

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO:II**

SPECIAL BENCH(Video Conference)

**CORAM: HON'BLE MADAN BHALCHANDRA GOSAVI – MEMBER JUDICIAL
HON'BLE DR.BINOD KUMAR SINHA-MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 28.07.2021 AT 12:30 PM THROUGH VIDEO CONFERENCE**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) No.720/9/HDB/2019
NAME OF THE COMPANY	SSB Structural & Galvanising Pvt Ltd
NAME OF THE PETITIONER(S)	Bharat Industrial Corporation
NAME OF THE RESPONDENT(S)	SSB Structural & Galvanising Pvt Ltd
UNDER SECTION	9 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

Order pronounced in open court vide separate order.

CP (IB)No.720/9/HDB/2019 is admitted.

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Member(Technical)

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Member(Judicial)

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**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

**CP(IB) No. 720/9/HDB/2019
U/s. 9 of Insolvency & Bankruptcy Code, 2016
R/w Rule 6 of I & B (AAA) Rules, 2016**

In the matter of:

Bharat Industrial Corporation
Unit No.11, Technocrats Industrial Estate
Balanagar
Hyderabad – 500 037

.... Operational Creditor

Vs.

SSB Structural & Galvanising Private Limited
Plot No.900, Sy.No.229 to 246
B.N.Reddy Nagar, HCL Post
Cherlapally
Hyderabad – 500 051

... Corporate Debtor

Date of Order: 28.07.2021

Coram:

Hon'ble Shri. Madan B. Gosavi, Member (Judicial)
Hon'ble Dr. Binod Kumar Sinha, Member (Technical)

Parties / Counsels present:

For the Petitioner : Ms. Divya Datla, Mr. V. Basava Raju,
Mr. T. Uma Sankar, Ms. K. Prabhavathi,
Mr. M. Naga Deepak, Mr. Rohan Aloor,
Ms. Himangini Sanghi, Advocates

For the Respondent: Mr. V.K.Sajith, Mr. V. Ravi Kumar, Advocates

Heard on: 19.03.2021, 14.07.2021

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[Per: Bench]

ORDER

1. The instant Petition is filed by **Bharat Industrial Corporation/Operational Creditor** alleging that **M/s. SSB Structural & Galvanising Private Limited / Corporate Debtor** had defaulted an amount of **Rs.3,31,17,194/- (Rupees Three Crores Thirty One Lakhs Seventeen Thousand One Hundred and Ninety Four only)** which includes Principal amount of Rs.3,13,69,118/- and interest of Rs.17,48,076/- (Interest calculated @ 18% per annum from the due date i.e. on 17.03.2019).

Hence, this petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016, r/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

2. The averments of the petition filed by the Petitioner/Operational Creditor in brief are described hereunder:
 - i. It is averred that as per the Orders raised by the Corporate Debtor, the Operational Creditor made supplies of Zinc Ingots and raised invoices for an amount of Rs.3,13,69,118/- for the period from 22.01.2018 to 28.12.2018, which are shown as **Annexure-D at page nos. 35 to 77 of the petition.**
 - ii. When the said amount was not paid, the Operational Creditor got issued a Demand Notice dated 08.07.2019 in Form-3 by demanding to pay the total debt amount of Rs.3,31,17,194/- which includes

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principal of Rs. 3,13,69,118/- plus interest of Rs.17,48,076/- (interest calculated @ 18% p.a. from the due date i.e. on 17.03.2019) which was received by the Corporate Debtor on 15.07.2019. However, even on service of demand notice, the Respondent failed to send any reply within the statutory time period of 10 days to indicate either payment of debt or existence of dispute.

- iii. It is submitted that letters issued by the Corporate Debtor dated 31.03.2019 & 31.08.2019 seeking to confirm the balance as on 31.03.2019 & 31.08.2019 (**shown at page nos.83 and 91 of the application**) and inturn the Operational Creditor issued letter Ref.Nos. BIC/011/2019, dated 31.03.2019 & Letter Ref.No.BIC/05/2019, dated 31.08.2019 (**shown at page nos.84 and 92 of the application**) respectively confirming that an amount of Rs.3,13,69,118/- is due as per the books of accounts of the Operational Creditor and also shown the list of invoice details of the Corporate Debtor at **page no. 93 of the application**.
 - iv. It is submitted that a Bank Statement of Operational Creditor for the period from 01.04.2018 to 31.03.2019 is shown **at page nos. 94 to 156 of the application**.
 - v. It is averred that the outstanding amount due to the Operational Creditor have never been disputed by the Corporate Debtor in any manner whatsoever.
 - vi. It is averred that the Petitioner left with no further option, filed the instant petition.
3. The averments of the Counter dated 27.01.2020 filed by the Respondent/Corporate Debtor in brief are described hereunder:

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- a. It is averred that the application needs to be dismissed as –
- i. The Operational Creditor is a Proprietorship firm, which is not covered under the definition of person under Section 3(23) of the I&B Code, 2016 and relied on the **Order of Hon'ble NCLT, New Delhi dated 23.09.2019 in IB 722/ND/2019** in the matter of **RG Steels vs. M/s. Berrys Auto Ancillaries Pvt.Ltd.** held that a 'Sole Proprietary Concern' is not a person within the meaning of Section 3(23) of I&B Code, 2016 hence not entitled to initiate the insolvency proceedings before the Adjudicating Authority. It is also averred that Section 5(20) clearly says with respect to who is the Operational Creditor in that definition of person was not covered the present proprietorship firm and hence the present petition need to be dismissed and the applicant herein chosen a wrong door instead of filing a suit/criminal case filing the present application for recovery of the above alleged amount of debt and hence the same is need to be dismissed, it is against the provisions of the I&B Code, 2016.
 - ii. The Applicant vide page no.34 placed a Board Resolution authorising the Applicant to file the present application, since the company itself is a proprietorship firm where is the board comes from. He himself showed as Board member and approved the resolution and misleading the court that the operational creditor is having Board. There is no proof of Proprietorship firm was attached in the application for the reasons best known to them only.

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- iii. The tax invoices were attached which were generated by the Applicant only and failed to submit the proof of acceptance of goods i.e. Way Bills etc. alongwith the application.
 - iv. The Corporate Debtor neither received the Demand Notice nor received any information from the Applicant about the filing of the present application.
 - v. The Applicant filed four Balance Confirmation letters. The first two and other two letters are one and the same morphed by the Applicant in the same way.
 - vi. The Applicant herein illegally claiming an amount of Rs.1,72,57,712/- since there is no proof of receipt of materials by the Corporate Debtor was attached with the application and the Corporate Debtor admitting that there is an amount of Rs.1,41,11,406/- is due. As per the provisions it is clear that wrongful claim was not to be admitted by the Adjudicating Authority and need to be dismissed in limini.
 - vii. The Operational Creditor have to file an Affidavit under Section 9(3)(b). Since the same was failed to file by the Applicant, the application itself is incomplete and incomplete application needs to be dismissed by the Adjudicating Authority.
- b. It is averred that the Operational Creditor has not disclosed the actual facts and circumstances and had filed the present application with an intent to harass the Corporate Debtor Company and defame the reputation of the Company in the eye of society and the same is illegal.

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- c. It is averred that the Corporate Debtor is liable to pay an amount of Rs.1,41,11,406/- to the Operational Creditor, but they filed the present application claiming an amount of Rs.3,31,17,194/-. The invoices which were filed by the Operational Creditor are placed illegally not even accepted by the Corporate Debtor herein with respect to the materials.
- d. The Corporate Debtor denies and disputes the various allegations and averments and claims made in the company petition in toto. Further, stated that there is no iota of truth in any of the allegations and claims made thereunder. The Applicant has concealed entire facts for the reasons best known to them and filed the present company petition with false allegations and unentitled claims. It is also strictly denied that there is any outstanding due amount or any such payment as alleged in the notices overdue to the Operational Creditor herein.
- e. It is averred that the Corporate Debtor at no point or time agreed or admitted or confirmed to pay such amount mentioned in the said demand notices and the present company petition. Further, there is no question of any liability for such alleged unpaid amounts styled as 'Operational Debt' in the present company petition. Further, it is averred that the Operational Creditor does not qualify as an Operational Creditor under the provisions of the Insolvency and Bankruptcy Code, 2016, and as estopped from taking shelter under the said code.
- f. It is further submitted that without prejudice to the foregoing the amount claimed by the Operational Creditor in the instant petition is disputed as the entire claim is untenable and illegal.

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4. The averments of the Rejoinder dated 15.02.2020 filed by the Petitioner/Operational Creditor in brief are described hereunder:
- i. In reply to paragraph 2(a), (b) and (c) of the counter, it is averred that the Operational Creditor is a Sole Proprietorship firm. A natural person and his sole proprietorship firm are the same legal entity. The liability of the sole proprietorship firm is that of the natural person carrying on business under its name. The sole proprietorship firm of a natural person and the natural person owning the firm do not enjoy the benefit of being treated as separate legal entities. They are the one and the same legal entity. In view of the same, a sole proprietorship falls under the definition of person under Section 3(23) of the I&B Code, 2016 and relied on the Order of the Hon'ble High Court at Calcutta in **Devendra Surana vs. Bank of Baroda (2019) 1WBLR (Cal)202** held that a Sole Proprietorship and an individual carrying on the business are one and the same. In view of the same, the averments made by the Corporate Debtor that Operational Creditor is not a 'person' as per Section 3(23) of the I&B Code, 2016 does not sustain in law. It is therefore submitted that the Operational Creditor is an individual as per Section 3(23)(a) of the I&B Code, 2016 and has the locus to maintain the present application.
 - ii. In reply to paragraph 2(d), (e), (f) and (g) of the counter, the contents are denied. It is averred that an application under Section 9 is maintainable when corporate Debtor admits that debt is payable. The Operational Creditor on several occasions requested to pay the dues. Failing to receive any amount, the Operational Creditor issued a Demand Notice under Form-3 on 08.07.2019. After the receipt of demand notice on 31.08.2019, the Corporate Debtor addressed another letter to the Operational Creditor duly acknowledging that an amount of Rs.3,13,69,118/- is payable. The corporate Debtor cannot dispute the debt at this juncture. The Hon'ble NCLAT in a

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plethora of cases has held that the dispute must be pre-existing i.e. before filing of the company Petition under the provisions of I&B Code, 2016. Any dispute raised at a belated stage i.e. after filing of the Company Petition cannot be considered by this Adjudicating Authority.

- iii. In reply to paragraph 2(g) of the counter, the contents are denied. It is denied that the Balance Confirmation Letters were not signed by the Corporate Debtor. The Corporate Debtor has addressed these letters to the Operational Creditor in person duly affixing its stamp.
- iv. In reply to paragraph 2(h) of the counter, all the contents are denied. It is averred that the Operational Creditor was served a copy of the Demand Notice through RPAD and the Operational Creditor received an acknowledgement card.
- v. The contents of Paragraph 3 and 4 of the reply filed by the Corporate Debtor are denied. The Corporate Debtor is misleading this Hon'ble Tribunal by deposing incorrect statements. The Operational Creditor has supplied Zinc Metal to the Corporate Debtor against the Order raised by the Corporate Debtor, the Operational Creditor raised invoices for the goods supplied. The Corporate Debtor never raised any dispute with regard to the goods supplied and accepted them without any demur. Despite accepting these dues, the Corporate Debtor has not paid any dues to the Operational Creditor.
- vi. The contents of paragraph 5 of the counter are denied. The Operational Creditor has requested the Corporate Debtor to clear the dues and the Corporate Debtor through letter dated 31.03.2019 confirmed that the outstanding balance is Rs.3,13,69,118/-. Since the Corporate Debtor has not paid the debt, the Operational Creditor issued Form 3 and Form 4 on 08.07.2019, as iterated supra, the Form 3 and Form 4 have been duly acknowledged. Subsequent to

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the acknowledgement of such demand notice, the Corporate Debtor addressed a letter on 31.08.2019 confirming that Rs.3,13,69,118/- is due and payable to the Operational Creditor.

- vii. The contents of paragraph 6 of the counter are denied. It is averred that a natural person and his sole proprietorship firm are the same legal entity. The liability of the sole proprietorship firm is that of the natural person carrying on business under its name. The sole proprietorship firm of a natural person and the natural person owning the firm do not enjoy the benefit of being treated as separate legal entities. A proprietor and the proprietorship are construed as one and the same legal entity. In view of the same, a sole proprietorship fall under the definition of person under Section 3(23) of the I&B Code, 2016.
- viii. The contents of paragraph 9, 10, 11 and 12 of the counter are denied in entirety. The Corporate Debtor has duly acknowledged the debt to the Operational Creditor. The Corporate Debtor cannot dispute the debt at this juncture. The Hon'ble NCLAT in a plethora of cases has held that the dispute must be pre-existing i.e. before filing of the company petition under the provisions of I&B code, 2016. Any dispute raised at a belated stage i.e. after filing of the Company Petition cannot be considered by this Adjudicating Authority.
5. The Operational Creditor filed a Memo dated 26.11.2019 stating that as per the directions of this Adjudicating Authority, the Petitioner had carried out personal notice to the Respondents by way of Registered Post Acknowledgements due on 19.11.2019. Copies of the Postal Acknowledgements and tracking reports are attached.
6. The Operational Creditor filed a Memo dated 01.04.2021 stating that this Adjudicating Authority through Orders dated 19.03.2021 directed the

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Operational Creditor to file an affidavit complying the provisions of Section 9(3)(b) & 9(3)(c) of I&B Code.

7. It is averred that as per the directions of the Hon'ble Tribunal, the Petitioner had filed an Affidavit under Section 9(3)(b) of IBC, 2016 and attached a copy of the same as Annexure-A of the Memo. In respect of the affidavit under Section 9(3)(c) of IBC, 2016, the Operational Creditor has made an endeavor to obtain the certificate from their bankers, confirming that there is no payment of the unpaid operational debt by the Corporate Debtor, the requisite certificate has not been provided by the bankers.
8. Reliance is also placed on the order of Hon'ble Supreme Court in the matter of **Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd. in CA No.15481/2017 and CA No.15447/2017** which has categorically done away with the necessity of the compliance to S.9(3)(c) of the IBC, 2016.
9. Heard both sides and perused the records. It is seen that in the instant case, the Operational Creditor had supplied Zinc Ingots to the Corporate Debtor and raised invoices for an amount of Rs.3,13,69,118/- for the period from 22.01.2018 to 28.12.2018. These invoices are enclosed to the petition at pages 35 to 77 of the petition. The amount remained unpaid and the Operational Creditor issued a Demand Notice dated 08.07.2019 in Form-3 demanding a sum of Rs.3,31,17,194/- including principal amount of Rs. 3,13,69,118/- and interest of Rs.17,48,076/-. The said Demand Notice was received by the Corporate Debtor on 15.07.2019 as is evidenced from copy of RPAD Acknowledgement filed alongwith the petition. However, the Corporate Debtor did not send a reply within the statutory period of 10 days either to indicate that no amount of debt was due or to indicate that there was existence of a dispute between the Corporate Debtor and the Operational Creditor. As a consequence, the instant petition came to be filed by the Operational Creditor on 30.10.2019.

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10. The Corporate Debtor have filed counter in which they have taken the technical grounds pertaining to the Operational Creditor herein being a Sole Proprietary Concern and not included in the definition of "Person" as stipulated in Section 3(23) of the I&B Code, 2016. The second technical objection raised by the Corporate Debtor was with regard to non-submission of Affidavit as envisaged under Section 9(3)(b) and Certificate of Banker under Section 9(3)(c). The Corporate Debtor has also alleged that the present Company Petition is based on incorrect facts as the Corporate Debtor is actually liable to pay an amount of Rs.1,41,11,406/- to the Operational Creditor but the Operational Creditor filed the present application claiming an amount of Rs. Rs.3,31,17,194/-.
11. The Operational Creditor has placed reliance on the invoices, the Demand Notice and balance confirmation letters dated 31.03.2019 and 31.08.2019 confirming a sum of Rs.3,13,69,118/- is due and payable by the Corporate Debtor to the Operational Creditor. It is pertinent to note that the Operational Creditor, vide its letter No.BIC/05/2019, dated 31.08.2019 sent a list of invoices (43 in number) detailing dates, numbers and amounts remaining due, for confirmation by the Corporate Debtor and the same has been duly acknowledged, stamped and returned by the Corporate Debtor on 05.09.2019 (page nos.92 to 93 of the petition).
12. As regards the argument advanced by the Corporate Debtor alleging ineligibility of the Operational Creditor to file this application in view of the definition of "Person" as included under Section 3(23) of the I&B Code, 2016, suffice it to say that a Sole Proprietorship concern and the Proprietor i.e. individual are to be treated as one and the same and there is no distinction of personalities involved therein. A Sole Proprietorship

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is also known as individual entrepreneur, sole trader or simply proprietorship and it is a type of an unincorporated entity i.e. owned by one individual only. This matter has also been decided by the Hon'ble Calcutta High Court in **Devendra Surana vs. Bank of Baroda (2019) 1WBLR (Cal)202** wherein it has been laid down as under:

“A natural person and his sole proprietorship firm are the same legal entity. The liability of the sole proprietorship firm is that of the natural person carrying on business under its name. The sole proprietorship firm of a natural person and the natural person owning the firm do not enjoy the benefit of being treated as separate legal entities. They are one and the same legal entity”.

Therefore, this argument of Corporate Debtor fails.

13. The second technical argument taken by the Corporate Debtor was that the Operational Creditor had not filed Affidavit under Section 9(3)(b) and Certificate of Banker under Section 9(3)(c). On a direction from this Adjudicating Authority dated 19.03.2021, the Operational Creditor has filed an Affidavit dated 01.04.2021 under Section 9(3)(b), which is placed on record and accepted by this Adjudicating Authority. As regards Banker Certificate under Section 9(3)(c), the Operational Creditor has made a request to the Bank but has not received the said certificate as yet. However, it is seen from **Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd. (CA No.15481/2017 and CA No.15447/2017)** that the **Hon'ble Supreme Court** have categorically removed the necessity of Certificate from Banker as a mandatory condition for filing application under Section 9 of I&B Code, 2016.
14. It is also seen from record that the Corporate Debtor have confirmed the balance due to the Operational Creditor through letters on a monthly basis starting from February, 2019 to September, 2019. As per the latest balance confirmation letter dated 30.09.2019, the debt amount of

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Rs.3,15,70,502/- has been admitted as payable by the Corporate Debtor to the Operational Creditor. All Confirmation Letters have been signed by the Director / Authorised Signatory of the Corporate Debtor.

15. From a careful consideration of the arguments and evidence on record, it is apparent that the Operational Creditor had supplied Zinc Ingots to the Corporate Debtor during the period from 22.01.2018 to 28.12.2018 and an amount of Rs.3,13,69,118/- had fallen due for payment by the Corporate Debtor. However, the said amount remained unpaid and the liability is admitted by the Corporate Debtor through various balance confirmation letters as mentioned in foregoing paragraphs. Thus, there has been a debt and there was a default on the part of the Corporate Debtor. A statutory notice under Section 8 of the Code was served on the Corporate Debtor but there was no reply either to indicate that no amount was due to be paid to the Operational Creditor or to indicate any pre-existence of dispute. In these circumstances, we are inclined to admit this application. Accordingly, the instant application filed under Section 9 of the I&B Code, 2016 is hereby admitted.
16. The Operational Creditor has not named anyone as Interim Resolution Professional (IRP) and has requested this Adjudicating Authority to appoint one for the Insolvency Resolution Professionals as IRP. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period from 1st July, 2021 to 31st December, 2021 in compliance with Section 16(3)(a) of the Code in order to avoid delay. Accordingly, this Tribunal appoints Mr. Theegala Venkateswar Rao having Registration No. IBBI/IPA-001/IP-P02268/2020-21/13484, e-mail: teevpee@gmail.com as Interim Resolution Professional. As per the IBBI website, his AFA is valid upto 09.04.2022. The aforesaid IRP has no disciplinary proceedings pending against him. He shall file his written communication and all relevant

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papers immediately before the Registrar of this Adjudicating Authority but not later than three days.

17. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with the following directions: -

- i. The Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor;
- ii. Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.
- iii. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

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- iv. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- v. That the order of moratorium shall have effect from the date of this Order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- vi. The Petitioner is directed to deposit a sum of Rs.2,00,000/- (Rupees Two Lakhs Only) with the Interim Resolution Professional within three days from the date of this Order to meet out the expenses and his fee to perform the functions assigned to him in accordance with regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The initial expenditure incurred by IRP shall, however, be subject to the approval by the Committee of Creditors, in its first meeting.
- vii. That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.
- viii. Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.

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BINOD KUMAR SINHA
MEMBER (TECHNICAL)

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MADAN B. GOSAVI
MEMBER (JUDICIAL)

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