

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV**

Company Petition No. (IB)- 2561/(ND)/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016

In the matter of:

M/s. Shapoorji Pallonji & Co. Private Limited
.... Operational Creditor/applicant

Vs.

M/s. Sinnar Thermal Power Limited
(formerly known as Rattan India Nasik Power Limited)
.... Corporate Debtor/ respondent

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)

Order Delivered on: 19.09.2022

ORDER

PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

The instant petition is filed by M/s. Shapoorji Pallonji & Co. Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') having registered office at 70 Nagindas Master Road Fort, Mumbai-400023 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Sinnar Thermal Power Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor').

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1 of 14



2. The Respondent Company M/s. Sinnar Thermal Private Limited having CIN: U70109DL2007PLC157316 is incorporated under the provisions of the Companies Act, 2013 having its registered office situated at A-150-151, Ground Floor, K.H. No.407, A Block, Mahipalpur Extension, New Delhi - 110037. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
3. Briefly stated facts of the present case are that Operational Creditor as well as Corporate Debtor entered into a contract for the Civil & Structural Work for Boiler, Turbine & Generator (hereinafter referred as "the BTG Works") vide agreement dated 28.05.2010, for the purpose of establishing 5 X 270 mega wat Nasik Thermal Power Project, at Sinnar for an amount of Rs.1,80,00,00,000/-, initially agreed as total payment payable under the agreement dated 28.05.2010, whereas the total value of the contract was to be subsequently increased vide several amendments, to the tune of Rs. 224,13,18,811.04/- inclusive of GST. In connection with the contract, the work order dated 20.11.2012 was awarded to the Operational Creditor for the civil work of ash handling, workshop building and cable duct bank from MCR to GIS Building Nashik for a total value of Rs.12,56,47,212.11/- and the said award work was completed by the Operational Creditor on 31.03.2018.
4. Further, it is submitted that as per the contract, the defect liability period was applicable for a period of one year, within which all the defects rectification and any issue faced by the Corporate Debtor should have been resolved, but during this period, no such issue was ever raised with respect to construction and the corporate debtor also did not claim any damages on account of delay, accordingly, defect liability period was over on 31.03.2019.

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5. It is further submitted that the cumulative work done for the contract amounts of Rs.208,33,63,433/- and out of the aforesaid amount the Operational Creditor has received only a sum of Rs.146,14,00,095/-. It is submitted that on 25.04.2018, Operational Creditor submitted the final bill measurement sheet in excel format to the Corporate Debtor for verification which was duly acknowledged by the Corporate Debtor vide its e-mail dated 25.04.2018. Thereafter, the Operational Creditor sent a demand notice under Section 8 to the Corporate Debtor on 16.08.2019 demanding a differential amount of Rs.62,19,63,338/-. In its reply dated 29.08.2019, the Corporate Debtor raised fresh disputes for the first time which were never raised in order to make out a case of pre-existing dispute between the parties. In defiance of terms of contract, the corporate debtor not only refused to return the Performance Bank Guarantee issued, rather the Corporate Debtor threatened the Operational Creditor with invocation of the same. Thereafter, the Operational Creditor filed and sought a relief from the Hon'ble High Court of Delhi with respect to Performance Bank Guarantee and accordingly, vide order dated 20.08.2019, the Hon'ble High Court stayed the invocation of Performance Bank Guarantee subject to the Operational Creditor keeping the PBG alive. Hence, it is being submitted that a sum of Rs.62,19,63,338/- are due against the Respondent/Corporate Debtor, accordingly, the applicant prayed for acceptance of the present petition and to initiate CIR process against the Respondent/Corporate Debtor.

6. On the other hand, the corporate debtor filed a detailed reply submitting that there were pre-existing disputes between the parties as the petition under Section 9 of the Arbitration and Conciliation Act 1996 was pending between the parties before the Hon'ble High Court of Delhi and the Arbitrator was duly appointed. Further, it is submitted that letter of charge dated 26.02.2010, for the Construction of BTG Civil and Structural Work for the Project does not pertain to Respondent as the same is signed and acknowledged by "Elena Power and Infrastructure Limited", Therefore, the

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said documents do not pertain to Corporate Debtor and there is no privity of contract between the Operational Creditor and the Corporate Debtor.

7. Further, it is submitted that BTG contract also contains an arbitration clause and as per that, parties were to settle the same by mutual agreement. It is also submitted that though the Respondent/Corporate Debtor made the appropriate and corresponding payments, however, the applicant miserably failed to complete the assigned scope of work on various occasions and the Corporate Debtor and its representative & associates repeatedly informed the applicant thereby bringing to its notice the delay caused by Operational Creditor in completion of the assigned work as per the agreement including various other quality issues. This can be verified from the various correspondence mode through e-mails and vide e-mail dated 02.05.2016, the Corporate Debtor had brought to the notice of the Operational Creditor that the following significant checks were pending and were to be completed i.e.

- a) Grid wise Column Alignment First & Second part (verticality).
- b) Span and diagonal between column.
- c) Alignment of skirt girder & verticality of stub column.

8. Sufficient time was provided to them, even adequate and qualified erection welders were not deployed at the elevated structure, there was lot of compromise with the quality of the work by the Operational Creditor, as there were various defects in the same. It is also submitted that vide MoM dated 01.11.2014 the Corporate Debtor expressed its concern over the non-availability of 250 MT Crane, which the Operational Creditor have to provide in the month of Oct 2014 and the Corporate Debtor also asked the Operational Creditor to provide the completion programmer in line with the requirement of the Corporate Debtor, but no further progress was made. Subsequently, vide MoM dated 12.11.2014, the Corporate Debtor has expressed his concern on shortage of manpower, especially structural manpower and accordingly, the Operational Creditor was asked to immediate argumentation to meet the target dates. Thereafter, vide MoM

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dated 18.12.2014, 22.12.2014 & 29.012.2014 the Corporate Debtor expressed its serious concern over the poor supervision at the project and repetitive failure on the part of the Operational Creditor for the weekly execution of works completion targets commitments. Vide MoM dated 06.01.2015 the same concern were expressed to the Operational Creditor and this get on repeated the expressed on 03.03.2016, 31.03.2016, 02.04.2016, 07.04.2016, 14.04.2016, 21.04.2016, 05.05.2016, 11.05.2016, 19.05.2016, 26.05.2016, 02.06.2016, 09.06.2016, 17.06.2016, 23.06.2016, 30.06.2016, 07.07.2016, 19.07.2016, 04.08.2016, 11.08.2016, 18.08.2016, 27.08.2016, 01.09.2016, 07.09.2016, 22.09.2016, 01.10.2016, 13.10.2016, 27.10.2016, 03.11.2016, 10.11.2016, 01.12.2016, 08.12.2016, 22.12.2016, 01.01.2017, 12.01.2017, 16.02.2017, 23.02.2017, 09.03.2017, 23.03.2017, 13.04.2017, 04.05.2017, 11.05.2017, 25.05.2017, 08.06.2017. Thus, there were constant delay and deficiency of services on the part of the Operational Creditor in completing the project site and the Corporate Debtor was constrained to issue e-mail on 22.01.2016, however, the Operational Creditor vide e-mail dated 23.01.2016 denied their liability and requested the Corporate Debtor to withdraw their termination requests, even after repeated representations and assurance to provide best services by the Operational Creditor, the Operational Creditor still lacked in completing the work of the Corporate Debtor. The Corporate Debtor vide e-mail dated 22.02.2016 had brought to the notice of the Operational Creditor that the mobilization of manpower and machineries till date was not enough to cater the required work pace to achieve the agreed work completion plan. It is further submitted, vide letter dated 27.07.2017, the present director stated that the work of waterproofing as guaranteed was done, but there was leakage from the roofs of various building, at the project site. Hence, the work done by the Operational Creditor was of poor quality and in violation of the contract.

9. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply and rejoinder filed by the parties. The relevant documents annexed with the respective submissions have been examined.

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10. We observe that the applicant had sent demand notice dated 16.08.2019 in Form 3 under Section 8 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 (a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor for demanding payment in respect of the outstanding operational debt amounting Rs.62,19,63,338/-. Consequently, the applicant in Part-IV of Form 5 of the petition had claimed an outstanding operational debt amounting Rs.62,19,63,338/- along with the interest at 18%per annum.

11. At this juncture, it is pertinent to mention that the Insolvency and Bankruptcy Code is a self-contained Code. It has made provision under Section 9 sub-section (5) of the Code for providing an opportunity to rectify the defects of application, and in any position, it cannot be denied. The provision of section 9 sub-section (5) of the code are reproduced hereunder:-

“9. Application for initiation of corporate insolvency resolution process by operational creditor.—

(1) xxx

(2) xxx

(3) xxx

(4) xxx

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

12. We are further strengthened by the Hon’ble Supreme Court dated **21.09.2017** **in Civil Appeal No.9405/2017 in Mobilox Innovations Pvt Ltd V. Kirusa Software Pvt Ltd** at paragraph 25 it is observed as under:

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“Adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh?

(See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

*(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed **before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?***

13. From the aforesaid decision, it is clear that the existence of ‘Dispute’ must be ‘pre-existing’ i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding Rs. 1 lakh and the Application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a ‘Dispute’ between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid ‘operational debt’, the Application under Section 9 cannot be rejected and is required to be admitted.
14. On a cojoint reading of the provision envisaged under Section 9 of the Code, 2016 and **the Mobilox Innovations (Supra)**, we are of the considered opinion that it is a settled preposition that the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.
15. Adverting to factual matrix of the present case, we are satisfied that present petition is complete as per the provisions of Code, 2016 read with rules made thereunder, outstanding operational debt claimed in part IV of Form-5



of the petition is above the pecuniary threshold limit as envisaged under Section 4 of the Code, 2016 and duly supported by Agreement dated 28.05.2010 and addendums thereto, Running Account Bills and other ancillary documents, therefore, the requirements as envisaged under Section 9(5)(i)(a), 9(5)(i)(b) and 9(5)(i)(c) of the Code, 2016 are satisfied.

16. The only issue this Adjudicating Authority have to determine is ***whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?***
17. It is apparent from the records that the corporate debtor had not raised any substantial objection or dispute pertaining to the work performed by the Operational Creditor prior to the issuance of the demand notice dated 16.08.2019. It was on 29.08.2019 when the corporate debtor had responded for the first time in its reply dated 29.08.2019 to the demand notice issued by the Operational Creditor under Section 8(1) of I&B Code raising dispute making reference to its own communications to establish that there is deficiency of services and the works were incomplete by the applicant, consequent of which that alleged operational debt is disputed.
18. As a preface to our analysis, we observe that the concerns raised by the corporate debtor in the communications referred by the corporate debtor in its reply were addressed by the applicant to the full satisfaction of the corporate debtor, resultant to which the corporate debtor had issued completion certificate dated 09.05.2019 to the applicant. It is pertinent to note here that by then the Defect Liability Period of 12 months had already expired. Further, call period of two months beyond the expiry of the Defect Liability Period was also over without raising any dispute by the corporate debtor regarding any defects in work completed by the applicant. This evidently proves that if there were any discrepancies, the applicant could not have obtained Work Completion Certificate from the corporate debtor with a remark that the applicant performance was found satisfactory to the best of



their knowledge. This also shows that all the defects, if any, pointed out by the corporate debtor have been timely rectified within the appropriate time, so that the corporate debtor found it appropriate to issue the Work Completion Certificate, otherwise, the corporate debtor would not have issued an incorrect certificate. Therefore, the corporate debtor is estopped from raising the plea of the pre-existing dispute between the parties. The work completion certificate dated 09.05.2019 is as below:-

SINNAR THERMAL POWER LIMITED

Date: 09.05.2019

WORK COMPLETION CERTIFICATE

This is to certify that M/s Shapoorji Pallonji & Co. Pvt. Ltd. has completed Main plant are (BTG) Civil & Structural work for 5 x 270 MW Nasik Thermal Power Project against contract Agreement No. IRL/Civil/NTPP/BTG/ Civil/001 dated: 28.05.2010.

M/s Shapoorji Pallonji & Co. has completed above contracts and their performance found satisfactory to best of the knowledge.

This certificate is issued to M/s Shapoorji Pallonji & Co. on their request for participating in tenders in Public sector/ Private sector/ PSU and any other private organization.

For SINNAR THERMAL POWER LIMITED

(Formerly known as Indiabulls Realtch Limited & Rattanindia Nasik Power Limited)

Sd/-

Authorized Signatory

Received Completion certificate issued for the work completed by us on 31/Mar/2018.

Sd/-

CC: M/s Shapoorji Pallonji & Co.

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19. We observe that the applicant had filed an injunction petition i.e., O.M.P.(I)(Comm.) 262 of 2019 under Section 9 of the Arbitration and Conciliation Act,1996 before the Hon'ble Delhi High Court, seeking protection from illegal invocation of Performance Bank Guarantee by the Corporate Debtor. Further an arbitration notice dated 23.09.2019 was sent by the applicant to the corporate debtor to protect the invocation of PBG by the Corporate Debtor after the issuance of the demand notice dated 16.08.2019 and filing of the present petition on 19.09.2019.

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20. Be that as it may, as a matter of fact the Hon'ble Arbitral Tribunal has passed a final award dated 22.04.2022 wherein the corporate debtor is ordered to pay amount of Rs.62,19,63,338/- (Rupees Sixty Two Crore Nineteen Lakh Sixty Three Thousand Three Hundred Thirty Eight). Further, on a meticulous perusal of the final award, we observe the summary of the findings-issue wise as recorded in the final award, no issue relating to the deficiency of service, breach of contract either by any of the parties was raised or pressed by the corporate debtor, which corroborates the fact that there exists no dispute between the parties. Moreover, the arbitration final award is passed in favour of the applicant which further substantiates the fact that the operational debt was due and in default by the corporate debtor. Therefore, the corporate debtor had failed to raise any plausible contention and the pre-existing dispute attempted to be raised by the corporate debtor is a feeble one, unsupported by any evidence, is a moonshine and nothing else.

21. The Hon'ble Supreme Court in case **K.Kishan v. M/s. Vijay Nirman Company Private Limited [Civil Appeal No. 21824 of 2017, judgement date:14.08.2018]** while dealing with the issue ***Whether the Insolvency and Bankruptcy Code, 2016 can be invoked in respect of an operational debt, where an arbitral award has been passed against the operational debtor, but which has not yet been finally adjudicated upon?*** observe as follow:-

18) *We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.*

19) *We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in*

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such clear cases that the insolvency process may then be put into operation.

22. Section 34(3) of the Arbitration and Conciliation Act, 1996 Act provides that an application for setting aside an arbitral award has to be made within *three months of the date of receipt of the arbitral award by the applicant*. The Final Award by the Arbitral Tribunal was delivered on 22.04.2022 and neither the corporate debtor nor the operational creditor had made any submission regarding the filing of the application for setting aside the arbitration award during the final arguments in the petition on 18.08.2022, therefore considering the timeline prescribed for filing the application under Section 34 of the Arbitration and Conciliation Act, 1996 has already expired, hence, placing reliance on **K.Kishan case (supra)**, an inference can be drawn that the arbitration award had attained finality.
23. In view of the foregoing averments and the discussions made, we are of the considered view that operational debt above the threshold limit of Rs. 1 Lakh as provided in Section 4 of the Code, 2016 before notification was due and there is default on the part of the corporate debtor in pursuance of invoices raised on behalf of the applicant. Further there exists no pre-existing dispute between the parties regarding the completion of work and services rendered by the applicant prior to the issuance of the demand notice dated 16.08.2019 and there was correspondence related to invocation of bank guarantee between the parties, for which a petition under section 9 of the Arbitration and Conciliation Act, 1996 was filed by the applicant seeking injunction. It is only after the filing of present petition, arbitration was invoked by the applicant vide arbitration notice dated 23.09.2019, to protect the Performance Bank Guarantee. Pertinent to note that as per extant rules and procedure under the Arbitration and Conciliation Act, 1996 and Rules made thereunder, the applicant was constrained to file all the claims before the Arbitral Tribunal including the claim of outstanding operational debt with the claim of protecting Performance Bank Guarantee. The very fact that the corporate debtor has joined the arbitral proceedings,

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and the award was given in favour of the applicant, also indicates the existence of 'debt' and 'default'.

24. Therefore, keeping in view all the afore noted reasons, this Adjudicating Authority is satisfied that there is an admission of 'debt' and 'default' as defined under the Code, 2016.
25. Thus the present petition (**IB-2561/(ND)/2019**) filed under Section 9 of the Code, 2016 **stands admitted** in terms of Section 9(5) of the Code and **CIRP is hereby ordered to be initiated** against the Corporate Debtor i.e., M/s. Sinnar Thermal Power Limited.
26. The applicant in Part-III of the petition has proposed the name of Mr. Adarsh Sharma as IRP, therefore, this bench appoints Mr. Adarsh Sharma, IBBI Registration no. IBBI/IPA-001/IP-P01256/2018-19/12045 and e-mail id : adarsh@adarshca.com as the Insolvency Resolution Professional of the corporate debtor. The specific consent in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 has been taken on record. The consent of the proposed interim resolution profession in Form-2 is taken on record. The IRP so appointed shall file a valid AFA and disclosure about non-initiation of any disciplinary proceedings against him, within three (3) days of this order.
27. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Adarsh Sharma to meet out the expense 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 one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

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28. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

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

(d)The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.”

(e)The IB Code 2016 also prohibits *Suspension or termination of any 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, 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, concessions, clearances or a similar grant or right during the moratorium period.*”

26. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

27. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in



accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'.

28. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders.
29. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.
30. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

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(DR.BINOD KUMAR SINHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)