00,000/- (Rupees One Hundred and Fifty Crores only) was sanctioned to the Corporate Debtor. Out of the sanctioned amount, a sum of ₹1,10,00,00,000/- (Rupees One Hundred and Ten Crores only) was disbursed by the Financial Creditor to the Corporate Debtor on 23 August, 2017 by RTGS.
- 6.2 Thereafter, pursuant to offer letter dated March 14, 2018, the Corporate Debtor and the Financial Creditor executed another loan agreement dated 22 March, 2018 whereby a term loan facility to the tune of ₹1,95,00,00,000/- (Rupees One Hundred and Ninety-Five Crores only) was sanctioned to the Corporate Debtor. The entire sanctioned amount was disbursed to the Corporate Debtor on 31 March 2018 by RTGS.
- 6.3 The sum disbursed under the first loan agreement was to be repaid in three (3) equal monthly installments at the end of the 35th, 36th and 37th month from the date of first drawdown *i.e* on 23 July, 2020, 23 August 2020 and 23 September 2020, respectively.



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- 6.4 The sum disbursed under the second loan agreement was to be repaid in three (3) equal monthly installments at the end of the 35th, 36th and 37th month from the date of first drawdown *i.e* on 28 February, 2021, 31 March 2021 and 30 April 2021, respectively or on the exercise of Put/Call Option. It was further decided that in the event of default in repayment of the said installments, the Financial Creditor would have the option to recall the whole or part of the principal amounts of the said loans as well as the interests accrued thereon and any other monies payable by the Corporate Debtor.
- 6.5 Due to the defaults committed by the Corporate Debtor with respect to the various terms of both the loan agreements, the Financial Creditor issued a demand notice dated 30 October 2018 on the Corporate Debtor, thereby demanding repayment of the overdue sums, no later than seven (7) days from the delivery of the sad notice.
- 6.6 Despite the same, the Corporate Debtor failed to repay the overdue sums and did not cure any of the defaults pointed out in the demand notice.
- 6.7 Consequently, the Financial Creditor vide separate letters, both dated 20 November 2018, issued Put Option Notices and thereby demanded the repayment of the put option amounts. The Corporate Debtor has failed to repay the put option amounts pertaining to the facilities, or any part thereof.

7. Stand taken by Corporate Debtor in its reply affidavit is summarized hereinafter:

- 7.1 The total amount sanctioned to it by the Financial Creditor was ₹3,45,00,00,000/- (Rupees Three Hundred and Forty-Five Crores only). However, the entire sanctioned amount was never disbursed to it. As a



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result, it could not complete the project and suffered huge loss and damage. As such, the claim of the Financial Creditor being ₹5,04,90,34,231/- is highly inflated and absurd.

7.2 The only assets of the Corporate Debtor are the lands admeasuring 340.025 Acres situated at villages (1) Dehenkoni (2) Dhuwadkhar (3) Kalwadkhar (4) Shahabaj, Taluka Alibaug, District Riagad, Maharashtra. The aforesaid assets of the Corporate Debtor is mortgaged with SREI Equipment Finance Limited (SEFL) against a loan sanctioned by SEFL in favour of the Corporate Debtor, amounting to ₹1070,00,00,000/- and out of the same, a sum of ₹ 7,86,51,00,000/- has been disbursed. It is further mentioned that as on 31 March 2022, the principal outstanding of the said loan interest stands at ₹7,88,01,00,000/- .

7.3 The Financial Creditor is a 100% subsidiary of Infrastructure Leasing and Financial Services Limited (IL&FS). Also, IL&FS Transportation Networks Limited (ITNL) is another wholly owned subsidiary of IL&FS. ITNL was sanctioned a loan of ₹200,00,00,000/- (Rupees Two Hundred Crore Only) by SREI Infrastructure Finance Limited (SREI) *vide* Sanction Letter dated 20 March 2018. The said loan provided by SREI to ITNL is outstanding as on date. The entire outstanding loan of ITNL was assigned by SREI to the Corporate Debtor herein (assignee in the agreement) under a deed of assignment dated 23 March 2020 (hereinafter referred to as "Assignment Agreement") together with all its rights, title and interest in the financing documents executed between ITNL and SREI. Therefore, the Corporate Debtor has stepped in the shoes of SREI and upon such assignment, therefore, the Respondent Corporate Debtor stands subrogated in its place.

7.4 Thus, it is apparent from the above that the Corporate Debtor is entitled to certain sum of money aggregating to ₹ 2,07,82,00,000/- and interest

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accrued on such amount payable in terms of the financing agreement executed by ITNL till payment. Since the Financial Creditor and ITNL are same group companies of IL&FS, which have reciprocal rights and obligations vis-à-vis the Corporate Debtor, the Corporate Debtor claims equitable and legal set-off of the alleged dues to the Financial Creditor against the money owed to the Corporate Debtor by ITNL.

7.5 The Corporate Debtor can be relieved of the alleged claim by the Financial Creditor if the set-off is allowed against the money due and payable to the Corporate Debtor from the same set of group entities. Such set-off shall also allow ITNL to pare its debts qua the Corporate Debtor.

7.6 No set-off will be possible if the CIRP is initiated, however, it is not the scenario as only an application has been filed to initiate CIRP and the amount can be mutually set-off against each other.

8. Rejoinder on behalf of the Financial Creditor:

8.1 It is submitted that the averments in the reply affidavit filed on behalf of the Corporate Debtor have not been verified in accordance with law and as such, no reliance should be placed on the said affidavit.

8.2 Further, the Corporate Debtor has suppressed material facts from the Adjudicating Authority. It is submitted that the entire sum sanctioned to the Corporate Debtor *vide* both loan agreements, was disbursed by the Financial Creditor.

8.3 It is further submitted that the Corporate Debtor has admitted to its liability in letter dated 02 November 2018 addressed to the Financial Creditor.

8.4 Further, it is submitted that the Corporate Debtor is not entitled to the set-off claimed by it. The transactions between the Financial Creditor and the Corporate Debtor has no connection whatsoever with the alleged

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transactions between ITNL, SREI and the Corporate Debtor. Hence, the question of set-off does not arise in the prevailing circumstances.

9. Supplementary Affidavit on behalf of the Corporate Debtor:

8.1 The instant supplementary affidavit has been filed on behalf of the Corporate Debtor to bring on record the following judgments passed by the Hon'ble National Company Law Appellate Tribunal (NCLAT):

- a. *Union of India vs. Infrastructure Leasing & Financial Services Ltd. & Ors¹*;
- b. *Union of India vs. Infrastructure Leasing & Financial Services Ltd. & Ors²*.

10. Analysis and Findings:

10.1 Heard the Ld. Counsel for the Financial Creditor and perused the record. Before proceeding further, it requires to be mentioned that the Corporate Debtor was set *ex parte* by this Adjudicating Authority on 09 January 2023 after its repeated non-appearance.

10.2 On 17 November 2022, the Ld. Counsel on behalf of the Corporate Debtor stated that it intends to settle the matter with the Financial Creditor. However, on the next date *i.e* 16 December 2022, no one appeared on behalf of the Corporate Debtor, and it was stated by the Ld. Counsel on behalf of the Financial Creditor that no settlement has taken place. The matter was posted for the next date on 09 January 2023 for the appearance

¹ Company Appeal (AT) No. 346 of 2018 with I.A. No. 3616, 3851, 3860, 3962, 4103, 4249 of 2019; I.A. No. 182, 185 of 2020 with Company Appeal (AT) No. 347 of 2018 with I.A. No. 3850, 3859 of 2019 with Company Appeal (AT) No. 256 of 2019

² I.A. No. 586 of 2022 in Company Appeal (AT) No. 346 of 2018.

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of the Corporate Debtor. However, again on 09 January 2023, no one appeared on behalf of the Corporate Debtor, and thus the Corporate Debtor was set *ex- parte* in terms of order dated 16 December 2022 wherein it was mentioned that if on the next date there is no representation by or on behalf of the Corporate Debtor, the instant petition will be heard accordingly. Further, on 09 January 2023, the matter was posted for hearing on 08 February 2023. There was no representation on behalf of Corporate Debtor. The matter was posted on 15 March 2023 and again none appeared on behalf of the Corporate Debtor. Thereafter on 12 April 2023, none appeared for the Corporate Debtor and after hearing the arguments of the Financial Creditor, the instant matter was reserved for final orders.

- 10.3 We have perused and considered the stand taken by Corporate Debtor in its Reply - Affidavit. The first contention of the Corporate Debtor in its Reply – Affidavit is regarding the quantum of the amount in default. It is contended that the sum of ₹504,90,34,231/- claimed by the Financial Creditor is inflated as it failed to disburse the entire sanctioned amount to the Corporate Debtor because of which the Corporate Debtor was unable to finish his project and suffered great monetary loss. The said contention of the Corporate Debtor, made in the Reply- Affidavit in Paragraph 6 (a), has been reproduced hereunder:

“The Respondent / Corporate Debtor, in the present matter, approached the Applicant Financial Creditor for disbursal of a loan amount to the tune of Rs. 150,00,00,000 and Rs. 195,00,00,000/- (total being Rs. 345,00,00,000/-) for the purpose as mentioned in the Offer Letter dated August 4, 2017 and March 14, 2018



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respectively. However, it is pertinent to mention that the entire loan amount that was sanctioned by the Respondent / Corporate Debtor for the purposes mentioned in the Offer Letter was never disbursed-to-the- Respondent/Corporate Debtor. Due to such shortfall in the disbursement, the Corporte Debtor could not complete its project and suffered huge loss and damage. The Fincacial Creditor claim of Rs. 504,90,34,231/- is highly inflated and absurd as the entire sanctioned amount was not disbursed by the Financial Creditor.) Non-disbursal of the amount committed under the financing documents shall also tatamount to breach of the commitment of the Financial Creditor under the financing documents.”

10.4 While dealing with this plea, we would like to rely on the recent decision by Hon’ble NCLAT in the matter of **N.K. Kurian vs. Kosamattom Finance Limited**³, wherein the Hon’ble Appellate Tribunal has held that:

“22. Under the Insolvency and Bankruptcy Code, 2016, the shift is from inability to pay, to the existence of a Default. A mere ‘Dispute’ about the quantum of payment, does not infringe the right of a ‘Financial Creditor’, to prefer an Application under Section 7 of the I & B Code. Even though a ‘Debt’ is disputed, if it is more than Rs.1/- crore (after Amendment to the Code) and where the minimum sum of Default is one lakh (prior to Amendment), the Application /Petition filed by the

³ Comp. Appeal (AT) CH (INS) No. 88 of 2023

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concerned party/ entity/organization/ Bank etc., is to be admitted and there is no escapade on that, as opined by this Tribunal.

23 It is aptly pointed out by this Tribunal, that the circumstance under which the 'Corporate Debtor', is not able to repay the 'Financial Debt', need not be taken as a 'Defence', in a proceeding under the Code. The reason for incapacity/inability of a 'Corporate Debtor', to pay its 'Debt', is not required to be gone into/looked into by an 'Adjudicating Authority'/ 'Tribunal', in the considered opinion of this 'Tribunal'."

In **N.K. Kurian** (supra), the hon'ble NCLAT has further been held that:

39. It cannot be gainsaid that, even if a portion of the debt due and payable is tacitly admitted by a 'Corporate Debtor'/company and it comes within the threshold sum of the default of Rs.1 crore, as per (Section 4 (1) of I & B code, 2016 vide chapter 1 preliminary part 2) then, the Adjudicating Authority/Tribunal, is endowed with a subjective discretion, to admit the Section 7 Application filed by a party under the I & B Code, 2016 once the 'Debt and Default' are proved, to its satisfaction."

- 10.5 It is to be noted that in paragraph 10 of the Reply- Affidavit, the Corporate Debtor, in the process of disputing the claimed amount, has admitted that a certain amount was sanctioned and disbursed to it by the Financial Creditor. The Corporate Debtor has further admitted to its liability to the tune of ₹3,05,00,00,000/- towards the Financial Creditor vide letter dated

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02 November 2018 which is annexed to the petition at page 291. The said acknowledgement is extracted hereinbelow:

Textual information (37)

Disclosure of notes on borrowings explanatory [Text Block]

LONG TERM BORROWINGS			
Particulars	As at 31st March, 2020	As at 31st March, 2019	
Rs.	Rs.		
12.5% Redeemable Unsecured Non-Convertible Debentures	-	2,000,000,000	
Term Loan-Secured			
From Public Financial Institutions	-		
From Others		8,980,962,000	4,834,700,000
Total	8,980,962,000	6,834,700,000	
a) Nature of Securities			
Term loan from others of Rs. 5,924,462,000/- is secured by way of first charge on immovable and movable assets, both present and future, of the Project. Interest payable quarterly in arrears. Term Loan from others of Rs. 3,050,000,000/- to be secured by way of pari passu second charge on immovable and movable assets, both present and future, of the Project. Interest payable quarterly in arrears.			
b) Terms of Repayment			
Name of the Entities	Amount outstanding as on 31st March, 2020	Amount outstanding as on 31st March, 2019	Terms of Repayment
Rs.	Rs.		
Srei Infrastructure Finance Limited - Term Loan	4,316,362,000	550,000,000	In three equal annual instalments commencing from 30th June, 2020
Srei Equipment Finance Limited - Term Loan	1,614,800,000	1,234,700,000	In four equal quarterly instalments on 1st April 2027, 1st July 2027, 1st October 2027 and 1st January 2028.
Infrastructure Leasing & Financial Services Limited - Term Loan	3,050,000,000	3,050,000,000	In three equal instalments on 23rd June, 23rd July and 23rd August 2020
Srei Infrastructure Finance Limited - Debentures		2,000,000,000	In three equal instalments on 31st March 2019, 2020 and 2021.
As of 31st March, 2020, certain transactions were recorded in the books of accounts and financial instruments were received against availment of loans from financial institutions, and financial instruments were			



10.6 Considering the clear admission of liability of the Corporate Debtor, as well as the judgment, it is clear to us that there was disbursement of debt to the Corporate Debtor, and it has committed default in the repayment of its debt to the Financial Creditor.

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- 10.7 The second contention of the Corporate Debtor is that since a debt is due from ITNL, a subsidiary of IL&FS, and the Financial Creditor is also a 100% subsidiary of IL&FS, the Corporate Debtor should be allowed to set-off the debt due from ITNL against the debt due from it to the Financial Creditor.
- 10.8 The aforementioned plea has been raised by Corporate Debtor in paragraph 6 clauses (c), (d) and (f) of the Reply - Affidavit. From perusal and consideration of stand taken therein by the Corporate Debtor, the set-off sought to be claimed is not forthcoming out of the same transaction or connected with the same loan transaction as relied upon by the Corporate Debtor. The debts in question are not connected in such a way to make it equitable for this Adjudicating Authority to allow the claim of set-off. And therefore, plea of Corporate Debtor with respect to set off is hereby rejected.
- 10.9 While dealing with this issue, reliance is placed on the decision taken by the Hon'ble Supreme Court in the matter of *Union of India vs. Karam Chand Thapar and Ors. (Coal Sales) Limited and Ors.*⁴, wherein it was held that:

“18. What the rule deals with is legal set-off. The claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for

⁴ MANU/SC/0209/2004

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extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the Court to entertain and allow such plea or not to do so.”

- 10.10 Further, in ***Bhupendra Narain Singha Bahadur v. Bahadur Singh and Ors***⁵, the Apex Court again ruled that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction.
- 10.11 Lastly, regarding the question of the instant petition being within limitation period, we would like to note that the date of default for both the loan facilities is 01 October 2018. As such, the limitation period would ordinarily be over by 01 October 2021. However, it can be seen on page no. 291 of the petition that the Corporate Debtor has admitted to its liability towards the Financial Creditor in its balance sheet for the Financial Year ending on 31 March 2020. Considering the said acknowledgement, under section 18 of the Limitation Act, 1963, the limitation period would get extended by three (03) years and would finally be over on 31 March 2023. As such, the instant petition, having been filed on 15 December 2021, is well within the limitation period.
- 10.12 In light of the above-mentioned facts, circumstances and position of law, this Adjudicating Authority is satisfied that a financial debt of more than one Crore Rupees was due from the Corporate Debtor to the Financial

⁵ MANU/SC/0060/1952

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Creditor and the Corporate Debtor has committed a default in the payment of the same. And Financial creditor had a right to file this petition against the Corporate Debtor. As such, the instant petition deserved to be *admitted*.

10.13 The particulars of Interim Resolution Professional (IRP) have been proposed in the petition. The petition is within the period of limitation. As such, the instant petition is complete in all respects.

10.14 It is, accordingly, hereby ordered as follows:-

- a) The application bearing **CP (IB) No. 43/KB/2022** filed by **IL&FS Financial Services Limited** (*Financial Creditor*), under section 7 of the Code read with rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Attivo Economic Zone (Mumbai) Private Limited** (CIN U45400WB2008PTC224115), the Corporate Debtor, is *admitted*.
- b) There shall be a moratorium under section 14 of the IBC.
- c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) **Mr. Bimal Kanti Choudhury** having registration number **IBBI/IPA-001/IP-P01028/2017-18/11682**, email: bimalkantichoudhury@gmail.com is hereby appointed as



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Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Financial Creditor shall initially deposit a sum of ₹4,00,000/- (Rupees Four lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.



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- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
 - j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 11. CP (IB) No. 43/KB/2022** to come up on **10.07.2023** for filing the progress report.
- 12.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 9th day of June 2023

SM(LRA)