

**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI**

**CP. (IB) No. 04/GB/2020**

**Coram: Hon'ble Shri H.V Subba Rao, Member (J) : Hearing through  
Hon'ble Shri Prasanta Kumar Mohanty, Member (T) : Video Conferencing**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF THE NATIONAL COMPANY TRIBUNAL,  
GUWAHATI BENCH ON 30/11/2021**

Name of the Company: BANK OF INDIA ..... Financial Creditor  
V/S  
1. AKJ FINCAP LIMITED .....Corporate Guarantor to the  
CD, Agnipa Energo Pvt. Ltd  
.....Respondent

**Section:** Under section 7 read with Rule 4 of the Insolvency and Bankruptcy Code, 2016.

<b>S.No.</b>	<b>NAME (CAPITAL LETTERS)</b>	<b>DESIGNATION</b>	<b>REPRESENTATION</b>	<b>SIGNATURE</b>
1.	NONE	Advocate	Petitioner	Present
2.	MR. BIKASH SHARMA	Advocate	Respondent	in video Conference

**ORDER**

The Applicant is represented through respective Learned Counsel (s).

The case is fixed for pronouncement of order.

The Order is pronounced in the open court, Through Video Conferencing vide separate sheet.

**Sd/-**

**(PRASANTA KUMAR MOHANTY)  
MEMBER (T) &  
ADJUDICATING AUTHORITY**

**Sd/-**

**(H.V SUBBA RAO)  
MEMBER (J) &  
ADJUDICATING AUTHORITY**

## **ORDER**

**[Per se: Shri Prasanta Kumar Mohanty, Member (T)]**

**1. The present petition has been preferred by the Applicants/Financial Creditor, i.e. Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as a "Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking for initiation of Corporate Insolvency Resolution Process ("CIRP" in short) in respect of the Corporate Guarantor namely, AKJ Fincap Limited to the CD-Agnipa Energo Pvt. Ltd under CIRP**

2. The Petitioner/Financial Creditor namely, Bank of India, a body corporate constituted under Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 founded on September 7, 1906, having its Registered Head Office at Plot No. C-5, G Block, Bandra Kurla Complex, Bandra east, Mumbai-400051, Maharashtra and carrying on its Banking business through diverse branches and in particular a branch named, Guwahati SME Branch, Killa Building 1<sup>st</sup> Floor, Christian Basti, G.S. Road, Guwahati, P.O- Dispur and District- Kamrup (M), PIN- 781005, Assam and is represented by the Assistant General Manager, Zonal Office, bank of India, Saikia Commercial Complex, Sreenagar, Christian Basti, Guwahati-781005. TAN of the Guwahati SME Branch is SHLB02711C.

3. The Corporate Debtor/Guarantor namely AKJ Fincap Limited was incorporated on 08.08.1995 under the provisions of the Companies Act, 1956 vide **CIN: U67190DL1995PLC071546** having its Registered Office at C-8, Greater Kailash-I, South Delhi Area, New Delhi, Pin- 110048.

**4. It is submitted by the Petitioner that the Total defaulted amount in the Term Loan account including uncharged interest calculated up to 27.12.2019 stands at Rs. 11,34,30,136.00 (Rupees Eleven Crores Thirty-Four Lakhs Thirty Thousand One Hundred Thirty-Six Only) as on 27.12.2019.**

**5. It is also submitted that the loan account became Non-Performing Asset (NPA) on 30.04.2018 and is still continuing as NPA account. The statements of account along with Memorandum of Interest and Loan Installments Report and Certificate in accordance with the Bankers Book Evidence Act, 1891 (18 of 1891) have been filed herewith as ANNEXURE: I-A, I-B, I-C & I-D.**

6. It is submitted that One Agnipa Energo Pvt. Ltd has approached the Financial Creditor (Bank of India) and the Financial Creditor has agreed in principle to sanction an aggregate loan amount of Rs. 10.65 Crores (Rupees Ten Crores and Sixty-Five Lakhs Only) in the form of Term Loan (Rs. 10.00 Crores) and Cash Credit (Rs. 65.00 Lakhs). **The Bank of India as the Financial Creditor had sought to lodge this application for resolution of the loan account under the Code of 2016 with respect to its sanction in the form of Term Loan.**

7. Again, it is submitted that The Agnipa Energo Pvt. Ltd through its Director has signed Hypothecation cum Loan Agreement dated 25.03.2013, thereby hypothecating plant and machineries, fixtures and fittings, current and fixed assets etc. in favor of the Financial Creditor.

8. It is submitted that the Corporate guarantor AKJ Fincap Ltd offered its Corporate Guarantee and was represented by its Director Shri Ashok Kumar Jain, and who upon duly authorized by virtue of a Board resolution dated 06.01.2013 had signed and executed the Deed of Guarantee dated 25.03.2013 along with personal guarantees of Sri Ashok Kumar Jain, Sri Anil Jaina and Sri Gaurav Jaina in favor of the Financial Creditor, covering the loan facilities.

9. It is further submitted that Corporate Debtor Agnipa Energo Pvt. Ltd had also created Equitable Mortgage over Leasehold right period (32 years) over a piece or parcel of land measuring 0.815 hectares by deposit of Registered Lease Agreement No. 139/11

dated 28.06.2011 and also confirmed the same by signing and executing the Attendance Register for Oral Assent on 25.03.2013 and Memorandum of Deposit dated 25.03.2013, as security for repayment of the loan facilities.

10. It is also submitted that the Corporate Guarantor [AKJ Fincap Ltd] had also created Equitable mortgage over the entire 2<sup>nd</sup> Floor with one servant room and WC on the terrace and roof rights, part of property bearing No. E-320, by deposit of Registered Title Deed (Being Deed No. 10519, Book No. 1, Volume No. 948 of 1996 dated 29.10.1996) and also confirmed the same by signing and executing the Attendance Register for oral Assent on 25.03.2013 and Memorandum of Deposit dated 25.03.2013, as security for repayment of the loan facilities. However, the said property had since been sold by the Financial Creditor under the provisions of the SARFAESI Act, 2002 on 12.02.2019 for an amount of Rs. 1,91,00,000.00 (Rupees One Crores Ninety-One Lakhs Only) and the said amount stood adjusted in the Term Loan account of the Agnipa Energo Pvt. Ltd. Agnipa Energo Pvt. Ltd (Borrower) had also registered the charge over the secured properties (hypothecated and mortgaged properties) with the Registrar of Companies and relevant document have been filed therein.

11. Further, the Agnipa Energo Pvt. Ltd (Borrower), Corporate Guarantor and the personal guarantors had also signed and executed Acknowledgment of Debt dated 24.03.2016 for the Term Loan in favor of the Financial Creditor, thereby confirming that all the security documents executed by them in favor of the Financial Creditor besides the Balance Sheets for the years 2017 and 2018 reflecting the dues and the guarantee respectively and also covered by creation of Equitable Mortgages.

12. It is also submitted that since the Agnipa Energo Pvt. Ltd (Borrower) failed to complete the project for which loan facilities were sanctioned, the Financial Creditor had disbursed the Term loan of Rs. 8,51,67,362.75 out of the sanctioned amount of Rs. 10.00 Crores as per the demand of the Agnipa Energo Pvt. Ltd (Borrower) but could not disburse the Working Capital of Rs. 65.00 Lacs due to the said non completion of project.

13. Again Agnipa Energo Pvt. Ltd. (Borrower) failed to maintain the Term Loan account (A/C No. 505565410000001) maintained by the Financial Creditor as it failed to pay the installments as per terms and conditions. The Term loan account was classified as NPA on 30.04.2018. Thereafter, having no other alternative, the Financial Creditor had issued a reminder Letter dated 14.03.2018 to the Agnipa Energo Pvt. Ltd (Borrower), to pay the interest and the loan instalments. Moreover, the Agnipa Energo Pvt. Ltd (Borrower) while admitting its liability had submitted a One Time Settlement proposal dated 17.05.2019, but the same could not be accepted by the Financial Creditor as the OTS amount was not only too meagre but also the fact that the account was declared "Fraud" and was reported to the RBI and criminal action followed. The required Statements of Account and Certified Entries in a Bankers Book in accordance with the Bankers Book Evidence Act, 1891 (18 of 1891) also prove the claim of the Financial Creditor against the AKJ Fincap Ltd. (Corporate Guarantor) besides the borrower Agnipa Energo Pvt. Ltd (Borrower) **(Annexures I-A, I-B, I-C & I-D)**.

14. The Petitioner has also submitted the particulars of Financial Debt such as Documents, Records and Evidence of Default. The same are mentioned below:

- i. **Particulars of Security Held, the date of its Creation, its estimated value as per the Creditor:** The Financial Creditor has sanctioned a Cash Credit of Rs. 65.00 Lakhs and TL Limit of the Rs. 10 Crores aggregating to Rs. 10.65 Crores in favor of the Agnipa Energo Pvt. Ltd (Borrower). The Term Loan facility is secured by way of the following:
  - a. Hypothecation cum Loan Agreement dated 25.03.2013 for Rs. 10.65 Crores. **(Annexure I-T)**
  - b. E.M of Leasehold right period (32 years) created by the Agnipa Energo Pvt. Ltd over a piece or parcel of land measuring 0.815 hectares at Pahumara Irrigation Scheme, Village- Lauguan, District-Baksa, Assam vide **Registered Lease Agreement No. 139/11 dated 28.06.2011. (Annexures I-V and I-V.1)**

- c. Equitable Mortgage created by Corporate Guarantor **(AKJ FINCAP LTD.)** over the entire 2<sup>nd</sup> Floor with one servant room and WC on the terrace and roof rights, part of property bearing No. E-320, Greater Kailash, Part-I, New Delhi-110048 for a measuring area 208 sq. yards, along with 1/3<sup>rd</sup> undivided proportionate share in the land underneath and use of common passage, common staircase etc. by deposit of **Registered Title Deed (Being Deed No. 10519, Book No. 1, Volume No. 948 of 1996 dated 29.10.1996) (Annexure I-X)**. However, the said property had since been sold by the Financial Creditor under the provisions of the SARFAESI Act, 2002 on 12.02.2019 for an amount of Rs. 1,91,00,000.00 (Rupees One Crore Ninety-One Lakhs Only) and the said amount stood adjusted in the Term loan account of the M/s Agnipa Energo Pvt. Ltd.
- d. The Corporate Guarantor and the Personal Guarantors have executed security documents including Deed of Guarantee dated 25.03.2013 **(Annexure I-U)** and the M/s Agnipa Energo Pvt. Ltd and the Corporate Guarantor has also created equitable mortgage by deposit of title deeds in favor of the Financial Creditor. **Extracts of the Attendance Register for Oral Assent on 25.03.2013 and Memorandums of Deposit dated 25.03.2013 (Annexures I-W and I-W. 1 and I-Y and I-Y. 1)** for creation of Equitable Mortgage by deposit of Registered Lease Agreement and Registered Title Deed had been executed accordingly by Agnipa Energo Pvt. Ltd and Corporate Guarantor respectively.
- e. The estimated value of the hypothecated and mortgage properties standing in the name of the Agnipa Energo Pvt. Ltd as per Valuation Report dated 10.12.2018 prepared by the registered and empaneled Valuer Sri Rabi Sankar Dutta is Rs. 2,15,42,260.00 **(Annexure I-AI)**.
- f. Certificate of Registration of Charge along with list of index of registered charges created by the Agnipa Energo Pvt. Ltd in favor of the Financial Creditor and also of the Corporate Guarantor AKJ Fincap Ltd. as available on the website [www.mca.gov.in](http://www.mca.gov.in) **(Annexure I-E and I-F)**.

- ii. Particulars of an order of Court, Tribunal or Arbitral Panel Adjudicating on the Default:
  - a. The Financial Creditor as Applicant had filed an Original Application bearing O.A. No. 438/2018 before the Debts Recovery Tribunal at Guwahati against Agnipa Energo Pvt. Ltd., Corporate Guarantor and Personal Guarantor as Defendants for recovery of Rs. 11,3535,259.26 and the said Application in Pending disposal. The next day of hearing is 25.11.2021.
  - b. The Financial Creditor as Applicant had initiated a resolution process against the Corporate Debtor (Borrower) i.e. Agnipa Energo Pvt. Ltd., by preferring 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 before the Hon'ble NCLT, Guwahati Bench and the said petition has been registered as CP(IB)/37/GB/2019, which is under CIRP.
- iii. Record of Default with Information Utility, if any: CRILC (Central Repository of Information on Large Credits) Report dated 06.01.2020 **(Annexure I- AA. 1)**.
- iv. Particulars of latest and complete Copy of the Financial Contract Reflecting all Amendments and Waivers to Date:
  - a. Request by Agnipa Energo Pvt. Ltd (Borrower) vide Project Report (DPR) and Application requesting financial assistance from the Financial Creditor **(Annexure I-I)**.
  - b. Sanction Letter No. GMCB/GD/12-13/047 dated 04.03.2013 issued by the Financial Creditor to the Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-J)**.
  - c. Letter No. GMCB/GD/12-13 dated 23.03.2013 for revision of the rate of interest of the credit facilities issued by the Financial Creditor to the Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-K)**.
- v. Record of Default as Available with any Credit Information Company: Credit Information reports as generated from Trans Union CIBIL **(Annexures I-AA and I-AA.a)**.

- vi. Entries in a Bankers Book in accordance with the Bankers Book Evidence Act, 1891 (18 of 1891) **(Annexure I-D)**.
- vii. List of documents attached to the application in order to prove the Existence of Financial Debt, the amount and date of default:
- a. Demand Promissory Notes both dated 25.03.2013 for Rs. 10.00 Crores and Rs. 65.00 Lacs executed by the Agnipa Energo Pvt. Ltd. (Borrower) in favor of the Financial Creditor. **(Annexures I-N and I-O)**.
  - b. Hypothecation cum Loan Agreement dated 25.03.2013 executed by the Agnipa Energo Pvt. Ltd (Borrower) in favor of the Financial Creditor. **(Annexure I-T)**.
  - c. Loan Bearer Letters both dated 25.03.2013 for Rs. 10.00 Crores and Rs. 65.00 Lacs executed by the Agnipa Energo Pvt. Ltd (Borrower) in favor of the Financial Creditor. **(Annexure I-P and I-Q)**.
  - d. Instalment Letter dated 25.03.2013 for Rs. 10.00 Crores executed by the Agnipa Energo Pvt. Ltd (Borrower) in favor of the Financial Creditor. **(Annexure I-R)**
  - e. Term Loan Agreement dated 25.03.2013 for Rs. 10.00 Crores executed by the Agnipa Energo Pvt. Ltd (Borrower) in favor of the Financial Creditor. **(Annexure I-S)**.
  - f. Extract of minutes of Board Resolution of Agnipa Energo Pvt. Ltd dated 05.03.2013 **(Annexure I-L)**.
  - g. Extract of minutes of Board Resolution of AKJ Fincap Ltd. (Corporate Guarantor) dated 06.01.2013 **(Annexure I-M)**.
  - h. Deed of Guarantee dated 25.03.2013 signed and executed by Sri Ashok Kumar Jain, Sri Anil Jain, Sri Gaurav Jain and Corporate Guarantee by AKJ Fincap Ltd (Corporate Guarantor and represented by its Director Shri Ashok Kumar Jain) in favor of the Financial Creditor **(Annexure I-U)**.
  - i. Extract of the Attendance Register for Oral Ascent on 25.03.2013 and Memorandum of Deposit dated 25.03.2013 **(Annexures I-W and I-W.1 & I-Y and I-Y.1)**.

- j. Demand Letter dated 14.03.2018 to Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-AC)**.
- k. Demand Notices both dated 11.05.2018 to Agnipa Energo Pvt. Ltd and Corporate Guarantor/Personal Guarantors under Section 13(2) of the SARFAESI Act, 2002 **(Annexure I-AD and I-AD.1)**
- l. Representation dated 06.07.2018 by the Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-AE)**
- m. Reply dated 18.07.2018 by Financial Creditor. **(Annexure I-AF)**
- n. OTS proposal dated 17.05.2019 by the Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-AG)**.
- o. Acknowledgement of Debt dated 24.03.2016 signed and executed by the Agnipa Energo Pvt. Ltd (Borrower) and Corporate Guarantor. **(Annexure I-Z)**.
- p. Audited Balance sheet of the Agnipa Energo Pvt. Ltd for the year 2017 **(Annexure I-AH)**
- q. Audited Balance sheet of the AKJ Fincap Ltd. for the year 2018 **(Annexure I-AH.1)**
- r. Account Statements along with Memorandum of uncharged interest **(Annexures I-A and I-B)**
- s. CIBIL Report of Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-AA)**
- t. CIBIL Report of AKJ Fincap Ltd (Corporate Guarantor) **(Annexure I-AA.a)**

15. It is observed that an Application was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in Short the 'IBC') filed by M/s. Bank of India (the 'Financial Creditor') and an ex-parte Order was passed by this Adjudicating Authority on 18.03.2020 observing that Notice was served on the 'Corporate Debtor', but there was no appearance.

16. It is submitted by the Learned counsel of Respondent that the Section 7 Application came up for hearing for the very first time on 10.02.2020 and Notice was issued to the M/s AKJ Fincap Ltd. returnable on 25.02.2020; on 25.02.2020 the Adjudicating Authority observed that the Notice sent to the Respondent herein, had returned with an

endorsement 'insufficient address' and directed issuance of fresh Notice and also directed the Petitioner herein to serve copy of the same upon the Respondent and the matter was posted for Hearing on 18.03.2020. While so, on 15.03.2020, the Adjudicating Authority had directed that apart from matters which require urgent Hearing, it would not take up matters listed from 16.03.2020 to 27.03.2020 on account of the Covid situation; the Respondent became aware of the pendency of the Section 7 Application only when the Counsel came across the same on the website; the Respondent was proceeded ex-parte on 18.03.2020 solely on the basis of the submissions of the Petitioner that the Notice has been served upon them.

17. Thereafter, aggrieved by that Order, I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 was filed by M/s. AKJ Fincap Limited, Respondent herein, seeking a direction to set aside the ex-parte Order, which was taken up for Hearing on 07.10.2020 and a Notice was issued to the Respondent (Petitioner herein) to file their Reply; on 11.11.2020 the matter was listed again for hearing on 25.11.2020 and the I.A. was dismissed without considering the provisions under Rule 49(2) of the NCLT Rules, 2016.

18. The Adjudicating Authority dismissed the said IA on the ground that the Tribunal has no power to review or set aside its own Company Petition Admission Order as per settled proposition of law. Learned Counsel for the Respondent strenuously argued that the Adjudicating Authority has the power to set aside this ex-parte Order, but has erroneously dismissed the I.A. on the ground that the Order dated 18.03.2020 dealt with 'Admission of the Application' filed under Section 7.

19. Aggrieved by the impugned Order dated 09.12.2020, passed by this Adjudicating Authority in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020, the Respondent i.e. M/s. AKJ Fincap Limited, filed an appeal with NCLAT against the impugned order dated 09.12.2020 of this bench.

20. On hearing the Appeal No. Company Appeal (AT)(Insolvency) No 178 of 2021 filed by the AKJ Fincap Ltd against the impugned order of this Bench passed in the IA No 45 of 2020 in Company Petition (IB) No 04/GB/2020, the Principal Bench of the Hon'ble NCLAT has passed order on 16.04.2021 and the relevant portion of the order is reproduced below:

*"9. Learned Adjudicating Authority has dismissed the I.A. on the ground that they do not have powers to review or set aside the Order of Admission under Section 7. At this juncture, we find it relevant to reproduce Rule 49(2) of the NCLT Rules, 2016;*

*"49. Ex-parte Hearing and disposal. –*

*(1) ....*

*(2) Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the ex-parte hearing as against him upon such terms as it thinks fit."*

*10. From the aforementioned Order dated 18.03.2020 reproduced in Para 7, it is evident that no Order of Admission has been passed and it was only an Order setting the Appellant herein ex-parte.*

*11. Having regard to the fact that 18.03.2020 falls during the Covid-19 period and the restrictions imposed by the Government read together with the Notice issued by the Learned Adjudicating Authority on 15.03.2020 that matters posted during the period 16.03.2020 to 27.03.2020 would be adjourned, except for urgent matters, keeping in view Principles of Natural Justice, we are of the considered opinion that an opportunity may be given to the Appellant herein to file his Reply and take part in the proceedings. Further, it is an admitted fact that the Appellant before the Adjudicating Authority is a guarantor of Agnipa Energo Private Limited whose Petition is already pending before the Adjudicating Authority. Therefore, the Order setting the Appellant herein ex parte is set aside. Though we are of the considered view that the Adjudicating Authority had the power to set aside an ex-parte Order provided, it is satisfied*

*that there was sufficient cause with respect to service of Notice, as provided in Rule 49(2) of the NCLT Rules, 2016, it is noted that the Appellant herein is silent about the service of Notice which was affected upon them by e-mail. Hence, we find it a fit case to impose costs of Rs. 25,000/- on the Appellant to be paid to the Respondent before the next date of Hearing.*

*12. In the result, this Appeal is allowed and the Order of the Adjudicating Authority is set aside. Both parties are directed to appear before the Learned Adjudicating Authority on 26th April, 2021 and the Appellant shall pay to the Respondent the costs on or before 26th April, 2021. Keeping in view the timelines provided for in the Code, Learned Adjudicating Authority shall dispose of the Application as expeditiously as practicable.*

*13. Company Appeal (AT) (Insolvency) No. 179 of 2021 has been filed against the Impugned Order dated 18.03.2020 passed by the Adjudicating Authority in CP (IB) No. 04/GB/2020 with a delay of 334 days. For reasons cited in I.A. No. 412 of 2021, the Application seeking condonation of delay is allowed. As Company Appeal (AT) (Insolvency) No. 178 of 2021 is allowed and the Order of the Learned Adjudicating Authority in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 is set aside, this Appeal is disposed of as infructuous."*

**21. As per the Order of Hon'ble NCLAT the Corporate Guarantor paid Rs 25000.00 to the FC and the CP(IB) NO 04/GB/2020 is taken up by this Bench afresh.**

**22.** During the proceedings the Respondent i.e. the Corporate Guarantor has submitted that:

- i. Under the Insolvency & Bankruptcy Code, 2016 there is a Section 227 in the Code with the caption '**Power of Central Government to notify financial service providers, etc.'** reads as under:

*"227. Notwithstanding anything to the contrary examined in this Code or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed."*

This Section thus prescribes that the Central Government in consultation with the "**Financial Sector Regulator**" can notify "**Financial Service Provider**" or "Categories of Financial Service Providers" for the purpose of their Insolvency proceedings to be conducted under Insolvency Code in the manner prescribed therein.

- ii. Under the Insolvency Code, there is an enabling **Section 239** which enshrines "Power to make Rules" to the Central Government wherein it is specifically inserted **Sub section (2)(zk)** empowering the Central Government to make Rules in the matter of proceedings prescribed u/s. 227 of the Code to formulate the manner of conducting Insolvency & Liquidation Proceedings.
- iii. Exercising the powers as enshrined in the Insolvency Code 2016, the Ministry of Corporate Affairs/Central Government has issued "Notification" on 15.11.2019 by formulating the Rules called as "Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019". These Rules shall apply to such "Financial Service Providers" (in short FSP) or "Categories of Financial Service Providers" as notified by Central Government u/s 227 of the Insolvency Code for the purpose of their Insolvency and Liquidation proceedings under these Rules. For the purpose of conducting Insolvency process an "Administrator" is to be appointed as defined **U/r 3** means an Individual appointed by the Adjudicating Authority under Rule 5(a)(iii) to exercise the powers and functions of the Insolvency Professional/Interim Resolution Professional/Resolution Professional/Liquidator in respect of a Financial Service

Provider undergoing Insolvency Proceedings as per the I&B Code. To facilitate the Insolvency proceedings an "Advisory Committee" is to be constituted by the "Regulator" in accordance with Rule 5(c) of these Rules. Vide Section 3 of "Definitions", the definition of "**Appropriate Regulator**" means "**Financial Sector Regulator**" as notified by Central Government u/s 227 for a category of "Financial Service Providers".

- iv. Through this Rule there are certain modifications such as wherever the expression "Corporate Debtor" is used in general in this Code, conversely, for the purpose of application of these Rules it shall mean "Financial Service Provider" and wherever the expression "Insolvency Professional", "Interim Resolution Professional" "Resolution Professional" or "Liquidator" occur, now for the application of this Rule, shall mean "Administrator".
- v. Under this newly introduced Rules 2019 the process of Insolvency is prescribed as per Rule 5 supra reads as under:

**"5. Corporate Insolvency Resolution Process of financial service providers** – *The provisions of the Code relating to the Corporate Insolvency Resolution Process of the corporate debtor shall, mutatis mutandis applies, to the Insolvency resolution process of a financial service provider subject to the following modifications, namely:*

**(a) Initiation of Corporate Insolvency Resolution Process-**

- (i) no corporate insolvency resolution process shall be initiated against a financial service provider which has committed a default under section 4, 3 except upon an application made by the appropriate regulator in accordance with Rule 6;*
- (ii) the application under sub-clause (i) shall be dealt with in the same manner as an application by a financial creditor under section 7, subject to clause (iii); and*
- (iii) on the admission of the application, the Adjudicating Authority shall appoint the individual proposed by the appropriate regulator*

*in the application filed under sub-clause (i) of clause (a) of Rule 5, as the Administrator.*

*(b) Moratorium- Save as provided in Section 14-*

*(i) an interim moratorium shall commence on and from the date of filing of the application under clause (a) till its admission or rejection; and*

*(ii) the license and registration which authorizes the financial service provider to engage in the business of providing financial services shall not be suspended or cancelled during the interim-moratorium and the corporate insolvency resolution process.*

*Explanation- For the purposes of this clause, "interim moratorium" shall have the effect of the provisions of sub-sections (1), (2) and (3) of Section 14.*

***(c) Advisory Committee-***

*(i) the appropriate regulator may, where deemed necessary, constitute an Advisory Committee, within 45 days of the insolvency commencement date, to advise the Administrator in the operations of the financial service provider during the corporate insolvency resolution process;*

*(ii) the Advisory Committee shall consist of three or more Members, who shall be persons of ability, integrity and standing, and who have expertise or experience in finance, economics, accountancy, law, public policy or any other profession in the area of financial services or risk management, administration, supervision or resolution of a financial service provider;*

*(iii) the terms and conditions of the Members of the Advisory Committee and the manner of conducting meetings and observance of rules of procedure shall be such as may be determined by the appropriate regulator;*

- (iv) *the compensation paid to the Members of the Advisory Committee shall be part of the insolvency resolution process costs;*
- (v) *the Administrator shall chair the meetings of the Advisory Committee.*

**(d) Resolution Plan:**

- (i) *the resolution plan shall include a statement explaining how the resolution applicant satisfies or intends to satisfy the requirements of engaging in the business of the financial service provider, as per laws for the time being in force;*
- (ii) *upon approval of the resolution plan by the committee of creditors under sub-section (4) of section 30, the Administrator shall seek 'no objection' of the appropriate regulator to the effect that it has no objection to the persons, who would be in control or management of the financial service provider after approval of the resolution plan under section 31;*
- (iii) *the appropriate regulator shall without prejudice to the provisions contained in Section 29A, issue 'no objection' on the basis of the 'fit and proper' criteria applicable to the business of the financial service provider;*
- (iv) *where an appropriate regulator does not refuse 'no objection' on an application made under clause (ii) within forty-five working days of receipt of such application, it shall be deemed that 'no objection' has been granted."*

- vi. As far as the appointment of "Insolvency Professional" is concerned, under this Rule, it is provided under Rule 9 that for the purpose of these Rules, only an "**Administrator**" proposed by the appropriate Regulator and appointed as such by the Adjudicating Authority **shall act as an Insolvency Professional**, etc. as the case may be. The "Administrator" so appointed shall have the same duties, functions, obligations, responsibilities, rights, and powers of an

- Insolvency Professional, etc. while acting in an Insolvency Resolution of a "Financial Service Provider". A replacement of the "Administrator" is possible on an Application made by the "Appropriate Regulator" before the Adjudicating Authority.
- vii. These Rules have also laid down the procedure for submission of requisite Form-I to be accompanied by a fee of Rs. 25,000.00 having enclosed a written consent and declaration of "Administrator" on Form-2, format is annexed. The Application is to be filed in electronic form as and when such facility is made available by the Adjudicating Authority, however, till such facility is made available, the Applicant may submit the documents in a legible portable format in a data storage device such as Compact Disc or a USB Flash Drive acceptable to the Adjudicating Authority.
- viii. Most importantly, the respondent would like to draw attention of this Hon'ble Tribunal on a **Notification dated 18.11.2019** which was issued in exercise of the powers conferred u/s 227 of the Code in consultation with RBI, reproduced below for ready reference:

**"MINISTRY OF CORPORATE AFFAIRS**

**NOTIFICATION**, New Delhi, the 18<sup>th</sup> November, 2019

**SO. 4139(E)**- In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 31 OF 2016, the Central Government in consultation with the Reserve Bank of India hereby notifies as under:

The insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (in this notification referred to as the 'Rules') and the applicable Regulations:

<b>Sl. No.</b>	<b>Category of Financial Service Provider (rule 2 of the Rules)</b>	<b>Appropriate Regulator [clause (a) of sub-rule (1) of rule 3 of the Rules]</b>	<b>Dealing with third-party assets (rule 10 of the Rules)</b>
(1)	(2)	(3)	(5)
1	Non-banking finance companies (which include housing finance companies) with assets size of Rs. 500 crores or more, as per last audited balance sheet	Reserve Bank of India	To be notified separately

**Thus vide this Notification “Non-Banking Finance Companies” including “Housing Finance Companies” with assets size of 500 Crores or more, the proceedings shall be undertaken in accordance with the provisions of IB Code 2016 to be read along with these Rules by the appropriate Regulator through Administrator and in this case Reserve Bank of India is designated.**

- ix. That the above all guidelines are not followed in the application before this Hon’ble Tribunal.
- x. The corporate debtors before this Hon’ble Tribunal is Financial Service Provider company as per the above sections, rules etc. and the application filed without following due process of law is liable to be dismissed.

A copy of Registration certificate issued by the RBI is annexed and marked as **ANNEXURE-A.**

23. On the other hand, the Applicant FC has submitted that:

- i. One Agnipa Energo Pvt. Ltd has approached the Financial Creditor (Bank of India) and the Financial Creditor has agreed in principle to sanction an aggregate loan amount of Rs. 10.65 Crores (Rupees Ten Crores and Sixty-Five Lakhs) only in the form of Term Loan (Rs. 10.00 Crores) and Cash Credit (Rs. 65.00 Lakhs). The Bank of India as the Financial Creditor has sought to lodge this application under the Code of 2016 with respect to its sanction in the form of Term Loan.
- ii. The Agnipa Energo Pvt. Ltd through its Director has signed Hypothecation cum Loan Agreement dated 25.03.2013, thereby hypothecating plant and machineries, fixtures and fittings, current and fixed assets etc. in favor of the Financial Creditor.
- iii. The Corporate guarantor AKJ Fincap Ltd has offered its Corporate Guarantee and was represented by its Director Shri Ashok Kumar Jain, and who upon duly authorized by virtue of a Board resolution dated 06.01.2013 had signed and executed the Deed of Guarantee dated 25.03.2013 along with personal guarantee of Sri Ashok Kumar Jain, Sri Anil Jaina and Sri Gaurav Jaina in favor of the Financial Creditor, covering the loan facilities.
- iv. Further, Corporate Debtor Agnipa Energo Pvt. Ltd had also created Equitable Mortgage over Leasehold right period (32 years) over a piece or parcel of land measuring 0.815 hectares at Pahumara Irrigation Scheme, Village-Laugaon, District-Baksa, Assam by deposit of Registered Lease Agreement No. 139/11 dated 28.06.2011 and also confirmed the same by signing and executing the Attendance Register for Oral Assent on 25.03.2013 and Memorandum of Deposit dated 25.03.2013, as security for repayment of the loan facilities.
- v. Similarly, the Corporate Guarantor/Debtor [AKJ Fincap Ltd] had also created Equitable mortgage over the entire 2<sup>nd</sup> Floor with one servant room and WC on the terrace and roof rights, part of property bearing No. E-320, by deposit of Registered Title Deed (Being Deed No. 10519, Book No. 1, Volume No. 948 of 1996 dated 29.10.1996) and also confirmed the same by signing and executing the Attendance Register for oral Assent on 25.03.2013 and Memorandum of

- Deposit dated 25.03.2013, as security for repayment of the loan facilities. However, the said property had since been sold by the Financial Creditor under the provisions of the SARFAESI Act, 2002 on 12.02.2019 for an amount of Rs. 1,91,00,000.00 (Rs. One Crores Ninety-One Lakhs Only) and the said amount stood adjusted in the Term Loan account of the Agnipa Energo Pvt. Ltd.
- vi. Agnipa Energo Pvt. Ltd (Borrower) had also registered the charge over the secured properties (hypothecated and mortgaged properties) with the Registrar of Companies and relevant document have been filed therein.
  - vii. Further, the Agnipa Energo Pvt. Ltd (Borrower), Corporate Guarantor and the personal guarantors had also signed and executed Acknowledgment of Debt dated 24.03.2016 for the Term Loan in favor of the Financial Creditor, thereby confirming that all the security documents executed by them in favor of the Financial Creditor besides the Balance Sheets for the years 2017 and 2018 reflecting the dues and the guarantees respectively and also covered by creation of Equitable Mortgages. Therefore, the instant petition has been filed well within the period of limitation.
  - viii. So far jurisdiction is concerned, since the borrower company runs its business at Guwahati and Loan facility had been granted for executing contractual work in Assam, for which corporate guarantee was provided by Corporate Guarantor by executing the Guarantee Agreement at Guwahati, therefore the instant petition had filed within the Jurisdiction of this Hon'ble Tribunal.
  - ix. Moreover, the Press Release by Insolvency and Bankruptcy Board of India No. IBBI/PR/2019/30 dated 18.11.2019 also satisfies the Jurisdiction for filing the instant petition against the Corporate Guarantor as Debtor in the Guwahati Bench of this Hon'ble Tribunal. Similarly, there is sufficient cause of action against the Corporate Guarantor as it is also a borrower within the meaning of Debtor as prescribed under the Code.
  - x. It is pertinent to mention herein that since the Agnipa Energo Pvt. Ltd (Borrower) failed to complete the project for which loan facilities were sanctioned, the Financial Creditor had disbursed the Term loan of Rs.

8,51,67,362.75 out of the sanctioned amount of Rs. 10.00 Crores as per the demand of the Agnipa Energo Pvt. Ltd (Borrower) but could not disburse the Working Capital of Rs. 65.00 Lakhs due to the said non completion of project. It is worth mentioning herein that there were continuous deferments of Date of Commencement of Commercial Operation (DCCO) of the project and which resulted in modification of terms during internal review of the project for which loan facility was sanctioned.

- xi. The Agnipa Energo Pvt. Ltd. (Borrower) failed to maintain the Term Loan account (A/C No. 505565410000001) maintained by the Financial Creditor as it failed to pay the installments as per terms and conditions. The Term loan account was classified as NPA on 30.04.2018. Thereafter, having no other alternative, the Financial Creditor had issued a Reminder Letter dated 14.03.2018 to the Agnipa Energo Pvt. Ltd (Borrower), to pay the interest and the loan installments. Thereafter, the Financial Creditor had also initiated action under SARFAESI Act, 2002 by issuing Demand Notices dated 11.05.2018 to the Agnipa Energo Pvt. Ltd (Borrower), Corporate Guarantor AKJ Fincap Limited and the personal guarantors under Section 13 (2) of the said Act but they failed to pay the same. However, on receipt of the said Notice, the Director of the Agnipa Energo Pvt. Ltd (Borrower) submitted a Representation dated 06.07.2018 raising certain objections but admitting the liability and in response to the said Representation, the Financial Creditor through its Authorized Officer had replied to the same vide Reply dated 18.07.2018. But no payment had been received by the Financial Creditor towards liquidation of the outstanding dues. Moreover, the Agnipa Energo Pvt. Ltd (Borrower) while admitting its liability had submitted an One Time Settlement proposal dated 17.05.2019 but the same could not be accepted by the Financial Creditor as the OTS amount was not only too meager but also the fact the account was declared "Fraud" and was reported to the RBI and criminal action followed. The required Statements of Account and Certified Entries in a Bankers Book in accordance with the Bankers Book Evidence Act, 1891 (18 of 1891) also prove the claim of

the Financial Creditor against the Agnipa Energo Pvt. Ltd (Borrower) **(Annexure I-A, I-B, I-C & I-D of the Section 7 Petition)**.

- xii. Considering the total outstanding dues in the Term Loan Account, there is no scope for the Financial Creditor to resolve the entire debt on resolution of the petition filed under Section 7 of IB Code, 2016 (registered as CP(IB)/37/GB/2019) against the Corporate Borrower/Debtor (Petition admitted on 2020, IRP appointed and final resolution plan submitted for consideration by the COC) and hence the Financial Creditor has preferred the instant petition under Section 7 of the IB code, 2016 against the Corporate Guarantor who is also a debtor within the meaning as provided under the code and is therefore a Corporate Debtor in this petition and the Financial Creditor having proved the loans, debts and defaults of the Corporate Debtor along with the issues pertaining to Limitation and Jurisdiction through more than sufficient documents annexed with the petition/amended petition/additional affidavit cum amendment and taking into consideration of the facts and records of the case, it is respectfully prayed that this Hon'ble Tribunal may be pleased to admit the petition and pass such other order/orders as to this Hon'ble Tribunal may deem fit and proper.
- xiii. The Financial Creditor does not admit the statements, allegations and submissions made in the Preliminary Affidavit filed by the CD. So far the provisions of Insolvency Code vis-a-vis Financial Service Provider Rules as mentioned in the Preliminary Objection/Affidavit filed by the CD, the submission of the FC in connection thereof is that even if the CD (Corporate Guarantor) falls under the category of financial Service Provider as defined under Section 227 of IBC, 2016 read with Section 239 of the Code and as per the MCA Notification dated 15.11.2019, however in terms of the MCA Notification dated 18.11.2019, the service provider has to have assets over Rs. 500.00 Crores and above and in the instant case, the CD (AKJ Fincap), as per last Balance Sheet for the Financial Year from 01.04.2019 to 31.03.2020 (submitted with ROC and downloaded from MCA site), it is found that the total Asset of the CD (AKJ

Fincap) stands at **Rs. 15,62,60,505.00 as on 31.03.2020**. Therefore, it is abundantly clear that the CD (AKJ Fincap Limited) is not at all eligible. **(Annexure-VII, VIII and IX).**

- xiv. The statements made the Corporate Guarantor in Paragraphs are not correct and the FC denies the same. There are no fatal defects or infirmities as claimed by the CD. There is no legal requirement to make the borrower party in the instant Section 7 Application filed against the Corporate Guarantor/Corporate Debtor and pendency of CIRP proceedings is not a bar to initiate separate proceeding under the Code against the Corporate Guarantor/Corporate Debtor as Hon'ble Apex Court has already laid down in this regard.
- xv. It is further submitted by the FC that the submissions made by the Respondent are completely false, fabulous, without any basis and it is prayed that the Section 7 petition filed by the FC may be admitted as that debt had been established beyond any reasonable doubt and the same had backed by irrefutable documentary evidence.

### **ORDER**

**24. Heard both the sides at length and perused the documents, written submissions made available.**

**25. During the proceedings, it is clearly established with the documents submitted and agreed by both the Applicant as well as the CD/Respondent that:**

**25.1 The CD/Respondent is a NBFC/Financial Service Provider and Certificate issued to this effect by the RBI dated 18/03/1998 has been enclosed by the CD;**

**25.2 The Applicant/FC has also admitted in its submission in the affidavit dated 10/08/2021 filed by it enclosing the latest Balance Sheet of the CD for the Financial Year 2019-2020, downloaded**

**from the MCA site, that the Total Assets of the CD –AKJ Fincap Ltd stands at Rs 15.63 crores only.**

**26 It is pertinent to note that:**

**26.1 Section 3(7) of IBC 2016 reads that “Corporate Person”** means a Company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force **but shall not include any financial service provider.**

**26.2** The Central Government has notified the following and brought into effect the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of a Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 with effect from 01.12.2019 **NOTIFICATION**, New Delhi, the 18<sup>th</sup> November, 2019.

**26.3** In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 31 OF 2016, the Central Government in consultation with the Reserve Bank of India hereby notifies as under:

26.4 The insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (in this notification referred to as the ‘Rules’) and the applicable Regulations

<b>Sl. No.</b>	<b>Category of Financial Service Provider (rule 2 of the Rules)</b>	<b>Appropriate Regulator [clause (a) of sub-rule (1) of rule 3 of the Rules]</b>	<b>Dealing with third-party assets (rule 10 of the Rules)</b>
----------------	---	--	---

(1)	(2)	(3)	(5)
1	Non-banking finance companies (which include housing finance companies) with assets size of Rs. 500 crores or more, as per last audited balance sheet.	Reserve Bank of India	To be notified separately

26.5 Thus vide this Notification “Non-Banking Finance Companies” including “Housing Finance Companies” with assets size of 500 Crores or more, the proceedings shall be undertaken in accordance with the provisions of IB Code 2016 to be read along with these Rules by the appropriate Regulator through Administrator and in this case Reserve Bank of India is designated.

**26.6 Hence, it is evident from the said Notification that the said Rules shall apply to such Financial Service Providers of categories as may be notified by the Central Government under Section 227 of the IB Code, 2016 from time to time and pursuant to the exercise of power contained in Section 227 of the IB code, 2016 the Central Government has chosen to notify NBFC with the assets of Rs. 500 crore or more as per last audited balance sheet (Notification dated 18.11.2021) and it is also seen from the Rule framed by the Central Government that any one cannot initiate proceedings seeking for Corporate Insolvency Resolution Process (CIRP) of the Financial Service Provider and it is only the Regulators who have been given the power to initiate the proceedings before the Adjudicating Authority namely this Tribunal.**

27. **The Corporate Debtors before this Hon'ble Tribunal is a Financial Service Provider Company as per the above sections, rules etc., and we don't find any merit in the arguments of the Counsel for the FC and the submissions of the FC that the Application filed by it under Section 7 of IBC is admitted and CIRP initiated even though it has admitted that the Total Assets of the CD is Rs 15.63 Crores only which is well below the stipulated limit amount of Rs 500.00 crores.**

28. **Applicant FC has not followed the Guidelines and filed this Application under Section 7 of IBC in respect of a Financial Service Provider without following the due process of law.**

29. **Hence, this Application is hereby rejected so as to no cost.**

30. **However, we are making it clear that this Application filed under Section 7 of IBC is rejected but the order of rejection will not affect the right of the Applicant to seek recourse, if otherwise eligible, before other forum(s) as the Petitioner may determine to proceed.**

**Sd/-**

**(PRASANTA KUMAR MOHANTY)  
MEMBER (T) &  
ADJUDICATING AUTHORITY**

*//RM//*

**Sd/-**

**(H.V SUBBA RAO)  
MEMBER (J) &  
ADJUDICATING AUTHORITY**