IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI

BENCH-VI

IB-706/ND/2021

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

UGRO Capital Limited
Registered Office at:
Equinox Business Park,
Tower 3, Fourth Floor, Off BKC,
LBS Road, Kurla Mumbai – 400070

...Financial Creditor/Applicant

Versus

A.ES Engineers Private Limited
Through its MD/Chairman/Directors
House No – 358, Block – CB, Naraina Village New Delhi
South West Delhi - 110028

...Corporate Debtor/Respondent

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Coram:

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)
SHRI RAHUL BHATNAGAR, Hon'ble Member (Technical)

Counsel for Applicant: Adv. Arvind Jadon

Counsel for Respondent: Ms. Sonam Gupta

ORDER

Per Shri. P.S.N Prasad, Member(Judicial)

04.10.2022

1. This is an application filed by UGRO Capital Limited to initiate the Corporate Insolvency Resolution Process ("CIRP") against A.ES Engineers Private Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code") for an alleged default on the part of the Respondent in settling an amount of Rs. 1,97,27,033 (One Crore Ninety Seven Lakhs Twenty Seven Thousand Thirty Three Rupees) as on 18.11.2021. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

a. That the Financial Creditor is a Non-Banking Financial Institution (NBFC) registered with the Reserve Bank of

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India engaged in the business of lending for commercial purposes.

b. That the Corporate Debtor was introduced to the Financial Creditor by Kiran Udyog Private Ltd (KUPL) with whom the Financial Creditor has a Master Service Agreement.

c. That KUPL has a network of suppliers that supply it with raw materials, and that such suppliers require financial assistance. The Corporate Debtor was one such vendor and the facility provided was in the nature of bill discounting or Supply Chain Finance.

d. That while the Corporate Debtor is liable to pay its own dues, in the event of a default, KUPL had agreed to backstop the liabilities of the Corporate Debtor as per the Master Service Agreement between the two companies. KUPL is not a party to the proceedings as principal liability lay with the Corporate Debtor.

e. That the Corporate Debtor availed Supply Chain Finance loan in terms of Cash Credit Limit/Revolving Loan Facility in respect of invoices raised by the Corporate Debtor to KUPL for the purchase of goods or

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raw materials up to the limit of Rs. 2,00,00,000 (Two Crore Rupees). Further, the Corporate Debtor agreed to repay each drawing on its Maturity Date which is 90 days. The Corporate Debtor also agreed to pay interest on such drawings at a rate of 13% p.a. (floating) for each interest period upfront.

f. That the Corporate Debtor accepted the terms and conditions and signed the sanction letter dated 07.08.2020.

g. That a default was made on the repayment of said loan with effect from 20.04.2021 and that the Corporate Debtor did not pay despite numerous meetings and demand notice dated 20.04.2021.

h. That the Cash Credit Limit of the loan was approved and renewed on 07.08.2020 and was disbursed in tranches, repayable within 90 days from the date of such disbursement per the Facility Agreement dated 07.08.2020.

i. That as per the Financial Creditor's books of account, the Corporate Debtor owes an amount of Rs.

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1,97,27,033 towards the Financial Creditor which the Corporate Debtor is unable to pay.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply and contended that:

a. That the Corporate Debtor is a small enterprise registered under the Micro, Small and Medium Enterprises Development Act, 2006 and is engaged in the business of manufacturing and supplying cast iron products.

b. That the Corporate Debtor has been supplying cast iron products to KUPL for the manufacturing of automobile components.

c. That in early 2019, KUPL began facing financial constraints and began defaulting on its payments. As a result, the Corporate Debtor expressed its inability to continue rendering supplies to KUPL. Pursuant to this, KUPL introduced the Corporate Debtor to the Financial Creditor which had agreed to provide bill discounting services to KUPL.

d. That representatives of the Financial Creditor and KUPL explained the composite transaction to the

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Corporate Debtor and ensured that the payments to be made to the Corporate Debtor would remain secured at all points in time. Further, that KUPL and the Financial Creditor shared a Master Service Agreement executed between them on 28.03.2019, in order to induce the Corporate Debtor to agree to the transaction structure.

e. That post the Master Service Agreement, the Financial Creditor and KUPL informed the Corporate Debtor that the business arrangement between KUPL and the Corporate Debtor would continue as usual. KUPL would mark certain invoices raised by the Corporate Debtor to the Financial Creditor and the Financial Creditor would then clear the invoices owed by KUPL to the Corporate Debtor. Any invoices not marked by KUPL to the Financial Creditors would be paid directly by KUPL to the Corporate Debtor.

f. That KUPL is under an obligation to make a payment of Rs. 1,25,16,944 (One Crore Twenty Five Lakh Six Thousand Nine Hundred and Forty Four Rupees) to the Corporate Debtor for supply of goods and a

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separate claim has been filed against KUPL for the same.

g. That while transactions continued under the MSA, the Financial Creditor and KUPL induced the respondent to enter into a Facility Agreement dated 07.08.2020 based on the representations of KUPL and the Financial Creditor that this was a common practice of NBFCs. That the Facility Agreement emanated directly from the MSA and was premised on the obligations and liabilities embodied in the MSA.

h. That, in early 2021, KUPL began defaulting on its payments to the Financial Creditor and as a result, the Financial Creditor began pursuing the Corporate Debtor for money owed to it by KUPL. Further, that the Financial Creditor began misrepresenting the Facility Agreement as a Loan Agreement and attempted to mischaracterise the Corporate Debtor as the borrower in order to pay for the liabilities of KUPL.

i. That the Financial Creditor sent a Loan Recall Notice to the Corporate Debtor on 20.04.2021 and continued to disburse money to the Corporate Debtor even after

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such notice. Further, that after four months of the loan recall notice, the Financial Creditor sent an Arbitration Reference Notice to the Corporate Debtor along with a letter of appointment of a sole arbitrator.

j. That the Financial Creditor chose to invoke arbitration under the Facility Agreement, severing it from the MSA and that the Financial Creditor moved an Application u/s 17 of the Arbitration and Conciliation Act,1996 before the sole arbitrator to take possession of the moveable/immovable property and goods of the Corporate Debtor.

k. That the proceedings before the sole arbitrator were withdrawn on 10.09.2021, before the Corporate Debtor could file a response to the Arbitration Notice and after the Corporate Debtor objected to the unilateral appointment of a sole arbitrator and the picture being portrayed by the Financial Creditor.

l. That on 18.11.2021, the Financial Creditor filed the present petition u/s 7 of the IBC, thereby abandoning the arbitration process. Further, that the Financial Creditor lodged a police complaint against the

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Corporate Debtor whose notice was received on 22.11.2021.

m. That the filing of the present petition u/s 7 of the IBC is barred u/s 10-A of the IBC read with Notifications of the Ministry of Corporate Affairs (MCA) dated 24.09.2020 and 22.12.2020 that placed a bar on the institution of applications u/s 7, 9 and 10 in respect of defaults arising on or after 25.03.2020 for a period of one year.

n. That on 25.11.2021, the Financial Creditor sent another Arbitration Notice u/s 11 of the Arbitration and Conciliation Act, 1996 proposing the appointment of a new arbitrator. That the Corporate Debtor has responded to the notice, giving consent to a composite arbitration in terms of the MSA under the Delhi International Arbitration Centre with KUPL as a party to the proceedings.

o. That on 01.12.2021, the Financial Creditor presented to the High Court of Calcutta an agreement dated 31.07.2020 executed between the Financial Creditor

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and KUPL which was never disclosed to the Corporate Debtor previously.

p. That the Financial Creditor has filed an application under Section 11 of the Arbitration Act against the Corporate Debtor before the High Court of Calcutta seeking appointment of an arbitrator under the Facility Agreement to adjudicate disputes between the parties.

q. That KUPL was admitted to CIRP by this Tribunal per an order dated 14.12.2021. Further, that such CIRP has been withdrawn owing to a settlement between KUPL and the opposing party.

r. That the Corporate Debtor has filed a petition before the High Court of Delhi on 05.01.2022 u/s 11 of the Arbitration Act seeking the appointment of an Arbitral Tribunal under the MSA. Further, that a similarly placed supplier has filed a similar petition which is being heard with the Corporate Debtor's petition.

3. The Respondent further filed a reply on merits alleging:

a. That no financial debt has been disbursed by the Financial Creditor to the Corporate Debtor. Further, that the Corporate Debtor did not take any financial assistance from the Financial Creditor that would fall under Sections 5(7) and 5(8) of the IBC. Further, that the Corporate Debtor merely received payments against goods it supplied to KUPL.

b. That there is no relationship of debtor and creditor between the Financial Creditor and Corporate Debtor as the payments received were against the supply of goods. That the Financial Creditor has intentionally and dishonestly misled this Tribunal by concealing the role played by KUPL in the provided Statement of Account and that KUPL has acknowledged such liability towards the Financial Creditor. Further, that the Corporate Debtor did not stand as a beneficiary to the MSA.

c. That the Application at this stage is premature and that no inquiry has taken place as to whether a default has occurred on the part of the Corporate Debtor which is a going concern, ably running its administration and discharging its debts in a planned and timely manner. Further, that the non-payment of the alleged debt is not on account on insolvency but on a stance that the Corporate Debtor owes no liability.

4. The Applicant has filed a rejoinder stating:

a. That no material facts have been concealed due to no mention of 'bill discounting arrangement' or 'loan facility' being cogently mentioned in the loan documents.

b. That the filing of this suit is not barred by Section 10-A of the IBC since the Notification of the MCA was introduced on the 24.09.2020 but the date of default is 20.04.2021.

c. That KUPL did not introduce the Corporate Debtor to the Financial Creditor due to its financial constraints, that representatives of the Financial Creditor did not explain the transaction to the Corporate Debtor and that the MSA executed between the Financial Creditor and KUPL was not shared with the Corporate Debtor at any time.

d. That the Corporate Debtor was not a party to either of the MSAs executed between KUPL and the Financial Creditor and, thus, the Financial Creditor was under

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no obligation to disclose said contracts to the Corporate Debtor.

e. That the transactions between the Financial Creditor, Corporate Debtor and KUPL did not take place as alleged and that the Facility Agreement between the Financial Creditor and Corporate Debtor was not represented as a common business practice of NBFCs or premised on the obligations and liabilities embodied in the MSA.

f. That the loan recall notice was not a mere formality due to the Financial Creditor being a NBFC. Further, that the Financial Creditor did not abandon arbitration proceedings and did not initiate false proceedings and that the contents of the notice dated 22.11.2021 from the Assistant Commissioner of Police are true and correct.

g. That the facts pertaining to the arbitration process as alleged by the Corporate Debtor are false.

h. That KUPL's obligations to the Financial Creditor are not an essential precursor to the transaction contemplated between the Financial Creditor and

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Corporate Debtor by the Facility Agreement. Further, that the MSA can be terminated whether dues under the Facility Agreement have been paid or not.

i. That the MSA was entered into between the Financial Creditor and KUPL to create an arrangement whereby working capital facility was to be extended by the Financial Creditor to the suppliers of KUPL. Further, that the MSA stated that in the event that KUPL was unable to credit the designated account, the Corporate Debtor (Supplier/Borrower) shall repay the Facility with other Outstanding Amounts.

5. The Corporate Debtor has filed written submissions stating the following:

a. That KUPL availed bill discounting facility from the Financial Creditor under the MSA dated 29.03.2019 whereby the Financial Creditor agreed to settled invoices raised by suppliers to KUPL on their behalf.

b. The Corporate Debtor was, thus, introduced to the Financial Creditor by KUPL. The transaction carried out by KUPL raising purchase orders which were fulfilled by the Corporate Debtor. KUPL would then

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forward the invoices by way of email to the Financial Creditor who would make payments against the invoices to the Corporate Debtor at the instructions of KUPL who would later repay the Financial Creditor.

c. While transactions took place under the MSA since May of 2019, a Facility Agreement dated 07.08.2020 was executed between the Financial Creditor and the Corporate Debtor with the modus of their transactions remaining the same.

d. That u/s 10-A of the IBC, read with MCA Notifications dated 24.09.2022 and 22.12.2022, the petition filed before this Tribunal is liable to be dismissed. Further, that the Financial Creditor has indicated the date of Loan Recall Notice as the date of default which is incorrect.

e. That the payments received by the Corporate Debtor were against goods provided to KUPL under the terms of the MSA. That the Financial Creditor has *mala fidely* represented the Facility Agreement as an independent agreement. Further, that under the MSA and Facility

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Agreement, KUPL is the Principal and has the primary liability to repay the Financial Creditor.

f. That KUPL has admitted its liability to pay and sought time to share a repayment plan in response to emails from the Financial Creditor.

g. That assuming any debt is owed by the Corporate Debtor to the Financial Creditor, it can only be an operational debt. Further, that the relationship between the Financial Creditor and Corporate Debtor is one of provision of goods and services.

h. That the Corporate Debtor is a going concern which has never defaulted in repayment of its debts. Further, that the questions of fact that exist between the parties can only be determined in arbitration proceedings.

6. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. The Applicant is claiming a default on the part of the Respondent for an amount of Rs. 1,97,27,033 (One Crore Ninety Seven Lakhs Twenty Seven Thousand Thirty Three Rupees) as on 18.11.2021.

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7. A mere plain reading of the provisions u/s 7 of the IBC shows that in order to initiate CIRP under Section 7, the Applicant is required to establish financial debt and show that a default has been committed in respect of said debt. What constitutes a 'default' must be determined under the provisions of the Code.

8. Per Section 10A of the IBC, 2016 and the MCA Notifications dated 24.09.2020 and 22.12.2020, no application for CIRP may be filed for defaults occurring between 25.03.2020 to 24.03.2021. Per the statement of the Loan Account provided in Annexure A/4 of the Petition filed by the Applicant, the maturity date of the transactions recorded up to Invoice No 2457 (recorded on 31.12.2020) would fall within the dates notified by the MCA. As such amounts were due on their maturity dates per Clause 10.1(a) of the Facility Agreement as submitted in the Applicant's Petition, they cannot be admitted as grounds for initiation of CIRP against the Respondent company. However, the remaining invoices from Invoice No. 2493 to 3812 which are well above the threshold limit of Rs. 1 Crore u/s 4 of IBC, 2016 do not fall within the

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dates notified by MCA and are outside the purview of Section 10A of IBC, 2016.

9. When considering the remaining transactions that may be admitted as part of this Petition, per the opinion of the Supreme Court in *Indus Biotech Pvt Ltd v Kotak India Venture (Offshore) Fund and Ors (2021) 6 SCC 436*, there must be the existence of a debt as well as the occurrence of a default. Per the facts of this case, the Corporate Debtor availed Supply Chain Finance loan in terms of Cash Credit Limit/Revolving Loan Facility in respect of invoices raised by the Corporate Debtor to KUPL for the purchase of goods or raw materials up to the limit of Rs. 2,00,00,000 (Two Crore Rupees). Further, the Corporate Debtor agreed to repay each drawing on its Maturity Date which was 90 days. The Corporate Debtor also agreed to pay interest on such drawings at a rate of 13% p.a. (floating) for each interest period upfront. The Corporate Debtor accepted the terms and conditions and signed the sanction letter dated 07.08.2020.

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10. The Hon'ble Supreme Court in the case of *M/s Orator Marketing Pvt. Ltd. vs M/S Samtex Desinz Pvt. Ltd. Civil Appeal No. 2231 Of 2021* held that:

> *"the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."*

In the present case, the Corporate Debtor has knowningly defaulted in the payment of outstanding amount as per the Cash Credit Limit/Revolving Loan Facility Agreement in terms of Clause 5.1 & 5.2 of the Facility Agreement dated 07.08.2020.

11. Further, the Hon'ble Supreme Court in *Innoventive Industries Ltd Vs ICICI Bank & Anr Civil Appeal Nos. 8337-8338 Of 2017* held that:

> *"The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed."*

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12. In the light of the aforesaid facts, we find that the documents submitted by the Financial Creditor and the Corporate Debtor clearly substantiate the Financial Creditor's claim that the Corporate Debtor has indebted and defaulted the repayment of loan amount.

13. After giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal **admits** this petition and initiates CIRP on the Corporate Debtor with immediate effect.

14. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Abhishek Anand for appointment as Interim Resolution Professional having registration number IBBI/IPA-002/IP-N-00038/2016-2017/10077. Mr. Abhishek Anand has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,

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2016 dated 16.11.2021. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

15. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending.

16. Section 16(1) and Section 16 (2) of the Code mandate that the Resolution Professional proposed by the Financial Creditor shall be appointed as the Interim Resolution Professional (IRP) by the Adjudicating Authority (Tribunal) if no disciplinary proceedings are pending against him. Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, require the proposed Interim Resolution Professional to make a declaration in Form 2 confirming his eligibility to be appointed as a Resolution Professional as well as a declaration confirming that no disciplinary proceedings are pending against him in the Insolvency and Bankruptcy Board or elsewhere. The proposed

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Interim Resolution Professional Mr. Abhishek Anand has submitted the declaration in Form 2 dated 16.11.2021.

17. It is pertinent to mention here that the Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. The material on record clearly goes to show that respondent had availed the credit facilities and has committed default in repayment of the outstanding loan amount.

18. We are satisfied that the present application is complete in all respects and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

19. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

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20. Mr. Abhishek Anand having registration number IBBI/IPA-002/IP-N-00038/2016-2017/10077 is appointed as an Interim Resolution Professional.

21. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

22. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(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;*

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(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;

(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.

23. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium

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shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

24. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any preferential/ undervalued/ tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional shall make an application to this Adjudicating Authority (Tribunal) with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under

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duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

25. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

RAHUL PRASAD BHATNAGAR Digitally signed by RAHUL PRASAD BHATNAGAR Date: 2022.10.04 16:53:03 +05'30'

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

PATIBANDLA SATYANARAYANA PRASAD Digitally signed by PATIBANDLA SATYANARAYANA PRASAD Date: 2022.10.04 15:42:00 +05'30'

(P.S.N. PRASAD)
MEMBER (JUDICIAL)