



IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 01
(IBPP)-02(PB)/2022

IN THE MATTER OF:

CHD Developers Ltd
Through Gaurav Mittal (MD)

.... Petitioner/Applicant

Order Under Section 54 of Insolvency & Bankruptcy Code (Pre-Packaged)

ITEM No. 02
(IB)-1775(PB)/2018

IN THE MATTER OF:

Mr. Shailendra Kumar Agarwal
v.
M/s. CHD Developers Ltd.

.... Petitioner/Applicant

.... Respondent

Order Under Section 7 of Insolvency & Bankruptcy Code

ITEM No. 03
(IB)-1081(PB)/2020

IN THE MATTER OF:

Rajeev Kumra & ors.
v.
M/s. CHD Developers Ltd.

.... Petitioner/Applicant

.... Respondent

Order Under Section 7 of Insolvency & Bankruptcy Code

Order delivered on 05.09.2022

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Petitioner

Mr. Sumant Batra, Mr. CS Gupta, Ms. Ruchi,
Advs. (for respondent in (IB)-1775(PB)/2018
& (IB)-1081(PB)/2020))

Mr. Gaurav Mitra, Adv.

For the Objector

Mr. Vivek Kohli, Sr. Adv., with Mr. Sandeep
Bhuraria, Mr. Manish Surendram, Mr. Juvas,
Advs.

Mr. Nayan Dubey, Mr. Sinha Shrey, Advs.

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For the Home Buyers

Mr. Sidharth Chopra, Adv.
Mr. Piyush Singh, Mr. Aditya Ramani,
Ms. Riddhi Jain, Advs. (for petitioner in (IB)-
1081(PB)/2020)
Mr. Abhishek Anand, Mr. Karan Kohli, Mr.
Sahil Bhatia, Advs. For Resortico (Suites)
Association

ORDER

Per: Oral: JUSTICE RAMALINGUM SUDHAKAR (Hon'ble President)

1. CP. No. (IBPP)-02(PB)/2022 is a petition filed under Section 54C of IBC (Pre-Packaged). Pursuant to IBC (Amendment) Ordinance dated 04.04.2021, a new procedure for resolving cases of Micro, Small and Medium Enterprises (MSME) under IBC has been introduced by way of Chapter III-A. It goes by the nomenclature "Pre-Packaged Insolvency Resolution Process" (PPIRP) in short.

2. Section 54A provides as to when a corporate debtor of the above kind becomes eligible for PPIRP.

Section 54B provides for duties of Resolution Professional before initiating PPIRP.

Section 54C, provides the manner by which an application to initiate PPIRP is to be made.

Section 54D, provides a time limit for completion of PPIRP. Section 54E deals with Moratorium and public announcement.

The duties and powers of the Resolution Professional during PPIRP is provided under 54F.

3. In so far as the present case is concerned Section 54-G, H, I & J may not be that relevant. However, under Section 54K, the manner of consideration and approval of resolution plan is

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provided. The termination of the PPIRP, if it fails, is provided under Section 54-L.

4. The present petition CP. No. (IBPP)-02(PB)/2022 was filed on 12.07.2022 and for the first time it was listed for hearing on 26.07.2022 and it was adjourned on more than two occasions, at request. On 03.08.2022, the following order was passed:-

“IA-3591/2022 & IA-3592/2022

At request, both the applications stands adjourned to 24.08.2022.

CP. No. (IBPP)-02(PB)/2022

Heard Mr. Sumant Batra, Ld. Counsel for the respondent, Mr. Abhishek Anand, Ld. Counsel for Buyers Welfare Association, Mr. Sidharth Chopra, Ld. Counsel for the Home Buyers & Mr. Piyush Singh, Ld. Counsel.

We have heard about the interpretation of Section 54C read with 54A of chapter 3A as well as Section 11A and other provisions in relation to the appreciation of cases under various provisions like 7, 9, 10 & 54A of IBC.

For further arguments, list the matter for physical hearing on 24.08.2022.”

5. We heard the learned counsels and on the preliminary issue which was recorded on 03.08.2022 as above, we passed a detailed order on 25.08.2022 which reads as follows:-

“Mr. Sumant Batra, Ld. Counsel assisted by Mr. C S Gupta, Ld. Counsel appearing for M/s. CHD Developers Limited., has now proposed Pre-Packaged Insolvency Resolution Process, with respect to the corporate debtor under Chapter



III-A by way of filing an application and thereby invoking the Section 54C of IBC.

The matter was first taken up by this Bench, on 26.07.2022. On that day we noted that the petition under Section 54C of IBC was filed on 12.07.2022 and we heard Ld. Counsel Mr. Sumant Batra, on 26.07.2022. It will be pertinent to point out that on the day of first appearance and subsequent days, it is observed that a Section 7 petition filed by the home buyers namely Mr. Rajeev Kumra & Ors. ((IB)-1081(PB)/2020), was already filed on 21.10.2020 and in this matter after several hearings, arguments were heard and Order was reserved on 01.03.2021 by the then Bench of Actg. President. On 31.05.2021 the matter was de-reserved by the then Actg. President at the end of his tenure and thereafter it has been adjourned from time to time, and it is still pending for adjudication.

On this peculiar fact, taking note of Section 11A of IBC, which deals with the manner in which disposal of applications under Section 54C and under Section 7 or 9 or 10 of the IBC should be considered by this Adjudicating Authority, we have heard Ld. Counsel Mr. Sumant Batra, at length on various dates. He has submitted certain reports, documents etc., supporting his arguments. We have also heard Mr. Piyush Singh, Ld. Counsel for the petitioner in (IB)-1081(PB)/2020.

The preliminary issue that arises for consideration is whether a pre-packaged application can be entertained, when a petition under Section 7 of IBC is pending before this Tribunal long before the coming into force of Pre-Packaged Ordinance dated 04.04.2021. In this regard, we are inclined to issue notice to the limited extent for examining the issue on the admissibility of the pre-packaged application in the light of Section 11A of IBC.

We issue notice to the Parties in CP. No. (IB)-1081(PB)/2020 and in CP. No. (IB)-556(PB)/2022. We also allow other home

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buyers related to this Corporate Debtor i.e. M/s. CHD Developers Limited, who would like to present their point of view on this preliminary issue alone.

The Present matter to be listed for next date of hearing on 30.08.2022, at the top of the cause-list.”

6. In continuation to the earlier submissions, we heard all the parties. Before we commence to consider the issue as to whether the Pre-Packaged petition should be admitted or not in the light of Section 11A there are certain facts relevant to the present case which need to be recorded and the same reiterated below.

7. The Corporate Debtor (CD) is one CHD Developers Limited. It proposed several real estate projects both Commercial and Residential. On the basis of the real estate projects proposed by the CD, a large number of the home buyers showed interest in seeking allotment in the Real Estate Project and they claim that they have paid money to the CD. It will be relevant to mention that the land in question in this project belongs to M/s. Roots Developers Private Limited who has also raised objection. In other projects whether the land is of the CD or not is not relevant for consideration in the present issue. As to whether the lands vest with the CD or otherwise will be dealt with at the appropriate stage as one such objection has been raised and it is pending. We are at the stage of considering PPIRP.

8. It is not in dispute that the CD defaulted in completing the project and delivering the units to the real estate allottees. Therefore, one set of real estate allottees filed a CP. No. (IB)-

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1081(PB)/2020 on 21.10.2020. On 08.12.2020 notice was issued and adjourned again on several dates by the previous benches. In the mean while IA-5694/2020 was filed on 22.12.2020 by land owner namely M/s. Roots Developers Pvt. Ltd. in the project CHD Vann. Primarily the objection in issue was that the land did not belong to the CD. Certain other reliefs were sought with which we are not concerned at present. At that stage the matter was heard and orders were reserved by the then bench consisting of Sh. B.S.V. Prakash Kumar, Hon'ble Actg. President with Sh. Hemant Kumar Sarangi, Hon'ble Member (Technical) on 01.03.2021 in the case of CP. No. (IB)-1081(PB)/2020, Rajeev Kumra & Ors. v. M/s. CHD Developers Ltd. by order dated 01.03.2021 which read as under:-

“Arguments heard. Orders reserved.”

9. This order was not delivered. It is also to be noticed that an earlier Bench while recording an order dated 07.06.2021 has referred to CP. No. (IB)-1775(PB)/2018, which is filed by Mr. Shailendra Kumar Agarwal, one other real estate allottee, who pursued the Section 7 petition from 2018, prior to the IBC (Amendment) Act, 2020 w.e.f. 28.12.2019. After the amendment, it is stated that other real estate allottees joined hands with him so as to comply with the threshold limit as required by the Amendment, subject to verification of various orders on admission of additional real estate allottees.

10. Sh. B. S. V. Prakash Kumar, Actg. President on the eve of completing his tenure, by order dated 31.05.2021 re-opened the

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case for hearing on 07.06.2021. On 07.06.2021, the new incumbent Sh. R. Vardharajan, Hon'ble Actg. President and Sh. Hemant Kumar Sarangi, Hon'ble Member (Technical), hearing the matter afresh passed the detailed order in CP. No. (IB)-1775(PB)/2018 in the case of Mr. Shailendra Kumar Agarwal v. CHD Developers Ltd. which reads as under:-

"In relation to all these matters Mr. Sumant Batra, Advocate is present for the Corporate Debtor through Video Conferencing Mode.

In relation to Item No. 1 being a Petition filed by the Homebuyers, the Petitioners are being represented by Mr. Gaurav Mitra, Senior Advocate. In relation to Item No. 3 which has also been filed by the Homebuyers is being represented by Mr. Piyuesh Singh, Advocate.

In relation to Item Nos. 2, 4 & 5 as filed by the Operational Creditors, the respective Operational Creditors in Item Nos. 2 and 4 are being represented by Mr. Naresh Kumar Joshi, Advocate and Mr. Sougata Ganguli, Advocate.

No representation for Item No. 5.

It is also brought to the notice of this Tribunal that the matter in Item No. 1 was heard in detail and order was also reserved by the erstwhile Principal Bench, however, the order was not pronounced and the matters came to be de-reserved for fresh hearing. Under the circumstances, the matter(s) has been listed before this Tribunal.

In relation to Item No. 1, it is brought to the notice of this Tribunal by the Ld. Advocate for the Corporate Debtor as well as by the Ld. Senior Advocate appearing for the Petitioners that since initially at the time of filing the Petition since the compliance as mandated under the provisions of the Insolvency & Bankruptcy Code, 2016 more particularly

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Section 5(8) of the Insolvency & Bankruptcy Code, 2016 as amended has not been complied with.

However, subsequently in view of the judgement passed by the Hon'ble Supreme Court in **Pioneer's** case, the amendment incorporated came to be sustained by the Hon'ble Supreme Court and in the circumstances the Homebuyers subject to compliance with requisite qualifications as prescribed under Section 5(8) was entitled to proceed with the matter.

By virtue of the time granted by the Hon'ble Supreme Court, endeavour was made by the Homebuyers in Item No. 1 to comply with qualification standards as prescribed, but there has been some delay and the same was heard since it was agitated before this Tribunal by the Corporate Debtor by the erstwhile Principal Bench.

In relation to Item No. 3, it is brought to the notice of this Tribunal by the Ld. Advocate for the Petitioner that no such issue had been raised in so far as this Petition is concerned as 128 Homebuyers have joined together and initiated the process before this Tribunal and that they have fully complied with requisite compliances as mandated under the provisions of the Insolvency & Bankruptcy Code, 2016 for the Homebuyers to file a Petition.

In relation to Item Nos. 2, 4 & 5 being Petitions filed by the Operational Creditors, it is also brought to the notice of this Tribunal by the Ld. Advocate for the Corporate Debtor that the Corporate Debtor does not have any objection in CIRP being initiated against the Corporate Debtor.

Since all the Petitions namely Item Nos. 1 to 5 are in respect of initiation of CIRP, in view of the statement made by the Ld. Advocate for the Corporate Debtor, we direct the Corporate Debtor to file a suitable Board Resolution to this effect as well as an Affidavit supporting the same before this Tribunal on or before the next date of hearing.

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In relation to Item Nos. 1 and 3, Mr. Sandeep Buharia, Advocate brings to the notice of this Tribunal that Intervening Application has been filed in these Petitions filed by the Homebuyers in IA-4716/2020 in Item No. 1 and IA-569/2020 in Item No. 3. In the circumstances, let these Applications be also posted along with the concerned main Petitions on the date of hearing.

Post these matters on 16.07.2021.”

11. It is to be noticed that Mr. Sumant Batra, Ld. Counsel for the CD has clearly stated that CD does not have objection if the CIRP is initiated against CD in view of debt and default, though at that moment it was partly in respect of operational creditors and the issue of home buyers was unclear on numbers. However, for reasons recorded, the Bench adjourned the matter to 16.07.2021. Thereafter, the various Benches adjourned the matter from time to time probably due to shortage of Members and shortage of time. In the mean while the IBC (Amendment) Ordinance dated 04.04.2021 came into effect bringing forth Chapter III-A and PPIRP. As noticed above, the present (IBPP)-02(PB)/2022 was filed on 12.07.2022 under Chapter III-A.

12. On the basis of our query raised, Mr. Sumant Batra, Ld. Counsel for the petitioner who proposed the pre-packaged application has submitted and has relied upon the object and reason behind the Ordinance dated 04.04.2021 which reads as under:-

“WHEREAS COVID-19 pandemic has impacted businesses, financial markets and economies all over the world, including

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India, and has impacted the business operations of micro, small and medium enterprises and exposed many of them to financial distress;

AND WHEREAS the Government has taken several measures to mitigate the distress caused by the pandemic, including increasing the minimum amount of default for initiation of corporate insolvency resolution process to one crore rupees, and suspending filing of applications for initiation of corporate insolvency resolution process in respect of the defaults arising during the period of one year beginning from 25th March, 2020.

AND WHEREAS such suspension for filing of applications for initiation of corporate insolvency resolution process has ended on 24th March 2021; AND WHEREAS the country has shown remarkable resilience, be it tackling the pandemic or ensuring economic recovery;

AND WHEREAS micro, small and medium enterprises are critical for India's economy as they contribute significantly to its gross domestic product and provide employment to a sizeable population;

AND WHEREAS it is considered necessary to urgently address the specific requirements of micro, small and medium enterprises relating to the resolution of their insolvency, due to the unique nature of their businesses and simpler corporate structures;

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AND WHEREAS it is considered expedient to provide an efficient alternative insolvency resolution process for corporate persons classified as micro, small and medium enterprises under the Insolvency and Bankruptcy Code, 2016, ensuring quicker, cost-effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses and which preserves jobs;

AND WHEREAS in order to achieve these objectives, it is considered expedient to introduce a pre-packaged insolvency resolution process for corporate persons classified as micro, small and medium enterprises;

13. Mr. Sumant Batra, Ld. Counsel has relied on the Report of the Insolvency Law Committee on PPIRP of July, 2021. It is little surprising to note that the report of the Insolvency Law Committee (ILC) on PPIRP is dated July, 2021 whereas Ordinance was already issued on 04.04.2021. Perhaps there were some preliminary reports which guided the competent authority to issue the PPIRP Ordinance. Be that as it may, he refers to Chapter III on eligibility (para 3.2, 3.3, 3.4) which reads as under:

*“3.2 As discussed above, the Committee decided that the pre-pack process should be available only to corporate debtors that are MSMEs as an alternative to the CIRP under the Code (see para 2.4.). In this regard, the Committee noted that the **Code should provide that the pre-pack process***

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is available for corporate debtors classified as 'MSMEs' as per Section 7(1) of the MSME Development Act, 2006. This reference to the definition of an MSME has been used under the Explanation to Section 240A of the Code, and the Committee discussed that jurisprudence developed on the interpretation of the reference to the definition of MSMEs as under Section 240A may be applicable to the pre-pack process as well.

3.3. Further, the Committee considered if default should be a requisite criterion for eligibility to apply to the pre-pack process. In this regard, the Sub-committee had recommended that a default by the corporate debtor should be required in the present framework. It had suggested that the pre-pack process may be implemented in phases and in the first phase, it may commence in respect of corporate debtors with "defaults from Rs.1 lakh to Rs.1 crore and COVID-19 defaults for which CIRP is not available today.

3.4. The Committee agreed with the recommendation of the Sub-committee that the corporate debtor should have committed a default to be eligible for the pre-pack process. It discussed that since the pre-pack process is a mechanism to resolve 'insolvency', it should require the corporate debtor to establish that it is facing financial distress. Notably, introduction of the default test in the Code for determination of insolvency was deliberated by the BLRC Report extensively, and it was noted that such test may promote early detection and resolution of insolvency⁶⁸. Considering that the jurisprudence on proving default has now settled under the CIRP, the Committee noted that there may be no merit in introducing a new standard for proving distress. **Thus, it agreed that the MSME corporate debtor should have committed a default to be eligible to initiate a pre-pack process.**

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(emphasis supplied)



14. He also referred to Eligibility as per Section 29 A (para 3.7) which is as under:-

“3.7. Section 29A lays down the requirements that a person has to fulfil to be a resolution applicant during the CIRP. This means that in order to submit a resolution plan in a CIRP, a person would have to be eligible as per the provisions of Section 29A. Where the corporate debtor undergoing CIRP is an MSME, Section 240A provides that the resolution applicant is exempted from certain requirements of Section 29A (clauses (c) and (h)).”

15. On the issue of Overlap with CIRP he referred to para 3.13, 3.14, 3.15 & 3.16 at Page 146 to 148 which is as under:-

3.13. The Committee noted that the pre-pack process is an alternative to the CIRP, and therefore, the corporate debtor may choose to go for either process at a given point of time. Thus, the Committee agreed that the Code should provide that a corporate debtor in respect of whom a CIRP has been admitted, would not be eligible to apply for the pre-pack process.

3.14. Further, there may be scenarios where an application for CIRP and pre-pack are pending together. The Committee deliberated on whether the Code should lay down the order in which the Adjudicating Authority may consider such applications. It noted that ordinarily, the Adjudicating Authority would dispose of the application that has been filed first. However, since the corporate debtor will need to make preparations before being able to file an application to initiate the pre-pack process, CIRP applications may often be filed (and remain pending) before a

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pre-pack application is filed. If the Adjudicating Authority then considers the CIRP application first, it would lead to very few instances of a corporate debtor being able to avail the pre-pack process.

3.15. Moreover, although the Code envisages that a CIRP application should be disposed of within 14 days of its filing, such disposal takes much longer in practice. Where a CIRP application has been filed and is pending for a long period, the corporate debtor may not have certainty on the feasibility of negotiating a base resolution plan in the absence of rules on prioritising simultaneous CIRP and pre-pack applications. Even if a base resolution plan has been negotiated by the corporate debtor in such a scenario, delay in disposal of CIRP application may lead to value erosion and make the negotiated plan moot. Further, different NCLTs may adopt different practices on the manner of disposal of simultaneous applications - leading to inconsistent practices. For instance, some NCLTs may give preference to pre-pack process applications since there is prior negotiation between parties, whereas others may entertain applications on the basis of the date of filing.

3.16. Thus, the Committee noted that the mechanism for determining the priority for disposing pre-pack and CIRP applications that are simultaneously pending should be laid down in the Code. In this regard, the Committee decided that the following principles may be reflected in the Code -

- a. **Where an application for initiating a pre-pack process is filed first, the Adjudicating Authority should first decide whether to admit or reject such application, before considering any CIRP application that is***

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filed subsequently. This approach provides an objective manner of dealing with simultaneous applications as it considers the application that has been filed first before any subsequent applications.

- b. **Where an application for initiating CIRP is filed and subsequently a pre-pack application is filed within 14 days of the former, the Adjudicating Authority should first dispose of the application for**

initiating the pre-pack process.

Although under this approach the application that has been filed subsequently is to be disposed first, such a provision may be necessary to allow effective access to pre-packs in practice. The filing of a pre-pack application requires more preparation while CIRP applications can often be filed (and are indeed filed) immediately on default. Further, certain creditors may rush to file a CIRP application if they discover that the corporate debtor is attempting to negotiate a base resolution plan with its creditors. This may make accessibility to pre-packs limited, hindering quicker and cost-effective resolution of the stress faced by MSME corporate debtors. Therefore, the Committee thought that it would be suitable to allow corporate debtors a small window, after the filing of a CIRP application, to file a pre-pack application that would be considered first. In practice, this will only help debtors that are at an advanced stage of preparation for filing the pre-pack application.

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- c. **Where an application for initiating CIRP is filed and subsequently a pre-pack application is filed after 14 days of former, the Adjudicating Authority should first dispose of the application for initiating CIRP.** As with (a), this approach provides an objective manner of dealing with simultaneous applications as it considers the application that has been filed first before any subsequent applications.
- d. In order for this mechanism outlined in paragraph b and c. to work as intended, the Committee noted that it was critical that the 14-day time- limit be strictly adhered to (see para 4.9.). **The filing systems of the NCLTs will need to monitor this closely to prevent abuse of the process.”**

16. Annexure-II of the report is the Summary of Recommendations, at Page-216, it is recorded in the report as follows:-

“iii. Overlap with CIRP

A corporate debtor that is undergoing a CIRP should not be eligible to apply for a pre-pack process. Further, if applications for initiating a pre-pack process and a CIRP in respect of the same corporate debtor are simultaneously pending, they should be disposed of in the following manner (Para 3.16.): -

- a. *Where an application for initiating a pre-pack process is filed first and subsequently a CIRP application is filed, the Adjudicating Authority*

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should first dispose of the application for initiating the pre-pack process.

- b. *Where an application for initiating a CIRP is filed and subsequently a pre-pack application is filed within 14 days of the former, the Adjudicating Authority should first dispose of the application for initiating the pre-pack process.*
- c. *Where an application for initiating a CIRP is filed and subsequently a pre-pack application is filed after 14 days, the Adjudicating Authority should first dispose of the application for initiating CIRP.”*

17. Keeping in line with the above recommendation the Ordinance has been brought into effect. The key provisions provide as follows:-

Section 54A (1) provides that a corporate debtor classified as a Micro, Small and Medium Enterprise (MSME) falling under Section 7(1) of the Micro Small and Medium Enterprises Development Act, 2006 is entitled to initiate PPIRP.

Section 54A (2) provides that an application for initiating PPIRP on default can be made subject to conditions which are set out therein.

Section 54A (3) provides prior approval of financial creditors representing not less than 66% in value of the financial debt due to such creditors which is claimed to have been complied with. This is however objected by one FC and therefore it is in the realm of dispute.

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Section 54A (4) provides for certain compliances that we are not dealing with in the present case, in view of the preliminary issue that is to be adjudicated.

Section 54C (1) provides the manner in which an application to initiate PPRIP is to be made.

Section 54C (2) provides for the form with particulars.

Section 54C (3) provides the details to be submitted with the application.

Section 54C (4) provides that the Adjudicating Authority shall within the period of 14 days of receipt of the application admit the application if it is complete or reject the application if it is incomplete.

In the proviso to Section 54C (4) it is laid down that the Adjudicating Authority shall before rejecting an application, give notice to the applicant to rectify the defect in the application within seven days from the receipt of such notice from the Adjudicating Authority.

Section 54C (5) indicates the date of commencement of the PPIRP.

In the light of the above provisions another section becomes relevant in the present case, namely Section 11A and it reads as follows:-

“11A. (1) Where an application filed under section 54C is pending, the Adjudicating Authority shall pass an order to admit or reject such application, before considering any

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application filed under section 7 or section 9 or section 10 during the pendency of such application under section 54C, in respect of the same corporate debtor.

(2) Where an application under section 54C is filed within fourteen days of filing of any application under section 7 or section 9 or section 10, which is pending, in respect of the same corporate debtor, then, notwithstanding anything contained in sections 7, 9 and 10, the Adjudicating Authority shall first dispose of the application under Section 54C.

(3) Where an application under section 54C is filed after fourteen days of the filing of any application under section 7 or section 9 or section 10, in respect of the same corporate debtor, the Adjudicating Authority shall first dispose of the application under section 7 or section 9 or section 10.

(4) The provisions of this section shall not apply where an application under section 7 or section 9 or section 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.”

18. Section 11A is provided under Part II, Chapter II of Insolvency & Bankruptcy Code as extracted above.

19. On the mandate of Chapter III-A and the various Sections contained therein, it was argued by Mr. Sumant Batra, Ld. Counsel for the CD (CHD Developers Ltd.) that Section 11A is not part of Chapter III-A and special provisions of Chapter III-A

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should be given precedence over all other pending applications and PPIRP should be admitted once it is compliant with the requirement of Section 54C, and if the petitioner is eligible under Section 54A. The CD in the present case has invoked the provisions of Chapter III-A and states that he has the approval of the requisite percentage of the financial creditors, though there is a dispute on the actual numbers. The application at first blush, may be stated to be in compliance with Section 54A read with Section 54C on Chapter III-A.

20. The question which arises for consideration is as to what is the role of the Adjudicating Authority when there is a Section 7 IBC petition filed and pending long before the present PPIRP application is filed. For this we fall back on Section 11A which guides the Adjudicating Authority on the procedure to be adopted in dealing with such a situation. It is the contention of Mr. Sumant Batra, Ld. Counsel for the CD that Section 11A is not part of the mandate of Chapter III-A. Therefore, Section 11A (4) should be read in the manner that Section 7, 9 & 10 petition filed and are pending as on the date of Ordinance dated 04.04.2021, will not have any application to Chapter III-A proceedings. Meaning thereby the only thumb rule is the manner of dealing with petitions as contemplated under Section 11A (1), (2) & (3), by the Adjudicating Authority in dealing with petitions of different kinds of CIRP & PPIRP. That pending applications refer to Section 11A (1), (2) & (3) should be dealt with only on those terms and any application which do not form part of Section 11A (1), (2) & (3) and which are pending as on the date of commencement of

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the Amendment dated 04.04.2021 has no relevance in relation to PPIRP application and dealt with as priority.

21. On the contrary, Mr. Piyush Singh, Ld. Counsel for the petitioner who has filed one Section 7 petition on 21.10.2020 long before the 04.04.2021 Ordinance and which is pending consideration on the various dates of hearing, which we have already recorded earlier in para 5, submits that the Clause (4) of Section 11A guides the Adjudicating Authority in the following manner:-

In Section 11A (1), (2) & (3) reference is made to Section 54C of Chapter III-A in relation to Section 7, 9 & 10 of IBC whereas Section 11A (4) does not speak about Section 54C at all. Therefore, the same should be read to mean that any petition filed under Section 7, 9 & 10 prior to coming into force of Ordinance dated 04.04.2021 should be dealt with independently. Chapter III-A will have no bearing on the earlier Section 7 petition. If a petition filed under Section 7, 9 & 10 is already pending well before the Ordinance dated 04.04.2021, that will take precedence. It is pleaded that the Section 11A provides the manner in which the Adjudicating Authority would deal with cases of pre-Amendment Ordinance dated 04.04.2021 in Section 11A (4) and post-the Amendment Ordinance dated 04.04.2021 in Section 11A (1), (2) & (3). Post-the amendment, the guiding factor to the Adjudicating Authority is as to how Section 54C application will be dealt if Section 7, 9 or 10 of IBC petitions are filed. It would have no bearing in so far as pending cases under

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Section 7, 9 & 10 of IBC pre amendment Ordinance dated 04.04.2021.

22. Mr. Vivek Kohli, Ld. Sr. Counsel appearing on behalf of one objector stated that on and after the Ordinance dated 04.04.2021 Chapter III-A came into force providing for PPIRP and the eligibility is provided under Section 54A, and the application to be filed under Section 54C. It is a substantive provision of law enabling the CD to opt for PPIRP and that substantive provision of law should be considered prospectively unless express intent is provided in the provision itself. He cited judgement dated 12.08.1994 of the Hon'ble Supreme Court in the matter of *K.S. Paripoornan v. State of Kerala* and the relevant paras (64 & 65) of the judgement are extracted below:-

"64. A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. A statute is regarded as retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. By virtue of the presumption against retrospective applicability of laws dealing with substantive rights transactions are neither invalidated by reason of their failure to comply with formal requirements subsequently imposed, nor open to attack under powers of avoidance

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subsequently conferred. They are also not rendered valid by subsequent relaxations of the law, whether relating to form or to substance. Similarly, provisions in which a contrary intention does not appear neither impose new liabilities in respect of events taking place before their commencement, nor relieve persons from liabilities then existing, and the view that existing obligations were not intended to be affected has been taken in varying degrees even of provisions expressly prohibiting proceedings. (See Halsbury's Laws of England, 4th Edn., Vol. 44, paras 921, 922, 925 and 926.)

65. These principles are equally applicable to amendatory statutes. According to Crawford:

“Amendatory statutes are subject to the general principles ... relative to retroactive operation. Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary. In other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary. Indeed there is a presumption that an amendment shall operate prospectively.”

23. It was therefore pleaded that Chapter III-A cannot gain inroads to Section 7 of IBC petition filed and pending. It cannot erase the right already accrued.

24. Mr. Abhishek Anand, Ld. Counsel for the CHD Resortico Buyers Welfare Association has submitted that following:-

(i) Pre-existing Section 7(1) IBC petition does not bar the filing of an application under Chapter III-A by a CD in terms of Section 54A read with Section 54C. He quoted the case of

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M/s. Surendra Trading Company v. M/s. Juggilal Kamlapat Jute Mills Company Limited And Others wherein it is laid down that the 14 days period granted to Adjudicating Authority under Section 7 IBC and also in terms of Section 54A & 54C PPIRP is not mandatory but directory. Therefore, by no stretch of imagination can it be said that Section 7 IBC petition filed long before the Pre-Packaged petition was filed would have precedence. *M/s. Surendra Trading Company v. M/s. Juggilal Kamlapat Jute Mills Company Limited And Others* (2017 16SCC 143) para 24 reads as follows:-

“24. Further, we are of the view that the judgments cited by NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting the proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.”

(ii) Mr. Abhishek Anand, Ld. Counsel's next contention is that under Section 7 IBC the period of CIRP is 270 days plus 60 days in all 330 days. In so far as PPIRP is concerned, it is 120 days. Therefore, these two proceedings have different timeline and therefore pre-package is

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governed by a shorter time line will have to be considered first. If the pre-package does not happen within the 120 days, then Section 7 IBC can be initiated or revived by any party and therefore, the special provision should be given precedence. He also pleaded that the period from 15.03.2020 to 31.05.2022, by virtue of suo moto order passed by Hon'ble Supreme Court, if excluded, then pre-package application will fall short by period of one month only from the date of Ordinance dated 04.04.2021 and he pleaded that Section 238A be invoked to his benefit.

25. Mr. Gaurav Mitra, Ld. Counsel for one of the Home Buyers who first initiated the proceedings against CHD Developers Ltd. ((IB)-1775(PB)/2018) submitted that:-

(i) The special provision of Chapter III-A will override the general provision of Section 7 of IBC because it is in keeping with the ultimate purpose of rehabilitation of the company.

(ii) In view of the timeline of 120 days provided in the PPIRP, one can safely go back to CIRP proceedings, if the PPIRP does not work. Therefore, no prejudice will be caused to the CIRP proceedings already initiated by way of Section 7 & 9 of IBC.

(iii) Since the PPIRP is based on the approval of home buyers or the real estate allottees, it is in the best interest of the real estate allottees that pre-packaged be allowed to continue as it will enure to their benefit.

26. We have considered the rival submission and the legal pleas as above. At the outset, we are very clear that this Adjudicating Authority is a creature of the statute and has to work within the framework of the IBC. As we see from the objects and reasons of

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the amendment to the IBC which came into effect on 04.04.2021, the Parliament in its wisdom after having enacted the IBC Code, 2016 thought it fit to have an alternative mechanism by bringing in the concept of pre-package by way of an Amendment on 04.04.2021. On a reading of the objects and reasons, one factor is clearly discernible that the Government wanted a hybrid method of Insolvency Resolution Process which includes creditors in control (Section 7, 9 or 10) as well as debtors in control (PPIRP). The Government opted for the hybrid method by bringing this Ordinance.

27. Now the question is as to how the hybrid method should work? While bringing the amendment into force the Parliament in its wisdom perceived a situation where the Adjudicating Authority will be faced with the dilemma as to how the matter should be resolved if there are applications are filed or pending under IBC & Chapter IIIA as the case may be. It is a situation of FC in control versus the CD in control.

28. In order to ensure that the Adjudicating Authority does not face a logjam and to resolve the overlap, Section 11A was brought into force laying down the parameters as to how the Adjudicating Authority will deal with the cases of this nature.

29. Going forward let us now examine Section 11A. Section 11A (1) deal with the case where an application filed under Section 54C is pending, Adjudicating Authority shall pass the order to admit or reject the application, before considering an application filed under Section 7, 9 or 10 during the pendency of such application under Section 54C, in respect of the same corporate

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debtor. Meaning there by once an application is filed under Section 54C is pending and if a petition under Section 7, 9 or 10 is filed thereafter, then 54C will have precedence.

30. Section 11A (2) speaks about a situation where a Section 7, 9 or 10 application is filed and pending in respect of CD then an application under Section 54C is filed within 14 days of the filing of Section 7, 9 or 10 petition then the Adjudicating Authority will first dispose of the application filed under Section 54C and not the application filed under Section 7, 9 or 10 of IBC. Here again Section 54C takes precedence.

31. The third Scenario is Section 11A (3) If 54C application of PPIRP is filed 14 days after application under Section 7, 9 or 10 of IBC is filed against the same CD, the Adjudicating Authority has been mandated to dispose off the application under Section 7, 9 or 10 of IBC at the first instance, making it clear that Section 7, 9 or 10 will take precedence over Section 54C.

32. A combined reading of Section 11A (1), (2) & (3) makes it clear that this time line for taking up petitions as mentioned therein comes into effect only from 04.04.2021 (i.e) the date of Ordinance. It is because Section 54C can be filed only on & after 04.04.2021. Now, in a given case if an application under Section 7 IBC is pending prior to Amendment dated 04.04.2021 what will be the method adopted by the Adjudicating Authority, is provided under Section 11 (A) (4). Though the language of Section 11A(4) is clear and unambiguous there are two arguments on this proposition, one by Mr. Sumant Batra, Ld. Counsel and Mr. Abhishek Anand, Ld. Counsel stating that Clause (4) of Section

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11A makes it clear that an application filed under Section 7, 9 or 10 has no priority from the commencement of the Amendment Ordinance dated 04.04.2021. Therefore, Section 54C Chapter III-A petition has to be dealt with without any further inquiry. On the contrary Mr. Piyush Singh, Ld. Counsel would plead that a plain reading of clause (4) of Section 11A makes it clear that the manner of disposing of an application under Chapter III-A will apply only in respect of situations as under 11A (1), (2) & (3) and it will not apply in case where Section 7, 9 or 10 application is filed and pending earlier to 04.04.2021.

33. The question is as to how Section 11A (4) should be read? Whether the plain literal meaning or the manner in which CD and some of the real estate allottees want it to be read? This has been answered by the Hon'ble Supreme Court in catena of cases that the language of statute should be understood in its plain and simple manner and intent and not in a manner that will efface its intent. This principle has been upheld by the Hon'ble Supreme Court in various judgments:-

- i. **Nathi Devi v. Radha Devi Gupta reported in AIR 2005 SC 648**, the Apex Court held:

13. The interpretation function of the Court is to discover the true legislative intent, it is trite that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When a language is plain and unambiguous and admits of only one meaning no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are

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injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the Court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.

14. *It is equally well-settled that in interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors.*

15. *It is well settled that literal interpretation should be given to a statute if the same does not lead to an absurdity*

- ii. In *Nairin v. University of St. Andrews* reported in 1909 AC 147, the Apex Court held that,

“Unless there is any ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice.”

- iii. In *Ram Rattan v. Parma Nand* reported in AIR 1946 PC 51, it was held as follows:

The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning. If, however,

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such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case, the literal construction leads to no apparent absurdity and therefore, there can be no compelling reason for departing from that golden rule of construction.

iv. In *Nasiruddin v. Sita Ram Agarwal* reported in (2003) 2 SCC 577, the Supreme Court held as follows:

35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom....

*37. The courts jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used.But the intention of the legislature must be found out from the scheme of the Act.(xxiii) In *Indian Dental Association, Kerala v. Union of India* reported in 2004 (1) Kant. LJ 282, the Court held that, The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used", for it is well-accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. Where the language of an Act is clear and explicit, the Court must give effect to it, whatever may*

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be the consequences, for in that case the words of the statute speak the intention of the Legislature. Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. The decision in a case calls for a full and fair application of particular statutory language to particular facts as found. It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express. A construction which would leave without effect any part of the language of a statute will normally be rejected.

v. In *State of Jharkhand v. Govind Singh* reported in (2005) 10 SCC 437, the Supreme Court held that,

“12. It is said that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or sententia legis of the legislature.”

vi. *State of Andhra Pradesh v. Linde India Ltd*, Case Citation: (2020) 16 Supreme Court Cases 335: SCC OnLine SC 362

“It is a trite principle of interpretation that the words of a statute must be construed according to the plain, literal, and grammatical meaning of the words”

34. If the Parliament in its wisdom wanted to say that all pending Section 7, 9 or 10 petitions as on the date of commencement of Amendment dated 04.04.2021 will have no application, then they would have clearly said so. In Section 54D, it is clearly provided that PPIRP shall be completed or terminated within 120 days of commencement of pre-package insolvency. The Parliament was conscious of the fact that timeline has been granted under Chapter III-A and therefore if that does not work then CIRP can be initiated or pursued. This can only relate to situation under Section 11A (1), (2) & (3). On the contrary, in

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Section 11A (4) it is clearly mentioned that the provisions of Section 11A will not apply where an application under Section 7, 9 or 10 is filed and pending on the date of commencement of the (Amendment) Ordinance, 2021 dated 04.04.2021. From this it clear that the procedure prescribed under Section 11A (1), (2) & (3) of Chapter III-A will not hold the Adjudicating Authority from considering an application already filed and pending under Section 7, 9, 10 of IBC.

35. There may be situations where just prior to Ordinance dated 04.04.2021 a Section 7, 9 & 10 application may be filed; even then if a Section 54C petition is filed within 14 days of commencement of the Amendment Ordinance, then Section 11A cannot be invoked in view of Section 11A (4). If the application under Section 7, 9 & 10 is filed long before, the question of invoking the Section 11A (1), (2) & (3) to give precedence to PIRP over application under Section 7, 9 & 10 filed long before the Amendment dated 04.04.2021 does not arise.

36. We therefore, hold that the pre-package application under Chapter III-A which has been filed on 12.07.2022, cannot take precedence over the Section 7 of IBC application which was filed on 21.10.2020, and remained pending though heard and reserved and re-heard on a number of occasions. The Section 7 IBC application filed and pending in the case will have to be given precedence over the pre-package application. We are also not inclined to accept the plea of Mr. Abhishek Anand that PIRP application will be given benefit of limitation by excluding the period from 15.03.2020 to 31.05.2022 because even if it is

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excluded it does not help. Because the days fall short and as held by this Adjudicating Authority in para 35 above, Section 7, 9 or 10 IBC application filed prior to Ordinance dated 04.04.2021 will have precedence over Section 54C petition. We also notice that the CD through his counsel has earlier recorded that he has no objection for initiation of CIRP proceedings and it is recorded in order dated 07.06.2021 and has already been recorded in para 10 above. For various reasons the Section 7 IBC application could not be admitted and there appears to be no fault on the part of the applicant in the Section 7 IBC application. Merely because there was a delay in the admission of CIRP proceedings in the Section 7 IBC application, this Tribunal finds no justification to allow the pre-package to take precedence. We are bound by the mandate of Section 11A (4). Further our view is fortified by reading the paragraph 3.16 (c) of Insolvency Law Committee Report which is already extracted earlier. It clarifies the object and intent behind Section 11A(4).

37. The object of Section 11A is to guide the Adjudicating Authority to deal with applications of IBC-vs. Pre pack based on relevant dates as between them (Section 11A(1) (2) & (3) and to ensure that there is no clash between the applications filed prior to the Amendment dated 04.04.2021 and application filed after coming into force of the Amendment dated 04.04.2021. Various scenarios have been identified under Section 11A and the guiding principle has been given to the Adjudicating Authority. The guiding principle enjoined in Section 11A (1), (2), (3) & (4) is binding on this Adjudicating Authority. Therefore, there cannot

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be any deviation, however, much the real estate allottees' plead that it will be in their best interest.

38. In the result we hold that the PPIRP i.e. (IBPP)-02(PB)/2022 cannot be entertained in view of the pending Section 7 IBC petitions CP. No. (IB)-1081(PB)/2020 & CP. No. (IB)-1775(PB)/2018. Since the CD has already given the consent for admission of CIRP in the earlier proceedings as recorded and that, the debt and default is already admitted and recorded by this Tribunal in the earlier order dated 07.06.2021 recorded in para 10 above, which has not been modified or altered. The CD has also admitted debt and default as it is a pre condition for Chapter III-A petition. Therefore, there is no further enquiry needed on debt and default. The CD having conceded to debt and default both in terms of operational creditor earlier and real estate allottee presently, no further enquiry on debt and default is required. Therefore, CP. No. (IB)-1081(PB)/2020 & CP. No. (IB)-1775(PB)/2018 stand **admitted**.

39. In view of above, (IBPP)-02(PB)/2022 stand **dismissed**.

40. As the applicant(s) in CP. No. (IB)-1775(PB)/2018 has aligned in support of the PIRP whereas the applicant in CP. No (IB)-1081(PB)/2020 has opposed the nomination of IRP by the applicant(s) in CP. No. (IB)-1775(PB)/2018, we deem it appropriate to appoint the IRP from the panel provided by IBBI. Accordingly we appoint Mr. Rajesh Kumar Parakh having registration No. IBBI/IPA-001/IP-P00272/2017-18/10516 having email i.d. parakh.rajesh@gmail.com mobile no. 9811350848 as IRP. Mr. Rajesh Kumar Parakh, proposed IRP is directed to file

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his written consent in terms of Rule 9(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 forthwith.

41. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of IBC. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

42. As a consequence of the application being admitted in terms of Section 7 of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) of IBC shall follow in relation to the Respondent as per sub clauses (a) to (d) of section 14(1) of the IBC. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the IBC shall come in force.

43. We direct the Petitioners to deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs Only) with the Interim Resolution Professional Mr. Rajesh Kumar Parakh, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Petitioner. The amount however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Petitioner.

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44. The registry is directed to communicate a copy of the Order to the Petitioner, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi, at the earliest, but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

(RAMALINGAM SUDHAKAR)
PRESIDENT

(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)

05.09.2022
Ritu Sharma