



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I**

CP (IB) 702/MB/2019

Under section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of

**AMI CORPORATION
Through Sole Proprietor Mr. NIPUN THAKKAR,**

301, CIEM Industrial Estate, Ramchandra Lane
Extension, Malad (West), Mumbai – 400064.

... Financial Creditor /Petitioner

Versus

**SHIVAM PARIVAR DEVELOPERS PRIVATE
LIMITED**

[CIN: U45200MH2005PTC152371]

Office At 2/13 Siddharth Nagarpart V, Prabhodhan
Krida Bhavan, Goregaon (W), Mumbai – 400104.

... Corporate Debtor /Respondent

Order Delivered on : 23.06.2023

Coram:

Hon'ble Member (Judicial) : Mr. H. V. Subba Rao,
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam,

Appearances:

For the Financial Creditor : Mr. Rohan Agrawal, Counsel.
For the Corporate Debtor : Mr. Gauraj Shah, Counsel.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The Company Petition is filed under section 7 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**), by Mr. Nipun Thakkar, Sole Proprietor of Ami Corporation, (“**the Financial Creditor/ Petitioner**”) above-named, seeking to initiate Corporate



Insolvency Resolution Process (CIRP) against **Shivam Parivar Developers Private Limited** ("the Corporate Debtor").

2. The present Petition was filed on 13.02.2019 before this Adjudicating Authority claiming a sum of Rs.7,44,80,000/- (Rupees Seven crores Forty-Four Lakhs Eighty thousand only) along with interest at the rate of 12% p.a. from 01.01.2019 till date of actual payment, is payable by the Corporate Debtor and the Corporate Debtor has defaulted in repayment of the same.
3. The Corporate Debtor is a Private company limited by shares and incorporated on 01/04/2005 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its registered office is at Office 2/13 Siddharth Nagarpart V, Prabhodhan Krida Bhavan, Goregaon (W), Mumbai – 400104.

Submissions made by Financial Creditor by way of Petition:

I. EXISTENCE OF FINANCIAL DEBT AND DEFAULT

4. The Financial Creditor submits that the amount claimed to be in default in Part IV of the Petition is Rs.7,44,80,000/- (Rupees Seven crores Forty-Four Lakhs Eighty thousand only). The date of default has been stipulated as December 31, 2018. The debt thus, is not time-barred.
5. The Counsel for the Financial Creditor submits that between the years 2009-2010, the Petitioner has advanced an amount of Rs.3,74,38,800/- (Rupees Three Crore Seventy-four lakhs thirty-eight thousand eight hundred only) to the Corporate Debtor in anticipation of Joint development by the Financial Creditor and the Corporate Debtor. Conditions precedent did not fulfil and



therefore the agreement came to an end and the Corporate Debtor agreed to repay the amount along with the interest to the Financial Creditor (“the Financial debt”). The Corporate Debtor initiated repayment and repaid a part payment of Rs.1,50,00,000/- (One crore Fifty lakhs only).

6. The Counsel further submits that vide Letter of Understanding (First Agreement) dated 31.12.2017 the Corporate Debtor defaulted in paying the Financial Debt of Rs.6,65,00,000/- along with interest @ 12% within a period of 180 days from 31st December, 2017. The said Letter of Understanding First Agreement executed on 31.12.2017 along-with its enclosures is annexed to the Petition and marked as **Exhibit – C (Pgs.19-23)**.
7. By a Supplemental letter of Understanding, the Corporate Debtor replied to the letter of Financial Creditor dated 04.07.2018 and once again reiterated and confirmed the agreement recorded in letter of Understanding dated 31.12.2017 and sought a final extension of time and executed a Supplemental Agreement dated 16.07.2018 being Exhibit – D at page 24, inter-alia, agreeing to pay the Financial Debt of Rs.7,44,80,000/- along with interest @12% p.a. on or before 31.12.2018.
8. Resolution of the Board of Directors dated 13.07.2018 ratifying and confirming the Letter of Understanding dated 31.12.2017 committed to make payment of the Financial Debt of Rs.6,65,00,000/- along with interest @ 12% p.a. for the period 01.01.2018 to 31.12.2018 amounting to Rs.79,80,000/- aggregating to a sum of Rs.7,44,80,000/- (Rupees Seven crore forty-four lakhs eighty thousand only) on or before 31.12.2018. The Financial Creditor claims further interest @ 12% p.a. to be calculated on the



Financial Debt of Rs.7,44,80,000/- from 01.01.2019 till date of actual payment. The Supplemental Agreement dated 16.07.2018 read with Resolution dated 13.07.2018 passed at the meeting of the Board of Directors of the Corporate Debtor is annexed to the Petition as **Exhibit – D Colly (pgs 24-27).**

9. As the Financial Debt amount as was not repaid within a period of 180 days from 31.12.2017, the Financial Creditor vide its letter date 04.07.2018 called upon the Corporate Debtor to repay the Financial Debt amount as due i.e. Rs.6,65,00,000/- (Rupee Six crore sixty-five lakhs only) along with interest @ 12% p.a. from 01.01.2018 till the actual date of realization of payment. A copy of the letter dated 04.07.2018 addressed by the Financial Creditor / Applicant to the Corporate Debtor, is annexed to the Petition as **Exhibit – F (pg. 29).**
10. Copy of the Email dated 07.12.2018 addressed by the Financial Creditor to the Corporate Debtor attaching the statement of confirmation of accounts for the Assessment Years 2018-2019 is annexed to the Petition as **Exhibit – G (pgs. 30-31).** A copy of the Statement of Confirmation of Accounts dated 01.04.2018 signed by the Corporate Debtor and the Financial Creditor duly confirming the Financial debt amount due to the Financial Creditor is annexed to the Petition as **Exhibit -H (pgs. 32).** Copy of the Bank Statement of the Applicant is annexed to Petition as **Exhibit – I (pgs. 33-48).**
11. **Details of Claim as given in Exhibit – E (pg. 28)**

Particulars	Amount in Rupees
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Base outstanding / Principal Amount as on 31.12.2017 (Confirmed in Letter of Understanding dated 31.12.2017 – Exhibit D)	6,65,00,000.00
Add : Interest @ 12% p.a. for the period 01.01.2018 to 31.12.2018 (Confirmed in Supplemental Letter of Understanding dated 16.07.2018 – Exhibit F to the Petition)	79,80,000.00
Total amount due as on 31.12.2018	7,44,80,000.00

The Financial Creditor claims further interest @ 12% p.a. to be calculated on the aforesaid outstanding due of Rs.7,44,80,000/- to be calculated from 01.01.2019 till date of actual payment and/or realization.

12. The Petitioner further submits that at the hearing on 26.08.2019, this Tribunal raised a query as to whether the claim of the Financial Creditor is time barred or not under Sec.18 of the Limitation Act, 1963. In response, the Financial Creditor by way of written submissions, submitted as follows:

(a) *At the outset, reliance is placed on the provisions of Section 25(3) of the Indian Contract Act, 1872 which provides that a fresh promise to pay amounts to a fresh cause of action, even in respect of a time barred debt. Section 25 of the Contract Act is reproduced hereinbelow:*

25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.

An agreement made without consideration is void, unless —

(1) It is expressed in writing and registered under the law for the time being in force for the registration of [documents], and is



made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(3) It is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract and is an enforceable contract on the breach committed by the Corporate Debtor and gives rise to fresh cause of action.

(b) It is submitted that the basic requirement to fall under section 25(3) of the Contract Act, has to be:

(a) It must refer to a debt which the creditor but for the period of limitation, might have enforced:

(b) There must be a distinct promise to pay wholly or in part such debt;

(c) The promise must be in writing signed by the person or by his duly appointed agent (in the present petition the Board Resolution at page 26 ratifies the entire promise and is enforceable in law).



(c) *In the instant matter, it is respectfully submitted that assuming without admitting that if the claim herein is time barred, only the remedy of the Financial Creditor is extinguished but the debt is not extinguished even after limitation period is over. In a situation where the debtor approaches the creditor and makes a fresh promise to pay the debt, there is no such law which bars the debtor from discharging its debt to the creditor. Cause of action accordingly arises from the date when such fresh promise is made.*

(d) *In the present matter, the Corporate Debtor made a renewed/ fresh promise through their authorized signatories being the Directors and supported by the Board Resolution dated 13th July, 2018 (annexed at page 26 to the Petition) and expressly agreed to pay the financial debt to the Financial Creditor which is evidenced from the documents referred to hereinabove.*

13. This acknowledgement of Debt by the Corporate Debtor cannot be construed as beyond the period of limitation under section 18 of the Limitation Act, 1963, as this Debt is legally enforceable under Section 25(3) of the Indian Contract Act, 1872. The Letter of Understanding /1st agreement dated 31.12.2018 read with supplemental agreement dated 16.07.2018 along with the resolution dated 13.06.2018 and the confirmation of accounts annexed at page 32 at Exhibit – H all constitute fresh cause of action enforceable against the Corporate Debtor. On their default, the present Petition is filed and that is within limitation. These documents amount to fresh promise to pay and gives rise to a fresh cause of action to the financial creditor and the present application is based on the fresh cause of action. Such a promise validates an intention to pay the debt by the Corporate Debtor to the Financial



Creditor. An unconditional acknowledgement on the part of the Corporate Debtor on the documents referred to hereinabove are all unconditional acknowledgement giving a fresh cause of action on the failure of the Corporate Debtor to fulfill their promise of payment to the Financial Creditor.

In view of the above, the Financial Creditor submits that the financial debt is within the limitation as the cause of action arose on 31.12.2018 due to the default of the Corporate Debtor to pay the financial debt to the Financial Creditor. The Financial Creditor has relied upon Section 25 of the Indian Contract Act based upon the fresh promise to pay by the Corporate Debtor which amounts to a valid contract to repay the financial debt to the Financial Creditor.

Further Submissions by the Financial Creditor by way of Addl. Affidavit dated 15.09.2021

14. The Financial Creditor submits that this Petition was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC). The said Company Petition was admitted by this Tribunal vide its Order dated 13.12.2019 thereby initiating the Corporate Insolvency Resolution Process (CIRP) and Mr. Paras Khimji Savla was appointed as Interim Resolution Professional (IRP).
15. The appointed IRP filed a Miscellaneous Application No.4102 of 2019 in the said Company Petition u/s.12A of IBC r/w Regulation 30A of the Insolvency and Bankruptcy Board (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) for withdrawal of CIRP. The said Miscellaneous Application was filed by the IRP based on the Consent Terms dated 19.12.2019 arrived between the



Financial Creditor and the Corporate Debtor. This Tribunal allowed Miscellaneous Application in terms of the Consent Terms, vide its Order dated 10.01.2020. Copy of the Consent Terms dated 19.12.2019 is annexed as **Exhibit – B (pgs 20-28)** and copy of the Order dated 10.01.2020 is annexed to this Addl. Affidavit **Exhibit – C (pgs 29-30)**.

16. The Financial Creditor by way of present Additional Affidavit brings on record subsequent facts and events consequent to the withdrawal of the above-captioned Petition vide order of this Tribunal dated 10.01.2020 which are as under:

(a) 13.01.2020 — In view of the Order dated 10.01.2020 and in furtherance of the said Consent Terms, the Advocates of the Corporate Debtor handed over 12 (twelve) Post dated cheques vide Letter dated 13.01.2020, to the Financial Creditor for the agreed Financial Debt of Rs.8,21,75,781/- along with interest @ 12% p.a. The following are the details of the cheques honoured and dishonoured:

Sr. No.	Cheque No.	Date	Amount (Rs.)	Status
1.	000 403	19.12.2019	50,00,000	Honoured
2.	000 404	15.01.2020	50,00,000	Honoured
3.	000 405	15.04.2020	1,00,00,000	Dishonoured
4.	000 406	15.06.2020	1,00,00,000	Dishonoured
5.	000 407	15.07.2020	1,00,00,000	Dishonoured
6.	000 408	31.07.2020	1,00,00,000	Dishonoured
7.	000 410	15.08.2020	1,00,00,000	Dishonoured
8.	000 411	31.08.2020	1,00,00,000	Dishonoured



9.	000 412	15.09.2020	1,00,00,000	Dishonoured
10.	000 413	30.09.2020	21,75,781	Dishonoured
11.	000 415	30.09.2020	51,73,898	Dishonoured
12.	000417	31.12.2020	15,71,563	Dishonoured
	TOTAL		8,21,75,781	

The Financial Creditor craves to refer and rely upon copies of dishonoured cheques.

- (b) 02.06.2020 — The Financial Creditor vide its email called the Corporate Debtor to pay the entire amount of interest on or before 15.06.2020.
- (c) 12.08.2020 — The Financial Creditor sent another Notice to the Corporate Debtor and its Directors/Personal Guarantors through its Advocate indicating therein breach and non-compliance of the said Consent Terms dated 19.12.2019 and the Order dated 10.01.2020 passed by this Tribunal under Sec.12A of the IBC. Further, the Financial Creditor called upon the Corporate Debtor and its Directors/Personal Guarantors to pay the agreed Financial debt along with interest accruing thereon which was due and as recorded in the said Consent Terms dated 19.12.2019. The conduct of the Corporate Debtor and its Directors is recorded in the Letter dated 13.08.2020 addressed by the Advocates for the Financial Creditor.
- (d) 19.08.2020 — The Financial Creditor invoked insolvency under Sec.95 of the IBC against the Personal Guarantors thereby issuing Demand Notices dated 19.08.2020 to the personal Guarantors (Mr. Pramod Bhosale, Mr. Ajit



Bhosale and Mr. Sanjay Bhosale) for initiation of Insolvency Resolution proceedings in their capacity as Personal Guarantor to the Financial Debt of the Corporate Debtor.

- (e) 25.08.2020 — The Corporate Debtor vide its email and letter dated 25.08.2020 to the Financial Creditor admitted receipt of Legal Notice dated 12.06.2020 by itself along with its Personal Guarantor. The Corporate Debtor once again attempted to delay the process of law and to dissuade the Financial Creditor from taking appropriate legal steps within limitation.
- (f) 03.09.2020 — The Personal Guarantors replied to the demand notice under Sec.95 of IBC once again reiterated the same frivolous excuses and requested to further settle the amount already agreed to pay vide consent terms. The Corporate Debtor did not make the payment.
- (g) 29.09.2020 — The Corporate Debtor and Directors/Personal Guarantors vide its letter in contrary to the aforesaid Consent Terms dated 19.12.2019 requested the Financial Creditor not to deposit the cheque bearing No.000407 dated 15.07.2020 amounting to Rs.1,00,00,000/- (Rupees One crore only), as the last date of payment of same, was 30.09.2020. The said request for an extension was admittedly in breach of Consent Terms.
- (h) 04.10.2020 — The Financial Creditor through its Advocates replied to the Corporate Debtor's letters dated 03.09.2020 and 29.09.2020, wherein the Financial Creditor denied all



the false contentions of the Corporate Debtor. The Financial Creditor refused to grant any more extension which would be contrary to Consent Terms and called upon the Corporate Debtor to pay Financial Debt. The Financial Creditor categorically stated that the Corporate Debtor and its Personal Guarantors were in breach of the Consent Terms.

- (i) The Financial Creditor has also initiated Civil and Criminal Proceedings against the Corporate Debtor and its Directors/Personal, the same are pending.
- (j) As the Corporate Debtor breached the said Consent Terms and Order dated 10.01.2020, the Financial Creditor filed an Interlocutory Application No.1915 of 2020 for the revival of this Company Petition (IB) No.702 of 2019. The Corporate Debtor in its Affidavit in Reply along with its Directors/Personal Guarantor admitted its default in payment of the financial debt. The Corporate Debtor also stated its no objection to the revival of aforesaid Company Petition. Affidavit in Reply of the Corporate Debtor in IA No.1915 of 2020 is annexed to this Addl. Affidavit as Exhibit – D (pages 31.34).
- (k) The Financial Creditor filed Petition under Sec.95 of IBC against all the Personal Guarantors (Mr. Pramod Bhosale, Mr. Ajit Bhosale and Mr. Sanjay Bhosale) bearing CP(IB) No.1405 of 2020; CP(IB) No.1421 and CP(IB) No.20 of 2021 respectively.



- (l) 01.02.2021 — This Tribunal vide its order 0.02.2021 admitted the CP No.1405 of 2021 filed against Directors/Personal Guarantor Mr. Pramod Bhosale and appointed Mr. Prashant Jain having Reg. No. IBBI/IPA-001/IP-P01368/2018-2019/12131 as Resolution Professional (RP). Copy of the Order dated 01.02.2021 is annexed to this Addl. Affidavit as **Exhibit – E (pages 35-38)**.
- (m) 04.02.2021 — This Tribunal vide its order reserved the CP No.1421 of 2020 and CP No.20 of 2021 for Orders filed against the Personal Guarantor Mr. Ajit Bhosal and Mr. Sanjay Bhosale respectively. A copy of the Order dated 04.02.2021 in CP No.1421 of 2020 and copy of Order dated 04.02.2021 in CP No.20 of 2021 are annexed to this Addl. Affidavit as **Exhibit – F (pg 39) & Exhibit – G (pg.40)** respectively.
- (n) 11.02.2021 — In addition to the Consent Terms dated 19.12.2019 the Directors/Personal Guarantor of the Corporate Debtor entered into 3 (three) separate consent terms with the Personal Guarantors to make the payment of the outstanding Financial Debt. The Corporate Debtor has agreed and undertaken to pay to the Financial Creditor an amount of Rs.7,21,76,000/- on such terms and conditions as agreed in the said Consent Terms dated 11.02.2021.

Submissions made by the Corporate Debtor:



17. The Corporate Debtor submits that the Original Company Petition No.702 of 2019 had given details of financial debt in the sum of INR 6,65,00,000/- (Rupees Six crore Sixty-five lakhs only) as the debt granted. The amount claimed to be in default was INR 7,44,80,000/- (Rupees Seven Crore Forty-four lakhs Eighty thousand only).
18. Thereafter, by virtue of consent terms dated 19.12.2019 (First Consent Terms), the parties had entered into the First Consent Terms and settled the matter for a sum of INR 8,21,75,781/- (Rupees Eight crore twenty-one lakhs Seventy-five thousand Seven hundred Eighty-one only).
19. A sum of INR 1,00,00,000 (Rupees One crore only) was paid as per the repayment schedule of the First Consent Terms.
20. Thereafter, the Petitioner filed Interim Application No.1915 of 2020 for revival of the Company Petition No.702 of 2021 on or after September 10, 2020, for the following reliefs:
 - (a) Revive the CP(IB) 702/NCLT/MB/2019 filed under Sec.7 of the Insolvency and Bankruptcy Code, 2016 thereby initiating Corporate Insolvency Resolution Process of the Shivam Parivar Developers Private Limited i.e. Corporate Debtor.
 - (b) Recall the Order dated 10.01.2020 in MA/4102/2019 filed under Sec.12A of the Insolvency and Bankruptcy Code, 2016 on account of breaches and defaults committed by the Corporate Debtor.



- (c) Initiate Corporate Insolvency Resolution Process of the Shivam Parivar Developers Private Limited i.e. Corporate Debtor in terms of Order dated 13.12.2019 passed in CP(IB) 702/NCLT/MB/2019 filed under Sec.7 of IBC, 2016.
- (d) Pass any such further or other order(s) as this Tribunal may deem fit and proper in the facts and circumstances of the case to grant justice to the Applicant.
21. The Corporate Debtor states that during the pendency of the said proceedings, consent terms dated 11.09.2020 (second consent terms), were entered between the parties for settling the dispute for a sum of INR 7,21,00,000 (Rupees Seven crore twenty-one lakhs only).
22. The Corporate Debtor further states that the Financial Creditor without disclosing the second consent terms, pressed for revival of the Company Petition on 10.08.2021, hence the revival itself is contrary to the record since admittedly there is no default considering the execution of second consent terms.
23. The Corporate Debtor submits that the entire amount of INR 7,21,00,000/- (Rupees Seven crore twenty-one lakhs only) in the following manner:

AMI CORPORATION PAYMENT DETAILS			
As per consent term (total amount)			
As per consent term paid amount			
Pay Order No.	Date	Paid amount	Account No.
29015	09.02.2021	90,00,000.00	643405052127
29016	09.02.2021	50,00,000.00	643405052127



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I

CP(IB) 702/MB/2019

29019	10.02.2021	50,00,000.00	643405052127
000533	11.02.2021	76,000.00	643405052127
ICICR42021051500519629 (RTGS)	15.05.2021	3,000,000.00	643405052127
ICICR42021051700516697 (RTGS)	17.05.2021	2,000,000.00	643405052127
24255919221 (RTGS)	31.05.2021	50,00,000.00	643405052127
ICICR42021062800529122 (RTGS)	28.06.2021	50,00,000.00	643405052127
ICICR42021063000528181 (RTGS)	30.06.2021	50,00,000.00	643405052127
CNRBR52021071565352213 (RTGS)	15.07.2021	50,00,000.00	55381010001028
ICICR42021083100526417 (RTGS)	31.08.2021	25,00,000.00	643405052136
ICICR42021090200500282 (RTGS)	02.09.2021	25,00,000.00	643405052136
ICICR4202109140050026 (RTGS)	14.09.2021	250,0,000.00	643405052136
ICICR42021100600525333 (RTGS)	06.10.2021	50,00,000.00	643405052136
ICICR420210112200503829 (RTGS)	22.11.2021	35,00,000.00	643405052136
CMRBS52021120973115894 (RTGS)	9.12.2021	61,00,000.00	55381010001028
BARBH 21347916090 (RTGS)	13.12.2021	10,00,000.00	34320200000027
BARBH 21347916088 (RTGS)	13.12.2021	10,00,000.00	34320200000027
BARBH 21347916195 (RTGS)	13.12.2021	10,00,000.00	34320200000027
BARBH 21347916155 (RTGS)	13.12.2021	10,00,000.00	34320200000027
BARBH 21347916163 (RTGS)	13.12.2021	8,50,000.00	34320200000027
BARBH 21348920688 (RTGS)	14.12.2021	10,00,000.00	34320200000027
BARBV 21348363327	14.12.2021	1,50,000.00	34320200000027
Less : (Paid amount)		5,31,00,000.00	
Total amount paid		7,21,76,000.00	



025722985551 (NEFT)	14.12.2021	25,000/- imposed cost as per NCLT order DTE 02.12.2021
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24. By order dated 03.12.2021, extension of time was granted upon payment of costs which has been duly complied with. While complying with the said Court Order dated 03.12.2021, and during the compliance, the Petitioner has not made any reservations or caveats while accepting the costs as well as the agreed amounts as contemplated under 10(e) of the second consent terms (schedule of payment). Hence, the Petitioner has voluntarily given up any claim under clause 10(h) if at all applicable. It is humbly submitted that the act of the Court cannot cause harm or prejudice to any party. The extension of time was granted to comply with the Settlement terms and to settle the matter. The Respondent has made payments and acted upon the Order. The Petitioner cannot contend that the Respondent should pay more amounts having accepted the Order dated 03.12.2021, and its compliance and that too, without any protest, reservation or caveat.

In addition, paid to AMI Corporation Payment details		
Chq. No.	Date	Paid amount
000403	19.12.2019	50,00,000.00
000404	15.12.2020	50,00,000.00
Total		1,00,00,000.00

25. Clause 10(h) of the Second Consent Terms dated 11.09.2020, reads as under:

h. In the event if the Corporate Debtor, Respondent/Personal Guarantor and the said other two Personal Guarantors or any of them default/fails in making any payment/instalment on their designated due



dated or the allowed extended date/grace period of one week as afore-stated, than the Corporate Debtor, Respondent / Personal Guarantor and the said other two Personal Guarantors agree and undertake as under: -

a. The Corporate Debtor, Respondent / Personal Guarantor and the said other two Personal Guarantors will be liable to pay the full outstanding amount of the Financial Debt together with interest at the rate of 15% per annum (compounded annually) from the date of default till payment and/or realization;

b. Additionally, the Corporate Debtor, Respondent / Personal Guarantor and the said other two Personal Guarantor will be liable to pay a sum of Rs.1,00,00,000/- (Rupees One crore only) as pre-determined liquidated damages to the Financial Creditor immediately on the date of default;

c. It is further agreed that the liquidated damages, as recorded hereinabove, shall stand reduced to a sum of Rs.75,00,000/- (Rupees Seventy Five lakhs only), in the event, the Corporate Debtor, Respondent/Personal Guarantor and the said other two Personal Guarantor successfully make the payment of the amount of the Second Installment as per the respective due date but default in making payment of the amount of the Third Instalment, as recorded hereinabove to the Financial Creditor.

d. Time is the essence of payment of the Financial Debt. The penal interest of 15% p.a. (compounded annually) as afore-stated shall be charged on all outstanding amounts from the date of default to the date of realization of the said amounts.

26. The Corporate Debtor further submits that the Financial Creditor at no point of time informed that they have accepted the amounts



under protest or accepted the payments subject to liquidated damages and penal interest. Hence the Corporate Debtor submits that the Financial Creditor has accepted performance of promise other than that agreed upon and cannot claim compensation for any loss occurred in the non-performance of the promise at the time agreed unless at the time of such acceptance.

27. The Corporate Debtor further submits that several payments made after the notice dated 20.05.2021, at which time, the Petitioner / Financial Creditor has not issued any notice as contemplated under Sec.55 paragraph 3 of the Indian Contract Act, 1872,

Effect of acceptance of performance at time other than that agreed upon—

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives a notice to the promisor of his intention to do so.

28. Further, it is stated that all instalments stand duly paid and the Financial Creditor has not protested the payment receipt nor has the Financial Creditor given notice that it intends to enforce the default clause at the time of receipt of payment or otherwise howsoever. The Financial Creditor filed the Interim Application No.1915 of 2020 for revival of the above captioned Company Petition without reference to the Second Consent Terms and the subsequent facts that have followed.

29. Section 61 of the Indian Contract Act reads as under:



61. Application of payment where neither party appropriates — where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally.

30. The Financial Creditor rely upon the said section in paragraph 10 of the Written Submissions and states that according to the Financial Creditor, there is no appropriation, the payment shall be applied in discharge of debts in order of time. Further submits that in the present case, the order of time requires the first payment of instalments. Therefore, there is no question of any liquidated damages or other additional interest being payable. There is no question of the payment being applied proportionately since there is no debt of equal standing. Further submitted that the Additional Affidavit dated 14.09.2021, filed by the Financial Creditor, does not plead that they have appropriated the amounts towards the liquidated damages and interest and there is no question of the same being a liability or a debt as understood under the IBC, 2016.
31. The Corporate Debtor further submits that the claim in liquidated damages is not tenable as in the facts and circumstances of the present case, the liquidated damages is not a matter of right. It has been voluntarily given up and the claim now sought to be made is not even as per any appropriation made whereby “principal” amount is due. The case argued and the case pleaded is completely at variance. The Additional Affidavit filed by the Petitioner makes out no case for appropriating a sum of INR 1,33,00,000/- whereby balance principal stands outstanding. In para 10 of the Written



submissions the case is of proportionate appropriation which is not applicable on a simple reading of section 61 of the Indian Contract Act. The Corporate Debtor argues that even reading of clause 10(h) shows that the amount of INR 1,33,00,000 is wrongly claimed and most importantly, the entire claim for damages is given up. Notwithstanding the above, considering the totality of the facts, there is serious dispute about the claim made and that too by way of an Additional Affidavit. It is pertinent that the main Company Petition No.702 of 2019 has not been amended despite its revival and there is no case of there being any payment of balance amount being due and payable.

32. The Corporate Debtor in the Additional Affidavit dated 14.12.2021, in para 17 states that there is no claim that survives on the following ground and the same has not been controverted by the Financial Creditor despite being served prior to the hearing on 15.12.2021 but insisted for hearing without choosing to deal with the said Affidavit.

13) I state that Corporate Debtor had been making regular monthly payments of a substantial value and as on the previous date of hearing, i.e. December 2, 2021, of the above captioned Company Petition, the Corporate Debtor had already paid a sum of INR 1,60,00,000/- towards the third and final instalment as per the second consent term and was, as on the date of the hearing, required to only pay an amount of INR 1,21,00,000/- towards the full and final settlement of the claim.

14) I state that the Hon'ble Tribunal, vide hearing dated December 2, 2021 had called upon the Corporate Debtor to settle all outstanding dues and pay the sum as stated in the above company Petition by and before December 9, 2021, transferred a sum of INR



61,00,000/- to the Financial Creditor. Further, the Corporate Debtor, on 11.12.2021, transferred a sum of INR 48,50,000/- to the Financial Creditor and transferred the remaining amount of INR 11,50,000/- to the Financial Creditor on 14.12.2021.

15) I state that vide the hearing of the above captioned Company Petition on 02.12.2021, the Hon'ble Tribunal had also imposed a cost of INR 25,000/- on the Corporate Debtor which was due and payable to the Financial Creditor. I state that the Corporate Debtor has transferred the sum of INR 25,000/- on 14.12.2021, to the Financial Creditor.

16) I state that the Corporate Debtor has complied with all the directions passed by the Hon'ble Tribunal on 02.12.2021. the Corporate Debtor has paid the sum as was claimed by the Financial Creditor in the above captioned Company Petition and therefore, there is no outstanding dues pending which are payable by the Corporate Debtor to the Financial Creditor. Annexed and marked as Annexure – I is the total balance sheet in respect of the payments made by the Corporate Debtor to the Financial Creditor.

17) Further, I state that all instalments stand duly paid and the Financial Creditor has not protested the payment receipt nor has the Financial Creditor given notice that it intends to enforce the default clause at the time of receipt of payment or otherwise howsoever. The Financial Creditor filed the Interim Application No.1915 of 2020 for revival of the above captioned Company Petition without reference to the Second Consent Terms and the subsequent facts that have followed.

18) In view of the settlement of all claims of the Financial Creditor by the Corporate Debtor, it is prayed before this Hon'ble Tribunal that the above captioned Company Petition be withdrawn.



33. It is further stated that the payments made either before or after the notice dated 20.05.2021, as per clause 10(e) of the Consent terms dated 11.02.2021, the payment was to be made in three instalments. Admittedly, the first instalment was paid in time. The second and third instalments have also been paid without any protest and a conjoint reading of Section 65(3) and 61 makes it clear that the amount contemplated under the second terms has been fully paid.
34. The Corporate Debtor further submit that if the Petitioner insist on the payment of INR 1,33,00,000/-, there is a pre-existing dispute considering the same. (Considering the reading of clause 10(h) sub-clause 3 and 4, there is even dispute with regard to the very existence of the claim to the Liquidated damages and interest.
35. To buttress the arguments, the Corporate Debtor relied upon the following case laws:

The National Company Law Tribunal, Mumbai Bench in the matter of **Gujarat Urja Vikas Nigam Limited versus Nitash Co-generation Private Limited**, observed that —

“22. It is submitted that the claim in hand purports to be in respect of losses in form of ‘liquidated damages’. This is not a claim for providing goods or services. The meaning of damages is clear from the decision of the Bombay High Court in the case of Iron & Hardware (India) Co. V. Shamlal [MANU/MH/0115/1954: ILR 1954 BOM 739], Order dated 14.01.1954, wherein it was observed that “damages are compensation which a court of law gives to a party for the injury which he has sustained”. Therefore, the present claim is out of the ambit of the provisions of the code.



27. *As held by the Hon'ble Supreme Court in the case of Union of India V. Raman Iron Foundry. [1974 AIR 1265], order dated 12.03.1974:*

The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligations, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to issue for damages. That is not in actionable claim and this position is made amply clear by the amendment in Sec.6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.

28. *Further, in the case of E-City Media Pvt. Ltd. V. Sadhrta Retail Ltd. [CP 367/2009] the Hon'ble Bombay High Court held that: "If the clause in the present case is regarded as being a clause which stipulates the payment of a named sum by way of liquidated damages a debt will*



become crystallized only upon an adjudication of damages in a suit. Prior to an adjudication, it still constitutes a claim for damages. The decree of the court is what transforms the claim into a stated sum due and payable by way of damages. Whether the amount is reasonable or by way of penalty are evidential matters which cannot be decided in a petition for winding u. for, as the judgement in Saw Pipes holds, even if the sum stipulated by way of liquidated damages is clear, the jurisdiction of the Civil Court extends to determining whether it is unreasonable or by way of penalty. All these issues have to be decided in a suit. Whether or not evidential proof will be required to sustain such a claim is again a matter for the trial Court or, as the case may eb, an arbitral forum to decide. The Petition for winding up would manifestly not be maintainable. Until an adjudication results in duly constituted proceedings, it cannot be held that there is a debt due and payable”.

30. *A conclusion can be drawn from a plain reading of the above said judgements that the liquidated damages arises on breach of contract for which a suit can be filed wherein the damages are required to be ascertained because the said damages must not be allowed arbitrarily. Hence liquidated damages can be crystallized only after adjudication from a court of law. Its reasonableness is also decided by a court of law on the other hand, the insolvency proceedings are not the appropriate forum to decide the reasonability of the liquidated damages or to file claim for damages. Hence, the damages claimed in the present case cannot be adjudicated as the same is the subject⁶ matter of a civil suit. Liquidated damages are not an actionable claim, until and unless adjudicated. This is the first reason for not considering the liquidated damages as ‘operational debt’.*



31. *Liquidated damages are provided in certain legal contracts as an estimate of otherwise intangible or hard-to-define losses to one of the parties. As against that, the meaning of 'operational debt' is a claim in respect of goods supplied, or services rendered as defined in section 5(21) of the Code. Therefore, it can be concluded that the impugned claim of damages, neither ascertainable nor crystallized, hence out of the ambits of the Operational Debt. This is the second reason for rejection.'*

32. *In addition to the reasoning assigned in above paragraph, it is an admitted fact that the Petitioner had neither supplied any goods nor rendered any service to the other side, hence, there was no relationship of creditor on one hand and the debtor on the other hand as defined under Section 5(21) of the Code. The contract was for the performance of Power Purchase Agreement wherein the Corporate Debtor had to set up a project before the Scheduled Commercial operation date which was 06.06.2011. The Corporate Debtor failed to do the same and thus it was merely in the nature of impugned penalty for damages caused due to no-performance of contract. The scope of liquidated damages is distinct from Operational Debt, albeit, very thin. As far as this case is concerned, the admitted facts itself have drawn this distinction broadly. This is the third reason for not considering this claim as operational debt.*

33. *It is worth to note that the scope and jurisdiction of this Tribunal is limited and also confined to the provisions of Insolvency Code only while dealing a Petition filed under Section 9, therefore, the impugned Debt in question does not fall within those ambits. However, the claim under any other law, if permissible, can be pursued by the Petitioner as prescribed under any other law. Any observation, legal or factual, shall not prejudice the rights of the Petitioner, if to be exercised under any other law."*



36. Further, in the case of Karnataka State Financial Corporation versus Namasthe Exports Pvt. Ltd., the National Company Law Tribunal, has observed as follows:

“8. *Without prejudice, we may also state that the entire exercise of repayment of debt in this Petition is an exercise in recovery. Once the matters have been brought under the IBC 2016, and all earlier matters have abated, they have to be considered under the provisions of the Code. It is a settled position of law that the provisions of the Code cannot be invoked for recovery of outstanding amount but can be invoked to initiate CIRP for justified reasons as per the Code. The Hon’ble Supreme Court in the case of Mobilox Innovations Private Limited v. Kirusa Software Private Limited, has inter alia, held that I&B Code, 2016 is not intended to be substitute to a recovery forum.*

Further, in another latest judgement rendered in Transmission Corporation of A.P. Ltd. v. Equipment Conductors and Cables Ltd., Hon’ble Supreme Court of India has inter alia held that existence of an undisputed debt is since quo non of initiating CIRP. In the instant case there was no debt within the meaning of the Code. Even if there may otherwise be amounts payable by the Respondent, and that too was disputed from the very beginning requiring the intervention of the BIFR with the Petitioner opposing various proposals, from time to time. There was therefore, no clear debt. Proceedings under the Code are summary proceedings where the debt, if any, has to be undisputed and clear. This is not the case here.”

37. In the case of TATA Chemicals Limited versus Raj Process Equipments and Systems Private Limited, the National Company Law Tribunal of the Mumbai Bench, observed that —



“18. It is further stated that when an obligation resembling those created by contract has been incurred and has not been discharged, any persons injured by the failure to discharge it, is entitled to receive the same compensation from the party in default, as if such person has contracted to discharge it, and had broken his contract.

19. In this case, the Petitioner has raised claim of Rs.5,00,000/- per day for loss of production, which is not only in nature of consequential damages, but also completely arbitrary and baseless, which cannot be relied upon in absence of adjudication. The alleged claim is not adjudicated by any competent authority in law, and hence, such a claim cannot be described as “Operational Debt”.

20. In case of E-City Media Private Limited vs. Sadhrta Retail Limited in CP No.367 of 2009, the Hon’ble High Court of Judicature at Bombay has held that “The Petition for winding up cannot be maintained upon a claim for damages. Damages become payable only when they are crystallized upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. Damages require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallized.”

21. Further, in case of Union of India vs Raman Iron Foundry (9174 AIR 1265, 1974 SCR (3) 556), it has been held that “the claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon and damages assessed by an adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eoinstanti incur any pecuniary obligation nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach has is the right to sue for damages, and this is not an actionable claim.”



38. We have heard the counsels appearing for both sides and perused the records.
39. The main contention of the Corporate Debtor is that amount claimed by the corporate debtor is amount settled vide Consent term/settlement agreement dated 19.12.2019. Therefore, Petition is not maintainable as petition does not fall within the ambit of section 5(8) of Insolvency and Bankruptcy Code, 2016 as debt claimed is not financial debt.
40. Upon perusal of records it is noted that Consent terms dated 19.12.2019 entered between parties clause 12 provide that there was undertaking on behalf of Respondent about revival of the Company Petition in case of default. Clause 12 is as follows:

“12. The obligations undertaken by the Corporate Debtor under these present Consent Terms more particularly stated in these Consent Terms shall be treated as undertakings given by the Corporate Debtor to this Hon'ble Tribunal and the Applicant in addition to the remedies available to him under law, shall be duly entitled to initiate appropriate proceedings against the Corporate Debtor, in case of default, including execution of these Consent Terms and /or making Application to this Hon'ble Tribunal for revival of the captioned Petition, wherein the litigation cost and/or any other cost associated with the proceedings will be solely borne by the Corporate Debtor.”

41. The Hon'ble NCLAT, Delhi, by the judgement passed in the matter of **IDBI Trusteeship Services Limited vs. Nirmal Lifestyle Limited Company Appeal (AT) (Insolvency) No.117 of 2023 dated 15.05.2023**, wherein while discussing this issue, it



was observed that when the consent terms itself contains clause for revival, not giving liberty specifically for revival by the Adjudicating authority is inconsequential.

42. We also consider the facts of the case in the lights of the Order passed by Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition.
43. Upon perusal of records, this Bench is of the considered opinion that there is no dispute regarding the Corporate Debtor owes money to the Financial Creditor.
44. The Financial Creditor has proposed the name of **Mr. Rajesh S. Shah**, Registration No. IBBI/IPA-002/IP/N-00592/2018-2019/11881, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration.
45. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this,



this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

46. It is, accordingly, hereby ordered as follows: -

- (a) The Petition bearing **CP (IB) 702/MB/2019** filed by **Mr. NIPUN THAKKAR Sole Proprietor of AMI CORPORATION**, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **SHIVAM PARIVAR DEVELOPERS PRIVATE LIMITED [CIN: U45200MH2005PTC152371]**, the Corporate Debtor, is **admitted**.
- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
 - (i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;



- (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium:-
- (i) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
- (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) **Mr. Rajesh S. Shah**, Registration No. IBBI/IPA-002/IP/N-00592/2018-2019/11881, having address at 635/84, Sisharth, Vijayanagar Colony, Next to MSEDCL Building, Opp to Neelayam Theatre, Pune 411030, is hereby appointed



as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Financial Creditor shall deposit a sum of Rs.2,00,000/- (Rupees Two Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of



Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

23.06.2023
SAM

Sd/-

H. V. SUBBA RAO
Member (Judicial)