IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

C.P (IB) No.1128/KB/2019

In the matter of

An application under 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of:

Punjab National Bank, a body corporate, constituted under the Banking Companies (Acquisition & Transfer of Undertaking) Act, 1970, having its Head office at Plot No.4, Sector 10, Dwarka, New Delhi-110075 and the successor of Oriental Bank of Commerce, by a scheme of amalgamation of Oriental Bank of Commerce/United Bank of India, passed by the Central Government under section 9 of the Banking Companies/(Acquisition & Transfer of Undertaking) Act, 1980 through Zonal Sastra, Kolkata, at United Tower, 3rd Floor at 11, Hemanta Basu Sarani, Kolkata-700001.

… Financial Creditor

Versus

In the matter of:

M/s Krishna Alex Private Limited, a private Limited Company registered under the Companies Act, 1956, CIN: U28113WB2002PTC094809 having its Registered Office at 121, Chittaranjan Avenue, Kolkata-700073..

…Corporate Debtor

Date of hearing : 28/06/2021

Order Pronounced on :14/09/2021

Coram:

Mr. Rajasekhar V.K., Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Joy Saha, Sr. Advocate } For the Financial Creditor
2. Md. Nasiruddin, Advocate }
3. Mr. Sourojit Dasgupta, Advocate }

1. Mr. Jishnu Chowdhury, Advocate }
2. Mr. Ratul Das, Advocate } For the Corporate Debtor
3. Ms. Sutapa Mitra, Advocate }

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. By way of this application filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, **Punjab National Bank,** a body corporate having its Head Office at New Delhi and the successor of Oriental Bank of Commerce by a scheme of amalgamation of Oriental Bank of Commerce/United Bank of India passed by the Central Government under section 9 of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1980 (hereinafter referred as the Financial Creditor) has sought initiation of Corporate Insolvency Resolution Process in respect of **M/s Krishna Alex Private Limited** having CIN: U28113WB2002PTC094809 and having its Registered Office at 121, Chittaranjan Avenue, Kolkata-700073 (hereinafter referred as the Corporate Debtor). This application is supported by an affidavit of Mr. Rajesh Kumar, Assistant General Manager of the Financial Creditor, who has been duly authorised vide letter of authority dated 14/06/2019 to make any pleadings and file affidavits and also to do all other acts necessary for filing the application under the Insolvency Bankruptcy Code, 2016.

3. It is submitted in the application, Part-II that the authorised share capital of the Corporate Debtor is Rs.3,00,00,000/- (Rupees Three Crores Only), with 30,00,000 Equity shares of Rs.10/- each (Financial

Year 2017-18). It has issued paid-up share capital of Rs.2,29,82,000/- (Rupees Two Crore Twenty-Nine Lakh Eighty-Two Thousand only) with 22,98,200 Non-cumulative share of Rs.10/- each. It is submitted in Part IV of the application that the Financial Creditor had granted a Cash Credit (Hypothecation) limit of Rs.10.50 Crore, Bank Guarantee limit of Rs.50.00 Lakh, Letter of Credit limit of Rs.7.50 Crore and Forward Contract limit of Rs.7.50 Crore (Credit equivalent to Rs.38.00 Lakh). It is stated that the total amount sanctioned was Rs.18.88 Crores, to the Corporate Debtor.

4. The Financial Creditor further submits that the Corporate Debtor committed default in payment of Rs.11,45,39,903.94 (Rupees Eleven Crore Forty-Five Lakh Thirty-Nine Thousand Nine Hundred Three and Paise Ninety-Four only) as on 08/12/2017 and the debt due was classified as Non-Performing Asset on 17/03/2018 to the tune of Rs.12,96,64,085.94 (Rupees Twelve Crore Ninety Six Lacs Sixty Four Thousand Eighty-Five and Paise Ninety Four only). It is further submitted that the total outstanding inclusive of interest calculated up to 31.05.2019 is Rs.19,63,61,994.50 (Rupees Nineteen Crores Sixty-Three Lacs Sixty One Thousand Nine Hundred Ninety Four and Fifty Paise). The computation of outstanding amount with days of default is annexed with the application as (Annexure-I to the application).

5. The Financial Creditor in support of its claim has annexed various documents, records and evidence of default, which are enumerated as under:-

1.	**PARTICULARS OF SECURITY HELD BY THE FINANCIAL CREDITOR** Particulars of security held **SCHEDULE-I REFERRED TO ABOVE** 1ST Pari-Passu charge of stock in trade, Receivables and other current assets of the company present and future of the Corporate

	Debtor on a pari-passu basis with other working capital lenders/banks
2.	Original Application No.335 of 2019, before the Ld. DRT-III, Kolkata, but till now no order was passed.
3.	Record of Default with the information Utility, if any(Attach a Copy of such Record): NA
4.	Record of Default with the information Utility, if any (Attach a copy of Such Record): CRILC Report dated 14.06.2019.
5.	Details of Succession Certificate, or Probate of A Will, or Letter of Administration, Or Court Decree (As Maybe Applicable), Under the Indian Succession Act, 1925 (10 of 1925)-NA
6.	The latest and Complete copy of the Financial Contract Reflecting all Amendments and waivers to date-NA
7.	A Record of Default as available with any credit information company (Attach a copy)-NA
8	Copies of Entries in a Bankers Book in Accordance with the Bankers Books Evidence Act, 1981 (18 of 1891) (Attach a Copy) Entries in Banker's Books Evidence Act, being the Statements of Account duly certified under the Banker's Books Evidence Act, 1981 are annexed at Serial No.IV of Annexure "I" hereto.
9.	List of Other documents attached to this application in order to prove the existence of the financial debt, the Amount and Date of Default.
i)	Certified true copy of Letter of Sanction of the Financial Creditor 28.05.2005 being Serial V of Annexure "I" hereto.
ii)	Certified true copy of Agreement of Hypothecation of Assets being known as Loan Doc-1 dated 30.06.2006 executed by the Corporate Debtor being Serial VI of Annexure "I" hereto
iii)	Certified true copy of Agreement of Term Loan being known as Loan Doc-5 dated 30.06.2005 executed by the Corporate Debtor being Serial VII of Annexure "I" hereto

iv)	Certified true copy of the Counter Guarantee Agreement being known as Loan Doc-12 dated 30.06.2005 executed by the Corporate Debtor being Serial No.VIII of Annexure “I” hereto
v)	Certified true copy of Common Agreement being known as Doc -38 dated 30.06.2005 executed by the Corporate Debtor, being Serial IX of Annexure “I” hereto
vi)	Certified true copy of memorandum of Deposit of Title Deed dated 30.06.2005 executed by the Corporate being Serial X of Annexure “I” hereto
vii)	Certified true copy of Letter of Sanction dated 06.02.2007 of Financial Creditor being Serial XI of Annexure “I” hereto
viii)	Certified true copy of Board Resolution held on 16.02.2007 of the Corporate Debtor being Serial XII of Annexure “I” hereto
ix)	Certified true copy supplementary Agreement being known as Loan Doc-13 dated 16/02/2007 executed by the Corporate Debtor being Serial XIII of Annexure “I” hereto
x)	Certified true copy Counter Guarantee Agreement being known as Loan Doc- 12 dated 16.02.2007 executed by the Corporate Debtor being Serial XIV of Annexure “I” hereto
xi)	Certified true copy of Common Agreement being known as Doc-38 dated 16.02.2007 executed by the Corporate Debtor being Serial XV of Annexure “I” hereto
xii)	Certified true copy of Balance and Security Confirmation being known as Loan Doc-20 dated 16.02.2007 supported by Board Resolution held on 16.02.2007 executed by the Corporate Debtor being Serial XVI OF Annexure “I” hereto.
xiii)	Certified true copy of Documents known as LTR-18.2 dated 17.02.2007 executed by the Corporate Debtor being Serial XVII of Annexure “I” hereto
xiv)	Certified true copy of Letter of the Sanction of the Financial Creditor dated 10.9.2008 being Serial XVIII of Annexure “I” hereto

xv)	Certified true copy of the Board Resolution dated 27.09.2008 of the Corporate Debtor being Serial XIX of Annexure "I" hereto.
xvi)	Certified true copy of the Supplementary Agreement being known as Loan Doc-13 dated 27.09.2008 executed by the Corporate Debtor being serial XX of Annexure "I" hereto.
xvii)	Certified true copy of the Counter Guarantee Agreement being known as Loan Doc-12 dated 27.09.2008 executed by the Corporates Debtor being Serial XXI of Annexure "I" hereto.
xviii)	Certified true copy of Agreement of Term Loan being Know as Loan Doc-5 dated 27.09.2008 executed by the Corporate Debtor being Serial XXII
xix)	Certified true copy Common Agreement being known as Doc-38 dated 27.09.2008 executed by Corporate Debtor being Serial XXIII of Annexure "I" hereto
xx)	Certified true copy of Balance and Security Confirmation being known as Loan Doc-20 dated 27.09.2008 executed by the Corporate Debtor being Serial XXIV of Annexure "I" hereto
xxi)	Certified true copy of LTR-1 dated 27.09.2008 of the Corporate Debtor being Serial XXV of Annexure "I" hereto.
xxii)	Certified true copy of the Document known as LTR-22 dated 24.09.2008 executed by the Corporate Debtor being Serial XXVI of Annexure "I" hereto.
xxiii)	Certified true copy of Letter of Sanction dated 19.04.2010 of the Financial Creditor being Serial XXVII of Annexure "I" hereto.
xxiv)	Certified true Board Resolution dated 06.09.2010 of the Corporate Debtor being Serial XXVIII of Annexure "I" hereto
xxv)	Certified true copy of the Balance and Security confirmation being known as Loan Doc-20 dated 06.09.2010 executed by the Corporate Debtor being Serial XXIX of Annexure "I" hereto.
xxvi)	Certified true copy of Letter of Sanction dated 28.12.2011 of the Financial Creditor being Serial XXX of Annexure "I" hereto.

xvii)	Certified true copy of Board Resolution dated 14.05.2012 of the Corporate Debtor being Serial No. XXXI of Annexure "I" hereto.
xviii)	Certified true copy of Balance and Security confirmation being known as Loan Doc-20 dated 21.05.2012 executed by the Corporate Debtor being Serial No. XXXII of Annexure "I" hereto.
xxix)	Certified true copy of Inter-se-Agreement dated 19.10.2012 executed by the Corporate Debtor being Serial No. XXXIII of Annexure "I" hereto.
xxx)	Certified true copy of Facility Agreement Consortium Term Loan dated 19.10.2012 executed by the Corporate Debtor being Serial XXXIV of Annexure "I" hereto.
xxxi)	Certified true copy of Joint Deed of Hypothecation dated 19.10.2012 executed by the Corporate Debtor being Serial XXXV of Annexure "I" hereto.
xxii)	Certified true copy of Joint Deed of Hypothecation (Term Loan) dated 19.10.2012 executed by the Corporate Debtor being Serial XXXVI of Annexure "I" hereto.
xxiii)	Certified true copy of Working Capital Consortium Agreement dated 19.10.2012 executed by the Corporate Debtor being Serial XXXVII of Annexure "I" hereto.
xxiv)	Certified true copy of Letter of Sanction dated 31.03.2013 of the Corporate Debtor being Serial XXXVIII of Annexure "I" hereto.
xxv)	Certified true copy of Board Resolution dated 03.04.2014 of the Corporate Debtor being Serial No. XXXIX of Annexure "I" hereto.
xxvi)	Certified true copy of the Letter of Sanction dated 18.10.2014 of the Corporate Debtor being serial No. XLI of Annexure "I" hereto.
xvii)	Certified true copy of the Board Resolution held on 28.10.2014 of the Corporate Debtor being Serial No. XLII of Annexure "I" hereto.
xviii)	Certified true copy of the Agreement of Hypothecation of Assets being known as Loan Doc -1 dated 20.11. 2014 executed by the Corporate Debtor being Serial No. XLIII of Annexure "I" hereto.

xxix)	Certified true copy of the Counter Guarantee Agreement being known as Loan Doc-12 dated 20.11.2014 being Serial No. XLIV of Annexure "I" hereto.
xl)	Certified true copy of the Supplemental Agreement being known as Loan Doc-13 dated 20.11.2014 being known as Corporate Debtor Serial No. XLV of Annexure "I" hereto.
xli)	Certified true copy of the Common Agreement being known as Doc-38 dated 20.11.2014 executed by the Corporate Debtor being Serial No. XLVI of Annexure "I" hereto.
xlii)	Certified true copy of the Balance and Security Confirmation being known as Loan Doc-20 dated 28.10.2014 supported by Board Resolution held on 28.10.2014 being Serial No. XLVII of Annexure "I" hereto.
xliii)	Certified true copy of the Annexure D dated 21.11.2014 executed by the Corporate Debtor being Serial No. XLVIII of Annexure "I" hereto.
xliv)	Certified true copy of Working capital Consortium Agreement dated 30.07.2015 executed by the Corporate Debtor being Serial No. XLIX of Annexure "I".
xlv)	Certified true copy of Inter-se- Agreement datd 30.07.2015 executed by the Corporate Debtor being Serial No. L of Annexure "I" hereto.
xlvi)	Certified true copy of Joint Deed of Hypothecation dated 30.07.2015 executed by the Corporate Debtor being Serial No. LI of Annexure "I" hereto.
xlvii)	Certified true copy of the Letter of sanction dated 31.03.2016 of the Financial Creditor being Serial No. LII of Annexure "I" hereto.
xlviii)	Certified true copy of the Letter of approval dated 18.07.2016 of Financial Creditor regarding rate of interest being Serial No. LIII of Annexure "I" hereto.
xlix)	Certified true copy of Board Resolution held on 06.02.2017 of the

	Corporate Debtor being Serial No. LIV of Annexure “I” hereto.
l)	Certified true copy of Balance and security confirmation being known as loan Doc-20 dated 07.02.2017 executed being Serial No. LV of Annexure “I” hereto.
li)	Certified true copy of Letter of sanction of the Financial Creditor dated 13.10.2017 executed by the Corporate Debtor being Serial No. LVI of Annexure “I” hereto.
lii)	Certified true copy of Board Resolution of the Corporate Debtor dated 29.11.2017 executed by the Corporate Debtor being Serial No. LVII of Annexure “I” hereto
liii)	Balance and security confirmation of the Corporate Debtor dated 29.11.2017 supported by Board Resolution held on 29.11.2017 executed by the Corporate Debtor being Serial No. LVIII of Annexure “I” hereto.
liv)	Certified true copy of the letter of the Financial Creditor dated 05.03.2018 being Serial No. LIX of Annexure “I” hereto.
lv)	Certified true copy of the letter of the Financial Creditor dated 03.04.2018 being Serial No. LX of Annexure “I” hereto.
lvi)	Certified true copy of the Recall Notice under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 dated 10.04.2018 being Serial No. LXI of Annexure “I” hereto.
lvii)	Certified true copy of the A/D showing the receipt of the notice dated 10.04.2018 of the Financial Creditor being Serial No. LXII of Annexure “I” hereto.
lviii)	Certified true copy of the Demand Notice through Advocate Md. Nasiruddin of the Applicant /Bank dated 16.05.2019 of the Financial Creditor being Serial No. LXIII of Annexure “I” hereto.
lix)	Certified true copy of the postal receipts of the demand notice dated 16.05.2019 of the Financial Creditor being serial no. LXIV of Annexure “I” hereto.

lx)	Certified true copy of the Track Report dated 17.05.2019 of the Financial Creditor & A/D being serial No. LXV of Annexure "I" hereto.

6. The Financial Creditor has further proposed the name of **Smt. Rachna Jhunjhunwala**, Insolvency Professional with the Registration No. **IBBI/IPA-001/IP-P00389/2017-18/10707**, who has filed Form-2 with this Adjudicating Authority giving her consent to her appointment as the IRP, if an admission order is passed in the present application. She has further, *inter alia,* mentioned that she is serving as RP in only one case and no disciplinary proceedings are pending against her either with the Board or with the Indian Institute of Insolvency Professional of ICAI.

7. The Corporate Debtor in its Reply-affidavit dated 11th November, 2019 through one of its Directors Mr. Sumit Agarwal has submitted that the Corporate Debtor was incorporated on 27.06.2002 and the factory of Company was set up in January 2006 and was further expanded in September 2010. The Second Unit of the Company was set up in March 2011 and was expanded in October 2011. It is submitted that the Company was absolutely well and sound from 2006-2007 to 2017-2018 as mentioned in Para IV of the affidavit. It is further submitted that the turnover of the Company was increasing gradually and achieved good profit margins. It is stated that on 05.07.2016, the Company faced a major accident due to an explosion caused in Ageing machine, which caused the death of few workmen resulting in the closure of the factory from 05/07/2016 to 29/07/2016. Due to the said accident production of the company totally stopped and it faced a deep jolt, which led to the turmoil condition in the said company. It is further stated that the Company had gone under maintenance from 29/07/2016 to 30/11/2016, during which period the company suffered huge losses due to the said formidable accident. It is stated that the renovation of the said company started from 01/12/2016 onwards. The company filed its insurance claim of Rs. 250 lakhs for the period September 2016 to 2017

and submitted various documents but the Insurance Company repudiated the claim of the Corporate Debtor on frivolous grounds. The Company took recourse to the appropriate Court of justice challenging the said repudiation of the claim made by the Insurance Company. It is stated that from July 2016 to December 2017 despite facing heavy losses, the company made various payments to the Financial Creditor to the tune of Rs. 8,97,38,379/- as mentioned in Para X. It is further stated in the affidavit that the company has suffered disaster due to the said accident and the said losses are yet to be recovered.

8. It is further submitted that the credit for the recovery of which the Financial Creditor has filed the petition, is a Consortium loan and Allahabad Bank and Bank of Baroda are the part of said Consortium and Allahabad Bank is the lead bank in the said Consortium which has already taken measures under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and also preferred the Original Application before the Debts Recovery Tribunal at Kolkata for recovery of its dues, and those proceedings are challenged by the Corporate Debtor and are stated to be pending for adjudication.

9. It is stated that there was several joint lenders' meeting held for the loan account of the said company at the office of the lead bank and jointly the financial creditors took for recovery of the dues. In such a meeting held on 07/08/2019, the insurance policies of the said company had been handed over to the lender banks for realizing their dues from the claim amount payable by the insurance company for the said accident having taken place in the year 2016 but the lenders did not take any proper step to realise the claim and left it over in an unreasonable manner.

10. It is stated that due to such indolence of the lenders, ultimately the corporate debtor took initiative to realize their legitimate insurance claim but after the lapse of one and a half years, the insurance company has

repudiated the claim of the Corporate Debtor on a very lame point. Such repudiation has been challenged by the Corporate Debtor before the appropriate Court of law.

11. It is further stated that meanwhile the Corporate Debtor submitted the restructuring proposal before the Consortium for the survival of the said company, which is reflected in the minutes of the meeting held on 05.07.2018 and 10.05.2018 in between the lender banks and the present corporate debtor. The said restructuring proposal is still pending proper consideration.

12. It is stated that it would be clear from the extract of the minutes of the Consortium meeting dated 21.09.2017, that the company has achieved sales of Rs. 40 crore for the half-year ending September 2017. The main reason attributed to lower sales was the impact of demonetisation and implementation of GST.

13. It is stated that in the year 2017, the company has achieved sales of Rs. 40 crore for the half-year ending September 2017. Due to the demonetization and implementation of GST as well as the depression in the market condition, the company is running at loss presently but there is enough potential in the said company to survive. The process of insolvency can stop only the wheel of the factory but cannot invent a new organization. It is better to provide the appropriate time to the Corporate Debtor to refund the credits to the lender bank otherwise foreclosure of the company is not an appropriate remedy to realise the dues of the Financial Creditor.

14. It is further submitted that the lead bank of the Consortium *i.e.* Allahabad Bank has taken possession of the assets and properties of the company under the possession notice dated 22.01.2019 issued under the provisions of section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and has already created a charge over the said property.

15. The Corporate Debtor further stated that in the circumstances stated in the affidavit, the Corporate Debtor is a running company and striving for reorganizing its lost honour, and the liquidation will only succumb the bright future of the said company and livelihood of the thousands of workers and, therefore, the company may be given an opportunity to survive because its survival can recover its position. It is further submitted that the Corporate Debtor is trying hard to settle the dispute amicably with the Financial Creditor and other members of the Consortium by paying their legitimate dues and pray for time to settle the dispute.

16. In the rejoinder filed on 16th January 2020 to the reply-affidavit of the Corporate Debtor, the Financial Creditor denied the averments mentioned in the reply-affidavit by the Corporate Debtor that the Financial Creditor had failed or neglected to render any kind of cooperation during the period of acute need. It is reiterated that all types of cooperation to the Corporate Debtor was provided by the Financial Creditor and approved the holding on operation with 10% cut back in Cash Credit & Letter of Credit Account as is reflected in the letter of the Financial Creditor dated 18th October 2017 (Annexure-"X") to the rejoinder. The Financial Creditor further submitted in Para '11' of the rejoinder that the Corporate Debtor agitated that Insurance Policy of the Corporate Debtor had been handed over to the lender bank for realizing their dues from the claim amount payable by the Insurance Company for the said accident that took place in the year 2016, which does not tally with the Minutes of the meeting of Consortium Member held on 07.08.2019. It is denied that the lenders had not taken any proper steps to realize the claim and left it over in an unreasonable manner. It is further submitted that the restructuring proposal had been declined by the lender bank from time to time as the said proposal was not bankable and finally the OTS proposal of the Corporate Debtor was dealt with, in the meeting of the Consortium Member banks held on 16th December

2019 in presence of Directors of the Corporate Debtor and after due discussions with the Directors of the Corporate Debtor, the OTS proposal was declined with instructions to improve the offer which should be acceptable to the Bank but both the Directors expressed their inability to increase offer amount and accordingly the OTS proposal was declined on 16th December 2016 as mentioned in the minutes of the Consortium member banks on 16th December 2019. (Annexure "X-1") to the rejoinder.

17. It is submitted by the Financial Creditor that the Corporate Debtor had informed that the company has achieved sales of Rs.40.00 Crore for the half-year, and informed that the main reason attributed for the lower sales is the impact of demonetization and GST implementation without supporting documents and that the Financial Creditor denied that due to demonization and implementation of GST as well as depression in the market condition, the Corporate Debtor is running in loss or that the process of insolvency could stop only the wheel of the factory but could not invent a new organization. The Financial Creditor further denied the need to provide any further time to the Corporate Debtor to refund the credits to the lender bank.

18. The Financial Creditor in its rejoinder to reply affidavit denied that the liquidation can only succumb the bright future of the said company or will destroy the livelihood of thousands of workers in the organization or that any opportunity of survival could be given. It is submitted that several opportunities and sufficient time had already been allowed by the Financial Creditor and other members of the Consortium banks but the Corporate Debtor has failed to liquidate the claim of the Financial Creditor and other Members. It is submitted that the Financial Creditor was compelled to file this application under section 7 of Insolvency and Bankruptcy Code, 2016 and O.A. No. 335/2019 under section 19 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 before the Ld. Debts Recovery Tribunal-III, Kolkata which is also pending.

19. While reiterating the averments in the pleadings, the Ld. Senior Counsel for the Financial Creditor submitted that the debt and the default are admitted by the Corporate Debtor in their reply affidavit. According to the Ld. Senior Counsel, the averments made in the reply affidavit clearly indicate that the company had suffered losses and had been fighting for its survival. The Corporate Debtor had submitted a restructuring proposal also before the Consortium, which is reflected in the minutes of the meeting held on 5th July 2018 and 10th October 2018 between the lender Banks of the Corporate Debtor. It is further mentioned in the reply affidavit that the Corporate Debtor was trying hard to settle the dispute amicably with the Financial Creditor and other members of the Consortium by paying their legitimate dues and prayed for time before this Tribunal to settle the dispute in instalments. According to the Ld. Senior Counsel, there is no denial of debt and default by the Corporate Debtor and it tantamounts to the admission of the debt and default. Ld. Counsel further submitted that the debt as of 8th December 2017 is Rs.11,45,39,903.94, which was classified as a Non Performing Assets on 17th March 2018. It is submitted that the Original Lender Oriental Bank of Commerce was substituted by Punjab National Bank vide order of this Adjudicating Authority dated 11th January 2021. The Financial Creditor has filed Statement of Accounts duly certified under section 2A of the Banker's Books Evidence Act, 1891, Certificate of modification of charge dated 14th August 2015 issued by the MCA, Balance Confirmation dated 29th November 2017 duly supported by Board Resolution of the Corporate Debtor. It is submitted that application under section 19 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 being O.A. No. 335/2019 is still pending adjudication.

20. Ld. Senior Counsel further submitted that one Bansal Alumex Pvt. Ltd. (hereinafter referred to as the Bansal) is the corporate guarantor of the Corporate Debtor M/s Krishna Alex Private Limited. The Corporate Debtor herein is the Principal borrower. The Corporate Debtor and

Bansal have common Directors, shareholders and Creditors. The common Directors of the Corporate Debtor and Bansal are Nitin Agarwal and Sumeet Agarwal. The common Financial Creditors are Punjab National Bank, Bank of Baroda and Indian Bank. Consequently, it is submitted that Section 7 applications against both the Corporate Debtor *i.e.* Krishna Alex Pvt. Ltd. and Bansal, the corporate guarantor, were filed in July 2019 with proposed common RP in both matters. Petition in respect of Bansal was admitted to the CIRP on 25th February 2020 and the period of CIRP expired on 31st May 2020.

21. It is submitted that the Factory of the Corporate Debtor is situated at the land belonging to Bansal. The lease by Bansal in favour of the Corporate Debtor is an un-registered one for 99 years period with lease rent payable only Rs.100 per month. It is submitted that the factory of the Corporate Debtor is running and the same is still a going concern. On the one hand, it is stated that the petition against the Corporate Debtor has not been decided, and on the other hand, no suitable plan is forthcoming in respect of the CIRP of Bansal.

22. Ld. Counsel for the Corporate Debtor, however, in his reply submitted that until the conclusion of CIRP and liquidation of Bansal, the petition against the Corporate Debtor should not be admitted. It is argued that the claim of the Financial Creditor or its voting percentage could not be decided, pending its decision against Bansal, in the CIRP of Corporate Debtor because according to the Ld. Counsel, it may be that upon conclusion of the proceedings in respect of Bansal, the Financial Creditor would not have any claim against Corporate Debtor herein.

23. According to the Ld. Counsel for the Corporate Debtor, in ***Dr. Vishnu Agarwal v. Piramal Enterprises Limited, MANU/NL/0003/2019, 2019] 149 CLA 30*** (***Piramal***), ***IFCI Limited v. ACCIL Hospitality Limited, MANU/NL/0130/2020***, ***Shabad Khan Vs. Nisus Finance and Investment Manager & Ors***., ***MANU/NL/0251/2020*** and ***Bijay Kumar***

Agarwal, Ex-Director of Genegrow Commercial Private Limited, MANU/NL/0032/2020, this position has been appreciated by the Hon'ble NCLAT. In ***State Bank of India v. Athena Energy Ventures Private Limited***, ***MANU/NL/0436/2020, [2021] 164 SCL 293*** (***Athena Energy***), a different bench of hon'ble NCLAT has taken a contrary view. There is no judgement of the Supreme Court which decides this issue.

24. Ld. Counsel for the Corporate Debtor submits that precedent law requires that the earlier view of the Hon'ble NCLAT is required to be followed, in the event of a conflict. *See:* ***Sundeep Kumar Bafna vs. State of Maharashtra and Anr.***, ***(2014) 16 SCC 623***, paras 19 and 20.

25. Ld. Counsel submits that in the present situation, the view taken in ***Piramal*** is the earlier view, therefore, the same shall be followed.

26. Ld. Counsel for the Corporate Debtor further submitted that the Financial Creditor has now relied upon ***Kanwar Raj Bhagat v. Gujrat Hydrocarbons and Power SEZ Limited through IRP & Anr., 2021 SCC Online NCLAT 157*** and ***State Bank of India v.. V.Ramakrishnan***, ***(2018)17 SCC 394*** (***Ramakrishnan***) which follows the view taken in ***Athena Energy***.

27. It is further stated on behalf of the Corporate Debtor that in ***Athena Energy***, the hon'ble NCLAT relies on the judgement of the Hon'ble Supreme Court in ***Ramakrishnan***. The ***Ramakrishnan*** case deals with section 60(2) of IBC, 2016. So does ***Lalit Kumar Jain v. Union of India & Ors.*** (***Lalit Kumar Jain***), a later judgement of the Hon'ble Supreme Court which upholds the vires of section 60(2). ***Ramakrishnan*** case and ***Lalit Kumar Jain*** case cannot be relied upon as a precedent for a proposition at hand because, section 60(2) of IBC, 2016 directs that when a petition is pending before the NCLT against the Principle Borrower, a petition against the Guarantor would have to be instituted before such authority. Section 60(5) further mandates that such authority would have the right to entertain the applications. These

provisions and/or rights created thereunder are provided by the statute. The Code does not separately or specifically create any such right or jurisdiction, where both the borrower and guarantor are corporate persons. The intrinsic connection between a company and its directors who may be guarantors have been recognised in these judgements. The same would not apply to two separate persons. Further, there is no concept of group insolvency or connection between two corporate debtors in processes under the Code.

28. Ld. Counsel further submits that in ***Sandeep Kumar Bafna*** Case, the Supreme Court held that the latter view is *per incurium* because it is required to follow the earlier view. Therefore, the petition against the Corporate Debtor may be stayed pending decision and result of the proceedings relating to Bansal following the former view.

29. Ld. Counsel further submits that the issue at hand (the issue being whether the present petition should be admitted until the conclusion of CIRP of Bansal) is no longer open to be independently decided by the Adjudicating Authority.

30. Ld. Counsel stated that the Adjudicating Authority would follow either the view adopted by the NCLAT in ***Piramal*** or the view adopted in ***Athena Energy*** case. Since ***Piramal*** is the earlier view, such judgement must be followed and the present proceeding may be stayed or adjourned *sine die* or be dismissed with liberty to file afresh after conclusion of CIRP of Bansal.

31. While dealing with contentions of the Financial Creditor, it is argued that the Hon'ble Supreme Court had stayed the view or passed status quo order in respect of ***Piramal*** case and other cases where similar view had been expressed by the Hon'ble NCLAT. It is argued that the order of stay is only binding in between the parties and it does not affect the precedential value of a judgement **[*Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI Cinod Secretariat,***

Madras, (1992) 3 SCC 1 paragraph 10, and ***Pijush Kanti Chowdhury v. State of West Bengal & Ors., (2007) 3 CHN 178, paragraph 7 and 10*]**.

32. It is submitted that the exact claim of the Financial Creditor cannot be ascertained until CIRP of Bansal is complete. Even if it is admitted that the claim is about Rs.1,00,000/-, it is not the argument of the Corporate Debtor that the petition should be dismissed. Argument of Corporate Debtor is that until CIRP of Bansal is concluded, CIRP of the Corporate Debtor may not be initiated.

33. It is submitted by the Ld. Counsel for the Corporate Debtor that it is not open to the Financial Creditor to raise such contentions inasmuch as the ratio of ***Lalit Kumar Jain*** case and ***Ramakrishna*** case do not directly decide the issue raised in the present matter, which has been dealt with in ***Piramal***. The *ratio decidendi* is the rule deducible from the application of law to the facts and circumstances of a case. It is not a conclusion based upon facts. It is not deduction [***The Regional Manager & Anr.,(1976) 3 SCC 334, paragraph 7*** and ***Quinn v. Leatham, (1901) 1 AC 49].***

34. It is further argued by the Ld. Counsel for the Corporate Debtor that looking at the facts of the aforesaid two judgments of the Hon'ble Supreme Court, and enunciation of law, it can be safely stated that the ratio of either of the two cases would not decide the present case because no such situation was before the Hon'ble Supreme Court in either of the two cases. It is submitted that ***Lalit Kumar Jain*** case is a judgement on the *vires* of section 60 of the Code, whereas ***Ramakrishnan*** is a judgement on personal guarantee and the liability of the guarantor in terms of section 31 of the Code. It is submitted that the ratio of either of the two judgements would not directly apply. It is argued that the test would be whether by either ***Ramakrishnan*** case or ***Lalit Kumar Jain*** case, ***Piramal*** or the other judgments operating on

the same field, would stand impliedly overruled and can be said to be *per incurium* and the answer would be in the negative. It is submitted that this Adjudicating Authority would not be in a position to hold that the ***Piramal*** view is to be held *per incurium* or any such judgments are *per incurium* that would be contrary to the law of precedents. It is submitted that if the judgement is to be passed deducing the law from ***Lalit Kumar Jain*** or ***Ramakrishnan*** case, it would be identical to the ***Athena Energy*** case, already based by Hon'ble NCLAT and that it would be akin to ***Athena Energy*** case. It is submitted that this is a latter view and cannot be followed since there is already an earlier view on the issue.

35. The Learned Counsel for the Corporate Debtor further submitted that Lalit Kumar Jain case only operates the *vires* of section 60 of IBC, 2016 which permits such a proceeding to be filed. Neither does Section 60 speak nor does it enumerate whether during the pendency of CIRP of Corporate Debtor No.1, CIRP of Corporate Debtor No.2 can be initiated, when the Corporate Debtors are Borrowers/Guarantors. It is submitted that this issue or topic is not discussed in the ***Lalit Kumar Jain*** case or for that matter in the ***Ramakrishnan*** case. It is submitted that Section 60 of the Code is also not conclusive on the decision. Learned Counsel further submitted that section 60 of IBC, 2016 was in the statute book at the time when ***Piramal*** was decided. Whether considered or not, it is not for the Adjudicating Authority to term such authority *sub silentio* or *per incurium*. It is submitted that the petition against Krishna Alex Private Limited may be stayed pending decision and result of the proceedings relating to Bansal.

36. The Corporate Debtor has not denied the existence of either the debt or the default. It has, however, raised the issue that whether the present petition can be admitted until the conclusion of CIRP of Bansal.

37. Judgments on the aforesaid issue have been cited from both sides. The judgment heavily relied on by the Corporate Debtor is ***Piramal*** that was

decided on 08.01.2019 by the Hon'ble NCLAT, that lays down that once an application under Section 7 filed by the Financial Creditor is admitted against either the Principal Borrower or the Corporate Guarantor, a second application by the same Financial Creditor for the same set of claim and default cannot be admitted against the other.

36. The Financial Creditor has relied on ***Athena Energy,*** decided on 24.11.2020, wherein the Hon'ble NCLAT has differed from what has been held in the ***Piramal*** judgment. In ***Athena Energy,*** the Hon'ble NCLAT while referring to section 60(2) and 60(3) of the Code, which had not been noticed in the ***Piramal*** judgment, has observed that the Code does not have aversion to simultaneous proceeding against the Corporate Debtor and Corporate Guarantor. If two applications can be filed for the same amount against Principal Borrower and Guarantor, keeping in view the section 60(2) and 60(3), the applications can be maintained too.

37. The Hon'ble NCLAT has also referred to the observations made by the Insolvency Law Committee in its Report of February 2020 and was of the view that simultaneous remedy is central to the contract of guarantee where Principal Borrower and surety are undergoing CIRP.

36. Having perused both the judgments, *i.e.,* ***Piramal*** and ***Athena Energy***, we are inclined to go with the Hon'ble NCLAT in ***Athena Energy*** for the reasons that the judgment in ***Piramal*** does not deal with section 60(2) and 60(3) and also the February 2020 Report of the Insolvency Law Committee insofar as the simultaneous CIRP of the Principal Borrower and Corporate Guarantor is concerned.

37. However, it has been argued on behalf of the Corporate Debtor that when an issue is decided by different benches of the same strength of the same higher court of the appellate tribunal, the view taken in the judgment that has been decided prior in time has to be adhered to by subordinate courts and tribunals unless the issue is decided by a larger bench or court.

38. While the aforesaid argument of the Corporate Debtor is correct and the subordinate courts and tribunals are indeed bound by the judgment that has been decided prior in time, it is also a settled principle of law that when a court comes across judgments on the same issue decided by the court of co-equal strength, then the court may follow a decision that the court considers to have been decided correctly.

39. In para 24 of the ***Jaydeo S/o Mahadeo Parate v. State of Maharashtra and others, 2005 SCC OnLine Bom 1283,*** the Hon'ble High Court of Bombay has held that "*the Full Bench of this Court in the case of* ***Kamleshwar Ishwardas Patel v. Union of India, 1994 Mh.L.J. 1669*** *dealing with a question as to what course has to be followed by the High Court when confronted with contrary decisions of the Supreme Court emanating from Benches of coequal strength, has held that the High Court is not necessarily bound to follow the decision later in point of time, but must follow the one which in its view is better in point of law. For coming at such a conclusion, the Full Bench of this Court has relied on the judgment of the Constitution Bench of the Apex Court in the case of* ***Atma Ram v. State of Punjab, AIR 1959 SC 519.***"

40. Following the aforesaid principle laid down by the Hon'ble Supreme Court that has been followed by the Hon'ble High Court, we are of the considered view that the Hon'ble NCLAT's judgment in ***Athena Energy*** is the correct position of law. The present petition against the Corporate Debtor can be admitted despite the Corporate Debtor being under CIRP.

41. We have heard learned Senior Counsel appearing for the Financial Creditor and learned Counsel Appearing for the Corporate Debtor and perused the record.

42. The present petition made by the Financial Creditor is complete in all respect as required by law. The petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is

more than the minimum amount stipulated under section 4(1) of the Code, *i.e.,* Rupees one lakh, at the relevant time.

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

a. The application bearing CP (IB) No.1128/KB/2019 filed by Punjab National Bank, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Krishna Alex Private Limited, CIN: U28113WB2002PTC094809, the Corporate Debtor, is **admitted**.

b. There shall be a moratorium under section 14 of the IBC.

c. 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.

d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

e. Smt. Rachna Jhunjhunwala, registration number IBBI/IPA-001/IP-P00389/2017-18/10707, residing at Vikram Vihar, Flat 304, Block-H, 493/B/18, G.T.Road, Shibpur, Howrah, West Bengal-711102, email: jsa.jhunjhunwala@gmail.com is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or, as the case may be, the

RP shall be compliant with such Regulations, Circulars and Directions 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 Code.

f. 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 one week from the date of receipt of this Order, in default of which coercive steps will follow.

g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

h. The Financial Creditor shall deposit a sum of Rs. 3,00,000 (Rupees three 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. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

j. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means 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.

44. **CP (IB) No. 1128/KB/2019** to come up on 15.11.2021 for filing the Progress Report.

45. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rajasekhar V.K.)
Member (Judicial)

Order singed , the 14th day of September, 2021

PJ/SR