IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKT BENCH,

KOLKATA

C.P (IB) No.430/KB/2019

In the matter of

An application 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.

And

In the matter of:

Dena Bank, having its corporate office at Dena Corporate Center, C-10,G-Block, Bandrakurla Complex, Bandra (E), Mumbai- 400051, and also at Dena Bank Corporate Business Branch," Avani Height', 1st Floor, 59A, Chowranghee Road, Kolkata-700020.

... Financial Creditor

Versus

In the matter of:

M/s Aryavrat Trading Pvt.Ltd. CIN U70200WB1995PTC071258,having its registered office at Crescent Tower, 5th Floor, 229, A.J.C. Bose Road, Kolkata-700020.

...Corporate Debtor

Date of hearing : 22/02/2022

Order Pronounced on : 01/04/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Ms.Mandeep Kaur, Adv. } For the Financial Creditor

1. Mr.Joy Saha,Sr.Adv. } For the Corporate Debtor
2. Mr. Pradip Sancheti, Adv.
3. Mr. Siddhartha Chatterjee, Adv.

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This 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 has been filed by **Dena Bank,** having its corporate office at Dena Corporate Center, C-10,G-Block, Bandrakurla Complex, Bandra (E), Mumbai- 400051, and also at Dena Bank Corporate Business Branch," Avani Height', 1st Floor, 59A, Chowranghee Road, Kolkata-700020, through Chief Manager, Mr. Sanjeev Kumar Sinha vide Authorization /permission letter no. DCC/SAMV/777C/2018-19 dated 12.03.2019 (hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **M/s Aryavrat Trading Pvt.Ltd. (CIN** U70200WB1995PTC071258),having its registered office at Crescent Tower, 5th Floor, 229, A.J.C. Bose Road, Kolkata-700020 (hereinafter referred to as the Corporate Debtor/ATPL).

3. It is submitted that the Financial Creditor had sanctioned a cash creditor Hypothecation of loan of Rs.27,05,00,000/- (Rupees Twenty Seven Crores Five Lakhs only) and Rs. 55,25,00,000/-(Rupees Fifty Five Lakhs Twenty Five Lakhs only) on account of Packing Credit/PCFC. It is submitted that the Financial Creditor had committed default in repayment of the loan on 14th July,2018, and Principal sum outstanding as on 31st January, 2019 is Rs.81,78,54,736.50 (Rupees Eight One crore Seventy Eight Lacs Fifty Four Thousand Seven Hundred Thirty Six and Fifty Paisa only) and interest outstanding @ 14.65% per annum including penal interest @ 2% for cash credit Hypothecation, and a sum of Rs.7,89,70,795.10/- is due and outstanding. It is further submitted that a sum of Rs.7,14,706.31 is due on account of charges and other miscellaneous expenses. Therefore, a total loan of Rs.89,75,40,237.91 is stated to be due and payable by the Corporate Debtor to the Financial Creditor.

4. It is submitted that the Financial Creditor secured its loan by equitable mortgage of following assets:-

" 1. EM of the office premises located at Flat No. 2B on 2nd Floor, Crescent Tower, 229, AJC Bose Road, Kolkata-700020 owned by Aryavrat Trading Pvt.Ltd. (formerly known as Aryavrat Properties Pvt.Ltd.).

2. EM over land measuring 438.03 sqmtrs situated at 325/AD, Sector-A, IDA scheme no. 74C, Indore, Madhya Pradesh owned by Aryavrat Trading Pvt. Ltd. (formerly known as Artavrat Properties Pvt.Ltd.)

All the aforesaid have been created vide Supplemental Joint Letter of Mortgage issued by the CD on 26.09.2016,Copy of which is annexed hereto as "Exhibit-D".

All the aforesaid have been created vide Corporate Guarantee for Term Loan, Corporate Guarantee of Working capital, Supplemental joint letter of Mortgage for Indore Development Authority, Supplemental Joint letter of Mortgage for Crescent Tower Property (all the mentioned documents executed by CD on 29.09.2016).

*Memorandum of Entry for Indore Development Authority and Memorandum of Entry for Crescent Tower property (crea*ted by lead bank *on behalf of consortium member banks on 29.09.2016)".*

5. The Financial Creditor has annexed with the petition copies of all the financial contract and all other documents in order to prove existence of financial debt, the amount and the date of default. The Financial Creditor has also enclosed copies of the bank statement thereby reflecting in all the amounts due and outstanding. The Financial Creditor has also filed CIBIL (Commercial Credit Information Report) dated 7th March, 2019.

6. The Financial Creditor proposed the name of **Mr. Pranab Kumar Chakrabarty,** to act as an IRP having Registration No. **IBBI/IPA-003/IP-N00088/2017-2018/10826,** who has consented vide his affidavit and Form-2, and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.

7. ***On being served with the notice of the court, the Corporate Debtor***

has filed its reply affidavit.

8. The Corporate Debtor has filed reply AFFIDAVIT of Mr. Balesh Kumar Bagree, authorized representative of the Corporate Debtor, who has submitted that the application is not maintainable in law and facts and is liable to be rejected. It is submitted that by way of a Gazette Notification dated January 02,2019 issued by the Department of Financial Services, Ministry of Finance, Government of India issued in exercise of the powers conferred by Section 9 of the Banking Companies (Acquisition and Transfer of Undertakings)Act, 1970 (5 of 1970) and Section 9 of the Banking Companies (Acquisition and Transfer of Undertakings)Act, 1980 (40 of 1980), the Central Government after consultation with the Reserve Bank of India hereby made a Scheme called the Amalgamation of Vijaya Bank and Dena Bank with Bank of Baroda Scheme,2019.

9. It is submitted that pursuant to and from the date of commencement of the scheme, the undertaking of Transferor Banks, namely, Dena Bank and Vijaya Bank vested in the Transferee Bank, namely, Bank of Baroda. The said Scheme came into force on and from April 01, 2019. Clause 4(4) of the said Notification inter alia provides that all debts, actionable claims, earnest monies, receivables, bills, credits, loans, advances and deposits, forming part of the undertaking, whether recoverable in cash or in kind or for value to be received, bank balances etc., the same stand transferred to and vested in the Transferee Bank without any notice or other intimation to any person to the end and intent that the rights of the Transferor Banks to recover or realize the same stands transferred to the Transferee Bank and to the extent such assets is a debt,loan, receivable, advance or deposit, appropriate entries should be passed in their respective books to record the aforesaid change, without any notice or other intimation to such debtors, depositors or persons as the case may be.

10. It is further submitted that Clause 4(9) provides that if, immediately

before the commencement of this Scheme, any cause of actions, suit, decrees, recovery certificates, appeals or other proceedings of whatever nature in relation to any business of the undertakings which have been transferred, is pending by or against the Transferor Banks before any court or Tribunal or any other authority (including for the avoidance of doubt, an arbitral Tribunal), the same shall not abate, be discontinued or be, in any way prejudicially affected by reason of the transfer of the undertakings of the Transferor Banks or of anything contained in this Scheme but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the Transferee Bank.

11. It is submitted that in view of the aforesaid Scheme, the alleged "financial debt" stands transferred in favour of Baroda and Dena Bank, the Applicant herein can no longer pursue its alleged claim as on and from April 01,2019, it has ceased to exist. The applicant as on date is a non-entity and cannot continue with the present proceeding.

12. It is further submitted that in terms of clause 5 of the said Notification, on and from the date of commencement of the Scheme, the Board of the Transferor Banks stand dissolved. In view of the Dissolution of the boards of the Transferor Banks, the authorization of one Sanjeev Kumar Sinha by the Board of the Applicant, annexed at pages 11 and 12 of the said application, to act on its behalf Bank has also ceased and the present cannot be proceeded with either by the Applicant Bank nor by the said authorised representative.

13. It is submitted that that the Corporate Debtor was granted a financial facility by way of a Working Capital Loan Consortium dated September 29, 2016 consisting of the Applicant, Allahabad Bank and Oriental Bank of Commerce.

14. It is submitted that the Corporate Debtor had sometime in

October,2014, acquired Unit at Bhilwara, Rajasthan for a cost of Rs. 41,00,00,000/- which was initially funded by the Promoters of the company and thereafter by Allahabad Bank being the lead banker of the aforesaid Working Capital Loan Consortium. By way of the said Term Loan granted by Allahabad Bank, a sum of Rs. 20,00,00,000/- was reimbursed towards acquisition of the said Unit at Bhilwara. The said Unit from its very inception could not operate at its optimum and remained under-utilized for over two years owing to the inadequate working capital as the first tranche of working capital being 56% of the Assessed Working Capital was disbursed by the Lead Banker sometime in October, 2015 nearly after one year of the acquisition. The Balance 44% was disbursed by Oriental Bank of Commerce and the Application sometime in August 2016 and October 2016 respectively.

15. It is submitted that during these two years, several workers had been employed and the work force was maintained at its full strength on the presumption that the working capital will be disbursed at a timely fashion and the skilled work force maintained by the company will achieve full production upon such disbursement. However, due to delayed disbursements, the company could not achieve optimum production level to cover its fixed cost, which resulted in operational losses. Moreover, during the period commencing from September 2016, the State Electricity Board of Rajasthan increased its tariff resulting in substantial increase in the power cost of producing yarn at the Bhilwara Unit; as a result of such hike in tariff, all attempts made by the company to improve its financial health came to an unforeseen close. Under such circumstances, the company consolidated its operation out of the units based in Madhya Pradesh and accordingly the fixed assets were moved from Bhilwara, Rajasthan to Pithampur, Kasrawad and Phillukhedi in Madhya Pradesh. All the movement of assets were fully audited and verified by the Chartered Engineer appointed by the Lead Bank and his Report was tabled in the consortium meeting held on August 10,2017. In fact, the Chartered Engineer had in person confirmed the movement of assets without any discrepancies in the said meeting.

16. It is further argued by the Ld. Counsel for the Corporate Debtor that the company took a further toll while recovering from its financial crisis owing to 'demonetization'. As a matter of Industry practice, a part of daily wages is paid by cash by most textile units for meeting the daily livelihood needs of the workers. During the phase of demonetization, such cash payments could not be arranged causing labour shortage and consequential loss of production. The impact of demonetization continued till March, 2017. It is submitted that sometime from May 2017, the market again attained a stand still situation in view of GST implementation. On the pretext of GST implementation from July 01,2017, the market which is predominantly driven by traders, adopted a 'wait and watch' strategy a lot of uncertainties engulfed the market regarding GST rates, transitional provision of the stock and allied issues, which lead the traders to zero down on stock on and from the transition day till the GST regime. The circumstances did not improve till October 2017.

17. It is further submitted that the market scenario hereinabove stood beyond the control and foresight to the company and was a product of extraordinary economic reforms put in place by the Government of India. Significant amount of raw materials stagnated as the production volume could not commensurate with the intended rotation of RM Stock level as was the case in previous years. With the passage of time the quality of the stocked materials degraded resulting in further losses. In spite of the aforesaid, the company has made all efforts to meet its repayment obligations towards its banks and has repaid a sum of about Rs. 90,00,00,000/- during the Financial Years 2016-2017 and 2017-2018. Further, during such period the company made repayment of all its Term Loans aggregating to a sum of Rs.19,75,00,000/- to the Applicant and the other consortium members, which demonstrates the bona fide intention of the company.

18. It is submitted that the aforesaid facts were duly brought to the notice of the Applicant and the other consortium members during a meeting held on July 23,2018. All the members of the consortium including the Applicant had

in fact agreed to the proposal of restructuring and regularizing of the credit facility in addition to further disbursements under the Export Packing Credit taking into consideration the track record of the company and the extraordinary circumstances owing to which the company had suffered severe losses. The company had also proposed to prepare a 'Resolution Plan' to address all the issues and to provide a way to recover from the unforeseeable losses it had sustained. Accordingly, a restructuring proposal was prepared by the company and submitted to the Consortium and a meeting was held on September 14, 2018. The Lead Bank had assured that such proposal would be duly considered. In fact, the Lead Bank is in the process of appointing an agency for ICE Rating/TEV/Forensic Audit/ Stock Audit and take the restructuring proposal to the competent authority. This was duly brought to the notice of the Applicant by letter dated October 03,2018.

19. It is submitted that the Applicant, in clear violation of such agreement and in derogation of the decision arrived at by the consortium in the aforesaid meeting, issued a loan recall notice on August 06, 2018 which was duly responded to by the company through its letter dated August 20, 2018 bring on record all the material facts and circumstances. It is further submitted by the Ld. Counsel for the Corporate Debtor that the applicant has acted in breach of its commitment and cannot be allowed to pursue the remedy provided under section 7 of the 2016 Code, more so, where the other consortium lenders are willing to lend necessary assistance to the company and have refrained from joining the applicant bank in the present proceeding. Moreover, in the present case, Allahabad Bank has been designated as the Lead Banker in terms of the Working Capital Consortium Agreement. It is the usual practice in the banking sector that a Power of Attorney is issued in favour of the Lead Banker to take all steps for and on behalf of the Consortium. Without rescinding the Consortium Agreement and the Power of Attorney, Dena Bank cannot in law pursue any claim on its own. It is an admitted position that the said Consortium Agreement is subsisting and the Power of Attorney has not been disclosed in the present proceeding. It is also pertinent to mention that in terms of the relevant notifications/

guidelines/instructions issued by the Reserve Bank of India from time to time only the Lead Bank of the Consortium can take steps for prosecuting the borrower.

20. It is submitted that the application has been filed without the existence of any financial debt payable to the financial creditor herein, and is in abuse of process of law and is a malafide and vexatious proceeding.

21. In the **rejoinder** affidavit filed by the Financial Creditor to the reply affidavit filed by the Corporate Debtor, the deponent Mr.Sanjeev Kumar Sinha, Chief Manager of the Financial Creditor submitted that Financial Creditor has sanctioned /enhanced a sum of Rs.27,05,00,000/- on account of Cash Credit Hypothecation and sum of Rs.55,25,00,000/- on account of Packing Credit/PCFC (hereafter referred to as the said Credit Facilities).

22. It is submitted that it is a matter of fact that by reason of minutes of the meeting held on 26.09.2016 at 5.P.M. the Board of Directors of Corporate Debtor had resolved

a. "*That the said M/s Wearit Global Ltd., do accept and borrow the said Credit Facilities from the Bank.*"

23. It is submitted that by a reason of a Working Capital Consortium Agreement dated 29.09.2016 (hereinafter referred to as the said Consortium Agreement) executed at Kolkata by and between the Allahabad Bank, Dena Bank and Oriental Bank of Commerce (in short the Banks) and the said Corporate Debtor, whereby and where under the said Corporate Debtor has unequivocally admitted that the said Corporate Debtor has availed the said Credit Facilities. In the said agreement the Corporate Debtors has agreed that in case the loan account of Corporate Debtor declared as Non Performing assets (NPA), the Banks shall have the liberty to proceed against the Corporate Debtor singly or jointly under the RDDBFI Act, 1993 (as amended up to date), SARFAESI Act,2002 (as amended up to date) as also under any other law for the time being in force.

24. It is submitted that the Corporate Debtor in the said consortium Agreement declared and admitted that the credit facility would be governed by the terms and conditions set out in the sanction letter being Ref. No. DB/BR/ADV/09/15.2016 dated September 26, 2016 issued by the Financial Creditor as also the terms and conditions contained in the said Consortium Agreement as well as those embodied in the relatives security documents.

25. It is submitted that the said Consortium Agreement further provides that the right and obligation of each of the consortium members i.e. banks are several and failure of anyone or more of the said banks to perform its or their obligation in respect of the said facilities does not relieve or absolve the other consortium members or the borrower's respective obligations. By reason of this agreement the Financial Creditor singly has initiated this proceeding against the Corporate Debtor.

26. It is further submitted that in Clause 10 of Article-I of the said Consortium Agreement, the Corporate Debtor has agreed with each of the consortium banks that unless otherwise agreed to by the said consortium banks or any one or more of them, the Corporate Debtor shall repay the said facilities to each of the said Banks forthwith on demand all such amounts as may be standing at the foot of said accounts together with interest, compound interest, additional interest, liquidated damages, costs, charges, expenses and other money's thereon etc. and failure of the Corporate Debtor to repay the said facilities, shall entail in the Corporate Debtor being treated as the defaulter and the amount due as in default invoking the provisions as to default as stated therein the said consortium agreement.

27. It is submitted that Clause 9 of the Article V of the said Consortium Agreement provides that the Financial Creditor may in its absolute discretion and without any further notice to the Corporate Debtor, grant, transfer and assign to any person/ bank/financial institution for any reason whatsoever any of its rights under the said Consortium Agreement and other documents executed for Corporate Debtor and the terms attached thereto, including right

to receive the balance loan/ cash facility and in particular may grant, transfer, assign such right by way of charge of as a security and any person to whom such rights are granted, transferred, assigned shall be entitled to full benefits of such rights. It is further provided that, this agreement shall be binding upon the Financial Creditor and the Corporate Debtor and shall ensure for the benefit of the Financial Creditor and its successor in title and assigns.

28. It is submitted that by reason of joint Deed of hypothecation (consortium term loan) made between the Corporate Debtor and Financial Creditor the parties thereof agreed that in pursuance of the Facility Agreement and in consideration of the Financial Creditor's having agreed to grant to the Corporate Debtor, at the request of the Corporate Debtor and on terms and subject to the conditions set out in the Facility Agreement and in consideration of the premises, the Corporate Debtor thereby agreed, confirmed and undertaken that the Corporate Debtor shall repay/pay the said Facility, all interest, commitment charge, charges, costs, expenses and all other monies, as stipulated and in the matter set out in the said Facility Agreement and /or other Transaction Documents and shall duly observe and perform all the terms and conditions of the Facility Agreement and other Transaction Documents and in view of the said Facility Agreement the whole of the assets thereby hypothecated as and by way of charge which is more particularly described in Schedule II of the said joint deed of Hypothecation. The said Facility Agreement shall mean the said Sanction letter being no. DB/BR/ADV/09/15/2016 dated 26.09.2016, which has also been referred in Clause 2 in Article-I of the said Consortium Agreement.

29. It is submitted that in Clause 2.2 of Article II of the Facility Agreement (Consortium Term Loan to M/s Wearit Global Ltd) dated 29.09.2016 that the Corporate Debtor shall repay the principal amount of the said Facility in accordance with the repayment schedule set forth in Schedule III of the said Agreement and the Corporate Debtor shall also pay to the Financial Creditor's interest at the Applicable Interest Rate on the principal amount of the respective Facility outstanding from time to time, monthly in each year on the

interest payment date.

30. It is submitted that in section 11.5 of Article-K of the said Facility Agreement that the Financial Creditor at its sole discretion without notice to the Corporate Debtor share the credit risk of the whole or part of the said facility with any other bank by way of participation. Notwithstanding any such participation all right, title, interest and special status and other benefits and privileges enjoyed or conferred upon or held by the Financial Creditor under the said Facility Agreement and other Transaction Documents shall remain valid,effective and enforceable by the Financial Creditor on the same terms and conditions and the Corporate Debtor shall continue to discharge in full all its obligations under the Facility Agreement and the other Transaction Documents of the Financial Creditor. The Corporate Debtor shall not have and shall not claim any privity of contract with such participating bank on account of any reason whatsoever.

31. It is submitted that the Ritspin Synthetics Ltd. is a corporate guarantor of the Corporate Debtor to the said Credit Facility. The said Corporate Guarantor by reason of its resolution of its Board of Directors dated 27.09.2016, has resolved that Corporate Guarantor will extend its Corporate Guarantee in favour of the Financial Creditor in respect of the said Credit Facilities extended to the Corporate Debtor and the Corporate Guarantor further resolved that the Corporate Debtor will extend its hypothecation charge of all the current assets and mortgage charge or its property which particularly described in the said resolution.

32. It is submitted that by reason of a joint deed of Hypothecation dated 29.09.2016 the said M/s Ritspin Synthetics Ltd. represented to the Financial Creditor that the Corporate Debtor has been sanctioned the aforesaid credit facilities by the Financial Creditor in accordance with the terms and conditions contained in the said Consortium Agreement and Facilities Agreement both dated 20.09.2016 and the Corporate Guarantor had agreed with the Corporate Debtor that the Corporate Guarantor had agreed with the

Corporate Debtor that the Corporate Guarantor shall abide by all the terms and conditions contained in the said Consortium Agreement dated 29.09.2016. In the said agreement the Corporate Guarantor has agreed to repay to the Financial Creditor its respective principal amount on demand as mentioned in the said Consortium Agreement dated 29.09.2016. In the said agreement, the Corporate Guarantor has further agreed with the Bank that so long as the said facilities or any portion thereof shall remain outstanding or unpaid, the said Corporate Guarantor shall pay to the Financial Creditor together with interest and commission as per the terms of the said Consortium Agreement.

33. It is submitted that in the deed of Guarantee dated 29.09.2016, the said M/s Ritspin Synthetics Ltd., therein referred to as the Guarantor, thereby had unconditionally, absolutely and irrevocably guaranteed to and declared and agreed with the Financial Creditor that in the event of any credit on the part of the Borrower in payment/repayment of the said Facilities, the said Corporate Guarantor shall forth with pay to the Financial Creditor upon its demand.

34. It is submitted that Aryavrat Trading Pvt. Ltd., is also a Corporate Guarantor of the Corporate Debtor to the facility. The said M/s Aryavrat Trading Pvt. Ltd. by reason of a resolution of its Board of Directors held on 27.09.2016, the Board of the said Corporate Guarantor has resolved that Corporate Guarantor will extend its Guarantee in favour of the Financial Creditor in respect to the said Credit Facilities extended to the Corporate Debtor and the Corporate Guarantor further resolved that the Corporate Guarantor will extend its hypothecation charge of all the current assets and mortgage charge of its property which particularly described in the said resolution.

35. It is submitted that in the deed of Guarantee dated 29.09.2016, the said M/s Aryavart Trading Pvt. Ltd. there in referred to as the Corporate Guarantor, thereby unconditionally, absolutely and irrevocably guaranteed to

and declared and agreed with the Financial Creditor that in the event of any default on the part of Corporate Debtor in payment/repayment of the said facilities, the said Corporate Guarantor shall forthwith pay to the Financial Creditor upon its demand.

36. It is submitted that the Hind Syntax Ltd. is also a resolution of the Board of Directors of the said M/s Hind Syntex Ltd., held on 27.09.2016, the Board of the said Corporate Guarantor has resolved that Corporate Guarantor will extend its Corporate Guarantee in favour of the Financial Creditor in respect to the said Credit Facilities extended to the Corporate Debtor and the Corporate Guarantor further resolved that the Corporate Guarantor will extend its hypothecation charge of all the current assets and mortgage of its property which particularly described in the said resolution.

37. It is submitted that in the deed of Guarantee dated 29.09.2016, the said Hind Syntex Ltd., is referred to as the Guarantor, thereby had unconditionally, absolutely and irrevocably guaranteed to and declared and agreed with the Financial Creditor that in the event of any default on the part of Corporate Debtor in paymet/ repayment of the said credit facilities, the said Corporate Guarantor shall forthwith pay to the Financial Creditor upon its demand.

38. It is submitted that after some time from the disbursement of the said credit facilities unto and in favour of the said Corporate Debtor, the Corporate Debtor has been regular in payment of the said credit facility in terms of the said Consortium Agreement and thereafter the said Corporate Debtor with ulterior motive had committed to default of making the payment of the said creditor facilities in violation of various terms and conditions of the said Consortium Agreement and also in violation of Various terms and conditions as enshrined in all other financial agreements and contracts executed by the Corporate Debtor. Despite repeated requests, reminders and follow-ups the Corporate Debtor intentionally refused and neglected to make repayment of the said outstanding credit facilities. In such view of the matter the aforesaid

credit facilities has been classified as NPA with effect from 14.07.2018 as the Corporate Debtor has willfully defaulted to make payment of the said credit facilities.

39. It is submitted that the Financial Creditor vide its notice being reference No. DB/CBB/KOL/226/2018 dated 06.08.2018 demanded the sum of Rs.82,04,86,983.50p together with uncharged interest with effect from 01.06.2018 from the Corporate Debtor within 15 days from the date of receipt of the said notice. The Corporate Debtor has willfully neglected to pay the said outstanding credit facilities without any cogent reason thereof and accordingly the said outstanding credit facilities become the Financial Debt within the meaning of Section 4(8) of the IBC,2016 and the said Wearit Global Limited became the Corporate Debtor within the meaning of Section 3(8) of the IBC,2016 as it owes the said financial Debt.

40. It is submitted that the Financial Creditor has specifically denied all statements and has not admitted anything in the reply letter dated 20.08.2018.

41. The said letter was issued by the Corporate Debtor in reply to the said facility recall notice dated 06.08.2018. The said reply letter dated 20.08.2018 is contrary to and/or inconsistent with the said Consortium Agreement dated 29.09.2016 and the said facility recall notice dated 06.08.2018.

42. In the said reply letter dated 20.08.2018, Corporate Debtor has purportedly contemplated several untenable pleas viz. demonetarization and implementation of GST etc.only with a view to willfully avoid to repay of the said credit facilities, which had been availed by the said Corporate Debtor admitted that the Corporate Debtor has availed the said credit facilities. The Corporate Debtor did not dispute that the Corporate Debtor had availed the said credit facilities and enjoyed, fruits and benefits of the said credit facility and now the Corporate Debtor is avoiding to make payment by untenable

alibis Viz demonetarization and implementation of GST etc. In the said reply dated 20.08.2018 the Corporate Debtor has purportedly been contemplated several untenable pleas viz. demonetarization and implementation of GST etc. only with a view to willfully avoid repayment of the said credit facilities, which had been availed by the said Corporate Debtor.However, in the said reply the Corporate Debtor admitted that the Corporate Debtor has availed the said credit facilities. The Corporate Debtor did not dispute that the Corporate Debtor had availed the said credit facilities and enjoyed, fruits and benefits of the said credit facility and now the Corporate Debtor is avoiding to make payment by a untenable alibis viz. demonetarization and implementation of GST etc. In the said reply letter dated 20.08.2018 the Corporate Debtor has admitted, inter alia, -**" the fact behind our failure to serve the financial obligations of your bank, resulting the account to be classified as Non-Performing Assets, stands beyond the control of the Company's management,".** As such the Corporate Debtor has unequivocally admitted that the Corporate Debtor became NPA, which was beyond the control of the management of the Corporate Debtor. The Corporate Debtors has cleared its view that its management is not competent to run the business after having huge sum from the Financial Creditor and this manner the Corporate Debtor has swallowed the public money which was held by Financial Creditor. In such view of the matter, it may be presumed that the organization of the Corporate Debtor is not viable and likely to be permanently sick unit.

43. It is submitted that the Financial Creditor vide its Advocate Notice dated 11.02.2019 demanded a sum of Rs. 89,68,25,43.60p which was due as on 31.01.2019 together with interest @ 1 YMCLR plus 3.20% and penal interest @ 2% the rate being 14.65% p.a. from 01.02.2019 till the payment and /or realization of the said sum together with other expenses costs and charges etc. payable under the various loan document executed by the Corporate Debtor, failing which the Financial Creditor shall have no option but to initiate appropriate proceedings under section 7 of the IBC 2016. The said notice was issued without prejudice to the rights and remedies available to the Financial Creditor. The Corporate Debtor has received the said notice

and admitted the facts stated therein since there is no denial to the said notice by the Corporate Debtor.It will appear in the statement of account of the Corporate Debtor as on 31.01.2019 a sum of Rs.81,78,54,736.50p/- is shown as principal outstanding. From the aforesaid facts, it is evident that the default has occurred on the part of the Corporate Debtor.

44. **During the course of arguments,** Ld. Counsel appearing for the Financial Creditor submitted that the Financial Creditor hs filed the present application against the Corporate Debtor herein because on 26th September, 2016 the Bank had granted loan of Rs. 27.05 Crores as Cash Credit hypothecation and Rs.55.25 Crores as Packing Credit/PCFC to Wearit Global Ltd., the Principal Borrower. The said loan was guaranteed the M/s Aryavrat Trading Pvt. Ltd., the Corporate Debtor/ Corporate Guarantor along with two other personal Guarantors, Mr. Manish Kumar and Mrs. Ritika Kumar, both the Directors of Wearit Global Ltd., as Personal Guarantors. It is further submitted by the Ld. Counsel that the agreement dated 29th September, 2016 was executed between the Consortium of the Bank including the Bank of Baroda , "erstwhile Dena Bank" and the Wearit Global Ltd.

45. It is submitted that Clause 10 of the said Agreement provides that in the event of failure of Wearit Global Ltd. to repay the loan, Wearit Global Ltd. being treated as defaulter. It is submitted that Clause 13 of the said Agreement provides that the loan had been granted to Wearit Global Ltd. by the consortium bankers (including the said Bank) covered by securities by way of pari-passu first charge over the assets of guarantors namely Ritspin Synthetics Limited and the said ATPL.

46. He further submitted that a Deed of Guarantee dated 29th September, 2016 was executed by ATPL in favour of the Bank. Clause 2 of the testatum of the said deed provides, inter alia, that "In the event of any default on the part of the Borrower/ repayment of any of the monies referred above, or in any event of any default on the part of the Borrower to comply with or perform any

of the terms, conditions and covenants contained in the said loan agreements, the Guarantor shall, upon demand by the Lenders/ Lead Bank, forthwith pay to the Lenders without demur all the amounts payable by the Borrower under the Loan Agreements.

47. He further submitted that Clause 24 of the testatum of the said deed provides, inter alia that " The Guarantor agrees and declares that the rights and powers conferred on the Lenders by these presents shall be joint and several and shall be deemed always to be so and they may be exercised by the Lenders accordingly."

48. It is submitted that on 14th July 2018, the said loan account of Wearit Global Ltd. had turned into NPA, in accordance with the directions/guidelines to assets classification issued by RBI and accordingly as on 31st July 2018 a sum of Rs. 82,04,86,983.50 together with further interest became due and payable by Wearit Global Ltd. Despite repeated request, the said Wearit Global Ltd. and the said Guarantors had failed and neglected to repay the said outstanding amount.

49. It is submitted that in view of the above, by a notice dated 6th August, 2018 addressed to the Principal Borrower and the said guarantors (including ATPL) all of them and each of them were called upon to pay the amount due together with interest within 15 days from the date of receipt of that notice. It is humbly submitted that by the said notice the said Bank invoked the Corporate guarantee of ATPL.

50. It is submitted that by a letter dated 10th October, 2018 the said ATPL along with the Principal Borrower and the other guarantors jointly requested the Bank to support the restructuring proposal submitted by them and also requested Bank for some time.By this letter ATPL along with other guarantors and Principal Borrower jointly admitted that they defaulted to repay the outstanding loan with interest and were seeking for reconstruction of said loan.

51. It is submitted that by a notice dated 11th February, 2019 the Bank through is Advocates demanded the outstanding sum from the said Principal Borrower along with the said guarantors. The said notice was issued to the Principal borrower alongwith the Corporate Guarantors which include ATPL. ATPL has received the said demand notice and chose not to make any reply thereto.

52. It is submitted that in view of the above, it is evident that the said Deed of Guarantee dated 29th September, 2016 was invoked against ATPL at first by the said notice dated 6th August, 2018 issued by the said Bank and again by another notice dated 11th February, 2019 issued by the Learned Advocates on behalf of the said Bank. The Deed of Guarantee unequivocally provides that in the event of default on the part of the WGL,(Principal Borrower), the ATPL (corporate guarantor) shall upon demand by the Bank forthwith pay the bank without any demur all the amount payable by the said WGL under the said loan agreement. Bank has invoked the said Deed of Guarantee and demanded the outstanding loan from the ATPL. ATPL never opposed such invocation of the said Deed of Guarantee. There is no defence on the part of ATPL to the bona fide claim of the Bank. In fact, the ATPL admitted the claim of Bank.

53. Finally, the Ld. Counsel for the Financial Creditor as prayed that this petition fulfills all the requisites of Section 7 of the Code and therefore the petition should be admitted and the CIRP be initiated in respect of the Corporate Debtor.

54. Ld. Se. Counsel appearing for the Corporate Debtor, however, submitted that the Corporate Debtor has been roped in, in its capacity of the corporate guarantor and that the Financial Creditor has filed an application under section 7 of the Code against the Principal Borrower. It is submitted that the OTS proposal submitted by the Principal Borrower with deposit of Rs.25,00,000/ has not been rejected and is still under consideration. It is submitted that the matter was posted for hearing on 15th March, 2022. Ld.

Counsel submitted that the Corporate Debtor herein has not availed any loan from the Financial Creditor and that the proceedings against the Principal Borrower are pending, and default by the Principal Borrower has not yet been established. Accordingly, the present petition should be deferred till such time a decision is taken by the Financial Creditor on the OTS proposal submitted by the Principal Borrower till the final adjudication of CP.

55. It is submitted that Clause 2 read with Schedule-I provides that the deed of guarantee can be invoked either by the lenders acting collectively or by the lead bank. He submitted that the deed of guarantee does not allow for a single lender to invoke it. It is submitted that admittedly, the lenders of the lead bank has not invoked the guarantee . The purported invocation of guarantee by the Financial Creditor is de hors the agreement and invalid. It is submitted that the instant proceedings cannot be maintained on the basis of such illegal invocation. The deed of guarantee has not been invoked at all within the meaning of the deed of agreement. There is no pleading nor any document to support the factual assertion that the guarantee has been invoked as against the Corporate Debtor. Ld. Counsel has placed reliance on ***Syndicate Bank Vs. Channaveerappa Beleri & Ors. reported in (2006) 11 SCC 506, paragraphs 9 to 14***.

56. We have considered the pleadings of the parties and along with documents placed on record, and we have taken into consideration the submissions made by the Ld. Counsel for the parties. We find that all requisites of section 7 of the Code have been fulfilled. Admittedly, there was disbursement of loan as submitted in the petition to the Principal Borrower. The Corporate Debtor in the present petition was the corporate guarantor as per the deeds of guarantee. Since the Principal Borrower failed to make the repayment in terms of the loan agreement and further communications sent by the Financial Creditor to the Principal Borrower from time to time, the Financial Creditor was very much within its rights to proceed against the Corporate Guarantor, the Corporate Debtor herein, by invoking the Corporate Guarantee duly executed by the present Corporate Debtor. The default in

making payment occurred on 14th July, 2018 and the total amount payable as mentioned in the petition by the Financial Creditor is Rs.89,75,40,237.91 along with future interest, which the Corporate Debtor has failed to pay as corporate guarantor of the Principal Borrower. The law of guarantee is very clear that the liability of the Principal Borrower and the Guarantor is joint, several and co-extensive. The Financial Creditor is free to proceed against either of them or both of them as per its own choice. Since the Corporate Debtor in the petition has failed to make the payment in spite of notice dated 25th September, 2018 followed by notice dated 11th February,2019 issued to the Principal Borrower and also to the Guarantors including the present Corporate Debtor, the Corporate Debtor does not have any plausible defence in the present matter.

57. The petition is otherwise complete in all respects.

58. On the basis of the material placed before us, we are satisfied that this petition deserves to be admitted and we, therefore, pass the following orders:-

O R D E R S

i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 (54 of 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.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) **Mr. Pranab Kumar Chakrabarty** registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-003/IP-N00088/2017-2018/10826**, Email pranabchakrabartypkc@yahoo.com hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xi) The Financial Creditor/Applicant is directed to deposit **Rs.3,00,000/- (Rupees Three Lacs Only**) with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

xiii) List the matter on 20/05/2022 for the filing of the progress report.

xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 1st day of April, 2022

Pj