



**BEFORE ADJUDICATING AUTHORITY (NCLT)  
AHMEDABAD BENCH  
AHMEDABAD**

**C.P. No. (IB) 268/9/NCLT/AHM/2018**

**In the matter of:**

**POSCO India Pune Processing Center Private Limited.**

Plot No. A-9, Floriculture Park

Talegaon MIDC

Village Navlakh Umbre

Taluka Maval

Dist. Pune 410 507

Maharashtra State

:

**Petitioner**

Operational Creditor

**Versus**

**Poggenamp Nagarsheth Powertronics Private Limited**

C-1/B 4402 GIDC Estate

Vatva

Ahmedabad 382 445

GUJARAT STATE

:

**Respondent**

Corporate Debtor

**Order delivered on 22<sup>nd</sup> January, 2020**

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)**

**Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

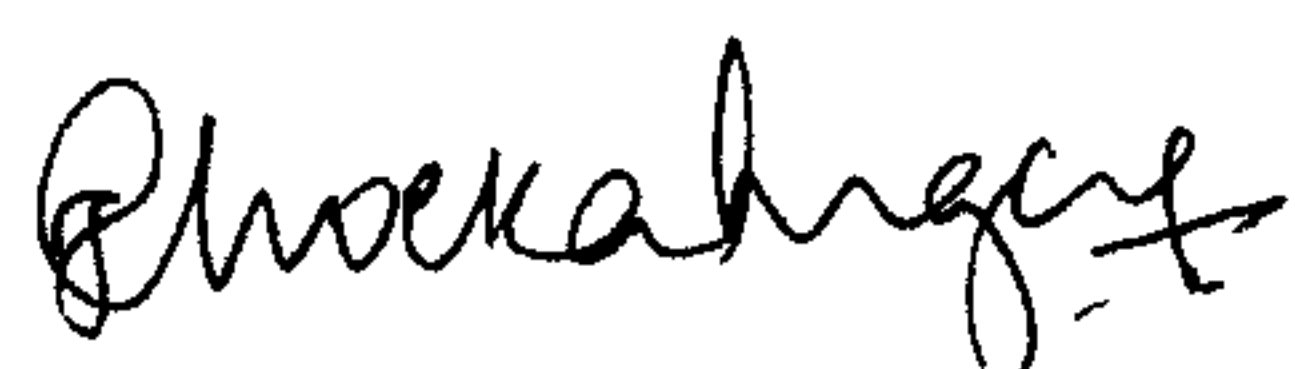
**Appearance:**

Advocate Mr. Manan Patel along with Advocates Mr. Abhay Hogi and Mr. Prateek Goyal for the operational creditor  
Advocate Anandoday Mishra along with Helly Parikh and Rohit Lalwani for respondent.

**ORDER**

**[Per: Ms. Manorama Kumari, Member (J)]**

1. Mr. Ashish Arvind Parikh, Company Secretary being authorised person of M/s. **POSCO India Pune Processing Center Private Limited** filed this Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with Rule 6 of The Insolvency

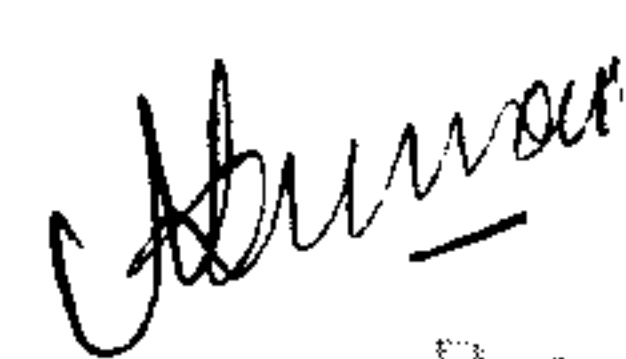
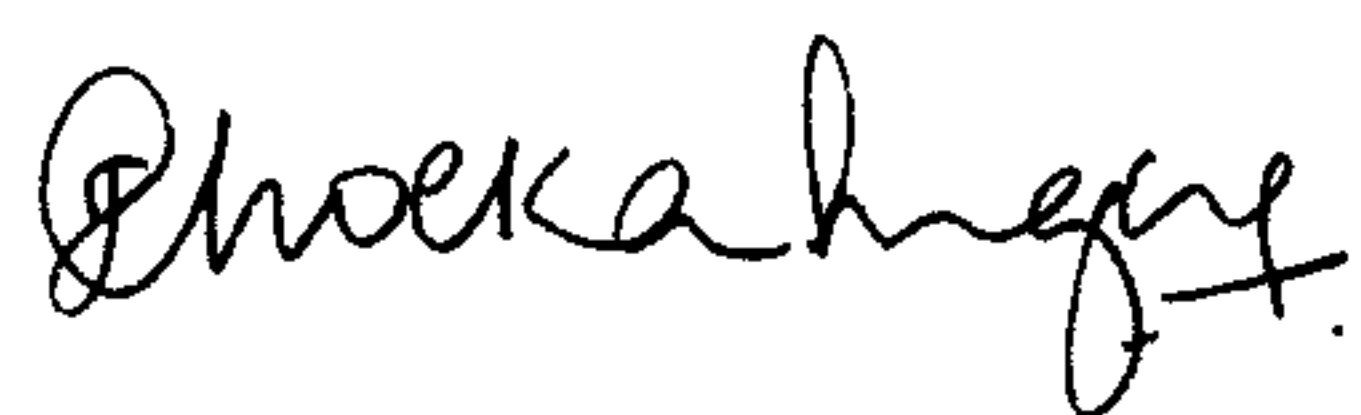




and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Rules"], as operational creditor/applicant.

2. The petitioner/operational creditor is a private limited company having identification No. U27107PN2005PTC021580 and having registered office at MIDC, Talegaon, Dist. Pune, Maharashtra.
3. The respondent/corporate debtor is a private limited company registered under the Companies Act, incorporated on 08.06.1992 and having identification No. U72200GJ1992PTC017786 and having registered office at GIDC, Vatva, Ahmedabad, Gujarat State. Authorised share capital of the respondent company is Rs. 3,00,00,000/- and paid up share capital is Rs. 3,00,00,000/-. The respondent company is in the business of manufacture of electrical laminations known as motor stampings since 1982.
4. The applicant/Petitioner has submitted that total debt due as on April 30, 2018 and payable by the corporate debtor is **Rs. 16,08,45,996/- (Rupees sixteen crores eight lacs forty-five thousand nine hundred ninety-six only)** including the interest @ 6% per annum for the period beyond 90 days from the date of the invoice. That, date of default is January 07, 2014.

5. The applicant has further stated that notwithstanding the interest as per agreed credit terms, an interest @ 10.50% on the total outstanding amount is due and payable from the date of June 01, 2015 to April 30, 2018.
  
6. The applicant has further stated that it made several follow-ups for the repayment of aforesaid amount and as a result of the consistent follow ups and discussions, the corporate debtor vide letter dated June 3, 2015 acknowledged the debt and also agreed to pay the interest at the rate of 10.5% from 01.06.2015 till the date of payment, with an undertaking to pay the outstanding dues in full in 18 equal instalments thereof. That, the operational creditor accepted the proposal and accordingly raised the debit notes on month-to-month basis in respect of such interest on the outstanding dues. That vide letter dated June 03, 2015 the corporate debtor further assured to furnish personal guarantees in their individual capacities in favour of the operational creditor, in case of failure of the corporate debtor to clear all outstanding dues within stipulated time period i.e. within the said 18 months. That, the corporate debtor completely failed to honour the said undertaking. However, the corporate debtor thereafter made certain ad-hoc payments which was adjusted by the operational creditor against the principal and interest on the outstanding dues. That, inspite of the accepted commitment and the agreed timelines, the corporate debtor has failed to make payment of the outstanding dues. That the detailed chart



showing the date of each of these transactions, credit terms and date from which the debt fell due is annexed to the application (page No. 383) marked as Annexure - 2.

7. It is further stated by the applicant that, despite efforts, having failed to receive the payment of debt from the corporate debtor, the applicant had issued demand notice dated 11.05.2018 in form No. 4. That, the corporate debtor has not raised any objection with regard to the default committed in making payment of Rs. 16,08,45,996/- to the petitioner.
8. In support of its claim, the petitioner has submitted copy of the following documents: -

Sr. No.	Particulars	Page No.
1	Form 5 under I & B Code	2-6
2	Demand notice - form 4 dated 11.05.2018	7-376
3	Acknowledgement of demand notice	377
4	General affidavit verifying the petition dated 29.05.2018	378-380
5	Board resolution in the name of the person authorised to submit the application	381-382
6	Detailed chart showing the date of each transactions, credit terms and date from which the debt fell due	383
7	Detailed chart showing the adjustments of the ad-hoc payments received and balance outstanding amount	384
8	Bank statements	
9	Bank certificate of Standard Chartered Bank dated 29.05.2018, Shinhan Bank dated 29.05.2018 and Yes Bank dated 29.05.2018	385 (A) 385 (B) 385 (C)

9. The respondent filed affidavit in reply raising various objections to the admission and maintainability of the company petition filed by the operational creditor.

*Shoekahng*

*Shoekahng*

10. It is stated by the respondent that it is a solvent company having reserve and surplus of Rs. 12.94 crores as on 31<sup>st</sup> March, 2018 with sales turnover of Rs. 54.92 crores. That, the corporate debtor's substratum is not lost and the company is solvent and regular in repayment of its dues to all its creditors including financial creditors. That, the company employs around 240 employees and workmen including contract labourers. That, the stake of the financial creditors is much higher than the stake of the operational creditor and, in view of the same, if the resolution process is initiated, it would frustrate the very object of the IB Code. That, the petition is time barred and the annexures annexed to the application are incomplete and vague. That, there is no default on the part of the corporate debtor. There is dispute with regard to the operational debt, and hence the amount claimed is not payable.

### **Findings**

11. Heard at length the learned lawyer appearing for both the sides and perused the documents annexed to the petition/reply.
12. On perusal of the records, prima facie, it appears that the objections raised by the corporate debtor are imaginary and not supported by any documents, whereas, the documents produced on record by the operational creditor is enough to establish that operational debt is due and payable to the

*Shoekabegum*

*Shoekabegum*

applicant from the respondent which was acknowledged on 03.06.2015 and thereafter also made some payment from time to time on instructions of corporate debtor.

13. At this juncture it is desirable to refer para No. 3 & 4 of letter dated 3<sup>rd</sup> June, 2015 written by the corporate debtor and addressed to the applicant. For the sake of brevity, 3<sup>rd</sup> and 4<sup>th</sup> para of the said letter is reproduced here below: -

***"In furtherance to your continuous follow-ups, our commitments to pay the said outstanding dues and various discussions between both the companies herein, we being the promoters/Directors of POGGEN AMP would like to provide you this written assurance/commitment for payment of the said outstanding dues as mentioned herein.***

***Accordingly, we, the undersigned, hereby acknowledge that as on 1<sup>st</sup> June, 2015, a total amount of Rs. 16,04,87,392/- (Rupees sixteen crores four lacs eighty-seven thousand three hundred and ninety-two only) is yet to be payable by POGGEN AMP TO POSCO – IPPC, towards the cost of materials received."***

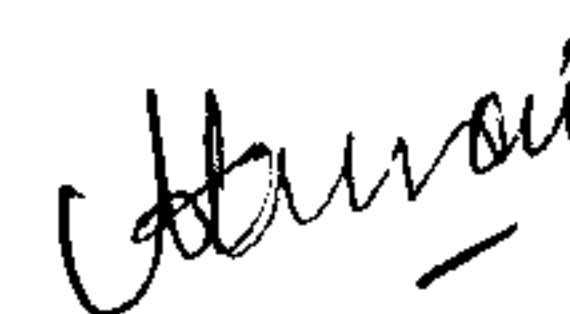
14. On perusal of the records it is also found that the said letter dated 3<sup>rd</sup> June, 2015 is signed by three directors of the respondent company admitting the debt of Rs. 16,04,87,392/- and to pay the applicant simple interest @ 10.5% per annum on the balance outstanding dues, until payment of the entire outstanding dues in addition to the payment of entire principal outstanding dues. That, in the said letter commitment/assurance is given by the corporate debtor to pay the entire outstanding dues of the operational creditor along with applicable interest thereon within next 18 (eighteen) equal monthly instalments starting from June, 2015 up to November, 2016. That, in case of failure on the

*Shankar Singh*

*Harman*

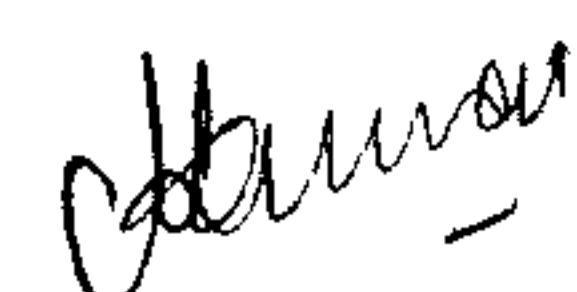
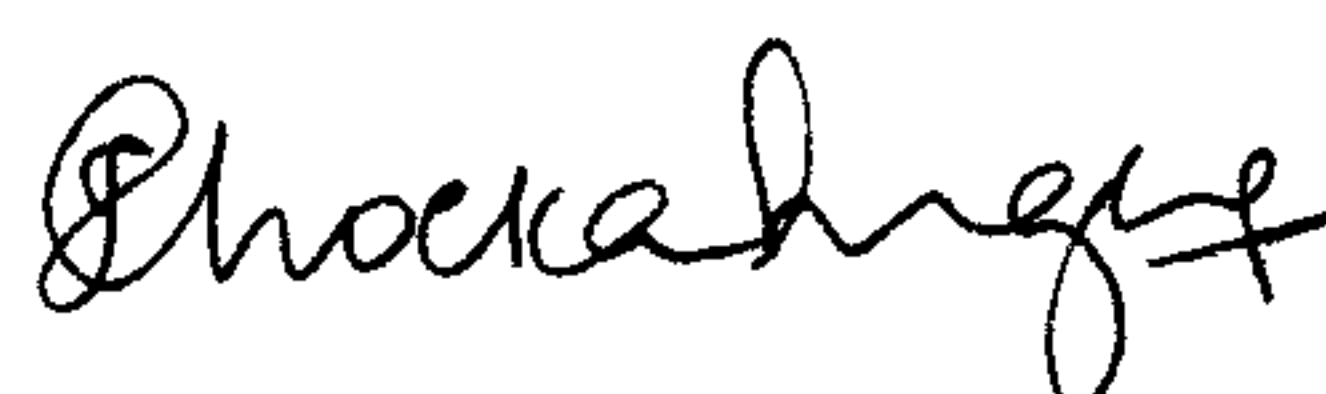
part of the respondent to pay the operational creditor the said outstanding dues, the directors shall provide/execute personal guarantees in their respective individual capacities in favour of the applicant within 30 days from the date of such failure.

15. On perusal of the records it is found that as per Annexure – A to letter dated September 11, 2017 (page 64 of the reply) addressed to the corporate debtor by the applicant an amount of Rs. 16,06,45,635/- is shown as the principal outstanding payable by the corporate debtor to the applicant as promised in letter dated 03<sup>rd</sup> June, 2015. Upon payment of Rs, 3,36,00,000/- by the corporate debtor towards principal outstanding, the principal outstanding as on 31.08.2017 has been shown as 12,70,45,635/- and the total outstanding as on 31.08.2017 has been shown as Rs. 15,04,09,405/- which includes interest of Rs. 2,33,63,770/- Copy of the ledger book (01-04-2016 to 31-03-2017) annexed at page No. 124 to the reply of the corporate debtor, confirms that the corporate debtor had made the last payment of Rs. 10.00 lacs to the operational creditor on 9<sup>th</sup> January, 2017.
16. On perusal of the records it is found that Annexure R-10 (page No. 125) to the affidavit in reply is a letter dated 2<sup>nd</sup> March, 2017, addressed to the applicant by the respondent stating that the corporate debtor has diverted its funds to



its another joint venture viz. PPESPL and seeking more time for settling the outstanding debt.

17. On perusal of the records it is found that at page No. 15 to the application, the petitioner has provided a copy of the invoice dated 07.01.2014 reflecting the details of order placed by the corporate debtor vis-à-vis the terms of payment.
18. From the above discussions it is evident that the respondent has defaulted in payment of the debt and has admitted the operational debt from time to time, the last being copy of ledger book annexed to the reply at page No. 124.
19. It has been observed in ***Mobilox Innovative Private Limited vs. Kirusa Software Private Limited [2017] 1 IBJ(JP) 2 SC*** that while examining an application under Section 9 of the Act, will have to determine the following: -
  - (i) Whether there is an "operational debt" as defined exceeding Rs. 1.00 lac (See Section 4 of the Act)
  - (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?  
**and**
  - (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of



the demand notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected.

20. Thus, under the facts and circumstances and as discussed above, in the light of the Hon'ble Supreme Court Judgement and the provisions thereof as enshrined in Insolvency & Bankruptcy Code, this adjudicating authority is of the considered view that operational debt is due to the Applicant and it fulfilled the requirement of I & B Code. That, service is complete and no dispute has been raised by the respondent at any point of time. That, Applicant is an Operational Creditor within the meaning of Section 5 sub-section 20 of the Code. From the aforesaid material on record, petitioner is able to establish that there exists debt as well as occurrence of default and the amount claimed by operational creditor is payable in law by the corporate debtor as the same is not barred by any law of limitation and/or any other law for the time being in force.

21. Section 13 of the Code enjoins upon the Adjudicating Authority to exercise its discretion to pass an order to declare a moratorium for the purposes referred to in Section 14, to cause a public announcement of the initiation of corporate insolvency resolution and call for submission of claims as provided under Section 15 of the Code. Sub-section (2) of Section 13 says that public announcement

*Shankar Singh*

*Shankar Singh*

shall be made immediately after the appointment of Interim Insolvency Resolution Professional. This Adjudicating Authority direct the Interim Resolution Professional to make public announcement of initiation of Corporate Insolvency Process and call for submission of claims under Section 15 as required by Section 13(1)(b) of the Code.

22. From the above stated discussion and on the basis of material available on record it is evident that the corporate debtor has committed default in payment of operational debt and, therefore, it is a fit case to initiate Insolvency Resolution Process by admitting the Application under Section 9(5)(1) of the Code.
23. The petition is, therefore, admitted and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of Section 14 of the Code: -
- (i) 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;
  - (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  - (iii) 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 Securitisation and Reconstruction of Financial Assets



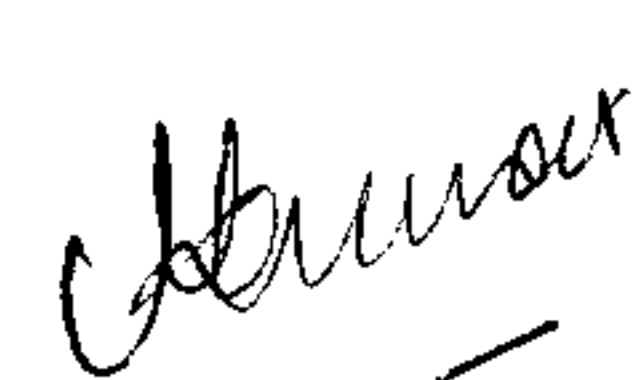
and Enforcement of Security Interest Act, 2002 (54 of 2002);

(iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

24. It is further directed that the supply of goods and essential services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

25. The order of moratorium shall have effect from the date of receipt of authenticated copy of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

26. The applicant/operational creditor has not proposed name of the Interim Resolution Professional. This Adjudicating Authority hereby appoint Mr. Sachin Bhattbhatt, A-103, Yogiraj Villa 2, Kunal Char Rasta, Nr. Signat Plaza, Behind Iscon Heights, Gotri Laxmipura Road, Gotri, Vadodara 390 023 having registration No. IBBI/IPA-003/IP-



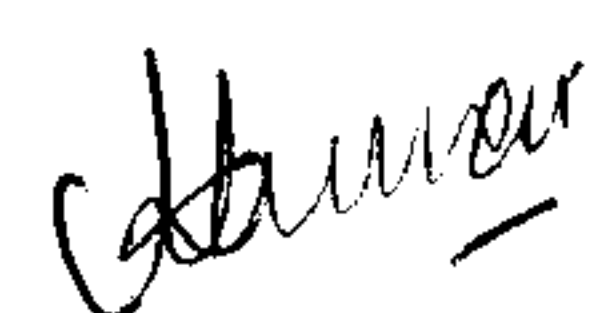
N000138/2017-18/11514 to act as an interim resolution professional under Section 13(1)(c) of the Code.

27. This Petition is accordingly admitted.
28. Communicate a copy of this order to the applicant, Corporate Debtor, Registrar of Companies and to the Interim Resolution Professional.
29. Registry is directed to inform the office of Registrar of Companies that the respondent company is under corporate insolvency resolution process and, therefore, no proceedings for striking off name of the respondent company be initiated arising out of non-compliances of Sections 159 to 162 & 220 etc. of the Companies Act, 2013 as it would be detrimental to the process of the liquidation and sale of assets to realise the amount for all the stakeholders.

**Inv. P 07 of 2019**

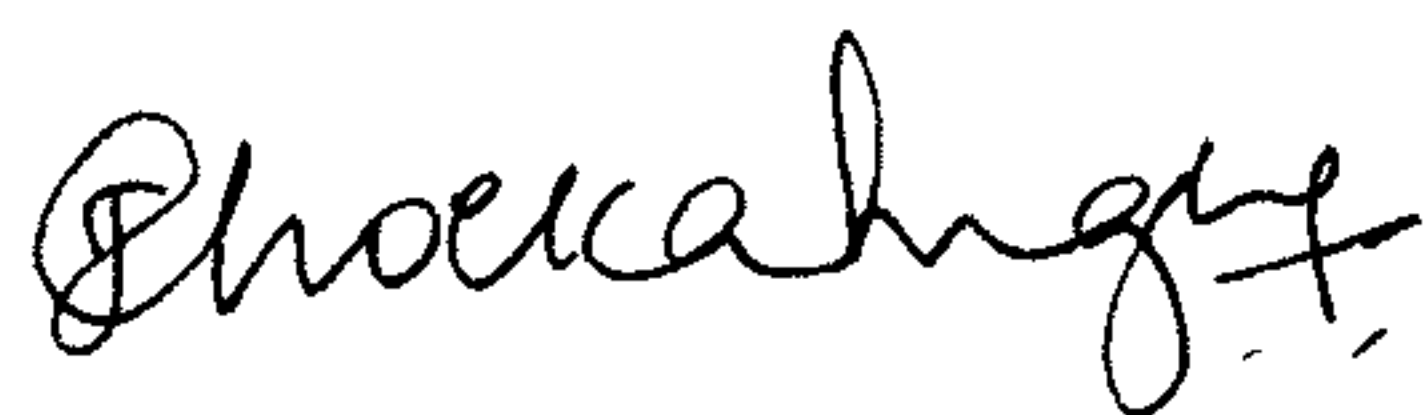
30. During the pendency of the instant application, an Intervening Petition by UCO Bank was filed through its Chief Manager, UCO Bank, GH-5 Circle, Sector-16, Gandhinagar arraying POSCO India Pune Processing Center Pvt. Ltd (Operational Creditor) as Respondent No. 1 and Poggenamp Nagarsheth Powertronics Pvt. Ltd. (Corporate Debtor) as Respondent No. 2. The Applicant (Intervener) submitted that the application so filed by Operational Creditor is not





maintainable as it would defeat the object the IB Code and would create unnecessary burden on consortium and also, put public money at stake.

31. It is further submitted that by filing the application under Section 9 of the IB Code, the object of maximising the value of assets could not be achieved and if the same is admitted, it would result in great financial loss to the stakeholders in as much as in Secured Loans which amounts to Rs. 54.20 Crores and factory valuation of Corporate Debtor is Rs. 72-73 Crores. But a distress sale pursuant to appointment of IRP would hardly realize money at 50% or less valuation, which would not be sufficient to realize debt of the Secured Creditor.
32. The Petitioner/Intervener further stated that the Corporate Debtor has so far received large amount of term loans amounting to Rs. 15-20 Crores with interest and even today, Corporate Debtor is regular in repaying the loan amount with interest. Under such circumstances, if the application under Section 9 of the IB Code is admitted, in that event it would not yield any fruitful and material result.
33. Petitioner/ Intervener submitted that so far no other Creditor, whether Secured or Unsecured, has raised plea regarding the credit worthiness of the Corporate Debtor. It is further stated that Corporate Debtor is a going concern

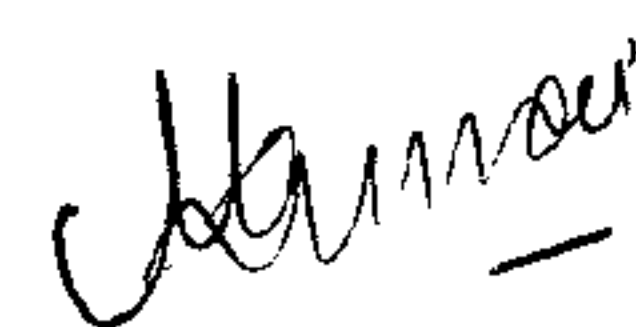


and livelihood of number of persons are dependent on the Corporate Debtor, who will lose their employment in the event of admission of this IB application.

34. Heard the Petitioner/ Intervener and also seen the documents annexed therein, while dealing with the application under section 9 of the IB Code, this Adjudicating Authority has to see whether the amount is due and payable to the Petitioner and the same is defaulted from the payment. Apart from that, this Adjudicating Authority also has to see whether the amount due to Operational Creditor is not less than 1 Lakh rupees. On perusal of the application, so filed under Section 9 of the IB Code by Operational Creditor in CP (IB) 268 of 2018, it is found to be complete in all respect and an amount of Rs. 16,08,45,996/- including interest @ 6% per annum for the period before 90 days from the date of invoice is payable and due to Operational Creditor. The Corporate Debtor vide its letter dated 03.06.2015 has acknowledged the debt and has also agreed to pay the interest @ 10.5% from 01.06.2015.

35. However, the Hon'ble NCLAT in the matter of **Axis Bank Ltd. v. Lotus Three Developments Ltd.** held that No person other than the Corporate Debtor has a right to be heard. The relevant part of the said judgment reads thus:

***"6. From the aforesaid decision, it is clear that the Adjudicating Authority is only to satisfy that the default has occurred and that the Corporate Debtor is entitled to point out that the default has not been***





***occurred in the sense that the debt is not due. No other person has a right to be heard at the stage of admission of the application under Section 7 and 9 of the I & B Code including the shareholders of the personal guarantor etc."***

36. The Adjudicating Authority following the above referred judgment also made an order dated 19.11.2018 in the case of **KKR Jupiter Investors (P.) Ltd. v. JBF Petrochemicals Ltd. [2018]** thereby rejecting the intervention application filed by a third party. Para 17 of the said judgment reads thus: —

***"17. Thus, it is clear that the third party (being an entity other than the Financial Creditor/ Corporate Debtor) is not offered the right to be heard and/or to intervene in a proceeding initiated under Section 7 of the IB Code as affirmed by the Hon'ble Supreme Court. That from the aforesaid decision, it is clear that the Adjudicating Authority is only to satisfy that the default has occurred and that the Corporate Debtor is entitled to point out that the default has not been occurred in the sense that the debt is not due. That no other person has a right to be heard at the stage of admission of the application under Section 7 and 9 of the IB Code including the shareholders or the personal guarantor, etc."***

37. The aforesaid order made by this Adjudicating Authority came to be confirmed by Hon'ble NCLAT by order dated 28.1.2019 in Company Appeal (AT) (Ins) No.786 of 2018.
38. Under such circumstances, the Intervention Petition so filed by UCO Bank vide Inv. P 07 of 2019 is not maintainable.

  
**Chockalingam Thirunavukkarasu**  
 Adjudicating Authority  
 Member (Technical)

  
**Ms. Manorama Kumari**  
 Adjudicating Authority  
 Member (Judicial)

nair