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02-02-2022

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**NATIONAL COMPANY LAW TRIBUNAL
COURT - 2, AHMEDABAD BENCH**

A. COMPANY PETITION IB-232/AHM/2018 with IA 496 of 2019

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

In the Matter of:

IDBI Bank Limited. Applicant/Financial Creditor

Vs.

JBF Petrochemicals Ltd. Respondent/Corporate Debtor

B. COMPANY PETITION IB-226/AHM/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the Matter of:

Sundyne International SA Applicant/Operational Creditor

Vs.

JBF Petrochemicals Ltd. Respondent/Corporate Debtor

Order Pronounced on: 28.01.2022

Coram:

Dr. Deepti Mukesh, Hon'ble Member(Judicial)

Kaushalendra Kumar Singh, Hon'ble Member (Technical)



MEMO OF PARTIES

1. COMPANY PETITION IB-232/AHM/2018

IDBI Bank Limited.

IDBI Tower

WTC Complex, Cuffe Parade

MUMBAI 400 005

...

Applicant/Financial Creditor

Vs.

JBF Petrochemicals Limited

Survey No. 273

Village Athola

Dadra Nagar Haveli

Silvassa 396 230

...

Respondent/Corporate Debtor

Appearance:

For the Applicant : Mr. Navin Pahwa, Sr. Advocate

For the Respondent : Mr. Maulik Nanavati, Advocate

2. Interlocutory Application-496/AHM/2019

JBF Petrochemicals Limited

Survey No. 273

Village Athola

Dadra Nagar Haveli

Silvassa 396 230

...

Applicant/ Corporate Debtor

Vs.

IDBI Bank Limited.

IDBI Tower

WTC Complex, Cuffe Parade

MUMBAI 400 005

...

Respondent/Financial Creditor

Appearance:

For the Applicant : Mr. Maulik Nanavati, Advocate

For the Respondent : Mr. Navin Pahwa, Sr. Advocate



3. COMPANY PETITION IB-226/AHM/2019

SUNDYNE INTERNATIONAL S.A.

307, Abhishree Adroit,
Besides Gwalia sweets,
Mansi Cross Roads,
Vastrapur, Ahmedabad-380015

...

Applicant/ Corporate Debtor

Vs.

JBF Petrochemicals Limited

Survey No. 271
Village Athola
Dadra Nagar Haveli
Silvassa 396 230

...

Respondent/Corporate Debtor

Appearance:

For the Applicant : Mr. Samiron Borkatakey, Adv.

For the Respondent : Mr. Maulik Nanavati, Adv.

ORDER

Kaushalendra Kumar Singh, Member (Technical)

Background:

An application under Section 7 of IBC, 2016, numbered as CP(IB) 232 of 2018 has been filed by the Financial Creditor viz. IDBI Bank Limited against the Corporate Debtor viz. JBF Petrochemicals Limited to initiate the Corporate Insolvency Resolution Process. In the context of this application, the Corporate Debtor JBF Petrochemicals Limited has filed an Interlocutory Application numbered as IA 496 of 2019 challenging therewith the maintainability of the application filed under Section 7 of IBC in CP(IB) 232 of 2018 saying that the Financial Creditor had filed the said application in pursuance of the RBI Circular dated 12.02.2018 for initiating corporate Insolvency Resolution Process against it whereas the said RBI Circular has been declared as ultra-virus by the Hon'ble Supreme Court vide its order dated 02.04.2019 in the case of Dharani Sugars & Chemicals Limited [(2019) 5 SCC 480] and thereby all proceedings which have been initiated in



pursuance of the said RBI Circular will have to be declared as non-est and as such the application filed under Section 7 of IBC in CP(IB) 232 of 2018 would not be maintainable. The Corporate Debtor had also filed its detailed objections to oppose the application filed under Section 7 of IBC. It is pleaded therein that as per the RBI Circular dated 12.02.2018, the application under Section 7 of the IBC could have been filed against the large stressed borrowers only after expiry of the time-line of 180 days prescribed therein for resorting to corrective measures and to put in place a credible resolution plan; and whereas in the present case, the application under Section 7 was filed much before the completion of 180 days.

A number of applications have also been filed under Section 9 of the IBC against the said Corporate Debtor JBF Petrochemicals Limited. One of such application is numbered as CP(IB) 226 of 2019 which is filed by the Operational Creditor viz. Sundyne International SA. The applications filed under Section 7 of IBC in CP(IB) 232 of 2018 together with IA 496 of 2019 and under section 9 of IBC in CP(IB) 226 of 2019 have been heard and for convenience, all these applications are disposed of and decided through this common order.

1. IA 496 of 2019 IN CP(IB) 232 of 2018

1.1 This Interlocutory Application numbered as IA 496 of 2019 has been filed by the Corporate Debtor JBF Petrochemicals Limited [**JBF Petro**] challenging the maintainability of the application filed on 11th may 2018 [CP (IB) 232 of 2018] under Section 7 of IBC, 2016 by the Financial Creditor IDBI Bank Limited [**IDBI Bank**] against it for initiating Corporate Insolvency Resolution Process on the ground that the application under section 7 was filed in pursuance of RBI Circular dated 12.02.2018 which was later declared as ultra-virus by the Hon'ble Supreme Court's order dated 02.04.2019 in Dharani Sugars (supra) and thereby any proceedings which were initiated in pursuance of said RBI Circular will also have to be declared as non-est.



1.2 The relevant facts and issues involved, as narrated by the Corporate Debtor in its application and presented / argued by Learned Advocate Mr. Maulik Nanavati are summarised hereunder:

(i) The Financial Creditor IDBI Bank along with the other consortium lenders viz. Overseas Bank, Bank of Baroda and Union Bank of India cumulatively granted exposure to the extent of USD 464 million to the Corporate Debtor for its project. The project pertains to construction, development and setting up of a plant for manufacture of 1.25 million ton per annum (154 ton per hour) of purified terephthalic Acid (**PTA**) which would be amongst the largest of its kind in India. The said project is based on process technology developed by globally reputed British Petroleum (BP) which was licensed for the first time in India. The PTA is the essential raw-material for making polyester and is extensively used in producing textiles, packaging and film products.

(ii) The cost of the said project was then estimated to be about USD 603.81 million. Under the facility agreement, the Financial Creditor IDBI Bank was described as the original lender / agent and IDBI Trusteeship Services Limited was described as the Security Trustee. The first facility agreement dated 11.05.2012 was entered between the Corporate Debtor and the Financial Creditor IDBI Bank under which the Financial Creditor had agreed to partly finance the said project by granting an external commercial borrowing term loan of USD 416 million. Thereafter, the Corporate Debtor entered into a foreign currency facility agreement dated 14.02.2013 with EXIM Bank, Financial Creditor in its capacity as agent and IDBI Trusteeship Services Limited as Security Trustee whereby Financial Creditor down sold its exposure to an extent of USD 60 million to EXIM Bank. In view thereof, another agreement between the corporate debtor and the IDBI bank was entered on the same day on 14.02.2013 [referred as First Amendment to facility Agreement]. Following that, Financial Creditor further down sold and / or assigned the debt to the extent of USD 130 million to three other banks being Indian Overseas Bank (USD 50



million), Bank of Baroda (USD 50 million) and Union Bank of India (USD 30 million). Accordingly, the total exposure of Financial Creditor IDBI Bank Limited got reduced to 226 million and the same was recorded by way of a supplemental facility agreement dated 15.04.2015. Later, an additional amount to the extent of USD 41.04 million was granted on account of cost over run and the same was recorded in second amendment agreement to the facility agreement dated 31.03.2016. Out of USD 41.04 million, the Financial Creditor IDBI Bank contributed USD 26 million and the balance was contributed by other lender banks. This way, the total amount borrowed by the Corporate Debtor from Financial Creditor IDBI Bank was a sum of USD 252 million $[416 - 60 - 130 + 26]$. The total amount of the term loan provided by the lenders Bank amounted to USD 457.04 million $[416 + 41.04]$.

(iii) Initially the scheduled date of commercial operation (**SCOD**) was contemplated on 01.10.2014. Later the SCOD was extended to 01.04.2017. The repayment schedule for the principal amount was also extended and the first installment for the principal amount was due on 01.04.2018. The interest component was payable 6 monthly. The Corporate Debtor had made regular undisrupted payment of interest component every 6 months from October 2013 to march 2017 amounting USD 46.72 million.

(iv) The trial run for the plant was conducted in march 2017 and Corporate Debtor was in the process of complying with the technical specifications i.e. by taking routine checks and removing deficiencies based on technical guidelines for sustainable satisfactory technical performance. At this juncture there was a need to infuse funds towards working capital, purchase of spare part, payment to vendor for rendering technical expertise and supplies etc.

(v) The interest component of an amount of USD 8.14 million for the period 01.04.2017 to 30.09.2017 was due to the Financial Creditor on 01.10.2017. However, the Corporate Debtor was unable to service the

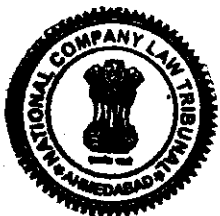


interest amount on the term loan w.e.f. 01.10.2017 due to circumstances beyond its control including cost over-run, delayed availability of infrastructure like new port facility, and delayed execution by renowned global agencies etc. As such in October 2017, the account of the Corporate Debtor was under financial stress.

(vi) The account of Corporate Debtor was classified as SMA – 2 as on 29.11.2017 due to non-servicing of interest on terms loan w.e.f. 01.10.2017. In view thereof, a joint lenders forum (**JLF**) was constituted for formulating a corrective action plan.

(vii) In the context various meetings of JLF were held. In the first JLF meeting held on 12.12.2017, an offer from Reliance Industries Limited (**RIL**) to take over the project was discussed. While the discussions were on-going to resolve the loans by exploring options for restructuring and investment through change in management by way of invocation of the “outside strategic debt restructuring scheme” (**OSDR / SDR Scheme**) under the extant RBI circulars, the RBI issued a circular on 12.02.2018 revising the frame work for the resolution of stressed assets in view of the enactment of Insolvency and Bankruptcy Code 2016. Through the said circular, the RBI decided to substitute the then existing guidelines with a harmonized and simplified generic frame work for resolution of stressed assets.

(viii) Following the issuance of RBI circular, a meeting of JLF (Being the consortium of lenders to the Corporate Debtor in terms of the RBI circular) was convened on 21.02.2018. In that meeting, the representative of IDBI Bank informed the members of the forum / consortium that RIL which was allowed exclusivity period upto 18.02.2018 for making their ‘binding offer’ was keen to pursue the transaction and has sought extension of time upto March 27.03.2018 to conclude the transaction. Thereafter in a meeting held on 14.03.2018 and 22.03.2018, KKR Jupiter Investors Pte. Ltd (**KKR**) expressed interest to resolve the stress with a proposal for settling 100 percent of the principal outstanding. In another JLF meeting held on 23.03.2018,



the reliance offer and the KKR proposal were discussed. The lenders were aggregable in principal to implement the resolution plan involving change in management with OTS offer of minimum 100 per cent principal, provided the same was paid by 31.03.2018. However, on the same day the Financial Creditor recalled its entire debt to the tune of USD 259.68 million. Further on the same day on 23.03.2018, a notice of invocation of pledge was issued by the security trustee IDBI trusteeship services Ltd calling for the payment of dues to the tune of USD 14.76 million, owing to the failure of the Corporate Debtor to meet its repayment obligation. These payments were to be made within three days from the date of notice, failing which the pledge created over shares held by JBF Global in the Corporate Debtor were to be invoked. In reply to the recall notice, the Corporate Debtor vide letter dated 26.03.2018 requested the Financial Creditor to allow it to avail the timelines stipulated under the said RBI circular dated 12.02.2018 for enabling it to finalize modalities. While the Corporate Debtor was making best endeavours to establish its accounts and achieve resolution, two new investors i.e. edelweiss and Indian oil corporation also evinced interest to take over the said project. However, the Financial Creditor issued another notice dated 31.03.2018, referring to the recall notice and setting out details of default subsisting on the part of Corporate Debtor to repay the entire loan amount.

(ix) Following that, the Corporate Debtor entered into a binding term sheet dated 05.05.2018 with KKR for the purpose of resolution and restructuring of the account of the Corporate Debtor. The resolution plan was proposed to be implemented together with restructuring the debt owed to the various lenders, including Financial Creditor. While the resolution plan was under consideration, the Financial Creditor in contravention of the timelines stipulated under the said RBI circular, proceeded to file the application on 11.05.2018 under Section 7 of IBC for initiating insolvency proceedings. It is the case of the Financial Creditor that it has not contravened the said RBI circular dated



12.02.2018 as the timelines of 180 days given therein was merely an outer limit. Being aggrieved by the conduct of the Financial Creditor, the Corporate Debtor vide its letter dated 17.05.2018 once again proposed to implement the resolution plan in compliance with the said circular and requested the lenders to provide the requisite consent for the resolution plan. However, the Financial Creditor by letter dated 02.06.2018 refused to give consent without assigning any reasons or ground. Following that on 10.08.2018, the Corporate Debtor filed writ petition No.3527 of 2018, before the Hon'ble Bombay High Court challenging the arbitrary action of the Financial Creditor including the premature initiation of the insolvency proceeding under the IBC with the main prayer for directing the Corporate Debtor to withdraw the said insolvency petition [CP (IB) 232 of 2018] and to engage a discussion in good faith with the Corporate Debtor and / or their investors to arrive at possible financing solutions for the loan default and to provide a reasonable time frame of 180 days for such discussion as has been mandated under the said RBI circular.

(x) On 08.10.2018, the Corporate Debtor filed its objections to the present insolvency proceedings in CP (IB) 232 of 2018. One of the primary grounds of challenge was that the insolvency proceedings is not maintainable as it contravenes the time line of 180 days laid out in the said RBI circular. The rationale behind providing the time line of 180 days was to afford an opportunity to the Corporate Debtor and lenders to work closely to evolve a workable resolution plan and implement the same within 180 days. It was only in the event that resolution plan failed that the formal structured insolvency resolution process under the IBC would takeover.

(xi) the Financial Creditor filed its affidavit in rejoinder dated 18.01.2018 [in CP (IB) 232 of 2018] inter alia contending the following.

- (a) The said circular states that the lenders are free to file proceedings under the code even without first attempting resolution outside the code.



- (b) Footnote 8 of the said circular clarifies that timeline of 180 days is only an outer time limits by which the banks mandatorily have to initiate proceedings under the code.
- (c) The Financial Creditor denied that the insolvency proceeding was filed in breach of the said circular.
- (d) The said circular specifically states that the timeline provided therein are not mandatory and that the creditors may initiate proceedings under the code without waiting for 180 days to expire.
- (e) It is not the intention of the said circular to differ or prevent the rights of the Financial Creditor to utilize the mechanism provided under the code prior to the timeline of 180 days.
- (f) The Financial Creditor under the said circular and code has the liberty to file proceedings in case of a default and has accordingly availed its right and remedy.
- (g) Footnote 8 gives express permission to a creditor to file proceedings under the code even before the expiry of 180 days period provided therein.

(xii) Being aggrieved by the said RBI's 12th February circular, which withdrew the OSDR / SDR mechanism, the Corporate Debtor filed writ petition (civil) No.159 of 2019 before the Hon'ble Supreme Court inter alia assailing the legalities and validity of the said circular. The Corporate Debtor was adversely affected by the said circular as it derailed the OSDR mechanism which was under implementation prior to the issuance of the said circular. The main reliefs sought were to declare the said circular as arbitrary, bad in law and unconstitutional; to restrain the lenders for initiating / continuation of insolvency and recovery proceedings; to restrain any proceedings under IBC. On 13.02.2019 the Hon'ble Supreme Court was pleased to direct all parties to maintain status quo until final adjudication of the said writ petition. In the interregnum period from 07.03.2019 to 14.03.2019, similar writ



petitions challenging the said circular were argued at length before the Hon'ble Supreme Court and the issue was decided by its judgment and order dated 02.04.2019 [Dharani Sugar and Chemicals Ltd. Vs Union of India, 2019 SCC Online SC 460] whereby the Hon'ble Supreme Court has declared the said RBI 12th February circular as ultra-virus as a whole and having no effect in law and declared the insolvency proceedings based on the said circular as non-est. The said judgment held as under:

"45... For these reasons also, the impugned circular will have to be declared as ultra-virus as a whole, and be declared to be of no effect in law. Consequently, all actions taken under the said circular, including actions by which the insolvency code had been triggered must fall along with the said circular. As a result, all cases in which debtors have been proceeded against by Financial Creditors under Section 7 of the Insolvency Code, only because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est."

(xiii) On 05.07.2019 i.e. after judgment was passed quashing the said circular and declaring the insolvency proceedings filed based on the said circulars as non-est, the Financial Creditor for the first time sought to contend the following by way of its counter affidavit in its writ petition (civil) no. 159 /2019 before the Hon'ble Supreme Court :

- (a) The said circular had no pertinence in the trigger of the insolvency proceedings by the Financial Creditor;
- (b) The resolution plan contemplating change of management was independent of the said circular;
- (c) The present insolvency proceedings filed by the Financial Creditor was under the exercise of its statutory right and such right "could have" been exercised independent of the said circular.

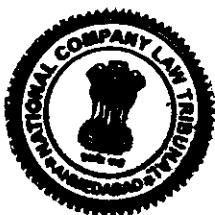
(xiv) The Hon'ble Supreme Court disposed of the writ petition [159 / 2019] vide its order dated 19.07.2019 by recording that the National Company Law Tribunal is free to consider as to whether insolvency



proceedings were initiated pursuant to the RBI's circular dated 12.02.2018.

(xv) It is an admitted position that the present insolvency proceeding has proceeded with and arise out of the said circular and the same is evident from the following:

- (a) The OSDR which was being implemented to resolve the stressed account of the Corporate Debtor was scrapped because of the said circular;
- (b) The lenders granted their in- principle approval to continue with the resolution plan envisaging change in ownership under the said circular;
- (c) The Corporate Debtor had at several occasions requested the Financial Creditor to assist in implementing the resolution plan under the said circular. The Financial Creditor had in fact rejected the resolution plan submitted under the said circular;
- (d) The Financial Creditor has proceeded with the insolvency proceedings by contending that it was in consonance with the said circular as the time lines provided thereunder were merely outer limits;
- (e) The Financial Creditor has taken shelter of footnote 8 of the said circular to justify its action of initiating the Insolvency proceedings prior to the timelines stipulated in the said circular;
- (f) The Corporate Debtor has filed WP no. 3547 of 2018 before the Hon'ble Bombay High Court impugning the action of the Financial Creditor in initiating the insolvency proceedings prior to the timelines stipulated in the said circular. In the proceedings pending before the Hon'ble Bombay High court, the Financial Creditor has at no point in time contended that the insolvency proceedings were filed independent of the said circular. In fact, the Financial



Creditor admitted that 1st March, 2018 was taken as the reference date under the said circular and 180 days expired on 27.08.2018 and thus sought to contend that the relevant prayer (c) of the writ petition had become infructuous;

- (g) Prior to the said judgment, Financial Creditor did not, at any point in time, contend that the insolvency proceedings were filed independent of the said circular. In-fact the Financial Creditor has heavily relied upon and acted under the said circular.

1.3 In view of the aforesaid facts and issues raised thereupon, the Corporate Debtor has sought the following reliefs;

(i) The company petition no 232 of 2018 filed under Section 7 of the IBC 2016 by the Financial Creditor ought to be dismissed as non-est in terms of judgment dated 02.04.2019 passed by the hon'ble Supreme court of India in Dharani sugars and Chemical Ltd. [2019 SCC online SC 460];

(ii) During the pendency of the company petition no 232 of 2018, the Financial Creditor be directed to offer inspection or produce the minutes of the meetings held from December 2017 to till date, internal notes and correspondences exchanged between the consortium of lenders from 01.12.2017 to 31.07.2019 to the Corporate Debtor as sought in their letter dated 30th July 2019.

1.4 In its affidavit in reply dated 16.08.2019 filed by the financial creditor which is placed on record, and as argued by learned senior advocate for the financial creditor Shri Navin Pahwa, it has been submitted that the present interlocutory application [IA 496 / 2019] have been filed by the Corporate Debtor with the sole intention to delay and impede the proceedings underway under Section 7 petition, and to obstruct and curtail the statutory rights of the Financial Creditor under the IBC; that the Corporate Debtor has made several such unsuccessful attempt in the past; that the Corporate Debtor has

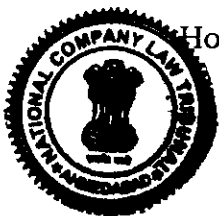


once again approached this tribunal with similar intent in order to obfuscate the defaults in its payment obligations. It is further submitted that similar contentions regarding the maintainability of the section 7 petition were raised by the Corporate Debtor in the main petition [CP (IB) 232 of 2018] by way of written objections; and also vide another interlocutory application (IA No. 307 of 2018) which this Hon'ble tribunal has already disposed of; that vide order dated 19.08.2018, by taking cognizance of the fact that the Corporate Debtor had already raised similar issues of maintainability in the past, this tribunal had observed as under:

"The learned lawyer for the respondent is requesting for adjournment on the ground that he needs some time to file some preliminary objection with regard to the maintainability. On perusal of the record, it is found that he has already filed detailed objection and a ground of maintainability has already been taken on the objection. Even otherwise while deciding the application, this adjudicating authority must see the maintainability of the application before proceeding further. Under such circumstances, I found no reason to adjourn the case on the ground of the filing of any application with regard to the maintainability".

It is further submitted that the Corporate Debtor had simultaneously proceeded to raise similar contentions in relation to the maintainability of the Section 7 petition in different writ petitions filed before various other judicial fora, including the Hon'ble Bombay High Court, the Hon'ble Gujarat High Court, The Hon'ble National Company Law Appellate Tribunal; that the Corporate Debtor had also filed writ petition before the Hon'ble Supreme Court [WP (civil) No.159 of 2019] challenging therewith the validity of RBI's circular dated 12.02.2018 entitled as "*Resolution of stressed assets – revised framework*", [**12th Feb circular**] and correspondingly, the initiation of Section 7 petition as allegedly being under the terms of the 12th February circular; that the filing of the supreme Court writ petition by the Corporate Debtor also seems to have been done as an afterthought, given that this was done only after an order was passed by the Hon'ble NCLAT on 28.01.2019 observing that the matter had been pending for a prolonged period of time, and directing that this tribunal hear and decide the matter within three weeks therefrom.

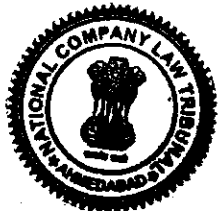
It is also submitted that in order to circumvent the deadline laid down by the Hon'ble NCLAT, the Corporate Debtor mischievously approached the Hon'ble



Supreme Court by filing the above referred writ petition, in order to have this matter listed along with the other matters challenging the validity of the 12th Feb circular, although it was clear that the instant Section 7 petition had nothing to do with the 12th Feb Circular and was completely unconnected to such other matters listed before the Hon'ble Supreme Court. It is further submitted that as the Hon'ble Supreme Court had previously declared the 12th Feb Circular unconstitutional and invalid vide its judgment dated 02.04.2019 in the case of Dharani Sugars and chemicals Ltd. (supra), it had vide its order in the Supreme Court writ petition (159 of 2019) dated 19.07.2019 directed this tribunal to adjudicate on the issue of whether the Section 7 petition was indeed initiated under the terms of the 12th Feb Circular and whether these proceedings were valid in light of the decision of Hon'ble Supreme Court in Dharani Sugars (Supra); that by having obtained the Supreme Court order, the Corporate Debtor has approached this tribunal by filing this interlocutory application 496 of 2019 alleging that the Section 7 petition was filed by the Financial Creditor pursuant to the terms of the 12th Feb Circular; and that the contentions so raised is both baseless and frivolous, simply constitutes another attempt by the Corporate Debtor to derail the admission of Section 7 petition, which has been pending since long. It has been further submitted that as the factum of the occurrence of the default is not in dispute by the Corporate Debtor, the Corporate Debtor had chosen to raise false and frivolous objections with the sole intention to delay the admission of the Section 7 petition.

The various issues as raised by the Corporate Debtor in this interlocutory application has been replied para wise and the same are also summarized here under;

- (i) The corporate debtor has not demonstrated in any manner that section 7 petition was filed pursuant to the 12th Feb circular. The fact that the corporate debtor is simply shooting in the dark with the hope of finding a possible escape from the inevitable admission of a CIRP against it is clear from the fact that, vide the application, the Corporate Debtor is seeking inspection of the minutes of meetings of the Financial



Creditor and the other lenders to find any information that it could use to support its case that the section 7 petition is connected in any manner to the 12th Feb circular.

(ii) The section 7 petition was not initiated pursuant to the terms of the 12th Feb circular as contended by the Corporate Debtor; and that the filing of the same was based on a commercial decision taken by the joint lenders forum of the Corporate Debtor (as existed at the time) to initiate insolvency proceedings against the Corporate Debtor, given that it had remained in default for a prolonged period of time, and that no resolution of its account and debt seemed forthcoming or possible. The fact that the decision to file the section 7 petition was a commercial one is supported by the fact that the consortium of lenders (i.e. erstwhile joint lenders forum) of the Corporate Debtor in its meeting held on 14.03.2018 and 22.03.2018 unanimously agreed that in the event that no resolution of the account of the Corporate Debtor was effected by 31.03.2018, the account would be referred to IBC.

(iii) A bare perusal of the minutes of the meeting of the consortium of lenders dated 14.03.2018 makes it apparent that decision to initiate insolvency proceedings against the Corporate Debtor was in no way connected to the 12th Feb circular. During this meeting, the consortium of lenders had categorically stated that in case the two proposals for resolution (given by KKR and RIL) did not fructify, then it would be commercially prudent and necessary to refer the matter to the Tribunal under the provisions of the IBC. The relevant extract from the minutes of the meeting dated 14.03.2018 is replicated hereunder:

"2. Shri Gupta welcomed the participants. After confirmation of the minutes of the last JLM held on 21.03.2018, he informed that reliance industries limited (RIL) which had been allowed time upto 27.03.2018 to make its offer for acquisition of JBF Petro, was yet to submit its final offer. Shri Gupta informed that based on discussion with RIL officers, it appears that the due diligence process was complete; however, they are yet to conclude their discussions with other stakeholders viz. Shri Bhagirath Arya and KKR. Shri Gupta informed that IDBI Bank officials had again met with KKR but they were still deliberating on the



valuations. KKR has informally expressed that in case the lenders are agreeable for acceptance of 100% principal outstanding and waiver interest and other dues. Lenders were of the view that the proposal needs to be improved at least to cover the interest upto 30.09.2017 which had fallen due on 01.10.2017. However, they were agreeable to favorably consider offer for 100% principal outstanding provided the transaction is closed by 31.03.2018. Another meeting is scheduled with KKR on 19.03.2018 to improve on the offer so as to pursue with them for recovery of entire principal and interest and other dues. Consortium members observed that based on the initial discussion with RIL on 12.12.2018, it had appeared that the transaction would be closed immediately. However, considerable time has since lapsed and there has been no progress.

3. *Shri Rakesh Gothi, Director, JBF Petro, informed lenders that the company's plant was shut down since COD in April, 2017, due to various technical reasons. The plant was now kept in the preservation mode under the guidance of the technical consultant (Technip and BP).*

4. *Considering that time was the essence, consortium lenders were of the unanimous view that in case there was no resolution in the account by 31.03.2018, it could be referred to NCLT, without holding any more JLM."*

That from these minutes, it is clear that members of the JLF took a commercial decision to refer the Corporate Debtor to IBC, owing to the fact that a possible resolution for the Corporate Debtor was nowhere in sight.

(iv) It is an admitted position by the Corporate Debtor that it has defaulted on its payment to the Financial Creditor and its other lenders. This is also evident from the balance confirmation letter that was issued by the Corporate Debtor on 05.04.2018, wherein it had acknowledged its outstanding balance of USD 268.28 millions which was payable to the Financial Creditor as on 31.03.2018. As the factum of the existence of the default itself forms sufficient basis for the admission of the section 7 petition, the Corporate Debtor is attempting use of the 12th Feb circular as a shield to circumvent the initiation of a CIRP against it.

(v) The Corporate Debtor has clearly also failed to understand the scope and applicability of the decision of the Hon'ble Supreme Court in



Dharani Sugars (supra), which deemed the 12th Feb circular to be invalid, as well as the types of proceedings that are impacted by the judgment. The operative part of the judgement is given as under:

*“Consequently, all actions taken under the said circular, including actions by which the insolvency code has been triggered must fall alongwith the said circular. As a result, all cases in which debtors have been proceeded against by Financial Creditor under section 7 of the IBC, 2016, **only** because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est.”*

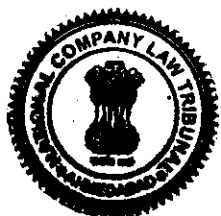
That from the above, it is clear that Hon’ble Supreme Court declared only such proceedings initiated under the IBC to be non-est which were initiated **only because of the 12th Feb circular**. The section 7 petition was filed on 11.05.2018 i.e. only two months after the issuance of the 12th Feb circular. Under the terms of the 12th Feb circular, for accounts having aggregate debt exposure of more than Rs.2000 crores (INR 20 billion), a six-month window was provided to effectuate a resolution of such accounts, post which the lenders were mandated to initiate an insolvency proceeding against the relevant Corporate Debtor. It is thus clear that the only situation where lenders can be said to have initiated an insolvency proceeding **“only because of the operation”** of the 12th Feb circular is where the time period of six month from the relevant reference date expired and the lenders were thus mandated to initiate proceedings under the IBC as per the terms of the 12th Feb circular. If the insolvency proceeding was initiated prior to the expiry of these six months window, it is clear that the same would be pursuant to a commercial decision taken by the lenders, and not only because of the applicability or operation of the 12th Feb circular.

(vi) The Corporate Debtor has alleged that the recall of the loan by the financial creditor was premature and was done wrongfully. This contention was already raised by the Corporate Debtor in its written objections and has been duly responded to and rebutted in the affidavit in rejoinder filed on 18.01.2019. That the Corporate Debtor has



mischievously attempted to re-agitate this point vide the instant interlocutory application.

(vii) The Corporate Debtor has contended that the Financial Creditor has acted in contravention of the terms and time-lines of the 12th Feb circular in filing the section 7 petition. This goes completely contrary to the Corporate Debtor's primary contention that the Financial Creditor had filed section 7 petition under the terms of 12th Feb circular, and goes to show that the Corporate Debtor's contention in this regard is completely devoid of merit. By making such a contention, the Corporate Debtor seeks to approbate and reprobate on the same issue, and this makes it clear that it does not in fact believe that the section 7 petition was filed under the 12th Feb circular; that the 12th Feb circular does not prescribe any mandatory wait period for first attempting the resolution of the relevant Corporate Debtor before the Financial Creditor can take other steps, including the initiation of insolvency proceedings against the Corporate Debtor; that the Corporate Debtor together with other lenders were well within their rights to reject the resolution plan submitted by the KKR on account of the fact that the same was not commercially satisfactory according to the lenders. The Corporate Debtor is once again attempting to mislead the Tribunal by claiming that the Financial Creditor itself cited and took shelter of the terms of the 12th Feb circular in its affidavit in rejoinder (filed in section 7 petition) in order to support its decision to file the section 7 petition. The instant case does not meet the test in Dharani Sugars (supra), to be deemed as invalid or non-est by virtue of operation of the judgment. The reference to the 12th Feb circular and footnote 8 thereof was made solely in response to the Corporate Debtor's contention in its written objection that it was mandatory to wait for outer time-limit for resolution prescribed under the 12th Feb circular to expire prior to initiating insolvency proceeding; that footnote 8 expressly grants Financial Creditor the option to initiate insolvency proceeding without waiting for the time period specified under the 12th Feb circular to



expire. The submissions made in this regard was simply to clarify and rebut the point sought to be made by the Corporate Debtor in its written objection; that the Corporate Debtor has now sought to mischievously take this submission out of context and use them to contend that the Financial Creditor conceded to the fact that it had initiated the insolvency proceeding under the terms of 12th Feb circular; that no such submissions were ever made by them and that this is an incorrect position both under law and fact. Further, the Corporate Debtor has also sought to contend that the submissions made by the Financial creditor in its affidavit in reply filed before the Hon'ble Bombay High Court in WP 3547 of 2018 regarding the expiry of outer time limit for purposes of the 12th Feb circular in some manner demonstrates a connection between the initiation of the section 7 petition and the 12th Feb circular; that this is again an attempt by the Corporate Debtor to use the submissions contained in the said affidavit in reply in a manner i.e. out of context and to mislead this Tribunal; that from a bare reading of the said affidavit in reply submitted before the Hon'ble High Court, it is abundantly clear that the submission was made for the sole purpose of contesting the Corporate Debtor's submission that the Financial Creditor was obligated to wait for the outer time limit (six months) prescribed under the 12th Feb circular to expire before initiating action under the IBC on the basis that the submission so made was in any case infructuous as the six-month time period had lapsed by that time; and that such contention of the Corporate Debtor was completely irrelevant.

1.5 While replying to the various issues raised by the Corporate Debtor, Senior advocate for the Financial Creditor Shri Navin Pahwa had also taken us to peruse the relevant minutes of the JLF meetings and based on that, he submitted that on account of the continuing default on the part of the Corporate Debtor in servicing its interest obligation, the joint lenders forum had already started the process for resorting to corrective steps and started deliberation on the corrective action plan under the extant RBI circulars prior



to issuance of 12th Feb circular; and in the process had started discussion with RIL for the possible takeover of the management in December 2017 itself as is evident in the minutes of JLF meeting held on 12.12.2017; and that when the JLF (the consortium of lenders bank) met again in the month of February on 21.02.2018 to discuss the way forward, it was noted that the existing resolution package envisaging change in management, outsider SDR / SDR would not be applicable in terms of RBI circular dated 12.02.2018 and in that context, reference to 12th Feb circular was made in the minutes dated 21.02.2018. It was also submitted that 12th Feb circular had completely revamped the regime for restructuring in India, and did away with all previous restructuring mechanism that were in place so far; and thus as per the para 18.1 of the 12th Feb circular, the earlier instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets, Corporate Debt Restructuring Scheme, Flexible Structuring of Existing Long Term Project Loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A) were withdrawn with immediate effect on operation of the said 12th Feb circular. The learned Advocate had emphasized repeatedly that the decision to file section 7 petition was a commercial decision taken by the Financial Creditor and it was not solely on account of the RBI instructions as contained in 12th Feb circular.

1.6 In the rejoinder dated 06.09.2019 filed on behalf of the Corporate Debtor, it has been submitted that the Financial Creditor had made false statements and baseless allegations in its reply dated 16.08.2018 with a view to mislead the Tribunal; and that the Financial Creditor has sought to obfuscate the facts of case by introducing an unsubstantial and unnecessarily prolix narrative which has no bearing in the subject matter. It has been submitted that the Financial Creditor has made the following submissions in the reply;

- (a) The Financial Creditor was mandated to undertake the restructuring of the Corporate Debtor under the terms of the circular as all other restructuring schemes stood withdrawn;



(b) The circular dated 12th Feb 2018, for accounts having aggregate debt exposure of more than Rs.2000 crore, a six month window was provided to effectuate the a resolution, **post which** the lenders were mandated to initiate insolvency proceeding against the Corporate Debtor. The judgment dated 02.04.2019 passed in the case of Dharani Sugars will be applicable to cases which were filed after the expiry of six months. Since the present insolvency proceedings were filed within two months of the circular, the judgment will not apply.

(c) The circular does not prescribe any mandatory waiting period for first attempting resolution before initiation of the insolvency proceedings. Footnote 8 of the circular permits the initiation of proceedings prior to 180 days.

With respect to submission as narrated in clause (a) above, the Corporate Debtor in its rejoinder has submitted that as OSDR/ SDR scheme stood withdrawn under the circular, and the lenders were mandated to undertake the restructuring of the Corporate Debtor under the terms of the 12th Feb circular, the lenders granted in-principle approval to continue with the resolution plan envisaging change in ownership; that in other words, the ongoing OSDR process which was invoked stood substituted with the revised framework under the 12th Feb circular, and the lenders proceeded with continuing the resolution plan envisaging change in ownership under that circular; that admittedly, the Financial Creditor rejected the resolution plan which was submitted in terms with the Circular and having so rejected the resolution plan submitted in terms with that circular, the Financial Creditor is now stopped from contending that it did not observe the provisions under the 12 Feb circular which lead to triggering of the insolvency proceedings.

Further, with respect to submission at Clause (b) above, it is submitted that the Financial Creditor is attempting to mislead the Tribunal by misreading the plain language of the judgment; that nowhere does the judgment hold that only those proceedings which are filed after the expiry of 180 days will be non-est or that the proceedings which are filed prior to 180 days will not be covered; That the judgment makes it absolutely clear that *"all actions taken*



under the said circular, including actions by which the insolvency code has been triggered must fall along with the circular"; that the Financial Creditor is attempting to mislead the Tribunal by interpreting the circular to suit its convenience; that despite the circular providing a six month window period i.e. upto August, 2018, the Financial Creditor initiated insolvency proceedings against the Corporate Debtor in May, 2018 i.e. pursuant to the issuance of the 12th Feb circular. It is further submitted that admittedly, it has been the case of the Financial Creditor that it had not breached the timelines under the said circular as the period of six months was the outer limit for initiating insolvency proceedings; that having conceded the applicability of the said circular and after taking steps to restructure as well as consider resolution plans submitted in terms of that circular, the Financial Creditor is desperately attempting to digress from its earlier stands (i.e. it had not breached the timelines under the 12th Feb circular) by now contending at a belated stage that the present proceedings were not filed under that circular; that evidently, this change in stance has arisen due to the judgment which quashed the 12th Feb circular and declared all proceedings and actions taken under that circular as non-est.

Further, with respect to the submission at clause (c) above, it has been submitted that on one hand the Financial Creditor has sought to contend that the timelines of six month under the circular is not mandatory and on the other hand it is contended that the judgment applies to only those cases which are filed after the expiry of six month; that the Financial Creditor has proceeded with the insolvency proceedings by contending that it was in consonance with the circular as the timelines were merely outer limits. It is further submitted that all throughout it has been a case of the Financial Creditor that it had not breached the time lines of the 12th Feb circular; and after having taken shelter of footnote 8 of that circular to contend that the present proceedings were not prematurely filed, the Financial Creditor is stopped from contending that the present proceedings were not filed under that circular.



1.7 In its rejoinder, the Corporate Debtor has also given detailed para-wise reply to rebut the affidavit in reply of the Financial Creditor (respondent in present IA). The same are summarized hereunder:

(i) It is denied that the interlocutory application has been filed to delay or impede the proceedings under section 7 petition; that it is further denied that the Corporate Debtor is trying to create obstacles or obfuscate as alleged or at all; that the present interlocutory application is filed to formally terminate the proceedings on section 7 petition as the Hon'ble Supreme Court declared it as non-est in terms of the judgment; that the Corporate Debtor has filed the present interlocutory application by placing on record all relevant facts and documents enabling the Tribunal to adjudicate as to whether the insolvency proceedings were initiated pursuant to the 12th Feb circular as directed by the order dated 19.07.2019 passed by the Hon'ble Supreme Court; that it is vehemently denied that the Corporate Debtor had filed writ petition before the Hon'ble Supreme Court as an afterthought or to circumvent the deadline, as alleged or at all;

(ii) That the Applicant Corporate Debtor demonstrates in detail the manner in which Financial Creditor has acted and filed the section 7 petition pursuant to the circular; that it is denied that the Corporate Debtor is shooting in the dark as alleged or at all; that the Financial Creditor has neither offered inspection of the documents and minutes of the meetings nor replied to the letter dated 30.07.2019 addressed by the Corporate Debtor seeking inspection and this itself proves that the Financial Creditor is deliberately suppressing documents and information in its possession with a sole reason that in case these documents are exposed, it would belie and demolish the entire case of the Financial Creditor.

(iii) That it is denied that the petition was filed based on commercial decision taken by the joint lenders forum; that it is denied that minutes of the meeting dated 14.03.2018 and 22.03.2018 supports the frivolous plea of commercial decision as alleged or at all.



(iv) That it is denied that the Corporate Debtor has failed to understand the scope and applicability of judgment; that it is denied that the Corporate Debtor has mischievously cited submission out of context as alleged.

(v) That merely because insolvency proceedings were prematurely filed two months after the issuance of the circular, the same does not indicate that the decision to file was commercial in nature or completely independent of the circular; that the Corporate Debtor has from the very inception raised an objection that the Financial Creditor was bound to follow and comply with the timelines prescribed under the circular.

1.8 We have considered the submissions made from both the sides and have perused the relevant records. The basic issue for decision is as to whether the section 7 petition of the Financial Creditor IDBI Bank under IBC in CP(IB) 232 of 2018 is filed on account of operation of RBI's circular dated 12.02.2018; and if so then whether the said section 7 petition requires to be declared as non-est in view of the Hon'ble Supreme Court's decision in the case of Dharani Sugars and Chemicals Limited [2019 SCC Online SC 460]. In the context, we have referred to the said RBI's 12th Feb circular and the decision of the Hon'ble Supreme Court in Dharani Sugars (supra). For the sake of convenience and ready reference, we reproduce hereunder the relevant paragraphs of 12th Feb circular:

Resolution of Stressed Assets – Revised Framework

The Reserve Bank of India has issued various instructions aimed at resolution of stressed assets in the economy, including introduction of certain specific schemes at different points of time. In view of the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), it has been decided to substitute the existing guidelines with a harmonised and simplified generic framework for resolution of stressed assets. The details of the revised framework are elaborated in the following paragraphs.



I. Revised Framework

A. Early identification and reporting of stress

- 2 Lenders¹ shall identify incipient stress in loan accounts, immediately on default², by classifying stressed assets as special mention accounts (SMA) as per the following categories:

SMA Sub-categories	Basis for classification – Principal or interest payment or any other amount wholly or partly overdue between
SMA-0	1-30 days
SMA-1	31-60 days
SMA-2	61-90 days

- 3 As provided in terms of the circular DBS.OSMOS.No.14703/33.01.001/2013- 14 dated May 22, 2014 and subsequent amendments thereto, lenders shall report credit information, including classification of an account as SMA to Central Repository of Information on Large Credits (CRILC) on all borrower entities having aggregate exposure³ of ` 50 million and above with them. The CRILC-Main Report will now be required to be submitted on a monthly basis effective April 1, 2018. In addition, the lenders shall report to CRILC, all borrower entities in default (with aggregate exposure of ` 50 million and above), on a weekly basis, at the close of business on every Friday, or the preceding working day if Friday happens to be a holiday. The first such weekly report shall be submitted for the week ending February 23, 2018.

B. Implementation of Resolution Plan

- 4 All lenders must put in place Board-approved policies for resolution of stressed assets under this framework, including the timelines for resolution. As soon as there is a default in the borrower entity's account with any lender, all lenders – singly or jointly – shall initiate steps to cure the default. The resolution plan (RP) may involve any actions / plans / reorganization including, but not limited to, regularisation of the account by payment of all over dues by the borrower entity, sale of the exposures to other entities / investors, change in ownership, or



restructuring⁴. The RP shall be clearly documented by all the lenders (even if there is no change in any terms and conditions).

C. Implementation Conditions for RP

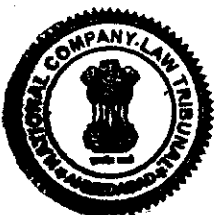
5 A RP in respect of borrower entities to whom the lenders continue to have credit exposure, shall be deemed to be 'implemented' only if the following conditions are met:

- a. the borrower entity is no longer in default with any of the lenders;
- b. if the resolution involves restructuring; then
 - i. all related documentation, including execution of necessary agreements between lenders and borrower / creation of security charge / perfection of securities are completed by all lenders; and
 - ii. the new capital structure and/or changes in the terms of conditions of the existing loans get duly reflected in the books of all the lenders and the borrower.

6 Additionally, RPs involving restructuring / change in ownership in respect of 'large' accounts (i.e., accounts where the aggregate exposure of lenders is ` 1 billion and above), shall require independent credit evaluation (ICE) of the residual debt<sup>5</sup> by credit rating agencies (CRAs) specifically authorised by the Reserve Bank for this purpose. While accounts with aggregate exposure of ` 5 billion and above shall require two such ICEs, others shall require one ICE. Only such RPs which receive a credit opinion of RP⁴⁶ or better for the residual debt from one or two CRAs, as the case may be, shall be considered for implementation. Further, ICEs shall be subject to the following:

(a) The CRAs shall be directly engaged by the lenders and the payment of fee for such assignments shall be made by the lenders.

(b) If lenders obtain ICE from more than the required number of CRAs, all such ICE opinions shall be RP⁴ or better for the RP to be considered for implementation.



D. Timelines for Large Accounts to be Referred under IBC

8. In respect of accounts with aggregate exposure of the lenders at `20 billion and above, on or after March 1, 2018 ('reference date'), including accounts where resolution may have been initiated under any of the existing schemes as well as accounts classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines), RP shall be implemented as per the following timelines:
- i) If in default as on the reference date, then 180 days from the reference date.
 - ii) If in default after the reference date, then 180 days from the date of first such default.
9. If a RP in respect of such large accounts is not implemented as per the timelines specified in paragraph 8, lenders shall file insolvency application, singly or jointly, under the Insolvency and Bankruptcy Code 2016 (IBC)⁷ within 15 days from the expiry of the said timeline⁸.
12. For other accounts with aggregate exposure of the lenders below `20 billion and, at or above `1 billion, the Reserve Bank intends to announce, over a two-year period, reference dates for implementing the RP to ensure calibrated, time-bound resolution of all such accounts in default.

V. Withdrawal of extant instructions

18. The extant instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets, Corporate Debt Restructuring Scheme, Flexible Structuring of Existing Long Term Project Loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A) stand withdrawn with immediate effect. Accordingly, the Joint Lenders' Forum (JLF) as an institutional mechanism for resolution of stressed accounts also stands discontinued.

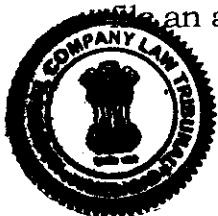


All accounts, including such accounts where any of the schemes have been invoked but not yet implemented, shall be governed by the revised framework.

19. *The list of circulars/directions/guidelines subsumed in this circular and thereby stand repealed from the date of this circular is given in Annex - 3.*
20. *The above guidelines are issued in exercise of powers conferred under Section 35A, 35AA (read with S.O.1435 (E) dated May 5, 2017 issued by the Government of India) and 35AB of the Banking Regulation Act, 1949; and, Section 45(L) of the Reserve Bank of India Act, 1934.*

Footnotes : 8 : The prescribed timelines are the upper limits. Lenders are free to file insolvency petition under the IBC against borrowers even before the expiry of the timelines, or even without attempting a RP outside IBC.

It is noted that this circular has been issued by the RBI in supersession of all its earlier instructions / circulars hitherto regarding handling of the defaults in repayment of bank term loans and for resorting to timely corrective actions for arriving at resolution by regularizing the accounts on repayment of all the overdues, sale of exposures to other entities / investors, change in ownership or restructuring with a view to substitute the existing guidelines with a harmonized and simplified generic framework for resolution of stressed assets in view of the enactment of the Insolvency and Bankruptcy Code, 2016. In the context of large accounts over Rs.2000 crore, the new circular also provides for taking up appropriate action on the part of lender banks to arrive at resolution before any such account could be taken up for the resolution under the IBC. For this purpose, the circular provided a timeframe of maximum 180 days meaning thereby that if no resolution could be arrived at within that time, then the lenders will have to file an application mandatorily for insolvency resolution under the IBC. The



direction so given by the RBI was quite general and its application, without considering the facts on merit, would have had an adverse impact across all the industries in the case of the default and would have led filing of numerous applications under section 7 of the IBC without any exception after 180 days timeline, if the lender banks could not arrive at any satisfactory resolution outside the IBC within that period of 180 days. Apparently, the circulars of this kind can be issued by the RBI under sections 35AA and 35AB of the Banking Regulation Act, 1949 which itself were introduced by way of amendment therein with effect from 04.05.2017 in the light of enactment of IBC, 2016. The section 35AA provided that the Central Government may by order authorize the Reserve Bank to issue direction to any banking company or banking companies to initiate insolvency resolution process in respect of a default under the IBC. Section 35AB enables the RBI to issue directions to the banking companies from time to time for resolution of stressed assets. In pursuance of the powers conferred by Section 35AA, the Government of India, vide notification dated 5th May 2017, had further authorized the RBI to issue such directions to any banking company or banking companies which may be considered necessary to initiate insolvency resolution process in respect of a default under IBC. On examining these provisions of Section 35AA and the notification dated 5th May 2017 issued thereunder, the Hon'ble Supreme Court, in its decision dated 2nd April 2019 in the case of Dharani Sugars (supra) had observed that the section enables the Central Government to authorize the RBI to issue such directions in respect of '**a default**' and as such it refers to a particular default of a particular debtor; and therefore, the directions that can be issued under section 35AA can only be in respect of specific default by specific debtor; and that this is also the understanding of the Central Government when it issued the notification dated 05.05.2017 which authorized the RBI to issue such directions only in respect of '**a default**' under the Code. The RBI's 12th Feb circular has been found to contain general directions in respect of all the debtors on default (having aggregate debt exposure of more than Rs.2000 crores) for filing applications under section 7 of the IBC without having reference to the facts of each



individual case, if no resolution (out of IBC) could be arrived at within a period of 180 days; and as such for that reason, the Hon'ble Supreme Court declared it as ultra-virus section 35AA of the Banking Regulation Act. In fact, the Hon'ble Supreme Court has declared the 12th Feb circular as ultra-virus as a whole. The decision of the Hon'ble Supreme Court in Dharani Sugars (supra) could save a large number of industries in power sectors and steel sectors which were under financial stress for taking up the matter mandatorily in indiscriminate manner, after the lapse of 180 days as provided under the aforesaid circular, for insolvency resolution under the IBC. Nevertheless, the lenders could consider each case of default on merit to proceed with insolvency resolution prescribed under the IBC. In that view of the matter, the Hon'ble Supreme Court has also held that all cases in which debtors have been proceeded against the Financial Creditor under section 7 of Insolvency Code, **only because of the operation of the RBI's 12th Feb circular**, will be the proceedings which, being faulted at the very inception, are declared to be non-est.

1.9. Thus, in the present case, in order to arrive at the decision as to whether the section 7 petition filed by the Financial Creditor was indeed triggered **only** on account of the operation of said RBI's 12th Feb circular, we have carefully perused the minutes of various meetings of JLF / consortium of banks held on 12.12.2017, 21.02.2018, 14.03.2018, 22.03.2018 and 23.03.2018. For ready reference, the relevant paras of the minutes on these meetings are reproduce hereunder:

Minutes of Joint Lenders Forum meeting held on 12.12.2017

A joint Lenders Forum (JLF) meeting of lenders to JBF Petrochemicals LTD. (JBF Petro) was held on December 12, 2017 at IDBI tower, Cuffe Parade, Mumbai. Shri K.P.Nair, DMD, IDBI Bank, chaired the meeting. The representatives of Reliance Industries Ltd (RIL), along with SBI cap team, attended the meeting as special invites. The list of participants is given at Annexure.

2. *Shri Nair welcomed the JLF members and initiated the discussion in the absence of representatives of the company and the prospective investor I.e. RIL. The minutes of the last JLM held on November 24, 2017 was confirmed.*

3. *Shri Nair informed the JLF that the PTA project, after achieving COD, was non-operational due to certain technical issues; besides, the working capital*



limits could also not be fully tied up yet. Shri Nair briefed that though the project has achieved COD, the company had informed that large amount of long-term funds (US 90 mn) would still be required for recommencing plant operations and also for clearing the critical interest dues of lenders. The promoters of the company are under financial stress and have expressed their inability to infuse further funds to make it operational. The account has been classified as SMA – 2 due to non-serving of interest on Term Loans w.e.f. October 1, 2017. The attempts made for raising priority debt were also not fruitful. In these circumstances, IDBI has been evaluating various options to find a resolution. Meanwhile, some of the companies in the same line of business evinced interest in taking over the unit. Reliance Industries Ltd. (RIL) has now come forward with a preliminary non-binding offer to takeover the ownership and management of the company. He stated that the time frame, process, terms, etc. of the change in Management proposal would still need to be worked out. But, at this juncture, inducting a new resourceful investor appeared to be the most preferred option. The new investor who would take majority equity stake and also take over the management, would also be expected to infuse long-term funds required for bringing the project back on track. He informed that, the existing consortium would serve as Joint Lenders Forum (JLF) and decide on the Corrective Action Plan (CAP). He then requested Shri Sanjiv Sachdev, CGM, IDBI Bank, to make a brief presentation on the offer received from RIL.

4. Shri Sachdev gave a presentation on the current status of the company and the offer received from RIL. The broad terms of the non-binding offer of RIL are (i) acquisition of 51% to 100% stake in JBF Petro, (ii) RIL would infuse required funds to restart operations of the 1.25 MMTPSA PTA facility, (iii) No cash sweep or acceleration of debt repayment, (iv) No penalty for repayment or refinancing. As part of the proposal, RIL has indicated that the current ECB facility would need to be refinanced for a longer tenor and at a more competitive rate (tenor likely to be elongated to 12 years, with 2 year moratorium; indicative RoI for ECB at Libor+2% and, in case of conversion of ECB into RTL, at MCLR(Y)). RIL has sought exclusivity for the transaction for a period of 60 days from the JLF meeting date to enable completion of due diligence/ negotiations and submission of final "Binding Bid". JLF was also informed that existing promoters were 'in principle' agreeable to RIL's proposal, subject to approval of all stakeholders.

5 Company and RIL representatives then joined the meeting. Shri Udeshi, senior official of RIL, gave a brief introduction of RIL, stating that RIL was amongst the largest PTA producer globally, with 5 plants across the globe. RIL has done a preliminary due diligence of JBF Petro. RIL's PTAS plant at Malaysia has also been set up with BP technology, based on which the JBF petro plant has been set up, Shri Alok Agarwal, CFO, RIL, briefed lenders that the company was a strategic fit in RIL's long term plan in petrochemical space, He further stated that there would be no sacrifices for lenders and existing lenders could decide whether they would like to participate in ECB refinancing in the event of RIL takeover. However, RIL would not be paying any prepayment penalty on case any of the; lenders wanting an early exit. He again reiterated the terms which



were covered in the presentation and requested that confidentiality be maintained. Shri Gothi & Shri Ajay Agarwal of JBF Petro reiterated that promoters of JBF Petro were 'in-principle' agreeable to RIL's proposal, subject to approval of all stakeholders. There was discussion among the JLF members, RIL and company representatives on the proposal and modalities of taking it forward, after which RIL and company representatives left the meeting.

6. JLF members then discussed the proposal amongst themselves and it was unanimously (100% in terms of value and number) decided as under:

(i) Formation of JLF, on the date of this meeting, under RBI Guidelines in respect of Framework for Revitalising Distressed Assets.

(ii) Corrective Action Plan by way of invocation of Outside Strategic Debt Restructuring Scheme (OSDR) / SDR for change in Ownership, under the resolution process of RBI Guidelines, with reference date of December 12, 2017 subject to the approval of the respective Delegated Authority.

(iii) In-principle agreement to the broad terms of RIL so as to enable them to undertake the due diligence process and submit the "Binding Offer". (except for the change in the tenor & interest rate of ECB facility, which shall be decided while considering the binding offer by RIL).

Minutes of Consortium Meeting held on 21.02.2018

Consortium meeting of JBF petrochemicals Ltd. (JBF Petro) was held on February 21, 2018 at 10.30. am at IDBI Tower, BKC, Mumbai. Shri Sanjiv Sachdev, CGM IDBI Bank, chaired the meeting. The list of participants is given at Annexure. Brief record of the proceedings of the consortium is as under:

1. Shri Sachdev welcomed the participants. The minutes of the last JLM held on December 12, 2017 were confirmed by the Consortium Lenders. He informed that this meeting is mainly convened to discuss the way forward as the existing resolution package envisaging Change in Management-Outside SDR/ SDR would not be applicable in terms of RBI Circular on Resolution of Stressed Assets-Revised Framework dated February 12, 2018. He stated that Reliance Industries Ltd (RIL) which had been allowed exclusively period upto February 18, 2018 for making their 'binding offer' was keen to pursue the transaction and has sought extension of time upto March 27, 2018 to conclude the transaction. Consortium members desired to know the reason for long time being taken by RIL to finalise its offer. Shri Sachdev informed that based on discussions with RIL officials, it appears that their due diligence process of the company was almost complete and they are in discussion with other stakeholders viz. Shri Bhagirath Arya and KKR to work out the modalities of acquisition. Shri Sachdev informed that IDBI Bank officials met with KKR to elicit their view on the transaction. While, KKR was also agreeable for going ahead with the transaction they were



deliberating on the valuations of the investments they have made in the company at the Group level. Company officials informed that RIL officials had visited company's Plant at Mangalore and had undertaken technical due diligence. Since the due diligence process undertaken by RIL was at an advanced stage, Lenders were agreeable, in-principle, to continue with the Resolution Plan envisaging Change in Ownership under revised RBI Guidelines. Accordingly, Lenders agreed to extend the exclusivity period upto March 27, 2018 to RIL for completion of due diligence/negotiation and submissions of Bindings offer.

2. *Keeping in view the intricacies in the process of Change in Management, it was decided to appoint Cyril Amarchand Mangaldas as Lenders Legal Counsel to advise on the process to be adopted for the transaction of Change in Management. The Consortium approved the appointment of CAM with a broadened scope.*

3. *Shri Rakesh Gothi, Director, JBF petro informed lenders that the company's plants is shut down since April 2017 due to technical reasons. The plant is kept in the preservation mode under the guidance of the technical consultants Technip & BP. Shri Ajay Agarwal, CFO, JBF Petro informed that company was incurring an expenditure of Rs.10-12 crore for preservation of the Plants which was being met by promoters.*

Minutes of Consortium Meeting held on 14.03.2018

2. *Shri Gupta welcomed the participants. After confirmation of the minutes of the last JLM held on February 21, 2018, he informed that Reliance Industries Ltd (RIL) which had been allowed time upto March 27,2018 to make its offer for acquisition of JBF Petro, was yet to submit its final offer. Shri Gupta informed that based on discussion with RIL officials it appears that the due diligence process was complete; however, they are yet to conclude their discussions with other stakeholders viz. Shri Bhagirath Arya and KKR. Shri Gupta informed that IDBI Bank officials has again met with KKR but they were still deliberating on the valuations. KKR has informally expressed that in case the lenders are agreeable for acceptance of 100% principal outstanding and waiver interest & other dues. Lenders were of the view that the proposal needs to be improved at least to cover the interest upto September 30,2017 which had fallen due on October 01,2017. However, they were agreeable to favourably consider offer for 100% principal outstanding provided the transaction is closed by March 31, 2018. Another meeting is scheduled with KKR on March 19,2018 to improve on the offer so as to pursue with them for recovery of entire principal & interest and other dues. Consortium members observed that based on the initial discussions with RIL on December 12,2018 it had appeared that the transaction would be closed immediately. However, considerable time has since lapsed and there has been no progress.*

3. *Shri Rakesh Gothi, Director, JBF petro, informed lenders that the company's plant was shut down since COD in April 2017, due to various*



technical reasons. The plant was now ept in the preservation mode under the guidance of the technical consultants (Technip & BP).

4. Considering that time was of essence, Consortium Lenders were of the view that in case there was n resolution in the account by March 31, 2018, it could be referred to NCLT, without holding any more JLM. Consortium also agreed to continue Cyril Amarchand Mangaldass for advising on any transaction for sale / settlement as well as for filing application before NCLT. Consortium was informed that Kanti Karamsey & Co. has been appointed for valuation of assets of the company. The company was advised to adequately insure charged assets of JBF Petro, so as to cover the exposure of consortium lenders.

Minutes of Consortium Meeting held on February 21, 2018

Consortium meeting of JBF petrochemicals Ltd. (JBF Petro) was held on February 21, 2018 at 10.30. am at IDBI Tower, Cuffee Parade, Mumbai, Shri Subroto Gupta, ED, IDBI Bank, chaired the meeting. Shri Sanjiv Sachdev, CGM, IDBI Bank was also present. The list of participants is given at **Annexure** Summary record of the proceedings of the consortium is as under:

2. Shri Sanjiv Sachdev, CGM, IDBI Bank, informed that the meeting was convened as per decision taken at the meeting held on March 14, 2018. Consortium was informed that after discussion KKR had informally agreed for settlement of lenders outstanding at 100% Principal. However, no written offer had been received so far. Consortium lenders were agreeable to consider the proposal from the investors provided 100% Principal was received by March 31, 2018 to Lenders. Consortium members desired that IDBI Bank should negotiate with the investors to obtain a binding offer to include the interest dues & other charges on a best effort basis. Consortium Lenders were also of the unanimous view that un case there were no resolution by March 31, 2018, the case could be fees of the LLC for this purpose. Cyril Amarchand Mangaldass, the LLC, who was invited for the meeting, presented various options available to lenders under loan documents. They were requested to be in readiness for filing of NCLT application in case there was no resolution by March 31, 2018.

3. Company representatives were then invited to join the meeting and were informed about the consortium decision that in case 100% principal amount was not received before March 31, 2018, the case would be referred t NCLT.

On perusal of these minutes, it is noted that immediately after classifying the account of the Corporate Debtor as SMA-2 due to non-payment of interest on terms loan with effect from 01.10.2017, a meeting of joint lenders forum was conducted on 12.12.2017, i.e. prior to issuance of 12th Feb 2018 circular, in accordance with the extant RBI's circulars for finding a resolution and to take



decision on corrective action plan. In that meeting, the JLF had duly noted that after achieving COD (commercial operation date), the plant was non-operational due to certain technical issues; that the company further required long term funds of approximately USD 90 million as working capitals for recommencing the plant operation; that the promoters of the company had expressed their inability to infuse further funds to make it operational; and in these circumstances, the IDBI bank has been evaluating various options to find a resolution; and that some of the companies in the same line of business evinced interest in taking over the unit; that Reliance Industries Limited had come up with a preliminary non-binding offer to take over the ownership and management of the company. The representative of IDBI Bank, in that JLF meeting, also informed other members that the time frame, process, terms etc. of the change in management proposal was to be worked out; but, at that juncture, inducting a new resourceful investor appeared to be the most preferred option. The JLF also considered the broad terms of non-bidding offer of RIL being (i) acquisition of 51% to 100% stake in JBF Petro, (ii) RIL would infuse required funds to restart operation, (iii) no cash sweep or acceleration of debt repayment, (iv) no penalty for pre-payment or re-financing. The RIL had also sought exclusivity for the transaction for a period of sixty days from the JLF meeting date to enable them completion of due diligence / negotiation and submission of final 'binding bid'. In that meeting JLF members were also informed that existing promoters were in-principle aggregable to RIL's proposal subject to approval of all stakeholders. In that JLF meeting, the decision was taken for corrective action plan by way of invocation of **Outside Strategic Debt Restructuring Scheme (OSDR) / SDR for change in ownership**, under the resolution process of RBI guidelines, with reference date of 12.12.2017.

Then, meanwhile the RBI had issued its new circular on 12.02.2018. Following that the JLF again met on 21.02.2018 to discuss the way forward the existing resolution package envisaging change in management-outside SDR / SDR. It also took note of the revised 12th Feb circular in supersession of all earlier circulars in this regard. The Reliance Offer was also discussed



and time for concluding the transaction, on their request, was extended to 27.03.2018. The representative of IDBI Bank further informed other members of the JLF that RIL officials were in discussion with other stake-holders viz. Shri Bhagirath Arya and KKR to work out the modalities of acquisition. It was recorded in the minutes that due diligence process undertaken by RIL was at an advanced stage, therefore, lenders were agreeable, in principle, **to continue with resolution plan envisaging change in ownership under revised RBI guidelines;** and accordingly, lenders agreed to extend the exclusivity period to RIL upto 27.03.2018 for completion of due diligence / negotiation and submission of binding offer. Thereafter, in the consortium meeting of the lenders held on March, 14 2018, the reliance offer was further discussed. The representative of IDBI Bank also informed that KKR has also informally expressed to their bank officials and made an offer for payment of 100% principal outstanding but with waiver of interest and other dues. To this, it was recorded in the minutes that the consortium of lenders were agreeable to favorably consider KKR's offer for 100% principal outstanding provided the transaction was closed by 31.03.2018. Then in their next meeting held on March, 22 2018, the representative of IDBI Bank informed the other members of the consortium that though the KKR had informally agreed for settlement of lenders outstanding at 100% principal,, no written offer was received from them till then. Thereupon, it is recorded in the minutes that the consortium lenders were agreeable to consider that proposal provided 100% principal was received by 31.03.2018; and that if no resolution could be made by 31.03.2018, the case could be referred to NCLT. For that purpose, they decided to engage Cyril Amarchand Mangaldas, Law Firm and to request them to be in readiness for filing NCLT application if there was no resolution by March 31, 2018. Then in the consortium meeting held on the next date on 23.03.2018, the representative of IDBI Bank apprised the lenders that RIL had indicated that they shall be able to submit their offer to acquire the company after expiry of the exclusivity period i.e 27.03.2018; and that KKR had indicated that they would consider payment of 100% of the principal outstanding only. On this, once again it was recorded in the minutes that the lenders were agreeable in principle, for the change in the management



proposal with offer for OTS (One time settlement) with payment of minimum 100% principal outstanding, provided the same was paid by 31.03.2018. It is noted that even when the talks for settlement with RIL and KKR was going on, the consortium decided for invocation of pledge of shares and asked the security trustee to issue a notice to the Corporate Debtor. It is recorded in the minutes that this step will enable the lenders to expeditiously transfer the shareholding in favour of new investor on acceptance of the final offer. Following that the security trustee viz. IDBI Trusteeship Services Ltd.(ITSL) had issued a notice dated 23.03.2018 to the Corporate Debtor calling for the payment of dues (on account of outstanding interest to the tune of USD 14.76 million). As per that notice, payment was to be made within three days from the date of notice, failing which, the pledge created over shares held by JBF Global in the Corporate Debtor were to be invoked. It is also noted that simultaneously the Financial Creditor IDBI Bank also issued a notice dated 23.03.2018 for recall of its entire debt (principal + interest) to the tune of USD 259.68 million by 31.03.2018 and following that the Financial Creditor issued another notice dated 31.03.2018, referring to the recall notice to pay all the amounts. Finally, the section 7 petition was filed in the NCLT on 11.05.2018.

1.10 In view of these facts, we are of the considered view that the plea of the Corporate Debtor that section 7 petition had triggered only on account of the operations of instructions contained in RBI's 12th Feb circular is not acceptable. The Financial Creditor alongwith other lenders had started negotiations for change of management in the month of December,2017 itself i.e. prior to the issue of 12th Feb circular, in accordance with the then existing RBI's circular and continued with that even after the issuance of new circular. It is noted that in the new circular also, the guidelines for arriving at resolution on defaults continued as such. The major change has been of the timelines for arriving at such resolution and the mandatory instructions of the RBI for filing application under section 7 of IBC, 2016 before the NCLT, if the resolution, in large account, could not be arrived at within a given time frame. In various meetings of the JLF / consortium of lenders, it was categorically expressed that if resolution could not be made till 31st of March



2018 then they may consider for filing application in the NCLT. It is noted that otherwise also, there has been no bar in filing the application under IBC and the lender public banks can validly file the application before NCLT on occurrence of any default, just like any other Financial Creditor, even without resorting to any corrective action plan for arriving at a resolution outside the IBC. However, the lender banks, being public sector bank, are also to observe the instructions issued from time to time by the RBI under the Banking Regulation Act. The timeline of 180 days given in the new circular in the case of large accounts for arriving at resolution out of IBC, past which the mandatory instruction for referring the matter under IBC is to be seen as a direction to ensure that the public sector banks do not show any laxity in dealing with those accounts in case of default and resort to corrective action plan by way of regularization / change in management / restructuring in the given time frame of 180 days failing which they had to take up the matter mandatorily within next 15 days by filing application under IBC. The circular does not debar any such public sector banks for taking up the matters under IBC before the expiry of time line of 180 days so given. The footnote 8 to the said circular clarifies the issue. Moreover, it is not a case of the corporate debtor that merely because the resolution could not be arrived at in the given timeframe of 180 days and for that reason alone, the financial creditor, being governed under Banking regulation Act, had to prefer the matter under the IBC. Had it been the case, then a view could be formed that section 7 petition was filed only on account of the operation of 12th Feb circular.

We are also of the considered view that even if the said circular was not declared ultra-virus by the Hon'ble Supreme Court, the decision of the Financial Creditor in filing section 7 petition under IBC could not have been faulted with on the ground that it was filed in violation of the RBI circular in as much as 180 days time line was not followed. It is noted that the Corporate Debtor has also taken such pleadings while putting it's objections in the main petition [CP(IB) 232 of 2018]; and the objection so raised is devoid of any merit. **In view of these facts, it is held that the section 7 petition in CP(IB) 232 of 2018 cannot be said to have been triggered only on account of**



operation of the RBI's 12th Feb circular and as such the present interlocutory application fails and hereby rejected.

1.11 However, as already mentioned, it is noted that the Corporate Debtor had paid interest on term loan to all the lender banks (including IDBI Bank) till 31.03.2017. The very first default in payment of interest had occurred on 01.10.2017 when the interest for the period of six month from 01.04.2017 to 30.09.2017 became due for payment. The payment of principal amount was already rescheduled and the first installment thereon was due on 01.04.2018. The trial run for the plant was already conducted in March 2017 and the Corporate Debtor was in the process of complying with the technical specification by taking routine checks and removing deficiencies for sustainable satisfactory technical performance and at that juncture, there was a need to infuse funds towards working capitals, purchase of spare-parts, payment to vendors for rendering technical expertise and supplies etc. In those circumstances, the Corporate Debtor, being under financial stress, was looking for certain new financiers. At one stage, as could be seen from the records of CP(IB) 245/9/NCLT/AHM/2018 that the Corporate Debtor had made an effort to get sanction of Rs. 1500 crores as working capital and Rs.500 crore of standby letter of credit [SBLC] from the lender banks. For this purpose, the Corporate Debtor had entered into an agreement with M/s IDBI Capital Markets and Security Limited who had offered their services to arrange the funds from the lender banks (including the IDBI Bank) for which as per the terms of the offer letter, the Corporate Debtor was to pay IDBI Capital Markets and Security Limited, the fee totaling to Rs.2 crores [Rs. 20 lakh as commencement fee + Rs. 30 lakh on issuance of sanction letter by IDBI Bank and the balance amount on financial closure]. It is noted that as against the desired working capital of Rs.1500 crores, only Rs.283 crores (Rs.203 crores by IDBI Bank and Rs.80 Crore by Indian Overseas Bank) were sanctioned. Likewise as against the stand-by letter of credit of Rs.500 crores, only Rs.217 crores (Rs.157 crores by IDBI Bank and Rs.60 Crore by Indian Overseas Bank) were sanctioned. It is also noted that IDBI Bank had issued sanction letter on 31.01.2017 whereas Indian Overseas Bank had issued



sanction letter on 29.07.2017. But even these amounts were not disbursed to the Corporate Debtor. Then, the Financial Creditor IDBI Bank, on the very first default of six monthly interest payment amounting to Rs 8.14 million, which became due as on 01.10.2017 and considering the financial stress of the Corporate Debtor, got engaged in for negotiations with RIL and KKR for change of management. The negotiations with RIL started in December 2017, as is evident from the minutes of JLF meeting held on 12.12.2017. RIL was given time upto 27.03.2017 for giving their final 'binding offer'. Likewise, the negotiations with KKR had started in the month of February 2018 as is evident from the minutes of consortium meetings held on 21.02.2018. The KKR had offered for payment of 100% principal amount and was seeking waiver of interest which was outstanding with effect from 01.10.2017 and further amount on monthly basis. While negotiations with these two investors were in progress and JLF / consortium of lenders was considering their proposal as is evident from their minutes of meeting held on 14.03.2018 and 22.03.2018, the Financial Creditor alongwith other lender banks were deliberating to take up the matter under the IBC, if the transactions could not be completed as one time settlement before 31.03.2018. It is noted that this was a matter of large account (where the debt was more than Rs.2000 crores), and any investor would need some reasonable time to take a call for putting up their final offer and for payment.

We fail to understand the rigid approach adopted by the Financial Creditor and other consortium banks in allowing them reasonable time before proceeding ahead for filing application under IBC. As such, there no bar and no timeline (except that of limitation period) is prescribed for filing application under IBC provided there is a default. But it is to be noted that the object of filing an insolvency petition under the IBC is also for seeking a resolution in time bound manner. The change in management and / or sale as a going concern is also envisaged as a first step in the insolvency process too with an object of maximization of value of assets and also to promote entrepreneurs. The resolution of this kind by a change in management, to the satisfaction of the stakeholders, has also been provided through various



RBI circulars on resolution package envisaging change in management – outside SDR / SDR. We have also noted that the Financial Creditor alongwith other lender banks were already engaged in this process and were having deliberations with RIL and KKR. But then all a sudden invoking the pledge and issuing a recall notice on 23.03.2018 had ultimately paralyzed the process that they themselves had initiated for seeking resolution merely because of their rigid approach on the time (31.03.2018) fixed for closure of the transaction. Though such **hasty** decision taken by Financial Creditor and other consortium Lender banks would not lead to any valid ground for questioning the maintainability of section 7 petition, as has been done by the Corporate Debtor by putting written objections in the main petition and also by way of the present interlocutory application, we are of the view that the Financial Creditors (IDBI Bank & other lenders) ought to have observed restraints while dealing with such matters. The plant was already set-up and ready for operation and a little support and patience while considering the investors proposal could have saved the situation. As stated by the Corporate Debtor, the revenue streams expected on the operation of the plant would have been in the range of USD 120 million to USD 150 million (before interest, taxes, depreciation and amortization) per annum; and the project, which is situated at the SEZ in Mangalore over 150 acres of land, would have generated a large amount of employment for approximately 1000 families directly or indirectly; but the entire activities have come to standstill and now the plant is lying completely closed and as submitted by the Senior advocate Mr. Pahwa, the situation in the plant has deteriorated to the extent that now there are no security guards and electricity supply at the site of Corporate Debtor and salaries are not paid to the junior staff since April 2021 and to the senior staff since November, 2020.

With these remarks and observations, the present inter-locutory application is disposed of and the prayers raised therein stand rejected.



2. CP(IB) 232 of 2018

2.1 The present application [CP(IB) 232 of 2018] is 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 by IDBI Bank Ltd. (**IDBI Bank**), through Mr. Vasudaveen Ramakrishnan who is duly authorized vide Board Resolution dated 14.08.2017, with a prayer to initiate the Corporate Insolvency Resolution Process against the JBF Petrochemicals Limited (**JBF Petro**). The application has been filed by the IDBI Bank being the Financial Creditor of JBF Petro on the ground that the JBF Petro (the Corporate Debtor) has defaulted in payment of its dues totaling to USD 268.28 million as on 31.03.2018.

2.2 The Applicant IDBI Bank is a limited company, incorporated under the provisions of the Companies Act, 1956 on 27.09.2004, duly registered with the Registrar of Companies, Mumbai bearing CIN: L65190MH2004GOI148838 and having registered office at IDBI Tower WTC Complex, Cuffe Parade, MUMBAI 400 005

2.3 The respondent corporate debtor JBF Petro is a Limited Company, incorporated under the provisions of companies Act, 1956 on 18.09.2008, duly registered with Registrar of Companies, Gujarat with CIN: U242290DN2008PLC000287 and having registered office at Dadra & Nagar Haveli, Silvassa. The Authorized share capital of the Respondent is Rs. 1250,00,00,000/- and paid up share capital of the company is Rs. 1086,64,16,910/-.

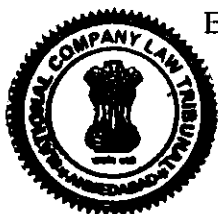
2.4 The facts, as per records are summarized hereunder:

- (i) The Financial Creditor IDBI Bank along with the other consortium lenders viz. Overseas Bank, Bank of Baroda and Union Bank of India cumulatively granted exposure to the extent of USD 464 million to the Corporate Debtor for its project. The project pertains to construction, development and setting up of a plant for manufacture of 1.25 million ton per annum (154 ton per hour) of purified terephalic



Acid (**PTA**) which would be amongst the largest of its kind in India. The said project is based on process technology developed by globally reputed British Petroleum (BP) which was licensed for the first time in India. The PTA is the essential raw-material for making polyester and is extensively used in producing textiles, packaging and film products.

(ii) The cost of the said project was then estimated to be about USD 603.81 million. Under the facility agreement, the Financial Creditor IDBI Bank was described as the original lender / agent and IDBI Trusteeship Services Limited was described as the Security Trustee. The first facility agreement dated 11.05.2012 was entered between the Corporate Debtor and the Financial Creditor IDBI Bank under which the Financial Creditor had agreed to partly finance the said project by granting an external commercial borrowing term loan of USD 416 million. Thereafter, the Corporate Debtor entered into a foreign currency facility agreement dated 14.02.2013 with EXIM Bank, Financial Creditor in its capacity as agent and IDBI Trusteeship Services Limited as Security Trustee whereby Financial Creditor down sold its exposure to an extent of USD 60 million to EXIM Bank. In view thereof, another agreement between the corporate debtor and the IDBI bank was entered on the same day on 14.02.2013 [referred as First Amendment to facility Agreement]. Following that, Financial Creditor further down sold and / or assigned the debt to the extent of USD 130 million to three other banks being Indian Overseas Bank (USD 50 million), Bank of Baroda (USD 50 million) and Union Bank of India (USD 30 million). Accordingly, the total exposure of Financial Creditor IDBI Bank Limited got reduced to 226 million and the same was recorded by way of a supplemental facility agreement dated 15.04.2015. Later, an additional amount to the extent of USD 41.04 million was granted on account of cost over run and the same was recorded in second amendment agreement to the facility agreement dated 31.03.2016. Out of USD 41.04 million, the Financial Creditor IDBI Bank contributed USD 26 million and the balance was contributed by



other lender banks. This way, the total amount borrowed by the Corporate Debtor from Financial Creditor IDBI Bank was a sum of USD 252 million [416 – 60 - 130 + 26]. The total amount of the term loan provided by the lenders Bank amounted to USD 457.04 million [416 + 41.04].

(iii) Initially the scheduled date of commercial operation (**SCOD**) was contemplated on 01.10.2014. Later the SCOD was extended to 01.04.2017. The repayment schedule for the principal amount was also extended and the first installment for the principal amount was due on 01.04.2018. The interest component was payable 6 monthly. The Corporate Debtor had made regular undisrupted payment of interest component every 6 months from October 2013 to march 2017 amounting USD 46.72 million.

(iv) The trial run for the plant was conducted in march 2017 and Corporate Debtor was in the process of complying with the technical specifications i.e. by taking routine checks and removing deficiencies based on technical guidelines for sustainable satisfactory technical performance. At this juncture there was a need to infuse funds towards working capital, purchase of spare part, payment to vendor for rendering technical expertise and supplies etc.

(v) The interest component of an amount of USD 8.14 million for the period 01.04.2017 to 30.09.2017 was due to the Financial Creditor on 01.10.2017. However, the Corporate Debtor was unable to service the interest amount on the term loan w.e.f. 01.10.2017 due to circumstances beyond its control including cost over-run, delayed availability of infrastructure like new port facility, and delayed execution by renowned global agencies etc. As such in October 2017, the account of the Corporate Debtor was under financial stress.

(vi) The account of Corporate Debtor was classified as Special Memorandum Account (SMA) – 2 as on 29.11.2017 due to non-servicing of interest on terms loan w.e.f. 01.10.2017. In view thereof, a



joint lenders forum (**JLF**) was constituted for formulating a corrective action plan and the process they had made an effort to resolve the financial stress of the Corporate Debtor by exploring options for restructuring and investment through change in management by way of invocation of the 'outside strategic debt restructuring scheme' (OSDR / SDR Scheme) under the extent RBI circulars and considered the offers given by Reliance Industries Ltd. (RIL) and KKR Jupiter Investors Pvt. Ltd. (KKR) in various JLF meetings [held on 12.12.2017, 21.02.2018, 14.03.2018, 22.03.2018 and 23.03.2018]. In those JLF meetings, the consortium of lender banks had also taken a considered decision that if no satisfactory proposal was coming up by 31.03.2018 then they would refer the matter for filing application under IBC. Following that, the application under section 7 has been filed on 11.05.2018.

2.5 In support of the default on the part of Corporate Debtor in repayment of facilities extended under the various facility agreement, the Financial Creditor has also annexed the following documents;

- (i) Independent Auditors Report in respect of the Corporate Debtor for the Financial Year ended March 2017.
- (ii) Report of TransUnion CIBIL Limited pertaining to the Corporate Debtor dated 14.02.2018.
- (iii) Letter of recall dated 23.03.2018 for an amount aggregating USD 259.68 million due as on 01.10.2017.
- (iv) Notice of invocation of pledge dated 23.03.2018 issued by the Security Trustee, on behalf of, inter alia, the Financial Creditor to JBF Global Pte. Ltd. (the pledgor under the deed of pledge of shares dated 23.08.2013 as amended by the supplemental deed of pledge dated 26.04.2016).
- (v) Notices issued by the Financial Creditor to the Corporate Debtor dated 31.03.2018, setting out details of the continuing default of the Corporate Debtor in failing to repay all the outstanding.



(vi) Balance confirmation dated 05.04.2018 provided by the Corporate Debtor reflecting an outstanding balance of USD 268.28 millions as on 31.03.2018, payable to Financial Creditor.

(vii) Report of the Central Repository on Information on Large Credits **(CRLC)** generated on 02.05.2018.

(viii) ECB-2 return form dated 09.05.2018 submitted by the Corporate Debtor, reflecting the amount of debt granted, and the outstanding balance amount as on 29.03.2018.

(ix) The copies of the entries in the banker's books, alongwith the certificate under the Banker's Book Evidence Act, 1891.

2.6 The Financial Creditor has also given the details of disbursement made in regards to the debt granted to the Corporate Debtor and for ready reference, these are reproduced hereunder:

Disbursement details of facilities granted by Financial Creditor to Corporate Debtor

S.NO	Facility	Debt Granted (USD)	Date of Disbursement	Comments
1	ECB OF USD 226 million & USD 26 million	6,264,580.00	17.06.2013	ECB Disbursements made either for direct payments or retirement of Inland or Foreign Letter of Credit
2		298,254.00	22.08.2013	
3		13,468,024.56	26.08.2013	
4		7,443,216.00	03.09.2013	
5		13,460,788.66	04.09.2013	
6		856,457.00	05.09.2013	
7		297,724.48	12.09.2013	
8		2,756,160.00	07.10.2013	
9		1,310,590.00	24.10.2013	
10		26,985,358.46	23.06.2014	
11		2,142,616.02	24.06.2014	
12		10,200,000.00	21.10.2014	
13		7,321,132.18	05.11.2014	
14		1,206,479.00	25.11.2014	
15		5,000,000.00	10.02.2015	



16	6,006,321.20	26.02.2015
17	1,731,608.25	21.03.2015
18	2,470,000.00	15.04.2015
19	12,690,000.00	07.05.2015
20	327,647.00	19.05.2015
21	1,310,589.00	24.06.2015
22	327,647.00	24.06.2015
23	655,295.00	24.06.2015
24	267,328.25	25.06.2015
25	24,602,417.88	22.07.2015
26	7,443,165.65	03.08.2015
27	249,720.60	12.08.2015
28	111,799.94	13.08.2015
29	15,218.57	26.08.2015
30	6,500,000.00	26.08.2015
31	3,690,000.00	30.09.2015
32	1,212,345.08	10.05.2015
33	9.00	05.10.2015
34	2,465,117.66	05.11.2015
35	756,708.09	10.11.2015
36	1,40,000.00	23.11.2015
37	4,320,728.00	23.11.2015
38	301,038.46	30.11.2015
39	287,000.00	08.12.2015
40	1,310,590.00	09.12.2015
41	405,661.00	10.12.2015
42	310,000.00	16.12.2015
43	287,000.00	21.12.2015
44	197,323.24	28.01.2016
45	480,580.99	16.02.2016
46	5,991,995.26	22.02.2016
47	436,373.12	21.03.2016
48	6,930,811.39	22.03.2016
49	20,985,820.35	04.04.2016
50	668,483.00	22.06.2016
51	1,310,590.00	28.06.2016
52	2,251,084.05	30.06.2016
53	2,963,916.00	25.08.2016
54	5,530,000.66	05.10.2016
55	7,104,847.76	25.10.2016
56	324,153.00	27.10.2016
57	750,000.00	07.11.2016
58	183,261.76	28.11.2016
59	80,646.00	28.12.2016
60	2,260,000.00	29.12.2016
61	263,005.13	17.01.2017
62	40,322.50	16.02.2017
63	420,192.92	01.03.2017
64	90,000.00	01.03.2017
65	752,963.76	06.03.2017
66	156,711.08	06.04.2017



67		53,358.56	08.05.2017
68		6,105,000.00	08.05.2017
69		1,184,797.76	30.05.2017
70		2,632,111.38	06.07.2017
71		917,413.00	17.01.2018
	Total	251,532,125.66	

2.7 The Corporate Debtor has raised the issue of maintainability by raising objections to the petition vide its reply dated 09.10.2018 saying that as per RBI circular dated 12.02.2018, the application under section 7 of the IBC could have been filed against the large stressed borrower only after expiry of the timeline of 180 days prescribed therein for resorting to corrective measures and to put in a place a credible resolution plan; that the Financial Creditor has not followed the spirit of RBI's circular dated 12.02.2018 by not providing opportunity to restructure its debt outside of the mechanism provided under the IBC and that the Financial Creditor has filed the petition before the period of 180 days prescribed under the RBI's circular expired. The Corporate Debtor has also filed an Interlocutory Application No. 496 of 2019 in the petition challenging therewith the maintainability of the application filed under section 7 saying that the Financial Creditor had filed the said application in pursuance of the RBI's circular dated 12.02.2018 for initiating Corporate Insolvency Resolution Process against it whereas the said RBI circular has been declared as ultra-virus by the Hon'ble Supreme Court in the case of Dharani Sugars and Chemical Ltd. (2019) 5 SCC 480 and thereby all proceedings which have been initiated in pursuance of the said RBI circular will have to be declared as non-est and as such the application filed under section 7 would not be maintainable.

The issue so raised by the 'objections' and 'interlocutory application' has been discussed in detailed while disposing of the IA No.496 of 2019 hereinabove in this order. For the brevity, the same are not being repeated here. We have already taken the view that the present section 7 petition [CP(IB) 232 of 2018] cannot be said to have been filed only on account of the RBI's circular dated 12.02.2018 and that the petition can also not be faulted with on the ground that it was filed before the expiry of 180 days' timeline prescribed under RBI's 12th Feb circular for restructuring the debt / arriving at



resolution outside of the mechanism provided under the IBC. In view thereof, the objections raised by the Corporate Debtor in the context of the present petition is rejected.

2.8 Admittedly, there is a default within the meaning of the provision of Insolvency and Bankruptcy Code, 2016. The Hon'ble Supreme Court has already laid down the law, in the cases of Innovative Industries Vs. ICICI Bank [(2018) 1 SCC 407] and Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. [(2018) 1 SCC 353] in relation to admission of application under section 7 of the IBC by stating that for admission of such applications, the only thing that the Applicant has to establish is the existence of a 'debt' and a 'default' by the Corporate Debtor.

2.9 In the present case, the Financial Creditor has provided the term loan for setting-up the plant and thus there is a debt onto the Corporate Debtor; and admittedly, on account of the financial stress, the Corporate Debtor defaulted payment of the interest with effect from 01.10.2017 and also defaulted to repay the entire amount of term loan and interest which became due for payment later with effect from 01.04.2018. The debt is also not barred by limitation. As such, the application is complete and defect free and deserves to be admitted.

2.10 The name of Interim Resolution Professional Mr. Sundaresh Bhat [Registration No.IBBI/IPA-001/IP-P00077/2017-2018/10162] has been proposed whose consent is on record. Further, from the material on record, it is evident that no disciplinary proceedings are pending against such IRP.

2.11 Accordingly, we admit the application and order as under:

ORDER

1. Corporate Debtor JBF Petrochemicals Ltd. is admitted in Corporate Insolvency Resolution Process under Section 7 of Insolvency and Bankruptcy Code, 2016.

2. We appoint Mr. Sundaresh Bhat [Registration No.IBBI/IPA-001/IP-P00077/2017-2018/10162] having address BDO



Restructuring Advisory LLP, BDO India LLP, Level 9, The Ruby, North West Wing, Senapati Bapat Road, Dadar West ,Mumbai City, Maharashtra- 400028 [having e-mail sundareshbhat@bdo.in, and Mobile:9920977977] under section 13(1) (c) of the IB Code as Interim Resolution Professional (**IRP**).

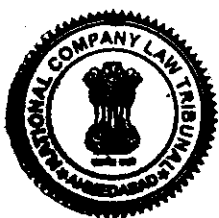
3. As a consequence of the application being admitted, the moratorium as envisaged under Section 14(1) shall follow in relation to the Corporate Debtor prohibiting all of the actions mentioned under Section 14(1) (a) to (d).

4. The IRP so appointed shall make Public announcement of Corporate Insolvency Resolution Process (CIRP) be made immediately as specified under Section 13 of the Code and by calling for submissions of claim under Section 15 of the Code.

5. The IRP shall perform all his functions as contemplated, inter-alia, by Sections 17,18,20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or Co-operate, IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

6. The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016.

7. We direct the Financial Creditor / Applicant to deposit a sum of Rs.2,00,000/- (Rs. Two Lakhs) with the interim resolution professional, namely Mr. Sundaresh Bhat to meet out the expenses to perform the



functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditor.

8. Copy of the order shall be communicated to the Applicant Financial Creditor, Corporate Debtor as well as to the IRP appointed herein, by the registry. In addition, a copy of the order shall also be forwarded to IBBI for its records and also to RoC for updating the Master Data. RoC shall send compliance report to the Registrar, NCLT.

Accordingly, CP(IB) No. 232/NCLT/AHM/2018 is allowed and stands disposed of.

3. CP (IB) 226 / 2019

3.1 The present application to initiate Corporate Insolvency Resolution Process in respect of JBF Petrochemical Ltd. (**Corporate Debtor**) have been preferred under Section 9 of the IBC 2016 by Sundyne International S.A. (**applicant/ Operational Creditor**). The Operational Creditor is a company incorporated under the laws of French republic. The application has been filed through Mr. Pierre Oliver, authorized signatory of the company. M/s Desai and Diwanji, advocates solicitors and notaries are the person resident in India authorized to accept the service of process on behalf of the Operational Creditor.

3.2 The total amount of debt due from the Corporate Debtor is stated to be USD 54,201 (equivalent to INR 38,97,100/-). In the context, the facts as given in the application and argued by the counsel for the applicant Operational Creditor Shri Shamron Borkataki Advocate are summarised hereunder:

- (i) The Corporate Debtor had purchased three Sundyne HMP 7000 pumps, and in that regard it had requested the operational creditor for a commercial offer/fee-quote for obtaining its services for commissioning the said Pumps.



(ii) The Corporate Debtor after negotiations with the operational creditor issued a work order dated 07.06.2017 in favour of the operational creditor, for commissioning of the three Sundyne Pumps at the corporate debtor's site in Mangalore. Following that the operational creditor had installed these pumps between 13.06.2017 to 25.06.2017 and pursuant to the commissioning of these pumps in terms of the work order, it had raised an invoice dated 03.08.2017 as per Clause 3 of the work order for an amount of USD 54,201; and in accordance with Clause 4.2 of the work order the Corporate Debtor was obliged to make payment within period of 30 days. However, the Corporate Debtor failed to make payment towards the invoice.

(iii) Owing to the non-payment of the above amount, the operational creditor issued a demand notice under Section 8 of the IBC to the Corporate Debtor on 15.09.2018 through courier and registered post. The notice issued through courier was received by the Corporate Debtor on 20.09.2018, and the notice issued through registered post was received on 01.10.2018. Despite issue of the demand notice and passing of over 10 days from the date of receipt of such notice, the invoice amount remained unpaid. No reply to the Section 8 notice was given by the Corporate Debtor. Following that the Operational Creditor filed its application under Section 9 of the IBC on 18.03.2019.

3.3 The respondent Corporate Debtor filed its objection, during the proceedings, through its affidavit in reply on Section 9 petition on 27.08.2019. The basic objection as raised therein and argued by the learned counsel for the Corporate Debtor Shri Maulik Nanavati advocate are summarised here under:

(i) As per the work order dated 07.06.2017 issued by the Corporate Debtor, the engineers of operational creditor visited its site and installed the three pumps during 13.06.2017 to 25.06.2017 but the commissioning remained incomplete in as much as certain technical issues in running the pumps remained unresolved.



(ii) The technical problems, that were being faced by the Corporate Debtor in running these pumps, were stated to be as under:

- (a) Thrust action is away from prob, the gap voltage are negative
- (b) Pump trip settings need to be changed to suit the plant operating conditions.

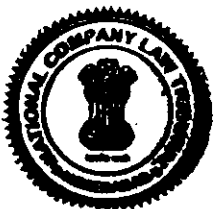
On these issues, the Operational Creditor provided different settings and a table to match the values; however, the issue was still not resolved and the displacement readings did not match even after the new fittings were implemented. One of the pumps had even tripped due to axial displacement. The issues could not be resolved by the Operational Creditor even after a number of communications made through email.

(iii) The statement of accounts relied upon by the Operational Creditor were not certified as per Banker's Books Evidence act, 1891.

(iv) The Operational Creditor ought to have invoked the appropriate forum for arbitration for adjudication of dispute, before filing application under the IBC.

(v) Since the Operational Creditor did not perform its obligation under the work order and the work remained incomplete, there arose no liability to make payment to the Operational Creditor. As such, in the absence of any debt being payable, there can be no event of default.

(vi) The present application is filed on the strength of a power of attorney dated 25.01.2019 which appears to be executed by Mr. Heux Joel; that as per the purported power of attorney, Mr. Heux Joel is Managing Director as well as the legal representative of the Operational Creditor. No documentary proof is produced to demonstrate that Mr. Heux Joel has the authority to delegate powers to the signatory; and that it is well settled law, a power of attorney holder is not competent to file an application under the IBC. In addition to that, the document



of 'power of attorney' is not stamped and hence, cannot be taken into consideration.

3.4 We have heard both the sides and perused the relevant records and documents. It is noted that during the proceeding before us, the Operational Creditor has filed additional documents containing therewith a copy of resolution passed in the meeting of board of directors of Sundyne International SA authorizing Mr. Pierre Olivier for initiating / pursuing proceedings for Corporate Insolvency Resolution against JBF Petro. The additional documents are filed on 12.12.2019 through an affidavit dated 25.11.2019. It is also noted that the objection raised for not paying the dues on the ground of minor issues in running the pump are not at all reasonable and does not give rise to any genuine dispute, more so when we find that the Corporate Debtor, otherwise also even after achieving the SCOD on 01.04.2017, was not able to run the plant as a whole due to various technical issues and financial stress and inability of the promoters to infuse the required fund as working capital. We also take note of the fact that during the proceeding, the Corporate Debtor had come up with proposal to make settlement and to pay the outstanding dues to the Operational Creditor. As is evident from the orders dated 29.01.2020, 16.06.2020, 27.08.2020, 29.09.2020, 13.11.2020 and 11.02.2021 placed on record, adjournments were sought number of times on the ground that efforts were being made for payment and for that purpose, permission from RBI was being sought. It is also noted that at one stage, the Corporate Debtor had filed an Interlocutory Application No.855 of 2020 seeking direction of this adjudicating authority in Tribunal for issuing necessary instruction to the RBI as they were insisting the Corporate Debtor to obtain a no objection certificate from this Tribunal in order to give their approval of foreign remittances of an amount of Rs. 5 lakh in equivalent of USD to the Operational Creditor.

3.5 Having considered these facts, we are of the view that the Corporate Debtor has defaulted in payment of the dues to the Operational Creditor. The amount of default is above the threshold limit of Rs.1 lakh for filing application under IBC at relevant point of time. The application is complete



and free from any defect. And as such, the application filed by the Operational Creditor under section 9 of IBC to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor deserves to be admitted.

3.6 However, we have already admitted the Corporate Insolvency Resolution Process against the same Corporate Debtor in CP(IB) 232 of 2018. For this reason, the Operational Creditor may place its claim in the CIRP which has been initiated on the application filed by the IDBI Bank under section 7 of the IBC in CP(IB) 232 of 2018, as ordered hereinabove in para-2 of this common order. In case, the CIRP order initiated in that case gets set-aside / terminated on account of any litigation, then the present application shall be deemed to have been admitted from the date of this order itself; and the CIRP will continue ahead on the strength of this section 9 petition of the present Operational Creditor in CP(IB) 226 of 2019.

With these observations, the application is disposed of.

-Sd-

[KAUSHALENDRA KUMAR SINGH]
MEMBER (TECHNICAL)

-Sd-

[DR. DEEPTI MUKESH]
MEMBER (JUDICIAL)



Prepared by VIMAL
Signature [Signature]
Date 01-02-2020

Certified to be True Copy of the Original
[Signature]
Deputy Registrar
NCLT, Ahmedabad Bench
Ahmedabad