IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH –II, CHENNAI

CP (IB)/106(CHE)/2021

(filed under section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of **BHADRESHWAR VIDYUT PRIVATE LIMITED**

STATE BANK OF INDIA
Represented by its Assistant General Manager,
Stressed Asset Management Branch,
Reg. off: State Bank Bhavan, Corporate Centre,
Madame Cama Road, Nariman Point, Mumbai – 400 021
Maharashtra

.... *Financial Creditor*

-Vs-

BHADRESHWAR VIDYUT PRIVATE LIMITED
(Erstwhile OPGS Power Gujarat Private Limited)
Reg. off: New No. 16, Old No. 41,
Ground Floor Thomas Nagar, Little Mount,
Saidapet, Chennai - 600015

Also having office at,
Terra 2A, Flat No. 404, No.2/5,
Lavender Street, Mugalivakkam,
Porur, Chennai – 600 125

... *Corporate Debtor*

Order Pronounced on ***18th October 2022***

CORAM:
JUSTICE (RETD.) RAMALINGAM SUDHAKAR, PRESIDENT
SAMEER KAKAR, MEMBER (TECHNICAL)

For Financial Creditor: A.L. Somayaji, Senior Advocate
For M/s. King & Partridge

For Corporate Debtor: S.R. Rajagopal, Senior Advocate
For Ms.Tanya Kapoor, Advocate

ORDER

Under Consideration is an Application filed by one **STATE BANK OF INDIA** (hereinafter referred to as "financial creditor") on 24.05.2021, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **BHADRESHWAR VIDYUT PRIVATE LIMITED** (hereinafter referred to as "Corporate Debtor") seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. From Part-I of the Application, it is seen that the Financial Creditor is a Bank. The registered office address of the Financial Creditor as per the Application is stated to be situated at State Bank Bhavan, Corporate Centre, Madame Cama Road, Nariman Point, Mumbai – 400 021 Maharashtra and also having its Branch office at Indian Red Cross Society Building, No. 32, Montieth Road, Egmore, Chennai – 600 008. Further, Part-I lays down the Authorized Representative of the Financial Creditor as One Mr. R. Spurgen David, Assistant General Manager of the Financial Creditor by virtue of Letter of Authorization dated 19.05.2021 which is placed as Annexure I-3 at page No. 9 of the typed set filed along with the Application.

3. Part-II of the Application lays down the details of the Corporate Debtor. It can be seen that the Corporate Debtor is a Private Limited Company incorporate under the Companies Act, 1956 on 26.04.2007 with CIN: U40101TN2007GAT063283. The registered office of the Corporate Debtor as mentioned in the MCA Master Data is situated at New No. 16, Old No. 41, Ground Floor Thomas Nagar, Little Mount, Saidapet, Chennai – 600015. And is also having its office at Terra 2A, Flat No. 404, No.2/5, Lavender Street, Mugalivakkam, Porur, Chennai – 600 125.

4. From Part-III of the Application, it is seen that the Financial Creditor has proposed the name of one Mr. Hitesh Goel, Reg. No. IBBI/IPA-001/IP-P01405/2018-2019/12224 as the Interim Resolution Professional.

5. From Part-IV of the Application, it is seen that the Financial Creditor has claimed dues as follows;

S. No.	PARTICULARS	AMOUNT
1	Principal Amount due	Rs. 262,73,49,922.36/-
2	Interest as on 19.05.2021	Rs. 91,94,09,514.06/-
	PRINCIPAL + INTEREST	**Rs. 3,54,67,59,436.42/-**
3	Bank Guarantee (which was not yet due for payment as on 19.05.2021)	Rs. 9,00,00,000.00/-
	TOTAL	**Rs. 3,63,67,59,436.42/-**

with further interest on the principal sum till the date of payment viz., the cash credit facility (including dues under Letter of Credit) given for interest at the rate of 13.10% p.a. and term loan facility accorded for interest at the rate of 15.60% p.a. which is due and payable by the Corporate Debtor. The date of default as averred in Part-IV of the Application is **28.02.2019.** The loan accounts were classified as Non-Performing Assets (NPA) on **30.05.2019**.

6. Part-V of the Application describes the particulars of the Financial Debt, list of documents as annexed with the typed set filed and the details of pending litigation before DRT-I, Chennai in OA. No.211/2020.

7. <u>PREFATORY</u>

Before venturing into the facts of the instant application, it is necessary to mention here that originally one of the Financial Creditors of the Corporate Debtor viz. Syndicate Bank has filed an Application under Section 7 of IBC, 2016 against the Corporate Debtor vide IBA/967/2019 and this Tribunal vide its order dated 27.01.2020 initiated the CIRP in respect of the Corporate Debtor. Aggrieved by the same, one of the Shareholder of the Corporate Debtor went on appeal before Hon'ble NCLAT and the Hon'ble NCLAT vide its order dated 24.08.2020 has *set aside* the order passed by this Tribunal. The operative portion of the said order is extracted hereunder;

> 29. We have carefully perused the record of the case, argument advanced on behalf of the parties and gone through the written submissions. Taking aforesaid facts and circumstances, we are of the view that Ld. Adjudicating Authority have failed to consider the letter dated 27.12.2018 filed before this Tribunal at Page No. 17 vide Diary No. 18698 dated 06.02.2020 whereby refer to the minutes of the consortium meeting dated 18th September, 2018 the Syndicate Bank (Respondent No. 1) agreed to open further LCs in favour of the Appellant as the Appellant was going through cash difficulties and also agreed to restore the sanctioned limits of the Appellant. The LC limits to the extent of Rs. 46.50 Crores and further it was agreed that the amount which have been deposited in TRA, the amount will be paid to Respondent No. 1 after opening the TRA.
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> - The Syndicate Bank (Respondent No. 1) constitutes a miniscule 1.64% of total outstanding debt of BVPL and PNB was a lead bank of consortium.
> - The Respondent No. 1 has only 1.64% stake of the total value of debt owed by the Corporate Debtor to all the Financial Creditors.
> - The Ld. Adjudicating Authority failed to consider the certificate issued by S.K. Gulecha & Associates, Chartered Accountants dated 05.02.2020 Annexure- 37 at page 18 of the Additional Documents which has not been denied by the Respondent No. 1. The relevant portion of certificate of Chartered Accountants is as under: -
>
>   "we also certify that the collection amount of Rs. 962.92 crores credited to the account of Punjab national Bank TRA- 0343002100540705 for the period from 1st July, 2018 to 30th June, 2019. Month wise collection details are herewith."
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> - The Ld. Adjudicating Authority also failed to consider the letter dated 27.12.2018 written by the Chief Manager,

Punjab National Bank to the Syndicate Bank (Respondent No. 1) whereby refer to the minutes of the consortium meeting dated 18th September, 2018 the Syndicate Bank (Respondent No. 1) agreed to open further LCs.

- On 06.09.2018 Punjab National Bank (lead bank) made request to the Respondent No. 1 to permit the Appellant to utilize the LC limits to the extent of frozen limit of Rs. 46.50 Crores and it was also agreed that the amount of Syndicate Bank will be paid from TRA account but instead of complying the aforesaid decision taken in the meeting, the Respondent No. 1 declared the amount of NPA from retrospective effect from 30.06.2018 to the tune of Rs. 32,22,50,660.16/-.

- Despite the request of the Punjab National Bank (lead bank) vide letter dated 27.12.2018 the Respondent No. 1 failed to comply the decision taken on meeting dated 05.12.2018 and filed an Application under Section 7 of the IBC which was mechanically allowed by the Ld. Adjudicating Authority.

- The Ld. Adjudicating Authority overlooked the facts and also Judgment of the Hon'ble Supreme Court in the case of *Innoventive Industries Ltd. Vs. ICICI Bank & Anr.* (2018) 1 SCC 407.

- In the face of ample and weighty evidence on record, it cannot be said that the Corporate Debtor is under no obligation to discharge its liability in respect of the 'Financial Debt' payable to the 'Financial Creditor' but the mere fact of debt being due and payable in law is not enough to justify initiation of Corporate Insolvency Resolution Process at the instance of Financial Creditor unless it establishes default on the part of the Corporate Debtor in regard to the debt. The onus of proof of default on the part of Corporate Debtor lies on the Financial Creditor and it has to demonstrate that default has occurred on account of failure on the part of Corporate Debtor to discharge its liability.

- In the instant case, Corporate Debtor has been subjected to restructuring of credit facilities and the operations of the bank account of the Corporate Debtor are regulated by the 'Punjab National Bank Consortium Inter se Agreement' dated 17th December, 2015, which has to be read in juxtaposition with 'Trust Retention Account (TRA) Agreement' dated 26th July, 2016. Under the arrangement of debt restructuring, the Corporate Debtor's deposit would go to the TRA account and it is not open to the Corporate Debtor to discharge its liability on account of financial debt to various lenders without the approval of the Lead Bank i.e. Punjab National Bank. It transpires from the record that information in this regard has already been given by the Corporate Debtor to the Lead Bank that the Financial Creditor Bank i.e. Respondent No. 1 has expressed its Syndicate intention to trigger Corporate Insolvency Resolution Process against it unless payments are released. However, the Lead Bank has conveyed to Respondent No.1 that it shall have to issue a Letter of Credit before release of payment by the Corporate Debtor but Respondent No. 1 Syndicate Bank (Financial Creditor) did not comply. It further appears from record that the stake of Respondent No. 1 Bank (Financial Creditor) barely extends to 1.64% of the total debt. Viewed in this context, the only conclusion deducible from record is that the default cannot be attributed to the Corporate Debtor as the money deposited with the TRA Account was already available for release but its release was regulated in terms of the 'Punjab National Bank Consortium Interse Agreement' r/w 'Trust Retention Account (TRA) Agreement'. May be the Lead Bank was not justified in insisting upon issue of Letter of Credit as a precondition for release of payment in favour of Respondent No.1, but that does not in any manner be read as an act of default on the part of Corporate Debtor who has, in compliance of the terms of the aforesaid agreements made over its entire collection in the TRA Account as per terms of the Agreement. It would therefore be difficult to hold that a default has occurred on the part of the Corporate Debtor. Non-release of money out of the entire collection of Corporate Debtor does not render the Corporate Debtor liable for default who has performed his part of the contract. The fault lies somewhere else. In the inter-se dispute of Financial Creditors, Respondent No. 1 may have faced discrimination as regards release of money from TRA Account but that would not render the Corporate Debtor accountable for default.

- In these circumstances, triggering of Corporate Insolvency Resolution Process at the instance of Respondent No. 1 is unwarranted. This is not the case where the Corporate Debtor is invoking Inter Creditor Agreement to wriggle out of its liability. The Corporate Debtor having performed his part of the contract by placing its entire collection in the Trust Retention Account (TRA) in accordance with the terms of the agreement cannot be said to be in default. Release of the amount due to Respondent No. 1 in terms of the 'Punjab National Bank Consortium Interse Agreement' read together with Trust Retention Account (TRA) Agreement is an in-house contractual arrangement interse the Creditors for which the Corporate Debtor cannot be blamed. Initiation of Corporate Insolvency Resolution Process in the facts and circumstances, as noticed, cannot be appreciated as the same falls foul of the mandate of Section 7 of the I&B Code. Viewed thus, the impugned order cannot be supported. The Appeal, therefore, needs to be allowed.

It is seen that in the interregnum, the Financial Creditor herein has also taken steps pursuant to provisions of section 13 (2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by issuing a notice of 24.12.2019 for the attachment of the property and also have approached the Debt Recovery Tribunal under section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 claiming recovery by filing OA. No.211 / 2020 before DRT-1, Chennai.

8. SUBMISSION MADE BY THE FINANCIAL CREDITOR

8.1. The Learned Senior Counsel for the Applicant submitted that the Corporate Debtor had undertook a project for developing and setting up a 300 MW (2x150MW) coal-based group captive thermal power project at Bhadreshwar, Kutch District, Gujarat. The total cost of this project was initially estimated to be Rs.1,640 crores which was to be met in a Debt-Equity ratio of 75:25. The sum of Rs.1,168 crores was financed by a consortium led by Punjab National Bank, wherein, the erstwhile State Bank of Hyderabad (e-SBH) issued its first sanction letter dated 03.09.2013 sanctioning the term loan of Rs.200 crores. The said erstwhile State Bank of Hyderabad (e-SBH) got merged with the State Bank of India vide Gazette Notification No. D. L.-33004/99 dated 22.02.2017. The said facility, now being in the nature of a Non-Performing Account, stands transferred to the Stressed Assets Management Branch (SAMB), Chennai I.e. the Financial Creditor herein.

8.2. Thereafter, it was submitted that the Corporate Debtor swapped the said facility for a Rupee Term Loan of Rs.1,215.41 crore, to meet part of the estimated project cost of Rs.1,620.55 crore, with a new set of consortium consisting of Rural Electrification Corporation Limited, as the lead lender. Apart from the aforesaid facilities availed, the Corporate Debtor also availed, other working capital facilities to the tune of Rs.565 crores from another consortium consisting of the Punjab National Bank as the lead bank and the erstwhile State Bank of Hyderabad (e-SBH) out of which the erstwhile State Bank of Hyderabad (e-SBH) had sanctioned Rs.46 Crore.

8.3 The Learned Senior Counsel for the Applicant submitted that the Corporate Debtor having availed facilities from the consortium of Banks, including the Applicant herein (for the sake of ease of reference the facilities shall be referred to as *"Term Loan Facilities"* and *"Working Capital Facilities")* and the Consortium of bankers towards the loan facilities had executed loan documents *inter alia*, Common Term Loan Agreement, Lenders Agent Agreement; Security Trustee Agreement; and Inter-Creditor Agreement. Further, since the loan was extended by a consortium, the banks appointed a Security Trustee to hold the securities against the loan on behalf of the consortium lenders.

8.4 The Learned Senior Counsel for the Applicant referred to the Minutes of the Meeting of the Consortium Lenders (Term Loan and Working Capital) of the Corporate Debtor held on 08.03.2021 annexed at Pg. 474 of volume 3 of the Written Arguments filed by the Applicant, wherein the majority of the lenders have expressed their consent to file Application under Section 7 of IBC, 2016. The said portion of the minutes is extracted hereunder;

"In view of above it was agreed that since the majority of the Lenders are in favour of going to NCLT to initiate IBC Proceedings, ***all the lenders authorized SBI to file section 7 applications in Hon'ble NCLT for initiation of CIRP under IBC*** *on behalf of all the lenders…."*

We may hasten to add here that this meeting was post the order of the Hon'ble NCLAT dated 24.08.2020.

8.5. The Learned Senior Counsel for the Applicant placing his reliance upon the Balance Confirmation Letter dated 10.04.2018 (*Page 1388 in Volume 4 -Part II of Applicant typed set)* signed by the Authorized Representative of the Corporate Debtor, submits that the Respondent had confirmed the amount due and payable as on 31.03.2018. Further, the Applicant in Volume-2 of their written Arguments along with annexures filed on 03.11.2021 had brought to the knowledge of this Adjudicating Authority on the proposed scheme in CA(CAA)/63/(CHE)/2021 pending before Division Bench –I, Chennai. From which the Learned Counsel for the Applicant had submitted that the Corporate Debtor by way of the proposed scheme has admitted its default as extracted hereunder *"Company made all the efforts to keep the lenders' accounts 'Standard' but the adhoc withdrawal of sanctioned working capital facilities resulted in losses and reduced cash flow. This had landed the Company account in NPA Category with……..other 2 lenders (SBI & PNB)…..".* Moreover, the statement of transaction for the respective periods as available between pages 1437 to 1480 in Volume 4 - part II of Applicant typed set is referred to prove the default in payment.

8.6. The Learned Senior Counsel for the Applicant had submitted that the consortium lenders had declared the Accounts of the Corporate Debtor as NPA on multiple dates, in particular SBI, the applicant herein had declared the Corporate Debtor as NAP on 30.05.2019.

8.7 Thereafter, during the ***Working capital consortium Meeting*** on ***26.06.2019***, as all the accounts of the Corporate Debtor was declared NPA except that of Indian Bank, and upon request of the Corporate Debtor to implement "***Holding of Operations***" at 10% tagging of future cash flows till the implementation of Resolution Plan. The Consortium of lenders had requested the Corporate Debtor to submit the resolution plan by end of June 2019 and on the other hand "Holding on Operations" at 10% tagging of future cash flows till the implementation of Resolution Plan and 90% of the future cash flows will be used for operation and maintenance of the unit with effect from 01.07.2019 was approved. Holding on Operations as defined under clause 5.3 of the Information Memorandum for Restructuring of Loan dated 27.11.2020 is as extracted hereunder,

> **5.3 HOLDING ON OPERATIONS (HOO)**
> *"In order to keep the company as a going concern, after the account was declared as NPA by lenders, it was decided in the lenders meeting held on 26.06.2019 to start Holding on Operations w.e.f. 01.07.2019 as an <u>intermittent arrangement till a final Resolution Plan is</u>*

achieved. As per banking practice and as proposed by lenders, a 10% of the collection by the company for distribution amongst revenue share for the lenders was agreed during the Holding on Operation period while 90% was allowed to be used for operation of the company. In the interim, company also worked on and submitted few resolution options for consideration and approval of the lenders.

Under HOO, PNB, the Lead Working Capital lender, monitored the inflow and outflow of funds of BVPL and was solely responsible for distribution of funds among lenders in line with TRA Agreement.

Out of the 10% tagging under Holding on Operations (HOO) the company has paid certain amounts to Lenders/Bankers during the period from 01.07.2019 to 30.09.2020"

8.8. The Learned Senior Counsel for the Applicant had further submitted that during the meeting of ***consortium of working capital lenders on 17.09.2019*** the Corporate Debtor had proposed a resolution plan to the lenders. Where*, after in-length deliberation & discussions among participants on various proponents of the restructuring plan as submitted by the Project Company, lenders informed to project Company that the Proposed Resolution Plan as presented herein, in the current form, is not acceptable. Representative of the SBI informed that considering the non-availability of long-term PPA, absence of pass-through fluctuation of imported coal and proposed Hair-cut, they are not in favour of current restructuring plan and suggested to explore compromising settlement with the borrower. Lenders advised project Company to review the proposal in line with the discussion in the consortium meeting and resubmit it to all lenders. In case, the revised proposal is not accepted by lenders may explore other option including but not limited to the recovery action/IBC proceedings etc. REC informed to all the participants that without maintaining parity among lenders,* *no resolution plan will be acceptable to REC.* It was further decided *Although RBI's 7th June 2019 notification is not currently applicable to the project, it was agreed that lenders may sign 'inter-creditor Agreement' (ICA) on the submission of acceptable resolution plan to lenders. REC will facilitate the execution of ICA.*

8.9. RESTRUCTURED PLAN DATED - 27.11.2020

The Resolution Plan proposed by the Corporate Debtor with an effective implementation date from 01.04.2021 was submitted to restructure the loan to the tune of INR 850 Crore (amounting to 47.88%) for the total debt of INR 1775.21 (including term loan/CC/LC/BG) as on 31.05.2019 requesting the lenders to consider the Resolution Plan for implementation to adequately service their debt in line with the expected cash flows as per the Resolution Plan as well as to help in the long term revival of the project and protect the interest of all the stakeholders.

8.10. The Learned Senior Counsel for the Applicant had averred that since the Corporate Debtor having faced financial stress was not able to repay the loan instalment on time and that the lenders had classified the Accounts of the Corporate Debtor as NPA, which is well established from the Directors report dated 07.12.2020. Even in the notes to Financial Statement for the year ended 31st March 2020 which is subsequent to the HOO being in operation the default in repayment has been admitted and recorded by the Respondent.

8.11 The Learned Senior Counsel for the Applicant had submitted that during the meeting of ***consortium lenders (Term Loan & Working Capital) on 08.03.2021*** discussions regarding the submitted restructured resolution plan was carried out and it was accordingly deliberated not to consider the plan in the proposed form and that queries from all the lenders were requested at the earliest. In the mean time since, majority of the lenders were of the opinion to move to NCLT, SBI was authorized to do so. As admitted HOO was an intermittent arrangement agreed between the Consortium of Lenders and Respondent to enable the Respondent to continue as a going concern until a Resolution Plan as mutually agreed. That is not novation of contract

8.12. Thereafter, a meeting of the lenders was held on **20.05.2021** where, the lenders had rejected the proposal of the company since, the Company has failed to address most of the concerns / observations of the lenders. Despite Communication of the above rejection to the Corporate Debtor, and upon a request made by the Corporate Debtor vide its letter dated 26.07.2021 for reconsideration of plan a meeting of the lenders was called upon in a short notice on **28.07.2021** where, after deliberations made the lenders had showed their inability to pursue the plan for the reasons extracted hereunder;

> *1. No improvement in the offer has been made and the proposal is exactly the same as already rejected by the lenders.*

2. *Despite ample opportunities being given to the Company to address the observations/concerns of the lenders, project Company repeatedly failed to address the concerns of the lenders.*

Therefore, your request for reconsideration of the restructuring proposal dated 28.11.202 is once again rejected on account of the reasons mentioned above.

Thus, the instant application under section 7 of I& B Code, 2016 has been preferred by the Financial Creditor.

9. SUBMISSION MADE BY THE CORPORATE DEBTOR

9.1. The Learned Senior Counsel for the Respondent/Corporate Debtor had averred that the applicant has not made out a case for default according to section 3(12) of the insolvency and Bankruptcy Code 2016. It is further averred that for a default to exist there must be non-payment of debt as a whole or in part. Further has averred that "Default occurs on the fulfilment of twin conditions, i.e., debt becoming due and payable and non-payment thereof. It is submitted that such a condition is *sine qua non* to constitute a default under the IBC. The Learned Counsel for the Respondent has further averred that the financial creditor has claimed an immature payment, which was not yet due for payment as on the date of filing of the application. For which the respondent had placed reliance upon the Hon'ble NCLAT order in ***M/s. Starlog Enterprises Ltd. v. ICICI Bank Ltd., Company Appeal (AT) (Ins.) No. 5 of 2017***, *where it has held that an immature amount, never having become due* *and payable to the financial creditor could not have been claimed* and the order of The Supreme Court in ***Indus Biotech (P) Ltd. v. Kotak India Venture (offshore) Fund (2021) 6 SCC 436*** in which it has reiterated that *a petition under section 7 of the IBC may be dismissed taking note of the stance of the Corporate Debtor, that if the situation is not yet ripe to call default and that it satisfied that it is a profit making company.*

9.2 The Learned Senior Counsel for the Respondent/Corporate Debtor had further countered that the applicant has no locus to file the instant application as the applicant herein being the Stressed Assets Management Branch is not a part of the Consortium of lenders and has no relationship with the Corporate Debtor. Moreover, the Corporate Debtor has challenged the verification of pleadings done by the Assistant General Manager, SAM Branch. It is further submitted that the Applicant along with other banks in the Consortium unequivocally agreed to the terms and conditions of the Trust retention Agreement (TRA) and have further agreed to "equal treatment and pro-rata allocation" of funds. Having agreed upon such terms and conditions the Applicant cannot seek to maintain the present application contrary to actual consensus arrived between the parties.

9.3 The Learned Senior Counsel for the Respondent/Corporate Debtor had further countered that the instant application is violative of the RBI Directives issued for time bound resolution of stressed assets submitting that the time period for revival is within 180 days from the reference date and as such no reference date was finalized by the consortium of lenders.

9.4 The Learned Senior Counsel for the Respondent/Corporate Debtor had further countered that the Holding on Operation (HOO) is an agreement and that by virtue of the same the rights and obligations of the Respondent and the Consortium stood altered and modified as such it is well settled position of law, that the terms and obligations under the Original Contract are not required to be performed when the terms have been altered with the Consent of both the parties. Further it was submitted that the HOO also holds sanctity on par with all other loan agreements entered between the Respondent and the Consortium Members. The Learned Counsel for the Respondent further submitted that the HOO arrangement is still in operation even after filing the instant application, wherein part payments are being made till date, which is the current payment mechanism operative and being complied with by the Respondent till date.

9.5 The Learned Senior Counsel for the Respondent/Corporate Debtor had further countered that the decision on HOO was taken on 26.06.2019 and that the Action point is as follows, *"Action Points- ... 2. To allow Holding on Operations at 10% tagging of future cash flows till the implementation of resolution* *plan and 90% of the future cash flows would be used for operation and maintenance of the unit w.e.f 01.07.2019"* which means that until the Resolution Plan is given effect to, the HOO arrangement is in place. The rejection of Resolution Plan does not disturb the existing HOO arrangement but only gives an opportunity to the Respondent to improve/re-work their plan. The Bank admits to the HOO arrangement still being in place, indicating that the payment as per the agreed mechanism is being made and there is no default.

9.6 The Learned Senior Counsel for the Respondent/Corporate Debtor had further countered that the Plan was under consideration even on 28.07.2021 and that, HOO arrangement is not subject to rejection of resolution plan but subject to implementation of the same. The HOO arrangement is a positive agreement since it refers to the same being in existence until implementation of Resolution Plan and not until rejection of the same.

9.7 The Learned Senior Counsel for the Respondent/Corporate Debtor had further countered that the pre-requisite to take action as per loan documents was not followed by applicant for which the clauses as per the Master IC Agreement dated 26.07.2016 (Pg 1168/1180/1185-Paper Book-4) is as extracted hereunder;

"Definition of "***Enforcement Action****: shall mean any action or proceeding by one or more lenders against the borrower, ... for the purpose of enforcing the rights of the Lenders* *under the relevant financing Documents, including without limitation ... action to appoint a receiver or liquidator or any action by the Lenders for exercising the rights under their respective Financing Documents for adjudicating or seeking judgement on a claim."*

2. CONSULTATION AND COMMUNCIATION

2.1. General Consultation

The lenders and the security trustee agree that to the extent of their participation in the circumstance: (i) this is under to afford each other reasonable opportunity to exchange views before taking any action that could affect the borrower...

2.2. Mandatory notice - relating to enforcement action

b) no enforcement action shall we initiated except after complying with the procedure and requirements set out herein below:

c) any Lender intending to take any Enforcement Action ... shall give notice of its intention to initiate enforcement action notice shall specify the particular Enforcement action, which the Enforcement Intending Party proposes. After receipt of such notice from the Enforcement Intending Party, the lender's agent shall convene a meeting of the lenders in this behalf to take a view on such Enforcement Action notice. if the course of action proposed by the Enforcement Intending party in the enforcement action notice or any other course of action is approved by the lenders holding more than 60% of at the then outstanding secured obligations, then all the lenders shall jointly take or cause to be taken by the Lender's Agent/Security Trustee such approved course of action.""

9.8. Lastly, the Learned Counsel for the Respondent/Corporate Debtor had further countered that Parallel proceedings in guise of insolvency petition cannot be initiated and that the applicant is doing forum shopping.

10. The Learned Counsel for the Financial Creditor had filed a rejoinder by denying all the averments made by the Respondent in the Counter. With regard to the allegations in paragraph 2-12 of the Counter, the Financial Creditor has submitted that the HOO arrangement in itself is an indication of default and that this arrangement does not water down the obligations of the Corporate Debtor under various debt agreement. Further, the pending composite scheme in itself amounts to acknowledgement of debt and default.

11. In response to paragraph 13-32 of the Counter, the Financial Creditor had substantiated that it has *locus* to file the instant application as the application under section 7, I&B Code, 2016 is not in a manner of enforcement of security interest but for initiation of CIRP to review the debt-ridden respondent. Moreover, there is no such embargo on the applicant herein to exercise the applicants' individual vested rights in law.

12. In response to paragraph 38 & 41 of the Counter, the Financial Creditor had substantiated that the averment as to the department handling the matter is only in desperate attempt to avoid the inevitable outcome of the proceedings.

13. In response to the averments in paragraph 82-85, the financial creditor had submitted that the referred RBI Circular is advisory in nature and that the lenders have already explored all the possibilities to restructure.

14. ANALYSIS AND FINDINGS OF THIS TRIBUNAL

14.1. The matter was heard in detail on 08.08.2022, 12.08.2022, 17.08.2022, 13.09.2022 and 16.09.2022. It is seen that after hearing the arguments, the Respondent has filed an application seeking to bring on record the additional documents, however since the same was filed after the commencement of arguments, we do not deem it fit to take the said documents on record.

14.2. We have heard the submissions made by the Learned Senior Counsel for both the parties and have also meticulously gone through the voluminous documents filed by both the parties.

14.3. While adjudicating an application under Section 7 of IBC 2016, this Tribunal is required to see as to whether there is any 'financial debt' and whether the Corporate Debtor has committed any 'default' in repayment of such 'financial debt'.

14.4. As to the present case, from the term loan agreement dated 03.09.2013, which has been entered into by the Corporate Debtor with the Financial Creditor, it is seen that the Corporate Debtor is required to repay the term loan in 40 Equal Quarterly Instalments of Rs.5 Crores starting from 30.06.2015.

14.5. From Part – IV of the Application, it is seen that the Corporate Debtor, out of the total principal amount of Rs.271.73 Cores, has repaid only a sum of Rs.9 Crores to the Financial Creditor. Thus, the principal outstanding amount alone comes to the tune of Rs.262.73 Crores. It is seen that the last instalment was paid to the Financial Creditor in the month of February 2019 and the accounts of the Corporate Debtor was classified as NPA on 30.05.2019 by the Financial Creditor.

14.6. In the present case, it is seen that there are two Consortium of Lenders, one for Term Loan and another for Working Capital. On perusal of the minutes of the Working Capital Consortium meeting held on 26.06.2019, it could be seen that the Consortium of Lenders has granted time to the Corporate Debtor to furnish a Restructuring Plan to revive the operations of the Corporate Debtor. Further it could be seen that till such time the Restructuring Plan is submitted; the Corporate Debtor requested the Lenders to implement the 'Holding on Operation' at 10% taking of future cash flows till the implementation of the Restructuring Plan. It could be seen from the said minutes that the Lenders have allowed the Corporate Debtor to implement the 'Holding on Operation' till such time they submit the Restructuring Plan and as such the **Corporate Debtor was kept as a going concern**.

14.7. Upon perusal of the minutes dated 08.03.2021 it is seen that the Corporate Debtor has submitted the Restructuring Plan before the Lenders on 28.11.2020 and the same was deliberated upon by the Consortium Lenders and it has been observed by the Lenders that the restructuring proposal given by the Corporate Debtor in the current form is not acceptable. Further, it has also been agreed by the majority of the Lenders that they want to proceed under Section 7 of IBC, 2016 before this Tribunal and all the Lenders have authorized the Financial Creditor herein viz., State Bank of India to file an application under Section 7 of IBC, 2016. The extract of the said minutes is reproduced below:

> *"SBI will file section 7 application in Hon'ble NCLT for initiation of CIRP under IBC on behalf of all the lenders. SBI may appoint Interim Resolution Professional (IRP) from any of the BIG 4 firms (i.e., PwC, KPMG, E&Y and Deloitte). Further, all the lenders agreed to share the cost fees as may be incurred by SBI for initiating the process on pro-rata basis."*

14.8. Thereafter, it could be seen that another meeting of the lenders were convened on 20.05.2021 and upon perusal of the minutes of the said meeting, it is seen that the restructuring proposal given by the Corporate Debtor was considered in detail by the Consortium of Lenders and they have categorically rejected the restructuring proposal of the Corporate Debtor. It could also be seen that Consortium of Lenders have requested the Financial Creditor viz., State Bank of India to file an application under Section 7 of IBC, 2016 for initiating Corporate Insolvency Resolution Process as against the Corporate Debtor. The said portion of the minutes dated 20.05.2021 is extracted below:

> *"REC requested SBI to inform the status of the Section 7 application to be filled by the SBI in NCLT as per the decision in the last lenders meeting held on 08.03.2021. SBI apprised that the section 7 application was almost finalised and shall be filed in NCLT for initiation of IBC proceedings with the nomination of erstwhile RP Mr. Hitesh Goel, Partner, KPMG as IRP, within a weeks' time. All the lenders noted the same and requested SBI to expedite the filing of application in NCLT."*

14.9. The rejection of restructuring proposal of the Corporate Debtor was communicated to the Corporate Debtor on 25.05.2021. In response to the same, the Corporate Debtor wrote a letter to the members of Consortium to reconsider the restructuring proposal. Pursuant thereto, it could be seen that based on the said request made by the Corporate Debtor, the meeting of the Consortium Lenders was called on 28.07.2021 and all the Lenders have shown their inability for reconsideration of the restructuring proposal in which it could be seen that the restructuring proposal of the Corporate Debtor dated 28.11.2020 was rejected by the Consortium of Lenders.

14.10. One of the main contentions raised by the Learned Senior Counsel for the Respondent was that after declaring the assets of the Corporate Debtor as NPA, the Lenders themselves have permitted the Corporate Debtor to continue with the 'Holding on Operation' which proves that there is no debt which is subsisting as on date of filing of this application by the Financial Creditor and as such the consequent 'default' also does not occur in the present case. Further, it is also contended by the Learned Senior Counsel for the Respondent that 'Holding on Operation' would amount to Novation of Agreement and since the Corporate Debtor is repaying certain amount to the Financial Creditor, there is not default on the part of the Corporate Debtor.

14.11. At this juncture, it is significant to refer to the meaning of the term 'holding operations', which is as follows;

> *A temporary way of dealing with a situation until a new and better way can be introduced:*
>
> *Something that is done as a temporary action in order to stop a bad situation from getting worse, or until further decision can be made:*

14.12. The term 'Holding operations' would connote only a temporary arrangement which is made to stop a bad situation from getting worse. That does not by itself means that the loan of the Corporate Debtor has been restructured. The Corporate Debtor cannot plead novation of Agreement. Further, upon perusal of the minutes of meeting dated 26.06.2019, 08.03.2021 and 25.05.2021, would manifest the fact that the 'Holding on Operation' was given to the Corporate Debtor by the Lenders as an temporary arrangement till such time the Corporate Debtor submits a restructuring Plan and is considered by the Consortium.

14.13. Assuming without admitting, if the arguments of the Learned Senior Counsel for the Respondent is taken on face value, there is no need for the Corporate Debtor to submit the restructuring proposal, since according to the Corporate Debtor there is no default on account of HOO. However, in the present case, it is to be noted that the default on the part of the Corporate continues from the date of which the account of the Corporate Debtor has been classified as NPA till such time it is being repaid in full. The stand taken by the Learned Senior Counsel for the Corporate Debtor that the 'Holding on Operation' alters the position of the Corporate Debtor as 'no default' status is a mere moonshine argument to get over the default. A temporary arrangement made in the nature of HOO, cannot be stretched to mean novation of the agreement to give a different and overriding meaning, disregarding the various loan agreement and the terms contained therein. The primary debt due to the consortium continues and the default persist. HOO only extends it till a plan is submitted and considered. In this case, the plan was submitted and considered by the Consortium of bankers and they have rejected the plan and consequence is the nature of this Petition.

14.14. Further, it is also required to be noted that in the present case, Consortium of Lenders have taken a concrete stand that they are inclined to proceed with the filing of an application under Section 7 of IBC, 2016 and they have also authorized State Bank of India to file the present application. Further, the fact that the Corporate Debtor had repaid a part amount of Rs.9 crores over the principal outstanding amount of Rs.271.73 crores would show that the Company is unable to repay its debt and hence, it is a fit case for initiating Corporate Insolvency Resolution Process ("CIRP") as against the Corporate Debtor. It is also required to be noted that the Corporate Debtor has filed a Scheme of Compromise under Section 230 of the Companies Act, 2013 which is also pending before this Tribunal and the Corporate Debtor has also admitted in the said Petition that they have committed default in repayment of the debt to the Financial Creditors and as such their accounts have become 'NPA'. It is therefore clear that Corporate Debtor has admitted both the debt and default in no uncertain terms.

14.15. During the hearing held on 13.09.2022 and answering to a query by this Bench, Learned Senior Counsel for the Respondent apprised this Tribunal that the plant of the Corporate Debtor was closed during August 2021 as such the Corporate Debtor is not a going concern and presently the Corporate Debtor is only collecting the past dues from its debtors and a part of which is being paid to the Financial Creditors. As such the plant in which crores of rupees are invested is lying closed. A thermal power generation unit is a national asset of this country and it cannot be left to be in-operative. This reason would suffice to commence CIRP in respect of the Corporate Debtor and to find a solution to the financial woes of the Corporate Debtor and to maximise its assets and value or else it may drain down to liquidation.

14.16. Thus, from the documents placed on record and also for the reasons stated above, the existence of 'debt' and consequent 'default' on the part of the Corporate Debtor is proved and as such, in terms of Section 7(5) of IBC, 2016, the present application is required to be admitted. It is also seen that the default in the present case has happened much prior to COVID pandemic and as such the Corporate Debtor cannot seek shelter under Section 10A of IBC, 2016. Thus we hold that the debt and default on the part of the Corporate Debtor is proved. Under the said circumstances, we are of the view that this Application filed by the Financial Creditor is required to be admitted under Section 7(5) of IBC, 2016.

15. The upshot of the above analysis and findings would lead us to the following conclusion;

- The account of the Corporate Debtor was declared as NPA as early as on 30.05.2019 and as such the Corporate Debtor continues to be in default till date.

- 'Holding on Operations' was only a temporary arrangement given to the Corporate Debtor by the Lenders in order to make the situation from getting worse. That does not by itself means that the loan of the Corporate Debtor has been restructured. The plan submitted by the Corporate Debtor for restructuring was rejected by the Consortium of lenders.

- The fact that the Corporate Debtor has submitted a Scheme under Section 230 – 232 of the Companies Act, 2013 would prove that the Corporate Debtor has committed default and was unable to honour its loan obligation. In the said Scheme objections have been filed by the Secured Lenders.

- By taking into consideration the present financial condition of the Corporate Debtor, the Consortium of Lenders have taken a concrete stand that they are inclined to proceed with the filing of an application under Section 7 of IBC, 2016 and they have also authorized State Bank of India, the Applicant herein to file the present application and initiate CIRP in respect of the Corporate Debtor.

- The 'debt' and 'default' on the part of the Corporate Debtor is proved beyond reasonable doubt and as such it is a fit case for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

- The Plant of the Corporate Debtor is closed for more than a year and it is non – operational and therefore to maximize the value of assets, initiation of CIRP is necessary.

16. The Financial Creditor has proposed the name of one **Mr. Hitesh Goel**, having Registration Number **IBBI/IPA-001/IP-P01405/2018-2019/12224,** having Authorisation for Assignment (AFA) valid upto **16.02.2023** as Interim Resolution Professional (IRP) and written communication in the format prescribed under Form-2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 has been filed by the proposed IRP who is appointed as the IRP to take forward the process of Corporate insolvency Resolution of the Corporate Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIR Process in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

17. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

18. However, during the pendency of moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder;

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be

terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and mange the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

19. The duration of period of moratorium shall be as provided in Section 14(4) of the Code which is reproduced below for ready reference;

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

> 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 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.

20. The IRP is directed to take charge of the Corporate Debtor's management immediately. The IRP is also directed to cause public announcement as prescribed under Section 15 of the IBC, 2016 within three days from the date the copy of this Order is received, and call for submissions of claim by the creditors in the manner as prescribed under Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

21. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15, 17, 18 of the IBC, 2016 and file his report within 30 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

22. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The Directors of the Corporate Debtor, its

Promoters or any person associated with the management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 of IBC, 2016 for the purpose of discharging his functions under Section 20 of IBC, 2016.

23. The IRP shall conduct the Corporate Insolvency Resolution Process in respect of the Corporate Debtor as stipulated under Chapter VIII of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

24. Based on the above terms, the Petition stands **admitted** in terms of Section 7 of the Code and the Moratorium shall come into effect as of this date. A copy of the Order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named shall also be furnished with copy of this Order forthwith by the Registry, who will communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

25. The IRP is directed to file the 1st Progress Report before this Tribunal on or before the 45th day of initiation of CIRP by this Adjudicating Authority.

26. Accordingly, the present Petition stands **admitted**.

-Sd- -Sd-

SAMEER KAKAR **JUSTICE RAMALINGAM SUDHAKAR**
MEMBER (TECHNICAL) PRESIDENT