

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 03/95/JPR/2023

IN THE MATTER OF:

BANK OF MAHARASHTRA

...Applicant

VERSUS

MRS. SAROJ GUPTA

...Respondent/ Personal Guarantor

MEMO OF PARTIES

BANK OF MAHARASHTRA

Central Office, Lokmangal, 1501,
Shivajinagar, Pune, Maharashtra-
411005

Also At:

Stressed Assets Management
Branch, B-29, Maharashtra Bank
Building, Connaught Place, New
Delhi- 110001

...Applicant

VERSUS

MRS. SAROJ GUPTA

Plot No. 1391, Sector- 4, Rewari,
Haryana- 123401

Also at:

L3-809/810, Ashiana Angan,
Bhiwadi, Alwar- 301019 (Rajasthan)

...Respondent/ Personal Guarantor

FOR THE APPLICANT :

Animesh Khandelwal, Adv.

FOR THE RESPONDENT :

Karan Pratap Singh, Adv.

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Assistant Registrar
National Company Law Tribunal
Jaipur

Order Pronounced on: 24.09.2024

ORDER

Per: Shri Rajeev Mehrotra, Technical Member

1. The present Application has been filed by *Bank of Maharashtra* ('Applicant'/ 'Applicant Bank') with the prayer to initiate Insolvency Resolution Process against *Mrs. Saroj Gupta* ('Personal Guarantor'/ 'Respondent') under Section 95 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. The Personal Guarantor has stood as Guarantor in respect of the loans availed by *M/s Maa Santoshi Marbles Pvt. Ltd.* ('Corporate Debtor').
2. It is stated that the Personal Guarantor had executed a personal guarantee to secure the repayment of the financial assistance availed by the Corporate Debtor from the Applicant. Pursuant to default in repayment of debt by the Corporate Debtor, the personal guarantee of *Mrs. Saroj Gupta* was invoked and accordingly, the Personal Guarantor was called upon to repay the debt of the Corporate Debtor, which she has failed to repay.
3. It has been submitted that in the year 2013, *M/s Pushpa Minerals*, a proprietary firm of *Mrs. Pushpa Gupta* (later taken over by *M/s Maa Santoshi Marbles Pvt. Ltd.*, the Corporate Debtor), approached the Applicant Bank for availing credit facilities. Acting upon the said request,

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the Applicant sanctioned a credit facility of Rs. 4.75 crores on 11.03.2013. The aforementioned facility was further reviewed on 19.09.2013 and the Applicant Bank also extended non-funded limit for 3 Bank Guarantees of Rs. 1 Crore each totalling to a sum of Rs. 3 Crores.

4. Thereafter, *M/s Pushpa Minerals* was taken over by the Corporate Debtor i.e., *M/s Maa Santoshi Marbles*, Private Limited and the full credit facility of Rs. 7.75 Crores was transferred to the Corporate Debtor on 24.12.2014 and the details of the same as provided in the Petition are reproduced below:

<i>Nature of Facility</i>	<i>Cash Credit Limit</i>	<i>Bank Guarantees</i>
<i>Amount of facility</i>	<i>Rs. 4.75 Crore (Rupees Four Crore Seventy- Five Lacs Only)</i>	<i>Rs. 3.00 Crore (Rupees Three Crore Only)</i>
<i>Purpose</i>	<i>Working capital</i>	-
<i>Rate of Interest</i>	<i>Base Rate (floating) + 4.50% i.e. 14.75% p.a. at the time of sanction on monthly compounding basis.</i>	-

5. Thereafter, the Corporate Debtor had signed, executed, and delivered various documents in favour of the Applicant Bank to secure the due repayment of the said credit facilities. The Respondent in the instant Petition i.e., *Mrs. Saroj Gupta*, stood as one of the Personal Guarantor for the due repayment of the aforementioned credit facilities and executed a deed of guarantee dated 24.12.2014.

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6. The said credit facilities were secured by creating primary security in the form of stocks and receivables and equitable mortgage properties by delivery of title deeds. The details of the mortgaged properties are reproduced below:
- Plot No. 1391, Sector-4, Rewari in name of Pushpa Gupta, Saroj Gupta & Saroj Gupta measuring 256.50 sq. mt.*
 - Plot No. 1728, Sector-4, Rewari in name of Mr. Bal Kishan Gupta.*
 - Plot No. 1729, Sector-4, Rewari in name of Mr. N.K. Gupta.*
 - H. No. 56, Ward-8, Old Anaj Mandi Tauru, Gurgaon in the name of Mr. Bal Kishan.*
7. In pursuance of the execution of the above-mentioned documents by the Corporate Debtor as well as the Personal Guarantors, a cash credit account bearing Account No. 60196782609 was opened by the Applicant Bank in the name of the Corporate Debtor.
8. The Corporate Debtor defaulted in payment of the dues payable to the Applicant Bank and consequently, the Account of the Corporate Debtor was declared as NPA on 24.09.2015. Further, the Applicant issued demand notices calling upon the Corporate Debtor as well as the Guarantor to repay the total outstanding amount. However, the Corporate Debtor failed to comply with the same.
9. Thereafter, in order to recover the outstanding amount, the Bank had filed an Original Application bearing No. 949/2016 titled as *BOM vs. Maa*

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Santoshi Marvels Pvt. Ltd. which is pending adjudication before the DRT-I, Delhi.

10. Thereafter, the Bank issued a Recall cum invocation of Guarantee Notice dated 26.07.2022 to the Corporate Debtor as well as the Guarantors invoking Deed of Guarantee executed by the Respondent for payment of the outstanding dues amounting to Rs. 15,41,67,344.80/- (Rupees Fifteen Crore Forty One Lacs Sixty Seven Thousand Three Hundred Forty Four and Eight Paise Only) within 7 days. However, the said notice remained uncompiled with.
11. Subsequently, a Demand Notice dated 25.08.2022 was issued as per Rule 7(1) of the Insolvency and Bankruptcy (Application for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 to all the Personal Guarantors including the Personal Guarantor herein i.e., *Mrs. Saroj Gupta*, and the Corporate Debtor seeking payment of the default amount of Rs. 15,41,67,344.80/- (Rupees Fifteen Crores Forty-One Lakhs Sixty-Seven Thousand Three Hundred Forty-Four and Eighty Paise Only) within 14 days. However, the Personal Guarantors failed to repay the debt in default within the prescribed period.
12. In Part III of the Application, the amount in default is reflected as Rs. 15,41,67,344.80/- (Rupees Fifteen Crores Forty-One Lakhs Sixty-Seven Thousand Three Hundred Forty-Four and Eighty Paise Only) as on 19.08.2022. Further, the date on which the debt became due is mentioned

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as 24.06.2015 and the date of default is mentioned as the NPA date i.e., 24.09.2015.

13. The Personal Guarantor has filed its preliminary objections vide diary No. 52/2024 dated 04.01.2024 wherein stated the following:

13.1. It is submitted that the instant Application is grossly misconceived and devoid of any merit whatsoever, and thus, liable to be dismissed. The application has been filed in abject derogation of the provisions of the IBC, 2016 and the rules made thereunder and thus liable to be dismissed.

13.2. It is stated that the application has been been filed by *Mr. Sanjay Kumar Sharma* who claims to be the Chief Manager of the Zonal Office of the Applicant Bank. The pleadings made in the application have been verified by him along with the affidavit by way of which the facts as mentioned in the application have been deposed. However, the Applicant Bank has failed to bring on record any cogent documentary evidence whatsoever which demonstrates that *Mr. Sanjay Kumar Sharma* is the chief manager of the Bank and is authorised to file the instant application. The Applicant Bank has annexed authorization letter dated 19.04.2022 cum board resolution as Annexure 9 of the Application, however, the aforesaid authorization neither has the name of *Mr. Sanjay Kumar Sharma* nor

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elucidates as to how *Mr. Sanjay Kumar Sharma* is authorised to file the Application.

- 13.3. The purported board resolution dated 19.04.2022 appears to be a general circular of the Applicant Bank wherein internal policy pertaining to appointment of certain officials as Principal Officers has been prescribed. Moreover, even in the aforesaid circular, it has been mentioned that the concerned zonal/Branch office is to provide a specific authorization letter in this regard. Thus, the Application has been filed without any authorization whatsoever and thus liable to be dismissed at threshold.
- 13.4. The Applicant Bank has served a recall notice dated 26.07.2022 and a demand notice dated 25.08.2022 on the purported address which has been in the possession of the Applicant Bank since 2016 and subsequently has been sold under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest, 2002 ('SARFAESI Act') in the year 2017 itself. Based on the abovementioned facts and circumstances, it is duly established that the Applicant Bank has miserably failed to serve the demand notice as prescribed under the IBC, 2016 and rules made thereunder.
- 13.5. It is a settled principle of law that a person who approaches a court/judicial forum is expected to come with clean hands. A perusal of the abovementioned facts and circumstances duly reflects the malicious

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and unscrupulous conduct of the Applicant Bank who has approached this Tribunal with tainted and unclean hands. The Applicant Bank was fully aware of the fact that the property situated at *Plot No. 1391, Sector 4 Rewari* has been sold by the Applicant Bank itself under the provisions of the SARFAESI Act, 2002 in order to seek recover its alleged dues. However, the Applicant Bank has not only concealed this fact before this Tribunal but has also abused the process of law by issuing notices to the Personal Guarantor at the same address. Moreover, a bare perusal of part III of the petition reveals that the Applicant Bank has, inter alia, falsely mentioned that *plot No. 1391, Sector-4, Rewari*, amongst other properties, is still mortgaged with the Applicant Bank.

13.6. As per Section 238A of the IBC, 2016, the provisions of the Limitation Act, 1963 is applicable to the proceedings before this Tribunal. As such, any petition filed before this Tribunal under the provisions of IBC, 2016 and the rules made thereunder have to be filed within the limitation period prescribed under the provisions of the Limitation Act, 1963. It is a settled principle of insolvency jurisprudence that Article 137 of the Limitation Act, 1963 is applicable to ascertain the limitation period for an insolvency petition and the same has been upheld by the Hon'ble Apex court in catena of cases.

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- 13.7. A bare perusal of Part-III of the application reveals that the Applicant Bank has mentioned the date on which the default occurred as 24.09.2015. The same has also been mentioned allegedly as the date of NPA. As such, as per Section 238A of the IBC, 2016 read with Article 137 of the Limitation Act, 1963, the limitation period for filing a petition under the provisions of the IBC, 2016 was until 23.09.2018, i.e. 3 years after the date of default. It is apposite to mention that the instant Application has been filed on 04.01.2023 and registered on 09.01.2023. As such, the same has been filed after more than 7 years from the date of default, i.e. 24.09.2015. Moreover, there is no whisper in the petition pertaining to how the same is within the limitation period as prescribed nor there is any documentary evidence pertaining to the same. It is apparent that the captioned petition is heavily time barred and has been filed beyond the limitation period prescribed under the Limitation Act, 1963 and the IBC, 2016. It is a settled proposition of law that the IBC, 2016 cannot be used as a tool to revive and resuscitate time barred debts and this Adjudicating Authority is not a forum for recovery of money.
14. The Applicant Bank has filed its Rejoinder vide Diary No. 990/2024 dated 22.04.2024, and has stated the following:

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- 14.1. The Personal Guarantor has not disputed the fact of availing the loan facilities. Further, the preliminary objections raised by the Respondent wherein it had tried to persuade this Adjudicating Authority to exercise a right which has not been granted by the statute itself.
- 14.2. The Preliminary objections preferred by the Personal Guarantor are not maintainable at this stage as none of provisions of the Code and the rules framed thereunder entails the Respondent to raise the objections to the admissibility of the Applications as no adjudication is involved at this juncture. The Personal Guarantor may raise the objections only after the Interim Resolution Professional appointed by the Tribunal submits its report under Section 99 of the Code and prior to that stage no objections are tenable under the code as no adjudication is involved under Sections 95 to Section 99 of the IBC. The Applicant Bank has relied upon the Judgment of the Hon'ble Supreme Court in the matter of *Dilip B Jiwrajka Versus Union of India & Ors.* Writ Petition (Civil) No. 1281 of 2021. The aforesaid judgment of the Hon'ble Supreme Court leaves no space of doubt and clearly renders that no adjudicatory role is involved at this stage.
- 14.3. The objections challenging the authority of the authorized signatory are vehemently denied as being vague and baseless. It is reiterated herein that *Mr. Sanjay Kumar Sharma* is duly authorized by the

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Applicant bank to initiate the proceedings before this Tribunal. The Applicant has duly placed on record the board resolution passed by the Applicant bank at *Annexure-9* authorizing its Zonal Manager/Deputy Zonal Manager/Assistant General Manager/Chief Manager posted at Zonal Office as authorised officer to prosecute litigation and defend the bank before various courts of law. *Mr. Sanjay Kumar Sharma* being the Chief Manager is duly authorized in view of the board resolution dated 19.04.2022.

14.4. It is submitted herein that in view of the provisions of the IBC, 2016 as well as the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, the demand notice dated 25.08.2022 was sent on the last known address of the Personal Guarantor which was provided by the Personal Guarantor herself, hence, the presumption of service is to be drawn against the Personal Guarantor.

14.5. It is worthwhile to mention herein that the Applicant has relied upon the possession Notice u/s 13(4) as well as the Auction Notice issued by the Applicant Bank under the provisions of SARFAESI Act, interestingly the possession Notice as well the auction notice as referred by the Personal Guarantor bears the same address of the Respondent. Since the demand notice as well as the recall notice was

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duly issued on the last known address of the Personal Guarantor and it is not the case of the Respondent that they had furnished any fresh address to the Applicant Bank, thus, the basic presumption under Section 27 of the General Clauses Act, 1977 shall be drawn.

14.6. In so far as the contention of the Respondent qua concealment of facts is concerned, it was submitted that the Applicant Bank has preferred the instant Application under the provisions of the IBC, 2016 and the same has no relation to the proceedings under the SARFAESI Act.

14.7. It was submitted that the instant Application is under limitation as envisaged under the provisions of the Code. The account of the Respondent was classified as NPA on 24.09.2015 and thereafter, the Respondent had time and again acknowledged the debt which would extend the period of limitation in view of the Section 18 of the Limitation Act, 1963. As per Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication.

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Section 18 of the limitation is reproduced hereinunder for the ready reference:

*“18. Effect of acknowledgement in writing.- (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.
(.....)”*

14.8. It was submitted that the Corporate Debtor had time and again approached the Applicant Bank and had issued letters dated 13.1.2016, 19.08.2016, 20.08.2016, 23.08.2016, 21.10.2016, 05.01.2017 and 21.02.2017 wherein it had acknowledged its liability towards the Applicant Bank. Moreover, the Corporate Debtor had acknowledged the debt in its balance sheets for the year ending on 31.03.2020 and for the year ending on 31.03.2022. Thus, the instant Application is within the prescribed limitation period.

14.9. In support of its contentions the Applicant Bank had relied upon the following case laws:-

- I. *Asset Reconstruction Company (India) Limited v/s Tulip Star Hotels Limited & Ors. Civil Appeal Nos. 84-85 of 2020.*
- II. *Laxmi Pat Surana v/s Union Bank of India & Anr. Civil Appeal No. 2734 of 2020.*

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15. We have heard the learned counsels for the parties and perused the averments made in the Application, the Reply and the Rejoinder along with the documents on record.
16. In the instant case, the moot question of law that arises for our consideration is whether at the stage of Section 95 Application, this Adjudicating Authority can adjudicate upon the issue of limitation.
17. In order to address the aforementioned issue, it is relevant to refer to the Judgment of the Hon'ble Supreme Court in the case of *Dilip B. Jiwrajka v. Union of India* (2024) 5 SCC 435 wherein the Hon'ble Court upheld the constitutional validity of sections 94 to 100 and the conclusion of the judgments are as follows:

"86.1 No judicial adjudication is involved at the stages envisaged in sections 95 to 99 of the Insolvency and Bankruptcy Code;

86.2 The resolution professional appointed under section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under section 94 or 95. The report to be submitted to the Adjudicatory Authority is recommendatory in nature on whether to accept or reject the application;

86.3 The submission that a hearing should be conducted by the Adjudicatory Authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under section 97(5) of the Insolvency and Bankruptcy Code is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

86.4 The resolution professional may exercise the powers vested under section 99(4) of the Insolvency and Bankruptcy Code for the purpose of examining the application for insolvency resolution and to seek

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information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;

86.5 There is no violation of natural justice under sections 95 to 100 of the Insolvency and Bankruptcy Code as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;

86.6 No judicial determination takes place until the Adjudicating Authority decides under section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the Adjudicatory Authority when it exercises its jurisdiction under section 100;

86.7 The Adjudicatory Authority must observe the principles of natural justice when it exercises jurisdiction under section 100 to determine whether to accept or reject the application;

86.8 The purpose of the interim moratorium under section 96 is protect the debtor from further legal proceedings; and

86.9 The provisions of sections 95 to 100 of the Insolvency and Bankruptcy Code are not unconstitutional as they do not violate article 14 and article 21 of the Constitution.”

18. The issue of adjudication upon the question of limitation at the initial stages of Section 95 came up before the Hon’ble NCLAT in the case of *Mr. CL Sharma v/s Bank of Maharashtra & Anr (2024) ibclaw.in 141 NCLAT* wherein the Hon’ble Appellate Authority relied upon the Judgment of *Dilip B. Jiwrajka (supra)* and observed that: -

“11. The law declared by the Hon’ble Supreme Court in the above judgment is very clear. The Adjudicating Authority should consider the issue pertaining to jurisdictional fact at the stage of Section 100 and there is no adjudication contemplated at the stage when RP is appointed under Section 97, sub-section (5). The conclusion recorded in paragraph 86 (iii) clearly lays down the aforesaid. The submission of the Appellant(s) that Applications were barred by time, ought to have been considered at the

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time when Adjudicating Authority appointed the RP, thus, cannot be accepted.

...

15. In view of the judgment of the Hon'ble Supreme Court in Diliip B Jiwrijka, it is settled now that question of adjudication of issues between the parties arises only at the stage of Section 100 and the RP has only role of facilitator. The RP has to submit a Report, after examining the Application under Section 95 and after giving opportunity to Personal Guarantor. The role of RP has been elaborately examined by the Hon'ble Supreme Court in the aforesaid case and it is held that RP does not perform any adjudicatory function, nor even can take an administrative decision. The role of RP has been held to be only facilitator. The judgment relied by learned Senior Counsel for the Appellant in Shankarlal Aggarwala has no application in the facts of the present case.

16. Insofar as the submission of the Appellant(s) that Adjudicating Authority failed to take into consideration that authorization was not filed by the RP, it is always open for the Appellant to take such or other pleas as permissible at the time of adjudication of issue, including any defect in the Application under Section 95 and the said question also does not require any consideration at the stage when RP is appointed. Of course, if there is any invalidity or shortcomings while appointing the RP, Section 98 is there for the debtor or creditor, which provides for replacement of the RP."

19. In view of the aforementioned Judgments, this Adjudicatory Authority is of the opinion that no adjudication is contemplated at the stage when RP is appointed under Section 97 of the Code and question of adjudication of issues between the parties arises only at the stage of Section 100. Thus, the issues raised by the Debtor/Personal Guarantor cannot be adjudicated upon at this stage. Moreover, it is made clear that this adjudicating authority has not given any finding qua the merits of the issues raised by the Debtor and

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the Debtor/Personal Guarantor shall be at liberty to raise the same at the stage of Admission or Rejection of Application i.e., Section 100.

20. In the instant case, in Part IV of the Application the Applicant has nominated *Mrs. Anju Agarwal* as Resolution Professional. It shall be noted that the appointment of the Resolution Professional under Section 97 of the Code is critical and essential for the Creditor but also relevant to safeguard the assets of the Personal Guarantor in terms of the provisions of the Code. In view of this, *Mrs. Anju Agarwal* duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-001/IP-P00106/2017-18/10213 (email: Anju@insolvencysevrices.in), is hereby appointed as the Resolution Professional.
21. It is clear that from the date of filing of this application i.e., 09.01.2023, that Interim Moratorium commences as stipulated under Section 96(1) of the Code in relation to all the debts of the Personal Guarantor. During the Interim Moratorium period: (i) any pending legal action or proceedings in respect of any debt shall be deemed to have been stayed; and (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. As per Section 96(3) of the Code, the provisions of sub-section 96(1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
22. The Applicant is directed to serve the copy of this order along with copy of the Application and documents immediately on the Insolvency and

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Bankruptcy Board of India and file proof of service including dispatch and delivery thereof. Also, a copy of this Order and Application shall be served on the Personal Guarantor for limited purpose of presence on the next date of hearing and to be informed about the commencement of moratorium. The Personal Guarantor is directed to co-operate with the Resolution Professional appointed hereunder and provide all relevant information to the concerned Resolution Professional. The Personal Guarantor shall also furnish a copy of his last 3 Income Tax Returns and latest statement of affairs including, but not limited to position of assets and liabilities together with relevant documents to the Resolution Professional.

23. The Resolution Professional is directed to exercise all the powers as enumerated under Section 99 of the Code read with Rules made thereunder. The Resolution Professional is directed to make the recommendations with reasons in writing for acceptance or rejection of this Application within the stipulated time as envisaged under the provisions of Section 99 of the Code. The Resolution Professional shall provide a copy of the report under sub-Section 7 of Section 99 to the Creditor as soon as the same is filed before this Authority.
24. Further, the Applicant is directed to deposit Rs. 1,00,000/- (Rupees One Lakh Only) to the bank account of the Resolution Professional within one week, towards his fees. This shall be subject to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.

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25. The registry is directed to provide a copy of this order to the parties as well as mail the same to the Resolution Professional.

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**RAJEEV MEHROTRA,
TECHNICAL MEMBER**



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(Signature)
**Assistant Registrar
National Company Law Tribunal
Jaipur**

