



**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. I
KOLKATA**

Company Petition (IB) No. 89/KB/2024

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

IN THE MATTER OF:

Central Bank of India

... Applicant/ Petitioner.

Versus

Vivek Brothers Pvt Ltd

...Corporate Debtor/Respondent.

Date of Pronouncement: December 17th, 2024.

Coram:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)**

Appearance:

For the Financial Creditor:

Mr. Anshumala Bansal, Adv.
Ms. R. Choudhury, Adv.

For Corporate Debtor:

Mr. Dwaipayan Banerjee, Adv.
Mr. Amitav Mandal, Adv.
Ms. Mahima Mukherjee, Adv.
Ms. Shipra Naskar, Adv.

ORDER

Per Bidisha Banerjee, Member (Judicial):

- 1.** This Court congregated through hybrid mode.
- 2.** Heard the Learned Counsels for both parties.
- 3.** This instant application is filed under Section 7 of the Insolvency and Bankruptcy Code, for brevity I&B Code, read with Rule 4 of the Insolvency

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and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, by “Central Bank of India”, hereinafter referred to as “Financial Creditor” (“Applicant”/ “FC”) against “Vivek Brothers Pvt Ltd”, hereinafter referred to as “Corporate Debtor” (“Respondent”/ “CD”) seeking direction to initiate Corporate Insolvency Resolution Process (for brevity “CIRP”) in respect of the Corporate Debtor.

4. As of 20th February 2024, the total outstanding balance stands at Rs. 43,47,83,415. This balance is calculated based on a loan amount due and recoverable from Eastern Gases Limited as of 21st August 2018, amounting to Rs. 23,15,37,663, which was accepted as a claim in liquidation. From this amount, Rs. 10,20,37,136 has been received in liquidation vide Order dated 21.08.2018. Additionally, further interest has accrued from 22nd August 2018 to 29th February 2024, totalling Rs. 30,52,82,888. This brings the overall outstanding balance to Rs. 43,47,83,415.

5. Brief Facts of the case:

5.1 Financial Creditor had sanctioned working capital credit limits to the tune of Rs. 20 crores (Fund Based Working Capital facilities of 12 Crores and Non-Fund based limit of 8 crores) in favour of the Principal Borrower under Consortium Agreement dated 16/11/2012.

5.2 The said amount was secured by the guarantees of Jainco Automotive Pvt. Ltd. and Vivek Brothers Pvt. Ltd.

5.3 Two Deeds of Guarantee were executed by the Corporate Debtor (Corporate Guarantor), one on 05/02/2013 for an amount of Rs. 43 crores and another Deed of Guarantee on 21/01/2016 for an amount of Rs. 47 Crores.

5.4 The Corporate Debtor via Form 8 created charge on 17th September 2012 by way of mortgage by depositing title deeds of 9 residential flats owned by it in Mouza Raghunathpur, PS Rajarhat, District - 24

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Parganas (North) on pari passu basis in favour of the CBI consortium upto a liability of the borrower fixed at 43 crores and registered as such with the Registrar of companies.

5.5 Further, a Joint letter was also issued by Corporate Debtor (Corporate Guarantor) along with Jainco Automotive Pvt. Ltd. to the Financial Creditor for creation of mortgage in respect of 22 flats situated at Mahaveer Apartment at Mouza Raghunathpur, J.L. No. 8 R.S. No 134 comprised in R.S. Plot No. 580 under L.R. Khaitan Nos. 943/1 and 428/2 under holding Nos. RGM/21/2987 & 21/2088, North 24 Paraganas.

5.6 The account of Principal Borrower became NPA on 2nd May 2017 and is continuing as a NPA account. By an order dated 8th November 2017 delivered in CP(IB)No.482/KB/2017, CIRP was initiated against the Principal Borrower and thereafter, pursuant to an order dated 21st August 2018 passed in IA 718/KB/2018 under the same case number, the Principal Borrower went under liquidation. In the liquidation, the financial creditor being one of the members of COC received a sum of Rs 10,20,37,136.00/-, thereby leaving a sum of Rs. 43,47,83,415.00/- due and payable to the Financial Creditor.

5.7 As stated by the CD, the Financial Creditor had relinquished the third-party security of first charge by way of mortgage of 9 residential flats owned by the Corporate Debtor, whereas on the same note it is contended by the Financial Creditor that the concerned letter is a fresh sanction letter renewing the loan facilities.

5.8 However, the Corporate Debtor has initiated Title Suit No. 2156 of 2022 in the City Civil Court at Calcutta for the cancellation of the guarantee and the release of 9 flats, being contested by the applicant.



5.9 In the above background, this Company Petition has been filed by the Financial Creditor for initiation of CIRP proceeding against the Corporate Debtor.

6. Submissions of the Ld. Counsel for the Applicant:

6.1 It is submitted that on 16th November 2012, Ms/Eastern Gases Limited had approached the Financial Creditor for sanction of credit limits and the Financial Creditor had sanctioned credit limit of Rs. 20 crores (Fund Based working capital facilities of 12 Crores and Non-Fund based limit of 8 crores) by sanction letter dated 16/11/2012.

6.2 It is claimed that the Corporate Debtor acted as a Corporate Guarantor on 5th February 2013 by executing a Deed of Guarantee for an amount of 43 crores and another Deed of Guarantee for an amount of 47 crores on 21st January 2016, additionally securing the guarantee by mortgaging part of 22 flats located at Mahaveer Apartment in Mouza-Raghunathpur.

6.3 It is further submitted that the account of M/s Eastern Gases Limited was classified as an NPA on 2nd May 2017. ICICI Bank Ltd. (being a member of Consortium) filed a petition against the principal borrower, Eastern Gases Limited, being CP(IB) No. 482/KB/2017, and accordingly an order of liquidation was passed on 21/08/2018. In Liquidation, the Financial Creditor being one of the members of CoC, received a sum of Rs. 10,20,37,136/-.

6.4 It is contended that as of the current date, an outstanding principal amount of Rs. 13,15,37,663 remains due, along with Rs. 30,52,82,888 in accrued interest, bringing the total payable amount to Rs. 43,47,83,415.



6.5 It is submitted that the corporate debtor being the corporate guarantor for the said loan account of Eastern Gases Limited is liable to pay the said amount.

6.6 It is claimed that in its balance sheets from 31st March 2020 to 31st March 2023, the corporate debtor has acknowledged the guarantee and charge on its assets for Eastern Gases Limited. Copies of the audited balance sheets for the years 2021 to 2022 are annexed and marked as Annexure-F.

6.7 It is further submitted that, as it is evident from the cash flow and receivables of the corporate debtor, that it is insufficient to cover the debt burden. Under these circumstances, Section 7 of the Code is being invoked to initiate the corporate insolvency resolution process.

7. *Submission of the Corporate Debtor:*

7.1 It is submitted that the applicant has concealed crucial facts, including relinquishing the first charge on 9 flats owned by the corporate debtor via a letter dated 30th June 2016. The applicant is also pursuing Civil Suit No. 2156 of 2022 in the Calcutta City Civil Court to cancel the guarantee and release these flats, allegedly for unjust gain. Thus, this application should be dismissed.

7.2 It is submitted that the applicant granted joint Finance credit facilities to a company namely, Eastern Gases Limited by way of leading the consortium financed comprised of Central Bank of India, Axis Bank and DBS Bank Ltd.

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7.3 It is contended that at the request of Eastern Gases Limited, the respondent agreed to act as a guarantor for a limited period. The Consortium loan was guaranteed by the respondent through a Deed of Guarantee and Memorandum of Entry dated 5th and 13th February 2013, with the applicant as the lead bank. A copy of the Deed of Guarantee is annexed as Letter-B.

7.4 It is further submitted the respondent received a letter dated 16th April 2022 from the applicant, seeking reasons why the respondent should not be treated as a wilful defaulter for the account of Eastern Gases Limited. A copy of the letter is annexed as Letter-C.

7.5 It is contended that no claim was received within 3 years, i.e., by 15th November 2016, as the facilities under the sanction letter of 16th November 2012 were valid for only 1 year, until 15th November 2013. Any disbursement made after that date is not covered by the guarantee, and thus, any claim made is barred by limitation.

7.6 It is contended that the applicant never informed the respondent about the relinquishment of the third-party security on the 9 residential flats. The respondent only became aware of this through the letter dated 16th August 2022.

7.7 It is claimed that the applicant entered its appearances in the aforesaid civil suit and contesting the same till date and the next date is scheduled on 12th November 2024. A copy of the plaint along with order passed in connection with the aforesaid suit are annexed and marked as letter “E” & “F”.

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7.8 It is further submitted that the applicant has also sent demand notice under section 13(2) to the corporate debtor on 19.06.2024. Parallel proceeding is not barred by law but forum shopping or invoking all the remedies at same time is abuse of process of law. A copy of demand notice under section 13(2) of SARFAESI Act is annexed and marked with the letter “G”.

7.9 It is contended that the form 1 submitted by the Central Bank is unclear/ half-filled submitted with wrong data and no default has been established. On this ground itself the application should be rejected.

7.10 It is claimed that the applicant relinquished the corporate guarantee and third-party security of nine mortgaged residential flats owned by the respondent on 30th June 2016, without informing the respondent until 2022. Due to this lack of awareness, the respondent recorded a contingent liability in the balance sheets until 2023. After learning of the relinquishment, the respondent noted the release in the balance sheet, clarifying it does not acknowledge debt. Given the account was classified as an NPA on 2nd May 2017, the relief sought is barred by limitation.

7.11 It is contended that the initial guarantee, securing nine residential flats owned by the respondent, was provided under a Deed of Guarantee dated 5th February 2013. However, on 30th June 2016, the applicant relinquished the first-charge mortgage on these flats. The existence of any inter se agreement or letter of authority dated 5th February 2013 between consortium members is disputed.



8. Rejoinder on behalf of Financial Creditor:

8.1 It is submitted that the sanction letter dated 30th June 2016, which revised loan terms for M/s Eastern Gases Limited, was never acted upon or fulfilled by the principal borrower, rendering it lapsed and ineffective. Additionally, no Objection Certificate was issued by the Financial Creditor for the guarantor or relevant properties under this sanction.

8.2 It is contended that the quantum of Guarantee that is Rs. 43 crores in the aforesaid mention Deed of Guarantee dated 21st January 2016 which has been annexed and marked as Annexure K.

8.3 It is claimed that the guarantee was a continuing as shall appear from cluse 8 of the Deed of Guarantee dated 5th February 2013 being Annexure N to the application and any disbursement post that date will not to be covered by the Guarantee of that any claim made thereunder is barred by limitation as alleged or at all.

8.4 The Respondent denies receiving the alleged letter dated 16th August 2022 regarding the relinquishment of third-party security. No evidence of such communication has been provided. The principal borrower was under liquidation in April 2022, raising questions about the source of the purported information. The omission appears deliberate and in bad faith.

8.5 The sanction letter was never acted upon or enforced, and no NOCs were issued. The Corporate Debtor, being aware of this, continued acknowledging the debt and charge on the residential flats in its annual balance sheets filed with the Registrar of Companies.

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8.6 The letter dated 30th June 2016 was never implemented by the principal borrower, rendering it ineffective. Additionally, the Financial Creditor did not issue any "No Objection Certificates" for the guarantor or the associated properties as outlined in the sanction letter.

9. We have duly considered the submissions made by both parties and perused the documents and records placed before us carefully.

Analysis and Findings:

10. We find that there is no dispute about default as the Corporate Debtor acting as Respondent/Corporate Guarantor had executed Guarantee Deed in the favour of the Financial Creditor and has also shown the guarantee amount as a contingent liability of Rs. 43 crores in its balance sheet from 2019-2023.

11. The only relevant issue that needs consideration is that of the limitation i.e. whether the application for CIRP against the corporate guarantor, has been filed within the prescribed time limit as per Limitation act 1963, duly considering the date of NPA and Entries made in the balance sheet of the Corporate Guarantor in connection with the acknowledgment of the liability thereof.

12. From the audited balance sheets of the Corporate Debtor at Annexure F (pp 69-13, Vol 1), the contingent liabilities with respect to the bankers of M/s Eastern Gases Limited can be found from the year 2020 to 2023 as below:

- a) Year 2019-2020 - Corporate guarantee of Rs 43 crores along with collateral security of flats owned by the company.
- b) Year 2020-2021 - Corporate guarantee of Rs 43 crores along with collateral security of flats owned by the company.

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c) Year 2021-2022 - Company gave corporate guarantee and collateral security of flats and property (shown under note 8 of sheet), plant and equipment to secure Rs 43 crores.

d) Year 2022 2023 - Company gave the corporate guarantee and collateral security of flats owned by the company along with stock-in-trade to secure 43 crores.

In this matter, we rely on the judgement of ***Asset Reconstruction Company India Limited v. Bishal Jaiswal & Anr., Civil Appeal No.323 of 2021***, where it has been opined by the hon'ble Apex Court that,

*“14. Several judgments of this Court have indicated that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act. Thus, in ***Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402***, this Court held: **“12. The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to M/s Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963 and extend the period of limitation for the discharge of the liability as debt. ...”**”*

Emphasis Added

13. In view of the acknowledgement within 3 years, the limitation would stand extended till 2023. As such the point of limitation taken by the Corporate Debtor being the guarantor does not come to the aid of the Corporate Debtor.

14. Further, it is evident that the Corporate Debtor (M/s Eastern Gasses Limited) had entered into a loan agreement where the Financial Creditor had sanctioned working capital credit limits aggregating to Rs. 20 Crores including Fund Based Working Capital of 12 crores and Non-Fund based limit of 8 crores in favour of the Principal Borrower, M/s Eastern Gasses Limited under Consortium arrangement on 16/11/2012.

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15. However, the principal borrower went under liquidation vide order dated 21.08.2018. Through that liquidation, the Financial Creditor being one of the members of COC was only able to recover Rs. 10,20,37,136.00/- leaving a substantial due of Rs. 43,47,83,415.00 till 20th February 2024.

16. Further, while going through the Deed of Guarantee, this Tribunal is of the view that the guarantee was a continuing one as per para 8 of the deed. Moreover, the acknowledgment of the corporate guarantor in its balance sheet regarding the contingent liability leaves no space for any other evidence to verify the existence of liability on the part corporate debtor.

17. Now the issue is whether the CIRP can be initiated against the Corporate Guarantor. At this juncture, it would be appropriate to go through the proviso laid down under Sections 127 and 128 of the Contract Act, 1872, which are reproduced verbatim as below:

“Section 127 of the Contract Act, 1872: Consideration for guarantee- Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.”

“Section 128 of the Contract Act, 1872: Surety’s liability -The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.”

18. Further, we would refer to the settled law as laid down by the Hon’ble Apex Court and the Hon’ble as under:

(a) ***Laxmi Pat Surana v. Union Bank of India reported in (2021) 8 SCC 481: MANU/SC/0221/2021 at Para 37:***

“Further, the expression “default” has been defined in Section 3(12) to mean non-payment of “debt” when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt.”

(Emphasis Added)

19. Further, on the issue whether pre-existing disputes are of any consequence in context of initiation of CIRP, we would refer to judgement of the Hon'ble Apex Court reported in (2022) 9 SCC 364 (Kotak Mahindra Bank Ltd. v. Kew Precision Parts (P) Ltd.) wherein in paragraph 15 the Hon'ble Court has been of the view that **“pre-existing disputes are of no consequence to an application of a Financial Creditor under Section 7 of IBC for initiation of CIRP.”**

(Emphasised Added)

20. Thus in terms of forgoing discussions and decisions, we find, no reason to dismiss the application on the grounds canvassed by Corporate Debtor (Corporate Guarantor). We are of the considered view that the Corporate Guarantor is fully liable to pay the remaining dues of Rs. 43,47,83,415.00 (amount being calculated along with interest till 20/02/2024) to the Financial Creditor.

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21. In the light of the facts stated in the application bearing Company Petition (IB) No. 89/KB/2024, and the evidence placed on record and the discussion hereinabove, we **allow** this application filed under Section 7 of I&B Code, and accordingly, we order the initiation of Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor by the following Orders:

i. The Application filed by the Central Bank of India (Financial Creditor), under Section 7 of the Insolvency & Bankruptcy Code, 2016, is hereby, admitted for initiating the Corporate Insolvency Resolution Process in respect of Vivek Brothers Pvt. Ltd. (Corporate Debtor).

ii. As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.

iii. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

- a)** The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment decree or order in any court of law, Tribunal, arbitration panel or other authority;
- b)** Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its asset or any legal right or beneficial interest therein;
- c)** Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its

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property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

iv. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

v. The provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vi. The Applicant has proposed the name of “Sri Subodh Kumar Agarwal”, Registration No. IBBI/IPA-001/IP-P00087/2017-18/10183, Address Road: 1, Ganesh Chandra Avenue, 3rd Floor, Room No. 301, Kolkata 700012, Email ID: subodhka@gmail.com, as the “IRP”. We have perused that there is a written communication,

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annexed as Annexure “V” at Page 257, to this Application as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or Indian Institute of Insolvency Professional of Insolvency Professional Agency of Institute of Cost Accountants of India. In addition, further necessary disclosures have been made by “Sri Subodh Kumar Agarwal” as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of the Section 7(3)(b) of the code. Hence, we appoint “Sri Subodh Kumar Agarwal” as the Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the I&B 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 the RP, as the case may be, 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 I&B Code.

vii. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and call for the submission of claims under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016, shall be made immediately. 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.

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viii. During the CIRP period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, 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. There shall be no future opportunities in this regard.

ix. The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned Police Authorities and/or the Officer-in-Charge of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.

x. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

xi. The Financial Creditors shall be liable to pay to IRP a sum of **Rs. 3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

xii. In terms of sections 7(5) and 7(7) of the Code, the Registry of this Adjudicating Authority is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email

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immediately, and in any case, not later than two days from the date of this Order.

xiii. Additionally, the Registry of this Adjudicating Authority shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), 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.

xiv. The Resolution Professional shall conduct CIRP in time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xv. The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIRP in respect of the Corporate Debtor to this Adjudicating Authority time to time.

xvi. The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.

22. This order is issued under Section 7 of I&B Code 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016.

23. Urgent certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

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24. Post the matter on **14/02/2025** for filing the Periodical Progress Report by the IRP/RP.

Balraj Joshi

Member (Technical)

Bidisha Banerjee

Member (Judicial)

This Order is signed December 17th, 2024.

Arunav. P [LRA]