

Sl. No. 59/2024

1

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 05/7/JPR/2021

IN THE MATTER OF:

PHEONIX ARC PRIVATE LIMITED

...FINANCIAL CREDITOR

VERSUS

KARNI DEVELOPERS AND CONSTRUCTION
COMPANY PRIVATE LIMITED

...CORPORATE DEBTOR

MEMO OF PARTIES

PHEONIX ARC PRIVATE LIMITED

Registered Office at: Dani
Corporate Park, 5th Floor, 158
CST Road, Kalina, Santa Cruz
East, Mumbai- 400098

...Financial Creditor

VERSUS

KARNI DEVELOPERS AND CONSTRUCTION
COMPANY PRIVATE LIMITED

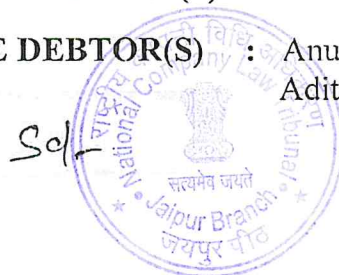
Registered office at: Plot No.
817, A/1-2, 7th Chopasani Road,
Jodhpur, Rajasthan- 342003;
Also at: Ramiya Bhawan,
Ghanchiyon Ka Mohalla, Near
Balwari School, Inside Jalori
Gate, Jodhpur, Rajasthan- 342003

...Corporate Debtor

FOR THE FINANCIAL CREDITOR(S) : Usha Singh, Adv

FOR THE CORPORATE DEBTOR(S) : Anuroop Singhi, Adv.
Aditya Vijay, Adv.

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N. Adhvech
Assistant Registrar

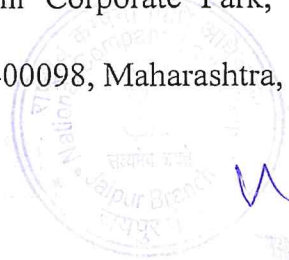
Order Pronounced On:22.02.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The instant Application has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the 'IBC'/ 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by *Phoenix ARC Private Limited* ('Applicant'/ 'Financial Creditor') through *Mr. Mahesh P. Malunekar*, Vice President of the Financial Creditor, with a prayer to initiate Corporate Insolvency Resolution Process ('CIRP') in respect of *M/s Karni Developers and Construction Company Private Limited* ('Respondent'/'Corporate Debtor') for defaulting in payment of Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty Nine Thousand and Six Hundred and Ninety-Eight Only). The Corporate Debtor is involved in the business of construction of buildings.
2. The Applicant is a Company incorporated under the Companies Act, 1956 and registered as an Asset Reconstruction Company under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest, 2002 ('SARFAESI Act'), having its registered office at 5th Floor, Dani Corporate Park, 158 CST Road, Kalina, Santacruz (East), Mumbai-400098, Maharashtra, India.

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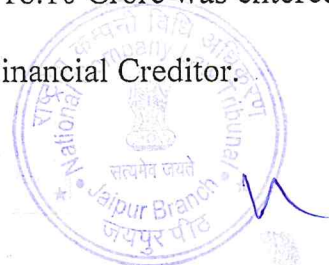
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3. The Corporate Debtor is a Private Limited Company incorporated on 19.11.1999 under the provisions of the Companies Act, 1956, duly registered with the Registrar of Companies, Jaipur, having CIN: U45201RJ1999PTC016008. The registered office of the company is situated at Plot No. 817, A/1-2, 7th Chopasani Road, Jodhpur, Rajasthan-342003. The authorized share capital of the company is Rs. 25,00,000/- (Rupees Twenty Five Lakhs Only) and the paid-up share capital is Rs. 24,70,200/- (Rupees Twenty-Four Lakhs Seventy thousand and two hundred Only) as per the records available on the website of Ministry of Corporate Affairs ('MCA').
4. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:
- 4.1. Initially, a Term Loan of Rs. 15 Crores was sanctioned vide Sanction Letter dated 02.12.2005 by *Union Bank of India* ('Bank') in favour of the Corporate Debtor ('Term Loan I'). The said loan was assigned to the Financial Creditor by *Union Bank of India* vide Assignment Agreement dated 3.12.2013 wherein the Bank assigned the Term Loan I along with interest, underlying security, and guarantees to the Applicant. Subsequently, on request of the Corporate Debtor, the assigned debt was restructured and a Memorandum of Compromise for a settlement amount of Rs. 18.10 Crore was entered into between the Corporate Debtor and the Financial Creditor.

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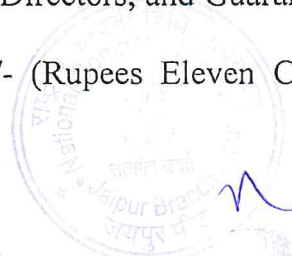
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4.2. The Corporate Debtor sought additional funding from the Financial Creditor for restructuring and revival of the operations of the Company. On request of the Corporate Debtor, the Financial Creditor granted a new Term Loan of Rs. 3,40,00,000/- (Rupees Three Crore Forty Lakhs Only) ('Term Loan II') vide Term Loan Agreement dated 07.02.2014. The Applicant has Annexed a copy of the Term Loan II Agreement, Letter of Personal Guarantees, Memorandum relating to the Deposit of Title Deeds, Deed of Hypothecation, and Mortgage Deeds, executed by the Corporate Debtor for securing the Term Loan from the Financial Creditor.

4.3. The Corporate Debtor failed to make the necessary payments for Term Loan II and the Loan account of the Corporate Debtor was classified as Non Performing Asset ('NPA') on 31.03.2016. Subsequently, the Financial Creditor issued a recall notice dated 29.04.2017, calling upon the Corporate Debtor, its Directors, and Guarantor to pay the sum of Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty Nine Thousand and Six Hundred and Ninety-Eight Only). Thereafter, the Financial Creditor issued a Demand Notice dated 14.08.2019 under Section 13(2) of SARFAESI Act, 2002 to the Corporate Debtor, its Directors, and Guarantors, to repay an amount of Rs. 11,29,75,720/- (Rupees Eleven Crores Twenty

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Nine Lakhs Seventy Five Thousand Seven Hundred and Twenty Only) along with further interests, costs and other charges.

4.4. Due to non-payment of the outstanding amount even after issuance of the Recall Notice and Demand Notice, the Financial Creditor has filed the present Application under Section 7 of the IBC on 11.01.2021. The Financial Creditor further submitted that the Present Application has been filed within the limitation period as the Corporate Debtor has acknowledged the debt in its letters dated 08.05.2017, 29.04.2017, and 12.03.2019.

4.5. The details as reflected in PART IV of the Application are as below:

<u>PARTICULARS OF FINANCIAL DEBT</u>		
1.	Total amount of debt granted Date of the disbursement	<p>a) Financial Creditor(s) in the year 2014 sanctioned a term loan of Rs. 3,40,00,000/- (Rupees Three Crore Forty Lakhs Only) vide Term Loan agreement dated 07.02.2014.</p> <p>b) The account of the Corporate Debtor was classified as NPA on 31.03.2016 in accordance with the guidelines of Reserve Bank of India.</p>
2.	Amount claimed to be in default and the date on which the default occurred	<p><u>Amount claimed to be in default-</u></p> <p>The amount claimed to be in default is Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty-Nine Thousand Six Hundred Ninety-Eight Only) as per the Recall notice dated 29.04.2017</p>

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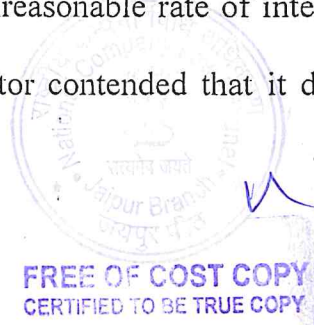


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5. The Corporate Debtor filed its Reply *vide* Dairy No. 2129/2022 dated 18.07.2022 and Written Submission *vide* Diary No. 3085/2023 dated 27.12.2023, which are being considered jointly as below:
- 5.1. The Corporate Debtor availed a Term Loan of Rs. 15 Crores from Union Bank sanctioned *vide* sanction letter dated 02.12.2005 whereas the Bank had only disbursed an amount of Rs. 12.92 Crores against the sanctioned limit of Rs. 15 Crores. The said loan was later assigned to the Financial Creditor which was restructured, and a Memorandum of Compromise for a settlement amount of Rs. 18.10 Crore was entered into between the Corporate Debtor and the Financial Creditor. The Corporate Debtor contended that the aforementioned Agreement was executed under compulsion.
- 5.2. The Corporate Debtor *vide* its letter dated 03.12.2013 requested the Financial Creditor to grant a fresh Term Loan of Rs. 6.90 Crores. The Financial Creditor, instead of accepting the request of the Corporate Debtor, granted a fresh Term loan of Rs. 3.40 Crores only. The deficiency in the amount of Loan sanctioned by the Financial Creditor resulted in a liquidity crunch, and hampered the projects of the Corporate Debtor. Further, the terms and conditions of the Loan provided for an exorbitant and unreasonable rate of interest of 30% Per Annum. The Corporate Debtor contended that it did not have

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equal bargaining power at the time of entering into the Loan Agreement. Therefore, the Financial Creditor cannot be permitted to rely upon the same to initiate the CIRP.

5.3. The Financial Creditor issued a recall notice dated 29.04.2017 to the Corporate Debtor for payment of a sum of Rs. 5,05,89,698 (Rupees Five Crores Five Lakhs Eighty Nine Thousand and Six Hundred and Ninety-Eight Only), in response to which the Corporate Debtor vide its letter dated 5.05.2017 sought additional time to make payments. Despite repeated requests of the Corporate Debtor, the Financial Creditor in an arbitrary manner issued a Demand Notice dated 23.06.2017 under Section 13(2) of the SARFAESI Act, 2006. Thereafter, the Financial Creditor took possession of the Secured Assets and proceeded to auction the properties of the Corporate Debtor at a minuscule amount than what they were worth, although the properties remained unsold due to the non-participation of bidders.

5.4. During the pendency of the present proceedings, the Corporate Debtor vide its letter dated 31.05.2022 submitted a One Time Settlement Offer ('OTS') to the Financial Creditor wherein the Corporate Debtor offered a settlement amount of Rs. 18 Crore as full and final payment for both the Term Loans. Despite the best efforts

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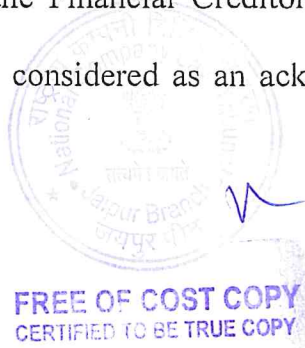


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of the Corporate Debtor to settle the debt, the Applicant is trying to harass the Corporate Debtor by continuing the present proceedings.

- 5.5. The Corporate Debtor contended that the Application is not maintainable as the existence of default is a prerequisite for initiation of CIRP under Section 7 of the Code. The word 'default' has to be interpreted as a conscious and wilful act of the Corporate Debtor and it cannot be read to mean any non-payment that too due to inaction or arbitrary act of the Financial Creditor.
- 5.6. The Corporate Debtor further submitted that the Present Application is barred by limitation. The date of default as per *RBI Master Circular No. RBI/2023-24/06 (Prudential norms on Income Recognition, Asset Classification, and Provisioning pertaining to Advances)* would be 90 days prior to the date of NPA. The Account of the Corporate Debtor was declared as an NPA on 31.03.2016. Therefore, the date of default in the present case would be a date somewhere in the year 2015 but not later than 31.12.2015 and the period of limitation i.e., three years, will end on 31.12.2018. The present Application was filed by the Financial Creditor on 11.01.2021 which is after the expiry of the limitation period.
- 5.7. The Corporate Debtor further submitted that the Balance Sheet of the Corporate Debtor filed by the Financial Creditor for the year ending on 31.03.2020 cannot be considered as an acknowledgment

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of debt for extending the period of limitation. The Balance Sheet was signed on 7.12.2020 which is after the expiry of the limitation period. The Corporate Debtor has relied upon Section 18 of the Limitation Act, 1963 to contend that the acknowledgment of debt for extension of the Limitation Period ought to have been made before the expiry of the Limitation Period i.e., on or before 31.12.2018. Thus, the Petition filed by the Financial Creditor is barred by limitation.

5.8. The Corporate Debtor also contended that the Financial Creditor has failed to mention the date of default in Form-1 Part IV which is a mandatory requirement. In the absence of the date of default, the Petition filed u/s 7 of the Code deserves to be dismissed for non-compliance of the mandatory requirements of law.

5.9. The Corporate Debtor placed reliance upon the following judgments in support of its contentions:

- I. *Asset Reconstruction Company (India) Ltd. v/s Manyata Developers (P) Ltd. [2023] 155 taxmann.com 259 (NCLT-Beng.)(SB)*
- II. *M.K. Dhir v/s Punjab National Bank Ltd. NCLAT 2022 SCC OnLine NCLAT 32*
- III. *Asset Reconstruction Company v/s Bishal Jaiswal & Anr 2021 (6) SCC 366*

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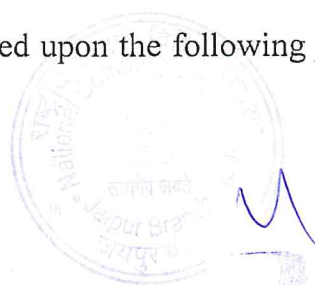
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6. The Financial Creditor filed its Written Submissions vide Diary No 189/2024 dated 19.01.2024 and raised the following contentions for initiation of CIRP against the Corporate Debtor:

6.1. The Financial Creditor filed the Balance Sheet of the Corporate Debtor for the F.Y. 2019-20 and letters of acknowledgment of debt vide Diary No. 1290/2021 dated 6.07.2021 and Diary No. 636/2021 dated 9.03.2021. It was submitted that the Corporate Debtor has acknowledged the existence of the debt in its correspondences with the Financial Creditor dated 08.05.2017, 29.04.2017, 5.05.2017, 11.03.2019, and 11.08.2020. The Corporate Debtor has also acknowledged the debt in its Balance Sheet for the Financial Year 2019-20 wherein both the Term Loans along with the unpaid interest amount were shown under the head Other-Current Liabilities. In light of the aforementioned acknowledgments, the Present Application u/s 7 of the Code is filed within the prescribed limitation period.

6.2. It was also submitted that while considering the Application for initiation of CIRP u/s 7 of the Code, the Adjudicating Authority is only required to ascertain the existence of the 'debt' and 'default'. All the ingredients for initiation of CIRP are available in the present case. The Financial Creditor relied upon the following judgments in support of its contentions:

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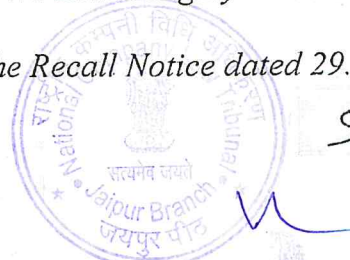
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- I. *Asset Reconstruction Company (India) Limited v/s Bishal Jaiswal (2021) 6 SCC 366*
 - II. *B.K Educational Services Private Limited v/s Parag Gupta and Associated Hold Goods (2019) 11 SCC 633*
 - III. *Vivek Jha v/s Daimler Financial Services India Private Limited & Anr. 2020 SCC OnLine NCLAT 64*
 - IV. *Nazamunnessa Begum v/s Vidyasagar Cotton Mills Ltd (1963) 33 Comp Cas 36 (Cal.)*
 - V. *Innovative Industries Ltd. v/s ICICI Bank (2018) 1 SCC 407*
7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, and Written Submissions along with the documents enclosed therein.
8. In the present Application, the Corporate Debtor has raised a technical objection that the date of default has not been mentioned in the Form-1 of the Application filed by the Financial Creditor, therefore the application filed under Section 7 is defective and is not maintainable. Upon perusal of Form-1 filed by the Financial Creditor, in Part IV against the amount claimed to be in default and the date on which default occurred, the Financial Creditor has stated that “*Amount claimed to be in default is Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty-Nine Thousand Six Hundred Ninety-Eight only) as per the Recall Notice dated 29.04.2017.*”

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9. From the Part IV of Form I, it is seen that the Financial Creditor has mentioned the amount of default but no date is mentioned regarding the date of occurrence of default. However, the Financial Creditor has annexed several documents to show the existence of debt and its default including a copy of the Term Loan Agreement, Personal Guarantee Agreements, Recall Notice dated 29.04.2017 and Notice under Section 13(2) of SARFAESI dated 14.08.2019. The Financial Creditor has also stated that the Account of the Corporate Debtor was declared as NPA on 31.03.2016. Further, the Financial Creditor has also produced letters from the Corporate Debtor acknowledging the debt and the Corporate Debtor has itself annexed the OTS which was presented to the Financial Creditor.
10. The Financial Creditor has produced all the relevant documents regarding the debt and its default. In such a situation, it will be inequitable and unjust to dismiss the Application solely on the technical ground that the Financial Creditor has failed to mention the date of default in Part IV of the Application.
11. Further, Hon'ble NCLAT in the case of *Mr. Manmohan Singh Jain V/s M/s. State Bank of India & ors. Company Appeal (AT) (CH) (INS) No. 97 of 2021* has held that:

"47. Further, this 'Tribunal' hold that omission to mention date of default in Col.2 Part IV in Form 1 is not fatal to the application. As we are of the view that as per Col.8 of Part V in Form 1 regarding particulars of Financial Debt documents, records and evidence of default to be attached, the Financial Creditor has shown sufficient documentary evidence to establish the date of NPA i.e. 27.11.2018 and the

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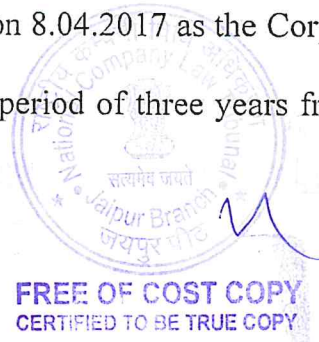
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Adjudicating Authority has taken note of the same and admitted the application. This 'Tribunal' do not find any illegality in admitting the application."

12. The Corporate Debtor contended that the Present Application is barred by limitation as the date of default would be 90 days prior to the Date of NPA and since the Account of the Corporate Debtor was declared as NPA on 31.03.2016, the date of default would be a date not later than 31.05.2015.
13. It is pertinent to mention that the Corporate Debtor has acknowledged the liability in its letter dated 8.05.2017. Further, as per the Balance Sheet of the Corporate Debtor for the Financial Year 2019-20, both the Term Loans along with the unpaid interest amount were shown under the head Other-Current Liabilities of the Corporate Debtor. As per Section 18 of the Limitation Act, 1963, a fresh period of limitation shall be computed from the date of acknowledgment of debt provided the acknowledgment is made before the expiry of the Limitation Period.
14. In light of the settled principle of law, a fresh period of limitation will start from the date of acknowledgment. In the present case, the Corporate Debtor had acknowledged its liability in the letter dated 8.04.2017. Therefore, even if the argument of the Corporate Debtor regarding the date of default being a date not later than 31.05.2015 is considered, a fresh period of limitation will begin on 8.04.2017 as the Corporate Debtor has acknowledged the debt within a period of three years from such date

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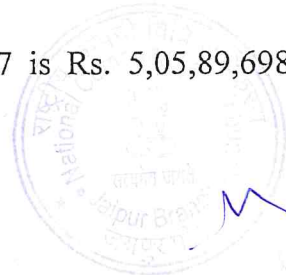
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of default being not later than 31.12.2015. Further, as per the guidelines issued by the Supreme Court to deal with the Covid Crisis, in cases where the limitation would have expired during the period between 15.03.2020-28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. Hence, in our consideration, the Present Application which was filed on 9.01.2021 is well within the limitation period prescribed by the law and the averment of the Corporate Debtor qua non-maintainability of the Application is untenable.

15. As far as the other contentions of the Corporate Debtor are concerned, it will be relevant to refer to Section 7 of the Code. Section 7 of the Code clarifies that the Adjudicating Authority has powers to initiate CIRP upon being satisfied that default has occurred of the financial debt. The key ingredients of an Application filed under Section 7 of the Code are: (i) there has to be a financial debt and; (ii) there must be a default in repayment of the financial debt. While dealing with an application under section 7, the Adjudicating Authority is not required to consider the question of the dispute between the parties as long as the 'debt' and 'default' is proved.
16. Presently, the Applicant has contended that the Corporate Debtor has defaulted in repayment of Term Loan II and the outstanding amount as per Recall Notice dated 29.04.2017 is Rs. 5,05,89,698/- (Rupees Five

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Crores Five Lakhs Eighty-Nine Thousand Six Hundred Ninety-Eight Only).

17. The Financial Creditor has established the existence of the debt and its default. In light of the aforementioned, we are of the view that Corporate Insolvency Resolution Process ought to be initiated against the Corporate Debtor as all the ingredients laid down under Section 7 of the Code are fulfilled in the present matter.
18. The Applicant has named one *Mr. Manoj Sehgal* having Registration Number IBBI/IPA-002/IP-N00108/2017-18/10256 (Mobile No.: +91 9312010519), duly registered with ICSI Insolvency Professional Agency, to be appointed as the Interim Resolution Professional. The Applicant has filed Consent in Form 2 under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016, stating that no disciplinary proceedings are pending against the named IRP.
19. Consequences of initiation of CIRP shall be inter-alia as follows:

19.1. The Resolution Professional proposed by the Applicant is *Mr. Manoj Sehgal*, who is an IP registered with ICSI Insolvency Professional Agency having Registration No. IBBI/IPA-002/IP-N00108/2017-18/10256, is hereby appointed as the Insolvency Resolution Professional ('IRP') to take over the affairs of the Corporate Debtor and execute duties as required to be performed by him under the provisions of IBC,

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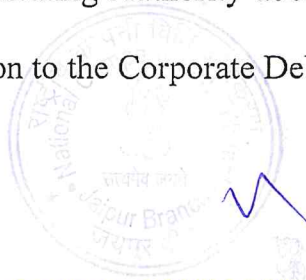
2016, including the issue of the publication in widely circulated Newspaper as contemplated under the provisions of IBC, 2016 and calling for the claims from the creditors of Corporate Debtor and collation of the same therein.

19.2. Further, as a sequel of admission, Moratorium as envisaged under Section 14 of IBC, 2016, is invoked concerning the Corporate Debtor, which will be in vogue during the Corporate Insolvency Resolution Process of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of IBC, 2016, in relation to the Corporate Debtor.

19.3. The said IRP shall act strictly in compliance with the provisions of IBC, 2016 and defray his expenses to be incurred and fees on the account. The Applicant is directed to act in accordance with Regulation 33(1) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Applicant shall deposit a sum of Rs 2 Lakh Only as the fees in the account of IRP within three days from the date of this order. The IRP shall duly file a status report from time to time appraising this Adjudicating Authority about the progress of CIRP unfolded in relation to the Corporate Debtor.

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19.4. In terms of Sections 17 & 19 of IBC, 2016, all personnel of the Corporate Debtor including its Promoters and the Board of Directors, whose powers shall stand suspended and shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

19.5. In terms of Section 7 of IBC, 2016, this order shall be communicated to the Applicant, Corporate Debtor, and the Interim Resolution Professional (IRP) appointed by this Adjudicating Authority to carry out the CIRP at the earliest, not exceeding one week from today.

20. A copy of this order shall also be communicated to IBBI for its record, and to any other body/entity to whom the Corporate Debtor is under legal/contractual obligation to inform/update.

21. In the circumstances, CP No. (IB) 05/7/JPR/2021 stands admitted.

Pending Applications, if any, shall stand disposed off.



(Signature)

Sdr
DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

Sdr
RAJEEV MEHROTRA,
TECHNICAL MEMBER

